HARVARD JOURNAL
on
LEGISLATION

VOLUME 24, NUMBER 2 SUMMER 1987

ARTICLES

NOTE

COMMENT

BOOK REVIEW

BOOK NOTE

HARVARD JOURNAL ON LEGISLATION
Harvard Law School
Cambridge, Massachusetts 02138

Phone: (617) 495-4400

The HARVARD JOURNAL ON LEGISLATION (ISSN 0017-808x) is published twice each year (winter and summer) by Harvard Law School students. Third-class postage paid at Boston, Massachusetts, and at additional mailing offices.

Publication Policy

The JOURNAL specializes in the analysis of legislation and the legislative process. It focuses on legislative reform and on organizational and procedural factors that affect the efficiency and effectiveness of legislative decisionmaking. The JOURNAL is especially interested in publishing articles that examine a public policy problem of nationwide significance and propose legislation to resolve it.

The JOURNAL welcomes unsolicited manuscripts. Authors interested in being published in the JOURNAL should send their manuscripts and all related correspondence to the Coordinating Editor, HARVARD JOURNAL ON LEGISLATION, at the above address. Manuscripts should be typed, double-spaced, and submitted in duplicate.

Views expressed in the JOURNAL are those of the authors and do not necessarily reflect the views of the JOURNAL's officers, editors, or other members.

Subscriptions

The JOURNAL's subscription rate for the 1987 volume (Volume 24) is $20.00 domestic rate; $23.00 foreign surface rate; $35.00 foreign air mail. All correspondence concerning subscriptions should be addressed to the Subscriptions Manager, Publications Center, Harvard Law School, Cambridge, Massachusetts 02138.

Unless otherwise requested by the subscriber, the JOURNAL is mailed at bulk rate. For some overseas subscribers, delivery via air mail may be more reliable than standard surface rate service. Claims for missing issues of Volume 24 will be honored only until January 1988.

How to Obtain Copies of Individual Issues

Copies of individual issues from the current volume can be obtained directly from the JOURNAL for $10.00 each (plus $1.50 per copy for foreign mailing).

Copies of issues from all past volumes of the JOURNAL are available from Fred B. Rothman & Co., 10368 West Centennial Road, Littleton, Colorado 80123. Single issues are $8.50 per copy. Contact Fred B. Rothman & Co. for information on prices for bound volumes.

When purchasing copies of issues from either the JOURNAL or Fred B. Rothman & Co., please send a check for the purchase price when you place your order.

ARTICLE

PRESIDENTIAL SIGNING STATEMENTS AS INTERPRETATIONS OF LEGISLATIVE INTENT: AN EXECUTIVE AGGRANDIZEMENT OF POWER*

MARC N. GARBER**
KURT A. WIMMER***

When signing a bill into law, presidents often release a statement concerning the legislation. Traditionally, these signing statements express the President's praise for the new legislation and briefly note any reservations he might have concerning the law. Recently, however, President Reagan has departed from this traditional approach. Rather than merely expressing his own views on the new legislation, he has attempted to interpret the legislative intent underlying the bill he is signing, and his administration expects courts to consider these signing statements when interpreting the statute.

In this Article, Mr. Garber and Mr. Wimmer argue that courts should not refer to these presidential signing statements when attempting to discern congressional intent. To rely on the statements, the authors argue, would violate the Constitution's separation of powers doctrine by both giving the President the power to make law and by allowing the President to usurp the judiciary's role of interpreting statutory meaning. Furthermore, the authors note that in addition to constitutional violations, there are important policy reasons for a court to refuse to rely on presidential signing statements when interpreting a law, including the fact that these statements are inherently unreliable as a measure of legislative intent.

I. THE NATURE OF EXECUTIVE POWER

> The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, . . . may justly be pronounced the very definition of tyranny.[1]
>
> —James Madison

* The authors wish to express their unabiding thanks and unabashed admiration and respect for the Hon. Jerry Buchmeyer, United States District Court for the Northern District of Texas, without whose support this article would not have been possible.

** Associate, Gibson, Dunn & Crutcher, Dallas, Texas. B.S., The Wharton School, University of Pennsylvania, 1982; J.D., State University of New York at Buffalo, 1985.

*** Associate, Sidley & Austin, Washington, D.C. B.J., University of Missouri-Columbia, 1982; M.A., Newhouse School of Communications, 1985; J.D., Syracuse University College of Law, 1985.

[1] THE FEDERALIST No. 47, at 300 (J. Madison) (H. Lodge ed. 1888).

The American presidency is an office of strictly circumscribed power.[2] Its limitations are a matter of deliberate design on the part of the Framers of the Constitution.[3] Despite contemporary and historical efforts to expand the boundaries of executive power beyond the carefully scripted cartography of the Constitution,[4] the power of the Executive Branch remains constrained

---

[2] The President's powers are largely contained in Article II ("the Executive power shall be vested in a president"), Article I, § 7 (the Presentment Clause), and Article IV, § 4 (power to protect the states from domestic violence in guaranteeing a republican form of government). While the constitutional structure contemplates a system of three co-equal branches, "[w]e are, and must remain, a society led by three equal Branches, with one permanently 'more equal' than the others: as the Supreme Court and Congress are pre-eminent in constitutional theory, so the President is pre-eminent in constitutional fact." L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 4-1, at 157 (1978).

Given this "pre-eminen[ce] in constitutional fact," the extent of the President's authority is often unclear. As Justice Jackson noted, "[a] century and a half of partisan debate and scholarly speculation [on concrete problems of executive power] yields no net result but only supplies more or less apt quotations from respected sources on each side of any question [which] largely cancel each other out." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634–35 (1952) (Jackson, J., concurring). Generally, there is little doubt that the President has more discretion to act in the area of foreign affairs than on domestic issues. *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 315–29 (1936). There is a significant debate on whether the constitutional structure allows more room for the President to act outside of strictly enumerated powers than can Congress. *Compare* L. TRIBE, *supra*, at § 4-2 (presidential authority) *with id.* at §§ 5-2, 5-3 (congressional authority). *Cf.* C. THATCH, THE CREATION OF THE PRESIDENCY 1775–1789, at 138–39 (1923) (arguing that absence of limiting language such as that in Art. I § 1 ("powers herein granted") and Art. III, § 2 ("powers shall extend to") implies "a field of action much wider than that outlined by the enumerated powers" in Art. II). Given the potential abuses inherent in any extensive expansion of power by the Executive, the Judiciary should be especially wary of attempts by the Executive Branch to increase its power across the breadth of policy concerns confronting the federal government.

[3] Indeed, revolutionary documents reveal a palpable distrust of a strong executive department. The early state constitutions concentrated power in the legislatures; the Pennsylvania charter, for example, "practically obliterated the Executive authority in the name of liberty." S. PRESSER & J. ZAINALDIN, LAW AND AMERICAN HISTORY 139 (1980); *see* PA. CONST. OF 1776, *quoted in* THE PROCEEDINGS RELATIVE TO CALLING THE CONVENTIONS OF 1776 & 1790, at 54–65 (1825). The Articles of Confederation reflected a similar distaste for a strong executive. *See* S. PRESSER & J. ZAINALDIN, *supra*, at 139. Toward these ends, the Constitution's Framers created an Executive Branch of limited power. *See* THE FEDERALIST No. 51 (J. Madison); *see also* Notes of James Madison (June 1, 1787), *reprinted in* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 66–67 (M. Farrand 2d ed. 1966); C. THATCH, *supra* note 2, at 89–90 (suspicion of overly powerful executive).

[4] President Washington, for example, unilaterally ended diplomatic relations with France without consulting Congress and refused to comply with the House of Representatives' request for papers relevant to the Jay Treaty in 1796. *See* E. CORWIN & L. KOENIG, THE PRESIDENCY TODAY 30 (1956). President Jefferson purchased the Louisiana Territory despite his recognition that he lacked explicit constitutional authority to do so. *See* 8 THE WRITINGS OF THOMAS JEFFERSON 241–49 n.1 (Ford ed. 1897). President Truman seized the steel mills to avert a perceived national crisis, although the Supreme Court later rejected this exercise of authority. *See Youngstown*, 343 U.S. at 582–83.

During the Watergate era, Congress passed two major statutes that were designed to prevent the Executive from acting outside of his authority. *See* The War Powers Res-

between the law-making powers of the Legislature[5] and the law-interpreting powers of the Judiciary.[6] Its primary domestic duty[7] is to execute the law passed by the Legislature,[8] and its involvement in matters legislative and judicial is strictly limited.[9]

In spite of the strictly limited nature of executive power—or, perhaps, because of it[10]—executive attempts to grasp extracon-

---

olution, Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541–1548 (1982)); The Budget and Impoundment Control Act, Pub. L. No. 93-344, 88 Stat. 297 (1974) (codified at 31 U.S.C. § 1301 (1982)).

[5] U.S. CONST. art. I.

[6] U.S. CONST. art. III. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (Marshall, C.J.).

[7] In contrast, the Executive's foreign policy powers have been allowed to expand far beyond the Constitution's strictures; this expansion has resulted from historical statements of its legitimacy and modern statements of the need for a unified foreign policy voice. *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936) ("[i]n this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation"). *Cf.* L. TRIBE, *supra* note 2, § 4-3 at 164 ("[t]he Constitution plainly grants the President the initiative in matters directly involved in the conduct of diplomatic and military affairs"); 1 W. BLACKSTONE, COMMENTARIES *252 ("[w]hat is done by the royal authority, with regard to foreign powers, is the act of the whole nation"). This view is based primarily on historical legacy. *See* L. TRIBE, *supra* note 2, § 4-3 at 163–65.

While Congress has attempted to limit the reach of the Executive's foreign policy authority, these attempts have not been especially successful. *See* L. TRIBE, *supra* note 2, § 4-6 at 173 (while Art. I, § 8 "reposes in Congress the power to declare war[,] military history . . . is replete with instances of executively ordained uses of military force abroad in the absence of prior congressional approval"). One such notable attempt is the War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541–1548 (1982)). The effect of this resolution on limiting the President's power is unclear. *See generally* Carter, *The Constitutionality of the War Powers Resolution*, 70 VA. L. REV. 101 (1984); Vance, *Striking the Balance: Congress and the President Under the War Powers Resolution*, 133 U. PA. L. REV. 79 (1984); Note, *The Future of the War Powers Resolution*, 36 STAN. L. REV. 1407 (1984); Note, *A Defense of the War Powers Resolution*, 93 YALE L.J. 1330 (1984).

Moreover, most courts are reluctant to resolve cases dealing with the extent of presidential power in foreign affairs due to "political question" considerations. *See* Goldwater v. Carter, 444 U.S. 996 (1979) (dismissing a challenge to the constitutionality of President Carter's termination of a treaty with Taiwan without congressional approval); Holtzman v. Richardson, 361 F. Supp. 544 (E.D.N.Y.), *rev'd sub nom.* Holtzman v. Schlesinger, 484 F.2d 1307 (2d Cir. 1973) (dismissing a challenge to the constitutionality of the war in Southeast Asia), *cert. denied*, 416 U.S. 936 (1974); Atlee v. Laird, 347 F. Supp. 689 (E.D. Pa. 1972) (same), *aff'd*, 411 U.S. 911 (1973).

[8] *See* L. TRIBE, *supra* note 2, § 4-2 at 158.

[9] The Executive's involvement in judicial matters is limited to making judicial appointments; even in this instance, he is confined to doing so "by and with the advice and consent of the Senate." Art. II, § 2; *see also* L. TRIBE, GOD SAVE THIS HONORABLE COURT 79–89 (1985) (the Senate has, in the past, played an active part in limiting this power). The Executive's constitutional involvement in legislative matters is limited to signing or vetoing bills passed by the Legislature, Art. I, § 7, and informing the Legislature of the state of the union, Art. II, § 3. *See also infra* notes 37–64 and accompanying text.

[10] The circumscribed power of the presidency has led numerous executives to seek greater authority. The dissonance between an office which is "the main repository of 'national spirit' in the central government," Wechsler, *The Political Safeguards of Federalism*, 54 COLUM. L. REV. 543, 556 (1954), and the limited nature of domestic

stitutional authority are not uncommon. It is, however, unusual for such an attempt to be made explicitly and openly; usurpations of constitutional power are most comfortably accomplished in a clandestine manner.[11] Nonetheless, through the use of presidential signing statements as a tool of statutory interpretation, the current administration is engaged in an overt attempt to usurp power reserved for the Legislature and the Judiciary.

Although presidential signing statements are a long-standing facet of presidential politics,[12] the statements currently being produced by the administration are both qualitatively and quantitatively different from the traditional presidential statement. In the past, presidents who disagreed with a specific provision of a bill that they were signing merely noted their disapproval in their signing statement and expressed their desire that Congress would make changes in the future.[13] In contrast, in the new genre of signing statements, the President, rather than noting that his views differ from those of Congress, attempts to reinterpret the language of the bill so as to coincide with his own views.[14]

---

authority accorded to the President leads to informal methods of presidential influence. *See* E. GRIFFITH, THE AMERICAN PRESIDENCY: THE DILEMMAS OF SHARED POWER AND A DIVIDED GOVERNMENT 43–51 (1976); H. HECLO, A GOVERNMENT OF STRANGERS: EXECUTIVE POLITICS IN WASHINGTON (1977); R. NEUSTADT, PRESIDENTIAL POWER—THE POLITICS OF LEADERSHIP FROM FDR TO CARTER (1980); C. ROSSITER, THE AMERICAN PRESIDENCY 149 (2d ed. 1960).

[11] Two recent examples of surreptitious usurpations of power by the Executive are the Iran-Contra arms scandal and the Watergate affair. The Iran-Contra scandal involved sales of arms to Iran through Israel, with millions of dollars in profits allegedly secretly funding the Nicaraguan Contras. *See* S. REP. NO. ———, 100th Cong., 1st Sess. ——— (1987). The most often cited constitutional violations implicit in these secret dealings by the Executive are breaches of the President's duty to inform the Legislature of his foreign policy decisions, *see* U.S. CONST. art. II, § 2, cl. 2, and a usurpation of the Legislature's power to declare war, *see id.* at Art. I, § 8, cl. 11. The actions also may have violated the Neutrality Act, which demands that no military actions be taken against a country with which the United States is at peace. *See* 18 U.S.C. § 960 (1982); *see also* Wiborg v. United States, 136 U.S. 632, 660 (1896) (stressing importance of Neutrality Act). The constitutional implications of the Watergate scandal are well documented. *See generally* CONSTITUTIONAL ASPECTS OF WATERGATE (A. Boyan ed. 1976); R. WINTER, WATERGATE AND THE LAW (1974).

[12] *See, e.g.*, 2 MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1897 493–94 (J. Richardson ed. 1896) (statement of President Andrew Jackson upon signing of road appropriations measure); 7 MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1897 373–75 (J. Richardson ed. 1898) (statement of President Ulysses S. Grant upon signing of appropriations bill).

[13] *See, e.g.*, 12 WEEKLY COMP. PRES. DOC. 857, 858 (1976) (President Ford signing 1976 Federal Election Campaign Act Amendments although he had reservations about certain provisions); 10 WEEKLY COMP. PRES. DOC. 800 (1974) (President Nixon signing Congressional Budget and Impoundment Control Act although he disagreed with certain provisions).

[14] *See, e.g.*, 22 WEEKLY COMP. PRES. DOC. 1534, 1536 (1986) (President Reagan

In addition, Attorney General Edwin Meese III has made a concerted effort to present such statements as part of the legislative history of the act and expects the statements to be used as interpretive tools by courts of law. The statements are being published, for the first time, in the *U.S. Code Congressional and Administrative News*. In announcing the new arrangement with the West Publishing Company, the Attorney General stated that the purpose of the statements was to clarify the President's understanding of the intent of the Legislature in passing a law:

> To make sure that the President's own understanding of what's in a bill is the same . . . or is given consideration at the time of statutory construction later on by a court, we have now arranged with West Publishing Company that the presidential statement on the signing of a bill will accompany the legislative history from Congress so that all can be available to the court for future construction of what that statute really means.[15]

Moreover, the statements will, in the words of one Justice Department official, receive "more searching review" by the Department before they are submitted to the President for his consideration.[16]

Rather than being limited in scope to the intent of the Executive in signing a bill, these "executive history" statements purport to ascertain the intent of the Legislature in passing the bill. The danger inherent in such a document is that its author will graft ambiguities and exceptions onto an act that was not so encumbered during the legislative process,[17] thus making law in violation of Article I of the Constitution.[18] Moreover, such statements raise the specter of an executive interpreting law, thereby encroaching on the exclusive authority of the federal courts under Article III.[19] Together, these concerns indicate that these

---

reinterpreting the meaning of language in the Immigration Reform and Control Act so as to make it harder for aliens to be eligible for permanent status); 22 WEEKLY COMP. PRES. DOC. 831, 832 (1986) (President Reagan reinterpreting the meaning of language in the Safe Drinking Water Act so as not to make EPA enforcement of provisions of the Act mandatory). *See also infra* notes 20–27 and accompanying text.

[15] Address by Attorney General Edwin Meese III, National Press Club, Washington, D.C. (Feb. 25, 1986).

[16] *See* Kmiec, *Judges Should Pay Attention to Statements by President*, Nat'l L.J., Nov. 10, 1986, at 13. Mr. Kmiec is the deputy assistant attorney general in the Justice Department's Office of Legal Counsel.

[17] *Cf.* Regan v. Wald, 468 U.S. 222, 237 (1984) (statements of witnesses and legislators not debated by Congress should not be used by courts to override "clear statutory language").

[18] *See infra* notes 32–109 and accompanying text.

[19] *See infra* notes 110–49 and accompanying text.

statements should be given no weight by a court when interpreting the intent of Congress.

The implementation of the Immigration Reform and Control Act of 1986[20] presents these abuses in stark relief. The Act provides that "brief, casual, and innocent" absences from the country do not terminate a deportable alien's "continuous physical presence" in the country, and thus do not make the alien ineligible for legalized status.[21] The current administration, however, relies upon a statement made by President Reagan when signing the Act to severely limit the reach of that provision.[22]

This interpretation would require, as a matter of law, that aliens apply to the Immigration and Naturalization Service (INS)[23] before even a brief absence from the country.[24] The presidential signing statement at once grafts a qualification onto the Act as to which the Act and Congress were silent;[25] more-

---

[20] Pub. L. No. 99-603, 100 Stat. _____ (1986) (to be codified after 8 U.S.C. § 1255) [hereinafter Act].

[21] *Id.* § 245A(a)(3)(A), (a)(3)(B).

[22] The presidential statement upon which the Attorney General relies in his interpretation provides, in part:

> To the extent that the INS has made available a procedure by which aliens can obtain permission to depart and reenter the United States after a brief, casual, and innocent absence by establishing a *prima facie* case of eligibility for adjustment of status under this section, I understand section 245A(a)(3) to require that an unauthorized departure and illegal reentry will constitute a break in "continuous physical presence."

Statement on Signing S. 1200 Into Law 5–6, 22 WEEKLY COMP. PRES. DOC. 1534, 1536 (Nov. 10, 1986).

[23] This requirement that aliens consult with the INS and obtain permission before they take short trips out of the country takes on an even more bizarre cast given the relationship of aliens to the INS. The INS is the agency that has the power to deport illegal aliens, and Congress implicitly found that fear of the INS among deportable aliens constituted a significant impediment to the successful operation of the Act's initiatives. *See* H.R. REP. NO. 682, 99th Cong., 2d Sess. 72–74 (1986), *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 5649, 5676–78. Because of this fear, Congress created volunteer agencies to act as intermediaries between the deportable aliens and the government, thus excluding the INS completely. *See* Act, *supra* note 20, at § 245A(c).

[24] *See* Appellant's Brief at 12, Catholic Social Services v. Meese, No. 86-2907 (9th Cir. Dec. 17, 1986). The administration's rationale is that the focus of the "brief, casual, and innocent" language does not apply merely to the "absence," but also to the subsequent reentry into the country. The Attorney General, in his implementation of the Act, holds that if the subsequent reentry was accomplished without the permission—obtained in advance—from the INS, then the subsequent reentry is not "innocent." The "absence," then, is tainted by the reentry, and the alien's physical presence has not been "continuous." *See id.*

[25] *See* Act, *supra* note 20, at § 245A(a)(3)(A), (B). The Act states that a deportable alien may qualify for legalization if he entered the United States before January 1, 1982, has resided here continuously, and has had "continuous physical presence" not counting "brief, casual, and innocent absences." The "brief, casual, and innocent" language was first added in a proposed amendment by Sen. Edward Kennedy (D-Mass.). *See* 131 CONG. REC. S11,426 (daily ed. Sept. 13, 1985). The legislative history is completely silent on the meaning of the language. *See* H.R. REP. NO. 682, *supra* note 23, at 116,

over, the qualification it creates requires an interpretation of the "brief, casual, and innocent" language utilized by Congress[26] that is at variance with interpretations given the term by the Judiciary over its decades of use.[27] The implementation of the Act thus presents the danger of encroachment on both the Legislature and the courts inherent in the production of "executive history" statements, and presents an actual offense to the doctrine of separation of powers.

The permissibility of reliance on such a statement is currently before the courts. In *Catholic Social Services v. Meese*,[28] the

---

reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 5649, 5675–76 (echoing statutory language). Despite this silence, the Attorney General and the President assert that an absence from the country without advance permission from the Immigration and Naturalization Service is not "innocent" within the meaning of the Act.

[26] Congress may be presumed to have knowledge of prior judicial interpretations of the statutory language it uses, and to have adopted that interpretation for purposes of the new law. *Cf.* Merrill Lynch v. Curran, 456 U.S. 353, 382 n.66 (1982) (Congress presumably knows how courts interpreted language of an earlier statute, so when Congress incorporates that language into a new statute it presumably approves of the prevailing interpretation). In passing the Act, there was actual rather than presumptive knowledge on Congress' part of the judicial interpretation of the terms used in the Act. Assistant Attorney General John R. Bolton, in a letter written to Rep. Peter Rodino (D-N.J.) when Congress was considering the language, urged that Congress change the "brief, casual and innocent" language to ensure that "absence related to violations of the immigration laws would automatically interrupt the physical presence requirement, regardless of the period of absence." H.R. REP. No. 682, *supra* note 23, at 116, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 5649, 5720. Congress obviously declined to do so, as the identical language exists in the version of the Act passed by Congress.

[27] The phrase "brief, casual and innocent" originated in Rosenberg v. Fleuti, 374 U.S. 449, 462 (1963), in which the Court held that a brief trip outside the country—and a subsequent illegal entry—did not necessarily disrupt an applicant's resident alien status under the Immigration and Naturalization Act, 8 U.S.C. § 1251(a)(1) (1982). The courts and the INS have since focused on the purpose of the trip rather than the illegal entry following it in determining whether the trip was "innocent" or not. *See* Palapian v. INS, 502 F.2d 1091 (9th Cir. 1974); Matter of Herrera, 18 I.& N. Dec. 4 (B.I.A. 1981); *Cf.* Git Foo Wong v. INS, 358 F.2d 151 (9th Cir. 1966) (court applies relaxed approach of *Fleuti* to extend interpretation of "continuous" stay requirement); Wadman v. INS, 329 F.2d 812 (9th Cir. 1964) (court cites *Fleuti* in adopting relaxed interpretation of "continuous" stay requirement). The Supreme Court implicitly limited the meaning of the "brief, casual, and innocent" phrase in INS v. Phinpathya, 464 U.S. 183 (1984), by refusing to follow the Ninth Circuit's extension of the relaxed *Fleuti* approach to the "continuous presence" requirement; this strict meaning has, however, been legislatively overruled by the Act. The correct interpretation of the statutory language, then, appears to be that taken from *Fleuti* and exercised for 20 years; indeed, Assistant Attorney General Bolton recognized this fact when he encouraged Congress *not* to use the language taken as a term of art from case law. *See* Bolton letter, *supra* note 26.

[28] No. 86-2907 (9th Cir. 1987). As this Article went to print, the Ninth Circuit handed down a decision in the *Catholic Social Services* case, No. 86-2907, slip op. (9th Cir. Apr. 3, 1987). The Ninth Circuit specifically limited its review to whether the district court had abused its discretion in granting plaintiffs' request for a preliminary injunction. *Id.* at 6. While the court indicated that the Attorney General's interpretation of the statute in question was a reasonable one, *id.* at 9, the court did not evaluate the arguments presented in this Article. Instead, the court remanded the issue of interpreting the statute to the district court. *Id.* at 12.

plaintiff class charges that the Attorney General proposes an implementation of the Act that would thwart the will of Congress, and result in the deportation and exclusion of many class members who could benefit from the law's provisions.[29] The Attorney General, however, argues that the proposed INS implementation is permissible because it is "in accord with the statement of the President of the United States" upon signing the Act.[30] The implementation of this major legislative initiative, then, rests largely on the permissibility of reliance upon a presidential statement of congressional intent.[31]

This Article argues that presidential signing statements should not be used by the courts as a tool for interpreting congressional intent. The Article presents both the constitutional separation of powers doctrine prohibitions on using these statements and the policy concerns undermining the statements' usefulness.

II. The Executive Making Law: A Violation of the Separation of Powers Between Article I and Article II

It is well settled that the use of congressional materials in discerning the intent of Congress is a standard means of statutory construction.[32] The question raised by the new generation of presidential signing statements is whether such statements can ever be a constitutionally reliable "aid to construction of the meaning of words" carefully chosen by Congress in the

[29] The Act was passed on November 6, 1986; plaintiffs filed a class action for injunctive relief on November 12, 1986. *See* Catholic Social Services v. Meese, No. 86-2907 (9th Cir. 1987). On the same day, the plaintiffs obtained a temporary restraining order, requiring the Attorney General to issue instructions to INS to implement §§ 245A(e)(1) and 210(d) so as to prevent mass expulsions of aliens who would fall under the Act's protections. Three hours before the scheduled hearing on the order, the Attorney General implemented the sections by national telex. *See* Emergency Motion to Modify Stay Order at 7, Catholic Social Services v. Meese, No. 86-2907 (9th Cir. Dec. 15, 1986). On November 24, 1986, plaintiffs filed an amended complaint, alleging that the nature of the Attorney General's implementation of the Act was contrary to congressional intent, in part because of the reliance upon the statement of the president.

[30] Appellant's Brief, *supra* note 24, at 24 n.16.

[31] The Ninth Circuit stayed the temporary restraining order obtained by the plaintiffs. Although such orders are generally not susceptible to stay, the Ninth Circuit held that the order is "deemed to be a preliminary injunction." Catholic Social Services v. Meese, No. 86-2907 (9th Cir. Dec. 3, 1986). Argument on the injunction was held on an expedited schedule, and a resolution is pending.

[32] *See* Train v. Colorado Pub. Interest Research Group, 426 U.S. 1, 9–10 (1976) (citing cases employing congressional materials to interpret legislation).

exercise of its lawmaking function.[33] Although no rule of law forbids the use of extrinsic materials in aid of statutory construction,[34] "the fact that a given . . . procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution."[35] It is thus incumbent upon the federal courts to ascertain whether reliance on presidential statements is constitutionally permissible.[36]

A. *Use of the Presidential Signing Statements Represents a Violation of the Veto Requirements of the Presentment Clause*

The Framers of the Constitution set forth the respective roles of Congress and the President in the legislative process in Article I, section 7, clause 2 of the Constitution.[37] This provision sets

---

[33] *See id.* at 10. *See also* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (in striking down an unauthorized action of the Executive Branch as an unconstitutional seizure of Art. I power, the Supreme Court reaffirmed that Congress possesses the exclusive authority to create the laws that the President must execute).

[34] *See Train*, 426 U.S. at 9.

[35] INS v. Chadha, 462 U.S. 919, 944 (1983). In *Chadha*, the Supreme Court held that the Constitution prevents Congress from interfering with the actions of those whose responsibility it is to execute the laws through a means short of legislation satisfying the demands of art. I, § 7, cl. 2, even where such a procedure is an efficient, convenient and useful "political invention." *Id.* at 945.

[36] *See* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821) (Marshall, C.J.) ("[q]uestions may occur, which we would gladly avoid; but we cannot avoid them. All we can do is to exercise our best judgment, and conscientiously to perform our duty"); *see also* Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 346–48 (1936) (Brandeis, J., concurring); *but see* Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961) (Supreme Court should avoid constitutional adjudication on the merits when there is a narrower basis for the decision). *Cf.* Bowsher v. Synar, 106 S. Ct. 3181 (1986); Barnes v. Kline, 759 F.2d 21 (D.C. Cir. 1985), *vacated sub nom.* Burke v. Barnes, 107 S. Ct. 734 (1987) (cases holding that disputes between branches of the federal government are justiciable).

Interestingly, Catholic Social Services v. Meese, No. 86-2907 (9th Cir. 1987) presents institutional separation of powers issues in the context of a live controversy involving the rights of private individuals. *Compare id. with* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S 579 (1952) (Supreme Court resolved controversy between steel company and federal government by referring to separation of powers between Congress and President); *see also* United States v. United States Dist. Court, E. Dist. of Mich., 407 U.S. 297, 317 (1972) ("individual freedoms will best be preserved through a separation of powers and division of functions among the different Branches . . . of [g]overnment").

[37] The Presentment Clause, Art. I, § 7, cl. 2 provides:

> Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after

forth the exclusive method for the exercise of the lawmaking powers granted to the federal government.[38] The President's role in this process is quite limited:[39] he can propose legislation he thinks wise[40] or he can veto proposed legislation.[41]

The history of the Constitutional Convention makes it plain that the President was granted the veto power in order to protect the people from "whatever propensity a particular Congress might have to enact oppressive, improvident, or ill-considered measures."[42] More importantly, however, the Framers took great pains to limit and qualify this power through the painstaking process of enactment embodied in Article I, section 7, clause 2.[43] Any procedure that subverts this process,[44] or circumvents

---

such Reconsideration two thirds of [each] House shall agree to pass the bill . . . it shall become a Law. . . .

If any Bill shall not be returned by the President within ten Days . . . after it shall have been presented to him, the Same shall be a law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

[38] *See Chadha*, 462 U.S. at 951.

[39] *See id.* at 947.

[40] Art. II, § 3 provides that the President "shall from time to time . . . recommend to [Congress for] their consideration such Measures as he shall judge necessary and expedient. . . ." *See also Youngstown*, 343 U.S. at 587 ("The Constitution limits [the President's] functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad.").

[41] Under Art. I, § 7, cl. 2, each bill passed by Congress must be presented to the President so that he may sign it into law. If he does not approve, he can veto the bill by returning it to Congress within 10 days along with his objections, so that Congress might reconsider the bill in light of the President's views. This institutional limitation represents the boundary around the President's activity in the lawmaking process. *See Youngstown*, 343 U.S. at 587; *see also Chadha*, 462 U.S. at 947–48 (the President has "limited and qualified power to nullify" bills enacted by Congress). His role can be neither extended nor contracted, absent constitutional amendment. *Cf. Bowsher*, 106 S. Ct. at 3192 (participation in the lawmaking process can only be through a means consistent with Art. I, § 7, cl. 2).

[42] *Chadha*, 462 U.S. at 947–48. It bears noting that one member of the Convention strongly opposed the creation of the veto procedure, believing that "[n]o one man could be found so far above all the rest in wisdom" to merit such an exercise of authority. Notes of James Madison (June 4, 1787), *reprinted in* 1 THE RECORDS OF THE CONSTITUTIONAL CONVENTION OF 1787, at 99 (M. Farrand rev. ed. 1966) (comments of Roger Sherman).

[43] James Madison stated, in reference to an absolute veto, that "to give such a prerogative would certainly be obnoxious to the temper of the country." Notes of James Madison, *supra* note 42, at 100. Benjamin Franklin cautioned that "[n]o good law whatever could be passed without a private bargain with [the President]." *Id.* at 99. Indeed, the delegates to the convention unanimously rejected a proposal granting the President an absolute veto. *See id.* at 103.

[44] *See Youngstown*, 343 U.S. at 588 (execution of an executive order, absent either statutory or constitutional authority to act, subjects the lawmaking power of Congress to presidential control in violation of the separation of powers).

it,[45] must be treated as an unconstitutional exercise of authority.[46]

It must be presumed at the outset of an analysis under the doctrine of separation of powers that the President has acted pursuant to the authority delegated to him by the Constitution.[47] The President's limited role in the lawmaking process detailed in the Presentment Clause of Article I, section 7, clause 2, however, rebuts the presumption that presidential signing statements can be constitutionally meaningful pronouncements to a court on the intent of Congress. In the context of a live controversy where one party claims to have acted consistently with the interpretation of the President's statement upon signing the legislation, a court's use of the presidential statement would grant to the President an absolute veto, in violation of the express terms of the Presentment Clause.[48]

The Constitution establishes the permissible involvement of the President in the legislative process. As the Supreme Court has asserted, "[e]xplicit and unambiguous provisions of the Constitution prescribe and define the respective functions of the Congress and of the Executive in the legislative process."[49] Article I reserves "all legislative powers" to the Legislature, and leaves a most limited involvement to the Executive. These provisions "are integral parts of the constitutional design for the separation of powers,"[50] and they guide the analysis here.

---

[45] *See Chadha*, 462 U.S. at 956–58 (exercise of legislative veto is an act subject to the strictures of Art. I, § 7, cl. 2).

[46] *Cf. Bowsher*, 106 S. Ct. at 3192 (the Constitution prohibits one branch from exercising the powers of another).

[47] *See Chadha*, 462 U.S. at 951; United States v. Nixon, 418 U.S. 683, 703–04 (1974).

[48] Efforts of the President must be based on a valid exercise of executive authority if they are to be held constitutional. *See Youngstown*, 343 U.S. at 585 ("the President's power, if any, must stem either from an Act of Congress or from the Constitution itself"). As one commentator has noted, "[n]otwithstanding that an executive order emanates from the most powerful office in the nation, it is axiomatic to a system of limited government that without constitutional or statutory authority an executive order is void of legal effect." Note, *Executive Orders 12,291 and 12,498: Usurpation of Legislative Power or Blueprint for Legislative Reform?*, 54 GEO. WASH. L. REV. 512, 533 (1986). *Accord*, Rosenberg, *Beyond the Limits of Executive Power: Presidential Control of Agency Rulemaking Under Executive Order 12,291*, 80 MICH. L. REV. 193, 196–220 (1981).

[49] *Chadha*, 462 U.S. at 945. The *ratio decidendi* of the *Chadha* Court was that the use of a legislative veto impermissibly extended the role of Congress in the executive process. *See also Bowsher*, 106 S. Ct. at 3192 (portion of law struck down where the terms of legislation allowed Congress to retain control over the execution of the law).

[50] *Chadha*, 462 U.S. at 946.

Under the plain terms of Article I, section 1, Congress possesses the exclusive power to create the laws to be executed by the other branches.[51] The Presentment Clause makes clear, however, that the President has a role in the legislative process.[52] Through the President's qualified veto power, he can check the lawmaking power of the Congress.[53] In turn, the President's veto power is balanced by Congress' capacity to override it.[54] As the Supreme Court noted in *INS v. Chadha*,[55] the Presentment Clause "represents the Framers' decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure."[56] The constitutionally drawn procedure is not subject to any enlargement by the Executive.[57]

This process also makes clear that while "the President must have some power to revise legislative acts," the Framers "equally strongly believed [an absolute veto] was dangerous and unwarranted."[58] To prevent this danger, the Framers crafted the requirement that the President either sign a properly presented bill or return it to Congress with his objections; otherwise it becomes a law.[59] In the absence of such a sanction, the President

[51] *See Youngstown*, 343 U.S. at 588.

[52] *Chadha*, 462 U.S. at 947.

[53] *Id.*

[54] *Id.* at 951.

[55] 462 U.S. 919 (1983).

[56] *Id.* at 951; *see also supra* notes 37–46 and accompanying text.

[57] The President's legislative participation is limited to the strictly qualified veto power accorded him by the Constitution. "The President is a participant in the lawmaking process by virtue of his authority to veto bills enacted by Congress." Buckley v. Valeo, 424 U.S. 1, 121 (1976); *see also Bowsher*, 106 S. Ct. at 3214 (White, J., dissenting) (legislative process "affords each Branch ample opportunity to defend its interests"). The fact that the President has some amount of legislative authority does not mean, of course, that his role may be expanded. O'Donoghue v. United States, 289 U.S. 516, 530 (1933) (the existence of "an occasional specific [constitutional] provision conferring upon a given department certain functions, which, by their nature, would otherwise fall within the general scope of the powers of another [serves] to emphasize the generally inviolate character of the [constitutional separation of powers] plan").

[58] Barnes v. Kline, 759 F.2d 21, 31 (D.C. Cir. 1985) (citing historical sources), *vacated sub nom.* Burke v. Barnes, 107 S. Ct. 734 (1987). This case involved the constitutionality of the President "pocket vetoing" congressional legislation by not returning a bill to Congress when Congress was in intersessional adjournment but had appointed an agent to receive any veto message of the President. The Court found that it was a moot issue whether or not the President could use the pocket veto since the legislation enacting the pocket veto had expired under its own terms. *Barnes*, 107 S. Ct. at 736. *See also* Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974) (President cannot use pocket veto during intersession adjournment of Congress if an agent was appointed to receive veto message).

[59] *See* The Pocket Veto Case, 279 U.S. 655 (1929) (discussing requirements of Presentment Clause); *see also Constitutionality of the President's Pocket Veto Power: Hearings before the Senate Judiciary Subcommittee on Separation of Powers*, 92d Cong., 1st Sess. (1971).

could defeat legislation by simply not acting, thereby blocking congressional reconsideration.[60]

Through the Presentment Clause, then, the Constitution enjoins the President from achieving "through inaction what the Framers refused to permit him, namely, an absolute veto,"[61] and protects Congress' opportunity to reconsider bills not approved by the President.[62] Thus, as a matter of constitutional law, any procedure which frustrates the presentment process—and "evades constitutional restraints"—is antithetical to the very heart of the legislative process and violative of the constitutional doctrine of separation of powers.[63] Use of presidential statements to discern the intent of Congress is just such a procedure.[64]

First, reliance on signing statements provides the President with an unconstitutional absolute veto over legislation. The President, through his signing statement, can shade the meaning of the language voted upon by Congress.[65] Because the bill is signed, however, the President's views cannot be reconsidered by Congress; these views thus take on the indicia of absolute statements of law that have passed through the process of legislative distillation mandated by the Constitution.[66] In contrast, if the President chose to let a bill become law by not signing it,

---

[60] *See Barnes*, 759 F.2d at 31 (discussing history of veto power).

[61] *Id.*

[62] *See* Edwards v. United States, 286 U.S. 482, 486 (1932) (setting forth the dual purpose of the qualified veto power to protect Congress' opportunity to reconsider legislation rejected by the President, and to safeguard the President's opportunity to consider all acts of Congress).

[63] Bowsher v. Synar, 106 S. Ct. 3181, 3203 (1986) (Stevens, J. concurring); *Chadha*, 462 U.S. at 959.

[64] The President has, of course, tremendous extra-constitutional influence over the legislative process. This influence arises from his position as a national leader of his party, *see* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 654 (1952) (Jackson, J., concurring), and from his ability to express his opinion at various stages in the legislative process. *See* Abascal & Kramer, *Presidential Impoundment Part I: Historical Genesis and Constitutional Framework*, 62 GEO. L.J. 1549, 1559 (1974); *see also* G. MCCONNELL, THE MODERN PRESIDENCY 81–98 (1976); R. NEUSTADT, PRESIDENTIAL POWER—THE POLITICS OF LEADERSHIP FROM FDR TO CARTER (1980) (arguing that much of the President's power stems from his power to persuade).

[65] Even those who advocate reliance on presidential statements admit that it is not within the Executive's power to "supply additional terms to legislation or adopt an interpretation that would do violence to the terms provided." Kmiec, *supra* note 16, at 13.

[66] The history of the Presentment Clause—the single method under the Constitution for enacting the laws of the United States—makes clear the Framers' purpose that Congress determine the policies of the federal government and the laws by which those policies will be carried out. *See Youngstown*, 343 U.S. at 587–88; *see also* THE FEDERALIST No. 51 (J. Madison).

he could not express any view at all as to the bill's purpose or meaning; if he vetoed a bill, Congress could consider and debate his objections.[67] Under the guise of signing statements used to interpret the acts of Congress, the President can state his objections to a bill in the form of interpretations without fear of contradiction by Congress. Contrary to the very terms and purpose of the Presentment Clause, Congress will never have an opportunity to debate and vote on these views unless it enacts new legislation.[68] The use of these statements in a live controversy, then, subverts the entire legislative process detailed in Article I, section 7, clause 2 by allowing the President an absolute veto over Congress.

Second, reliance on presidential statements allows the President to exercise an unconstitutional line-item veto over duly enacted legislation. Under the Presentment Clause the President must either sign the bill Congress presents or state his objections and return the bill to Congress.[69] He cannot sign part of a bill and veto the remainder.[70] By employing the device of signing statements to interpret the intent of Congress, however, surreptitious piecemeal approval of legislation will result. Thus, by reinterpreting those parts of congressionally enacted legislation of which he disapproves, the President exercises unconstitutional line-item veto power.[71]

---

[67] The language chosen by the Framers should not be drained of its meaning; the rationale behind Art. I, § 7, cl. 2, is clearly to allow Congress to debate any objections raised by the Executive. *See* Notes of James Madison, *supra* note 42, at 98–103.

[68] Such a logistically difficult and sparsely used technique, however, cannot serve as part of the legislative process painstakingly created by the Framers. *Cf.* Buckley v. Valeo, 424 U.S. 1, 124 (1976) (emphasizing importance of maintaining Constitution's separation of powers framework).

[69] *See* U.S. CONST., art. I, § 7, cl. 2.

[70] *See* Gressman, *Is the Item Veto Constitutional?*, 64 N.C.L. REV. 819, 822 (1986) (line-item veto would unconstitutionally "augment presidential involvement in the legislative process beyond what the framers of the presentment clause intended"); *see also* Edwards, *The Case Against the Line-Item Veto*, 1 NOTRE DAME J.L. ETHICS & PUB. POL'Y 191 (1985); *but see* Dixon, *The Case for the Line-Item Veto*, 1 NOTRE DAME J.L. ETHICS & PUB. POL'Y 207 (1985). President Reagan is the most recent of seven presidents to request unsuccessfully that Congress give him line-item veto power. *See* Dixon, *supra*, at 212; *see also* Note, *Addressing the Resurgence of Presidential Budgetmaking Initiative: A Proposal to Reform the Impoundment Control Act of 1974*, 63 TEX. L. REV. 693, 694 n.4 (1984).

[71] Such action clearly exceeds the constitutional boundaries of the President's role in the legislative process. Similar actions, such as the impoundment of funds appropriated for expenditure by Congress, raise grave constitutional questions. *See* L. TRIBE, *supra* note 2, § 4-11 at 195 ("presidential impoundments to halt a program would . . . be tantamount to a veto that no majority in Congress could override"); *see also* Abascal & Kramer, *Presidential Impoundment, Part II: Judicial and Legislative Responses*, 63 GEO. L.J. 149 (1974); Mikva & Hertz, *Impoundment of Funds—The Courts, Congress*

Third, the Constitution makes clear that the President's role in the legislative process is limited.[72] Once the ten day period during which he can sign or veto a bill expires, his participation comes to an end.[73] However, through the use of the President's signing statements to interpret bills passed by Congress, the President is able to extend his participation in the lawmaking process beyond constitutional limits.[74] Such over-involvement constitutes an unauthorized intrusion into Congress' lawmaking function,[75] and results in the kind of concentration of constitutional power addressed and rejected by the Framers.[76]

Under the Supreme Court's holding in *Chadha*, legislative actions that fall within the ambit of the Presentment Clause must conform to the procedures of Article I.[77] The *Chadha* court stated that in order to

> maintain the separation of powers, the carefully defined limits on the power of each Branch must not be eroded. To accomplish what has been attempted . . . in this case requires action in conformity with the express procedures of the Constitution's prescription for legislative action. . . .[78]

The use of a presidential signing statement in aid of statutory interpretation would, however, impermissibly circumvent these constitutionally required procedures by altering the legal rights

---

and the President: A Constitutional Triangle, 69 NW. U.L. REV. 335 (1974). Similarly, overt presidential interference into agency processes may raise similar concerns. *See* Rosenberg, *supra* note 48; *see also* Note, *supra* note 48, at 532. *But cf.* Cutler & Johnson, *Regulation and the Political Process*, 84 YALE L.J. 1395, 1410–17 (1975).

[72] *See Chadha*, 462 U.S. at 945.

[73] *Cf. id.* at 958; Bowsher v. Synar, 106 S. Ct. at 3192 (to accomplish legislative change, conformity with the express procedures of the Constitution is required).

[74] In *Chadha*, the issue before the Court was whether either house of Congress could exercise a one-house veto over executive action. The Court struck down the use of a legislative veto on the ground that it impermissibly allowed Congress to extend its participation into the executive process in violation of the separation of powers. *Chadha*, 462 U.S. at 958–59. The use of presidential signing statements similarly extends the President's role in the legislative process beyond the permissible bounds detailed by the Framers in Art. I, § 7, cl. 2. *See also Bowsher*, 106 S. Ct. at 3192.

[75] In *Youngstown*, the Supreme Court rejected the executive action at issue because it constituted an attempt to subject Congress' lawmaking power to presidential supervision and control. *See Youngstown*, 343 U.S. at 588. The Court noted that the President, and not Congress, was directing national policy in violation of the separation of powers doctrine. *See id.*

[76] Excessive presidential control over the lawmaking process could, as Benjamin Franklin feared, lead to a situation in which "[n]o good law whatever could be passed without a private bargain with [the President]." Notes of James Madison, *supra* note 42, at 99. *See also Chadha*, 462 U.S. at 946–51 (discussing the Framers' view that the federal power needed to be divided and dispersed in order to protect the people's liberty); THE FEDERALIST No. 51 (J. Madison).

[77] *See Chadha*, 462 U.S. at 956–57.

[78] *Id.* at 957–58 (footnote omitted).

of persons affected by the legislation without first satisfying the constitutionally mandated veto procedure of Article I, section 7, clause 2.[79] Use of the presidential signing statement, therefore, violates the veto requirement of the Constitution.

B. *Use of Presidential Signing Statements Violates Separation of Powers Because the President Lacks the Authority to Speak for Congress*

In *Youngstown Sheet & Tube Co. v. Sawyer*,[80] the Supreme Court held that a seizure of the steel mills by the Secretary of Commerce, pursuant to an executive order issued by President Truman, violated the constitutional doctrine of separation of powers. In reaching this result, the Court indicated that the President's power to act must come either from an act of Congress, whether express or implied, or from the Constitution itself.[81] Because Congress had never given the President such authority, and because the Constitution did not authorize him to act, the Court found that the executive order directing the seizure constituted a legislative act in violation of the separation of powers.[82]

In *Catholic Social Services*,[83] as in *Youngstown*, the Attorney General can point to no statutory provision, whether in the Act or in another part of the United States Code, that expressly or impliedly empowers the President to authoritatively state what Congress intended by enacting the Act. Further, there is no provision of the Constitution that could support such an argument. Thus, absent a delegation of authority to act for Con-

---

[79] *Cf. Chadha*, 462 U.S. at 952. *Chadha* makes clear that any change of legal rights must be accomplished through constitutionally mandated procedures.

[80] 343 U.S. 579 (1952).

[81] *Id.* at 635–38 (Jackson, J., concurring) (actions of the President may fall into three categories: (1) express or implied grants of authority from Congress, at which time the President's power is at its maximum; (2) independent power in a "zone of twilight" of authority shared with Congress, at which time the test of authority depends upon the imperative of the event; and (3) the President's own constitutional authority minus any authority the Constitution grants to Congress over the matter, at which time the President's power is at its lowest ebb).

[82] *Id.* at 589.

[83] No. 86-2907 (9th Cir. 1987).

gress,[84] the assertions of the Executive Branch that the President's signing statements authoritatively discerned Congress' legislative intent violates the separation of powers doctrine upheld in *Youngstown*.

In proffering such statements to the courts, the Attorney General might claim that the President issued the signing statement pursuant to his role in the lawmaking process under Article I, thereby making the signing statement legislative in nature. Nevertheless, "[w]hen the Executive acts, he presumptively acts in an executive or administrative capacity as defined in [A]rticle II."[85] The question, then, is whether the Constitution authorizes the President to avoid this presumption and to issue statements legislative in nature.[86]

The inquiry under the holding of *Youngstown* must begin with the express language of the Constitution.[87] It might be argued that the recommendation provision of Article II, section 3 makes a signing statement a legislative act, and thus indicative of congressional intent. That section provides that the President "shall from time to time give to the Congress Information of the State of the Union, and recommend to [Congress for] their Consideration such Measures as he shall judge necessary and expedient."[88] The President's signing statements, however, are not recommendations to be acted upon by Congress. If that were the case, the statements would fall into the category of matters subject to the standards of the Presentment Clause.[89] As those standards can never be satisfied by the very terms and nature of the issuance of the signing statement, the recommen-

---

[84] The legislative process is considered to be under the exclusive control of Congress. *See Youngstown*, 343 U.S. at 589 (Congress *alone* possesses the lawmaking power). Therefore, the separation of powers doctrine would likely void even an express delegation by Congress of its primary lawmaking responsibility. *Cf. Bowsher*, 106 S. Ct. at 3191 ("structural protections against abuse of power [are] critical to preserving liberty").

[85] *Chadha*, 462 U.S. at 951.

[86] This is similar to the question presented in *Youngstown*: could the Executive's act be sustained on the basis of some provision in the Constitution? *Id.* at 587; *see also id.* at 640 (Jackson, J., concurring); *cf. Chadha*, 462 U.S. at 952 (whether the actions of the House are, as a matter of constitutional law, an exercise of executive power "depends not on their form but upon 'whether they contain matter which is properly to be regarded as legislative in its character and effect'") (quoting S. REP. No. 1335, 54th Cong., 2d Sess. 8 (1897)). It is well settled that the President does have a limited role in the legislative process. *See supra* notes 37–41 and accompanying text.

[87] *See Youngstown*, 343 U.S. at 640 (Jackson, J., concurring) (act of President can only be sustained if found to be beyond control of Congress and solely within his constitutional domain).

[88] U.S. CONST. art. II, § 3; *see also Youngstown*, 343 U.S. at 587 (President's role in legislative process limited to recommending and vetoing acts of Congress).

[89] U.S. CONST. art. I, § 7, cl. 2.

dation provision of Article II, section 3 can be of no assistance to the Executive.

The only other language in the Constitution which might supply sufficient legislative indicia to the President's statement to overcome the presumption of executive action is the provision that the President shall faithfully execute the laws.[90] Under this broadly stated grant of power, the administration could argue that the statements are issued in furtherance of the President's duty under Article I, section 7, clause 2 to sign bills properly presented by Congress.[91] The President's qualified veto power, however, implies that the views of the President shall only have constitutional significance if he *objects* to the bill presented by Congress.[92] Because the terms in the Presentment Clause implicitly negate the argument that the President's affirmatively stated views upon signing a bill into law are constitutionally meaningful, the President cannot rely on his role in the legislative process under Article I for the authority to speak for Congress.

Nor does past presidential practice support the argument.[93] A presidential practice may be given deference if it is "a systematic unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . [that] may be treated as a gloss on 'executive Power' vested in the President by [Section] 1 of article II."[94] In contrast, the offering to a court of presidential signing statements as authoritative expressions of the will of Congress is a new practice, undertaken in an effort to accumulate constitutional authority properly belonging to Congress.[95]

It becomes clear that the President lacks any constitutional authority to speak for Congress and that the presumption that he has acted in an executive capacity must be sustained. In

---

[90] U.S. CONST. art. II, § 3 provides that the President "shall take Care that the Laws be faithfully executed."

[91] *Cf. Youngstown*, 343 U.S. at 640–41 (Jackson, J., concurring) (although "the President does enjoy unmentioned powers[, this] does not mean the mentioned ones should be narrowed by a niggardly construction").

[92] *See* U.S. CONST. Art. I, § 7, cl. 2.

[93] *See Youngstown*, 343 U.S at 610–11 (Frankfurter, J., concurring) (past presidential practice is relevant because the constitutional framework for government must be viewed in the context of its actual operation).

[94] *Id.* at 610–11 (Frankfurter, J., concurring); *see also* Dames & Moore v. Regan, 453 U.S. 654, 686 (1981) (long-term exercise of foreign policy power by President justified the abrogation of various claims of individuals against the government of Iran).

[95] *See supra* notes 12–16 and accompanying text.

Bowsher v. Synar,[96] the Supreme Court set forth what "functions . . . plainly [entail] . . . execution of the law in constitutional terms."[97] It stated that "[i]nterpreting a law enacted by Congress *to implement* the legislative mandate is the very essence of 'execution' of the law."[98] Under this analysis the President's signing statement constitutes an interpretive statement issued in execution of a law passed by Congress—not pursuant to any legislative authority expressed or implied by the Constitution. Therefore, courts presented with presidential statements must declare that the President lacks the constitutional authority to speak for Congress and that a President's signing statement simply contains the views of the Executive Branch issued pursuant to its executive—and not legislative—authority. As such, they are constitutionally unreliable indicators of Congress' will, and a court should not use these statements as a tool for interpreting the acts of Congress.

C. *The Statements are Equivalent to the Unconstitutional Executive Order Rejected in* Youngstown

Presidential signing statements subvert the constitutional allocation of power in the federal government by providing a means to substitute presidentially created policies for those of Congress. The Constitution, however, empowers Congress to express in law our national policy, and set the guidelines for its implementation. The President's constitutional role is to carry out these laws, and to administer those policies, according to the framework set by Congress. The use of signing statements places the President in the role of policymaker by substituting his interpretation of law for Congress' language. Nothing in the constitutionally enumerated powers of the President allows such policymaking.[99] Those seeking to justify such conduct have instead looked to a notion of "implied" powers.[100]

---

[96] 106 S. Ct. 3181 (1986).

[97] *Id.* at 3192.

[98] *Id.* (emphasis added). *See infra* note 125.

[99] *See Youngstown*, 343 U.S. at 641 (Jackson, J., concurring).

[100] *See id.* at 646 (Jackson, J., concurring). In fact, in *Youngstown*, as well as in *Catholic Social Services*, the executive action was premised on an assertion of implied constitutional authority under Art. II, § 3. *See* Appellant's Brief at 24–25 n.16, *Catholic Social Services*, No. 86-2907 (9th Cir. 1987).

The President claimed in *Youngstown* that necessity and custom had given him broad powers to act in the national interest as he saw fit.[101] The Supreme Court rejected this argument, stating that under the Constitution, "the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. [It] limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad."[102] Moreover, the Constitution provides that Congress "shall make the laws which the President is to execute."[103]

In *Youngstown*, the President's order did not direct that a congressional policy be executed in a manner prescribed by Congress, but rather directed the execution of the President's own policy in a manner prescribed by the President. Consequently, the Supreme Court held that the issuance of the order constituted a legislative act in violation of separation of powers principles.[104] The Court reached this result despite the existence of an emergency situation, which threatened military readiness.[105] If the President is not authorized to exercise policymaking power in such an extreme context, he certainly should not be able to do so in the more mundane circumstance of issuing signing statements.

The logic underlying the use of presidential signing statements to discern congressional policy violates the rationale of *Youngstown*. Such a position, in substance and effect, holds that the conduct of the Executive Branch must be judged against the President's interpretation of the law, and not by the law itself.[106]

By this sleight of hand, the Executive Branch would enable itself to do by the President's statement what it could not do through an executive order: "direct that a presidential policy be executed in a manner prescribed by the President."[107] As *Youngstown* makes clear, however, the President can only direct, whether through executive order or proclamation, "that a congressional policy be executed in a manner prescribed by

---

[101] *See Youngstown*, 343 U.S. at 646 (Jackson, J., concurring).

[102] *Id.* at 587.

[103] *Id.*; *see also* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415–16 (1819).

[104] *See Youngstown*, 343 U.S. at 588–89.

[105] *See id.* at 646 (Jackson, J., concurring).

[106] The Attorney General has moved toward this position in the case challenging the implementation of the Immigration Reform and Control Act of 1986, by placing heavy emphasis on the President's signing statement. *See* Appellant's Brief at 24–25 n.16, *Catholic Social Services*, No. 86-2907 (9th Cir. 1987).

[107] *Youngstown*, 343 U.S. at 588.

Congress[.]"[108] To give legislative effect to a President's signing statement would allow the Executive to direct policy in a manner Congress could not check.[109] This would make the President both a lawmaker and law enforcer, and erase the boundary between Article I and Article II.

The singular duty of the Legislature to make law is basic to our constitutional structure. The use of presidential signing statements to interpret acts of Congress offends the tripartite system of government, which grants exclusive lawmaking powers to the Legislature. This is one of the basic structural principles on which our polity was formed, and thus, these statements cannot be relied on as an indication of congressional intent.

III. Use of Signing Statements to Influence Interpretation of Law Violates the Underpinnings of Separation of Powers Between Article II and Article III

> If the essential constitutional role of the Judiciary is to be maintained, there must be both the appearance and the reality of control by Article III judges over the interpretation, declaration, and application of federal law.[110]

The separation between powers exercised by the Judiciary and powers exercised by the Executive is fundamental. Those whose thought influenced the formation of this republic feared the tendency toward tyranny inherent in executive exercise of judicial power.[111] Indeed, a major objection voiced against the Crown in the Declaration of Independence was that colonial judges were made dependent upon the will of the Executive

---

[108] *Id.*; *cf.* Federal Energy Admin. v. Algonquin SNG, Inc., 426 U.S. 548, 558–60 (1976) (presidential proclamation made pursuant to express grant of authority by Congress held not a violation of separation of powers).

[109] *See Youngstown*, 343 U.S. at 588.

[110] Pacemaker Diagnostic Clinic of America v. Instromedix, 725 F.2d 537, 544 (9th Cir. 1984) (en banc), *cert. denied*, 469 U.S. 824 (1985) (holding constitutional a federal statute that allowed magistrates to conduct civil trials with the consent of all parties).

[111] *See* J. Montesquieu, The Spirit of Laws 151–52 (T. Nugent trans. 1949) (any combination of executive and judicial functions creates a system with an inherent tendency toward tyrannical actions); *see also* The Federalist No. 47, at 325–26 (J. Madison) (H. Lodge ed. 1888) (discussing Montesquieu: "the fundamental principles of a free constitution are subverted" by exercise of another branch's power); J. Montesquieu, *supra*, at 120 ("were the power of judging joined to the Executive the judge might behave with all the violence of an oppressor").

alone.[112] The Framers thus crafted an independent judiciary that would stand free of control by the Executive.[113] Separation between the Executive and the Judiciary is indispensable to public liberty and its breach cannot be tolerated.[114]

The presentation of a presidential signing statement as definitive evidence of Congress' intent injects the Executive Branch into the judicial process to a degree that cannot be countenanced under current approaches to the separation of powers.[115] Although boundaries between the branches of government can no longer be characterized as absolute,[116] Article III guarantees of judicial independence—"designed to give judges maximum freedom from possible coercion or influence by the Executive"[117]—are as vital under the current administration as under any

---

[112] *See* United States v. Will, 449 U.S. 200, 219 (1980). In 1761, the King converted the tenure of colonial judges to service at his pleasure, which became one of the basic objections voiced against the Crown. *See* The Declaration of Independence para. 1 (U.S. 1776) ("He has made Judges dependent on his Will alone."). This concern was also voiced by the Framers at the Constitutional Convention. *See* Notes of James Madison (July 18, 1787), *reprinted in* 2 THE RECORDS OF THE FEDERAL CONVENTION 45 (M. Farrand rev. 2d ed. 1966) (discussing constitutional prohibition on reducing judges' salaries during their tenure); *see also* O'Donoghue v. United States, 289 U.S. 516, 531 (1933) (Framers' recognition of "high importance" of Judiciary independent of executive influence manifested in salary reduction prohibition).

[113] Direct executive interference with judicial duties was resoundingly rejected by the Constitutional Convention, which defeated a proposal to allow judges to be removable by the Executive. "The judges would be in a bad situation if made to depend on any gust of faction which might prevail in the two Branches of government." J. Madison, 2 JOURNAL OF THE FEDERAL CONVENTION 257 (Hunt ed. 1908)

[114] The independence of the Judiciary is a primary goal of Article III. From the outset, Article III "was designed as a protection for the parties from the risk of legislative or executive pressure on judicial decision." Currie, *Bankruptcy Judges and the Independent Judiciary*, 16 CREIGHTON L. REV. 441, 460 n.108 (1983); *see also* Kaufman, *Chilling Judicial Independence*, 88 YALE L.J. 681, 713 (1979). The existence of a free judiciary exists not for the judges, but for the judged; "a judiciary free from control by the Executive and Legislature is essential if there is a right to have claims decided by judges who are free from potential domination by other Branches of government." United States v. Will, 449 U.S. 200, 217–18 (1980); *see also* Northern Pipeline v. Marathon Pipe Line Co., 458 U.S. 50, 58 (1982) (plurality opinion of Brennan, J.). This principle was reaffirmed by the Court just last term. *See* Commodity Futures Trading Comm'n v. Schor, 106 S. Ct. 3245, 3256 (1986). It is undoubtedly a principle that is deserving of effectuation in this context.

[115] *See Pacemaker*, 725 F.2d at 541 ("A separate and independent judiciary, and the guarantees that assure it, are present constitutional necessities, not relics of antique ideas.").

[116] *See* Springer v. Philippine Islands, 277 U.S. 189, 209 (1928) (Holmes, J., dissenting) ("[t]he great ordinances of the Constitution do not establish and divide fields of black and white"); Buckley v. Valeo, 424 U.S. 1, 121 (1976) (per curiam) ("a hermetic sealing off of the three Branches from one another would preclude the establishment of a nation capable of governing itself effectively"); Bowsher v. Synar, 106 S. Ct. 3181, 3200 (1986) (Stevens, J., concurring) ("a particular function, like a chameleon, will often take on the aspect of the office to which it is assigned") (citing Myers v. United States, 272 U.S. 52, 291 (1926) (Brandeis, J., dissenting)).

[117] United States ex rel. Toth v. Quarles, 350 U.S. 11, 16 (1955).

other.[118] Article III commands that "the independence of the Judiciary be jealously guarded."[119]

This section will show that no justification exists for the use of presidential signing statements by the Judiciary. Despite the absence of explicit prohibition of such statements in Article III, the separation of powers principles which it embodies are offended by the use of signing statements. These statements should be excluded because they are unreliable, inaccurate, and misleading evidence of legislative intent, while at the same time they violate the separation of powers principles that structure our government.

A. *An Executive Statement is Not Part of the President's Duty to Execute the Laws*

The use of signing statements to encroach on judicial interpretation of law cannot be justified by a hollow invocation of the President's duty to execute the laws.[120] Although there is no doubt that the Constitution "assigns to the Executive Branch, and not the Judicial Branch, the duty to 'take care that the laws be faithfully executed,'"[121] it is equally beyond reproach that the President's duty to execute the law is circumscribed by the terms of the law as enacted by Congress.[122] Although actions of the Executive legitimately taken to execute the law are entitled

---

[118] *See Bowsher*, 106 S. Ct. at 3186–87 (tracing Court's decision to the influence of Montesquieu's and Madison's ideas regarding the separation of powers in the Constitution); *see also* Glidden Co. v. Zdanok, 370 U.S. 530, 582 (1962) (plurality opinion of Harlan, J.).

[119] Northern Pipeline v. Marathon Pipe Line Co., 458 U.S. 50, 60 (1982) (plurality opinion of Brennan, J.). Based on this constitutional commitment, the *Marathon* Court found institutional protections for judicial independence so compelling that it struck down a painstakingly drawn congressional plan for bankruptcy courts. *See id.* at 87.

[120] U.S. CONST. art. III, § 3 ("he shall take Care that the Laws be faithfully executed").

[121] Allen v. Wright, 468 U.S. 737, 761 (1984). Thus, a "restructuring of the apparatus established by the Executive Branch to fulfill its legal duties" is not a fit subject for judicial resolution; the Court recognized, however, that a similar complaint based on violation of a legal obligation would not run afoul of the structural principles of the Constitution. *See id.* at 757, 759.

[122] *See Bowsher*, 106 S. Ct. at 3207 (White, J., dissenting); Myers v. United States, 272 U.S. 52, 156–57 (1926) (quoting United States v. Guthrie, 58 U.S. (17 How.) 284, 308 (1854) (McLean, J., dissenting); *see also Myers*, 272 U.S. at 184 (McReynolds, J., dissenting) ("chief duty of the President is to carry into effect the will of Congress through such instrumentalities as it has chosen to provide"). *See generally* United States v. Perkins, 116 U.S. 483, 485 (1886); Kendall v. United States, 37 U.S. (12 Pet.) 524, 610 (1838); E. CORWIN, THE PRESIDENT: OFFICE AND POWERS 1787–1957 80–81 (1957).

to high regard,[123] "[t]he courts must not abdicate their responsibility to check the governmental excesses of the Executive" in reviewing its actions.[124]

There is a vast difference between the Executive's constitutional function of putting Congress' will into effect through administrative action and the attempt, by use of signing statements, to affect a court's interpretation of that legislative intent.[125] Execution of the law, as constitutionally mandated, does not include transformation of the meaning of the law. Nor does it include presentation of this modified construction for use in a judicial determination of the legitimacy of executive action. Accordingly, these statements are not part of the Executive's duty to execute the laws.

B. *The Executive Statement Is Entitled to No Deference as an Agency Interpretation*

It is critical to recognize that an executive statement interpreting law is not entitled to the same deference given to an administrative agency's construction of a statutory scheme it is

[123] Respect must be granted to legitimate actions on the part of the Executive Branch to accomplish its constitutional role. *See* United States v. Burr, 25 F. Cas. 187, 190, 191–92 (C.C. Va. 1807) (No. 14,694) (Marshall, C.J.); D. MALONE, JEFFERSON THE PRESIDENT: SECOND TERM 1805–1809 304–05 (1974); *see also* FTC v. Standard Oil Co. of California, 449 U.S. 232, 249 (1980) (Stevens, J., concurring); United States Parole Comm'n v. Geraghty, 445 U.S. 388, 397 (1980) (separation of powers constraints prevent court from intruding into executive investigations). This constitutional fact, however, cannot prevent judicial intervention when necessary to defeat an illegitimate exercise of power that is not legitimately granted to the President by the Constitution. *See* Northern Pipeline v. Marathon Pipe Line Co., 458 U.S. 50, 83 (1982) (plurality opinion of Brennan, J.); *see also* Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661, 682 (1978).

[124] United States v. Gonsalves, 691 F.2d 1310, 1319 (9th Cir. 1982); *see also* Ciba-Geigy Corp. v. EPA, 801 F.2d 430, 438 (D.C. Cir. 1986) (doing so implies no lack of "[r]espect for our coordinate Branch of government").

[125] Of course, in executing the law, the Executive Branch must often act where the intent of Congress is not clear. These signing statements, however, serve a much different purpose. As with the Act, the Executive is apparently not trying to interpret the intent of Congress, but is grafting a new meaning onto the statute. *See supra* text accompanying notes 12–31. While the Executive could engage in many of the same activities in the absence of a signing statement, it is the use of these statments as justification for the executive action that brings on separation of powers concerns. In addition, in most cases where the Executive Branch acts in making an initial interpretation of a statute, it is the agency trusted with implementing the act that makes the decision. Because of agency expertise and congressional delegation, these decisions are given appropriate deference by the courts. *See* K. DAVIS, ADMINISTRATIVE LAW TEXT § 5.03 (3d ed. 1972). However, the presidential signing statements should be accorded no deference as an agency interpretation. *See infra* notes 126–32 and accompanying text. Presidential signing statements go much further, and with much less justification, than traditional executive interpretations of statutes made in the course of implementing a congressional program.

charged with enforcing.[126] Although a degree of central management under presidential direction may be desirable,[127] the President's actual involvement in the workings of even the executive agencies is highly attenuated.[128] The plain fact is that the chief executive is not an expert on all facets of each agency that is theoretically under his control. Courts award deference to agency interpretations of law because the agency is supposed to have developed unsurpassed expertise in dealing with questions of its own statutory authorization.[129] The chief executive, in graphic contrast, cannot possess unsurpassed expertise in applying all statutory law that touches on any program to be administered by the Executive Branch—especially when the interpretation proffered by the Executive involves a nascent statutory program that the Executive Branch has not yet implemented.

Moreover, it is justifiable to grant deference to an agency determination because the agency—even if formed as an executive body—is a creature of Congress and is subject to its control. It is axiomatic that "administrative activity cannot reach beyond the limits of the statute that created it."[130] When an

---

[126] No amount of deference, of course, can allow the Legislative or Executive Branch to exercise Article III power under the guise of accomplishing its putative constitutional purpose. *See* Schick v. Reed, 419 U.S. 256, 274, 276 n.12 (1974) (Marshall, J., dissenting) ("a legal opinion from the Attorney General supplies reasoned interpretations, but hardly bears the force of law"). It is fitting to recognize that Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) itself involved a question of deference to a determination by an administrative official of the Executive Branch. When the agency seeks to have an interpretation control a court's determination of a constitutional or statutory point, it is clear that the agency's determination must fall to that required, in the court's judgment, by the provision or act being interpreted. *See Marbury*, 5 U.S. (1 Cranch) at 166 ("the question whether a right has vested or not is, in its nature, judicial, and must be tried by the judicial authority"); *see also* Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 2 (1983); Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co., 463 U.S. 29, 41 (1983); United Church of Christ v. Federal Communications Comm'n, 707 F.2d 1413, 1425 (D.C. Cir. 1983) (cases both requiring a "hard look" before any deference is shown when agency proposes a change of course).

[127] *See* Bruff, *Presidential Power and Administrative Rulemaking*, 88 YALE L.J. 451, 491–95 (1979). Central management may be desirable because many agencies share similar administrative needs; a central structure is thus conducive to efficiency. *See* R. KATZMANN, REGULATORY BUREAUCRACY: THE FEDERAL TRADE COMMISSION AND ANTITRUST POLICY 140 (1980).

[128] *See* Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 590 (1984) ("Even in executive agencies, the layer over which the President enjoys direct control of personnel is very thin and political factors may make it difficult for him to exercise even these controls to the fullest.").

[129] *See* Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984); Columbia Basin Land Protection Ass'n v. Schlesinger, 643 F.2d 585, 600 (9th Cir. 1981).

[130] INS v. Chadha, 462 U.S. 919, 953 n.16 (1983). *See also* Koch, *Judicial Review of Administrative Discretion*, 54 GEO. WASH. L. REV. 469, 484 (1986). Koch argues that even the freedom to make policy is granted to the agency by Congress because the

agency overreaches its authority, the delegation doctrine ensures that the agency's interpretation of its actions will be measured against the statutory authority granted by Congress in the agency's organic law.[131] No such assurance exists for presidential interpretations. Furthermore, any exercise of judicial or quasi-judicial power by an executive agency is subject to procedural safeguards, including judicial review.[132] Neither procedural protection nor direct judicial review exists to safeguard presidential interpretations of law from abuse. Such interpretations cannot be relied on or deferred to under any theory of agency expertise. Therefore, the specific legal authorization of agency interpretations cannot provide a justification for general power of the President to interpret legislative intent.

C. *It Is the Sole Province of the Judicial Branch to Interpret the Will of Congress*

Early in our nation's history the Supreme Court established that "it is, emphatically, the province and duty of the judicial

---

Legislature valued the administrative consideration of social goals. Whether the agency has exceeded the policy granted to it by Congress is a question of law, to be decided by the courts. *See id.* at 488.

[131] Despite the moribund status attributed to the delegation doctrine by many commentators, see National Ass'n of Property Owners v. United States, 499 F. Supp. 1223, 1239–41 (D. Minn. 1980); K. DAVIS, ADMINISTRATIVE LAW TREATISE § 3.1 (1978), there are recent indications that a majority of the Supreme Court believes the doctrine to be fully viable. *See* American Textile Mfg. Inst., Inc. v. Donovan, 452 U.S. 490, 543 (1981) (Rehnquist, J., dissenting); Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 672 (1980) (Rehnquist, J., concurring). Justice Blackmun, Justice White, and Chief Justice Burger joined Justice Rehnquist in finding a delegation question in Hampton v. Mow Sun Wong, 426 U.S. 88, 123 (1976) (Rehnquist, J., dissenting). A majority narrowly construed a statute to avoid potential delegation questions in National Cable Television Ass'n v. United States, 415 U.S. 336, 342 (1974). Justice Marshall and Justice Brennan have recognized the validity of the doctrine in laws invoking criminal sanctions or affecting fundamental rights. *See* Federal Power Comm'n v. New England Power Co., 415 U.S. 345, 353 (1974) (Marshall, J., concurring); United States v. Robel, 389 U.S. 258, 275 (1967) (Brennan, J., concurring). *But cf.* Scalia, *A Note on the Benzene Case*, 4 REGULATION 25–28 (July–Aug. 1980) (revitalizing doctrine would lead to "judicial activism").

[132] *See Chadha*, 462 U.S. at 966 n.10 (Powell, J., concurring); Northern Pipeline v. Marathon Pipe Line Co., 458 U.S. 50, 83 (1982) (plurality opinion of Brennan, J.) (agencies "do, in a sense, affect the exercise of judicial power, but they are also incidental to Congress' power to define the right that it has created"). Judicial review is critical to the legitimacy of delegations of authority. *See* Yakus v. United States, 321 U.S. 414 (1944) (imposing judicial review upon the test for determining breadth of delegations); Amalgamated Meat Cutters v. Connally, 337 F. Supp. 737, 744–48 (D.D.C. 1971) (Levanthal, J.); *see also* Aranson, Gellhorn & Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 2, 14 (1982); Davis, *A New Approach to Delegation*, 36 U. CHI. L. REV. 713 (1969).

department to say what the law is."[133] A critical element of the Judiciary's duty to interpret the law is the duty to determine the extent of the law.[134] The prime element of determining the law's extent, in turn, is the duty to discern "the meaning of an enactment."[135] Indeed, "[t]he cardinal purpose of a court in construing statutes is to determine the intent of Congress."[136] This constitutionally essential function, the delineation of congressional intent, is reserved to the Judiciary.[137]

---

[133] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803); *see also* Cooper v. Aaron, 358 U.S. 1, 17–19 (1958).

[134] *See* Kendell v. United States, 37 U.S. (12 Pet.) 524 (1838); *cf.* Ex parte McCardle, 74 U.S. (7 Wall.) 506, 514 (1868).

[135] Tennessee Valley Auth. v. Hill, 437 U.S. 153, 194–95 (1978) (once meaning and constitutionality of a law are determined, "the judicial process comes to an end"). The ultimate guide to interpreting statutory law is the intent of Congress, and the institution that discerns that guide is the Judiciary. Indeed, the Judiciary has the power to fashion remedies for statutory and constitutional violations impliedly from provisions that are silent in that regard; "such power is to be exercised in the light of relevant policy determinations made by the Congress." Bush v. Lucas, 462 U.S. 367, 373 (1983); *accord* Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 403–04 (1971) (Harlan, J., concurring) (judicial power involves policy choices enlightened by Congress); *see also* Chappell v. Wallace, 462 U.S. 296, 303–04 (1983); Carlson v. Green, 446 U.S. 14, 18–20 (1980); Davis v. Passman, 442 U.S. 228, 245 (1979).

[136] Matter of Koerner, 800 F.2d 1358, 1364 (5th Cir. 1986).

[137] To date, the courts have considered signing statements in deciding cases, without giving them any special consideration, but have not analyzed the constitutional concerns. In Bowsher v. Synar, 106 S. Ct. 3181 (1986), the Supreme Court cited the President's statement on signing the Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1038 (codified at 2 U.S.C. §§ 901–907, 921–922 (1986)). The Court referred to the signing statement simply to indicate that the President, as well as members of Congress, believed parts of this Act to be unconstitutional. *See Bowsher*, 106 S. Ct. at 3185 n.1 (citing statement on signing H.R.J. Res. 372 into law, 21 WEEKLY COMP. PRES. DOC. 1491 (1985)). The Court did not in any way rely on the President's statement as an authoritative expression of Congress's intent. Furthermore, Justice White, dissenting, found President Reagan's view of the Act inconsistent with the President's constitutional role in its enactment. *See Bowsher*, 106 S. Ct. at 3206 n.2 (White, J., dissenting) ("The Solicitor General appeared on behalf of the . . . Executive departments, which intervened to attack the constitutionality of the statute that the Chief Executive had earlier endorsed and signed into law."). This view implies that when the President signs a bill, he automatically endorses it without qualifications and accepts its every provision. *Compare id. with* United States v. Lovett, 328 U.S. 303, 313 (1946) (Supreme Court referred to, but did not rely upon, President's statement upon signing the Urgent Deficiency Appropriation Act of 1943); National Parks and Conservation Ass'n v. Kleppe, 547 F.2d 673, 678 n.16 (D.C. Cir. 1976) (noting that an issue left expressly unanswered in an earlier case had been tangentially addressed previously in President Johnson's statement upon signing a bill revising the Administrative Procedure Act of 1966). *But see* Berry v. Department of Justice, 733 F.2d 1343, 1349–50 (9th Cir. 1984) (citing President Johnson's statement upon signing into law the Freedom of Information Act for the proposition that a goal "of the FOIA is to allow the public to determine how agencies reach decisions"); Clifton D. Mayhew, Inc. v. Wirtz, 413 F.2d 658, 661–62 (4th Cir. 1969) (relying on statement of President Truman on signing into law the Portal-to-Portal Act). It must be pointed out that the courts in *Berry* and *Mayhew* did not address the constitutional implications raised by their use of presidential signing statements.

Other branches of government must, in the course of their duties, initially interpret[138] the Constitution and laws of the United States; notwithstanding any initial interpretation by another branch, however, the Judiciary must make a wholly independent determination of the intent of the legislature.[139] Any action by the Executive that has the practical effect of limiting the ability of the Judiciary to determine the law thus encroaches upon Article III protections of judicial independence.[140] Such an encroachment is constitutionally impermissible when it concerns a matter that is "inherently judicial";[141] determining the intent of Congress is certainly such an inherently judicial function.

When the Executive intrudes upon such an "essential attribute of judicial power," concerns that it "impermissibly threatens the institutional integrity of the judicial Branch" are at their highest.[142] In determining whether executive action "impair[s] the

---

[138] Other officers in other branches, of course, take oaths to uphold the Constitution and must make initial determinations of constitutionality before placing their imprimatur on an action. *See* Fisher, *Constitutional Interpretation by Members of Congress*, 63 N.C.L. REV. 707, 747 (1985). *See also supra* note 125. Past executives have recognized this fact. *See* Letter from Thomas Jefferson to Abigail Adams (Sept. 11, 1804), *reprinted in* 8 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 4, at 310–11 n.1 (executive must determine whether law is constitutional before signing). The ultimate arbiter of binding constitutionality is, however, the Judiciary; presidents themselves have recognized this fact. *See* Letter from Franklin D. Roosevelt to Congressman Samuel B. Hill (July 6, 1935), *reprinted in* 4 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 297–98 (S. Rosenman ed. 1935) (executive unsure of constitutionality; ultimate decision rests in courts).

[139] *See* United States v. Nixon, 418 U.S. 683, 703 (1974) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)) ("many decisions of this Court . . . have unequivocally reaffirmed . . . that '[i]t is emphatically the province and duty of the judicial department to say what the law is'"); *see also* Powell v. McCormack, 395 U.S. 486, 549 (1969) ("[o]ur system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another Branch").

