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POLICY ESSAY

A NEW HORIZON FOR CAMPAIGN FINANCE REFORM

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A generation has passed since the federal government implemented a campaign finance reform initiative. In that time, the amount of money needed to be a competitive candidate for any elected office has skyrocketed, and the maneuvers employed to assemble these funds have become, accordingly, more sophisticated. The authors survey the history of campaign finance reform efforts, including the Federal Election Campaign Act of 1971 and the Buckley v. Valeo *precedent, and examine recent judicial, legislative, and political developments, including state-level legislative efforts, the Supreme Court's holding in* Nixon v. Shrink Missouri Government PAC, *and early events in the 2000 presidential campaign. They argue that changed political circumstances and improved economic conditions have made the time ripe for new, comprehensive campaign finance legislation, and they offer an outline for such legislation.*

As the nineteenth century came to a close, former United States Senator Mark Hanna (R-Ohio) noted that "[t]here are two things that are important in politics. The first is money and I can't remember what the second is."[1] A century later, money is arguably an even more powerful force in American politics. In a survey conducted after the 1996 presidential election, three in four respondents expressed agreement with the statement that "many public officials make or change policy decisions as a result of money they receive from major contributors."[2]

Indeed, it is hard to find an American who thinks we should not do something to reform the way we finance our political campaigns. There is a growing consensus that significant changes need to take place, as was demonstrated by the fact that four out of five voters interviewed in exit polls at the New

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[1] Helen Dewar, *For Campaign Finance Reform, A Historically Uphill Fight*, WASH. POST, Oct. 7, 1997, at A5.

[2] Francis X. Clines, *Most Doubt a Resolve to Change Campaign Financing, Poll Finds*, N.Y. TIMES, Apr. 8, 1997, at A1.

Hampshire primaries earlier this year supported campaign finance reform efforts.[3] After years of being relegated to editorial pages and traditional academic discourse, the finance issue has leaped to the front pages during the current campaign season.[4]

To their credit, several members of both major political parties have made a determined effort to unite behind campaign finance reform. Recent federal legislative efforts[5] have centered on abolishing the use of "soft money"—spending by political parties that can flow directly from corporate coffers and unions and in unlimited amounts from wealthy individuals. This is a laudable goal, as the use of soft money creates a particularly egregious appearance of corruption. Such large dollar amounts given to political parties create concern that financial interests can buy access to and influence with lawmakers.[6]

While abolishing soft money alone may be a terrific first step, however, this will not by itself make our political system accessible to and fair for all citizens. Our democratic system must *engage* the public. We can accomplish this by eliminating the perception that money—rather than ideas and leadership—governs, and by working to change the unfortunate realities that give rise to this perception. Such a lofty goal calls for a more comprehensive approach.

There are several reasons that the current campaign finance system must be reformed. First, campaigns are too expensive. Over the past two decades, candidates for congressional seats have spent more than $2 billion.[7] As the cost of political contests rises, voters come to view money, rather than issues and leadership, as the driving force behind elections.[8] The sheer amount

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[3] *See* Tom Baxter, *New Hampshire Rewrites Battle Plans*, ATLANTA J. & CONST., Feb. 2, 2000, at A1; *Poll: Voters Support Campaign Finance Reform*, ASSOCIATED PRESS, Feb. 18, 2000.

[4] *See, e.g.*, Stephen Braun, *Bradley, McCain Take On Reform, and Front-Runners*, L.A. TIMES, Dec. 17, 1999, at A1.

[5] *See, e.g.*, Bipartisan Campaign Reform Act of 1997, S. 25, 105th Cong. (1997).

[6] *See, e.g.*, Fred Wertheimer & Susan Weiss Manes, *Campaign Finance Reform: A Key to Restoring the Health of Our Democracy*, 94 COLUM. L. REV. 1126, 1129–31 (1994) (identifying several studies documenting public concern with the degree of influence wielded by generous donors and aggressive interest groups); H.R. REP. NO. 93-1239, at 3 (1974) ("[u]nder the present law the impression persists that a candidate can buy an election by simply spending large sums in a campaign").

[7] *See* Kenneth N. Weine, THE FLOW OF MONEY IN CONGRESSIONAL ELECTIONS 7 (Brennan Center for Justice at New York University School of Law, Campaign Finance Reform Series, 1997).

[8] *Cf.* Clines, *supra* note 2.

spent fuels speculation about the integrity of our democratic processes.[9]

Second, the increasingly exorbitant cost of running for public office allows special interests to exert too much influence over decisionmaking in government and, accordingly, hampers average citizens' ability to make their own views heard in a meaningful and influential way.[10] Third, the current cost of campaigning requires that politicians spend too much of their time raising the requisite funding, thereby detracting from their ability to devote as much time as they otherwise might to serving their constituency or mastering critical policy issues.[11] Rather than being encouraged to conduct "town hall" meetings or to speak with community leaders, for example, a candidate might instead be advised to attend lucrative fundraising events.[12]

As these various facts should make clear, our system in its current state cries out for reform.[13] Yet there is a fourth, critical reason that our campaign finance system must be reformed: we need our most talented people to consider service in public office. Currently, many potential (and potentially high-quality) candidates believe they lack the personal wealth or financial savvy that they think is necessary to compete for political office. Consequently, many who might otherwise do so decline to make the effort. As a recent news account noted with regard to the upcoming 2000 elections: "[T]he candidate fields are being narrowed early, often because the contenders are dumping their own money into their campaigns and scaring off challengers."[14] If we truly want to persuade our most talented citizens to turn their passion to public service, we must see to it that electoral out-

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[9] *See, e.g.*, Wertheimer & Manes, *supra* note 6, at 1129–31.

[10] *See* Jamin Raskin & John Bonifaz, *Equal Protection and the Wealth Primary*, 11 YALE L. & POL'Y REV. 273, 276 (1993).

[11] As Senator Frank Lautenberg (D-N.J.) stated when he opted not to run for reelection in 2000: "I do not want to sit there all these hours of each day asking for money when in fact there is good solid work to be done. It would distract me from the job I was sent to Washington to do." *See Clean Money Campaign Reform* (visited January 14, 2000) <http://publicampaign.org/cleanmoney.html>.

[12] *See* Vincent Blasi, *Free Speech and the Widening Gyre of Fundraising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 COLUM. L. REV. 1281, 1282–83 (1994) ("[L]egislators continually concerned about re-election are not able to spend the greater part of their workday on matters of constituent service, information gathering, political and policy analysis . . . .").

[13] *See, e.g.*, Cass Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390, 1399 (1994) (arguing that campaign finance reform promotes political equality).

[14] Susan Milligan, *Candidates with Cash Narrow Field: Wealthy Congressional Hopefuls Win Party Support, Unsettle Rivals*, BOSTON GLOBE, Oct. 25, 1999, at A1.

comes turn on the power of ideas rather than on candidates' financial resources.

The momentum is clearly on the side of reformers. In light of progressive state initiatives,[15] apparent support for reform in recent Supreme Court jurisprudence,[16] and the attention that campaign finance reform has already received in the current election news cycle,[17] movement on this issue appears imminent.

I. A Brief History of Campaign Finance Reform

To assess properly current campaign finance issues one must first understand the recent history of reform efforts. This Section discusses the passage of the Federal Election Campaign Act and the Supreme Court's ruling as to its constitutionality. It then addresses more recent congressional efforts.

A. *The FECA and the* Buckley *Precedent*

Almost three decades ago, in response to the rising cost of campaigning for federal political office, Congress passed the Federal Election Campaign Act of 1971 (FECA).[18] In 1974, on the heels of the Nixon Administration scandals, Congress amended the law.[19] In overhauling the campaign finance system, the House Committee Report noted that "[u]nder the present law the impression persists that a candidate can buy an election by simply spending large sums in a campaign."[20] As the Supreme Court noted in 1976, FECA was clearly an attempt to quash the appearance of corruption that was generated when candidates received excessive sums in the form of private contributions.[21]

In particular, the passage of FECA was a congressional response to the increasing use of television by candidates.[22] In fact,

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[15] *See infra* notes 41–55 and accompanying text.

[16] *See infra* notes 56–63 and accompanying text.

[17] *See infra* notes 65–67 and accompanying text.

[18] Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended at 2 U.S.C. §§ 431–455 and in scattered sections of 18 & 47 U.S.C. (1994)).

[19] Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974) (codified as amended at 2 U.S.C. §§ 431–455 and in scattered sections of 18 & 47 U.S.C. (1994)).

[20] H.R. Rep. No. 93-1239, at 3 (1974).

[21] *See* Buckley v. Valeo, 424 U.S. 1, 17 (1976).

[22] *See* Jill E. Fisch, *Frankenstein's Monster Hits the Campaign Trail: An Approach to Regulation of Corporate Political Expenditures*, 32 Wm. & Mary L. Rev. 587, 643

FECA went so far as to place limits on how much a candidate could spend on paid media when running for federal office.[23] Moreover, the 1974 amendments placed specific limits on *total* spending by House and Senate candidates in primary and general elections.[24] For the presidential election, FECA provided public matching funds during the primary season and additional public financing for the general election.[25] Though the Supreme Court struck down portions of FECA in *Buckley v. Valeo*,[26] it is still the legislative instrument that dictates the rules for federal elections.

Current and future reform efforts face a constitutional landscape shaped by the *Buckley* case, in which the Court found mandatory spending limits to be an unconstitutional violation of a candidate's First Amendment right of free speech.[27] The *Buckley* Court, however, did find *contribution* limits to be an acceptable means of countering the appearance of corruption in the campaign finance system.[28] The Court also held open the possibility of public financing of presidential elections.[29]

Perhaps the most profound part of the *Buckley* opinion was the Court's determination that money was akin to speech for First Amendment purposes. The Court stated that:

> [V]irtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs .... The electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech.[30]

Again, any effort to reform the campaign finance system must consider the implications of *Buckley*.

(Spring 1991) (noting that "[c]ongressional concern about voter reactions to superficial political advertising was one of the motivating factors behind the increase in the regulation of campaign financing").

[23] *See* Pub. L. No. 92-225 § 104, 86 Stat. 5 (1972) (codified at 47 U.S.C. § 803 (1972)) (repealed 1974).

[24] *See* Pub. L. No. 93-443, 88 Stat. 1263, 1264–65 (1974) (not codified) (repealed 1976).

[25] *See* The Revenue Act of 1971, Pub. L. No. 92-178 § 801, 85 Stat. 562 (1971) (codified as amended in scattered sections of 26 U.S.C. (1994)).

[26] 424 U.S. 1 (1976).

[27] *See id.* at 48–49.

[28] *See id.* at 20–38.

[29] *See id.* at 57.

[30] *Id.* at 19.

B. *Recent Congressional Reform Efforts*

Admirable attempts have been made over the past several years to attain bipartisan consensus regarding the questions raised by the current campaign finance system and the role of money in politics more generally. Reform efforts such as those led by Senators John McCain (R-Ariz.) and Russell Feingold (D-Wis.) in the Senate, Christopher Shays (R-Conn.) and Martin Meehan (D-Mass.) in the House, as well as by the Clinton Administration have forced members of Congress to focus on this issue and have brought needed national exposure.[31]

When Senator Feingold helped introduce the Bipartisan Campaign Reform Act of 1997 (popularly known as the McCain-Feingold Bill),[32] he noted that "[f]or years, campaign finance reform has stalled because of the inability of the two parties to join together and craft a reform proposal that is fair to both sides."[33] Senator McCain joined Senator Feingold, declaring that through the proposed legislation "we can change the face of politics today."[34]

The McCain-Feingold Bill was ambitious. It would have provided free and discounted television time and discounted postal rates for congressional candidates willing to limit their total expenditures.[35] Such candidates would not be allowed to spend more than $250,000 in personal funds and would have to raise the majority of their campaign money (in the form of $1,000-maximum donations) from individuals within their home states.[36] The legislation doubled the contribution limit to $2,000 for a participating candidate whose opponent chose not to participate in the voluntary system,[37] and it provided additional public funds to a participating candidate whose non-participating opponent

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[31] *See* S. 25, 105th Cong. (1997). "The rules governing our system of financing [f]ederal election campaigns are sorely out of date. Enacted more than two decades ago when election campaigns were much less expensive, the rules have been overtaken by dramatic changes in the nature and cost of campaigns and the accompanying flood of money." President William J. Clinton as quoted by Jeremy Lehrer, *The Reform Quandry: As McCain-Feingold Awaits Final Judgment, the Debate Continues About the Merits and Finer Points of Campaign Finance Reform*, 25 HUM. RTS. J. 10, 10 (Winter 1998).

[32] S. 25, 105th Cong. (1997).

[33] Bipartisan Campaign Reform Act of 1997 (Jan. 21, 1997) (press release).

[34] *Id.*

[35] *See* S. 25, 105th Cong. § 503(a)(1)(B) (1997).

[36] *See id.* § 105(3)(B).

[37] *See id.* § 241(6).

received independent expenditures on his own behalf.[38] In addition, the legislation prohibited national parties from receiving unregulated and unlimited soft money and tightened the rules for political action committee (PAC) contributions to candidates.[39] Subsequent efforts to pass either the McCain-Feingold Bill in the Senate or the legislation introduced by Representatives Shays and Meehan in the House, however, have been thwarted by procedural maneuvers.[40]

II. Positive New Developments

While legislative attempts to reform the campaign finance system have been stymied in Congress, there has been positive movement in various states, in the Supreme Court, and in the current presidential campaign. These advances are cause for optimism among those passionate about reforming our system of democratic elections, and, taken together, they provide a roadmap for Congress to follow in its own efforts.

A. *The States as Laboratories of Reform*

The states are the most fertile ground for significant campaign finance reform efforts—truly "laboratories of reform."[41] Voters in such states as Maine, Massachusetts, and Arizona have passed

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[38] *See id.* § 503(d)(2).

[39] *See id.* §§ 324, 325(a).

[40] *See, e.g.*, 144 Cong. Rec. S1045 (daily ed. Feb. 26, 1998) (citing failed cloture vote); 144 Cong. Rec. S1046 (daily ed. Feb 26, 1998) (statement of Sen. John Glenn (D-Ohio)) ("the majority did not prevail because of the cloture that we would have been required to get to break a filibuster"). Ann McBride, President of Common Cause, stated that "[a] minority of Senators today turned their backs on the American people and used an obstructionist filibuster to thwart the will of the majority of Senators who stand ready to pass campaign finance reform." *Quoted in* Samuel M. Walker, Note, *Campaign Finance Reform in the 105th Congress: The Failure to Address Self-Financed Candidates*, 27 Hofstra L. Rev. 181, 195 n.98 (Fall 1998). *See also* Alison Mitchell, *G.O.P. Defections Delay House Vote on Campaign Bill*, N.Y. Times, Mar. 27, 1998, at A1 (detailing the procedural maneuvers that permitted members of Congress to avoid a vote). Unfortunately, McCain-Feingold's adversaries have blocked even the simple proposal to ban soft money.

[41] *See, e.g.*, Dana Milbank, *Campaign-Finance Reformers Pin Hopes on the States*, Wall St. J., Dec. 26, 1997, at A10; Julia Malone, *Election '98 Issues: Special Interests Groups' Donations Fueled Races Nationwide*, Atlanta Const., Nov. 5, 1998, at K4; Herbert E. Alexander, *Introduction: Rethinking Reform, in* Campaign Money: Reform and Reality in the States, 1, 13 (Herbert E. Alexander ed., 1976) (paraphrasing Justice Brandeis' dissenting opinion in New State Ice Co. v. Liebman, 285 U.S. 262, 311 (1932)).

comprehensive ballot initiatives.[42] Vermont, Minnesota, and Missouri have also passed legislation aimed at eliminating the undue influence of money in the political system.[43] These legislative initiatives arose from concern that existing finance laws jeopardize "the democratic principle of 'one person, one vote' by allowing large contributors to have a disproportionate and therefore deleterious influence on the political process, and diminish[ ] the rights of citizens of all backgrounds to equal and meaningful participation in the democratic process."[44] Similar efforts are underway this election season in other states.[45]

The Maine Clean Election Act,[46] a ballot initiative that was approved by a margin of more than ten percentage points[47] and will affect the 2000 election season, is one of the more ambitious examples. The law, which has been challenged in federal court, offers full public financing to candidates who limit themselves to soliciting two sorts of funds—$5 "qualifying contributions" from individuals in a candidate's district, and $100-maximum "seed contributions," which may only be used to finance a candidate's efforts to obtain qualifying contributions. Once a candidate obtains a certain number of qualifying contributions, he may seek "Clean Election Act" status and thus become eligible for public campaign financing and must accept no further private contributions.[48]

A similar initiative, recently passed in Massachusetts,[49] eliminates the transfer of unregulated soft money from national to

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[42] *See* Editorial, *Campaign Reform Dead? Not According to Public*, USA TODAY, Oct. 22, 1997, at 14A.

[43] *See* Editorial, *Vermont's Bid for Better Politics*, BOSTON GLOBE, Apr. 6, 1997, at D6; CAMPAIGN FINANCE REFORM: A SOURCEBOOK (Anthony Corrado et al. eds., 1997) at 337–38 (noting the history of state campaign finance reform initiatives).

[44] *See* 1998 Mass. Acts 395 § 1(a)(1).

[45] In Akron, Ohio, for example, a comprehensive campaign finance reform initiative, already endorsed by at least 33 elected state officials, will be on the November 2000 ballot. *See* Werner Lange, *Don't Kid Yourself: Candidates Are Chosen by the Wealthy*, CINCINNATI POST, Mar. 17, 2000, at A22. In addition, while California's Proposition 25, a campaign finance reform measure, was defeated in March, state legislative leaders plan an attempt to enact campaign reform this year. *See* Carl Ingram, *California and the West: Key Legislator Seeks Bipartisan Campaign Reform Bill*, L.A. TIMES, Mar. 10, 2000, at A3.

[46] ME. REV. STAT. ANN. tit. 21-A, §§ 1121–1128 (West Supp. 1997).

[47] *See Mainers Speak Out for Campaign Reform*, PORTLAND PRESS HERALD, Nov. 8, 1996, at 10A.

[48] *Id.* § 1125; *see* Michael E. Campion, *The Maine Clean Election Act: The Future of Campaign Finance Reform*, 66 FORDHAM L. REV. 2391 (1998) (discussing the reforms in the Maine initiative).

[49] MASS. GEN. LAWS ch. 55A, §§ 2851–2856 (1998). *See also* Kevin Deeley, Recent Legislation, *Campaign Finance Reform*, 36 HARV. J. ON LEGIS. 547 (1999).

state political parties, requires electronic disclosure of campaign contributions to candidates and to PACs, and gives public money to candidates who comply with fixed spending limits and who only accept contributions of $100 or less.[50] Prior to receiving public funds, a candidate must demonstrate support by accumulating "seed money" in contributions of between $5 and $100 from voters registered in his district.[51]

Likewise, the Vermont Campaign Finance Option[52] permits statewide candidates to receive full public financing if they are able to demonstrate support by gaining "seed money" and they agree that they will neither take any other private contributions nor make use of soft money in their state campaigns.[53] Under the Vermont statute, however, even non-complying candidates are subject to relatively strict contribution limits.[54] Moreover, the law stands in direct opposition to *Buckley* in that it limits a candidate's total expenditures regardless of whether he accepts public funds.[55]

B. *The Supreme Court Weighs In*

On January 24, 2000, the day that marked the official beginning of the 2000 presidential campaign, the Supreme Court provided a boost to supporters of campaign finance reform. In *Nixon v. Shrink Missouri Government PAC*,[56] the Court upheld a Missouri statute that limits campaign contributions for state offices. While many had expected the Court to use the opportunity to dilute (if not overturn) its previous holding in *Buckley*, in which it had upheld a $1,000 limit on campaign contributions, the Court instead reasserted its concern with the appearance of corruption created by large donations to candidates. Justice Souter, writing for the Court, said:

> Leave the perception of impropriety unanswered, and the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance. Democracy works "only if the people

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[50] *See id.*
[51] *See id.*
[52] VT. STAT. ANN. tit. 17, §§ 2851–2856 (Lexis Supp. 1997).
[53] *See id.*
[54] *See id.*, § 2805.
[55] *See id.*; *see also* Buckley v. Valeo, 424 U.S. 1, 48–49 (1976).
[56] No. 98-963, 2000 WL 48424 (S. Ct. Jan. 24, 2000).

> have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption."[57]

In a separate concurring opinion, Justice Stevens suggested that certain further reforms of the campaign finance system would pass constitutional muster, concluding that "[m]oney is property; it is not speech."[58] Further:

> Speech has the power to inspire volunteers to perform a multitude of tasks on a campaign trail, on a battleground, or even on a football field. Money, meanwhile, has the power to pay hired laborers to perform the same tasks. It does not follow, however, that the First Amendment provides the same measure of protection to the use of money to accomplish such goals as it provides to the use of ideas to achieve the same results.[59]

Justice Breyer largely agreed. While Breyer (joined by Ginsburg) declared that "a decision to contribute money to a campaign is a matter of First Amendment concern—not because money is speech (it is not)[,] but because it enables speech," he went on to say, "[o]n the other hand, restrictions upon the amount any one individual can contribute to a particular candidate seek to protect the integrity of the electoral process—the means through which a free society democratically translates political speech into concrete governmental action."[60]

Even Justice Kennedy, in his dissenting opinion, expressed concern over the escalating costs of political campaigns and recognized that significant initiatives on the campaign finance reform front could survive First Amendment scrutiny. He declared, first, that soft money "creates dangers" that are "confusing, if not dispiriting, to the voter;"[61] and, second, that he "would leave open the possibility that Congress . . . might devise a system in which there are some limits on both expenditures and contributions, thus permitting officeholders to concentrate their time and efforts on official duties rather than on fundraising."[62] Such language, from a justice who in the same opinion attacked the

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[57] *Id.* at *9 (quoting United States v. Mississippi Valley Generating Co., 364 U.S. 520, 562 (1961)).
[58] *Id.* at *11 (Stevens, J., concurring).
[59] *Id.* at *12 (Stevens, J., concurring).
[60] *Id.* at *13 (Breyer, J., Ginsburg, J., concurring).
[61] *Id.* at *18 (Kennedy, J., dissenting).
[62] *Id.* at *19 (Kennedy, J., dissenting).

Buckley ruling as "inventing an artificial scheme" that "intervene[s] in the dynamics of speech and expression,"[63] is cause for optimism as to the constitutional prospects of a comprehensive reform effort.

C. *The 2000 Presidential Campaign*

The *Nixon* decision was not the only cause for optimism among campaign finance reformers during the early moments of the 2000 presidential campaign. The four leading contenders in the Iowa and New Hampshire primaries[64] all voiced support for some form of campaign finance reform efforts.[65] Three of these four[66] made the issue of banning soft money and other campaign finance initiatives a centerpiece of their campaigns.[67] Reformers have reason to hope that this near-consensus among candidates might provide the momentum needed to make reform efforts a reality.

III. Devising a Federal Reform Effort

A. *A Proposal for Public Financing*

The most comprehensive campaign finance reform efforts on the federal level ought to include the public financing of congressional elections. Policymakers may argue over the specifics of such proposals, but public financing is ultimately the only way, short of constitutional amendment, to prevent private money from playing an overbearing role in such elections.

Public financing permits candidates to focus their own and voters' attention on platforms and leadership rather than on money. As First Amendment scholar Cass Sunstein pointed out more than a decade ago, "what seems to be government regulation of speech actually might promote free speech, and should

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[63] *Id.* at *18 (Kennedy, J., dissenting).

[64] Vice President Al Gore, Senator John McCain (R-Ariz.), Governor George W. Bush (R-Tex.), and former senator Bill Bradley (D-N.J.).

[65] *See, e.g.*, Elizabeth Shogren & Maria L. La Ganga, *Finance Reform Gains a Convert*, L.A. Times, Feb. 16, 2000, at A16.

[66] Vice President Gore, Senator McCain, and former senator Bradley. As of this writing, Senator McCain and former senator Bradley had withdrawn from the campaign.

[67] *See, e.g.*, Shogren & La Ganga, *supra* note 65, at A16.

not be treated as an abridgement at all."[68] Moreover, public financing can level the playing field for candidates and encourage new and talented people to participate more fully in our democracy.

There should be limits, of course, to any public financing system. A candidate should not get something for nothing; rather, a candidate must *earn* public funding, not merely by declaring his intent to participate in a public financing scheme, but by obtaining a specified minimum amount of "seed money." Such money could be raised, for example, in maximum contributions of $100.

Once a candidate has raised $20,000 in this manner, he would be entitled to receive public funding up to the amount allowed for that congressional district. The Federal Election Commission (FEC) would set the amount after evaluating the size of the relevant media market, the cost of media advertising, and the amounts spent in previous campaigns in the district.[69] If dissatisfied, a candidate could appeal the funding level determination, first to the FEC and then to the courts.

A "seed money" requirement would be a significant and substantive hurdle that could not be cleared without genuine grassroots support. Its inclusion in a reform plan should alleviate concern that a congressional hopeful could simply take money from the public coffers without first having demonstrated legitimacy and viability. Under such a scheme, viability could be evaluated by the degree of aggregate support a candidate generates rather than by the size of the lump-sum contributions he is able to attract.

A public financing system must also be voluntary,[70] as voluntary systems are the only sort that the Supreme Court has upheld (on grounds that they promote free speech by presenting candidates with an alternative means of raising funds).[71] Such a sys-

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[68] Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 267 (1992).

[69] However, a public financing scheme will not be successful if participating candidates can continue to raise private funds while they are receiving public dollars. As has been recently noted, "partial public financing schemes . . . couple the most troubling effect of private financing with the most problematic aspects of public financing." David Donnelly, Janice Fine, & Ellen Miller, *Going Public*, 22 BOSTON REV. 5, 5 (Apr./May 1997).

[70] *See* Sue O'Brien, Editorial, *Seduce When You Can't Compel*, DENV. POST, Dec. 8, 1996, at G1.

[71] *See* Buckley v. Valeo, 424 U.S. 1, 92, 93 (1976) (noting that public financing is not intended "to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people.").

tem, said the Court in *Buckley*, "furthers, [rather than] abridges, pertinent First Amendment values."[72]

While making the system voluntary is necessary for it to pass constitutional muster, a reformed financing scheme need not leave the public without recourse when a candidate who opts out of it raises significantly more money than those candidates who choose to participate. One solution is to provide additional matching funds to participating candidates, subject to a "triggering" mechanism. If a privately financed candidate made the decision to spend above the level established for a particular district, the FEC could issue additional money to each of his publicly financed opponents in an amount equal to the excess spent by him.[73]

A "trigger" would encourage candidates to participate in the public financing system without coercing such participation. It would ensure that a participating candidate would not be hamstrung if his non-participating rival chose to exceed the spending level established for their district. Furthermore, it might also discourage candidates from spending exorbitant amounts of money on media campaigns designed to drown out opponents' messages.

An effective public financing system must in addition account for independent expenditures—the frequently large amounts spent by private individuals on media campaigns without coordination between the individual and the candidate(s) who is benefited. Since the establishment of contribution limits in the 1970s, independent expenditures have allowed non-candidates to, in effect, exceed vastly those limits.[74] Deterred by *Buckley*, however, campaign finance reformers thus far have shied away from seeking regulation of independent expenditures.[75]

A "trigger" mechanism applicable to independent expenditures, however, would pass constitutional muster and would pro-

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[72] *Id.* at 93.

[73] The Maine Clean Election Act provides for just such a "triggering" mechanism permitting candidates to receive additional public funds when appropriate. *See* ME. REV. STAT. ANN. tit. 21-A, § 1125(9) (West Supp. 1997). Such a "trigger" of additional public funds could also be attached to a requirement that the participating candidate increase his level of "seed money."

[74] Independent expenditures play a much larger role in campaigns than they did at the time of the *Buckley* decision. *See* Campion, *supra* note 48, at 2399.

[75] *See, e.g.*, *Buckley*, 424 U.S. at 44–51 (holding that independent expenditures are equivalent to candidate expenditures, and thus regulation of these expenditures is unconstitutional on First Amendment grounds).

vide additional encouragement for candidates to participate in a public financing system.[76] Those who did participate would not have to worry that their messages would be overwhelmed by media campaigns funded with private money. Without such a provision, the prevalence of independent expenditures would discourage otherwise willing candidates from participating in a voluntary system.[77]

Despite its many advantages, detractors argue that a public funding system would be cost-prohibitive.[78] Not only do such arguments often exaggerate the cost of publicly financing congressional elections, but, more fundamentally, they ignore the societal cost of *not* providing public funds.[79] A system financed purely by private funds causes a sense of frustration and skepticism among the public concerning the responsiveness of government to public needs. It also breeds cynicism regarding the role that private contributions play in the actions of elected officials. While this cost may be difficult to quantify, such public officials as Senator McCain have asserted that there are links between specific pieces of legislation and increased prices for American consumers—and that these links are attributable to the influence of private contributions on the legislative process. As Senator McCain stated, with regard to recent legislative action in the telecommunications area, "[a]nybody who glances at the so-called 1996 Telecommunications Reform Act and then looks at the results—which are increases in cable rates, phone rates, mergers, and lack of competition—clearly knows that the special interests are protected in Washington and the public interest is submerged."[80]

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[76] *See* Kenneth N. Weine, *Triggering the First Amendment: Why Campaign Finance Systems that Include "Triggers" are Constitutional*, 24 NOTRE DAME J. LEGIS. 223, 226–27 (1998).

[77] *See id.*

[78] *See, e.g.*, David J. Weidman, *The Real Truth About Federal Campaign Finance: Rejecting the Hysterical Call for Publicly Financed Congressional Campaigns*, 63 TENN. L. REV. 775 (Spring 1996).

[79] *See* CONGRESSIONAL QUARTERLY, CONGRESSIONAL CAMPAIGN FINANCES 26 (Mary W. Cohn ed., 1992); *see also* Marty Jezer, Randy Kehler, & Ben Senturia, *A Proposal for Democratically Financed Congressional Elections*, 11 YALE L. & POL'Y REV. 333, 358–59 (1993) ("Because Democratically Financed Elections represents a new concept of reforming campaign finance law, it is impossible to predict absolutely its cost to the taxpayer. A generous estimate would place the cost of total public financing of both the primary and general election at under $500 million a year, or less than five dollars for each federal taxpayer. These figures are obviously rough estimates.").

[80] George F. Will, *McCain Should Be Wary of New Limits on Speech*, WASH. POST, Oct. 8, 1999, at 23A (quoting Senator McCain).

Furthermore, the total cost per election cycle for such a proposal as that outlined above would be less than $1 billion.[81] "[C]ompared with the billions of dollars monied interests currently wrest from Congress in the form of corporate and industry bailouts, tax breaks, subsidies, regulatory exemptions, and other forms of special interest legislation, the cost to the taxpayer for total public funding of all federal elections would represent real savings."[82]

Moreover, it was during hard economic times that Congress passed the 1992 campaign finance bill providing for public funding of congressional campaigns. President Bush's veto of that bill was due in part to Congress's inability to establish where funding for the measure would come from.[83] In these more prosperous economic times, restoring needed confidence in our democracy should be a priority. Nothing indicates this need better than the numerous studies showing the degree to which the general public believes that politicians have been taken hostage by aggressive lobbyists and monied interest groups.[84]

B. *Strengthening the FEC*

The Public Voice Campaign Finance Reform Act of 1997 (PVCFRA),[85] introduced in the 105th Congress, was intended to address several important campaign finance reform issues, including the much-needed strengthening of the FEC. As the agency responsible for enforcing campaign finance laws, the

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[81] *See* Jezer, Kehler, and Senturia, *supra* note 79, at 358–59.

[82] *Id.* at 359.

[83] *See* Frank J. Sorauf, *Politics, Experience, and the First Amendment: The Case of American Campaign Finance*, 94 COLUM. L. REV. 1348, 1362 (1994) (noting that providing the necessary funding for this partial public funding of the bills in the 102d and 103d Congress stymied such legislation). The 102d Congress passed a campaign finance reform measure that was vetoed by President Bush. The House and Senate of the 103d Congress each passed bills that did not make it out of conference. Both bills contained public financing provisions. The Senate bill was designed to provide congressional candidates willing to adhere to spending limits with public funding if a nonparticipating opponent spent above the established limit. While this bill received a good amount of public attention, it was blocked in conference. *See* Adam Clymer, *Campaign Finance: The Lateral Pass*, N.Y. TIMES, Aug. 9, 1998, § 4, at 6.

[84] *See* Wertheimer & Weiss Manes, *supra* note 6, at 1129–31 (identifying several such polls and studies).

[85] H.R. 2051, 105th Cong. (1997). The PVCFRA was introduced by the author; *see* 143 CONG. REC. E1327-01 (daily ed. June 25, 1997). It has not yet been reintroduced in the 106th Congress. The author, however, intends to introduce in the 106th Congress legislation that will incorporate a number of the proposals outlined *infra* Part III.A.

FEC must have the power and resources necessary to fulfill its institutional mission.

Three of the PVCFRA's provisions for strengthening the FEC are particularly worthy of mention. First, the bill would allow the FEC to charge a filing fee to candidates, political committees, and parties that meet minimum thresholds of financial activity. This reform is particularly important, as it would give the agency a degree of financial independence that Congress has thus far refused to provide.[86]

Second, the bill would restore the FEC's ability to conduct random audits of candidates and would allow the FEC to refer a case to the Justice Department as soon as Commission members believed that criminal activity might have taken place. This would give "teeth" to the FEC's existing enforcement capabilities.

Finally, the bill would require the president to appoint a seventh FEC commissioner. This "independent" commissioner would be recommended by the existing six members and would serve as chairman. Such a reform measure would help break the partisan dynamics of a commission whose membership is currently split evenly between Democrats and Republicans.[87]

V. CONCLUSION

A generation has passed since the federal government implemented a campaign finance reform initiative. It is time for the next generation of congressional leaders to move the ball forward and articulate an improved vision of what our system of elections should look like in the twenty-first century. Since the federal government's last attempt at comprehensive reform there have been, not surprisingly, substantial changes in our system of electing public officers, including a dramatically increased emphasis on fundraising and a rise in the use of paid media. Now is the time for a new, modern framework for regulating our system of elections.

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[86] *See id.* Both Thomas Mann of the Brookings Institution and Norman Ornstein of the American Enterprise Institute have endorsed this effort. *See, e.g.*, David E. Rosenbaum, *Campaign Finance: The Hearings*, N.Y. TIMES, Sept. 24, 1997, at A24 (reporting on Mr. Ornstein's and Mr. Mann's testimony in Senate hearings on campaign finance issues).

[87] *See* 143 CONG. REC. E1327-01.

The amount of money needed to be a competitive candidate for any elected office has skyrocketed, and the maneuvers employed to assemble those funds have become, accordingly, more sophisticated. The devotion of such extraordinary energies to raising money, however, tends to obfuscate the real goals of our democracy, both in candidates' minds and in the public's perceptions. Gaining the support of individuals and constituency groups is critical when running for public office, but the current campaign finance system places a premium on dollars rather than on policy ideas and grassroots support. By addressing these now endemic problems, true reform will encourage greater participation in public service by our most talented citizens. Congress now must turn the people's desire for reform into a reality.

POLICY ESSAY

MAINTAINING "PEACE THROUGH STRENGTH": A REJECTION OF THE COMPREHENSIVE TEST BAN TREATY

SENATOR JON KYL*

In this Essay, Senator Jon Kyl argues that the Senate's October 1999 rejection of the Comprehensive Test Ban Treaty (CTBT) was justified because it was flawed, ineffective, and if ratified, would have threatened the security of the United States. Senator Kyl believes ratification of the CTBT would have (1) jeopardized the safety and security of the United States nuclear arsenal, (2) failed to curb nuclear proliferation, and (3) been neither verifiable nor enforceable. He recommends that, rather than signing on to the CTBT, the United States ensure its security, and that of its allies, through a strong military deterrent and better enforcement of existing agreements.

On the evening of October 13, 1999, the Comprehensive Test Ban Treaty (CTBT) came before the United States Senate for a vote. Ratification of the CTBT, signed by President Clinton in 1996, would have obligated the United States to give up forever the option of testing the weapons in its nuclear stockpile. When the votes were counted, however, the treaty failed to gain the two-thirds majority required by the Constitution. It failed even to win a simple majority, with only forty-eight members in favor of ratification, fifty-one members against ratification, and one abstention. For the first time since it rejected the Versailles Treaty seventy-nine years before, the Senate turned down a major international treaty.

Though many Americans find the idea of phasing out nuclear weapons appealing, a majority of senators believed the treaty was fundamentally flawed. Close study of the treaty text and consultation with those responsible for maintaining a strong United States nuclear deterrent made it clear that "going with the

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flow" would have been irresponsible. Those who voted to reject the treaty did so because (1) it would have jeopardized the safety and reliability of our nuclear arsenal; (2) it would not have curbed nuclear proliferation; and (3) it would be neither verifiable nor enforceable.

Contrary to the claims of treaty proponents, no previous president had ever proposed a treaty to ban nuclear testing completely and permanently. While President Clinton reacted bitterly to the CTBT's defeat, the United States and those who depend on its nuclear deterrent will be safer without United States participation in this agreement.

I. DETERRENCE TODAY

To see why a majority of the Senate voted against the CTBT, it is important first to understand the significance most senators attach to a strong nuclear deterrent.

Since the end of the Cold War, some have argued that nuclear deterrence is an outdated concept and that the United States no longer needs to retain a substantial nuclear weapons capability. Deterrence, however, is not a product of the Cold War. It has been around since the beginning of statecraft. Over 2,500 years ago, the Chinese philosopher Sun Tzu confirmed the value of deterrence, observing: "To win one hundred victories in one hundred battles is not the acme of skill. To subdue the enemy *without* fighting is the acme of skill."[1] In 1780, President Washington said: "There is nothing so likely to produce peace as to be well prepared to meet an enemy."[2] "Peace through Strength" was not invented by Ronald Reagan.[3]

The West's victory in the Cold War does not mean national security threats to the United States have evaporated. James Woolsey, President Clinton's first CIA director (and an opponent of the CTBT), aptly described the current security environment when he said: "[W]e have slain a large dragon [the Soviet Union], but we live now in a jungle filled with a bewildering variety

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[1] SUN TZU, ART OF WAR 184 (Ralph D. Sawyer trans., Westview Press 1994) (emphasis added).

[2] THE BULLY PULPIT: QUOTATIONS FROM AMERICA'S PRESIDENTS (letter from Washington to Elbridge Gerry, Jan. 29, 1780) 153 (Elizabeth Frost ed., 1988).

[3] PUB. PAPERS 668 (May 24, 1982).

of poisonous snakes."[4] Rogue nations like North Korea, Iran, and Iraq have programs to develop weapons of mass destruction and are hostile to the United States. China is an emerging power whose relationship with the United States is rocky at best. Furthermore, Russia retains significant military capabilities, including over 6000 strategic nuclear warheads, which former Russian President Boris Yeltsin once ominously warned President Clinton that the United States should keep in mind.[5]

The Gulf War is a good example of the continuing importance of nuclear deterrence in the post-Cold War world. In that conflict, America's nuclear capability—coupled with the understanding that it might draw on that capability if allied troops were attacked with other weapons of mass destruction—saved lives. Saddam Hussein had a large arsenal of chemical weapons at his disposal. The 1925 Geneva Protocol outlaws the use of these weapons, but Saddam had violated this international protocol before, unleashing chemical agents against Iraq's Kurdish population and against Iranian troops during the Iran-Iraq war in the 1980s.[6] In 1991, President Bush told the Iraqi leader: "The United States will not tolerate the use of chemical or biological weapons. . . . You and your country will pay a terrible price if you order unconscionable acts of this sort."[7] Iraqi Foreign Minister Tariq Aziz acknowledged in 1995 that Iraq did not attack the forces of the United States-led coalition with chemical weapons during the Gulf War because Washington's threats of devastating retaliation were interpreted as meaning nuclear retaliation.[8]

The credibility of the United States nuclear stockpile is a precious, if intangible, commodity. Our actions on the international stage, and the obligations we take on, must be assessed in terms of their effect on the credibility of our deterrent. This is espe-

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[4] *Hearing Before the Senate Select Comm. on Intelligence*, 103d Cong. 76 (1994) (statement of R. James Woolsey, nominee for director of the Central Intelligence Agency).

[5] Responding to President Clinton's criticism of Russia for civilian casualties in Chechnya, Mr. Yeltsin said: "It seems Mr. Clinton has forgotten Russia is a great power that possesses a nuclear arsenal." *With China's Blessing, Yeltsin Scolds the U.S.*, CINCINNATI POST, DEC. 10, 1999, AT 5A.

[6] *See* Julia Johnson, *U.S. Asserts Iraq Used Poison Gas Against the Kurds*, N.Y. TIMES, Sept. 9, 1988, at A1.

[7] George Bush, *President's Letter to Saddam Hussein*, 2 U.S. DEP'T STATE DISPATCH 25, 25 (1991).

[8] *See* KEITH B. PAYNE, DETERRENCE IN THE SECOND NUCLEAR AGE 84 (1996); R. Jeffrey Smith, *U.N. Says Iraqis Prepared Germ Weapons in Gulf War*, WASH. POST, Aug. 26, 1995, at A1.

cially important given the failure of the United States thus far to deploy a defense against missile-delivered weapons of mass destruction. Furthermore, it will remain critical because no missile-defense system currently contemplated could defend against (and, thus, deter) an attack of the kind that could be launched by countries like Russia and China.

II. Impact of a Test Ban on the Reliability and Safety of the U.S. Stockpile

America's nuclear weapons are the most sophisticated in the world. Each one typically has thousands of parts. Some of their materials, like plutonium, enriched uranium, and tritium, are radioactive materials that decay. As these materials decay, they also change the properties of other materials within a weapon.[9]

We lack experience in predicting the effects of such aging on the safety and reliability of our stockpile. The United States did not design its weapons to last forever; their shelf life was expected to be about twenty years. New designs, intended to meet ever-changing mission requirements, were introduced into the stockpile every few years during the Cold War. Thus, in the past, United States nuclear engineers did not encounter problems with aging weapons because they were fielding new designs and retiring older designs. If the United States joined a perpetual test ban, we could not engage in the testing necessary to field new designs to replace older weapons.

With no new designs in the offing, the United States would have to rely exclusively on remanufacturing components of existing weapons that have deteriorated. Producing these replacement parts without testing is problematic, however. Over time, manufacturing processes and materials have changed. Some chemicals previously used in the production of United States weapons have been banned by environmental regulations.[10] Our documentation of the technical characteristics of some of our older weapons is incomplete. Furthermore, the plutonium pits in some of our weapons are approaching the end of their life-span. According to James Schlesinger, the former Defense and Energy

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[9] *See Hearing on FY 2000 Appropriations Before the Energy and Water Development Subcomm. of the Senate Comm. on Appropriations*, 106th Cong. 7 (Mar. 11, 1999) (statement of Victor H. Reis, Assistant Secretary of Energy for Defense Programs).

[10] *See id.* at 8.

Secretary who served in the Ford, Nixon, and Carter administrations, one national laboratory estimates the pits used in some of these weapons will last thirty-five years.[11] Since many of the pits used in the current arsenal are about thirty years old, we will soon need to replace them, but without testing, we cannot be sure that these replacement parts will work as effectively as their predecessors.[12]

The former director of the Lawrence Livermore National Laboratory, Dr. John Nuckolls, addressed the challenges of remanufacturing:

> Periodic remanufacture is necessary, but may copy existing defects and introduce additional defects. Some of the remanufactured parts may differ significantly from the original parts—due to loss of nuclear test validated personnel who manufactured the original parts, the use of new material and fabrication processes, and inadequate specification of original parts. There are significant risks of reducing stockpile reliability when remanufactured parts are involved in warhead processes where there are major gaps in our scientific understanding.[13]

Despite our technical expertise, there is much we still do not understand about our own nuclear weapons. These gaps in our knowledge do not merely present a theoretical problem. Approximately one-third of all weapons designs fielded by the United States since 1958 have required testing to resolve difficulties that arose after deployment.[14] According to a 1987 study by the Livermore Laboratory, *Report to Congress on Stockpile Reliability, Weapon Remanufacture, and the Role of Nuclear Testing*, of the one-third of designs that required testing to fix, "in three-quarters of [the tested] cases, the problems were

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[11] *See Hearings Before the Senate Comm. on Armed Services to Receive Testimony on the National Security Implications of the Comprehensive Test Ban Treaty*, 106th Cong. 128 (Oct. 6, 1999) (statement of James Schlesinger, former Secretary of Energy and Secretary of Defense).

[12] *See id.* at 115.

[13] Letter from Dr. John Nuckolls, former Director, Lawrence Livermore National Laboratory, to Sen. Jon Kyl, United States Senator, 2 (Sept. 2, 1999) (on file with the author).

[14] *See Safety and Reliability of the U.S. Nuclear Deterrent: Hearing Before the Subcomm. on Int'l Sec., Proliferation, and Fed. Servs. of the Senate Comm. on Governmental Affairs*, 105th Cong. 40 (1997) (President George Bush, REPORT TO THE COMMITTEES ON ARMED SERVICES AND APPROPRIATIONS OF THE SENATE AND HOUSE OF REPRESENTATIVES ON NUCLEAR WEAPONS TESTING REQUIRED BY SECTION 507 OF THE ENERGY AND WATER DEVELOPMENT APPROPRIATIONS ACT (1993)).

identified as a result of nuclear testing."[15] With only nine weapon designs in our nuclear stockpile, each with different mission requirements, a serious problem affecting even a couple of weapon types would be a cause for great concern.[16]

The importance of operating a complex weapon or machine to be assured that it works cannot be overstated. Before World War II, the United States Navy lacked the funds needed to test its torpedoes.[17] The results were disastrous, as hundreds of torpedoes failed in the first two years of the war.[18] It is critical that both the United States *and our adversaries* know that our nuclear deterrent will work.

III. THE STOCKPILE STEWARDSHIP PROGRAM

The Clinton administration hopes to replace actual nuclear tests with computer simulations and scientific experiments called the Stockpile Stewardship Program (SSP).[19] The Department of Energy hopes that, by 2010, the SSP will have the "capabilities that are necessary to provide continuing high confidence in the annual certification of the stockpile without the necessity for nuclear testing."[20] During the CTBT debate, proponents exaggerated the current capabilities of the still immature and untested Stockpile Stewardship Program, declaring flatly that it has replaced testing.[21] While the SSP may eventually provide valuable information and improve our grasp of the complex (and to some extent mysterious) workings of our own nuclear arms, it faces

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[15] *Id.* at 117 (George H. Miller, et al., REPORT TO CONGRESS ON STOCKPILE RELIABILITY, WEAPON REMANUFACTURE, AND THE ROLE OF NUCLEAR TESTING (1987)).

[16] *See Hearings Before the Senate Comm. on Armed Services to Receive Testimony on the National Security Implications of the Comprehensive Test Ban Treaty*, 106th Cong. 21 (Oct. 7, 1999) (statement of Robert B. Barker, Assistant to the Director, Lawrence Livermore National Laboratory).

[17] *See* EDWIN P. HOYT, SUBMARINES AT WAR: THE HISTORY OF THE AMERICAN SILENT SERVICE 71 (1983).

[18] At the Battle of Midway in 1942, the crucial naval confrontation of the Pacific war, none of the torpedoes launched from U.S. torpedo bombers damaged a single Japanese ship. Without American dive bombers dropping bombs, the United States would have been defeated at Midway. *See* 145 CONG. REC. S12,282 (daily ed. Oct. 8, 1999) (letter from James R. Schlesinger, Frank C. Carlucci, Donald H. Rumsfeld, Richard B. Cheney, Caspar W. Weinberger, and Melvin R. Laird, former Secretaries of Defense, to Sens. Trent Lott (R-Miss.) and Tom Daschle (D-S. Dak.)).

[19] *See* DEPARTMENT OF ENERGY, FISCAL YEAR 2000 STOCKPILE STEWARDSHIP PLAN EXECUTIVE OVERVIEW 17 (1999).

[20] *Id.* at 23.

[21] *See* 145 CONG. REC. S12,274 (daily ed. Oct. 8, 1999) (statement of Sen. Carl Levin (D-Mich.)).

tremendous technical challenges and may never be an adequate substitute for testing. It is a set of research projects, most of which will not reach fruition for years, and which have suffered setbacks already. The National Ignition Facility (NIF), the linchpin of the program, recently fell behind schedule and is over budget.[22] NIF still faces a critical technical uncertainty about a major goal of its design: Will it be able to achieve thermonuclear ignition?[23]

A careful look at the comments of current and former senior officials at the Department of Energy and the national laboratories shows that proponents of the test ban oversold the SSP. While current laboratory employees typically say it is the best approach to maintaining our weapons *in the absence of testing*, they have been careful *not* to guarantee that the program will succeed in replacing testing. As Dr. Siegfried Hecker, former director of the Los Alamos National Laboratory, said in a 1997 letter to me, "We recognize there is no substitute for full-systems testing in any complex technological enterprise. This is certainly true for nuclear weapons. A robust nuclear testing program would undoubtedly increase our confidence."[24]

The architect of the Stockpile Stewardship Program, Dr. Victor Reis, described the challenge ahead in stark terms. This program, he said in a recent speech, is expected

> to maintain forever, an incredibly complex device, no larger than this podium, filled with exotic, radioactive materials, that must create, albeit briefly, temperatures and pressures only seen in nature at the center of stars; do it without an integrating nuclear test, and without any reduction in extraordinarily high standards of safety and reliability. And, while you're at it, downsize the industrial complex that supports this enterprise by a factor of two .... This within an industrial system that was structured to turn over new designs every fifteen years, and for which nuclear explosive testing was the major tool for demonstrating success.[25]

Just as the reliability of the weapons would be in question if the United States never again had the option of testing, weapon

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[22] Walter Pincus, *U.S. Laser Program Faces Cost Overruns*, WASH. POST, Sept. 1, 1999, at A8.