[140] *Cf.* United States v. Will, 449 U.S. 200, 217 (1980) (denial of salary increases to federal judges violates separation of powers because control over judicial pay creates a potential of domination by the other Branches). Indeed, early courts hesitated to utilize even legislative statements as indications of congressional intent; determinations of the Judiciary interpreting the law from the words of the statute were preferable to collecting statements of legislators. *See* Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 899 (1985) (states in reference to 17th Century British courts: "[i]n seeking a statute's proper construction, courts would also admit the practical exposition of the statute supplied by usage under it"); *see also* Letter from Thomas Jefferson to Skelton Jones (July 28, 1809), *quoted in* D. MALONE, JEFFERSON THE VIRGINIAN 261–62 (1948) (meaning of act is "in the air" until "settled by decisions").

[141] Northern Pipeline v. Marathon Pipe Line Co., 458 U.S. 50, 68 (1982) (plurality opinion of Brennan, J.); Ex parte Bakelite, 279 U.S. 438, 458 (1929).

[142] *See* Commodity Futures Trading Comm'n v. Schor, 106 S. Ct. 3245, 3258 (1986).

role of the courts under Article III,"[143] the proper inquiry focuses on whether the action taken prevents the Judiciary from accomplishing its constitutionally assigned duties.[144] It is fundamental that the Executive cannot share an attribute of the judicial power with the courts.[145] Moreover, another branch impinges upon the Judiciary if it "improperly directs the Judiciary in the performance of its duties."[146] In determining whether the courts have been improperly directed, "the extent and character" of the potential direction must be assessed "according to common sense and the inherent necessities of governmental coordination."[147]

The Executive Branch may not compel a court to reach a particular decision. However, the offering of a presidential signing statement purporting to explain legislative intent exerts a powerful influence on the court's perceptions. The authority and prestige of the President infuse the signing statement with a potent aura of veracity. Thus, acceptance of these statements

---

[143] United States v. Nixon, 418 U.S. at 707. *See also* Nixon v. Fitzgerald, 457 U.S. 731, 754 (1983). Similar to the inquiry of whether one branch has impaired the functions of another is the related question of whether one branch has expanded its powers at the expense of a coordinate branch. *See* Muskrat v. United States, 219 U.S. 346, 362 (1911) (Judiciary is barred by Constitution from performing legislative function through issuance of advisory opinions on legislative action); Hayburn's Case, 2 U.S. (2 Dall.) 409, 412 (1792) (Jay, C.J.) (judicial powers are unconstitutionally expanded by law mandating judicial declaration of rights subject to review by Executive Branch). Because the analytical methods under the expansion-of-power test have most often been applied to the expanding of judicial power by the Judiciary, it will not be applied here. *See* Note, *Separation of Powers and Judicial Service on Presidential Commissions*, 53 U. CHI. L. REV. 993, 1008 (1986).

[144] Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 443 (1977); *see also* United States v. Claiborne, 727 F.2d 842, 848 (9th Cir. 1984), *stay denied*, 790 F.2d 1355 (9th Cir. 1986) (actions "interfere with the legitimate operation of a Branch of government").

[145] *See* Gordon v. United States, 69 U.S. (2 Wall.) 561, *opinion released*, 117 U.S. 697, 703 (1864) (Taney, C.J.) (executive exercise of judicial power renders order nugatory). The Supreme Court has made this fact explicit:

> [T]he judicial Power of the United States, vested in the federal courts by Art. III, § 1, of the Constitution, can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto. Any other conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of a tripartite government.

United States v. Nixon, 418 U.S. 683, 704 (1974) (citing THE FEDERALIST No. 47, at 313 (J. Madison) (S. Mittel ed. 1938)).

[146] Pacemaker Diagnostic Clinic v. Instromedix, 725 F.2d 537, 544 (9th Cir. 1984) (citing United States v. Klein, 80 U.S. 128, 147 (1871)); *see also* INS v. Chadha, 462 U.S. 919, 966 (1983) (Powell, J., concurring) (judicial power cannot be usurped by other branches, neither of which are subject to "internal constraints" to protect fundamental rights).

[147] Buckley v. Valeo, 424 U.S. 1, 122 (1976) (citing Hampton & Co. v. United States, 276 U.S. 394, 406 (1928)).

in court will tend to have the effect of directing the judge to follow the President's interpretation. This tendency is strongly reinforced by the President's appointment power.[148] Such an act by the Executive is contrary to the spirit of the separation of powers as expressed by the Supreme Court.[149]

IV. CONCLUSION: EXECUTIVE STATEMENTS OF LEGISLATIVE INTENT ARE INHERENTLY UNRELIABLE

Presidential signing statements purport to declare the intent and purpose of Congress in passing a law, in order to put forth the President's conception of that law. This endeavor must be regarded with great suspicion, because the President's statements are essentially making and interpreting law—functions reserved by the Constitution to the Legislative and Judicial Branches. Such statements, which are contrary to the constitutionally mandated division of powers, are inherently unreliable. In addition to these constitutional problems, the presidential signing statements are unlike more reliable sources of legislative history which have undergone the test of legislative debate. The signing statements are produced after the enactment of the acts they seek to interpret. They therefore lack the characteristics necessary to constitute a reliable source of information as to the will of the Legislature.

The chronological placement in the legislative process of sources of legislative history is critical. In *Regan v. Wald*,[150] the

---

[148] The power of appointment, although antecedent to the exercise of judicial power, maintains potential for influence over the actions of judges. It is not irrelevant that nearly half the federal bench has now been appointed by one President. *See* Garber & Wimmer, *President's Statements No Help to U.S. Judges*, Nat'l L.J., Sept. 8, 1986, at 15, 42. In an era when one ideology predominates in the federal judiciary, safeguards are essential. *See* Carter, *Judicial Review of the Reagan Revolution*, 65 JUDICATURE 458, 460 (1982); THE FEDERALIST No. 78, at 489 (A. Hamilton) (H. Lodge ed. 1888) (judicial unwillingness to hazard the displeasure of an overly powerful executive).

[149] *See supra* note 145. Catholic Social Services v. Meese, No. 86-2907 (9th Cir. 1986) provides an excellent example of such interference with judicial interpretation by the President's use of signing statements. In this case, the Executive sought to evade a construction placed on a term of art utilized by Congress and supported by twenty years of judicial interpretation. *See supra* notes 25–26. Not only does this action offend the separation of powers between the Legislative and Executive Branches in grafting an exception onto a legislative provision, but it offends the separation between the Judicial and Executive Branches by seeking to overturn a time-honored judicial interpretation.

[150] 468 U.S. 222 (1984). In *Regan*, the Court considered a Treasury Department regulation that prevented American citizens from traveling to Cuba. *See id.* at 224. A colloquy between the Assistant Secretary of the Treasury and a Congressman, during congressional consideration of the bill upon which the regulation was based, was found to be immaterial in the interpretation of the regulation. *See id.* at 236–37.

Court found that oral testimony of witnesses and legislators is seldom reliable because such statements are made before a bill has achieved its final form. Reliance on this testimony would undermine the language of the bill actually voted on by Congress.[151] Legislative history may be persuasive, however, if tempered by the heat of congressional debate. In *State of Arizona v. State of California*,[152] the Court interpreted an act consistently with views expressed by two opponents of the bill because "the proponents of the bill made no response to the opponents' criticism."[153] Similar to the statement considered in *Regan*, and unlike the statements offered in *Arizona*, the presidential statements at issue here are drafted in isolation from full congressional debate.

Congress is denied the opportunity to respond to, or even consider, the content and implications of a presidential signing statement.[154] As in *Regan*, the Executive's views as expressed in the statement have not been debated by Congress with an eye toward the actual language of the subject act; rather, the actual language of the act has been agreed upon by all relevant parties and submitted to the President. If the courts were to accept the President's statement, it "would open the door to the inadvertent, or perhaps even planned, undermining of the language actually voted on by Congress and [presented to] the President."[155] The views of the President expressed in signing statements have never been tested in the cauldron of congressional debate, and, if used, could indeed undermine the language of the act at issue. Presidential signing statements are therefore entitled to no weight in a judicial determination of legislative intent.

It is the responsibility of the Judiciary to settle disputes among branches of government presented in the context of a live con-

---

[151] *See id.* at 237. The language used by individual legislators and witnesses, if used to alter the specific meaning of statutory language enacted by Congress, could alter the meaning of the law. The Court expressed concern about undue influence of those commenting on the bill in question; a parallel concern is appropriate here, where the author of the statements in question seeks to alter the meaning of plain language passed by Congress.

[152] 373 U.S. 546 (1963).

[153] *Id.* at 583 n.85.

[154] It is the inability of Congress to consider and act on presidential signing statements that contributes to the separation of powers concerns between Article I and Article II. *See supra* notes 37–79 and accompanying text.

[155] *Regan*, 468 U.S. at 237.

troversy.[156] An aspect of this judicial duty is the protection of Congress' "exclusive constitutional authority to make laws necessary and proper to carry out the powers vested by the Constitution" in the government of the United States.[157] The current administration has created a constitutional crisis by its subtle but transparent attempt to encroach upon both the legislative power of Congress and the judicial power of the courts, and the courts should not allow this encroachment to continue or spread.

Under any concept of judicial responsibility, reliance on executive interpretations of law is constitutionally impermissible. The context of *Catholic Social Services v. Meese*[158] presents the potentially formidable abuses of such statements at their apex. It arises in a situation in which the legislative power of Congress is at its most complete,[159] and in which the power of the Judiciary is at its most focused.[160] In such a context, it is little less than sophistry for the Executive to intrude on legislative or judicial power under the mantle of its constitutional authority.[161] Such an exercise manifestly presents the "aggrandizement of one Branch at the expense of the other."[162] The Executive must be restrained from attempts at illicit influence over the inherently judicial function of interpreting the will of the Legislature.

---

[156] *See* Bowsher v. Synar, 106 S. Ct. 3181, 3186 (1986); *see also supra* note 36.

[157] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 588 (1952).

[158] No. 86-2907 (9th Cir. 1986).

[159] *See* Kleindienst v. Mandel, 408 U.S. 753, 766 (1972). The power of the Legislature is at its zenith when it deals with questions of immigration. The Legislature holds "plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden." Boutilier v. INS, 387 U.S. 118, 123 (1967). Indeed, "over no conceivable subject is the legislative power of Congress more complete" than over questions of immigration. Oceanic Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909); *see also* Lem Moon Sing v. United States, 158 U.S. 538, 547 (1895) (Harlan, J.). The action of the Executive seeking to usurp Congress's plenary power under the Act is thus eminently unjustifiable.

[160] *See* Crowell v. Benson, 285 U.S. 22, 61 (1932) (separation of powers inquiry sharpest when "fundamental rights are in question"). Indeed, the exercise of judicial power by the Executive carries connotations of a deprivation of "due process of lawmaking." *See Bowsher*, 106 S. Ct. at 3204–05 n.23 (Stevens, J., concurring); Fullilove v. Klutznick, 448 U.S. 448, 549 (1980) (Stevens, J., dissenting); *see also* L. TRIBE, *supra* note 2, § 10-7, at 501 (due process clauses "have their historical origins in the notion that conditions of personal freedom can be preserved only when there is some institutional check on arbitrary government action").

[161] *See* Springer v. Philippine Islands, 277 U.S. 189, 201–02 (1928).

[162] Northern Pipeline v. Marathon Pipe Line Co., 458 U.S. 50, 57 (1982) (plurality opinion of Brennan, J.); *see also* Buckley v. Valeo, 424 U.S. 1, 122 (1976); *see also Chadha*, 462 U.S. at 949 (citing 1 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 254 (1911) ("despotism comes on mankind in different shapes, sometimes in an Executive, sometimes in a military one" (citation omitted)).

The United States courts must, in order to quiet the boundaries of power, unequivocally reject as constitutionally unreliable any presidential signing statements offered as evidence of congressional intent. Any lesser action will result in a realignment of authority under the Constitution, with a dangerous concentration of uncheckable power in the hands of the Executive.

ARTICLE

FROM UNNECESSARY SURGERY TO PLASTIC SURGERY: A NEW APPROACH TO THE LEGISLATIVE VETO SEVERABILITY CASES

GLENN CHATMAS SMITH*

In Immigration and Naturalization Service v. Chadha, *the United States Supreme Court ruled that the legislative veto was unconstitutional, thereby denying to Congress a mechanism that had become an important check on the Executive Branch. In the aftermath of Chadha, courts have been forced to decide whether the legislative veto provisions contained in many federal laws are severable from the laws themselves, or whether the laws are necessarily invalid because they contain these provisions*

In this Article, Professor Smith reviews the severability analysis that courts have engaged in following the Chadha decision and concludes that the courts have inappropriately removed statutory provisions. He explains that this statutory surgery is unnecessary, as courts have failed to realize the potential of promising alternatives which do not demand a choice between over-delegating and under-delegating power to the Executive Branch. Finally, Professor Smith explains the implications of his position for other severability issues, arguing that outside of the veto severability context courts can use more creative approaches as legitimate alternatives to statutory surgery.

> Without the legislative veto, Congress is faced with a Hobson's choice: either to refrain from delegating the necessary authority . . . or in the alternative, to abdicate its lawmaking function to the Executive Branch and independent agencies.
>
> —Justice White, dissenting in *Immigration and Naturalization Service v. Chadha.*[1]

In the more than three years since the Supreme Court decided *Chadha*, thereby denying Congress one of its favorite means of

---

* Associate Professor of Law, California Western School of Law. LL.M., 1979, Georgetown University Law Center; J.D., 1978, New York University School of Law; B.A., 1975, George Washington University. The author would like to thank Professor John Noyes and the other California Western faculty members for their helpful comments, and Rochelle Fandel, Barbara Seaman, and Diane Seaberg for editorial and research assistance.

[1] 462 U.S. 919, 968 (1983) (White, J. dissenting).

controlling executive branch discretion,[2] another branch of government not mentioned by Justice White has faced squarely the "Hobson's choice" his dissent attributed to Congress.

The federal courts have decided over two dozen post-*Chadha* cases[3] in which litigants argued that federal laws concerning such diverse subjects as anti-discrimination enforcement,[4] oil price control regulation,[5] and District of Columbia home

---

[2] *Chadha* invalidated § 244(c)(2) of the Immigration and Naturalization Act of 1952, Pub. L. No. 82-414, § 244(c)(2), 66 Stat. 216 (1952), which permitted either House of Congress to overturn the Attorney General's decision that deportation of a particular alien should be suspended for humanitarian concerns. The majority opinion of Chief Justice Burger, joined by five other Justices, viewed § 244(c)(2) as a device by which one House of Congress could reverse executive action, thereby "altering the legal rights, duties and relations of persons . . . outside the Legislative Branch." 462 U.S. at 952. Because the veto was "essentially legislative in purpose and effect," *id.*, the majority held that it impermissibly avoided the bicameralism and presentment requirements established for legislative acts by Article I, § 7, clauses 2 and 3 of the Constitution. The majority invalidated the one-House veto provision because it permitted alteration of the legal status quo without following "the carefully crafted restraints spelled out in the Constitution." *Id.* at 959.

Technically, the *Chadha* opinion invalidated only one veto provision. However, the Court majority made no effort to confine the reach of its reasoning. As Justice White noted,

> [t]oday the Court not only invalidates § 244(c)(2) of the Immigration and Naturalization Act, but also sounds the death knell for nearly 200 other statutory provisions in which Congress has reserved a "legislative veto." For this reason, the Court's decision is of surpassing importance.

462 U.S. at 967 (White, J. dissenting); *see id.* at 959 (Powell, J., concurring: "The Court's decision . . . apparently will invalidate every use of the legislative veto."). That the Court would not find the various forms of legislative veto used in different policy contexts any more acceptable than the veto in the Immigration Act was confirmed two weeks later, when the Court let stand the anti-legislative veto decisions of two District of Columbia Circuit panels. Process Gas Consumers Group v. Consumer Energy Council, 463 U.S. 1216 (1983), *aff'g mem.*, Consumer Energy Council v. FERC, 673 F.2d 425 (D.C. Cir. 1982) (invalidating one-House veto provision in 1978 Natural Gas Pricing Act which gave FERC interim pricing rulemaking authority) and Consumers Union v. FTC, 691 F.2d 575 (D.C. Cir. 1982) (en banc) (invalidating two-House veto provision in trade regulation rulemaking authority granted by 1975 FTC Improvements Act).

For a summary of some of the academic literature discussing and criticizing *Chadha*'s approach to the the nature of the Article I "legislative power", *see* Note, *Chadha and the Nondelegation Doctrine*, 94 YALE L.J. 1493, 1498 n.31 (1985).

[3] A total of 31 cases are cited or cross-referenced *infra* at notes 4–6, 12, 13 & 63.

[4] *E.g.*, Muller Optical Co. v. EEOC, 574 F. Supp. 946 (W.D. Tenn. 1983), *rev'd on other grounds*, 743 F.2d 380 (6th Cir. 1984) (claim that EEOC authority to enforce Age Discrimination in Employment Act of 1967 was invalid because agency received enforcement power through reorganization plan under the 1977 Reorganization Act, which contained invalid legislative veto provision). The remaining 21 cases in which targets of EEOC enforcement actions made similar severability-based claims are collected *infra* at notes 58–60. *See also* United States v. City of Yonkers, 592 F. Supp. 570 (S.D.N.Y. 1984) (United States Attorney General's authority to bring pattern and practice employment discrimination action against city police department arguably invalid because Attorney General received power under 1977 Reorganization Act).

[5] United States v. Exxon Corp., 773 F.2d 1240 (Temp. Emer. Ct. App. 1985) (whether invalid veto provisions negated Emergency Petroleum Allocation Act of 1973 (EPAA)

rule[6] were invalid because they contained invalid legislative veto provisions. In deciding whether the legislative power grants in the challenged laws were "inseverable"[7] from the invalid legislative veto provisions attached to them, the courts have chosen between two imperfect options. The first option, invalidating the veto-conditioned power grants, leaves behind less power than Congress planned to provide. It hampers delegation of what Justice White termed "the necessary authority."[8] The second option, preserving the power grants without their accompanying vetoes, leaves behind more power than Congress intended. In Justice White's parlance this option "abdicate[s the] lawmaking function to the executive and independent agencies."[9]

This Article takes the novel position that the federal courts have resolved this Hobsonian dilemma in many of the legislative veto severability cases by engaging in inappropriate and unnecessary statutory surgery.[10] The severability surgery is inappropriate because it has too frequently and too facilely severed power grants from their accompanying veto provisions when indicators of legislative intent point toward a different (or at least more cautious) approach. The severability surgery is unnecessary because the veto severability decisions have ignored promising alternatives for avoiding the full force of the dilemma between too much and too little delegation.

This Article's assessment of the many veto severability cases decided since *Chadha* has particular relevance in light of the current veto severability controversies continuing to seek res-

---

and Energy Policy and Conservation Act of 1975 (EPCA) grants of jurisdiction to Temporary Emergency Court of Appeals to review private damage claims under federal oil price controls); Gulf Oil Corp. v. Dyke, 734 F.2d 797 (Temp. Emer. Ct. App.), *cert. denied*, 469 U.S. 852 (1984) (same); Exxon Corp. v. Dept. of Energy, 744 F.2d 98 (Temp. Emer. Ct. App.), *cert. denied*, 469 U.S. 1077 (1984) (severability-based claim in two consolidated cases that regulations adopted pursuant to EPAA and EPCA were invalid); United States v. Sutton, 585 F. Supp. 1478 (N.D. Okla. 1984) (same).

[6] Dimond v. District of Columbia, 618 F. Supp. 519 (D.D.C. 1984) (argument that 1982 District of Columbia Compulsory/No Fault Motor Vehicle Insurance Act was invalid because it was promulgated pursuant to District of Columbia Self-Government and Governmental Reorganization Act of 1973, which contained invalid veto provision).

[7] The origin and major attributes of the "severability" doctrine at the core of the judicial challenges analyzed in this Article are discussed in Part I, *infra* at text accompanying notes 13–21. Older cases and commentaries use the term "separability" instead of "severability." To avoid confusion, this Article replaces the former term with the latter in quotes from these cases and commentaries.

[8] *Chadha*, 462 U.S. at 968.

[9] *Id.*

[10] Justice Harlan originally used the term "surgery" to apply to this situation in his concurrence in Welsh v. United States, 393 U.S. 333, 351 (1969).

olution in the federal courts,[11] including, most recently, the United States Supreme Court.[12] Further, the novel approaches to resolving severability disputes proposed in this discussion could be usefully applied in other severability contexts to embody congressional intent more accurately.

Part I of this Article summarizes the guiding principles behind current severability analysis.

Part II presents a three-part critique of the accumulated body of legislative veto severability case law. The Part begins by providing examples of veto severability cases which ill-serve congressional intent—the supposed touchstone of severability analysis—by summarily severing power grants from their veto provisions. Part II then explains how the cases have effected their pro-severability tilt primarily through inappropriate decisional presumptions and secondarily through other analytical errors. The Part concludes by positing that these inappropriate presumptions and analyses reflect the judiciary's desire to escape several difficulties that holdings of inseverability would have posed.

Part III uses the legislative veto severability cases as a vehicle for rethinking the difficult dilemma in which current severability doctrine places courts. The Part explains how courts could have escaped the dilemma by adopting one of two alternative approaches: (1) more selective statutory excision, or (2) reformulation of statutory provisions. The Part then explores the legal legitimacy of each alternative.

The Article concludes by speculating about the more general significance of legislative veto-based analysis for a wide range of potential severability disputes.

---

[11] For example, on January 20, 1987, the Court of Appeals for the District of Columbia Circuit decided a veto severability case involving the sensitive subject of presidential power to defer spending approved by Congress. New Haven v. United States, 809 F.2d 900 (D.C. Cir. 1987). Affirming the holding of the district court in National League of Cities v. Pierce, 634 F. Supp. 1449 (D.D.C. 1986), the District of Columbia Circuit held that President Reagan could not exercise the authority to defer appropriated funds granted by Title X of the Congressional Budget and Impoundment Control Act of 1974. The court reasoned that Congress would never have given the President deferral authority if it had known that the means it used to check exercise of that authority—a legislative veto—would be invalidated. 809 F.2d at 905–09. *See infra* note 39.

[12] *See, e.g.*, Alaska Airlines v. Brock, 55 U.S.L.W. 4396 (U.S. March 25, 1987), *aff'g* Alaska Airlines v. Donovan, 766 F.2d 1550 (D.C. Cir. 1985), *rev'g* 594 F. Supp. 92 (D.D.C. 1984). The Supreme Court held that Department of Labor rules were valid because their statutory basis, the employee protection section in the Airline Deregulation Act of 1978, was severable from the legislative veto provision Congress attached to it.

I. THE JUDICIAL ROLE IN SEVERABILITY DECISION-MAKING: AN INTRODUCTION TO THE SEARCH FOR CONGRESSIONAL INTENT

Although severability is not itself a constitutional issue,[13] it often arises "[i]n the exercise of the judicial power to declare legislation void on the ground that it violates constitutional limitations."[14] In some cases, courts consider severability before reaching constitutional questions in the hope that the resolution of the former will eliminate the need to decide the latter.[15] In other cases, the severability issue remains to be decided after the court holds that part of a statute's provisions or applications are unconstitutional.[16]

---

[13] *See* EEOC v. Allstate Ins. Co., 467 U.S. 1232 (1984) (dismissing direct appeal of district court's legislative veto severability decision because not within statute authorizing any party to appeal to the Supreme Court from any "final judgment . . . holding any act of Congress unconstitutional"); *see also id.* at 1236 (Burger, J., dissenting) ("Had the District Court simply determined, *as a matter of statutory construction*, that appellant cannot exercise the authority to enforce the Equal Pay Act because Congress did not wish the Act to be operative absent the veto provision, I would agree that dismissal would clearly be compelled. . . ."(emphasis added)).

[14] 2 N. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 44.01, at 479 (rev. 4th ed. 1986).

[15] In Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1983), the Supreme Court "deem[ed] it appropriate to address questions of severability first," before reaching the constitutional merits of the 1952 Immigration Act's legislative veto provision. *Id.* at 931 n.7. The Court explained that, depending upon how it resolved the severability issue, appellee-respondent Chadha might not have standing to challenge the veto provisions:

> Congress also contends that the provision for the one-House veto in § 244(c)(2) cannot be severed from § 244. Congress argues that if the provision for the one-House veto is held unconstitutional, all of § 244 must fall. If § 244 in its entirety [is violative of the Constitution], it follows that the Attorney General has no authority to suspend Chadha's deportation under § 244(a)(1) and Chadha would be deported. From this, Congress argues that Chadha lacks standing to challenge the constitutionality of the one-House veto provision because he could receive no relief even if his constitutional challenge proves successful.

Id. at 931. *See* McCorkle v. United States, 559 F.2d 1258 (4th Cir. 1977) (deciding that plaintiff had no standing to challenge constitutionality of legislative veto provision because it was inseverable from power grant upon which plaintiff sought to rely).

In another landmark severability case, Champlin Refining Co. v. Corporation Comm'n, 286 U.S. 210, 234–35 (1932), the Court's initial decision that respondent Commission acted under statutory provisions severable from provisions that were subject to a constitutional challenge allowed the Court to avoid ruling on the merits of the challenge.

[16] For example, in Regan v. Time, Inc., 468 U.S. 641 (1984), the Supreme Court considered the constitutionality of a federal anti-counterfeiting statute banning photographic reproductions of United States currency unless the reproductions met certain requirements as to purpose, publication, color, and size. After finding that the statute's purpose requirement was an unconstitutional content-based regulation of free speech, the Court had to determine whether the portions of the statute not relating to purpose were severable from the invalid portion.

Also, in United States v. Jackson, 390 U.S. 570 (1968), the Court determined that

It is well-settled that severability is first and foremost an issue of legislative intent.[17] More specifically, severability is a question of *hypothetical* legislative intent: it asks, if the legislature had known that part of its chosen statutory approach would be invalidated, what statutory disposition would it have wanted?[18] Courts pursuing the "elusive inquiry"[19] posed by the severability doctrine consider a number of standard indicators of legislative intent, including "the history of the act, . . . the object sought by the legislature, [and] the context of the act, . . ."[20] Of particular interest are specific indications about the invalid provision's centrality to the overall legislative scheme.[21]

Before the Supreme Court's recent decision in *Alaska Airlines v. Brock*,[22] the veto severability cases had spawned a potentially important dispute over what kind of legislative intent the severability inquiry seeks to discover. In deciding that employee protection provisions in the 1978 Airline Deregulation Act were severable from the legislative veto provisions attached to them, the Court of Appeals for the District of Columbia's *Alaska Airlines* opinion posed the severability question as whether "Congress would have preferred no employee protection at all to the existing provision *sans* the veto provision."[23] The *Alaska*

---

death penalty provisions in a federal anti-kidnapping law were unconstitutional. The Court then had to determine whether the remainder of the law could be severed from the unconstitutional penalty provision.

[17] 2 N. SINGER, *supra* note 14, § 44.03, at 483 ("Judicial opinions are replete with statements that severability is to be decided according to the legislative intent."); *compare Time, Inc.*, 468 U.S. at 653 (opinion for the Court by White, J.) (severability "is largely a question of legislative intent") *with id.* at 664 n.2 (Brennan, J., concurring in part: "contrary to Justice White's implication, severability is exclusively a question of legislative intent").

Severability is also concerned with the question of whether, if invalid statutory portions are severed, "what is left is fully operative as law." *Champlin*, 286 U.S. at 234. Strictly speaking, this question is answered by analysis of the statutory terms themselves, not the legislative intent in enacting them. However, the distinction blurs because many courts use the independence of valid provisions from invalid ones as an indicator that the legislature intended that the valid provisions be severable. *See* 2 N. SINGER, *supra* note 14, § 44.04, at 489.

[18] *See, e.g., Champlin*, 286 U.S. at 234 (severability depends upon what legislature would or "would not have enacted"); Tilton v. Richardson, 403 U.S. 672, 684 (1971) (quoting and applying *Champlin* standard).

[19] *Chadha*, 462 U.S. at 932.

[20] N. SINGER, *supra* note 14, at § 44.03, at 484.

[21] Federal and state severability decisions frame the inquiry about the invalid provision's importance in a variety of ways, including whether the invalid portion was so important to have provided "the principal inducement for the passage of the statute," *id.* § 44.06, at 502, and whether the "dominant or main purpose of the enactment" is "defeated by the invalidity of part of the act," *id.* § 44.07 at 503.

[22] 55 U.S.L.W. 4396 (U.S. March 25, 1987), *aff'g* 766 F.2d 1550 (D.C. Cir. 1985).

[23] *Alaska Airlines*, 766 F.2d at 1561 (emphasis in original).

Airlines circuit court panel relied on a previous District of Columbia Circuit decision, which used a similar formulation.[24] To the contrary, a number of veto severability decisions,[25] including the district court decision reversed by the *Alaska Airlines* circuit court panel,[26] formulated the question as whether Congress would have passed the remaining provisions *in the form that it did*, if it had known the veto device attached to the provision would be declared invalid.

This impending fight over semantics had significant implications for the ability of challengers to mount severability-based attacks on statutes they wished to invalidate. If the severability inquiry probes whether Congress would have enacted remaining provisions in the form that it did, future challengers can argue for inseverability on either of two grounds: that, had the legislature anticipated the subsequent invalidation of part of its statute, (1) it would not have enacted any provision(s) on the disputed subject, or (2) it would have enacted a *different version* of the challenged provision(s).[27] Because legislatures typically give serious consideration to several statutory formulations before settling on final language, proponents of inseverability often have a variety of "different versions" to cite in arguing that Congress would not have chosen the formulation contained in the statute.[28]

However, if taken literally, the District of Columbia Circuit's *Alaska Airlines* formulation forecloses the option of arguing that

---

[24] *See* Gulf Oil Corp. v. Dyke, 734 F.2d 797, 804 (Temp. Emer. Ct. App. 1984) ("whether Congress would have preferred these statutes, after severance of the legislative veto provisions, to no statute at all").

[25] New Haven v. United States, 809 F.2d 906 (D.C. Cir. 1987) ("whether Congress would have intended the statute to operate even in the absence of the invalid provision"); EEOC v. CBS, Inc., 743 F.2d 969, 971 (2d Cir. 1984) ("whether Congress would have delegated to the President the broad reorganizing authority granted him by the [1977 Reorganization] Act without reserving for itself [a] one-House veto"); EEOC v. Hernando Bank, Inc., 724 F.2d 1188, 1190 (5th Cir. 1984) ("whether Congress would have enacted the remainder of the statute in the absence of the invalid [legislative veto] provision"); American Fed'n of Gov't Employees v. Pierce, 697 F.2d 303, 307 (D.C. Cir. 1982) ("the crucial inquiry [is] whether Congress would have enacted other portions of the statute in the absence of the invalidated provision").

[26] *See* 594 F. Supp. 92, 94 n.2 (D.D.C. 1984) ("the issue is whether Congress would have enacted the *same* statute" in absence of veto provision (emphasis in original)).

[27] Brief for Petitioners at 14–15, Alaska Airlines v. Brock, 55 U.S.L.W. 4396 (U.S. March 25, 1987) (No. 85-920).

[28] Indeed, during the process of enacting the Airline Deregulation Act at issue in *Alaska Airlines*, Congress considered a number of alternatives, including a House-passed proposal based on the employee protection approach Congress had taken in previous legislation concerning transportation industries. *See* H.R. 12611, 95th Cong., 2d Sess. § 32 (1978), reprinted in 124 CONG. REC. 30,709 (1978).

Congress would have adopted a different statutory version.[29] Challengers are limited to arguing that the legislature would have preferred nothing to something—a position that is more difficult to prove,[30] particularly given the strong pro-delegation bias the federal courts bring to severability decision-making.[31]

In its *Alaska Airlines* opinion, the Supreme Court defused the semantic controversy by harmonizing the circuit court panel's severability formulation with "the established severability standard."[32] Even though the reasoning behind the harmonization effort is problematic,[33] the Court's result is appropriate in light

---

[29] *See Alaska Airlines*, 766 F.2d at 1560 ("Nor is the [severability defeated by a showing that] Congress would have passed some alternative version of the statute if it knew that it could not lawfully have included the offending provision."); *Gulf Oil*, 734 F.2d at 804 ("the question is not whether Congress would have enacted th[is] *exact* statute[] had it known at the time of enactment that the legislative veto provisions were invalid") (emphasis in original).

[30] For example, the District of Columbia Circuit opinion in *Alaska Airlines* concluded that the employee protection program was "an important feature" of the Airline Deregulation Act and an expression of "humane Congressional concern for adversely affected airline employees." 766 F.2d at 1561, 1563. If the appropriate test is whether the Congress that enacted the Airline Deregulation Act of 1978 would prefer no employee protection to a non-vetoable employee protection, the inseverability argument is much more difficult to make.

[31] *See infra* text accompanying notes 200–219.

[32] The Court stated that "[t]he final [severability] test, for legislative vetoes as well as for other provisions, is the traditional one: the unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted." Alaska Airlines v. Brock, 55 U.S.L.W. 4396, 4398 (U.S. March 25, 1987). Thus, the Court implicitly endorsed the formulation of severability pursued by the *Alaska Airlines* district court and a number of other veto severability decisions—whether Congress would have enacted the remaining provisions in the form that it did. *See supra* notes 25 & 26. The Court also found the severability formulation used by the *Alaska Airlines* court of appeals panel "to be completely consistent with the established severability standard." 55 U.S.L.W. at 4398 n.7.

[33] In their filings with the Court, both the petitioners and respondent in *Alaska Airlines* devoted substantial attention to the legitimacy of the severability standard used in the court of appeals *Alaska Airlines* decision. *See* Brief for Petitioners at 14–24, 55 U.S.L.W. 4396; Brief for the Secretary of Labor at 16–21, *id.* Despite this concern, the Court limited its discussion of the court of appeals' phraseology to a one-paragraph footnote:

> Petitioners argue that the Court of Appeals formulated a completely new standard for severability. They rest this argument on the court's statement that an invalid portion of a statute may be severed unless . . . it is proved "that Congress would have preferred no airline employee protection provisions at all to the existing provision sans the veto provision." Petitioners interpret this statement as a signal that the court asked whether Congress would have enacted *some* form of protection for airline employees, rather than whether Congress would have enacted the same protections currently found in the Act. Any such inquiry, of course, would be tautological, as Congress' intent to enact a statute on the subject is apparent from the existence of the [employee protection provisions] in the Act.

55 U.S.L.W. at 4398 n.7 (emphasis added and citations omitted).

The Court's attempted harmonization of the court of appeals' formula has two flaws. First, the Court is overly quick to dismiss petitioners' interpretation of the court of appeals' formulation on grounds that petitioners posed a "tautological" reading. Cer-

of estblished severability precedent. Beginning with *Champlin Refining Co. v. Corporation Commission*,[34] the 1932 case from which modern severability analysis derives, the severability test inquiry has asked whether Congress would have adopted "those provisions" that it did without the subsequently invalidated provisions.[35] The key to the question has been whether Congress "would have been satisfied with what remained."[36] That Congress would have wanted a different statute is as effective and logical a way to meet the traditional test as a showing that Congress would have wanted no statute.

II. Unnecessary Judicial Surgery in the Legislative Veto Severability Cases: The WHEN, HOW, and WHY of the Judicial Tilt Toward Severance

The cardinal principle of severability analysis is that a court should achieve the statutory result that the legislative body enacting the statute would have desired.[37] Therefore, the analytical steps a court takes in considering a severability ques-

---

tainly Congress's intent to include employee protection provisions in the Airline Deregulation Act is indicated by the fact that it did so. But severability analysis does not ask the tautological question of what Congress did in 1978.

Rather, severability analysis probes the hypothetical question of what Congress *would have done* in 1978 had it known that the legislative veto provision would be invalidated. *See supra* note 18. Viewed in this light, the question whether Congress would have enacted *some* form of employee protection provision is no more tautological than the inquiry whether Congress would have enacted *the same* employee protection provisions. Either question suggests a plausible congressional approach and can only be answered through a careful analysis of legislative intent.

Second, the Court states in the sentence immediately following the language quoted above that the court of appeals' formulation is "completely consistent" with the "traditional" severability standard. 55 U.S.L.W. at 4398 n.7. The accuracy of this assertion is doubtful. The Court does not explain its assertion, and it glosses over a significant disparity between the appellate court's approach and the traditional severability test. One traditionally acceptable way of proving that Congress would not have enacted remaining provisions without a veto—therefore proving inseverability under the Court's own standard, *see supra* note 32—is to show that Congress would have adopted a different formulation. *See infra* text accompanying notes 35–36. Yet the *Alaska Airlines* appeals court panel clearly stated that such a showing would *not* establish inseverability. *See supra* note 29.

[34] 286 U.S. 210 (1932).

[35] *Id.* at 234 (severability turns on whether the legislature would have enacted "those provisions which are within its power, independently of that which is not"). Supreme Court cases quoting the *Champlin* severability phraseology include Buckley v. Valeo, 424 U.S. 1, 108 (1976), and United States v. Jackson, 390 U.S. 570, 585 (1968).

[36] *Champlin*, 286 U.S. at 234.

[37] *See supra* notes 17–21 and accompanying text.

tion—and any presumptions or decisional canons it uses[38]—should be judged by whether they facilitate or undercut the goal of embodying legislative intent. This yardstick does not serve kindly the legislative veto severability cases. The cases illustrate a federal judiciary tilting toward findings of severability and performing unnecessary—indeed illegitimate—statutory surgery too often and too easily.[39]

Subpart A of this Part illustrates when courts have erred on the side of severability. Subpart B depicts how courts hearing legislative veto severability cases have used two inappropriate presumptions and have made other analytical errors in arriving at incorrect or inadequately reasoned results. Subpart C explores why courts tilt toward severability by showing several practical considerations and strongly felt judicial policies served by the pro-severability rulings.

A. *The WHEN of Unnecessary Statutory Surgery: Three Case Studies*

Some of the legislative veto severability cases involve statutes whose legislative histories suggest overwhelmingly that the veto

[38] Federal and state courts have developed a number of canons of construction, which include rebuttable presumptions, to guide them when deciding severability questions. *See generally* N. SINGER, *supra* note 14, §§ 44.01–.13. The two most important presumptions employed by recent federal court cases hearing severability disputes are discussed *infra* at text accompanying notes 94–170.

[39] Not all of the veto severability decisions have reached the same conclusions. Most recently, both a District of Columbia Circuit panel and a federal district court concluded that Title X of the Congressional Budget and Impoundment and Control Act of 1974, 31 U.S.C. 1400 (1982), which grants the President authority to defer federal spending mandated in previous legislation, is inseverable from the legislative veto provision Congress employed to restrain the deferral authority. New Haven v. United States, 809 F.2d 900 (D.C. Cir. 1987), *aff'g* National League of Cities v. Pierce, 634 F. Supp. 1449 (D.D.C. 1986). These rulings came in response to a suit filed by mayors, community groups, potential federal benefit recipients, and members of Congress challenging Reagan Administration deferral of the expenditures federal law envisioned for four housing and community development programs.

The *New Haven* court based its conclusion that "Congress would have preferred no statute at all to a statute that conferred unchecked deferral authority on the President," 809 F.2d at 906, on the numerous indications in legislative history that Congress granted deferral authority to the President only after (1) imposing broader restrictions on presidential impoundment authority, and (2) assuring that presidential abuse of the deferral power could be checked, and achievement of the overall congressional hostility to impoundment could be achieved, through the legislative veto device. *Id.* at 906–07. Both the circuit and district courts read these legislative history indicators in the context of an act reflecting "a Congress virtually united in its quest for a way to reassert its fiscal prerogative" against presidential incursions. *National League of Cities*, 634 F. Supp at 1454.

provisions were the sine qua non of Congress' delegation of power to administrative officials. Because Congress would not have enacted the power-granting provisions in the form that it did without the veto, courts considering severability challenges to these statutes should have opted for inseverability. The significance of these cases—as exemplified by the first two case studies in this subpart—lies in the large number of courts that have found the relevant provisions severable.

Other cases finding legislative vetoes severable exemplify an unfortunate judicial tilt toward severability not because they are clearly inconsistent with evidence of congressional intent, but because they give that evidence short shrift in reaching their conclusions. In these cases—as illustrated by the third case study—the legislative history provides strong, competing indications about congressional intent regarding severability. What is troubling about the courts in the cases in this category is that they employ a truncated and simplistic, rather than a thorough and sophisticated, analysis of legislative intent.

1. The Reorganization Act and the Legislative Veto

The Reorganization Act of 1977[40] has been the most frequent subject of legislative veto severability litigation. The Act continued the practice Congress began in 1932 of permitting the President to reorganize executive branch entities by presidential order, subject to strong congressional review.[41] One reorganization plan submitted under the authority of the Act gave the Equal Employment Opportunity Commission (EEOC) authority to enforce certain federal laws against employment discrimination.[42] Relying on the post-*Chadha* invalidity of the legislative veto provision in the 1977 Act, plaintiffs in more than two dozen cases attempted to fend off EEOC enforcement authority by arguing that the Act's grant of reorganization authority, and the EEOC reorganization plan promulgated under it, were inseverable from the legislative veto provision.[43] Would the 1977 Con-

[40] Pub. L. No. 95-17, 91 Stat. 29 (1977) (codified at 5 U.S.C. §§ 901–912 (1982)).

[41] For a general history of successive reorganization enactments from 1932 to 1977, see *Studies on the Legislative Veto Prepared by the Congressional Research Service for the Subcommittee on Rules of the House Rules Committee*, 96th Cong., 2d Sess. (1980) [hereinafter *CRS Veto Studies*].

[42] Reorg. Plan No. 1 of 1978, 43 Fed. Reg. 19,807, *reprinted in* 5 U.S.C. app. I 1155–58 (1982), 42 U.S.C. § 2000e-4 (1982).

[43] *See infra* notes 58–60.

gress have granted broad reorganization authority to the President without a strong check via the one-House veto? Based on the record of reorganization legislation predating the 1977 Act and on the legislative history of the 1977 enactment, the question should be answered in the negative.

Successive reorganization enactments indicate that some form of veto has generally been an integral precondition of congressional willingness to delegate reorganization authority. According to an authoritative reconstruction of the legislative history, a legislative veto provision was a crucial prerequisite to congressional adoption of the first Reorganization Act.[44] In more recent enactments, Congress moved in successive stages to make its veto easier to exercise,[45] including making veto by one House, rather than both Houses, sufficient to defeat a proposed reorganization.[46] Congress' moves to increase the potency of the veto power mirror its efforts to place greater substantive restrictions on the reorganization power in the period from 1932 to 1977.[47]

The legislative history of the 1977 Reorganization Act demonstrates that congressional willingness to give the President reorganization authority was contingent upon reservation of the power to veto specific reorganization proposals.[48] Unfettered presidential reorganization authority was an option neither entertained nor feasible, in light of the political context of the 1977 Reorganization enactment. The spectrum of legislative choice ranged from the Carter Administration's proposal for reorganization authority conditioned on a one-House veto, to the proposal of the Chairman of the House Committee on Government

---

[44] *See CRS Veto Studies*, *supra* note 41, at 171–75. The Congressional Research Service legislative history reconstruction indicates that early experimentation with presidential reorganization *sans* veto convinced Congress of the veto's necessity. *See id.* at 178–94 (describing evolution from Economy Act of 1933, which did not provide for a legislative veto, to 1939 Reorganization Act, which provided for a two-House veto, and pointing to fear of "executive usurpation" as a major factor in the change).

[45] *See, e.g., id.* at 217–24 (describing a reduction in the number of members of either House who must vote against a reorganization plan in order to invalidate it).

[46] *See id.* at 205–15 (describing 1949 Reorganization Act's departure from previous use of two-House veto to system in which veto by either House sufficient).

[47] *See, e.g., id.* at 226–31 (prohibition in 1964 Reorganization Act against use of reorganization authority to create new executive departments).

[48] After renewing the reorganization authority during the Nixon Administration through enactment of Pub. L. No. 92-179, 85 Stat. 574 (1971), Congress allowed the authority to lapse on April 1, 1973. Subsequent proposals to revive the authority were made, "often accompanied by a more active role for Congress." *CRS Veto Studies*, *supra* note 41, at 234. However, the authority was not revived. Thus, the 1977 Reorganization Act was necessary to give reorganization authority to newly-inaugurated President Carter, whose platform included giving significant attention to enhancing governmental efficiency and reducing governmental expenditures. *Id.* at 236.

Operations for reorganization authority dependent upon the affirmative approval of both houses.[49] The 1977 Act ultimately embodied a compromise which, by seeking to allay fears that too much authority would be delegated to the President under the administration's one-House veto option,[50] showed the value Congress placed on having its say on presidential reorganization plans.[51]

Other legislative words and deeds during deliberations on the 1977 Reorganization Act show that Congress expected—and even desired—that the grant of reorganization authority would be nullified if the veto provision met that fate. The Congress that enacted the 1977 Act was aware of the strong possibility that a court would find the veto mechanism to be unconstitutional.[52] Yet, Congress failed to incorporate a severability clause, an easily available step to save the underlying power grant from invalidation[53]—a failure one House member characterized as an intentional strategy.[54] Further, both the House

---

[49] *See* H.R. REP. NO. 105, 95th Cong., 1st Sess. 3, *reprinted in* 1977 U.S. CODE CONG. & ADMIN. NEWS 42, 43 (summarizing major provisions of H.R. 3131, (Chairman Brooks's (D-Tex.) bill), and H.R. 3407, (Carter Administration bill)).

[50] The compromise included provisions designed to ensure that a presidential reorganization plan would not become law merely through congressional failure to vote on it. Pub. L. No. 95-17, § 2, 91 Stat. 33–34 (1977) (codified at 5 U.S.C. §§ 910–912 (1982)).

[51] *See* H.R. REP. NO. 105, 95th Cong., 1st Sess. 2–3, 17, *reprinted in* 1977 U.S. CODE CONG. & ADMIN. NEWS 41, 42–43, 56–57 (discussing rationale behind compromise bill, H.R. 5045, 95th Cong., 1st sess. 1977); 123 CONG. REC. 9344 (1977) (statement of Rep. Brooks that compromise "will provide far more control over reorganization than would have been the case if the [Carter Administration] proposals had gone through unchallenged"); *id.* at 9345 (statement of Rep. Horton (R-N.Y.) that veto is "an important and meaningful provision" for "those of us who feel strongly that Congress should not forfeit its constitutional role on the question of reorganization"); *id.* at 9348 (statement of Rep. Levitas (D-Ga.) that one-House veto provision will provide "substantial congressional control over reorganization").

[52] H.R. REP. NO. 17, 95th Cong., 1st Sess. 3, 9–17, *reprinted in* 1977 U.S. CODE CONG. & ADMIN. NEWS 42, 49–57 (statement by Chairman Brooks of the Government Affairs Committee that the one-House legislative veto provisions of this bill "raise[s] serious constitutional questions"; discussion of testimony on constitutional issues before Government Operations Committee); *see CRS Veto Studies*, *supra* note 41, at 237–43 (surveying Senate and House consideration of constitutional issues).

[53] Congress could have easily included in the 1977 Reorganization Act a severability clause, stating that the invalidity of one part of the Act should not be deemed to affect the validity of remaining parts. Under traditional severability analysis, a severability clause provides a strong signal to the courts that the legislature does not regard the invalid provision at issue in a subsequent lawsuit as an integral part of the overall legislative package. *See infra* text accompanying notes 94–124, for an explanation of the nature of, and an expression of doubt about, judicial treatment of severability clauses.

[54] In "Additional Views" appended to the House Report on the bill that became the 1977 Act, Representative Drinan (D-Mass.), a member of the House Committee on Governmental Operations, stated that

> [i]t must be remembered that [the compromise bill which ultimately became the 1977 Reorganization Act] intentionally does not contain a severability clause. The one House veto provision is deemed to be an integral part of the

Report on the 1977 Act[55] and the details surrounding House consideration of an amendment by Representative Brown (R-Mich.)[56] suggest that Congress expected the demise of the Act's legislative veto provision to cause the demise of the reorganization authority grant.

The foregoing suggests that post-*Chadha* courts, seeking to achieve the severability disposition the 1977 Congress would have wanted,[57] were hard-pressed to find the veto provision

---

> legislative scheme for reorganization. That is a proposition to which all agree. Yet [this] jeopardizes the [reorganization] plans developed under the statute, and all agency authority exercised pursuant to them.

H.R. REP. No. 105, 95th Cong. 1st Sess. 42, *reprinted in* 1977 U.S. CODE CONG. & ADMIN. NEWS 41, 69. During full House debate on the compromise bill, Representative Drinan also called the attention of his colleagues to the possibility that, "if the one House veto clause fails, the whole act fails." 123 CONG. REC. 9352 (1977).

[55] After noting that the legislative veto provisions of the Act justified substantial "fears of unconstitutionality," the Committee on Government Operations nevertheless recommended enactment because "the risk is worth taking." H.R. REP. No. 105, 95th Cong., 1st Sess. 3, *reprinted in* 1977 U.S. CODE CONG. & ADMIN. NEWS 43. The language of the report implies that the risk Congress was running by passing the Reorganization Act, complete with legislative veto, was the risk that the "expected results" of the reorganization process ("cost reduction, improved management and better services to the public") would not be achieved. *Id.* at 43. Thus, the report implies a recognition that the downfall of the veto provision would mean the downfall of the reorganization authority. There is no implication that the "risk" was that the President would be free to reorganize the government without regard to congressional wishes. *But see* United States v. City of Yonkers, 592 F. Supp. 570, 577 (S.D.N.Y. 1984) (reading report language as expressing congressional belief "that the benefits which would flow from the substantive portions of the Act outweighed the diminution of congressional control").

[56] The House considered, but rejected, Representative Brown's proposed amendment to restrict the relief that a court could grant if it found constitutional problems in the Reorganization Act's legislative veto scheme. The amendment would have provided that "the relief granted by such court shall be restricted to relief with respect to [the reorganization plan challenged] and not to plans previously adopted." 123 CONG. REC. 9363 (1977). Representative Brown justified the amendment as a way to express "a congressional intent [that] we would like to have those plans which have been already adopted and implemented not have their validity challenged by a subsequent decision of unconstitutionality on the basic enacting statute." *Id.* at 9364.

The House's brief consideration of the Brown amendment indicates that all who discussed it, including the key floor managers of the compromise reorganization bill, assumed that judicial invalidation of the veto provisions would invalidate one or more reorganization plans. *See* 123 CONG. REC. 9363–65 (1977). Because plan invalidation would occur only if courts would find that the basic grant of reorganization authority falls along with the veto provisions, those who discussed the amendment implicitly assumed the inseverability of the relevant provisions.

[57] A subsequent Congress indicated that what *it* wanted in the aftermath of *Chadha* was for reorganization plans to become law only with express congressional approval. *See* Reorganization Act of 1984, Pub. L. No. 98-614, § 3(a)(1), 98 Stat. 3187, 3192 (1984).

severable from the reorganization authority given to the President. At a minimum, the courts should have provided an alternative explanation for the items of legislative history just discussed or pointed to compelling indications of a contrary intent. Yet, of the twenty courts expressing a view on the severability of 1977 Reorganization Act provisions,[58] only three found the veto provisions inseverable from the basic power grant.[59] None of the seventeen decisions in favor of severability[60] adequately

---

[58] The twenty courts discussing the severability of the Reorganization Act provisions are listed *infra* at notes 59–60. Seven of the twenty courts, facing severability-based challenges to the Act, did not reach the merits of the severability claim. A panel of the Sixth Circuit concluded that, because Congress did not exercise the Reorganization Act veto provision with respect to the EEOC enforcement authority reorganization plan, there was no "constitutional confrontation that would require judicial intervention." Muller Optical Co. v. EEOC, 743 F.2d 380, 387 (6th Cir. 1984). In EEOC v. Peat, Marwick, Mitchell & Co., 589 F. Supp. 534 (S.D.N.Y. 1984), the court avoided the severability issue by holding that subsequent congressional actions, including passage of two appropriations bills, "ratified" the transfer of anti-discrimination authority to the EEOC. *See infra* note 229. Congressional enactment of Pub. L. No. 98-532, 98 Stat. 2705 (1984), which authorized the changes effected by all reorganization plans implemented prior to the law's effective date, mooted before decision on the merits the severability controversy posed in four cases: EEOC v. Westinghouse Electric Corp., 765 F.2d 389 (3d Cir. 1985); EEOC v. First Citizen Bank of Billings, 758 F.2d 397 (9th Cir. 1985); EEOC v. State Employees' Credit Union, No. 84-955-CIV-5, slip op. (D.N.C. Feb. 11, 1985); Barrett v. Suffolk Transp. Servs., 600 F. Supp. 81 (E.D.N.Y. 1984). Finally, in EEOC v. Pan American World Airways, 576 F. Supp. 1530 (S.D.N.Y. 1984), the district court stayed decision on severability, awaiting the outcome of other pending cases; the court did not revisit severability after those cases were decided, probably because of the passage of Pub. L. No. 98-532.

[59] EEOC v. CBS, Inc., 743 F.2d 969 (2d Cir. 1984); EEOC v. Chrysler Corp., 595 F. Supp. 344 (E.D. Mich. 1984); EEOC v. Allstate Ins. Co., 570 F. Supp. 1224 (S.D. Miss. 1983).

[60] EEOC v. Hernando Bank, 724 F.2d 1188 (5th Cir. 1984); EEOC v. Dayton Power and Light Co., 605 F. Supp. 13 (S.D. Ohio 1984); EEOC v. Pennsylvania, 596 F. Supp. 1333 (M.D. Pa. 1984); EEOC v. Delaware Dep't of Health and Soc. Servs., 595 F. Supp. 568 (D. Del. 1984); EEOC v. New York, 590 F. Supp. 37 (N.D.N.Y. 1984); EEOC v. Colgate-Palmolive Co., 586 F. Supp. 1341 (S.D.N.Y. 1984); EEOC v. Ingersoll Johnson Steel Co., 583 F. Supp. 983 (S.D. Ind. 1984); EEOC v. Old Dominion Freight Line, Inc., 587 F. Supp. 1128 (M.D.N.C. 1984); EEOC v. Pan American World Airways, 576 F. Supp. 1530 (S.D.N.Y. 1984); EEOC v. Radio Montgomery, Inc., 588 F. Supp. 567 (W.D. Va. 1984); Muller Optical Co. v. EEOC, 574 F. Supp. 946 (W.D. Tenn. 1983); EEOC v. Cudahy Foods Co., 588 F. Supp. 13 (W.D. Wash. 1983); EEOC v. U.S. Steel Corp., 34 Fair Empl. Prac. Cas. (BNA) 1091 (W.D. Pa. 1984); EEOC v. CBS, Inc., 34 Fair Empl. Prac. Cas. (BNA) 257 (S.D.N.Y. 1984); EEOC v. El Paso Natural Gas Co., 33 Fair Empl. Prac. Cas. (BNA) 1837 (W.D. Tex. 1984); EEOC v. City of Memphis, 581 F. Supp. 179 (W.D. Tenn. 1983); EEOC v. Jackson County, 33 Fair Empl. Prac. Cas. (BNA) 963 (W.D. Mo. 1983).

explained the importance Congress placed on the 1977 Act's veto provision;[61] many of them did not even try.[62]

2. The Legislative Veto and the Watergate Tapes

Another erroneous severability decision illustrating the pro-severability judicial tilt is *Allen v. Carmen*.[63] *Allen* was one of a number of lawsuits triggered by passage of the Presidential Recordings and Materials Act of 1974 (Materials Act).[64] To prevent the Watergate tapes from being turned over to former President Richard Nixon before the public interest in Watergate-era information had been vindicated, the Materials Act abrogated what Congress regarded as an overly generous property disposition agreement between the head of the General Services

---

[61] One example of a case inadequately parsing the 1977 Act's legislative history is *Hernando Bank*, 724 F.2d at 1188. *Hernando Bank* quoted numerous legislative statements about the value of governmental reorganizations, and then concluded: "With the exception of Congressman Drinan's comments, nothing in the wording of the Act or in its legislative history indicates that Congress would not have enacted the Reorganization Act without the legislative veto provision or that Congress even considered the issue of severability." *Id.* at 1191. That conclusion would be more convincing if the court had discussed the history of previous reorganization enactments, the fact that the 1977 Act was a choice between a one-House veto proposal and a proposal requiring affirmative congressional approval, the comments of Representative Brooks and others about the importance of the legislative veto provision, or the House consideration of the Brown amendment. Other aspects of the *Hernando Bank* analysis are criticized *infra* text accompanying notes 174–98.

Another example is EEOC v. Ingersoll Johnson Steel Co., 583 F. Supp. 983 (S.D. Ind. 1984). The *Ingersoll* court's lengthy analysis of the 1977 Act's legislative history is marred by a number of errors, including the factually incorrect assertion that before 1949 Congress did not use the veto device to condition presidential reorganization authority. *Compare* 583 F. Supp. at 988–89 *with supra* notes 44–46 and accompanying text. The *Ingersoll* court also relies too heavily on statements made during the legislative debate casting doubt upon the wisdom of requiring affirmative congressional action to approve a reorganization plan. Statements that members prefer the one-House veto approach to the affirmative approval approach are not equivalent to statements that members would have preferred presidential reorganizations without any congressional control—especially considering that the latter option was neither considered nor feasible. *See supra* text accompanying note 49.

[62] *See, e.g.*, EEOC v. Dayton Power & Light Co., 605 F. Supp. 13, 18 (S.D. Ohio 1984) (briefly quoting EEOC v. Hernando Bank and stating that it "joins a growing list of courts which have reached the same conclusion"); EEOC v. New York, 590 F. Supp. 37, 37 (N.D.N.Y. 1984) (basing severability decision on citation to other pro-severability cases and "reasons which have already been adequately stated by several other district courts").

[63] 578 F. Supp. 951 (D.D.C. 1983).

[64] Pub. L. No. 93-526, 88 Stat. 1695 (1974) (codified at 44 U.S.C. § 2107 (1982)). A three judge court upheld the constitutionality of the Materials Act in Nixon v. Administrator, 408 F. Supp. 321 (D.D.C. 1976), *aff'd* 433 U.S. 425 (1977). The federal courts heard subsequent challenges to General Services Administration (GSA) regulations issued under the Act in Nixon v. Freeman, Civil Action No. 77-1395, slip op. (D.D.C. 1978), *aff'd*, 670 F.2d 346 (D.C. Cir. 1982).

Administration (GSA) and Nixon.[65] In place of the agreement, the Act required the GSA administrator to retain possession of all Nixon-era materials and to protect them from unauthorized disclosure or destruction.[66] The Act also required the administrator to propose regulations governing public access to Watergate-related materials.[67] The proposed regulations would take effect within ninety days of their submission to Congress, unless either House of Congress disapproved.[68]

The *Allen* court had to determine, *inter alia*, whether regulations adopted pursuant to the Materials Act were invalid because the provision giving the GSA rulemaking authority was inseverable from the invalid legislative veto provision.[69] The court ruled that the provisions were severable[70]—a conclusion that is difficult to square with the patent indications in the legislative history that Congress would not have given the GSA

---

[65] Pub. L. No. 93-526, § 101(a), (b)(1), 88 Stat. 1695, 1695–96 (1974). The principal legislative objections to the Nixon-Sampson agreement are summarized in the House Report on the bill which became the Materials Act. H.R. REP. No. 1507, 93d Cong., 2d Sess. 2–4 (1974). Essentially, the Congress was concerned that the agreement "if implemented, could seriously limit access to [Nixon Administration] records and could result in the destruction of a substantial portion of them." *Id.* at 2.

[66] Pub. L. No. 93-526, §§ 101–103, 88 Stat. 1695, 1695–96 (1974).

[67] Pub. L. No. 93-526, § 104(a), 88 Stat. 1695, 1696–97 (1974). The Act provided that the GSA regulations were to take into account seven enumerated factors, including the public's need for "the full truth" about Watergate, protection of individual privacy and the right to a fair trial, and "the need to give to Richard M. Nixon, or his heirs, for his sole custody and use, tape recordings and other materials which are not likely to be related to the [public need for Watergate information] and are not otherwise of general historical significance." *Id.*

[68] Pub. L. No. 93-526, § 104(b), 88 Stat. 1695, 1697 (1974). The main subsection of the § 104(b) veto power is quoted *infra* note 253.

[69] *Allen*, unlike many of the legislative veto cases, involved a challenge to veto provisions which actually had been exercised several times by one or more Houses of Congress. From 1975 to 1980, successive sets of regulations were proposed by the GSA and vetoed in light of Congress' continuing objections to key provisions withholding disclosure on personal privacy grounds. 578 F. Supp. at 955–60. The *Allen* case arose when, after finally completing the veto-revision-veto-revision process to the satisfaction of Congress, GSA encountered resistance from another quarter. Twenty-nine former members of the Nixon Administration, who thought the congressionally-approved version of GSA regulations erred too much on the side of disclosure, challenged the regulations in light of the *Chadha* decision. The challengers argued that the regulations were invalid because (1) they were adopted pursuant to rulemaking authority not severable from the invalid veto provision, or (2) they were the product of congressional influence made improper by *Chadha*.

[70] *Allen*, 578 F. Supp. at 968–71. The court's ruling cleared the way for subsequent GSA regulations promulgated pursuant to the grant of rulemaking authority and not amenable to congressional veto. The court determined that *Chadha* should apply retroactively to invalidate regulations that were the product of previous legislative vetoes. *Id.* at 966–68. The court ordered that the regulations be "revamped" in a form "unfettered by an untoward Congressional influence because of the one-house veto provision." *Id.* at 968.

rulemaking authority without reserving the right to send the rulemakers back to the drawing board.

In enacting the Materials Act under tight deadlines, Congress was in the awkward posture of requesting regulations promoting open public disclosure from the same agency (GSA) whose administrator had entered into an objectionable agreement with former President Nixon. That situation explains both why the veto provision was added to the Materials Act[71] and why Senate and House debate on it repeatedly stressed the availability of the veto option.[72] Indeed, when one House member during floor debate asked whether the GSA could be trusted to implement the Act's policy, the House bill's floor manager relied on the veto provision to assure the inquiring member that Congress could assert appropriate control.[73]

Notwithstanding the *Allen* court's reasoning, it is doubtful that the 1974 Congress would have wanted the GSA to have unfettered control over the rules governing release of presidential materials. The opposite conclusion, that the veto provisions and the rulemaking authority are inseverable, is more sound—particularly since, even without the rulemaking authority pro-

---

[71] The version of the Materials Act originally introduced in the Senate did not contain an express legislative veto provision. However, Senate sponsors appear to have assumed from the outset that GSA public access regulations could be vetoed by Congress. The House added language expressly providing for congressional veto. *See CRS Veto Studies*, *supra* note 41, at 62–72 (describing Senate and House consideration of Materials Act).

[72] *See id.* The *Allen* court recognized the existence of "heated statements by various members of both Houses of Congress concerning whether they should trust [GSA] with control of the documents." Yet, the court inexplicably denigrated these statements as "emotional remarks exchanged by Congressmen in creating emergency legislation," 578 F. Supp. at 970. The court did not explain why otherwise valid legislative history should be devalued because it has an "emotional" quality or because the legislature was operating under time constraints. *Cf.* Cohen v. California, 403 U.S. 15, 26 (1971) ("much linguistic expression serves a dual communicative function . . . . words are chosen as much for their emotive as their cognitive force").

[73] The relevant portion of the exchange referred to is as follows:

> Mr. Yates [D-Ill.]. Does the gentleman have some compunction about leaving [decisions on retention of presidential records] to the Administrator of the General Services Administration, he being the one who made the agreement with the President of the United States?
>
> Mr. Brademas [D-Ind.]. I think the gentleman's point is very well taken. It is precisely because of the apprehension of the members of the committee with respect to that particular point that the bill contains language which directs the Administrator to submit to Congress, within 90 days after the enactment of the measure, regulations which would provide public access to the materials.
>
> Secondly, it is precisely because we shared that apprehension that those regulations would not go into effect without an opportunity for both the House and Senate to review the regulations and to exercise a veto if we disapprove of them.

120 CONG. REC. 37,903 (1974).

visions, the Materials Act would have achieved Congress' basic goal of preventing the return of the materials to Nixon or their destruction.[74]

3. The 1952 Immigration Act and the Legislative Veto: Severability and the Statute that Started It All

Unlike the legislative histories explored in the two previous case studies, the legislative history surrounding the use of the legislative veto in the Immigration Act of 1952—the veto invalidated in the landmark *Chadha* decision[75]—points less clearly in the direction of inseverability. There are indications that Congress was reluctant to cede authority to the executive branch without retaining substantial legislative control. This reluctance suggests that the Act's grant of deportation suspension authority to the United States Attorney General should not remain on the books without the one-House veto used to control it. But Congress also signaled what the Supreme Court called legislative "irritation"[76] with the burden of a more active role in suspending deportation orders; this factor may argue for severability by indicating that Congress would have let the Attorney General retain an unchecked power to suspend deportation.

Plausible cases can be made for and against severing the legislative veto from the rest of the Immigration Act. However, neither the Ninth Circuit nor the Supreme Court *Chadha* decisions justified their rulings for severability by a thorough and convincing analysis. Thus, these opinions exemplified a different form of unnecessary severability surgery, in which courts too readily reach a decision that cannot, in the final analysis, be pronounced clearly inconsistent with congressional intent.

The chronology of immigration enactments illustrates that Congress has been ambivalent from the beginning about delegating deportation suspension authority. Before 1940, an alien who was found deportable could remain in the United States

---

[74] The *Allen* court wrongly asserted that holding the grant of rulemaking authority to GSA inseverable from the veto provision "would gut the statute." 578 F. Supp. at 970. Even if the entire section on GSA rulemaking (Materials Act § 104) were nullified, the other Materials Act provisions obligating the GSA to continue to retain possession of the materials and safeguard them until their ultimate disposition is resolved would remain in effect. *See supra* note 66 and accompanying text. The legal status quo would have been preserved until Congress passed legislation establishing rules for final disposition.

[75] *See supra* text accompanying note 2.

[76] Immigration and Naturalization Service v. Chadha, 462 U.S. 919, 934 (1983).

only if Congress altered the alien's status through a private bill passed pursuant to normal legislative procedures.[77] Legislators began to regard the private bill process as time-consuming and unproductive; in 1937, the House passed (but the Senate did not consider) a bill to authorize the Executive Branch to grant permanent residence in "meritorious" cases.[78]

In the Alien Registration Act of 1940,[79] the Congress authorized the Attorney General to suspend deportation of certain aliens. Compared to the 1937 House-passed proposal, however, the 1940 Act (1) more narrowly defined the category of aliens eligible for suspension of deportation, (2) required that cases of suspension be reported to Congress semi-monthly, and (3) reserved the right to veto, by a two-House concurrent resolution, any suspension of deportation favored by the Attorney General.[80] A court analyzing this first grant of deportation suspension authority to the Executive Branch would realize that Congress did so out of dissatisfaction with the private bill approach. But that court would also conclude that Congress was grudging in its delegation; it narrowed the scope of the authority and added a significant legislative check.

This grudging delegation repeated itself in 1948, when Congress gave with one hand by broadening the category of aliens eligible for deportation suspension, and took away with the other by conditioning suspension on a still more potent legislative check: a requirement that suspensions be affirmatively approved by both Houses.[81] And, even as the 1952 Immigration Act reverted to a system in which deportation suspensions favored by the Attorney General would become law unless Congress objected,[82] the 1952 Act continued the prior tradition of

[77] *Id.* at 933.

[78] 81 CONG. REC. 5542 (1937) (quoting Rep. Dies' (D-Tex.) statement that "it is impossible to deal with this situation through special bills"). *See Chadha*, 462 U.S. at 933.

[79] Alien Registration Act of 1940, ch. 439, 54 Stat. 670 (codified at 8 U.S.C. §§ 1301–1306 (1982)).

[80] *Chadha*, 462 U.S. at 933. *See CRS Veto Studies*, *supra* note 41, at 381 (recounting details of 1940 Act).

[81] Alien Registration Act of 1940, 8 U.S.C. §§ 1301–1306, *cited in Chadha*, 462 U.S. at 933–34. The two-House approval requirement reflected a congressional desire to assert more control over deportation suspensions. Congress reacted to the Senate Judiciary Committee's confession that "for all practical purposes [suspension requests subject to veto under the 1940 Act] have not been given any consideration" by the Congress because they "are almost automatically shelved in favor of other matters in which affirmative action is required." S. REP. No. 1204, 80th Cong., 2d Sess. 3–4 (1948).

[82] Pub. L. 82-414, § 244, 66 Stat. 163, 214 (1952). The House Judiciary Committee had come to regret the increasing workload the 1948 Act's affirmative approval requirement imposed. *See* H.R. REP. No. 362, 81st Cong., 1st Sess. 2 (1949).

retaining significant controls. The Act "tightened drastically the requirements for suspension of deportation."[83] Even more important to the severability inquiry, the Act asserted congressional control through a one-House veto[84]—a mechanism that, compared to the two-House veto in the 1940 Act, made it easier for Congress to overrule the Executive Branch.

In deciding that the 1952 Congress would have given the Attorney General full deportation suspension authority even if the legislative veto device had been unavailable to Congress—that is, in deciding that the 1952 power grant is severable from the veto—neither the Ninth Circuit nor the United States Supreme Court majority adequately accounted for the legislature's tightrope walk between dual concerns. Both *Chadha* opinions recounted the successive immigration enactments,[85] but their interpretations of the conflicting signals are conclusory and, in some ways, confusing.

The Ninth Circuit opinion recognized the grudging nature of successive deportation suspension delegations. The court stated expressly that "when the several Congresses were presented with the question of the Attorney General's discretion, they preferred to retain some supervisory power, rather than relinquish it."[86] Yet, the Ninth Circuit opinion failed to realize the anti-severability implications of Congress' supervisory preference. Instead, the court rendered a conclusory pro-severability holding based on two brief and questionable statements about the 1952 Act's legislative history.

The first statement, that "Congress' basic purpose" in enacting the suspension of deportation provisions "was to alleviate the onerous burden of numerous private bills,"[87] implicitly attributes the motivation of the 1937 House of Representatives to the 1952 Congress. However, the history of grudging delegation canvassed above reflects Congress' ongoing pursuit of a mix of purposes. Without more discussion, labeling the burden-alleviation purpose as basic and the discretion-control purpose as not basic is a mere judicial *tour de force*.

---

[83] *CRS Veto Studies*, *supra* note 41, at 383.

[84] Immigration and Naturalization Act of 1952, Pub. L. No. 82-414, § 244(a), 66 Stat. 163, 214 (1952). *See also Chadha*, 462 U.S. at 934.

[85] 634 F.2d 408, 416–17; 462 U.S. at 932–34.

[86] *Chadha*, 634 F.2d at 416.

[87] *Id.*

The second statement, that the legislative history is devoid of "any statements that the one-house disapproval mechanism is essential to the legislative purpose,"[88] may be literally true. Apparently no congressional spokesperson for the 1952 Act said the equivalent of "the veto provision is essential." However, a court assessing congressional intent to decide a severability question should look beyond express statements about the invalid provision and examine other intent indicators, such as the history of enactments leading up to the one in question.[89]

The Supreme Court's *Chadha* analysis is even more problematical. After recounting the legislative history of the 1952 enactment and its predecessors, the Court noted that "Congress' desire to retain a veto in this area cannot be considered in isolation but must be viewed in the context of Congress' irritation with the burden of private immigration bills."[90] But the Court did not follow its own prescription. Rather than weighing Congress' conflicting goals, the Court merely asserted that "there is insufficient evidence that Congress would have continued to subject itself to the onerous burdens of private bills had it known that [the veto provisions] would be held unconstitutional."[91]

---

[88] *Id.* at 417 n.5.

[89] *See supra* text accompanying notes 19–21. *Compare, e.g.*, Regan v. Time, Inc., 468 U.S. 641, 653–55 (1984) (restrictive provisions of anti-counterfeiting law are severable; primary reliance on legislative reports) *with id.* at 669–73 (Brennan, J., concurring in part, dissenting in part) (restrictive provisions are inseverable; primary reliance on legislative reports and chronology of anti-counterfeiting enactments).

[90] *Chadha*, 462 U.S. at 934.

[91] *Id.* Justice Rehnquist's dissent, in which Justice White joined, criticizes the majority's assertion about the legislative history of the 1952 Act:

> The Court finds that the legislative history of [the 1952 Act section containing both the grant of deportation suspension authority and the legislative veto] shows that Congress intended [the veto provision] to be severable because Congress wanted to relieve itself of the burden of private bills. But the history elucidated by the Court shows that Congress was unwilling to give the Executive Branch permission to suspend deportation on its own. Over the years, Congress consistently rejected requests from the Executive for complete discretion in this area. Congress always insisted on retaining ultimate control, whether by concurrent resolution, as in the 1948 Act, or by one-House veto, as in the present Act. Congress has never indicated that it would be willing to permit suspensions of deportation unless it could retain some form of veto.
>
> It is doubtless true that Congress has the power to provide for suspensions of deportation without a one-House veto. But the Court has failed to identify any evidence that Congress intended to exercise that power. On the contrary, Congress' continued insistence on retaining control of the suspension process indicates that it has never been disposed to give the Executive Branch a free hand.

462 U.S. at 1015–16. (Rehnquist, J., dissenting).

Even on its own terms, the Court's assertion of insufficient evidence is dubious for two reasons. First, it is by no means clear that the proper way to pose the severability question is to ask whether Congress would have reverted to the private bill method. The traditional severability formulation would ask whether, without the invalid veto provision, the Congress would have granted deportation suspension authority *in the form that it did.*[92] Put another way, the traditional inquiry would ask whether Congress would have delegated *as much* deportation suspension power to the Attorney General as it in fact did.

A second, potentially related problem is that the *Chadha* Court ignored an important bit of evidence about the 1952 Congress' relative preference between controlling and facilitating Attorney General discretion. The legislative history indicates that Congress adopted the 1952 Act in part because it concluded that "the suspension of deportation process was being abused and that illegal entrants were being favored excessively."[93] This casts additional doubt on the likelihood that Congress would, in the absence of the legislative veto, have given the Attorney General the broader grant of power contained in the 1952 Act. The legislature's concerns about the Attorney General's performance suggest that had Congress known of the constitutional mandate for a more cumbersome legislative oversight procedure, it might have preferred to limit the extent of authority granted to the Attorney General.

Thus, both *Chadha* decisions illustrate a subtler, but by no means less objectionable, form of unnecessary severability surgery.

B. *The HOW of Unnecessary Surgery: Inappropriate Presumptions and Other Analytical Errors*

This subpart explores the primary decisional mechanisms through which the courts deciding veto severability cases have justified their erroneous and peremptory statute excisions. The subpart examines (1) inappropriate presumptions, and (2) other

---

[92] *See supra* text accompanying notes 34–36.

[93] S. REP. No. 1515, 81st Cong., 2d Sess. 600–01 (1950) *reprinted in CRS Veto Studies, supra* note 41, at 382. *See CRS Veto Studies* at 382–83 (quoting H.R. REP. No. 1365, 82nd Cong., 2d Sess. 62–63 (1952) and citing S. REP. No. 1137, 82d Cong., 2d Sess. 25 (1952)).

analytical errors, both of which have obscured an accurate and full assessment of legislative intent.

1. Two Inappropriate Pro-Severability Presumptions

The primary mechanism for unnecessary statutory surgery in the veto severability cases has been judicial use of two presumptions: (1) that the presence of a severability clause in a statute containing a legislative veto creates a strong presumption that Congress would want the associated provisions to retain their validity, and (2) that, even in the absence of a severability clause, courts should presume severability unless it is evident that the legislature intended otherwise. This subpart critiques each presumption in turn, explaining, first, how most of the veto severability cases have employed the presumption and, second, why this use is erroneous in the legislative veto context.

a. *The severability clause presumption*

(1). The presumption and the legislative veto severability cases

A federal court will begin its severability analysis with a presumption in favor of severability if the statute in question has a severability clause, i.e., a statutory statement that one invalid part of a statute should not be deemed to affect the validity of other parts.[94] Because several of the legislative veto severability cases involved statutes having such clauses, courts deciding those cases called upon the severability clause presumption and used it as a shortcut to decision.

For example, at the outset of their *Chadha* opinions, both the Supreme Court and the Ninth Circuit quoted the severability clause of the 1952 Immigration Act[95] and stated that its presence

[94] N. SINGER, *supra* note 14, § 44.08, at 507. Believing that such a clause on its face "discloses an intention to make [an] Act divisible," Champlin Refining Co. v. Corporation Comm'n, 286 U.S. 210, 235 (1932), federal courts see the clause as an "explicit declaration" to which they "must give heed" in "seeking to ascertain the congressional purpose," Electric Bond & Share Co. v. SEC, 303 U.S. 419, 434 (1938).

[95] The text of the clause reads: "If any particular provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances should not be affected thereby." 462 U.S. at 932.

justified a presumption in favor of severability.[96] That presumption in turn led both *Chadha* courts to evade the fuller exploration of legislative intent that this Article argues was necessary. The Supreme Court saw the severability clause-based presumption as saving it from an extensive "elusive inquiry" into hypothetical legislative intent.[97] Armed with its presumption in favor of severability, the Court was content to conclude that the anti-severability indications in the complicated and contradictory legislative history were "not sufficient to rebut the presumption raised by [the severability clause]."[98] Similarly, after using the severability clause presumption to impose a special burden of persuasion on proponents of inseverability, the Ninth Circuit used that presumptive burden as the standard by which to weigh the indicators of legislative intent.[99]

Another opinion using the severability clause presumption to cut short the analysis of legislative intent is *Allen v. Carmen*.[100] *Allen* cited the Supreme Court's reliance on the severability clause presumption in *Chadha*,[101] noted that "the Act in issue here contains a severability clause,"[102] and concluded that the clause "create[d] a presumption that Congress would have been satisfied with those sections which remain after the invalidated ones are dropped."[103]

---

[96] The Supreme Court called the clause "unambiguous." It said that "Congress could not have more plainly authorized the presumption that the provision for a one-House veto . . . is severable from [the remaining deportation suspension authority] and the Act of which it is a part." 462 U.S. at 932. The Ninth Circuit stated that the clause helped place on "those who seek to establish inseverability" the "burden" to demonstrate "that 'it is evident'" that Congress would not have enacted the deportation suspension authority without the veto. 634 F.2d at 416.

[97] *Chadha*, 462 U.S. at 932; *cf.* Alaska Airlines v. Brock, 55 U.S.L.W. 4396 (U.S. March 25, 1987) (citing *Chadha* as case illustrating that "[t]he inquiry is eased when Congress has explicitly provided for severance by including a severability clause").

[98] *Chadha*, 462 U.S. at 934.

[99] *Chadha*, 634 F.2d at 415–16. Edited to highlight the point being made in the text, the relevant passage reads: Here, Congress has enacted a severability clause. . . . Thus, those who seek to establish inseverability bear the burden. . . . This burden has not been met. *Id.*

[100] 578 F. Supp. 951 (D.D.C. 1983).

[101] *Id.* at 969–70 (quoting *Chadha*, 462 U.S. at 932).

[102] *Id.* at 970. The severability clause in the Materials Act reads:

> If, under [other procedures in the Act providing for judicial review of challenges to the Act or regulations issued under it], a judicial decision is rendered that a particular provision of this title, or a particular regulation issued under the authority granted by this title, is unconstitutional or otherwise invalid, such decision shall not affect in any way the validity or enforcement of any other provision of this title or any regulation issued under the authority granted by this title.

Pub. L. No. 526, § 105(b), 88 Stat. 1694, 1698 (1974).

[103] *Allen*, 578 F. Supp. at 970.

The *Allen* court purported not to "rely solely on the presence of this clause in finding the invalid [veto] section severable."[104] The court claimed to rely as well on examination of the legislative history of the Materials Act and its veto provision. Yet, a close parsing of the *Allen* court's analysis shows that its severability holding rests completely on the presence of the severability clause. The court admitted that much of the Act's legislative history pointed toward inseverability. Ultimately, the court relied on only one aspect of legislative intent in ruling for severability, and the severability clause provided the only basis for this decisive aspect.[105]

(2). The Inappropriateness of the Presumption in the Legislative Veto Cases

The strong presumptive weight accorded by the *Chadha* and *Allen* courts to the presence of severability clauses[106] is objec-

---

[104] *Id.*

[105] The relevant passage of the opinion reads:

> The Court does not rely solely on the presence of this [severability] clause in finding the invalid section severable, however. . . . The Court has examined the legislative history of the Act, as a whole, and the legislative history of the veto provision itself. The Court recognizes that both contain heated statements by various members of both Houses of Congress concerning whether they should trust the [GSA] with control of the documents and how they might supervise the process leading to public access. . . . The Court has also considered plaintiffs' argument that the one-house veto provision is quite detailed and demonstrates that Congress was preoccupied with exactly how it would exercise its power. *The fact remains, however, that Congress was also concerned that a judicial decision, such as this one, which declares the one-house veto invalid, not drag the remainder of the statute down with it.*

Id. (emphasis added). The court did not indicate the source of the "fact" asserted in the emphasized sentence. Yet, because there is no support in the legislative history for the stated congressional concern, the only conceivable source is the language in the severability clause itself referring to "a judicial decision . . . that a particular provision . . . is unconstitutional." *See supra* note 102. Despite the *Allen* court's protestation to the contrary, then, the severability clause in the Materials Act formed the sole basis for the court's decision to ignore all other legislative intent indicators, which the court admitted argued against severability.

[106] Subsequent cases and commentaries read the presumption used in the *Chadha* opinions as a potent one. For example, the District of Columbia Circuit opinion in Consumer Energy Council of America v. FERC, 673 F.2d 425 (1982), *aff'd mem.*, 463 U.S. 1216 (1983), cited the Ninth Circuit *Chadha* opinion as showing that "[t]he presence of a severability clause . . . makes it extremely difficult for a party to demonstrate inseverability." 673 F.2d at 441. *See also* EEOC v. CBS, Inc., 34 Fair Empl. Prac. Cas. (BNA) 257 (1984). There the court noted that "[U]nlike *Chadha* I do not have a severability clause, which, of course, would make my job much easier." *See* Note, *Severability of Legislative Veto Provisions: A Policy Analysis*, 97 HARV. L. REV. 1182, 1186 (1984) (discussing *Chadha*'s use of severability clause presumption and concluding that, in many veto severability disputes, "the presence of a severability clause may be the factor that resolves the issue in favor of severability").

tionable on three independent grounds. First, the weight of this presumption seems immoderate when compared to that given in previous severability cases. Second, a number of generally applicable objections to federal court use of the severability presumption are persuasive in the legislative veto severability context. Third, even if the case against general use of the presumption were less strong, special reasons exist for foregoing its use to determine severability challenges to statutes containing legislative vetoes.

(a). *Overly strong application of the severability clause presumption.* One reason the *Chadha* and *Allen* courts' use of the severability clause presumption is inappropriate is that it is a particularly strong application of the presumption. Generally, modern federal courts use the language of presumption to give a severability clause "reasonable consideration." They use the clause as "an aid," not as "an inexorable command."[107] Further, courts reserve the right to refrain from applying the literal wording of such clauses to "cover situations which they were never intended to reach."[108]

These principles suggest that, presumptions notwithstanding, severability clauses should be read in context with—indeed, checked for accuracy against—other indicators of congressional intent. Above all, the presence of a severability clause should not be interpreted as a reason to short-circuit interpretation of congressional intent.[109] Yet, *Chadha* and *Allen* appear to have done precisely that.

---

[107] N. SINGER, *supra* note 14, § 44.08, at 349–50 (quoting Dorchy v. Kansas, 264 U.S. 286, 290 (1924)); *see also* Ptasynski v. United States, 550 F. Supp. 549, 554 (D. Wyo. 1982), *rev'd on other grounds*, 462 U.S. 74 (1983) (Alaska oil exception inseverable from other provisions of windfall profits tax legislation notwithstanding severability clause; clause is "in no way conclusive or binding").

[108] Stern, *Separability and Separability Clauses in the Supreme Court*, 51 HARV. L. REV. 76, 124 (1937). *See, e.g.*, Sloan v. Lemon, 413 U.S. 825, 833–34, *reh'g denied* 414 U.S. 881 (1973) (invalidation of state aid to sectarian schools; refusal to apply state aid law to nonsectarian private schools despite severability clause because severance would "create a program quite different from the one the legislature actually adopted"); Williams v. Standard Oil Co., 278 U.S. 235, 243 (1929) (statutory provision permitting administrative board to fix gasoline prices invalidated; despite severability clause, court held related provisions establishing board and authorizing it to collect data inoperative as well); Spokane Arcades, Inc. v. Brockett, 631 F.2d 135, 139 (9th Cir. 1980), *aff'd mem.*, 454 U.S. 1022 (1981), *reh'g denied sub. nom.* Brockett v. Spokane Arcades, Inc., 454 U.S. 1165 (1982) (entire statute invalidated because severability clause does not authorize court to remove "a vital part of the statutory scheme. To eliminate these . . . provisions would essentially eviscerate the statute. . . .").

[109] *See* United States v. Jackson, 390 U.S. 570, 585 n.27 (1968) ("the ultimate determination of severability will rarely turn on the presence or absence of [a severability] clause").

(b). *General objections to presumptive use of severability clauses.* Had the veto severability cases taken the more typical federal judicial approach toward severability clauses, that approach would still have been objectionable. Any form of severability clause-based presumption is questionable for three reasons.

To begin with, there is nothing inherently compelling about the present federal presumption. Severability doctrines in some states see the severability clause as "merely declaratory of the established principle that statutes may be separable."[110] Other state severability decisions do not talk in terms of presumption, but choose instead to treat severability clauses as one indicator of legislative intent.[111] Indeed, the current federal judicial tendency to accord presumptive significance to severability clauses is not the only approach federal courts have ever employed.[112]

Second, the presumption in favor of severability when severability clauses are present is naive, given the manner in which legislatures generally employ such clauses. Severability clauses are usually very broad and general. They apply to any and all parts of a statute, even if the statute is extensive and multifaceted; they are hardly precise indicators of a given legislature's specific intention with respect to the removal of particular provisions.[113] Attributing great meaning to severability clauses ignores the fact that legislatures, including the United States Congress, have long used them "indiscriminately."[114] The habit-

---

[110] N. SINGER, *supra* note 14, § 44.08 n.9 and accompanying text and cases cited therein.

[111] *Id.* § 44.08 n.7 and accompanying text and cases cited therein.

[112] As a 1927 commentary in the *Harvard Law Review* observed in analyzing federal court interpretation of severability clauses:

> Many statutes containing [severability clauses] are held separable but in the great majority of cases the clause is relied on very slightly. Even when the court professes to lean heavily on a [severability] clause, a close examination will often show that it is merely doing what it had previously done without express words of separability.

Note, *Effect of Separability Clauses in Statutes*, 40 HARV. L. REV. 626, 628–29 (1927). *See* Stern, *supra* note 108, at 117 ("the only cases in which the Court has given effect to the separability clause seem to be those in which the same result would have been achieved without reference to it").

[113] *See, e.g.*, Note, *The Severability of Legislative Veto Provisions: an Examination of the Congressional Budget and Impoundment Control Act of 1974*, 17 U. MICH. J. L. REF. 743, 756 (1984) ("a severability clause without specific application does not accurately indicate whether the legislature would have enacted the statute without a particular suspect provision"); N. SINGER, *supra* note 14, § 44.08, at 507 (severability clause "is regarded as little more than a mere formality").

[114] Stern, *supra* note 108, at 124; *see* Tribe, *The Legislative Veto Decision: A Law By Any Other Name?*, 21 HARV. J. ON LEGIS. 1, 22 (1984) (describing 1952 Immigration

ual inclusion of severability clauses stems from their development as a defensive legislative strategy in the face of the general presumption *against* severability that courts employed in the early decades of this century.[115]

The *Chadha* case illustrates that this second general objection to affording severability clauses substantial decisional weight applies in the legislative veto context. The severability clause in the 1952 Immigration Act is quite broad and general in its wording.[116] The legislative history does not indicate that the Act's drafters considered that the legislative veto provision might be of questionable validity, or intended the severability clause to be pressed into service to resolve a severability question involving the veto.[117] Moreover, the legislative history provides a graphic example of the tendency to use severability clauses habitually and automatically. The House Judiciary Committee's report on the 1952 Act treats the clause as mere boilerplate requiring little explanation for the report's readers. The report's entire discussion on the severability clause is as follows: "Section 406 contains the severability clause."[118]

A third general objection against the severability clause presumption—an objection that also applies to the legislative veto severability cases—is that courts use the presumption in an erroneous one-way manner. Although federal cases presume severability from the *presence* of a severability clause, they have consistently refrained from presuming the opposite, insevera-

---

Act severability clause as "a boilerplate severability clause (of the sort most laws contain)"); Note, *supra* note 106, at 1185–86.

[115] *See, e.g.*, Williams v. Standard Oil Co., 278 U.S. 235, 241–42 (1929) ("In the absence of [a severability clause], the presumption is that the legislature intends an act to be effective as an entirety. . . . The effect of the [clause] is to create in the place of the presumption just stated the opposite one of separability."); Electric Bond & Share Co. v. SEC, 303 U.S. 419, 434 (1938) (severability clause "reverses the presumption of inseparability").

Modern federal cases employ a general presumption in favor of severability, even in the absence of a severability clause. *See infra* text accompanying notes 139–41.

[116] The severability clause stated "If any particular provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby." Pub. L. No. 82-414, § 406, 66 Stat. 216, 263 (1952).

[117] However, substantial objections to the constitutionality of the one-House veto device for overseeing the Attorney General's exercise of deportation suspension authority did surface after the 1952 Act's passage. *See CRS Veto Studies*, *supra* note 41, at 384–85.

[118] H.R. REP. No. 1365, 82d Cong., 2d Sess. 2, *reprinted in* 1952 U.S. CODE CONG. & ADMIN. NEWS 1653, 1750.

bility, from the clause's *absence*.[119] One-sided use of the presumption reflects no intrinsically logical principle.[120] Indeed, given the habitual legislative use of severability clauses, instances when Congress departs from the norm may be more meaningful than instances when it complies with the norm.[121]

The 1977 Reorganization Act veto severability cases illustrate the objectionable one-sidedness of the severability clause presumption. Congress' failure to employ a severability clause when enacting the 1977 Reorganization Act may have been deliberate; at the least, it occurred against a backdrop of serious concern about the constitutionality of the legislative veto.[122] Yet, the Reorganization Act severability cases generally have not afforded presumptive weight to Congress' failure to use a severability clause.[123] Other legislative veto severability cases also show the dubiousness of the one-way presumption by failing to employ a reverse presumption when it would have been at least as appropriate as the presumption in favor of severability when a severability clause is present.[124]

---

[119] Stern, *supra* note 108, at 119. *See, e.g.*, Alaska Airlines, Inc. v. Brock, 55 U.S.L.W. 4396, 4398 (U.S. March 25, 1987) ("In the absence of a severability clause, however, Congress' silence is just that—silence—and does not raise a presumption against severability.") (citing United States v. Jackson, 390 U.S. 570 (1968) and Tilton v. Richardson, 403 U.S. 672 (1971) (plurality opinion)).

[120] *See, e.g.*, Note, *supra* note 113, at 755 (criticizing inconsistent application of severability clause presumptions).

[121] As one commentator put it colorfully in a slightly different context: "Severability clauses are thus now significant only because of their absence. Like articles of clothing, if they are present little attention is paid to them, but if they are absent they may be missed." Stern, *supra* note 108, at 122.

[122] *See supra* note 52 and accompanying text.

[123] *See, e.g.*, EEOC v. Hernando Bank, 724 F.2d 1188, 1190 (5th Cir. 1984) (court raised, but ultimately rejected, suggestion that it "might infer from [the absence of a severability clause] that Congress intended the provisions of the statute to be nonseverable"); United States v. City of Yonkers, 592 F. Supp. 570, 577 (S.D.N.Y. 1984) (provisions in Reorganization Act severable; "absence of a severability clause, as here, is of negligible consequence to the inquiry posited"); EEOC v. Allstate Ins. Co., 570 F. Supp. 1224, 1230 (S.D. Miss. 1983) (lack of a severability clause merely suggestive).

[124] Consumer Energy Council v. FERC, 673 F.2d 425 (D.C. Cir. 1982), held that provisions of the National Gas Policy Act of 1978 granting rulemaking authority with respect to incremental pricing regulations for natural gas were severable from the legislative veto provision attached to that rulemaking authority. The court refused to accord any significance to the absence of a severability clause, quoting statements from United States v. Jackson, 390 U.S. 570, 585 n.27 (1968), to the same effect. 673 F.2d at 442. Other aspects of the *Consumer Energy Council* case are discussed *infra* at text accompanying notes 209–12 and 230–37.

National League of Cities v. Pierce, 634 F. Supp. 1449 (D.D.C. 1986), held that provisions of the Congressional Budget and Impoundment Control Act of 1974, giving the President authority to defer funds appropriated by Congress, were not severable from the legislative veto Congress attached to the deferral power. Even though the Act did not contain a severability clause, the Court stated that the clause's absence was "not dispositive," but was "merely evidence of congressional intent." *Id.* at 1453 n.4.

(c). *The particular inappropriateness of the severability clause presumption in legislative veto severability cases.* Even if the case for the severability clause presumption were stronger as a general matter, use of the clause is particularly problematic in the legislative veto context. One problem is that a severability clause is particularly unlikely to convey meaningful legislative intent about the severability of provisions, such as the legislative veto, that *limit* legislative power grants.[125]

The court did not employ a reverse presumption against severability, but instead devoted substantial attention to a detailed consideration of other legislative history sources. *Id.* at 1455–58. Similarly, the District of Columbia Circuit panel that recently affirmed the *National League of Cities* district court concluded that it "need not rely on the absence of a severability clause [because] more direct evidence of congressional intent conclusively establishes [inseverability]." New Haven v. United States, 809 F.2d 900, 905 n.15 (1987).

The point is not that the absence of a severability clause should have been given a reverse presumptive effect in these cases. (This Article concludes that in most cases severability clauses, or the lack of them, should not be the basis for presumptions.) Rather, the point is that, as a general matter, the case for according significance to Congress' failure to use a severability clause in the 1974 and 1978 enactments considered in *National League of Cities, New Haven,* and *Consumer Energy Council* is as valid as the argument for presuming severability from Congress' inclusion of a severability clause in the 1974 Materials Act, as the court did in Allen v. Carmen, *see supra* text accompanying notes 100–05.

[125] Another problem is that many legislative vetoes have been added, through subsequent legislative measures or during recodifications, to power grants that Congress enacted previously without vetoes. Note, *supra* note 106, at 1186. This means that many legislative veto severability cases implicate a particularly troublesome application of the severability clause presumption: the judicial willingness to employ the presumption even when the severability clause is contained not in the bill in which an invalid provision was enacted, but in the prior enactment to which it was attached.

An example may clarify the point. In 1980, amid increasing concern about trade regulations proposed by the Federal Trade Commission, Congress placed a one-House veto on rulemaking authority it had originally given to the Commission via the 1975 Magnuson-Moss FTC Improvements Act. Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, § 21(f)1, 94 Stat. 374, 393. Neither the 1980 nor the 1975 enactment contained a severability clause. Yet, the 1938 Federal Trade Commission Act, substantially amended by the 1980 and 1975 enactments, does contain a severability clause. Pub. L. No. 75-447, § 17, 52 Stat. 117, 117 (1938). Under the general federal doctrine about use of the severability clause presumption, the 1938 Act's severability clause could justify employing a presumption of severability in deciding whether the 1980 veto provision is severable from the 1975 Act. *See* Note, *supra* note 106, at 1187 (courts "could have reasoned that the general severability clause in the original grant of regulatory power demonstrated an intention to make all subsequently added sections severable").

Even one unpersuaded that the severability clause's generality and routine use make it an insufficiently precise indicator of legislative intent would be hard pressed to defend the more attenuated use of the clause illustrated by the FTC example and suggested by two post-*Chadha* legislative veto severabiity cases. *See* Alaska Airlines v. Donovan, 766 F.2d 1550, 1559, n.7 (D.C. Cir. 1985), *aff'd sub nom.* Alaska Airlines v. Brock, 55 U.S.L.W. 4396 (U.S. March 25, 1987) (ascribing significance to fact that disputed 1978 Airline Deregulation Act, which contained no severability clause, arguably amended Federal Aviation Act, which contained severability clause); Gulf Oil Corp. v. Dyke, 734 F.2d 797, 803 n.24 (Temp. Emer. Ct. App. 1984) (attributing significance to severability clause in statutory precursor of two laws in dispute). Assuming that a legislature acts

Severability clauses evolved as a defensive device for counteracting the presumption against severability once employed by the federal courts.[126] That general anti-severability attitude coincided with the heyday of judicial willingness to invalidate federal enactments regulating the national economy on a variety of constitutional grounds (including, particularly, substantive due process).[127] Thus, the initial development of severability clauses reflected a legislative desire to protect novel enactments against complete invalidation, in the event that a portion of the statute proved too avant garde for the judiciary.[128]

---

with a detailed knowledge of previous measures may be a necessary evil in some domains of statutory construction. *But see* R. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 281 (1985). This unrealistic assumption need not be extended to the quite different severability clause presumption context—when that extension would compound significantly the error of presuming that general severability clauses indicate a specific severability intent useful in deciding particular cases.

[126] *See supra* note 115 and accompanying text.

[127] *See* Note, *supra* note 112, at 626 (severability clauses "seem to have come into vogue about 1910, and have been steadily increasing in popularity"); *compare* Stern, *supra* note 108, at 114–22 (discussing evolution of severability clauses in the first several decades of the 20th century) *with, e.g.*, L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 8-2 (1978) (summarizing judicial willingness to invalidate social and economic enactments during *Lochner* period).

[128] For example, the first federal statute containing a severability clause to reach the Supreme Court was the 1921 Futures Trading Act (FTA), ch. 161, 42 Stat. 187 (1920), considered in *Hill v. Wallace*, 259 U.S. 44 (1921). *See* Stern, *supra* note 108, at 116. The Act's central purpose was "regulating the conduct of business of boards of trade through supervision of the Secretary of Agriculture and the use of an administrative tribunal consisting of the Secretary, the Secretary of Commerce, and the Attorney General." 259 U.S. at 66. The Act's major regulatory provisions authorized the Secretary of Agriculture to designate boards of trade as valid contract markets if they agreed to follow certain enumerated conditions (FTA § 5) and provided that the administrative tribunal referred to above would police future compliance with the enumerated conditions (FTA § 6).

Congress apparently believed that the Commerce Clause would not provide a sufficient justification for regulation of the futures markets. Congress chose, therefore, to justify the FTA by invoking the Article I taxing power. Thus, the FTA provided a powerful incentive for boards of trade to seek the initial and continued regulation of the federal government; with one minor exception, all futures contracts by entities other than Agriculture Secretary-approved boards of trade would pay a hefty federal tax (FTA § 4) or face a hefty federal penalty (FTA § 10).

The 1921 Congress also worried, in turn, that its taxing power rationale would prove insufficient. (The *Hill* decision, invalidating the § 4 tax provision, proved Congress clairvoyant.) Thus, congressional inclusion of a severability clause (FTA § 11) in the Act was calculated to protect other pro-regulatory provisions of the statute from the possible invalidation of § 4.

The *Hill* Court ultimately invalidated §§ 5, 6, and 10 on the theory that they were provisions "interwoven" with the invalid § 4 tax. 259 U.S. at 70. However, the Court gave partial deference to Congress' severability clause by suggesting that it would save from invalidation sections authorizing the Secretary of Agriculture to investigate practices in the grain futures markets (FTA § 9) and imposing an excise tax on certain futures contracts of a "gambling" nature (FTA § 3). *Id.* at 71.

It is likely that, during the habitual use of severability clauses from that time forward, the legislature continued to associate the clauses with protecting one affirmative power grant from the fall of another affirmative power grant, and vice versa. Certainly, there is little in the fact patterns or doctrine of pre-*Chadha* Supreme Court cases to suggest the use (or usefulness) of severability clauses to protect an affirmative power grant against a limitation of that power.[129]

Indeed, the legislative veto severability case of *Allen v. Carmen*[130] illustrates that, when Congress employs a severability clause, it is more likely worried about the continued validity of the various power-granting parts of the statute than about its power-limiting parts. In finding that Congress' delegation to the GSA of rulemaking authority over Watergate materials survived the invalidation of the veto provision conditioning it, the *Allen* court held that the Materials Act severability clause[131] reflected congressional concern that "a judicial decision, *such as this one, which declares the one-House veto invalid*, not drag the remainder down with it."[132] Yet, it is highly unlikely that a judicial invalidation of the Materials Act's one-House veto provision was the kind of ruling about which Congress expressed concern by including the severability clause.

The relevant legislative reports on the Materials Act expressed no particular misgivings about the constitutionality of the veto provision.[133] Nor were such concerns a focus in hear-

---

[129] *See* Sloan v. Lemon, 413 U.S. 825 (1973) (challenged section provided state reimbursement for children attending religious private schools; unsuccessful argument that severability clause preserved tuition reimbursement scheme for children attending non-religious private schools); Electric Bond & Share Co. v. SEC, 303 U.S. 419 (1938) (challenged sections required holding companies to register with SEC and prohibited unregistered companies from using instrumentalities of interstate commerce; severability clause protected other sections regulating business practices of registered companies against possible future invalidation); Champlin Refining Co. v. Corporation Comm'n, 286 U.S. 210 (1932) (challenged § 2 of Oklahoma law prohibited crude oil production when market price was below "actual value" as determined by a commission; remaining sections of law protected by severability clause authorized commission to prevent various forms of crude oil "waste", to allocate non-wasteful production among common oil range owners, and to take other necessary actions).

[130] Allen v. Carmen, 578 F. Supp. 951 (D.D.C. 1983).

[131] The text of the severability clause is quoted at *supra* note 102

[132] *Allen*, 578 F. Supp. at 970 (emphasis added).

[133] The House report merely explained in neutral terms that regulations promulgated by the GSA will be subjected to a one-House veto provision; the report briefly explained how the veto mechanism would work. H.R. REP. No. 1507, 93d Cong., 2d Sess. 6 (1974). The relevant Senate report did not refer to the legislative veto provision ultimately enacted. *CRS Veto Studies*, *supra* note 41, at 63.

ings preceding floor debate[134] or in the floor debate itself.[135] Instead, the judicial proceedings of foremost concern to Congress were those already commenced by former President Nixon to enforce the Nixon-Sampson agreement.[136] Because the Materials Act would abrogate that agreement and impose several significant restrictions on the former President's access to materials, Congress foresaw that Nixon would broaden his legal strategy by attacking Materials Act provisions limiting his control over Watergate papers.[137] Congress wanted to preserve remaining materials-protecting provisions of the Act if the courts invalidated one or more of their number. This does not suggest that Congress wanted to preserve one of the materials-protecting provisions (*i.e.*, the GSA regulatory authority) if a court invalidated the major provision ensuring its appropriate exercise (i.e., the legislative veto).[138]

b. *The general "presumption" in favor of severability*

(1). The presumption and the legislative veto severability cases

It is also established federal precedent that, even in the absence of a severability clause, portions of a statute are severable "unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of

---

[134] "[T]he question of authorizing legislative veto of GSA regulations received no attention in the [House Administration Committee] hearing." *CRS Veto Studies*, *supra* note 41, at 67. At the request of the Senate Governmental Operations Committee, the Senate held no hearings on the Materials Act. *Id.* at 63.

[135] *See id.* at 66 ("no debate" in Senate on the section requiring submission of GSA regulations to Congress); *id.* at 70–72 (no constitutional concerns about veto provision expressed during brief House floor debate).

[136] The House report discussed prominently the Nixon-Sampson agreement and the efforts of former President Nixon to enforce it through federal court litigation. *See* H.R. REP. No. 1507, 93d Cong., 2d Sess. 3–4 (1974).

[137] Former President Nixon's subsequent broad-gauge attack on the Materials Act did not include an argument that the Act's basic scheme was unconstitutional because of congressional reliance on the one-House veto mechanism. *See* Nixon v. Administrator, 408 F. Supp. 321, 328–29 (D.D.C. 1976) (three-judge court) (summarizing separation of powers, privacy, freedom of speech, equal protection, and bill of attainder arguments made by President Nixon). Nixon did amend a complaint in a subsequent proceeding several years later to add a veto-based challenge. However, in partial settlement of the case, the veto-based claim was dropped. *See* Allen v. Carmen, 578 F. Supp. 951 (D.D.C. 1983).

[138] Indeed, the case for inseverability is quite strong. *See supra* text accompanying notes 71–74.

that which is not."[139] This formulation has only recently been termed a "presumption,"[140] although for some time it has had such an effect on the severability analyses conducted by federal courts.[141]

The veto severability cases have made extensive use of this general pro-severability formulation.[142] For example, the District of Columbia Circuit's *Alaska Airlines* opinion began its severability analysis by stating that federal law employs a general "presumption" of severability.[143] The court then stated that, to embody the presumption, "the burden is placed squarely on the party arguing against severability to demonstrate that Congress would not have enacted the provisions without the severed portion."[144] The *Alaska Airlines* court did undertake a "trek through the legislative history of the Airline Deregulation Act."[145] When it came time to declare the decisional result of its legislative history review, however, the court reemphasized the "exacting inseverability standard that [requires inseverabil-

---

[139] Champlin Refining Co. v. Corporation Comm'n, 286 U.S. 210, 234 (1932). Some recent cases cite *Champlin* indirectly by citing Buckley v. Valeo, 424 U.S. 1, 108 (1976), which, in turn, quoted *Champlin*. The remaining discussion will refer to the "unless it is evident" formulation of the general pro-severability presumption as the "*Champlin/Buckley*" standard.

[140] Regan v. Time, Inc., 468 U.S. 641, 653 (1984) (plurality opinion).

[141] For example, in Buckley v. Valeo, the general pro-severability presumption formed the real basis for the conclusion that a constitutionally-acceptable scheme of public financing for presidential campaigns was severable from other election reform provisions the Court found unconstitutional. 424 U.S. at 108–09. After citing the "unless it is evident" pro-severability presumption, the Court limited its discussion of congressional severability intent to a one-sentence conclusion that "the value of public financing is not dependent on the existence of a generally applicable expenditure limit." 424 U.S. at 109. Yet, the severability inquiry should not have turned on the question of whether the Court thought the statutory scheme had sufficient value to pass constitutional muster. The inquiry should have focused on the question of whether Congress would have wanted the public financing scheme to stand without the other election reforms. Armed with its general pro-severability presumption, the Court did not in any meaningful way explore this latter question.

[142] Although the Supreme Court began the severability discussion in its *Chadha* opinion by quoting the "unless it is evident" language of *Champlin/Buckley*, the Court saved its talk of presumptions for the presumption raised by the presence of a severability clause. *Accord* Chadha v. Immigration and Naturalization Service, 634 F.2d 408, 415 (9th Cir. 1980).

[143] Alaska Airlines v. Donovan, 766 F.2d 1550, 1560 (D.C. Cir. 1985), *aff'd sub nom.* Alaska Airlines v. Brock, 55 U.S.L.W. 4396 (U.S. March 25, 1987). The Supreme Court's *Alaska Airlines* opinion also employed a presumption, although it did not clearly label it as such. The Court stated the severability test, even in situations where no severability clause is present as follows: "the unconstitutional provision *must be severed unless* the statute created in its absence is legislation that Congress would not have enacted." 55 U.S.L.W. at 4398 (emphasis added).

[144] Alaska Airlines v. Donovan, 766 F. 2d at 1560.

[145] *Id.* at 1565.

ity to] be 'evident'" and ruled in favor of severability.[146] Other legislative veto severability cases have also placed a heavy weight on the side of severability in assessing the legislative intent indicators.[147]

The general pro-severability presumption embodied in the *Champlin/Buckley* "unless it is evident" test[148] can make the difference that decides cases. For example, in *EEOC v. CBS, Inc.*,[149] the district court recognized that some expressions of congressional intent in the legislative history pointed against severability; the court labeled the decision between severability and inseverability "a very close call, admittedly."[150] In deciding in favor of severability, the court relied heavily on the pro-severability presumption it found implicit in the Supreme Court's use of the *Champlin/Buckley* standard in *Chadha*.[151] Seeing the "unless it is evident" formulation as "pretty strong language" meaning that evidence of inseverability has to be "crystal clear,"[152] the court ruled in favor of severability.[153]

---

[146] *Id.*; *accord Alaska Airlines*, 55 U.S.L.W. at 4398 (quoting and employing "well-established" unless-it-is-evident standard of Buckley/Champlin).

[147] *E.g.*, EEOC v. Hernando Bank, 724 F.2d 1188, 1192 (5th Cir. 1984); EEOC v. Chrysler Corp., 595 F. Supp. 344, 348 (E.D. Mich. 1984) (noting "presumption that an unconstitutional portion of a statute should be severed from the rest of the statute," quoting *Champlin/Buckley* formulation). *But see* Consumer Energy Council v. FERC, 673 F.2d 425, 442 (D.C. Cir. 1982) ("the question of where the presumption lies is mostly irrelevant, and serves only to obscure the crucial inquiry").

[148] *See supra* note 139.

[149] 34 Fair Empl. Prac. Cas. (BNA) 257 (S.D.N.Y. 1984), *rev'd*, 743 F.2d 969 (2d Cir. 1984).

[150] 34 Fair Empl. Prac. Cas. (BNA) at 258. The point is emphasized in the transcript of the oral argument that immediately preceded the court's ruling from the bench, which comprises the published decision. The oral argument transcript provides a rare and easily accessible window into the judicial decision-making process with regard to severability questions. The district judge called two previous opinions, one for and one against severability, "fairly reasoned, well thought out opinions" and said he did not "have any problem with the reasoning in either case." The judge continued: "I think that it is just a matter of a judgment call one way or the other." Oral Argument Transcript at 5, EEOC v. CBS, Inc., 34 Fed. Empl. Prac. Cas. (BNA) 257 (S.D.N.Y. 1984) (No. 81 Civ. 2781 (JES)), (WESTLAW, Allfeds library) [hereinafter Oral Argument Transcript]. The Oral Argument Transcript also indicates that the judge returned, midway through oral argument, to his theme that "this case is close, admittedly close." *Id.* at 18.

[151] The court stated:

> [Assuming that *Chadha*] means what it says, I read the Supreme Court as telling me that unless I find it evident, unless it is evident, that the statute would not have been passed but for the unconstitutional provisions set forth in the statute, then the statute is valid. . . .

34 Fed. Empl. Prac. Cas. (BNA) at 257–58.

[152] Oral Argument Transcript, *supra* note 150, at 11.

[153] Another example of heavy decisional reliance on the "unless it is evident" presumption is EEOC v. Delaware Dep't of Health & Social Servs., 595 F. Supp. 568 (D. Del. 1984). The *Delaware Department* court emphasized the word "evident" the first

(2). The Inappropriateness of the Presumption in the Legislative Veto Cases

Is the use of a general pro-severability presumption appropriate in the legislative veto severability cases? As with the severability clause presumption, the generic pro-severability presumption is subject to some broad criticisms that could recommend against its use to decide any severability issue.[154] Unlike the views expressed above about the severability clause presumption, however, this Article does not condemn use of the general pro-severability presumption in any and all severability disputes. The presumption of severability provides a good initial representation of congressional intent in cases pondering whether the invalidity of one power-granting legislative provision should negate other power-granting sections. As long as courts employ the presumption of severability reasonably, and not as a substitute for consideration of relevant legislative history, the use of the presumption in such cases is legitimate.

For example, in the frequently-cited severability case of *United States v. Jackson*,[155] the Supreme Court had to decide whether an unconstitutional capital punishment provision in the Federal Kidnapping Act was severable from the Act's other penalty sanctions. The Act had no severability clause, but the Court employed a general pro-severability presumption. Because all the penalty provisions sought to serve a complemen-

---

time it quoted the "unless it is evident" formulation of the federal severability doctrine. *Id.* at 571. It then emphasized the "evident" standard three more times in its discussion of conflicting legislative history. *Id.* at 571, 573.

[154] The general pro-severability presumption is not the only approach ever used by federal courts. *See* Stern, *supra* note 108, at 79–81, 118–20 (describing initial tendency of courts to favor severability without using language of presumption and subsequent general presumption against severability). From the standpoint of legal history, the presumption is based on an overly facile extension of the 1930's-era cases establishing the severability clause presumption. As indicated at *supra* note 139 and accompanying text, *Champlin* is the seminal case cited for the general pro-severability presumption. *Champlin* uttered its much-quoted statement—that severability is presumed "unless it is evident"—in the course of explaining why a severability clause justified an *exception* from the general rule presuming *in*severability. Champlin Refining Co. v. Corporation Comm'n, 286 U.S. 210 (1932). Given that it was carving out an exception, the *Champlin* Court did not have to address the validity of—and can only with difficulty be read as questioning—the general anti-severability presumption. Thus, the Supreme Court's subsequent extension of *Champlin*'s "unless it is evident" formulation to create a generic pro-severability presumption in the absence of a severability clause, United States v. Jackson, 390 U.S. 570, 585 & n.27 (1968), is dubious.

A final objection to the general pro-severability presumption is that, if given an overly strong application, it may "debase[ ] the importance of legislative intent in severability conflicts." Note, *supra* note 113, at 755–56.

[155] 390 U.S. 570 (1968).

tary goal (the deterrence of kidnapping), the reasonable a priori assumption about congressional intent was surely that the inability to provide extreme punishment for aggravated kidnapping cases[156] did not extinguish the legislative desire to punish the crime by other strong means. Thus, the *Jackson* Court's pro-severability presumption reflected a "common sense" assumption about legislative intent. Equally important, the Court used the presumption as a complement to, not a substitute for, analysis of legislative intent indicators.[157]

Use of a general pro-severability presumption in the legislative veto context is unwarranted, however, for three main reasons. First, unlike use of the presumption for determining the severability of complementary provisions, use of the presumption in the legislative veto context is at least as likely to lead to results undercutting, rather than advancing, congressional intent. The legislative veto provisions that Congress included in over 200 statutes are in fundamental conflict with the power-granting provision or provisions whose severability has been in question. By employing a legislative veto to condition its grant of power to the Executive Branch, Congress signaled its basic unease with Justice White's Hobson's choice between delegating too much and too little power.[158] It is not more reasonable to presume initially and generally that Congress would resolve the dilemma by retaining its power grant than by jettisoning it. Indeed, the more reasonable initial assumption may be that Congress would not have passed the power-grant in the form that it did[159]—otherwise, why include the veto?

A second problem is that importation of the general pro-severability presumption into the veto severability cases requires an unjustified extension of prior precedent. With one

---

[156] Under the capital punishment provision of the Kidnapping Act, aggravated kidnappings were those in which the kidnapped person "has not been liberated unharmed." *Id.* at 571.

[157] The Court drew inferences from the successive kidnapping laws Congress enacted in 1932 and 1934 and analyzed relevant legislative reports and statements during floor debate. The Court stated that this legislative history "confirms what common sense alone would suggest"—that the penalty provisions were severable. *Id.* at 586–91.

[158] Immigration and Naturalization Service v. Chadha, 462 U.S. 919, 968 (1983) (White, J., dissenting).

[159] In accordance with the traditional formulation of the severability inquiry, endorsed by the Supreme Court in *Alaska Airlines*, see *supra* text accompanying notes 32–36, courts should not sever surviving statutory provisions if Congress would have passed a different version of the statute had it known of the partial invalidity of the statute that it did pass.

possible exception,[160] the pre-*Chadha* Supreme Court cases employing the general pro-severability presumption involved the severability of *complementary* statutory provisions.[161] The applicability of these cases to the severability of *conflicting* provisions—the context of legislative veto disputes—is by no means self-evident.

Indeed, the apparent rationales behind these pre-*Chadha* cases do not readily apply in the legislative veto context. To the extent that the general presumption for severability is a judicial attempt "to effectuate rather than thwart legislative policies,"[162] one can have no confidence in the veto context that legislative policies point toward severability. The result is no different if one assumes that the severability presumption reflects the "cardinal principle of statutory construction . . . to save and not to

---

[160] The possible exception is Tilton v. Richardson, 403 U.S. 672 (1971). *Tilton* considered an Establishment Clause challenge to a law providing for federal construction grants for college and university facilities, including secular facilities of private church-related colleges and universities. In upholding the construction grant law because it specifically excluded financing for "any facility used or to be used for sectarian instruction or as a place for religious worship," the Court faced a problem: by its terms, the just-quoted exclusion lasted for 20 years only. *Id.* at 675. This time period was problematic because "[i]f at the end of 20 years, the building [was], for example, converted into a chapel or otherwise used to promote religious interests, the original federal grant [would] in part have the effect of advancing religion." *Id.* at 683.

The *Tilton* Court's answer to this problem lay in the severability doctrine. After quoting the *Champlin* language that courts should assume severability "unless it is evident," the Court held that the 20 year time limit could be severed from the overall ban against use of construction grants for non secular purposes. *Id.* at 684. The judicial surgery eliminated the Establishment Clause problem because the federal assistance was then subject to a limitation that would prevent it from impermissibly advancing religion.

Viewed in one light, *Tilton* stands as a Supreme Court case that applied a general pro-severability presumption to decide whether an invalid limitation to a provision (the 20 year time limit) was severable from the provision it limited (the ban on funding of primarily religious facilities). However, because the severed ban on funding of primarily religious facilities was itself a limitation on more basic statutory provisions (those providing for federal financial assistance), the symmetry between the *Tilton* situation and the legislative veto severability context is blurred. The case is a less than clearcut precedential base for the application of the general pro-severability presumption to the legislative veto context.

[161] *See supra* note 129 (describing severability situations in *Champlin* and Electric Bond & Share Co. v. SEC, 303 U.S. 419 (1938)); *see also supra* text accompanying notes 155–57, (describing provisions at issue in United States v. Jackson). Another often-cited severability case, Buckley v. Valeo, 424 U.S. 1 (1976), applied a general pro-severability presumption in deciding that constitutionally-invalid provisions in the Federal Election Campaign Act (limitations on expenditures by candidates, on total campaign expenditures, and on "independent" expenditures on behalf of specific candidates) were severable from other complementary regulatory provisions (such as limitations on individual campaign contributions and record-keeping requirements).

[162] Stern, *supra* note 108, at 120; *cf.* Regan v. Time, Inc., 468 U.S. 641, 652 (1984) (plurality opinion) (linking severability to avoidance of constitutional disputes and the resulting "frustrat[ion of] the intent of the elected representatives of the people").

destroy."[163] This cardinal principle is not a salvage-at-all-costs rule.[164] Courts employing it recognize that statutory portions should be saved only when the portion saved makes sense and furthers legislative intent,[165] something that cannot be assumed initially, if at all, in the legislative veto severability context.

A final, related problem is that importation of the general pro-severability presumption into the legislative veto context ignores a more pertinent line of authority in existence during the same era that produced the "unless it is evident" formulation. In *Davis v. Wallace*,[166] a 1921 case cited approvingly by the Supreme Court only three years before the *Champlin* decision that spawned the general pro-severability presumption,[167] the Supreme Court noted a principle applicable to the legislative veto severability situation:

> Where an excepting provision in a statute is found unconstitutional, courts very generally hold that this does not work an enlargement of the scope or operation of other provisions with which that [unconstitutional] provision was enacted and which it was intended to qualify or restrain.[168]

A legislative veto provision is "an excepting provision" and is "intended to qualify or restrain" the underlying power grant to which it is attached. Severing the veto from the power grant certainly does "work an enlargement of the scope or operation of other provisions." The enlargement implicates the fear voiced

---

[163] NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937). Although the statement in *Jones & Laughlin* was made in the context of narrow statutory construction to avoid reaching a constitutional question, the "save, do not destroy" principle has been linked to the judiciary's general willingness to presume severability in the absence of persuasive contrary indications. *See, e.g.*, Tilton v. Richardson, 403 U.S. 672, 684 (1971) (quoting *Jones & Laughlin* language in context of severability discussion); Alaska Airlines v. Donovan, 766 F.2d 1550, 1560 (D.C. Cir. 1985), *aff'd sub nom.* Alaska Airlines v. Brock, 55 U.S.L.W. 4396 (U.S. March 25, 1987) (quoting *Tilton* in turn quoting *Jones & Laughlin* in severability context); *cf. Alaska Airlines*, 55 U.S.L.W. at 4398 (quoting statement of plurality opinion in *Time, Inc.*, 468 U.S. at 652, that "a court should refrain from invalidating more of a statute than is necessary").

[164] In particular, the severability doctrine does not embody a salvage-at-all-costs principle. Otherwise, the presumption of severability would be irrebuttable and would not be open to a showing of legislative intent to the contrary.

[165] *See infra* text accompanying notes 300–05.

[166] 257 U.S. 478 (1921). In *Davis*, the Supreme Court found that the portion of a North Dakota statute permitting taxation of railroads was inseverable from the unconstitutional provision restricting the basis for calculation of the tax. The *Davis* Court believed that the grant of taxation power should fall along with the restriction because "[o]nly with that restricted meaning did [both provisions] receive the legislative sanction which was essential to make them part of the statute law of the State." *Id.* at 484–85.

[167] Frost v. Corporation Comm'n, 278 U.S. 515, 525 (1929) (quoting *Davis*, 257 U.S. at 484).

[168] *Davis*, 257 U.S. at 484.

in a pre-*Davis* case involving the severability of a power-limiting provision—the worry that "by rejecting the exceptions intended by the legislature [a statute can] be made to enact what confessedly the legislature never meant."[169] Yet, the *Davis* exceptions-are-generally-inseverable principle and its apparent presumption of inseverability for power-limiting provisions are not followed or even discussed in the vast majority of legislative veto cases.[170]

In sum, neither of the presumptions discussed in this Part materially assists the legislative veto severability cases in arriving at dispositions furthering congressional intent. Indeed, in many cases the presumptions actually detract from the courts' essential mandate: to answer the hypothetical question posed by severability in the way that the legislature enacting the veto provision would have answered it.

2. Other Analytical Errors

This subpart demonstrates that analytical errors not necessarily related to the severability presumptions have contributed to unnecessary surgery in the veto severability cases.[171] It discusses examples of three analytical errors made in Reorganization Act severability cases. These cases include *EEOC v. Hernando Bank*,[172] a Fifth Circuit opinion that influenced several other courts deciding the severability of Reorganization Act provisions.[173] The three errors, all of which have contributed to erroneous findings of severability, result from: (1) the excessive reliance on statutory language to establish congressional intent regarding severability; (2) the assumption that the veto device

---

[169] Spraigue v. Thompson, 118 U.S. 90, 95 (1886).

[170] Most of the veto severability cases ignore the exceptions-are-generally-inseverable view. One case explicitly noted it and rejected its relevance. Consumer Energy Council v. FERC, 673 F.2d 425, 445 (D.C. Cir. 1982) ("We decline to adopt [the view] as a general principle that would make all veto provisions prima facie inseverable."). Only two judicial opinions discussing the severability of legislative vetoes relied on the *Davis* case and its view that statutory exceptions are likely to be inseverable: the pre-*Chadha* case of McCorkle v. United States, 559 F.2d 1258, 1261–62 (4th Cir. 1977), which held a veto provision inseverable as a means of avoiding a decision on the constitutionality of the legislative veto; and the dissent of Justice Rehnquist in *Chadha*, see *supra* note 91.

[171] The presumptions and the errors may be related. Arguably, by suggesting that most severability issues can be decided through generic decisional rules, the expansive pro-severability presumptions discourage courts from analyzing specific factors in a statute's legislative history.

[172] 724 F.2d 1188 (5th Cir. 1984).

[173] *See, e.g.*, EEOC v. Dayton Power & Light Co., 605 F. Supp. 13 (S.D. Ohio 1984).

is less important when Congress supplements it with other statutory limits on executive power; and (3) the view that congressional failure to exercise the power afforded by a legislative veto provision indicates that it is unimportant to the overall statutory scheme.

a. *The relevance of "the language of the statute"*

Courts have long accepted the principle of statutory construction that, in attempting to determine the legislature's intent in enacting a statute, courts should look to the language of the statute before examining less direct sources.[174] In several Reorganization Act veto severability cases, courts have relied on this plain meaning canon to reach the conclusion that Congress would have wanted presidential reorganization authority to survive intact without the Act's one-House veto provision. Reliance upon "the language of the statute" in these cases was inappropriate both because it exaggerated the conclusiveness of statutory language in determining legislative intent and because it misinterpreted the statutory language at issue.

The *Hernando Bank* case is the point of departure for this survey of faulty analysis. After declaring that "[c]ongressional intent and purpose are best determined by an analysis of the language of the statute in question,"[175] the court proceeded to focus attention on the Reorganization Act's policy and purpose section. This section contained six separate statements referring to the benefits that can accrue from presidential reorganization plans. An additional statement proclaimed that the purposes of the Act "can be accomplished more speedily [by using the Act's approach that the plan-is-valid-unless-vetoed] than by the enactment of [each plan by] specific legislation."[176] The court interpreted the policy and purpose section to mean that the legislative veto provision's primary purpose was expediency, and the court concluded "that Congress [would] have enacted the Reorganization Act without the legislative veto provision."[177]

---

[174] N. SINGER, *supra* note 14, § 46.01, at 73.

[175] *Hernando Bank*, 724 F.2d at 1190.

[176] *Id.* at 1191. The court also looked at other Reorganization Act provisions placing specific limits on the reorganization authority delegated to the President. *See infra* text accompanying notes 187–92 for an argument that the court's analysis of these provisions is also erroneous.

[177] *Hernando Bank*, 724 F.2d at 1191.

The *Hernando Bank* approach, emphasizing statutory language, has been cited approvingly in other Reorganization Act severability cases[178] and by one court considering another statute.[179] The approach is problematic, first of all, because of the unusual form legislative intent interpretation must take in severability decisions. Unlike the usual statutory construction inquiry into what the legislature's intent *was*, judicial consideration of severability probes into what Congress' intention *would have been* and assesses the importance the legislature attached to particular statutory provisions.[180] Actual statutory language and generic preambulary statements presuming the legitimacy of the total statute will not be very useful in this assessment.[181] Congress' relative preferences among different statutory goals are much more clearly revealed in descriptions of specific provisions in detailed committee reports and in floor statements, accounts of legislative reaction to amendments seeking the alteration or deletion of provisions, and other similar sources.[182]

Second, assuming that policy and purpose sections can convey valuable information in severability determinations, the *Hernando Bank* court exaggerated the importance and misinterpreted the meaning of the Reorganization Act's policy language. The court's focus on the Act's policy and purpose language failed to appropriately note the extensive, potent veto provisions in the body of the Reorganization Act.[183] In so doing, the court

---

[178] *E.g.*, EEOC v. Dayton Power & Light Co., 605 F. Supp. 13, 17 (S.D. Ohio 1984); EEOC v. City of Yonkers, 592 F. Supp. 570, 578 (S.D.N.Y. 1984).

[179] Gulf Oil Corp. v. Dyke, 734 F.2d 797, 803 (Temp. Emer. Ct. App.), *cert. denied*, 469 U.S. 852 (1984).

[180] *See supra* text accompanying notes 17–18.

[181] The *Hernando Bank* opinion did not explain why Congress' very general Reorganization Act declarations about the importance of governmental efficiency and reorganization, and the benefits of short-circuiting the full legislative process *assuming a strong congressional control mechanism*, are reliable indicators of what Congress' views would be in the absence of the assumption.

[182] Most of the veto severability cases assessing legislative history in detail have focused on the overall context of legislative enactments and such legislative history indicators as committee reports, floor statements, and changes occurring to legislative language as the process unfolded to ultimate enactment. *See, e.g.*, Alaska Airlines v. Brock, 55 U.S.L.W. 4396, 4399–401 (U.S. March 25, 1987) (detailed assessment of context and legislative history of 1978 Airline Deregulation Act); National League of Cities v. Pierce, 634 F. Supp. 1449, 1454–58 (D.D.C. 1986) (detailed examination of "historical political context" and "voluminous history" of the Impoundment Control Act).

[183] The court noted that the "legislative veto provision reflects Congress' desire to vote its approval of any specific reorganization plan." EEOC v. Hernando Bank, 724 F.2d 1188, 1191 (5th Cir. 1984). However, the court downplayed the relevance of the veto provisions, stating "[b]ut there is more of relevance to our inquiry in the language of the Act." *Id.*

ignored the general rule of statutory interpretation that sections announcing general legislative purposes should be considered along with "all parts of the act" in discerning legislative intent.[184] The court also ignored the fact that the Act's much-discussed policy and purpose language originated in an earlier 1949 reorganization enactment and was merely repeated in the 1977 Act.[185] The policy and purpose language conveyed no special understanding of the 1977 Congress' views on the importance of the legislative veto provision to the overall statutory scheme.[186]

b. *The significance of multiple power limitations: is more less?*

A second analytical error, again illustrated by the *Hernando Bank* opinion, is the assumption that, by using other limiting mechanisms in addition to the veto provisions to condition the reorganization power it granted, Congress somehow signaled that the veto mechanism was not important to the remaining statutory scheme. The *Hernando Bank* court noted that the 1977 Reorganization Act included a novel section providing that no reorganization plan submitted by the President could create a new executive department, abolish an existing department or independent regulatory agency, or grant new agency powers not contained in existing law.[187] The court viewed the presence of

---

[184] N. SINGER, *supra* note 14, § 47.04, at 128; *see* R. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 101 (1975) (general rule that policy and purpose sections "should not be treated as a definitive, overriding pronouncement").

[185] The policy and purpose language in the 1977 Act traces its lineage to section two of the Reorganization Act of 1949, Pub. L. No. 81-109, § 2, 63 Stat. 203, 203 (1949).

[186] Significantly, both of the contending versions of what ultimately became the 1977 Act (Representative Brooks' bill to require affirmative congressional approval for reorganization plans and the Carter Administration's proposal to permit reorganization subject to a one-House veto) employed the 1949 Act's formulation. *See* H.R. 3131 and H.R. 3407, *reprinted in Providing Reorganization Authority to the President: Hearings Before the Subcomm. on Legislation and National Security of the House Comm. on Government Operations*, 95th Cong., 1st Sess. 3–11 (1977). Both bills amended the 1971 Reorganization Act, which contained policy and purpose language identical to the 1949 Act. This provides strong evidence that the policy and purpose language was not fraught with clear and significant clues about the 1977 Congress' relative preferences between controlling reorganizations and facilitating them. Indeed, Representative Brooks' proposal envisioned that reorganization through affirmative congressional approval (the result of finding Reorganization Act provisions *in*severable) could coexist with the 1949 Act's policy and purpose language. Notwithstanding the *Hernando Bank* reasoning, then, the policy and purpose language does not point against an inseverability holding.

[187] *Hernando Bank*, 724 F.2d at 1191 (citing Pub. L. No. 95-17, § 905, 91 Stat. 29, 31–32 (1977)).

these substantive restrictions as indicating an increased willingness to delegate reorganization authority even without the legislative veto limitation.[188]

Neither *Hernando Bank*, nor the cases following *Hernando Bank* on this issue,[189] adequately explained why restraints on the *substance* of reorganization indicated a diminished legislative desire to control the *process* by which reorganization took place. The Reorganization Act's legislative veto provision limited types of reorganization that were acceptable under the substantive restraints. Further, the legislative history of the 1977 Act belies the view that the substantive restraints show that Congress was more sanguine about the delegation of reorganization authority to the President.[190] Rather, the legislative history shows that the same Congress that limited the scope of the reorganization power also strengthened the legislative veto provision.[191]

Thus, as with other methods of relying on the Reorganization Act's language to support a finding of severability, the citation to the Act's other major power-limiting section "[does] not help much in determining whether Congress was willing to turn the reorganization process over to the President unrestricted and unsupervised" by a legislative veto.[192]

c. *The meaning of unexercised vetoes*

A third error is the assumption that Congress' failure after 1977 to veto any reorganization plan strengthens the case that the 1977 Congress intended reorganization authority to stand without the legislative veto. In *EEOC v. CBS, Inc.*,[193] the district

---

[188] *Id.*

[189] EEOC v. Ingersoll Johnson Steel Co., 583 F. Supp. 983, 989 (S.D. Ind. 1984) (citing "the many other limits placed on the President's power by the legislation" as one factor pointing to severability); Muller Optical Co. v. EEOC, 574 F. Supp. 946, 952 (W.D. Tenn. 1983), *rev'd on other grounds*, 743 F.2d 380 (6th Cir. 1984).

[190] In indicating why he would support a compromise reorganization bill in lieu of his original proposal to require affirmative congressional approval of reorganization plans, Representative Brooks referred *both* to the strengthened veto provisions *and* to the substantive limitations on the reorganization power. Representative Brooks saw both types of provisions as evidence that the compromise "will provide Congress with far more control over reorganization" than the Carter Administration's proposal. 123 CONG. REC. 9344 (1977).

[191] *See supra* text accompanying notes 50–51.

[192] EEOC v. CBS, Inc., 743 F.2d 969, 974 (2d Cir. 1984).

[193] 34 Fair Empl. Prac. Cas. (BNA) 257 (S.D.N.Y.), *rev'd*, 743 F.2d 969 (2d Cir. 1984).

court viewed Congress' rejection of resolutions calling for invalidation of a plan to transfer anti-discrimination enforcement authority to the EEOC as a persuasive indicator pointing toward severability. The court recognized that Congress' acceptance of the EEOC reorganization was "not constitutionally significant if [Congress] did not have the authority to do that anyway."[194] However, the court perceived the congressional inaction as "certainly relevant on the question of whether [Congress] would have enacted the statute absent the one-House veto provision."[195] The Fifth Circuit's *Hernando Bank* opinion echoed the *EEOC v. CBS, Inc.* conclusion.[196]

Notwithstanding either court's assertion, Congress' failure to veto the EEOC reorganization plan provides no information about the importance of the veto provision to the 1977 Reorganization Act generally. Congress' actions with respect to one specific plan do not reveal its overall evaluation of the ability to consider other plans. Moreover, Congress does not have to exercise its veto option to realize its value. Even an unexercised veto threat may enable Congress to assert enhanced control.[197] Finally, assuming that exercise of the veto power with respect to reorganization plans would provide evidence of the legislature's commitment to the veto provision, by 1977 Congress had vetoed a total of twenty-three reorganization plans pursuant to six preceding reorganization enactments.[198]

In sum, leading cases deciding the most frequently litigated veto severability issue—whether the Reorganization Act's invalid veto provision is severable from its power-granting provisions—illustrate that analytical errors join inapposite presumptions as mechanisms of unnecessary statutory surgery in veto severability cases.

---

[194] 34 Fair Empl. Prac. Cas. (BNA) at 258.

[195] *Id.*

[196] The court saw a "significant distinction" between an unexercised veto and "the exercise of a one-house veto, such as that held invalid in *Chadha*." EEOC v. Hernando Bank, 724 F.2d 1188, 1192 n.2. (5th Cir. 1984). However, the court did not explain why the distinction should affect severability.

[197] *See* Clark v. Valeo, 559 F.2d 642, 678–79 (D.C. Cir. 1977) (MacKinnon, J., dissenting), *aff'd mem. sub nom.* Clark v. Kimmitt, 421 U.S. 950 (1977) (describing how legislative veto provision in federal campaign laws "as a practical matter" required Federal Election Commission to consult key members of Congress before submitting rules formally for congressional review).

[198] *See CRS Veto Studies, supra* note 41, at 245.

C. *The WHY of Unnecessary Surgery: Broader Concerns of Policy and Practicality*

So far the discussion has been careful to refer to inappropriate presumptions and other analytical errors to explain *how* courts in the legislative veto severability cases arrive at pro-severability results. At this point, the question arises: does the *how* also explain the *why*? Is there no explanation for the too frequent and too facile impulse to sever veto provisions other than that federal courts, while striving to seek analytically correct results, have misused presumptions and misapplied statutory interpretation rules? If so, then all that is necessary to assure better severability decision-making in future cases is for courts to mend their doctrinal and analytical ways.

This subpart argues instead that an explanation of the unnecessary severability surgery in the legislative veto cases is incomplete without identification of the broader policy concerns that lie behind it.[199] The implication of this argument, explored more fully in Part III, is that real improvement in severability decision-making requires alternative approaches that accommodate the deeper motivations underlying the pro-severability tilt. This subpart contends that the erroneous severability reasoning (1) reflects a substantial bias in favor of delegation of power, and (2) avoids two practical difficulties that arise when invalid provisions are held to be inseverable.

1. The General Pro-Delegation Bias of the Veto Severability Courts

Behind the veto severability courts' use of presumptions and analyses favoring severability is a more basic judicial bias in

[199] This is hardly surprising, in light of the consistent general observations by commentators that severability decisions are laden with subjectivity and reflect judicial policy views. Referring to pre-1937 severability cases, one commentator found significant examples of "parallelism between the attitude of individual judges on severability and their position with respect to the substantive validity of particular statutes." Stern, *supra* note 108, at 113–14. More recent commentaries on severability decisions have sounded similar themes. Thus, severability analysis has been called "flexible," "indeterminant," and "malleable," by an observer also noting that current severability norms "emerged from an amalgam of judicially perceived values." Note, *supra* note 106, at 1183, 1184. Another commentator noted that "judicial determinations of legislative intent are inherently subjective—and this subjectivity leads to widely disparate results among cases involving the resolution of a statute's severability." Note, *supra* note 113, at 752.

favor of the legislative power grants at issue in the statutes containing vetoes.[200] Whether they have perceived it or not, the courts deciding veto severability cases have been forced to decide which of two imperfect approaches—granting more power than Congress intended, or providing less power than it wished to give—constituted the lesser of two evils. The courts' strong commitment to Congress' delegation of power, their failure to perceive the granting of too much power as a real evil, or both of these attitudes, have blinded the veto severability courts to strong indications that Congress viewed the evils differently.

The general pro-delegation bias manifests itself in the veto severability cases in three different ways. In some cases, the courts simply signal their support for the power grants whose severability is at issue. In other cases, the courts exhibit a disinterested attitude toward the power grant, one that suggests little sympathy for the power-restraining goal Congress sought to achieve through the legislative veto. In still other cases, the pro-delegation impulse is more subtly intertwined with other doctrinal issues.

Two cases in the first category, decisions forthrightly basing pro-severability holdings on a desire to protect the contested legislative delegations, are *Allen v. Carmen*[201] and *EEOC v. CBS, Inc.*[202] In *Allen*, the court defended its ruling for severability by stating that a contrary finding would "gut" the Materials Act's protection of Watergate-era materials.[203] The court's opinion also endorsed "the desirability of saving the [Materials Act's power-granting] provision and leaving a workable statute"[204] so

---

[200] Modern federal courts generally treat sympathetically broad delegations of legislative power to executive officials. *See* B. SCHWARTZ, ADMINISTRATIVE LAW §§ 2.1, 2.2, 2.6 (2d ed. 1984); K. DAVIS, ADMINISTRATIVE LAW TEXT §§ 2.01–.05 (3d ed. 1972). The *Chadha* majority opinion is an example of the tolerance afforded to executive agencies exercising legislative power under congressional delegation. The Court majority took a generous approach toward allowing executive agencies to exercise law making power without complying with Article I bicameralism and presentment requirements, even as it took a very restrictive approach toward congressional attempts to control those broad delegations through means not in compliance with Article I. *See* Immigration and Naturalization Service v. Chadha, 462 U.S. 919, 984–89 (1983) (White, J., dissenting).

[201] 578 F. Supp. 951 (D.D.C. 1983).

[202] 34 Fair Empl. Prac. Cas. (BNA) 257 (S.D.N.Y.), *rev'd*, 743 F.2d 969 (2d Cir. 1984).

[203] 578 F. Supp. at 970. For a discussion of why invalidating the Materials Act grant of rulemaking authority to the GSA administrator would not undercut the central purposes of the Act, see *supra* note 74.

[204] *Allen*, 578 F. Supp. at 971.

that the General Services Administrator "'would be free to draft regulations more protective of constitutional rights. . . .'"[205]

In *EEOC v. CBS, Inc.*, the district court expressed two levels of pro-delegation bias. First, the court interpreted Congress' overall desire for effective enforcement of anti-discrimination laws to indicate a congressional position favoring severability. The court mentioned the following factors as pointing toward severability of the 1977 Reorganization Act's legislative veto from its power grant: "the very practical circumstance" that the anti-discrimination enforcement power the EEOC would receive through a reorganization plan was "remedial in purpose"; the fact that "Congress undoubtedly has a strong interest in [anti-discrimination enforcement], in terms of constituency"; and the fact that the anti-discrimination laws are "a popular piece of legislation from the standpoint of the public at large."[206] Of course, these considerations in no way justify a holding of severability. That Congress might want the EEOC to enforce anti-discrimination laws in no way indicates it would want all reorganizations under the 1977 Act to proceed without a legislative veto.

Second, the *CBS* court expressed its concern that an inseverability holding would undercut a number of other desirable delegations of legislative power. The court worried that the reasoning behind a ruling of inseverability with respect to the Reorganization Act would lead other courts to infer that Congress "would not have passed two hundred other statutes either[,] but for the legislative veto, which would put Congress in a state of inaction."[207] This inference is unjustified, because the severability issue posed by each statute containing a veto should be decided in light of that statute's individual legislative history. Still, the statement reveals how support for a particular legislative delegation can affect the court's decision-making in severability cases.[208]

---

[205] *Id.* (quoting Nixon v. Administrator, 408 F. Supp. at 338 n.17).

[206] *CBS*, 34 Fair Empl. Prac. Cas. (BNA) at 258.

[207] Oral Argument Transcript, *supra* note 150, at 14.

[208] A related aspect of judicial support for a specific congressional enactment is judicial hostility toward those opposing the congressional enactment. The latter attitude emerged in Gulf Oil Co. v. Dyke, 734 F.2d 797 (Temp. Emer. Ct. App.), *cert. denied*, 469 U.S. 852 (1984). Immediately before concluding that the power grants relating to federal oil price controls in two energy enactments were severable from legislative veto provisions, the court in *Gulf Oil* impugned the sincerity of the challengers attacking the statute on severability grounds. The court characterized the *Gulf Oil* challenge as the "latest" in a long line of "unreasonably broad" attacks commencing with "the beginning of price controls under federal statutes and regulations." 734 F.2d at 805.

Other severability cases demonstrate another link between judicial attitudes toward legislative power grants and severability decision-making. In these cases, an indifferent attitude toward delegating power to the executive branch contributed to an excessive willingness to accept delegations of legislative power without a protective veto. For example, in *Consumer Energy Council v. Federal Energy Regulatory Commission*,[209] the court made a revealing comment in the process of distinguishing the law at issue, the Natural Gas Policy Act (NGPA),[210] from the statute involved in a previous District of Columbia Circuit severability case:

> Here, in contrast, the delegation of rulemaking authority to FERC was *entirely routine*: [FERC] was required to issue a rule on a specifically defined subject, and to do so pursuant to normal administrative procedures. Such delegations are commonly made without any provision for legislative review. . . .[211]

This reasoning is open to a number of objections. First, Congress "commonly" conditions rulemaking delegations on veto provisions.[212] Second, if Congress departed from common practice in attaching a legislative veto to the NGPA, this departure indicates the great significance Congress placed on the Act's veto provision. Nevertheless, the passage shows how a general attitude that broad delegations to administrative agencies are the norm could skew the severability analysis and contribute to a pro-severability holding.

Another example of judicial complacency in the face of a substantial delegation of legislative power to the executive branch can be found in the *Hernando Bank* case. During a discussion of factors pointing toward severability, the court compared the effects of governmental reorganization under the Reorganization Act to the effects of deportation suspensions under the statute at issue in *Chadha*. The court noted that

> [i]n the instant case . . . no action was taken that affected the substantive rights of any person. The challenged executive action did *nothing more than* transfer the federal government's responsibility for enforcing the Equal Pay Act

---

[209] 673 F.2d 425 (D.C. Cir. 1982), *aff'd mem.*, 463 U.S. 1216 (1983).

[210] Pub. L. No. 95-621, 92 Stat. 3352 (codified at 15 U.S.C. §§ 3301–3342 (1982)).

[211] 673 F.2d at 445 n.70 (emphasis added).

[212] *See, e.g.*, Immigration and Naturalization Service v. Chadha, 462 U.S. 919, 1009–12 (1983) (appendix to opinion of White, J., dissenting) (partial list of statutes with legislative vetoes including 16 statutes listed under category "Rulemaking").

> from one executive agency to another. . . . The reorganization plan effected no *substantive change* in the applicable substantive legislation.[213]

Again, the court's reasoning is questionable. The court's suggestion that exercise of the power delegated by the Reorganization Act has little substantive impact contrasts directly with Congress' own statements about the significance of the reorganization power.[214] However, the court's perception about the impact of reorganization power clearly influenced its pro-severability holding.

Finally, two appellate decisions reflect in a more subtle way the courts' strong predisposition toward preserving delegations of authority to executive branch officials in severability cases. These cases are *Alaska Airlines v. Donovan*,[215] and *Gulf Oil Corp. v. Dyke*,[216] a District of Columbia Circuit case on which the *Alaska Airlines* court relied.

Both opinions posed the severability inquiry in terms seemingly more favorable to a finding of severability than the formulation under traditional severability doctrine.[217] For example, unlike traditional analysis, the *Alaska Airlines* approach appeared to ignore the possibility that Congress might have delegated different (and probably less broad) powers had it known that the veto would be invalidated.[218] The novel *Alaska Airlines* approach would have required proponents of inseverability to show "that Congress would have preferred no [power delegation] at all to the existing provision *sans* the veto provision."[219] The implicit value judgment in this formulation is that it is appropriate to leave behind significantly more power than Congress desired—as long as Congress desired to grant *any* power at all.

2. Avoidance of the Practical Implications of Inseverability

By favoring severability, the veto severability courts avoided two practical problems that flow from findings of inseverability.

---

[213] EEOC v. Hernando Bank, 724 F.2d 1188, 1192 n.2 (5th Cir. 1984) (emphasis added).

[214] *See supra* notes 50–51 and accompanying text.

[215] 766 F.2d 1550 (D.C. Cir. 1985), *aff'd sub nom.* Alaska Airlines v. Brock, 55 U.S.L.W. 4396 (U.S. March 25, 1987).

[216] 734 F.2d 797 (Temp. Emer. Ct. App.), *cert. denied*, 469 U.S. 852 (1984).

[217] *But see Alaska Airlines*, 55 U.S.L.W. at 4398 (*Alaska Airlines* court of appeals formulation "completely consistent with established severability standard"). The validity of the Supreme Court's harmonization is considered at *supra* note 33.

[218] *See supra* notes 29–31 and accompanying text.

[219] 766 F.2d at 1561 (emphasis in original).

First, by holding invalid vetoes severable from the power-granting provisions to which they were attached, the veto severability courts avoided creating precedents that might invalidate numerous governmental actions taken pursuant to the power-granting provisions. Second, the holdings of severability avoided a chain of severability questions that would have arisen from initial holdings of inseverability.

Because the veto severability judges do not admit these concerns, attributing some significance to the practicalities looming in the veto severability context involves inference. Still, given the large number of statutes and governmental actions the *Chadha* decision subjected to potential severability attack,[220] a number of courts have likely been drawn toward findings of severability—and toward presumptions and analyses facilitating such findings—in part because of a desire to avoid the practical consequences.

a. *The potential invalidity of actions undertaken pursuant to inseverable provisions*

Like any court holding an invalid provision inseverable from a related power-granting provision, a court deciding that a veto provision is inseverable would have to face the prospect that "a substantial amount of legislation [would be] drawn into question, as well as agency action thereunder."[221]

The Reorganization Act severability cases provide a dramatic example. As recognized by one such case, "[t]he Reorganization Act of 1977 alone . . . was the basis for ten different reorganizations which became effective between 1977 and 1980."[222] An inseverability ruling invalidating the statutory basis for all ten plans would have subjected each individual plan to a potential challenge. Indeed, because the ten plans "created agencies, transferred functions among agencies, and consolidated functions to eliminate duplication,"[223] all government actions undertaken pursuant to those created, transferred, and consolidated authorities arguably could be considered invalid.

Similarly, invalidation of the home-rule provisions giving the District of Columbia City Council greater authority over local

[220] *See supra* notes 3–6 and accompanying text.
[221] Muller Optical Co. v. EEOC, 743 F.2d 380, 384 (6th Cir. 1984).
[222] *Id.* at 384–85.
[223] *Id.*

laws, subject to congressional veto,[224] would have subjected a wide variety of civil and criminal ordinances to potential challenge.[225] Finally, invalidation of the federal rulemaking authority under oil price control provisions[226] would have called into question the validity of the price control rules and other administrative actions taken pursuant to them.

Could the veto severability courts holding power grants inseverable, and therefore invalid, have protected actions previously taken pursuant to the power grant by issuing exclusively prospective rulings? The option is theoretically available, but court decisions are generally presumed to apply retroactively. Courts generally issue prospective-only rulings only when the decision establishes a new principle of law not clearly foreshadowed, when retroactive application would retard the operation of the rule, or when the decision would produce substantial inequitable results.[227]

The veto severability courts would have had difficulty meeting any of the traditional prerequisites for departing from the norm of retroactive application. First, given the credible pre-*Chadha* arguments that the legislative veto was unconstitutional,[228] the decision was hardly a novel one not clearly foreshadowed. Second, given the *Chadha* Court's insistence on scrupulous adherence to the Constitution's legislative procedures, it cannot be said that retroactive application would retard operation of the rule of *Chadha*. The most plausible argument for a prospective-only ruling is that retroactive application would produce substantial inequitable results. Yet, the few veto severability courts deciding the retroactivity question have split on this inequity dimension.[229]

---

[224] District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, §§ 404(a), 602(c), 87 Stat. 774, 787, 814 (1973). Congress amended the Act in 1984 to remove the veto provisions. *See* Dimond v. District of Columbia, 618 F. Supp. 519, 522 n.1 (D.D.C. 1984).

[225] The Self-Government Act made all non-emergency civil ordinances and all criminal laws subject to two-House and one-House veto provisions, respectively. Pub. L. No. 93-198, §§ 602(c), 604, 87 Stat. 774, 814–16 (1973). Thus, after *Chadha* all such laws passed since 1974 were susceptible to potential challenge.

[226] This invalidation was the objective sought by the oil company challengers in Exxon Corp. v. Dep't of Energy, 744 F.2d 98 (Temp. Emer. Ct. App.), *cert. denied*, 465 U.S. 1108 (1984).

[227] Chevron Oil v. Huson, 404 U.S. 97, 106–07 (1971).

[228] *See* Immigration and Naturalization Service v. Chadha, 462 U.S. 919, 942 n.13 (1983) (summarizing long-standing constitutional objections raised by various United States presidents to legislative veto); *id.* at 976–77 n.12 (listing pre-*Chadha* academic commentary disfavoring legislative veto).

[229] *Compare* EEOC v. Chrysler Corp., 595 F. Supp. 344, (E.D. Mich. 1984) (Reor-

Overall, the excessive pro-severability bias of the veto severability courts can be expected to reflect, at least in part, a willingness to avoid the difficulties that flow from a holding of inseverability.

b. *The potential need to decide successive inseverability claims*

The second practical difficulty that a ruling of severability avoids arises when the provisions in a statute are interconnected in a complex way. Because of this relationship, a ruling that statutory provision *B* falls because invalid provision *A* is inseverable from it, raises a new question: must provision *C*, to which *B* was attached, fall because *B* is inseverable from *C*? With a multi-faceted statute, this chain of inquiries could go through additional cycles before reaching the ultimate question of whether all of the statute is void because of invalid provision *A*.

The statute at issue in *Consumer Energy Council v. Federal Energy Regulatory Commission*[230] provides an illustration. Title I of the Natural Gas Policy Act of 1978[231] established a comprehensive natural gas decontrol scheme.[232] Title II sought to ease

---

ganization Act's power grant inseverable from veto provision, but retroactive application "extremely unfair to the individual claimants in this suit") *with* EEOC v. Allstate Ins. Co., 570 F. Supp. 1224, 1232–33 (S.D. Miss. 1983), *appeal dismissed*, 467 U.S. 1232 (1984) (Reorganization Act power grant inseverable; holding should be applied retroactively in absence of substantial unfairness) *and* EEOC v. CBS, Inc., 743 F.2d 969, 975–76 (2d Cir. 1984) (Reorganization Act power grant inseverable; argument for prospective-only application rejected, but judgment stayed to permit remedial congressional action).

In addition, courts in some Reorganization Act cases have established an alternative basis for avoiding the scenario in which invalidation of the Reorganization Act power grant would negate the EEOC's enforcement authority. Usually as an alternative holding in case their holdings for severability are overturned on appeal, these courts have held that subsequent congressional actions, including the passage of two appropriations bills, have ratified the transfer of anti-discrimination authority to the EEOC. *See, e.g.*, Muller Optical Co. v. EEOC, 574 F. Supp. 946, 953–54 (W.D. Tenn. 1983) (court was "reluctant to base its holding solely on the severability of the one House veto"; court "consequently" decided Congress had ratified reorganization). Without a similar basis for arguing that other reorganization plans adopted under the 1977 Act had been ratified, the ratification theory would not have protected these plans, and governmental actions taken pursuant to them, from subsequent challenge. *See* Muller Optical Co. v. EEOC, 743 F.2d 380, 385 (6th Cir. 1984) ("The present case is merely one of the many possible ways a dispute might arise challenging a specific act of reorganization").

[230] 673 F.2d 425 (D.C. Cir. 1982).

[231] 15 U.S.C. §§ 3301–3432 (1982).

[232] *See Consumer Energy Council*, 673 F.2d at 433 (construing 15 U.S.C. §§ 3301–3333 (1982)).

the transition to deregulation through a two-phase system of incremental pricing. Phase I of Title II required FERC to issue an incremental pricing rule covering only one type of large industrial gas user. Phase II provided that subsequent FERC incremental pricing rules would go into effect if Congress did not veto them.[233]

The *Consumer Energy Council* court held that the veto provision conditioning the FERC's authority to propose Phase II interim regulations was severable from Congress' provision granting that authority.[234] Had the court held Phase II rulemaking authority invalid because the veto provision was inseverable, the court would have been faced with the question of whether Phase I pricing regulations were invalid because the authority to promulgate them was inseverable from the authority to promulgate Phase II rules.[235] In turn, a finding that Phases I *and* II (and therefore all of Title II) were invalid would have required the court to determine whether Title I could stand independent of Title II—or whether they were so intertwined that the invalidity of Title II required the invalidity of Title I.[236]

This chain of severability questions would have posed significant analytical difficulties. Indeed, it may have been with a sigh of relief that the *Consumer Energy Council* court stated: "[w]e do not need to reach these secondary arguments, however, because we find that [the veto provision] is severable from the remainder of [the Phase II regulatory power]."[237] A similar de-

---

[233] *See id.* at 435–36 (construing 15 U.S.C. § 3342 (1982)).

[234] *Id.* at 440–45 (construing 15 U.S.C. § 3342 (1982)).

[235] The argument for the inseverability of the two phases was that Congress would never have resolved the controversy over interim pricing through a two-phase approach to regulatory authority if it had been unable to use a veto device to condition Phase II. *Id.*

[236] The court would have had to decide all these questions because of the differing inseverability arguments made by the various parties in the course of disputing plaintiffs' standing:

> [Plaintiffs, who wish to benefit from Phase II interim pricing rules without the impediment of the legislative veto,] deny that [the veto provision] is inseverable from [the grant of Phase II rulemaking authority], but they go on to argue that if [all the Phase II provisions] must stand or fall as one, then [they] are inseverable from the rest of Title II, which in turn is inseverable from the NGPA. Striking down the entire NGPA arguably would provide petitioners with effective relief because it would reinstate the pre-existing stringent natural gas price control scheme. FERC denies that [Phase II is] inseverable from the remainder of the NGPA, arguing that Phase I and Title I could go into effect without change. Gas consumers, on the other hand, agree that [Phase II] is inseverable from [Phase I], but contend that Title I may stand alone.

Id. at 441.

[237] *Id.*; Gulf Oil Corp. v. Dyke, 734 F.2d 797 (Temp. Emer. Ct. App.), *cert. denied*, 469 U.S. 852 (1984), provides another illustration of the chain of successive severability

sire to avoid severability questions may have led other veto severability courts to use pro-severability presumptions and analyses in deciding in favor of severability.[238]

III. Two Cures for Unnecessary Surgery: Micro-Surgery and Plastic Surgery as Alternatives to the Either/Or Choice of Severability

The discussion in subpart II.C. suggests that the judicial tendency to find in favor of severability in the veto severability cases results in part from the narrow range of judicial options traditional severability analysis assumes. The veto severability courts have viewed their choices as limited to total severability of the legislative vetoes at issue from their accompanying power grants (and permitting executive officials to exercise more power than Congress would have preferred), and total inseverability (and providing those officials with less power than Congress

questions an initial finding of inseverability can pose. In *Gulf Oil*, the Gulf Oil Company argued that inclusion of legislative veto provisions in portions of the federal laws establishing and continuing federal oil price controls meant that both control schemes were invalid in their entirety. 734 F.2d at 802. The oil company's argument required the following reasoning:

(1) In enacting the Energy Policy and Conservation Act (EPCA) of 1975, Pub. L. No. 94-163, 89 Stat. 871 (1975), Congress would not have given the President authority to make subsequent adjustments to the oil price controls he established under the EPCA, EPCA at § 401, 89 Stat. 871, 944–45 (adding §§ 8(e)–(g) to Emergency Petroleum Allocation Act (EPAA) of 1973), without attaching a legislative veto to the power to make adjustments, *id.* § 551, 89 Stat. at 965–69.

(2) If Congress had not given the President the power to make subsequent adjustments, it would not have passed the provision authorizing the President to put a new scheme of price controls into effect initially, EPCA § 401, 89 Stat. at 942 (adding § 8(a) to EPAA of 1973).

(3) If Congress had not authorized the President to put into effect the new price controls (which were, in turn, modifications of the EPAA-based price controls already in effect), it would not have extended the previous price control regime. *See* Sen. Conf. Rep. No. 516, 94th Cong., 1st Sess. 189–90, *reprinted in* 1975 U.S. Code Cong. & Admin. News 1956, 2031 (discussing EPCA as embodying legislative compromise on extension of previous oil pricing policy).

(4) If Congress had not continued the price control regime, it would not have enacted legislation continuing the jurisdiction of the Temporary Emergency Court of Appeals to hear appeals based on oil pricing regulations. *Gulf Oil*, 734 F.2d at 804–05.