[23] Bernadette Tansey, *Costs of Livermore Lasers Predicted to Grow*, S.F. CHRON., Jan. 11, 2000, at A3.

[24] Letter from Dr. Siegfried Hecker, former Director, Los Alamos National Laboratory, to Sen. Jon Kyl, United States Senate (Sept. 9, 1997) (on file with author).

[25] Dr. Victor Reis, Address at Sandia National Laboratory (Jan. 19, 1999).

safety would also be in doubt. Nuclear weapon safety has always been of paramount concern in the United States. Throughout the history of our nuclear program, we have made every effort to ensure that even in the most violent of accidents there would be the minimum chance of an atomic explosion or radioactive contamination. The results of such an accident would be catastrophic. Nuclear tests must be done in many cases to confirm that, once safety features are incorporated, the weapons will still function as intended.[26] Participation in a test ban of unlimited duration, called for by the CTBT, would have made it pointless to invent better safety features because they could not be adopted without nuclear testing. Even worse, the CTBT would have halted the incorporation in current weapons of existing, well understood safeguards—safeguards that can, for example, prevent premature detonation or prevent the dispersal of radioactive contamination should the plutonium inside a weapon be damaged during a conflict or by an accidental fire.

The bottom line is that a ban on nuclear testing prevents us from making our weapons as safe as we know how to make them and discourages the search for ever-better safety measures.

IV. The Treaty Will Not Stop Proliferation

The CTBT's goals are announced in its preamble; its wording demonstrates the international community's view that possessing, proliferating, and testing nuclear weapons are closely interrelated. What gave rise to this treaty, says the preamble, was the recognition

> that the cessation of all nuclear weapon test explosions and all other nuclear explosions, by constraining the development and qualitative improvement of nuclear weapons and ending the development of advanced new types of nuclear weapons, constitutes an effective measure of nuclear disarmament and non-proliferation in all its aspects.[27]

Clearly the treaty authors believed that outlawing tests would strike a blow against the use, the proliferation—even the posses-

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[26] *See Hearings supra* note 16 at 21 (statement of Robert B. Barker, Assistant to the Director, Lawrence Livermore National Laboratory)

[27] Comprehensive Nuclear Test-Ban Treaty. S. Treaty Doc. No. 105-28 at 122 (1997).

sion—of nuclear arms. This equation does not withstand close examination for two reasons.

First, banning tests adds nothing new to the effort to curb the various activities involved in nuclear proliferation because we already have a norm against proliferation: it is the Nuclear Nonproliferation Treaty (NPT). The NPT, which came into force in 1970, already obliges the 182 countries that are party to it (except the five participants that are declared nuclear powers, i.e., the United States, the United Kingdom, Russia, China, and France) not to pursue nuclear weapons programs. North Korea and Iraq are parties to the NPT, and we know they have violated it.[28] They have pursued nuclear weapons programs despite their solemn international pledge never to do so. Any country (except the five declared powers) that breaks the terms of the CTBT has already broken the NPT. Violators of the CTBT would be vowing not to test weapons they were never supposed to possess or develop in the first place.

Second, even if rogue states were to join the CTBT and adhere to its promise never to test, the world would not be safer. Although testing is essential to maintaining the sophisticated nuclear weapons in the United States arsenal today, it is not required for those countries developing a relatively simple, first-generation atomic device. The American bomb dropped on Hiroshima was never fully tested, and the nuclear arsenals of Israel, Pakistan, and South Africa have been constructed without testing.[29]

The Clinton Administration does not dispute this point. As CIA Director George Tenet told the Senate in 1997: "Nuclear testing is not required for the acquisition of a basic nuclear weapons capability (i.e., a bulky, first-generation device with high reliability but low efficiency) . . . . Nuclear testing becomes critical only when a program moves beyond basic designs to incorporate more advanced concepts."[30] We cannot afford to underestimate the weapon described by Director Tenet. A "bulky, first generation device with high reliability but low efficiency" is a lot like the bomb we dropped on Hiroshima that changed world history. It is a strategic weapon. If North Korea or Iran could

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[28] *See* John M. Deutsch, *The New Nuclear Threat*, FORGN. AFFRS., Fall 1992, at 120.

[29] *See id.* at 123.

[30] *Current and Projected National Security Threats to the United States: Hearing Before the Senate Select Comm. on Intelligence*, 105th Cong. 87–88 (1997) (statement of George Tenet, acting Director of Central Intelligence).

credibly threaten to deploy such a weapon, they could severely reduce our ability to protect our interests in East Asia or the Persian Gulf.

In the end, no one could seriously claim that states like North Korea, Iran, or Iraq would be deterred from pursuing their nuclear programs by ratification of the CTBT by the United States. Thus treaty advocates fell back on the nostrum that at least ratification by the United States would make a moral statement. Is it not our duty, CTBT advocates asked, to take the lead on this issue? They argued that, in declaring a halt to our own testing, we would persuade others to follow our example. This could not withstand scrutiny either, given that the United States has been unilaterally observing—as is its right—a moratorium on nuclear tests since 1992.[31] Yet, since 1992, India, Pakistan, Russia, China, and France have all conducted nuclear tests.[32] Nations test their arsenals when it is in their self-interest to do so, and no amount of moral posturing will change this.

V. Easy to Cheat

Another reason treaty proponents could never carry the argument that the CTBT would curb proliferation is because the treaty is neither verifiable nor enforceable. For international authorities to verify effectively that no atomic testing is occurring, they would have to be highly confident that militarily significant cheating could be detected in a timely manner.

No one in a position of authority could credibly make that claim, however. Even with the treaty's new International Monitoring System in place, nations could conduct militarily significant nuclear tests with little or no risk of detection. The problem is that the treaty purports to ban *all* tests ("zero yield"), yet low yield tests are impossible to detect. Tests with yields below one kiloton (one kiloton being roughly 500 times larger than the blast that destroyed the Alfred P. Murrah Building in Oklahoma

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[31] Energy and Water Development Appropriations Act, 1993, Pub. L. No. 102-377, Sec. 507, 106 Stat. 1315, 1343–44 (1992).

[32] *See* Jonathan Karp, *Questions Seen in the Guidance of India Foreign Policy*, Asian Wall St. J., May 31, 1998, at A1; Dexter Filkins, *Pakistan Explodes 5 Nuclear Devices in Response to India*, L.A. Times, May 29, 1998, at A1; Steven Lee Myers, *U.S. Suspects Russia Set Off Nuclear Test*, N.Y. Times, Aug. 29, 1997, at A7.

City) can both escape detection and be militarily useful to the nation that conducted them.[33]

Moreover, it is a fairly simple task for countries with nuclear programs to obscure testing through well-known evasive techniques. One of the best known means of evasion is detonating the device in a cavity such as a salt dome or a room mined below ground. Because it surrounds the explosion with empty space, this technique—called decoupling—reduces the noise, or the seismic signal, of the nuclear detonation. The signal of a decoupled test is so diminished—by as much as a factor of seventy—that it will not be possible to detect it reliably. For example, a 1000-ton (one kiloton) hidden test could appear as small as an overt test of fourteen tons. This puts the signal of the illicit test well below the threshold of detection.[34]

There are also other means of cheating. For example, if a nation hid a device on a small boat or barge, towed it into the ocean, and detonated it anonymously, it would be extremely difficult to link the test to the cheater. It has been argued that the testing nation would not even need to monitor its own explosion; alarmed international observers would immediately measure and publicize the results of the test. While evasive techniques are expensive and complex, the costs are relatively low compared to the expense of a nuclear weapons program, and no more complicated than weapons design. Established nuclear powers are well positioned to conduct clandestine testing to assure reliability and at least modestly upgrade their arsenals. It is likely that nations have already begun to violate their pledges to refrain from testing. Within the last year alone, Russia and China are believed to have conducted tests. According to the *Washington Times*, United States intelligence agencies believe that China conducted a small underground nuclear test in June of 1999 and Russia is believed to have conducted two nuclear tests in September of that year.[35] While neither country has ratified the CTBT, both

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[33] *See The Comprehensive Test Ban Treaty and Nuclear Nonproliferation: Hearing Before the Subcomm. on Int'l Sec., Proliferation, and Fed. Servs. of the Senate Comm. on Governmental Affairs*, 105th Cong. 24 (Mar. 18, 1998) (statement of Kathleen C. Bailey, Senior Fellow, Lawrence Livermore National Laboratory).

[34] The United States demonstrated this technique in 1966 when we conducted nuclear tests in salt domes in Chilton, Mississippi, in which a 380-ton test gave an apparent seismic signal of only 5.3 tons. *See id.*

[35] *See* Bill Gertz, *Moscow, Beijing Balk at Monitors: Testing Sites Not Included in Nuke Treaty*, WASH. TIMES, Oct. 12, 1999, at A1.

have signed the treaty and claim to be observing a testing moratorium.[36]

CTBT proponents point out that if the United States needs additional evidence to detect violations, on-site inspections could be requested under the treaty. However, the treaty requires that requests for on-site inspections be backed by specific evidence (which could potentially disclose the sources and methods of United States intelligence-gathering) and must be approved by at least thirty affirmative votes from the CTBT's fifty-one-member Executive Council. In other words, if the United States wanted to request an inspection of another nation suspected of carrying out a nuclear test, it could only get an inspection if twenty-nine other nations concurred with the request. In addition, under the terms of the treaty, a nation can declare a fifty-square kilometer area of its territory off limits to any inspections that are approved.

Thus, a nation could develop its atomic weaponry while formally participating in this agreement and receiving international credit for supporting disarmament. The text of the treaty, the nature of nuclear testing, and the state of seismic monitoring make this scenario possible. The treaty text is problematic in other ways, as well. The CTBT is weakest at its very foundation because it actually fails to say what it bans. Nowhere in its seventeen articles and two annexes are the terms "nuclear weapon test explosion" or "nuclear explosion"—the terms used in the first article, "Basic Obligations"—defined or quantified. Acting Undersecretary of State for Arms Control and International Security John Holum admitted this to the Senate Foreign Relations Committee. He wrote to the Committee on June 29, 1999, stating:

> The U.S. decided at the outset of negotiations not to seek international agreement on a definition of "nuclear weapon test explosion" in the Treaty text. The course of negotiations confirmed our judgement that it would have been extremely difficult, and possibly counterproductive, to specify in technical terms what is prohibited by the Treaty.[37]

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[36] *See Hearings on Department of Defense Appropriations for 1997 Before the Subcomm. on National Security of the House Comm. On Appropriations*, 104th Cong. 90 (Mar. 7, 1996) (statement of Secretary of Defense William Perry).

[37] *Hearing Before the Senate Comm. on Foreign Relations on the Nomination of John Holum to be Undersecretary of State for Arms Control and International Security*, 106th Cong. 11 (June 28–29, 1999).

If we were to imagine improvements in verification, we would still face the question of punishing nations that were caught violating the terms of this treaty. Astonishingly, the CTBT provides no effective mechanism for enforcement of its terms. Article V recommends, in vague terms, that international sanctions be imposed on violators. "If the case is urgent," it adds, the CTBT Executive Council can bring the issue to the attention of the United Nations[38]—an ultimate enforcement mechanism that is similarly vague, and therefore ineffectual. In addition, the treaty provides no guidance as to how one might distinguish an "urgent" violation from one that was merely "routine."

Due to this and other deficiencies, Senator Richard Lugar (R-Ind.) remarked during the treaty debate that this document was not "of the same caliber as the arms-control treaties that have come before the Senate in recent decades."[39] Indeed, after the vote in the Senate took place, former Secretary of State Henry Kissinger said the CTBT's defeat means that "traditional arms control agreements—especially of the toothless variety—may have come to the end of the road."[40] By rejecting this inferior agreement, the Senate has strengthened the negotiating positions of American diplomats. When future United States negotiators insist on clearer and more effective provisions on matters such as verification, citing the need to satisfy an exacting Senate, their warnings will be credible.

VI. NOT EASY TO PULL OUT

Supporters of the treaty were willing to concede that the CTBT had flaws, but they argued that if participation harmed our security, the United States could always withdraw from the treaty in the future. This assurance provided little comfort to senators who understood the political difficulties in doing so. After all, the United States has never withdrawn from an arms-control treaty, and this accord was not likely to break that pattern. The Clinton administration, trying to reassure skeptical members of the Senate on this and other points, announced six

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[38] Comprehensive Nuclear Test-Ban Treaty. S. TREATY DOC. NO. 105-28, art. V (4), at 158 (1997).

[39] 145 CONG. REC. S12,380 (daily ed. Oct. 12, 1999) (statement of Sen. Lugar).

[40] Henry H. Kissinger, *Arms Control to Suit a New World,* L.A. TIMES, Nov. 21, 1999, at M2.

conditions or "safeguards" for participation in the CTBT.[41] The Administration's Condition 6 reaffirmed Article IX, the treaty's escape clause,[42] stating:

> If the President determines that nuclear testing is necessary to assure, with a high degree of confidence, the safety and reliability of the United States nuclear weapons stockpile, the President shall consult promptly with the Senate and withdraw from the Treaty pursuant to Article IX(2) of the Treaty in order to conduct whatever testing might be required.[43]

Consider, however, the cost of withdrawing out of concern for the safety and reliability of our stockpile. Withdrawal for such a reason would, as some administration officials have been forced to acknowledge,[44] send a message to the world that confidence in the nuclear deterrent has eroded. Even if serious safety or reliability problems arose, the United States would likely avoid taking any diplomatic action—such as withdrawing from a major international arms-control agreement like the CTBT—that might raise doubts about America's nuclear arsenal, and embolden potential adversaries.[45]

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[41] *See* 145 CONG. REC. S12,427, daily ed. Oct. 12, 1999. The Clinton Administration's conditions/safeguards were turned into Senate amendments to the treaty and adopted by majority vote of the Senate before the final vote on the treaty.

[42] States have the right to withdraw from the CTBT if "extraordinary events" arise that jeopardize their "supreme interests." Comprehensive Nuclear Test-Ban Treaty. S. TREATY DOC. NO. 105-28, art. IX (2), at 164 (1997).

[43] 145 CONG. REC. S12,427, *supra* note 41.

[44] *See Hearings Before the Subcomm. on Energy and Water Development of the Senate Comm. on Appropriations*, 105th Cong. 59 (1997) (statement of Franklin C. Miller, Acting Assistant Secretary of Defense for International Security Policy, and statement of Harold Smith, Assistant to the Secretary of Defense for Atomic Energy).

[45] A related condition, Condition 3, pledged that: "The United States shall maintain the basic capability to resume nuclear test activities prohibited by the Treaty in the event that the United States ceases to be obligated to adhere to the Treaty." 145 CONG. REC. S12,427, *supra* note 25. This was similarly unrealistic. At present, the United States is two years or more away from being able to conduct a nuclear test. "Merely preserving facilities and support infrastructure at NTS [the Nevada Test Site] will not provide readiness. In spite of our best efforts, some special skills such as test containment reside in only a few individuals today, and some of the special equipment is no longer maintained or available from private industry." Letter from Siegfried Hecker to Jon Kyl, *supra* note 24. This was precisely the concern voiced by President Kennedy when he announced in 1962 that the United States would resume underground atomic testing. In a March 2, 1962 radio and television address to the American people, President Kennedy explained the difficulties of participating in a test-ban agreement on the "honor system," i.e., without proper arrangements for detection and verification, and the difficulty of doing what Condition 3 suggests, namely, "maintain[ing] the basic capability to resume nuclear test activities." As President Kennedy said:

> On September first of last year, while the United States and the United Kingdom were negotiating in good faith at Geneva, the Soviet Union callously broke its moratorium with a two-month series of tests of more than 40 nuclear

The Administration was unable to overcome the general awareness that, because arms-control agreements take on lives of their own, membership in them is effectively irreversible. This is the case no matter how our multilateral treaty partners behave. The United States has often been reluctant to protest vigorously others' treaty violations out of deference to the delicate diplomatic balance. Many Soviet and more recent Russian violations of arms-control treaties, most importantly the Biological Weapons Convention and the ABM Treaty, did not lead to American withdrawal from those agreements.[46] Actually withdrawing from the CTBT in protest over violations, or in response to weapons advances made by a potential aggressor, would depend on the political courage of the officials in question and the willingness of a future president to make a potentially unpopular decision on the basis of evidence that may not be conclusive and recommendations that may not be unanimous.

The Clinton administration offers a recent example of this problem. In order to strengthen the Missile Technology Control Regime (MTCR), a voluntary arrangement among supplier nations not to sell long-range rockets to less advanced nations, the United States Congress passed legislation in 1990 requiring a president to implement sanctions against violators. United States law requires that sanctions be imposed on any entity that transfers missile systems controlled by the MTCR. In the early 1990s, China transferred M-11 missiles to Pakistan. In response, the Clinton administration simply declared that the evidence presented by the intelligence community failed to prove that the missiles had been transferred. Dr. Gordon Oehler who, at the time of the missile sale, was director of the CIA's Nonproliferation Center, testified to the Senate Foreign Relations Committee:

> weapons. Preparations for these tests had been secretly underway for many months...Some may urge us to try it [an "uninspected moratorium"] again, keeping our preparations to test in a constant state of readiness. But in actual practice, particularly in a society of free choice, we cannot keep top-flight scientists concentrating on the preparation of an experiment which may or may not take place on an uncertain date in the undefined future. Nor can large technical laboratories be kept fully alert on a stand-by basis waiting for some other nation to break an agreement. This is not merely difficult or inconvenient—we have explored this alternative thoroughly, and found it impossible of execution.

PUB. PAPERS 186, 191 (Mar. 2, 1962).

[46] *See* Sue Lackey, *Russia Violates Bio-Chem Treaties*, JANE'S INTEL. REV., Oct. 1, 1999, at 10.

> Senior intelligence officials knew why the Administration took the position that they did, that the imposition of sanctions would have a very . . . great impact on its relationship with China, and any measure, almost any measure needed to be found to continue their negotiating flexibility . . . . One of the easier outs on this is to say that the intelligence information doesn't quite meet their high standards. I must say that the intelligence analysts in the community were very concerned by this. And, they were very discouraged to see that fairly regularly, their work was, in their view, summarily dismissed by the policy community, with the statement that "it is not good enough, it is not good enough."[47]

That politics can affect enforcement-related decisions is an enduring feature of political life. In view of the high degree of integrity and political will required to check nuclear proliferation activities overseas, we should only enter into agreements with other nations that we can and will enforce. Diplomatic obligations that erode the value of United States intelligence-gathering by creating a cynical need to look the other way are best avoided.

VII. A New, Pragmatic Approach to Arms Control

While some have said rejection of the CTBT was an opportunity foreclosed, I believe that history will show that it marks the beginning of a new, pragmatic approach to arms control.

Disarmament proposals have long drawn upon a reservoir of support in America and Western Europe. There is an enduring and understandable tendency of peace-loving peoples to believe that they can lay aside preparations for war. Whenever disarmament sentiment gained the upper hand in the past, however, the consequences were disastrous. The emotional power of such sentiments has caused many democracies to ignore what Winston Churchill called the "iron realities" of international politics.[48] Disarmament policies pursued in the 1920s and 1930s, wrote Samuel Eliot Morison, "merely served to lull the democracies into a false feeling of security, while giving the militarists elsewhere a chance to plot, plan, and prepare for a war that

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[47] *Proliferation of Chinese Missiles: Hearing Before the Senate Comm. on Foreign Relations*, 105th Cong. 29 (1998) (statement of Gordon Oehler, former special assistant to the Director of Central Intelligence for Nonproliferation).

[48] Winston S. Churchill, While England Slept: A Survey of World Affairs, 1932–1938 24 (1938).

would enable them to divide the world."[49] Efforts to stave off conflict by appeasing ambitious powers did not stop the aggression of Germany, Japan, or the Soviet Union during this century.

The siren song of "disarmament"—a word that occurs seven times in the preamble of the CTBT—originated in the twentieth century. As the technology for waging war became more frightening and more destructive, well-meaning intellectual and political leaders began to preach that war could be not only avoided but made obsolete by a new species of diplomatic agreement that would transcend political conflicts and make all nations disarm.[50] The Kellogg-Briand Pact of 1928, for example, sought to outlaw war for all time.

The first major agreement to be infused with this liberal/pacifist view was the peace treaty that ended the First World War, the Treaty of Versailles. Its guiding spirit, President Woodrow Wilson, incorporated into the treaty a charter for a League of Nations. He pledged that this new forum would accord Germany, the defeated aggressor in the late war, "a place of equality among the peoples of the world."[51] His aim, he said, was "peace without victory."[52] The positions taken by President Wilson and his congressional opponents are especially pertinent because, upon the defeat of the CTBT, its advocates took to comparing the Senate's action in 1999 to the Senate's disapproval, in 1920, of the Treaty of Versailles and the League of Nations.

However, while there are points of congruence, the test-ban advocates have mischaracterized them. What united Senate Republicans against the Treaty of Versailles was not, as disappointed CTBT supporters have claimed, isolationism. The most influential Republican senators during the 1919-1920 debates—Majority Leader Henry Cabot Lodge (R-Mass.), Irvine Lenroot (R-Wis.), and Frank B. Kellogg (R-Minn.)—were not isolationists but mainstream Republicans. Senator Lodge, for example,

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[49] SAMUEL ELIOT MORISON, OXFORD HISTORY OF THE AMERICAN PEOPLE 922 (1965).

[50] *See* PATRICK GLYNN, CLOSING PANDORA'S BOX: ARMS RACES, ARMS CONTROL, AND THE HISTORY OF THE COLD WAR xi, 45–48 (1992). Glynn cites as the definitive prewar manifesto of disarmament *The Great Illusion*, by British author Norman Angell, which was a bestseller in 1912.

[51] Woodrow Wilson, Address to Congress (Jan. 8, 1918), SUPPLEMENT TO THE MESSAGES AND PAPERS OF THE PRESIDENTS COVERING THE SECOND ADMINISTRATION OF WOODROW WILSON 8412ff, *reprinted in* 2 DOCUMENTS OF AMERICAN HISTORY 137, 139 (Henry Steele Commager ed., 9th ed. 1973).

[52] Woodrow Wilson, Address to the Senate (Jan. 22, 1917), S. Doc. No. 64-68S (1917).

favored a strong postwar alliance between England, France and America, and, presciently, the dismemberment of Germany to prevent it from threatening Europe again.[53] These men had "accepted the fact that the United States must play an international role but resisted what they saw as the compromise of American sovereignty and freedom of action implicit in League of Nations membership."[54]

Today's Republicans—conservative and moderate alike—concluded that it would be wrong to accept an unenforceable arms-control treaty, especially when that treaty would inevitably reduce confidence in our own nuclear deterrent. It was treaty advocates, not critics, who took the radical position in this debate. They argued that joining the international test ban would promote nuclear disarmament, and they were willing, in the interests of disarmament, to risk allowing the United States nuclear deterrent to become inoperable. Our responsibility in the Senate was to weigh soberly the chances, and the consequences, of ending up with a disabled and/or unsafe nuclear arsenal. Since there was so little prospect that the treaty could ever achieve its goals, the risks of a perpetual, zero-yield treaty were simply not worth it.

Rather than relinquishing the ability to test its nuclear weapons forever, the United States must guarantee its own security and that of its allies through the combination of a robust military deterrent (including deployment of missile defenses to provide options short of retaliation) and more serious enforcement of existing agreements. The United States and other nations that are parties to the Nuclear Nonproliferation Treaty should punish violators of that treaty. Agreements must be enforced if they are to be effective.

President Wilson was right about the need to appeal to Americans' fundamental belief in democracy, and their aspirations to-

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[53] *See* HERBERT F. MARGULIES, THE MILD RESERVATIONISTS AND THE LEAGUE OF NATIONS CONTROVERSY IN THE SENATE xii, 11, 27–28, 112, 178 (1989). *See also* Glynn, *supra* note 50, at 54, 56; Fareed Zakaria, *Fallout From the Test Ban Vote: Another Versailles? Yes, But . . .* WALL ST. J., Oct. 18, 1999, at A48.

[54] Glynn, *supra* note 50, at 54. Unhappiness with the terms of the Versailles Treaty was bipartisan, but only Republicans went on record with reservations because "few Democrats active in politics dared to incur [President Wilson's] wrath by opposing him." *See* ARTHUR S. LINK, WILSON THE DIPLOMATIST: A LOOK AT HIS MAJOR FOREIGN POLICIES 135–39 (1957). One Democratic Senator, Thomas J. Walsh of Montana, did comment in a private letter that "[t]he President has handled the thing most maladroitly and has evidenced a disposition to exclude the Senate from any real, active participation in the making of the treaty." Margulies, *supra* note 53, at 9.

ward what is just and right, in formulating United States foreign policy. He was misguided, however, in severing morality from the national interest. We cannot fulfill our moral responsibilities as guarantor of the security of free nations if we do not defend our interests. If Americans are to carry a message of peace and freedom around the world, we must remain a powerful nation able to protect ourselves and others. Our strategic security is the very foundation of our national power. Binding the United States to the Comprehensive Test Ban Treaty would have compromised our security, and approval of the treaty would have been an abdication of our moral responsibility to maintain the peace of the world. We must hold, as President Reagan did, to the doctrine of "peace through strength."

POLICY ESSAY

THE KYOTO PROTOCOL IS NOT THE ANSWER TO CLIMATE CHANGE

SENATOR FRANK H. MURKOWSKI*

The Kyoto Protocol has been offered as a solution to the problem of climate change. In this Policy Essay, Senator Murkowski argues that the Kyoto Protocol would harm the United States economy and would fail to stabilize concentrations of greenhouse gases in the atmosphere. This Essay offers alternatives to the Kyoto Protocol that should be implemented as part of a "no-regrets" approach to climate change that will provide incentives for innovation, support for new energy technologies, and investment in research to reduce the uncertainty surrounding climate change.

We must address responsibly the credible threat of climate change caused by human-induced greenhouse gas emissions. The Kyoto Protocol climate treaty,[1] often offered as the "cure" for climate change, is actually bitter medicine that would weaken the American economy and discourage the sustained long-term effort needed to stabilize greenhouse gas concentrations and protect the global environment.

Even the treaty's most ardent supporters admit that Kyoto alone would not stabilize atmospheric greenhouse gas concentrations or result in any measurable difference in the climate.[2] The explosive growth in emissions from China, India, South Korea, Mexico, and approximately 130 developing nations not bound by emissions limits in the treaty would quickly overshadow any emissions reductions the United States and the 38 other nations subject to Kyoto's limits achieve.[3]

At the same time, the Kyoto treaty would harm the United States economy. It requires us to reduce energy use by as much

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[1] Kyoto Protocol to the United Nations Framework Convention on Climate Change, *adopted* Dec. 10, 1997, 37 I.L.M. 22.

[2] *See, e.g.*, Bert Bolin, *The Kyoto Negotiations on Climate Change: A Science Perspective*, 279 SCIENCE 330, 331 (1998); T.M.L. Wigley, *The Kyoto Protocol: CO2, CH4 and Climate Implications*, 23 GEOPHYS. RES. LETT. 2285, 2285–88 (1998).

[3] *See* Alan Manne & Richard Richels, *The Kyoto Protocol: A Cost-Effective Strategy for Meeting Environmental Objectives?*, *in* THE ENERGY JOURNAL: THE COSTS OF THE KYOTO PROTOCOL: A MULTIMODEL EVALUATION 1, 20 (John P. Weyant ed., 1999).

as 40% below the levels otherwise expected in the year 2010.[4] The Energy Information Administration, an independent arm of the Department of Energy, predicts that implementation of the Kyoto Protocol could cause gasoline prices to rise by 53% and electricity prices by 86% over the next decade.[5] The estimated total cost of implementation is between 2% and 5% of the annual United States Gross Domestic Product ("GDP"). Cost estimates for other developed nations show similar impacts.[6]

In other words, the Kyoto Protocol climate treaty imposes significant economic pain without measurable environmental gain. It makes no sense for the United States to constrain its own economic growth in an effort to minimize the uncertain impacts of climate change. There are other actions we can take to reduce this uncertainty while fostering the research and development of clean and efficient energy sources. Instead of disrupting the economy, we can leverage the power of technology and the marketplace to produce cleaner sources of energy. This Essay summarizes some of the critical scientific, economic and policy issues that will drive climate change debate within Congress in the coming year, and suggests some sensible responses to climate change that should be implemented in lieu of ratification of the Kyoto Protocol.

I. UNCERTAINTY OF CLIMATE CHANGE

A number of scientists now believe that human activities, which have increased atmospheric concentrations of carbon dioxide (CO_2) by one-third over the past hundred years, may be leading to an increase in global average temperatures.[7] The basic science involved is simple: without the greenhouse effect that results naturally from CO_2 and other greenhouse gases, the Earth would be much cooler and thus hostile to life as we know it.

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[4] *See* ENERGY INFO. ADMIN., U.S. DEP'T OF ENERGY, IMPACTS OF THE KYOTO PROTOCOL ON U.S. ENERGY MARKETS AND ECONOMIC ACTIVITY (1998) (reference case projects a 33% increase over 1990 levels in emissions to 2010, Kyoto target is 7% below 1990).

[5] *See id.* at 15.

[6] *See, e.g.*, William Nordhaus & Joseph Boyer, *Requiem for Kyoto: An Economic Analysis of the Kyoto Protocol*, *in* THE ENERGY JOURNAL: THE COSTS OF THE KYOTO PROTOCOL: A MULTIMODEL EVALUATION 93, 120 (John P. Weyant ed., 1999).

[7] *See* B.D. Santer et al., *Detection of Climate Change and Attribution of Causes*, *in* CLIMATE CHANGE 1995: THE SCIENCE OF CLIMATE CHANGE 407, 412 (J.T. Houghton et al. eds., 1996).

Carbon dioxide and other greenhouse gases trap infrared radiation that is emitted by the Earth; the atmosphere radiates this trapped heat energy back towards the Earth's surface where some of it is absorbed, increasing surface temperature. Concern is growing among scientists and policymakers, however, that human activities, such as the burning of fossil fuels, industrial production, and certain land-use practices, are increasing atmospheric concentrations of CO_2 and other trace gases such as chlorofluorocarbons-CFCs, methane (CH_4), nitrous oxide (N_2O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs) and sulfur hexafluoride (SF_6).[8] As concentrations of these greenhouse gases increase, the greenhouse effect becomes larger, leading to a further increase in surface temperature.

If the effects were uniform, we could clearly project the risks of climate change and formulate policy options to address this risk. Research in the past few decades, however, has greatly expanded our understanding of the Earth and its complex climate system. We now know that the effects of increased greenhouse gases will likely be variable in space and time.[9] We suspect that changes in the chemical composition of the atmosphere could impact rainfall patterns, cloud formation, ocean heating and circulation, and changes in vegetation and soil moisture.[10] Each of these processes is linked to the atmosphere in a remarkably complex, non-linear manner that will challenge earth systems scientists for many years to come.[11]

Despite numerous studies,[12] the effects of greenhouse gases remain uncertain. Building on the available scientific literature,

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[8] These are the six gases subject to limits under the Kyoto Protocol. For evidence of their documented increases, see D. Schimel et al., *Radiative Forcing of Climate Change, in* CLIMATE CHANGE 1995: THE SCIENCE OF CLIMATE CHANGE 65, 76–91 (J.T. Houghton et al. eds., 1996).

[9] *See* text and numerous works referenced in N. Nicholls et al., *Observed Climate Variability and Change, in* CLIMATE CHANGE 1995: THE SCIENCE OF CLIMATE CHANGE 141, 141–52 (J.T. Houghton et al. eds., 1996).

[10] *See id.* at 151–67.

[11] *See* text and numerous works referenced in K.E. Trenberth et al., *The Climate System: An Overview, in* CLIMATE CHANGE 1995: THE SCIENCE OF CLIMATE CHANGE 51, 55–64 (J.T. Houghton et al. eds., 1996).

[12] The World Meteorological Organization and the United Nations Environmental Programme established the Intergovernmental Panel on Climate Change ("IPCC") in 1988 to study the threat of climate change from increases in greenhouse gases. The IPCC was charged with assessing the scientific, socioeconomic and policy dimensions related to climate change and its impact, and hundreds of scientists from around the world are involved with this effort to provide technical advice to policymakers. Congress formed the United States Global Change Research Program ("USGCRP") in 1989 with an initial appropriation of $133.9 million. Since then, the USGCRP budget has

the Intergovernmental Panel on Climate Change ("IPCC") concluded in its 1996 Second Assessment Report that the "balance of evidence suggests a discernable human impact on the climate system," even though that signal does not clearly emerge from the background noise of natural climate variability.[13] The projected increase in atmospheric greenhouse gases could cause global mean surface temperatures to rise between 1.6° and 6.3° Fahrenheit by the year 2100, with an associated sea level rise of six to thirty-six inches.[14] These changes may result in an increase in the incidence of extreme high temperature events, floods, droughts, fires, and pest outbreaks. The IPCC report recognizes, however, that the reliability of regional-scale climate predictions is still low, and the degree to which climate variability may change is uncertain.[15]

Much of this uncertainty stems from our limited knowledge of the global carbon cycle. Each year, 800 billion tons of carbon from naturally occurring processes cycles through the biosphere as CO_2. Ice cores and other proxy climate data, which indicate CO_2 concentrations in the atmosphere, show a relatively stable global climate over the past ten thousand years, since the end of the last ice age.[16] Consequently, many scientists suggest that the amount of carbon generated by natural processes balances the amount of carbon absorbed and sequestered by natural processes.[17] Human activity, however, primarily in the form of burning fossil fuels, is now generating an additional 24 billion tons of CO_2 each year.[18] Available evidence shows that half of this

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increased dramatically to nearly $2 billion, reflecting one-third of the national total for federally funded environmental research. *See* text and numerous works referenced *in* CLIMATE CHANGE 1995: THE SCIENCE OF CLIMATE CHANGE (J.T. Houghton et al. eds., 1996).

[13] *Id.* at 39. *But see* INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, SPECIAL REPORT ON EMISSIONS SCENARIOS (N. Nakicenovic et al. eds., forthcoming May 2000) (Scientific uncertainties contrary to the IPCC's opinion were addressed in Chapter 8, "Detection of Climate Changes and Attribution of Causes," in the Science Working Group Report.).

[14] *See supra* note 12, at 39–40.

[15] *See id.* at 6–7.

[16] *See* Dominique Raynaud et al., *Changes in Trace Gas Concentrations During the Last 2000 Years and More Generally the Holocene*, *in* CLIMATE VARIATIONS AND FORCING MECHANISMS OF THE LAST 2000 YEARS 547, 551–54 (Philip D. Jones et al. eds., 1996).

[17] *See generally* Kim Holmén, *The Global Carbon Cycle*, *in* GLOBAL BIOGEOCHEMICAL CYCLES 239, 254 (Samuel S. Butcher et al. eds., 1992).

[18] *See supra* note 8, at 79 (Table 2.1 indicates that total anthropogenic emissions are 7.1 GtC (7.1 billion tons of carbon), which translates to 26 billion tons of CO_2 (using a molecular weight ratio of 44/12)).

additional amount is absorbed by natural processes on land and in the ocean, and half enters the atmosphere to increase the CO_2 concentration.[19] Some scientists suggest that a significant amount of CO_2 may be stored in northern latitude soils and in temperate and tropical forests.[20] Significant uncertainty remains, however, with regard to exactly where the added carbon from human activities goes (the so-called "missing sink" of carbon).[21] We must focus research efforts on the role of natural ecosystems and human-induced changes, such as forest management and land-use practices, in order to better understand the carbon cycle and its role in climate change.

Recent computer models of the Earth's climate project that if greenhouse gases continue to accumulate in the atmosphere at the current rate, the mean global temperature will increase by 3° to 8° Fahrenheit.[22] Based on these model simulations, many climate scientists predict that such a warming could shift temperature zones, rainfall patterns, agricultural belts and, under certain scenarios, cause sea levels to rise and inundate low-lying coastal areas.[23] Further, they predict that global warming could affect natural resources, ecosystems, food and fiber production, energy supply and use, transportation, land use, water supply and control, and human health.[24]

While the media focuses on those expected to experience negative net benefits from climate change, climate change will likely bring positive net benefits to some, particularly those in richer nations who can easily adapt to or ameliorate the adverse

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[19] *See* C.D. Keeling et al., *A Three-Dimensional Model of Atmospheric CO2 Transport Based on Observed Winds: 4. Mean Annual Gradients and Interannual Variations, in* ASPECTS OF CLIMATE VARIABILITY IN THE PACIFIC AND WESTERN AMERICAS, GEOPHYSICAL MONOGRAPH 55, 305–63 (David H. Peterson ed., 1989). *See also* C.D. Keeling et al., *Interannual Extremes in the Rate of Rise of Atmospheric Carbon Dioxide Since 1980*, 375 NATURE 666 (1995).

[20] *See, e.g.*, S. Fan et al., *A Large Terrestrial Carbon Sink in North America Implied by Atmospheric and Oceanic Carbon Dioxide Data and Models*, 282 SCIENCE 442 (1998).

[21] *See supra* note 18 (the "missing sink" is reflected in Table 2.1 as "Other Terrestrial sinks").

[22] *See* A. Kattenberg et al., *Climate Models: Projections of Future Climate, in* CLIMATE CHANGE 1995: THE SCIENCE OF CLIMATE CHANGE 285, 289 (J.T. Houghton et al. eds., 1996).

[23] *See, e.g., id.* at 285–358; R.A. Warrick et al., *Changes in Sea Level, in* CLIMATE CHANGE 1995: THE SCIENCE OF CLIMATE CHANGE 359, 359–407 (J.T. Houghton et al. eds., 1996).

[24] Specific impacts are discussed in INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 1995: IMPACTS, ADAPTATION AND MITIGATION OF CLIMATE CHANGE (R.T. Watson et al. eds., 1996).

impacts.[25] The coarse grid resolution of current computer models does not precisely predict climate changes on local or regional scales,[26] so an assessment of the true costs and benefits of climate change on a specific area or region is not possible.

Challengers of the global warming theory argue that the scientific proof is incomplete or contradictory, and that too many uncertainties about the nature and direction of the Earth's climate remain.[27] Skeptics also question the reliability of climate models used to make projections of future warming due to the difficulty current climate models have reconstructing known climates of the past utilizing only measurements from ice cores, ocean sediments and other proxy data. For example, one ongoing project, the Paleoclimate Modeling Intercomparison Project ("PMIP"), is currently studying these models' ability to replicate the climate of the relatively warm Holocene period (nearly 6,000 years ago) and the relatively cold Last Glacial Maximum (about 21,000 years ago).[28] A recent PMIP study found that differences in model simulations of the Asian Monsoon (an event of great importance to billions of people in today's climate) during the Holocene were "related to differences in model formulation" and "(d)espite qualitative agreement with paleoecological estimates of biome shifts, the magnitude of the monsoon increases over northern Africa are underestimated by all the models."[29] These studies highlight the limitations of our knowledge and provide insight into where we can best target research efforts to reduce uncertainty. They also demonstrate that our knowledge is insufficient for sound policy decisions.

There is also disagreement as to whether the climate is getting warmer. National Oceanic and Atmospheric Administration ("NOAA") researchers report that the twelve warmest years

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[25] *See id.* (note particularly the positive agricultural benefits to Canada, northern parts of the former Soviet Union, and Scandanavian countries).

[26] *See supra* note 22, at 339 (Section 6.6 pertaining to regional simulations of climate change indicates that "confidence in the regional scenarios . . . remain low.").

[27] *See, e.g., Carbon Dioxide: A Satanic Gas?, Hearings before the Subcomm. on Nat'l Econ. Growth, Nat. Resources and Reg. Affairs of the House Comm. on Gov't Affairs*, 106th Cong. (1999) (statement of Patrick J. Michaels). *See also* S. FRED SINGER, HOT TALK COLD SCIENCE: GLOBAL WARMING'S UNFINISHED DEBATE (1999); S. Fred Singer, *Human Contribution to Climate Change Remains Questionable*, 80 AM. GEOPHYS. UNION 183 (Apr. 20, 1999).

[28] *See* S. Joussaume et al., *Monsoon Changes for 6000 Years Ago: Results of 18 Simulations from the Paleoclimate Modeling Intercomparison Project (PMIP)*, 26 GEOPHYS. RES. LETT. 859, 859–62 (1999).

[29] *Id.* at 859.

(since historical records have been kept) occurred in the past two decades, with 1990 and 1998 among the warmest.[30] At least some of this warming, they concluded, is human-induced.[31] On the other hand, satellite instruments, which measure temperatures of the atmosphere in a deep column above the surface, do not demonstrate any positive trends over the past twenty years.[32] A recent report by the National Research Council ("NRC") notes that the observed disparity between the two temperature measures is at least partially real and not an artifact of the measurement method.[33] The NRC report suggests that current climate models do not include all fundamental climate processes needed to simulate correctly this aspect of the climate system.[34]

Since the natural climate is highly variable, even the record-setting warmth and severe weather events in the 1980s and 1990s do not convince a vast majority of knowledgeable scientists that these extremes are attributable to human-induced global warming.[35] The El Nino and La Nina phenomena suggest causal relationships between climate changes and present-day severe weather events.[36] Skeptics challenge that these extreme weather events indicate long-term climate change, not global warming.

In any event, singular extreme weather events focus public attention on possible outcomes of potential long-term climate change and a need for a better understanding of regional climates. The United States Global Change Research Program is in the process of assessing the consequences of climate change through the use of two models,[37] neither of which was a United States climate model. The two models predict very different out-

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[30] *See* NATIONAL OCEANOGRAPHIC AND ATMOSPHERIC ADMINISTRATION, NOAA RELEASES CENTURIES TOP WEATHER, WATER AND CLIMATE EVENTS (last modified Dec. 13, 1999) <http://www.publicaffairs.noaa.gov/releases99/dec99/noaa99084.html>.

[31] *See id.*

[32] *See* NATIONAL RESEARCH COUNCIL, RECONCILING OBSERVATIONS OF GLOBAL TEMPERATURE CHANGE 41–49 (2000). For details on the Microwave Sounding Unit (MSU) instrument, *see* R.W. Spencer & J.R. Christy, *Precision Lower Stratospheric Temperature Monitoring With the MSU: Technique, Validation and Results 1979–1991*, 6 J. CLIMATE 1194 (1993).

[33] *See* NATIONAL RESEARCH COUNCIL, *supra* note 32, at 22.

[34] *See id.* at 23.

[35] *See, e.g.*, *supra* note 9, at 168–73.

[36] *See* K.E. Trenberth & T.J. Hoar, *El Nino and Climate Change*, 24 GEOPHYS. RES. LETT. 3057, 3057–60 (1997) (observing that changes in El Nino and La Nina patterns are unlikely to be purely the result of natural variability).

[37] *See* U.S. GLOBAL CHANGE RESEARCH PROGRAM, CLIMATE CHANGE AND AMERICA: OVERVIEW DOCUMENT: A REPORT OF THE NAT'L ASSESSMENT SYNTHESIS TEAM (2000). For more detailed information, see (visited May 2, 2000) <http://www.nacc.usgcrp.gov.html>.

comes for most regions of the United States,[38] which is not surprising when one considers the limitations of the current generation of climate models.[39]

Thus, the scientific questions remain: Can scientists now confirm that humans are, at least in part, the cause of recent climate changes? If so, is the Earth committed to some degree of future global warming? What might the consequences of that warming be? What impacts of climate change can be prevented through human intervention? Where will these impacts be felt, and how quickly? Hoping to address many of these unresolved issues, a third IPCC assessment of global climate change is expected late in 2001.[40] In the meantime, scientists continue to investigate the core issues so that we may responsibly address the risks associated with climate change.

II. Policy Perspective

Despite uncertainty in the science of climate change, 155 nations, including the United States, signed the Framework Convention on Climate Change[41] ("FCCC") at the 1992 United Nations Conference on Environment and Development in Rio de Janeiro, Brazil. The Rio Convention sets the goal of "stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system."[42] The FCCC was ratified by the Senate and entered into force in March 1994.[43]

The Clinton Administration later defined five fundamental principles of any United States response to climate change:

> that we be, one, guided by the science; two, that our approach be market-based and common sense; three, that we should first look for the win-win, positive solutions that exist before us; four, that there must be global participation, that this is a global problem that requires a global solution;

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[38] The data is available at (visited May 2, 2000) <http://www.cgd.ucar.edu/naco/gcm/tmppt.html>.

[39] *See supra* text accompanying note 28.

[40] The schedule of IPCC activities is available at (visited May 2, 2000) <http://www.ipcc.ch/activity/master-sch.html>.

[41] *United Nations Framework Convention on Climate Change, opened for signature* June 20, 1992, 31 I.L.M. 849.

[42] *Id.* Art. II.

[43] Signatories to the Framework Convention on Climate Change are listed at 1–4 (last modified Dec. 10, 1999) <http://www.unfccc.de/resource/kpstats.pdf>.

> and fifth, recognizing the uncertainty in engaging on a long-term we need to have common sense, economic and scientific review periodically.[44]

President Clinton expanded on the fourth principle shortly before the United States delegation departed to the Third Conference of the Parties in Kyoto, Japan in 1997: "The question before us is whether the nations of the world, both the developed and the developing nations, can put their rhetoric aside and find common ground in a way that enables us to make real progress in reducing the danger of global warming."[45]

That question remains equally valid today. Unless developing nations are included in the emissions control regime, many predict that uneven energy prices will spark a shift of industrial production and jobs from industrialized nations to the developing world.[46] Moreover, actual global emissions might increase more rapidly from this production shift because industrial countries are generally more energy efficient than developing nations.[47] Even under business-as-usual scenarios, emissions from developing nations are expected to exceed those from industrial nations by 2015.[48]

The United States Senate quickly recognized the importance of participation of developing nations. In July 1997, the Senate adopted, by a vote of 95-0, Senate Resolution 98,[49] commonly known as the "Byrd-Hagel" resolution. The resolution was to provide guidance to the Administration and its global climate negotiating team as they entered negotiations in Kyoto. It stipulates two conditions that must be met before the United States can become a signatory to any international agreement on climate change: first, the agreement must include quantified emissions limitations for developing countries; second, it cannot re-

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[44] OFFICE OF THE PRESS SECRETARY, THE WHITE HOUSE, PRESS BRIEFING ON CLIMATE CHANGE (Oct. 22, 1997) (visited May 2, 2000) <http://www.pub.whitehouse.gov/ori.res/12R?orn:pdi://oma.eop.gov.us/1997/10/30/9.text.1>.

[45] OFFICE OF THE PRESS SECRETARY, THE WHITE HOUSE, 1997 REMARKS BY THE PRESIDENT IN PHOTO OPPORTUNITY BEFORE BUDGET MEETING, (Dec. 1, 1997) (visited May 2, 2000) <http://www.pub.whitehouse.gov/uri-res/I2R?urn:pdi://oma.eop.gov.us/1997/12/1/4.text.1>.

[46] *See, e.g.*, Warwick McKibbin et al., *Emissions Trading, Capital Flows and the Kyoto Protocol*, *in* THE ENERGY JOURNAL: THE COSTS OF THE KYOTO PROTOCOL: A MULTIMODEL EVALUATION 287 (John P. Weyant ed., 1999).

[47] *See* Robert Engelman, *Profiles in Carbon: An Update on Population, Consumption and Carbon Dioxide Emissions* (visited Apr. 27, 2000) <http://www.populationaction.org/why_pop/carbon/carbon_index.htm>.

[48] *See supra* note 3.

[49] S. Res. 98, 105th Cong. (1997).

sult in serious harm to the United States economy.[50] Despite this admonition from Congress, the Kyoto Protocol negotiated in December 1997[51] did not require quantified emissions limits for developing countries. The Kyoto Protocol would impose legally binding emissions limits for greenhouse gases only on industrialized nations while setting forth vague mechanisms for compliance, which the Parties to the FCCC will flesh out in subsequent meetings. Most industrialized nations would be required to reduce emissions by 2008-2012 to levels that are 6% to 8% below 1990 emissions levels, and the United States would be required to meet a 7% reduction.[52]

Although the Administration continues to pursue what it terms "meaningful developing country participation,"[53] the level of participation required under Byrd-Hagel seems unachievable in the short-term.[54] It is, therefore, safe to say that the first of the Byrd-Hagel tests will not be met.

III. ECONOMIC IMPACT OF KYOTO

Economists differ in their assessment of whether the Kyoto Protocol also fails to meet the second Byrd-Hagel test regarding serious harm to the United States economy.[55] Some economic models predict a sharp fall in national GDP while others find little or no economic impact.[56] Not surprisingly, results from these models are sensitive to the economic assumptions implicit in their design. For instance, if one presumes a large negative

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[50] *See id.*

[51] Kyoto Protocol to the United Nations Framework Convention on Climate Change, *adopted* Dec. 10, 1997, 37 I.L.M. 22.

[52] *See id.* Annex B.

[53] OFFICE OF THE PRESS SECRETARY, THE WHITE HOUSE, PRESIDENT CLINTON'S INDIA TRIP: PROTECTING THE ENVIRONMENT, PROMOTING CLEAN ENERGY DEVELOPMENT AND COMBATTING GLOBAL WARMING (Mar. 22, 2000) (visited May 2, 2000) <http://www.pub.whitehouse.gov./uri-res/12R?urn:pdi://oma.eop.gov.us/1997/12/1/9.text.1>.