[238] *But see* National League of Cities v. Pierce, 634 F. Supp. 1449 (D.D.C. 1986) (finding veto provision inseverable from grant of budget deferral authority; remaining parts of Impoundment and Control Act held severable); Alaska Airlines v. Donovan, 594 F. Supp. 92, 96 n.5 (D.D.C. 1984), *rev'd*, 766 F.2d 1550 (D.C. Cir. 1985), *aff'd sub. nom.* Alaska Airlines v. Brock, 55 U.S.L.W. 4396 (U.S. March 25, 1987) ("Defendants suggest that the Court cannot strike down [the employee protection provisions of the 1978 Airline Deregulation Act] without also striking down the entire [Act]. The Court has little difficulty in rejecting this argument, and extended discussion is not necessary.").

would have preferred). Generally tolerant of broad legislative power delegations and aware of the practical problems raised by holdings of inseverability, courts apparently have seen total severability as the lesser of two evils.

This observation suggests, in turn, that erroneous judicial severability decisions could have been avoided in the veto cases—and would be avoided in future cases disputing the severability of power-limiting from power-granting provisions—by a new conception of severability permitting courts to transcend the stark either/or proposition. A "middle ground" approach would allow courts to accommodate competing congressional goals of delegating power and checking its exercise. Courts could support one goal without abandoning the other. Specifically, courts could partially honor Congress' power-checking goal while still avoiding the problems of policy and practicality now inclining the federal judiciary towards overly-generous severability rulings.

This Part analyzes two alternatives suggested, but neither justified nor fully developed, by the Supreme Court's severability analysis in *Chadha*. The first alternative may be called "microsurgery." It is similar to the approach taken in most legislative veto severability cases in that it excises statutory language; the difference is that the statutory surgery would be performed more precisely. The second alternative is not limited to cutting away the statutory language that is present. Rather, this "plastic surgery" approach would involve judicial reformulation of existing statutory provisions to achieve a desirable balance between delegation and control.

Subpart A illustrates the alternatives by examining how they could have been applied to statutes at issue in some of the legislative veto severability cases. Subpart B discusses the legitimacy of the judicial role implicit in each alternative.

A. *Two "Middle Ground" Alternatives: Some Examples*

1. More Precise Statutory Excision—The "Microsurgery" Alternative

a. *Excision to create a "report and wait" provision*

Many courts facing the apparent either/or dilemma posed by severability of legislative veto statutes had an easy, readily avail-

able option for partial escape. After holding that the power grants at issue survived despite the demise of their attached veto provisions, these courts could have taken pains to limit their statutory surgery to the narrowest excision necessary to remove the offending veto language. This microsurgery could have left behind language assuring significant legislative control over delegated power through a "report and wait" scheme.

A successful but too rare example of microsurgery is *Gulf Oil Corp. v. Dyke*.[239] The court held that section 551(a) of the Energy Policy and Conservation Act of 1975 (EPCA), which permitted the President to propose "energy actions" to respond to future energy crises,[240] was not invalidated by the legislative veto language contained in section 551(c). Section 551(c) provided that

> [a proposed energy action] shall take effect at the end of the first period of 15 calendar days of continuous session of Congress after the date on which such action is transmitted to such Houses, *unless between the date of transmittal and the end of such 15 day period, either House passes a resolution stating in substance that such House does not favor such action.*[241]

In severing the offending veto language, italicized above, in section 551(c), the *Gulf Oil* court recognized that the remainder of subsection (c) was not itself invalidated by *Chadha*.[242] The court preserved the residual language of subsection (c) so that, in concert with other remaining subsections of 551, "Congress would still retain the opportunity to review the Presidential proposals [and] disapprove of such actions through use of the constitutional legislative process."[243]

The report and wait scheme retained by the *Gulf Oil* court was a less powerful congressional check than the one-House veto device.[244] Still, the *Gulf Oil* court's effort to perform sta-

---

[239] 734 F.2d at 797. *See supra* note 237.

[240] *Gulf Oil*, 734 F.2d at 797 (construing Pub. L. No. 94-163, § 551(a), 89 Stat. 965 (1975)). "Energy actions" subject to veto included presidential proposals to make adjustments in oil price controls. *See supra* note 237.

[241] Pub. L. No. 94-163, § 551(c)(1), 89 Stat. 965 (1975) (codified at 42 U.S.C. § 6421 (Supp. 1986) (emphasis added)).

[242] *See also* Sibbach v. Wilson & Co., 312 U.S. 1, 15–16 (1941) (approving constitutionality of 180-day "report and wait" provision used to adopt Federal Rules of Civil Procedure); Immigration and Naturalization Service v. Chadha, 462 U.S. 919, 935 n.9 (1983) (citing *Sibbach*).

[243] *Gulf Oil*, 734 F.2d at 804 n.26.

[244] The most significant limitation is that action by one House would no longer be sufficient to alter presidential energy action. Given a system of congressional representation in which each House may view the other as under hostile partisan or ideological

tutory microsurgery to avoid the demise of all congressional control was preferable to ruling that the section 551(a) grant of presidential power may stand alone.[245]

Even without report and wait authority, Congress can always pass legislation to overturn *post facto* an execution of delegated authority.[246] However, widespread congressional use of report and wait provisions suggests that there is a significant difference between a scheme in which the executive action is valid until contrary legislation overruling it is passed during the normal legislative process, and a system in which the action is suspended for a specified time.[247] In a legislative session with an increasingly heavy workload, a report and wait provision can create a natural action-forcing mechanism by suggesting that suspended action may take effect soon unless Congress acts.[248]

---

control, the need to obtain the acquiescence of "the other body" to oppose the President's proposed energy action may be a signficant stumbling block. This disadvantage is not present, however, when report and wait schemes replace legislative veto provisions that require both Houses to express their disapproval. *See, e.g., infra* text accompanying notes 255–56 (two-House veto for FTC trade regulation rulemaking).

Further, even if a majority of both Houses agrees that legislation overriding an energy action should be passed, a president, already on record as believing the energy action is necessary, can through exercise of the veto require Congress to muster a two-thirds majority to override the veto. *See* Kaiser, *Congressional Control of Executive Actions in the Aftermath of the Chadha Decision*, 36 AD. L. REV. 239, 252 (1984). However, it would be incorrect to assume that a president would always be willing to proceed with an energy plan in the face of the disapproval of a majority of Congress. Presidential vetoes are not always politically cost-free. G. EDWARDS, PRESIDENTIAL INFLUENCE IN CONGRESS 23 (1980).

[245] The rationale for a ruling that the § 551(a) grant of authority alone shou]d be preserved would be that §§ 551(b) and (c) were intended solely to further the veto provision and are themselves inseverable from it.

[246] *See* Kaiser, *supra* note 244, at 244.

[247] One study of congressional enactments during the 1932–1978 time period suggests the extent to which Congress has regarded the report and wait option as a viable alternative to the legislative veto form of oversight. The study indicates that Congress passed 238 report and wait provisions and 205 legislative veto provisions during the time period. J. Cooper, Working Paper for Executive-Legislative Project, Georgetown University Center for Strategic and International Studies (October 31, 1983), *reprinted in Legislative Veto After* Chadha*: Hearings Before the House Comm. on Rules*, 98th Cong., 2d Sess. 252, 254 (1984) [hereinafter *House* Chadha *Hearings*].

[248] Congress' workload has increased drastically in recent years. *See* R. DAVIDSON AND W. OLESZEK, CONGRESS AND ITS MEMBERS 241 (2d ed. 1985) (Congress faces "heavy" and "expanding" workload). As a result, Congress is increasingly drawn to deadline-setting in order to accomplish its regular legislative business. *See, e.g.*, W. OLESZEK, CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS 44–45 (1978) (summarizing "rigorous timetable" for consideration of budget and spending bills established by 1974 Budget and Impoundment Control Act); A. MIKVA & P. SARIS, THE AMERICAN CONGRESS: THE FIRST BRANCH 200, 305 (1983) (describing congressional interest in mechanism by which "each government program would be 'sunsetted' every ten years unless renewed by Congress" as means to "insure the systematic review of government program"). Indeed, the steps Congress took to add an "action-forcing" mechanism to the legislative veto scheme in the 1977 Reorganization Act, see *supra* note 50, show

To the extent that these provisions create a real possibility that congressional opposition can be galvanized during the allotted time period, that possibility will not be lost on executive officials whose actions are subject to potential legislative disapproval while they wait.[249]

Many of the statutes at issue in veto severability cases lend themselves to the approach illustrated in *Gulf Oil*.[250] Further, the possibility of creating report and wait provisions in the wake of a severability holding had been noted in the Supreme Court's opinion in *Chadha*.[251] Yet few courts have performed the veto

---

that the legislature views deadline-creating provisions as necessary even when strong oversight medicine is administered.

[249] *See, e.g., supra* note 197 (summary of executive branch consultations with Congress due to legislative review provisions in federal election laws).

[250] The report and wait option was available to the large number of courts considering the validity of the Reorganization Act of 1977. The pertinent portion of the Act containing the veto provision reads as follows:

> a reorganization plan is effective at the end of the first period of sixty calendar days of continuous session of Congress after the date on which the plan is transmitted to it *unless, between the date of transmittal and the end of the sixty-day period, either House passes a resolution stating in substance that the House does not favor the reorganization plan.*

Pub. L. No. 95-17, § 2(a), 91 Stat. 29, 32 (1977) (codified at 5 U.S.C. § 906(a) (Supp. 1986) (emphasis added)). As with the statute in *Gulf Oil*, striking the italicized portion of § 2(a), while leaving the remainder of the section, would have created a provision in which reorganization plans would not have gone into effect for 60 days after they were reported. This would have created an opportunity, even longer than the 15 day time period in the EPCA, for opponents of reorganization plans to galvanize congressional action to overturn the plan.

Careful excision of veto language would have created report and wait provisions in the portions of the District of Columbia Self-Government and Governmental Reorganization Act to which Congress attached a legislative veto, Pub. L. No. 93-198, § 602(c), 87 Stat. 774, 814 (1973) (one- and two-House vetoes over certain District of Columbia ordinances). Finally, report and wait provisions could also have been created by the courts hearing severability challenges to the 1978 Airline Deregulation Act and the Presidential Recordings and Materials Act. *See infra* notes 252–53.

[251] Supreme Court recognition of the report and wait alternative came during discussion of whether the remainder of the Immigration Act's provisions on suspension of deportation would be "fully operative as a law" if the legislative veto provision were severed. The *Chadha* majority stated that its severance of the legislative veto language would leave a statutory scheme in which some congressional control over the Attorney General would still be possible. Immigration and Naturalization Service v. Chadha, 462 U.S. 919, 934–35 (1983). The Court said that the veto-less provisions still required the Attorney General (1) to report all proposed deportation suspensions to Congress, and (2) to wait the amount of time provided in the veto provision before finalizing the suspension. In the *Chadha* Court's view, the remaining controls created a de facto report and wait provision akin to the procedure used for congressional consideration of the Federal Rules of Civil Procedure. *Id.* at 935 n.9. "Congress' oversight of the exercise of this delegated authority [would be] preserved," *id.* at 935, because Congress could reverse the deportation suspension by passing new legislation pursuant to the ordinary legislative process, in compliance with Article I bicameralism and presentment requirements. *Id.*

See *infra* text accompanying notes 266–69 for an argument that the interrelationship of the suspension of deportation provisions is more complicated than the *Chadha* Court's

severability surgery in a way that leaves behind functioning report and wait provisions. The circuit court severability opinion recently affirmed by the Supreme Court in *Alaska Airlines, Inc. v. Brock* took advantage of one opportunity to create a functioning report and wait provision—only to ignore another opportunity for creating a longer, more general one.[252] Another court stated its intention to sever veto language so as to leave behind a report and wait provision, but the court's mishandling of the statute undercut that desire.[253]

---

analysis suggests; more than mere excision of veto language is necessary to achieve the result the *Chadha* Court envisioned for the Immigration Act. For now, what is significant is that many of the judges who tangled with the either/or choice of severability after *Chadha* could have followed the Supreme Court's suggestion and excised veto language so as to leave behind a functioning report and wait provision.

[252] The statute at issue in Alaska Airlines, Inc. v. Brock, 55 U.S.L.W. 4396 (U.S. March 25, 1987), is the Airline Deregulation Act of 1978. The section of the Act giving the Secretary of Labor rulemaking authority in order to implement the Act's "employee protection program" includes the following subsection:

> The Secretary shall not issue any rule or regulation as a final rule or regulation under this section until 30 legislative days after it has been submitted to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Public Works and Transportation of the House of Representatives. Any rule or regulation issued by the Secretary under this section as a final rule or regulation shall be submitted to the Congress and shall become effective 60 legislative days after the date of such submission *unless during that 60-day period either House adopts a resolution stating that that House disapproves such rules or regulations*. . . .

Pub. L. No. 95-504, § 43(f)(3), 92 Stat. 1750, 1752 (1978) (codified at 49 U.S.C. § 1552(f)(3) (Supp. 1986)) (emphasis added to specify unconstitutional legislative veto language). The *Alaska Airlines* opinion by the District of Columbia Circuit characterized the section just quoted as "combin[ing a] 'report and wait' provision (found in the first sentence of the quoted language) with a one-House legislative veto (set forth in the second sentence)." Alaska Airlines v. Donovan, 766 F.2d 1550, 1553 (D.C. Cir. 1985). The court concluded—and the Supreme Court did not alter the ruling in this regard, 55 U.S.L.W. at 4399—that the entire second sentence of the subsection was "eviscerated by *Chadha*" but that the first sentence was "unaffected in *Chadha*'s wake." 766 F.2d at 1560–61.

Salvaging the first sentence of section 43(f)(3) is certainly preferable to striking it down along with the second sentence. The 30-day report and wait provision will achieve part of the congressional intent to check the Secretary of Labor's rulemaking power by ensuring that relevant committees get an opportunity to react to rules before they become final.

However, the *Alaska Airlines* court's statutory surgery missed another opportunity to maximize the cause of congressional oversight. Contrary to the court's implicit assumption, *Chadha* only invalidates the italicized part of the second sentence of section 43(f)(3), not the part that precedes it. The non-italicized part of the second sentence, if retained after the severance of the veto language, would provide an additional longer period (60 days) for the *full Congress* to react to Labor Department regulations while the regulations lay dormant.

[253] The case is Allen v. Carmen, 578 F. Supp. 951 (D.D.C. 1983), which considered the severability of the rulemaking provision in the 1974 Presidential Recordings and Materials Preservation Act from the related legislative veto provisions. The Act's pertinent parts read:

> Sec. 104. (a) The Administrator shall, within ninety days after the date of enactment of this title, submit to each House of the Congress a report proposing

Overall, by severing veto provisions from their underlying power grants, courts have missed opportunities to "preserve[] to the greatest extent possible the compromise between Congress and the Executive intended."[254]

---

and explaining regulations that would provide public access to the tape recordings and other materials referred to in section 101. Such regulations shall take into account [seven specified factors.]

(b)(1) The regulations proposed by the Administrator in the report required by subsection (a) shall take effect upon the expiration of ninety legislative days after the submission of such report, *unless such regulations are disapproved by a resolution adopted by either House of the Congress during such period. . . .*

(3) The provisions of this subsection shall apply to any change in the regulations proposed by the Administrator in the report required by subsection (a). Any proposed change shall take into account [the seven specified factors in subsection (a)], and such proposed change shall be submitted by the Administrator in the same manner as the report required by subsection (a).

Pub. L. No. 93-526, § 104(a), (b)(1), (b)(3), 88 Stat. 1695, 1696, 1697 (emphasis added to specify the legislative veto language).

In finding that "the rulemaking authority of the Administrator under section 104(a) remains" after "the one-house veto provision is struck from the Act," the *Allen* court specifically stated its "disagreement" with the argument by the government defendants that portions of §§ 104(b)(1) and (b)(3) retained validity. 578 F. Supp. at 971. The court went on to state that, even without §§ 104(b)(1) and (b)(3), "[s]ection 104(a), standing alone" constituted a "'report and wait' provision." *Id.* Said the court: "Under the Act . . . a report will continue to be made to Congress. . . . Pursuant to this decision, the Administrator will have to promulgate appropriate new public access regulations by normal procedures which will become effective absent intervening corrective legislation." *Id.*

The court simply misread in two ways the interplay of the statutory provisions. First, § 104(a) "standing alone" could either permit the GSA to propose (but not promulgate) rules requiring affirmative congressional approval—something the *Allen* court clearly does not envision—or permit the GSA to report to Congress rules that are *immediately effective* upon reporting. Nothing in the language of § 104(a) would require the GSA report to "wait" a period of time so that Congress could consider "intervening corrective legislation." The non-italicized portion of § 104(b)(1), which states that reported GSA rules become effective at the end of 90 legislative days, would have to be retained to establish a report and wait scheme. Yet the court inexplicably chose not to retain § 104(b)(1).

Second, the *Allen* court's rejection of the idea of retaining § 104(b)(3) in the wake of severing the Act's veto language undercuts the congressional accountability the court attempted to further by creating a report and wait provision. Section 104(b)(3) was an important part of Congress' overall scheme to ensure appropriate GSA rulemaking. It prevented the GSA Administrator from avoiding the congressional review procedures through the artifice of "changing" a regulation in which Congress had acquiesced; the section did this by providing that changes in rules would be subject to the same congressional oversight procedures as the rules themselves.

A court seeking to leave behind a report and wait provision in severing the Act's veto provisions, therefore, would want to retain both the remaining constitutional portion of subsection 104(b)(1), to establish the report and wait scheme, and § 104(b)(3), to assure the efficacy of the scheme. The *Allen* court did neither.

[254] *Gulf Oil*, 734 F.2d at 804–05 n.26.

b. *Excision of only a portion of the veto-conditioned power grant*

Substituting report and wait provisions for legislative vetoes would partially sustain Congress' power-limiting goal while giving relatively more effect to Congress' power-granting purpose (by retaining all power-delegating provisions as originally enacted). As an alternative, more precise statutory surgery could be performed in a way that more fully supports Congress' power-limiting goal, but less effectively promotes Congress' power-granting purpose.

The statute enacted in 1975 to give the Federal Trade Commission power to prescribe "rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce"[255] illustrates the possibilities for this alternative form of surgery. In 1980, Congress limited the FTC's rulemaking authority by subjecting its rules to the possibility of a two-House veto.[256] Employing the traditional either/or severability approach to resolve a challenge to the rulemaking power's validity, the District of Columbia Circuit considered only two options: invalidating the full rulemaking authority or retaining it without the veto.[257]

Yet, there was another, better alternative. The legislative history of the 1980 legislative veto enactment shows that, although the 1980 legislative veto provision applied to FTC rules regulating both unfairness and deception, Congress was much more

---

[255] Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, Pub. L. No. 93-637, § 202(a), 88 Stat. 2193 (1975) (adding new § 18(a)(1)(B) to Federal Trade Act of 1938) (codified at 15 U.S.C. § 57(a)(1)(B) (Supp. 1986)).

[256] Federal Trade Commission Improvement Act of 1980, Pub. L. No. 96-252, § 21(a)–(i), 94 Stat. 374, 393–96 (1980) (codified at 15 U.S.C. § 57(a) (Supp. 1986)). The law reauthorized the Federal Trade Commission for three years. The 1980 law's provision for a two-House veto of FTC rules was a compromise between the House of Representatives' desire to subject FTC rules to an even more restrictive veto, and the Senate's narrow rejection of the House veto provision in favor of a scheme in which FTC regulations could be disapproved by joint resolution within a set time frame. H.R. CONF. REP. NO. 917, 96th Cong., 2d Sess. 37–38, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 1143, 1154–55.

[257] *Consumers Union v. FTC*, 691 F.2d 575 (D.C. Cir. 1982). The District of Columbia Circuit panel held, and the Supreme Court affirmed, that the FTC legislative veto provision was unconstitutional and severable. Despite the substantial congressional concerns reflected in the passage of the veto provision, see *infra* notes 258–62, the District of Columbia Circuit's decision merely assumed without discussion the severability of the FTC rulemaking power grant from the invalid veto provision.

concerned about the unfairness-based rules.[258] Congress adopted the veto provision partially in response to a study undertaken by the Administrative Conference of the United States.[259] The study emphasized the extent to which the FTC had in the late 1970's evolved "an extremely plastic, open-ended set of theories" to justify regulation under the unfairness portion of its rulemaking grant.[260] Congress' 1980 legislative veto enactment also responded to substantial objections by a wide array of interest groups to the extensiveness of the Commission's unfairness-based jurisdiction.[261] In fact, House and Senate proponents of the legislative veto repeatedly emphasized concerns about the unfairness aspect of FTC rulemaking power.[262]

---

[258] *See infra* notes 261–62. Indeed, Congress' concern about FTC authority after *Chadha* continued to focus on the unfairness-based powers. For example, in 1985 the Senate again considered legislation to amend the Federal Trade Commission Act. One provision of the amendments would have limited Commission power to declare acts or practices unlawful under an unfairness theory to situations in which "the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition." S. 1078, 99th Cong., 1st Sess. § 9, 131 CONG. REC. S10041 (daily ed. July 25, 1985). This restriction, which would not have been imposed on FTC actions based on a deceptive act or practice, was described by the floor manager of S. 1078 as an outgrowth of the fact that "Congress became increasingly concerned in the 1970s about some FTC actions under this broad mandate." *Id.* at S10044 (statement of Senator Ford (D-Ky.)).

[259] *See* S. REP. NO. 500, 96th Cong., 1st Sess. 3, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 1102, 1105. Section 202(d) of the 1975 FTC Improvements Act, Pub. L. No. 93-637, § 202(d), 88 Stat. 2183, 2198 (codified at 15 U.S.C. § 57(a) (Supp. 1986)), required the Administrative Conference of the United States (ACUS) to "conduct a study and evaluation of Federal Trade Commission rulemaking procedures" and report the results of the study to Congress within eighteen months.

[260] 131 CONG. REC. S10043 (daily ed. July 25, 1985) (statement of Senator Ford), quoting ACUS study at *supra* note 259.

[261] *See generally* STAFF OF SENATE COMM. ON COMMERCE, SCIENCE, & TRANSPORTATION, 96TH CONG., 2D SESS., UNFAIRNESS: VIEWS ON UNFAIR ACTS AND PRACTICES IN VIOLATION OF THE FEDERAL TRADE COMMISSION ACT (Comm. Print 1980) (230 page collection of divergent views of "numerous parties who are interested in the FTC proceedings involving unfair acts and practices"). *Id.* at 1. The great majority of the views collected in the Committee Print are highly critical of the broad FTC definition of "unfairness" for trade regulation rulemaking.

[262] This statement by the prime Senate advocates of the 1980 FTC legislative veto is typical in its emphasis on limiting unfairness-based trade rules:

> Considering that rules of the Commission may apply to any act or practice "affecting commerce," and that the only statutory restraint is that it be unfair, the apparent power of the Commission with respect to commercial law is virtually as broad as the Congress itself. The FTC claims the power to declare any commercial act, practice or commission to be "unfair," regardless of State law, and thereby to amend all State statutes and reverse all State cases which may be inconsistent with its declaration. All 50 state legislatures and State supreme courts can agree that a particular act is fair and lawful, but the five-man appointed FTC can overrule them all.

S. REP. NO. 184, 96th Cong., 1st Sess. 18, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 1073, 1088 (additional views of Senator Schmitt (R-N.M.), and Senator

Accordingly, one "middle ground" alternative to the extremes of finding the FTC rulemaking grant fully severable or fully inseverable would have been to find the legislative veto inseverable from the unfairness-based rulemaking power grant but severable from the deception-based power grant.[263] A court pursuing this alternative would not have excised all of the statutory words Congress used to define the FTC's mandate. Rather than attack the FTC's authority to enact rules regulating "acts or practices which are unfair or deceptive . . . ,"[264] the statutory surgery simply could have deleted the words "unfair or." This modification would have furthered Congress' power-controlling objective, by preventing the FTC from employing novel "unfairness" theories without a new congressional enactment. At the same time, this microsurgery would have partially honored Congress' power granting goal, by avoiding complete invalidation of all FTC rulemaking authority. Consistent with the legislative history's more limited concern about FTC rulemaking for deceptive acts or practices, FTC authority over such deceptive acts would have been preserved.

2. Judicial Reformulation of Statutory Language—The "Plastic Surgery" Alternative

a. *Reformulation to create a report and wait provision*

The discussion of the *Gulf Oil* decision explained how some courts severing power grants from their legislative veto provisions could have preserved functioning report and wait schemes; it also showed how report and wait schemes could have promoted congressional oversight objectives.[265] However, some

---

Goldwater (R-Ariz.)); *see also* S. REP. NO. 500, 96th Cong., 1st Sess. 59–60, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 1102, 1138–39 (identical language in additional views of Senator Schmitt, Senator Goldwater, and Senator Pressler (R-S.D.)).

[263] Other potential alternatives to total legislative veto severability or inseverability under the FTC Act existed. An option that would have better facilitated Congress' power-granting objective would have been to preserve the existing rulemaking authority *in toto* but reformulate the statute to subject rules to a report and wait provision. *See infra* note 269. An option honoring the congressional power-limiting purpose even more than the alternative discussed in the text would be to strike the unfairness-based rulemaking power grant *and* subject FTC exercise of the remaining misleading-based rulemaking authority to a report and wait provision.

[264] Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, Pub. L. No. 93-637, § 202(a), 88 Stat. 2183, 2193 (1975).

[265] *See* text accompanying notes 239–45.

formulations of legislative veto provisions are not convertible to report and wait provisions through statutory surgery alone. In these situations, the courts must perform "plastic surgery" to transform existing statutory language into a report and wait formulation.

For example, after authorizing the Attorney General to suspend deportation in appropriate cases, the Immigration Act of 1952 provides for a one-House legislative veto via the underlined portion of this statutory scheme:

> (c)(1) . . . If the deportation of any alien is suspended under the provisions of this subsection, a complete and detailed statement of the facts and pertinent provisions of law in the case shall be reported to the Congress with reasons for such suspension. . . .
>
> (2) . . . *[I]f during the session of the Congress at which a case is reported, or prior to the close of the [next session], either the Senate or the House of Reresentatives passes a resolution stating in substance that it does not favor the suspension of such deportation, the Attorney General shall thereupon deport such alien. . . .* If, within the time above specified, neither the Senate nor the House of Representatives shall pass such a resolution, the Attorney General shall cancel deportation proceedings.[266]

Merely stripping away the italicized veto portion in subsection (c)(2) would not leave behind a functioning report and wait provision. Subsection (c)(1) establishes the "report" component, but not the "wait" component. The non-italicized part of subsection (c)(2) does not by its own terms require that proposed deportation suspensions lie in abeyance for the amount of time specified in the 1952 Act. A functioning report and wait provision could only be created by reading the non-italicized portions of subsection (c)(2) as though they provided the following: "If legislation to the contrary is not enacted during the session of the Congress at which a case is reported, or prior to the close of the next session, the Attorney General shall cancel deportation proceedings."

The Supreme Court's *Chadha* opinion appears to endorse this reformulation approach, although the endorsement must be inferred from a brief and ambiguous discussion. In describing how

---

[266] 8 U.S.C. § 1254 (c) (1982) (emphasis added).

section (c) would operate without its veto provisions, the Court stated that

> [e]ntirely independent of the one-House veto . . . Congress' oversight of the exercise of this delegated authority is preserved since all such suspensions will continue to be reported to it under § 244(c)(1). Absent the passage of a bill to the contrary, deportation proceedings will be cancelled when the period specified in § 244(c)(2) has expired.[267]

This language could be read as showing that the Court thought that a report and wait provision would be created by the mere deletion of veto language. Or, the language could indicate an implicit willingness to perform statutory plastic surgery to preserve substantial room for meaningful congressional oversight of delegated authority.[268]

Whether intentionally or not, the *Chadha* court did provide a model by which some other courts facing legislative veto severability decisions could avoid the either/or severability dilemma.[269]

---

[267] Immigration and Naturalization Service v. Chadha, 462 U.S. 919, 934–35 (1983). The Court's presumed result requires executive branch action to wait—and be subject to congressional reversal—for a time period that would be, at a minimum, longer than a congressional session. This waiting period is significantly longer than the periods that would be created by the statutory excision process explained at *supra* notes 250–54 and accompanying text.

[268] This latter interpretation draws some support from two *Chadha* opinion footnotes, which may indicate that the Court recognized that the transformation of subsection (c) into a report and wait provision did not flow automatically from deletion of the veto language. In one footnote the Court stated that without the veto provision "Congress would *presumably* retain the power, during the time allotted in [subsection] (c)(2), to enact a law, in accordance with the requirements of Article I of the Constitution, mandating a particular alien's deportation." *Chadha*, 462 U.S. at 935 n.8 (emphasis added). In another footnote the Court stated that, without the veto language, subsection (c) "resembles" a report and wait provision. *Id.* at 935 n.9.

[269] For example, the legislative veto provision Congress attached to the FTC's rulemaking authority was written as follows:

> (a)(1) The Federal Trade Commission, after promulgating a final rule, shall submit such final rule to the Congress for review in accordance with this section. . . .
>
> (2) Any such final rule shall become effective in accordance with its terms unless, before the end of the period of 90 calendar days of continuous session after the date such final rule is submitted to the Congress, both Houses of the Congress adopt a concurrent resolution disapproving such rule.

Federal Trade Commission Improvement Act of 1980, Pub. L. No. 96-252, § 21(a), 94 Stat. 375, 393 (codified at 15 U.S.C. § 57a-1 (Supp. 1986) (omitted as terminated pursuant to Pub. L. No. 96-252 § 21(i), which provided that Pub. L. No. 96-252 § 21 cease to have any force on Sept. 30, 1982, and Pub. L. No. 97-373, which extended it until Sept. 30, 1983)). Mere statutory excision would have been insufficient to create a functioning report and wait provision for FTC rules. Rather, the language of subsection (a)(2) would have to have been read as though it embodied a formulation different from its express terms. (For example, subsection (a)(2) would have to be read as though it stated "Any such final rule shall become effective . . . unless, before the end of . . . 90 calendar days, legislation is validly enacted.").

b. *Reformulation of the veto-conditioned power grant*

Subpart III.A.1.b. expanded the concept of statutory microsurgery beyond the legislative veto provision, to include the power grant the veto modifies.[270] The theoretical possibilities for statutory reformulation also extend beyond alteration of legislative veto provisions. In appropriate cases, judicial plastic surgery could be performed on the power grants Congress seeks to limit through the veto mechanism. The results could provide a much closer approximation of Congress' intent than either total severability or total inseverability.

A timely example is the statute at issue in *Alaska Airlines v. Brock*.[271] In response to concerns that the 1978 Airline Deregulation Act could lead to temporary unemployment among airline employees, Congress established an employee protection program with two components: (1) a program providing monthly assistance payments to eligible employees deprived of employment through economic dislocations in the airline industry (the monthly assistance program), and (2) a general requirement that air carriers give preference to the dislocated former employees of other air carriers when filling new job vacancies (the duty to hire provision).[272] Congress granted the Secretary authority to make rules "necessary for the administration" of the employee protection program.[273] Congress then subjected "[a]ny rule or regulation issued by the Secretary under [the employee protection] section" to a sixty-day one-House veto provision.[274]

The language of the legislative veto provision did not distinguish rules implementing the monthly assistance program from those fleshing out the duty to hire provision.[275] However, the nature of the obligations imposed under, and the legislative history of, the employee protection program indicates that Congress's worries about limiting secretarial rulemaking were not triggered by the prospect of the Secretary's implementation of the duty to hire provision.[276] Rather, the monthly assistance

---

[270] *See supra* text accompanying notes 255–64.

[271] 55 U.S.L.W. 4396 (U.S. March 25, 1987), *aff'g* Alaska Airlines v. Donovan, 766 F.2d 1550 (D.C. Cir. 1985).

[272] Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (1978) (codified at 49 U.S.C. § 1552 (Supp. 1986)).

[273] 49 U.S.C. § 1552 (f)(1) (Supp. 1986).

[274] *Id.* § 1552 (f)(3).

[275] The veto provision is quoted in full at *supra* note 252.

[276] 55 U.S.L.W. at 4399–401.

program provided greater room for executive discretion,[277] involved a potentially large commitment of government funds,[278] and, as a result, created more controversy and concern about limiting executive discretion.[279] Further, the only bit of legislative history directly supporting the veto provision as a means of controlling secretarial discretion referred specifically to regulations implementing the monthly assistance program.[280]

The courts deciding the *Alaska Airlines* severability dispute conceived their task as deciding whether the legislative veto provision Congress had included was severable from all of the employee protection rulemaking grant, or none of it.[281] Yet Congress' different levels of concern about the two subjects of the Labor Secretary's employee protection rulemaking offered an alternative conception of the severability question: from *how much* of the rulemaking grant was the legislative veto severable?

The courts could have answered the new question by concluding that Congress would not have given the Secretary rulemaking authority over the monthly assistance component without retaining a legislative veto, but would have granted rulemaking authority over the duty to hire without the veto

---

[277] The provisions relating to the monthly assistance program give the Secretary several rulemaking powers directly fixing the amount of benefits available. For example, Congress authorized the Secretary to promulgate guidelines "to be used in determining the amount of each monthly assistance payment to be made to a member of each craft and class of protected employees," 49 U.S.C. § 1552(b)(1) (Supp. 1986); the Secretary also had power to define "reasonable moving expenses" and determine how to calculate whether a protected employee had to sell his house "at a price below its fair market value" because of "industry dislocation," *id.* § 1552(c).

By contrast, the Secretarial tasks with respect to the duty to hire extended to more routine duties such as publishing a periodic list of jobs available with air carriers and making "every effort to assist an eligible protected employee in finding other employment." *Id.* § 1552(d)(2) (Supp. 1986).

[278] S. REP. No. 631, 95th Cong., 2d Sess. 115 (1978) (discussion about "the potential expenditure of Government funds" focuses on monthly assistance program; no discussion about cost of duty to hire provision).

[279] *See, e.g.*, 124 CONG. REC. 10674–83 (1978) (Senate debate over proposal by Senator Zorinsky (D-Neb.) to eliminate monthly assistance program, but not duty to hire program).

[280] S. REP. No. 631, 95th Cong., 2d Sess. 116 (1978) (statement that the "amount of [each monthly] payment would be . . . determined by regulations promulgated by the Department of Labor" and that "[t]hese regulations will be subject to congressional review").

[281] Alaska Airlines v. Donovan, 766 F.2d 1550, 1554 (D.C. Cir. 1985) (statement that "the severability of the legislative veto from the remainder of section 43 of the Airline Deregulation Act" was the "principal issue presented on this appeal"); 594 F. Supp. 92, 94 (issue is whether "defective [veto] portion of § 43 can be 'severed' from the rest of that section").

limitation.[282] This answer would have been equivalent to the holding of partial inseverability discussed in the FTC rulemaking example—except that statutory reconstruction, not just selective statutory excision, would have been necessary. Essentially, the courts would have had to construe the employee protection program rulemaking grant as though it authorized not "[a]ny rule or regulation issued by the Secretary under this section," but merely "any rule or regulation issued by the Secretary *to implement the duty to hire provisions of* this section."

In sum, through more selective statutory excision (the "microsurgery" model) or statutory reconstruction (the "plastic surgery" model), many veto severability courts could have more effectively balanced Congress' competing desires to grant power and to restrain its exercise.

B. *The Legitimacy of More Careful Judicial Surgery*

The alternatives just described would involve a more active and creative judicial role than that assumed by the traditional severability doctrine. Therefore, the question naturally arises whether the proposed role is legitimate in terms of the constitutional separation of powers and related norms about judicial treatment of the democratically-elected legislature's work product.

Because severability courts and commentators have assumed that severability poses an either/or choice, they have not spoken directly to the legitimacy of the more creative judicial role proposed in this Article. The severability cases and commentaries do recognize in a general way an outer limit to the judicial role. For example, two early commentaries warn that a court deciding a severability dispute "cannot take upon itself the right to legislate"[283] and that it "cannot, by making necessary deletions

---

[282] Because Congress never appropriated funds for the monthly assistance component, the Labor Secretary never issued regulations implementing it. *Alaska Airlines*, 766 F.2d at 1553. Still, an interpretation of the employee protection rulemaking power as *partially* inseverable from the legislative veto provides a more satisfactory reading of the statute than that offered by either the district court, which found total inseverability, or the circuit court, which found total severability. *See supra* note 12.

[283] Hayes, *Partial Unconstitutionality With Special Reference to the Corporation Tax*, 11 COLUM. L. REV. 120, 141 (1911).

and insertions . . . , completely revise the legislative scheme."[284] More recent versions of this theme include a 1980 Ninth Circuit severability opinion disclaiming judicial authority "to indulge in major revisions to salvage the statute"[285] and a 1984 reminder from Justice Brennan that "the doctrine of severability 'does not . . . license a court to usurp the policy-making and legislative functions of duly-elected representatives.'"[286]

These statements need not necessarily suggest that it would have been illegitimate for the veto severability courts to have performed more extensive microsurgery or plastic surgery. The judicial microsurgery and plastic surgery previously discussed would not have "completely revised" the underlying statutes. Being relatively brief, the changes would not even have constituted "major" revisions. More active judicial approaches to severability do not necessarily deserve to be denigrated as "judicial legislation" or "usurpation" as long as the approaches serve congressional intent. Indeed, since honoring congressional intent is the touchstone of severability analysis, it would be ironic to brand as illegitimate approaches that serve legislative purpose better than the present either/or severability approach.

Still, the current approach to severability has tradition on its side. Therefore, this subpart presents a three-step argument for the legitimacy of microsurgery and plastic surgery as alternative severability approaches. First, this subpart assesses the conceptions of the judicial role used in *Regan v. Time, Inc.*,[287] a Supreme Court severability case decided one year after *Chadha*. Second, this subpart examines the view of judicial legitimacy employed in Supreme Court decisions applying two analogous statutory construction doctrines. Third, this subpart argues that the legitimacy conception revealed both in *Time, Inc.* and in the analogous cases justifies the more active role inherent in microsurgery and plastic surgery.

---

[284] Stern, *supra* note 108, at 100 n.111. Stern's statement echoed his subsequent conclusion that courts deciding a severability dispute cannot "write a completely new statute." *Id.* at 123.

[285] Spokane Arcades Inc. v. Brockett, 631 F.2d 135, 139 (9th Cir. 1980), *aff'd mem.*, 454 U.S. 1022 (1981), *reh'g den. sub nom.* Brockett v. Spokane Arcades Inc., 454 U.S. 1165 (1982).

[286] Regan v. Time, Inc., 468 U.S. 641, 665 n.2 (1984) (Brennan, J., concurring in part) (quoting Heckler v. Mathews, 465 U.S. 728, 741 (1984)).

[287] 468 U.S. at 641.

1. *Regan v. Time, Inc.*: Direct and Indirect Support for Severability Microsurgery

In *Regan v. Time, Inc.*, a majority of the Supreme Court invalidated on First Amendment grounds provisions conditioning the application of federal anti-counterfeiting laws to the representation of federal currency upon the purpose of the representation.[288] Four Justices then relied upon severability doctrine to rule that the invalidity of this "purpose" limitation did not require the invalidation of two related restrictions, based on the size and color of the pictorial representations.[289]

The size and color restrictions were part of the same "single integrated statutory phrase"[290] containing the purpose limitation. This meant that the willingness of the four Justices to disengage the purpose limitation from the color and size restrictions[291] signaled—apparently for the first time[292]—a willingness by the Court to engage in statutory microsurgery. The *Time, Inc.* plurality's selective excision of an invalid portion from other parts of a statutory section was the form of microsurgery that veto severability courts could have used to separate valid report and wait portions from invalid veto parts.[293] Thus, read in terms of

---

[288] 18 U.S.C. § 474 (1982) bans the use of photographic reproductions of United States currency. 18 U.S.C. § 504(1)(D) (Supp. 1986) grants an exception from the § 474 ban for, inter alia, the printing of currency illustrations "for philatelic, numismatic, educational, historical, or newsworthy purposes in articles, books, journals, newspapers, or albums." The exception is available only if illustrations are in black and white and are significantly smaller or larger than the actual size of the currency depicted. All but one member of the Court found that the portions of § 504(1)(D) referring to the purpose of the currency illustration constituted content-based government regulation impermissible under the First Amendment. 468 U.S. at 648–49 (plurality opinion by White, J., joined by Burger, C.J., Rehnquist, and O'Connor, JJ.) (purpose restrictions "cannot help but be based on the content of the photograph and the message it delivers"); *id.* at 664 n.1 (Brennan, J., concurring in part, joined by Marshall, J.); *id.* at 691 (Powell, J., concurring in part, joined by Blackmun, J.).

[289] Five Justices found the color and size requirements of § 504(1)(D) to be constitutionally legitimate. *Id.* at 655–59 (plurality opinion) (requirements are reasonable content-neutral "time, place, and manner" regulations); *id.* at 700–04 (Stevens, J., concurring in part). The remaining four Justices did not reach the issue. *Id.* at 688 n.27 (Brennan, J., concurring in part, joined by Marshall, J.); *id.* at 692 (Powell, J., concurring in part, joined by Blackmun, J.).

[290] *Id.* at 667 (Brennan, J., concurring in part).

[291] The plurality opinion surveyed the legislative history of § 504 and concluded: "We are quite sure that the policies Congress sought to advance . . . can be effectuated [by severing and preserving the color and size requirements] even though the purpose requirement is unenforceable." *Id.* at 653. An equal number of Justices opposed the plurality's severability disposition. *See infra* note 295 and accompanying text.

[292] *Time, Inc.*, 468 U.S. at 667 (Brennan, J., concurring in part).

[293] *See supra* notes 239–54 and accompanying text.

its holding, *Time, Inc.* provides plurality support for the more modest form of microsurgery proposed in this Article.

The case has a broader application to the issue of legitimacy. Read in terms of the debate between its key Supreme Court factions, *Time, Inc.* suggests that a court does not lose its legitimacy when it departs from severability as an either/or choice.[294] Rather, the case suggests that a court errs only when it departs from congressional intent in the process.

Justice Brennan's lengthy and spirited dissent from the plurality's statutory microsurgery—a dissent endorsed by three other Justices[295]—appears at first to be a general critique of judicial creativity during severability decision-making. The Brennan dissent included the charge, quoted above, that the plurality had usurped legislative and policy-making functions.[296] The dissent also called the plurality's separation of the "purpose" requirement of federal anti-counterfeiting statutes from the color and size requirements "a 'remarkable feat of judicial surgery.'"[297]

However, Justice Brennan did not object to the plurality's use of statutory microsurgery per se. Rather, Justice Brennan objected to the plurality's actions because the "reconstructed scheme [bore] no relationship to the language, history, or pur-

---

[294] This sentence, like the remainder of the discussion in this subpart, mirrors current severability case law in assuming that the present either/or severability options do not themselves raise separation of powers concerns. Professor Laurence Tribe disputed that assumption in a critique of the Supreme Court's handling of severability in the *Chadha* case. As Tribe noted, "whatever Congress *would have done* if the veto device had been unavailable to it at the time of the underlying law's enactment, the fact is that Congress *has not enacted* the law in a veto-free form." Tribe, *supra* note 114, at 22 (emphasis in original). Tribe viewed a holding of severability as one "disregard[ing] the absence of any actual enactment of the severed law in accord with Article I's strictures" and creating a "new law . . . by judicial fiat." *Id.* On the other hand, Tribe's analysis suggests that "the option of *refusing* to sever the invalid provision so as to leave the underlying law in effect once its unconstitutional veto provision has been held void and rendered inoperative poses separation-of-powers problems of its own." *Id.* at 23 (emphasis in original).

The alternative approaches proposed in this Article do not "avoid[] the several paradoxes to which the more heavily intent-based approaches to severability—the approaches ordinarily employed by the Supreme Court—give rise." *Id.* at 26. However, the Article's alternatives are no less legitimate.

[295] Justice Marshall joined the dissent in which Justice Brennan extensively critiqued the plurality's severability disposition, 468 U.S. at 659–77. Justice Powell wrote a less extensive separate concurrence, in which Justice Blackmun joined. The Powell concurrence expressed agreement with Justice Brennan's analysis of the severability issue. *Id.* at 691–92.

[296] *See supra* text accompanying note 286.

[297] 468 U.S. at 661 (Brennan, J., dissenting in part) (quoting Welsh v. United States, 398 U.S. 333, 351 (Harlan, J., concurring in result)).

pose of the statutes enacted."[298] Justice Brennan agreed with the plurality that judicial statutory reconstruction is legitimate "as long as [the Court's] interpretation remains consistent with Congress' objectives."[299]

2. Judicial Creativity in the Service of Congressional Purpose: Legitimacy Conceptions in Two Analogous Domains

The suggestion in *Time, Inc.* that the legitimacy of judicial statutory reformulation depends not upon the method of the reconstruction, but on its faithfulness to congressional intent, is supported by cases from two doctrinal domains closely related to severability. Both domains—narrow statutory construction to avoid constitutional questions and remedial extension of unconstitutionally underinclusive statutes—resemble severability in that they are non-constitutional statutory construction doctrines closely allied with the adjudication of constitutional questions. Unlike severability, however, both domains tolerate judicial plastic surgery on statutes as long as it is consistent with legislative intent.

The assumption that courts may legitimately "rewrite" statutes is inherent in the principle that courts should construe statutes to avoid constitutional questions.[300] Courts applying this principle go far beyond merely "construing" statutes, in the sense of clarifying ambiguous terms in light of intrinsic and extrinsic legislative intent indicators. In many cases, the narrow judicial constructions are the functional equivalent of striking out existing statutory language and adding new language not present in the statute as enacted.

---

[298] 468 U.S. at 661; *see id.* at 660 (plurality opinion erred by ignoring "the statutes enacted by Congress" in favor of "a statutory scheme of its own creation"); *id.* at 691 ("the alternative pieces of legislation proposed by Justice White and Justice Stevens bear little resemblance to the statute Congress passed"). Justice Brennan based this conclusion on an extensive analysis of the language and legislative history of federal anti-counterfeiting legislation. *See id.* at 663–77.

[299] *Id.* at 661 (Brennan, J., concurring in part). Justice Brennan equated Justice White's conclusion that the color and size restrictions were severable from the purpose restrictions with a "limiting construction of the statute at issue." It is in this context that Justice Brennan made the statement partially quoted in the text. The full statement reads: "I certainly agree with the principle that we should construe statutes to avoid constitutional questions, so long as our interpretation remains consistent with Congress' objectives." *Id.* at 661.

[300] *See, e.g.*, Ashwander v. TVA, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring); G. GUNTHER, CONSTITUTIONAL LAW 1597–98 (11th ed. 1985).

An example is the plurality decision in *Welsh v. United States*.[301] Through statutory reconstruction the plurality sidestepped an Establishment Clause challenge to a provision of the Universal Military Training and Service Act exempting from military service "any person . . . who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form."[302] The plurality read the exemption as though it applied to "all those whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war."[303] Functionally, this disposition amounted to striking the phrase "by reason of religious training or belief" from section 6(f) and inserting the plurality's "moral, ethical, or religious" formulation in lieu of the religious-only restriction.

Particularly instructive is the fact that acceptance of judicial "rewriting" of statutes in the narrow construction context has come after early Supreme Court warnings that "amendment may not be substituted for construction" and "a court may not exercise legislative functions" to avoid a constitutional confrontation.[304] Under current doctrine the legitimacy of a proposed narrow construction does not turn on whether the construction "amends" existing statutory language. Rather, what determines legitimacy is whether the new meaning is consistent with the overall legislative policy embodied in the statute.[305]

---

[301] 398 U.S. 333 (1969).

[302] Universal Military Training and Service Act, ch. 625, 62 Stat. 604, 612 (1948) (codified at 50 U.S.C. § 451 (1982)). The Military Act's language raised an Establishment Clause issue because it favored conscientious objectors motivated by formal, traditional courses of "religious training and belief" while disfavoring objectors motivated by nontraditional courses of spiritual inquiry.

[303] 398 U.S. at 344.

[304] Yu Cong Eng v. Trinidad, 271 U.S. 500, 518 (1926); *see, e.g.*, United States v. Reese, 92 U.S. 214, 221 (1875) (rejecting argument that, in reconstruing unconstitutional statutory provision, court can go beyond "striking out or disregarding words that are in the section" and "insert[] those that are not now there").

[305] For example, in dissenting from a majority opinion narrowly construing federal labor statutes to avoid a constitutional question, Justice Brennan distinguished between constructions that are "fairly possible" and "reasonable," because they comport with the legislative history of the statute in question, and those which constitute "wholesale judicial dismemberment of congressional enactments." NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 510–11 (1979) (Brennan, J., dissenting). *See also* Heckler v. Mathews, 465 U.S. 728, 741–44 (1984) (rejecting narrow construction argument because it was inconsistent with legislative intent); Welsh v. United States, 398 U.S. 333, 351 (1969) (Harlan, J., concurring in result) (criticizing majority's narrow construction as inconsistent with statutory terms and legislative history; construction would be "a lobotomy" that "completely transformed the statute"); Marchetti v. United States, 390

The validity of reconstructive statutory surgery by the judiciary is similarly recognized under the doctrine that, after holding a statutory scheme invalid because of unconstitutional underinclusiveness, a court can remedy underinclusive statutes by "extend[ing] the coverage of the statute to include those who are aggrieved by exclusion."[306] For example, in *Califano v. Westcott*,[307] the Supreme Court held that a federal statute affording aid to families with dependent children who are deprived of parental support because of the unemployment of their father—but not their mother—reflected an unconstitutional gender-based discrimination. Rather than terminate all assistance under the provision, the Court remedied the discrimination by extending program benefits to children regardless of the gender of their unemployed parent.[308]

As with cases involving narrow statutory construction to avoid constitutional difficulties, courts "extending" the coverage of statutory benefits must go beyond mere statutory excision to achieve congressional intent; the courts must read words into existing statutes.[309] Also like the narrow construction cases, the dispute about the legitimacy of reformulating underinclusive statutes concerns whether the action will further, instead of undercut, congressional intent[310]—not whether the extension is legitimate at all.[311]

U.S. 39, 58–60 (1968) (rejecting attempt to read narrowing words into statute because result would be contrary to "a significant element of Congress' purposes").

[306] *Welsh*, 398 U.S. at 361.

[307] 443 U.S. 76 (1979).

[308] In so holding, the Court cited a number of "previous cases involving equal protection challenges to underinclusive federal benefits statutes [in which] this Court has suggested that extension, rather than nullification, is the proper course." 443 U.S. at 90–91.

[309] For example, the statutory provision at issue in Califano v. Westcott gave benefits to families with a "dependent child," the definition of which included a "needy child . . . who has been deprived of parental support or care by reason of the unemployment . . . of his father." 443 U.S. at 80 (later quoting § 407 of the Social Security Act). Mere excision of the term "father" from the definition of "needy child" would not eliminate the gender discrimination in the program. Either (1) the term "father" would have to be deleted and the term "parent or parents" would have to be added, or (2) the term "or mother" would have to be added after the term "father".

[310] The majority in Califano v. Westcott justified the remedial statutory extension as consistent with congressional intent. 443 U.S. at 90 (extension avoids imposing "hardship on beneficiaries whom Congress plainly meant to protect"). In disputing the validity of the majority's statutory extension, the four dissenting Justices argued that the Court could not "assume that Congress in 1968 would have approved this extension if it had known that ultimately payments would be made whenever either parent became unemployed." *Id.* at 95–96.

[311] *See id.* at 91–92 ("All parties before the District Court agreed that extension was the appropriate remedy. . . . The narrower question presented [concerned] the form that extension should take.").

3. The Legitimacy of—and Limitations on—the Alternative Approaches to Severability

The cases analyzed in the two previous subparts provide the raw materials for establishing the legitimacy of judicial microsurgery and plastic surgery as an adjunct to severability decision-making. The cases provide models directly legitimizing microsurgery and plastic surgery on statutory sections containing invalid portions. The cases also stand for a general principle indirectly legitimizing microsurgery and plastic surgery on statutory sections other than those containing invalid portions. These more creative judicial procedures are only legitimate to the extent that they achieve results consistent with legislative intent.

The *Time, Inc.* plurality directly approved microsurgery for partially invalid statutory provisions when the procedure would advance the legislature's overall purpose. In turn, the Justices dissenting from the plurality's severability disposition accepted microsurgery in appropriate cases.

The Supreme Court precedents on avoidance of constitutional questions and extension of underinclusive statutes provide a useful analogy for legitimizing reformulation of partially invalid provisions through plastic surgery. Analogizing severability decision-making to the narrow statutory construction area is apt, given the extent to which severability cases, and commentaries on them, have drawn comparisons between the two domains.[312] Analogizing severability to the extension of underinclusive statutes recognizes the essential similarity between the two situations: when constitutional considerations prevent Congress from pursuing its desired statutory approach, the courts must determine how much, if any, of the remainder Congress would want to preserve.[313] In both the narrow construction and underinclusive statute contexts, the legitimacy of judicial statutory reformulation does not vanish when the court must go beyond word deletion and actually "add words" to a statute. Likewise in the analogous severability domain, it would be legitimate for sever-

---

[312] *See, e.g.*, Regan v. Time, Inc., 468 U.S. 641, 664–65 n.2 (1984) (Brennan, J., dissenting in part) (severability "derives" from "the general rule of construing statutes to avoid constitutional questions"; citing narrow construction cases as applicable to severability context); *see also supra* note 15 (citing severability cases that draw parallels to narrow construction doctrine).

[313] By contrast, narrow construction of statutes is undertaken to *avoid* constitutional adjudication.

ability courts to perform plastic surgery on statutory provisions in the face of partial or potential invalidity, provided that the reformulation furthers congressional intent.

Because the above cases involved microsurgery or plastic surgery on statutory provisions themselves containing constitutionally suspect portions, they provide only an indirect model for the two remaining severability alternatives proposed in this Article: microsurgery and plastic surgery on provisions *other than* those containing the invalid veto provisions.[314] However, these alternatives gain legitimacy when *Time, Inc.* and the analogous cases are read as embodying the broader principle that judicial reformulation of statutes is legitimate in the service of legislative intent. Indeed, given the concern expressed in *Time, Inc.* that severability dispositions not "frustrate the intent of the elected representatives of the people,"[315] modest deletion of words from, or addition of words to, provisions other than those containing the troublesome language seems fully appropriate if it is the best way to avoid such frustration.[316]

Of course, each of the alternative formulations proposed in this Article would lose its claim to legitimacy if a court employed it without sufficiently clear knowledge that it would further legislative intent. Statutory reformulation would be illegitimate when the court simply "[could not] know how Congress would assess the competing demands" that must be weighed in reconstituting a statute.[317] Statutory reformulation would also lose its

---

[314] *See supra* text accompanying notes 263 & 282 (explaining possible microsurgery on portion of FTC rulemaking grant relating to "unfair" practices, and plastic surgery on Labor Department employee protection rulemaking power in 1978 Airline Deregulation Act).

[315] 468 U.S. at 652 (plurality opinion by White, J.).

[316] The deletions or additions should be "modest," as a prudential measure to assure consistency with congressional intent and to avoid violating the injunction that courts should not "indulge in major revisions to salvage the statute." *See supra* text accompanying note 285.

[317] Marchetti v. United States, 390 U.S. 39, 59 (1967). The Court rejected the government's plea that the Court read restrictive language into federal laws requiring gamblers to register and pay an occupational tax so that the law would be insulated against a Fourth Amendment attack. As noted *supra* at note 305, the Court rejected the proposed reconstruction in part on the theory that it would "directly preclude effectuation of a significant element of Congress' purposes in adopting the wagering taxes." *Marchetti*, 390 U.S. at 59. However, the Court also rejected the proposed reconstruction on the following basis:

> Moreover, the imposition of such restrictions would necessarily oblige state prosecuting authorities to establish in each case that their evidence was untainted by any connection with information obtained as a consequence of the wagering taxes; the federal requirements would thus be protected only at the cost of hampering, perhaps seriously, enforcement of state prohibitions against gambling. We cannot know how Congress would assess the competing demands

legitimacy if it required a judgment for which the court is "ill-equipped."[318]

One hypothetical example violating both limitations would be a court trying to reformulate the congressional bargain that lead to passage of Title X of the Impoundment and Control Act of 1974. Title X gave the President authority to defer congressionally-mandated spending appropriations, subject to a legislative veto.[319] The legislative history of Title X indicates that it was part of a carefully crafted compromise between the Senate's position that presidential cancellation or deferral of appropriations should require affirmative congressional approval, and the House's position that they should proceed, subject to a one-House veto.[320]

The legislative history contains no solid indications about which potential reconstruction of Title X Congress would have preferred.[321] Congress may well have returned to the legislative drawing board rather than accept either House's position. Finally, given the sensitive fiscal and constitutional dimensions of the fight between Congress and the President leading to passage of Title X,[322] courts seem "ill-equipped" to resolve the offsetting policy considerations that reformulation of the Title would have required.

---

of the federal treasury and of state gambling prohibitions; we are, however, entirely certain that the Constitution has entrusted to Congress, and not to this Court, the task of striking an appropriate balance among such values.

390 U.S. at 59–60.

[318] Califano v. Westcott, 443 U.S. 76, 93 (1979) (rejecting statutory reformulation requiring the Court "to estimate the relative costs of various types of coverage, and to gauge the effect that different levels of expenditures would have upon the alleviation of human suffering").

[319] Pub. L. No. 93-344, §§ 1001–1017, 88 Stat. 297, 332–37 (1974) (codified at 2 U.S.C. §§ 681–688 (1985)). The example is hypothetical because the court that actually considered the severability of Title X's deferral authority from its accompanying legislative veto provision found the provisions inseverable. National League of Cities v. Pierce, 634 F. Supp. 1449 (D.D.C. 1986). This decision was more appropriate than attempting to reformulate Title X through any of the alternatives proposed in this Article.

[320] "The compromise bill [which became the Impoundment and Control Act] adopted the Senate approach for rescissions, or permanent impoundments, requiring approval through the enactment of legislation. It employed the House approach for deferrals, or temporary impoundments, allowing the deferrals to become effective unless disapproved by either House." *National League of Cities*, 634 F. Supp. at 1455.

[321] For example, the conference report on the bill that became the Impoundment and Control Act merely stated that "[t]he conference substitute combines features from each version." S. CONF. REP. No. 924, 93d Cong., 2d Sess. 76, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 3462, 3616. The explanation of the compromise bill does not in any way characterize which House's concerns were dominant or which provisions were key elements of the compromise. S. CONF. REP. No. 924, 93d Cong., 2d Sess. 76–78, 1974 U.S. CODE CONG. & ADMIN. NEWS 3616–18.

[322] *See, e.g.*, G. GUNTHER, *supra* note 300, at 361–62.

In sum, a recent Supreme Court encounter with severability and recent court decisions in the narrow construction and underinclusive statute domains justify, by example or by underlying principle, the alternative approaches to severability discussed in subpart III.A.

IV. Conclusion

The legislative veto severability cases required the federal courts to decide an unusually large number of severability disputes over a brief time period. The collective judicial response has been marred by an excessive eagerness to sever veto provisions from their accompanying power grants. Compounding inappropriate decisional presumptions with other analytical errors, most of the veto severability courts have ignored strong legislative history signals that justified holdings of inseverability or, at the least, merited more probing analyses of Congress' severability intent.

Implicit in this critique is the position that courts resolving veto severability disputes now or in the future should avoid the errors of their predecessors. Yet, explicit in this Article's discussion of why the veto severability courts have erred is the view that the federal courts' general pro-delegation bias and the practical difficulties posed by the inseverability holdings will continue to provide strong incentives to favor severability. If the only alternative is total inseverability and the subsequent total frustration of Congress's power-granting goal, unnecessary statutory surgery is likely to continue. Instead, a better embodiment of Congress' mixed power-granting and power-limiting goals could be achieved through alternative approaches avoiding severability as an either/or choice.

The analysis in this Article has more general implications. It suggests that courts confronting controversies about the severability of power-granting provisions from *any* power-limiting provisions should avoid both the pro-severability presumptions and the analytical errors found in the veto severability cases. The analysis also suggests that these courts should consider using "microsurgery" and "plastic surgery" to avoid the dilemma created when traditional severability doctrine applies to situations in which, in delegating power, Congress both giveth and taketh away.

In arguing why the severability clause-based presumption and the general pro-severability presumption should not apply in the veto severability context, this Article used reasoning generally applicable to all power-limiting provisions. Whatever its other deficiencies, the presence of a generic severability clause is a particularly unreliable basis for concluding that Congress wants power grants to survive when the significant controls placed upon these grants do not. Similarly, the general presumption that Congress intends related provisions to be severable loses its predictive value when one of the provisions serves as any form of limitation—veto or otherwise. Further, in assessing the severability of power limitations other than the legislative veto, courts are no more justified in granting inordinate weight to the language of the statute (as opposed to other severability intent indicators); and Congress' employment of a number of power limitations to condition its power grant, rather than one limitation, should enhance, not negate, the argument that Congress took its power limitations seriously.

The considerations of policy and practicality that have inclined courts toward inappropriate veto severability results should also work to skew analysis of the severability of other power-granting provisions. Given the general pro-delegation sympathies of the federal judiciary, courts are no more likely to assume that Congress would desire the total demise of a power grant subject to a non-veto limitation. And, although the large number of veto-conditioned statutes present an extreme threat to the validity of federal government powers, significant doctrinal difficulties are present when even one power grant subject to an invalid limitation has been the basis for exertions of federal power. Holdings of inseverability with respect to non-veto power limitations could present the same difficulty present in the veto severability cases: a chain of successive severability questions.

Thus, outside of the veto severability context, more creative approaches to severability decision-making could provide desirable and legitimate alternatives to unnecessary statutory surgery. By remaining alert to the possibilities for honoring both Congress' power-limiting purposes and its power-giving purposes, courts considering a potentially broad range of severability challenges could transcend severability as a stark binary choice. Maybe then courts would be willing to address even-handedly and openly the elusive inquiry into congressional severability intent.

NOTE

PROVIDING ACCESS TO VOTER REGISTRATION: A MODEL STATE STATUTE

ERIC T. SECOY*

Millions of qualified United States citizens are not now registered to vote. While some go unregistered simply because they do not wish to vote, many are not registered as a result of restrictive voter registration procedures such as registrars' limited office hours, distant registration sites, and the absence of deputy registrars, which limit registration opportunities. Such restrictive procedures impose a disproportionate burden on minorities and the poor.

In this Note, Mr. Secoy reviews the current state voter registration laws and analyzes legal challenges to restrictive voter registration procedures based on the Due Process Clause, the Equal Protection Clause, and the Voting Rights Act. After concluding that the piecemeal success of such challenges will not guarantee the adoption of sound voter registration procedures by the states, Mr. Secoy proposes a Model Registration Statute ensuring expanded access to voter registration. This Model Statute and accompanying commentary offers guidance to both courts and legislatures considering the problem of restricted access to the fundamental right of voting.

Over forty-five million Americans of voting age are not registered to vote.[1] Although a sizable number of these people may be unregistered because they are not interested in voting,[2] many others are unregistered because their opportunities to register are restricted. Restrictive voter registration procedures impose several types of burdens upon the eligible citizen who wishes

---

* Affiliated with Yanagida & Nomura Law Office, Tokyo, Japan. A.B., Grinnell College, 1983; J.D., Harvard University, 1986.

[1] *See* U.S. BUREAU OF THE CENSUS, VOTING AND REGISTRATION IN THE ELECTION OF NOV. 1980, CURRENT POP. REPORTS, SERIES P-20, No. 370, 3 (Table B), 5 (Table D) (1982) [hereinafter CENSUS, No. 370]. This data is based on interviews conducted by the Census Bureau. Because these registration figures are self-reported, overreporting of both voting and registration occurs. Between 5% and 15% more people report voting to the Census Bureau than actually vote in presidential elections. *See id.* at 7–8. The total number of citizens not registered to vote was calculated based on this Census data by deducting the number of noncitizens (6.3 million) from the total number unregistered to vote (51.4 million). *See also* Note, *Eradicating Racial Discrimination in Voter Registration: Rights and Remedies Under the Voting Rights Act Amendments of 1982*, 52 FORDHAM L. REV. 93, 97 n.19 (1983). No nationwide compilation of actual voter registration figures exists. Some states do not even compile accurate statewide totals.

[2] *See* CENSUS, No. 370, *supra* note 1, at 89–92 (47.1% of nonregistrants surveyed reported not registering because they were not interested or did not prefer any of the likely candidates); Scharfenberg, *Better Way to Register*, Boston Globe, June 16, 1984, at 15, col. 6 (40% of nonregistrants stated that they were not registered because they had not gotten around to it); Note, *supra* note 1, at 93.

to register.[3] Inconvenient registration locations and office hours impose unnecessarily high transportation costs and opportunity costs upon potential registrants.[4]

Many separate provisions of states' voter registration systems work together to limit accessibility and impose higher costs upon potential registrants. In states which require in-person registration, the often inconvenient location of the registration site, or perhaps sites, can impose significant transportation costs upon those who wish to register.[5] Additional hardship is imposed upon people who do not have access to a car.[6] These problems are particularly acute in rural, small town and suburban areas where public transportation rarely exists. The restriction of the availability of registration to business hours on weekdays[7] can impose substantial additional costs on citizens,[8] and creates perhaps insurmountable barriers to registration for some citizens. Some people cannot leave their work during business hours, others work for employers who are unwilling to allow employees to leave in order to register, and others simply cannot afford the loss of wages that taking time off to register would require.[9] Those who care for young children may face a similar dilemma: no baby-sitter may be available or they may not be able to pay a baby-sitter.[10]

Liberal opportunities to register out of the registrar's office and during weekend or evening hours would reduce many of

---

[3] The restrictive registration practices discussed in this Note appear to be facially neutral and not intended to prevent or inhibit a resident's ability to register to vote, although they may have that effect. Other restrictive registration practices, such as harassment and intimidation by local registrars, closing of offices during registration drives, slowdowns, failure to provide sufficient personnel for registration work, irregular hours, withholding of registration, distribution of inaccurate information, omitting of registered voters' names from electoral lists, and allowing improper challenges, are obviously illegitimate. Comment, *Access to Voter Registration*, 9 HARV. C.R.-C.L. L. REV. 482, 491–92 & n.65 (1974); U.S. COMMISSION ON CIVIL RIGHTS, POLITICAL PARTICIPATION 60–85 (1968).

[4] *See* Coalition for Sensible and Humane Solutions v. Wamser, 771 F.2d 395, 400 (8th Cir. 1985).

[5] In some areas of Mississippi, for example, a trip of up to fifty miles may be necessary in order to register. Plaintiff's Answers to Defendant's First Set of Interrogatories and Requests for Documents at 5–6, Operation PUSH v. Allain, CA No. 84-35-WK-0 (N.D. Miss. filed Mar. 1, 1984) (on file at HARV. J. ON LEGIS.).

[6] U.S. BUREAU OF THE CENSUS, 1980 CENSUS OF POPULATION AND HOUSING: SOCIAL, ECONOMIC & HOUSING CHARACTERISTICS; *see* Note, *supra* note 1, at 100 & n.38.

[7] LEAGUE OF WOMEN VOTERS EDUC. FUND, ADMINISTRATIVE OBSTACLES TO VOTING, *quoted in* 119 CONG. REC. S5957–60 (daily ed. Jan. 18, 1973) (remarks of Sen. Kennedy (D-Mass.)); Comment, *supra* note 3, at 493.

[8] *Wamser*, 771 F.2d at 400.

[9] *Id.*

[10] *Id.*

these costs and would help overcome the barriers to registration. Many states, however, do not have such provisions. Out-of-office registration may be restricted to polling places and is often conducted only during business hours on weekdays. Furthermore, the date, time, and place of all registration may be left up to the local registrar's discretion.[11] The appointment of additional deputy registrars, necessary to any effective expansion of voter registration opportunities, is also often left within the unbounded and unreviewable discretion of the local registrar.[12] In some places, registrars simply reject all requests to expand voter registration opportunities.[13]

These procedures are interrelated, and together they produce the restrictiveness and burdensome costs associated with many state voter registration systems. Any piecemeal analysis tends to underestimate the effectiveness of the procedures in restricting the availability of registration. Likewise, any piecemeal reform of state voter registration systems may fail to eliminate effectively the burdens unnecessarily imposed by restrictive systems.

Restrictive voter registration procedures are particularly reprehensible because they have a disporportionate impact upon the ability of blacks, other minorities, and poor persons to register and to vote. Nationwide, a significantly lower percentage of eligible black people than eligible white people are registered to vote.[14] In particular areas this imbalance is more pronounced

---

[11] *See, e.g.*, MONT. CODE ANN. § 13-2-201 (1981) (broad discretion over establishing weekend and evening hours); S.D. CODIFIED LAWS ANN. § 12-4-3 (Supp. 1986) (no requirement to establish full-time working hour registration); R.I. GEN. LAWS § 17-9-3 (1981) (no requirement to establish registration hours during non-working hours); ILL. ANN. STAT. ch. 46, paras. 4-6.3, 5-16.3 (Smith-Hurd Supp. 1986) (no requirement to establish satellite registration locations).

[12] *See, e.g.*, GA. CODE ANN. § 21-3-120(d) (1982); NEB. REV. STAT. § 32-208 (1978); OR. REV. STAT. § 246.250(1) (1983); TENN. CODE ANN. § 2-12-201 (1979).

[13] *See, e.g.*, Connecticut Citizen Action Group v. Pugliese, Civ. No. 84-431, slip op. (D. Conn. 1984) (LEXIS, Genfed library, Dist file) (order granting preliminary injunction) (Connecticut law); Plaintiff's Answers to Defendant's First Set of Interrogatories and Requests for Documents at 18–20, Operation PUSH v. Allain, CA No. 84-35-WK-0 (N.D. Miss. filed Mar. 1, 1984) (Mississippi law).

[14] The Census Bureau found that 68.4% of whites reported being registered to vote, in comparison with 60% of blacks and 36.3% of Hispanics. CENSUS, No. 370, *supra* note 1, at 3 (Table B). The long history of overt disenfranchisement of blacks in this country continues to be reflected in low black political participation rates, although most of the explicit barriers to black participation have been removed. Jordan v. Winter, 604 F. Supp. 807, 811–12 (N.D. Miss.), *aff'd sub nom.* Mississippi Republican Exec. Comm. v. Brooks, 469 U.S. 1002 (1984) (Mississippi history). This history and the reasons for low black political participation are more fully discussed in Comment, *supra* note 3, at 485–94; *see also* P. KIMBALL, THE DISCONNECTED 4–7, 247–72 (1972); U.S. COMMISSION ON CIVIL RIGHTS, *supra* note 3.

than it is nationwide.[15] The numbers of blacks and minorities unregistered, however, is substantial throughout the country as well as disproportionately greater than the number of whites unregistered.[16] Moreover, a disproportionate number of those unregistered are poor.[17]

State legislatures need to change these restrictive registration practices in order to increase the accessibility of registration. Part I of this Note analyzes the possible bases for legal challenges to restrictive registration practices. These practices may violate the Equal Protection Clause of the Fourteenth Amendment either because they burden the right to vote or because they create suspect classifications. In addition, restrictive registration procedures which have a racially discriminatory impact violate section 2 of the Voting Rights Act. Overturning current restrictive practices is not sufficient though—new, sound voter registration practices must be ordered by the courts or adopted by the legislature to replace the old restrictive practices. Part II of this Note therefore details in a Model Statute the measures that should be included in a sound voter registration system to expand access to voter registration.

I. Legal Constraints Upon Restrictive Voter Registration Procedures

Several different legal theories could be used to challenge a state's restrictive voter registration procedures. These theories stem from three sources:[18] 1) the Due Process and Equal Protection clauses of the Fourteenth Amendment,[19] 2) the Fifteenth

---

[15] *See* Census, No. 370, *supra* note 1, at 3 (Table B).

[16] *See id.*; *see also Connecticut Citizen Action Group*, Civ. No. 84-431 slip op. (LEXIS).

[17] Coalition for Sensible and Humane Solutions v. Wamser, 771 F.2d 395, 400 (8th Cir. 1985); P. Kimball, *supra* note 14, at 4–5.

[18] The First Amendment also arguably prohibits restrictive registration practices. The Supreme Court has held that the First Amendment protects the right to associate with others for political ends. *See, e.g.*, Anderson v. Celebrezze, 460 U.S. 780, 788 (1983); NAACP v. Claiborne Hardware, 458 U.S. 886, 913 (1982). The argument is that the rights of individuals and groups who wish to register eligible citizens to further their own political ends are violated when they cannot do so because registration opportunities are restricted. The courts, however, have never applied this right to overturn restrictive registration practices. *Anderson* overturned a restriction on independent candidates' access to the ballot, 460 U.S. at 780–81; *Claiborne Hardware* blocked a civil suit for damages against the organizers of a politically motivated consumer boycott, 458 U.S. at 887.

[19] U.S. Const. amend. XIV.

Amendment,[20] and 3) section 2 of the Voting Rights Act of 1965, as amended in 1982.[21] First, the Fourteenth Amendment prohibits states from denying any person the equal protection of the laws, thereby barring registration procedures which impermissibly burden the right to vote or the rights of minority groups. Second, the Fifteenth Amendment prohibits states from denying or abridging any citizen's right to vote because of race.[22] Any legal theory based on this Amendment must argue that the particular restrictive registration procedures were part of a state's scheme to disenfranchise a racial group and that the laws have that effect, perpetuating past discrimination. Lastly, section 2 of the Voting Rights Act prohibits any restrictive registration procedures that have a racially discriminatory impact.[23]

A. *Due Process Clause*

Thirty-five years of controversy surrounds the scope of rights protected by the Due Process Clause. A few cases have argued that the right to vote falls within its ambit because voting is a fundamental personal right.[24] The Supreme Court, however, evidently rejects this due process approach as subsequent right to vote cases have uniformly proceeded under the Equal Protection Clause of the Fifteenth Amendment.[25]

---

[20] U.S. CONST. amend. XV.

[21] 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1982 & Supp. II 1984).

[22] Fifteenth Amendment claims need not be analyzed separately from Fourteenth Amendment claims challenging procedures as racially discriminatory in purpose and effect, for the Supreme Court treats these claims as coextensive, and analyzes them under Fourteenth Amendment standards. *See, e.g.*, Rogers v. Lodge, 458 U.S. 613 (1982).

[23] *See infra* notes 133–147 and accompanying text.

[24] United States v. Texas, 252 F. Supp. 234, 250 (W.D. Tex.), *summarily aff'd*, 384 U.S. 155 (1966); *cf.* Carrington v. Rash, 380 U.S. 89, 97–99 (1965) (Harlan, J., dissenting) ("the Equal Protection Clause was not intended to touch state electoral matters"); United States v. Alabama, 252 F. Supp. 95 (M.D. Ala. 1966) (three judge panel). The majority in *Alabama* overturned Alabama's poll tax on equal protection grounds but Johnson, J., concurring, also relied upon the Due Process Clause (citing *Texas*, 252 F. Supp. 234). *Alabama*, 252 F. Supp. at 106. *Accord* Comment, *Equal Protection and Due Process: Contrasting Methods of Review Under Fourteenth Amendment Doctrine*, 14 HARV. C.R.-C.L. L. REV. 529, 537–41, 563–65 (1979) (arguing that cases charging infringement of the right to vote and other fundamental interests should be analyzed under the Due Process Clause through an interest-balancing approach rather than under the Equal Protection Clause).

[25] *See infra* notes 34–88 and accompanying text. The only arguable support in the decisions of the Supreme Court for a due process approach is found in Louisiana v. United States, 380 U.S. 145 (1965), in which the Court overturned Louisiana's constitutional interpretation prerequisite to registration because it vested absolute discretion in parish registrars to determine who passed and could therefore vote. The Court,

B. *Equal Protection Clause*

Voting is a fundamental right.[26] The Equal Protection Clause requires that a state afford equal treatment to all citizens as to their fundamental rights; so every person must be given the same access to voting as every other person.[27] Therefore all procedures used by a state as an integral part of the election process must withstand scrutiny under the Equal Protection Clause.[28] Voter registration is a necessary part of the states' electoral procedures, so the guarantee of equal access to voting extends to all voter registration procedures.

Under the Equal Protection Clause, all legislative classifications enacted by the state that discriminate among its citizens must pass a test of minimum rationality. The classification, in this instance according the vote to some individuals but not to others, depending on their status as registered or unregistered, must not be wholly irrelevant to achieving the state's objectives.[29] Statutes drawing "suspect classifications" or burdening "fundamental interests," however, will be subjected to so-called strict scrutiny.[30] The strict scrutiny test is only satisfied if a statute is precisely tailored to accomplish a compelling state interest.[31] Classifications in such statutes must be the least drastic means available to the state to serve that compelling interest.[32] The Supreme Court has recently begun to apply an intermediate level of scrutiny in some instances, including some voting rights situations, in which they find the implicated interest to be less fundamental.[33] No articulable test though seems to

---

however, did not specify which clause(s) of the Fourteenth Amendment the statute violated.

The summary affirmance of United States v. Texas, 384 U.S. 155 (1966), should not be construed as adoption of the due process grounds of that decision by the Court, because the Court had already overturned state poll taxes solely on equal protection grounds. Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966).

[26] *See* Wesberry v. Sanders, 376 U.S. 1, 17 (1964) ("No right is more precious in a free country than that of having a choice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."); Reynolds v. Sims, 377 U.S. 533, 562 (1964).

[27] L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-1, at 992–93 (1978).

[28] Moore v. Ogilvie, 394 U.S. 814, 818 (1969).

[29] McGowan v. Maryland, 366 U.S. 420, 425–26 (1961).

[30] *See* Comment, *supra* note 3, at 495–96.

[31] Dunn v. Blumstein, 405 U.S. 330, 335 (1972); *see* Comment, *supra* note 3, at 495–96.

[32] *Dunn*, 405 U.S. at 343.

[33] *See infra* notes 73–88 and accompanying text (discussion of voting cases in which the election was found not to be particularly important or no prohibition of voting was involved).

have emerged from the voting rights cases applying intermediate levels of scrutiny.

The standard of equal protection scrutiny that courts are likely to apply to challenges to restrictive voter registration procedures can best be determined by examining the bases for these claims. The claims may be divided into three categories: 1) those based upon violation of all citizens' right to vote, 2) those based upon allegations of wealth discrimination, and 3) those based upon allegations of racial discrimination. Challenges based upon violation of all citizens' right to vote will be considered first.

1. The Right to Vote and the Equal Protection of the Laws

a. *Minimum rationality of restrictive registration procedures.* State voter registration requirements, like all legislative classifications, are subject to a test of minimum rationality under the Equal Protection Clause of the Fourteenth Amendment.[34] A legislative classification can survive the minimum rationality test if it bears some rational relation to a legitimate state interest.[35] The courts have repeatedly found efficient administration of the election process and prevention of voting fraud to be legitimate state interests.[36] As a result, most voter registration procedures can withstand minimum rationality review.[37]

Not all voter registration procedures, however, can withstand the minimum rationality test. For example, in *Walker v. Jackson*,[38] an amendment to the Arkansas Constitution requiring female voters to designate their marital status by the prefix

[34] *See* Rosario v. Rockefeller, 410 U.S. 752, *reh'g denied*, 411 U.S. 959 (1973) (registration cutoff for voting in party primary).

[35] United States Dep't of Agric. v. Moreno, 413 U.S. 528, 533 (1973).

[36] *See, e.g., Rosario*, 410 U.S. at 761; Lendall v. Bryant, 387 F. Supp. 397, 401–02 (E.D. Ark. 1975) (state has a valid interest in the fairness and efficiency of its election machinery and in the integrity of the electoral process). *See also* Coalition for Sensible and Humane Solutions v. Wamser, 771 F.2d 395, 399–400 (8th Cir. 1985); Walker v. Jackson, 391 F. Supp. 1395, 1401–02 (E.D. Ark. 1975). *Cf.* Olagues v. Russoniello, 770 F.2d 791 (9th Cir. 1985) (United States attorney had legitimate interest in initiating investigation into possible voting fraud resulting from invalid registration of aliens).

[37] *See, e.g., Wamser*, 771 F.2d 395 (refusal by city board of elections to appoint qualified volunteers as deputy registrars was rationally related to state's legitimate interests in prevention of fraud, maintenance of impartiality, and efficient administration, in that it assured that deputy registrar positions would be filled by persons with training and experience in handling voter registration materials); Citizen's Committee for the Recall of Jack Williams v. Marston, 109 Ariz. 188, 507 P.2d 113 (1973) (state procedure requiring re-registration of electors did not violate Equal Protection Clause, because it furthered legitimate state interest in purifying its electoral system).

[38] 391 F. Supp. 1395 (E.D. Ark. 1975).

"Miss" or "Mrs." in order to register to vote was held to violate the Equal Protection Clause. The court reasoned that the state had no conceivable interest in imposing such a requirement, because marital status "is simply irrelevant as far as [a citizen's] qualifications to vote are concerned and has nothing to do with the efficiency or integrity of the electoral process."[39]

Dual registration is another procedure which fails the minimum rationality test.[40] Dual registration requires voters to register twice, once for federal elections and once for state elections, in order to vote. In *Haskins v. Davis*[41] a federal district court applied a minimum rationality test to overturn Virginia's dual registration requirement. Dual registration had been required in Virginia after the Twenty-fourth Amendment to the United States Constitution prohibited poll taxes in federal elections.[42] As poll taxes were still permissible in state elections, Virginia maintained its poll tax for state elections and kept separate registration books of those who had paid and could therefore vote in the state elections. After the Supreme Court invalidated Virginia's state election poll tax in *Harper v. Virginia State Board of Elections*,[43] there was no longer any rational basis for Virginia's dual registration system.[44]

b. *Burdens on the fundamental interest of voting.* Even though many barriers to voter registration pass the test of minimum rationality, they still might not withstand equal protection

---

[39] *Id.* at 1403.

[40] Haskins v. Davis, 253 F. Supp. 642 (E.D. Va. 1966) (per curiam). One registration satisfies the state's legitimate interests in voter registration, and the excess paperwork and complication caused by the second registration can only hamper efficiency. Thus, not only is the second registration irrelevant to furthering the state's interests, but it may also hinder the achievement of the state's objectives.

[41] 253 F. Supp. 642 (E.D. Va. 1966) (per curiam).

[42] *Id.* at 643; U.S. CONST. amend. XXIV.

[43] 383 U.S. 663 (1966) (holding that Virginia's state election poll tax violated the Equal Protection Clause of the Fourteenth Amendment).

[44] *Haskins*, 253 F. Supp. at 643, holding that:

> [n]o rational basis exists for distinction between persons registered to vote only in federal elections and those registered to vote in all elections. The provisions of Virginia's dual registration and qualification laws which treat persons who are registered only for Federal elections differently from persons registered for all elections violate the Equal Protection Clause of the Fourteenth Amendment.

Id. Mississippi, the last state with a dual registration requirement, abolished that requirement in 1984. 1984 MISS. LAWS, ch. 457. Whether the present version of the Mississippi election law gives some local registrars the discretion to continue to require dual registration is currently being litigated in the Federal District Court for the Northern District of Mississippi. *See* Operation PUSH v. Allain, CA No. 84-35-WK-0 (N.D. Miss. filed Mar. 1, 1984).

scrutiny. In many instances, infringements upon voting rights have been subjected to strict scrutiny under the Equal Protection Clause because they burden the fundamental interest in voting.[45] The logic behind strict scrutiny was first expounded by Justice Stone in his famous *Carolene Products* footnote: legislation restricting "those political processes which can ordinarily be expected to bring about repeal of undesirable legislation may call for more exacting judicial scrutiny under the Fourteenth Amendment than is given most other legislation."[46] Voting is the mechanism through which those who make and repeal legislation are chosen, and thus is at the core of those political processes.

The state statutes restricting the ability to vote to which the Supreme Court has applied strict scrutiny differed from most restrictive voter registration procedures in that they explicitly excluded a certain group from the franchise.[47] In order to convince the courts to apply strict scrutiny to restrictive registration practices, a litigant must show that those procedures effectively fence out certain voters from the franchise in the same way explicit exclusions do.[48]

When strict scrutiny is applied to burdensome legislative classifications, the state must demonstrate that those classifications are needed to achieve a compelling state interest.[49] States may not enact franchise restrictions on any lesser justification.[50] In addition, legislative classifications that do serve a compelling state interest must be narrowly tailored to serve that interest. The state must show that no "less drastic means" of accomplishing its end are available.[51]

---

[45] Kramer v. Union Free School District No. 15, 395 U.S. 621, 627 (1969); Dunn v. Blumstein, 405 U.S. 330, 335 (1972); Evans v. Cornman, 398 U.S. 419, 421–22 (1970).

[46] United States v. Carolene Products Co., 304 U.S. 144, 152–53 & n.4 (1938) (dictum); *see also* Reynolds v. Sims, 377 U.S. 533, 562 (1964) (voting is "a fundamental . . . preservative of all rights").

[47] *Kramer*, 395 U.S. at 662 (nonproperty owners as well as lessors without school age children); *Dunn*, 405 U.S. at 334–35, 360 (new residents); *Evans*, 398 U.S. at 426 (residents of a federal enclave).

[48] *See* Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966); *see also infra* notes 89–99 and accompanying text.

[49] *Kramer*, 395 U.S. at 627; *Dunn*, 405 U.S. at 335.

[50] Bishop v. Lomenzo, 350 F. Supp. 576, 584 (E.D.N.Y. 1972) ("the imposition by states of requirements that bear no reasonable relationship to a compelling state interest will have the effect of disenfranchising many qualified members of the electorate and denying them the right to vote, which is one of the fundamental and precious rights of a U.S. citizen" (citations omitted)).

[51] *Dunn*, 405 U.S. at 343.

Ferguson v. Williams[52] provides a clear-cut example of the impact that strict scrutiny can have on the results of equal protection analysis. In *Ferguson*, a three-judge federal district court panel passed upon the constitutionality of Mississippi's four-month residency requirement for voting in state and local elections. The court, observing that "[c]hoosing the correct standard [of scrutiny] will be determinative of the result in this case," applied the minimum rationality test and upheld the Mississippi law, reasoning that the residency requirement was rationally related to the state's legitimate goal of compiling accurate registration records in time for a given election.[53] The Supreme Court summarily vacated the district court's judgment, in light of its recent application of strict scrutiny to Tennessee's similar durational residency requirements in *Dunn v. Blumstein*.[54] On remand the district court applied strict scrutiny and, on the same facts as before, overturned Mississippi's durational residency requirement.[55] The court reasoned that although the requirement could withstand minimum rationality review, it could not survive the more exacting strict scrutiny test. Whatever the state's interest in maintaining accurate records, the prohibitive effect of the four-month residency requirement on the right to vote violated "[t]he state's plain duty, where it insists upon the maintenance of registration books, . . . to provide efficient and expeditious registration procedures that impose only the imperatively needed restrictions."[56]

c. *Review of registration procedures that do not irreversibly disenfranchise*. Because registration itself is thought to serve a compelling state interest in orderly elections, the decisive issue becomes which restrictions are imperatively needed. However, the results of the courts' analysis of which restrictions are "imperatively needed" seem to be fairly manipulable. Indeed, the courts do not always categorically reject durational residency requirements. In *Dunn* and *Ferguson*, for instance, the courts applied strict scrutiny, but allowed states to retain registration cut-offs that require voters to register at least thirty days prior

[52] 330 F. Supp. 1012 (N.D. Miss. 1971) (three judge panel), *vacated and remanded*, 405 U.S. 1036 (1972), *on remand*, 343 F. Supp 654 (N.D. Miss. 1972) (per curiam) (three judge panel).

[53] *Ferguson*, 330 F. Supp 1012.

[54] 405 U.S. 1036 (1972).

[55] *Ferguson*, 343 F. Supp. at 655.

[56] *Id.* at 656.

to an election.[57] After *Dunn*, the Supreme Court upheld two states' fifty-day registration cut-offs.[58] Although the Court observed that fifty days approached the "outer constitutional limits,"[59] no subsequent case has established the precise bounds of those outer limits. Thus the Supreme Court has not clearly drawn the line between legitimate exercises of state administrative discretion and unreasonable burdens upon the franchise.

Restrictive registration practices, such as limited sites and office hours, are different from the barriers to voting most often overturned by the Supreme Court. Those barriers overturned by the Court explicitly and irreversibly disenfranchised a certain group: new residents in *Dunn* and *Ferguson*;[60] soldiers in *Carrington v. Rash*;[61] nonproperty owners and lessors without school age children in *Kramer v. Union School District No. 15*;[62] and residents of a federal enclave in *Evans v. Cornman*.[63] Nevertheless, indirect barriers may be just as effective at abridging rights as direct barriers.[64] Voter registration procedures, although they do not irreversibly disenfranchise anyone, can be formidable indirect barriers to voting. The restrictive registration procedures adopted in the South in the 1950's and 1960's, enacted to prevent blacks from exercising their newly-won federal voting rights protection, are startling examples.[65]

The courts, however, will be less willing to overturn registration procedures that do not bar any citizen from registering but merely make registration difficult. In *Coalition for Humane and Sensible Solutions v. Wamser*,[66] the Court of Appeals for the Eighth Circuit held that there is no "constitutional right to greater access to voter registration facilities per se,"[67] but noted that in some instances restricted access to voter registration

---

[57] *Id.* at 657; *Dunn*, 405 U.S. at 345–49.

[58] Marston v. Lewis, 410 U.S. 679 (1973) (per curiam); Burns v. Fortson, 410 U.S. 686 (1973) (per curiam).

[59] *Burns*, 410 U.S. at 687. The Court in *Marston* deferred to the "recent and amply justifiable" legislative determination that 50 days rather than 30 days was needed to prepare accurate voter registration lists. *Marston*, 410 U.S. at 681.

[60] *Dunn*, 405 U.S. at 334–35; *Ferguson*, 343 F. Supp. at 656.

[61] 380 U.S. 89, 96–97 (1965).

[62] 395 U.S. 621, 622 (1969).

[63] 398 U.S. 419, 419–20 (1970).

[64] "Constitutional rights would be of little value if they could be . . . indirectly denied." Smith v. Allwright, 321 U.S. 649, 665 (1944).

[65] *See* P. KIMBALL, *supra* note 14, at 247–72; LAWYERS' COMM. FOR CIVIL RIGHTS UNDER LAW, VOTING IN MISSISSIPPI: A RIGHT STILL DENIED (1981).

[66] 771 F.2d 395 (8th Cir. 1985).

[67] *Id.* at 400.

facilities could unconstitutionally infringe upon the right to vote.[68] In this case, however, the court found that the City of St. Louis provided its citizens sufficient registration opportunities.[69]

The *Wamser* court examined the accessibility of voter registration in the plaintiff's locality. Because St. Louis made voter registration facilities available at approximately 150 permanent sites throughout the city—both during normal business hours and occasionally beyond business hours—and conducted periodic registration drives at temporary sites (such as supermarkets), sometimes on Friday evenings, the court refused to require the city to appoint qualified volunteers as deputy registrars.[70] The court noted that the plaintiff in this case lived within ten blocks of two permanent satellite registration facilities, both of which were accessible by public transportation and one of which was open on Saturdays and on some evenings.[71]

The Eighth Circuit did note, however, that many people were deterred by financial factors from registering at the Board of Registrars' office in the downtown business district during normal business hours.[72] The logical implication of this last finding is that a voter registration system which relied solely upon such limited registration opportunities would unconstitutionally infringe upon the right to vote. But *Wamser* does not provide any firm guidance as to when a procedure qualifies as unreasonably burdensome.

The Supreme Court has also applied less than strict scrutiny in some voting rights cases when it has felt that the barrier to voting was merely volitional on the plaintiff's part, or when the election at issue was for a special governmental body and not for one with general powers. The cases concerning merely volitional barriers are more relevant to registration barriers than the cases involving elections for special governmental bodies, because registration requirements usually apply for all elections, including those for governmental bodies with general powers.

In *Rosario v. Rockefeller*, the Supreme Court upheld a New York law which required voters who wanted to switch political parties for the next primary to do so at least eleven months

---

[68] *Id.*
[69] *Id.*; 590 F. Supp. 217, 222 (E.D. Mo. 1984).
[70] *Wamser*, 771 F.2d at 397–98, 400.
[71] *Id.* at 398 (citing the decision below, 590 F. Supp. at 222–23).
[72] *Wamser*, 771 F.2d at 400.

beforehand.[73] The Court's stated rationale in *Rosario*, that plaintiff's failure to switch her registration in time was merely volitional,[74] may be applicable to almost any challenge by a nonregistrant to a burdensome registration procedure. The argument is that if the nonregistrant is truly serious about registering to vote, she would take the time and effort to overcome the barrier involved. Presumably neither the state nor the local voter registrars are preventing her from registering. The Supreme Court, at least on one occasion, has taken the argument to its logical extreme. In *McDonald v. Board of Election Commissioners of Chicago*,[75] the Court unanimously upheld Illinois' refusal to allow pre-trial detainees in the Cook County jail to vote by absentee ballot. The Court refused to apply "exacting" scrutiny because the record did not show that Illinois *might* not set up polling booths in the jail or make special poll transportation arrangements for the detainees, among other possibilities, although Illinois had not done either to date.[76] The mere fact that detainees would find it impracticable, if not impossible, to vote did not move the Court on the detainees' behalf.[77]

The Court reasoned that because Illinois had not absolutely precluded the detainees from voting (not even those held on nonbailable offenses), there was no need for it to examine the law closely. The Court did note, rather disingenuously, that the distinctions in the Illinois statute were not drawn upon the grounds of race or wealth, which would have required the Court to scrutinize the law more carefully.[78] This case was decided, however, before *Dunn* and the other cases applying strict scrutiny to preclusions from the franchise. Courts might still employ the *McDonald* Court's analysis, however, if they did not find that the state's actions had directly precluded anyone from voting.

---

[73] 410 U.S. 752 (1973). Under a First Amendment theory, the Court overturned a similar Illinois law the next term in Kusper v. Pontikes, 414 U.S. 51 (1973). Illinois, however, required voters to switch political parties twenty-three months beforehand. *Id.* at 52. Unlike the New York law at issue in *Rosario*, this longer time frame could lock voters into an unwanted party affiliation from one primary to the next. *Id.* at 60–61.

[74] *Rosario*, 410 U.S. at 758.

[75] 394 U.S. 802 (1969).

[76] *Id.* at 807–08.

[77] *Id.* at 809–10.

[78] *Id.* at 807.

In *O'Brien v. Skinner*,[79] a case challenging a similar denial of absentee ballots to pre-trial detainees, decided after *Dunn*, the Court reached the opposite result of *McDonald*. Chief Justice Burger's majority opinion did not specify what level of scrutiny the Court applied in overturning the New York provisions, but Justice Marshall, in a concurrence signed by three members of the Court, did apply strict scrutiny.[80] The case reached the Court in a slightly different posture than *McDonald*, for New York officials, unlike the Illinois officials in *McDonald*, had expressly refused to make any other arrangements whereby the detainees could vote.[81] Therefore the Court found that the detainees were precluded by the state from exercising their right to vote.[82] The Court was also disturbed by the incongruities of New York's policy, which allowed pre-trial detainees confined outside their county of residence to vote by absentee ballot but denied absentee ballots to detainees confined within their county of residence.[83] In contrast, this same incongruence in Illinois did not bother the *McDonald* Court.

New York officials had also refused to devise any procedures whereby pre-trial detainees could register to vote.[84] The Court found that this refusal also violated the Equal Protection Clause, *independently* of the refusal to allow detainees to vote.[85] Thus restrictive registration practices, like voting restrictions, may be so burdensome that they violate the Equal Protection Clause. The two dissenters in *O'Brien*, though, paralleling the reasoning in *Rosario*'s and *McDonald*'s approvals of harsher burdens upon the right to vote, adopted the view that the detainees had caused their own disenfranchisement by engaging in the actions leading to their incarceration.[86] Under the view espoused by the dissenters, a challenge to restrictive voter registration procedures on equal protection grounds becomes practically impossible, because nonregistrants' failure to register has always "caused" their disenfranchisement.

If a court is determined to follow the approach to equal protection analysis taken by the *O'Brien* dissenters or the *Mc-*

---

[79] 414 U.S. 524 (1974).
[80] *Id.* at 533 (Marshall, J., concurring).
[81] *Id.* at 527, 529; *see also id.* at 531–32 (Marshall, J., concurring).
[82] *Id.* at 530–31.
[83] *Id.* at 528–30.
[84] *Id.* at 530.
[85] *Id.*
[86] *Id.* at 537 (Blackmun and Rhenquist, JJ., dissenting).

Donald majority, then barriers to voter registration might seem beyond constitutional review when they do not irreversibly bar anyone from voting. As *McDonald* intimates, however, stricter scrutiny could be applied if the distinctions in the registration procedures were drawn upon illegitimate grounds, such as race or wealth.[87] Under the approach to equal protection analysis taken by the Supreme Court in *O'Brien* and the Eighth Circuit in *Wamser*, however, the burden these statutes place upon fundamental rights would be acknowledged even without any showing that the procedures were drawn upon illegitimate grounds. The key issue is whether the courts will scrutinize indirect registration barriers as closely as they scrutinized the registration and absentee ballot provisions at issue in *O'Brien*. The more burdensome and unnecessary the procedures, the more probable it is that the courts would overturn them. Neither the Supreme Court nor the lower federal courts have established a bright line or specific criteria that determine when a registration procedure becomes too burdensome and violates the right to vote. *Wamser* and *McDonald* seem to indicate that a procedure must impose a serious (*Wamser*) and perhaps absolute (*McDonald*) barrier before the courts will overturn the procedure.[88] The result might be different, however, if the poor or a particular minority group were burdened by the procedures.

2. Suspect Classifications and the Equal Protection of the Laws

a. *Wealth discrimination. Harper v. Virginia State Board of Elections*[89] refutes the idea that a barrier to voting must be absolute before it may be subjected to strict scrutiny. In *Harper*, the Court found that Virginia's $1.50 poll tax requirement invidiously discriminated on the basis of wealth, in violation of the Equal Protection Clause.[90] Although the poll tax was merely a burden upon exercise of the franchise and did not irreversibly preclude anyone from voting, the Court had no difficulty in overturning it.

The poll tax cases highlight one of the suspect distinctions courts have at times been willing to reject as violations of the

[87] *See infra* notes 89–124 and accompanying text for a discussion of this alternative.
[88] *See* Comment, *supra* note 3, at 510–11.
[89] 383 U.S. 663 (1966).
[90] *Id.* at 668.

Equal Protection Clause. The state may not use wealth as a qualification for voting, because "[w]ealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process."[91] The *Harper* decision cannot rest narrowly upon the grounds that an individual's right to vote was conditioned upon payment of a direct and explicit tax, for the Court concluded that the use of affluence as a criterion, independent of any fee payment requirement, is forbidden.[92] Restrictive voter registration procedures impermissibly use affluence as a criterion because less affluent citizens are the ones burdened by the state's restrictive procedural requirements for registering to vote.

In scrutinizing state regulations which burden other rights that the courts have found to be fundamental, the additional cost imposed by the regulation is often the key factor leading to the regulation's rejection.[93] In *City of Akron v. Akron Center for Reproductive Health*,[94] the Supreme Court overturned a requirement that all second-trimester abortions be performed in a hospital and not in a clinic, because such regulations unduly burdened the right of women to choose to have abortions. A "primary burden" of the regulation was the additional cost it imposed upon women.[95] The Court recognized that although the hospitalization regulation did not explicitly impose this additional cost, the regulation did impose this cost in practice. Restrictive registration practices likewise impose additional costs upon voters. The courts should thus similarly recognize the costs practically imposed by restrictive voter registration procedures, because in using these procedures the state is placing burdens upon another fundamental right of citizens.[96]

---

[91] *Id.*

[92] *Id.* at 666 ("a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter *or* payment of any fee an electoral standard" (emphasis added)). A California Court of Appeal recently found that denying homeless residents the opportunity to vote because they cannot afford housing uses affluence of the citizen as an electoral standard and therefore violates the Equal Protection Clause. Collier v. Menzel, 176 Cal. App. 3d 24, 37, 221 Cal. Rptr. 110, 116 (1985).

[93] *See, e.g.*, City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 434–35 & n.20 (1983); Planned Parenthood v. Ashcroft, 462 U.S. 476, 481–82 (1983); *see also id.* at 497–98 & n.4 (Blackmun, J., dissenting).

[94] 462 U.S. 416 (1983).

[95] *Id.* at 434.

[96] *See Harper*, 383 U.S. at 667; *see also* Coalition for Sensible and Humane Solutions v. Wamser, 771 F.2d 395, 400 (8th Cir. 1985) (recognizing the financial burdens imposed upon the less well-off by restricted registration opportunities).

Nevertheless, discrimination against the poor, standing on its own, has rarely if ever motivated the Court to overturn entire statutes.[97] In *San Antonio Independent School District v. Rodriguez*,[98] the Court refused to overturn the use of local property taxes to fund schools although this practice necessarily penalized poorer districts. The Court implied in dictum that some absolute minimum of educational benefits might be required of government to protect the "meaningful exercise" of the right to speak and vote.[99] The Court has yet to find this absolute minimum violated, and the current Court seems quite indisposed to overturn laws because they indirectly burden the poor.[100] It seems likely that the facial neutrality of most registration procedures as well as their administrative nature would preclude the success of any claim that the state had not discharged its minimum burden.

b. *Race discrimination: equal protection and the Fifteenth Amendment.* Evidence of wealth discrimination would probably be given the most weight when considered in conjunction with evidence of racial discrimination in a state's restrictive voter registration practices. The poll tax cases recognized the historical purpose of restrictive registration laws: to deny blacks the vote. A district court case decided before *Harper*, *United States v. Alabama*,[101] clearly recognized this purpose. The court overturned Alabama's poll tax as discriminatory on the grounds that it was enacted for a discriminatory purpose and that there was no evidence that Alabama had abandoned that purpose.[102] Other lower courts have also considered evidence of wealth discrimination, particularly because poverty so often correlates with race in the United States.[103] The problems many nonregistrants face in getting to the courthouse during working hours thus should be sufficient evidence to convince a court to examine voter registration procedures closely. In and of itself, though,

---

[97] *See* L. TRIBE, *supra* note 27, at §§ 16-9, 16-50 to -57 (1978).
[98] 411 U.S. 1 (1973).
[99] *Id.* at 36–37.
[100] *See generally* L. TRIBE, *supra* note 27, at §§ 16-50 to -57 (1978).
[101] 252 F. Supp. 95 (M.D. Ala. 1966).
[102] *Id.* at 104.
[103] *See* Cross v. Baxter, 604 F.2d 875, 881 (5th Cir. 1979) ("evidence of socioeconomic inequities gives rise to a presumption that the disadvantaged minority group does not enjoy access to the political process on an equal basis with the majority"); *see also* Kirksey v. Bd. of Supervisors of Hicks County, Mississippi, 554 F.2d 139, 145 (5th Cir. 1977).

such evidence will probably not lead to the rejection of the procedures.

The courts are guided in this area by what they understand as the interrelated nature of the Fourteenth and Fifteenth Amendments. The court in *United States v. Alabama* stated that:

> The two amendments [Fourteenth and Fifteenth] mean simply that the States and the Federal government must exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of the regulation. The Fifteenth Amendment teaches that race can never be a reasonable ground for discrimination.[104]

Such discrimination need not be overt to violate the Fifteenth Amendment.[105] The Court no longer analyzes race-based voting discrimination claims separately under the Fifteenth Amendment but rather analyzes such cases under the Equal Protection Clause of the Fourteenth Amendment.[106] Many restrictive voter registration procedures are just the type of onerous procedural requirements, originally enacted to prevent blacks from exercising their right to vote, that should be suspect under the Equal Protection Clause.

c. *Race discrimination: intent.* Neutral state laws which have disparate impact along racial lines, such as restrictive voter registration procedures, violate the Equal Protection Clause if they were enacted or maintained with a racially discriminatory intent or purpose.[107] In two recent cases, *City of Mobile v. Bolden*[108] and *Rogers v. Lodge*,[109] the Court specifically required a showing of discriminatory intent to restrict voting rights in order to establish an equal protection claim. The formulation of the intent requirement in these two cases was quite different,

---

[104] *Alabama*, 252 F. Supp. at 99.

[105] Lane v. Wilson, 307 U.S. 268, 275 (1939) (overturning a restricted registration period for all those previously disenfranchised by a "grandfather clause" as an onerous procedural requirement) ("The [Fifteenth] Amendment nullifies . . . onerous procedural requirements which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race.").

[106] *See supra* note 22; *see, e.g.*, White v. Regester, 412 U.S. 755, 764–69 (1973).

[107] City of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 264–65, 270 & n.21 (1977); Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977); *see also* Rogers v. Lodge, 458 U.S. 613 (1982); Hunter v. Underwood, 471 U.S. 222 (1985).

[108] 446 U.S. 55 (1980).

[109] 458 U.S. 613, *reh'g denied*, 459 U.S. 899 (1982).

although *Rogers* attempted to reconcile its formulation with the *Bolden* formulation. The *Bolden* plurality's approach does not seem to be good law after *Rogers*,[110] so it appropriate to focus on the Rogers approach. Furthermore, Congress overruled *Bolden*'s interpretation of the Voting Rights Act when it amended that statute in 1982.[111] *Rogers* overturned an at-large electoral system which, although racially neutral at adoption, was maintained for invidiously discriminatory purposes.[112] The Court in *Rogers* found discriminatory intent based upon 1) historical evidence of state-sanctioned discrimination, 2) evidence of differences in voter registration rates between the races, and 3) evidence of differences in accessibility and responsiveness of the political system to the races.[113] Under the *Rogers* approach discriminatory intent can thus be inferred from objective evidence of discriminatory impact.[114]

Many restrictive registration procedures, both in the South and elsewhere, were intended to restrict or have the effect of restricting minority groups' access to voting, and therefore should be open to equal protection challenge. Mississippi's voter registration laws provide a good example of such a system. Dual registration was first enacted by Mississippi in 1892 to help implement the Mississippi Constitutional Convention of 1890's goal of disenfranchising the state's blacks.[115] Mississippi's strict limitations on out-of-office registration were adopted in 1955, at an extraordinary session of the Mississippi legislature

---

[110] In *Bolden*, the plurality held that the state must act purposely to further racial discrimination before its actions violate the Equal Protection Clause. *Bolden*, 446 U.S. at 66, 69–71 (plurality opinion). The plurality rejected as insufficient to prove intent evidence that 1) no blacks had ever been elected to the City Commission under the at-large electoral system, 2) the City Commission discriminated against blacks in municipal employment and provision of services, 3) the City had a substantial history of official racial discrimination, and 4) the mechanics of the at-large system were biased. *Id.* at 73–74. In *Rogers*, the Court relied upon this very sort of evidence to find racially discriminatory intent. 458 U.S. at 622–27; *see also id.* at 629 (Powell, J., dissenting). Thus, the *Bolden* plurality's demanding approach does not seem to be good law after *Rogers*.

[111] *See* Note, *supra* note 1, at 113; Jordan v. Winter, 640 F. Supp. 807, 810–14 (N.D. Miss.), *summarily aff'd sub nom.* Mississippi Republican Exec. Comm. v. Brooks, 469 U.S. 1002 (1984).

[112] *Rogers*, 458 U.S. at 616.

[113] *Id.* at 623–25; *see also supra* note 110. *But see Bolden*, 446 U.S. at 67–70 (plurality opinion).

[114] *But see* Note, *supra* note 1, at 115 ("practices that persist from the past, . . . however[,] are immune from Fourteenth Amendment scrutiny" (citing *Bolden*, 446 U.S. at 69–70 (plurality opinion))).

[115] 1892 MISS. LAWS, ch. 68 §§ 11–31; United States v. Mississippi, 380 U.S. 128 (1965) (unanimous decision); *Jordan*, 604 F. Supp. 807; *see also* MISS. CONST. § 244 (1890) (establishing literacy requirement for all voters).

convened to frustrate the implementation of *Brown v. Board of Education*[116] by creating new obstacles to registration by blacks.[117] Disproportionately lower rates of voter registration among black citizens than among white citizens, and less access to and responsiveness from the political system for black citizens, are also evident throughout the state.[118] Mississippi's voter registration procedures thus seem more open to equal protection challenge than the at-large electoral system overturned in *Rogers* which, unlike Mississippi's procedures, was not adopted with clear discriminatory intent. Furthermore, in 1985 the Supreme Court reaffirmed in *Hunter v. Underwood* that a violation of the Equal Protection Clause may be established by showing that a law's original purpose was to disenfranchise blacks and that the law continued to have a racially disparate impact.[119]

Mississippi enacted new voter registration laws in 1984 and 1986, and one could argue that these new laws' discriminatory intent must be proven without reference to their historical antecedents. The historical antecedents of a law, however, as well as a history of state-sanctioned discrimination, may not be ignored.[120] If current registration procedures, although now facially neutral, perpetuate the effects of past official discrimination, they may be overturned upon these grounds.[121]

The Fifth Circuit recently overturned a district court finding that the discretion vested in a county board of registrars did not violate the rights of blacks. The board had limited office hours, failed to conduct satellite registration, and refused to appoint deputy registrars.[122] The circuit court noted that although the appointment of deputy registrars is discretionary, "the fact that the Board refused to appoint such deputies is evidence of a

---

[116] 347 U.S. 483 (1954), *opinion and judgments announced* 349 U.S. 294 (1955) (racial segregation in public schools a denial of due process under the Fifth Amendment).

[117] 1955 MISS. LAWS, Extra Sess. chs. 103–04 (codified at MISS. CODE ANN. § 23-5-29 (1972)).

[118] *Jordan*, 604 F. Supp. at 811–13.

[119] 471 U.S. 222, 233 (1985).

[120] *Id.*; *see also* Rogers v. Lodge, 458 U.S. 613, 625 (1982), declaring that:

> [e]vidence of historical discrimination is relevant to drawing an inference of purposeful discrimination, particularly in cases . . . where the evidence shows that discriminatory practices were commonly utilized, that they were abandoned when enjoined by courts or made illegal by civil rights legislation, and that they were then replaced by laws and practices which, though neutral on their face, served to maintain the status quo.

[121] *See Rogers*, 458 U.S. at 616; Schnapper, *Perpetuation of Past Discrimination*, 96 HARV. L. REV. 828, 843 (1983); *see also* Note, *supra* note 1, at 104—09.

[122] United States v. Dallas County Comm'n, 739 F.2d 1529, 1539 (5th Cir. 1984), *overturning finding in* 548 F. Supp. 875, 888–90 (S.D. Ala. 1982).

failure to act to overcome past discrimination."[123] Although this case involved Voting Rights Act claims, the same type of evidence could be used under *Rogers* to support the finding of discriminatory intent necessary to an equal protection claim. An equal protection claim must attack the discretion accorded registrars under state statutes and the local registrars' abuse of that discretion to disadvantage minorities and the poor, because the deference often granted by federal courts to state discretion in administering state laws is the greatest obstacle to claims against restrictive registration practices. When the administration of state laws effectively perpetuates past discrimination, however, the courts should be willing to limit the discretion accorded the state in administering its laws.[124]

d. *Compelling interests and least restrictive means.* Once a statutory scheme has been found to be discriminatory, the state may still attempt to prove that the statute serves a compelling state interest and that, because there is no less drastic means available to pursue that interest, the statute is a reasonable one which should be upheld.[125] Three interests which states can legitimately claim are furthered by voter registration are prevention of voting fraud, preservation of impartiality, and efficient administration.[126]

These interests are unquestionably legitimate state objectives, but methods less discriminatory than the current restrictive voter registration practices are available for pursuing them. For example, voter registration is unlikely to prevent voting fraud, because voting fraud is typically committed by election officials rather than by private individuals.[127] Various state criminal statutes are available to penalize those who engage in voting

---

[123] *Dallas County Comm'n*, 739 F.2d at 1539.

[124] *See* Cross v. Baxter, 604 F.2d 875, 881 (5th Cir. 1979) ("[t]he mere removal of past official discrimination does not render the present effects of that discrimination irrelevant in determining whether an electoral scheme dilutes the votes of the minority.").

[125] *See* Dunn v. Blumstein, 405 U.S. 330, 343 (1972).

[126] *See, e.g.*, Coalition for Sensible and Humane Solutions v. Wamser, 771 F.2d 395, 399–400 (8th Cir. 1985) (city election board's decision not to appoint qualified volunteers as temporary registrars upheld as furthering important state interests of prevention of fraud, maintenance of impartiality, and administrative efficiency).

[127] *Voter Registration: Hearings on S. 1199, S. 2445, S. 2457 and S. 2574 Before the Senate Comm. on Post Office and Civil Service*, 92d Cong., 1st Sess. 78 (1971) (testimony of Sen. Kennedy (D-Mass.)) [hereinafter *Hearings*]; *id.* at 159 (testimony of Anne Wexler, Director, Voting Rights Project, Common Cause).

fraud.[128] Such criminal sanctions should be "more than adequate to detect and deter whatever fraud may be feared."[129]

As for efficient administration, it is not clear that many state voter registration systems currently keep accurate and up-to-date lists of eligible voters.[130] Improvement of record keeping systems would increase efficiency without imposing undue burdens on voters. Furthermore, even if a state's system kept accurate lists, administrative convenience alone may not justify the denial of the fundamental civil right of voting.[131] The U.S. District Court for the Eastern District of New York concluded that "[t]he state may not deny a voter the right to register (and hence to vote) because of clerical deficiencies. The remedy lies in providing more clerks rather than in registering fewer voters."[132]

Many less discriminatory alternative procedures are available to states which currently use restrictive registration procedures. Such alternatives would not necessarily be more expensive than the state's current practices. For example, volunteer deputy registrars could be recruited through political, community and church groups. Churches and public buildings could be opened by these volunteer deputy registrars as satellite registration sites. Deputy county clerks could keep staggered hours, allowing longer office hours for voter registration without increasing the total number of hours each deputy works per week. Permanent satellite registration sites could be established at schools, libraries and other government offices, utilizing the personnel already working at these sites. Or a more significant change, such as registration by mail, could also be adopted. Thus, the state may protect its legitimate interests in many nondiscriminatory ways; necessity does not require discriminatory practices.

---

[128] *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 16-181 to -184, 16-1001 to -1020 (1984 & Supp. 1986); MASS. GEN. LAWS ANN. ch. 56, §§ 1–59 (West 1975 & Supp. 1986); TENN. CODE ANN. §§ 2-19-101 to -208 (1985 & Supp. 1986).

[129] *Dunn*, 405 U.S. at 353.

[130] In many states, the lack of data, inaccurate reporting, and the local nature of reports make it difficult to determine the quality of local voter registration lists. *See* R. SMOLKA, ELECTION DAY REGISTRATION: THE MINNESOTA AND WISCONSIN EXPERIENCE IN 1976 9 (1977) [hereinafter R. SMOLKA, ELECTION DAY].

[131] *See Ferguson*, 343 F. Supp. 654, 656 (N.D. Miss. 1972) (per curiam) (three judge panel).

[132] Bishop v. Lomenzo, 350 F. Supp. 576, 587 (E.D.N.Y. 1972). *See also Ferguson*, 343 F. Supp. at 656 ("[T]he state's plain duty, where it insists upon the maintenance of registration books, is to provide efficient and expeditious registration procedures that impose only the imperatively needed restrictions.").

C. *The Voting Rights Act*

Restrictive voter registration procedures which have a racially disparate impact or perpetuate past discrimination are subject to statutory as well as constitutional scrutiny. The Voting Rights Act,[133] originally passed in 1965, forbids states from using electoral procedures, including registration procedures, that deny or abridge the right to vote on account of race.[134] Two provisions of the Act, section 2 and section 5, implement this prohibition.

1. Section 2

Section 2 applies nationwide[135] and enables any private individual to sue to enjoin an electoral procedure which violates the Act.[136] Section 2 provides that "[n]o voting qualification or prerequisite to voting or standard, practice or procedure shall be imposed or applied by any state or political subdivision in a manner which results in a denial or abridgment of the right . . . to vote on account of race. . . ."[137] Congress made clear when it amended the Voting Rights Act in 1982 that restrictive registration practices which have a discriminatory racial impact perpetuate past discrimination and are therefore proscribed by section 2.[138] Specifically, reports in both Houses of Congress noted that inconvenient registration hours and locations are barriers to voting.[139] The House Judiciary Committee also noted that dual registration and the "refusal to appoint minority registration and election officials" are barriers to voting.[140]

Although the language of section 2 is similar to the language of the Fifteenth Amendment, different standards are applied

---

[133] Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1982)).

[134] 42 U.S.C. § 1973(a) (1982); *see* Connecticut Citizen Action Group v. Pugliese, Civ. No. 84-431, slip op. (D. Conn. 1984) (LEXIS, Genfed library, Dist File) (order granting preliminary injunction and overturning registration procedures under the Voting Rights Act); H.R. REP. No. 227, 97th Cong., 1st Sess. 1, 14, 31 (1981) [hereinafter H.R. REP. No. 227]; S. REP. No. 417, 97th Cong., 2d Sess. 10 n.22, 12, 52 n.180 (1982) [hereinafter S. REP. No. 417]; Note, *supra* note 1, at 110–12; Comment, *supra* note 3, at 516–17.

[135] 42 U.S.C. § 1973(a) (1982).

[136] *See* Gray v. Main, 291 F. Supp. 998, 999–1000 (M.D. Ala. 1966); H.R. REP. No. 227, *supra* note 134, at 32.

[137] 42 U.S.C. § 1973(a) (1982).

[138] H.R. REP. No. 227, *supra* note 134, at 31; S. REP. No. 417, *supra* note 134, at 52 n.180.

[139] H.R. REP. No. 227, *supra* note 134, at 14; S. REP. No. 417, *supra* note 134, at 10 n.22.

[140] H.R. REP. No. 227, *supra* note 134, at 14.

under the two provisions to determine the legality of a registration procedure. Discriminatory intent must be shown to establish a constitutional violation,[141] but intent need not be proven to establish a violation of the statute.[142] Under section 2 the "results" of using a given electoral procedure or the "totality of the circumstances" can suffice to prove that use of the procedure violates the Act.[143] In *Connecticut Citizen Action Group v. Pugliese*,[144] the U.S. District Court for the District of Connecticut held that disproportionately lower registration rates among racial minority groups and other evidence of lack of access to the political process were sufficient to establish a violation under section 2, and found such a violation in the City of Waterbury's treatment of its Hispanic community.[145] Therefore, the court ordered Waterbury's registrars to appoint volunteer deputy registrars, a matter which had been left to their discretion by state law.[146] Thus, the statutory standard is less strict than the constitutional standard,[147] and the Voting Rights Act can be utilized as a powerful weapon to control the discretion of local registration officials.

2. Section 5

In areas of the country having a history of racial discrimination in their electoral systems,[148] the Voting Rights Act imposes

[141] Rogers v. Lodge, 458 U.S. 613, 617 (1982); *see supra* note 110.

[142] *See* Jordan v. Winter, 604 F. Supp. 807, 810–11 (N.D. Miss.) *summarily aff'd sub nom.* Mississippi Republican Exec. Comm. v. Brooks, 469 U.S. 1002 (1984); Connecticut Citizen Action Group v. Pugliese, Civ. No. 84-431, slip op. at 11 (D. Conn. 1984) (LEXIS, Genfed library, Dist file); H.R. REP. No. 227, *supra* note 134, at 28–31; S. REP. No. 417, *supra* note 134, at 27–30; *see also* Blumstein, *Defining and Proving Race Discrimination: Perspectives on a Purpose vs. Results Approach from the Voting Rights Act*, 69 VA. L. REV. 633 (1983).

[143] H.R. REP. No. 227, *supra* note 134, at 28–31; S. REP. No. 417, *supra* note 134, at 27–30. This test was upheld by the Supreme Court in *Mississippi Republican Exec. Comm.*, 469 U.S. at 1002 (Stevens, J., concurring, discussing the precedential effect of the summary affirmance of this case); *see also Connecticut Citizen Action Group*, slip op. at 11–12 (LEXIS).

[144] Civ. No. 84-431, slip op. (D. Conn. 1984) (LEXIS, Genfed library, Dist file).

[145] *Id.* at 11 (LEXIS); H.R. REP. No. 227, *supra* note 134, at 31.

[146] *Connecticut Citizen Action Group*, slip op. at 15 (LEXIS).

[147] Congress intended this result. In City of Mobile v. Bolden, 446 U.S. 55 (1980) a plurality of the Supreme Court decided that intent was a necessary element of proof in both constitutional and Voting Rights Act challenges to electoral procedures. *Id.* at 60–74 (plurality opinion). Although Congress could not overrule the Court's constitutional interpretation (the Court may have done so, however, *see supra* notes 107–114 and accompanying text for a discussion of the Court's subsequent treatment of this issue and the plurality opinion in *Bolden*), it can and did overrule the Court's interpretation of the Voting Rights Act. H.R. REP. No. 227, *supra* note 134, at 31; S. REP. No. 417, *supra* note 134, at 36–37.

[148] 42 U.S.C. § 1973b(b) (1982) establishes a formula to determine which jurisdictions

additional safeguards against the adoption of discriminatory electoral procedures.[149] Section 5 of the Voting Rights Act[150] requires covered jurisdictions to clear any changes in electoral procedures in advance with the U.S. Department of Justice. The affected state and local governmental bodies must prove to the Department that the proposed changes are nondiscriminatory.[151] Even if the Department of Justice decides the proposals are nondiscriminatory and therefore approves the change, private parties may challenge the proposed change in the U.S. District Court for the District of Columbia and the jurisdiction will again be required to prove that the proposed change is nondiscriminatory.[152] The same standards adopted under section 2 also apply to determine whether a procedure violates section 5.[153]

D. *Summary*

Legal challenges to restrictive voter registration procedures can be successfully made in several ways. A restrictive procedure that disproportionately burdens a minority group, such as blacks or Hispanics, violates the Voting Rights Act.[154] It may also violate the Equal Protection Clause of the Fourteenth Amendment if discriminatory intent can be proven.[155] The courts are also willing to consider whether restrictive registration procedures impermissibly burden the right of all citizens to vote,[156] although they have not yet clearly established the extent to which access may be restricted before a violation will be found.

Once a violation is found, the courts possess broad remedial powers to order the use of nonrestrictive voter registration pro-

---

have such a history and are therefore covered by section 5: jurisdictions which 1) used any test or device to determine eligibility to vote in the 1964, 1968, or 1972 presidential elections and 2) which had less than 50% of their voting age population registered to vote on Novemeber 1, 1964, 1968, or 1972, or that recorded a less than 50% turnout in the 1964, 1968 or 1972 presidential elections.

[149] 42 U.S.C. § 1973c (1982).

[150] Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1982)).

[151] *Id.*

[152] *Id.*

[153] Note, *supra* note 1, at 117–19; S. REP. No. 417, *supra* note 134, at 12 n.31.

[154] *See supra* notes 133–53 and accompanying text.

[155] *See supra* notes 107–24 and accompanying text.

[156] *See, e.g.*, O'Brien v. Skinner, 414 U.S. 524 (1974); Coalition for Sensible and Humane Solutions v. Wamser, 771 F.2d 395 (8th Cir. 1985).

cedures.[157] Legislatures of course need not and should not wait for the courts to order the elimination of restrictive voter registration procedures. Both legislatures and courts may require some guidance however as to what procedures a sound voter registration system should include.

II. Sound Voter Registration Policy: Access, Integrity, and Efficiency

Whether a court or a legislature is the body considering how to eliminate restrictive registration practices, three principal policy considerations should determine the design of a state's voter registration system. The primary policy consideration must be to make voter registration conveniently and equally accessible to all residents. This policy is designed to ensure that registration does not become a barrier to voting for either the general population or for a disfavored minority group. The second policy consideration is that voter registration should help prevent voting fraud, in order to reinforce the integrity of the electoral system. The third policy consideration is that voter registration should be conducted efficiently, in order to maintain accurate and up-to-date lists of registered voters, thereby providing an effective check on voting fraud.

These policy considerations are compromised by the practices of many existing voter registration systems. In particular, they are compromised by the administrative actions of many local voter registration officials. Officials' abuse of the discretion vested in them by most state voter registration statutes is perhaps the most intractable problem associated with many state voter registration systems.

A. *Control of Local Registrars' Discretion*

1. Local Registrars' Discretion

The scope of the discretion vested in local voter registration officials varies widely among different states, but commonly

[157] *See* Note, *supra* note 1, at 122–31.

includes setting office hours;[158] determining whether to conduct voter registration drives, as well as when and where to conduct them;[159] and determining whether to appoint deputy registrars, as well as how many and whom in particular to appoint.[160] Because of the extensive discretion allowed in many states, voter registration practices differ markedly not only from state to state but from county to county within a state.[161] Many restrictive registration practices thus stem from the individual preferences of local registrars and not necessarily from state law.[162] Some of these practices are deliberately adopted by registrars to restrict registration opportunities.[163] Others are adopted because the local registrar puts his own convenience ahead of that of the voters.[164]

Although legal challenges to abuses of discretion by local voter registration officials can be made and have succeeded,[165] challenging restrictive practices jurisdiction by jurisdiction is logistically much more difficult than challenging a restrictive state law.[166] Legal challenges to registrars' abuses of discretion should be brought whenever possible, but the most effective way to eliminate many of these restrictive registration practices would be to create a voter registration system which controls the discretion of local registrars from the start.

---

[158] *See, e.g.*, ME. REV. STAT. ANN. tit. 21-A, § 101(6) (Supp. 1986). For a more complete discussion and citation of state statutes see Note, *supra* note 1, at 103 nn.49–50.

[159] *See, e.g.*, WIS. STAT. ANN. § 6.28(1)(a) (West 1986) (but § (2)(a) requires registrars to go to local high schools to register students and members of the high school staff). For a more complete discussion and citation of state statutes see Note, *supra* note 1, at 103–04 nn.51–52.

[160] *See, e.g.*, MO. ANN. STAT. § 115.143 (Vernon Supp. 1986). For a more complete discussion and citation of the state statutes see Note, *supra* note 1, at 102 n.48.

[161] AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF VIRGINIA, VOTING RIGHTS PROJECT, VOTER REGISTRATION PRACTICES IN VIRGINIA: THE CRAZY QUILT 6, 29–30 (1984) (on file at HARV. J. ON LEGIS.) [hereinafter ACLU]; Note, *supra* note 1, at 102–04.

[162] ACLU, *supra* note 161, at 29.

[163] Note, *supra* note 1, at 104.

[164] *Id.* at 115 n.139; ACLU, *supra* note 161, at 29–30. "Many registrars appear to operate as if their offices were private feifdoms." *Id.* at 30.

[165] *See, e.g.*, Connecticut Citizen Action Group v. Pugliese, Civ. No. 84-431, slip op. at 15 (D. Conn. 1984) (LEXIS, Genfed library, Dist file) (order granting preliminary injunction and overturning local registrar's refusal to appoint volunteer assistant registrars, under a state statute which made their appointment discretionary, as a violation of section 2 of the Voting Rights Act).

[166] *See* Note, *supra* note 1, at 102 n.47.

2. Control—Removal of Discretion

The most obvious way to control local registrars' abuse of their discretion is to remove them from the voter registration process. This removal could be accomplished by abolishing the registration requirement, allowing registration on election day, establishing a federal registration system, or establishing a canvass to make lists of eligible voters. For a variety of reasons, however, none of these alternatives would be the most effective way to ensure accessible and accurate voter registration systems.

Abolishing the registration requirement eliminates both the problems and advantages of voter registration. One state, North Dakota, has no registration requirement and apparently has no particular problem with voting fraud.[167] More highly populated and urbanized areas are unlikely to be so fortunate. Many areas of the country have experienced voting fraud,[168] and the voter registration requirement provides a salutory check on the possibilities of such fraud by making attempts to stuff the ballot box more obvious.[169] Some other states require registration but allow registration on election day.[170] This system also imposes no check on voting fraud as any address cross-checking occurs well after election results are tallied.[171] Prosecution of offenders has proven practically impossible.[172]

Another alternative to a local voter registration system is the creation of a federal voter registration system. Such a system was proposed in the 1970's.[173] The United States Constitution

---

[167] *See id.* at 96 n.14; N.D. CENT. CODE § 16.1-02 (1981).

[168] *See* R. SMOLKA, ELECTION DAY, *supra* note 130, at 1–2, 6–8. Fraudulent procedures include stuffing the ballot box, padding the lists of registered voters, and voting by nonresidents, among others.

[169] *See id.* at 6–8.

[170] ME. REV. STAT. ANN. tit. 21-A, § 122(4) (Supp. 1986); MINN. STAT. § 201.061(3) (1982); WIS. STAT. ANN. § 6.55(2)–(3) (West 1986 & Supp. 1986). Oregon formerly allowed election day registration but the state recently amended its law to require registration at least one day prior to the election (twelve days prior for mail registration). OR. REV. STAT. § 247.025(1) (1985).

[171] *See* R. SMOLKA, ELECTION DAY, *supra* note 130, at 65–69.

[172] *Id.* at 66–67.

[173] S. 2574, 92d Cong., 1st Sess. (1971); S. 2457, 92d Cong., 1st Sess. (1971); *see generally Hearings*, *supra* note 127; K. PHILLIPS & P. BLACKMAN, ELECTORAL REFORM AND VOTER PARTICIPATION: FEDERAL REGISTRATION: A FALSE REMEDY FOR VOTER APATHY 55–59 (1975). Bills to establish registration by mail and election day registration for federal elections were introduced in the 99th Congress, but did not get out of committee. H.R. 1453, 99th Cong., 1st Sess. (1985) (registration by mail); H.R. 1454, 99th Cong., 1st Sess. (1985) (election day registration).

grants Congress control over most regulations of federal elections;[174] however, the Constitution leaves determination of voter qualifications to the states.[175] In *Oregon v. Mitchell*, the Supreme Court broadly construed Congress' authority to regulate federal elections and upheld Congressional reduction of the voting age to eighteen in federal elections.[176] However, the Court held that Congress may only alter voter qualifications for state elections when such standards conflict with other constitutional provisions.[177] Thus a constitutional amendment was required to lower the voting age to eighteen for all elections.[178] Therefore it does not seem that Congress by itself could create a federal voter registration system for state elections.[179]

Although some states might abolish their registration systems if a federal registration system were created, others might wish to retain local authority.[180] Any resulting duplication would be inefficient and could create both inequities and confusion as to

---

[174] U.S. CONST. art. I, § 4 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof, but the Congress may at any time by Law make or alter such Regulations except as to the Places of choosing Senators."). *See* Smiley v. Helm, 285 U.S. 355, 366–67 (1932) ("Congress may supplement these state regulations or may substitute its own.").

[175] U.S. CONST. art. I, § 2 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."); U.S. CONST. amend. XVII (changing the method of electing Senators).

[176] 400 U.S. 112, 117, 119–24 (1970).

[177] *Id.* at 118, 124–31.

[178] U.S. CONST. amend. XXVI.

[179] *See Mitchell*, 400 U.S. at 121–24. *Mitchell* did uphold Congress' abolition of literacy tests in all elections. *See* 42 U.S.C. § 1971(a)(2)(C) (1982). The use of literacy tests conflicted with constitutional provisions such as equal protection, which would not be implicated by a state's use of a nonrestrictive neutral system of voter registration. *Mitchell*, 400 U.S. at 118, 131–34, 144–47, 216–17, 231–36, 282–84.

[180] The state's interest in maintaining local voter registration is supported by traditional federalism concerns that the states be allowed to define and administer their own political processes, so long as they do so in a nondiscriminatory, nonburdensome manner. The states' role is thus a key part of the federal structure of elections as established by the Constitution. Although the Supreme Court's recent decision in Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985), indicates that states must look to Congress and the political process and not to the courts to protect federalism interests, *id.* at 549–54, imposition of a federal registration system for all elections seems to be of greater constitutional concern than the minimum wage provisions at issue in *Garcia*. An analogous question is whether Congress could abolish the position of state Lieutenant Governor. To do so would interfere with the structure of the political process relied upon by the *Garcia* court to protect the states' interests in federalism. Similarly, imposition of a federal voter registration system would change that structure and therefore could violate the implications of *Garcia*. At present, Congress seems uninterested in the possibility of a federal voter registration system, *see supra* note 173, so a test of these possible limits of *Garcia* does not appear imminent.

who is registered for which election. Without effective coordination between the two systems, the registration burden imposed upon individual citizens could double as well. In addition, the displacement of local officials by federal officials does not guarantee that abuse of discretion will cease as federal officials are also eminently capable of abusing discretion. Given these potential problems and the lack of congressional interest in creating such a system,[181] this alternative seems unattractive.

Many other Western countries create lists of registered voters by having the national government canvass all households.[182] No American jurisdiction has adopted this method.[183] The advantages of this system are that it allows uniform administration of voter registration and that a very high percentage of eligible voters are registered.[184] Such a system, however, may be one of the most expensive registration alternatives.[185] The National Municipal League proposed the adoption of statewide canvassing in its Model Election Law more than ten years ago.[186] This proposal apparently generated very little interest because no state has adopted such a system. Additionally, some people may feel that a canvass violates the individual's autonomy to choose whether or not to participate in the political process, a value traditionally held by many Americans.[187] On the whole, it seems that complete removal of local registration officials' discretion is not a politically feasible alternative.

---

[181] *See supra* note 173. A constitutional amendment to establish a federal voter registration system has apparently never been proposed and would be very unlikely to be enacted considering the strenuous adoption requirements. The relatively few constitutional amendments adopted over the years, the struggle over adoption of the Equal Rights Amendment and its eventual rejection, and the rejection of the District of Columbia Representation Amendment all indicate how difficult it is to ratify an amendment.

[182] *See* K. PHILLIPS & P. BLACKMAN, *supra* note 173, at 77–99; *see also* Burnham, *A Political Scientist and Voting Rights Litigation: The Case of the 1966 Texas Registration Statute*, 1971 WASH. U.L.Q. 335, 337; Comment, *supra* note 3, at 482 n.5.

[183] Adoption of canvassing has been proposed. *See* NATIONAL MUNICIPAL LEAGUE, A MODEL ELECTION SYSTEM 62–63 (1973).

[184] *See* K. PHILLIPS & P. BLACKMAN, *supra* note 173, at 65–67.

[185] *See* R. SMOLKA, COST OF ADMINISTERING AMERICAN ELECTIONS 65–67 (1973) [hereinafter R. SMOLKA, ELECTION COSTS].

[186] *See* NATIONAL MUNICIPAL LEAGUE, *supra* note 183, at 62–63.

[187] The worth of this value can be questioned; it is, however, a strongly held value. Americans generally disapprove of compulsory voting, as required in Australia and in many Communist countries. *See* K. PHILLIPS & P. BLACKMAN, *supra* note 173, at 69, 93–97.

3. Control—Carefully Bounded Statutory Discretion

The alternative to eliminating the role of local officials in voter registration is to limit their discretion, so that abuse will become unlikely, or at least less common. A carefully drafted state voter registration statute could accomplish this desired end. Such a statute would need to set out very specifically what local voter registration officials are required to do and should also include many objective criteria to evaluate the local voter registration officials' performance. What follows is a draft of such a statute.

B. *Model Voter Registration Statute*

PART A. VOTER REGISTRATION

SECTION 1. VOTER REGISTRATION SYSTEM

(A) *Purpose.* The purpose of the system of voter registration is to aid the orderly conduct of elections by maintaining an accurate list of those citizens eligible to vote. Only those citizens listed may vote.

(B) *Responsible Officials.* [Local voter registration officials] will bear primary responsibility for administering the voter registration system, as specifically set out in [Sections 2–10] of this Act. The [state voter registration official] will be responsible for supervising the voter registration system and for training [local voter registration officials] in order to ensure that voter registration throughout the state is conducted according to this Act's provisions.

(C) *Duties.* The legislature intends to encourage all citizens to vote and similarly intends that the registration requirement not be a barrier to voting. Therefore it is the duty of those responsible for administering the voter registration system to actively encourage and facilitate voter registration, as well as to keep accurate registration records.

COMMENTARY TO SECTION 1: This section establishes voter registration as a prerequisite to voting but notes that the legislature intends to encourage access to voter registration. This explicit declaration of legislative intent should guide both voter registration officials and the courts to interpret the statute so as to provide liberal access to voter registration for all citizens.[188]

[188] Similarly, CAL. ELEC. CODE § 302 (West 1977) explicitly declares the intent of the legislature to increase access to the voter registration system.

The section also explicitly establishes who bears what responsibility for administering the voter registration system. Primary responsibility is placed upon local officials. Different states, depending upon the structure of their local governments, will utilize different local officials to perform this function.[189] Currently, most states administer their voter registration systems primarily through local officials.[190] This approach seems appropriate considering the permanent administrative presence necessary for a successful registration system, as well as local officials' superior knowledge of the local polity. Placing responsibility at the local level creates problems, however, as it provides opportunities for the abuse of discretion.[191] The various provisions of this Model Statute should control discretion in a manner which allows flexibility but prevents abuse.

This section also gives state officials responsibilities in the voter registration system.[192] State officials are to train local voter registration officials, to design and print standard registration forms,[193] and to supervise local officials' performance of their duties.[194] To aid in monitoring elections and statewide compliance with this statute, state officials are to be provided with up-to-date copies of each local jurisdiction's master list of registered voters.[195] The involvement of state officials in the system should provide some uniformity and a check on local officials' discretion.

SECTION 2. REGISTRATION REQUIREMENTS

(A) *Registration Cards.* Those citizens eligible to vote may register by completing, signing, and filing a registration card. This card should

---

[189] The officials most commonly utilized will probably be county clerks or county registrars, but because this usage will vary they will be referred to throughout this Model Statute as the local voter registration official. The appropriate local official's title should of course be substituted before adoption. In general brackets will be used throughout the Model Statute to indicate items which need to be altered to fit any particular adoption of the statute.

[190] *See, e.g.*, CAL. ELEC. CODE § 301 (West 1977 & Supp. 1987).

[191] *See supra* notes 158–64 and accompanying text.

[192] As with local officials, the particular state officials given these responsibilities will vary from state to state. Most commonly either the Secretary of State or the State Board of Elections is given responsibility for voter registration. Throughout this Model Statute the state officials responsible for voter registration will be referred to as the state voter registration official.

[193] *See infra* Model Statute § 3(A) (state to design and print registration forms).

[194] *See infra* Model Statute § 12 (state voter registration official given power to challenge in court the registration procedures used by local voter registration officials).

[195] *See infra* Model Statute § 10(C).

either be mailed or submitted in person to the [local voter registration official] for filing.

(B) ***Required Information.*** **The registration card shall include the following information:**

(1) name (middle initial optional);

(2) residential address;

(3) telephone number (optional);

(4) previous place of registration to vote (if any) (optional);

(5) [political party affiliation]; and

(6) racial/language group (optional).

In addition, the registrant must sign the following statement: "I affirm that I am a United States citizen, that I will be at least eighteen years of age on the next Election Day, that I am not currently imprisoned because of conviction for a crime, and that all the information I have provided on this card is true. I understand that providing false information is punishable as perjury."

(C) ***Aid in Filling Out Registration Cards.*** **Anyone may assist those wishing to register to complete the registration card. Those eligible voters who cannot sign their name may mark an "X" instead; however, cards so marked must be countersigned by a registered voter before they can be filed.**

COMMENTARY TO SECTION 2: Subsection (A) of this section allows citizens to submit registration cards either in person or by mailing them to the local voter registration official. Forty percent of the states now allow voter registration by mail.[196] So-called postcard registration has many advantages over systems that require in-person registration. Registrants are no longer required to appear at certain times at specific places, which may be inconvenient or even impossible. In addition, postcard registration simplifies, encourages, and reduces the cost of voter registration drives by interested civic and political organizations. Massachusetts Secretary of State Michael Connolly surveyed states that allow postcard registration and found that "[w]ithout exception the states surveyed have endorsed mail registration. Most states report an increase in registration and

[196] *See* ARTHUR YOUNG & CO., MAIL REGISTRATION SYSTEMS I 3 (Exhibit II-1) (1977). Since the report was prepared, two other states have adopted registration by mail. *See* ME. REV. STAT. ANN. tit. 21-A, § 152 (Supp. 1986); MO. ANN. STAT. § 115.159(1) (Vernon 1980). For a more complete citation of each state's mail registration statute, see Note, *supra* note 1, at 127 n.219. Voters in Massachusetts though recently rejected a registration by mail statute in a state-wide referendum. Boston Globe, Nov. 6, 1986, at 23.

all found mail registration more convenient for both voters and registrars."[197] The percent of a state's voters registering by mail varies widely, depending upon when the system was adopted and how widely the state distributes the mail-in forms.[198]

Postcard registration, however, is no panacea that assures high voter registration rates.[199] Although some barriers to voter registration may be removed by its adoption, registration still requires an affirmative act on the part of the citizen, and therefore the state will still need to take affirmative steps to make registration easily available.[200] Some common objections to postcard registration systems are that fraud will increase as no personal appearance by the registrant is required and that many registration cards will not be filled out correctly.[201] These problems can be dealt with effectively.[202] Sending a notice to each registrant to confirm the information submitted on the registration card (and purging anyone whose notice is returned by the Post Office as undeliverable) should adequately safeguard against fraud.[203] Some increase in deficiently completed registration cards may be a natural consequence of increasing access, but states adopting postcard registration have not found this problem to be significant.[204]

The intent of subsection (B) is to require registrants to provide only the information necessary for the efficient administration

---

[197] Report by Michael Connolly, Massachusetts Secretary of State, *quoted in* Scharfenberg, *supra* note 2, at 15, col. 5.

[198] ARTHUR YOUNG & Co., *supra* note 196, at 6 (Exhibit III-1) (Maryland, Oregon, and Pennsylvania register 80% or more by mail; Alaska, Kansas, Kentucky, Ohio, and Wisconsin register less than 5% by mail).

[199] *See* R. SMOLKA, REGISTERING VOTERS BY MAIL: THE MARYLAND AND NEW JERSEY EXPERIENCES 62–65, 83 (1975) [hereinafter R. SMOLKA, MAIL REGISTRATION].

[200] *See infra* Model Statute § 3(B) (wide distribution of mail-in registration cards); *id.* at § 4 (appointment of volunteer deputy registrars); *id.* at § 5 (evening and Saturday office hours); *id.* at § 6 (temporary registration sites).

[201] *See* R. SMOLKA, MAIL REGISTRATION, *supra* note 199, at 73–84; ARTHUR YOUNG & Co., *supra* note 196, at 11–14; K. PHILLIPS & P. BLACKMAN, *supra* note 173, at 115–26 (problems with postcard registration as identified by secretaries of state).

[202] *See* ARTHUR YOUNG & Co., *supra* note 196, at 9–14; R. SMOLKA, MAIL REGISTRATION, *supra* note 199, at 83–85.

[203] *See infra* Model Statute § 8(A) (notice to registrants); *id.* at § 9(A)(4) (purging the names of those registrants whose notices are returned because they are undeliverable); *see also* ARTHUR YOUNG & Co., *supra* note 196, at 9–14. *But see* R. SMOLKA, MAIL REGISTRATION, *supra* note 199, at 78–80. *See generally* Scharfenberg, *supra* note 2, at 15, col. 5 (reporting results of surveys conducted by Massachusetts Secretary of State Michael Connolly and the Federal Election Commission, stating that mail registration did not produce a significant percentage of fraud).

[204] *See* R. SMOLKA, MAIL REGISTRATION, *supra* note 199, at 70–73; ARTHUR YOUNG & Co., *supra* note 196, at 11; *see also infra* Model Statute § 8(B) (procedures concerning deficient registration cards).

of the voter registration system. Some states require unnecessarily detailed information on their registration forms.[205] Name, address,[206] and the affirmation provide all the substantive information needed to complete registration.[207] The provision of a telephone number can aid local voter registration officials in correcting deficient registration cards[208] so it is requested, although not required. Previous place of registration is requested to enable local voter registration officials to notify other local registrars of the registrant's new address and thereby help keep the state's voter registration lists as up-to-date as possible. Whether political party affiliation is included will depend upon the particular state's election laws. Any state which places restrictions on who may vote in party primaries will need such information. Finally, the racial and language group of the registrant is requested solely to aid in monitoring how successful the state's voter registration system is in registering minorities, who have traditionally been given less access to voter registration.[209]

Subsection (C) is intended to prevent restrictive practices by local registrars, by establishing that anyone may assist a citizen

---

[205] *See, e.g.*, TENN. CODE ANN. § 2-2-116 (1985) (requiring registrants to provide information on such items as occupation, place of birth, and social security number, if any).

[206] Too narrow a construction of the residency requirement would be unconstitutional. The homeless, for example, may not be uniformly excluded from voting because of their nontraditional residences. *See* Pitts v. Black, 608 F. Supp. 696 (S.D.N.Y. 1984); Collier v. Menzel, 176 Cal. App. 3d 24, 221 Cal. Rptr. 110 (1985). Because the homeless are no more likely than others to commit voting fraud, because they can normally be reached at a mailing address, and because residences such as shelters, alleys and park benches can be assigned to voting districts, no compelling state interests support the abridgment of homeless residents' right to vote. *See Pitts*, 608 F. Supp. at 706–10; *Collier*, 176 Cal. App. 3d at 34–36, 221 Cal. Rptr. at 115–16; *see also* Tye, *Voting Rights of Homeless Residents*, 20 NATIONAL CLEARINGHOUSE FOR LEGAL SERVICES, INC., CLEARINGHOUSE REVIEW NO. 3 227, 231–32 (July 1986). Therefore that abridgment violates the Equal Protection Clause of the Fourteenth Amendment. *Pitts*, 608 F. Supp. at 709–10; *Collier*, 176 Cal. App. 3d at 37, 221 Cal. Rptr. at 117. *See generally* Tye, *supra* at 227–33.

[207] The affirmation in subsection (B) mentions imprisonment because most states do not allow those currently imprisoned to vote. *See, e.g.*, CAL. ELEC. CODE §§ 707–08 (West Supp. 1987). This exclusion seems consistent with punishment for violation of societal norms. In addition, several states do not allow ex-felons to vote even after release from prison. *See, e.g.*, MINN. STAT. § 201.014 (West Supp. 1987). The legal status of these statutes is unclear. The Court in Hunter v. Underwood overturned an Alabama law which provided for the disenfranchisement of anyone convicted of certain felonies and misdemeanors, as a Fourteenth Amendment violation of blacks' voting rights. *Hunter*, 471 U.S. 222, 233 (1985).

[208] *See infra* Model Statute § 8(B); *see also* CAL. ELEC. CODE § 503(b) (West Supp. 1987), which provides for local voter registration officials' use of telephone numbers to attempt to correct deficient registration applications.

[209] *See supra* notes 14–17 and accompanying text.

in filling out the registration card. The countersignature required on registration cards of those unable to sign their own name is merely a countercheck to prevent fraud, which is naturally a greater possibility in such instances.

PART B. ENSURING ACCESS TO VOTER REGISTRATION

SECTION 3. FORMS

(A) *Printing.* The [state voter registration official] shall design and print blank registration cards and shall distribute them to all [local voter registration officials]. Versions of these forms shall be printed in English and in any other language which current United States Census data indicates is the primary language spoken by three percent or more of the voting age population of any precinct in the state. These forms shall include the information specified in [Section 2(B)] and shall be pre-addressed for return to the [local voter registration official].

(B) *Distribution.* The [local voter registration official] shall provide sufficient quantities of the appropriate versions of these cards for voter registration at the [local voter registration official's] office. In order to ensure that registration forms are distributed to the public throughout the [local jurisdiction], the [local voter registration official] shall provide sufficient quantities of the appropriate versions of these cards to:

(1) public high schools;

(2) public libraries;

(3) public colleges, universities, and institutions of higher learning;

(4) state [driver's license examination bureaus];

(5) state [welfare and unemployment aid offices];

(6) municipal and county buildings;

(7) other sites necessary to ensure convenient registration for those wishing to register; and

(8) citizens or organizations (including but not limited to civic groups, political groups or parties, labor unions, businesses, and private schools) who wish to distribute such cards.

The [local voter registration official] must mail a form immediately to any resident who wishes to register and requests a form.

COMMENTARY TO SECTION 3: The state is to design and print the blank registration cards to ensure uniformity,[210] and to en-

[210] If the legislature wishes to design the form itself, "design and" should be omitted

sure that forms will be provided in the language of any significant minority language group.[211] Provision could also be made in subsection (A) for the state's payment of return postage on the blank voter registration cards, if the state's treasury permits.[212] Payment of return postage would minimize any disincentive to use the postcard system, but such payment would significantly increase the cost of the state's voter registration system[213] and it is not vital to encourage registration.[214]

Subsection (B) gives explicit guidance to local voter registration officials about where they must distribute blank voter registration cards.[215] This subsection in effect establishes these locations as permanent satellite registration sites because registration cards should always be available at these locations. If a state did not wish to adopt registration by mail, it would be necessary to formally designate these sites as permanent satellite registration sites and to appoint a deputy registrar at each one of them.[216]

SECTION 4. DEPUTY REGISTRARS

(A) *Appointment.* **In order to promote and encourage voter registration, [local voter registration officials] shall enlist the aid of interested residents and organizations and shall deputize such residents and members of such organizations as registrars. The [local voter registration officials] may appoint as many deputy registrars as necessary, but must appoint at least one deputy registrar for each 10,000 residents in the [local jurisdiction] according to current United States Census data. Deputy registrars may register voters anywhere in the [local jurisdiction] and must register *any* citizen who wishes to register.**

---

from the first sentence of subsection (A) and instead the legislature's design should be included at the end of subsection (A).

[211] The three percent figure is taken from CAL. ELEC. CODE § 302 (West 1977) (which concerns deputy registrars), in recognition of California's significant non-English speaking population and the state's consequent experience with such problems.

[212] *See* ARTHUR YOUNG & CO., *supra* note 196, at 6 (Exhibit III-1).

[213] *See* R. SMOLKA, MAIL REGISTRATION, *supra* note 199, at 68–70.

[214] In voter registration drives, for instance, the organizers can return all the completed voter registration cards at once, thereby minimizing costs.

[215] Subsection (B) is modeled after CAL. ELEC. CODE § 507 (West Supp. 1987). The Model Statute however gives much more explicit guidance to local voter registration officials. The subsection's list of places is in part drawn from ILL. ANN. STAT. ch. 46, para. 4-6.2 (Smith-Hurd Supp. 1986), although that statute details who shall be appointed a deputy registrar.

[216] Permanent satellite registration sites could be established by adding a new subsection establishing such to § 6 of this Model Statute. For an example of such an approach see ILL. ANN. STAT. ch. 46, para. 4-6.2 (Smith-Hurd Supp. 1986).

(B) *Diversity.* To promote and encourage voter registration [local voter registration officials] shall recruit deputy registrars who represent a cross-section of the community. In particular [local voter registration officials] shall appoint deputy registrars from minority racial and language groups at least in proportion to the minority groups' presence in the population, as determined by current United States Census data. If, according to that data, three percent or more of any precinct's voting-age population primarily speaks a language other than English, then the [local voter registration officials] shall appoint deputy registrars fluent in both that language and English, and [local voter registration officials] shall publish all registration notices in every appropriate language.

COMMENTARY TO SECTION 4: The appointment of deputy registrars, including volunteer deputy registrars, is an important way to encourage voter registration.[217] The use of deputy registrars complements registration by mail, as it provides for active as well as passive registration efforts.[218] In at least one state, research suggests that the appointment of volunteer deputy registrars produces a higher rate of voter registration.[219] If a state chooses not to adopt registration by mail, then the liberal appointment of deputy registrars becomes a particularly important method of ensuring ample access to the voter registration system. Subsection (B) is intended to ensure that the diversity of the community is reflected in its voting registrars, because minority communities respond better to registration efforts that include staff members from their communities.[220] If a state fears that local registrars might be unable to enlist a sufficiently diverse group of deputy registrars after making all reasonable efforts, then a waiver procedure to excuse failures to meet this subsection's requirements, administered by the state voter registration official, could be added at the end of the subsection.

---

[217] The particular provisions of this section concerning interested residents and organizations, reasonable efforts to recruit bilingual deputies, and grants of authority to deputies to register anywhere in the local jurisdiction are drawn from CAL. ELEC. CODE § 302 (West 1977). The provision that deputies must register anyone regardless of party, race, etc. who presents himself to a deputy is drawn from IOWA CODE ANN. § 48.27(1) (West Supp. 1986). Iowa, unlike California, had required that deputy registrars be drawn from lists prepared by each area's two major political parties. IOWA CODE ANN. § 48.27 (West Supp. 1986). This restriction was held unconstitutional as a violation of the First Amendment as applied to the state through the Fourteenth Amendment in Iowa Socialist Party v. Slockett, 604 F. Supp. 1391, 1397–98 (S.D. Iowa 1985). *But see* Coalition for Sensible and Humane Solutions v. Wamser, 771 F.2d 395, 400 (8th Cir. 1985) (finding a similar Missouri provision legal).

[218] *See* CAL. ELEC. CODE § 303 (West 1977) (noting legislative intent that adoption of registration by mail should not restrict the liberal use of volunteer deputy registrars).

[219] ACLU, *supra* note 161, at 30.

[220] *See* Note, *supra* note 1, at 126.

Waivers, if given at all, should only be granted in extraordinary cases.

SECTION 5. OFFICE HOURS

[Local voter registration officials'] offices shall be open to receive registrations during normal business hours, 9 a.m. to 5 p.m., throughout the year. To provide registration opportunities for persons who work during those hours, the [local voter registration officials'] offices shall also be open at least three hours every Saturday and three hours one weeknight evening throughout the year.

COMMENTARY TO SECTION 5: One of the greatest barriers to registration is limited office hours.[221] This section mandates both Saturday and weekday evening operation, allowing people who work during the day to register more easily. This provision does not necessarily require local voter registration officials to increase their staff, because a current deputy registrar's hours could be shifted away from regular business hours to accommodate the new office hours. These expanded hours apply throughout the year in order to encourage voter registration when elections are not imminent.[222]

SECTION 6. SATELLITE REGISTRATION SITES

(A) *Temporary Satellite Registration Sites.* **In order to ensure that registration is conveniently available, [local voter registration officials] shall establish temporary satellite registration sites near areas of concentration of population or use by the public, at such times as are convenient to the public. Possible temporary satellite registration sites include, but are not limited to, public buildings, churches, community centers, shopping centers, hospitals, stores, parks, apartment complexes, factories, businesses, child care centers, and nursing homes.**

---

[221] Some states do not even require full-time registration hours. *See, e.g.*, ME. REV. STAT. ANN. tit. 21-A, § 101(6) (Supp. 1986) (requiring "reasonable office hours"); *see also* Note, *supra* note 1, at 103 nn.49–50 (summarizing and giving full citations for many state statutes concerning office hours).

[222] Expanding operating hours throughout the year should reduce any last minute registration rush and thus alleviate pressures for early pre-election closures. Many states, however, require expanded office hours only immediately prior to an election. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 51, § 28 (West Supp. 1986), NEV. REV. STAT. § 293.560(2) (1986), UTAH CODE ANN. § 20-2-6 (Supp. 1986). A change to expanded operating hours throughout the year could be accomplished at no additional cost to the registrar. The local registrar's deputies need merely shift to different working hours while continuing to perform their usual work.

(B) *Frequency of Temporary Registration.* **Temporary satellite registration sites shall be available to the public at least two hours per year for each 1000 residents in the [local jurisdiction] according to current United States Census data.**

(C) *Notice.* **The [local voter registration official] shall publish notice of the time and place of temporary registration in a newspaper of general circulation within the [local jurisdiction] at least three but not more than ten days before the event.**

COMMENTARY TO SECTION 6: This section requires local voter registration officials to conduct voter registration drives outside of their offices.[223] The intent is that registration should be available when and where people gather, and not that people should have to gather for registration. It makes concrete the local registrars' duty to encourage and facilitate registration.[224] The use of temporary satellite registration sites demonstrably increases the rate of voter registration.[225] The local voter registration officials cannot merely rely upon the initiative of local civic or political organizations to conduct registration drives.

If a state chooses not to adopt registration by mail, an additional subsection should be added to this section to create permanent satellite registration sites. Without registration by mail, these sites are needed to make registration available throughout the community on a regular basis. The sites should include all the places section 3(B) of the Model Statute designates for blank registration card distribution.[226]

SECTION 7. REGISTRATION CLOSING DATE

Voter registration for each election shall close twenty-eight days before the election. Voter registration cards may still be filed during this period; however, these registrants shall not be entered on the list of registered voters until after the election.

COMMENTARY TO SECTION 7: The intent of this section is to permit only those time restrictions imperatively needed to ensure the accurate administration of the voter registration system, because such restrictions prevent citizens from registering at election time when they may be most interested in doing so.

[223] This section is generally modeled on ILL. ANN. STAT. ch. 46, para. 4-6.3 (Smith-Hurd Supp. 1986), but the language has been rewritten, the list of appropriate sites expanded, and the dates of notice changed.

[224] *See supra* Model Statute § 1(C).

[225] ACLU, supra note 161, at 30.

[226] *See supra* Model Statute § 3(B)(1)–(7).

The precise length of time restriction needed is not clear. Under an efficient voter registration system which makes registration efforts throughout the year, however, this period should not be very long at all.[227] Twenty-eight days was chosen as the registration closing date for the Model Statute because most states cut off registration a month before elections.[228] Because most elections in this country are held on weekdays,[229] a twenty-eight day closing period ensures that registration will close on a weekday instead of on a weekend. Having the final day of registration fall on a day that the local registrar's office is open should maximize registration opportunities.

PART C. ENSURING ACCURACY IN VOTER REGISTRATION

SECTION 8. NOTICE TO REGISTRANTS

(A) ***Complete Registration Cards.*** **Upon receiving a voter registration card which contains all the information required by [Section 2 (B)] of this Act, the [local voter registration official] shall mail a notice to the registrant indicating the registrant's proper precinct and polling place. To prevent fraudulent registration, the notice shall be sent by first-class mail and shall indicate that it must be returned if it is not deliverable to the registrant at that address.**

(B) ***Deficient Registration Cards.*** **If the voter registration card received does not contain all the information required by [Section 2(B)] of this Act but the telephone number is legible, the [local voter registration official] shall telephone the citizen and attempt to collect the missing information. If this attempt does not succeed or no telephone number is provided, and the citizen's address is legible, then the [local voter registration official] shall send the citizen both a notice explaining what further information is needed and a new registration card.**

---

[227] Iowa, for example, closes registration by deputy registrars ten days prior to general elections and eleven days prior to all other elections, although registration by mail closes twenty-five days prior to an election. IOWA CODE ANN. §§ 48.11, 48.3 (West Supp. 1986).

[228] *See* R. SMOLKA, ELECTION DAY, *supra* note 130, at 3. Courts have on occasion chosen 30 days as a reasonable registration closing date when overturning earlier closing dates. *See, e.g.*, Ferguson v. Williams, 343 F. Supp. 654, 657 (N.D. Miss. 1972) (three judge panel) (per curiam). However, the courts have also let 50-day periods stand, although noting that 50 days "approaches the outer constitutional limit." Burns v. Fortson, 410 U.S. 686, 687 (1973) (per curiam); *see* Marston v. Lewis, 410 U.S. 679, 681 (1973) (per curiam).