[54] *See supra* note 49. Regarding the requirement of "new specific scheduled commitments to limit or reduce greenhouse gas emissions for Developing Country Parties within the same compliance period," only Kazakhstan has voluntarily taken on commitments since the Kyoto Protocol was opened for signature. *Report of the Conference of the Parties on its Fifth Session*, FCCC/CP/1999/6, at 25 (visited May 2, 2000) <http://www.unfccc.de/resource/docs/cop5/06.pdf>.

[55] This issue was the subject of a hearing held on March 25, 1999, by the Senate Energy and Natural Resources Committee. *See Economic Impacts of the Kyoto Protocol: Hearing Before the Senate Comm. on Energy and Nat. Resources*, 106th Cong. (1999).

[56] *See, e.g.*, THE ENERGY JOURNAL: THE COSTS OF THE KYOTO PROTOCOL: A MULTI-MODEL EVALUATION (John P. Weyant ed., 1999).

economic impact of climate change, the benefits of avoiding damage from climate change will likely offset the costs of emission reductions.[57] If the models assume, however, that implementation of the emissions reduction requirements in advanced industrial economies will only result in a shift to emissions by developing nations, there would be no net benefits to offset the cost of emissions controls.[58]

In a report released in July 1998, the President's Council of Economic Advisors ("CEA") predicted that the emissions limitations imposed by the Kyoto Protocol will have a "modest" impact.[59] CEA anticipated that implementation of the protocol would generate total compliance costs between $7 billion and $12 billion per year between 2008 and 2012.[60] In terms of energy costs, these estimates translate to between $14 and $23 per ton of carbon, resulting in a projected increase in household electricity bills of between $70 and $110 per year.[61] CEA's analysis is at the low end of the range of economic cost studies that have been conducted,[62] primarily due to its overly optimistic assumptions as to how the emissions reductions are achieved. CEA's analysis assumes that (1) reductions are undertaken in an efficient manner, (2) meaningful participation of developing countries is secured (e.g., they too take on emissions limits), (3) effective global international emissions trading is in place to allow emissions reductions at the lowest cost, and (4) a well functioning Clean Development Mechanism is in place that allows developed countries to receive emissions reduction credit for activities that foster clean energy use in developing countries.[63]

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[57] *See id.*

[58] *See id.*

[59] *See* COUNCIL OF ECONOMIC ADVISORS, EXECUTIVE OFFICE OF THE PRESIDENT, THE KYOTO PROTOCOL AND THE PRESIDENT'S POLICIES TO ADDRESS CLIMATE CHANGE: ADMINISTRATION ECONOMIC ANALYSIS 19 (1998) (visited Apr. 30, 2000) <http://www.whitehouse.gov/WH/New/html/kyoto.pdf.>.

[60] *See id.* at 53.

[61] *See id.*

[62] *See, e.g., The Impact of the Kyoto Protocol On Economic Growth: Tax Policies to Promote Technology and Sequestration: Hearing Before the Senate Comm. on Energy and Nat. Resources*, 106th Cong. (2000) (statement of Margo Thorning, Senior Vice President and Chief Economist, American Council for Capital Formation) (visited Apr. 30, 2000) <http://www.accf.org/ThorningTestimony.pdf>.

[63] *See supra* note 59, at 50. The assumptions used are "overly optimistic" because three of the four necessary conditions are not being met even at the current time: (1) an efficient market for trading in emissions permits does not yet exist, (2) an effectively functioning Clean Development Mechanism ("CDM") does not exist, and (3) there is only one developing country that has made such a meaningful commitment. *See Report*

Two often-cited economic studies project vastly different costs than those predicted by the CEA. The Energy Information Administration ("EIA"), an independent statistical and analytical agency within the Department of Energy, prepared a report for the United States House of Representatives Committee on Science in October, 1998.[64] EIA conducted case studies evaluating six different emissions reduction scenarios, including the Kyoto target of reducing emissions by 7% from 1990 levels by 2010.[65] The EIA concluded that average delivered energy costs, as measured in 1996 dollars, would likely increase between 17% and 83% relative to the 2010 baseline projections if the Kyoto targets are met via a market-based mechanism.[66] This would result in predictable decreases in economic growth and employment relative to the baseline forecast.[67]

Another study, conducted by WEFA, Inc. (formerly Wharton Econometric Forecasting Associates), found that implementing the Kyoto Protocol would result in sharply higher energy and electricity prices.[68] These higher prices would put the American economy at a competitive disadvantage relative to developing countries and would lead to a decline in the American standard of living. WEFA estimates that successful implementation would result in a loss of nearly 2.4 million jobs and a $300 billion annual decline in GDP.[69] The average income loss would amount to $2,728 per family.[70] The WEFA model, however, does not consider the effect of emissions trading, a compliance mechanism in the Kyoto Protocol that would allow emissions reductions to be made at the lowest global cost.[71] This exclusion is reasonable given the doubts which have been raised since Kyoto as to whether such a program will ever be implemented.[72] In order for the Kyoto Protocol to be successful, commitments form developing countries to reduce emissions would be necessary, but

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of the Conference of the Parties on its Fifth Session, *supra* note 54.

[64] *See supra* note 4.

[65] *See supra* note 52.

[66] *See supra* note 4, at 48 (summary of predicted changes in energy commodity prices).

[67] *See id.* at 131.

[68] *See* WEFA, INC., GLOBAL WARMING: THE HIGH COST OF THE KYOTO PROTOCOL, NATIONAL AND STATE IMPACTS EXECUTIVE SUMMARY 2 (1998) (visited Apr. 30, 2000) <http://www.api.org/globalclimate/wefa/exec.pdf>.

[69] *See id.* at 3.

[70] *See id.*

[71] *See id.* at 8.

[72] *See id.*

these countries will not accept these policies until there are viable technological alternatives to fossil fuels.[73]

While these economic studies serve as rough estimates of the costs of implementing the Kyoto Protocol, any potential damages from climate change are likely to depend on a complex climatic response that scientists are still trying to understand. Quantifying the costs avoided by preventing climate change is difficult because the precise link between CO_2 emissions, atmospheric concentrations, and climate response is unknown. Thus, a quantity control on emissions (such as that mandated by Kyoto) does not necessarily translate into a corresponding quantity control on climate change. Because both price (e.g., a carbon tax) and quantity (e.g., emissions caps and tradable permits) controls may lead to uncertain climate benefits, there is no reasonable basis on which to carry out a cost/benefit analysis of the various policy measures under consideration.[74] Therefore, traditional policy instruments for dealing with air pollution, such as price and quantity controls, may not be applied easily to a global, long-term problem such as climate change.

IV. A Realistic Approach to Climate Change

Many proponents of action to address potential climate change have suggested adopting a "precautionary principle," which would be comprised of a number of anticipatory yet flexible policy responses that might be likened to the purchase of an insurance policy to hedge against some risks of potential climate change in the future.[75] Broader national responses might include engineering countermeasures (carbon sequestration), passive adaptation, prevention, or the pursuit of an international law of the atmosphere. In the early 1990s, President Bush advocated what has been called a "no regrets" approach to national policy, which, in theory, would not only reduce emissions of greenhouse gases, but would provide other benefits to society as well.[76] Such

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[73] *See id*; *see also supra* note 56.

[74] *See* W. Pizer, *Choosing Price or Quantity Controls for Greehouse Gases, Climate Issues Brief No. 17, in* Resources for the Future (1999) (RFF study on GHG economics) (on file with author).

[75] *See, e.g.*, The World Environment 1972–1992: Two Decades of Challenge 77 (UN Envir. Prog. ed. 1992) (Box 7.7).

[76] *See id.* (President Bush's policies were categorized as "no regrets," defined as indicating a policy in which a reduction in greenhouse gases can be justified on other

policy options stress energy efficiency, conservation, renewable energy, planting trees to enhance CO_2 sequestration from the atmosphere, and substitution of fuels producing little or no CO_2. Many scientists suggest that such actions might buy time to gain a better understanding of global climate change and perhaps reduce negative impacts attributable to human-induced climate change.[77]

Because the United States might realize net positive benefits from a warmer, CO_2-rich environment,[78] however, it is difficult for politically attuned leaders to agree to risk America's economic growth in an effort to minimize the uncertain impacts of climate change. Even if it could be determined that action now yields benefits later, the discounting of those benefits means that the current willingness-to-pay for emissions reductions is quite low relative to current costs.

The nature of the climate change issue, therefore, requires that any policy response adhere to certain principles. First, any actions to address climate change must be voluntary and without substantial economic cost. Expensive command-and-control approaches to regulating greenhouse gas emissions will not work, nor will inflexible national policies that do not allow for firms and individuals to seek the lowest possible costs involved.

Second, a policy response should not fall unfairly on certain segments of the economy or countries of the world, especially given the increasingly global economy driven by the principles of free trade. Climate change knows no national or economic boundaries; a molecule of greenhouse gas has no greater or lesser impact depending on where it is emitted into the atmosphere. Given the projected population increase in developing nations in the twenty-first century, even a modest increase in greenhouse gas emissions per capita in those countries will negate any sort of action taken elsewhere under the Kyoto Protocol or similar agreement. Thus, participation of all parties utilizing the global "commons" of the atmosphere is essential.

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grounds; *see also* President George Bush, Remarks to the Intergovernmental Panel on Climate Change (Feb. 5, 1990) (visited May 2, 2000) <http://bushlibrary.tamu.edu/papers/1990/90020502.html>.

[77] *See* INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, IPCC SECOND ASSESSMENT: CLIMATE CHANGE 1995 46 (1996) (visited May 2, 2000) <http://www.ipcc.ch/pub/sa(E).pdf>

[78] *See, e.g.*, K.E. Idso & S.B. Idso, *Plant Responses to Atmospheric CO_2 Enrichment in the Face of Environmental Constraints: A Review of the Past 10 Years' Research*, 69 AGRIC. AND FOREST METEOROLOGY 153 (1994).

Third, we must recognize the limitations of our economy and infrastructure to respond to significant policy shifts. The demand for energy facing the world of the twenty-first century will be enormous if we wish to sustain the current standard of living in industrialized nations and extend it to developing countries.[79] We will not be able to meet these energy demands without some use of fossil fuels, and emerging renewable energy technology will continue to require significant market subsidies to be cost competitive.[80] Moreover, nations have invested trillions of dollars in power generation and transmission infrastructure that would need to be retired early if current energy sources are replaced.[81] There are also issues of reliability and availability of energy sources: the wind does not always blow, and the sun is not there to provide solar energy at night when heating is needed. Further, large production capacity for non-hydro renewable energy is not yet available.[82]

Finally, given the physical and chemical nature of greenhouse gases and the complexity of the Earth's system, any policy response must be part of a long-term energy strategy rather than a short-term response to a perceived catastrophe. Climate change consequences depend on the total amount of greenhouse gases in the atmosphere, not solely on the emissions rate, since greenhouse gases emitted today linger in the atmosphere for years to come. This suggests the need for a focus on controlling the stock of greenhouse gases in the atmosphere, rather than simply a focusing on emissions.

Given the principles listed above, we must adopt a new realism about our energy options. The developing economies of the twenty-first century, namely China and India, will require enormous amounts of energy for their growing populations to achieve the standard of living to which we have become accus-

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[79] *See supra* note 3.

[80] *See generally* ENERGY INFORMATION ADMINISTRATION, INTERNATIONAL ENERGY OUTLOOK 2000, DOE-EIA-0484, at 104 (2000) (visited May 2, 2000) <http://www.eia.doe.gov/oiaf/ieo/pdf/0484(2000).pdf>.

[81] The International Institute for Applied Systems Analysis and the World Energy Council have estimated 1990–2020 world capital infrastructure needs for the energy sector to be $9.5 to $14.3 trillion measured in 1990 U.S. dollars. Similar estimates for the 2021–2050 period range from $14.1 to $23.4 trillion measured in 1990 U.S. dollars. *See* GLOBAL ENERGY PERSEPECTIVES 102 (N. Nakicenovic et al. eds., 1998) (Table 6.1).

[82] *See generally supra* note 80.

tomed.[83] We must help these countries develop in a way that makes environmental sense.

Unfortunately, many in the Clinton-Gore Administration and most environmental groups are not advancing realistic solutions. They want to advance low-emission power generation and transportation systems,[84] but they oppose the proven, emissions-free sources of energy that are already making the largest contribution to emissions reductions.[85] For example, they oppose emissions-free nuclear energy, which produces 19% of our electricity.[86] They oppose emissions-free hydropower, which produces about 9% of our electricity.[87] They only seem to support non-hydro renewable energy, which currently produces about 2% of our electricity.[88] While there is potential for growth in this area, we would have to cover completely a number of southern and western states with solar panels, blanket hillsides with windmills, and put a great deal of arable land into the production of biomass if we are to use these energy sources alone to fuel our economy and its projected appetite for energy.[89]

The Administration's efforts to implement the flawed Kyoto Protocol without Senate ratification have created distrust in Congress and hindered a discussion that would otherwise lead to workable solutions.[90] What might those solutions be? Technol-

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[83] *See supra* note 3.

[84] *See, e.g.*, U.S. DEP'T OF STATE, INTERNAT'L INFO. PROGRAMS, UNITED STATES: TAKING ACTION ON CLIMATE CHANGE (1999) (visited May 2, 2000) <http://usinfo.state.gov/topical/global/environ/climate/main.htm>; OFFICE OF THE PRESS SECRETARY, THE WHITE HOUSE, PRESIDENT CLINTON'S FY2001 CLIMATE CHANGE BUDGET (Feb. 3, 2000) (visited May 2, 2000) <http://www.whitehouse.gov/Initiatives/Climate/budget.html>.

[85] Examples of environmental groups against nuclear power can be found at the Safe Energy Communication Council <http://www.safeenergy.org> and positions against hydroelectric power can be found at the Columbia and Snake Rivers Campaign <http://www.removedams.org>.

[86] *See* ENERGY INFO. ADMIN., ANNUAL ENERGY REVIEW 1998, DOE-EIA-0384 213 (Table 8.3), 215 (Table 8.4) (1999).

[87] *See id.*

[88] *See id.*

[89] Using 30 million acres for production of biomass would result in production of 45–50 billion gallons of ethanol, enough to meet one-quarter of U.S. transportation needs. *See* Richard Lugar & James Woolsey, *The New Petroleum*, FOREIGN AFFAIRS, Jan./Feb. 1999, at 88, 97. Also, low power densities for solar (0.3–0.6 kWh/m^2; assuming a 10-hour solar day) and wind (0.2–0.6 kWh/m^2) would require large areas (400 km^2) to match the output of a medium-sized 800 MW coal-fired power plant. *See* ENERGY INF. ADMIN., RENEWABLE ENERGY 1998: ISSUES AND TRENDS 48 (Figures 1, 2) (1999).

[90] *See, e.g., Fiscal Year 2001 Climate Change Budget Authorization Request: Hearing Before the Subcomm. on Energy and Evn't of the House Comm. on Science*, 106th Cong. (2000) (statement of Ken Calvert (R-Cal.), Chairman of Subcomm. on Energy and Env't) (visited May 2, 2000) <http://www.house.gov/science/calvert_030900.htm>.

ogy, applied globally, over the long-term, is a good place to start. I have been joined by the bipartisan support of seventeen of my colleagues in sponsoring the Energy and Climate Policy Act[91] that would put long-term technology development—rather than unrealistic international regulatory mandates—at the heart of our efforts to stabilize greenhouse gas concentrations. The supporters of this measure understand that efforts to stabilize greenhouse gas concentrations must be undertaken globally, over the long-term. The nature of greenhouse gases (with chemical lifetimes of decades to centuries), the complex physical nature of the climate system, the nature of economic growth (including the useable lifetime of physical plants) and other factors make this a marathon effort rather than a sprint.

The time limits in the Kyoto Protocol, on the other hand, are artificial, politically derived, short-term deadlines.[92] Moreover, the Kyoto Protocol, in subjecting only some nations to emissions limits,[93] distinguishes between emissions from different nations. The atmosphere makes no such distinction. This potential problem is global in scope. The solutions we encourage must be global as well.

If we expect to achieve success, we must leverage the power of technology and the marketplace. We must expand existing emissions-free technologies, including nuclear and hydropower, as well as solar, wind, and biomass. We must make nuclear and hydro relicensing easier and solve the nuclear waste issue, which is a political problem rather than a technical one. We must promote new technology to trap and store greenhouse gases from emission into the atmosphere. And we must assist developing nations with clean coal technology and other improvements in energy efficiency.

Finally, we must remove existing regulatory barriers to voluntary reductions. For example, the Environmental Protection Agency ("EPA"), through its "new source review" regulations,[94] actually acts as a barrier to the use of new technology. If an energy user wants to modify a plant or process to achieve greater energy efficiency, the EPA requires a technology review[95] that is

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[91] S. 882, 106th Cong. (1999).

[92] Signatories to the Kyoto Protocol must meet their Annex B reduction targets as an average of emissions for the years 2008 through 2012. *See supra* note 51, Art. 3, § 1.

[93] *See supra* note 51, Annex B.

[94] 42 U.S.C. § 7411(b) (1994).

[95] *See* 42 U.S.C. § 7411(c) (1994).

intrusive and prescriptive. This is a senseless regulatory barrier that hinders voluntary emissions reductions.

Unfortunately, the Kyoto Protocol, and the belief that the Clinton-Gore Administration is taking steps to implement the treaty in the absence of Senate ratification, is hindering bipartisan cooperation in the areas listed above. We will not make progress on the climate issue until this treaty is formally declared dead.

V. Other Legislative Efforts

There are a number of other viable proposals to address the issue of climate change, and the upcoming year will feature significant discussion of these proposals through legislative hearings and debate. Taken together, many of these legislative actions would constitute a sensible "no-regrets" approach to addressing climate change by reducing greenhouse gas concentrations while minimizing costs to the American consumer.

A. *Alternatives to Kyoto*

The Energy and Climate Policy Act of 1999,[96] which I sponsored, would establish a new Office of Global Climate Change within the Department of Energy ("DOE") to coordinate the climate change activities within DOE.[97] This new office would increase accountability and finally put someone in charge of our climate policies. The bill authorizes $2 billion for a ten-year research, development, and demonstration program to develop new energy technology through public-private partnerships to help stabilize greenhouse gas concentrations in the atmosphere.[98] It also promotes voluntary efforts to reduce greenhouse gas emissions and to report greenhouse gas emissions under Section 1605 of the Energy Policy Act of 1992.[99] The existing program is one that we can strengthen and use to reward individuals and firms who choose to reduce greenhouse gas emissions.

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[96] Energy and Climate Policy Act of 1999, S. 882, 106th Cong. (1999).
[97] *See id.* § 3.
[98] *See id.* §§ 5–6.
[99] *See id.* § 4.

B. *Preventing Kyoto Implementation*

Congress has included a number of provisions in appropriations measures that prohibit the Administration from using appropriate funds to implement the Kyoto Protocol, or any parts of it, without formal Senate ratification of the treaty.[100] In addition, House Bill 2221,[101] introduced by Representative David McIntosh (R-Ind.), would prohibit the use of federal funds to implement the Kyoto Protocol until the Senate gives its advice and consent to ratification and would clarify the authority of federal agencies with respect to regulating carbon dioxide emissions.[102] The bill would also restrict use of federal funds to advocate, develop, or implement a program to provide regulatory credits for early voluntary greenhouse gas reductions prior to Senate ratification of the Kyoto Protocol.[103]

A number of hearings have been held on what many suspect are "back door" efforts to implement the Kyoto Protocol through existing Clean Air Act regulations.[104] The EPA has asserted its authority in this area, but it is clear that the Clean Air Act was not designed with carbon dioxide regulation in mind.

In April 1998, then-EPA General Counsel Jonathan Cannon issued a memorandum declaring that carbon dioxide meets the Clean Air Act's definition of "criteria pollutant."[105] His successor, Gary Guzy, reiterated this view before a Congressional hearing in October 1998.[106] Both stressed that EPA had not made any determination to exercise its authority over CO_2. The Clean Air Act does not specifically list CO_2 or any other greenhouse gas as a criteria pollutant subject to regulation under the Clean Air Act.[107] A number of environmental groups, however, have

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[100] *See, e.g.*, Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 2000, Pub. L. No. 106-74, 113 Stat. 1047 (codified in scattered titles of U.S.C.).

[101] Small Business, Family Farms, and Constitutional Protection Act, H.R. 2221, 106th Cong. (1999).

[102] *See id.* § 3.

[103] *See id.* § 3(c).

[104] *See, e.g., Is CO_2 a Pollutant and Does EPA Have the Power to Regulate It?: Joint Hearing Before the Subcomm. on Nat'l Econ. Growth, Nat. Resources, and Reg. Affairs of the House Comm. on Gov't Reform and Subcomm. on Energy and the Env't of the House Comm. on Science*, 106th Cong. (1999).

[105] Memorandum from Jonathan Z. Cannon to Carol M. Browner, EPA Administrator, EPA's Authority to Regulate Pollutants Emitted by Electric Power Generation Sources (Apr. 10, 1998) (on file with author).

[106] *See supra* note 104 (statement of Gary S. Guzy).

[107] *See* 42 U.S.C. § 7412(b) (1994).

petitioned the Environmental Protection Agency to regulate CO_2 under the Clean Air Act.[108] EPA has not yet responded. It is clear to me that the Clean Air Act was not designed with carbon dioxide, or any other greenhouse gas, in mind, and this has been validated by comments from Representative John Dingell, the then-Chairman of the House Committee on Commerce, who stated "I would have difficulty concluding that the House-Senate conferees, who rejected the Senate regulatory provisions . . . , contemplated regulating greenhouse gas emissions or addressing global warming under the Clean Air Act."[109] In the absence of implementing legislation authorizing EPA or any other agency to regulate greenhouse gases, there cannot be any such application of the Clean Air Act to regulate CO_2 emissions as EPA would claim.

C. *Carbon Sequestration*

Senate Bill 1066,[110] introduced by Senator Pat Roberts (R-Kan.) would encourage the use of, and research into, agricultural best practices to improve the environment. The bill enhances carbon storage through agricultural best practices in lieu of implementing the Kyoto Protocol.[111] Additionally, the bill authorizes appropriations for a Carbon Cycle Monitoring Program,[112] something that is needed if we are to gauge accurately our carbon emissions and their impact on the climate.

Senator Ron Wyden (D-Or.) introduced Senate Bill 1457,[113] which would put a similar focus on carbon sequestration in forests through the assessment of opportunities to increase carbon storage in national forests. The measure also makes changes to the voluntary Section 1605(b) reporting program[114] to facilitate

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[108] *See* International Center for Technology Assessment et al., *Petition for Rulemaking and Collateral Relief Seeking the Regulation of Greenhouse Gas Emissions from New Motor Vehicles under Section 202 of the Clean Air Act* (Oct. 20, 1999) (visited May 2, 2000) <http://www.icta.org/legal/ghgpet.doc>.

[109] Letter from the Honorable John D. Dingell to the Honorable David M. McIntosh (Oct. 6, 1999) (on file with author).

[110] Carbon Cycle and Agricultural Best Practices Research Act, S. 1066, 106th Cong. (1999).

[111] *See id.* § 1491.

[112] *See id.* § 1495.

[113] Forest Resources for the Environment and the Economy Act, S. 1457, 106th Cong. (1999).

[114] *See* 42 U.S.C. § 13385(b) (1994).

accurate reporting of forest projects that reduce atmospheric carbon dioxide concentrations.[115]

D. *Biomass Energy*

There is significant interest in employing bio-fuel crops and agricultural waste products as renewable energy sources. Three bills have been introduced to provide research and development in this area. Senate Bill 935,[116] introduced by Senator Richard Lugar (R-Ind.), authorizes a new research program to promote conversion of biomass into bio-based industrial products. The measure provides $49 million per year in new funding for a sustainable fuels chemicals research initiative.[117]

House Bill 2819,[118] introduced by Representative Mark Udall (D-Colo.), and House Bill 2827,[119] introduced by Representative Thomas Ewing (R-Ill.), both would reduce greenhouse gas emissions through the use of bio-based fuels and chemicals, as well as improved soil fertility and carbon sequestration. The bills authorize new research funds to promote the conversion of biomass into bio-based industrial products.[120] Congress has held hearings on both bills, and the Departments of Agriculture and Energy have convened a working group of industry, agriculture, and government interests to work on a combined "Bio-fuels Vision" for the twenty-first century.[121]

E. *Early Action Credits*

Some members of Congress have suggested that firms who take the initiative to voluntarily reduce greenhouse gas emis-

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[115] *See supra* note 113, §4.

[116] National Sustainable Fuels and Chemicals Act of 1999, S. 935, 106th Cong. (1999).

[117] *See id.* § 1490D.

[118] Biomass Research and Development Act of 1999, H.R. 2819, 106th Cong. (1999).

[119] National Sustainable Fuels and Chemicals Act of 1999, H.R. 2827, 106th Cong. (1999).

[120] *See id.* § 3; *supra* note 118, § 7.

[121] *See* DAN REICHER, DEP'T OF ENERGY, A VISION FOR BIOENERGY: GROWING AN INTEGRATED INDUSTRY (Oct. 1998) (visited May 2, 2000) <http://www.eren.doe.gov/bioenergy_initiative/sub1.html>; DAN REICHER, DEP'T OF ENERGY, GROWING AN INDUSTRY: OVERVIEW OF DOE'S BIOENERGY ACTIVITES AND PROPOSED PLAN OF ACTION (Nov. 1998) (visited May 2, 2000) <http://www.eren.doe.gov/bioenergy_initiative/sub2.html>.

sions under existing programs would be at a competitive disadvantage at some later date if domestic caps on total emissions were enacted.[122] Two bills, one in the Senate (S. 547,[123] introduced by the late Senator John Chafee (R-R.I.)) and one in the House (H.R. 2520,[124] introduced by Representative Rick Lazio (R-N.Y.)) would provide regulatory credits for any voluntary early actions to mitigate potential environmental impacts from greenhouse gas emissions. These emissions credits would not be allowed for activities started before 1999, and would not be granted until 2008 to coincide with the beginning of the first emissions budget period under the Kyoto Protocol.[125]

Most of those who oppose the ratification of the Kyoto Protocol also oppose this legislation, which presumes the eventual ratification of Kyoto (without which the credits are useless). Because the Kyoto Protocol is not the best approach to address climate change, these "early action" bills do not make sense as part of a "no regrets" strategy to reduce the effect of greenhouse emissions. We may, however, wish to consider further the principle of "baseline protection," which provides that firms who take voluntary actions now to reduce greenhouse gas emissions preserve their original "baseline" emissions for calculation in any future regulatory regime, should the science dictate that such a regime is absolutely necessary.

VI. Conclusion

Given the relatively certain implementation costs of the greenhouse gas emissions limits mandated by the Kyoto Protocol, the Senate is unlikely to ratify this flawed treaty in the near future. There are, however, a wide range of non-Kyoto options for addressing the potential risk from climate change that do not involve significant costs or new regulations. We can leverage the power of the free market to find cost-effective ways to limit greenhouse gases without government regulation. These actions can be part of a new "no-regrets" strategy that will buy us time to further study the climate, its response to changes in atmos-

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[122] *See, e.g., infra* notes 123–124.
[123] Credit for Voluntary Reductions Act, S. 547, 106th Cong. (1999).
[124] Credit for Voluntary Reductions Act, H.R. 2520, 106th Cong. (1999).
[125] *See id.* § 3; *supra* note 123 § 3.

pheric composition, and the complex social and economic issues at stake.

Dealing with the threat of global climate change may be the most complicated scientific, technological, environmental, economic, and political challenge in history. Making informed policy choices to combat this threat will take substantial effort and cooperation, both domestically and internationally, from all sectors of society. A comprehensive energy strategy that combines global environmental objectives with global economic development is required. The Energy and Climate Policy Act, which I introduced, takes major steps in defining a comprehensive energy strategy. The Act would foster innovation and energy efficiency, support the development of new energy technologies that would lessen greenhouse gas emissions, and invest in scientific research to reduce the uncertainties that persist in our basic knowledge of climate change and its impacts.

POLICY ESSAY

ACCOUNTABILITY AND TRANSPARENCY: PUBLIC ACCESS TO FEDERALLY FUNDED RESEARCH DATA

SENATOR RICHARD SHELBY*

On September 30, 1999, in its final revision to Circular A-110, the Office of Management and Budget (OMB) made federally funded research data subject to the Freedom of Information Act. In this Essay, Senator Richard Shelby argues that OMB's revision was a critical first step in improving the accountability and transparency in government decision-making and scientific research. Senator Shelby further contends that the Freedom of Information Act is a viable and effective vehicle for making data available to the public without compromising important issues of privacy, national security, and intellectual property.

After seeking extensive public comment, the Office of Management and Budget ("OMB") issued its final revision to Circular A-110[1] on September 30, 1999, thus expanding the public's access to research data funded by federal grants and agreements with institutions of higher education, hospitals, and other nonprofit organizations. The amended Circular requires that federally funded research data used to support federal rules and policies be released upon request through the Freedom of Information Act ("FOIA").[2] This revision and the law that generated it sparked significant debate in the scientific and research community about the level of accountability researchers and scientists have to the public when conducting research funded with federal dollars.

While OMB's final revision suffers from serious shortcomings, it still represents the first time the federal government has established a clear policy of allowing the public the opportunity

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[1] OMB Circular A-110, Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, and Other Non-Profit Organizations, 64 Fed. Reg. 54,926 (1999) (effective Nov. 8, 1999).

[2] *See id.* at 54,930.

to access research data funded through federal grants and awards. In the coming months, Congress will closely monitor agency progress in implementing the revised Circular and seek opportunities to expand accountability to the public.

I. BACKGROUND AND RATIONALE

Transparency and accountability in government are two principles crucial to securing the public trust. Americans have a right to know how their tax dollars are spent and whether they are spent wisely, as well as the underlying scientific basis for many of our federal policies and rules.

Today, with close to seventy-five percent of all federally funded research being performed extramurally,[3] the public's interest in monitoring the accrual of scientific data could not be stronger or more important. Increasingly, federal research is conducted through the use of grants and awards, with universities representing the largest block of recipients.[4] Generally, this has resulted in more efficient and productive research, but this benefit is only as good as the integrity of the research itself. Such integrity is essential when federally funded research is used to guide and support the federal decision-making process. Each year, the federal government enacts regulations, based on scientific research, that result in an estimated $700 billion of regulatory burden and compliance costs.[5]

The principle of data sharing has long been considered fundamental to the enterprise of science; access to raw data allows researchers to replicate, verify, and refute results. This transparency ensures confidence in results and allows for scientific progress. The very credibility of the scientific inquiry depends on the results being replicable. For years, members of the scientific community have called for greater public access to federally sponsored research findings in order to encourage more research and improve its quality.

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[3] *See* Eric A. Fischer & Genevieve J. Knezo, *Public Access to Data from Federally Funded Research: OMB Circular A-110 and Issues for Congress*, CRS Report for Congress, Nov. 18, 1999, at 7 [hereinafter *CRS Report*].

[4] *See id.*

[5] *See Hearings on H.R. 88 and Data Available under the Freedom of Information Act Before the Subcomm. on Government Management, Information and Technology, House Comm. on Government Reform*, 106th Cong. (1999) [hereinafter *Hearings on H.R. 88*] (statement of William L. Kovacs, United States Chamber of Commerce).

In 1985, the National Research Council (NRC)—an arm of the National Academy of Sciences—published *Sharing Research Data*, a report that identifies four important recommendations for improving the sharing of scientific data:

> 1. Sharing data should be a regular practice. 2. Investigators should share their data by the time of publication of initial major results of the data except in compelling circumstances. 3. Data *relevant* to public policy should be shared as quickly and widely as possible. 4. Plans for data sharing should be an integral part of a research plan whenever data sharing is feasible.[6]

After a decade of minimal action by the scientific community to implement this policy, the NRC repeated these recommendations in a 1997 report entitled *Bits of Power: Issues in Global Access to Scientific Data*.[7] In this report, the NRC's Committee on Issues in the Transborder Flow of Scientific Data concludes:

> Governmental science agencies and inter-governmental organizations should adopt as a fundamental operating principle the full and open exchange of scientific data. By "full and open exchange" the committee means that the data and information derived from publicly funded research are made available with as few restrictions as possible, on a nondiscriminatory basis, for not more than the cost of reproduction and distribution.[8]

In addition, various professional groups, including the Council on Government Relations and the American Association for the Advancement of Science, have similarly recognized the importance of making scientific findings, particularly those supported by federal funding, subject to greater public disclosure.[9] Despite these admonitions to the scientific and research community to increase the public's access to scientific data, only a handful of research institutions receiving federal funds have established policies that allow greater access to federally funded research

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[6] *Report of the Committee on National Statistics*, *in* SHARING RESEARCH DATA 25-27 (Stephen E. Fienberg et al. eds., National Academy Press 1985).

[7] *Bits of Power: Issues in Global Access to Scientific Data*, Committee on Issues in the Transborder Flow of Scientific Data, Report by the National Research Council, 1997.

[8] *Id.*

[9] *See* Letter from the American Association for the Advancement of Science to the Honorable Jim Kolbe, Chairman, Subcomm. on Treasury, Postal Service and General Government, House Comm. on Appropriations (May 3, 1999) (visited Feb. 13, 2000) <http://www.aaas.or/spp/dspp/sfrl/projects/omb/congrlr.htm>; *see also* COUNCIL ON GOVERNMENTAL RELATIONS, POLICY CONSIDERATIONS: ACCESS TO AND RETENTION OF RESEARCH DATA, 5 (1996) (visited Feb. 17, 2000) <http: www.cogr.edu/ret/htm>.

data. Absent federal intervention, there appears to be little incentive within the scientific community, given the competitive nature of research, to encourage such openness. Federally funded research institutions appear more concerned about retaining their hold over the data produced from federal awards and grants than exploring the new research potentials and benefits that could result from sharing data. These benefits include validating research results—a key step in scientific inquiry—and providing researchers the opportunity to test new hypotheses on previously unavailable data sets. The current system, which allows individual researchers to monopolize taxpayer funded databases, forces other researchers to expend significant resources in order to create comparable databases to test their hypothesis. The winners in such a system are those who have the databases; the losers are the researchers with new ideas and no databases upon which to test them. This inefficiency, while good for enhancing publication credentials of a select number of established researchers, generally retards the scientific enterprise by preventing independent validation of research results, and by thwarting potential new research opportunities.

During the course of the debate over the new law and OMB's proposed revisions to Circular A-110,[10] many researchers were surprised to learn that federal awarding agencies historically have maintained a right under Circular A-110 and their research agreements with the federal government to "obtain, reproduce and publish" the data first produced under an award.[11] This right reflects the government's power to access research data produced with taxpayer dollars.

Unfortunately, while federal agencies have long maintained the right under Circular A-110 to access and use data produced under federal grants and awards, they rarely exercise this right and have allowed grantees to maintain control and ownership of such data.[12]

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[10] *See* Proposed Revisions to OMB Circular A-110, .36(c), Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals and Other Non-Profit Organizations, 64 Fed. Reg. 5684-85 (1999) [hereinafter *OMB Proposed Revision*].

[11] OFFICE OF MANAGEMENT AND BUDGET, CIRCULAR A-110, UNIFORM ADMINISTRATIVE REQUIREMENTS FOR GRANTS AND AGREEMENTS WITH INSTITUTIONS OF HIGHER EDUCATION, HOSPITALS, AND OTHER NON-PROFIT ORGANIZATIONS (1997) [hereinafter *OMB Circular A-110*].

[12] *See* S. REP. No. 105-251, at 8 (1998).

Efforts to force agencies to allow public access to data or to seek data directly through the use of FOIA have been largely ineffective and were, in fact, specifically rejected in a 1980 Supreme Court ruling. In *Forsham v. Harris*,[13] the Supreme Court ruled that unless created or obtained by the agency, a grantee's data were not "agency records" within the meaning of FOIA.[14] This ruling created questionable incentives on the part of agencies and grantees. In order to put research data beyond the reach of the public and the FOIA, agencies need only refuse to exercise their right to obtain the data they fund, and grantees would be immune from public disclosure of their research.[15] This is clearly not in the public's interest, nor is it in the best interest of scientific inquiry.

While access to data and quality of data issues are not new, the pressing need for additional access was highlighted by the controversial National Air and Ambient Quality Standards ("NAAQS") rule on ozone and particulate matter proposed by the Environmental Protection Agency ("EPA") in 1997. Disturbingly, efforts to gain access to the underlying scientific research were rebuffed despite the potentially wide-ranging and significant impact the rules generated by this research would have on every American. Cost estimates provided by the EPA in support of their proposal were widely challenged both inside and outside the Clinton Administration. Indeed, the Administration's own Council of Economic Advisors estimated the potential cost of the proposal at $60 billion, in contrast to the EPA's modest $2.5–8.5 billion impact analysis.[16] This wide disparity in potential costs fueled controversy over the data used to support the proposal.[17]

On several occasions during a public hearing held by the Veterans Affairs and Housing and Urban Development on April 8, 1997, I requested that the Administrator of the EPA make public the underlying data supporting their highly controversial proposal:

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[13] 445 U.S. 169, 179, 100 S. Ct. 977 (1980).

[14] *See id.* at 179.

[15] *See id.* at 192 (Brennan, J., dissenting).

[16] *See Hearings on the Environmental Protection Agency for Fiscal Year 1998 before the Veterans' Affairs and Housing and Urban Development and Independent Agencies Subcomm. on Appropriations, Senate Comm. on Appropriations,* 105th Cong. 247, 298–99 (1997) [hereinafter *Hearings on EPA*]; *see also Proposed Air Pollutant Standards,* SCI. MAG., July 4, 1997; *Loss of Balance Risked in New 'Clean Air' Proposals,* WASH. TIMES, June 30, 1997, at A15.

[17] *See Hearings on EPA, supra* note 16.

> Senator SHELBY. Again, do you believe that people that may be questioning some of your decisions in various areas as the Administrator of EPA would have a right to the data in which you base your decision?
>
> Ms. BROWNER. The American Cancer Society has an absolute protocol, as does Harvard, for allowing people to access that. We have encouraged them to go beyond that, to just put it out in the public. We agree with you.
>
> . . .
>
> Senator SHELBY. But, again, the scientific data that would support the new particulate matter rule, do you believe that other people that would be affected by this in America are entitled to the same information, and would you make sure that people that request it from you get this information to evaluate the basis on which you make these proposals, to see if they are real or if they are flawed? That was my question.
> Ms. BROWNER. The two databases, the American Cancer Society and the Harvard database are the databases there have been questions about. They are available for valid research purposes. You can file with either institution to request to access it.
>
> Senator SHELBY. But do you have that information?
>
> Ms. BROWNER. No; we do not have the databases.
>
> Senator SHELBY. So you make a decision just on their findings, and you do not go back to their basis of their information? I am troubled by this.
>
> Ms. BROWNER. We use a 4-year process to evaluate published, peer-reviewed scientific studies.
>
> Senator SHELBY. You still have not answered my question. I have got another round. I will be back.[18]

The Administrator stated that the EPA did not possess the databases that supported their rule, but noted that she had encouraged both Harvard and the American Cancer Society to make the data public. Further, she stated that the Subcommittee could file with either institution to request access to the databases.

Congress was addressing one of the EPA's most controversial and costly proposed rules, and we were being instructed by the Administrator of the EPA to implore Harvard University and the American Cancer Society for access to the scientific studies used to support the proposal. Equally troublesome was the fact that

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[18] *Id. at* 278–79.

the EPA was willing to base a major rule on research data that no one within the EPA or the federal government had reviewed. Although the Administrator touted the fact that each study used was peer reviewed, the scientific community itself has acknowledged that peer review can vary widely in quality and outcome, and is not a substitute for replication and validation of the original results.[19] Indeed, the peer and agency review process has proved to be insufficient as a means of validating data used in the agency regulatory process.[20] Ultimately, the integrity of the process itself was questioned because of the apparent unwillingness to make the underlying databases subject to greater public scrutiny.

Although the proposed particulate matter standard is an important example, it is by no means an isolated one. Veterans of the Vietnam War spent years requesting access to research data collected by the Department of Defense on the potential health effects of exposure to Agent Orange. The Department of Defense only released the data under intense congressional pressure. Similarly, it was only after review of the raw data from a National Cancer Institute ("NCI") study of the herbicide 2,4,-D that researchers found the conclusion of the study, that 2,4,-D causes cancer, to be erroneous.[21] In fact, researchers reviewing data from the study—a study which caused considerable alarm among farmers—found that the scientists who conducted the questionnaire used in the study asked no questions about 2,4,-D usage in particular, but instead asked questions about uses of all herbicides.[22] NCI subsequently published a correction. Last year, the Senate Government Affairs Committee held an oversight hearing on a study funded by the NCI on the public's risk from radiation fallout from approximately one hundred above-ground explosions in Nevada between 1951 and 1962.[23] Although the

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[19] *See Hearings on H.R. 88*, *supra* note 5 (statements of Robert W. Hahn, AEI-Brookings Joint Center for Regulatory Studies and Dr. Michael Gough, Adjunct Scholar, The Cato Institute); *see also* Michael Gough and Steven Milloy, The Case for Public Analysis to Federally Funded Research Data, Policy Analysis, Feb. 2, 2000, No. 336, at 2 [hereinafter Policy Analysis].

[20] *See id.* In his testimony before the Subcommittee, Mr. Hahn stated, "the peer-review process . . . is frequently not adequate for major public policy decisions, such as those involved in regulation." *Id.* at 3.

[21] *See Hearings on H.R. 88*, *supra* note 19, at 5; *see also* Policy Analysis, *supra* note 19, at 8-10.

[22] *See id.*

[23] *See Hearing on National Cancer Institute's Management of Radiation Studies, Perm. Subcomm. on Investigations, Senate Comm. On Governmental Affairs*, 106th

study was completed in 1992, it was not released until 1997—only after considerable media and congressional pressure.[24]

Due to the difficulty of obtaining underlying data, it is unclear whether these are isolated incidents. What is clear, however, is that according to the National Institute of Health's reports on incidences of scientific misconduct under federal grants and applications, data fabrication and data falsification are among the leading causes for formal sanctions.[25]

Sanctions can be an important check on such behavior, but they are not sufficient to address the damage done to the public trust and the integrity of the scientific process itself when data is publicly exposed as fraudulent or false.[26] Greater transparency and public scrutiny can minimize the possibility and opportunity for the use of "junk science" and fraudulent or flawed data in federal decision-making.

My unsuccessful effort to gain public access to the data supporting the EPA's controversial NAAQS rule reinforced my belief that greater access to research data is necessary to ensure both that the best science is being used to support our federal rules and policies, and that federally funded agencies and researchers feel a greater sense of accountability to the public.

A. *Improving the Public's Access to Research Data*

In an effort to improve the public's access to federally funded research data and build on existing "public right to know" and "paperwork reduction laws,"[27] several of my colleagues and I

Cong. (1998).

[24] *See id.*

[25] *See, e.g.*, OFFICE OF RESEARCH INTEGRITY, DEP'T OF HEALTH AND HUMAN SERVS., *Report on 1998 Annual Report on Possible Research Misconduct* (visited Apr. 29, 2000) <http://ori.dhhs.gov/98annaulreport.htm>; OFFICE OF RESEARCH INTEGRITY, ORI HANDBOOK FOR INSTITUTIONAL RESEARCH INTEGRITY OFFICERS (visited Apr. 29, 2000) <http://ori.dhhs.gov/toc.htm >; *Findings of Scientific Misconduct,* 62 Fed. Reg. 49,014 (1997) (notice of scientific misconduct findings); *Findings Of Scientific Misconduct,* 62 Fed. Reg. 42,558 (1997) (notice of scientific misconduct findings).

[26] *See, e.g.*, William J. Broad, *Data Tying Cancer to Electric Power Found to be False, U.S. Says a Scientist Lied: Studies Were Tailored to Meet Conclusions, According to a Federal Ethics Inquiry*, N.Y. TIMES, July 24, 1999, at A1; *Attack of the Killer Toasters,* WASH. TIMES, Aug. 2, 1999, at A18; *Science's Belated Complaint*, WALL ST. J., June 7, 1999, at A22; *Secret Science*, WASH. TIMES, Feb. 11, 1999, at A20.

[27] *See, e.g.*, The Paperwork Reduction Act of 1995, 44 U.S.C. 3501 et seq., and regulatory accounting requirement passed as part of Treasury and General Government Appropriations bill for Fiscal Year 1999, S. 2312, later incorporated into the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-

supported a provision in the Fiscal Year 1999 Treasury and General Government Appropriations bill (later incorporated into the Omnibus Appropriations bill), directing the OMB to amend its rules under Circular A-110 to make data produced under federal awards or grants subject to the FOIA.[28]

Specifically, the bill included language which stated:

> Provided further, That the Director of OMB amends Section_.36 of OMB Circular A-110 to require Federal awarding agencies to ensure that all data produced under an award will be made available to the public through the procedures established under the Freedom of Information Act: Provided further, That if the agency obtaining the data does so solely at the request of a private party, the agency may authorize a reasonable user fee equaling the incremental cost of obtaining the data.[29]

Contrary to the highly politicized rhetoric of some of the new law's opponents, the provision was not slipped into the bill in the middle of the night. Language requiring OMB to conduct a review of existing data sharing policies first appeared in the Senate version of the Treasury and General Government bill in July 1998.[30] Report language that accompanied the bill clearly articulated the Committee's concern with the public's lack of access to federally funded research:

> An issue of growing concern to the Committee is the public's lack of access to Government funded research data despite existing statutory and administration guidelines mandating increased access.
>
> The Paperwork Reduction Act of 1995 requests the Director of OMB to "foster greater sharing, dissemination, and access to public information." OMB Circular 110, subpart C, is even more specific, stating that unless specifically waived,

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277, 112 Stat. 2681-495 (1998).

[28] H.R. 4328, Omnibus and Consolidated Emergency Supplemental Appropriations Act, Pub. L. No. 105-277, 112 Stat. 2681-495 (1998).

[29] H.R. CONF. REP. No. 105-789, at 17 (1999). This bill was later incorporated into the Omnibus Consolidated Appropriations Act for Fiscal Year 1999, Pub. L. No. 105-277, 112 Stat. 2681 (1998).

[30] *See* Treasury and General Government Appropriations Act, S. 2312, 105th Cong. 37 (1998). The Senate version of the FY 1999 Treasury and General Government Appropriations required, "that the Director of OMB submit a report within 180 days of enactment to the Senate Committee on Appropriations: (1) evaluating the implementation of specific government-wide procedures for making federally funded research results (including all underlying data and supplementary materials) available as appropriate to the public unless such research results are currently protected from disclosure under current law; and (2) make a determination based on this evaluation for the need for additional or revised guidance." *Id.*

> Federal agencies "have the right . . . to obtain, reproduce, publish or otherwise use the data first produced under an award." Unfortunately, these policies directives are not being implemented on a systematic basis. Although the National Aeronautics and Space Administration, the Public Health Service, and the National Science Foundation currently implement data sharing policies in order to permit wider assessment of the validity of the research results and to facilitate broader public understanding, other Federal agencies do not. Given the prevalent use of Government funded research data in developing regulations and Federal policy, it is important that such data be made available to other interested Federal agencies and to the public on a routine basis for independent scientific evaluation and confirmation.[31]

The House version of the Fiscal Year 1999 Treasury and General Government bill, H.R. 4104, as promulgated by Committee, also included language requiring the OMB to issue rules addressing both the quality of and the "sharing of, and access to" federally funded data and data disseminated by federal agencies.[32] H.R. 4104 passed the House of Representatives on July 16, 1998.[33]

The Senate bill was considered and reported out of the Treasury Subcommittee and Full Committee on Appropriations on July 15, 1998 and considered and passed on the Senate floor on September 3, 1998.[34] During the Senate's consideration of the bill,[35] the provision was negotiated and drafted in consultation with both House and Senate members and the OMB.[36] The conference report on the Treasury and General Government bill, including the final language making all federally funded research data subject to FOIA, was considered and passed by the House of Representatives on October 7, 1998[37] and subsequently taken up for consideration by the Senate on October 9, 1998.[38] At that time, Senators Lott, Campell, and I again engaged in a colloquy on the floor to discuss the challenges that were made in confer-

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[31] S. REP. NO. 105-251, at 51 (1998).

[32] H.R. REP. NO. 105-592, at 49 (1998).

[33] *See* 144 CONG. REC. H5722 (daily ed. July 16, 1998).

[34] *See* 144 CONG. REC. S9915-16 (daily ed. Sept. 3, 1998); *see also* S. 2312, 105th Cong. (1998), S. REP. NO. 105-251, at 51 (1998).

[35] *See* 144 CONG. REC. S9913-14 (daily ed. Sept. 3, 1998) (statements of Senators Richard Shelby, Trent Lott (R-Miss.), Ben Nighthorse Campbell (R-Colo.), and Lauch Faircloth (R-N.C.)).

[36] *See id.*

[37] *See* 144 CONG. REC. H9941 (daily ed. Oct. 7, 1998).