[229] Federal elections and most state elections are held on Tuesdays. Texas, though, holds state elections on Sundays, so a 30-day or 27-day closing date would be needed to ensure that registration facilities were open on the final day of registration.

SECTION 9. PURGING

(A) *Request; Moving; Failure to Vote; Return of Notice to Registrant.* In order to keep the list of registered voters as accurate as possible, the [local voter registration official] shall remove names from the list when:

(1) the registered voter requests removal; or

(2) the voter or another [local voter registration official] notifies the [local voter registration official] that the voter has moved; or

(3) the voter has been registered to vote but has not voted in any election within the four preceding calendar years; or

(4) the notice to the registrant sent by the [local voter registration official] pursuant to [Section 8(A)] of this Act is returned by the U.S. Post Office as not deliverable to the registrant at that address.

(B) *Deaths.* Every month, each [local coroner] shall report to the [local voter registration official] the names and addresses of all residents of the [local jurisdiction] eighteen years of age or older who died during the previous month. The [local voter registration official] shall remove the names of the deceased from the list of registered voters.

(C) *Name Changes.* Every month, each [clerk of the local district court] shall report to the [local voter registration official] the names and addresses of all residents of the [local jurisdiction] eighteen years of age or older whose names were changed during the previous month by marriage, divorce, or any order or decree of the [local district court].

The [local voter registration official] shall remove anyone whose name has changed from the list of registered voters and shall mail to each such registered voter both a notice that re-registration is required and a blank registration card.

SECTION 10. RECORDS

(A) *Records of Registration Activities.* The [local voter registration official] shall be responsible for maintaining complete and accurate records of all voter registration activity in the [local jurisdiction]. In particular the [local voter registration official] shall be responsible for keeping the following on file:

(1) the original voter registration cards of all registered voters;

(2) the original voter registration cards of all voters purged during the previous four years as well as records indicating why they were purged; and

(3) the original voter registration cards of all individuals whose registration cards were rejected during the previous four years due to insufficient information.

(B) ***Master List of Registered Voters.*** **The [local voter registration official] shall be responsible for creating a master list of all those citizens registered to vote within the [local jurisdiction]. This list shall be kept alphabetically both by registrants' last names and by street names and numbers for each precinct.**

(C) ***Copies of the Master List of Registered Voters.*** **The [local voter registration official] must provide a copy of this master list to the [state voter registration official] prior to every election, or when the [state voter registration official] requests one. Copies of the master list shall be made available free or at cost to interested citizens, candidates, and political parties and organizations.**

COMMENTARY TO SECTIONS 8, 9, & 10: These sections are intended both to prevent abuse of the registration system and to provide efficient methods of maintaining accurate voter registration lists. The notices to be sent to each registrant in order to doublecheck the information given on the voter registration card[230] should effectively minimize the possibility of fraudulent registration.[231] Attempts to discover missing information are required, but without the information no registration is allowed.[232]

Maintaining accurate voter registration lists entails removing old, invalid registrations as well as registering new voters.[233] Purging must be done carefully, however, to ensure that names are not inappropriately deleted. Section 9 attempts to balance the interests of the state in maintaining an up-to-date, accurate list of registered voters against the infringement of affected individuals' voting rights that purging naturally entails.[234] Offi-

---

[230] *See supra* Model Statute § 8(A). This section is generally based on MINN. STAT. ANN. § 201.121(2) (West Supp. 1987), although the wording is different and the requirement that the notice be sent first-class has been added.

[231] *See* ARTHUR YOUNG & CO., *supra* note 196, at 9. *But see* R. SMOLKA, MAIL REGISTRATION, *supra* note 199, at 78–80.

[232] *See supra* Model Statute § 8(B). This section is modeled after CAL. ELEC. CODE § 503(b)–(c) (West Supp. 1987).

[233] Political candidates who send out mailings to registered voters often complain that 20% to 30% of the mailings are returned as undeliverable by the Post Office. *See* NATIONAL MUNICIPAL LEAGUE, *supra* note 183, at 6. The accuracy of voter registration lists varies greatly between localitites. *See supra* note 130 and accompanying text.

[234] The purging practices in some Southern states illustrate how this process can be abused to deny the right to vote. *See, e.g.*, Toney v. White, 488 F.2d 310 (5th Cir.) (en banc), *aff'g and modifying*, 476 F.2d 203 (5th Cir. 1973).

cials may purge the names of those who die,[235] change names,[236] move, request removal, fail to vote for four entire years,[237] or do not live at their listed address.

Finally, local voter registration officials are required to retain records of their activities in order to facilitate efficient administration of voter registration and to provide sufficient information to ensure that local compliance with the law can be monitored and, when appropriate, challenged.[238] The section also requires that the local voter registration officials make copies of the master list of registered voters available for elections, and to political parties and organizations. The master list is to be kept by street name and number, as well as by registrants' last names, because it provides an easy way to cross-check for nonexistent or overused addresses and also because it will be useful to precinct officials and political organizers.

PART D. ENFORCEMENT

SECTION 11. CHALLENGES TO REGISTRATION DECISIONS

(A) ***Cause of Action.*** **Decisions of the [local voter registration officials] to place or not to place any person on the list of registered voters, or to purge or not to purge a voter from the list of registered voters, may be challenged in [local district court].**

(B) ***Standing.*** **Any citizen of the state has standing to bring a claim under this section.**

(C) ***Attorneys' Fees.*** **Plaintiffs who bring successful claims under this section are entitled to payment of court costs and reasonable attorneys' fees by the Defendants.**

---

[235] Section 9(B) of the Model Statute is modeled on MINN. STAT. ANN. § 201.13 (West Supp. 1987).

[236] Section 9(C) of the Model Statute is based on MINN. STAT. ANN. § 201.14 (West Supp. 1987).

[237] Section 9(A)(3) of the Model Statute is modeled on MINN. STAT. ANN. § 201.171 (West Supp. 1987). This provision is the one most likely to cause inappropriate deletions from the list of registered voters. However, the great majority of those who are registered do vote, so this problem should not be too extensive. CENSUS, No. 370, *supra* note 1, at 6 (Table E) (over 88.6% of those registered to vote did so in the 1980 presidential election). No period of less than four years should be used, as a shorter period would remove from the list a registrant who only voted in presidential elections.

[238] *See infra* Model Statute §§ 11–12 (enforcement provisions).

SECTION 12. CHALLENGES TO PROCEDURES USED IN VOTER REGISTRATION

(A) *Cause of Action.* The procedures used by [local voter registration officials] in conducting voter registration may be challenged in [local district court] on the grounds that they violate this Act, or on any other legal grounds.

(B) *Standing.* Any citizen of the state as well as the [state voter registration official] has standing to bring a claim under this section.

(C) *Attorneys' Fees.* Plaintiffs who bring successful claims under this section are entitled to payment of court costs and reasonable attorneys' fees by the Defendants.

COMMENTARY TO SECTIONS 11 & 12: The enforcement provisions of the Model Statute are intended to be interpreted as broadly as possible, in order to ensure compliance with the law. In particular both sections grant any citizen of the state standing to challenge decisions made and procedures used by local voter registration officials, on the grounds that the makeup of the electorate affects each citizen's right to political association.[239] Both sections also award court costs and reasonable attorneys' fees to successful plaintiffs to reduce the financial disincentives to litigate these claims.

CONCLUSION

Enactment of these statutory provisions should succeed in controlling local registrars' discretion and practically ending current restrictive registration procedures. The Model Statute makes clear that local registrars have an affirmative duty to make registration widely available and to seek out nonregistrants who wish to register. For example, the registrars are required to conduct registration drives at times and locations convenient to the public. The Statute also makes registration more convenient for both citizens and local registrars by providing for registration by mail as well as in person. The mail-in

[239] This grant of standing is intended to be a bit broader than that currently allowed in the federal courts. *See* People Organized for Welfare and Employment Rights v. Thompson, 727 F.2d 167, 173 (7th Cir. 1984) (standing denied to organization which wished to challenge Illinois officials' registration procedures but did not include any unregistered voters among its members). P.O.W.E.R. would have standing to make that challenge under this Model Statute.

registration forms must be distributed to a wide range of public buildings throughout each community and to any private group that wishes to conduct registration drives. Registrars' offices must be kept open on Saturdays and on one weekday evening throughout the year. These provisions should end the barriers to registration created by inconvenient registration locations and limited registration office hours in many communities.

The Statute also requires that local registrars appoint liberal numbers of volunteer deputy registrars, and requires that the deputies be drawn from a cross-section of the community. The efforts of these private groups are to supplement the local registrars' activities and to ensure that registration outreach efforts penetrate into every section of the community. The provisions are designed to help remove the extra barriers to registration often faced by minority groups and non-English speaking citizens in the past. Finally, the Statute allows any citizen to bring suit to stop local officials from refusing to follow these procedures. The Statute incorporates as many objective criteria as possible in order to provide guidance to the courts, and to state and local voter registration officials, in assessing whether local registrars are fulfilling their duties under the Statute. These objective criteria include specification of certain days and times of operation, distribution of mail-in registration forms to specific public buildings on a regular basis, and utilization of ratios based on the population of the community to establish the minimum number of deputy registrars that must be appointed and the mimimum amount of time temporary registration sites must be open.

Without enactment of the Model Statute or a similar measure, legal challenges to restrictive registration practices are still possible. Generally, however, no objective criteria exist to evaluate the registrars' practices. The courts are willing to scrutinize restrictive registration practices to determine whether they violate the right to vote, but they have not clearly established which restrictive practices they are willing to overturn. Registration practices that burden minorities or perpetuate past discrimination, such as refusal to appoint deputy registrars from minority groups and inconvenient registration locations, are among the types of restrictions that can be overturned either under the Voting Rights Act or the Equal Protection Clause.

Both legislative action and legal challenges can be used to end restrictive registration practices. Legislative action, how-

ever, would probably provide a more thorough and well thought-out revision of the voter registration system than could be achieved through piecemeal court actions. Whichever method is used, though, the goal must be the expansion of access to voter registration for all, and for minority groups in particular. The forty-five million unregistered Americans deserve an opportunity to participate in our democracy.

COMMENT

STATUTORY LIMITATIONS ON DIRECTORS' LIABILITY IN DELAWARE: A NEW LOOK AT CONFLICTS OF INTEREST AND THE BUSINESS JUDGMENT RULE

KRISTIN A. LINSLEY*

The business judgment rule has long stood as a corporate director's primary shield from liability for errors made in the course of overseeing the business affairs of a corporation. Traditionally, courts have declined to second guess decisions made by a corporate board of directors, reasoning that the business judgment of an informed board is inherently superior to that of a judge viewing a given decision *ex post*. In the 1985 landmark decision of *Smith v. Van Gorkom*,[1] however, the Delaware Supreme Court blew a hole in the board's traditional shield, holding that the business judgment rule does not protect directors from monetary liability for acts of gross negligence.

Van Gorkom sent a shockwave across corporate America. Coupled with the dwindling availability of directors' and officers' liability insurance, the decision caused many corporate directors to fear that their personal assets would be placed at risk merely because they held a seat on a corporate board. In 1986, the Delaware General Assembly responded to this fear by adding a provision to the Delaware corporate code that permits a corporation, by shareholder vote, to amend its certificate of incorporation to limit or eliminate directors' liability for breach of the fiduciary duty of care.[2] The new provision, codified at

---

* A.B., Harvard University, 1982; member, Class of 1988, Harvard Law School. The author would like to thank Professor Robert C. Clark and her classmate Robert N. Kravitz for their helpful comments on drafts of this paper. She also benefitted from conversations with David S. Schaffer, Jr., member, Class of 1987, Harvard Law School.

[1] 488 A.2d 858 (Del. 1985).

[2] *See* DEL. CODE ANN. tit. 8, § 102(b)(7) (1983 & Supp. 1986). The statute now reads

> In addition to the matters required to be set forth in the certificate of incorporation . . . the certificate of incorporation may also contain any or all of the following matters . . . a provision eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, provided that such provision shall not eliminate or limit the liability of a director (i) for any breach of the director's duty of loyalty to the corporation or its stockholders, (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law, (iii) under section 174 of the Title, or (iv) for any transaction from

section 102(b)(7) of title 8 of the Delaware Code, essentially allows a corporation to fill in the gap in the business judgment rule left open by *Van Gorkom*.

The provision leaves intact, however, the other elements of a director's fiduciary obligations. Section 102(b)(7) expressly does not permit a limitation of liability for any breach of a director's duty of loyalty or for acts not in good faith. These exceptions raise questions as to the applicability of section 102(b)(7) to defensive actions taken by corporate managers in order to defeat hostile takeover bids. Defensive transactions tend to involve conflicts of interest, thus invoking duty of loyalty concerns. Although the Delaware courts have recognized these concerns, they have continued to address such transactions by reference to the business judgment rule, a rule commonly associated with the duty of care. The resulting doctrine is complex, and as several recent Delaware cases make clear, the facts of a given defensive transaction do not always fall neatly into either the duty of care or the duty of loyalty category. Since section 102(b)(7) may now create situations in which the distinction is crucial, the Delaware courts and others construing Delaware law may find it necessary to articulate their reasons for holding that a given defensive transaction does or does not implicate the duty of loyalty. This Comment will demonstrate that through a careful examination of existing Delaware case law, courts can address the conflicts of interest concerns inherent in defensive transactions, and at the same time develop a principled approach to section 102(b)(7) that is consistent with the statute's underlying purpose.

Part I of this Comment will discuss section 102(b)(7) and the concerns that it was intended to address. Part II will discuss the business judgment rule, a judicially created doctrine by which courts grant considerable deference to the business decisions made by a corporate board of directors. Part III will review the background of and policies underlying the duty of loyalty, breaches of which are expressly not covered by the statute. Part IV will then focus on the difficulties that arise when

---

which the director derived an improper personal benefit. No such provision shall eliminate or limit the liability of a director for any act or omission occurring prior to the date when such provision becomes effective. All references in this subsection to a director shall also be deemed to refer to a member of the governing body of a corporation which is not authorized to issue capital stock.

Id. The statute became effective on August 1, 1986.

courts apply the business judgment rule in situations involving defensive measures structured by management in order to defeat a hostile tender offer—situations that almost invariably involve potential conflicts of interest. Part V will outline certain ground rules that Delaware and other courts have developed in order to handle defensive situations with the potential for conflicts of interest. Finally, Part VI will discuss how section 102(b)(7) should be applied in defensive situations, taking into account the concerns underlying each of these ground rules.

I. THE DELAWARE STATUTE

In July, 1986, the Delaware General Assembly amended section 102(b) of its general corporation law to permit a corporation to include in its certificate of incorporation a provision limiting or eliminating the personal liability of its directors for monetary damages for the breach of fiduciary duty.[3] While the amended statute speaks of "fiduciary duties," it expressly prohibits any limitation on liability for breach of a director's duty of loyalty or for acts not in good faith or involving intentional misconduct. The legislative commentary accompanying section 102(b)(7) states that the section was intended to allow shareholders to eliminate or limit the liability for violations of a director's duty of care.[4] The provision applies only to directors, not to officers as such, and it has no effect on the availability of equitable relief for breach of any fiduciary duty.[5]

The stated purpose of section 102(b)(7), as set forth in the memorandum that accompanied the bill through the Delaware legislature, was to help alleviate the perceived crisis in the availability of liability insurance for directors.[6] Specifically, the concern was that qualified "outside" individuals were becoming

[3] *See supra* note 2. Under Delaware law, any amendment to the certificate of incorporation requires the approval of a majority of shareholders. *See* DEL. CODE ANN. tit. 8, § 242(b)(1) (1983).

[4] *See* Richards, *Delaware Shareholders May Limit Liability Under New Law*, N.Y.L.J., Aug. 11, 1986, at 35, 45.

[5] *See* DEL. CODE ANN. tit. 8, § 102(b)(7) (1983 & Supp. 1986).

[6] *See* "Proposed Amendments to Sections 102 and 145 of the Delaware General Corporation Law" at 1–3, nn.*–*** [hereinafter "Proposed Amendments"] (memorandum accompanying text of proposed statute submitted by the Council of the Corporation Law Section of the Delaware State Bar Association to the Delaware General Assembly). *See also* Richards, *supra* note 4, at 45.

reluctant to serve as directors because of the rising cost and dwindling availability of insurance coverage.[7]

The "insurance crisis" notwithstanding, it is generally agreed that section 102(b)(7) was passed in response to the Delaware Supreme Court's decision in *Smith v. Van Gorkom*,[8] in which both the inside and the outside directors of Trans Union Corporation were found personally liable for what the court termed "gross negligence" in approving the sale of the company to a third party.[9] Specifically, the court held that where directors' actions rose to the level of gross negligence, the business judgment rule would not insulate directors from liability.[10]

The critical facts of the *Van Gorkom* decision centered around a hasty two-hour meeting at which the sale of the company was approved by its board of directors. The directors had not received copies of the relevant documents prior to the meeting, and were not informed in advance of the subject of the meeting. Their decision approving the transaction was based solely on a twenty-minute oral presentation by the chairman and a report by the chief financial officer that the transaction was "at the beginning" of the "range of fairness."[11] The court found that although no fraud or self-dealing had been alleged, the directors had breached their duty of care by failing to make an informed decision. The court remanded the case for a consideration of damages, and the case ultimately settled for a reported $23.5 million.[12]

The *Van Gorkom* decision provoked immediate and sharp criticism from members of the corporate bar,[13] and was seen by

---

[7] *See* "Proposed Amendments," *supra* note 6.

[8] 488 A.2d 858 (Del. 1985). For articles indicating that the case provided an impetus to, if not the major motivation for, § 102(b)(7), *see Smith v. Van Gorkom: The State of the Business Judgment Rule in the State of Delaware*, 30 CORP. J. 123 (1986); Sparks, *Delaware's D&O Liability Law: Other States Should Follow Suit*, Legal Times, Aug. 18, 1986, at 10. Mr. Sparks is the chairman of the Corporation Law Section of the Delaware State Bar Association, which drafted section 102(b)(7).

[9] 488 A.2d at 873, 884.

[10] *Id.* at 888–89.

[11] *Id.* at 869.

[12] *See* N.Y. Times, Dec. 15, 1985, § 3, at 12, col. 3.

[13] *See, e.g.*, Fischel, *The Business Judgment Rule and the Trans Union Case*, 40 BUS. LAW. 1437, 1455 (1985) ("surely one of the worst decisions in the history of corporate law. . . ."); Manning, *Reflections and Practical Tips on Life in the Boardroom After Van Gorkom*, 41 BUS. LAW. 1 (1985) ("The corporate bar generally views the decision as atrocious. Commentators predict dire consequences as directors come to realize how exposed they have become."). *See also* Herzel, *Smith Brings Whip Down on Directors' Backs*, Legal Times, May 13, 1985, at 14.

some as the demise of the business judgment rule.[14] The decision apparently provoked concern that qualified individuals would be unwilling to place their personal fortunes at stake by serving as corporate directors. It was this concern, coupled with the General Assembly's perception of the "insurance crisis," that led to the enactment of section 102(b)(7).

Delaware's concern over the availability of qualified outside directors reflects the general view that the presence of outside directors on a corporate board provides certain protections for the shareholders.[15] Those who are not involved in the day-to-day management of a corporation are considered better able to take a more dispassionate view when the board is called on to make a decision. In addition, a director's experience in "outside" matters (for instance, as an officer of another company in the same or a related industry) may be an asset to the corporation, providing new information and insight to the decision-making process. More to the point, outside directors are thought to perform an important monitoring function, checking actions that may be taken in the interests of management and at the expense of the corporation and its shareholders. Whether or not these goals are achieved in practice,[16] the presence of indepen-

---

[14] *See, e.g.*, Note, *Smith v. Van Gorkom: A Narrow Interpretation of the Business Judgment Rule*, 15 CAP. U.L. REV. 725 (1986) (arguing that while the decision does not alter the basic formulation of the business judgment rule, it undermines the fundamental policies underlying the rule).

[15] This notion was the driving force behind the American Law Institute's Corporate Governance Project. *See generally* PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS, (Tent. Draft No. 4, April 12, 1985) [hereinafter PRINCIPLES]. The philosophy is shared in other contexts as well. For instance, several of the stock exchanges have adopted listing rules recommending that each listed company have independent director representation on its board. *See, e.g.*, AMERICAN STOCK EXCHANGE, COMPANY GUIDE § 122 (November 15, 1979). The New York Stock Exchange requires as a condition for listing the formation of an audit committee comprised entirely of independent directors. *See* NEW YORK STOCK EXCHANGE, LISTED COMPANY MANUAL § 303 (June 1986). In the Exchange's view, the Audit Committee "could be considered as the forum for review and oversight of potential conflicts of interest situations." *Id.* at § 307 (September 1984). The Securities and Exchange Commission also endorses the inclusion of independent directors on corporate boards and the establishment of independent audit committees. *See, e.g., In re American Stock Exchange, Inc.*, Exchange Act Release No. 16,722, 19 SEC DOCKET 1106 (April 3, 1980) (Order Approving Proposed Rule Change). *See also* NATIONAL CONFERENCE ON CORPORATE GOVERNANCE AND ACCOUNTABILITY IN THE 1980'S, at 9–11 (1981) (remarks of chairman Harold Williams).

[16] Several commentators have disputed the effectiveness of the "independent director" practice in achieving its underlying goals. *See, e.g.*, Brudney, *The Independent Director—Heavenly City or Potemkin Village?*, 95 HARV. L. REV. 597, 632–39 (1982); Cox & Munsinger, *Bias in the Boardroom: Psychological Foundations and Legal Implications of Corporate Cohesion*, 48 LAW & CONTEMP. PROBS. 83 (1985); and Fischel, *The Corporate Governance Movement*, 35 VAND. L. REV. 1259, 1282–84 (1982).

dent directors at the very least lends an air of legitimacy to corporate decisions.[17]

Section 102(b)(7) fell into a legal and academic minefield. Commentators have been arguing for years as to the extent to which corporate directors should be held liable for negligent actions[18]—in terms of economic theory, fairness, theories of contract and agency, and, perhaps most analogous to the statute at hand, in the context of indemnification.[19] The debate intensified following the Delaware Supreme Court's decision in *Van Gorkom* and with the flurry of controversy surrounding the American Law Institute Corporate Governance Project's proposed "duty of care" provision.[20]

The Delaware General Assembly's solution to the problem was to let the shareholders decide for themselves where the lines of directors' liability for negligence should be drawn.[21] Thus, the statute can be seen as a means of striking a balance

---

[17] The Delaware case law reflects this view, and Delaware courts consistently give greater deference to decisions made by a board composed of a majority of outside directors. *See e.g.*, Polk v. Good, 507 A.2d 531, 537 (Del. 1986); Gimbel v. Signal Cos., 316 A.2d 599, 609–10 (Del. Ch. 1974), *aff'd*, 316 A.2d 619 (Del. 1974); Puma v. Marriott, 283 A.2d 693, 695–96 (Del. Ch. 1971). For further discussion of the role of independent directors, *see generally* Brudney, *supra* note 16, at 607–31; and Leech & Mundheim, *The Outside Director of the Publicly Held Corporation*, 31 BUS. LAW. 1799, 1803–04 (1976).

[18] *See* Arsht, *The Business Judgment Rule Revisited*, 8 HOFSTRA L. REV. 93, 120 & nn.118–19 (1979).

[19] For arguments in the indemnification context, *see* J. BISHOP, JR., THE LAW OF CORPORATE OFFICERS AND DIRECTORS: INDEMNIFICATION AND INSURANCE (1981); Bishop, *Sitting Ducks and Decoy Ducks: New Trends in the Indemnification of Corporate Directors and Officers*, 77 YALE L.J. 1078 (1968); Oesterle, *Limits on a Corporation's Protection of its Directors and Officers From Personal Liability*, 1983 WIS. L. REV. 513, 514 & nn.3–4.

[20] *See* PRINCIPLES, *supra* note 15, at § 401(c)(2). For arguments against the need for a duty of care provision in the Project, see Fischel, *supra* note 16, at 1288–90 (duty of care should not be a concern of the Project or the courts); Phillips, *Principles of Corporate Governance: A Critique of Part IV*, 52 GEO. WASH. L. REV. 653 (1984) (whether the due care standard has been violated should be left to the courts, which should focus on the underlying loyalty problems). In defense of judicial employment of the duty of care doctrine, see Coffee, *Litigation and Corporate Governance: An Essay on Steering Between Scylla and Charybdis*, 52 GEO. WASH. L. REV. 789 (1984); see also Frankel, *Corporate Directors' Duty of Care: The American Law Institute's Project on Corporate Governance*, 52 GEO. WASH. L. REV. 705, 707–12 (1984). A liability limitation provision similar to that now authorized by the Delaware statute was proposed and debated during the Corporate Governance Project. *See* PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 7.16 (Discussion draft No. 1, June 3, 1985). *See also* Futter & Gross, *Charter Amendment Offers Way Out of D&O Crisis*, Legal Times, June 9, 1986, at 11 & n.5.

[21] By way of contrast, the Indiana legislature enacted a statute (prior to Delaware's addition of § 102(b)(7)) that eliminates entirely, without the need for a shareholder vote, directors' liability for any action or failure to act except for any willful misconduct or recklessness. *See* 23 IND. CODE ANN. § 1-35-1 (Burns 1986 Supp.).

between competing concerns by leaving the matter to shareholder vote.[22] If shareholders want protection from gross negligence on the part of directors, they can reject proposals to limit director liability. If they prefer to give directors the discretion to take business risks without having to fear monetary loss for negligence, they can approve such proposals.[23]

A number of Delaware corporations have already implemented section 102(b)(7) provisions,[24] and many others will be proposing such provisions to their shareholders during the 1987 proxy season.[25] In addition, a large number of non-Delaware corporations are planning to reincorporate in Delaware (or have done so already) in order to take advantage of the new law.[26] At least two states have followed Delaware's lead and passed substantially similar statutes.[27] It is only a matter of time, then, until the courts will have the opportunity to interpret the statute, or one like it.

II. THE ROLE OF THE DUTY OF CARE AND THE BUSINESS JUDGMENT RULE

The directors of a corporation owe the shareholders a fundamental "duty of care" when making decisions that affect

---

[22] For a company newly incorporated in Delaware the statute does not require a shareholder vote. The disclosure in such a situation would be made in the prospectus, prior to the prospective shareholder's purchase of shares, at which time the terms of the certificate can be assessed. Furthermore, even though the statute does not specifically mention reincorporation, any reincorporation usually involves a merger, which in turn requires an informed shareholder vote. Thus it seems unlikely that companies reincorporating in Delaware to take advantage of the new statute will be able to evade the shareholder vote requirement.

[23] For an excellent criticism of the "shareholder vote/contract" justification for charter provisions altering or affecting fiduciary duties, *see* Brudney, *Corporate Governance, Agency Costs, and the Rhetoric of Contract*, 85 COLUM. L. REV. 1403 (1985). Others argue that in certain contexts management's right to propose such amendments should be restricted. *See, e.g.*, Baysinger & Butler, *Antitakeover Amendments, Managerial Entrenchment, and the Contractual Theory of the Corporation*, 71 VA. L. REV. 1257 (1985); and Comment, *Unocal v. Mesa Petroleum Co.*, 72 VA. L. REV. 851 (1986).

[24] *See* L.A. Times, Oct. 7, 1986, pt. 4, at 5D, col. 4 (valley ed.).

[25] *See* Richards, *supra* note 4, at 35, 45. Richards, citing a model charter provision, notes that most of the proposed charter provisions provide for the broadest immunity from liability permitted by the statute. *Id.* at 45.

[26] *See id.* at 45. *See also Incorporations are Booming in Delaware*, The Morning News (Wilmington, Delaware), Dec. 8, 1986, at B1.

[27] The Massachusetts General Assembly recently enacted a statutory provision almost identical to Delaware's § 102(b)(7). *See* Mass. Sen. Bill 2151 (enacted Dec. 24, 1986), amending paragraph (b) of MASS. GEN. L. ch. 156(B), § 13 (1985). The state of Minnesota has done the same. *See* 55 U.S.L.W. 2454 (1987).

shareholder interests.[28] With regard to decisions made by the board of directors, however, the Delaware courts have developed the business judgment rule, which is "a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith, and in the honest belief that the action taken was in the best interests of the company."[29]

The business judgment rule applies only where there is no conflict of interest between the directors and the shareholders whose interests they represent. Thus, where the corporate directors are "disinterested," courts will generally not interfere with the business decisions of the directors and will not substitute their judgment for the presumptively superior judgment of the directors. In *Beard v. Elster*,[30] for example, the Delaware Court of Chancery stated

> We think the fact that a disinterested Board of Directors reached this decision in the exercise of its business judgment is entitled to the utmost consideration by the courts in passing upon the results of that decision. Such has long been the law of this State. . . . [W]e are precluded from substituting our uninformed opinion for that of experienced business managers of a corporation who have no personal interest in the outcome and whose sole interest is the furtherance of the corporate enterprise.[31]

More recently, in *Dynamics Corp. of America v. CTS Corp.*,[32] Judge Posner of the Court of Appeals for the Seventh Circuit articulated an economic rationale for the rule:

> [The business judgment] rule expresses a sensible policy of judicial noninterference with business decisions made in circumstances free from serious conflicts of interest between management, which makes the decisions, and the corporation's shareholders. Not only do businessmen know more about business than judges do, but competition in the product and labor markets and in the market for corporate control

---

[28] *See* Guth v. Loft, 23 Del. Ch. 255, 270, 5 A.2d 503, 510 (Del. 1939); *see also* Smith v. Van Gorkom, 488 A.2d 858, 872–73 (Del. 1985); Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984).

[29] Aronson v. Lewis, 473 A.2d at 812.

[30] 39 Del. Ch. 153, 160 A.2d 731 (1960).

[31] 39 Del. Ch. at 165, 160 A.2d at 738–39 (citation omitted). *See also* Sinclair Oil v. Levien, 280 A.2d 717, 720 (Del. 1971); Kaplan v. Goldsamt, 380 A.2d 556, 568 (Del. Ch. 1977); Gimbel v. Signal Cos., Inc., 316 A.2d 599, 608–09 (Del. Ch.), *aff'd* 316 A.2d 619 (Del. 1974).

[32] 794 F.2d 250 (7th Cir. 1986).

> provides sufficient punishment for businessmen who commit more than their share of business mistakes.[33]

As Judge Posner emphasized in *Dynamics*, however, the justifications for the business judgment rule are sound only where there is no conflict of interest between the directors and the shareholders whose interests they represent.[34]

Since any application of the business judgment rule assumes that there is no conflict of interest, the rule is most commonly associated with the duty of care branch of a director's fiduciary obligations.[35] As a general rule, unless the plaintiff demonstrates that a conflict of interest exists, the business judgment rule protects a director's decisions from judicial scrutiny, absent a showing of "gross negligence."[36] As noted above, it is this "gross negligence" exception, established by the Delaware Supreme Court in *Van Gorkom*, to which section 102(b)(7) appears to be primarily addressed.

III. The Limits of the Statute: The Duty of Loyalty and Bad Faith

On its face, section 102(b)(7) clearly allows corporations, by shareholder vote, to exempt directors from liability for ordinary negligence in making business decisions. Moreover, since section 102(b)(7) was a response to *Van Gorkom*, the provision would appear to permit immunity from liability for the type of gross negligence addressed by that case.[37]

The specific exceptions to the statute, however, raise more complex questions. The statute expressly precludes charter amendments limiting liability for breach of a director's "duty of loyalty" or for "acts or omissions not in good faith." By using the terms "duty of loyalty" and "good faith," rather than codi-

---

[33] *Id.* at 256.

[34] *Id. See also* Norlin v. Rooney, Pace Inc., 744 F.2d 255, 264–65 (2d Cir. 1984); Maldonado v. Flynn, 413 A.2d 1251 (Del. Ch. 1980).

[35] *See, e.g.*, Casey v. Woodruff, 49 N.Y.S.2d 625, 643 (1944) (reconciling business judgment rule and duty of care). *See also* Arsht, *supra* note 18, at 118–20.

[36] *See Van Gorkom*, 488 A.2d at 873.

[37] *See* Richards, *supra* note 4, at 35 (statute covers gross negligence). Even aside from the *Van Gorkom* case, the language of section 102(b)(7) suggests that it was intended to cover gross negligence. The statute permits immunity for breach of all fiduciary duties with specific exceptions—exceptions that do not include "gross negligence."

fying specific conduct not to be covered by the amendment,[38] the Delaware legislature has defined the limits of the permissible immunity in terms of a bewildering but flexible set of common law standards for dealing with director misconduct.

The duty of loyalty exception, which will be the primary subject of this Comment, refers to a doctrine grounded in the long-standing rule that a fiduciary may not enrich himself at the expense of the *cestui que trust*.[39] Thus, the duty of loyalty is concerned primarily with conflicts of interest.

The "acts not in good faith" exception refers to a broader standard of director conduct. While the business judgment rule normally affords a director's decision a presumption of good faith, that presumption can be overcome on a lesser showing than is required to prove a conflict of interest.[40]

The duty of loyalty has evolved over time. At first, courts were so convinced that corporate managers were likely to abuse their position of trust that they created a per se rule against self-interested transactions. Corporate directors were not permitted to engage in transactions involving conflicts of interest, and where they were found to have done so, any such transaction was voidable at the request of the non-interested party.[41] As Justice Field observed in *Wardell v. Railroad Co.*,[42]

> the same person cannot act for himself and at the same time, with respect to the same matter, as the agent for another, whose interests are conflicting. . . . The two positions im-

---

[38] A standardized and codified definition of the duty of care has been adopted in at least twenty states. *See* Veasey & Manning, *Codified Standard—Safe Harbor or Uncharted Reef?*, 35 BUS. LAW. 919, 921 & n.4 (1980). That approach was also used in the Model Business Corporation Act and in the Corporate Governance Project's proposed duty of care provision. *See* Phillips, *supra* note 20. The codified standard approach has been criticized on the ground that it lacks the flexibility possible through judicial review of specific transactions. *See* Phillips, *supra* note 20 at 659–64; Veasey & Manning *supra*, at 942–44.

[39] *See generally* A. SCOTT, THE LAW OF TRUSTS §§ 203, 206 (1967); G. BOGERT & G. BOGERT, THE LAW OF TRUSTS & TRUSTEES § 527 (1980).

[40] *See, e.g.*, Bennett v. Breuil Petroleum Corp., 99 A.2d 236, 239 (Del. Ch. 1953) (although defendant did not stand on "both sides of the transaction in the sense that he had an adverse personal interest," plaintiff had raised "a substantial factual dispute as to the legal propriety of the motives of the corporate defendant and its controlling stockholders," thus raising questions as to the defendant's good faith). *Compare id. with* Warshaw v. Calhoun, 221 A.2d 487, 493 (Del. 1966) (suggesting that the good faith presumption of the business judgment rule might be overcome by a showing of conflicting interests).

[41] *See* Marsh, *Are Directors Trustees? Conflict of Interest and Corporate Morality*, 22 BUS. LAW. 35, 36–39 (1966). *See also* Wendt v. Fischer, 243 N.Y. 439, 154 N.E. 303 (1926).

[42] 103 U.S. 651 (1880).

> pose different obligations, and their union would at once raise a conflict between interest and duty; and 'Constituted as humanity is, in the majority of cases duty would be overborne in the struggle.'[43]

In *Guth v. Loft*,[44] the Delaware Supreme Court restated the basic principles underlying the requirement of scrupulous loyalty on the part of corporate directors:

> Corporate officers and directors are not permitted to use their position of trust and confidence to further their private interests. . . . A public policy, existing through the years, and derived from a profound knowledge of human characteristics and motives, has established a rule that demands of a corporate officer or director, peremptorily and inexorably, the most scrupulous observance of his duty. . . . The rule that requires an undivided and unselfish loyalty to the corporation demands that there be no conflict between duty and self-interest.[45]

A director's potential liability for breach of the duty of loyalty was not, under this approach, cured by leaving the decision regarding a transaction to the non-interested directors.[46]

The courts gradually abandoned the strict prohibition of conflict of interest transactions, perhaps recognizing the possibility that a transaction between the corporation and an interested "insider" could benefit the corporation despite the conflict.[47] Courts have nonetheless recognized that such transactions carry with them the potential for overreaching, and have developed various safeguards to ensure the protection of shareholders' interests. In Delaware, a fairness standard for transactions involving conflicts of interest has evolved, and has been codified by statute. Currently, if the directors are shown to have an interest in a given transaction other than one accruing to shareholders generally, they must demonstrate that the transaction is fair to the corporation and its shareholders.[48]

---

[43] *Id.* at 658 (citation omitted).

[44] 23 Del. Ch. 255, 5 A.2d 503 (Del. 1939).

[45] 23 Del. Ch. at 270, 5 A.2d at 510.

[46] *See, e.g.*, Globe Woolen v. Utica Oil & Gas, 224 N.Y. 483, 121 N.E. 378 (1918) (applying fairness test).

[47] This move away from strict prohibition is summarized in Marsh, *supra* note 41. *See also* Brudney, *supra* note 16, at 607–09.

[48] *See* DEL. CODE ANN. tit. 8, § 144 (1983). *See also* Fliegler v. Lawrence, 361 A.2d 218, 221 (Del. 1976) ("[I]t is clear that the individual [director] defendants stood on both sides of the transaction in implementing and fixing the terms of the option agreement. Accordingly, the burden is on them to demonstrate its intrinsic fairness."). *See generally*

By including a "duty of loyalty" exception in section 102(b)(7), the Delaware General Assembly apparently acknowledged the public policy concerns expressed in *Guth v. Loft*. To remove a transaction involving a conflict of interest from judicial scrutiny, even with the shareholders' advance consent, would be to ignore the "profound knowledge of human characteristics and motives" recognized in *Guth*,[49] and would open the door to managerial self-dealing. However protective of director discretion Delaware may be, the General Assembly was not prepared to abandon all fiduciary concerns. Thus, even with a section 102(b)(7) provision in the charter, a director's actions in approving a transaction in which that director was interested will not be protected if the director cannot show that the transaction was fair.

IV. Defensive Transactions and Corporate Fiduciary Duties

Much has been written about the necessity of fiduciary duties in the context of the director-shareholder relationship. On one side is the "market" theory, which at its most extreme maintains that fiduciary principles are unnecessary, or should be severely limited in the corporate context, because the efficiencies of the

---

Weinberger v. UOP, Inc., 457 A.2d 701 (Del. 1983); Johnson v. Greene, 121 A.2d 919 (Del. 1956); Sterling v. Mayflower Hotel Corp., 93 A.2d 107 (Del. 1952).

Delaware and other states' courts have had some difficulty applying the "fairness test." While establishing in Singer v. Magnavox, 380 A.2d 969, 990 (Del. 1977) a requirement of "entire fairness" with respect to freezeout mergers, for instance, the Delaware Supreme Court declined to define what it meant by "entire fairness." The *Singer* decision has been criticized on the ground that courts are not in a position to examine the merits of business transactions to determine what is "fair" in a given context. *See* Easterbrook & Fischel, *Corporate Control Transactions*, 91 Yale L.J. 698, 724–25 (1982). The fairness test was clarified somewhat in *Weinberger*, 457 A.2d 701, and later in Rabkin v. Philip A. Hunt Chemical Corp., 498 A.2d 1099 (1985). Nonetheless, the "fairness test" and the judicial application of it have generated a good deal of debate among commentators. *See, e.g.*, Marsh, *supra* note 41, at 53–57; Brudney, *supra* note 23, at 1434 n.81; Brudney & Chirelstein, *Fair Shares in Corporate Mergers and Takeovers*, 88 Harv. L. Rev. 297 (1974); Carney, *Shareholder Coordination Costs, Shark Repellents, and Takeout Mergers: The Case Against Fiduciary Duties*, 1983 Am. B. Found. Res. J. 341 (advocating charter amendments rather than fiduciary duties to protect minority shareholders' interests in two-tier acquisitions); Easterbrook & Fischel, *supra*, at 715–33 (advocating a rule requiring only that minority shareholders be no worse off after a two-tiered acquisition). *See also* Fischel, *Appraisal Remedy in Corporate Law*, 1983 Am. B. Found. Res. J. 875; Carney, *Fundamental Corporate Changes, Minority Shareholders, and Business Purposes*, 1980 Am. B. Found. Res. J. 69.

[49] 23 Del. Ch. 255, 270, 5 A.2d 503, 510.

market will do a more effective job of protecting shareholders.[50] On the other side are those who argue that fiduciary principles, and the duty of loyalty in particular, are essential not only to correct the myriad deficiencies in the market mechanism but also to permit the corporation to function as a principal-agent arrangement.[51]

This debate has found its most fertile ground in the area of defensive measures undertaken by management in response to hostile takeover attempts[52]—an area with which the courts have had a good deal of difficulty. Part of the problem lies in determining whether, in defensive situations, a true conflict of interest exists. If the directors of a corporation are in fact "interested," the business judgment rule (and section 102(b)(7)) cannot be applied to the transaction in question.

From one perspective, a board facing a hostile takeover bid may have valid reasons for viewing the bid as a threat to corporate policy or as otherwise not in the best interests of the corporation and its shareholders. Thus, the board may legitimately believe that measures in opposition to the hostile bid are necessary in order to avert damage to the corporation. In Delaware and elsewhere, courts have consistently upheld the right of a corporate board to act in accordance with such legitimate beliefs in the interest of the corporation's well-being.[53]

Alternatively, management may simply fear the loss of its control over the corporation. Top executives do not wish to lose

---

[50] *See, e.g.*, Carney, *The Case Against Fiduciary Duties*, 1983 AM. BAR FOUND. RES. J. 341, 349–53; Easterbrook & Fischel, *supra* note 48, at 711–14; Fischel, *supra* note 16, at 1287–90; Fischel & Bradley, *The Role of Liability Rules and the Derivative Suit in Corporate Law: A Theoretical and Empirical Analysis*, 71 CORNELL L. REV. 261 (1986); Winter, *State Law, Shareholder Protection and the Theory of the Corporation*, 6 J. LEGAL STUD. 251, 254–58 (1977).

[51] *See, e.g.*, Brudney, *supra* note 23; Clark, *Agency Costs Versus Fiduciary Duties*, *in* PRINCIPALS AND AGENTS: THE STRUCTURE OF BUSINESS 55 (1985); Scott, *The Role of Preconceptions in Policy Analysis in Law: A Response to Fischel and Bradley*, 71 CORNELL L. REV. 299 (1986) (duty of loyalty); Phillips, *supra* note 20 (duty of loyalty); Frankel, *supra* note 20, at 707–12 (1984) (duty of care); Coffee, *supra* note 20 (duty of care).

[52] For a recent exchange in this ongoing debate, *see* Bradley & Rosenzweig, *Defensive Stock Repurchases and the Appraisal Remedy*, 96 YALE L.J. 322 (1986); Gordon & Kornhauser, *Takeover Defense Tactics: A Comment on Two Models*, 96 YALE L.J. 295 (1986); Macey, *Takeover Defense Tactics and Legal Scholarship: Market Forces Versus the Policymaker's Dilemma*, 96 YALE L.J. 342 (1986).

[53] *See, e.g.*, Panter v. Marshall Field, 646 F.2d 271 (7th Cir.), *cert. denied*, 454 U.S. 1092 (1981); Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985); Pogostin v. Rice, 480 A.2d 619 (Del. 1984); Cheff v. Mathes, 41 Del. Ch. 494, 199 A.2d 548 (Del. 1964); Kors v. Carey, 39 Del. Ch. 47, 158 A.2d 136 (1960); Martin v. American Potash & Chemical Corp., 33 Del. Ch. 234, 92 A.2d 295 (Del. 1952).

their jobs, and management directors may oppose at all costs any takeover efforts that threaten their continued control. The Delaware courts have consistently maintained that the use of corporate funds by corporate directors solely to perpetuate themselves in office creates a conflict of interest, implicating the duty of loyalty.[54]

There is obviously tension between these two positions. Drawing a clear line between self-interested and disinterested actions in the context of takeover defenses is seldom a simple task. Indeed, in reviewing many defensive transactions it is difficult to ascertain whether an impermissible motive was involved and then to determine to what extent it actually affected the directors' decision. When a given defensive transaction is challenged, the directors will always claim that they did not view the particular hostile bid as being in the best interests of the corporation. Alternatively, they will claim that an apparently defensive transaction was not defensive at all, but rather was a transaction the company had been planning for some time.[55] Since much in these situations turns on the motives of the board (which, if improper, are unlikely to be acknowledged),[56] it is often difficult to resolve the tensions present in these inherently ambiguous situations.

The issue of the propriety of management resistance to tender offers has generated a sizeable body of commentary, both pro and con.[57] Some commentators have advocated strict judicial

---

[54] *See, e.g.*, Bennett v. Propp, 41 Del. Ch. 14, 20, 187 A.2d 405, 408 (Del. 1962); and Hall v. Trans-Lux Daylight Picture Screen Corp, 20 Del. Ch. 78, 84, 171 A. 226, 228 (1934). *See also* Norlin v. Rooney, Pace Inc., 744 F.2d 255, 266 (2d Cir. 1984) (applying New York law).

[55] One recurring example of this explanation is in the context of employee stock option plans adopted in the heat of a takeover battle. These plans, which often involve the transfer of a block of authorized but unissued stock to the control of the plan's trustees, are certainly not illegal in themselves, but often have the practical effect of diluting a block of stock held by a hostile bidder. Thus they may involve fiduciary duty problems if adopted for the impermissible purpose of retaining control. *See, e.g.*, Norlin v. Rooney, Pace Inc., 744 F.2d at 264–67 (enjoining employee stock plan where implemented solely as an entrenchment device). *Compare id. with* In re Anderson, Clayton Shareholders' Litigation, 519 A.2d 669 (Del. Ch. 1986) (rejecting challenge to employee stock plan). *See also* Comment, *Employee Stock Ownership Plans & Corporate Takeovers: Restraints on the Use of ESOPs by Corporate Officers and Directors to Avert Hostile Takeovers*, 10 PEPPERDINE L. REV. 731, 744 (1983).

[56] *See* Marsh, *supra* note 41, at 60 ("I do not recall any case in which the incumbent management has admitted that it was fighting merely to preserve its position for its own benefit.").

[57] *See, e.g.*, E. ARANOW, H. EINHORN & G. BERLSTEIN, DEVELOPMENTS IN TENDER OFFERS FOR CORPORATE CONTROL (1977); A. FLEISCHER, TENDER OFFERS: DEFENSES, RESPONSES, AND PLANNING (1978).

scrutiny of defensive transactions in light of the tendency of such transactions to be adverse to shareholder interests. The most extreme position in this regard is seen in the work of Judge Easterbrook and Professor Fischel, who have argued that defensive transactions should in all instances constitute a breach of the duty of loyalty.[58]

This view has found substantial support, albeit in varying degrees. Some courts,[59] several dissenting federal judges,[60] and innumerable commentators[61] have expressed the view that in cases involving defensive reactions to hostile takeover bids, the usual application of the business judgment rule is inappropriate since the rule assumes as a prerequisite that no conflict of interest exists. In the context of a tender offer, where a bid above the market price is likely to benefit the shareholders and opposition to the bid is likely to benefit management, there is less justification for the application of the rule than in the context of daily decision-making by the board. As Judge Cudahy observed in his dissenting opinion in *Panter v. Marshall Field & Co.*,[62]

> The theoretical justification for the "hands off" precept of the business judgment rule is that courts should be reluctant

---

[58] Easterbrook & Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161 (1981); Easterbrook & Fischel, *Auctions and Sunk Costs in Tender Offers*, 35 STAN. L. REV. 1 (1982).

[59] *See* Edelman v. Fruehauf Corp., 798 F.2d 882, 887 (6th Cir. 1986); Dynamics Corp. of America v. CTS Corp., 794 F.2d 250, 256 (7th Cir. 1986); Minstar Acquiring Corp. v. AMF, Inc., 621 F. Supp. 1252, 1259 (S.D.N.Y. 1985).

[60] *See* Panter v. Marshall Field & Co., 646 F.2d 271, 299–304 (7th Cir.) (Cudahy, J., concurring and dissenting) (presumption that directors' decision is superior to that of the courts is less sound in defensive situations where management may have a conflict), *cert. denied*, 454 U.S. 1092 (1981); Johnson v. Trueblood, 629 F.2d 287, 299–301 (3d Cir. 1980) (Rosenn, J., concurring and dissenting) (burden of justifying transaction should shift to directors once a desire to maintain control has been shown to be a motive), *cert. denied*, 450 U.S. 999 (1981). *See also* Treadway Cos. v. Care Corp., 638 F.2d 357, 385–86 (2d Cir. 1980) (Feinberg, C.J., concurring and dissenting) (suggesting remand to determine whether business judgment rule should apply under New Jersey law).

[61] *See, e.g.*, Cohn, *Tender Offers and the Sale of Control: An Analogue to Determine the Validity of Target Management Defensive Measures*, 66 IOWA L. REV. 475, 501 (1981); Easterbrook & Fischel, *The Proper Role of a Target's Management*, *supra* note 58, at 1198–99; Gelfond & Sebastian, *Reevaluating the Duties of Target Management in a Hostile Tender Offer*, 60 B.U.L. REV. 403, 435–37 (1980); Gilson, *A Structural Approach to Corporations: The Case Against Defensive Tactics in Tender Offers*, 33 STAN. L. REV. 819, 824–31 (1981). *See also* Note, *The Misapplication of the Business Judgment Rule in Contests for Corporate Control*, 76 NW. U.L. REV. 980 (1982). *See generally* M. EISENBERG, J. COFFEE, R. GILSON & M. SMALL, AMERICAN LAW INSTITUTE PRINCIPLES OF CORPORATE GOVERNANCE—REPORTERS' STUDY NO. 1: TRANSACTIONS IN CONTROL (1985).

[62] 646 F.2d 271 (7th Cir. 1981).

> to review the acts of directors in situations where the expertise of the directors is likely to be greater than that of the courts. But, where the directors are afflicted with a conflict of interest, relative experience is no longer crucial. Instead, the great danger becomes the channeling of the directors' expertise along the lines of their personal advantage—sometimes at the expense of the corporation and its shareholders. Here courts have no rational choice but to subject challenged conduct of directors and questioned corporate transactions to their own disinterested scrutiny.[63]

Another view is that management should be entitled to engage in those transactions which will maximize shareholders' short-term interests.[64] According to this view, bidding contests tend to bring the shareholders a higher price for their shares. Thus, management should be allowed to solicit competing bids as long as in doing so it does nothing to obstruct the initial bid.

A third position is that takeover defenses do not pose a problem at all, and that even if they did, any judicial remedy is doomed to failure.[65] Under this view, any regulation should come from the legislature, which is inherently better suited than the courts to consider as a general policy matter the overall benefits and dangers of different types of defensive transac-

---

[63] *Id.* at 300 (Cudahy, J., concurring & dissenting) (footnote omitted). *See also* Minstar Acquiring Corp. v. AMF Inc., 621 F. Supp. 1252, 1259 (S.D.N.Y. 1985) (Lowe, J.) The court in *Minstar* asserted that

> [t]he [business judgment] rule was developed to protect directors' judgments on questions of corporate governance. Questions like "should we buy a new truck today?" or "should we give Joe a raise?" are[,] simplistically, types of business judgments which the rule was developed to protect. . . . Defensive tactics, however, raise a wholly different set of considerations. The problem is that defensive tactics often, by their very nature, act as a restraint on business purposes. Therefore, the application of the business judgment rule in this context seems, to us, questionable. . . .

See also Dynamics Corp. of America v. CTS Corp., 794 F.2d 250, 256 (7th Cir. 1986) (Posner, J.) ("When managers are busy erecting obstacles to the taking over of the corporation by an investor who is likely to fire them if the takeover attempt succeeds, they have a clear conflict of interest. . . . No one likes to be fired, whether he is just a director or also an officer.").

The court in *Minstar*, despite its concern over the appropriateness of the business judgment rule in the context of defensive transactions, felt constrained by existing case law to apply the rule to the transaction in question. *Minstar*, 621 F. Supp. at 1259–60.

[64] *See, e.g.*, Bebchuck, *The Case for Facilitating Competing Tender Offers*, 95 HARV. L. REV. 1028, 1034–38 (1982); Bebchuck, *The Case for Facilitating Competing Tender Offers: A Reply and Extension*, 35 STAN. L. REV. 23, 47–49 (1982); Gilson, *Seeking Competitive Bids Versus Pure Passivity in Tender Offer Defense*, 35 STAN. L. REV. 51 (1982); Gilson, *supra* note 61, at 865–75 (1981).

[65] *See* Lipton, *Takeover Bids in the Target's Boardroom: An Update After One Year*, 36 BUS. LAW. 1017, 1027–28 (1981); Lipton, *Takeover Bids in the Target's Boardroom: A Response to Professors Easterbrook & Fischel*, 55 N.Y.U. L. REV. 1231, 1236 (1980); Lipton, *Takeover Bids in the Target's Boardroom*, 35 BUS. LAW. 101, 115–116, 122–24 (1979).

tions.[66] Despite the disagreement over acceptable solutions, however, most commentators agree at the very least that defensive tactics initiated by management in opposition to a hostile takeover present conflict of interest problems.[67]

V. DELAWARE "GROUND RULES" FOR DEFENSIVE TRANSACTIONS

A. *The Recognition of Conflicts of Interest*

The enactment of Section 102(b)(7) may now make it critical for Delaware courts to determine which fiduciary duty a given defensive transaction implicates—the duty of care or the duty of loyalty. If the transaction is governed by the duty of care and the shareholders have adopted a section 102(b)(7) waiver provision, the provision will shield directors from liability. By contrast, if the transaction implicates the duty of loyalty, the shareholder waiver will have no effect and the directors may be held accountable for their actions.

To date, however, the Delaware courts have not defined the boundaries of directors' duty of care and duty of loyalty in taking defensive actions. Instead, they have taken a middle ground which blurs the distinction between the two.

On the one hand, the Delaware Supreme Court has long recognized the magnitude of the loyalty problems posed by certain

---

[66] *See* Lipton, *Takeover Bids in the Target's Boardroom: A Response to Professors Easterbrook & Fischel*, *supra* note 65, at 1236. *Compare id. with* Lowenstein, *Pruning Deadwood in Hostile Takeovers: A Proposal for Legislation*, 83 COLUM. L. REV. 249, 316–18 (1983) (arguing that legislation is advisable due to ineffectiveness of judicial review) and Clark, *Tender Offers and Corporate Governance, in* AMERICAN SOCIETY: PUBLIC AND PRIVATE RESPONSIBILITIES 251 (1986) (suggesting that the Securities and Exchange Commission be given substantive jurisdiction over defensive transactions).

[67] *See* Baysinger & Butler, *supra* note 23, at 1263; Bradley & Rosenzweig, *Defensive Stock Repurchases*, 99 HARV. L. REV. 1377, 1409–10 (1986); Gelfond & Sebastian, *supra* note 61, at 403–04, 435–37; Marsh, *supra* note 41, at 60–63. *See also* Herzel, Schmidt & Davis, *Why Corporate Directors Have a Right to Resist Tender Offers*, 3 CORP. L. REV. 107, 112–15 (1980). Those who as a general rule find fiduciary doctrine unnecessary argue that under the "market protections" theory, the major safeguard against managerial misconduct is the market for corporate control. Thus, most defensive measures are antithetical to the most extreme market models. *See* Easterbrook & Fischel, *The Proper Role of a Target's Management*, *supra* note 58, at 1175. *See also* Bradley & Rosenzweig, *supra*, at 1377. Even Martin Lipton, the most vigilant proponent of management discretion in defensive situations, concedes that some defensive tactics may pose conflicts of interest problems, warranting review by an independent board. *See* Lipton, *Takeover Bids in the Target's Boardroom*, *supra* note 65, at 121–22.

types of defensive transactions. In *Bennett v. Propp*,[68] for example, a case involving a defensive repurchase of shares, the court explicitly stated its concerns about potential conflicts of interest:

> We must bear in mind the inherent danger in the purchase of shares with corporate funds to remove a threat to corporate policy when a threat to control is involved. The directors are of necessity confronted with a conflict of interest, and an objective decision is difficult. Hence, in our opinion, the burden should be on the directors to justify such a purchase as one primarily in the corporate interest.[69]

Later, in *Cheff v. Mathes*,[70] the court extended this analysis by shifting the initial burden of proof to the directors where they had approved what is now commonly known as a "greenmail" payment.[71]

On the other hand, the Delaware Supreme Court has been reluctant to reject the business judgment rule entirely in evaluating defensive tactics.[72] Specifically, the court has declined to

---

[68] 41 Del. Ch. 14, 187 A.2d 405 (Del. 1962).

[69] 41 Del. Ch. at 22.

[70] 41 Del. Ch. 494, 199 A.2d 548 (Del. 1964).

[71] 41 Del. Ch. at 504–05. The court reiterated its concern about the conflict of interest problems posed by such measures. In *Cheff*, the directors of a target company repurchased stock at a premium from a shareholder threatening a takeover. Such a repurchase is often called "greenmail," and it enables directors in effect to pay an unwelcome suitor to forego any efforts to acquire the company. The court held that where directors initiate any defensive repurchase program, the burden is on them to demonstrate that they acted in the genuine belief that a threat to corporate policy existed.

The holdings in *Bennett* and *Cheff* formed the basis for the Delaware Supreme Court's later announcement in *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985) that a modified version of the same test would apply to all defensive transactions. *See infra* text accompanying notes 73–84. In the interim, there was some doubt as to the reach of *Bennett* and *Cheff*. Indeed, in several federal cases interpreting Delaware law, *Cheff* was read as placing the burden on the plaintiff to demonstrate that the board's implementation of a defensive transaction was motivated solely or primarily by a desire to maintain control. *See, e.g.*, Panter v. Marshall Field & Co., 646 F.2d 271, 297 (7th Cir.), *cert. denied*, 450 U.S. 999 (1981); Johnson v. Trueblood, 629 F.2d 287, 292–93 (3d Cir. 1980), *cert. denied*, 454 U.S. 1092 (1981). *See also* Treadway Companies. Inc. v. Care Corp., 638 F.2d 357, 382–83 (2d Cir. 1980) (applying New Jersey law). Judge Kearse stated that under *Cheff*, plaintiff "bears the initial burden of proving that the directors had an interest in the transaction, or acted in bad faith or for some improper purpose." *Treadway*, 638 F.2d at 383. It is likely that the *Unocal* case will convince the federal courts that in takeover defense cases under Delaware law, the initial burden is with the directors. *See* Dynamics Corp. of America v. CTS Corp., 794 F.2d 250, 255–56 (7th Cir. 1986) (dictum).

[72] In Pogostin v. Rice, 480 A.2d 619, 626–27 (Del. 1984), the court held with little discussion that the business judgment rule governs director conduct in defensive situations. *See also* Moran v. Household Int'l, Inc., 500 A.2d 1346 (Del. 1985); Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985); Cheff v. Mathes, 41 Del. Ch. 494, 199 A.2d 548 (Del. 1964); Bennett v. Propp, 41 Del. Ch. 14, 187 A.2d 405 (Del. 1962). Professor Brudney observed as early as 1966 that courts generally did not interfere

hold that defensive transactions *automatically* invoke the duty of loyalty and the fairness test. Instead, the court has altered the business judgment rule in a recent series of cases in order to control the potential for self-dealing that is inherent in defensive transactions. Through these cases, the Delaware courts have devised or approved three sets of "ground rules" for dealing with defensive tactics.

B. Unocal/Household *Test—Threshold Burden on Directors*

In *Unocal Corp. v. Mesa Petroleum Co.*,[73] the Delaware Supreme Court upheld a self-tender offer initiated by the Unocal board to defend against an allegedly coercive, two-tiered tender offer by the corporation's largest shareholder, Mesa Petroleum. Mesa had challenged the self-tender in the Court of Chancery because it was explicitly excluded from the company's offer.

Mesa secured a preliminary injunction against the self-tender offer, but the Delaware Supreme Court reversed and vacated the injunction. The court reaffirmed that the business judgment rule is applicable to takeover defenses.[74] Nonetheless, the court recognized the potential for conflicts of interest:

> Because of the omnipresent specter that a board may be acting primarily in its own interests, rather than those of the corporation and its shareholders, there is an enhanced duty which calls for judicial examination at the threshold before the protections of the business judgment rule may be conferred.[75]

To address this inherent conflict, the court announced a modified "business judgment" analysis. The court essentially established a presumption that directors act primarily in their own interests for the purpose of retaining control when they approve defensive measures.[76] Normally, the business judgment rule requires a plaintiff at the outset to overcome a presumption that the director or officer exercised due care. In *Unocal*, the court held that where defensive transactions are involved, the initial

---

with defensive tactics that would not otherwise violate the business judgment rule. Brudney, *Fiduciary Ideology in Transactions Affecting Corporate Control*, 65 MICH. L. REV. 259, 273 (1966).

[73] 493 A.2d 946 (Del. 1985).

[74] *Id.* at 954.

[75] *Id.*

[76] *See id.*

burden would be on the directors to rebut the presumption of self-dealing raised by such transactions.[77]

The court erected a two-part "threshold" test that the directors must satisfy in order to rebut the presumption of self-dealing. First, the directors must demonstrate that, in approving a defensive transaction, they had reasonable grounds for believing that a threat to corporate policy and effectiveness existed.[78] Second, they must prove that the defensive transaction adopted was "reasonable in relation to the threat posed."[79] Upon such a showing, the burden would then shift back to the plaintiff, who would be required to prove a primarily self-interested motive, or "some other breach of fiduciary duty such as fraud, overreaching, lack of good faith, or being uninformed."[80]

In *Moran v. Household International, Inc.*,[81] the Delaware Supreme Court reaffirmed the two-part threshold test announced in *Unocal*. *Household* addressed a complex defensive measure called a "poison pill" rights plan, adopted not in the heat of a battle for control, but prospectively, in advance of any takeover threat.[82] The court in *Household* made clear that what has come to be known as the "*Unocal* test" applies to all defensive transactions, whether prospective or responsive:

> [W]hen the business judgment rule applies to the adoption of a defensive mechanism, the initial burden will lie with the directors. The 'directors must show that they had reasonable grounds for believing that a danger to corporate policy and effectiveness existed. . . . [T]hey satisfy that burden by showing good faith and reasonable investigation. . . .' In addition, the directors must show that the defensive mechanism was 'reasonable in relation to the threat posed.'[83]

---

[77] *Id.* at 955.

[78] *Id.*

[79] *Id.* On the facts in *Unocal* the court found that the board's perception of Mesa's stock ownership as a threat was reasonable, and that the exclusion of Mesa from the self tender was reasonably related to that threat. The outcome of *Unocal* raised questions about whether the "*Unocal* test" would ever produce a result unfavorable to directors. Subsequent Delaware cases, however, have shown that such a result is possible. *See* AC Acquisitions Corp. v. Anderson, Clayton & Co., 519 A.2d 103 (Del. Ch. 1986); *see also infra* notes 118, 138–42 and accompanying text. *See also* Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986); *see also infra* text accompanying notes 85–103.

[80] *Unocal*, 493 A.2d at 958.

[81] 500 A.2d 1346 (Del. 1985).

[82] A "poison pill" plan is a complex charter provision that would require a hostile purchaser to incur a substantial debt in acquiring the target. Such a plan may, for example, give target shareholders the right to purchase the acquiring company's stock at a significant discount.

[83] *Id.* at 1356 (citations omitted) (quoting *Unocal*, 493 A.2d at 955).

The court also reaffirmed that if the directors overcome their threshold burden of proof, the burden will then shift back to the plaintiff to prove a breach of some fiduciary duty.[84]

C. Revlon *Test—Company "In Play"*

The rules of the game became more complex with the Delaware Supreme Court's decision in *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*[85] In *Revlon*, the court held that when a company is "in play"—that is, where a sale or breakup of the corporation is inevitable—defensive tactics that might otherwise pass the *Unocal* test become impermissible.[86] At that point, the role of the board of directors changes from that of an entity charged with defending the corporation from any threat to corporate "policy and effectiveness,"[87] to that of an auctioneer, charged with ensuring that the company is sold at the best possible price for the shareholders.[88]

The *Revlon* case involved various defensive measures approved by Revlon's board in the midst of a battle for control of the company. Faced with an unwanted tender offer from Pantry Pride, Inc., toward whose chairman the Revlon chairman held a "strong personal antipathy,"[89] the Revlon board initiated a series of defensive measures. One such measure was a poison pill notes plan similar to the rights plan at issue in *Household.*[90]

Pantry Pride responded to each defensive measure by raising its bid. Meanwhile, Revlon management began negotiations with a third party investment group interested in purchasing the company through a leveraged buyout. As a result of the negotiations,

---

[84] *Id.*

[85] 506 A.2d 173 (Del. 1986).

[86] *See id.* at 182. The *Revlon* court did not itself use the term "in play," but stated that the Revlon board's legal duties changed when it became "apparent to all that a break-up of the company was inevitable." *Id.* The term "in play" appears to have first been used by the Delaware Court of Chancery in Hecco Ventures v. Sea-Land Corp., No. 8486, slip op. at 7 (Del. Ch., May 19, 1986), a case following *Revlon*, to describe a company for which active bidding has begun to take place. The *Sea-Land* case is discussed *infra* at note 137.

[87] *Revlon*, 506 A.2d at 182.

[88] *See id.*

[89] *Id.* at 176.

[90] Pantry Pride's first tender offer was for $47.50 per share of Revlon common stock. The "poison pill" plan, however, would allow remaining shareholders to exchange each share for a $65 Revlon note at a 12% interest rate, with a one-year maturity. In effect, any bidder not approved by management would have to pay a $17.50 premium to Revlon noteholders in order to purchase the company. *Id.* at 177.

the investment group agreed to purchase the company and the Revlon board agreed to waive the notes.[91]

Upon announcement of the agreement, the value of the notes plummeted. The board, fearing that litigation would be initiated by the noteholders and faced with the continued and persistent efforts of the unwelcome Pantry Pride, approved a second agreement with the investment group. Under the revised agreement, the group would support the par value of the notes in order to appease the irate noteholders. In return, the Revlon board agreed to a "lock-up" provision granting the investment group an option, should the company be acquired by another bidder, to purchase one of Revlon's divisions at a price significantly below its appraised value. In addition, the agreement included a "no-shop" provision, through which the company agreed not to negotiate with any other prospective bidder, including Pantry Pride.[92]

The Court of Chancery enjoined the enforcement of the agreement, holding that the Revlon directors had breached their duty of loyalty to the shareholders by approving the lock-up option and the no-shop provision. The Chancery Court reasoned that since the sale of the company was imminent, the board's consideration of the interests of the noteholders and its own interest in avoiding litigation was improper.[93]

The Delaware Supreme Court affirmed, holding that where the sale of a company is imminent (as it found to be the case in *Revlon*), the directors' duties change. They may no longer take into account interests other than the direct, immediate interests of the shareholders. Any affirmative measures they might take must be directed at fulfilling their role as "auctioneers charged with getting the best price for the stockholders at a sale of the company."[94] The court held that the lock-up option and the no-shop provision approved by the Revlon board were inconsistent with the board's "auctioneer" duty, and thus were properly enjoined by the lower court.[95]

The message of *Revlon* is simple. When the sale of a company is imminent and inevitable, the "whole question of defensive

---

[91] *Id.* at 176–78.
[92] *Id.* at 178–79.
[93] Revlon, Inc. v. MacAndrews & Forbes Holding, Inc., 501 A.2d 1239, 1249–50 (Del. Ch. 1985), *aff'd*, 506 A.2d 173 (Del. 1986).
[94] *Revlon*, 506 A.2d at 182.
[95] *Id.* at 182–84.

measures" becomes "moot."[96] At that point, the board may not consider interests other than the short-term interests of the shareholders, since no other interests are relevant.

The critical issue for purposes of section 102(b)(7) is whether the "auctioneer" role announced in *Revlon* is a function of the duty of care or the duty of loyalty. If the auctioneer role is a function of the duty of care, then a section 102(b)(7) provision might preclude liability for damages in a similar case. If it is a function of the duty of loyalty, however, such a provision would provide no protection. The Court of Chancery had squarely held that the Revlon directors breached their duty of loyalty when, in considering the lock-up, they took into account their own potential personal liability for failing to approve the lock-up plan.[97] The Delaware Supreme Court affirmed this finding, but couched its final holding in terms of the duty of care.[98] Thus, its opinion provides limited guidance as to the proper application of section 102(b)(7).

Indeed, it is difficult to determine from the Delaware Supreme Court's opinion whether it viewed the board's "auctioneer" role as a consequence of the duty of care or of the duty of loyalty.[99] On the one hand, the court explained the "auctioneer" role as an extension, or alteration, of the board's duties under *Unocal*[100]—duties which the *Unocal* court had imposed to address conflict of interest problems. This approach would appear to indicate that the board's altered role was a function of its duty of loyalty. On the other hand, the court cited at length and with approval the recent opinion of the Court of Appeals for the Second Circuit in *Hanson Trust PLC v. ML SCM Acquisition, Inc.*,[101] a case that was decided, at least in form, on duty of care grounds.[102] The fact that in *Revlon* the directors took their own interests—potential liability—into account would

---

[96] *Id.* at 182.

[97] *Revlon*, 501 A.2d at 1250.

[98] *Revlon*, 506 A.2d at 184.

[99] The court's opinion refers almost interchangeably to the two duties. *See id.* at 182 (consideration of interests other than those of shareholders constituted a breach of the duty of loyalty); *id.* at 184 (protection of noteholders over shareholders was "contrary to the board's duty of care"); *id.* at 184 (affirming Chancery Court's ruling that failure to hold a fair auction constituted a breach of the duty of loyalty); *id.* at 185 (holding that defensive measure during auction, where it operates to the detriment of shareholders, constitutes a breach of the duty of care).

[100] *Id.* at 182.

[101] 781 F.2d 264 (2d Cir. 1986). The *Hanson* case is discussed in greater detail *infra* at text accompanying notes 104–11.

[102] *Id.* at 275–77.

seem to resolve the question in favor of the duty of loyalty, but the Delaware Supreme Court's reasoning rested on broader ground. The court held that when the sale of a corporation is inevitable, consideration of *any* interests other than those of the shareholders becomes impermissible.[103] Thus, the question of whether the primary breach in *Revlon* was of the duty of care or the duty of loyalty remains unresolved by the *Revlon* opinion itself.

D. *Indirect Self-Dealing—The* Hanson *Case*

Hanson Trust PLC v. ML SCM Acquisition, Inc.[104] involved a factual pattern that may pose more troubling questions under section 102(b)(7) than those addressed in *Unocal* and *Revlon*. Although the court based its holding on a breach of the duty of care by independent directors, its primary concern was an underlying problem of loyalty.

In *Hanson*, the Court of Appeals for the Second Circuit held that the independent directors of SCM Corporation breached their duty of care by allowing the management directors and their advisors to make the critical decisions in the structuring of a defensive leveraged buyout, where the management directors were themselves members of the purchasing group. The conflict of interest of the management directors was clear; indeed, they did not vote on the transaction.[105] They did, however, carry out the primary negotiations for the deal, setting the price and terms under which the company would be sold.

The court in *Hanson* was clearly concerned that the key decisions in the structuring of the management buyout were in fact made by interested management directors, albeit with the "rubber stamp" approval of the board members who were not participating in the buyout.[106] Indeed, there were indications in the record of a possible lack of independence on the part of the

---

[103] *Revlon*, 506 A.2d at 182.

[104] 781 F.2d 264 (2d Cir. 1986). The *Hanson* case was decided by the Court of Appeals for the Second Circuit, applying New York law, and thus may seem out of place in this discussion of Delaware "ground rules." As noted *supra* at text accompanying notes 101–02, however, the Delaware Supreme Court in *Revlon* cited *Hanson* with approval and discussed it at length. 506 A.2d at 183. Indeed, the Delaware court saw the situation in *Hanson* as similar to that with which it was presented in *Revlon*. *Id.* at 183–84.

[105] *Hanson*, 781 F.2d at 269.

[106] *See id.* at 275–77.

board members who were not in the purchasing group.[107] Significantly, the court's holding that the independent directors had breached their duty of care was based in part on its finding that "the Board appears to have failed to ensure that [the transactions] were negotiated or scrutinized by those whose only loyalty was to the shareholders,"[108] and that the board "acted in such a way as to ensure that management was in the picture at all costs."[109] The court held that the independent directors had an oversight obligation to ensure that the shareholders received the protection from self-dealing to which they were entitled.[110] Nonetheless, the court labelled the fiduciary breach as one of the duty of care, apparently because the only issue was the propriety of a decision made by directors who did not stand to gain financially from the leveraged buyout.[111]

VI. Effect of Section 102(b)(7) and Suggestions for Interpretation

A. *The Application of Duty of Care Analysis to Loyalty Cases*

The ambiguity in the cases discussed above, and in particular the *Revlon* and *Hanson* decisions, raises questions about the proper application of section 102(b)(7) to similar cases. Since *Hanson*, and less certainly *Revlon*, were styled duty of care cases, they could arguably fall within the scope of immunity permitted by section 102(b)(7). Yet such a conclusion would fail to take into account the underlying loyalty concerns motivating these decisions.

The courts in *Unocal*, *Revlon*, and *Hanson* invoked the business judgment rule, a doctrine commonly associated with the duty of care.[112] Yet, in each case the court altered the business judgment rule.[113] Normally, the business judgment rule affords directors the presumption of good faith and pursuit of the best interests of the corporation. By altering the business judgment rule in these three cases, however, the court recognized the

---

[107] *See id.* at 268 n.2.
[108] *Id.* at 277.
[109] *Id.* at 283.
[110] *Id.* at 277.
[111] *Id.* at 283.
[112] *Unocal*, 493 A.2d at 954; *Revlon*, 506 A.2d at 179–80; *Hanson*, 781 F.2d at 273.
[113] *Unocal*, 493 A.2d at 955; *Revlon*, 506 A.2d at 182; *Hanson*, 781 F.2d at 274, 277.

loyalty problems lurking in the defensive transactions at issue. Either self-interest was at least potentially involved in management's decision to approve a defensive measure, or so-called outside, disinterested directors unjustifiably deferred to interested management.[114]

It is now well recognized that courts have occasionally invoked the duty of care when in fact their main concern has been potential disloyalty.[115] The reason for the courts' failure to address loyalty problems directly, however, is less clear. Professor Phillips has suggested that courts use the duty of care analysis in cases that only indirectly or partially involve issues of loyalty because of the difficulties of proof involved in a duty of loyalty analysis.[116] Thus, where the court senses underlying loyalty problems but the plaintiff is unable to prove them, the court can allow the case to proceed on duty of care grounds, thereby avoiding the evidentiary difficulties involved in a duty of loyalty approach.

Another commentator has suggested that the rigid formulation of the fiduciary rules, which distinguish sharply between cases of self-dealing and cases of negligence, induces courts to choose only one theory as a basis for assigning liability. Under this view, the duty of care analysis is an easier route, since the court

---

[114] *Unocal*, 493 A.2d at 955; *Revlon*, 506 A.2d at 180; *Hanson*, 781 F.2d at 275–78.

[115] *See* Bishop, *Sitting Ducks and Decoy Ducks*, *supra* note 19, at 1100. In his analysis of *Selheimer v. Manganese Corp. of America*, 224 A.2d 634 (Pa. 1966), Professor Bishop observes that while the court "undoubtedly holds directors liable for failing to discharge their duties 'with that diligence, care and skill which ordinarily prudent men would exercise . . .' the facts are heavy with the odor of self-dealing." *Id.* Several others have observed this phenomenon in recent case law. *See* R. CLARK, CORPORATE LAW § 3.4, at 126–29 (1986); Kirk, *The* Trans Union *Case: Is it Business Judgment Rule As Usual?*, 24 AM. BUS. L.J. 467, 469, 475–78 (1986); Oesterle, *The Negotiation Model of Tender Offer Defenses and the Delaware Supreme Court*, 72 CORNELL L. REV. 117, 154–55 (1986); Phillips, *Managerial Misuse of Property: The Synthesizing Thread in Corporate Doctrine*, 32 RUTGERS L. REV. 184, 203–09 (1979); Phillips, *supra* note 20, at 692–98; Note, *Down But Not Out—The Lock-Up Option Still Has Legal Punch When Properly Used*, 43 WASH. & LEE L. REV. 1125, 1142 (1986). *See also* Herzel, Schmidt and Davis, *Why Corporate Directors Have a Right to Resist Tender Offers*, 3 CORP. L. REV. 107, 115 (1980) ("Although the courts have not always said so explicitly, it is likely that the potentially very high cost to the corporation of the purchase or sale of large amounts of stock in the light of the directors' conflict of interest has played a substantial role in . . . [courts'] decisions" to enjoin or closely scrutinize friendly placements and corporate buybacks in the face of a hostile tender offer); Lerner, *Impact of Heightened Judicial Scrutiny of Corporate Target's Board Room*, N.Y.L.J., Aug. 11, 1986, at 36, 40, col. 5 & n.44 ("lawsuits do not always fit into a procrustean mold, and it cannot be anticipated with certainty that a particular legal attack will fall neatly and exclusively into the 'duty of care' category").

[116] Phillips, *Managerial Misuse of Property*, *supra* note 115; Phillips, supra note 20, at 692–98. *See also* R. CLARK, CORPORATE LAW § 3.4, at 128 (1986).

does not need to pick apart the details of a given transaction to detect loyalty issues. Instead, the court can focus on the more tangible details of a board's decision-making process.[117]

In any event, in prior cases it did not particularly matter whether the court styled a particular breach of fiduciary duty as a violation of the duty of care or of the duty of loyalty, since the legal formulation did not necessarily determine the result. By labelling a particular transaction a breach of the duty of care, the court reached the desired result (enjoining the transaction or imposing damages) without having to address the difficult questions of "indirect disloyalty" and "mixed disloyalty," or the difficult problems of proof that may accompany a duty of loyalty approach.

B. *Section 102(b)(7) and the Delaware Ground Rules*

Section 102(b)(7) may change the ramifications of a duty of care approach to loyalty issues. If a court calls a given fiduciary breach one of the duty of care rather than of the duty of loyalty, liability will not be imposed where the corporation has a section 102(b)(7) provision. Unlike before, the legal category into which the court places the facts may determine the result and control the imposition of liablity.

Section 102(b)(7), therefore, should force the courts to address the definitional issue more directly than they have in the past. The following sections suggest certain definitional approaches the courts should take toward defensive tactics in order to ensure that breaches of the duty of loyalty are not immunized by an overbroad application of section 102(b)(7).

1. *Unocal* Test and Threshold Burdens

Given the expressed conflict of interest concerns underlying the two-part threshold test set out in *Unocal* and clarified in *Household*, it would seem self-evident that a failure to satisfy that test would constitute a breach of the duty of loyalty. Indeed, the Delaware Chancery Court so held in *AC Acquisitions Corp.*

---

[117] Kirk, *supra* note 115, at 467. Professor Kirk makes the intriguing, but not altogether convincing argument that *Van Gorkom* itself was a case involving "a breach of overlapping duties—the breach of a duty of loyalty and the breach of the duty to detect it." *Id.* at 481.

v. Anderson, Clayton & Co.,[118] a case discussed more fully below. Since the whole point of placing a threshold burden on directors in defensive transactions is to rebut a presumption that they acted in their own interests,[119] a failure to meet that burden should invoke the duty of loyalty and place on the directors the burden of demonstrating that the transaction was fair to the shareholders.[120]

Of course, if the directors successfully rebut the *Unocal* presumption, the burden would then shift back to the plaintiff to prove "by a preponderance of the evidence that the directors' decisions were primarily based on perpetuating themselves in office, or some other breach of fiduciary duty, such as fraud, overreaching, lack of good faith, or being uninformed."[121] At that stage, if the corporation has adopted a section 102(b)(7) provision and the plaintiff can prove only that the directors were "uninformed," the action should be dismissed. The directors' failure to inform themselves would amount to no more than a breach of their duty of care, for which they have been absolved in advance by the shareholders.

The possibility for confusion lies only in *Unocal*'s requirement that as part of the board's threshold burden to rebut the presumption of a conflict of interest it must prove that it undertook "reasonable investigation" in order to determine whether a threat to corporate policy or effectiveness existed.[122] This requirement should not be seen as a function of the duty of care, as would the plaintiff's efforts to prove, after the *Unocal* presumption has been successfully rebutted, that a given decision was uninformed.

Under *Unocal*, a board's inability to prove that it undertook a reasonable investigation into whether a prospective takeover posed a real threat to corporate welfare is itself evidence that any defensive measures taken by the board were motivated by impermissible considerations.[123] The "judicial examination at the threshold" called for by *Unocal*[124] is directed to the question of whether a conflict exists, and therefore, whether the directors' decision is entitled to deference under the business judgment

---

[118] 519 A.2d 103, 114 (Del. Ch. 1986).
[119] *See Unocal*, 493 A.2d at 954–55.
[120] *See Anderson, Clayton*, 519 A.2d at 115.
[121] *Unocal*, 493 A.2d at 958.
[122] *Id.* at 955.
[123] *Id.* at 958.
[124] *Id.* at 954.

rule. Apparently because of the difficulties in determining what motives lie behind a particular defensive transaction, and thus whether a conflict exists, the Delaware Supreme Court in *Unocal* established sensible, objective criteria by which the presumption of such a conflict can be rebutted.[125] One of these criteria is whether the directors underwent "reasonable investigation" to determine whether a threat to the corporation was present. If the directors are unable to make the minimal showing of legitimacy required by *Unocal*, then it is likely that their desire to retain control was the primary motivation behind a defensive transaction. Where that is the case, the presumption of a conflict of interest remains and the directors' actions invoke the duty of loyalty and the fairness test.[126]

Thus, while one of the threshold inquiries under *Unocal* is whether a board undertook "proper investigation" into the genuineness of a perceived threat, the ultimate question to be resolved by the *Unocal* test is whether the directors had a personal stake in the transaction. That question should not be confused with a duty of care inquiry.

2. Company "In Play"—*Revlon*

The "auction-ending" situation addressed in *Revlon* poses more complex problems for a proper application of section 102(b)(7). As noted above,[127] the formal basis for the court's holding in *Revlon* was unclear. The court's primary concern, however, was that the shareholders' short-term interests were inadequately represented.[128]

In the final analysis, *Revlon* is simply another application of *Unocal*'s balance of competing concerns. The *Unocal* court saw the board as the appropriate body to determine what was in the best interests of the shareholders.[129] In making that determination, the board could assess long-term interests, such as threats to corporate policy.[130] Furthermore, on the facts of *Unocal*, the board could take into account the possibility that a minority of

---

[125] *Id.* at 954–55.
[126] *See Anderson, Clayton*, 519 A.2d at 114.
[127] *See supra* text accompanying notes 98–103.
[128] *Revlon*, 506 A.2d at 176, 182.
[129] *Unocal*, 493 A.2d at 953–54.
[130] *See id.* at 955.

shares might end up being damaged by what the board perceives as a "grossly inadequate two-tier coercive tender offer."[131]

The *Unocal* court made clear, however, that the board's defensive response to a hostile tender offer, unlike day-to-day decisions, must be balanced against any perceived threat.[132] This balancing test was deemed necessary because of the potential conflicts of interest on the part of the directors. The test was also crucial because of an implicit recognition that a tender offer, albeit "hostile," at a significant premium over market price might well be very much in the shareholders' interests.

The implicit concern for shareholders' short-term interests was made explicit in *Revlon*, despite the ambiguity in the holding of that case. If a sale of the company is imminent, the shareholders' only interest is the short-term gain to be derived therefrom. Whatever long-term benefits might result from a defensive measure in an ordinary situation, therefore, are irrelevant. When the company will inevitably be sold, as the court stated in *Revlon*, "[m]arket forces must be allowed to operate freely to bring the target's shareholders the best price available for their equity."[133]

The court in *Revlon* based its inquiry on the threshold test established in *Unocal*,[134] reiterating that the reasons for the threshold *Unocal* test was the "omnipresent specter that a board may be acting primarily in its own interests."[135] The difference with respect to the lock-up in *Revlon* was that the sale of the company was inevitable, and at that point the court saw the board's *Unocal* duties as "significantly altered."[136] Since the short-term gain for the shareholders in an inevitable sale of the company was the only relevant interest, a board that made a decision based on anything other than that short-term interest could not satisfy the *Unocal* threshold burden of proving good faith.

Revlon simply narrowed the ways in which a board can meet its *Unocal* burden of proof where a company is "in play." Any action that forecloses bidding once the company is on the auction block cannot satisfy the good faith requirement of *Uno-*

---

[131] *Id.* at 956.
[132] *Id.* at 955.
[133] *See Revlon*, 506 A.2d at 184.
[134] *Id.* at 180 (citing *Unocal*, 493 A.2d at 955).
[135] *Id.* (quoting *Unocal*, 493 A.2d at 954).
[136] *Id.* at 182.

cal.[137] Thus a board, failing to justify its actions under *Revlon*, is left with the presumption of self-dealing, and must meet the more rigid requirements of the fairness test. Under *Revlon*, the consideration of long-term interests permitted by *Unocal* under the first prong of the threshold test is foreclosed by the practical fact that long-term interests are irrelevant when the company is about to be sold. Consideration of other interests in the *Revlon* situation makes it impossible for the board to satisfy the first prong of the *Unocal* test, and thus the business judgment rule affords the directors no protection. On the same logic, the protection of a section 102(b)(7) provision should be similarly unavailable.

As noted above, failure to meet the *Unocal* threshold test takes the case outside the protection of the business judgment rule and into the realm of the duty of loyalty.[138] That duty should be considered to be breached if the directors are unable to demonstrate that a given auction-ending measure was fair. If the directors cannot demonstrate fairness, they should be held liable for a breach of the duty of loyalty, and should not be shielded by a section 102(b)(7) provision.

The Delware Court of Chancery took this approach in *AC Acquisitions Corp. v. Anderson, Clayton & Co.*,[139] when it found that the Anderson, Clayton directors had failed to demonstrate

---

[137] *Id.* Satisfying the good faith requirement of *Unocal* is not impossible. In *Hecco Ventures v. Sea-Land Corp.*, No. 8486, slip op. (Del. Ch. May 19, 1986), for example, the Chancery Court found that the Sea-Land directors had fulfilled their duties as auctioneers under *Revlon*, and declined to find that their actions in accepting a friendly bid constituted a breach of the duty of loyalty. Plaintiffs had alleged that the directors' acceptance of the bid was designed "to entrench [the board] in office." *Id.* at 9. The court found that the directors had perceived that the company was "in play" and had conducted a proper and fair auction in order to obtain the best price for the shareholders. *Id.* at 7, 10–11. As a result, the court refused to issue a preliminary injunction against the consummation of a tender offer by the successful bidder.

[138] *Cf. Anderson, Clayton*, 519 A.2d at 114–15.

[139] 519 A.2d 103 (Del. Ch. 1986). *Anderson, Clayton* involved a self-tender offer approved by the Anderson, Clayton directors in response to a hostile tender offer. The court found that the board satisfied the first requirement of *Unocal*, which the court characterized as "simply a particularization of the more general requirement that a corporate purpose, not one personal to the directors," must be served by the transaction. *Id.* at 112. A self-tender authorized by the board would in theory provide shareholders with a choice of offers, a result the court viewed as satisfying the corporate purpose requirement. *Id.*

The board, however, failed to satisfy the second prong of the *Unocal* test. The court found that the manner in which the directors structured the self-tender was not rationally related to the purpose of providing shareholders with a choice. The court found that "no rational shareholder could afford not to tender into the Company's self-tender offer." *Id.* at 113. Thus, the self-tender, rather than offering a practical choice, was in fact coercive, foreclosing choice rather than promoting it. *Id.* at 114.

that a proposed defensive self-tender offer satisfied the *second* prong of the *Unocal* test.[140] The court held that having failed to meet the *Unocal* threshold burden, *however unwittingly*, the board had to meet the more stringent requirements of the duty of loyalty.[141] Since the court found it unlikely that the board could demonstrate the fairness of the self-tender, it issued an order temporarily enjoining the self-tender on duty of loyalty grounds.[142]

In the court's view, the duty of loyalty analysis necessarily followed from the board's failure to meet the *Unocal* test, because of the inherent self-dealing nature of defensive transactions noted in *Unocal* itself. The court reasoned:

> The first consequence [of the board's failure to satisfy *Unocal*] is that the Board's action does not qualify for the protections afforded by the business judgment rule. In the light of that fact, the obvious entrenchment *effect* of the [self-tender] and the conclusion that that transaction cannot be justified as reasonable in the circumstances, I conclude that it is likely to be found to constitute a breach of the duty of loyalty, albeit a possibly unintended one. . . . Where director action is not protected by the business judgment rule, mere good faith will not preclude a finding of a breach of the duty of loyalty. Rather, in most such instances (which happen to be self-dealing transactions), the transaction can only be sustained if it is objectively or intrinsically fair; an honest belief that the transaction was entirely fair will not alone be sufficient.[143]

The same analysis would apply in a *Revlon* situation where a board takes actions that thwart active bidding for a company already "in play." Such a transaction cannot survive the first test of *Unocal* for two reasons. Under *Revlon*, a transaction that ends active bidding while a company is on the auction block can by definition serve no valid corporate purpose, since the only valid purpose to be served is to obtain the best price for the shareholders.[144] Second, any action that ends active bidding cannot, as the court stated in *Revlon*, satisfy the "good faith"

---

[140] *Id.* at 112–14.

[141] *Id.* at 114.

[142] *Id.*

[143] *Id.* at 114–15 (emphasis in original). The court concluded that the transaction was unlikely to be sustained as fair to shareholders.

[144] *See id.* at 112. The court in *Anderson, Clayton* characterized the first leg of the *Unocal* test as a specific application of the general requirement that defensive transactions must serve a valid corporate purpose. *See id.*; *see also supra* note 139.

requirement of *Unocal*.[145] As a result, the presumption of self-interest established in *Unocal* calls into play a duty of loyalty analysis and fairness test. If the board fails the *Revlon* test by deterring active bidding, it has thereby failed under *Unocal*, and thus must demonstrate the fairness of the auction-ending transaction. If the directors are unable to do so, they cannot seek the protection of a section 102(b)(7) provision.

Indeed, in the *Revlon* context a duty of care analysis would appear to have little place. The *Revlon* decision was grounded in a failure to consider shareholders' short-term interests. And the sole guardian of those interests was the board of directors. Thus, it matters little whether the board deliberated for a given number of hours, or read a legally sufficient number of explanatory documents and expert opinions, before acting on considerations that ran counter to the shareholders' interest in getting the best price for their shares.

Significantly, the court's opinion in *Revlon*, despite its repeated references to the duty of care, made no mention whatsoever of the deliberative duties so carefully outlined in *Van Gorkom*. The fatal flaw committed by the directors in *Revlon* was that they took actions which by their very nature were contrary to the immediate interests of the shareholders. As a result, "[t]he Revlon board could not make the requisite showing of good faith by preferring the noteholders and ignoring its duty of loyalty to the shareholders."[146]

Auction-ending transactions initiated by a board when a company is in play should not be protected by section 102(b)(7). The statute may be designed to permit directors to take business risks, but the protections of the statute have no place when those risks are self-evidently contrary to shareholder interests and have the obvious effect of thwarting a bidding process that, if left alone, is likely to lead to the maximization of shareholders' value in an inevitable sale of the company. Defensive actions that thwart active bidding by definition fail the first leg of *Unocal* and thus should invoke the duty of loyalty exception to section 102(b)(7). Moreover, any such action, as the court stated in *Revlon*, constitutes bad faith.[147] Thus, it should be excluded

---

[145] *Revlon*, 506 A.2d at 182. *See supra* text accompanying notes 89–95.
[146] *Revlon*, 506 A.2d at 182.
[147] *Id.* at 181–83.

from the scope of the statute by the latter's "acts not in good faith" exception.

It should be noted, however, that both *Unocal* and *Revlon* addressed conflicts of interest on the part of *management* directors. Indeed, the Delaware Supreme Court recently held in *Polk v. Good*[148] that a transaction will not be enjoined under *Unocal* where the majority of the board is nonmanagement. Apparently, the court believed that the likelihood of improper motives diminishes where the majority of the board members stand to lose only their posts as directors and the nominal directors' fees.[149] Thus, the *Unocal* and *Revlon* tests, even with respect to a section 102(b)(7) analysis, would be required only where the liability of a management director is at issue. Such a result is consistent with the underlying purpose of section 102(b)(7), which was to provide outside directors a greater degree of protection from monetary liability.

Notwithstanding the inapplicability of the *Unocal* and *Revlon* tests, however, there remain some limits on outside director action. One such limit, the "good faith" exception to section 102(b)(7), will be discussed in detail in the next section.

3. Indirect Loyalty Issues—*Hanson*

The problems that arise when outside directors "rubber stamp" a defensive transaction in which management is clearly interested pose more difficult questions under section 102(b)(7) than those raised by *Unocal* and *Revlon*. A defensive management-initiated leveraged buyout poses significant problems of "indirect self-dealing." That is, management self-interest may be filtered through an approval process that consists of independent (non-interested) directors.

Disinterested outside directors play a critical role in the decision-making process where the management directors are interested. Interested management directors who, as in *Hanson*, decline to vote on the transaction are acting properly, since they

---

[148] 507 A.2d 531 (Del. 1986).

[149] *See id.* at 537. The rationale underlying the decision in *Polk*, which like *Revlon* and *Unocal* involved an action for injunctive relief, was that the likelihood of a conflict of interest was much smaller for outside directors than for management. This rationale would appear to apply equally under section 102(b)(7) where an action seeks monetary damages against individual directors. Where the director is a member of management, that director would be subject to the *Unocal* and *Revlon* tests in a section 102(b)(7) inquiry. Where the director is non-management, these tests would be inapplicable.

cannot vote objectively if they stand on both sides of the deal. As interested parties, the law does not expect them to view the transaction rationally from the perspective of the shareholders. Leaving the decision to others, then, provides needed shareholder protection.

It is in this context that the role of the independent director becomes crucial. Where a defensive transaction directly involves management, the potential for management self-dealing is the most acute. In a management-interested transaction, the independent director is the sole guardian of shareholder interests. The potential problems are very different from the vague "mixed motives" questions resolved by the *Unocal* decision. Where management stands on both sides of a defensive transaction, its self-interest acts as a counter-force, working directly against the interests of the shareholders.[150] As a result, it is critical to determine whether the "disinterested" directors are truly independent.

In *Hanson*, the court deemed the failure of independent directors to adequately separate themselves from interested management to be a breach of their duty of care.[151] In so holding, however, the court noted that the outside directors' legal counsel and financial advisors appeared to be simultaneously representing management.[152] The independent directors breached their fiduciary duty to the shareholders by allowing all the key decisions on the price and terms of the leveraged buyout to be made by management and its advisors. Thus, the concern underlying the court's holding was the potential for disloyalty on the part of management—disloyalty that was ratified by the "independent" board.[153]

---

[150] *See Hanson*, 781 F.2d at 284 (Oakes, J., concurring). According to Judge Oakes, independent directors have a heightened duty

> when the favored buyer . . . is a consortium including within it the management/non-independent directors who will have a substantial participation in the future equity of the potential buyer and whose interests by virtue of that participation, at that stage, are to favor the buyout at the lowest price. . . . [M]anagement interests are then in direct conflict with those of the shareholders of the target corporation to obtain the highest price either for their shares or for the company's assets. *Id.*

[151] *Id.* at 275–77.

[152] *See id.* at 268 & n.2.

[153] Indeed, the court in *Hanson* cited with approval two articles in which the authors discussed at length the danger that the relationship between management and outside directors might generate powerful biases, causing outside directors consistently to favor management. *See id.* at 277 (citing Longstreth, *Fairness of Management Buyouts Needs Evaluation*, Legal Times, Oct. 10, 1983, at 15; and Cox & Munsinger, *Bias in the Boardroom: Psychological Foundations and Legal Implications of Corporate Cohesion*, 48 LAW & CONTEMP. PROBS. 83 (1985)).

As to the correct application of section 102(b)(7), the *Hanson* case raises important policy issues. The statute was designed to permit protection of independent directors, to be sure, but it certainly was not intended to sanction self-dealing on the part of management which is buffered from liability by a board of "rubber stamp" directors who are in turn protected from liability by a section 102(b)(7) provision. The problem, as emphasized in *Hanson*, is ultimately one of loyalty. Are the shareholders represented by directors who have the shareholders' best interests in mind? Are their interests protected at all?

It is in a case such as *Hanson* that a wooden application of the Delaware statute, in the light of recent case law, could work the most severe damage. If interested management directors do not vote on the transaction, and the decisions of the non-interested directors are protected by a section 102(b)(7) provision, there remains nobody who may be held accountable to the shareholders. To limit judicial scrutiny to a "duty of care" analysis where the company has a section 102(b)(7) provision would thus preclude judicial review altogether in precisely the situation where review is most appropriate.

Any application of section 102(b)(7) that would preclude judicial review of transactions in which management has a stake would stretch the statute far beyond the facts of *Van Gorkom*, where section 102(b)(7) could quite properly have applied. In *Van Gorkom*, the independent directors simply failed to make a reasonable investigation before taking an important action, and in other ways failed to act diligently. There did not appear to be any counter-force such as managerial self-interest working directly against the interests of the shareholders.[154]

In situations like that of the *Hanson* case where management participates in a transaction, the court should closely scrutinize the true independence of the outside directors, even where management does not vote. If the court finds that those directors did not take steps to separate their decision-making process from the influence of interested management, it should hold the directors accountable for having failed to act in good faith, in contravention of the "acts not in good faith" exception to section 102(b)(7). As for the interested management directors, any attempts to improperly influence the independent board should subject their actions to scrutiny under the statute's duty of

[154] *See supra* text accompanying notes 8–12.

loyalty exception, even where they did not formally vote on the transactions.

Judicial scrutiny of the true independence of "outside" directors is admittedly a difficult and delicate task. On one hand, to give no weight to outside director approval of a transaction would interfere with a board's decision-making power. Moreover, failure to acknowledge approval by disinterested parties would in a sense undermine the assumptions underlying the policy favoring the presence of independent directors on corporate boards.[155]

On the other hand, as noted above, management buyouts require a closer inquiry into the independence of the outside directors than do other defensive transactions. In cases involving defensive transactions, the inquiry into independence becomes critical when management stands to gain financially, and as the likelihood of indirect self-dealing becomes more acute. It is true that Delaware courts have consistently deferred to the decisions of a board consisting of a majority of non-management

---

[155] Maldonado v. Flynn, 485 F. Supp. 274 (S.D.N.Y. 1980), *rev'd in part on other grounds*, 671 F.2d 729 (2d Cir. 1982), for example, involved a stockholder's derivative suit brought against nine present and past directors. An independent director committee determined to move for dismissal of the action. Although the past directors were clearly interested in the outcome of the committee's determination, Judge Weinfeld declined to accept the view that because members of an independent investigation committee of outside directors had been appointed by insiders, the committee members could not review and approve the dismissal of the action. The court noted that:

> This cynical attitude would require a per se disqualification of any committee appointed by a board exercising its statutory authority no matter how far the independent committee may be removed from the transactions that are at the core of the litigation. Moreover, this concept would sterilize the corporation, for "to disqualify the entire board would be to render the corporation powerless to make an effective business judgment with respect to prosection of the derivative action."

Id. at 282 (citation omitted). *Accord* Zapata Corp. v. Maldonado, 430 A.2d 779, 786–87 (Del. 1981). The two cases are related, and involved simultaneous proceedings on essentially the same issue. In the federal proceeding, the issue of the propriety of independent committee dismissal of derivative litigation was addressed both under the federal securities laws and under Delaware law. After Judge Weinfeld's ruling in the federal case, the Delaware Supreme Court addressed the same issue in *Zapata*. The Delaware court essentially agreed with Judge Weinfeld's holding that the mere fact that the committee was appointed by interested directors did not automatically disqualify the committee. The court also agreed with Judge Weinfeld that an inquiry into the true independence of the committee members was appropriate, but established an additional requirement that the court determine whether in its own "independent business judgment" the suit should be dismissed. *Id.* at 789; *see* discussion *infra* at text accompanying note 163. Subsequent to the Delaware Supreme Court's ruling, the Court of Appeals for the Second Circuit remanded the federal case to the district court for reconsideration under the altered test announced in *Zapata*. *Maldonado v. Flynn*, 671 F.2d 729, 732 (2d Cir. 1982).

directors in the context of ordinary defensive transactions.[156] There, however, the only question was whether the board's decision was motivated by improper concern for its own perpetuation in office.[157] When the defensive measure in question accrues directly to management's financial benefit, the court should scrutinize the board's independence more closely. In that situation, the question is whether management's admitted self-interest has filtered through the "independent" decision-making process and affected the outcome.

The Delaware courts have not had occasion to address the issue of outside director independence in the management buyout context.[158] The Court of Appeals for the Sixth Circuit, however, considered the issue in *Edelman v. Fruehauf Corp.*,[159] a case involving a management leveraged buyout approved by a committee of outside directors. The court in *Fruehauf* apparently perceived the danger that an "independent" committee

---

[156] *Compare* Polk v. Good, 507 A.2d 531, 537 (Del. 1986) (holding that the presence of ten outside directors on the board constituted a *prima facie* showing of good faith and reasonable investigation) *with* Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 176 at n.3 (Del. 1986) (where the majority of the board was found not to be independent, the board's decision was not entitled to the usual deference given to those made by a disinterested board). *See also supra* note 17.

[157] Some non-Delaware courts have taken the position that even in an ordinary defensive transaction where the alleged conflict of interest is a desire to maintain control, that possible conflict itself is enough to call into question the presumptions underlying the theory of "outside director approval." *See* Dynamics Corp. of America v. CTS Corp., 794 F.2d 250 (7th Cir. 1986). According to Judge Posner's majority opinion:

> [Management's conflict of interest] is not cured by vesting the power of decision in a board of directors in which insiders are a minority. . . . No one likes to be fired, whether he is just a director or also an officer. The so-called outsiders moreover are often friends of the insiders. And since they spend only part of their time on the affairs of the corporation, their knowledge of those affairs is much less than that of the insiders, to whom they are likely therefore to defer. *Id.* at 256.

See also Mobil v. Marathon Oil Co., [1981-1982 Transfer Binder] Fed. Sec. L. Rep. ¶ 98,375, 92,262, 92,265 (S.D. Ohio), *rev'd*, 669 F.2d 366 (6th Cir. 1981); Panter v. Marshall Field & Co., 646 F.2d 271, 300 (7th Cir. 1981) (Cudahy, J., dissenting). Judge Cudahy stated that:

> The fact that Field's may have had a majority of non-management (independent) directors is hardly dispositive. The interaction between management and board may be very strong. . . . I do not think it necessary to rely primarily on such directly pecuniary relationships . . . to establish a conflict of interest here. . . . [T]he very idea that, if we cannot trace with precision a mighty flow of dollars into the pockets of each of the outside directors, these directors are necessarily disinterested arbiters of the stockholders' destiny, is appallingly naive. *Id.* at 300 (cited with approval in *Dynamics* 794 F.2d at 256).

[158] The leveraged buyout addressed in the *Revlon* case initially contemplated management participation. *See Revlon*, 506 A.2d at 178. However, when the agreement was amended to include the lock-up option and the no-shop provision, the management participation provision was dropped. *Id.*

[159] 798 F.2d 882 (6th Cir. 1986).

would be unduly influenced by management, and rejected the board's suggestion that the buyout be analyzed under the business judgment rule.[160] In management buyout situations, it seems, the usual presumptions of validity afforded the decisions of independent directors were inappropriate.[161] The possibility for abuse of the independent director "seal of approval" was simply too great.[162]

The Delaware courts have addressed an analagous problem in cases involving "independent director" committees called on to review (and usually to dismiss) derivative suits against defendant directors. In *Zapata Corp. v. Maldonado*,[163] for instance, the Delaware Supreme Court stated that it is necessary to proceed with more caution in "litigation committee" cases than in those where management self-interest is only speculative:

> While we admit an analogy with a normal case respecting board judgment, it seems to us that there is sufficient risk in the realities of a situation like the one presented in this case to justify caution beyond adherence to the theory of business judgment. . . . [N]otwithstanding our conviction that Delaware law entrusts the corporate power to a properly authorized committee, we must be mindful that directors are passing judgment on fellow directors in the same corporation and fellow directors, in this instance, who designated them to serve . . . [as] committee members. The question naturally arises whether a "there but for the Grace of God go I" empathy might not play a role.[164]

The court in *Zapata* recognized that management had a strong interest in a committee resolution in its favor, and that even an "independent committee" was likely to be predisposed to take management's side. Therefore, the court established an elaborate test for deciding whether independent committee action would be sufficient to remove the taint of management self-dealing from the decision to terminate derivative litigation. Spe-

---

[160] The court's holding, however, was not that the transaction had constituted a breach of the duty of loyalty, but rather that the independent directors had breached their duty of care by failing to hold an auction for the company once it became clear that the company would be sold. By failing to entertain other bids on the same terms as management's bid, the independent directors breached their duty of care under the standard set forth by the Delaware Supreme Court in *Revlon v. MacAndrews & Forbes*. On the other hand, given the ambiguity of the court's holding in *Revlon*, *see supra* text accompanying notes 98–103, it is not at all clear that the *Fruehauf* court in citing *Revlon* was limiting itself to finding a breach of the duty of care.

[161] *See Fruehauf*, 798 F.2d at 886.

[162] *See id.*

[163] 430 A.2d 779 (Del. 1981).

[164] *Id.* at 787.

cifically, the court required an inquiry into whether the outside committee members were truly independent, and whether they voted in good faith based on adequate investigation. In addition, the court called for an independent judicial determination of fairness, requiring the trial court to decide whether, in its own "business judgment," the suit should be dismissed.[165]

Courts should use the same analysis when scrutinizing management leveraged buyouts by companies covered by section 102(b)(7). They should presume, as did the Delaware Supreme Court in *Zapata*, that management's direct interest affected the decision-making of the outside directors. Accordingly, the initial threshold burden of showing independence should be placed on the directors. In addition, the court may determine whether in its own judgment the buyout appears fair to the shareholders.

A director could satisfy the threshold burden of proving true independence by showing good faith, reasonable investigation, and freedom from management's influence. Once the director has done so, the burden would shift back to the plaintiff to show some breach of a fiduciary duty. At that point, if the corporation has a section 102(b)(7) provision and the plaintiff can allege only a lack of care, the action should be dismissed as to that director.

The threshold inquiry, as under *Unocal*, would not be a duty of care analysis. Rather, it would be part of a preliminary examination to determine whether management's direct financial self-interest tainted the decision-making process, thereby creating an indirect conflict of interest for the "independent" directors.

Support for a reading of the statute that would provide a check on management self-dealing can be found in the Delaware Supreme Court's opinion of *Fliegler v. Lawrence*.[166] In *Fliegler* the court was called on to interpret Delaware's conflict of interest statute.[167] The case involved the purchase by a mining company of property held by several of its directors—a classic conflict of interest transaction. Although the transaction had been approved by a majority of shareholders, the interested directors themselves, in their capacity as shareholders, held a majority of the shares voted.[168]

---

[165] *Id.* at 788–89.
[166] 361 A.2d 218 (Del. 1976).
[167] DEL. CODE ANN. tit. 8, § 144 (1983).
[168] *Fliegler*, 361 A.2d at 221.

The defendant directors argued that they should be relieved of the burden of proving the fairness of the transaction. A literal reading of the Delaware conflict of interest statute would have permitted any majority shareholder vote to override the requirement for proof of fairness,[169] even if a majority of the shares voted were held by interested parties.[170] The court refused to so read the statute, reasoning that the legislature could not have intended that self-dealing transactions, through a fictitious approval process, could go completely unchecked:

> We do not read the statute as providing the broad immunity for which defendants contend. [The statute] merely removes an "interested director" cloud when its terms are met and provides against invalidation of an agreement "solely" because such a director or officer is involved. *Nothing in the statute sanctions unfairness . . . or removes the transaction from judicial scrutiny.*[171]

Similarly, although section 102(b)(7) may have been designed to provide protection for independent directors against liability for negligence, it surely was not intended to provide immunity through nominally "independent" members of the board for management self-dealing. Nor should it remove a conflict of interest transaction from judicial scrutiny where as a practical matter the decision approving it may have been less than "independent."

In making a determination of independence, courts may consider a number of factors beyond any direct interest in the transaction at issue. Judge Weinfeld's treatment of the "independence" issue in *Maldonado v. Flynn*[172] is instructive, though perhaps not exhaustive. Most importantly, Judge Weinfeld focused not only on the "legal" independence of the directors—that is, their freedom from any direct financial interest in the dismissal of the litigation[173]—but also on factors that would tend to indicate that the independent committee members might be subject to pressure or undue influence from "interested" directors.[174] In *Maldonado*, Judge Weinfeld found that the directors

---

[169] *See id.* at 221–22.
[170] *Id.* at 222.
[171] *Id.* (emphasis added).
[172] *See supra* note 153.
[173] *Maldonado*, 485 F. Supp. at 283.
[174] *Id.*

were independent[175] by concluding that: "the Committee's members were independent of the remainder of the board *both formally in terms of the Committee's power and personally in terms of their relationships with the company and its directors.*"[176]

At the very least, an independent director committee reviewing a management leveraged buyout should retain its own legal and financial advisors. The author of a recent article in *The Wall Street Journal* points out that advisors retained by an independent board may reach different conclusions from those retained by management.[177] The author notes that in at least one case, the company's outside directors increased the value of the company for the shareholders by at least $180 million as a result of receiving independent advice.[178] Indeed it is likely that where independent board members and shareholders are aided by advisors who are not working on both sides of the transaction, results more favorable to the shareholders will be reached in most cases. Accordingly, a board's decision to retain its own legal and financial advisors should be given great weight in any consideration of the true "independence" of an outside board that has approved a management-interested transaction.

4. Intentional Misconduct or Acts in Bad Faith

A final observation on the scope of section 102(b)(7) is that even absent a finding that a director breached his duty of loyalty, there may be other limits on the degree to which directors can be heedless of the shareholders' interests. A finding of reckless behavior, for instance, may well satisfy the exception to section 102(b)(7) disallowing protection for acts involving "intentional

---

[175] Judge Weinfeld found that neither member of the two-man committee had had any significant connection with the company prior to his appointment. *Id.* at 283. Nor did either of them have any significant personal relationship with any of the director defendants. The fact that one of the committee members was also a member of the law firm hired to advise the Committee was deemed in itself indeterminative. *Id.*

[176] *Id.* at 283 (emphasis added).

[177] Heineman, *How to Avoid Conflicts of Interest in the Takeover Game*, Wall St. J., Feb. 9, 1987, at 18, col. 3. The author suggests that management's legal counsel may find itself with a conflict of interest problem if called on to represent both management and the board, and that management's financial advisors, who may stand to receive a sizeable contingency fee if management's proposed transaction is approved, are inappropriate representatives of the corporation and its shareholders. Some of these considerations seem to have motivated the court's decision in *Hanson*. *See supra* text accompanying notes 104–111.

[178] *See* Heineman, *supra* note 177, at 18, col. 6.

misconduct."[179] This analysis could apply to an egregious case of outside director heedlessness in situations similar to those in *Hanson* or *Fruehauf*, but where management is obviously "cheating" the shareholders, and outside directors nevertheless knowingly ratify management's actions. If such approval does not constitute "recklessness," it should in any event be designated "bad faith" and thus should not be protected under section 102(b)(7).[180]

C. *Section 102(b)(7) and the Business Judgment Rule*

Section 102(b)(7) is best viewed as an extension of the existing business judgment rule. In *Smith v. Van Gorkom*, the Delaware Supreme Court held that the business judgment rule did not protect gross negligence by directors. Section 102(b)(7) permits shareholders to fill the gap in the business judgment rule left open by *Van Gorkom*. If shareholders wish to shield directors from liability for gross negligence, the provision permits them to do so. As demonstrated above, however, the statute should not be read as providing broad immunity in situations involving the potential for conflicts of interest.

It may be argued that such a reading of section 102(b)(7) would be too narrow. The statute was designed to protect directors

[179] Whether recklessness constitutes a form of intentional conduct has been widely litigated in the context of liability for fraud under the federal securities laws. Since the Supreme Court held in *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976) that liability under Rule 10b-5 of the Securities Exchange Act of 1934 requires proof of scienter (or intent to deceive, manipulate or defraud, *id.* at 193), the Courts of Appeals that have considered the question have unanimously held that reckless conduct satisfies that requirement, reasoning that the standard for recklessness historically has been construed to contain elements of knowledge that bring it very close to intent. *See, e.g.*, Sanders v. John Nuveen & Co., 554 F.2d 790, 793 (7th Cir. 1977) ("We believe 'reckless' . . . comes closer to being a lesser form of intent than merely a greater degree of ordinary negligence. We perceive it to be not just a difference in degree, but also in kind."). Several Delaware cases have equated reckless conduct and intent in the context of disinterested shareholder approval. *See* Alcott v. Hyman, 42 Del. Ch. 233, 240, 208 A.2d 501, 505 (Del. 1965) (where a transaction that would otherwise invoke a fairness test has been approved by a majority of legally disinterested shareholders, plaintiffs must show that "the disparity between the money received and the value of the assets sold is so great that the court will infer that those passing judgment are guilty of improper motives or are recklessly indifferent to or are intentionally disregarding the interest of the whole body of stockholders.") (quoting Schiff v. RKO Pictures Corp., 34 Del. Ch. 329, 337, 104 A.2d 267, 271–72 (1954)).

[180] *See* Veasey, Finklestein, and Bigler, *Responses to the D & O Insurance Crisis*, 19 SEC. & COMMODITIES REG. 263, 268 (1986) (suggesting that where "alleged reckless conduct involves a conscious disregard of a known risk," it might be held not in good faith, and thus not protected by section 102(b)(7)).

from liability in order to encourage them to serve. Thus, the argument might go, the provision should be interpreted broadly to provide maximum protection. The authors of an article in the *Harvard Business Review* have raised a cry of alarm, suggesting that courts will emasculate the statute if they focus their attention directly on loyalty issues:

> Whether the new law will achieve any of its intended benefits is far from certain. That will take the cooperation of the courts, and they could easily prove obstreperous. . . . With only a little effort, courts could find directors liable for disloyalty where before they would have found them liable for negligence. If all courts take this tack, like the mythic Spanish cathedral of Corcuetos, which took 90 years to build and collapsed the day after its completion, the long-awaited statutory change will have wrought nothing.[181]

It is doubtful, however, that all will be lost if courts formally recognize the loyalty issues they have been scrutinizing all along under the rubric of the business judgment rule. The outcry following the *Van Gorkom* decision did not arise because directors were concerned about being held liable for breach of their duty of loyalty—they have long been aware of the possibility of such liability. Rather, the concern was that directors could be held liable for what the court called negligence, albeit gross negligence. The court in *Van Gorkom* demonstrated a willingness to view the directors' actions ex post, and elaborated on the time that must be spent and the steps that must be taken before decisions are made. It is this type of pure Monday morning quarterbacking that a section 102(b)(7) provision will prevent. Liability for negligence, gross or otherwise, is covered by the statute. This should allay the fears of the business community raised by *Van Gorkom*.

Moreover, *Van Gorkom* did not involve a defensive transaction. Thus, it is likely that the statute will have its intended effect, even if the courts adopt the approaches to defensive measures set forth in this Comment. Directors will be protected from liability for gross negligence, and thus will be more willing to serve. That was the goal sought by the Delaware General

---

[181] Herzel, Shepro & Katz, *Next-to-Last Word on Endangered Directors*, 65 HARV. BUS. REV. 38, 43 (1987) (citing L. PETER, WHY THINGS GO WRONG: THE PETER PRINCIPLE REVISITED (1984)). *See also* Herzel, *Relief for Directors*, Financial Times, July 17, 1986, at 11.

Assembly, and that effect will probably not be lessened if the courts continue to look for conflicts where they may well exist.

Furthermore, any reading of the statute that fails to take underlying loyalty concerns into account would contravene an established public policy mandating that self-dealing not escape judicial scrutiny. The Delaware General Assembly has recognized this public policy by establishing the duty of loyalty exception to section 102(b)(7). Thus, while the General Assembly determined that directors may need greater protection for negligence than was provided by the business judgment rule, neither the legislature nor the courts have been willing to sanction director self-dealing and abandon all fiduciary concerns to the market.

Accordingly, where genuine loyalty concerns underlie cases that might previously have been addressed under the rubric of the duty of care, there is nothing irrational about a court deciding to address those issues directly. Indeed, the strong public policy recognized in the section 102(b)(7) duty of loyalty and "acts not in good faith" exceptions, and in the concerns underlying the duty of loyalty generally, should preclude the courts from ignoring loyalty issues. Such a result would be consistent with existing business judgment doctrine and with the language and statutory purpose of section 102(b)(7).

VII. Conclusion

Defensive transactions inherently involve conflicts of interest problems. The Delaware courts, while not condemning such transactions altogether, have developed sensible criteria that allow a court to determine whether in a given case a defensive transaction was motivated by improper concerns. Although the courts have employed the business judgment rule to address defensive transactions, in doing so they have altered the rule by building into it certain checks designed to prevent a corporate board from avoiding judicial scrutiny of actions that may be disloyal. Section 102(b)(7) should not alter that judicial inquiry. Corporate directors should not be permitted to evade judicial review of transactions that may well involve serious conflicts of interest. While section 102(b)(7) establishes a rule that directors may be relieved of liability for gross negligence, courts should

be careful not to let the rule swallow the exceptions. The approach set forth in this Comment would permit a court to investigate potential conflicts in accordance with prior Delaware case law, and would at the same time allow section 102(b)(7) coverage in cases that in the final analysis involve only the duty of care.

BOOK REVIEW

RHETORIC AND PUBLIC POLICY: THE LIMITATIONS OF THE WAR ON POVERTY

*Review by Joseph Gordon Hylton, Jr.**

PRESIDENT JOHNSON'S WAR ON POVERTY: RHETORIC AND HISTORY. By *David Zarefsky*. University, Ala.: University of Alabama Press, 1986. Pp. xxiii, 208, notes, selected bibliography, index. $24.50 cloth.

More than two decades after its founding, the Office of Economic Opportunity (OEO) is remembered as the most ambitious part of Lyndon Johnson's War on Poverty.[1] It is also remembered as one of the greatest disappointments of the 1960s. Heralded at the time of its creation as the first major new social program since the New Deal, the Agency left a legacy of unfulfilled promises and unrealized expectations.[2] The reasons for its failure are the subject of David Zarefsky's *President Johnson's War on Poverty: Rhetoric and History*.

Zarefsky, a professor of Communications Studies at Northwestern University, rejects the traditional explanations for the Agency's inability to develop an effective strategy for the reduction of poverty. Instead of a downturn in the national economy, inadequate congressional funding, the inherent difficulties of social engineering, demographic changes, racism, or the growing American involvement in Vietnam, Zarefsky believes the War on Poverty failed due to the inability of the Johnson Administration to develop viable "symbols" that could arouse public support for the antipoverty cause *and* sustain the administration's program through a difficult period of implementation. It was, in Zarefsky's view, a failure of "discourse" (p. xi.).

Zarefsky begins by noting his belief that "reality is socially constructed" through public discourse (p. 1) and that the President's "power to persuade" stems from the emergence of the

---

* A.B., Oberlin College, 1974; J.D., University of Virginia, 1977; Ph.D., Harvard University, 1986.

[1] For a description of the War on Poverty, see J. PATTERSON, AMERICA'S STRUGGLE AGAINST POVERTY, 1900–1985, 138–41 (1986).

[2] Recent studies on the OEO include A. MATUSOW, THE UNRAVELING OF AMERICA: A HISTORY OF LIBERALISM IN THE 1960S (1984); C. MURRAY, LOSING GROUND: AMERICAN SOCIAL POLICY, 1950–1980 (1984); and J. SCHWARZ, AMERICA'S HIDDEN SUCCESS: A REASSESSMENT OF TWENTY YEARS OF PUBLIC POLICY (1983).

"rhetorical presidency" in the twentieth century (pp. 1–20). He then explores the significance of the military metaphor in the antipoverty debate (pp. 21–56) and the eventual unintended consequences resulting from its use (pp. 57–159). Although he traces the history of OEO through its termination in 1974, he focuses on 1967 when the War on Poverty "stalemated" and its supporters "were forced to concede virtually every one of their original doctrinal assumptions, with the result that the programs were left without a clear sense of mission, without a vision of how their goals might be achieved—and without a workable rhetoric" (pp. xii–xiii, 160–91). Zarefsky concludes with an assessment of the contributions and failures of the War on Poverty and with some thoughts on the "impasse of the liberal argument" in contemporary American politics (pp. 192–208).

Although Zarefsky provides a reasonably detailed history of OEO, his account ultimately suffers from an overreliance upon the concept of "rhetorical choice." Because of this single factor explanation, he ignores, or else too quickly dismisses, the purely political strategies employed by the Johnson Administration to secure congressional passage of the legislation. Furthermore, he fails to take proper account of the numerous non-OEO antipoverty programs of the 1960s which do not fit into his general analytic scheme.

I. The Office of Economic Opportunity

A. *A Brief History*

Created by the Economic Opportunity Act of 1964,[3] the Office of Economic Opportunity represented a new approach to the problem of poverty. As the parent agency of VISTA,[4] Job Corps, and community action programs, OEO sought to break through the "cycle of poverty" that prevented many Americans from sharing in the nation's prosperity. Through VISTA, OEO was to provide idealistic, middle class Americans with the chance to participate first hand in raising the standard of living for others who were less fortunate; the Job Corps was to recruit 100,000

[3] *See* Economic Opportunity Act of 1964, Pub. L. No. 88-452, 78 Stat. 508 (codified as amended at 42 U.S.C. §§ 2701–2995 (1982)). For the original text of the Act, see H. Rep. No. 1458, 88th Cong., 2d Sess. 3–18 (1964).

[4] Vounteers in Service for America.

young men and women annually to training centers far removed from slums or impoverished rural areas; and the community action programs were to mobilize local resources (including the poor themselves) for a comprehensive attack on poverty.[5]

The initial response to the OEO programs was one of great enthusiasm. For its first 10,000 openings, the Job Corps received over 300,000 applications.[6] Nine months after passage of the Economic Opportunity Act, forty-one local community action agencies had been created, and by June 1966, their number exceeded 1,000.[7] By the end of 1965, however, both programs were caught in a swirl of controversy. The Job Corps was plagued by reports of violence, crime, and sexual promiscuity at its training centers and by an embarrassingly poor placement record for its graduates (pp. 165–66).[8] As Zarefsky documents, community action programs had become embroiled in a three-way struggle between agency officials, community organizers, and local elected officials who welcomed federal funds but resented intrusions into what they viewed as matters of local governance (pp. 123–31). Furthermore, increasingly frequent ghetto riots in areas served by community action agencies led to charges that OEO was aggravating an already bad situation (p. 111).[9] By the end of 1965, Johnson himself had taken the side of local officials and had instructed the Agency to downplay its efforts to encourage "maximum feasible participation" by the poor themselves.[10]

By 1967, these widely publicized failures, combined with the Republican resurgence in the 1966 congressional elections, threatened OEO's very survival. Congress continued the Agency's funding, but only after a number of important compromises (pp. 160–86). To overcome congressional objections, OEO

---

[5] *See* Economic Opportunity Act of 1964, *supra* note 3. For a summary of the provisions of the bill, see *Johnson's Anti-Poverty Bill Coordinated Several Programs*, in CONGRESS AND THE NATION, 1945–1964: A REVIEW OF GOVERNMENT AND POLITICS IN THE POSTWAR YEARS 1326–29 (1965) [hereinafter *Johnson's Anti-Poverty Bill*].

[6] C. WEEKS, JOB CORPS 186–91, 203–05 (1967).

[7] J. SUNDQUIST, MAKING FEDERALISM WORK 39 (1969).

[8] S. LEVITAN, THE GREAT SOCIETY'S POOR LAW 278–81 (1969); S. LEVITAN & B. JOHNSTON, THE JOB CORPS: A SOCIAL EXPERIMENT THAT WORKS 30 (1975).

[9] *See* David, *Leadership of the Poor in Poverty Programs*, 29 ACAD. POL. SCI. PROC. 91 (1969); Haddad, *Mr. Shriver and the Savage Politics of Poverty*, HARPER'S, Dec. 1965, at 23, 44.

[10] Evidence of President Johnson's withdrawal of support from OEO is contained in the oral history interviews of Bill Heineman, Bertrand Harding, and Wilbur Cohen collected at the Johnson Presidential Library. *See also* J. PATTERSON, *supra* note 1, at 146, 261.

shifted funds from politically sensitive programs aimed at community organizing to less controversial ones such as the preschool program Head Start, and the focus of community action shifted from innovative thinking to the dispersal of federal funds through a limited number of well-defined programs. Furthermore, the Johnson Administration accepted an amendment that gave local governments the option of taking over private community action agencies in their jurisdictions.[11]

In spite of this retreat, total appropriations for OEO actually increased after 1967, growing to $1.7 billion in 1968 (a 4.4% increase over 1967) and to $1.9 billion in 1969.[12] Although the 1970 appropriation was reduced, it still represented the second largest in the Agency's history.[13] The phaseout of OEO did not begin until 1971 when numerous programs were transferred to other departments, and total spending dropped to $1.3 billion. This process continued into 1974, when OEO, by then little more than a shell, died a quiet death.[14]

B. *History and Rhetoric*

Zarefsky maintains that a series of "rhetorical choices" made by Lyndon Johnson in 1963 and 1964 brought about the demise of OEO (pp. xi–xii). The most important of these choices was the selection of the military metaphor embodied in his January 8, 1964 pronouncement—"This administration today, here and now, declares unconditional war on poverty in America."[15] The "significant symbolic implications" (p. xi) of designating the effort to eradicate poverty a "war" form the center of Zarefsky's analysis. Drawing upon the literature of the rhetoric of social movements,[16] Zarefsky proposes that public policy innovations move through three distinct phases: a period of *inception* where

[11] *See* N.Y. Times, Dec. 25, 1967, at 1, 26; N.Y. Times, Nov. 8, 1967, at 20; N.Y. Times, Oct. 22, 1967, at 3E; N.Y. Times, Oct. 12, 1967, at 51.

[12] Summaries of OEO budgets by program obligations for 1965–1974 are presented in R. PLOTNICK & F. SKIDMORE, PROGRESS AGAINST POVERTY: A REVIEW OF THE 1964–1974 DECADE 8–9 (1975).

[13] *Id.*

[14] *See* J. PATTERSON, *supra* note 1, at 148.

[15] PUB. PAPERS OF THE PRESIDENT: LYNDON B. JOHNSON, 1963–1964, 114.

[16] For example, M. EDELMAN, THE SYMBOLIC USES OF POLITICS (1964); M. EDELMAN, POLITICS AS SYMBOLIC ACTION: MASS AROUSAL AND QUIESCENCE (1971); C. PERELMAN & L. OLBRECHTS-TYTECA, THE NEW RHETORIC (1969); C. STEVENSON, ETHICS AND LANGUAGE (1944).

an alternative to existing policies is proposed; a period of *rhetorical crisis* where it becomes necessary for the public audience to choose between the arguments of those advocating change and those who oppose it; and, finally, a period of *consummation* during which the proposed alternative either becomes the new status quo or is dismissed as unpersuasive (p. 18).

In the "inception" phase of the War on Poverty the war metaphor proved to be very effective in generating support for the antipoverty initiative (pp. 21–28). A declaration of war demanded immediate, concerted action, instead of contemplation or deliberation. As Zarefsky asserts, the designation "defined the objective and encouraged enlistment in the effort, it identified the enemy against whom the campaign was directed, and it dictated the choice of weapons and tactics with which the struggle would be fought" (p. 29).

Unfortunately, the war metaphor proved to be a liability in the subsequent period of "rhetorical crisis." In Zarefsky's words, "the very choices of symbolism and argument which had aided the adoption of the program were instrumental in undermining its implementation and in weakening public support for its basic philosophy" (p. xii). Through a detailed summary of the events from the end of 1964 through mid-1967 (pp. 57–186), Zarefsky demonstrates how the central "rhetorical choices" of the the War on Poverty—the "unconditional war" objective, the identification of the enemy as the "cycle of poverty," and the choice of community action, manpower training programs, and careful and frugal management as the weapons—raised expectations, created divisions among the potential supporters of the program, forced a redefinition of critical terms, and ultimately raised doubts as to the effectiveness of the antipoverty efforts.

For example, by the end of 1965, it was politically impossible for the Johnson Administration to obtain from Congress the funds necessary to actually eliminate poverty in the United States. To have acknowledged this publicly, however, would have suggested that the administration had been deceitful or disingenuous in its original declaration of unconditional war (p. 91). Consequently, OEO officials and supporters were forced to characterize their quite limited results in a manner compatible with a winning wartime strategy (p. 91). The significance of tangible accomplishments was exaggerated (pp. 59–63), and impending victories were routinely promised (pp. 63–65). Such

tactics invariably undercut the credibility of the Agency as it repeatedly failed to satisfy the expectations it had raised (pp. 65–69).

By 1967, the administration was in retreat. According to Zarefsky, OEO survived a congressional attempt to abolish it only because it had been transformed into a "symbol of commitment" rather than an agency that aggressively sought to eliminate poverty (pp. 161–65). "OEO was forced to concede virtually every assumption which dominated its earlier discourse—the war metaphor, the view of poverty as a vicious circle, the community action motif, the disjunctions from welfare and race, and . . . the refutation of the traditional ideology that people are poor because something is wrong with them" (p. 185). In the "consummation" phase (1967–1974), the War on Poverty ground to a halt with the nation only nominally committed to the eradication of poverty (pp. 186–91).

II. Rhetoric and Reality: The Limits of the Analysis

Zarefsky's assertion that the critical problems of the OEO stemmed from decisions made by the administration in its formative period is very persuasive, but his explanation of its "failure" in terms of "rhetorical choices" is flawed in at least three respects. First, he overemphasizes the significance of the war metaphor. Second, he fails to deal with the fact that not all of the Great Society's antipoverty programs involved such rhetorical choices. Finally, and perhaps most importantly, it was political expediency, not rhetorical choice, that produced a poorly drafted and carelessly implemented antipoverty program.

Zarefsky overestimates the significance of President Johnson's decision to rely upon the military metaphor in formulating an antipoverty program. While Johnson did write in his memoirs that he chose the "military image" to stir popular opinion behind the antipoverty cause,[17] there was already a long tradition of characterizing government reform programs as "wars." Dating back at least to the publication of T.F. Gordon's *The War on the Bank of the United States* in 1834, the military metaphor has been used to describe zealous changes in American public policy. Moreover, the term has not always been reserved for

[17] *See* L. Johnson, The Vantage Point: Perspectives on the Presidency, 1963–1969, 74 (1971).

true crises; in 1918, for example, the United States government, in a effort to increase beef production, decided to make "war on the cattle tick."[18] Also, by 1964, there was a well established rhetorical link between the war metaphor and the belief that government had an obligation to end, or at least to reduce, poverty. In 1953, future Prime Minister Harold Wilson of Great Britain titled his book on economic deprivation *The War on Poverty: an Appeal to the Conscience of Mankind*; in 1959, President Dwight Eisenhower called for "a successful war against hunger—the sort of war that dignifies and exalts human beings;"[19] the following year, John F. Kennedy echoed Eisenhower, announcing that "the war against poverty and degradation is not over;"[20] two years later in New York, the Conference on the United Nations Development Decade published *War on Want*;[21] and in the same year the platform of the Socialist Party of the United States contained a call for a "war on poverty" (p. 24). By 1964, it was hardly surprising that a government effort to eliminate poverty would be designated a "war."

The value of Zarefsky's approach is also limited by his decision to equate the War on Poverty solely with the programs of the OEO. While he acknowledges that the phrase is often used to describe all the Great Society social welfare programs (p. xiii), Zarefsky justifies his focus on OEO on the grounds that its programs were the most innovative and controversial part of the effort (p. xiii). It must be noted, however, that the OEO programs also lend themselves much more readily to Zarefsky's type of analysis than do Medicaid, Medicare, increased Social Security and Aid For Dependent Children benefits, the Appalachian Regional Commission, unemployment insurance, Supplemental Security Income, Food Stamps, public housing, or any of the other efforts of the Johnson Administration to alleviate the problem of poverty.[22] Although such programs were not advanced with the same rhetorical flourish as their OEO counterparts, they actually accounted for a much larger share of the antipoverty budget. For example, total federal spending for the poor in 1965 totalled $19.95 billion, of which only

[18] *See* NATION, Feb. 7, 1918, at 2.

[19] *Quoted in* W. SAFIRE, THE NEW LANGUAGE OF POLITICS: A DICTIONARY OF GOVERNMENT AND POLITICS IN THE POSTWAR YEARS 479 (1968).

[20] *Id.*

[21] WAR ON WANT: REPORT OF A CONFERENCE ON THE UNITED NATIONS DEVELOPMENT DECADE, (1962).

[22] *See* J. PATTERSON, *supra* note 1, at 157–84.

$737 million was designated for the OEO.[23] This sharp contrast continued in 1968 when total antipoverty spending was $29.7 billion and OEO's budget was $1.7 billion.[24] Moreover, between 1964 and 1970, the years in which OEO "failed," the percentage of the American population classified as poor declined from 19% to 11.2%.[25] In other words, the triumph of the War on Poverty was not necessarily dependent upon the success of the OEO programs, but Zarefsky's decision to focus on rhetoric alone prevents him from addressing that possibility.

Even more significant is Zarefsky's too hasty dismissal of the possibility that OEO was simply another victim of the political process. The ambiguities in language that plagued OEO were not so much the consequences of "rhetorical choices" as they were the predictable consequences of a poorly drafted piece of legislation, pushed through Congress by a president anxious for a major legislative victory he could claim as his own.

In his rush to secure an antipoverty act before the August 1964 Democratic Convention, Lyndon Johnson was willing to pay whatever price was necessary, but by doing so he guaranteed that the act would be filled with inconsistencies and ambiguities.[26] Moreover, by relying upon his considerable political skills to ensure passage of the Economic Opportunity Act, he politicized the poverty issue to a degree that might have been unnecessary had he waited for public support to coalesce behind the antipoverty movement.

A. *Designing the Program*

At the heart of the problem was the way in which Lyndon Johnson came to embrace antipoverty as his issue. Exploration of the possibility of a federal antipoverty program had begun in early 1963 at the request of President Kennedy.[27] While the

[23] *See* R. PLOTNICK & F. SKIDMORE, *supra* note 12, at 198–211.

[24] *Id.*

[25] U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1979, 462 (1979).

[26] Johnson wished to have legislation enacted before the 1964 Democratic Convention in order "to put the Great Society imprint on the administration and dramatize his consolidation of power." R. EVANS & R. NOVAK, LYNDON B. JOHNSON: THE EXERCISE OF POWER 431 (1968). The background to the Economic Opportunity Act is discussed in R. EVANS & R. NOVAK, *supra*, at 427–31; E. GOLDMAN, THE TRAGEDY OF LYNDON JOHNSON 183–87 (1969); A. MATUSOW, *supra* note 2, at 97–127.

[27] *See* Brauer, *Kennedy, Johnson, and the War on Poverty*, 69 J. AM. HIST. 98.

antipoverty task force directed by Walter Heller of the Council of Economic Advisers was slow to develop concrete proposals, Kennedy seemed inclined toward some sort of antipoverty bill in his 1964 legislative package. When Heller met with Lyndon Johnson on November 23, 1963, the day after the Kennedy assassination, the new President instructed him to "push ahead full tilt."[28]

Heller and his aides put together a proposal calling for five urban and five rural local demonstration projects to test the task force's comprehensive antipoverty strategy. On December 20 Johnson rejected the demonstration projects, telling Heller that he wanted something that would be "big and bold and hit the whole nation with real impact."[29] Although there is no evidence that Johnson understood the full implications of community action,[30] he ordered the preparation of a program that would provide federal funds for the creation of a community action agency in every city and county in the United States. The announcement of the War on Poverty came less than three weeks later. On February 1, 1964 Johnson, impatient with the progress being made by his advisers, named Peace Corps Director and Kennedy brother-in-law Sargent Shriver to head the antipoverty effort,[31] a decision that undercut the efforts of the Heller group.

Shriver, like Johnson, had little interest in the theory underlying the yet undrafted act, and in six weeks he put together a package that included not only community action programs, but also a Jobs Corps, a Neighborhood Youth Corps, work/study jobs for needy college students, a domestic Peace Corps (VISTA), loans to farmers and small businessmen, and work-experience programs for welfare recipients.[32] The bill, described as "not a choice among policies so much as a collection of them,"[33] was sent to Congress on March 16.

Given the circumstances under which the Act was drafted, it is hardly surprising that it contained numerous flaws. The pro-

---

[28] *Id.; see also* R. EVANS & R. NOVAK, *supra* note 26, at 428.

[29] L. JOHNSON, *supra* note 17, at 74.

[30] Community action programs bypassed normal government channels and competed with existing welfare agencies. *See* J. PATTERSON, *supra* note 1, at 146.

[31] *See* L. JOHNSON, *supra* note 17, at 71; N.Y. Times, Feb. 2, 1964, at 1.

[32] *See supra* note 5.

[33] The characterization was made by Daniel Patrick Moynihan. Moynihan, *The Professors and the Poor*, in ON UNDERSTANDING POVERTY: PERSPECTIVE FROM THE SOCIAL SCIENCES 12–13 (D. Moynihan, ed. 1968).

liferation of programs (the result of Johnson and Shriver's policy of placating competing interests within the administration) combined with the existing budgetary constraints to virtually guarantee that all programs would be insufficiently funded. Hardly noticed in the scramble to put together the package was the reduction of funding for community action programs from the $500 million requested in the President's January budget message to $315 million in the Shriver bill.[34] By dividing responsibility for implementation of the Act between the new Office of Economic Opportunity and several cabinet agencies, the administration plan invited coordination problems.[35] More importantly, it made any precise definition of goals almost impossible since the program embodied a variety of approaches. Shriver himself would later admit that "[i]t's like we went down to Cape Kennedy and launched a half dozen rockets at once."[36]

Perhaps an even more significant consequence of the haste with which the administration's proposal was prepared was the inadequate attention paid to emerging scholarly ideas concerning the causes of poverty. If one is mistaken about the cause, one is unlikely to provide an adequate remedy. The Shriver plan embraced the "structuralist" view of poverty at the very time that scholars and social workers were challenging its fundamental premises. Structuralist thinking, which had dominated the debate on poverty in the 1950s, stressed that poverty was an economic condition stemming from blocked opportunities, not the result of individual defects (as had been the traditionalist view).[37]

By the early 1960's, however, the structuralist view was challenged by theorists who embraced a more anthropological point of view, sometimes designated as the "culture of poverty" approach. They maintained that poverty was more than a lack of income, that various racial and ethnic groups responded differently to economic misfortune, and that the poor did not necessarily want to act like the middle class (pp. 106–08). Further-

[34] For the original sum, see PUB. PAPERS, *supra* note 15, at 182–84; N.Y. Times, Jan. 22, 1964, at 18, 19. For the actual provisions of the bill, see Economic Opportunity Act of 1964, *supra* note 3; *see also Johnson's Anti-Poverty Bill*, *supra* note 5, at 1328.

[35] Relations between OEO and the Department of Labor would prove to be particularly bad. *See* J. PATTERSON, *supra* note 1, at 143.

[36] 1 JOHNSON PRESIDENTIAL LIBRARY, OFFICE OF ECONOMIC OPPORTUNITY DURING THE ADMINISTRATION OF PRESIDENT LYNDON B. JOHNSON, NOV. 1963–JAN. 1969: AN ADMINISTRATIVE HISTORY 135.

[37] Zarefsky describes the basic structuralist approach, which he calls the "cycle-of-poverty" theory, on pages 41–42.

more, these theorists believed that the problems associated with poverty could not be alleviated merely by giving individuals greater opportunities. Instead, the whole environment from which the poor came would have to be changed before meaningful progress against poverty could be made (p. 108). Although by 1964 the ideas of the second group were beginning to supplant those of the structuralists among specialists, the drafters of the Economic Opportunity Act still operated on structuralist premises. Consequently, the focus of the Act was on increasing opportunities for the poor, thereby enabling them to break out of the "cycle of poverty" and to become tax-paying citizens—a result whose likelihood was disputed by "culture of poverty" theorists. Unfortunately, such critical theoretical issues were never seriously debated by the drafters of the Act.[38]

B. *The Push to Congress*

Securing the draft of a bill was only the first problem; a greater obstacle in 1964 was the lack of public demand for an antipoverty program. The publication in 1962 of Michael Harrington's *The Other America: Poverty in the United States* had sparked a revival of interest in poverty in some circles (pp. 24–25), but the book hardly inspired the sort of immediate widespread public uproar occasioned by Upton Sinclair's *The Jungle* at the beginning of the century.[39] On the contrary, many believed that the American economy, left alone, would eventually remedy the problem of poverty. Between 1950 and 1960, the percentage of Americans living below the poverty line had dropped from 30% to 22.2% and had declined further to 19.5% by the end of 1963.[40] Moreover, public opinion polls conducted in 1964 and 1965 reported that more Americans attributed poverty to a lack of effort than to any other cause, that 83% of the public doubted that poverty could be ended, that 64% believed that "welfare and relief make people lazy," and that solid majorities favored laws restricting welfare eligibility (pp. 24, 41).[41]

The attitudes in Congress paralleled those of the American public. In June of 1963, the House of Representatives had de-

[38] *See* J. PATTERSON, *supra* note 1, at 115–25.
[39] U. SINCLAIR, THE JUNGLE (1906).
[40] *See supra* note 25.
[41] *See* J. PATTERSON, *supra* note 1, at 109–10, 171; N.Y. Times, Apr. 19, 1964, at 40.

feated an appropriation of $455.5 million for the Area Redevelopment Act (ARA),[42] a jobs-creation program established in 1961.[43] Fifty-seven Democrats (all but four from the South) opposed their own President by voting against the Act. Critical to the defeat were eighteen southern Democrats who had supported the 1961 act but opposed its extension two years later.[44] While the ARA extension was not an antipoverty bill per se, its defeat was an indication that the Economic Opportunity Act would encounter considerable opposition.

To gain support for his antipoverty bill, Johnson initially focused on wooing fiscally conservative Republicans and southern Democrats who had opposed the ARA. To garner their support, he guaranteed that the program would be economical, that it would focus on youth job training, and that it would be locally administered.[45] While somewhat at odds with his declaration of war, the emphasis on economy and local control enabled Johnson to enlist the support of conservatives like Phillip M. Landrum (D-Ga.) who agreed to sponsor the bill in the House of Representatives.[46] The sincerity of this commitment to economy was demonstrated in February when Johnson flatly rejected a proposal by Secretary of Labor Willard Wirtz for a $1.25 billion public employment program to be financed by an additional five cent tax on cigarettes.[47] From the President's perspective, a bill that would have more than tripled the size of the program *and* offended southern tobacco interests was simply out of the question.

Although Johnson realized that conservative support would be critical for the final passage of the Act, he was not averse to enlisting the services of liberal House Committee on Education and Labor Chairman Adam Clayton Powell (D-N.Y.). In hearings before Powell's Committee, the administration presented twenty-nine witnesses, including all members of the Cabinet

---

[42] Area Redevelopment Act of 1961, Pub. L. No. 87-27, 75 Stat. 47 (codified as amended at 15 U.S.C. § 696, 40 U.S.C. § 461, and 42 U.S.C. § 1464 (1982)). The 1963 bill failed in the Democratically controlled House by a vote of 204 to 209. 109 CONG. REC. 10,723 (1963).

[43] For a discussion of the Act's significance, see Levitan, *Area Redevelopment: A Tool To Combat Poverty?* in POVERTY IN AMERICA 375–85 (M. Gordon ed. 1965).

[44] 109 CONG. REC. 88 (1963). *See also* CONGRESS AND THE NATION, 1945–1964: A REVIEW OF GOVERNMENT AND POLITICS IN THE POSTWAR YEARS 382 (1965).

[45] *See* N.Y. Times, Mar. 17, 1964, at 1, 22; N.Y. Times, Jan. 15, 1964, at 21.

[46] *See* E. GOLDMAN, *supra* note 26, at 184–85. *See also Johnson's Anti-Poverty Bill*, *supra* note 5, at 1326.

[47] A. MATUSOW, *supra* note 2, at 239.

except the Secretary of State. Powell, whose congressional district included Harlem, presided in a domineering, partisan manner, limiting the opportunity for cross-examination of government witnesses and excluding the Republican members of the Committee from any meaningful participation in committee deliberations (pp. 52–54).[48] The bill was reported out of the Committee on a straight party vote (p. 54).

Once Powell's usefulness ended, leadership passed, as planned, to Landrum who emphasized the moderate, fiscally responsible nature of the bill. During the debates, Landrum announced on the House floor, "This will not be an expensive program. This will be the most conservative social program I have ever seen presented to a legislative body. There is not anything but conservatism in it."[49] Also central to the administration's strategy was the determination to focus the congressional debate on the general problem of poverty, and away from the specific programs in the proposed act (p. 52).

The battle, however, was far from over. Although the bill passed the more liberal Senate on July 23 by a vote of 62 to 33, the Democratic leadership had narrowly defeated (46 to 45) a conservative attempt to insert a "states' rights" amendment that would have given state governors the power to veto federally funded, private community action programs.[50] In addition, recent ghetto riots and the specter of white backlash had caused a number of northern Democrats in the House to rethink their positions, while several powerful southerners who equated the administration's bill with the cause of civil rights were determined to block its passage.[51] Furthermore, the opposition of powerful Committee Chairman Howard W. Smith (D-Va.) almost killed the bill in the Rules Committee, which reported it to the House floor by a narrow vote of 8 to 7.[52] As late as July 31, Johnson adviser Lawrence O'Brien's headcount found the House evenly divided with approximately thirty southern Democrats undecided (p. 55).

To break the deadlock, Johnson called House Democrats to the White House for election-year pictures and used the opportunity for traditional arm-twisting. Behind the scenes he re-

---

[48] *See* N.Y. Times, May 8, 1964, at 15; N.Y. Times, Mar. 18, 1964, at 1.
[49] 110 CONG. REC. 18,208 (1964). *See also* E. GOLDMAN, *supra* note 26, at 185.
[50] *See* 110 CONG. REC. 16,727 (1964); N.Y. Times, July 24, 1964, at 1, 10.
[51] *See* 110 CONG. REC. 18,208 (1964); E. GOLDMAN, *supra* note 26, at 186.
[52] *See* N.Y. Times, July 29, 1964, at 1.

cruited a powerful group of industrialists, businessmen, and newspaper editors to telephone reluctant congressmen of both parties and to urge their votes for the poverty program.[53] In order to demonstrate a broad base of support, Johnson also called upon the AFL-CIO to send wires to every member of the House.[54] Holders of federal contracts in key states were persuaded to contact their representatives in support of the bill.[55]

To guarantee passage, Johnson was also willing to make additional compromises, even if they cut into the heart of the bill. To placate southerners, the Democratic leadership quietly included in the final bill a provision granting governors a veto power over community action projects, the very provision that had been narrowly defeated in the Senate. It also permitted John Bell Williams (D-Miss.) to introduce an amendment requiring that Job Corps enrollees swear an oath of allegiance to the United States and that individual aid recipients sign an affidavit saying that they did not believe in or support any organization advocating the violent overthrow of the government.[56] Finally, in order to secure the support of eight uncommitted congressmen from North and South Carolina, Johnson agreed not to appoint as Deputy Director of the Office of Economic Opportunity Adam Yarmolinsky, a key architect of the poverty bill.[57] Yarmolinsky's "sins" were his alleged past association with Communist organizations and his role in a 1963 Department of Defense report that recommended desegregation of public accommodations on or near military bases.[58]

---

[53] *See* R. EVANS & R. NOVAK, *supra* note 26, at 431–32; E. GOLDMAN, *supra* note 26, at 186–87; N.Y. Times, Sept. 7, 1964, at 4.

[54] *See* N.Y. Times, Sept. 6, 1964, at 36.

[55] One Georgia representative reported receiving phone calls from "every guy in my district who's got a Federal contract or owes the government anything." NEWSWEEK, Aug. 17, 1964, at 32. Sargent Shriver was placed in the Rayburn Room just off the House floor, and Speaker of the House John McCormack (D-Mass.) was enlisted to put pressure on the targeted southerners. The full weight of the Executive Branch was thrown behind the cause. *Id.* In the words of one observer:

> Georgia's Phil Landrum, floor-managing the bill, bustled from caucus to caucus. Lobbyists and liaison men from the White House and a half-dozen Cabinet officers prowled the halls. "The corridors out there look like Engine House 5 when the four-alarm bell rings," said one Democrat. "They've got everybody out. I've never seen so many footpads from downtown."

Id. See also N.Y. Times, Sept. 6, 1964, at 36.

[56] Williams' amendment passed, 144 to 112. 110 CONG. REC. 18,588 (1964). *See also Johnson's Anti-Poverty Bill*, *supra* note 5, at 1326.

[57] *See* R. EVANS & R. NOVAK, *supra* note 26, at 432–33; E. GOLDMAN, *supra* note 26, at 187–88.

[58] *Id.; see also* N.Y. Times, Aug. 8, 1964, at 6.

When the vote finally came, the success of Johnson's efforts was apparent. Nineteen southern Democrats who had opposed the Area Redevelopment Act the previous year had voted for the bill, and only seven had deserted over the issue of civil rights. In addition, no northern Democrat voted against the bill and twenty-two Republicans cast affirmative votes.[59] Although a preliminary vote on Friday, August 7 indicated that passage was secured, the House leadership, taking no chances, scheduled a rare Saturday afternoon session for the final vote. The Act passed by a vote of 226 to 185.[60] Although the *New York Times* deplored what it described as the President's "concessions on issues of principle that contrast painfully with the high moral standards on which a commitment to abolish want must be based,"[61] Johnson had his antipoverty bill in time for the Democratic Convention.

III. CONCLUSION

However great the victory may have seemed in August, 1964, the strategy used to secure the passage of the Economic Opportunity Act ultimately undercut its effectiveness. By committing himself to limited funding before he even knew the outline of the program being prepared by his advisers, Johnson paved the way for the gap between expectations and accomplishments that Zarefsky documents. By rushing the program to the public and orchestrating the congressional debate, Johnson not only denied his advisers time to work out an integrated, ideologically consistent approach to the problem of poverty, but he also subverted intelligent debate in Congress that might have improved the program and helped generate a true public consensus. Moreover, his willingness to compromise, not just on the question of funding, but on issues as diverse as local control, loyalty oaths, and the appointment of officials to key positions, permanently politicized the War on Poverty and undercut his own efforts to present it as a crusade.

A consummate politican, Johnson proved to be a master at gaining short-term support of a war for which there was no

---

[59] 110 CONG. REC. 18,634 (1964). *See also Johnson's Anti-Poverty Bill*, *supra* note 5, at 1326.

[60] *See* 110 CONG. REC. 18,588 (1964); NEWSWEEK, Aug. 17, 1964, at 32–33.

[61] N.Y. Times, Aug. 13, 1964, at 28.

popular outcry. What he lacked was the willingness to take the political risks necessary to win that war, and that failure eventually undermined his own best efforts. Ultimately, it was not the rhetorical choices of the Johnson Administration that doomed the War on Poverty, but the decision to focus on short-term political gains—a landmark bill that Johnson could claim as his own—rather than on a realistic, long-range solution to the problem of poverty. Professor Zarefsky is correct in noting that the rhetoric of the War on Poverty raised expectations to an unreasonable level, but the failure to satisfy those expectations came not from the way in which the war was defined, but from the limited commitment and indifference to detail of its commanding officer.

BOOK NOTE

TO MAKE SHAREHOLDERS OF THEM: CONGRESS AND THE ALASKA NATIVES

*Review by William R. Brancard**

VILLAGE JOURNEY: THE REPORT OF THE ALASKA NATIVE REVIEW COMMISSION. By *Thomas R. Berger*. New York: Hill and Wang, 1985. Pp. xiii, 202, notes, appendix. $16.95 cloth, $8.95 paper.

The rights of no group of American citizens are as subject to the whims of Congress as are the rights of Native Americans. Over the past two centuries, congressional actions, often motivated by ethnocentric attitudes toward the indigenous peoples, have had a devastating impact on Native American land, economy, and culture. Congressional legislation intended to solve Native problems has often failed to incorporate the attitudes and ideals of Native society. As a result, the imposition of non-Native values has often resulted in the unintended creation of new problems and dilemmas.[1] An example of such congressional legislation is the Alaska Native Claims Settlement Act of 1971 (ANCSA).[2]

The ANCSA was initially hailed as an "overwhelming victory for the Natives."[3] Today, however, many people consider the ANCSA to be a great disappointment.[4] The political problems caused by the implementation of the Act and the management of the Native corporations that it set up, have proved to be enormous.[5] The Native corporations face the possibility of fall-

---

* B.A., Hamilton College, 1979; member, Class of 1987, Harvard Law School.

[1] *See generally* Cadwalader, *Preface*, in AGGRESSIONS OF CIVILIZATION ix (S. Cadwalader & V. Deloria eds. 1984).

[2] Pub. L. No. 92-203, 85 Stat. 668 (1971) (codified as amended at 43 U.S.C. §§ 1601–1629(a) (1982 & Supp. III 1985)).

[3] Lazarus & West, *The Alaska Native Claims Settlement Act: A Flawed Victory*, 40 LAW & CONTEMP. PROBS. 132 (1976).

[4] *See, e.g., id.* (detailing the practical problems of ANCSA).

[5] *See, e.g.*, Lazarus & West, *supra* note 3, at 133; Price, *A Moment In History: The Alaska Native Claims Settlement Act*, 8 UCLA-ALASKA L. REV. 89 (1979); Getches, *Alternative Approaches to Land Claims: Alaska and Hawaii*, in IRREDEEMABLE AMERICA: THE INDIANS' ESTATE AND LAND CLAIMS 301 (I. Sutton ed. 1985); Note, *Settling the Alaska Native Claims Settlement Act*, 38 STAN. L. REV. 227 (1985); *but see* Arnott, *The Alaska Native Claims Settlement Act: Legislation Appropriate to the Past and the Future*, 9 AM. IND. L. REV. 135 (1981) (arguing that the ANCSA may succeed because it allows both traditional subsistence and economic advancement).

ing into non-Native hands in the future[6] and many Natives now fear that the corporations' problems will result in the loss of the land that the ANCSA had assured them, land that is essential for their continued survival.[7] Native organizations are now urging Congress to revise the ANCSA to protect their land rights.[8]

A significant work focusing on the ANCSA debate is Thomas Berger's *Village Journey: The Report of the Alaskan Native Review Commission*. Berger, a Canadian judge, legal scholar, and longtime advocate of Native rights, analyzes how the ANCSA has affected the Native Alaskan population which it was designed to assist. *Village Journey* is in part a compilation of quotations and photographs of Alaska Natives that Berger gathered while traveling to more than sixty Native villages as the appointed head of the Alaska Native Review Commission. Directed toward the layman rather than toward the legal scholar already knowledgeable about the Alaska Native situation, the book combines ethnography, legal history, and political analysis in its examination of the ANCSA.

Although subtitled *The Report of the Alaska Native Review Commission*, *Village Journey* is far from what one normally expects of a commission report. Rather than overwhelm the reader with numerous statistics and graphs on the plight of the Native corporations or with detailed legislative history, Berger analyzes the ANCSA from the viewpoint of Natives who live in the remote tundra villages and who are directly affected by the Act. He offers criticism of the ANCSA and presents proposals for legislative and policy changes.

The book is intellectually divided into three basic themes. First, Berger combines the Alaska Native perspective with a broader historical sketch of Native American policies. Second, he outlines his proposal for a complete restructuring of the ANCSA. Third, he details the creation of a "Native image" and of a policy that coincides with and enhances that image.

Village Journey does, however, have flaws. Berger's style is at times disjointed and anecdotal. Many of the criticisms and proposals that Berger outlines have been presented elsewhere

---

[6] *See infra* text accompanying notes 47, 48.

[7] *See infra* text accompanying notes 81–82.

[8] *See* Worl, *The Villagers Go To Congress*, 5 ALASKA NATIVE 19 (1986); McClanahan, *Young to Allow No Amendments to Bill for 1991*, Tundra Times, Anchorage, Alaska, March 2, 1987, at 1, col. 1.

by others and often with greater precision.[9] His analyses are often superficial and either fail to present much supporting data, or ignore other aspects of the Alaska Native situation entirely.[10] In addition, the legal scholar will be disappointed both by his failure to present powerful empirical or rational arguments and by his unforgiveable paucity of footnotes.

Despite these flaws, *Village Journey* is valuable because it goes beyond a mere discussion of the ANCSA to give a thorough analysis of the Alaska Native situation. Berger also tries to force white America to reconsider its traditional relationship with Native Americans. In general, Berger wants the reader to share the powerful effects of his village journey and to develop an accurate view of the Native Alaskans and of their society:

> My journey to the villages of Alaska was an inner journey as well. Any inquiry into the condition of the Native peoples, any discussion of their goals and aspirations, must also entail a consideration of our own values. What we learn in this process about Native society should teach us much about our own society (pp. viii–ix).

This Book Note outlines the important provisions of the ANCSA and examines the criticisms and solutions that Berger and others offer. The Book Note also discusses the relationship between Congress and Native Americans, and tries to determine whether there is hope for better solutions to the Native Alaskan problems.

I. THE ALASKA NATIVE CLAIMS SETTLEMENT ACT

A. *Alaska Natives Prior To the ANCSA*

Native claims of aboriginal title to almost all of Alaska became an explosive political issue in the 1960's. During the preceding two centuries of Russian and American colonial rule, Euro-American physical and legal intrusions into most of Alaska were minimal. By the 1960's, however, the situation had changed. The Alaska Statehood Act (Statehood Act)[11] allowed the state

---

[9] *See, e.g.*, Lazarus & West, *supra* note 3; Note, *supra* note 5, at 227 (advocating congressional revisions including support for retribalization); Getches, *supra* note 5; Price, *supra* note 5.

[10] For example, Berger focuses almost exclusively on the rural, subsistence-oriented Native while paying little attention to the urban or wage-earning Native.