[38] *See* 144 CONG. REC. S12314 (daily ed. Oct. 10, 1998) (statements of Senators Richard Shelby, Trent Lott, and Ben Nighthorse Campbell).

ence. We articulated the intent of the final provision: to make all federally funded research accessible under FOIA. Due to unrelated procedural delays, the bill was set aside until incorporated and passed as part of the Omnibus Consolidated Appropriations bill for Fiscal Year 1999.[39]

While the research and university communities may have been taken by surprise, it was not by virtue of any effort to conceal the provision in the Omnibus Consolidated Appropriations bill. The provision was openly considered at all times as part of the public record—printed in a public bill, considered and passed by two committees of Congress, and ultimately passed by both the House and Senate with accompanying statements recorded and printed in the *Congressional Record.*

An editorial in the *Wall Street Journal* that appeared on June 7, 1999, aptly entitled *Science's Belated Complaint*, explains why the provision should have come as no surprise to anyone, especially the science and research community:

> The chickens are coming home to roost for university scientists who are fighting a controversial federal data-disclosure law . . . . Where were all these concerned scientists when we needed them years ago to fight junk science . . . in the courtrooms? Many of them took the federal money and ran, or naively assumed some public good would result no matter how tortured the data, or stood by while their hyperpoliticized colleagues drove serious public issues over the cliff . . . . If scientists want to take taxpayer money to conduct research, they should know that one of their main obligations is to make certain the public has full confidence in the way those results are used.[40]

Public confidence in the accuracy and reliability of information being used to drive public policy ultimately is in the best interest of scientific research. Increasing access to such data promotes the transparency and accountability that is essential to building public trust in government actions and decision-making.

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[39] *See* 144 CONG. REC. H11508 (daily ed. Oct. 19, 1998).
[40] *See Science's Belated Complaint, supra* note 26.

B. *Using the Freedom of Information Act As a Means To Make Data Available to the Public*

The reliance on FOIA as a mechanism for making research data available to the public was a key issue that arose in public comment and debate on the new law.[41]

The scientific and research community strongly opposed the use of FOIA in this fashion, arguing that it was a "meat-ax approach"[42] and would compromise medical privacy, intellectual property, and commercial interests, among others.[43] Indeed, unsuccessful efforts were made to suspend the application of the law or repeal it outright. Congressman George Brown (D-Cal.) introduced a bill, H.R. 88, to repeal the new law.[44] A hearing was held on this bill and issues arising from the new law on July 15, 1999; no further action was taken on this bill during the first session of Congress. In addition, the House Committee on Appropriations made an effort during its consideration of the Fiscal Year 2000 Treasury and General Government bill to suspend the new law while the scientific community further studied the issue.[45] This effort produced an amendment authored by David Price (D-N.C.) and James Walsh (R-N.Y.), offered to and rejected by the full House Appropriations Committee on July 15, 1999.[46]

In crafting the provision, I believed that FOIA was the most effective method of carrying out the intent of the law while giv-

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[41] *See* Mary Ellen Sheridan, Statement at the American Assoc. for the Advancement of Science—Federal Focus Briefing on Data Access (Feb. 26, 1999); *see also Hearings on H.R. 88* at 11 (statement of Dr. Bruce Alberts, President, National Academy of Science), (statement of Robert N. Sheldon, Vice Provost for Research, Univ. of Cal.) at 4-10.

[42] Laurie McGinley, *Scientists Challenge Provision Opening Access to Data*, WALL ST. J., Mar. 1, 1999, at A24.

[43] *See id*; *see also* Mary Ellen Sheridan, *Origins of Congressional Action Regarding Public Access to Data*, Statement at the American Association for the Advancement of Science-Federal Focus Briefing on Data Access (Feb. 26, 1999) (transcript available at <http://www.aaas.org/spp/dspp/sfrl/projects/omb/casey.html>) and Mary Ellen Sheridan, *The University Community and the A-110 Proposed Revision*, Statement at the American Association for the Advancement of Science-Federal Focus Briefing on Data Access (Feb. 26, 1999) (transcript available at <http://www.aaas.org/spp/dspp/sfrl/projects/omb/sheridan.html>).

[44] H.R. 88, 106th Cong. (1998).

[45] *See Effort to Block Access to Research Findings under FOIA Fails: Administration to Release Revised Regulation Soon*, WASH. FAX 1, at ¶ 4 (July 15, 1999) (http://www.washingtonfax.com/reprints/1999/19990715.html>; *see also Opponents of New Data Release Law Maintain Blocking Strategy, If Passed, House Amendment Would Strengthen Research Argument*, WASH. FAX (June 6, 1999).

[46] *See id.*

ing reasonable protection to interests that might be otherwise compromised. FOIA has been an accepted mechanism for making information available to the public for over twenty years and has numerous and broad exceptions for agencies to protect certain interests while processing FOIA requests. These exceptions are intended to protect national security, medical confidentiality, and trade secrets.[47] In testament to the effectiveness of these exceptions, Congress declined to expand further the definition or scope of existing exemptions to include disclosure.[48]

In addition, prior to the passage and implementation of the data access provision, FOIA already applied to a significant amount of sensitive data and research conducted directly by federal agencies.[49] Intramural research conducted by the National Institute of Health ("NIH"), such as research involving sensitive medical information, was already subject to FOIA.[50] Concerns that FOIA would not continue to protect this sensitive information was an indictment of FOIA itself, not of the law's extension to indirect research funded by the federal government.

In addition, Congress thought the existing regulatory and legal framework of FOIA would be an assurance to the research community rather than a cause for concern.[51] Federal agencies and the public have been processing and accessing information through FOIA for years. Indeed, using FOIA as the statutory tool to make information available to the public is a conservative approach, one that will not compromise the conduct of scientific research.

This intent and interpretation of the use of FOIA was further supported by testimony provided by Professor James O'Reilly before a July 15, 1999, hearing held by the Subcommittee on Government Management, Information, and Technology on H.R. 88 and the new data access law.[52] Considered an expert in the field of FOIA legislation, Professor O'Reilly supported using FOIA as the framework for implementing the provision:

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[47] *See* The Freedom of Information Act of 1966, 5 U.S.C. § 552(b)(1)–(9) (1994) (as amended Pub. L. No. 104-231, §§ 3–11, 110 Stat. 3049-54).

[48] *See Hearings on H.R. 88* at 2 (statement of James T. O'Reilly, Visiting Professor, College of Law, Univ. of Cin.).

[49] *See* S. REP. No. 105-251 (1998).

[50] *See CRS Report*, *supra* note 3, at 4, 11.

[51] *See* Shelby et al., *supra* note 35; *see also* Shelby et al., *supra* note 38.

[52] *See* O'Reilly, *supra* note 48, at 1, 2.

> The Freedom of Information Act of 1966, as amended, created a viable infrastructure for the public right to know, that has been world recognized as a model of government service to the public. That infrastructure is in place at the agencies and Shelby does not alter it. Shelby's effect is to widen the pool of public accountability, not to change the rules or processes of disclosure . . . . [t]he FOIA exemption for personal medical data collected by or for the government has, for more than a quarter of a century, protected the interests of medical and mental health patients and the agency infrastructure for that protection is very viable today. That exemption is unchanged by Shelby.[53]

Additionally, in a response to members' questions in the July 15, 1998, hearing, Professor O'Reilly continued:

> Q: Is [the Shelby Amendment] a revolutionary change to data ownership?
>
> A: No. It ties in existing A-110, existing exemptions, and existing cost reimbursement provisions. Evolutionary changes have been made by the Amendment. Adding to the existing FOIA processing system, the data that was paid for by federal dollars and prepared by nonprofit institutions, is not revolutionary, but evolutionary. Grantees already sign contracts providing for federal agency access to the work product paid for by the government. This means the agencies will exercise access rights more often, will bring in the data, and will screen it carefully.[54]

What became clear after extensive debate and public comment on the new law was that the scientific community, which generally opposed the use of FOIA to increase the availability to the public of federally funded research data, was offering no alternatives.[55] Their failure to offer any alternatives reflected, in my view, a general resistance to the very idea of increasing the availability of data to the public. Indeed, despite efforts to understand what might be legitimate concerns with the adequacy of the exemptions provided under FOIA, no tangible examples were provided to explain how the law, considered adequate to protect medically sensitive or commercially sensitive intramural research over FOIA's thirty year history, was now insufficient to protect the same kind of research conducted extramurally by research universities and other scientific entities.

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[53] *Id.*
[54] *Id.*
[55] *See* Sheridan, *supra* note 41.

C. *Implementing the New Law: OMB Proposed Revisions to Circular A-110*

OMB published proposed revisions for public comment in February and August of 1999.[56] A final revision was issued in September and took effect on November 8, 1999.[57] Over nine thousand comments were received on the first revision and three thousand on the second revision. Seeking to encapsulate congressional intent, OMB sought to mollify concerns raised by the scientific and research community regarding how expanding access would affect their ability to conduct research.[58] In both revisions, OMB narrowed the scope of the underlying statutory language to apply only to research data used to support federal policies and rules.[59] While I was sensitive to some of the concerns of the scientific community about using FOIA as a mechanism for public disclosure, I was confident that these concerns could be addressed through the extensive exceptions provided to address medical privacy, intellectual property, and other sensitive interests. In addition, if FOIA's exemptions were found to be insufficient, Congress certainly would have a strong interest in adding protections needed to safeguard these important concerns. Because FOIA is the public's primary mechanism for accessing information held by the government, any deficiencies within FOIA's exceptions would have a significant and wide-ranging impact. If the protections provided in FOIA were not sufficient to cover sensitive medical information or intellectual property interests for extramural research, this would indicate that these interests were possibly being compromised for similar research done intramurally and already subject to FOIA.

D. *OMB's First Revision*

OMB's first proposal was published on February 4, 1999.[60] There were significant differences in the intent of the published proposal and the original intent of the data access provision. The

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[56] *See OMB Proposed Revision*, *supra* note 10.

[57] *See* Request for Comments on Clarifying Changes to Proposed Revision on Public Access to Research Data, 64 Fed. Reg. 43,786-91 (1999).

[58] *See supra* note 48, at 2.

[59] *See supra* note 10, at 3.

[60] *See id.*

key differences turned on the revision's scope, its definition of data, the timing and release of data, and the adequacy of protection for privacy and intellectual property interests.

The original text of the law required that "all data produced under an award will be made available to the public through the procedures established under the Freedom of Information Act."[61] The proposal by OMB deviated from this language substantially. The change focused mainly on restricting the scope of the provision to data or research findings that were used by the federal government in establishing rules or policy.

OMB's revision stated:

> The proposed revision to Section_.36 of Circular A-110 implements the requirements of Pub. L. 105-277 by providing that, after publication of research findings used by the Federal government in developing policy or rules, the research results and underlying data would be available to the public in accordance with FOIA.[62]

In a letter to OMB Director Jacob Lew, commenting on the proposed revision, Senator Trent Lott (R-Miss.), Senator Ben Nighthorse Campbell (R-Colo.), and I expressed our concerns with the restrictive scope of the revision and reinforced our intent with respect to the new law.[63] In outlining our concerns, we hoped to clarify congressional intent on several key issues and recommend changes consistent with such intent.

As to the scope of the revision that would potentially limit FOIA's applicability to only that research data used by the federal government in developing "policy or rules," we wrote:

> While we understand OMB's legitimate effort to encapsulate Congressional intent in its proposed revision, we believe that the clear intent of the statutory language, the accompanying report language and floor debate was to make "all" federally funded research data subject to FOIA, not just that data which are used to support a federal rule or policy. At a minimum, the final revision should clarify that "policy" includes guidances, risk assessments, government surveys, and other government findings to more clearly conform with Congressional intent.[64]

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[61] H.R. CONF. REP. No. 105-789, at 17 (1998).

[62] *OMB Proposed Revision, supra* note 10, at 5684.

[63] *See* Letter from Sen. Richard Shelby, Trent Lott, and Ben Nighthorse Campbell to Jacob Lew, Director, Office of Management and Budget (Apr. 5, 1999) (on file with author) [hereinafter *Letter of April 5, 1999*].

[64] *Id.*

Limiting the scope of the OMB revision to research data used in rules and policies excludes a significant amount of research data that can shape policy on all levels and influence public behavior. Each year, the federal government issues thousands of reports on diverse issues such as education, health care, drug usage, crime, welfare, the environment, and Social Security. While some of this research may be used directly in forming federal rules, much of this research data will affect the American public in ways not currently recognized by the research community at large. This includes research data that can be used to influence federal, state, and local legislation, federal and state guidances, federal research priorities, and enforcement initiatives. These uses of federal research data can be as important as the data used in developing rules and policies. The narrow scope of the OMB Circular suggests that the public should not have a right to access this type of data; I disagree.

As to addressing timely notification, we noted that any final revision must ensure that the public has adequate opportunity to review and comment on the data:

> Unless the public can identify the research findings that are going to be used in developing a rule or policy before it is proposed, it is unlikely that the public will be able to obtain the research data through the FOIA process and review it in time to submit comments."[65]

In addition, the revision only applied to federally funded research data from published research findings.[66] On this point, we agreed that the OMB reference to published findings was not inconsistent with the underlying statute since it relates primarily to the "timing" of the release of the data, an area not addressed in the Omnibus Appropriations Act.[67] We also made clear, however, that if the data is sufficiently sound to support a federal policy or rule, then they should be able to bear public scrutiny and disclosure at the time they are used to support such rules and policies.[68] This point is critical to ensuring that our federal rules and policies are based on good science and research findings.

In defining "data," we attempted to make clear that the intent of the provision is to reach that data "necessary to replicate and

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[65] *Id.*
[66] *See OMB Proposed Revision, supra* note 10.
[67] *See Letter of April 5, 1999, supra* note 63.
[68] *See id.*

verify the original results and assure that the results are consistent with the data collected and evaluated under the award."[69] On the subject of medical privacy, I was highly sensitive to any legitimate concerns raised about the disclosure of personal identifying information. In addition to the protections of the Privacy Act,[70] however, the broad exception that exists under FOIA is sufficient to address such concerns.

According to the testimony of James T. O'Reilly, "the FOIA exemption for personal medical data collected by or for the government has, for more than a quarter century, protected the interests of medical and mental health patients and the agency infrastructure."[71] He goes on to state, "these protections apply to shield one individual's file and to shield sensitive data about groups of persons that could be broken apart or dis-aggregated."[72] In addition, there are over one hundred special exempting statutes that provide additional protections.[73]

The adequacy of FOIA's exemptions was supported further by four former administrators of the Office of Information and Regulatory Affairs in the OMB. In a letter to members of the House Appropriations Committee on June 7, 1999, they noted, "moreover, we realize that certain objections have been raised concerning potential losses of privacy and (legitimate) intellectual property. In our opinion such objections are groundless, as the Freedom of Information Act, through which the OMB requirements would have to operate, provides specific protections against the release of data in such instances."[74]

Finally, we clarified that the use of FOIA would protect intellectual property rights under existing exemptions that prevent the disclosure of matters that are "trade secrets and commercial or financial information obtained from a person and privileged or confidential."[75] This exclusion has been effective in protecting valid intellectual property rights.[76] In addition, federal statutes prohibit the disclosure of information related to technology transfer such as patent applications. In addition, the reference in OMB's proposed revision to research data relating to "pub-

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[69] *Id.*
[70] Privacy Act of 1974, 5 U.S.C. § 552A (1994).
[71] *Hearings on H.R. 88*, *supra* note 48, at 2.
[72] *Id.* at 3.
[73] *See id.* at 2.
[74] *CRS Report*, *supra* note 3, at 29.
[75] *Letter of April 5, 1999*, *supra* note 63.
[76] *See* O'Reilly, *supra* note 48, at 3.; *see also CRS Report supra* note 3, at 27.

lished" findings would provide additional protection by giving researchers control over when research data will be accessible through FOIA.

E. *OMB's Second Revision*

When OMB proposed additional clarifying changes to its revision,[77] I was disappointed to see that some of the sponsors' main concerns were not addressed by the revisions. The proposal was again much narrower than the drafters' original intent. The changes subsequently narrowed the scope of the proposal by further defining the terms "data," "published," and "used by the Federal Government in developing policy or rules," including possibly limiting the revision to regulations meeting a $100 million impact threshold.[78]

On September 10, 1999, Senators Phil Gramm (R-Tex.), Lott, Campbell, and I submitted another letter to Director Lew. In this letter, we reiterated our concern that the revision was inconsistent with the plain language of the statute:

> While we appreciate your efforts to move expeditiously to finalize the proposed revision, the August 11th proposal represents a significant retreat from OMB's original February 4th proposal as to render the provision potentially meaningless in its ability to improve the public's access to federally funded research data. The severe limitations included in the clarifying changes to the proposal are contrary to the plain meaning of the statute and Congress's intent in passing the law. Unless significant changes are made to the proposed revision, the final revision is unlikely to provide any public accountability for the significant taxpayer funds that are spent on research in this country and will do little to improve the quality of research or the public's participation in the federal policymaking process.[79]

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[77] *See Request for Comments, supra* note 57.

[78] *See id.* at 43,786, 43,791. In its second notice, OMB wrote:

> Many of these comments raised concerns about the impact P.L. 105-277 and the proposed revision would have on the conduct of scientific research. In part, these concerns arose from questions as to how expansively or narrowly the statute and the proposed revision would be interpreted and applied. In raising these questions, commentators on both sides of the debate sought clarification of four concepts found in the proposed revision: "data," "published," "used by the Federal Government in developing policy or rules," and cost reimbursement.

Id. at 43,791.

[79] Letter from Senators Richard Shelby, Trent Lott, Ben Nighthorse Campbell, and

Once again, we emphasized our concerns regarding scope, timing of data release, reliance on FOIA exemptions, as well as concerns regarding the proposed clarifications. Our primary concern, however, was with the suggested changes involved in the OMB's definition of "data," and its potential restriction to regulations meeting the threshold requirement.

Although we believed it was reasonable to allow researchers to make initial claims of privilege under existing FOIA exemptions, we did not want the revision to compromise the existing rights of awarding agencies to obtain federally funded research data under Circular A-110. We sought to ensure that awarding agencies make the final decisions as to what data should be released under the exemptions of FOIA. In our comments, we made clear that OMB's definition of "data" should not act to create a new "mini-FOIA" that would further restrict data that might be available under existing FOIA exemptions.[80]

Another concern was that restriction of the proposed revision to regulations satisfying the impact threshold would create the perverse incentive of encouraging federal agencies to engage in regulatory actions that would not trigger the public disclosure law. The $100 million impact threshold may result in agencies seeking to implement more rules and policies through guidances, orders, or other regulatory actions not subject to the public rulemaking process. The intent of the law was to create greater transparency and accountability in federal decision-making. We believed that restricting the revision to high-impact regulations would not achieve this purpose.

F. *The Final Revision*

OMB released its final revision to Circular A-110 on September 30, 1999.[81] While the OMB limited the final revision's scope to agency actions having the force and effect of law, it did not include the $100 million impact restriction.[82] Additionally, while

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Phil Gramm to Jacob Lew, Director, Office of Management and Budget (Sept. 10, 1999) (on file with author).

[80] *See id.*

[81] *See* OMB Circular A-110, Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, and Other Non-Profit Organizations, 64 Fed. Reg. 54,926 (1999) (effective Nov. 8, 1999).

[82] *See id.* at 54,930.

the final revision defines "data" to exclude certain information already covered by specific FOIA exemptions,[83] it is the sponsors' understanding from discussions with members of OMB, that this definition of "data" was intended to provide certainty to researchers of FOIA's protections, and not to create new definitions separate and distinct from existing FOIA exemptions.

II. CONCLUSION

The final revision to Circular A-110 is a crucial step forward in giving the American people access to the research and science behind federal policies and rules, but it is only a first step. In the future, I intend to monitor the implementation of OMB's revisions to ensure that the intent of the law is being met by the various agencies and to ensure that the public has access to this important information in a timely manner that allows meaningful participation in government decisions. In addition, I intend to build on this law and similar efforts to bring greater transparency and scientific accountability to the decisions that affect the lives of Americans every day.

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[83] *See id.*

SYMPOSIUM: SOCIAL REFORM THROUGH THE CLASS ACTION

On March 14, 2000, the Harvard Journal on Legislation held a public symposium on the growing use of class action litigation, as an alternative to the legislative process, as a means of effectuating social reform. Participants included scholars, practitioners, and activists with a variety of experience in the class action arena. Articles and essays by four of these participants, Jonathan Turley, David Rosenberg, Victor Schwartz, and Jeff Reh, are published herein. Full transcripts of the symposium are available from the Journal.*

MODERATOR:

Arthur R. Miller is the Bruce Bromley Professor of Law at Harvard Law School. For over thirty-five years, he has authored or co-authored *Federal Practice and Procedure*. Professor Miller also served as Reporter to the American Law Institute's Project on Complex Litigation.

Panel 1: Is the Class Action Democratic?

John H. Beisner is a partner in the Washington, D.C. office of O'Melveny & Myers, where he heads the firm's 120-attorney Class Action Practice Group. Over the past twenty years, Mr. Beisner has served as a defense attorney in over 350 class action lawsuits at both the trial and appellate levels. He has testified frequently before Congress on class action issues.

Victor E. Schwartz is a senior partner at Crowell & Moring in Washington, D.C, where he chairs the firm's Torts and Insurance practice group. Mr. Schwartz serves as an adjunct professor of law at Georgetown Law Center. Prior to entering a full-time law practice, he was a professor and dean at the University of Cincinnati Law School. For over two decades, he has co-authored *Prosser, Wade and Schwartz's Cases and Materials on Torts*, and he also authors *Guide to Multistate Litigation* and *Comparative Negligence*.

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* The symposium was made possible with the financial assistance of State Farm Mutual Automobile Insurance Company; Dow Chemical Company; ExxonMobil Corporation; Ford Motor Company; Fulbright & Jaworski, LLP; General Motors Corporation; and Vinson & Elkins, LLP.

Jonathan Turley is the Shapiro Professor of Public Interest Law at George Washington University School of Law, where he teaches courses on litigation, torts, constitutional criminal procedure, and environmental law. A frequent contributor to the *Wall Street Journal*, Professor Turley appears regularly as a legal expert on all of the major television networks.

Melvyn Weiss is a partner at Milberg Weiss Bershad Hynes & Lerach in New York City, where his practice includes securities, consumer fraud, commercial tort, accountant's liability, and complex litigation. A Fellow of the American College of Trial Lawyers, Mr. Weiss is also a former co-chair of the ABA's Class and Derivative Action Committee and a former member of the ABA's FRCP 23, Class Action Improvements Committee.

Panel 2: Should Congress Change the Class Action?

Dudley Oldham is a senior partner at Fulbright & Jaworski in Houston, where he specializes in product liability, toxic torts, insurance, and commercial litigation defense. Mr. Oldham has served as chairman and president of the Federation of Insurance and Corporate Counsel, as president of Lawyers for Civil Justice, and as chair of the Tort and Insurance Practice Section of the ABA.

Jeff Reh is General Counsel at Beretta, USA in Maryland, a position he has held since 1986. Mr. Reh has testified before Congress on issues relating to litigation against gun manufacturers.

David Rosenberg is Professor of Law at Harvard Law School. Professor Rosenberg has published over a dozen law review articles on mass tort litigation alone and has participated in some of the most influential class actions of the past three decades, including *Daubert v. Merrell Dow Pharmaceuticals*. He also served as National Coordinating Counsel for the plaintiffs in the DES litigation.

Melvyn Weiss participated in both the first and second panel discussions.

ESSAY

MASS TORT CLASS ACTIONS: WHAT DEFENDANTS HAVE AND PLAINTIFFS DON'T

DAVID ROSENBERG*

Defendants litigate common questions in mass tort claims from the posture of a de facto class action, allowing them to exploit economies of scale. In contrast, plaintiffs' claims are rarely 100% aggregated, preventing plaintiffs from making the optimal investment in common questions to maximize the aggregate and individual value of their claims. This Essay explains the advantages of scale economies and discusses the social costs of the systemic bias favoring defendants over plaintiffs. The author argues that this systemic bias can be corrected through mass tort class actions.

The standard case-by-case process for adjudicating mass tort claims generally denies class action efficiencies to plaintiffs but automatically affords precisely those litigation advantages to defendants.[1] Faced with numerous actual and potential claims presenting common questions of liability and damages ("class-able claims"), the defendant always, naturally and necessarily, prepares one defense for all of those claims, litigating from the

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* Professor of Law, Harvard Law School. I thank colleagues Arthur Miller, Bruce Hay, and Steven Shavell, and students Stuart Buck, David Gunter, Bert Huang, and Sandy Chung for helpful comments on previous versions of this Essay.

[1] Mass torts arise as an intrinsic byproduct of the means of mass production, which is essential to providing virtually all of the goods that sustain and enliven our society and societies worldwide. Mass production processes and their products in all forms and stages of use create systematic risks of accident threatening the well-being of members of an exposed population. Consequently, I define mass torts as encompassing any (negligently or strictly) tortious systematic risk-taking by business that exposes some population of individuals to injury in person or property or both. All product and occupational liability, as well as all business-generated environmental hazards, are mass torts. My definition is functional not essentialist; the relevant salient characteristics for classificatory inclusion or exclusion derive primarily from the deterrence and compensation objectives of tort law. Thus, consistent with the ends of tort law, my capacious definition draws no distinction between mass accidents and mass exposure cases. Rather, it broadly includes tortious injury from any business enterprise regardless of when, where and how manifest loss occurs, or even whether harm consists merely of latent risk. (Though there is no reason to press the point here, I do not confine the definition of mass torts to cases arising under some formal conception of tort law. It includes contract, property, employment discrimination, antitrust, securities and consumer fraud, and any other common law or statutory cause of action arising from systematic business risk-taking and serving the social objectives of deterrence and compensation.) To express the comprehensive scope of my analysis, I use the term "mass production torts" or more broadly still, "mass production injury."

posture of a *de facto* class action.[2] Because it "owns" the defense interest in the classable claims that comprise a given mass tort case, the defendant litigates as if all the claims have been aggregated in a mandatory non-opt out class action.[3] With class-wide aggregation of the defense interest, the defendant exploits economies of scale to invest far more cost-effectively in preparing its side of the case than plaintiffs can in preparing their side.[4]

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[2] Common questions comprise the central and vast majority of issues arising from the unitary, mass production design ratio that results in mass production torts, and consume the great bulk of resources devoted to adjudicating these cases. At the heart of any mass tort case involving products liability are a complex and costly to litigate set of questions common to every claim of harm from the allegedly defective product. Most cases, for example, turn on whether a reasonable, commercially and socially appropriate alternative design or cost-effective warning could have reduced the foreseeable risks. *See* Restatement (Third) of Torts § 2 (1998). The general standard of negligence and the rules of strict liability for abnormally dangerous activities or nuisance require a similarly demanding aggregate cost-benefit analysis as the test for all claims arising from a non-product-based mass tort case. *See* Restatement (Second) of Torts § 281–3280 and § 519–524A. (1979). These and other related questions concerning the "reasonableness" of product or other business risk-taking decision are not only common to every mass tort claim, they are *unitary*. For discussion of the unitary nature of these questions, see *infra* notes 62–63 and accompanying text.

[3] Fed. R. Civ. P. 23 distinguishes between mandatory and "opt-out" class certifications. Mandatory certifications bind all class members to the class judgment, allowing no option for voluntary "exit." Generally, mandatory certification is used when, as a practical or conceptual matter, class members' interests are indivisible or at least so interdependent in nature that separate adjudication of one member's claim could effectively determine or jeopardize the viability of another member's claim. In contrast, the interests in recovery of damages for injury to person and property involved in mass tort class actions are generally regarded as giving rise to independent claims. Their aggregation is expedient but not sufficiently compelling to override the preference of an individual class member to opt out for a separate action. For present purposes, I accept this characterization of mass tort interests and the related argument for allowing claimants "freedom of choice." For a showing that the characterization fundamentally misconceives the collective, interdependent and, to a large extent, unitary interests of class members in mass tort litigation and its goods of effective tort deterrence and insurance, see David Rosenberg, Mass Production Goods, Torts and Justice (1999) (unpublished manuscript, on file with author). But, while I assume the prerogative of class members to opt out, I doubt that anyone would consider autonomy per se worth the sacrifice of class action scale economies. The following analysis indicates, however, that in the absence of the possibility of free-riding on the work product of class counsel or self-dealing by non-class counsel, no one would rationally exercise the prerogative, given the incomparable benefits of class action efficiencies in resolving common questions.

[4] By economies of scale, I mean the idea that the ratio of cost to benefit from litigating a claim goes down if it is bundled with other similar claims. This occurs because investing in a common issue—that is, an issue shared by a set of classable claims—can be used in litigating all of the claims. For example, in a product liability case, once the defendant has invested in preparing a scientific study of the risks created by its product, that study can be used for all claims concerning the product. Suppose that the study costs $5 million. If there are 1000 claims, the per-claim cost of the study is $5,000; if there are 100,000 claims, the per-claim cost of the study is $50. All else being equal, the more claims there are, the more worthwhile the study becomes. Accordingly, the more claims there are, the more the defendant will invest in producing the study and in developing other common questions to win the case.

Defendants' scale-economy advantage is not an inherent property of the standard process ("separate action process"). Operating largely according to market forces, the separate action process induces plaintiffs' attorneys to acquire a beneficial (usually contingent fee) interest in classable claims and invest efficiently in developing their side of the common questions to maximize recovery of damages from trial or settlement. In an ideal world of perfect information and no transaction costs, the market for mass tort representation would achieve class action efficiencies on plaintiffs' side equiva-lent to those automatically available to defendants. Indeed, the real world of mass tort litigation is characterized by corporately structured organizations of plaintiffs' attorneys that not only compete for market share of classable claims to aggregate large claim inventories and attract financial backing from various sources of venture capital, but sometimes also share information and costs. These "law firms" thus exploit scale economies to some extent in preparing common questions en masse. Salient market defects, however, restrict mutually beneficial aggregation by plaintiffs. In particular, high costs of organization compounded by strong incentives for free-riding (problems of "collective action" or "coordination") preclude plaintiffs from efficiently or virtually ever achieving scale economies from class-wide aggregation to support the optimal investment that maximizes aggregate and individual value of their claims.

Generally affording only defendants class action scale economies in mass tort cases may strike many as a denial of "fair process." I put aside this question along with my qualms about the meaning of the often asserted, but never carefully defined, concept of "fair process." This Essay instead focuses on the social costs of biasing the allocation of litigation power. In particular, my concern is that differential access to the scale economies from class-wide aggregation undermines the primary goals of tort law: effective and administratively efficient deterrence and compensation.

Mass tort class actions represent a ready solution to this imbalance in litigation power.[5] The Supreme Court, however, has recently intimated reluctance to authorize their general use un-

[5] In the rare situation involving more than one defendant and demonstrable barriers to coordinating their defense efforts on common questions, courts could use subclassing to align the parties' access to class action scale economies.

less Congress instructs otherwise.[6] The Court does not seem to appreciate that this policy deprives plaintiffs of the class action scale economies that defendants naturally have, and moreover that the resulting inequality in litigation power distorts the effectiveness and efficiency of tort deterrence and compensation.

This Essay highlights the nature and social costs of the systemic bias favoring defendants over plaintiffs in hopes of alerting the Court, and in any event Congress, to the little recognized but crucial value of mass tort class actions. Part I explains how economies of scale afforded by class-wide aggregation of mass tort claims enhance a party's gains from litigating questions common to all classable claims. While noting the recognized advantage of avoiding wasteful relitigation of common questions, I focus on the crucial, but generally overlooked, effect on incentives to invest in preparing the common questions for trial. Scale economies derived from class-wide aggregation are essential to motivating a party to make the optimal investment that simultaneously maximizes the aggregate and per-claim value of all classable claims, whether in avoided damages for defendant or increased recovery for plaintiff. Part II addresses the social costs of systemic bias. I show that affording defendants but not plaintiffs the advantage of class action scale economies undermines the goals of tort liability. Analysis concentrates on the goal of deterrence, especially since opinions and commentary on class actions tend to ignore deterrence, but the effects of systemic bias on the objectives of compensation and administrative efficiency also are assessed. Part III focuses on the need for using litigation class actions in mass tort cases to correct systemic bias. After summarizing the benefits of this solution, I demonstrate the inferiority of "market" alternatives—in particular, voluntary claim joinder and global resolution by settlement-only class actions. Concluding in Part IV, I respond to a possible defense of systemic bias, specifically that it constrains the abuses

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[6] *See* Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997); Ortiz v. Fibreboard Corp., 119 S. Ct. 2295 (1999). While the Court was concerned with settlement-only class actions, cases certified exclusively for settlement purposes, my focus is primarily on litigation class actions, cases certified for all purposes including class-wide trial and settlement. The Court nevertheless appeared to presume, without any contradiction by the parties or amici, that litigation class certification was simply out of the question for failing the tests of manageability and superiority, if not predominance of common questions under Fed. R. Civ. P. 23(b)(3). For further discussion of the differences between settlement-only and litigation class actions and how the former perpetuates the systemic bias against plaintiffs, see *infra* part III.B.2.

of mass tort litigation, even though it also prevents beneficial mass tort litigation. I suggest, however, that the problems with mass tort litigation stem primarily from the outmoded substance and adjudicative process of tort law. Indeed, authorizing mass tort class actions will not only enhance the social benefits from the existing legal regime, but also will provide a theoretically sound and practically workable mode of litigation to serve as the basis for rational, discriminating reform of tort law.

I. SYSTEMIC BIAS

A. *Scale Economies from Aggregation*

Aggregating the classable claims arising from a mass tort event enables litigants to exploit economies of scale by investing once-and-for-all in the common questions and spreading the cost of that investment across all claims. In comparison to investing once-for-each claim, exploiting scale-economies from class-wide aggregation enhances a party's benefits from litigation—recovery of damages for plaintiffs or protection of assets for defendants. The benefits are twofold. First, the party avoids the costs of unnecessarily redundant litigation of common questions.[7] Second, the party is able to spread the cost of investing in the prosecution or defense of all classable claims, and thus has incentive to invest optimally in maximizing the aggregate, and hence, per-claim return on investment (in the form of either recovered damages or preserved assets).

The scale economies created by aggregating classable claims are typically associated with avoiding redundancy costs.[8] These costs inefficiently drain party resources away from more socially productive uses and reduce net benefits from litigation (measured in recovered damages for plaintiffs or preserved assets for defendants).[9] While this virtue of scale economies is well known

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[7] Redundancy is not inherently bad. In litigation it may serve the useful purpose of improving accuracy of decisions and reducing the costs of uncertainty, including the resulting loss of welfare for risk averse parties. On the utility of redundant litigation of common questions, in particular the relative benefits of conducting multiple trials under the auspices of a litigation class action as compared with conducting multiple trials in the conventional separate action process, see *infra* text accompanying notes 58, 66.

[8] The low ratio of recovered compensation to cost in mass tort cases is attributed principally to the costs of relitigating common questions and the potential bankruptcy of defendants. *See, e.g.*, Amchem, 521 U.S. at 598.

[9] These consequences hold true even though most cases are settled, because settle-

and often cited in favor of class actions, it is not unique to aggregation.[10] Complete *dis*aggregation of classable claims could produce the same result. Redundancy costs would be virtually eliminated in the separate action process, for example, if courts gave class-wide preclusive effect to a judgment in the first action, foreclosing re-litigation of common questions in all subsequent actions. Redundancy costs could also be eliminated without judicial intervention if attorneys in subsequent actions were to free ride on the record developed in the first case.[11]

Optimal aggregate investment in litigating common questions represents the special and generally overlooked benefit of scale economies that result from aggregating 100% of the classable claims. Essentially, the higher the stakes, the more mass tort litigants invest in developing the merits of their respective sides on the common questions.[12] Because this higher, cost-effective investment on the common questions promotes success at trial on all claims, classable claims as a whole are worth far more than the sum of their separate parts.

More precisely, like any business investing in a potentially profitable opportunity, litigants invest in developing their respective sides of a claim to the extent that net return on investment is maximized—plaintiffs seeking the greatest recovery of damages and defendants seeking the greatest reduction in damages paid.[13] Because a party usually has the option of making continuously varying investments of resources, and because increasing investment increases returns but at a diminishing marginal rate, the party will cease investing when the additional unit

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ment generally reflects the parties' anticipated net gains from trial. *See* discussion *infra* text accompanying notes 49–51.

[10] On the use of class action scale economies to avoid the costs of unnecessarily redundant litigation of common questions and the related benefit of spreading otherwise efficiently incurred costs across all classable claims to increase per-claim net recovery, see United States Parole Comm'n v. Geraghty, 445 U.S. 388, 402-03, 100 S. Ct. 1202, 63 L. Ed. 2d 479 (1980); *In re* A.H. Robbins Co., 880 F.2d 709, 732 (4th Cir. 1989); *In re* The Prudential Insurance Company of America Sales Practices Litigation, MDL NO. 1061, CIV.A.95-4704, 1997 U.S. Dist. LEXIS 4049, at *153 (D.N.J. 1997).

[11] The only difference between the two disaggregative modes is that free-riding entails additional costs mainly for the "public" because courts still must repeatedly hear and resolve the common questions.

[12] This proposition assumes that the probability of success on the merits increases continuously, though at a diminishing rate, as the party invests more in pre-trial preparation of the common questions. *See* discussion *infra* text accompanying notes 54–56.

[13] If it is difficult to imagine an individual plaintiff calculating litigation advantage in this fashion, substitute the plaintiff's attorney who most assuredly does, as any business wishing to survive must, make profit-maximizing decisions in gauging the appropriate level of investment for any contemplated litigation venture.

of time, money and effort yields an equal or lower unit in benefit. Crucially, compared to the limited return from investing in any fraction of the classable claims, class-wide aggregation assures the opportunity for optimally investing to the point of diminishing marginal returns, which maximizes the value from all claims in the aggregate ("optimal aggregate investment").[14] With more at stake, the party invests more and with greater effect, not only to reap maximum net aggregate benefit, but also to raise the value of each classable claim. Indeed, investment cost per claim will certainly rise in absolute terms, but the added expense will be more than made up by the higher return per claim. Significantly, neither claim preclusion, free riding nor any other disaggregative mode of litigation generates optimal incentives for investing to maximize the aggregate value of classable claims.[15]

A simple numerical example will make the point clear. Suppose that a product liability case involves 100 plaintiffs, each of whom suffers losses of $100,000. Among other common questions, all claims center on whether the product was defective for being unreasonably dangerous. Suppose further that a litigant (either defendant or plaintiff) sees advantage in acquiring an expert scientific assessment of the issue. Assume that the litigant could obtain a reliable study for $1 million.[16] All else being equal, if a litigant's stake is bounded by the $100,000 value of a single claim, no scientific study would be commissioned. Plainly, the $1 million investment would swamp even the highest possible benefit in recovered or avoided damages for one individual claim ($100,000). Even if the study would provide a 100% chance of success at trial, it would be a waste of money

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[14] I use the term "optimal" only in relation to a party's investment in litigating common questions that maximizes aggregate net expected benefit in recovered or avoided damages, or defendant's investment in precautions that maximizes aggregate net benefit in reduced accident risk. Thus, while the term "optimal" can be used to describe the best choice for a given actor under any set of constraints, for example, the best investment by plaintiffs given their inability to capture the benefits of scale, I will refer to such an investment as "sub-optimal."

[15] The optimal aggregate investment advantages of class action scale economies make class actions superior to court mandated alternatives, such as claim preclusion and consolidation of pending claims, and, as explained in Part III, make litigation class actions superior to market alternatives of voluntary joinder and settlement-only class actions.

[16] Obviously, the cost of preparing a competent scientific study does not vary with the aggregate value of the claims. The only question is whether the aggregate value supports making the investment. Even though it represents only one aspect of the overall litigation investment, spending a million dollars for a credible scientific study is not unrealistic. See *Panel Can't Link Breast Implants to any Diseases*, N.Y. TIMES, Dec. 8, 1998, at A1 (reporting findings by four court-appointed experts based solely on their review of medical literature at a cost of $800,000).

for any party to make the investment. By contrast, if the litigant could aggregate the 100 classable claims to capture the potential benefit of $10 million in recovered or avoided damages, the party would be much more likely to make the investment. From that perspective, the litigant would rationally make the investment so long as the resulting study more than "paid for itself" by either increasing or decreasing the probability of the product being found defective at trial. In this example, if such a study increases the litigant's chance of success at trial by only 10% on every claim, it would be worth commissioning since its aggregate expected value of $1,000,000 covers its cost. If we assume that the study is dispositive of the question of unreasonable dangerousness, it is easy to see how the presence or absence of scale economies by class-wide aggregation determines the benefit from litigation not only for classable claims overall, but also for each claim in particular.

B. *Defendant's De Facto Class Action Edge*

In mass tort cases, defendants naturally collectivize the common defense to any given set of classable claims and thus exploit the scale economies of a *de facto* class action. Defendants face none of the organizing costs and free-rider obstacles to class-wide aggregation that plaintiffs confront in litigating without the benefit of class action.[17] Since the defendant automatically aggregates all classable claims, it has optimal investment incentives, which create a built-in advantage over plaintiffs, who have to proceed in the separate action process and generally can aggregate only a fraction of the claims on a voluntary basis. As the single owner of the total potential benefit gained by avoiding damages on all claims, the defendant will be able to spread costs and reap return from its investment on the common questions *over the claims of all the plaintiffs*. In contrast, on the plaintiff's side, different plaintiffs are likely to be represented by different lawyers, no one lawyer handling—owning beneficial interest in—all the claims. Therefore, no plaintiff's lawyer is able to spread costs and reap the return gained by investing to maximize

[17] *See* discussion *infra* Part III.B.

the aggregate value from litigating the questions common to all claims.[18]

Because of this asymmetry, the defendant will make investments in the litigation that no plaintiffs' attorney can match economically. The defendant will invest up to the point at which the cost of additional investment exceeds the gain from additional investment relative to the aggregate value from 100% of the classable claims. All else being equal, a given plaintiff's attorney (handling only a fraction of the classable claims) will reach that point before the defendant does.

In the example above, the defendant treats the aggregate potential value of all classable claims—$10 million in avoided damages—as the baseline for determining whether a given investment is worthwhile. Accordingly, the defendant is willing to make some investments on the common questions that a litigant who "owns" beneficial interest in fewer than all classable claims is unwilling to make. In particular, the defendant is more likely to invest $1 million for a scientific survey than a plaintiffs' attorney holding a fraction of the classable claims, say 20% with a $2 million aggregate value. The investment the study requires is far less burdensome to the defendant when measured against the possible class-wide aggregate return. While a 10% increase in the chance of success justifies the study for a defendant with total stakes of $10 million, a 50% increase would be required for a plaintiff's attorney with total stakes of $2 million.

In general, the unequal investment incentive for defendants and plaintiffs in mass tort cases translates into a much greater chance that the defendant, who aggregates all classable claims automatically, will prevail on the common questions over the plaintiffs' attorney who acquires fewer than all claims. This analysis holds for virtually any type of investment in the litigation of questions common to classable claims. It could be discovery, expert witnesses, legal research, or any of numerous other investments of time, effort and money. It holds true, indeed, for

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[18] This analysis ignores the effects on investment incentives created by the typical contingent, percentage-of-recovery fee, which further divides the beneficial interest between the plaintiff and plaintiffs' lawyer. On this aspect of plaintiff-side investment problems, see Murray L. Schwartz & Daniel J.B. Mitchell, *An Economic Analysis of the Contingent Fee in Personal-Injury Litigation*, 22 STAN. L. REV. 1125 (1970); Kevin M. Clermont & John D. Currivan, *Improving on the Contingent Fee*, 63 CORNELL L. REV. 529 (1978); William J. Lynk, *The Courts and the Plaintiffs' Bar: Awarding the Attorney's Fee in Class-Action Litigation*, 23 J. LEGAL. STUD. 185 (1994).

the total investment in litigating those questions.[19] Because the investment bears on an issue common to all the claims, the defendant always exploits the scale economies of investing to maximize the aggregate return from all classable claims and confronts an adversary whom, as a practical matter, cannot.

II. Social Costs of Systemic Bias

I now analyze the effects of this systemic bias on the aims of tort law to deter and compensate tortious injury with the least administrative costs (including expenses for operating courts and remunerating lawyers).[20] It would be error for policy makers to ignore these effects in determining whether correcting the bias would enhance or diminish social welfare.[21] Legal process serves substantive ends, not itself. Mass tort litigation, like any other public enterprise that consumes social resources, must therefore find justification in its overall social benefit. Mass tort debates and decisions unfortunately have focused almost exclusively on questions of process, rarely considering questions of tort law and policy beyond superficial asides.[22] This mistake corrupts analysis

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[19] The overall investment can be made in an infinite number of degrees and combinations and in reality is continuous up to the total value at stake. Thus, only the aggregate value from 100% of the classable claims will provide the necessary incentive for a party to make the optimal aggregate investment. For discussion of this important point, see *infra* text accompanying notes 54–56.

[20] The interrelationship between these goals reduces to the object of minimizing the sum of accident costs. *See* Guido Calabresi, The Costs of Accidents (1970). For present purposes, however, the aims of tort law can be analyzed separately. To the extent that systemic bias in favor of defendants results in detrimental costs on any one or combination of dimensions, with all else being equal, it necessarily detracts from achieving the overall objective of minimizing the sum of accident costs.

[21] Indeed, I can see no alternative even after confining the question to one of "fair" process. It might be the case that everyone is made better off by giving defendants the upper hand in mass tort litigation. Defendants, for example, might deploy their superior litigation power to fend off frivolous tort claims, saving society (consumers, taxpayers and everyone else to whom defendants pass on their costs) from suffering welfare losses caused by "unfair" use of litigation. If no better remedy could be found for this abuse and the benefits of biasing the system exceeded costs—a very big "if"—then everyone would accept the status quo despite its apparent inequity. Because such a status quo rarely represents the best solution, however, we should generally eschew the quick, indiscriminate fix of using one serious defect in the process to offset another. We should instead adopt rational, experience-tested designs, here by eliminating the systemic bias to afford plaintiffs class action scale economies. *See* discussion *infra* Part IV.

[22] The Supreme Court's opinions in *Amchem* and *Ortiz* indicate an astonishing indifference to the theory and practice of tort law, begging virtually every question of tort liability ranging from its basic objectives to its substantive requirements and effects in practice. Leading commentary on mass torts consistently evinces the same rudimentary neglect. *See, e.g.*, Judith Resnick et al., *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. Rev. 296 (1996). Judging from its re-

of the subject on every dimension, beginning of course with the basic structure and incentives of the system addressed here.

To be sure, tort liability itself remains problematic. Tort damages are viewed as providing an excessive form of insurance for economic losses despite an ample supply of far less costly and risky first-party coverage from commercial carriers and government sources, and for non-pecuniary harm despite the teachings of insurance theory and experience to the contrary.[23] Tort litigation also is criticized for its high costs, largely attributed to enormous, if not excessive, lawyers' fees.[24] Overuse of the tort system is another concern; in many areas litigation costs exceed benefits measured as useful deterrence.[25] Moreover, many believe that mass tort cases thrust courts into the role of supervising business enterprise and resolving complex questions of science and public policy for which they lack adequate expertise and resources, and sufficiently comprehensive regulatory perspective. Indeed, pervasive uncertainty in determining the reasonableness of risk—the central issue in most tort cases—threatens to overdeter firms, pressuring them to take excessive precautions that waste resources, raise prices and make everyone worse off by shrinking surplus welfare from, and denying access to, goods.[26] For present purposes, however, I ignore these larger questions about the future of tort law. As I note in concluding remarks, the main trouble with mass torts may well be problems with the law of torts. Correcting a socially detrimental bias in the system provides a theoretically sound and practically workable baseline from which to proceed in designing targeted reforms of substantive tort law.[27]

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cently published Executive Summary, the forthcoming Rand study of class action litigation promises a similarly deficient account of costs alone, without any substantial attempt to assess the benefits in achieving deterrence and the other policy objectives of tort law and other substantive legal regimes. *See* DEBORAH R. HENSLER ET AL., INST. FOR CIV. JUST., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAINS: EXECUTIVE SUMMARY (1999).

[23] On the deficiencies in coverage and costs of tort insurance relative to commercially and governmentally supplied first-party insurance, see DON DEWEES ET AL., EXPLORING THE DOMAIN OF ACCIDENT LAW: TAKING THE FACTS SERIOUSLY (1996).

[24] *See* John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1346 (1995).

[25] *See* Steven Shavell, *The Fundamental Divergence Between the Private and the Social Motive to use the Legal System*, 26 J. LEGAL STUD. 575 (1997).

[26] *See* John E. Calfee & Richard Craswell, *Some Effects of Uncertainty on Compliance with Legal Standards*, 70 VA. L. REV. 965 (1984); *see also* David Rosenberg, *The Casual Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 849, 864 (1984).

[27] For discussion of problems and solutions respecting scientific uncertainty about

A. *Deterrence*

Given the widespread availability of commercial and government-supplied first-party insurance for serious harm, the basic, if not singular, function of tort law is to create incentives for reducing tortious risks. Optimally, tort achieves this goal by threatening potential injurers with liability for all losses their tortious conduct may cause, compelling them to internalize the costs of tortious harm before they take risky action.[28] Mass tort cases, involving businesses that usually react quickly and rationally to cost factors, present the most advantageous opportunity for tort to effectuate optimal deterrence.[29] Systemic bias, however, poses a major obstacle by preventing plaintiffs from investing optimally in developing the aggregate value of their claims, while the defendant engages in precisely that investment strategy to strengthen its case on the common questions and further drive down its adversary's expected benefit. Because the investment required would outweigh the potential damages, claims of injury for which the defendant should pay are not brought or prosecuted vigorously enough. In short, the systemic bias favoring the defendant subverts the goal of fully internalizing the costs of tortious harm to prevent it from occurring in the first place.

To illustrate, assume that 100 insureds each will suffer a $60,000 loss—$6 million in the aggregate—from ground-water pollution by the defendant, a hazard that it reasonably could reduce to zero at a cost of $4 million. Assume that a plaintiff has the following schedule of possible common-question investments and related probabilities of recovery:

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causation and related questions raised by mass tort cases, see *id.*

[28] On the theory of optimal deterrence, see STEVEN SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW (1987).