[11] Pub. L. No. 85-508, 72 Stat. 339 (1958).

to select 102.5 million acres of federal public land.[12] This triggered a drive by non-Natives to acquire even more land at the expense of the original Native claimants. To prevent outside incursions, Alaska Natives attempted to secure their own property rights. They filed extensive claims with the Bureau of Land Management asserting title to most of the state.[13]

Aware of the scramble to claim Alaskan territory, United States Secretary of the Interior, Stewart Udall, in late 1966 imposed an informal "land freeze" on both state land selection and federal mineral leasing. This move was later upheld by the Ninth Circuit.[14] After the 1968 oil discovery in Prudhoe Bay, however, oil companies increased overall pressure for further mineral development. These companies also pushed for the construction of an oil pipeline from Prudhoe Bay to Valdez, Alaska.[15]

Even though the Supreme Court under John Marshall had recognized that aboriginal or Indian title existed until extinguished by treaty or congressional act,[16] the legal strength of Native claims remained uncertain. However, more than a century later in *Tee-Hit-Ton Indians v. United States*,[17] the Court held that congressionl acts which recognized the Natives' aboriginal rights in Alaskan land[18] merely permitted Native occupation and did not establish permanent legal rights in the land.[19]

---

[12] Section 6(b) of the Statehood Act gave the state the right to select up to 102.5 million acres of federal land within 25 years after admission to the Union. The land was selected from a pool of federal public land which Native Alaskans originally claimed by aboriginal title. *See also id.* § 4, which states that the

> state and its people do agree and declare that they forever disclaim all right and title to any lands or other property not granted or confirmed to the State . . . and to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimo or Aleuts (hereinafter called [N]atives) . . . that all such land or other property, . . . which may belong to said [N]atives, shall be and remain under the absolute jurisdiction and control of the United States.

[13] Crews, *Clouds Over Alaska: The Native Claims*, 3 NAT. RESOURCES LAW. 460, 461 (1970). The total area claimed covered more than 100% of Alaska due to overlapping claims by different groups. One commentator estimated that, eliminating the overlaps, the claims covered about 300 million of the state's 375 million acres, or roughly 80% of Alaska. Block, *Alaskan Native Claims*, 4 NAT. RESOURCES LAW. 223, 223 (1971) (written by energy company attorney).

[14] Alaska v. Udall, 420 F.2d 938 (9th Cir. 1969).

[15] *See* R. ARNOLD, ALASKA NATIVE LAND CLAIMS 131, 139–40 (1976). The demand for mineral rights was demonstrated in late 1969 when energy companies paid over $900 million for oil leases on state land. *Id.* at 131.

[16] Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 587 (1823).

[17] 348 U.S. 272 (1955).

[18] *E.g.*, Organic Act for the Territory of Alaska, ch. 53, § 8, 23 Stat. 24, 26 (1884).

[19] 348 U.S. at 277–79.

The Court held that Congress had the power to extinguish such title without granting compensation to the Natives.[20] Prior to the passage of the ANCSA, the state and the energy companies continued to argue that both the Statehood Act and the Mineral Leasing Act[21] illustrated Congress' intent to extinguish aboriginal title.[22]

B. *The ANCSA Legislation*

After two years of extensive debate[23] and pressure, Congress passed the ANCSA in 1971. An unlikely alliance of Native groups, energy companies, and the state of Alaska joined to support the bill. When adopted, the ANCSA was hailed as a "monumental piece of legislation of which all Americans, Native and non-Native alike, can be proud."[24]

In general, non-Native parties gained from the ANCSA because it extinguished aboriginal title to most of the state.[25] Energy companies benefited because the ANCSA removed major obstacles that prevented mineral leasing and oil pipeline construction.[26] For the state of Alaska, the ANCSA allowed the resumption of land selection in compliance with the Statehood Act.[27] In return for extinguishing their aboriginal title claims to most of the state, Alaska Natives received a monumental monetary settlement.[28] The Alaska Natives, through corporations set up by the ANCSA, received title to over 40 million acres of land.[29] They also received almost a billion dollars in compensation.[30]

---

[20] *Id.* at 288–91.

[21] Pub. L. No. 86-705, 74 Stat. 781 (codified at 30 U.S.C. §§ 184, 226 (1982)).

[22] *See, e.g.*, Block, *supra* note 13, for an argument by an energy company attorney that these Acts extinguished Native rights. *But see* Alaska v. Udall, 420 F.2d 938 (9th Cir. 1969) (rejecting the state's argument on the Statehood Act).

[23] For a history of the efforts that lead to the passage of the ANCSA, see R. ARNOLD, *supra* note 15, at 117–44.

[24] *Id.* at 145 (quoting speech given by Stewart French of the Arctic Institute of North America, Aug. 1972).

[25] 43 U.S.C. § 1603 (1982) (extinguishing aboriginal titles and claims).

[26] *Id.*

[27] *Id.* § 1603(a).

[28] *Id.* § 1605.

[29] *Id.* §§ 1610–1615 (providing for withdrawal of public land, Native land selection, and conveyance of lands).

[30] *Id.* § 1605 (establishing Alaska Native Fund with expected deposits of $962,500,000).

At first, the ANCSA appeared to be a viable solution to satisfy the parties' competing interests. It also seemed that the ANCSA had obviated many of the problems that the Native Americans in the lower forty-eight states had previously experienced when they dealt with the federal government. In one moment, fifty or sixty thousand Alaska Natives obtained rights to almost as much land as was held by Native Americans in the entire lower forty-eight states.[31] The Alaska Natives also received more money than the Indian Claims Commission had awarded during its entire thirty-two year tenure.[32] When it enacted the ANCSA, Congress explicitly broke with the existing system of reservations and federal trusteeship of Native land[33] by instead creating Native-owned corporations to own the land.[34] The Natives gained full legal title to land and avoided federal trust control imposed on Indian reservations.[35] The ANCSA gave Alaska Native corporations secure title to a significant portion of their original land while avoiding the warfare, broken treaties, displacement, and lost heritage that other Natives Americans experienced.

C. *The ANCSA Corporations*

Within a few years of its passage, however, some early ANCSA advocates began to call the act a "flawed victory."[36] The original debate in Congress had focused primarily on de-

[31] The United States holds approximately 52.5 million acres of land in trust for Native American Indian tribes and individuals. F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 471 (1982).

[32] The Indian Claims Commission, from its establishment in 1946 to its end in 1978, adjudicated approximately 670 cases and awarded $774,222,906. Washburn, *Land Claims in the Mainstream of Indian/White Land History*, in IRREDEEMABLE AMERICA: THE INDIANS' ESTATE AND LAND CLAIMS 24 (I. Sutton ed. 1985).

[33] *See* 43 U.S.C. § 1601(b) (1982) (congressional intent not to establish a reservation system, trusteeship, or any "permanent racially defined institutions"); *see also id.* § 1618(a) (revocation of almost all existing reservations in Alaska).

[34] *See id.* § 1606(a) (regional corporations); *see also id.* § 1607(a) (village corporations).

[35] Outside of Alaska, Native interests in real property are shaped by federal trust responsibility and restraints. *See* F. COHEN, *supra* note 31, at 471–546. Congress specifically intended to avoid "creating a reservation system or lengthy wardship or trusteeship" in the ANCSA. 43 U.S.C. § 1601(b) (1982). *See also* Indian Law Resource Center, *United States Denial of Indian Property Rights: A Study In Lawless Power and Racial Discrimination*, in NATIONAL LAWYERS' GUILD COMMITTEE ON NATIVE AMERICAN STRUGGLES, RETHINKING INDIAN LAW, 15–25 (1982) [hereinafter RETHINKING INDIAN LAW] (describing the federal trust responsibility as "racial discrimination and unfettered United States power disguised as moral legal duty," *id.* at 19).

[36] *See, e.g.*, Lazarus & West, *supra* note 3.

termining appropriate amounts of land and money compensation for the Natives.[37] The flaws that later emerged concerned the institutions created to receive land titles and money—that is, the Native corporations. The ANCSA created two levels of corporate institutions: regional and village corporations.[38] Both types of corporations must be organized under Alaska corporate law.[39] The Act authorizes up to thirteen regional corporations[40] and at least 200 village corporations.[41]

Although not subsidiaries or joint shareholders of one another, the corporations are linked through a variety of devices including land ownership, fund distribution, and revenue sharing.[42] Most Native Alaskans alive at the date of the ANCSA's passage in 1971 are shareholders in one regional corporation and one village corporation.[43] Both corporations issue 100 shares to each Native enrolled in the region or village.[44] The shares are inalienable and can only be passed testamentarily to other Natives.[45] On December 18, 1991, however, twenty years from the date of the Act's passage, the inalienable stock[46] will be cancelled and alienable stock issued.[47] The 1991 changes would create the possibility that non-Natives could purchase shares and eventually take over the corporations.[48]

In addition to establishing this two-tier corporate structure, the ANCSA provided for a cash distribution of $962.5 million deposited into an "Alaska Native Fund" in the United States

---

[37] *See* Getches, *supra* note 5, at 306.

[38] *See supra* note 34.

[39] *See* ALASKA STAT. § 10.05.005 (1985) (Alaska corporation statute).

[40] 43 U.S.C. §§ 1606(a), (c) (1982).

[41] *Id.* § 1610(b).

[42] *See, e.g., id.* § 1613(f) (in lands selected by a village corporation under the ANCSA, the village corporation receives the surface estate and the regional corporation receives the subsurface estate); *see also* Lazarus & West, *supra* note 3, at 134–38.

[43] 43 U.S.C. § 1604(b) (1982) (directing the Secretary of the Interior to enroll each Native in the village and the region where he resides); *id.* § 1604(c) (Natives who are not residents of Alaska can enroll in a thirteenth regional corporation).

[44] *Id.* § 1606(g) (distribution by regional corporations); *id.* § 1607(c) (distribution by village corporations).

[45] *Id.* § 1606(h)(1) ("For a period of twenty years after December 18, 1971, the stock . . . may not be sold, pledged, subjected to a lien or judgment execution, assigned in present or future, or otherwise alienated.").

[46] *Id.* § 1606(h); (alienation limitations placed on regional corporation stock); *id.* § 1607(c) (also applies to village corporation stock).

[47] *Id.* § 1606(h)(3) (cancellation of stock and issuance of new stock subject only to certain restrictions that corporation can impose); *id.* § 1607(c) (applying § 1606 (h)(3) to village corporations).

[48] Later amendments of the ANCSA gave the Native corporations the power to adopt restrictons that would deny stock voting rights to non-Natives and give the corporation and the stockholder's family first refusal. *Id.* § 1606(h)(3)(b).

Treasury.[49] The money came from two sources. First, the federal treasury made appropriations, spread over eleven years, of $462.5 million.[50] Second, the remaining $500 million came from a two percent share in state mineral revenues.[51] Regional corporations received money based on their relative number of Native shareholders[52] and then disbursed at least fifty to fifty-five percent of their remaining capital stock to shareholders and to the individual village corporations.[53]

Most importantly, the corporations received land. The village corporations selected up to twenty-two million acres from a pool of 100 million acres of "public land."[54] The village corporations' specific entitlement varied according to their respective populations.[55] The regional corporations were entitled to select sixteen million acres before the Act's fourth anniversary.[56] For all land selected by the village corporation, the village corporation retains surface title while subsurface title passes to the regional corporation.[57] The regional corporation, however, receives full title to land it selects.[58]

Today, a decade and a half after the passage of the ANCSA, this corporate structure, and indeed the corporations themselves, seem severely flawed. Many Natives view the corporations as the greatest threat to the legitimacy and security of their

---

[49] *Id.* § 1605(a). The Alaska Native Fund was established in the United States Treasury to distribute money to the Native village and regional corporations.

[50] *Id.* § 1605(c). A total of $462,500,000 is appropriated from the general fund of the Treasury according to the following schedule: $12,500,000 is distributed during the fiscal year in which this chapter becomes effective; $50,000,000 during the second fiscal year; $70,000,000 during each of the third, fourth, and fifth fiscal years; $40,000,000 during the period beginning July 1, 1976 and ending September 30, 1976; and $30,000,000 during each of the next five fiscal years. Native Fund monies cannot be spent for political campaigns or for the purpose of disseminating and creating propaganda. *Id.* § 1605(b).

[51] *Id.* § 1608(b) ("a royalty of 2 per centum upon the gross value (as such gross value is determined for royalty purposes under such leases or sales) of such minerals produced or removed from such lands. . . .").

[52] *Id.* § 1605(c) ("all money in the Fund . . . shall be distributed . . . among the [r]egional [c]orporations . . . on the basis of the relative numbers of Natives enrolled in each region").

[53] *Id.* § 1606(j) ("not less than 45% of funds from such sources during the first five year period, and 50% thereafter, shall be distributed among the [v]illage [c]orporations in the region and the class of stockholders who are not residents of those villages . . . .").

[54] *Id.* § 1610(a).

[55] *Id.* §§ 1611(a), 1614(a).

[56] *Id.* § 1611(c).

[57] *Id.* §§ 1613(a), (f).

[58] *Id.* § 1613(e) ("Immediately after selection by a regional corporation, the Secretary shall convey to the regional corporation title to the surface and/or the subsurface estates.").

land rights (pp. 96–116). This widespread concern has ignited a new debate over whether and how to change the ANCSA. Serious questions concerning the viability and stability of the Native corporations remain, particularly since alienability restrictions will be lifted in 1991. While less successful corporations will always be at risk, the more successful ones may be likely takeover targets if and when the corporate shares become alienable.[59]

II. THE ANCSA: THE CRITICISMS

Commentators such as Berger have attacked the ANCSA on three levels: practical, cultural, and historical. On the practical level, the ANCSA has been beset by numerous implementation problems that have caused long delays and higher costs. On the cultural level, the corporate form of ownership and control has been sharply criticized as entirely inappropriate for a subsistence-based, egalitarian group such as the Native Alaskans. Further, if the corporations face insolvency or takeover by non-Natives, the land base essential to the Native culture becomes threatened. When the practical and cultural criticisms are seen in an historical perspective, the ANCSA resembles prior discredited policies that resulted in Native Americans as a whole losing much of their aboriginal land.

In addition, the ANCSA has generated a fear among Natives that the perpetuation of their culture and traditional way of life may have become dependent upon the ANCSA's success. This fear also manifests itself on three levels. The first level concerns the day-to-day problems that disrupt Native life and stem from the ANCSA's inherent impracticalities. The second fear goes more to the fundamental problem with the ANCSA and with the unsound corporate structure that it has established. This fear is founded in problems that extend far beyond mere daily inconveniences. It is a fear that the Natives could lose control of the corporations when the shares become alienable in 1991. The third fear is closely related and concerns the survival of Native Alaskan culture itself. A close examination of the ANCSA's impact on the Native population reveals that Native culture has become increasingly dependent on the survival of the

[59] *See* Getches, *supra* note 5, at 302–03, 309.

corporations. Should they fail, Native culture might also face an improvident demise.

A. *Practical Attack*

It was impractical to impose a corporate structure on Alaska Natives. As Berger notes, the ANCSA corporations, unlike the average business corporation, were not formed to exploit an economic opportunity. Rather, they were imposed on the Natives who had little or no entreprenurial experience and who were forced to create opportunities for the corporations to flourish (p. 28). As a result, the corporations, already saddled with the costly difficulties of implementing a sometimes vague statute, have often struggled to survive. Many village corporations face a serious threat of financial failure. They are undercapitalized and are forced to spend most of their resources to maintain support staffs (pp. 33–36).[60] There also is little likelihood that the village corporations will develop economically because most of their land is undesirable tundra (p. 34). The regional corporations are also in a precarious financial position. Some regional corporations have sustained losses totalling in the millions of dollars and a few have even filed for bankruptcy.[61]

Corporate revenue sharing schemes have also created problems. For example, if a regional corporation enters into an investment that ultimately fails, that corporation and its Native shareholders must bear the loss.[62] However, if a regional corporation earns revenue from its timber resources or from its subsurface estate, it must first distribute seventy percent of the total to the other regional corporations in the state.[63] It then distributes at least forty-five to fifty percent of the remainder to the village corporations.[64] By requiring this revenue sharing

---

[60] Lazarus & West, *supra* note 3, at 164–65. Lazarus and West describe the undercapitalization of the village corporations as the "most serious practical problem inherent in ANCSA." *Id.* at 164.

[61] *The Thirteenth Regional Corporation Pays Creditors*, Tundra Times, Anchorage, Alaska, March 2, 1987, at 5, col. 1 (Bering Straits Native corporation filled for bankruptcy in March 1986 and the thirteenth regional corporation filed in September 1986; by using a sale of its losses, the thirteenth regional corporation is planning to become debt free sometime in 1987); *see also* Pauly & White, *Saving Eskimo Capitalism*, NEWSWEEK, Jan. 12, 1987, at 42.

[62] 43 U.S.C. § 1606(i) (1982).

[63] *Id.* § 1606(j).

[64] *Id.*

method, the ANCSA may discourage some corporations from taking acceptable economic risks which could prove to be profitable for the Native shareholders.[65]

A variety of legal issues also emerged soon after the ANCSA's passage. The vague statutory language of the ANCSA has led to lengthy and costly litigation.[66] Conflicts have arisen between the Native corporations, governmental agencies, and even among individual Native Alaskans.[67] The corporations have differed over regional boundaries,[68] statutory duties,[69] and even over methods of sharing revenues.[70] The corporations and the Department of the Interior have also clashed over village status,[71] the process of land selection,[72] and the Department of the Interior's power to reserve easements on Native lands.[73] Concerns have been raised over the tax and security law consequences of distributing money and corporate shares.[74]

Conflicts such as these have eroded corporate unity, caused an enormous drain of funds, and led to a severe hampering of corporate operations.[75] In fact, as of 1984, thirteen years after the passage of the ANCSA, only seven percent of the corporate land had been fully conveyed to Native corporations.[76] In addition to these problems, Berger explains in *Village Journey*, problems have arisen because the Natives had no previous experience in corporate management. (pp. 30–36)[77] Non-Native managers had to be hired;[78] thus, a law originally designed to help Native Alaskans transferred much of the managerial power to non-Natives.

---

[65] *See* Getches, *supra* note 5, at 310.

[66] Lazarus & West, *supra* note 3, at 138.

[67] *Id.* at 164.

[68] *Id.* at 140 (boundary disputes submitted to arbitration).

[69] *Id.* at 153–54.

[70] *Id.* at 153–64 (conflicts over which revenues are shared, how amounts are determined, and who receives them).

[71] *Id.* at 139–40 (villages contest denial of village status by Interior Department).

[72] *Id.* at 147–50 (corporations challenge restrictive regulations on land selection issued by the Secretary of the Interior).

[73] *Id.* at 150–53 (Secretary of the Interior asserts broad power to reserve easements on Native land).

[74] *Id.* at 141–47 (whether distributions under the ANCSA are taxable and whether federal securities laws apply to the issuance of stock by the Native corporations).

[75] *See id.* at 140; Getches, *supra* note 5, at 308–10; Note, *supra* note 5, at 230.

[76] Note, *supra* note 5, at 230 n.20.

[77] Berger quotes a Native official who asserts that tens of millions of dollars have been spent by the Native corporations in implementing the ANCSA (p. 30).

[78] Getches, *supra* note 5, at 302–03, 309.

B. *Cultural/Historical Attack*

In his book, Berger launches a sharp cultural attack against the ANCSA. He describes the law as a cultural disaster and as a direct legislative attack on the legitimacy of Native ways of life. Alaska Natives were seen as a problem to be solved, Berger argues, and Congress believed that the ANCSA was the solution (p. 90).

In *Village Journey*, Berger shows that historically, legislation originally enacted to benefit Native Americans has usually placed Native land and culture in a more vulnerable position (pp. 99–100). To illustrate this point, he draws a parallel between the ANCSA and the General Allotment Act of 1887 (Allotment Act).[79] The Allotment Act divided Indian reservations in the lower forty-eight states into individual parcels of forty to one hundred and sixty acres.[80] This resulted in the reduction of total Indian land holdings in the lower forty-eight states from 138,000,000 acres to 48,000,000 acres (p. 84). Berger explains that the ANCSA could have the same overall effect on the Native Alaskans, especially in 1991, if the alienability restrictions are lifted. (pp. 85–87, 108–111).

Berger also complains that the corporate form of ownership and control is entirely inappropriate because it clashes with traditional Native notions of ownership (pp. 87–95). For example, land once held in common pursuant to traditional custom is now personal property held through corporate shares.[81] He also outlines several scenarios that could result in the loss of Native land ownership. First, land could be seized by creditors in bankruptcy or to satisfy debts (p. 99). Second, a corporation which needs cash to meet current expenses, pay past debts, or (after 1991) to pay possible land taxes could sell some land (p. 99). Third, after 1991, non-Natives could buy shares of the Native corporations (p. 100).

In addition, Berger explains that tribal members born after the ANCSA's passage do not even receive corporate shares. An entire segment of the population is thus denied the right to own

---

[79] General Allotment (Dawes) Act, ch. 119, 24 Stat. 388 (1887) (codified as amended in scattered sections of 25 U.S.C.).

[80] *Id.* § 1, 24 Stat. at 388.

[81] *See* 43 U.S.C. § 1606(g) (1982) (corporate shares issued to Natives enrolled under the ANCSA); *id.* § 1604(a) (enrollment limited to all Natives "who were born on or before, and who are living on December 18, 1971"); *see* Getches, *supra* note 5, at 311.

shares in the corporations. These after-borns thus find themselves in the unenviable position of simultaneously being members of the Alaska Native culture but not members of the corporations. They are therefore unable to influence the institutions that have such a profound impact on their lives.

The corporate view of land as a commodity to be exploited for profit is also antithetical to Alaska Native culture. The Natives see land as a life-preserving asset to be maintained for future generations, not as an instrument to be exploited for economic gain and profit (pp. 90–95).

According to Monroe Price, another ANCSA critic and noted author, one of the ANCSA's primary goals was to replace Native culture with corporate ideology. Price argues that legislative action has converted all Alaska Natives into "members of the corporate world—recipients of annual reports, proxy statements, solicitations, and balance sheets."[82]

As the corporations' financial prospects grow dimmer, continued Native land ownership becomes more uncertain. There now are tens of thousands of Natives who depend on the corporations not to provide dividends, but to safeguard the land that is essential to their lifestyle, subsistence, and culture. Growing debts and possible bankruptcy could, however, allow non-Native creditors to seize the corporations' and the Natives' most prized asset: the land. *Village Journey* shows us exactly how intertwined the Native Alaskan culture and future have become with the success of the ANCSA. Probably better than most other authors on the subject, Berger describes how Natives, even those who are not corporate shareholders, are concerned that their cultural survival depends on the corporations' continued existence.

III. The ANCSA: Reform or Reject?

Many of the flaws of the ANCSA have been recognized for years. Some attempts, both congressional and tribal, have been made to mitigate the dangers.[83] Most efforts have focused on assuring Native control over their land. This section briefly analyzes these reform efforts.

---

[82] Price, *supra* note 5, at 95.

[83] *See, e.g.*, Berger (pp. 155–72); Note, *supra* note 5, at 253–59. The Natives also continue to lobby Congress to revise the ANCSA. *See* Worl, *supra* note 8, at 19–22.

A. *The Alaska National Interest Lands Conservation Act*

The Alaska National Interest Lands Conservation Act (ANILCA), passed by Congress in 1980,[84] has been the most significant congressional attempt to improve the Native Alaskan situation. The ANILCA authorizes Native corporations to grant the corporations and Native families the right of first refusal for any stock offered for sale after 1991,[85] and to limit the right of non-Native shareholders to vote.[86] Also under the ANILCA, Native corporations can place their land in a land bank where it would be immune from property taxes and court judgments.[87] Finally, the ANILCA allows Natives to hunt and fish on all public lands.[88]

While the ANILCA does provide some protection, it does not sufficiently safeguard Native control over the land. The ANILCA does not prohibit all non-Native stock purchases and its existing protections may not be effective to prevent an ultimate non-Native corporate takeover. In fact, critics such as Berger have argued that the Native corporations, already burdened by debt, would lack sufficient cash to exercise their right of first refusal (pp. 101–02). Even if non-Natives were prevented from voting, a substantial block of non-Native stock could still influence a corporation's management.[89] Finally, placing Native land in a land bank may protect it from corporate financial and legal difficulties, but it also subjects the land to federal rather than Native management goals.[90]

---

[84] Pub. L. No. 96-487, 94 Stat. 2371–2551 (codified at 16 U.S.C. §§ 3101–3233 (1982 & Supp. III 1985); 43 U.S.C. §§ 1606, 1631–1641 (1982 & Supp. III 1985)).

[85] 43 U.S.C. § 1606(h)(3)(B)(ii) (1982).

[86] *Id.* § 1606(h)(3)(B)(i).

[87] *Id.* § 1636.

[88] 16 U.S.C. § 3114 (1982) (giving general preference to subsistence rights on public lands). *See also* Marine Mammal Protection Act of 1972, § 101, 16 U.S.C. § 1371(b) (1982) (providing for a limited Native subsistence exemption from federal moratorium on taking of protected marine mammals); Endangered Species Act of 1973, § 101, 16 U.S.C. § 1539(e) (1982) (allowing limited Alaska Native subsistence hunting of endangered species).

[89] Note, *supra* note 5, at 235–36. One possible scenario of non-voting shareholder influence would be a derivative suit claiming that the Native directors and managers violated their fiduciary duty by using corporate assets (e.g., land) to promote unprofitable Native subsistence activities rather than profitable economic development. *Id.* at 236 n.55.

[90] *See* 43 U.S.C. § 1636(b) (1982) (preventing development of the land and requiring management in a manner compatible with the management plan of adjoining federal or state lands). According to Berger, these statutory restrictions and others demanded by the federal government have discouraged Native corporations from agreeing to place their lands in the land bank (pp. 103–04).

B. *Retribalization*

"Retribalization" involves the transfer of Native land from the ANCSA corporations to the tribal governments. According to Berger, most Natives see retribalization as the answer to fears of losing their land and cultural integrity (pp. 158–59). By establishing sovereign political institutions outside of the corporate framework and pursuant to traditional Native Alaskan societal patterns, retribalization would afford the Natives greater control over their destinies.

Traditional Native groups are self-governing and have distinct political systems.[91] Newly organized local Native communities have established themselves either as state-chartered municipalities or as councils authorized under the federal Indian Reorganization Act of 1934 (IRA).[92] Still others have remained governed by traditional village councils.[93]

Many of the ANCSA's practical and cultural problems could be solved by retribalization. Under retribalization schemes, alienation of tribal government land would be difficult[94] and the land would be exempt from taxation.[95] All tribal members, including those born after the ANCSA's passage, could participate in the tribal government on an equal basis regardless of how many shares they own. Further, the tribal governments would have greater flexibility than the ANCSA corporations to base their policies on cultural, rather than economic, goals and values.

The success of retribalization, however, remains in doubt. Those transferring the corporate land may face opposition from federal and state governments, as well as from regional corporations and dissenting shareholders.[96] Several village corpora-

---

[91] For a discussion of traditional Alaska Native societies and their political systems, see D. CASE, ALASKA NATIVES AND AMERICAN LAWS 333–70 (1984). Berger also discusses traditional Native political systems (pp. 137–40). The ANCSA is relatively silent concerning Native political organization. The ANCSA only refers to Congress's intent not to create a reservation system, 43 U.S.C. § 1601(b) (1982), and also provides for the transfer of village corporation land to a municipal corporation, *id.* § 1613(b)(3).

[92] Ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461–479 (1982)).

[93] *See* D. CASE, *supra* note 91, at 373.

[94] *See* 25 U.S.C. §§ 177, 483 (1982).

[95] *Id.* § 465.

[96] For a discussion of the problems facing retribalization of the ANCSA corporation land, see Note, *supra* note 5, at 239–43. This Note argues that retribalization is impractical under present law. *Id.* at 241. For example, under Alaska corporate law the transfer of a major asset, such as the corporation's land, will require the approval of two-thirds of the corporation's shareholders. ALASKA STAT. §§ 10.05.438–.441 (1985).

tions have already sought to transfer their land to IRA governments,[97] but legal uncertainties and/or political conflicts may discourage or prevent significant retribalization of land.[98] If retribalization fails to secure Native culture and land interests, the question then becomes whether Congress can draft new legislation to prevent the potential loss of Native land and culture.

C. *Proposals*

Three proposals to ameliorate the Native Alaskan situation, briefly outlined here, all accept the premise that Alaska Native culture is in danger. To solve this problem, tribal governments should be revitalized. The proposals differ, however, in their views on the magnitude of the problem and on whether the ANCSA corporate structure should be substantially altered.

David Case, in his treatise *Alaska Natives and American Laws*, argues that the ANCSA essentially settled land claims, that the ANILCA addressed the Natives' subsistence claims, and that only issues of self-government remain unresolved.[99] He recognizes that Alaska Natives have a strong claim to sovereignty that predates and arguably survives despite the ANCSA. Case believes that the resolution of sovereignty claims, the greatest issue still facing the Alaska Natives, could be handled through litigation, legislation, or administrative decisions.[100]

A proposal in the *Stanford Law Review* argues for a legislative revision of the ANCSA, allowing both for retribalization and for a modification of the corporate structure.[101] Corporate voting rights would be extended to all Natives and the ban on Native

---

Any dissenting shareholder has the right to demand a fair market value payment from the corporation for their shares. *Id.* §§ 10.05.447–.462; *see also* Note, *supra* note 5, at 241. The Note also argues that because the ANCSA prohibits the sale of shares prior to 1991, 43 U.S.C. § 1606(h)(1) (1982), a single dissenting shareholder could block the land transfer. Note, *supra* note 5, at 241.

[97] *See* D. CASE, *supra* note 91, at 377 (a surge in applications for IRA governments in the early 1980's was reported by the Department of the Interior).

[98] For instance, the legitimacy of the tribal governments is uncertain. Federal, state, or local governments may refuse to recognize their claims of sovereignty. *See id.* at 371–477 (discussing the sovereignty claims of various Alaskan governmental institutions and the potential challenges to them).

[99] *Id.* at 477.

[100] *Id.* at 476–77.

[101] Note, *supra* note 5, at 253; *see also* Getches, *supra* note 5, at 317–18 (summarizing a similar argument).

stock alienation would be extended beyond 1991.[102] Congress would explicitly allow village corporations to retribalize their lands.[103] This proposal seeks to preserve Native land ownership while permitting regional corporations to develop the land.[104]

Berger makes a third proposal in *Village Journey*. Having sharply attacked the ANCSA on practical, cultural, and historical grounds, Berger argues that "simply to prop up the ANCSA's corporations would do no more than maintain an unacceptable status quo (p. 186)." Instead, he outlines a massive shift of land and power from the corporations to tribal governments. Because land held by the Native corporations is private property, Berger believes that the land transfer would be best accomplished by shareholder vote rather than by congressional act (p. 167). Such a move would help to facilitate the transfer and increase the tribal governments' power (pp. 166–72).

Berger urges village corporations to transfer land and regional corporations to transfer at least their subsurface rights to the tribal governments (pp. 167, 169). Tribal governments would then own the land in fee simple (p. 171) and have exclusive jurisdiction over hunting and fishing rights (p. 171). Congress would give the tribal governments veto power over surface development rights held by the regional corporations (pp. 167–68). The tribal governments would also be required to admit as members all current village corporation shareholders as well as "after-borns" who are not presently shareholders (p. 167). This proposal differs from others in that it does not envision a recreation of federal trust responsibility like that found on Indian reservations in the lower forty-eight states.[105] Berger also proposes that the federal and Alaskan state governments recognize the establishment of tribal governments (pp. 170–71) and develop a plan of shared jurisdiction over subsistence rights on federal and state land (pp. 171–72).

IV. Native Americans and Federal Policy

The proposals for reforming the ANCSA through congressional action create an important problem in reasoning. If the

---

[102] Note, *supra* note 5, at 254–55.

[103] *Id.* at 259.

[104] *Id.* at 260–61.

[105] *See id.* at 253–60 (advocating a reaffirmation and extension of the trust status of Alaska Natives and Native corporations, and proposing that retribalization land be held by the federal government in trust for the Natives).

problems were originally created by the ANCSA, can we expect Congress to now have the capacity and foresight to solve these problems?

Congress represents a culture far different from that of the Alaska Natives. It also has a history of enacting legislation that has resulted in significant losses of Native land. As it appears today, the ANCSA threatens to be yet another such ill-fated law. Will Congress understand the Natives' concerns and enact a law that genuinely benefits the Natives? How Congress chooses to deal with the ANCSA and the Alaska Natives may have significant implications for all Native Americans.

To answer these questions, it may be helpful to study past congressional actions to discern any recurring patterns. Three possible perspectives on the history of congressional action and its relation to Congress' role today are outlined here. In *Village Journey*, Berger touches on all three perspectives. The first paradigm or perspective separates past policies into "good" and "bad" categories depending on whether they supported Native self-determination or assimilation. Under this paradigm, Congress must be persuaded to reject the "bad" and embrace the "good" policies in order to produce beneficial legislation. The second perspective, labeled here the cynical paradigm, sees congressional action as inevitably detrimental to the Natives. A third paradigm sees each policy as an attempt to perpetuate an "idea" or "image" of Native American society. According to this perspective, meaningful change will only result when Congress' "image" of the Natives has changed and become more realistic.

A. *The Good/Bad Policy Paradigm*

Under this paradigm, federal laws and policies toward Native Americans are divided into "good" policies that generally support Native self-determination and sovereignty, and "bad" policies that encourage or force Native assimilation into the dominant culture.[106] Early legal support for Native sovereignty appeared in the Marshall Court decisions of the 1820's and 1830's which recognized Native American tribes as "domestic

[106] *See, e.g.*, Wilkinson & Biggs, *The Evolution of the Termination Policy*, 5 AM. IND. L. REV. 139 (1977) (analyzes federal Indian policy in terms of tension between assimilation and "separatism").

dependent nations."[107] The classic assimilationist or "bad" law was the General Allotment Act of 1887[108] which divided communally held reservations into individually owned parcels and gave citizenship status to the allottees.[109] The Allotment Act was part of a general federal policy in the late nineteenth and early twentieth centuries to forcibly assimilate the Natives by destroying their cultural institutions.[110]

Congress moved away from assimilation and toward Native self-determination in the Indian Reorganization Act of 1934 (IRA)[111] which sought to maintain and recreate tribal governments. The IRA ended the disintegration of reservations through allotments[112] and gave tribal governments various rights and powers, including power over tribal lands and assets.[113] This "good" policy, however, was replaced by the "bad" policy of Termination during the 1950's and 1960's.[114] Termination involved a series of congressional acts and programs that terminated numerous tribes and reservations,[115] diminished the power of tribal governments,[116] and encouraged the migration of Natives from the reservations to the cities.[117] During the late 1960's and 1970's, however, federal policy began to shift back toward the goal of Native self-determination.[118]

In his historical analysis of federal Native American policy, Berger explicitly follows a "good/bad" policy paradigm. (pp. 117–37). According to Berger, the ANCSA clearly fits

---

[107] Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16 (1831); *see also* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 556, 557 (1832); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823).

[108] General Allotment (Dawes) Act, ch. 119, 24 Stat. 388 (1887).

[109] *Id.* § 1, 24 Stat. at 388 (president authorized to subdivide reservations into individual parcels of 40 to 160 acres). *See also id.* § 6, 24 Stat. at 390 (an Indian who has received an allotment and "has adopted the habits of civilized life" is declared a citizen of the United States).

[110] *See generally* D. GETCHES & C. WILKINSON, FEDERAL INDIAN LAW 111–22 (2d ed. 1986); M. PRICE & R. CLINTON, LAW AND THE AMERICAN INDIAN 77–81 (2d ed. 1983). Between 1887 and 1934, Native American land holdings diminished from 138 million acres to 48 million acres. *Id.* at 110.

[111] Indian Reorganization (Wheeler-Howard) Act of 1934, ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461–479 (1982)).

[112] 25 U.S.C. § 461 (1982).

[113] *Id.* § 476.

[114] For a detailed discussion of the Termination Policy, see generally Wilkinson & Biggs, *supra* note 106.

[115] *See id.* at 151 for a list of terminated tribes.

[116] *See id.* at 158–62.

[117] M. PRICE & R. CLINTON, *supra* note 110, at 86.

[118] Wilkinson & Biggs, *supra* note 106, at 162–65.

within the assimilationist category (pp. 85–87, 117).[119] It ignores traditional collective governance and land ownership and turns tribal members into shareholders with individual rather than collective interests (pp. 87–95).

The appeal to Congress would incorporate arguments citing historical and legal precedent. Sovereign tribal governments were recognized by the Marshall Court and later reaffirmed by "good" laws such as the IRA; the "bad" policies were merely unfortunate aberrations. Berger applies this argument to the Alaska Natives (pp. 153–54) and argues that Congress and the Natives should replace the assimilationist policy of the ANCSA with the self-determination policy of retribalization. (pp. 155–72).

A closer, more in-depth examination of the policies toward Native Americans demonstrates, however, that a simple "good/bad" perspective is inadequate. The distinction between self-determination and assimilation is not always clear nor easily associated with "good" and "bad" policies.[120] While in hindsight the effects of a law might be clearly seen as assimilationist or "bad," these consquences might not have been apparent when the law was originally adopted. For instance, the ANCSA, now considered an attack on tribal sovereignty, was enacted in the 1970's when Native self-determination was the policy.[121] One commentator noted that the ANCSA "demonstrated the strongly pro-Indian sentiment of Congress."[122]

B. *The Cynical Paradigm*

The cynical paradigm places little faith in Congress to draft meaningful legislation that truly recognizes Native American tribal sovereignty and ultimately benefits the Natives.[123] According to the cynical paradigm, Congress' actions will always

---

[119] *See also* Price, *supra* note 5, at 95 (drawing parallels between the Allotment Act and the ANCSA); Getches, *supra* note 5, at 302 (noting that the ANCSA could be seen as termination in disguise).

[120] For instance, the IRA, hailed as pro self-determination or "good" law by Berger (pp. 126–27), is considered by others to have a long-term goal of assimilation. *See, e.g.*, Wilkinson & Biggs, *supra* note 106, at 145.

[121] The ANCSA was enacted during a period when both Congress and the Executive Branch were supporting the revitalization of tribal institutions. M. PRICE & R. CLINTON, *supra* note 110, at 99.

[122] Officer, *The Indian Service and its Evolution*, in THE AGGRESSIONS OF CIVILIZATION 89 (S. Cadwalader & C. Deloria eds. 1984).

[123] *See generally* RETHINKING INDIAN LAW, *supra* note 35, at 3–47, 103–26.

reflect the dominant culture's ideology and needs. This stems both from an ethnocentric bias and from the political weakness of the Natives. As a result, the Natives drive for self-determination and absolute control over their land will never receive much support in Congress. Even if the Natives somehow find sufficient congressional support, the bureaucracy will inevitably distort the legislation and create inappropriate policies.

This paradigm includes the theory that an overriding goal of federal policy and congressional action is to deprive the Indians of their land rights.[124] In the eighteenth and nineteenth centuries, land was taken directly through warfare, treaties, and forced removal.[125] The General Allotment Act of the late nineteenth century and the Termination Policy of the mid-twentieth century achieved basically the same effect: the fragmentation of reservations and the eventual transfer of land from Natives to non-Natives.[126] While the IRA did stop the loss of land through allotment, it still left considerable power in the hands of the federal government to exert control over Native land.[127]

The ANCSA easily fits within this version of the cynical paradigm because it removed aboriginal land title, allowed the construction of the Alaska pipeline, and ushered in the development of the North Slope oil field. Most importantly, the ANCSA placed Native culture in a precarious position becuase it exposed Native land to possible outside takeover and economic exploitation. One hope is for Natives to pursue their cause in international forums and not to rely solely on Congress to pass meaningful legislation.[128] Berger finds further support for his claims of Native sovereignty in the recent international recognition of the rights of indigenous peoples (pp. 173–81). He does not, however, advocate that Alaska Natives abandon Con-

---

[124] *See, e.g.*, Indian Resource Law Center, *United States Denial of Indian Property Rights: A Study In Lawless Power and Racial Discrimination*, in RETHINKING INDIAN LAW, *supra* note 35, at 15–25.

[125] "Removal" refers to the forced migration of Native groups from their traditional homelands to reservations or Indian "territories" that occured during much of the nineteenth century. *See* D. GETCHES & C. WILKINSON, *supra* note 110, at 98.

[126] *See supra* text accompanying notes 79–80, 108–10, 114–17.

[127] *See* Chambers & Price, *Regulating Sovereignty: Secretarial Discretion and the Leasing of Indian Lands*, 26 STAN. L. REV. 1061 (1974) (discussing the power of the Department of the Interior over the leasing of Native land to non-Natives); *see also* Cadwalader, *supra* note 1, at ix.

[128] For a discussion of the international approach, see, e.g., RETHINKING INDIAN LAW, *supra* note 35, at 129–78. Forcing the United States to defend its Native policies in an international forum under international standards could cause the country to change its policies if only to avoid embarassment.

gress and take their struggle to an international forum. Indeed, with 1991 fast approaching, Congress may be the only hope for those who seek significant changes in the ANCSA.

C. *The Image Paradigm*

The image paradigm recognizes that congressional action is often stimulated by a desire to find "solutions" to the Native "problem".[129] The solution, however, is generally less related to the problem than to the non-Native world view. Congress formulates law and policy based on its "idea of an Indian in American society."[130] This "idea" represents a vision of what the dominant society hopes the Native will become. Although the "idea" rarely has a basis in the reality of Native culture, it often has a powerful impact on Native society because of the implementation of federal policies based on this image.

Village Journey is more valuable for its image of Alaska Native culture than for its specific proposals to reform the ANCSA. Using excerpts from testimony at village hearings, Berger protrays the Natives as a people fearful of losing their culture and land because of distant corporate transactions and shifting markets. He attempts to establish a new "idea" of the Alaska Natives. This "idea" is one of a remarkably self-sufficient and independent people with a strong spiritual and economic community. Berger's real contribution, therefore, is his accurate depiction of the fear that many Native Alaskan people feel concerning the ANCSA and the probability that its many problems will lead to the ultimate demise of Native culture.

Different images stimulate different types of congressional enactment. As Monroe Price suggests, under the General Allotment Act Congress envisioned the Native as a small farmer.[131] To Congress, the small farmer represented the civilizing virtues of individualism and hard work.[132] While the IRA did recognize the validity of collective Native society, it nonetheless perpetuated a model of western majoritarian and representative democracy.[133] One could see in the IRA an image of the Native

---

[129] Cadwalader, *supra* note 1, at ix.
[130] Price, *supra* note 5, at 90.
[131] *Id.* at 95.
[132] *Id.* at 92–93.
[133] *See* Tullberg, *The Creation and Decline of the Hopi Tribal Council*, in RETHINKING INDIAN LAW, *supra* note 35, at 29–30.

American as a participant in the democratic system and as a voter.

The Termination Policy advocated cultural integration and therefore attempted to remove racial barriers prohibiting Native Americans from participating equally in American society.[134] At the same time that reservations were being terminated, the federal government was encouraging and assisting Natives to move to urban areas.[135] Thus, one could see the termination period as promoting an image of the Native American as an urban worker.

The ANCSA creates the image of the Native as corporate shareholder,[136] and has been more successful than earlier legislation in perpetuating its controlling image. Whereas the General Allotment Act did not "turn" all Natives into small farmers, the ANCSA has effectively transformed all Alaska Natives into shareholders of troubled corporations, dependent on the fortunes of the economic markets. Any advocate seeking to revise the ANCSA must come to grips with the idea that Congress perpetuated, or else seek to plant a new idea in Congress' imagination. If the reformers fail to present a new image, Congress may perceive the Alaska Natives as shareholders who want Congress to bail out their failed enterprises.

Berger differs from his fellow reformers in his attempt to create a new "idea" of the Native. Berger presents a powerful image of Alaska Natives surviving through hunting, fishing, and trapping, developing a spiritual and economic community and remaining remarkably self-sufficient in a modern world. The proposal to shift control over Native land from profit corporations to tribal governments relies on the image of the self-sufficient hunter who depends on the land to survive.

Berger's "idea" of the Native must face two important questions: is it accurate and will Congress accept it? The image of the rural, self-sufficient Native at odds with the corporate structure downplays the political and economic importance of the Native corporations. Native corporations are established institutions in Alaska with significant power.[137] While Berger's rhetoric emphasizes the negative aspects of the corporations, his proposals merely give the Natives the option of retribalizing corporate land (p. 167). The future role of the Native corpora-

---

[134] Price, *supra* note 30, at 93–94; *see generally* Wilkinson & Biggs, *supra* note 101.
[135] *See* M. PRICE & R. CLINTON, *supra* note 110, at 86.
[136] Price, *supra* note 5, at 95.
[137] *See* Getches, *supra* note 5, at 302.

tions and of the tribal governments would no longer be determined by Congress, but ultimately by the Natives themselves (pp. 153–54).

Congress, however, may find Berger's image difficult to accept or to understand. The earlier ideas of the Native—small farmer, voter, urban worker, shareholder—were roles prescribed by the dominant society. Congress placed the Native into a role that it understood and appreciated. Now, Congress must learn to deal with a new image, one that is authentic and comes directly from Native society.

V. Conclusion

An important distinction between the ANCSA and past failed congressional actions is that the ANCSA has yet to fail completely. While the Native corporations struggle and many Natives fear the eventual demise of their culture, the essential element—the land—remains in Native hands. Thus, the challenge for both the Natives and Congress is to create a workable solution while there is still time.

Village Journey brings the struggle of the Native Alaskans to maintain their cultural integrity to the attention of a larger audience. By placing the struggle in a cultural and historical context, Berger gives outsiders the chance to understand the relationship between the ANCSA and Native culture. The ANCSA turned the Alaska Natives into shareholders, into members of the corporate world. Yet, the Natives that Berger discovered want to pursue their traditional lifestyle, a lifestyle that is now threatened by the ANCSA. If Congress can grasp this distinction and act upon it, it may prevent another disaster in the history of white/Native relations.

> The great law of culture is to let one become what they were created to be. Let me be an Inupiat with the freedom to hunt, to fish, to trap, and to whale as my forefathers did in past centuries (pp. 47–48).
>
> —Delbert Rexford, Barrow

RECENT PUBLICATIONS

WORK, HEALTH, AND INCOME AMONG THE ELDERLY. Edited by *Gary Burtless*. Washington, D.C.: The Brookings Institution, 1987. Pp. xiii, 267, index. $26.95 cloth.

Our society is aging. Vast improvements in public health and medical technology over the past few decades have combined to raise life expectancies to unprecedented levels. These improvements in longevity and the maturing of the "baby-boom" generation will combine to dramatically increase the number of elderly over the next few decades: the number of persons over age sixty-five will increase from 25.5 million in 1980 to 31.8 million by the year 2000.[1] These changes will in turn strain as never before the resources available to respond to the needs of the elderly. Issues of elderly health care and retirement income are among the most difficult our society will face.

Social Security has been with us since 1935, and Medicare has been in existence for over twenty years. Yet the chronic problems these programs address have not been eliminated. The problems of old-age morbidity and poverty can only be expected to grow. Those who are not yet elderly are affected, finding themselves justifiably pessimistic about the adequacy of social security benefits that will be available when they retire.

Before developing policies to respond to these problems, however, we must understand the effects of current mortality trends on the health of the elderly and on their ability to remain employed. Edited by Gary Burtless and published by the Brookings Institution, *Work, Health, and Income Among the Elderly* contains six papers written by participants at a May 2, 1985 conference held at Brookings. The volume is the third in a series supported by a grant from the U.S. Department of Health and Human Services dedicated to studying the economic problems of old age and retirement.

Policy makers have recently begun to focus on the implications of the changes in old-age mortality and the maturing of the baby-boom generation. Unfortunately, the data needed to address these implications are not routinely available, making comprehensive analysis difficult (p. 2). All the papers in the volume are hampered by inadequate data. Much of the needed

---

[1] L. RUSSELL, THE BABY BOOM GENERATION AND THE ECONOMY 6 (1982).

data is historical, and may have been irretrievably lost, but much needed information can and should be discovered. For example, more extensive surveys and more sophisticated statistical methods can help isolate the most important causes of retirement among the elderly. Data collection is expensive, but it is better to use resources productively in research than to waste them on costly and ill-conceived policy initiatives.

Work, Health and Income Among the Elderly is a valuable step in the direction of improved collection and use of information about health and retirement among the elderly. The papers it contains investigate important consequences of fundamental demographic changes and society's responses to them. They all represent original contributions to our understanding of complex issues. The papers cover only a few of the issues that must be studied, however. None contains a complete synthesis of the existing literature on its topic. More comprehensive treatment might be incompatible with the level of detail and thoroughness of these authors' analyses.

In the volume's first paper, *Public Policy Implications of Declining Old-Age Mortality*, James M. Poterba and Laurence H. Summers focus on the dramatic improvements in mortality rates among the aged. From comprehensive statistical evidence, the authors estimate the number of marginal survivors—those people alive now who would not be had they faced the mortality rates of those born earlier. Finding large recent increases in the number of marginal survivors, the authors focus on a policy debate that has been vigorous in recent years: whether growth of this population carries any implications for the average health of the elderly population (p. 19). The authors contrast the optimistic view that factors reducing mortality will lead to reduced morbidity (rates of illness) among the aged with a widespread, more pessimistic view, that increased marginal survivorship is keeping alive very frail and seriously ill people who might otherwise have died, reducing average health and increasing the overall burden of care (p. 27).

The authors find that neither the optimistic view nor the pessimistic view of declining old-age mortality is appropriate. Increased survivorship by relatively less healthy persons has been offset by general reductions in mortality "leaving the age-specific health status of the population largely unchanged" (p. 49). Thus, future costs of Medicare and of institutional care of the elderly can be estimated using current age-specific information.

Based on current data, the authors forecast that by the year 2000 the population of men in retirement centers will increase by fifty-three percent while the population of institutionalized women will rise by as much as two-thirds (p. 49). In addition the authors predict, on the basis of the most recent profile of medicare costs by age, that medicare costs will increase by nearly forty percent by the end of the century (p. 49).

The authors briefly examine the policy implications of their study and make some suggestions. First, huge increases in the cost of care can be expected to overwhelm any savings achieved through improvement in health care delivery (p. 50). Second, resources should be devoted to improving the quality of the lives saved by medical advances, in addition to continuing to reduce mortality (p. 50). Third, finding that reductions in mortality do not seem to be associated with reductions in morbidity at each age, the authors reject frequently advanced proposals to redefine the retirement age (p. 50). Finally, medical progress will continue to increase the variance in health between the least and most healthy at each age (p. 50).

Many retiring workers cite poor health as their primary reason for leaving the work force. Reflecting Poterba and Summers' discussions of the double-edged impact of medical progress on the health of the elderly, Martin Neil Bailey in his *Aging and the Ability to Work* examines the impact of trends in the health of the elderly on their ability to work and their need to retire. His study has important implications for the design of public retirement and disability programs.

Bailey affirms the sensible notion that the optimal retirement age rises with the expected life span and the population's ability to work (p. 59). This relationship might be used to guide the establishment of a "normal" retirement age, the age at which workers first become eligible for retirement benefits (p. 96). But Bailey shares Poterba and Summers' observation that variances in the health status of the elderly are becoming greater (pp. 66–67). These age-specific variances in worker disability make a single, inflexible standard for retirement age undesirable (p. 97).

A lower retirement age for the unhealthy may be impossible to implement because true states of health are not often directly observable (pp. 67–68). Workers may distort their true condition to obtain early retirement benefits (p. 68). Truly disabled persons may be erroneously classified as healthy (p. 95). As Bailey points out, the health status of a worker is to some degree under

his own control (p. 70). Early disability benefits may cause workers to be less zealous in protecting their own health (p. 70).

Bailey also considers the effect of Social Security on workers' willingness to save for their own retirement (p. 65). If left to their own savings choices, workers would underestimate the importance of saving for retirement; this result underscores the need for both a forced-saving system and a minimum age for the receipt of social security (p. 65). The benefits of insuring adequate levels of retirement savings more than offset the problem of workers' not protecting their own health (p. 65).

Bailey moves to a discussion of the Social Security system today, noting that Social Security was originally conceived not as a universal retirement program, but rather as "insurance against not dying young" (pp. 71–72). When the program was initially conceived in the 1930's, a twenty year-old man had a life expectancy of 45.1 more years, just reaching the normal retirement age (p. 72). In 1980, in contrast, a 20-year-old man could expect to live ten years beyond retirement (p. 72).

Bailey also conducts an analysis of marginal survivorship. He asserts that the hypothesis that medical progress is "keeping the disabled alive" only partially explains the rise in reported disability (p. 83). Finally, after carefully examining trends in mortality and retirement, reported disability, and changes in the nature of employment over time, Bailey concludes that the period from age sixty-two to age sixty-five (the period between when early retirement benefits become available and the normal retirement age) is not one of particularly steep decline in health (p. 89).

Overall, Bailey finds that while data are inadequate regarding the causes of actual retirement, increased life expectancy and generally improved ability to work indicate that the normal retirement age can be increased (p. 96). Bailey embraces the optimistic position that the health of older workers has probably improved (p. 96). The current normal retirement age of sixty-five with early retirement at sixty-two can be increased to ages sixty-five to sixty-eight with little real impact on the level of health at retirement. Nevertheless, variations in the health of the aged suggest that social security's disability program should be a more important part of the retirement program (p. 97). An improved disability program, with an early retirement plan for those truly unable to work, may even reduce social security costs, allowing healthier workers to retire later.

In the third paper, *Occupational Effects on the Health and Work Capacity of Older Men*, Gary Burtless develops a complex statistical model to confirm the strong relationship between industry and occupation and health. As might be expected, workers in mining and construction jobs have significantly greater health-based limitations than do professionals, and are more likely to retire before age 65 (p. 114). Burtless argues that these systematic differences will continue, and must be considered in the design of Social Security (pp. 140–41). Proposed increases in retirement age may seriously affect retirement incomes of workers whose jobs force early retirement (p. 141).

Jerry A. Housman and Lynn Paquette, in *Involuntary Early Retirement and Consumption*, do not directly address the influence of health on the retirement age. Instead, they examine the hardship people experience when forced into retirement before the age when Social Security or private pension funds become available. If people are forced to retire before retirement funds become available, their level of welfare may be greatly reduced (p. 162).

The authors discover that most of those who retire before sixty-five do so involuntarily, suffering an income loss that results in an average decrease in personal consumption of thirty percent (p. 153). This result suggests that public assistance programs should be extended to more adequately cover early retirees (p. 175). For example, the Social Security system could be modified to allow people to withdraw part of their Social Security contributions before age sixty-two if they become involuntarily retired. Hausman and Paquette support such a modification, modelled along the lines of a private 401(k) savings plan, which many employers have already established (p. 175).

The availability of Social Security benefits affects the decision to retire by reducing the cost of not working. In *The Effect of Social Security on Labor Supply*, Robert Moffitt examines the resulting impact on labor supply and its policy implications. The cost consequences will depend critically on the responsiveness of retirement decisions to the level of Social Security benefits (pp. 183–84).

Moffitt uses a time-series model to confirm social security's impact on labor force participation since World War II. Contrary to previous studies, however, Moffitt finds that the most dramatic effects took place during the 1950's, and not after the dramatic changes in Social Security benefits that occurred in

1972 (p. 219). Further, the large shifts in the 1950's resulted from general increases in benefits and coverage during the preceding decades, and not to the relatively large changes actually implemented in 1950 (p. 215). Finally, the declines in labor force participation during the 1970's cannot be explained entirely by changes in social security wealth (p. 219).

Moffitt's study reveals that the conventional view—that large, abrupt changes in Social Security benefits would greatly affect labor force participation—may be incorrect (p. 218). On the other hand, Moffitt notes that future changes in Social Security are not the complete solution to recent declines in labor force participation rates (p. 219). If Moffit is correct, other factors affecting labor supply must be carefully studied.

Approximately one-third of elderly single women, many of them widows, live in poverty (p. 229). But few aged married women are poor (p. 229). In *Life Insurance of the Elderly: Its Adequacy and Determinant*, Alan J. Auerbach and Laurence J. Kotlikoff investigate this disparity. The authors address three questions: how large are private life insurance holdings relative to the amounts needed to maintain the previous standard of living of surviving spouses; do Social Security survivor benefits significantly increase the amount of life insurance protection; and is the pattern of private insurance purchases consistent with the idea that Social Security survivor insurance should subsititute dollar for dollar for private life insurance?

The authors find that a significant minority of older couples are inadequately insured, even when Social Security survivor benefits are included (p. 230). Insurance protection is especially poor for wives (p. 241). For example, a third of women whose husbands died between 1969 and 1971 experienced a decline of at least twenty-five percent in their standard of living (p. 241).

Auerbach and Kotlikoff urge policy makers to reassess the relative sizes of retirement and survivor benefits in Social Security (p. 261). The current amount of Social Security survivor insurance is inadequate for many older people, particularly widows whose standard of living depends on the continuation of their husbands' earnings (p. 230). Households do not appear to offset increases in Social Security survivor benefits by reducing their private insurance coverage, so increases in public coverage would improve the welfare of elderly people generally (p. 231). A public program to encourage families to purchase more adequate private insurance would also help (p. 261). Unfortunately,

Auerbach and Kotlikoff fail to state how such a program would be structured or how it could be implemented.

Many of the conclusions reached in the above papers may at first appear intuitive. Of course miners suffer more job-related health problems than do law professors. But not all of the authors' findings are so predictable. For example, Moffitt achieves some surprising results in his study of the labor-supply effects of Social Security. Poterba and Summers' study of the relationship between mortality and morbidity covers an area of lively debate. Even where their conclusions are not surprising, the papers help determine the kinds of information we need to gather, and how to use it.

But sufficient information is only valuable if it is used to develop useful policies. This translation from data analysis to prescription is the ultimate contribution a book like this must make. The authors whose papers are collected in *Work, Health, and Income Among the Elderly* provide only brief summaries of the policy implications that follow from their studies. A legislator considering a vote on a proposed change in Medicare cannot be expected to understand, much less interpret, the economic analysis presented. And the brief concluding paragraphs will not answer all of his or her questions regarding, for example, what aspects of Social Security most directly inhibit labor supply.

The usefulness of this volume, then, lies not in its comprehensiveness or in its direct application to policy analysis. Its contribution lies in its role as an addition to the growing literature on the problems of the elderly. Best suited to study by other economists, the volume offers valuable insights that can be used effectively by staffs of legislative committees and advocacy groups concerned with these problems.

—H. Bradley Southern

IMPACT: HOW THE PRESS AFFECTS FEDERAL POLICYMAKING. By *Martin Linsky*. New York: W.W. Norton & Co., 1986. Pp. xvii, 225, appendices, notes, index. $19.95 cloth.

Over the past decades, the media has become a virtually omnipresent power, "one of the most potent institutions in contemporary society."[1] Whether it is providing instantaneous coverage of the assassination attempts of President Reagan and Pope John Paul II, announcing the results of presidential elections before the polls have closed, or uncovering the latest government scandal, for most Americans the media provides the information that allows us to perceive and evaluate the events of the world. With all this power, the media inevitably influences as well as informs. In *Impact: How the Press Affects Federal Policymaking*, Martin Linsky attempts to assess the role that the media plays in affecting the policymaking of the federal government. While certainly not providing all the answers in this area, the book makes for lively reading and introduces a number of somewhat troubling questions about the role of the media as an active player in the federal policymaking process.

The book presents the results of six case studies[2] and an extensive survey of present and former government officials. The case studies cover a wide range of issue areas and types of media involvement including: 1) the reorganization of the Post Office in 1969; 2) the investigation and eventual resignation of Vice-President Agnew; 3) the Carter Administration's decisions involving the production of the neutron bomb; 4) the relocation of several hundred families from the contaminated Love Canal region; 5) the Reagan Administration's involvement in the controversy over granting a tax exemption to Bob Jones University; and 6) the 1984 suspension of Social Security disability reviews.

The case studies, which constitute a significant portion of the book, provide an excellent insight into the decisionmaking process of the government in specific instances. While more case studies would of course have been helpful, the ones chosen are basically sufficient both to prove Linsky's points and to give the reader a flavor of the issues. Unfortunately, Linsky focuses

[1] Orren, *Thinking About the Press and Government*, in M. LINSKY, IMPACT: HOW THE PRESS AFFECTS FEDERAL POLICYMAKING 1 (1986).

[2] The case studies themselves are published separately in M. LINSKY *ET AL.*, HOW THE PRESS AFFECTS FEDERAL POLICYMAKING: SIX CASE STUDIES (1986).

too much attention on areas where the media played a negative role in the policymaking process, cases where the policy chosen resulted in public relations disasters for the presidential administration taking action. This bias tends to demonstrate only the power of the media to prevent certain government action or to make certain steps more risky as a political matter. The most significant "success" studied was the reorganization of the Post Office, where Linsky cites the barrage of information sent to the media and the active role of Winston Blount, the Postmaster General, as major factors in the successes of the policy (pp. 151–66).

Linsky complements the case studies with an extensive set of interviews with senior government officials. In a somewhat systematic way, the comments vary across time and administrative position, and it is an amusing intellectual game to compare the attitudes of these officials towards the press with the picture painted by the media concerning these officials.

Linksy begins the book by assessing the relationship of the press and government in today's society (pp. 40–68). For those whose view of the relationship between the press and the government is shaped primarily by images of Sam Donaldson screaming questions at President Reagan whenever he can get within hearing range, or by memories of the media's role in the downfall of President Nixon, it may come as a surprise that this relationship has not always been viewed as an adversarial one. But the era where noted political reporters are simultaneously acting as political advisers to world leaders is for the most part in the past.[3] Today, most competent politicians and probably most Americans realize that the media is constantly searching for trouble in the government, and focuses primarily on its negative aspects.[4]

---

[3] For a look at the extensive involvement of one of America's most highly regarded columnists with political officeholders and candidates, see R. STEEL, WALTER LIPPMAN AND THE AMERICAN CENTURY (1980). Similar occurrences are not unknown today. George Will has been a primary figure. During the 1980 election, Will acted as part of the team preparing President Reagan for his debates against then-President Carter. *See* J. GERMOND & J. WITCOVER, BLUE SMOKE AND MIRRORS: HOW REAGAN WON AND WHY CARTER LOST THE ELECTION OF 1980 277 n.* (1981). Following the debates, Will praised Reagan's performance. More recently, it has been reported that Will provided Nancy Reagan with advance warning when he was writing negative columns concerning the President. Hackett, *Who's In the Kitchen With Nancy?*, NEWSWEEK, Mar. 16, 1987, at 22.

[4] As one editor noted, in rejecting an upbeat and positive story concerning diplomatic efforts of Averill Harriman, "'No blood. No news'" (p. 144). Senator Simpson (R-Wy.) summed up this attitude in recent comments to the Washington press: "You know very

The premise underlying Linsky's work is that even though the media is not necessarily the enemy of the government official, the official must constantly be aware of the media and must consider the power of the media in acting. While this premise is not a surprising one, the comments from government officials and the case studies reflect a curious ambivalence about its foundations, as many of the situations discussed did not indicate a sufficient awareness of the media.

The controversy surrounding the tax exemptions for Bob Jones University represents possibly the clearest example of a failure to consider the power and role of the media (pp. 95–104). In 1970, the Internal Revenue Service (IRS) decided to take away tax exemptions from racially segregated schools. The IRS justified its decision by arguing that in order to qualify as a charitable organization, an organization must conform to "public policy." The IRS made this decision without explicit congressional authorization. Bob Jones University, a fundamentalist religious school in Greenville, South Carolina, explicitly discriminated against black students in its admissions and administrative policies, and the university had been challenging the IRS decision in the federal courts for almost a decade.

In the process of deciding what position to take on this case at the Supreme Court level, officials at the Treasury and Justice Departments, who were almost exclusively lawyers, held discussions at various levels of the government, including meetings at the White House. Public affairs personnel were excluded from almost all involvement in these meetings. The government ultimately decided that because the I.R.S. decision had not been authorized by Congress, the exemptions should be granted, a decision which the government thought would moot the university's case.

This decision was a public relations disaster for the Reagan Administration. The conclusion Linsky draws from this case study is a simple one. Regardless of the legal propriety of the administration's decision, a better policy result could have been achieved if the administration were more aware of how the media would cover the issue. Linsky argues that the "legalistic" atmosphere that dominated the policymaking process prevented

---

well that you're not asking [President Reagan] things so you can get answers. You're asking him things because you know he's off balance and you'd like to stick it in his gazoo." NEWSWEEK, Mar. 30, 1987, at 17.

the administration from reaching a decision that could be justified to the public, especially given the Reagan administration's reputation on civil rights issues.

Part of Linsky's solution seems simplistic: he treats "public affairs professionals" as virtual saviours for errant policy decisions. While Linsky's admiration for these professionals seems overstated, the point is not. Certainly, the Reagan Administration, sensitive to criticism on its racial policies if not sensitive to the substantive concerns, should have considered the political implications of its decision. Regardless of the legal justification for the action, the administration's action would be presented by the press as a policy that segregated schools would be given the administration's tax blessing.

An improved policy result could probably have been accomplished by bringing in public relations people early on in the process. The same result could also have been accomplished by consulting *some* black leaders during the consideration. Perhaps the clearest conclusion is that lawyers should not be allowed to make political decisions in isolation. While a number of approaches might have prevented the public relations disaster, it was clear that the policy actors were unaware of the potential uproar created by the decision.

This example helps to illustrate many of the book's conclusions. Because the "press and policymakers in Washington are engaged in a continuing struggle to control the view of reality that is presented to the American people" (p. 36), the government must be aware of the media implications of its decisions. Linsky argues that "policymakers will be more successful at doing their jobs if they do better in their relations with the press" (p. 203). More specifically, he argues that "having more policymakers who are skilled at managing the media will make for better government" (p. 203).

In addition to these overarching conclusions, Linsky reaches some more specific conclusions regarding where the press has the most impact and the results of this impact. He notes that the press can play a significant role in accelerating the decision-making process. In the Love Canal relocation, for example, the premature release of a report discussing chromosomal damage from the chemical leaks required perhaps an equally premature decision by the Carter administration to relocate nearby families (pp. 71–81, 107–08). Media attention can also force the decision to be made at a higher level of the federal bureaucracy (pp. 109–

12). Generally, Linsky concludes that "the press has more substantial and significant an impact on the process of policymaking than on the content of the policies themselves" (p. 118). Despite this general finding, he notes that "in a small but significant number of policy decisions the outcome would clearly have been different if the press had not been there" (p. 118).

Linsky also investigates where the press is likely to have the most impact. One factor is the involvement of public affairs staffs at an early stage in the decisionmaking process. He views the foreign policy area as one where press coverage is traditionally extensive, and the potential for press influence is therefore at its highest (pp. 128–29). In policy areas where media attention is less consistent, such as agriculture and social security, the policymakers have a greater opportunity to influence media coverage (p. 129). Linsky points out, however, that the officials in these latter areas often squander this opportunity by ignoring the media unless there is a potential problem (pp. 109–10).

While most of the book deals with the operation of the executive branch in formulating policy, there is also a stimulating discussion on the differences between how the administration deals with the press and how Congress interacts with the same forces. Linsky makes two observations. First, "[m]embers of Congress need the press in a more direct sense than do those in the departments and agencies" (p. 134). This conclusion appears justified, given the need of Congressmen to generate publicity as a means of contacting their constituents. By comparison, most bureaucrats and policymakers are less concerned with obtaining favorable coverage at home than with influencing policy within their departments. Second, and possibly as a result of the need for the media, Linsky believes that "[m]embers of Congress look on the press more as a constant presence to be dealt with and used as a resource than as a force outside of their jobs which nevertheless affects their performance" (p. 135). This awareness leads Congress to maintain constant communications with the media, even where there is not a fire to put out. Linsky makes some insightful comments about Congress. Unfortunately, his analysis is not a focal point of the book, and his discussion is too cursory for the importance of the material.[5]

[5] Linsky's work indicates that a study similar to his should be done which focuses on the impact of the press on the operations of Congress. A recent study has been made of the nature of the press's coverage of the Senate. *See* S. HESS, THE ULTIMATE INSIDERS: U.S. SENATORS IN THE NATIONAL MEDIA (1986) (reviewed at 24 HARV. J. ON LEGIS. 351 (1987)).

Linsky presents some suggestions for governmental improvement in handling the media in a chapter entitled "Toward Better Policymaking." Generally, Linsky sees an active press strategy, rather than a reactive one, as the most effective way for the policymakers to use the benefits of the press while simultaneously minimizing the media's potentially negative impact. The evidence Linsky accumulates strongly supports the active strategy. As Linsky points out, where access to the White House or to agencies is curtailed by an administration trying to avoid unfavorable coverage, the media, which does not stop requiring news to keep busy, is forced to rely more and more on policy opponents and critics of the administration for its information (p. 212). Therefore, the result of avoiding the press may actually be a reduction in the ability of the administration to generate favorable media attention for various policy positions.

Impact raises a number of questions that it does not attempt to answer. Many of these questions are included in a section on areas for future research (pp. 223–25). Two other questions jump out at the reader. First, what is the role of the media in affecting who is given the opportunity to make policy? The role that the media plays in getting a president elected deserves closer scrutiny. The second question is normative: Should the media have the power that it does to affect the operations of the policy process? While the media's role in providing information to the public is a fundamental part of our democracy, it is not clear that the democratic system anticipates a media that has such an active role in the formulation and implementation of policy decisions.

All in all, the Linsky book is an interesting addition to the vast literature surrounding the role of the media in American politics and policy. While the book provides no startling new evidence or insights, it is an interesting compilation of information that raises a number of stimulating issues and, at the same time, answers a few questions about the role of the media in affecting federal policymaking.

—*Kirk J. Nahra*

WHY WE LOST THE ERA. By *Jane J. Mansbridge*. Chicago, Ill.: University of Chicago Press, 1986. Pp. 327, appendix, notes, index. $35.00 cloth, $9.95 paper.

One might think from its title that Jane J. Mansbridge has directed *Why We Lost the ERA* primarily toward proponents of the unratified Equal Rights Amendment (ERA) to the United States Constitution. But as Mansbridge explains in the preface, by "we" she means "the entire American citizenry, including those who opposed the ERA and those who did not care" (p. x). Indeed, while the book focuses upon the efforts of opponents and proponents of ratification of the ERA, *Why We Lost the ERA* addresses a larger audience composed of those interested in women's studies, the constitutional amendatory process, organizational psychology and, more abstractly, the interplay between law and politics.

Drawing heavily upon public opinion polls in the first few chapters, Mansbridge begins her analysis of the ERA ratification campaign by discussing the incongruity between public support for the ERA and public opposition to other substantive rights affecting women. Mansbridge observes that support for the ERA, though steady during the ten years of the ratification process, was only marginal and always superficial (pp. 20–22). From 1970, the year in which a polling organization first asked the American public about the Equal Rights Amendment, until 1982, when the time allowed for ratification by the states expired, a majority of between fifty and seventy percent of Americans always claimed they supported the ERA (pp. 201–19). In New York, New Jersey, Florida, Iowa, and Maine, polls conducted prior to state-wide referenda on the ERA consistently demonstrated majority approval (p. 14). Nonetheless, in each of these states, the majority voted against the ERA (p. 14).

Mansbridge believes that this inconsistency in public opinion highlights a fatal inconsistency in the source of public support for the amendment. While the amendment had great appeal as an abstract right, Americans were either unsure or fearful of the substantive effects of what would have been the twenty-seventh amendment to the United States Constitution (p. 20). In a survey conducted in 1977, the National Opinion Research Center found that 67% favored ratification of the ERA, 25% opposed it, and 8% had no opinion (p. 20). Surprisingly, however, the same polling sample expressed quite traditional opinions about

women's roles. For example, 62% thought that married women should not hold jobs when their husbands were able to support them (p. 20).

While the polls are interesting, Mansbridge never draws meaningful conclusions from them. Did public ambivalence cause the failure of the ERA? Was this ambivalence a symptom of the lack of substantive change which the ERA would produce? Or was it the result of the ERA movement's failure to promote the ERA effectively and palatably? Mansbridge's initial use of these polls raises unanswered questions about what conclusions the reader should draw, and about the direction Mansbridge's analysis will take in the remainder of the book.

Mansbridge next analyzes the legal effects which passage of the Equal Rights Amendment would produce. She concludes that the legal effects of passage would have been minimal. First, Mansbridge argues that the ERA, which spoke of equality of rights under the law, went no further than the Fourteenth Amendment[1] in prohibiting sex discrimination by private organizations and individuals (p. 37). Second, the Equal Pay Act of 1963[2] had invalidated "protective legislation" of the states which required a higher minimum wage for women and thus provided a disincentive to hiring women (p. 37). Third, Title VII of the Civil Rights Act of 1964[3] had by 1972 been interpreted by the Equal Employment Opportunity Commission to make unenforceable legislation limiting the hours employers could require women to work and the weights women could lift, as well as legislation completely barring women from some occupations (p. 37).[4] In fact, Mansbridge intriguigingly argues, the proposed ERA was far weaker than Title VII, which provides a mechanism for restraining the discriminatory behavior of private employers (p. 39).

In addition to legislation, beginning in 1973 with the Supreme Court's decision in *Frontiero v. Richardson*,[5] the courts began to look more closely at laws which discriminated between men

---

[1] U.S. CONST. amend. XIV.

[2] Pub. L. No. 88-38, 77 Stat. 56 (codified as amended at 29 U.S.C. § 206(d) (1978)).

[3] Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. § 2000e-5(e) (1981)).

[4] *See* 118 CONG. REC. 35,474 (1970) (legal memorandum from Equal Employment Opportunity Commission to Sen. Birch Bayh); *see also* Rosenfeld v. Southern Pacific Co., 444 F.2d 1219 (9th Cir. 1971) (upholding EEOC position).

[5] 411 U.S. 677 (1973).

and women. In 1976, *Craig v. Boren*[6] established gender as a quasi-suspect classification invoking intermediate scrutiny under the Equal Protection Clause of the Fourteenth Amendment.[7] Mansbridge, echoing *Craig*, argues that a state can classify individuals on the basis of gender only when the state can demonstrate that the classification has a "substantial" relationship (more than a "rational" relationship but less than a "necessary" one) to an "important" governmental objective (more than a "legitimate" objective but less than a "compelling" one) (p. 50). In effect, *Frontiero* and *Craig* operate to make most of the legislation and governmental practices that the ERA would have eliminated presumptively unconstitutional even in the absence of an ERA (pp. 46–47). Mansbridge's analysis of Supreme Court decisions demonstrates, however, an unfamiliarity with the nuances of constitutional doctrine; it fails to recognize the elasticity of Supreme Court standards—for example, that categorization according to strict, intermediate, or rational-basis levels of scrutiny is often the end of analysis rather than a mechanism for any further meaningful constitutional inquiry into the importance or policy of the applied labels. While this shortcoming might disturb legal scholars, it detracts little from Mansbridge's sociologically-oriented discussion.

Because of prior action taken by Congress and the courts, proponents of the ERA had few persuasive explanations of the substantive effect which ratification would have on women's roles. Mansbridge suggests that ratification would have rendered gender a suspect classification rather than a mere quasi-suspect classification (p. 50). Nonetheless, the effect of the ERA's passage would have been far smaller in 1976, when *Craig* was decided, than in 1972, when Congress first presented the amendment to the states for ratification (pp. 56–59). Mansbridge believes, however, that ratification of the ERA would still have provided great indirect benefits to women. The amendment would have symbolized congressional and public intent to remove gender inequalities (p. 60). Ratification would have motivated judges to re-interpret existing laws and legislators to enact new laws. Mansbridge posits an Equal Rights Act based on both the Fourteenth Amendment and the ERA; this law would have

---

[6] 429 U.S. 190 (1976).
[7] U.S. CONST. amend. XIV, § 1, cl. 3.

benefited women in the long run by eliminating discriminatory impacts rather than just discriminatory intent (p. 59, 197–98).

Unfortunately, active participants in the struggle for ratification were not content with symbolic progress, and they proceeded to radicalize the debate over the ERA's substantive effects. Relying upon her own observations as a participant in the effort to ratify the ERA in Illinois, Mansbridge states that "[b]ecause neither passing nor defeating the ERA promised any immediate tangible benefits to activists, both sides recruited activists by appealing to principle" (p. 118). Proponents of the ERA stressed, for example, their interpretation that ratification would require elimination of the military combat exclusion for women (pp. 60–66) and would require state funding of abortions (pp. 122–28). Opponents of the ERA proclaimed that ratification would lead to unisex toilets (p. 112) and homosexual marriage (pp. 136–37). On the issue of combat exclusion, Mansbridge makes a plausible argument that the Supreme Court would have read the War Powers Clauses of the Constitution[8] as giving broad discretion to military officials to assign women to serve wherever their skills or talents were applicable and needed, thus allowing the continuance of the combat exclusion for women (p. 63).

Mansbridge points out that the rhetoric of the ERA's proponents on the combat exclusion issue was therefore not only legally incorrect but, more importantly, politically unwise. From public opinion polls, proponents knew that debate on issues such as combat exclusion and abortion funding created the greatest controversy and opposition to ratification and yet they chose these interpretations instead of "deferential" interpretations (p. 68). The principled idealists in the pro-ERA camp, Mansbridge argues, "would rather lose fighting for a cause they believe in than win fighting for a cause they feel is morally compromised" (p. 3). This approach radicalized the debate. Mansbridge includes quotes from Illinois legislators describing the activists on both sides as "obnoxious" and "wild-eyed crazies" (p. 146). The consideration of the ERA became less a debate over the realistic substantive merits of the proposed amendment than an unstructured battle of competing ideological and religious attitudes toward marriage, children, and sexuality.

---

[8] *Id.*, art. I, § 8, cl. 11–16.

In the midst of this ideological debate, the ERA received two blows from which it could not recover. First, in 1973, the Supreme Court decided in *Roe v. Wade*[9] that women had a constitutional due process right to an abortion in the first trimester of pregnancy. This exarcerbated the tension between pro-ERA and anti-ERA forces over religious and ideological issues by raising the specter of increased federal intrusion into areas of family life and privacy (pp. 173–76). Second, Phyllis Schlafly began to form a very well-organized and effective opposition to the ERA. She united the opposition into a more hierarchical, coherent, professional and politically adept organization than the pro-ERA forces could ever muster (p. 133). "Once the ERA lost its aura of benefitting all women and became a partisan issue," Mansbridge argues, "it lost its chance of gaining the supermajority required for a constitutional amendment" (p. 6).

Mansbridge draws from her participation as an independent board member of ERA Illinois and her observation of the ERA ratification process the broader lesson that mobilizing volunteers produces ideological purity and polarization (p. 178). Because the volunteers receive little direct tangible benefit from their participation, they tend to get their satisfaction from the sense of having sacrificed, with others, for a common good. The members turn inward, building a sense of community and breeding homogeneity (pp. 180–81). Mansbridge believes that the pro-ERA movement suffered from homogeneity and polarization less than groups in other social movements have because of its emphasis on participation and debate (p. 184–86). She ruefully but perceptively concludes, however, that as the chances for real substantive progress for equal rights through constitutional amendment dimmed, the rhetoric of the pro-ERA forces became more shrill and less in touch with the legislators and with the millions of Americans whose support was necessary for ratification of the Equal Rights Amendment.

Mansbridge's book attempts to combine scholarly disengagement, in describing why the ERA failed, with political advocacy, in describing why it should have been ratified (p. x). Mansbridge succeeds on both counts. But the most valuable contribution of

---

[9] 410 U.S. 113 (1973).

Why We Lost The ERA lies in the unflinching honesty of its author, who participated in the ERA decade as more than a neutral observer and who provides the first-hand description that makes the events and issues seem fresh in the reader's mind.

—*Allen W. Hubsch*