[29] *See, e.g.*, Restatement (Third) of Torts § 2 cmt. A (1998) ("Because manufacturers invest in quality control at consciously chosen levels, their knowledge that a predictable number of flawed products will enter the marketplace entails an element of deliberation about the amount of injury that will result from their activity.").

FIGURE 1

Common Question Investment	Probability of Success at Trial	Expected Aggregate Recovery		Expected Per Claim Recovery	
		Gross	Net	Gross	Net
$250,000	40%	$2,4000,000 (= 40% x $60,000 x 100)	$2,150,000 (= gross – $250,000 cost)	$24, 000	$21,500
$600,000	60%	$3.6 million (= 60% x $60,000 x 100)	$3,000,000 (= gross – $600,000 cost)	$36, 000	$30,000
$2,500,000	100%	$6,000,000 (= 100% x $60,000 x 100)	$3,500,000 (= gross – $2,500,000 cost)	$60,000	$35,000

From the deterrence perspective, the only effective investment is $2.5 million. This investment alone generates a threat of liability sufficient to provide the prospective defendant with needed incentives to take reasonable precautions, namely the threat of at least $4 million (and up to $6 million) in damages if the firm fails to spend $4 million to prevent harm.[30] Investing less lowers the probability of success and correspondingly reduces the threat of liability below the threshold required for optimal deterrence. But the fact that the investment serves deterrence goals does not guarantee that it will be made. Because tort, like other common law systems, relies on "private" investors—here a plaintiffs' attorney—the value of an investment depends on its "private" returns, specifically the aggregate recovery of damages over and above the cost of investment.[31] In the example from Figure 1, the optimal aggregate investment given 100% participation among potential plaintiffs is $2.5 million, not because it is highest, but because it results in the highest (or maximum) net return from litigating all classable claims.[32] Relative to investing at $600,000, for example, it is economical to raise the common question investment to $2.5 million, because the marginal investment of $1.9 million (= $2.5 million – $600,000) increases the aggregate marginal expected return by even more, here $2.4 million (from $3.6 million to $6 million). That investment yields an aggregate net expected return of $3.5 million, more than the next best return of $3 million from the $600,000 investment.

Despite the evident value of the $2.5 million investment, no plaintiff prosecuting a lone claim would make it, or even the

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[30] For simplicity here, I ignore the defendant's optimal aggregate investment and its effect on the probability of success at trail.

[31] Plaintiffs' attorneys gauge the worth of an investment in the hard currency of recovered damages, not by its deterrence value. They rationally treat deterrence as a public good because its production and benefits are not within the attorneys' proprietary control and because these factors do not affect the magnitude of return on their investment.

[32] From the point of view of a plaintiffs' attorney, there are two key variables in the potential investment: first, the amount of money to spend; and second, the number of plaintiffs' claims to join. The former determines the probability of winning and recovering full losses. The latter determines how many damage awards will be aggregated. Together they determine the expected aggregate winnings and hence the expected aggregate returns on the investment in preparing the common questions for trial. Plaintiffs' incentives are to exploit scale economies to the hilt, and thus to aggregate 100% of the classable claims to maximize net benefits from investment. That is, they want to approximate the monolithic defendant as nearly as possible, investing to the point that marginal cost equals marginal return.

minimum investment of $250,000. It would require joinder of at least eleven claims to make the minimum investment worthwhile and thirty claims to economically justify investing $600,000.[33] To warrant making the optimal aggregate investment, an attorney must own the beneficial interest in 80 of the 100 claims; anything less, and the attorney is better off investing only $600,000.[34] For the plaintiffs to choose the aggregate optimal investment—by reaching 80% participation—is thus critical to deterrence. If the defendant believed that an 80% rate of claims-joinder was highly improbable, then it could realistically discount potential liability by at least 40%, since joinder of between 30% to 79% of the claims motivates only a $600,000 investment and corresponding 60% probability of succeeding at trial by the plaintiffs. The defendant facing at most $2.84 million (= $3.6 million x 79%) in damages would lack the necessary legal incentives to invest $4 million for reasonable precautions.[35]

The example ignores the fact that the defendant invests optimally in the aggregate value of all classable claims. Since defendants naturally have *de facto* class action scale economies,

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[33] In determining the minimum degree of claim-joinder to warrant an investment, the attorney makes a marginal assessment comparing the aggregate net expected return from the investment alternatives. Marginal analysis shows that zero investment is preferable to investing $250,000 on a single claim, because recovering $60,000 with 40% probability of success comes nowhere close to paying for the investment. To warrant the investment, an attorney must acquire the beneficial interest in a minimum of eleven claims, promising aggregate net return of $14,000 (= 11 x $60,000 x 40% – $250,000); joining only ten results in a $10,000 loss. The degree of claim joinder necessary to support higher investments is not simply a multiple of the number of claims needed for the $250,000, because incremental investments yield diminishing marginal returns. Thus, nothing less than a beneficial interest in thirty of the 100 claims would motivate an attorney to make the $600,000 investment. With thirty claims, the attorney expects an aggregate net return of $480,000 (= 30 x $60,000 x 60% – $600,000), which is just enough to surpass the aggregate net return of $470,000 from the alternative of investing $250,000 on thirty claims.

[34] Again, the attorney seeks to maximize aggregate net expected return from the marginal investment. Holding eighty claims, the attorney calculates that investing $600,000 for expected profit of $2.28 million (= 80 x $60,000 x 60% – $600,000) is inferior to spending $1.9 million more on the margin for a total investment of $2.5 million. The latter optimal aggregate investment on all claims promises a $2.3 million return (= 80 x $60,000 x 100% – $2,500,000).

[35] Note that the numerical example could easily be adjusted so that only a fully collectivized group of 100 would prefer the high level of investment and thus provide adequate deterrence for the firm. We can also generalize to a more realistic scenario in which the investment levels are continuous rather than at only the three discrete levels shown in Figure 1. Given a few real world assumptions about how the probability of success continuously rises with investment in discovery, for example, at a diminishing rate, the minimum number of joined plaintiffs required in order to prefer the highest rational level of investment would need to be the full 100. *See* discussion *infra* Part III.B.

disallowing plaintiffs equivalent scale economies by denying class certification will likely result in unequal investments to develop the common questions. Defendant's superior litigation power further drives down the aggregate expected liability and with it the needed incentives for reasonable precautions against tortious harm.

On the rare occasions when commentators, and still rarer occasions when courts, consider the deterrence effects of mass tort litigation, most treat the benefits as accruing to society as a whole rather than to the individuals comprising it. Talk of "individual justice" almost always refers to tort compensation and the benefits to individuals from receiving redress for harm done. When the two goals of deterrence and compensation come into conflict, as they often do in the current system, the sense that doing justice for individuals should count for more than maximizing some abstract social goal of deterrence usually leads to the conclusion that individual interests should prevail over society's.[36] This way of thinking is fundamentally mistaken. The benefits of optimal deterrence necessarily accrue to all individuals—in fact, to everyone who might be exposed to tortious risk—and not merely the relatively small fraction suffering actualized tortious harm. At the most basic level, optimal deterrence benefits every individual because reducing accident costs through reasonable precautions means more welfare to distribute and that makes everyone better off.[37]

Another way to see this point is to consider the preference of an individual seeking maximum well-being who is given a choice among the levels of precautions a firm can take to avoid accidents. Suppose that an accident will cause the victim to suffer a loss of $50,000 and that the firm with wealth of $100,000 could invest in precautions and affect the chance of that harm occurring as follows:

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[36] *See, e.g.*, Gregory E. Keating, *The Idea of Fairness in the Law of Enterprise Liability*, 95 MICH. L. REV. 1266 (1997).

[37] There are other more pragmatic reasons why deterrence benefits devolve to individuals. For example, reasonably avoiding tortious accident prevents losses that money cannot replace fully (such as harm to a loved one or death). Even when tort or other insurance fully replaces the loss, no one, least of all those averse to risk, prefers paying more in premiums (or the equivalent in taxes) to fund insurance coverage than paying less to avoid the accident altogether.

FIGURE 2

Firm's Wealth	Investment: Precautions	Risk: Probability x Loss
$100,000	0	100% x %50,000
$100,000	$10,000	10% x $50,000
$100,000	$20,000	0

To demonstrate the general nature of the point, assume that the individual has a 50% chance of either owning the firm or being the accident victim and makes the choice of precautions against accident before knowing what role fate has in store.

It is clear that the optimal level of precautions is $10,000 because it minimizes the sum of accident costs and hence maximizes net aggregate wealth.[38] By spending $10,000 to reduce the risk by 90% from $50,000 to $5,000, the firm is left with net wealth of $90,000 and the individual with $45,000 in expected wealth.[39] The total wealth of $135,000 exceeds the total from either of the alternative investments: zero investment yields total wealth of $100,000 for the firm and nothing for the individual; a $20,000 investment in precautions yields net wealth for the firm of $80,000 and $50,000 for the individual, totaling $130,000.

From the individual's perspective, uncertain about being the tortfeasor or tort victim, the choice is to maximize the value of being either by summing together the expected values of the alternative fates given a specific investment in precautions. Thus, if the firm makes no investment in precautions, the individual would have a 50% chance of having the firm's $100,000 wealth and a 50% chance of being the tort victim who loses $50,000, yielding total expected wealth of $50,000. If the firm invests $10,000 in precautions, the individual has a 50% chance of owning the firm with net wealth of $90,000 and a 50% chance of being a potential tort victim with expected wealth of $45,000, yielding total expected wealth of $67,500. If the firm invests

[38] Because we are assuming risk-neutrality, wealth can be equated with the welfare derived from wealth.

[39] The present concern with deterrence assumes the individual is risk-neutral and thus indifferent to the distribution of accident costs. As noted below, shifting accident costs from the accident victim to the firm does not affect the individual's rational preference for optimal investment in reasonable precautions to maximize expected welfare.

$20,000 in precautions, the individual has a 50% chance of having its net wealth of $80,000 and a 50% chance of escaping tortious injury and having $50,000 wealth, yielding total expected wealth of $65,000.[40] The total wealth of this "society" is maximized by the use of the $10,000 precaution. Uncertain about the future, an individual always rationally chooses the optimal investment in reasonable precautions, and by extension the optimal investment in maximizing the aggregate value of all classable claims, to assure that the threat of tort liability provides the firm with requisite incentives.

B. *Compensation*

To the extent that tort damages supply plaintiffs with useful insurance, the systemic bias plainly thwarts that objective. Because of their risk aversion, people in need of insurance prize the greatest and surest replacement of their loss.[41] Defendants' *de facto* class action advantages undermine the benefit of tort insurance on both counts.

The detrimental effect of systemic bias on the amount of loss replaced by tort insurance is easily demonstrated by referring to the above example and related Figure 1 depicting plaintiff's variable investments in a scientific study. Relegating plaintiffs to separate actions, for all practical purposes, denies them the scale economies required to make the investment in an economically worthwhile scientific study. Separately, no plaintiff has sufficient economic incentive to make even the minimum investment of $250,000 to produce a 40% chance of winning $60,000. None receives insurance from tort. The incentive to make the minimum commitment of resources exists only when more than ten plaintiffs form, in effect, a joint venture to invest in developing

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[40] It should be evident that by internalizing the expected wealth of both the firm and potential tort victim under any given investment in precautions, the individual's preference for optimal precautions is unaffected by the prospect of being compensated for the harm. For example, suppose the firm bears losses strictly. If the firm spends nothing on precautions, the individual has a 50% chance of $50,000 in net firm wealth after paying $50,000 compensation and a 50% chance of having that amount in compensation, yielding total expected wealth of $50,000, which is precisely the amount the individual would derive under a regime without compensation. Similarly, if the firm invests $10,000 in precautions, the individual has the same total expected wealth with or without compensation: $67,500 (= 50% (90% x $90,000 + 10% x $40,000) + 50% x $50,000).

[41] On the theory of optimal insurance, see SHAVELL, *supra* note 28.

the common questions. The promise of a return from thirty or more jointly prosecuted claims is required for the second-best investment. As indicated above, the investment that maximizes aggregate net expected return and therefore produces the greatest amount of insurance recovery for each needy victim requires the rather unlikely event of at least 80 of 100 plaintiffs banding together.

The true measure of detriment from systemic bias derives from the fact of plaintiffs' risk aversion, which the summary in Figure 1 does not reflect. Being risk averse and looking to tort for insurance, plaintiffs regard the chance of their loss going uncompensated with more concern than they would a purely statistical gamble.[42] Consequently, the greater the chance that systemic bias will prevent tort from replacing tortious loss, the greater the deprivation of insurance benefits upon which plaintiffs' welfare depends.

For a simple example of the point, assume that a plaintiff has total wealth of $60,000 and confronts different chances of suffering uncompensated loss as depicted in Figure 1 under the column for gross per claim recovery.[43] To represent the relationship between increasing risk of uncompensated loss and increasingly greater loss of individual welfare, I will equate the utility (welfare) an individual derives from a given amount of money with the square root of that amount.[44] This device provides a nearly continuous representation of the fact that the marginal utility per dollar increases as wealth decreases.[45] Plaintiff thus derives util-

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[42] Risk averse individuals refuse bets on even odds because the welfare (or utility) they would gain from winning is less than the detriment (or disutility) they would suffer from losing. Put another way, a risk averse individual suffers greater loss of utility from even a small chance of suffering uncompensated, uninsured loss comprising a substantial amount of the person's wealth than from suffering certain loss with the same expected value. For example, risk averse individuals would prefer incurring a 100% loss of $1,000 rather than a 1% chance of suffering an uncompensated loss of $100,000.

[43] The next section on administrative efficiency focuses on differences in net per-claim recovery and their effect on risk averse individuals.

[44] Equating the utility from a given amount of money with the square root of that amount depicts the behavior of individuals who attribute diminishing marginal utility to money. Using square roots to translate money into utility provides a graphical curve that is fairly sensitive to marginal changes in wealth and utility. Increasing wealth incrementally, for example, from 0 to $1 to $4 to $9 to $16 yields constant, but relative to the marginal expenditures, diminishing incremental gains in utility of 1, 2, 3, 4.

[45] Risk aversion is a corollary of the assumption that people act as if the marginal utility of money decreases as wealth increases. The assumption is based on experience that individuals are inclined to allocate scarce dollars first to goods and services they value most highly, spending first to procure necessities, then to satisfy wants, and lastly to pursue whims. *See* SHAVELL, *supra* note 28.

ity of 244.96 from having $60,000 wealth without an accident or from having that amount in tort compensation in the event of an accident. When costs preclude investing to develop the common questions, the plaintiff faces total uncompensated loss with virtual certainty and expects to derive no welfare from tort insurance. With a minimum investment, there is a 40% probability of success, so plaintiff's expected utility is 97.98 (= square root of $60,000 x 40%). With an investment of $600,000, the probability of success has increased to 60%, so plaintiff expects to derive welfare of 146.97. Plainly, plaintiff would derive maximum welfare from tort insurance if it were economical to make the optimal investment of $2.5 million, because then tort insurance would fully replace the tortious loss of $60,000 and the 244.96 in welfare plaintiff derives from that amount of wealth. Moreover, systemic bias that gives defendants an artificial edge as to investments on common questions depresses the chance of plaintiffs recovering compensation and hence further decreases the welfare they derive from tort insurance.

C. *Administrative Efficiency*

Defendants' *de facto* class action advantages include, as noted, eliminating the costs of wasteful repetition in preparing their side of the case on common questions. Most importantly, these advantages automatically enable defendants to make optimal investments that maximize the aggregate net return in avoiding damages. Defendants incur little or no extra expense to acquire and control their interest in the defense against all classable claims. Their collective interest is a natural and necessary consequence of being the source of allegedly tortious risk affecting numerous plaintiffs.

In contrast, relegating plaintiffs to the process of separate actions compels them to make and bear the costs of wastefully repetitive investments. Moreover, because no one has an incentive alone to optimally invest in the aggregate net value of all classable claims, the only alternative is to form a joint venture. But voluntarily joining plaintiffs is a very high-cost enterprise, involving expense for searching out and evaluating potential claims, often dispersed widely over time and territory as is particularly characteristic of mass exposure cases. The potential joint venturers will incur substantial costs in negotiating referral

fees and other profit-sharing terms and for monitoring each other to prevent defection and other forms of self-dealing. The difficulties and ensuing costs of these collective action problems increase exponentially as the percentage of classable claims necessary to support the optimal investment increases. Thus, while potential gain from scale economies encourages voluntary joinder, conflicts over allocating costs and surplus benefit and the strong incentives to free ride constantly and increasingly build resistant, disaggregative forces.

Moreover, without class-wide aggregation of claims, investment and collective action costs unnecessarily concentrate the burden of litigation on the organized fraction of claims. Aggregating eighty claims in a joint venture to support the optimal aggregate investment of $2.5 million would, as indicated in Figure 1, result in per claim recovery of $28,750, because costs are spread over eighty rather than 100 claims. Were the costs spread across all 100 classable claims, each plaintiff's net recovery would increase to $35,000. For risk averse individuals, diverting a substantial amount (18%) of potential tort insurance to pay for an inefficiently concentrated burden of litigation cost imposes demonstrably serious welfare losses.

Because costs are always best considered relative to benefits, a realistic account of the expense and utility of voluntary joinder must recognize that both the burdens of aggregation and forces of disaggregation inevitably combine to prevent achieving the degree of joinder needed to support optimal aggregate investment, let alone optimal spreading of the expense across all classable claims. These collective action costs disadvantage plaintiffs relative to defendants, who typically incur far less, if any, difficulty in aggregating 100% of the claims for coordinating and optimally investing on the defense side of the common questions. Overall, the administrative inefficiency of systemic bias undermines judicial economy by distorting the adjudication of mass tort cases, further diminishing the insurance and deterrence benefits of tort liability.[46]

This assessment is not significantly affected by the fact that the process of separate actions results in the settlement of most classable claims, or by the fact that defendants incur some costs of wasted effort, for example in repeatedly preparing and pre-

[46] The cost-effective production of optimal tort deterrence and insurance, as discussed below, represents the true measure of judicial economy.

senting evidence in a series of separate action trials. In settlement, all else being equal, the defendant's advantage—gained from spreading the cost of its optimal aggregate investment across all classable claims—usually means that its per-claim costs are lower than plaintiffs'. The defendant's maximum offer will therefore shrink, shifting the average settlement closer to the plaintiff's minimum demand.[47] The separate action process may entail wasteful redundancy for defendants, but they rarely absorb the total expense of this inefficiency. [48] Generally, defendants pass on their wasteful redundancy costs, like all of their anticipated litigation expenses, to potential plaintiffs in the form of higher product prices, lower wages and other "premium" charges for tort insurance. The burdens of excess litigation cost, compounded by the high uncertainty of litigation in a systematically biased legal process, are magnified by plaintiffs' risk aversion.

III. The Need for Mass Tort Litigation Class Actions

Litigation class actions are necessary to correct the systemic bias that favors defendants over plaintiffs in mass tort cases. In this Part, I first briefly summarize implications implicit in the main point of the foregoing analysis: that mass tort class actions place plaintiffs on an equal footing with defendants by providing them with the same opportunity to exploit scale economies in preparing the common questions. Second, I demonstrate that compared to litigation class actions, market alternatives including settlement-only class actions are inferior and should be precluded.

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[47] *See* discussion *infra* text accompanying notes 49–51.

[48] Defendants will often find it worthwhile to bear these costs because they impose an even greater burden on plaintiffs. In short, defendants' *de facto* class action advantages make it economical for them to wage a "war of attrition" in many mass tort cases. As I note later, however, redundancy is not necessarily wasteful. In particular, class-wide resolution of many mass tort cases may require conducting a series of test trials to derive an average expected judgment to serve as the template for settling the remaining bulk of classable claims. Averaging out the results of multiple trials on the common questions may increase accuracy, reduce pressure on risk averse parties, and improve deterrence and insurance effects of tort liability. On the advantages of conducting multiple test trials *under the auspices of a class action*, see *infra* text accompanying notes 58, 66.

A. *Mass Tort Class Actions Correct Systemic Bias*

The only solution that both corrects systemic bias and improves the deterrence, compensation and administrative productivity of the tort system is to provide plaintiffs with what defendants automatically have *de facto*, an efficient opportunity to exploit class action scale economies. It should be apparent from the foregoing analysis that tort goals require aggregation of all classable claims to make and spread the costs of once-and-for-all investment that maximizes the aggregate benefits of litigation through recovered or avoided damages. Denying defendants the opportunity to exploit scale economies, even if feasible, would not be a sensible solution to the problem of systemic bias. There is no reason to believe that relegating both parties to a process of separate actions would be better than the present, highly biased system. Why sacrifice the benefits of defendants' *de facto* class action scale economies? Why not simply certify litigation class actions to assure that plaintiffs too can make their best case on the common questions as defendants presently do, rather than forcing defendants to make a much worse, or even their worst, case like plaintiffs must now?

The argument for parity of litigation power is not grounded on mere appearances of esthetics or fairness, but rather rests on the theoretically and empirically demonstrable benefits for everyone from removing artificial constraints on the provision of needed tort deterrence and insurance. Moreover, affording plaintiffs equal opportunity with defendants to exploit class action scale economies promises to improve the workings of a generalist system of law- and policy-making that relies heavily on aggressive competition between adversaries to generate needed information and advice.

A settlement example shows the advantages of using class actions to correct systemic bias. Assume that a firm's activity poses a risk to 100 individuals, each of whom will suffer a $500,000 loss in the event of accident; the firm can avoid the risk by spending $20 million on precautions. Suppose that the parties can make only two levels of investment on the common questions: $100,000 or $5 million. Further, should both sides invest $5 million, each will have a 50% probability of recovering or avoiding total damages at trial, but if not, then the party in-

vesting $5 million will gain the advantage of a 70% probability of success against the party investing $100,000.[49] Since most cases settle, consider the parties' relative bargaining positions if plaintiffs prosecute their claims through (1) either of two "market" modes (a) a series of separate actions or (b) a joint venture comprising a sufficient number of claims to make the $5 million investment, or (2) by class action.[50]

Separate action. Exploiting scale economies of a *de facto* class action, the defendant invests $5 million for a 70% probability of success at trial because each plaintiff it confronts will have an individual incentive to invest only $100,000 on the common questions. Thus, given a 30% probability of success, the expected judgment in any given case equals $150,000 (= 30% x $500,000). Spreading the $5 million cost for its unified defense across all 100 potential claims, the defendant effectively invests $50,000 per claim and therefore will settle with each plaintiff for no more than $200,000 (= $150,000 + $50,000). Separately bearing the concentrated cost of the $100,000 investment on common questions, each plaintiff will settle for as little as $50,000 (= $150,000 – $100,000). All else equal, the

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[49] For sake of simplicity, I have eliminated the possibility of both parties investing $100,000. As the reader may intuit, providing class action scale economies to plaintiffs may result in both parties reaching a competitive equilibrium on investment that might disserve the system's informational needs. Thus, both parties might be best off spending only $100,000 each in developing their respective positions on the common questions. Yet the court might benefit from the information provided by joint investment of $10 million to formulate a policy that effectively solves problems posed by a broad category of cases that the present litigation merely exemplifies. This divergence between "private" investment incentives and "public" policy needs for developing information in litigation pervades all mass tort cases, and for that matter the entire system of judicial lawmaking. Unless courts receive major infusions of money and expertise to enable them to make public policy more effectively and responsibly, it seems sensible to constrict their jurisdiction over central areas of the nation's economic and social life whenever feasible and substitute more efficient and informed market and regulatory alternatives. Litigation class actions would vastly improve the system but cannot completely solve its major shortcomings as a poorly informed and inexpert regulator of social enterprise. Indeed, additional fundamental reform is required, though analysis may show that in many areas of concern the judicial system is beyond salvage and should be replaced by other more effective modes of regulation.

[50] I use the standard model of litigation settlement and the parties' respective reservation points in bargaining. *See generally*, Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis under Alterntaitve Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55 (1982). In the model, defendant's maximum offer equals the expected judgment at trial plus litigation costs; plaintiff's minimum demand equals the expected judgment at trial minus litigation costs. Assuming equal bargaining power, that the parties have roughly the same information and aversion to risk, and there is consensus on the expected judgment, on-average settlement will occur at the mean point between the maximum offer and minimum demand.

parties will settle at the mean of their reservation points: $125,000 per claim (= ($200,00 + $50,000) x 50%).

Joint venture. A minimum of 50 of the 100 plaintiffs must band together to make the $5 million investment worthwhile.[51] Should the unlikely event occur that 50% of the plaintiffs proceed jointly (and ignoring collective action costs), both parties would make equal investments yielding each a 50% probability of success at trial. Nevertheless, while the defendant would spread the cost across all claims effectively reducing its per-claim expense to $50,000, plaintiffs could spread the cost only over fifty claims equaling $100,000 per claim. Consequently, given consensus on the expected judgment of $12.5 million (= 50 claims x $500,000 loss x 50% probability of success), defendant's maximum settlement offer equals $15 million (= $12.5 million + $2.5 million (half the litigation costs)). Plaintiffs' minimum demand equals $7.5 million (= $12.5 million – $5 million litigation cost). If the parties settle at the mean point, plaintiffs' aggregate recovery would be $11.25 million, or $225,000 per claim.

Class action. Under these conditions, both parties invest $5 million and spread costs across all claims, effectively reducing per-claim expense to $50,000. Given consensus on the expected judgment of $25 million and because they bear equal costs for trial, the expected judgment represents the mean between the parties' respective reservation points. Settlement thus yields each plaintiff $250,000. With these examples in mind, the utility of mass tort class actions becomes evident.

1. Deterrence

Systemic bias undermines tort deterrence by decreasing the likelihood of voluntary aggregation that creates sufficient stakes for plaintiffs to invest optimally in the aggregate value of all classable claims. When plaintiffs lack that incentive, defendants lack the corresponding incentive from threatened liability to prevent unreasonable risk. In suggesting the need for class actions to aggregate "small" claims that have no economic viability as separate actions, the Supreme Court implicitly accepts this point,

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[51] At forty-nine claims, the joint venture is indifferent because both investments promise net aggregate recovery from trial of $7.25 million.

though apparently without recognizing its general significance.[52] The central rationale for class action aggregation applies not merely to cases comprised of uneconomical claims, but to all cases involving numerous claims for damages, regardless of economic viability as separate actions. In short, class action aggregation enables plaintiffs to exploit the economies of scale *the defendant already naturally enjoys* by treating separate claims as a single litigation unit. Enabling plaintiffs to exploit the same scale economies leads them to make more productive litigation investments that determine both the likelihood and magnitude of recovery and enhance the deterrence effects of threatened tort liability.

In the settlement example, only the class action *assured* the threatened tort liability of $25 million in damages necessary to provide sufficient incentives for defendant to take $20 million in precautions against the accident. The other "market" modes of proceeding in the example offered no functionally equivalent scale economies, nor, as discussed below, would they in real life practice. The failure of separate actions to provide incentives for investing in the aggregate recovery value of all classable claims enabled the defendant to wield the superior litigation power of a *de facto* class action to defeat the aims of tort deterrence. The joint venture, however unlikely its formation, invested optimally on the common questions, but in contrast to the defendant, could only spread the costs of that investment over fewer than all

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[52] *See* Amchem Products, Inc. v. Windsor, 521 U.S. 591, 617 (1997). The Court's purported distinction between "small" and "high stake" claims is completely unrealistic. It neglects both the costs and risks of litigation. Many cases of severe injury or death—"high stake" in the Court's taxonomy—involve complex issues of science and public policy as well as fact and law that render them uneconomical as separate actions. Indeed, no mass tort claim today is prosecuted as a pure, stand-alone "separate action." The standard separate action process is instead characterized by corporately organized plaintiffs' attorneys investing on the basis of actual or expected holdings of large inventories of claims in order to exploit scale economies. Many claims remain outside these large-scale "collectives," including a significant percentage at one extreme that receive no representation and at the other that fall into the hands of "boutique" firms specializing in claims with the highest recovery values. Yet even the existence of "boutique" services hardly indicates an individualist impulse, let alone a rational, well-informed choice, among plaintiffs to bear the enormous expense and risks of going it alone. Claims remaining outside large-scale aggregations are more plausibly explained by collective action barriers, especially high costs of locating and acquiring widely dispersed mass exposure claims, incentives to free ride and self-dealing by plaintiffs' attorneys. Channeling the great majority of classable claims into a number of large-scale joint ventures, the market, it is fair to infer, responds to and reveals plaintiffs' rational preference for en masse representation. The problem, as noted above and discussed shortly, is that the market supply falls short of demand because of free riding and other impediments and costs to effective coordination.

classable claims. The example thus demonstrates another systematic distortion of deterrence effects caused by defendants' superior litigation power. Defendant's *de facto* class action economies of scale enable it to reduce per-claim costs on common questions below that of plaintiffs in joint ventures. The bargaining leverage provided by that differential enables defendants to settle on average below the expected judgment required for optimal deterrence. The class action alone solves this and other deterrence problems because it is the only effective and, indeed, the only mode of proceeding that combines optimal aggregate investment with optimal aggregate spreading of costs.

2. Compensation

Tort law rarely supplies anything approaching optimal insurance, even when it is actually needed because no other source of compensation is available. As the example indicates, however, class actions better serve the insurance needs of risk averse plaintiffs than the posited market alternatives. Class action settlement makes plaintiffs relatively best off by avoiding the risks and costs of trial and thus generating the greatest amount and chance of compensation.

Because potential plaintiffs probably are risk averse, an appropriate explanation of how class actions increase individual welfare should recognize its synergies. Only class actions combine optimal investment and optimal spreading to maximize the net insurance value of tort damages, while at the same time creating optimal deterrence effects that eliminate the risk of reasonably avoidable accidents. No market mode of proceeding offers any practical hope of providing the functional equivalent of these advantages.

3. Administrative Efficiency

The efficacy of tort compensation and deterrence depends in large part on process efficiency, as is plainly demonstrated by the previous examples. From the conventional perspective of post-accident litigation, excessive process and litigation costs impose a dead weight loss on the parties and on society in general. Only the class action cost-effectively maximizes the net benefits of litigation, stated purely in process terms of accurately deter-mining (as far as necessary and cost-effective) liability and

damages. Both market alternatives charge more and deliver less. Among their major deficiencies, neither spreads the cost of investing in development of the common questions that maximizes aggregate net recovery to all classable claims, thereby dramatically decreasing their respective value at trial and consequently in settlement.

The post-accident perspective reveals only one facet of the consequences of excessive process and litigation costs—and not the most important at that. The full picture emerges from the pre-accident (or ex ante) perspective. Focusing on this point in time, we observe potential business defendants, the usual targets of mass tort liability, estimating future liability as the basis for their decisions about whether to take precautions against unreasonable risks and (assuming strict liability) to pay for reasonably unavoidable injuries. As the example shows, businesses projecting excessive process and litigation costs would realize that they are likely to escape liability for much of the tortious consequences of their activity because many claims are priced out of the system, prosecuted on less than the optimal investment, and laden with costs that depress their settlement value. These costs, moreover, reduce the amount of, and the chance that tort will provide, needed insurance. Finally, to the extent suits are brought, business' anticipatory price and wage adjustments force all potential plaintiffs to bear the expected costs of excessive, as well as reasonable, process and litigation expenses. These pre-accident effects of administrative inefficiency, separately and in combination, tax everyone's welfare, falling most heavily upon lower-income groups who are least capable of bearing risk.

Judicial economy also represents an important component of the goal of reducing excessive costs. In general, mass tort class actions promote judicial economies proportional to the savings in party resources, often generating synergistic benefits. In particular, savings free up judicial resources for more productive work. The true measure of judicial economy, however, is the same as the true measure of class action benefits for the system as a whole: relative productivity in serving the compensation and deterrence goals of tort law. Courts, like the system as a whole, should achieve effective output of the basic goods of tort deterrence and compensation. Minimizing absolute outlays regardless of forgone benefits is false judicial economy. Although

it may seem obvious to measure judicial "savings" by the "opportunity costs," emphasis is warranted because courts rarely, and then only superficially, consider compensation and deterrence effects in evaluating management and other costs of mass tort class actions.

B. *Inferiority of Market Alternatives*

A possible response to my argument in favor of certifying litigation class actions in mass tort cases to solve systemic bias might be that the market already supplies a functionally equivalent solution. In particular, it could be argued that the market overcomes the systemic bias by aggregating classable claims in large-scale joint ventures and ultimately resolves the vast bulk in settlement-only class actions.[53] This response fails in its particulars as well as generally. Obvious and basic defects in the market preclude plaintiffs from efficiently or indeed virtually ever achieving the scale economies from class-wide aggregation essential to support the optimal investment that maximizes aggregate value of the classable claims. Chief among the market defects thwarting collective action are high organizational and other coordination costs and incessant opportunities for free-riding.

A crucial and general point should be made before specifically addressing the deficiencies of joint ventures and settlement-only class actions. Nothing short of class-wide aggregation of classable claims assures sufficient economic incentive not only for plaintiffs to make the optimal investment maximizing their aggregate and per claim value, but also for defendants to make the optimal investment in taking reasonable precautions against accident (and under strict liability, in providing optimal insurance). Optimal tort deterrence and insurance depend respectively on the threat and imposition of liability for the maximum aggregate value of the classable claims; in turn, both depend on the scale economies from class-wide aggregation supplying plaintiffs with optimal investment incentives to maximize aggregate value. In

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[53] The situation in *Ortiz* exemplifies the nature and interrelation of these market options for aggregating classable claims. For background on these market developments, see Coffee, *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343 (1995); Shuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 CORNELL L. REV. 913 (1998).

reality, investments in precautions and litigation involve virtually continuous levels and options, and therefore incentives for optimizing both types of investment derive from the same source: *maximum aggregate expected value of 100% of the classable claims.* The greatest net return from scale economies in mass tort cases is achieved only by using the maximum aggregate expected value of 100% of the classable claims as the benchmark for the optimal investment in precautions or litigation.[54]

In contrast to the "lumpy" litigation investment levels in the above examples, plaintiffs, like defendants, in reality choose from among a virtually continuous range of options. Plaintiffs, for instance, could invest in any number of studies, experts and tests to prepare their side of the common scientific questions presented by the case. Plaintiffs, moreover, have almost limitless choices in the amount of time, effort and money to commit for research, discovery, other trial preparation and so forth. Of course, the point of diminishing marginal return sets the target point for investment. That point is marked by the maximum aggregate expected value from all classable claims in damages recovered or avoided.

In sum, given that litigation investments continuiously raise the probabilty of success at trial, plaintiffs will not optimally invest to maximize aggregate value from 100% of the classable claims unless they receive the full recovery from those claims. To illustrate, assume 100 classable claims having aggre-gate value of $100,000; plainffs' can incrementally vary investments in units of $100, and increasing investment raises the chance of winning $1,000, but at a diminishing rate up to the aggregate value at stake. Representing the chance of winning $1,000 at any investment level as the square root of that investment produces a curve depicting declining marginal returns. Thus, investing $100 yields a net expected return of $9,900 (= $1,000 x 10 (square root of 100) – $100); investing $200 yields an expected return of roughly $13,942 ($1,000 x 14.142 – $200); investing $400 yields an expected net return of $19,600 (= $1,000 x 20 – $400); investing $2,500 yields an expected net return of $47,500 (=

[54] The above examples were unrealistic in depicting discontinuous investment options. They were highly stylized to provide graphic illustration of the rarely noticed relationship between the scale economies of class-wide aggregation and optimal aggregate investment. But they should not leave the erronous impression that investments in precautions and litigation are "lumpy," offering the party only a small number of discrete options or significantly discontinuous choices.

$1,000 x 50 – $2,500). An investment of $10,000 optimally maximizes the posited aggregate recoverable value of $100,000 from the classable claims, yielding aggregate net recovery of $90,000.[55] Any lower investment results in less than the maximum aggregate recovery; for example at $9,900 total expected return is roughly $99,499 ($1,000 x 99.499), yielding net aggregate recovery of $89,599.[56]

Similarly, defendants usually choose among a boundless range of devices and methods for adjusting levels of care and activity (frequency and intensity of risk behavior) to avoid unreasonable risk. Deterrence theory requires the defendant to invest in precautions up to the point of diminishing marginal return. Because investment possibilities are continuous, that point of diminishing marginal return as a practical matter is marked by defendant's expected liablity for the aggregate recovery value of all classable claims. Nothing short of a threat of full damages from 100% of the classable claims will create optimal incentives for the defendant to take reasonable precautions. Thus, in the preceding example, defendant's continuous possiblities for investing in precautions requires threatening liability for the aggregate value of $100,000 of all classable claims. To illustrate the effect of threatening sub-optimal liability, suppose the defendant is limited to making incremental investments of $100 in precautions. Confronted with the optimal threat of liability for $100,000, defendant would regard spending $9,900 in precautions to reduce expected liability roughly to $499 as inferior to investing $100 more to cost-effectively eliminate both its liability exposure and accident risk. Defendant, however, would not have that incentive to reasonably reduce risk if it anticipated that plaintiffs, because of less than 100% aggregation, would invest sub-optimally, say only $9,900 to threaten liability equal to $99,499. Facing the sub-optimal threat of liability, defendant would invest the sub-optimal amount of $9,900 in precautions, leaving plaintiffs to bear the marginal, *unreasonable* risk of $501 and, in the event of an accident, a corresponding chance of suffering marginal, *uncompensated* loss.

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[55] Because there is no more value to extract from these claims, $10,000 marks the limit of economic investment at the point of diminishing marginal return.

[56] The optimal aggregate investment yields higher net aggregate and hence net per-claim recoveries than any lower investment. However the aggregate funds are distributed among claims, every plaintiff recovers more under the optimal aggregate investment.

With this reality in mind, it is readily apparent that the market and its specific features of joint venture and settlement-only class action are inferior to the litigation class action.

1. Joint Venture

Markets tend toward arrangements that foster scale economies, and the market for mass tort representation is no exception. That market, like any that satisfies widespread public demand for mass production goods, has evolved into a cluster of relatively large-scale suppliers of mass tort representation that compete for market share of classable claims. In particular, large, variously structured organizations of plaintiffs' attorneys vie against each other to acquire market share and represent classable claims en masse. While conceivable, it is highly unlikely that the competing organizations would join together to fund the optimal aggregate investment, let alone that a single organization (or otherwise optimally assembled group of lawyers) would own the beneficial interest in all classable claims. By contrast, because defendants' *de facto* class action scale economies derive essentially from the market, they retain decisive litigation superiority over plaintiffs.

Two obvious market defects severely constrain, if not preempt, efforts at collective action by attorneys. First, voluntary joinder entails substantial transaction costs to work out mutually beneficial arrangements designating those in charge of the litigation, distributing financial and other burdens and benefits, and monitoring compliance with the terms of agreement. In the absence of a single owner of all claims, it would be surprising to find these issues resolved unanimously. There is additional cost in toxic substance, products liability, consumer fraud and other cases of mass exposure torts because of the need to locate and evaluate claims widely dispersed over territory and time. Unless initially assigned to a single owner, the intervention of free-riding attorneys makes it doubtful that the joint venture would acquire all claims. Moreover, whenever initial ownership of classable claims is divided among two or more plaintiffs' attorneys, the cost of collective action generally includes "bribes" in the form of "referral," "finders" and other fees that directly reduce plaintiffs' net recoveries because they pay off

attorneys not for value-adding contributions, but solely for their relinquishing claims to the joint venture.

Second, voluntary joinder is beset by free-riding. Each individual plaintiff, as well as plaintiffs' attorney, is motivated to withhold contributions of effort, money and claims in hopes of benefitting from the collective work product without paying for it. It is difficult for joint venturers to thwart non-contributors from capitalizing on collective work as it usually enters rather quickly into the public domain through court records and insider leaks.

The magnitude of these problems in any particular case is undoubtedly an empirical question. But it would be fanciful to believe that coordination barriers do not prevent a joint venture from acquiring ownership of the beneficial interest in 100% (or even the hypothesized 80% or 50% in the above stylized examples) of the classable claims needed to maximize their aggregate value. In the rare situation in which a joint venture achieves class-wide aggregation, it is doubtful that the organization, search and "payoff" costs make it preferable to the litigation class action.[57]

In light of the legal, factual, and, most significantly, scientific uncertainty (especially regarding estimates of causation) that often exist in mass tort cases, it might be thought that the market's supply of disaggregated litigation is a virtue and not a failing. Indeed, many commentators and courts assume that disaggregated litigation is preferable to class actions because it "matures" mass tort cases by resolving claims through more than one test-trial, and often through more than one round of multiple-trials. They stress that in conducting multiple test trials and averaging-out their variant results, disaggregated litigation avoids the risk of a single, all-or-nothing class-wide trial imposing an outlier award of damages that diverges widely from the mean. At some point, this maturation process resolves uncertainty if not outrightly, then by providing a reliable basis of multiple test-trial results for averaging-out and extrapolating

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[57] This is not to say it can never happen. For example, a single plaintiff's attorney might directly acquire ownership interest in 100% of the classable claims arising from a small-scale pollution event affecting a confined area and limited number of individuals. Given prevailing procedures and practices, a class action might involve more costs than the market alternative, even after taking account of benefits from judicial oversight of class counsel's fee and settlement decisions. While beyond the scope of this essay, it should be noted that class actions could be reformed to greatly increase their efficacy, including use in handling small-scale mass tort cases. *See* Rosenberg, *supra* note 3.

claim values to settle the vast majority of remaining claims. Frequently, the claim values generated in the separate action process are incorporated into a grided schedule of damages that is enforced through a settlement-only class action.

Whatever its value, "maturation" does not require disaggregated litigation.[58] The litigation class action can "mature" mass tort claims more efficiently and effectively. In particular, class actions can readily accommodate the efficient redundancy of multiple test-trials. Courts could mimic the market in the class action context, conducting test-trials in the same number, locations and sequence, and then average out their varying results just as the market would. The singular difference that renders the market decisively inferior is that class action scale economies would engender optimal aggregate investments (and cost-spreading) to maximize the value of all classable claims in all test-trials and hence would enhance tort insurance and create necessary incentives for defendants to make optimal investments in precautions against accident.

2. Settlement-Only Class Action

The market alternative often culminates in the so-called settlement-only class action. This type of class action is convened solely for purposes of class-wide settlement. In a settlement-

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[58] There is some suggestion that there are maturation benefits from merely extending the period of litigation, even by decades as in the asbestos litigation. In particular, the supposition is that time will enhance scientific understanding, if not eliminate uncertainty altogether. But this view is premised on the fallacious assumption that developments in scientific knowledge correspond with developments in litigation of mass tort claims. There is, of course, no reason to believe that scientific understanding on a particular question of causal association, for example, will be better or worse when litigation begins, hits its mid-way peak, or tails off for lack of additional plaintiffs.

More importantly, since "maturity" cannot remove uncertaintly altogether, meaning that mass tort claims inevitably must be resolved solely on probalistic estimates of causation, there usually is no benefit from delaying judgment. Indeed, speedy resolution of mass tort cases provides many obvious benefits. True, courts are likely to over- or under-estimate the "true" causal probabilities, but neither deterrence nor compensation goals will suffer as long as these errors are *unbiased*, in the sense that courts are no more likely to underestimate than overestimate the association. *On average*, judicial estimates would be accurate, certainly accurate enough for purposes of tort deterrence and insurance, because, as predicted by lawyers, these judgments equal the aggregate expected value of 100% of the classable claims. If risk averse, the parties can use the amount to pay the premium for insurance to cover the aggregate actualized loss. *See* Rosenberg, *supra* note 26, at 921. There is, of course, systemic bias which favors defendants. This bias not only permeates the entire process but is likely to persist over time. Consequently, as is generally true, the efficacy of advancing judicial estimates of causal and other scientific probabilities depends on convening a litigation class action.

only class action, failure to achieve that compromise—whether because of a breakdown in bargaining or court disapproval of settlement terms—relegates plaintiffs to disaggregated litigation in the separate action process. Litigation class actions are operationally distinctive in the crucial respect that failure to achieve class-wide settlement does not result in disaggregation of litigation. Instead, the case proceeds to trial based on class-wide aggregation of the classable claims.

This key difference makes settlement-only class actions inferior to litigation class actions. Plaintiffs' litigation power in settlement-only class actions derives from whatever truncated scale economies they can marshal through disaggregated litigation in the market, which almost always provides too little incentive for them to optimally invest in maximizing the aggregate expected value of 100% of the classable claims. Any resulting class-wide settlement thus reflects claim values not only generated by plaintiffs' sub-optimal investment incentive, but also depressed by defendant's superior litigation power.[59]

IV. CONCLUSION

Litigation class actions solve systemic bias that favors defendants over plaintiffs. This solution entails costs, but they probably are outweighed by the benefits. Indeed, the purported expense of litigation class actions has been greatly exaggerated and the remedies have been largely underrated.

Consider, for example, two main complaints about litigation class actions: that they deprive the individual plaintiff of a "day in court," and they "blackmail" settlements from defendants.[60]

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[59] All of the benefits of settlement-only class actions are fully and more effectively achieved through litigation class actions. Obviously, litigation class actions afford the option of global settlement. The only difference is that driven by the optimal aggregate investment, litigation class settlement promises far greater benefit to the class, and to society generally, from its optimal deterrence and insurance effects.

Settlement-only class actions also might be useful as a means of enhancing joint venturers' investment incentives by shielding their potential market share from free riders. The availability of settlement-only class actions encourages higher investment in establishing claim values in the separate action process by incorporating those values in a class-wide settlement of the remaining present and future claims and assuring a stream of fees proportionate to each joint venture's respective present and future market shares. But, because of their divided holdings in classable claims, joint venture investment incentives will remain sub-optimal. In contrast, litigation class actions create optimal incentives to invest in maximizing the aggregate value of 100% of the classable claims.

[60] *See* Ortiz v. Fibreboard Corp., 119 S. Ct. 2295, 2315 (1997); *In re* Rhone-Poulenc

Though I do not endeavor to provide an elaborate, or even summary, critique,[61] let me suggest that both objections overstate not only the reality, but also the intractability of these problems.

Often asserted but never defined, the supposed ideal of individuals having a "day in court" apparently conceives of each plaintiff proceeding independently—each wholly internalizing the costs and benefits of separate action—and prosecuting the claim on its particular factual and legal merits. Judged by the overwhelming market demand for en masse representation, however, mass tort plaintiffs clearly prefer the greater returns from scale economies to the concentrated burdens and under-financed benefits of going it alone. In what amounts to "mass production justice," the market provides trial to relatively few claims, and usually only to those that serve as statistically reliable "test cases" to establish a pattern or schedule of average claim values for settling the vast majority of claims in bulk. An individual's "desire" for trial generally is subordinated to the collective need of efficient sampling and averaging. In a free market, any plaintiff can insist on a trial, but only an extraordinarily wealthy and self-indulgent individual would have the means and profligate spirit to do so. Given the far greater benefits from class action scale economies, any class member who opts out for a separate "day in court" on the common questions probably is falling prey to self-serving advice by an attorney seeking a separate action fee or free-riding on class counsel's work product.

Moreover, I have been discussing the litigation class action as conventionally understood to aggregate claims only for class-wide resolution of "common questions." Common questions in mass tort cases focus exclusively on issues that are intrinsically unitary in nature, such as whether the defendant incorporated all cost-effective safety features in the design of its product, or invested reasonably, up to the point of diminishing marginal return, in pollution controls. Contemplating its options under pressure of optimal incentives from threatened tort liability, the prospective defendant sums and averages out all possible risks and adopts an average level of precautions. If that mass production decision reasonably minimized accident costs, it would comply

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Rorer, Inc., 51 F.3d 1293 (7th Cir. 1995).

[61] For a detailed response, see David Rosenberg, *Individual Justice and Collectivizing Risk-Based Claims in Mass-Exposure Cases*, 71 N.Y.U. L. REV. 210 (1996); Bruce Hay & David Rosenberg, *Sweetheart and Blackmail Settlements in Class Actions: Reality and Remedy*, 75 NOTRE DAME L. REV. (forthcoming May 2000).

fully with the objectives of tort deterrence; if not, tort liability is warranted. In either case the defendant never takes any action that relates specifically or discretely to any one prospective plaintiff. Any accident that eventuates is merely a chance event, one of an infinite number of indeterminate and inseparable possible outcomes comprising the statistical average that the defendant expected ("internalized"). In short, no plaintiff has any coherent individualized, claim-specific story to tell about the common questions.[62] On the "non-common questions," of course, the litigation class action affords precisely the same opportunity as the separate action process for a "day in court."[63]

A long-standing complaint against litigation class actions is that they exert extortionate pressure systematically against defendants, inducing them to settle for more than the aggregate expected value of the class claim. Judge Richard Posner recently identified the source of the pressure as the prospect of a single class-wide trial deciding common questions on an all-or-nothing basis.[64] Faced with significant chance of an outlier judgment awarding catastrophically high damages, a risk averse firm would rather pay extra in settlement to avoid trial than bet the business on a single flip of the coin. Judge Posner concluded that the only solution was to reject the litigation class action and return plaintiffs to the separate action process. In that process, no

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[62] Mass production decisions incorporate a forecast of future risk and expected benefit derived from a probability-weighted aggregation of all possible outcomes. Consequently, mass production decisions are not amenable to classical analysis that seeks to specify an individualized relationship between duty and right and breach and resulting harm. Rather, these decisions and their benefits for society necessarily involve indivisible, statistically averaged relationships between defendant and all those exposed to the risk involved that legal analysis cannot disaggregate without becoming both scientifically incoherent and socially destructive. No rational relationship exists between the merits of common questions about the defendant's responsibility for harm and the specific situation of any given plaintiff; the supposition that judgment on a particular claim would reflect its individual merits is purely arbitrary. After defendant's liability on common questions is established, there will be a need for individualized determinations of severity of loss and, possibly, contributory negligence or other affirmative defenses. For a discussion of these and related points, see Rosenberg, *supra* note 3. In certain cases, plaintiffs may benefit from personally confronting a tortfeasor at defendant's cost, though this type of "therapeutic" process is difficult and costly to administer, and probably best supplied through some ADR or professional counseling service.

[63] For analysis demonstrating that optimal tort insurance and deterrence requires averaging of most "non-common" questions (e.g., varying state laws) and litigation conditions (e.g., competence of counsel) even with perfect information and where particularization entails no transaction costs, see Bruce Hay and David Rosenberg, The Individual Justice of Averaging (1997) (unpublished manuscript on file with author); Rosenberg, *supra* note 3; Rosenberg, *supra* note 61, at 245–48.

[64] *See In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1298 (7th Cir. 1995).

single coin toss decides the defendant's fate; rather, it faces its aggregate liability as reflected by the average of outcomes from a series of relatively independent trials—what Judge Posner describes as, "a pattern . . . a consensus, or at least a pooling of judgment, of many different tribunals."[65]

There is good reason to doubt that litigation class actions in reality exert systematic blackmail pressure against defendants. First, defendant firms are structured to operate risk neutrally and have many means of hedging against risk, notably derived from laws limiting liability and affording protection in bankruptcy, opportunities for stockholders to diversify their portfolios, and widespread availability of liability insurance. Second, the "blackmail settlement" pressure from a single, class-wide trial is not systematically directed towards defendants alone, but rather is directed at both sides of the litigation. Risk averse class members and class counsel are no less likely than a defendant to regard a single class-wide trial with apprehension. In reality, "blackmail settlement" effects in any given case induce both sides to pay a premium for settlement, which nets out to the disadvantage of the most risk averse.

The solution of consigning mass tort cases to the separate action process actually creates the prospect for systematic blackmail effects, in reality directed exclusively against plaintiffs and their attorneys. While defendants spread the risk of adverse judgments across all test trials, each trial decides the fate of each plaintiff party on a single roll of the dice. Moreover, in contrast to the defendant, plaintiffs' attorneys own the beneficial interest in less than 100% of the classable claims and consequently the value of each attorney's claim inventory may be determined by fewer than all test trials.

To the extent that blackmail settlement pressures from class actions undermine tort insurance and deterrence objectives, courts have at hand an effective remedy within the framework of a litigation class action. They can conduct multiple class trials, as discussed above, and obtain precisely the "pooling of judgment" that dissipates blackmail pressures on the risk averse. The prospect of multiple class trials would not necessarily increase litigation costs nor dull appropriate incentives to settle. The solution does, however, radically change the range of settlement

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[65] *Id.* at 1299–1300.

because plaintiffs, not just the defendant, invest optimally in maximizing the aggregate value of 100% of the classable claims.[66]

I offer these suggestions to demonstrate that litigation class actions are less the cause than the whipping boy for the perceived problems of mass tort litigation. This is not to deny that some of the concerns about mass tort litigation are warranted. A particularly troubling aspect of this litigation is that it places courts in the position of supervising mass production and other economic enterprise upon which our social existence depends. When courts exercise this power without adequate expertise and resources, they are apt to make major mistakes that are likely to result in substantial social detriment. Moreover, the rules of tort liability are not well designed for regulating business risk-taking, nor are their effects well understood by the judges and lawyers charged with making and implementing the regulatory policies of tort law. Even if this prospect of uninformed and haphazard exercise of state regulatory power does not represent a "crisis," surely the serious nature and magnitude of its consequences calls for special attention.

Biasing the system against plaintiffs by denying them litigation class actions, however, does nothing to address these problems. It is likely to increase the magnitude of errors, making everyone worse off by precluding potentially beneficial uses of tort liability in mass tort cases. The best approach to policy-making, in my view, is to pursue a rational design of malfunctioning components of the system before settling for some indiscriminate balance of evils. For example, if mass tort class actions are needed to correct systemic bias to increase social welfare from tort liability, we should not hesitate to make that design change simply because it may increase the costs of mass tort litigation. We should deal with the adverse effects of increased mass tort litigation by directly addressing their source through targeted adjustments of the standards and scope of tort liability, modes of common law adjudication, and rules governing class action. Resorting to the indirect and crude approach of offsetting one systemic defect against another—characteristic of much that passes for civil process as well as tort "reform"—is not just intellectually barren: it is socially irresponsible.

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[66] *See* Hay & Rosenberg, *supra* note 61.

ESSAY

A CRISIS OF FAITH: TOBACCO AND THE MADISONIAN DEMOCRACY

JONATHAN TURLEY*

The battle over tobacco in the United States has shifted from Congress and state legislatures to courtrooms. This Essay discusses the history of controversy surrounding tobacco and the recent tobacco litigation from a Madisonian perspective. Madison believed in separation of powers and the need for each branch to check the others. In this Essay, the author argues that as the Executive Branch seeks to controvert the legislative process, danger is posed if the other branches acquiesce.[1]

Few issues have divided the nation longer or more deeply than has tobacco. To some, tobacco is a symbol of corporate greed and immorality in the marketing of an addictive and deadly product. To others, it symbolizes individual choice and freedom in a life increasingly subject to governmental control. The only common denominator among these and other views of tobacco is that they are held intensely and personally by citizens. Advocates of these views tend to see the conflict in starkly moral and univocal terms. This allows for a clarity of purpose in advancing the interests of any given faction, and, consequently, can cause frustration with a governmental system that does not yield readily to a desired course of conduct.

Such a struggle makes it is easy to conclude that our constitutional system—designed over two hundred years ago—is simply ill-suited to, or out-dated in dealing with, contemporary realities. It is, therefore, not surprising that the refusal of Congress to enact more aggressive legislation in dealing with tobacco has raised doubts over "the responsiveness of our democratic institutions"[2] and produced open calls for the circumvention of Con-

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[1] Although greatly modified and expanded, this Essay is based on testimony given before the United States Senate Judiciary Committee. *See Big Government Lawsuits: Are Policy Driven Lawsuits in the Public Interest?: Hearings Before the Senate Comm. on the Judiciary* 106th Cong. (1999) [hereinafter *Senate Tobacco Hearing*] (prepared testimony of Professor Jonathan Turley).

[2] Alix M. Freedman & Suein L. Hwang, *Burning Questions: Tobacco Pact's Limit—and Its Loopholes—Presage Fierce Debate*, WALL ST. J., June 23, 1997, at A1 (observing that the establishment of meaningful tobacco regulation "'will test the responsive-

gress in dealing with this singular industry.[3] What is surprising, however, is that these doubts and calls for circumvention have come from within the Legislative Branch. In a recent Senate hearing on tobacco and government litigation,[4] various senators heralded the Clinton Administration's decision to circumvent Congress by seeking to impose massive liability and new forms of regulation on the tobacco industry. These senators chastised the legislature for repeatedly failing to act aggressively against the tobacco industry, thereby making such circumvention necessary. One senator observed that Congress's failure to act was simply due to "the peculiar way that we elect our leaders," suggesting some inherent flaw in the electoral process.[5] Another senator added that going to court for such social changes "is the American way."[6] The only question raised by the controversy, it was suggested, was "why [tobacco companies] are so afraid to face a jury of citizens."[7] All of these statements reflect more than a misunderstanding of the constitutional process. They represent a certain crisis of faith in Madisonian democracy. The "American way" set out in Philadelphia in 1787 was a unique experiment in representative government. Under that system, those who want social change must face the representatives of the public, not a randomly selected jury of six.

This Essay explores the basis and implications of recent tobacco litigation from a legislative, and ultimately a Madisonian, perspective.[8] In the midst of the current controversy, the views of a Framer, even James Madison, may appear to be something of an academic caprice for modern legislators. Surely, the Framers had no true comparison to contemporary litigation, and the concept of a mass tort or an action like the current federal lawsuit

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ness of our democratic institutions and is going to be a challenge the nature of which we have never before faced in America'") (statement of former Federal Trade Commissioner Michael Pertschuk).

[3] *See Senate Tobacco Hearing*, *supra* note 1 (prepared testimony of Professor Jonathan Turley).

[4] *See Senate Tobacco Hearing*, *supra* note 1.

[5] *Senate Tobacco Hearing*, *supra* note 1 (statement of Sen. Charles Schumer (D-N.Y.)).

[6] *Senate Tobacco Hearing*, *supra* note 1 (statement of Sen. Richard Durbin (D-Ill.)).

[7] *Senate Tobacco Hearing*, *supra* note 1 (statement of Senator Charles Schumer).

[8] Madisonian scholars are a diverse group with many different views of Madison's theories and positions. While there are common denominators among historians, law professors and political scientists, it would be arrogant to claim any particular view as the "genuine Madisonian" perspective. It is impossible to list all of the academics who have written on this subject. Some of these works, however, are included in citations in this Essay.

would have been entirely foreign to Madison and his cohorts. Madison, however, has much to say about how we, as a people, should resolve this or any political controversy.[9] In a Madisonian democracy, it is more important how we resolve questions than what we resolve. We are not immune to bad decisions, but our process protects the integrity of the system and gives it direction. To be blunt, the Framers gave us a system that is truly idiot-proof so long as we stay within its simple rules.[10] The only threat to a Madisonian system comes when one branch attempts to act extra-constitutionally or to circumvent the tripartite process of governance.

Tobacco is a subject that has proven frustrating to all factions due to the absence of a clear majority view on its use or proper regulation. Yet the divisions and uncertainties in Congress accurately reflect the fact that tobacco is a product bound up with a series of overlapping and often conflicting philosophical, economic, social, political and religious values. For example, some question the propriety of the continued manufacture and sale of tobacco to consumers. This has not, however, translated into a prohibition movement. While various contemporary leaders, like President Clinton, have denounced tobacco as a leading killer of Americans, there has been no call from the White House or Congress to ban the product.[11] Similarly, divisive questions exist concerning the role of the government in promoting or discouraging the sale or use of the product, the responsibility of individual smokers for their injuries in light of the widespread

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[9] I have long viewed Madisonian principles as relevant to the full spectrum of social and political issues that come before the three branches of government. *See, e.g.*, Jonathan Turley, *Senate Trials and Factional Disputes: Impeachment as a Madisonian Device*, 49 DUKE L.J. 1 (1999); Jonathan Turley, Symposium, *Through a Looking Glass Darkly: National Security and Statutory Interpretation*, 53 SMU L. REV. (forthcoming 2000); Jonathan Turley, *The Executive Function Theory, The Hamilton Affair and Other Constitutional Mythologies*, 77 N.C. L. REV. 1791 (1999); Jonathan Turley, Symposium, *Congress as Grand Jury: The Role of the House of Representatives in the Impeachment of an American President*, 67 GEO. WASH. L. REV. 735 (1999); Jonathan Turley, *Dualistic Values in the Age of International Legisprudence*, 44 HASTINGS L.J. 185 (1992); Jonathan Turley, *"When in Rome": Multinational Misconduct and the Presumption Against Extraterritoriality*, 84 NW. U. L. REV. 598 (1990).

[10] This is an article of faith that the Supreme Court has long articulated in the face of calls for judicial intervention. *See, e.g.*, Federal Communications Comm'n v. Beach Communications, Inc., 508 U.S. 307, 314 (1993) ("'The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.'") (quoting Vance v. Bradley, 440 U.S. 93, 97 (1997)).

[11] To the contrary, tobacco's greatest critics have denied any interest or intention to ban the product. *See infra* notes 57–58 and accompanying text.

knowledge of the risks of smoking,[12] and, in governmental litigation, the right of the federal or state governments to seek damages from any citizen or company without a clear public mandate. There is even a question of whether parties like the federal government, the state governments, or third-party insurers have in fact lost money on tobacco and, if so, to what extent. In any large scale recovery effort by the federal government, there remains an admittedly chilling analysis weighing the value of such damages against the impact of the cost-reducing benefits of tobacco illness on other federal programs.

From the perspective of any given faction, the dearth of congressional action addressing such questions can easily be mistaken for a failure of the legislative process rather than the simple absence of a clear majoritarian position concerning tobacco. The inclination to circumvent Congress and to take such political controversies to court is predictable but dangerous in the Madisonian system. The legislative process works to take diverse opinions and produce a common focal point that is acceptable to the majority. Where no common focal point can be found, it is usually due to the fact that society is too fractured on a given issue to support significant legislative change. The jurispathic process of litigation, however, simply defines winners and losers.[13] In large class actions or governmental lawsuits, courts can force legal consequences in areas where political consensus may be lacking. In this way, recent litigation has moved the debate over the future of tobacco from committee rooms to courtrooms. Now, powerful members of the Senate sit and debate what state and federal judges might do to institute tobacco

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[12] *See infra* note 59 and accompanying text.

[13] This is not to say that courts cannot perform a socially dialogic role in the articulation of public values. *See, e.g.*, William N. Eskridge, Jr. & Gary Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 MICH. L. REV. 707, 732 (1991) (discussing the role of courts in areas like desegregation); William N. Eskridge, Jr. & Philip P. Frickey, *Statutory and Constitutional Interpretation: Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 U. PITT. L. REV. 691, 720 (1987) (discussing views on the protection of insular groups through judicial intervention). *But see* Turley, *Through a Looking Glass Darkly*, *supra* note 9 (questioning the dialogic role of courts in areas like national security). Courts are particularly important in cases like the civil rights litigation in giving a forum to minority groups marginalized in the political system. *See, e.g.*, Eskridge & Peller, *supra*, at 732. The federal lawsuits and state class actions that are the subject of this Essay raise less compelling grounds for such a judicial role. These cases involve conflicts between states and unresolved social and economic issues. Courts are poor vehicles to balance rivaling public values and interests in such a controversy. *See* Jonathan Turley, *Through a Looking Glass Darkly*, *supra* note 9 (discussing the role of courts in resolving conflicts between national security values and environmental values).

reform. This remarkably pedestrian view of legislators reveals a failure to appreciate the core institutional role of Congress within the tripartite system of government.

This Essay looks at the myriad of recent tobacco litigation within a broad historical and constitutional context, and reflects on the implications of this litigation in light of core Madisonian principles. Tobacco litigation has easily fulfilled some of Madison's greatest fears and produced conditions sharply reminiscent of those leading up to the Constitutional Convention. After addressing prior legislation and litigation concerning tobacco in Part I, Part II of the Essay turns to the Madisonian issues raised by the recent federal and state litigation. The Essay suggests that circumvention of the legislative process in dealing with tobacco violates core constitutional principles and undermines the stability of the tripartite system of representative government. The Essay further suggests that the federal litigation is based on some highly dubious legal claims, not to argue the underlying merits of the action, but rather to illustrate the legal acrobatics often necessary to circumvent the legislative process. Federal lawsuits, state class actions and individual lawsuits offer an excellent microcosm of how the Madisonian system works to address divisive issues and, more importantly, the types of steps that can undermine the integrity and stability of that system.

I. TOBACCO'S ROAD: AN HISTORICAL REVIEW OF THE LEGISLATIVE AND LITIGIOUS EFFORTS TO REGULATE TOBACCO

Before addressing the Madisonian aspects of tobacco legislation and litigation, a brief historical review is warranted. Tobacco is a product with deep political and cultural roots in the United States, roots that have great relevance to some of the factional concerns behind a Madisonian democratic system. This history shows a nation long divided over the physical, moral, and economic consequences of tobacco consumption. Tobacco may be the quintessential debate for a Madisonian system, a product upon which factional views and interests are numerous, intense, and volatile.

A. *A Brief Overview of Tobacco's Social and Political History*

Tobacco makes for a fascinating model because of its deep roots in America's economic, political, and cultural history.[14] Tobacco was first discovered by Europeans shortly after Columbus' landfall.[15] About a week after reaching the New World, Columbus noted seeing natives chewing dried leaves or using a type of pipe called a *toboca*.[16] In what may be the first observation of tobacco's addictive qualities, Columbus noted that "it was not with[in] [the sailors'] power to refrain from indulging in the habit."[17] Sailors served as the first unpaid marketing reps for the product and soon spread tobacco use throughout Europe.[18] Tobacco was further assisted by such enthusiasts as Sir Walter Raleigh and claims that tobacco actually had curative effects for conditions like chronic ulcers as well as value as an antitoxin and disinfectant.[19] Tobacco quickly became the cash crop that would make it the envy of most other industries. Jamestown was largely financed on the profits from tobacco production.[20] Virginia was described as "wholly built on smoke."[21] Tobacco became the actual currency for many transactions in the colonies.[22]

From the earliest European encounters with tobacco, however, it was denounced for either its health or social defects. Amerigo Vespucci decried the effects of the product as early as 1499.[23] In

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[14] *See generally* JOSEPH C. ROBERT, THE STORY OF TOBACCO IN AMERICA (1949).

[15] Tobacco use has been found as early as the Mayan civilization between 600 and 900 A.D. *See* U.S. DEP'T OF HEALTH AND HUMAN SERVICES, THE HEALTH CONSEQUENCES OF SMOKING: NICOTINE ADDICTION: A REPORT OF THE SURGEON GENERAL 9 (1988) [hereinafter *Surgeon General's 1988 Report*].

[16] RICHARD KLUGER, ASHES TO ASHES: AMERICA'S HUNDRED-YEAR CIGARETTE WAR, THE PUBLIC HEALTH, AND THE UNABASHED TRIUMPH OF PHILIP MORRIS 9 (1996).

[17] *Id.*

[18] One of the greatest ambassadors proved to be the French Ambassador to Portugal, Jean Nicot, whose efforts on behalf of the product were so influential that he was ultimately immortalized in the word nicotine. *See* Susan DeFord, *Tobacco: The Noxious Weed That Built a Nation*, WASH. POST, May 14, 1997, at H1.

[19] One such claim originated with Jean Nicot. *See* KLUGER, *supra* note 16, at 9 ("As ambassador to Portugal in the mid-sixteenth century, Nicot learned that the court physicians prized the Indian leaf for its healing powers, and when a tobacco poultice was credited with curing the chronic ulcer of a relative of one of his aides, Nicot wrote home to Paris rhapsodizing about its curative powers.").

[20] *See* DeFord, *supra* note 18, at H1.

[21] *Id.*

[22] *See id.* (noting that "tobacco could buy a wife for a colonist, who simply paid 120 to 150 pounds of tobacco to choose one of the women shipped over the Virginia Company [and] [t]axes were paid and ministers' salaries calculated in tobacco").

[23] *See id.* (quoting Vespucci's description of natives using tobacco: "In behavior and

a "Counterblaste to Tobacco," James I in 1604 proselytized against smoking as "[a] custome Lothsome to the eye, hatefull to the Nose, harmefull to the braine, dangerous to the Lungs, and in the black stinking fume thereof, nearest resembling the horrible Stigian smoke of the pit that it [sic] bottomlesse."[24] Likewise, early medical reports began to appear linking the rising consumption of tobacco to health problems. In 1761, a London physician asserted a clinical opinion that linked snuff to cancerous conditions of the nose and mouth.[25] In 1798, Benjamin Rush suggested that tobacco produced a variety of ailments, including harm to the mouth, stomach, and nervous system.[26] Such fears grew[27] and were made widely known by such tobacco critics as Horace Greeley who defined a cigar as "a fire at one end and a fool at the other."[28] Some leading figures like Oliver Wendell Holmes harangued against tobacco use,[29] and others chastised women and Christians who surrendered to the plant's temptation. Citizens rejected such voices as either moralizing or meddlesome, and tobacco use grew exponentially in the nineteenth and twentieth centuries.

By the middle of the twentieth century, revolutionary marketing strategies,[30] the invention of cheap cigarette rolling machines,[31] and periodic wars exposing millions of soldiers to the

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looks, they were very repulsive . . . all had their cheeks swollen out with a green herb inside, which they were constantly chewing like beasts, so that they could scarcely utter speech.").

[24] *Id.*

[25] *See* Paul Galloway, *Tobacco's Road: Glamour and Addiction Built a Deadly Habit That's Facing the Heat*, CHI. TRIB., Oct. 17, 1996, at Tempo 1.

[26] *See id.*

[27] In 1927, an English physician, F.E. Tylecote, published a report detailing how virtually every lung cancer case reviewed involved a smoker. *See* William Ecenbarger, *Tobacco's Long and Winding Road*, CHI. TRIB., Dec. 29, 1991, at 16.

[28] Galloway, *supra* note 25, at Tempo 1.

[29] Holmes actually wrote a little anti-tobacco ditty for children to memorize:

> Tobacco is a filthy weed,
> That from the devil does proceed;
> It drains your purse, it burns your clothes,
> And makes a chimney of your nose.

Nancy R. Gibbs, *All Fired Up Over Smoking*, TIME, Apr. 18, 1988, at 64, 69.

[30] Tobacco companies developed new methods of advertising and perfected the use of celebrities like Lou Gehrig to push their products. *See* Ecenbarger, *supra* note 27, at 16 (quoting the Gehrig commercial for Camels recommending that "[f]or a sense of deep-down contentment, just give me Camels after a good man-sized meal").

[31] While pre-rolled cigarettes were introduced early, the cost remained a barrier to widespread distribution. "As of 1876, the cost-per-thousand for the standard factory hand-rolled cigarette was ninety-six cents, of which all but ten cents went to pay the rollers." KLUGER, *supra* note 16, at 19. This all changed in 1880 when a teenager named James Albert Bonsack invented the Bonsack machine, which could produce

danger of tobacco[32] had all spurred the social integration of tobacco, and smoking was becoming socially acceptable amongst both men and women. Nevertheless, the presumed health dangers, as well as social and religious objections to the product, had prompted a ban on the sale of tobacco in fifteen states by 1921.[33] By the 1940s and 1950s, the first substantive studies linking tobacco use to cancer were published.[34] Included was the breakthrough 1950 article of Ernst Wynder and Evarts Graham, "Tobacco Smoking as a Possible Etiologic Factor in Bronchiogenic Carcinoma: A Study of 684 Proved Cases," which appeared in the *Journal of the American Medical Association*.[35]

In order to combat this history of negative publicity, the tobacco industry was compelled in 1954 to launch its first campaign countering the claimed health risks of smoking.[36] Nevertheless, the public continued to receive reports of newfound health risks associated with smoking. In 1957, the Surgeon General publicly suggested for the first time that tobacco could be linked to some cancers. By 1964, the medical evidence was sufficiently strong for the Surgeon General to issue a report warning the public of the presumed health risks of smoking.[37] Since that time, cigarette smoking has been linked by the Surgeon General to "coronary heart disease, peripheral arterial occlusive disease, cerebrovascular disease, lung cancer, cancer of

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roughly 200 cigarettes a minute, a rate of production that would require roughly 50 workers. *See id.* Each Bonsack machine could produce as many as 120,000 cigarettes a day when a top cigarette roller could produce roughly 3000. *See* Ecenbarger, *supra* note 27, at 16.

[32] Wars were always good for tobacco. As early as the Revolutionary War, tobacco was prized as a critical resource for morale. George Washington once told colonialists "[i]f you can't send money, send tobacco." Ecenbarger, *supra* note 27, at 16. Cigarette factories first appeared after the Crimean War when a veteran of that war founded a British factory. *See id.* Cigarettes became part of the mystique of wars and military personnel came to expect free cigarettes as part of general support. *See* KLUGER, *supra* note 16, at 63 (indicating the importance of tobacco to World War I and quoting General John "Black Jack" Pershing as stating "[y]ou ask me what we need to win this war. I answer tobacco as much as bullets.").

[33] Such bans were often, however, short-lived and ineffectual. *See* Paul G. Crist & John M. Majoras, *The "New" Wave in Smoking and Health Litigation—Is Anything Really So New?*, 54 TENN. L. REV. 551, 555–56 (1987). By 1950, it is estimated that as many as one out of every two Americans was a smoker. *See* Robert L. Rabin, *A Sociolegal History of the Tobacco Tort Litigation*, 44 STAN. L. REV. 853, 855 (1992).

[34] *See Surgeon General's 1988 Report*, *supra* note 15, at 11.

[35] *See* KLUGER, *supra* note 16, at 136.

[36] *See* Ecenbarger, *supra* note 27, at 18 (noting that the industry took out full-page ads in 448 newspapers countering claims).

[37] *See* U.S. DEP'T OF HEALTH, EDUC., AND WELFARE, PUBLIC HEALTH SERV., SMOKING AND HEALTH: REPORT OF THE ADVISORY COMM. TO THE SURGEON GENERAL OF THE PUB. HEALTH SERV. (1964).

the larynx, oral cancer, cancer of the esophagus, cancer of the bladder, cancer of the pancreas, chronic obstructive lung disease, emphysema, gastrointestinal disease, premature births, and various oral disease including periodontal disease and tooth loss."[38]

In the 1990s, the tobacco industry faced an increasingly hostile public and political climate due largely to its near mantra-like denials of any knowledge of the dangers of smoking. The final stand of this unified front occurred before Congress when seven top executives of the major tobacco companies stood together before a House Committee in 1994 and swore that they did not believe that tobacco was addictive.[39] One executive testified that "cigarette smoking is no more 'addictive' than . . . Twinkies."[40] This wall crumbled in the late 1990s as more evidence revealed that companies had manipulated the nicotine levels in their tobacco[41] and hidden knowledge of its risks.[42] Finally, in 1997, tobacco companies began to admit publicly that tobacco is harmful and addictive.[43]

The social and medical costs of tobacco consumption are obviously high, although the actual, numerical costs are the subject of an ongoing debate.[44] Some studies have indicated that the fed-

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[38] Douglas N. Jacobson, *After Cipollone v. Liggett Group, Inc.: How Wide Will the Floodgates of Cigarette Litigation Open?*, 38 AM. U. L. REV. 1021, 1028 (1989).

[39] *See Regulation of Tobacco Products (Part 1): Hearings Before the Subcomm. on Health and the Env't of the House Comm. on Energy and Commerce*, 103d Cong. 628 (1994).

[40] *Id.* at 579 (statement of James W. Johnston, Chairman, R.J. Reynolds Tobacco Co.). These types of sworn statements would later produce glaring inconsistencies for the industry when it finally admitted that smoking could be addictive. *See If Tobacco Execs Lied Under Oath, Prosecute Them*, USA TODAY, Feb. 12, 1998, at 14A (comparing a 1994 sworn statement of a Philip Morris executive that "[c]igarette smoking is not addictive" with a 1998 statement from another Philip Morris executive that "[u]nder some definitions cigarette smoking is addictive").

[41] This includes so-called "fumo loco," or crazy tobacco, which was grown in Brazil by U.S. tobacco companies. This tobacco was genetically engineered with such high concentrations of nicotine that workers would become dizzy harvesting the crop. *See* Jonathan Turley, *The New Profiteers of the Tobacco War*, WALL ST. J., Sept. 20, 1999, at A29.

[42] Due to the earlier sworn testimony of the tobacco executives denying knowledge, the Clinton Administration made strong public statements indicating its intention to prosecute the executives for perjury before Congress. *See* Lorraine Woellert, *Executives of Philip Morris Get Subpoenas*, WASH. TIMES, Aug. 31, 1996, at C9. This criminal prosecution, however, never materialized after the Justice Department allowed the statute of limitations to run.

[43] *See, e.g.*, Myron Levin & Sheryl Stolberg, *Tobacco Company Admits Smoking Leads to Cancer*, L.A. TIMES, Mar. 21, 1997, at A1 (reporting that Liggett Group "acknowledged . . . that smoking causes cancer and heart disease, nicotine is addictive and the industry markets its products to underage youths").

[44] *See, e.g.*, *Public Can Comment on Proposal to Curb Teen Smoking*, FDA Consumer: Mag. U.S. Food & Drug Admin. (U.S. Dep't of Health and Human Servs.,

eral government has spent as much as $800 billion in Medicare payments alone for tobacco injuries while states have paid hundreds of billions in Medicaid funds, yet the federal and state governments receive the greatest percentage of money from cigarette sales, and some studies indicate that tobacco consumption may actually have saved the government money by reducing the life-expectancy of recipients of federal funds.[45]

In 1988, nicotine was formally declared an addictive drug.[46] The Surgeon General estimated in the same year that cigarettes were killing 300,000 Americans annually.[47] In 1993, secondhand smoke was found by the EPA to be a health danger.[48] These proclamations along with well-funded government public-awareness campaigns, anti-smoking legislation, and changing social attitudes towards smoking have contributed to a decline in the prevalence of smoking over the last three decades.[49] Despite

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Wash., D.C.), Oct. 1995, at 2 (observing that the Center for Disease Control and Prevention's estimate of the health care costs of smoking is $50 billion, which includes "$26.9 billion for hospital costs, $15.5 billion for doctors, $4.9 billion for nursing home costs, $1.8 billion for prescription drugs, and $900 million for home health-care expenditures," whereas "the Office of Technology Assessment calculates the social costs of smoking to be $68 billion: $20.8 billion in direct health-care costs, $6.9 billion in lost productivity from disabilities, and $40.3 billion in lost productivity from premature deaths").

[45] *See* W. Kip Viscusi, *The Governmental Composition of the Insurance Costs of Smoking*, 42(2) J.L. & ECON. 575, 576 (Oct. 1999); *see also* Turley, *The New Profiteers of the Tobacco War*, *supra* note 41, at A29.

[46] *See Surgeon General's 1988 Report*, *supra* note 15, at 9.

[47] *See Surgeon General's 1988 Report*, *supra* note 15, at vi. Recent studies suggest that between 434,000 and 600,000 deaths may be attributable to tobacco use. *See* Susan M. Marsh, *U.S. Tobacco Exports: Toward Monitoring and Regulation Consistent with Acknowledged Health Risks*, 15 WIS. INT'L L.J. 29, 34 (1996) (citing sources with varying estimates); *see also* WORLD HEALTH ORGANIZATION, TOBACCO OR HEALTH: A GLOBAL STATUS REPORT 223 (1997) (estimating that in 1995 there were 529,000 U.S. deaths attributable to smoking); CENTERS FOR DISEASE CONTROL AND PREVENTION, FACTS ABOUT CIGARETTE MORTALITY (1997) (estimating that smoking kills 430,700 Americans each year).

[48] *See* Carol M. Browner, *Environmental Tobacco Smoke: EPA's Report*, EPA J., Oct.-Dec. 1993, at 18; *see also Review of the U.S. Environmental Protection Agency's Tobacco and Smoke Study: Hearings Before the Subcomm. on Specialty Crops and Nat'l Resources of the House Comm. on Agric.*, 103d Cong. 26 (1993). "In the United States, environmental tobacco smoke is estimated to cause 3,000 lung cancer deaths, 150,000–300,000 cases of respiratory infections in infants and young children, and a worsening of symptoms in 200,000 to one million asthmatic children each year." Marsh, *supra* note 47, at 35.

[49] According to the World Health Organization, there was a 37% decline in male smokers and a 29% decline in female smokers between 1970 and 1993. *See* WORLD HEALTH ORGANIZATION, *supra* note 47, at 221; *see also* Cass R. Sunstein, *Is Tobacco a Drug? Administrative Agencies as Common Law Courts*, 47 DUKE L.J. 1013, 1021 (1998) (discussing smoking rates and declines among particular groups).

all of this, the number of smokers in the United States remains over 50 million[50] and the numbers in other countries are rising.[51]

B. *Efforts to Inform and Reform Smokers: The Legislative and Litigation History of Tobacco*

As the United States has entered the new millennium, the status of tobacco has changed socially, politically, and legally. Socially, smoking is no longer viewed as chic or even acceptable in many circles. Politically, tobacco companies have gone from powerful political brokers to political pariahs for many politicians seeking campaign contributions or support. Legally, tobacco companies have accepted that tobacco is both addictive and harmful. New legal fronts have opened in both the federal and state systems for tobacco. These challenges have come in the form of both new legislation and litigation.

1. Legislative History

Given the deep division in Congress over the use and regulation of tobacco, federal tobacco legislation has historically restricted itself to informing consumers of the danger of smoking and restricting the marketing and sale of tobacco through taxes and other devices. The first major federal legislation over tobacco occurred when Congress enacted the Federal Cigarette Labeling and Advertising Act of 1965, requiring warning labels on cigarette packages.[52] In 1970, Congress banned cigarette ad-

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[50] *See Supreme Court Hears Arguments that Question Whether the Federal Government Has the Authority to Regulate Tobacco as an Addictive Drug* (National Public Radio, Dec. 1, 1999) (noting FDA calculates current smoking population to be 50 million). Over one billion cigarettes are consumed by Americans each day. *See* Susan E. Kearns, *Decertification of Statewide Tobacco Class Actions*, 74 N.Y.U. L. REV. 1336, 1338 (1999) (citing MARKET AND TRADE ECON. DIV., U.S. DEP'T OF AGRIC., TOBACCO SITUATION AND OUTLOOK 3 (Apr. 1999)).

[51] For example, in China alone, 300 million men and 20 million women smoke, and 2000 of these smokers die each day. *See* Katherine Arms, *Millions Lighting Up Despite Warnings; Officials See Taxes as Best Deterrent*, WASH. TIMES, Nov. 8, 1999, at A15. Projected annual deaths from smoking for 2025 are ten million worldwide. *See Progress Made in the Implementation of Multisectoral Collaboration on Tobbacco or Health: Report of the Secretary General*, at 15–16, U.N. Doc. E/1995/67 (1995) ("While in 1994, tobacco consumption was responsible for three million deaths, of which two million were in the developed countries, the expected figure for 2025 is ten million deaths per year, of which seven million will be in developing countries.") (quoted in Marsh, *supra* note 47, at 37.

[52] Federal Cigarette Labeling and Advertising Act of 1965, Pub. L. No. 89-92, 79

vertising on television and radio.[53] In 1984, Congress adopted new warnings that were starker and more detailed.[54] In 1986, Congress focused on smokeless tobacco, requiring warnings and banning television and radio advertisements.[55]

Each piece of legislation came after considerable political debate and compromise. The decision to alter the original warnings on cigarette packs, for example, took three years of congressional negotiation and debate. What is most notable is not the legislation that passed, but the library of legislation that failed to secure majority support.[56] In 1998, for example, the Clinton Administration sought to enact legislation granting the FDA authority to regulate tobacco. Congress rejected the legislation, affirming its regulatory focus on informing rather than reforming citizens.[57] While the government has long financed multi-million

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Stat. 282 (requiring labels that state "Caution: Cigarette Smoking May Be Hazardous to Your Health").

[53] Act of Apr. 1, 1970, Pub. L. No. 91-222, § 2, 84 Stat. 89 (codified as amended at 15 U.S.C. § 1335 (1982)).

[54] After years of heated debate, the labeling law was amended in 1984 to require the current, more stark and stringent warnings:

> III. SURGEON GENERAL'S WARNING: SMOKING BY PREGNANT WOMEN MAY RESULT IN FETAL INJURY, PREMATURE BIRTH, AND LOW BIRTH WEIGHT.
> IV. SURGEON GENERAL'S WARNING: QUITTING SMOKING NOW GREATLY REDUCES SERIOUS RISKS TO YOUR HEALTH.
> V. SURGEON GENERAL'S WARNING: SMOKING CAUSES LUNG CAN CER, HEART DISEASE, EMPHYSEMA, AND MAY COMPLICATE PREGNANCY.
> VI. SURGEON GENERAL'S WARNING: CIGARETTE SMOKE CONTAINS CARBON MONOXIDE.

Comprehensive Smoking Education Act of 1984, 15 U.S.C. § 1333 (Supp. III 1985).

[55] Comprehensive Smokeless Tobacco Health Education Act of 1986, § 4, 15 U.S.C. §§ 4401–4408 (Supp. IV 1986).

[56] Various proposals have been offered on the subject of tobacco settlement but have not been enacted. *See, e.g.*, The Universal Tobacco Settlement Act, S. 1415, 105th Cong. (1997). Other proposals have addressed the larger question of mass tort reform with equal difficulty in securing majority support. *See, e.g.*, Multiple Punitive Damages Fairness Act, S. 2537, 103d Cong. (1994); Multiple Punitive Damages Fairness Act of 1997, S. 78, 105th Cong. (1997).

[57] Even restrictions on some forms of advertising can be viewed as a simple effort to protect consumers—particularly children—from misleading or overly influential marketing. Taxes are the only legislative measures that could be viewed as having a punitive component. The ever-increasing taxes on tobacco, however, appear more motivated by the need to balance past budgets than any consistent policy of cost-internalization or penalties. *See* Alissa J. Rubin, *Congress' Tobacco Support Quickly Going Up in Smoke*, L.A. TIMES, Apr. 8, 1998, at 1 (indicating that "for Congress, which has vowed to keep the budget balanced and has no taste for income tax increases, the tobacco bill would provide a substantial source of spending money"); *Financial Editor's Perspective*, CNNFN, Apr. 8, 1998 (CNNFN Financial Editor Myron Kandel criticizing the use of "tobacco taxes as a crutch to balance the budget"); *see also Tobacco Tax Improperly Used to Balance Budget, Judge Rules*, L.A. TIMES, Dec. 24, 1994, at 24 (reporting state judicial ruling that the State of California was improperly using tobacco taxes to bal-

dollar public awareness campaigns about the dangers of smoking, periodic efforts to regulate the product's content have failed. In fact, every direct attempt to regulate the content of tobacco products has met with determined opposition in Congress, and there has never been any clear support for banning this product despite its well-documented health hazards.[58] Congress has been content to inform citizens of the dangers of smoking while leaving the decision of whether to smoke to the individual.

Tobacco legislation in the past has been consistent with the underlying principles of assumption of risk and individual choice that barred most of the early tobacco litigation.[59] In the 1990s, however, Congress became aware of documents[60] establishing a pattern of concealment that supported the assertion of FDA jurisdiction over tobacco,[61] which gave rise to a series of congressional hearings. There was growing support for measures against the tobacco industry, an industry which one federal judge characterized as perhaps "the king of concealment and disinformation."[62]

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ance its budget). Yet there certainly have been arguments for higher taxes as a method to deter smoking, as well as claims that higher taxes are meant to reimburse the treasury for tobacco related costs to federal programs. *See, e.g., Clinton Unveils New Budget Plan* (CNN Morning News, Feb. 2, 1998) (The "proposed new tax on tobacco [is] designed to discourage teen smoking by making each pack more expensive."); *Best State Strategy vs. Big Tobacco: Tax to the Max*, USA TODAY, Apr. 3, 1997, at 14A (observing that several states "hope to raise money and deter smoking by hiking tobacco taxes").

[58] *See, e.g., Hearings Before the Subcomm. on Health and the Env. of the House Energy and Commerce Comm.*, 103d Cong. 143 (1993) (containing Chairman Henry Waxman's (D-Cal.) statement that he "[does not] know of any member of Congress that is for prohibition of cigarettes. Prohibition is a terrible idea.").

[59] Such defenses continue to result in dismissals. *See, e.g.*, Brown & Williamson Tobacco Corp. v. Carter, 723 So.2d 833 (Fla. Dist. Ct. App. 1998) (reversing, on grounds including assumption of risk, lower court's judgment for former smoker).

[60] Many of these documents were actually stolen from Brown & Williamson by a law clerk, Merrell Williams, and eventually found their way to Congress. *See* Myron Levin, *Smoking Gun: The Unlikely Figure Who Rocked the U.S. Tobacco Industry*, L.A. TIMES, June 23, 1996, at D1.

[61] *See* 60 Fed. Reg. 41,495 (1995) ("Internal company documents reveal that the [tobacco] industry conducted and funded this research effort on the effect of nicotine on the brain because the tobacco manufacturers strongly suspected, as long as 30 years ago, that nicotine's effects were the basis for the world tobacco market."); Supplementary Information: Introduction, 60 Fed. Reg. 41,314 (1995) (to be codified at 21 C.F.R. pts. 801, 803, 804, 807).

[62] Haines v. Liggett Group, Inc., 140 F.R.D. 681, 683 (D.N.J. 1992) (quoting Judge H. Lee Sarokin, who noted that "despite some rising pretenders, the tobacco industry may be the king of concealment and disinformation").

2. Litigation History

Since Congress apparently preferred to use legislation to inform tobacco consumers rather than to curb the industry, litigation has been used to seek more punitive and remedial courses of action. For most of tobacco's history, however, tobacco companies had the upper hand in litigation over the effects of their products. The modest litigation that began in the 1950s proved to be uniformly unsuccessful. Courts routinely granted summary judgment in favor of the tobacco companies,[63] and juries ruled in favor of the companies when final verdicts were obtained.[64] Negligence cases were undermined largely by legal causation questions of foreseeability and factual causation questions of the link between smoking and cancer.[65] Given the uncertainty over the link of cancer to tobacco use, courts instructed jurors in tobacco cases that "the manufacturer is not an insurer against the unknowable."[66] Cases of negligence, strict liability,[67] breach of warranty[68] and fraud or misrepresentation[69] produced protracted court battles but no verdicts against tobacco companies.

This track record changed with increasing scientific evidence of a causal link to cancer and the expansion of products liability law.[70] An important but limited victory for plaintiffs was secured in 1986 in *Cipollone v. Liggett Group, Inc.*[71] Breaking the near perfect record of the tobacco industry, the jury in *Cipollone* found that the tobacco company had failed to warn of health risks, but a finding of contributory negligence barred recovery.[72] The jury did, however, award $400,000 in damages based on a

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[63] *See, e.g.*, Cooper v. R.J. Reynolds Tobacco Co., 234 F.2d 170 (1st Cir. 1956); Albright v. R.J. Reynolds Tobacco Co., 350 F. Supp. 341, 352 (W.D. Pa. 1972).

[64] *See, e.g.*, Ross v. Philip Morris & Co., Ltd., 328 F.2d 3 (8th Cir. 1964); Lartigue v. R.J. Reynolds Tobacco Co., 317 F.2d 19 (5th Cir. 1963).

[65] *See, e.g.*, *Lartigue*, 317 F.2d at 35–39.

[66] *Id.* at 40.

[67] *See, e.g.*, Roysdon v. R.J. Reynolds Tobacco Co., 623 F. Supp. 1189 (E.D. Tenn. 1985), *aff'd*, 849 F.2d 230 (6th Cir. 1988).

[68] *See, e.g.*, Pritchard v. Liggett & Myers Tobacco Co., 295 F.2d 292 (3d Cir. 1961).

[69] *See, e.g.*, Cooper v. R.J. Reynolds Tobacco Co., 234 F.2d 170 (1st Cir. 1956).

[70] This was reflected in the increase of mass tort actions. *See generally* Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 CORNELL L. REV. 941, 947 (1995).

[71] 649 F. Supp. 664 (D.N.J. 1986); *see also* Haines v. Liggett Group, Inc., 140 F.R.D. 681 (D.N.J. 1992).

[72] While the jury found that Rose Cipollone was responsible for 80% of her illness due to her knowledge of some of the dangers of smoking, it found Liggett responsible for 20%. *See* Cipollone v. Liggett Group, Inc., 693 F. Supp. 208, 210 (D.N.J. 1988). This finding barred recovery under New Jersey's comparative negligence law. *See id.*

separate finding that Liggett breached an express warranty.[73] While the case proved that smokers could recover against tobacco companies, it also showed the inherent weakness of most smokers' claims when countered by defenses of contributory negligence and assumption of risk. On appeal, the Third Circuit found for the first time that the Federal Cigarette Advertising and Labeling Act preempted state laws,[74] a position later upheld by the Supreme Court.[75] After *Cipollone*, additional suits were filed—with limited success—based on traditional negligence and warranty theories.

In the 1990s, the tobacco industry faced its first serious legal threats.[76] These latest filings were often supported by documents that revealed to juries not only that tobacco companies had prior knowledge of the dangers of tobacco,[77] but also that these companies had engaged in a long pattern of concealment, denial, and even manipulation of the addictive component of tobacco.[78] The new evidence also triggered a resurgence of governmental interest in responding to tobacco injuries—albeit in litigation rather than legislation. Armed with these documents, the State of Mississippi led many states into the litigation fray with its May 1994 filing against tobacco companies to recover Medicaid funds ex-

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[73] *See id.*

[74] Cipollone v. Liggett Group, Inc., 789 F.2d 181, 187 (3d Cir. 1986); *see also* Roysdon v. R.J. Reynolds Tobacco Co., 849 F.2d 230, 235 (6th Cir. 1988); Palmer v. Liggett Group, Inc., 825 F.2d 620, 624 (1st Cir. 1987); Stephen v. American Brans, Inc., 825 F.2d 312, 313 (11th Cir. 1987).

[75] *See* Cipollone v. Liggett Group, 505 U.S. 504 (1992).

[76] The 1990s also saw some impressive victories for the tobacco companies, including the successful defeat of a class action certification of nationwide smokers in *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996). Such certifications are difficult given the requirement of the federal rules that plaintiffs demonstrate that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members." FED. R. CIV. P. 23(b)(3). Likewise, in the somewhat analogous area of asbestos, the Supreme Court delivered a major blow to the increasing use of settlement-only classes. *See* Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997).

[77] These documents contained remarkable admissions of knowledge, such as the 1963 statement of the Vice President and General Counsel of a major tobacco company acknowledging that "nicotine is addictive. We are, then, in the business of selling nicotine, an addictive drug effective in the release of stress mechanisms." Michael V. Ciresi et al., *Decades of Deceit: Document Discovery in the Minnesota Tobacco Litigation*, 25 WM. MITCHELL L. REV. 477, 486 (1999) (quoting from a Brown & Williamson document); *see also* 141 CONG. REC. H7470, H7471 (daily ed. July 24, 1995) (statement of Rep. Henry A. Waxman quoting Philip Morris Director of Research Thomas Osbene as stating that smokers use tobacco "to achieve [their] habitual quota of the pharmacologically active components of smoke" and quoting internal descriptions of tobacco as "a narcotic").

[78] *See* Ciresi et al., *supra* note 77, at 477.

pended for tobacco-related injuries.[79] Virtually every state would follow suit with a variety of different theories for recovery.[80] The combined pressure pushed the tobacco industry into a $206 billion settlement in order to extinguish further state claims.[81] Ironically, this settlement tied anticipated state revenue to sales of tobacco, making the states even more dependent on continued smoking patterns and consumption.[82]

After settling with the states, tobacco companies still face potentially debilitating damage awards on two major fronts.[83] First, the latest wave of private lawsuits has met in some cases with remarkable success.[84] For the first time, jurors saw incriminating documents demonstrating concealment and prior knowledge of tobacco's health risks by the tobacco companies. Juries responded, leveling major punitive and compensatory damage awards against the industry.[85] As a result, the industry now faces

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[79] *See In re* Corr-Williams Tobacco Co., 691 So. 2d 424 (Miss. 1997); *In re* Fordice, 691 So. 2d 429 (Miss. 1997).

[80] *See, e.g.*, State v. Philip Morris, Inc., No. CX-95-2536, 1995 WL 862582 (Minn. Ct. App. Dec. 26, 1996) (fraud and antitrust claims); Texas v. American Tobacco Co., No. 5:96-CV-0091 (E.D. Tex. filed Mar. 28, 1996) (RICO claims).

[81] Sundra Torry & John Schwartz, *States Approve $206 Billion Deal with Big Tobacco*, WASH. POST, Nov. 21, 1998, at A1.

[82] *See* Kathey Pruitt, *Barnes Joins Effort Opposing Federal Suit vs. Tobacco Firms*, ATLANTA J. & CONSTITUTION, July 24, 1999, at 2D (discussing the vulnerability of states to revenue short-falls due to the fact that under the state settlement "the long-term pay-outs decrease as sales volumes decline"); *see also* Editorial, *A Split in Tobacco's Defenses*, BALTIMORE SUN, Mar. 25, 1997, at 10A (criticizing settlement with Liggett that gives Maryland "a portion of Liggett's profits as compensation").

[83] An additional line of litigation developed over union and health funds suing tobacco companies for costs associated with tobacco use. The union cases have been unsuccessful, while suits by organizations like Blue Cross/Blue Shield are continuing.

[84] These private suits include the *Henley* case, which is most notable in its similarity to earlier unsuccessful cases. Henley v. Philip Morris, Inc., No. 995172, 1999 WL 221076 (Cal. App. Dep't Super. Ct. Apr. 6, 1999). *Henley* involved a smoker who consumed three packs per day. In earlier litigation, this case might have resulted in early dismissal. In light of the highly culpable documents obtained from the industry, however, the jury was outraged against the industry and awarded $1.5 million in compensatory and $50 million in punitive damages. Likewise, an Oregon jury awarded $80.3 million in the *Williams* case, of which $79.5 were punitive damages. *See* Margaret Cronin Fisk, *Trapped by Their Own Records*, NAT'L L.J., Feb. 28, 2000, at C8. While later subject to remittitur, *see Henley*, 1999 WL 221076 at *9 (reducing Henley's award from $50 million to $25 million); Williams v. Philip Morris, Inc., No. 9706-03957 (Or. Cir. Ct. 1999) (reducing Williams' awards from $80.3 million to $32.8 million), these judgments represented a serious threat to the industry if replicated across the country. *See* Gina Piccalo, *Cancer Patient Savors Victory in Tobacco Suit*, L.A. TIMES, Apr. 13, 2000, at B5 (reporting on the settlement by tobacco companies Philip Morris and R.J. Reynolds with cancer victim Leslie J. Whiteley for $21.7 million despite the fact that Whiteley began smoking after the imposition of warnings of the risks of smoking).

[85] *Henley* was the most notable of these cases, but a number of other juries have rendered significant verdicts against the industry. *See, e.g.*, Carter v. Brown & Williamson Tobacco Corp., 680 So.2d 546 (Fla. Cir. Ct. 1996).

potential multi-billion-dollar judgments from state juries. These potential damages are further magnified by generous state class action rules.[86] The industry has faced lawsuits by labor unions[87] and health insurance companies,[88] though these actions have met with mixed success.

The second potentially disastrous assault on the tobacco industry has come in the form of a federal litigation strategy seeking both damages and expanded regulatory authority.[89] Both state and federal litigation are discussed in the next section.

II. THE FEDERAL TOBACCO LITIGATION, FACTIONAL INTERESTS, AND THE CIRCUMVENTION OF THE LEGISLATIVE PROCESS

The tobacco "wars" have created a rich interplay of legislation and litigation. Driven by powerful political and social pressures, the fight over tobacco constitutes the quintessential Madisonian moment.[90] Tobacco is a factional dispute involving fundamental questions of personal responsibility versus corporate conduct.[91] It involves complex questions of the actual costs of this product on the federal and state governments.[92] It raises questions of the

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[86] One successful class action resulted in a large settlement between the tobacco companies and a class of flight attendants claiming injury from second-hand smoke. *See* Broin v. Philip Morris Cos., Inc., 641 So.2d 888 (Fla. Dist. Ct. App. 1994). This suit was settled for $349 million. Ramos v. Philip Morris Cos., Inc., Nos. 98-389, 98-397, 98-418, 98-513, 98-569, 98-2237, 1999 WL 157370, at *8 (Fla. Dist. Ct. App. Mar. 24, 1999).

[87] There have been more than eighty lawsuits filed by union health care trust funds. *See* Note, *Statutory Interpretation—Second Circuit Holds That Health Care Funds Lack Standing to Sue Tobacco Companies Under RICO*, 113 HARV. L. REV. 1063 (2000). Courts have proven hostile to such claims, which are often based on RICO theories. *See, e.g.*, Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc., 191 F.3d 229 (2d Cir. 1999) (holding that claim too remote to establish RICO claim).

[88] *See, e.g.*, Arkansas Blue Cross & Blue Shield v. Philip Morris, Inc., 47 F. Supp. 2d 936, 937 (N.D. Ill. 1999).

[89] *See In re* Tobacco/Governmental Health Care Costs Litigation, 76 F. Supp. 2d 5 (D.D.C. 1999).

[90] This is not a reference to Jack Rakove's fine work which uses this term. Jack N. Rakove, *The Madisonian Moment*, 55 U. CHI. L. REV. 473 (1988). While I respect Rakove's work immensely, we have different views on aspects of Madison's theories.

[91] The public has always been divided on the recovery of damages by smokers. Even at the height of revelations about knowledge and concealment by the industry, a majority of Americans polled still opposed recovery of damages by smokers. *See* Doug Levy, *Views Are Shifting on Tobacco Firms' Liability*, USA TODAY, Mar. 28, 1997, at D1 (noting a drop in the percentage of citizens opposed to the awarding of such damages but finding that 52% still opposed recovery).

[92] *See supra* notes 44–45 and accompanying text. Many of the states that sought and secured the largest settlements from the industry were the states that received some of the highest tax revenues from this product for decades. Florida, for example, acquires over $440 million a year in cigarette taxes alone, not including the added sales tax. *See*

governments' own culpability in the subsidization and taxation of an industry that is now targeted for damages.[93] It also questions the future of this industry and the priority of any federal payment vis-à-vis the state settlements and private mass tort verdicts.[94] It is a debate that has been joined by a vast array of different interest groups and organizations representing medical, legal, financial, and political interests. It is precisely the moment that Madison had in mind when he articulated his vision of a representative government.

The tobacco litigation on both the federal and state levels has produced two distinct factional problems identified by Madison. The first problem concerns the federal litigation and the circumvention of the legislative branch, which is discussed below. The second problem, discussed in Part III, deals with and the danger of opportunistic state legislation.

A. *The Madisonian Moment and the Role of the Legislative Process in Resolving Factional Disputes*

Before addressing the specific questions raised by the federal tobacco litigation, a brief review of relevant Madisonian principles may be useful.[95] After all, one must understand the meaning of a "Madisonian principle" before deciding that a federal lawsuit does or does not threaten it.

While it has evolved since its conception by James Madison and other Framers, the tripartite system continues to reflect the

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Richard N. Pearson, *The Florida Medicaid Third-Party Liability Act*, 46 FLA. L. REV. 609, 633 (1994). State taxes can easily reach a dollar a pack in some states; Washington, Massachusetts, and Michigan have held the top three rankings for taxation nationwide. *See* Tiffany S. Griggs, Comment, *Medicaid Reimbursement From Tobacco Manufacturers: Is the States' Legal Position Equitable?*, 69 U. COLO. L. REV. 799, 819 & n.138 (1998).

[93] *See* Turley, *The New Profiteers of the Tobacco War*, *supra* note 41, at A29 (discussing the roles of both the federal government and foreign governments in the sale of tobacco in critiquing their recent filings as victims of the product); *see also* Alan L. Calnan, *Distributive and Corrective Justice Issues in Contemporary Tobacco Litigation*, 27 SW. U. L. REV. 577 (1998) (discussing the role of states in tobacco sales).

[94] Various state governments have in fact opposed the federal tobacco lawsuit as well as past efforts to share Medicaid-recovery funds with the federal government. *See* Pruitt, *supra* note 82, at 2D (describing opposition of six Governors to the federal lawsuit as threatening state revenues from sales taxes and the state settlement).

[95] This brief overview reduces longer treatments that can be found in Turley, *Senate Trials and Factional Disputes*, *supra* note 9, at 1; Turley, *Through a Looking Glass Darkly*, *supra* note 9; Turley, *Congress as Grand Jury*, *supra* note 9, at 735.

genius of Madison.[96] Madison spent much of his life studying systems of government.[97] When the time came to design a new government structure after the failure of the Articles of Confederation, Madison had achieved an almost unrivaled knowledge and appreciation of various governmental antecedents. Madison was particularly interested in ancient systems such as the Achean confederacy of Greece and the Helvitic confederacy of Switzerland.[98] Madison was most interested in what caused these earlier democratic systems to fail.[99] In the course of his studies, he concluded that one of the chief causes of system failure was the corrosive influence of factions. This problem was exacerbated by the failure of prior systems to recognize the inevitability of factions and to channel effectively the pressures produced by such divisions.[100] Madison noted that these earlier models tended to be based on documents espousing a nation's common

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[96] Recently, Professor Larry Kramer published an insightful piece on the influence of Madison's views on the Constitutional Convention. Larry D. Kramer, *Madison's Audience*, 112 HARV. L. REV. 611 (1999). Professor Kramer argues that Madison's influence was far less than suggested by many academics. *See id.* Madison himself steadfastly declined the common label as the author of the Constitution or father of the American constitutional system. While Madison may have viewed such distinction as vainglorious, his vision of the tripartite system was the most cogent and dominant of his time. For a collection of Madison's writings, see JACK N. RAKOVE, MADISON: WRITINGS (1999).

[97] Madison was voracious in his appetite for books on government and particular confederacies. This appetite was so great that when Jefferson went to Paris in July 1784, Madison dogged him to send books on government. Jefferson would comb stores in Europe for his friend and ultimately sent back dozens of such works, including the 37-volume collection *Encyclopedie Methodique*. *See generally* WILLIAM LEE MILLER, THE BUSINESS OF MAY NEXT: JAMES MADISON AND THE FOUNDING (1992); JACK N. RAKOVE, JAMES MADISON AND THE CREATION OF THE AMERICAN REPUBLIC (1990); ROBERT MORGAN, JAMES MADISON ON THE CONSTITUTION AND THE BILL OF RIGHTS (1988); ADRIENNE KOCH, JEFFERSON AND MADISON: THE GREAT COLLABORATION (1950).

[98] *See* MILLER, *supra* note 97, at 15.

[99] Madison would so often speak on such antecedents in defending his model that other Framers, like James Wilson, grew to loathe his historical presentations. *See id.* at 18. As will be shown, however, there was a method to this intellectual fascination.

[100] Madison defined factions broadly: "By a faction I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community." THE FEDERALIST No. 10, 78 (James Madison) (Clinton Rossiter ed., 1961). The Framers were well aware of the presence of factions in the United States from their colonial experience. The colonies were riddled with often violent factional interests fueled by political and religious divisions. Nevertheless, as Madison strove to deal with factions, the delegates divided sharply between Federalists, favoring representative procedures, and Anti-Federalists, favoring more direct democratic procedures. The Federalists believed that pure democratic systems were inherently unstable and that the solution to factional threats could be found in a representative system containing a separation of powers doctrine and a system of checks and balances.

values and collective goals. They also tended to fail as factional pressures grew beneath their surfaces and exploded into their streets. The Athenian model of direct democracy, in particular, was rejected by Madison precisely because it "admit[ted] of no cure for the mischiefs of faction."[101]

Madison was faced with one of the most pluralistic nations in history, composed of all manners of religious, economic, political, and social factions.[102] Madison concluded that "the causes of faction cannot be removed and that relief is only to be sought in the means of controlling its adverse."[103] To this end, Madison offered a governmental system designed not to inspire, but to last. Where other systems built structures around a view of the common values of a people, Madison designed a system to neutralize division. Since its creation, the Madisonian system has withstood pressures that would easily have crushed its ancient predecessors.

The legislative model was central to Madison's approach of ameliorating factional pressures.[104] Madison recognized that factions and divisions within a nation can, if unresolved, fester into open conflict or "convulse the society."[105] Madison foresaw the natural inclination of citizens to divide on issues of importance in a democratic system since "[t]he latent causes of faction are . . . sown in the nature of man."[106] Madison wanted to create a system that would force such divisions into the open where they could be transformed into majoritarian compromises.[107] The bicameral system was a result of this deliberative democratic concept. The key was to deal with the inevitable formation of factions while not suppressing liberty itself.[108] Under this system,

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[101] *Id.* at 81.

[102] While the United States presented greater chances for factionalism, Madison also noted that the unique characteristics and the size of the new nation could help reduce these dangers since "society itself will be broken into so many parts, interests and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority . . . The degree of security . . . will depend on the number of interests and sects." THE FEDERALIST No. 51, 324 (James Madison) (Clinton Rossiter ed., 1961).

[103] THE FEDERALIST No. 10, *supra* note 100, at 80.

[104] Madison's vision of Congress was different in some respects from the system adopted by the Constitutional Convention. For example, Madison believed that the Senate should have proportional representation. *See* Kramer, *supra* note 96, at 653–62.

[105] THE FEDERALIST No. 10, *supra* note 100, at 80.

[106] *Id.* at 79.

[107] *See id.* at 80.

[108] As Madison explained, "[l]iberty is to faction what air is to fire, an ailment without which it instantly expires. But it could not be a less folly to abolish liberty, which is essential to political life, because it nourishes faction than it would be to wish the anni-

factional interests can be realized in whole or in part only by majoritarian agreement, forcing both the debate and reconciliation of differing public values. Such compromise necessarily requires individual factions to appeal to interests and values outside of their own narrow agenda.[109] Through debate and deliberation in the bicameral legislative process, factional interests can be reshaped and patched together as majoritarian resolutions. This is the "deliberative ideal,"[110] albeit sometimes an unrealized one.[111]

Threats to this Madisonian ideal come in a variety of forms. The greatest temptation in our system is to avoid the inconveniences and costs of the political process in favor of judicial intervention.[112] The threat of circumvention is most profound when one of the two political branches attempts an end-run around the legislative process. This is precisely the danger in the latest maneuverings of the tobacco wars.

Tobacco is an area rife with factional interests. There are economic factions including the tobacco companies, tobacco workers, unions, health insurance companies,[113] trial lawyers, inves-

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hilation of air, which is essential to animal life, because it imparts to fire its destructive agency." *Id.* at 78. Madison sought to balance these two interests, noting that "[t]o secure the public good and private rights against the danger of such a faction, and at the same time to preserve the spirit and the form of popular government, is then the great object to which our inquiries are directed." *Id.* at 80.

[109] *See* Letter from Thomas Jefferson to Edward Rutledge (June 24, 1798), *reprinted in* 2 THE LIFE OF THOMAS JEFFERSON 24 (1837), *quoted in* Stewart Jay, *Origins of Federal Common Law: Part One*, 133 U. PA. L. REV. 1003, 1024 (1985).

[110] *Id.* at 20.

[111] The public choice school has written extensively on the failures that can occur within the legislative process. For work discussing these theories, see generally Jonathan Turley, *Through a Looking Glass Darkly*, *supra* note 9; Turley, *Dualistic Values in the Age of International Legisprudence*, *supra* note 9, at 185; Turley, *"When in Rome,"* *supra* note 9, at 598; Turley, *Transnational Discrimination and the Economics of Extraterritorial Regulation*, 70 B.U. L. REV. 339 (1990).

[112] This is not to say that it is always inappropriate to seek major social or legal changes through the courts. Some citizen groups like the civil rights groups of the 1960s found the federal courts to be the only forum open to the realization of principles of equality and desegregation. Through cases such as *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), the federal courts succeeded not only in changing legal standards, but also in creating a dialogue about racial issues among the three branches. There is a great deal of difference, however, between marginalized groups seeking social justice in the courts and a branch of government seeking such judicial relief. When the Executive Branch seeks a judicial avenue for major policy changes, it is substituting a government by legislation with a government by litigation.

[113] Health care companies have proven some of the most aggressive litigants in search of tobacco damages despite the danger of "double-dipping" in first seeking compensation in higher premiums and then seeking direct damages for the same costs. *See* Turley, *The New Profiteers of the Tobacco War*, *supra* note 41, at A29. Blue Cross and Blue Shield companies have secured sizable damage awards as part of some state settlement agreements. *See, e.g.*, Settlement Agreement and Stipulation For Entry of Consent

tors, state governments, and such collateral industry groups as advertising companies, wholesalers, distributors, and retailers. There are non-economic factions including smoking advocates, anti-smoking advocates, religious denominations, citizens generally opposed to either government regulation or restrictions on free choice, advocates for children, and medical advocacy groups. Regional factions are also evident as a result of the heavy reliance on the tobacco industry in the Southeast. Individual voters often embody a combination of these different views of tobacco. Thus, for example, a citizen may take a narrow view of the role of government as a conservative or libertarian, but be personally opposed to tobacco for religious reasons.[114]

The factionalized nature of the tobacco debate underscores the need for a legislative resolution since it is only in Congress that these factional interests can properly be reconciled. For this reason, the decision of the Clinton Administration to pursue a judicial remedy in the tobacco debate converted a quintessentially Madisonian moment into a Madisonian nightmare. This nightmare is the removal of a highly factionalized dispute from the Legislative Branch to the Judicial Branch, and an invitation to judicial activism. Instead of a deliberative debate reconciling the numerous interests surrounding this important national issue, unelected judges can now replace the public's views with their own unaccountable, personal opinions. Although pursuing this issue through the judiciary circumvents a lengthy political fight, the cost to a Madisonian democracy of expediting such a process is prohibitive.

B. *The Federal Tobacco Litigation and the Circumvention of Congress over Tobacco Regulation*

The federal tobacco litigation was composed of two separate actions: the failed assertion of Food and Drug Administration ("FDA") jurisdiction over tobacco, and the federal tobacco lawsuit for recovery of past federal expenditures to cover tobacco-

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Judgment, State *ex rel.* Humphrey v. Philip Morris Inc., No. CI-94-8565, 1998 WL 394331, at *4, *6 (Minn. Dist. Ct. May 8, 1998) (specifying that Blue Cross and Blue Shield of Minnesota would receive $469 million in damages).

[114] A particularly good example of such a legislator is Senator Orrin Hatch (R-Utah), Chairman of the Senate Committee on the Judiciary and a Mormon opposed to smoking and drinking. *See Senate Tobacco Hearing*, *supra* note 1 (statement of Sen. Orrin Hatch).

related illnesses.[115] While these cases raise different legal questions, they both demonstrate the need for "institutional settlement" within the political—rather than the judicial—system.[116]

The first executive effort to circumvent Congress occurred in 1995, when the FDA stated its intent to regulate tobacco without a direct congressional mandate.[117] Previously, the FDA maintained that it could not regulate tobacco absent new legislation to that effect[118] unless tobacco companies began to claim that tobacco had beneficial health effects.[119] The FDA asserted this position against public interest groups in court.[120] While the FDA repeatedly stated it lacked such jurisdiction despite its view of the dangers of this product, Congress never acted to expand its jurisdiction in the six legislative measures directed at tobacco use.[121]

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[115] *See* FDA v. Brown & Williamson, 120 S. Ct. 1291 (2000); United States v. Philip Morris, Inc., No. 1:99CV02496 (D.D.C. 1999).

[116] *See* HENRY HART & ALBERT SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 4 (1958) ("The principle of institutional settlement expresses the judgment that decisions which are the duly arrived at result of duly established procedures of this kind ought to be accepted as binding upon the whole society unless and until they are duly changed.")

[117] *See* 60 Fed. Reg. 41 (1995). Not only was such a mandate missing, but Congress had statutorily expressed the view that marketing of tobacco was unique and deserving of protection. 7 U.S.C. § 1311(a) (2000) (establishing that "the marketing of tobacco constitutes one of the greatest basic industries of the United States with ramifying activities which directly affect interstate and foreign commerce at every point, and stable conditions therein are necessary to the general welfare").

[118] *See Cigarette Labeling and Advertising, 1965: Hearings on H.R. 2248 before the House Comm. on Interstate and Foreign Commerce*, 89th Cong. 193 (1965); *Federal Cigarette Labeling and Advertising: Hearings before the House Comm. on Interstate and Foreign Commerce*, 88th Cong. 18 (1964); Memorandum from Bureau of Enforcement, Food and Drug Admin., to Directors of Bureaus and Divisions and Directors of Districts, Food and Drug Admin. (May 23, 1963), *reprinted in Public Health Cigarette Amendments of 1971: Hearings on S. 1454 Before the Consumer Subcomm. of the Senate Comm. on Commerce*, 92d Cong. 240 (1972). In *FDA v. Brown & Williamson*, the Supreme Court further noted other unambiguous statements by the FDA in prior litigation, including its prior insistence that "[i]n the 73 years since the enactment of the original Food and Drug Act, and in the 41 years since the promulgation of the modern Food, Drug, and Cosmetic Act, the FDA has repeatedly informed Congress that cigarettes are beyond the scope of the statute absent health claims establishing a therapeutic intent on behalf of the manufacturer or vendor." 120 S. Ct. 1291, 2000 U.S. LEXIS 2195, at *47–*48 (2000) (quoting Brief for Appellee (FDA) at 14–15, Action on Smoking and Health v. Harris, 655 F.2d 236 (D. Cal. 1980).

[119] No such claims have been made by tobacco companies in decades.

[120] *See, e.g.*, Action on Smoking and Health v. Harris, 655 F.2d 236, 237 (D.C. Cir. 1980).

[121] *See* Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, 79 Stat. 282; Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 87; Alcohol and Drug Abuse Amendments of 1983, Pub. L. No. 98-24, 97 Stat. 175; Comprehensive Smoking Education Act, Pub. L. No. 98-474, 98 Stat. 2200; Comprehensive Smokeless Tobacco Health Education Act of 1986, Pub. L. No. 99-252, 100 Stat. 30; Alcohol, Drug Abuse, and Mental Health Administration Reorganization Act, Pub. L.

In 1996, the FDA issued a final rule entitled "Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents,"[122] which reversed its position and asserted jurisdiction to restrict the sale and advertisement of tobacco products to children and teens. The rule additionally laid the foundation for more expansive regulation of tobacco as a drug or device under the FDA's jurisdiction. After a district court partially upheld the regulation,[123] a divided panel of the United States Court of Appeals for the Fourth Circuit ruled against the FDA, and the Supreme Court granted certiorari to hear the case.[124] In its interpretation of the statute, the Fourth Circuit pointed to the rather clear "extrinsic evidence" that Congress specifically chose not to grant the FDA the jurisdiction it was now seeking from the judicial branch.[125] Included in this evidence were the repeated FDA requests for such authority. The court noted that Congress defeated fifteen bills that would have specifically extended FDA jurisdiction over tobacco.[126] These bills often represented the efforts of anti-tobacco members seeking legislative mandates to respond to the FDA's long-standing position that it lacked the same jurisdiction it later asserted in *Brown & Williamson.*[127]

In a five-four decision, the Supreme Court affirmed the Fourth Circuit. Writing for the majority, Justice O'Connor rejected the view that the FDA should prevail under *Chevron, U.S.A. v. Natural Resources Defense Council, Inc.*[128] The Court instead adopted a strikingly contextual view that found evidence in the body of statutory provisions and legislative history of an unambiguous intent to preclude the FDA from asserting jurisdiction over to-

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No. 102-321, § 202, 106 Stat. 394.

[122] Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44,396 (1996) (codified at 21 C.F.R. pts. 801, 803, 804, 807, 820, 897 (1997)).

[123] *See* Coyne Beahm, Inc. v. FDA, 966 F. Supp. 1374 (M.D.N.C. 1997).

[124] *See* Brown & Williamson Tobacco Corp. v. FDA, 153 F.3d 155 (4th Cir. 1998), *cert. granted*, 119 S. Ct. 1495 (No. 98-1152).

[125] *See id.* at 167. This extrinsic evidence included past failed legislative efforts, the prior position of the FDA denying the authority it asserted in the case, and other laws that indicated that Congress, and not the FDA, would make the decision on expanded regulation of tobacco. *See id.*

[126] *See id.* at 170; *see also* Susan M. Marsh, *U.S. Tobacco Exports: Toward Monitoring and Regulation Consistent with Acknowledged Health Risks*, 15 WIS. INT'L L.J. 29, 78 (1996) (listing additional failed legislative proposals on expanding tobacco regulation).

[127] 153 F.3d 155, 170 (4th Cir. 1998).

[128] 467 U.S. 837 (1984). *But see* 120 S. Ct. at 1320 (Breyer, J., dissenting).

bacco products.[129] The Court relied on a history of past denials of jurisdiction by the FDA, intervention by Congress to prevent such regulation, and the extreme measures that would be required of the FDA should jurisdiction be recognized.[130] Though the Court did not emphasize the core separation of powers concerns raised by legislative circumvention, the thrust of the decision was to leave the question of tobacco regulation with the legislative and executive branches.

The circumvention of Congress in the FDA case was open and notorious. Not only did the FDA break from its long-held position that it lacked the authority to regulate tobacco, but prior to seeking this authority through the courts, the Clinton administration was rebuffed in an attempt to secure a legislative mandate. Despite these problems, the FDA case is not as troubling as the massive federal lawsuit that followed. The FDA litigation might be defended under a view of the expanded role of agencies in a new age of regulation,[131] although it is difficult to discern any honest intentionalist claim that the FDA possessed this authority. The federal tobacco lawsuit, however, represented a sweeping new federal program of cost-recovery that could materially alter, if not bankrupt, the industry.

In his 1999 State of the Union address, President Clinton announced the federal lawsuit and stated his goal of recouping the

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[129] *See* 120 S. Ct. at 1297. The Court rejected strict textualism. "In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context." *Id.*

[130] The Court concluded that "if tobacco products were 'devices' under the FDCA, the FDA would be required to remove them from the market." *Id.* at 1303. The Court did not believe that potentially extreme measures should be based on a thin statutory foundation for establishing congressional intent. The Court properly left such choices to the political branches. This was in stark contrast to the suggested role advocated by academics like Walter Dellinger who predicted that the Court would tilt in favor of the government due to a preference for regulation by the agencies rather than by the private bar. Dellinger predicted that "[t]he court will realize there has to be a method of regulating tobacco and having a responsible federal agency staffed by experts is a better method than lawsuits, state attorneys general and contingency fees." Albert R. Hunt, *Drug-Delivery Devices—Cigarettes—Should be Regulated,* WALL ST. J., Dec. 2, 1999, at A23 (quoting Walter Dellinger). Such a judicial choice would have required a majority of justices to adopt a strikingly activist stance. It is not the province of the Supreme Court to choose "better" systems of regulation. Dellinger's point only magnifies the contemporary inclination to circumvent Congress to use courts as an alternative body for policy corrections.

[131] *See, e.g.*, Sunstein, *supra* note 49, at 1021; Randolph J. May, *When an Agency Extends Itself,* LEGAL TIMES, Dec. 13, 1999, at 64 (quoting Sunstein stressing the role of agencies like the FDA to "adapt[] the law to new circumstances, of both value and fact . . . in [a] continuing process[] of both 'updating' and 'particularization'").

"hundreds of billions" of federal funds spent covering tobacco injuries via programs like Medicare.[132] As with the FDA lawsuit, the Administration reversed its prior position, which rejected that there was federal authority for such a lawsuit absent congressional action.[133] The federal filing appears motivated, in part, by a judgment of the White House that Congress would not support an independent governmental cause of action.[134] Thus, by the time of the federal lawsuit, the White House had already failed in its effort to secure funding for the lawsuit, and Congress had barred the federal government from claiming any part of the state settlements.[135] Any lawsuit that achieved President Clinton's stated goal of billions in damages would have to be based on a re-interpretation of existing law. Since the goal of a massive recovery of Medicare funds was a new concept that did not appear in any prior legislation or legislative record, such re-interpretation would prove a difficult task. It required Justice

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[132] President Clinton stated:

> Smoking has cost taxpayers hundreds of billions of dollars under Medicare and other programs. You know the states have been right about this—taxpayers shouldn't pay for the cost of lung cancer, emphysema and other smoking-related illnesses. The tobacco companies should. So tonight I announce that the Justice Department is preparing a litigation plan to take the tobacco companies to court and with the funds we recover to strengthen Medicare.

Presidential Papers of William Jefferson Clinton, 35 WEEKLY COMP. PRES. DOC. 78 (Jan. 19, 1999).

[133] Attorney General Janet Reno previously testified before the Senate Judiciary Committee in April 1997 as to the lack of jurisdiction of the federal government to pursue an action against the industry: "What we . . . determined was that it was the state's cause of action and that we needed to work with the states, that the federal government does not have an independent cause of action." *Hearings on Justice Dep't Operations Before the Senate Comm. on the Judiciary*, 105th Cong. 72 (1997) (testimony of Attorney General Janet Reno). This testimony was later defended as implicitly referring only to Medicaid recovery. *See Senate Tobacco Hearing*, *supra* note 1 (statement of Sen. Ted Kennedy (D-Mass.)). *But see A Review of the Global Tobacco Settlement Before the Senate Comm. on the Judiciary*, 105th Cong. 39 (1997) (testimony of Mississippi Attorney General Mike Moore that the Justice Department had refused "to file a lawsuit on behalf of Medicare . . . [because] the Justice Department and others felt that they didn't have a . . . cause of action under the federal statutory framework"). Nevertheless, by May 5, 1999, Attorney General Reno informed the Senate that she had found a basis for federal recovery. *See Hearing on Oversight of the Dep't of Justice, Before the Senate Comm. on the Judiciary*, 106th Cong. (1999) (statement of Attorney General Janet Reno, concluding "that there were viable bases for the Department to pursue recovery of the federal government's tobacco-related litigation team, housed in the Civil Division, to pursue recovery of these costs").

[134] *See Senate Tobacco Hearing*, *supra* note 1 (statement of Senator Orrin Hatch and testimony of Professor Jonathan Turley).

[135] There was an attempt to bar federal funds from being used for this purpose. This legislation, however, was met with a chorus of constitutional and policy objections. Congress ultimately refused special funds but did not impose the prohibition. *See* Saundra Torry & Helen Dewar, *Possible Tobacco Suit Clears Hurdle: Senate Removes Restriction That Might Have Killed Action*, WASH. POST, July 23, 1999, at A10.

Department attorneys to reverse-engineer from a public claim of damages to a theory that would justify such damages while avoiding the need for new legislation.

When the Clinton administration set out to circumvent Congress, it chose a path previously barred by the Supreme Court. The Supreme Court has been generally consistent in its response to attempts at circumvention, no matter how creative the theory or popular the cause. In *United States v. Standard Oil Co. of Cal.*,[136] the Executive Branch sought to recover tortious damages from Standard Oil after one of its trucks injured a serviceman. Advancing a common law claim for recovery for medical expenses and wages, the Executive Branch sought damages that were available to litigants in state court. The Supreme Court ruled that the claim of the Executive Branch constituted a circumvention of the right of Congress to determine the circumstances under which the government could claim a cause of action.[137]

> For grounded though the argument is in analogies drawn from that field, the issue comes down in final consequence to a question of federal fiscal policy, coupled with considerations concerning the need for and the appropriateness of means to be used in executing the policy sought to be established . . . . [These analogies to tort law are] advanced . . . as the instrument for determining and establishing the federal fiscal and regulatory policies which the Government's executive arm thinks should prevail in a situation not covered by traditionally established liabilities.[138]

The Court returned to first principles, sending the Executive Branch to Congress and the legislative process to achieve its objectives.

> Whatever the merits of the policy, its conversion into law is a proper subject for congressional action, not for any creative power of ours. Congress, not this Court or the other federal courts, is the custodian of the national purse. By the same token it is the primary and most often the exclusive arbiter of federal fiscal affairs. And these comprehend . . . securing the treasury or the government against financial

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[136] 332 U.S. 301 (1947).

[137] The Court accepted that some historically recognized governmental claims do not require congressional action. The Court noted that "it has not been necessary for Congress to pass statutes imposing civil liability in those situations where it has been understood since the days of the common law that the sovereign is protected from tortious interference." *Id.* at 315 n.22. This included such claims as trespass. *Id.* at 315 n.22.

[138] *Id.* at 314.

> losses however inflicted, including requiring reimbursement for injuries creating them, as well as filling the treasury itself.[139]

The only difference between the recent federal tobacco filing and the failed effort at circumvention in *Standard Oil* is the current Administration's pretense of a statutory basis. The government was simply more straightforward in *Standard Oil* in acknowledging that it sought to construct a new cause of action through analogies to common law doctrines; it did not rely on the variety of statutory sources which could have been commandeered to serve as the basis for a new liability system. In evaluating the new federal claim over tobacco damages, courts must still determine whether there is any congressional intent to create such a cause of action. Without debating the merits of each federal claim, it is important to note the dubious statutory interpretation theories that the government advocated in order to avoid seeking a new and independent cause of action from the judiciary.

One claim made by the government was an attempt to seek reimbursement under the Medical Care Recovery Act ("MCRA").[140] MCRA was a belated response to the *Standard Oil* decision in which Congress, fifteen years after the decision, gave the federal government a right to recoup the costs for medical care and treatment paid by the government. While the 1996 amendment to MCRA specifically allowed the government to proceed independently against individual tortfeasors, it has never been used for Medicare reimbursement.[141] This statute was designed for the limited purpose of reimbursing the government for the cost of medical care and treatment of members of the armed forces and other federal employees.[142] The federal lawsuit would

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[139] *Id.* at 314–15.

[140] 42 U.S.C. § 2651 (1994 & Supp. IV 1998).

[141] Moreover, while an independent right is expressly mandated, the sentence creating the cause of action also refers to the action as subrogated. This makes ambiguous the question of whether a true independent right exists or whether the government must still stand in the shoes of the injured party. 42 U.S.C. § 2651(a) (1994 & Supp. IV 1998) states:

> the United States shall have a right to recover (independent of the rights of the injured or diseased person) from said third person . . . the reasonable value of the care and treatment so furnished, to be furnished, paid for, or to be paid for and shall, as to this right be subrogated to any right or claim that the injured or diseased person . . . has against such third person to the extent of the reasonable value of the care and treatment so furnished, to be furnished, paid for, or to be paid for.

[142] *See* Hanoch Dagan & James J. White, *Governments, Citizens, and Injurious Industries*, 75 N.Y.U. L. REV. 354, 402 (2000) (discussing the limited purpose of MCRA and its legislative history).

convert this limited statute into a massive Medicare recovery program without any legislative debate regarding the merits or efficiency of expanding its use.[143] Moreover, MCRA extends a right of recovery to the government only when an individual is harmed "under circumstances creating a tort liability upon some third person."[144] Such "circumstances" are found in state tort laws, which differ dramatically in terms of the elements and defenses of tortious liability. The court would have to allow the government to litigate an unprecedented number of individual cases without reference to their underlying state issues. Such litigation raises questions for any federal court concerned about the separation of powers as to whether it should (1) manipulate the language of a statute clearly designed for a different purpose (2) in order to achieve a massive public policy objective that (3) was never submitted to Congress.

The government also seeks to use the Medicare Secondary Payer ("MSP")[145] provisions to secure compensation. The suggested use of the MSP for tobacco claims is meritless and borders on frivolous. Congress enacted the statute to allow the government to seek reimbursement for Medicare funds. Although Congress amended the Act in 1984 to expand the government's cause of action, the statute is only designed to allow the pursuit of *insurers* of tortfeasors, not the tortfeasors themselves. As a threshold question, then, the court would have to find that tobacco companies constitute covered parties. In this sense, the self-insurance of the companies would have to be construed as a "primary plan," which is highly unlikely. Moreover, the MSP allows for recovery under the auspices of the Health Care Financing Authority ("HCFA") only through satisfaction of certain claim filing requirements that are difficult to apply to tobacco companies. Finally, the MSP refers to the recovery of payments that should be paid "promptly." There is no plausible argument that the tobacco companies ever had notice to pay costs since HCFA never suggested any needed to be paid. Neither the statute nor past practice would suggest to a tobacco company that it should pay anything at all, let alone on a prompt basis.

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[143] *But see* United States v. Gera, 279 F. Supp. 731 (W.D. Pa. 1968), *rev'd on other grounds*, 409 F.2d 117 (3d Cir. 1969) (finding the United States had an independent right of action under MCRA); United States v. Housing Auth. of City of Bremerton, 415 F.2d 239, 243 (9th Cir. 1969).

[144] 42 U.S.C. § 2651(a) (1994 & Supp. IV 1998).

[145] 42 U.S.C. § 1395(b)(2) (2000).

In order to assess damages against the tobacco industry under either MCRA or the MSP, courts would not only have to ignore the original intent behind these statutes, but also resolve a host of problems regarding the advancement of the government's case. These include statute of limitations problems. MCRA has a three-year limitation, which begins to run as soon as the government knew or should have known that it had a cause of action. MSP has a three-year limitation, though the operation of the regulations could practically reduce this to one-year due to a notice requirement.[146] The court would also have to aggregate injuries on questions of proximate causation, employ statistical methods of proof, bar individual defenses, and resolve various choice of law problems relating to the tort laws of each state involved in the pool of injured parties. Aggregation has never been used in an MCRA action against any defendant, and there is no authorization under the Act for such an action. Just as the Supreme Court declined to radically change the status of tobacco as a regulated product in *FDA v. Brown & Williamson*,[147] any federal court should be highly resistant to an effort to create a massive new recovery program under MCRA when the FDA notably has avoided giving the question to Congress.

The strongest basis for recovery in the federal lawsuit is the claim brought under the Racketeer Influenced Corrupt Organizations Act ("RICO").[148] Congress has allowed the statute to be applied to areas far removed from the Act's origins in the fight against organized crime. In fact, RICO contains an express invitation to liberally interpret its applicability.[149] The Supreme Court has referred to "Congress' self-consciously expansive language and overall approach [as well as] its express admonition" in requiring federal courts to ensure that the law is "read broadly."[150] This may carry the government past the threshold question of congressional purpose and intent. The court is left, however, with a host of subsidiary issues, including proof of injury. In *Holmes v. Security Investor Protection Corp.*,[151] the Supreme Court held that any RICO claim must show "some direct

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[146] *See* 42 C.F.R. § 411.24(f)(2) (1999).
[147] 120 S. Ct. 1291 (2000).
[148] 18 U.S.C. § 1961 (1994).
[149] Pub. L. No. 91-452, § 904(a), 84 Stat. 992, 947 (1970) (mandating that the law "shall be liberally construed to effectuate its remedial purposes").
[150] Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 497–98 (1985).
[151] 503 U.S. 258, 268 (1992).

relation between the injury asserted and the injurious conduct alleged" to satisfy proximate causation.[152] Failure to meet this requirement has led to dismissals in lower courts.[153] Moreover, the Government's argument advanced in the federal lawsuit seeks RICO damages in a manifestly new and untested way for a noncriminal enterprise.[154] While RICO has been shown to be susceptible to the wildest of interpretations, the court must take seriously the host of insular statutory and proof issues in adjudicating the federal litigation.[155]

The application of RICO to the tobacco litigation would obviously have sweeping implications for both the tobacco industry and smokers, and yet no one has seriously claimed outside of this litigation that Congress ever intended for any of these statutes to be used in this fashion. To the contrary, supporters of the federal tobacco lawsuit have openly hailed the litigation as the circumvention of a Congress unwilling to act to the satisfaction of anti-smoking interests.[156] Until tobacco is considered in the proper legislative manner, however, the position contained in any federal lawsuit will merely represent the view of the Executive Branch and not of the entire public for which it should speak.

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[152] *Id.* at 268.

[153] *See, e.g.*, Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc., 172 F.3d 223 (2d Cir. 1999), *withdrawn and superseded by* 191 F.3d 229, 236 (2d Cir. 1999) ("Where a plaintiff complains of injuries that are wholly derivative of harm to a third party, plaintiff's injuries are generally deemed indirect and as a consequence too remote, as a matter of law, to support recovery."); Steamfitters Local Union No. 420 v. Philip Morris, Inc., 171 F.3d 912, 930 (3d Cir. 1999) (observing that "the tortured path that one must follow from the tobacco companies' alleged wrongdoing to the Funds' increased expenditures demonstrates that plaintiffs' claims are precisely the type of indirect claims that the proximate cause requirement is intended to weed out"). However, Judge Jack Weinstein in the Eastern District of New York recently approved a RICO action on behalf of self-insured ERISA trust funds and Blue Cross & Blue Shield. *See* Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris, Inc., 36 F. Supp. 2d 560, 579 (E.D.N.Y. 1999).

[154] Most parties in RICO lawsuits proceed under Section 1964(c) for damages to property. 18 U.S.C. § 1964(c). Third parties in tobacco cases, however, have been unsuccessful under this provision. *See, e.g.*, Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc., 171 F.3d 912 (3d Cir. 1999); International Bhd. of Teamsters v. Philip Morris, Inc., 196 F.3d 818 (7th Cir. 1999). Taking a new approach, the Justice Department now seeks to use the equitable relief provisions of RICO, 18 U.S.C. § 1964(a) and (b), and seeks disgorgement of profits.

[155] In the interest of full disclosure, the author has also found civil RICO an irresistible vehicle for application in areas far removed from its origins. *See, e.g.*, Jonathan Turley, *Laying Hands on Religious Racketeers: Applying Civil RICO to Fraudulent Religious Solicitation*, 29 WM. & MARY L. REV. 441 (1988); Jonathan Turley, *The RICO Lottery and the Gains Multiplication Approach: An Alternative Measurement of Damages Under Civil RICO*, 33 VILL. L. REV. 239 (1988).

[156] *See Senate Tobacco Hearing*, *supra* note 1 (statements of Senators Durbin, Kennedy, and Schumer).

The federal tobacco lawsuit demonstrates a most dangerous impulse given our Madisonian system of government: a single faction has taken its insular interests to an unelected member of the judiciary in order to achieve that which the majority in Congress has previously denied. It is at this point that the Legislative Branch must act in its own institutional interest and, ultimately, in the interests of the entire constitutional system.

C. *The Institutional Role of Congress in the Face of Legislative Circumvention*

Separation of powers was understood to be vital to the new American model of self-government.[157] The problem of circumvention or usurpation would have to be checked to prevent a consolidation of power, for even a brief period, in any one branch.[158] Madison had no delusions about the motivations of individuals in politics or the institutional tendencies of the three branches they would lead.[159] Throughout our history, there has never been a Congress that did not want to act like the President; a President who did not want to act like Congress; or judges who did not want to act like both. Madison's ideal was to preserve the balance of power by denying any one branch the ability to govern alone.[160] In some ways, our system is held together by the

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[157] James Madison stressed that the essence of good government required that "the legislative, executive and judiciary departments ought to be separate and distinct." THE FEDERALIST No. 47, at 331 (James Madison) (Clinton Rossiter ed., 1961).

[158] This belief in the separation of powers was heavily influenced by John Locke. While Locke referred to a separation of powers in two rather than three parts, he viewed the separation as essential to defeat the "great temptation to human frailty" when those with "the Power of making laws" are the same as those with "the power to execute them." JOHN LOCKE, TWO TREATISES ON GOVERNMENT 364 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

Montesquieu also emphasized the need to separate the power of government among various branches. 11 BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 152 (Franz Neumann ed. & Thomas Nugent trans., 1949) (1748) ("There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals."). Montesquieu noted that checks must exist within a governmental system on the abuses of office since "constant experience shews us, that every man invested with power is apt to abuse it; he pushes on till he comes to the utmost limit." *Id.* at 200. A tripartite system thus allows "that by the very disposition of things power should be a check to power." *Id.*

[159] This was most evident in Madison's famous observation that "[i]f men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controuls on government would be necessary." THE FEDERALIST No. 51, 322 (James Madison) (Clinton Rossiter ed., 1961).

[160] The concept of separation of powers predates American jurisprudence and had

simultaneous pressures of each of the branches, a type of inverse pressure that holds the three parts as one. Madison relied on the self-interest of each branch to maintain this institutional balance, and expected that one branch would act in self-defense in the face of circumvention by another.[161] Madison believed that the solution to the problem of political opportunism was for "[a]mbition . . . to counteract ambition."[162]

Through the separation of powers and a system of checks and balances, Madison sought to achieve the difficult goal described in his Federalist No. 51: "In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to controul the governed; and in the next place, oblige it to controul itself."[163] This goal required not only the separation of governmental powers among "departments," but also a system of checks and balances with each department possessing the means to defend its constitutional prerogatives against other departments' encroachments.[164] Our system is designed to compel the two political branches,[165] sometimes against the inclinations of their leaders, to deal with each other in an open and deliberative way. It is only by passing divisive issues through the legislative system that factional interests can be brought to the forefront and reconciled. Once either political branch procedurally circumvents the other, the center of gravity in the Madisonian system is displaced, precipitating potentially dangerous consequences.

Madison anticipated that the branches would maintain a continual parry and thrust over their institutional prerogatives.[166] In

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grown in sufficient popularity by the time of the Founding to be a familiar political theory to the Framers. For an excellent treatment of the history behind the separation of powers doctrine, see Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393 (1996).

[161] *See* THE FEDERALIST NO. 48, 308 (James Madison) (Clinton Rossiter ed., 1961) ("Unless these departments be so far connected and blended, as to give each a constitutional controul over the others, the degree of separation which the maxim requires as essential to a free government, can never in practice, be duly maintained.").

[162] THE FEDERALIST NO. 51, *supra* note 159, at 322.

[163] *Id.*

[164] *See id.* at 321–22 ("[T]he great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others.").

[165] This term is used to refer to the Legislative and Executive Branches. Admittedly, it is a crude device that ignores obvious political aspects of judicial rulings. The reference, however, reflects the Madisonian view that any political role of the courts should be minimal in comparison to the central political functions of the other two branches.

[166] *See* THE FEDERALIST NO. 51, *supra* note 159, at 322.

the tripartite system, the maintenance of the balance between the branches is left to the self-interest of each branch to jealously guard its own constitutional domain. Attempts at circumvention by one branch, in and of themselves, present no particular danger to the system. The great danger arises when one branch attempts such a circumvention and the other branch does nothing in response. The failure of one branch to defend its constitutional territory produces a vacuum of authority that is itself destabilizing. The defense of the separation of powers is not left to the courts alone but to each branch through the use of its constitutional powers in defense of its institutional interests.

Congress, therefore, was given a powerful institutional interest in deterring the circumvention of the legislative process by the Executive Branch. That interest can be defended in a variety of ways. The power of the purse given to Congress is not simply a check on specific programs requiring appropriations. Congress can use its appropriations authority to respond to circumvention in the general budget authorizations for the affected agencies. Appropriations are a signal of agreement between the two branches on the conduct and goals of the government. If a majority of Congress views the Executive Branch as pursuing extra-legislative means to promote policy, it is entirely legitimate to withhold public support for such unilateral behavior.[167] Likewise, Congress may use its oversight authority to demand answers to questions over the constitutionality or propriety of executive actions. Finally, Congress can directly legislate to bar legal theories by the Executive Branch or to create protections for targets pursued by the Executive Branch. Congress can certainly overstep its bounds in exercising such authority. In the case of the federal tobacco lawsuit, however, a major policy question was unilaterally removed to the courts to avoid a Congressional vote. In such a circumstance, it is essential for Congress to respond and re-establish its procedural prerogative to debate and resolve legislative issues.

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[167] Some might object to such a use of the appropriations power as excessive and impinging on areas of Executive Branch authority. In my view, however, the power of the purse was given to Congress to force the Executive Branch into a continual dialogue with the two houses. Where the Executive Branch is avoiding such a dialogue in pursuit of judicial legislative acts, the purse can be drawn tighter to concentrate the collective mind of the Executive Branch.

The description of the "American Way" as seeking social change in the courts may not be an exaggeration.[168] Litigation is a tempting recourse for citizens and public officials tired or frustrated by the legislative process. A judge with the right political bias or slant can achieve in a single opinion what could take years to achieve in Congress. Moreover, since the civil rights period, citizens often view the courts as correcting the political failures or prejudices of government. Legislative members who yield to this impulse and acquiesce to legislative circumvention, however, have struck a Faustian bargain. Ultimately, the incremental benefits from circumvention will undermine the very foundation of the tripartite system. Legislative circumvention is primarily a counter-majoritarian device, useful to escape the confines of a representative system. For a legislator to flirt with such an extra-legislative solution is to hasten one's own obsolescence.

III. STATE TOBACCO LITIGATION, OPPORTUNISTIC LEGISLATION, AND "THE LITIGATION LOTTERY"

The second area of concern for this Essay is the growing number of state class actions and mass tort cases in the country. There should be no question that class actions are needed to protect citizens and deter corporate misconduct. The mere occurrence of the insolvency of a given company is not, in itself, an alarming or unjust result of these cases. Companies guilty of callous disregard of human life and health are appropriately at risk of such massive judgments. In the last decade, entire industries rather than individual companies are increasingly threatened in these actions. These industries range from tobacco companies to gun manufacturers to paint manufacturers.[169] Even in cases of single companies, state cases have created gross inequities for victims among the various states. It is precisely the importance of class actions and mass tort litigation to consumer protection that demands a re-examination of the efficiency and fairness of the current system. The distortive effects of recent litigation suggest not only the need for national legislation, but

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[168] *See Senate Tobacco Hearing*, *supra* note 1 (statement of Sen. Durbin).
[169] *See Senate Tobacco Hearing*, *supra* note 1 (statement of Sen. Hatch).

also a consideration of the role of factional interests in state legislation governing the legal system.

The concept of achieving social change through private litigation would have been quite foreign to the Framers. This is not to suggest that high-visibility litigation was itself a foreign concept or that political trials were unknown. Litigation was a tool used by the colonists against the Crown, particularly the use of colonial grand juries.[170] Individuals like John Adams were exceedingly adept at using the courts as an alternative forum for political expression.[171] Most such litigation, however, was confined to criminal or quasi-criminal proceedings. Rarely was a civil case viewed as a vehicle for meaningful social change.[172] The idea of private litigation as a tool for achieving massive national change would have seemed absurd at a time of largely narrow and formalistic legal judgments.

Our contemporary experience with class actions and mass torts, however, does raise some interesting historical comparisons. Modern litigation has created the danger of a patchwork of state laws and judgments that can contort a national market. A single case like *Engle v. R.J. Reynolds*[173] can now effectively bankrupt an industry as opposed to only a company. In this "litigation lottery,"[174] states will often compete in terms of the speed with which such cases are filed, and the potential resources with which punitive damages may be paid out in mass tort actions.[175] In the area of tobacco, states enacted special legislation to give an advantage to local actions in pursuing damages vis-à-vis other states.[176] Moreover, after the decision in *Castano v. Ameri-*

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[170] *See* Turley, *Senate Trials and Factional Disputes*, *supra* note 9, at 1.

[171] *See id.*

[172] There are a few notable exceptions where civil cases have had enormous political consequences. *See, e.g.*, Dredd Scott v. Sanford, 60 U.S. (19 How.) 393, 450–52 (1856) (defining the rights of African Americans who escaped slavery in property claim of the former owner); United States v. Amistad, 40 U.S. (15 Pet.) 518 (1841) (resolving questions of international law and slavery as part of a "property" dispute over the return of captured Africans); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823) (defining the rights of Native Americans in the holding and transfer of property in resolution of private land dispute). These cases developed from insular claims for damages, however, and not efforts to create new law as an alternative to legislation.

[173] 672 So. 2d 39 (Fla. Dist. Ct. App. 1996). Recently, a state court of appeals reversed its own panel decision to allow for a single punitive award against the tobacco companies without individual trials. *See* R.J. Reynolds Tobacco Co. v. Engle, 24 Fla. Law W.D. 2192, 1999 Fla. App. LEXIS 13055 (Sept. 17, 1999).

[174] *See infra* notes 204–205 and accompanying text.

[175] *See infra* notes 189–201 and accompanying text.

[176] For example, under Florida's Medicaid Third-Party Liability Act ("MTPLA"), Fla. Stat. Ann. § 409.910 (West Supp. 1997), the state negated central parts of the common

can Tobacco Co.,[177] a shift occurred away from national class actions in the federal system and toward state class actions.[178] This patchwork system raises some of the very dangers that Madison condemned in his campaign against factions, and implicates one of Madison's primary reasons for wanting to replace the Articles of Confederation.

A. *Madison, State "Encroachments," and the National Interest*

During the Constitutional Convention, Madison sought to counter the ill-effects that state laws produced on the national government under the Articles of Confederation. Madison's concerns in this area again turned on his view of factions and their destabilizing effect on governmental systems. The factional tendencies of the state legislatures prompted Madison to articulate his comprehensive view of a large republic and national legislature.[179] As a result of his two years of service in the Virginia state legislature and his observations of other states, Madison came to view the states as fertile breeding grounds for factional interests, and he saw state legislation as often advancing such interests to the manifest disadvantage of the nation.[180]

Under the Articles of Confederation, states had created a maddening patchwork of rivaling jurisdictions and barriers to

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law to assist in the recovery of funds. *Id.* § 409.910(1) ("Principles of common law and equity as to assignment, lien, subrogation, comparative negligence, assumption of risk, and all other affirmative defenses normally available to a liable third party, are to be abrogated to the extent necessary to ensure full recovery by Medicaid from third-party resources . . . ."). Maryland enacted similar legislation after a state judge imposed barriers to the recovery of tobacco funds. *See* Daniel LeDuc, *Md. Mulls Joining U.S. Tobacco Settlement or Gambling With Lawsuit*, WASH. POST, Nov. 14, 1998, at A09. Various other states adopted similar legislation to allow for cases that would turn on statistical proof and other nonconventional techniques. *See* Lauren Walker & John Monahan, *Sampling Liability*, 85 VA. L. REV. 329, 330 (1999).

[177] 84 F.3d 734 (5th Cir. 1996).

[178] *See* Larry Kramer, *Choice of Law in Complex Litigation*, 71 N.Y.U. L. REV. 547, 575 (1996) (noting increase in state class actions); Susan E. Kearns, *Decertification of Statewide Tobacco Class Actions*, 74 N.Y.U. L. Rev. 1336, 1336 (1999). Some state courts, however, have proven as hostile as federal courts to state class actions over tobacco injuries. *See, e.g.*, Reed v. Philip Morris, Inc., No. 96-5070, 1997 WL 538921 (D.C. Super. Aug. 18, 1997); Small v. Lorillard Tobacco Co., 679 N.Y.S.2d 593 (App. Div. 1998); Cosentino v. Philip Morris Inc., No. MID-L-5135-97 (N.J. Super. Ct. Oct. 22, 1998).

[179] 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 318 (Max Farrand ed., rev. ed. 1937) (noting that "the evils . . . which prevail within the States individually . . . indirectly affect the whole.).

[180] *See, e.g.*, James Madison, *Vices of the Political System of the United States*, *in* 9 PAPERS OF MADISON 353 (Robert A. Rutland et al. eds., 1977).

commerce. Madison complained in a letter to Thomas Jefferson that "[e]ncrouchments of the States on the general authority, sacrifices of national to local interests, interferences of the measures of different States, form a great part of the history of our political system."[181] In a similar letter to George Washington, Madison stressed the need for a new system and warned that, absent a strong federal government, the state would "continue to invade the national jurisdiction, to violate treaties and the law of nations & to harrass each other with rival and spiteful measures dictated by mistaken views of interest."[182] Madison was accurately describing a nation that was stymied by conflicting laws often reflecting the rawest opportunistic interests. As a result, the young nation under the Articles of Confederation was floundering from a lack of national government and majoritarian legislation.

The "evils" of state legislation are what Madison sought to address by creating a large republic in the interests of both "[the] public Good and private rights."[183] Madison rejected the views of political philosophers like Montesquieu who saw the ideal government as composed of small republics. Madison hoped to tear factional interests from their moorings, and subject them to a national legislative process. Only then, Madison believed, would the national interest be safeguarded and protected from the insular and often corrupt interests of the states.

Madison, however, was not satisfied with simply creating a centralized federal government. In addition to arguing for the adoption of a new constitutional system as a replacement for the Articles of Confederation, Madison sought to give Congress the authority to review and reject state legislation. Madison wanted to apply the anti-factional benefits of the new system in checking abuses to purely state matters. Through these measures, Madison believed that he could "restrain the States from thwarting and molesting each other, and even from oppressing the minority within themselves by paper money and other unrighteous measures which favor the interest of the majority."[184]

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[181] Letter from James Madison to Thomas Jefferson (Oct. 4, 1787), *in* 10 PAPERS OF MADISON 206, 210 (Robert A. Rutland et al. eds., 1977).

[182] Letter from James Madison to George Washington (Apr. 16, 1787), *in* 9 PAPERS OF MADISON 382, 384 (Robert A. Rutland et al. eds., 1975).

[183] Madison, *Vices of the Political System of the United States*, *supra* note 180, at 354.

[184] Letter from James Madison to Thomas Jefferson (Mar. 19, 1787), *in* 9 PAPERS OF MADISON 317, 318 (Robert A. Rutland et al. eds., 1975).

While Madison's proposed veto was roundly rejected,[185] his concern over checking the influence of state factions was achieved by the federal preemption authority exercised by Congress in areas of national interest. This authority has been used to protect interstate commerce from the repeated efforts of states to favor their own industries and citizens. This federal authority, however, has not been applied as rigorously when state legislation favors local legal interests in creating friendly environments for class actions or procedural rules with outcome-determinative characteristics. As a result, mass tort litigation has produced a patchwork of opportunistic laws that are driven by some of the same factional influences described by Madison in 1787.

B. *Mass Torts, Class Actions, and the "Litigation Lottery"*

The state tobacco lawsuits have focused the states on the dual objectives of securing state settlements with the industry and assisting constituents in pursuing similar damages.[186] After years of heavy state taxation, states have pursued additional compensation for tobacco-related expenditures in the form of Medicaid reimbursement, payments which have often gone to a wide array of projects unrelated to either smoking or its victims.[187] States also have an interest in private litigation. With the explosion of mass tort litigation,[188] states are increasingly competing for rapid and binding judgments. These judgments compensate state residents, but they also infuse potentially hundreds of millions of dollars into the state economy and provide support for trial lawyers and related localized interests. Litigation has become part of interstate commerce with each state able to construct procedures that can act like legal speedtraps to capture wealth.[189]

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[185] *See* Kramer, *supra* note 96, at 611.

[186] This may of course change with the finalization of the state settlement agreements. Many states have already begun to spend their part of the massive settlement and will continue to receive these payments from the industry. Some states may no longer view other lawsuits, either federal or individual, to be to their advantage since they now have a considerable stake in the industry.

[187] Elizabeth A. Frohlich, *Statutes Aiding States' Recovery of Medicaid Costs from Tobacco Companies: A Better Strategy for Redressing an Identifiable Harm?*, 21 JAMA 445, 449 (1995).

[188] Mass tort represents a small subset of tort litigation. By mass tort, I am referring to legal actions that can encompass thousands or even millions of injured parties nationwide. I am not concerned with class actions or mass torts that are confined to a single state.

[189] *See* Jonathan Turley, *Reforming the Great American Litigation Lottery*, CHI. TRIB.,

The best example of a state's ability to advantage its own citizens over other victims can be found in Florida.[190] Florida foresaw a new wave of lawsuits for tobacco damages and took action to remove obstacles that might stand between its citizens and recovery. The legislature enacted a law that significantly eased a plaintiff's burden in recovering costs from the tobacco industry, and eliminated the core defense needed by the tobacco industry to defend itself against such claims.[191] Previously, a company could raise any affirmative defense that it could raise against the individual Medicaid recipient when sued by a third-party. Under the Medicaid Third-Party Liability Act ("MTPLA"),[192] "[p]rinciples of common law and equity as to assignment, lien, subrogation, comparative negligence, assumption of risk, and all other affirmative defenses normally available to a liable third party, are to be abrogated to the extent necessary to ensure full recovery by Medicaid from third-party resources."[193] The MTPLA removed even the need for the state to identify individual recipients when the number of recipients "is so large as to cause it to be impracticable."[194] Such laws, enacted to ease the pursuit of damages from big industry,[195] can give one state a fast-track to the recovery of millions and even billions of dollars, and disadvantage other states that maintain traditional common law defenses. Accordingly, a type of race to the bottom can occur as each state attempts to position itself in the best—or at least equal—position for recovery.[196]

States have also enacted laws that greatly facilitate private lawsuits by their citizens. These rules are not necessarily intended to give advantages to victims from their state over victims from other states, but this is the result. Among the most significant examples are rules regarding the conditional right to

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Nov. 1, 1999, at A11.

[190] Maryland and other states have enacted similar legislation. *See supra* note 176.

[191] The Florida Supreme Court upheld these eliminations, although it struck down other parts of the law. *See* Agency for Health Care Admin. v. Associated Indus. of Fla., Inc., 678 So. 2d 1239 (Fla. 1996), *cert. denied*, 520 U.S. 1115 (1997).

[192] Fla. Stat. Ann. § 409.910 (West 1997).

[193] *Id.* § 409.910(1).

[194] *Id.* § 409.910(9)(a).

[195] The MTPLA can technically be applied to any industry but the Florida Governor has stated that it would only be used against tobacco companies. *See Agency for Health Care Admin.*, 678 So. 2d at 1246.

[196] Normally, any federal preemption of such laws would raise serious federalism concerns. These concerns are somewhat diminished, however, by the fact that Medicaid is a joint state and federal interest and that the actions of the states in such laws can have a significant effect on citizens of other states.

appeal. Many states have laws that require the posting of a bond as a prerequisite for appeal. In mass tort actions, however, a punitive damage award can easily threaten to divest the company of its assets, or the assets necessary to remain solvent.[197] As a result, the appeal of even the most outrageous judgment can be practically impossible, and settlements result where good-faith appeals may be justified.[198] In *Engle*, for example, the tobacco industry is eager to appeal a series of decisions by Judge Robert Kaye, who made some highly controversial rulings in the case. Under Florida law at the time *Engle* was filed,[199] however, to appeal a final decision from Kaye the companies would have to post a bond for the entire monetary judgment plus twenty percent interest.[200] Such a bond requirement could bankrupt defendants in states with similar class action and appellate rules. While the industry has promised billions of dollars to the states, payments are spread across a number of years and tied to future sales. A bond would have to be paid out of present assets. Even if the industry could post such a bond, tobacco stocks would likely go into a free fall. Yet if the tobacco companies do not post a bond, they could be prevented from appealing and end up stuck with the total bill for the punitive damages ultimately assessed. Other industries may someday face this Catch-22 as well, finding themselves subject to fifty different state laws

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[197] In *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987), the Supreme Court was confronted with a bond requirement of $13 billion in order for Texaco to appeal an adverse judgment. *See id.* at 5. While not the thrust of the decision, some members of the Court were unwilling to view such a bond requirement as unconstitutional. Justice Brennan stated that

> Texaco's claim that the Texas bond and lien provisions violate the Fourteenth Amendment is without merit. While Texaco cannot, consistent with due process and equal protection, be arbitrarily denied the right to a meaningful opportunity to be heard on appeal, this right can be adequately vindicated even if Texaco were forced to file for bankruptcy.

Id. at 18 (Brennan, J. with Marshall, J., concurring).

[198] Florida also has such a preexisting law on performance bonds. *See infra* note 199 and accompanying text.

[199] Shortly before this Article went to print, Florida enacted legislation that could partially or wholly rectify this problem in that state. The new law caps any bond required to appeal a verdict to no more than $100 million. *See Deal Protects Florida's Tobacco Payments*, N.Y. TIMES, May 6, 2000, at 10. Other states, including North Carolina, Virginia, Georgia, and Kentucky, have passed similar legislation. *See* Wendy Koch, *Tobacco Firms Catch a Break for Time Being; Fla. Bill Ensures Industry Can Appeal Jury's Verdict*, USA TODAY, May 8, 2000, at 6A. The new Florida legislation may face a challenge if applied in *Engle*, and has not been subject to judicial review. Putting aside the question of its application in pending cases, however, it is the prerogative of the legislature to dictate such bonding requirements.

[200] *See* Turley, *Reforming the Great American Litigation Lottery*, *supra* note 189, at A11.

passed by fifty different states all with one goal in mind: to secure as great a share of the damages as possible.

The recent increase in mass tort filings creates the potential for opportunistic state laws designed to advantage one state's citizens over those of other states. When Madison warned of the danger of "rival and spiteful measures dictated by mistaken views of interest,"[201] he could have been describing the developing system of conflicting state laws on mass torts and Medicaid recovery systems. Litigation has become big business, and mass torts now promise massive windfalls in punitive damages. In most other spheres of commerce, efforts to favor in-state businesses would result in a sharp rebuke from the federal courts. Rules governing litigation, however, are treated as manifestly different from commercial barriers in every other type of business. This is not to suggest that legal procedures are completely analogous to market rules or barriers. On some level, however, there must be a recognition that the rules governing litigation are in part a restriction of a multi-billion dollar, national industry. Legal rules are routinely protectionist and motivated by the raw market interests of in-state lawyers.[202] Trial lawyers, moreover, are an extremely powerful and effective lobbying group in every state. This produces an environment ripe for factional opportunism without the counter-pressure of the normal interstate commerce rules that govern other fields.

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[201] Letter from James Madison to George Washington (Apr. 16, 1787), *in* 9 PAPERS OF MADISON 382, 384 (Robert A. Rutland et al. eds., 1975).

[202] During the tobacco litigation, Maryland State Senate President Thomas V. Mike Miller, Jr. admitted that the contingency fee with the state's retained counsel, Peter G. Angelos, was reduced in exchange for changes in the state's laws. Miller noted that "Mr. Angelos . . . agreed to accept 12.5 percent if and only if we agreed to change tort law, which was no small feat. We changed centuries of precedent to ensure a win in this case." Daniel LeDuc, *Angelos, Md. Feud Over Tobacco Fee, $4 Billion Payout to State Will Be on Hold as Lawyer Argues for 25%*, WASH. POST, Oct. 15, 1999, at B01. In other states, favoritism and cronyism was alleged in the awarding of state contracts to pursue tobacco money under generous contingency arrangements. *See, e.g.*, Pamela Coyle, *Tobacco Lawyers Reveal How They'll Divvy Up Fee*, TIMES-PICAYUNE, May 12, 2000, at A01 (noting that a firm with "close ties to Attorney General Richard Ieyoub" was given state contract and would receive "more than $120 million"); Ted Wendling, *Bonanza for 3 Lawyers; Ohio Trio Could Split Up to $1 Billion in Tobacco-Case Fees*, PLAIN DEALER, Feb. 29, 2000, at 1A (indicating that lead tobacco lawyer hired close aide of state attorney general and his firm contributed roughly $26,000 to attorney general's campaign); Robert A. Levy, Commentary, *Hired Guns Corral Contingent Fee Bonanza*, LEGAL TIMES, Feb. 1, 1999, at 27 ("In Mississippi, Attorney General Michael Moore selected his leading campaign contributor, Richard Scrugs, brother-in-law of Sen. Trent Lott, to lead the Medicaid recovery suit."); *id.* (noting that four out of five firms selected by Texas Attorney General Dan Morales "contributed nearly $150,000 in campaign contributions to Morales").

These state laws also raise simple questions of fairness and equity. Mass torts are cases with victims spread across the country, but the current system allows for the distribution of damages on the most inefficient and unfair basis. Litigants in mass tort actions today are participants in a contest that has far more in common with a lottery system than a legal system. There is no better example of the workings of this lottery system than *Engle*. In the second phase of that tobacco case, a jury of six people will be asked to come up with a figure representing the punitive damages to be assessed against the tobacco industry. Some projections suggest that the figure could soar as high as $300 billion.[203] What is extraordinary is that a single state court could demand most of the liquid capital of an industry. Such a verdict could ultimately prevent payments towards the tobacco settlements of some states, and, more importantly, could leave other litigants with valid but valueless claims. This all will have come about absent any political debate or public consensus. Whole industries may fall, not by a vote of Congress, but due to massive blows delivered by mass tort lawsuits.

This is what fuels the litigation lottery. If you are the first in line to demand punitive damages, you may receive awards in the billions. Injured parties in later cases are likely to receive less as courts tend to reduce damages after an initial punitive award.[204] They may receive nothing if the first award killed the company or the industry. None of this makes much sense. There is no reason why one group of litigants should, solely on the basis of residency in a particular state, receive the lion's share of damages to the deprivation of hundreds of thousands of other injured parties. Moreover, there is no reason why one state should be able to impose this result on other states when a problem and its victims are shared by the nation as a whole.

Even when a state court agrees to extend a class to cover victims nationally, the result is far from optimal. As an initial mat-

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[203] Turley, *Reforming the Great American Litigation Lottery*, *supra* note 189, at A11.

[204] Judges in most states can reduce or eliminate punitive damage awards in a given case. If the industry has already been saddled with a large punitive award, the judge can deny a subsequent punitive award on the basis that it will not serve a deterrent function (which was already served by the earlier judgment) and could force the company into insolvency. Some states have codified such a limitation on punitive awards. *See, e.g.*, Ohio Rev. Code Ann. § 2315.21(D)(3)(b)(ii) (Anderson 1996) ("[A] court shall reduce the amount of any punitive or exemplary damages otherwise awardable pursuant to this section by the sum of the punitive or exemplary damages awards previously rendered against that defendant in any state or federal court.").

ter, such actions create unease merely because companies will often be tried before an elected judge, susceptible to greater local pressure than an Article III judge. This is particularly true where a class of victims is certified against an unpopular defendant, like an HMO company. The state must also make a choice of law decision that may favor the state law. Such dangers are evident in the Illinois class action against State Farm, in which a state judge in Southern Illinois certified a national class against the insurance company.[205] *Avery v. State Farm* involved allegations that State Farm improperly used "non-OEM" or aftermarket repair parts.[206] Illinois was viewed as a "friendly forum" in which to file, but the class was extended to cover victims across the country.[207] The class included five million people and the court applied Illinois law despite a patchwork of forty-eight relevant laws in other states, including conflicting provisions in states like Massachusetts.[208] In a trial with both jury and bench verdicts, the plaintiffs were awarded $456,636,180 for breach of contract, $130 million in disgorgement damages and $600 million in punitive damages, the largest damage award in the state's history.[209]

Avery reflects many of the dysfunctional effects of the current class action and mass tort system. The controversy over "aftermarket parts" or "non-OEM repair parts" has divided states and citizen groups.[210] It is an issue with tremendous significance to motorists across the country.[211] Many states did not take the view of the Illinois legislature or the Illinois courts in handling either

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[205] Avery v. State Farm, No. 97-L-114 (Ill. Cir. Ct. 1999).

[206] "OEM" stands for "original equipment manufacturer." *See* Aaron Chambers, *High Court Mum on State Farm Appeal*, CHI. DAILY L. BULL., Feb. 7, 2000, at 1.

[207] *See id.* at 1.

[208] In fact, due to conflicts between Illinois law and Massachusetts law, the Attorney General of Massachusetts filed in *Avery* to support State Farm and oppose the class action in Illinois. *See* Matthew L. Wald, *Suit Against Auto Insurer Could Affect Nearly All Drivers*, N.Y. TIMES, Sept. 27, 1998, at 29. Attorneys general from New York, Pennsylvania, and Nevada also filed in support of State Farm. *See id.*

[209] Robert Manor, *State Farms Liability Jumps to $1.1 Billion*, CHI. SUN-TIMES, Oct. 9, 1999, at 1.

[210] There were citizen groups on both sides of the debate. Some consumer protection groups favored the use of these parts as a way of controlling costs that would eventually be passed on to the consumer. Various state insurance commissioners also filed in support of State Farm. Editorials also took this view in opposing the premise of the case. *See, e.g.*, Editorial, *Mandating a Car Parts Monopoly*, CHIC. TRIB., Oct. 10, 1999, at 22 (warning that "[t]his verdict eliminates the competition and mandates the monopoly. It is wrong.").

[211] *See* Ralph Vartabedian, *Losers in State Farm Case May Be Consumers*, L.A. TIMES, Oct. 21, 1999, at W1 (discussing the effect that the decision will have on motorists).

class actions or this specific problem. All but eleven states allow for the use of aftermarket parts when disclosed to the consumer.[212] Six states impose some form of consent requirement while others require that consumers be given an option or more detailed disclosures.[213] The states also reflect different views on consumer fraud cases or class actions. Three states actually bar such claims in class actions.[214] One state, Tennessee, rejected the class action certification by the same counsel.[215] The Illinois court, however, simply ignored these differences, certified a national class, and applied its own state laws.[216] Not surprisingly, the ruling in *Avery* led to the filing of additional national class actions in the same county court system.[217] Likewise, such state class actions have been used in other areas to impose national standards on citizens of other states.[218] Such actions undermine the protection laws as well as core due process questions of affected citizens.[219]

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[212] *See* John Merline, *Collison Repair Parts: Cheap, But Good?*, CONSUMER'S RESEARCH MAG., Dec. 1, 1999, at 15.

[213] According to the Automotive Service Association, approval of the car owner is required in Hawaii, Indiana, Maine, Oregon, Rhode Island, and West Virginia. *See* Amanda Levin, *OEM Auto Part Overpriced, Ins. Study Says*, NATIONAL UNDERWRITER—PROPERTY & CASUALTY, Sept. 6, 1999, at 4; *see also* Merline, *supra* note 212, at 15 (discussing the requirement of consent in six states).

[214] TEX. BUS. & COM. CODE § 17.50(a)(1) (1979); ALA. CODE § 8-9-10 (1975); R.I. GEN. LAWS § 6-13.1 to .4 (1992).

[215] Murray v. State Farm Mut. Auto. Ins. Co., No. 96-2585-MI (W.D. Tenn. Aug. 19, 1997); *see also* Moorhead v. State Farm Mut. Auto. Ins. Co., No. 95-AR-0668-S (N.D. Ala. Sept. 12, 1996) (rejecting class).

[216] Even other county's in Illinois stood in contradiction to the *Avery* court's decision to certify the class. *See* Rioas Allstate Ins. Co., No. CH 11396 (Cir. Ct. Cook County, Ill. Jan. 27, 1998).

[217] *See, e.g.*, Paul v. County Mut. Ins. Co., No. 99 L 995 (Cir Ct. Madison County filed Oct. 13, 1999); Hobbs v. State Farm Mut. Auto. Ins. Co., No. 99-L1068 (Cir. Ct. Madison County filed Nov. 2, 1999).

[218] *See, e.g.*, Washington Mut. Bank v. Superior Court of Orange County, 7 Cal. App. 4th 299 (1999), *cert. granted*, Washington Mut. Bank v. Briseno, No. S070418 (Cal. May 12, 1999) (A state class action on behalf of a national class of over 25,000 loan borrowers was upheld despite differences in state laws.). In *Washington Mutual Bank*, California courts will dictate whether consumers in virtually every other state can be subject to "forced ordering" or "forced paring" of collateral protection insurance in which a company demands borrowers secure hazard insurance and reserves the right to impose a premium for insurance secured by the company if the borrower fails to maintain such coverage. Though there is a good faith basis for questioning the premiums charged and practice of forced ordering, this is also a consumer question on which states may disagree, particularly over the appropriate regulatory response. Some states may conclude that, absent a failure to disclose, this is a matter that should be left to the market while others may view the practice as fundamentally abusive. A similar problem is found in *Rosen v. Primus Automobile Financial Serv., Inc.*, 1999 Minn. LEXIS 538 (1999), in which a Minnesota class action has been allowed with a national class that may set the standard for financed care leases.

[219] This raises an issue reminiscent of the due process problem in *Phillips Petroleum*

Putting aside the dysfunctional legal aspects of the current system, there are also dysfunctional effects on national market systems and interstate commerce. This emerging patchwork of class action laws and specialized procedures for mass tort actions creates enormous costs for the market. Given the uncertainty of liability, the market may respond wildly to the actions of small state courts. As a result, there are massive costs to the market as companies and investors try to anticipate filings in any one of a number of favorable jurisdictions, any one of which could claim the working assets of any industry.

All of these problems suggest the need for a national unified system by which a narrow band of cases can be addressed in the federal system, as discussed below.

C. *The Role of Congress in Protecting National Interests in Mass Torts and Class Actions*

In *Amchem Products, Inc. v. Windsor*,[220] the Supreme Court was less than subtle in espousing its view that the national asbestos injury cases called for a uniform, federal response.[221] Congress can establish a national system for mass torts that would remove these cases from state to federal courts. This would prevent the ability of a state to gut an industry, and would allow for the consolidation of cases for a national resolution. Narrow criteria can be used to remove only those cases with truly national impact and the greatest interstate dimensions. These cases would be taken from a larger pool of litigation involving class actions in which punitive damages are sought. The removed cases would be class actions that are part of a product liability theory with injuries and anticipated cases distributed across the country. This would avoid the current danger in which each state has the ability to hit an industry with a massive or even fatal award to the deprivation of other states with similarly situated victims. It would reduce the potential for windfall damages to the swiftest litigants or the most aggressive state proc-

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Co. v. Shutts, 472 U.S. 797 (1985), when the Supreme Court rejected the use of Kansas law in a national class action to cover citizens in other states.

[220] 521 U.S. 591 (1997).

[221] *Id.* at 628–29 ("[T]he argument is sensibly made that a nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos exposure.").

ess.[222] It would avoid the injustice of one state court domesticating an award when other states have citizens with equal claims. And it would lend a degree of predictability and uniformity to the markets. The markets have experienced highly inefficient responses to the uncertainties of mass tort liability. Since any state law could potentially seize the assets of an industry in mass tort, the mere exposure of an industry results in expenditure of capital and resources in an effort to hedge or insure against such losses. Regardless of the ultimate liability of an industry like tobacco, the nation should create a system that affords greater structure and continuity to avoid such economic deadweight losses.[223]

A new federal scheme for mass torts and certain class actions would also bring a greater degree of equity to the distribution of damages in mass tort actions. Since compensatory damages would be paid upon final judgment and appeal, the payout from punitive awards can be delayed by a brief period to allow for the consolidation of cases and to avoid premature exhaustion of the fund. Congress could then mandate that punitive damage awards be placed in a single pool to be divided more evenly among injured parties. As part of this scheme, Congress should create caps for legal fees.[224] This is not an effort to radically slash attorney fees common to contingency litigation, which often serve as a necessary incentive to bring many worthy suits. Rather, the caps would only reduce the percentage that an attorney could take on punitive damages to prevent a repeat of the state tobacco scandals in which attorneys are entitled to billions of dollars (a

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[222] Currently, one could anticipate a type of "race-to-the-bottom" in which states attempt to gain advantages for their citizens in mass tort claims. Mass tort litigation can pit states against each other in seeking to offer their own citizens the same access and potential recovery as the citizens of other states. If one state has a draconian bonding requirement for appeal or a liberal proximate cause standard, for example, another state could adopt similar rules to level the playing field. As noted earlier, however, some states have in fact acted to reduce bond requirements that might be a barrier to appeal in tobacco cases. *See supra* note 199.

[223] *But see* Schuck, *supra* note 70, at 941 (suggesting the advantages of litigation over legislation in resolving mass tort actions).

[224] Alternatively, a federal statute could establish a uniform maximum percentage for such awards. One of the most disturbing aspects of the tobacco legal fee awards was the radical difference in percentages demanded by attorneys. *See* Pamela Coyle, *Tobacco Lawyers Reveal How They'll Divvy Up Fee*, TIMES-PICAYUNE, May 12, 2000, at A01 (listing different percentage claims in various states). In Mississippi, private lawyers will receive one-third of the state's $4.2 billion share of the tobacco settlement. *See Anti-Tobacco Lawyers Are Awarded Fees*, N.Y. TIMES, Aug. 1, 1999, at 25. In other states, like Illinois, Kansas, and Iowa, the percentages were 1.3%, 3%, and 4.3% respectively. *See* Coyle, *supra*, at A01.

rate in some cases of $200,000 per hour).[225] It would also avoid the spectacle of single firms or attorneys claiming literally billions of dollars in attorney fees.[226]

This is a general outline of only one approach to deal with mass torts. The merits of this proposal are less important than the need for a legislative response to the problem. While interstate issues are easiest to understand in the form of pollution or market barriers, it is now necessary to view some liability questions in interstate terms. The issues raised in cases like *Engle* produce a highly factionalized debate that touches on the role of lawyers, the role of tort liability, the conditions for business enterprise, and the right of states to control tort judgments. It is a debate that does not belong in a state trial court. It is a debate that belongs with the representatives of the entire populace, and that calls for the involvement of both political branches of our democracy.

IV. CONCLUSION

In the law of product liability, there is a legal term called "foreseeable misuse." This term refers to the doctrine that a manufacturer may still be liable for the misuse of a product if the misuse was foreseeable. Legislative circumvention is the constitutional counterpart to foreseeable misuse. Like any responsible product designer, James Madison anticipated such misuse and created a system to function in light of such conduct. The safety mechanism in the Madisonian design was a system of checks and balances in which circumvented branches could force correction and adherence to the original design. Such corrections or responses occur continually in the inevitable tension of a tripartite system. The mere presence of conflict, therefore, is not

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[225] *See The Tobacco Deal* (ABC 20/20, June 4, 1999); *see also* Bob Van Voris, *That $10 Billion Fee*, NAT'L L.J., Nov. 30, 1999, at A1 (indicating that in Texas, the hourly rate in the tobacco settlement was calculated at $92,000 per hour).

[226] *See, e.g.*, Marianne Lavelle & Angie Cannon, *The Reign of the Tort Kings*, U.S. NEWS & WORLD REPORT, Nov. 1, 1999, at 36 (reporting that "[l]awyers representing the first three states that settled—Florida, Mississippi, and Texas—were awarded $8.2 billion in legal fees"); Daniel LeDuc, *Angelos, Md. Feud Over Tobacco Fee; $4 Billion Payout to State Will Be on Hold as Lawyer Argues for 25%*, WASH. POST, Oct. 15, 1999, at B01 (reporting that lawyer Peter G. Angelos "has a three-year-old contract with Maryland to pay him 25 percent of the proceeds from the litigation, or about $1 billion"); Frank Phillips & Brian MacQuarrie, *Law Firms Get $775m in Mass. Tobacco Suit*, BOSTON GLOBE, July 30, 1999, at A1 (Five law firms have claimed $2 billion in fees for the $8.3 billion state settlement in Massachusetts.).

alarming. It is the possibility of acquiescence that is the danger to this system. Once one branch allows circumvention of its constitutional authority, the system becomes dangerously unstable.

This is not to say that the Republic will fall due to the filing of a federal tobacco lawsuit. To the contrary, the Madisonian democracy is a system that can take enormous abuse and still retain its integrity. The taste for legislative circumvention, however, only increases with time. We have seen disturbing examples in the recent circumventions and the negative effects of this trend should not be underestimated for the future. Our nation is one of the most pluralistic nations on Earth. We all come from different cultural, racial, and religious traditions. We share, however, one constitutional tradition. It is highly proceduralistic and pragmatic. It is magnificent in its simplicity. It requires little of us. The Madisonian democracy asks for only one thing, a type of covenant with its people. We must be willing to submit to the supremacy of a democratic process and the judgment of the majority. This judgment is found in the dialogue between the two houses of Congress and between the two political branches. The pressure of rivaling constituencies and institutional perspectives can transform factional politics into a national consensus. This is the Madisonian moment. What makes us unique as a people are not our problems but how we chose to solve them.

ESSAY

FEDERAL COURTS SHOULD DECIDE INTERSTATE CLASS ACTIONS: A CALL FOR FEDERAL CLASS ACTION DIVERSITY JURISDICTION REFORM

VICTOR E. SCHWARTZ*
MARK A. BEHRENS**
LEAH LORBER***

Class action legislation now pending in Congress would allow interstate class actions easier entry into federal courts. In particular, the legislation would amend the diversity jurisdiction and removal statutes that currently bar many interstate class actions from being heard in federal courts. In this Essay, Victor E. Schwartz, Mark A. Behrens, and Leah Lorber argue that passage of the pending legislation would be a welcome change. They present a history of the class action system and an illustration of current abuses of that system, which they argue are attributable in part to defects that the legislation would cure.

Consumers are being taken for a ride by a renegade legal practice that often compensates them nominally—for example, with coupons—while their lawyers take home millions of dollars in fees.[1] Class actions—once considered an efficient means for grouping together large numbers of individuals with common legal claims—have become a cash cow for plaintiffs' attorneys who find state courts willing to sanction sweetheart settlements that enrich the lawyers, but provide little or no actual benefit to their clients, the class members.[2]

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[1] *See* Mark A. Behrens, *Reform Consumer Lawsuits*, IDAHO STATESMAN, Oct. 6, 1999, at B6. *Cf.* Jayne O'Donnell, *Class Action Inaction: Lawyers Reap More Than Plaintiffs*, USA TODAY, Dec. 9, 1998, at B1 (discussing the large profits of attorneys bringing class actions against auto manufacturers).

[2] *See* O'Donnell, *supra* note 1. Entrepreneurial class action lawyers are making in-

Recently, contingency fee lawyers have launched new-style lawsuits that intensify the abuse in the current class action system and create new problems. These lawsuits allow private attorneys to serve their own ends by bypassing elected lawmakers and regulating entire industries.

Some class action attorneys seek to manipulate Wall Street to increase the power of their "legal extortion"[3] and conduct legal shakedowns.[4] They utilize the threat of burdensome class action litigation to drive down stock prices. They then agree to lift the cloud of litigation from companies' balance sheets, restoring the value of companies' stocks in exchange for lucrative settlements. This practice puts enormous pressure on corporate executives to settle even the flimsiest of cases in order to appease anxious shareholders.[5]

Class action abuse flourishes because of the ease with which contingency fee lawyers manipulate federal law to avoid federal courts and to have their cases heard in more sympathetic state courts. State courts often express bias against out-of-state corporate defendants and fail to apply class action certification standards as rigorously as federal courts do. Plaintiffs' lawyers can manipulate the system in this manner because of an unintended technical flaw in the law governing federal court diversity-of-citizenship jurisdiction: the complete diversity rule.[6]

In the class action context, the complete diversity rule requires that all named plaintiffs in a suit be citizens of different states

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creasing use of the Internet to drum up new business. Some sites include <http://www.notice.com>, <http://www.classaction.com>, and <http://www.alexanderlaw.com>.

[3] David Segal, *Tag-Team Lawyers Make Businesses Blink; HMOs Latest to Grapple With Threat of Investor-Scaring Mega-Verdicts*, WASH. POST, Nov. 12, 1999, at A1 (quoting Victor Schwartz).

[4] *See Seeds of Trouble*, WALL ST. J., Sept. 15, 1999, at A32 (editorial referring to one prominent class action attorney as a "corporate shakedown artist").

[5] *See* Milo Geyelin, *Lawyer Seeks Support for Settlement With HMOs*, WALL ST. J., Nov. 22, 1999, at B2.

[6] *See* Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806). *Strawbridge* established the complete diversity rule, the rule that federal diversity jurisdiction lies only when *all* plaintiffs are citizens of states different than *all* defendants. *See id. Strawbridge* construes the language of the 1789 Judiciary Act, not the limits of Article III diversity jurisdiction. *See id.* The Supreme Court has made clear that the decision to require complete diversity is a political decision not mandated by the Constitution, which requires only minimal diversity. *See, e.g.*, Newman-Green, Inc. v. Alfonzo-Larrian, 490 U.S. 826, 829 n.1 (1989). Since "Article III poses no obstacle to the legislative extension of federal jurisdiction, founded on diversity, so long as any two adverse parties are not co-citizens," Congress is free to overturn the complete diversity rule. State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 531 (1967).

than all defendants in the case. Congress also imposes a monetary threshold—now $75,000—for federal diversity claims.[7]

Federal diversity jurisdiction historically was constructed in light of legitimate concerns that state courts might discriminate against out-of-state defendants and hinder the development of interstate commerce.[8] Therefore, not only may a plaintiff bring a diversity case in federal court, but a defendant may "remove" a state civil action of which the United States District Courts would have original jurisdiction to federal court.[9] There are, however, time limits on removal.[10] A diversity case may not be removed more than one year after an action commences.[11]

Plaintiffs' lawyers have been able to exploit loopholes in the federal jurisdictional rules to keep class action cases in sympathetic state courts.[12] For example, if a case involves a question of federal law, class action counsel may draft the complaint to ob-

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[7] *See* 28 U.S.C. § 1332. In class actions, the amount in controversy requirement normally is satisfied if each of the class members individually seeks damages in excess of the statutory minimum. *See* Zahn v. International Paper Co., 414 U.S. 291 (1973). Federal courts, however, are divided over *Zahn*'s breadth and vitality. *See* H.R. REP. NO. 106-320, at 6 n.10 (1999).

[8] *See, e.g.*, Pease v. Peck, 59 U.S. (18 Howe) 595, 599 (1856) ("The theory upon which jurisdiction is conferred on the courts of the United States, in controversies between citizens of different States, has its foundation in the supposition that, possibly, the State tribunal might not be impartial between their own citizens and foreigners."). The concern about state court bias against out-of-state defendants was well-founded. The West Virginia Supreme Court of Appeals has reflected on this issue in two product liability cases. In *Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897 (W. Va. 1991), the court stated the following:

> State courts have adopted standards that are, for the most part, not predictable, not consistent and not uniform. *Such fuzzy standards inevitably are most likely to be applied arbitrarily against out-of-state defendants.* Moreover, this is a problem that state courts are by themselves incapable of correcting regardless of surpassing integrity and boundless goodwill. *State courts cannot weigh the appropriate trade-offs in cases concerning the national economy and national welfare when these trade-offs involve benefits that accrue outside the jurisdiction of the forum and detriments that accrue inside the jurisdiction of the forum.*

Id. at 905 (emphasis added). Earlier, in *Blankenship v. General Motors Corp.*, 406 S.E.2d 781 (W. Va. 1991), the court explained:

> [W]e do not claim that our adoption of rules liberal to plaintiffs comports, necessarily, with some Platonic ideal of perfect justice. Rather, for a tiny state incapable of controlling the direction of national law in terms of appropriate trade-offs among employment, research, development, and compensation for the injured users of products, the adoption of rules liberal to plaintiffs is simple self-defense.

Id. at 786.

[9] *See* 28 U.S.C. § 1441(a) (1994).

[10] *See* 28 U.S.C. § 1446(b) (1994).

[11] *See id.*

[12] *See* Scott L. Winkelman & Lori A. Bean, *Avoiding Federal Courts Through Removal Abuse: The Problem and Some Proposals*, PROD. SAFETY & LIAB. REP. (BNA), Aug. 18, 1995, at 895.

scure this fact or waive the federal claim altogether (which can be detrimental to his class members). Class counsel also may recruit citizens from a defendant's state to serve as named plaintiffs, preventing the defendant from removing to federal court by destroying diversity jurisdiction.

More commonly, class action counsel name local parties, such as retailers, wholesalers, and distributors, as co-defendants. The lawyers rarely intend to obtain a judgment against these local employers, who are dragged into the case simply to destroy diversity. This practice imposes legal costs on sellers. Ultimately, these costs are passed on to consumers in the form of tort taxes on the products and services they purchase.[13]

The loopholes in the federal diversity-of-citizenship and removal statutes can lead to perverse results. For example, a citizen can make a federal case out of a simple $75,001 slip-and-fall claim against a party from another state. But a class of twenty-five million people living in all fifty states alleging claims collectively worth $15 billion usually must be heard in state court. Such a case would not satisfy the complete diversity requirement, even if the individual claims satisfied the federal $75,000 amount-in-controversy requirement.

Given the complexity and high stakes that large class actions involve, it is unfair and unwise to allow state courts free reign to adjudicate them. Interstate class actions are excellent candidates for federal diversity jurisdiction because they implicate interstate commerce, invite discrimination by states against outsiders, and tend to cultivate bias against large business enterprises. They should be decided in more neutral federal forums.

Part I of this Essay will discuss the purpose and development of the federal class action system. Parts II, III, and IV will discuss the problems created by class action abuse and describe the laissez-faire approach to class actions taken by some state courts. Finally, Part V calls for Congress to amend the federal diversity-of-citizenship and removal statutes to allow interstate class actions to be brought in or removed to federal court. Such reform would ensure that interstate class actions are adjudicated in a fair, consistent, and efficient manner, and that class attorneys do

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[13] *See generally* Victor E. Schwartz & Mark A. Behrens, *Federal Product Liability Reform in 1997: History And Public Policy Support Its Enactment Now*, 64 TENN. L. REV. 595 (1997) (discussing costs of fraudulent joinder).

not exploit the unintended, technical exclusion of interstate class actions from federal jurisdiction.

I. DEVELOPMENT OF THE CLASS ACTION SYSTEM

A class action is a legal procedure for bundling together claims involving common issues of law and fact into a single proceeding.[14] When used correctly, class actions promote efficiency. They allow courts to resolve in one action many smaller, similar claims that might otherwise remain unheard because the cost of any particular suit would exceed the possible benefit to the claimant. Class actions also allow defendants to focus their energies on resolving all claims in one lawsuit, and prevent courts from being flooded with duplicative claims.

A. *Class Actions Were Originally Intended for Civil Rights Cases*

Class action lawsuits were developed mainly for civil rights litigants seeking injunctions in discrimination cases.[15] Those who wrote class action rules thought they would rarely, if ever, apply to personal injury cases such as products liability.[16] Class action status was disfavored even for simultaneous injury cases such as airplane crashes or hotel fires.[17] The Advisory Committee on the Federal Rules of Civil Procedure explained:

> A "mass accident" resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses of liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action

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[14] *See* 5 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 23.02 (3d ed. 1999).

[15] *See* John P. Frank, Prepared Statement of John P. Frank Before the Senate Judiciary Comm. Administrative Oversight and the Courts Subcomm. on Senate Bill S. 353, at 3 (May 4, 1999) ("If there was a single, undoubted goal of the committee, the energizing force which motivated the whole rule, it was the firm determination to create a class action system which could deal with civil rights and, explicitly, segregation."), *available in* Federal News Service. Mr. Frank was a member of the Civil Procedure Committee when the present Rule 23 was promulgated. *See id.*

[16] *See id.* at 3–4.

[17] *See* FED. R. CIV. P. 23 advisory committee's note on the 1966 amendment.

would degenerate in practice into multiple lawsuits separately tried.[18]

B. *Class Actions Applied to Mass Torts*

In the 1980s, some plaintiffs' lawyers tried to persuade judges to expand the use of class actions to mass torts—cases typically involving latent injuries allegedly caused by exposure to a product over time. Plaintiffs' lawyers argued that the rules needed broad interpretation; otherwise mass tort cases could slow or stop the judicial system in its tracks.[19] Some courts subsequently began to bend the rules and expand the types of claims they were willing to certify as class actions.[20]

C. *Class Actions Explode into State Courts*

The 1990s saw a dramatic increase in class action filings, primarily in state courts.[21] A recent survey of Fortune 500 companies found that from 1988 to 1998, class action filings against those companies increased by 338% in federal courts and by more than 1000% in state courts.[22] A 1997 Rand Institute study affirmed that "class action activity has grown dramatically" and noted that the increase in class action activity "has been concentrated in the state courts."[23] One well-known class action lawyer has candidly observed, "[i]t is no secret that class actions—formerly the province of federal diversity jurisdiction—are being brought increasingly in the state courts."[24] The explosion of class action filings and the trend toward state court adjudication of class claims have highlighted existing problems in the current

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[18] *Id.*

[19] *See* John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1358 (1995); Victor E. Schwartz, *"Class Action" Reform: Endless Clashes of Values or Constructive Results?*, 19 TRIAL DIPL. J. 231, 232 (1996).

[20] *See* Coffee, *supra* note 19, at 1356–58, 1363–64.

[21] *See* Federalist Society, *Analysis: Class Action Litigation—A Federalist Society Survey*, 1 CLASS ACTION WATCH 1, 5 (1999); Deborah Hensler et al., *Preliminary Results of the Rand Study of Class Action Litigation*, 1997 INST. FOR CIV. JUST. 15.

[22] *See* Federalist Society, *supra* note 21.

[23] Hensler et al., *supra* note 21.

[24] Elizabeth J. Cabraser, *Life After Amchem: The Class Struggle Continues*, 31 LOY. L.A. L. REV. 373, 386 (1998). *See also* Larry Kramer, *Choice of Law in Complex Litigation*, 71 N.Y.U. L. REV. 547, 575 (1996) (asserting that certification of nationwide classes by state courts "has been increasing in recent years").

class action system and have given plaintiffs' lawyers the freedom to manipulate the civil justice system in new and oppressive ways.

II. Problems with Poorly Controlled Class Action Litigation

The current class action system encourages litigation and provides few effective safeguards against abuse. Far too often, unrestrained class action litigation leaves defendants with no choice but to settle claims of little or no merit in order to avoid the enormous risks associated with defending class action suits. Further, class action plaintiffs' counsel often receive inordinately large fees while their clients receive nominal compensation, often in the form of coupons, for their injuries.

A. *Class Actions Encourage Unwarranted Litigation*

Class actions attract claimants in staggering numbers. As one federal appellate judge observed, "[t]he drum beating that accompanies a well-publicized class action . . . may well attract excessive numbers of plaintiffs with weak to fanciful cases."[25] One plaintiff in a mass tort case was quoted as saying that he did not know whether he had a claim, but "heard that they were getting up a suit, . . . [and] wanted to get in on the party."[26]

Sometimes class members are swept into lawsuits from which they may not benefit and that they may not have wanted to bring in the first place.[27] This happens because under the current federal rule governing class actions,[28] and under state rules that are patterned after the federal rule,[29] once a class is certified, all potential plaintiffs are automatically included in the class unless

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[25] *In re* "Agent Orange" Prod. Liab. Litig., 818 F.2d 145, 165 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988).

[26] Bruce Nichols, *Steel Plant Lawsuit Lingers 9 Years*, Dallas Morning News, Apr. 21, 1996, at 32A.

[27] *See, e.g.*, Peter A. Drucker, *Class Certification and Mass Torts: Are "Immature" Tort Claims Appropriate For Class Action Treatment?*, 29 Seton Hall L. Rev. 213, 219 (1998); Barry F. McNeil & Beth L. Fanscal, *Mass Torts and Class Actions: Facing Increased Scrutiny*, 167 F.R.D. 483, 490 (1996).

[28] *See* Fed. R. Civ. P. 23.

[29] *See* H.R. Rep. No. 106-320, *supra* note 7, at 5 (stating that 38 states have adopted the amended Federal Rule 23, sometimes with slight modifications).

they affirmatively choose to "opt out."[30] The opt-out provision provides many benefits, such as allowing a defendant facing massive liability to adjudicate all claims at once. Yet the provision can be a potent force for extra-legislative policy change. Potential class members, who may not understand an opt-out notice written in dense legalese, may inadvertently be included in a class. Plaintiffs' lawyers can use these larger classes to force defendants into settling.

Class actions also spawn copycat cases in other states.[31] Once a class action is filed, lawyers in other jurisdictions frequently file additional lawsuits—often on behalf of the same or similar class members and often using the language of the original complaint.[32] Because state courts have no way to consolidate interstate cases, defendants are forced to spend substantial amounts of money defending such duplicative suits.[33]

B. *Class Actions May Result in Judicial Blackmail*

The certification of a class action places tremendous pressure on a defendant to settle, regardless of a case's merit. "For defendants, the risk of participating in a single trial [of all claims], and facing a once-and-for-all verdict is ordinarily intolerable," even where an adverse judgment is improbable.[34] As Judge Posner of the Seventh Circuit Court of Appeals observed, certification of class actions forces defendants "to stake their companies on the outcome of a single jury trial, or be forced by fear of the risk of bankruptcy to settle even if they have no legal liability."[35] He

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[30] *See* FED. R. CIV. P. 23(c)(2) & (3). Originally, the Federal Rules Advisory Committee recommended allowing claimants to opt in to a class certified under Rule 23(b)(3). *See* Proposed (But Unadopted) Amendment of 1955 to Rule 23, *reprinted in* MOORE ET AL., *supra* note 14, ¶ 23 App. 03[1]. In 1966, when Rule 23 was completely revised, the Advisory Committee included in the rule that class members are "in" the case unless they "opt-out." *Id.* ¶ 23 App. 04[1]. *See generally* Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 397–98 (1967) (discussing the rationale of the opt-out rule).

[31] *See, e.g., N.J. users join wave of private lawsuits against Microsoft*, Associated Press Newswires, Dec. 29, 1999, *available in* WL APWIRESPLUS.

[32] *See S.353: The Class Action Fairness Act of 1999: Hearings Before Subcomm. on Administrative Oversight and the Courts of the Senate Judiciary Comm.*, 106th Cong. 8 (1999) (testimony of Stephen G. Morrison).

[33] *See id.*

[34] McNeil & Fanscal, *supra* note 27, at 490; *see also* Drucker, *supra* note 27, at 219.

[35] *In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1299 (7th Cir.), *cert. denied*, 516 U.S. 867 (1995).

explained further: "[Defendants] may not wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle."[36] Judge Posner called the resulting settlements "blackmail settlements."[37]

Other courts have described class actions as "legalized blackmail"[38] and "judicial blackmail,"[39] arguing that "a greedy and unscrupulous plaintiff might use the threat of a large class action, which can be costly to the defendant, to extract a settlement far in excess of the individual claims' actual worth."[40] The Judiciary Committee of the United States House of Representatives has elaborated:

> [T]he perverse result that companies that have committed no wrong find it necessary to pay ransom to plaintiffs' lawyers because the risk of attempting to vindicate their rights through trial simply cannot be justified to their shareholders. Too frequently, corporate decision makers are confronted with the implacable arithmetic of the class action: even a meritless case with only a 5% chance of success at trial must be settled if the complaint claims hundreds of millions of dollars in damages.[41]

Moreover, defendants who are forced to settle in order to avoid the remote, but potentially crippling, lightning-strike verdict at trial are denied appellate review, the most important safeguard against unfairness in the court system.[42]

C. *Class Action Status Influences Trial Outcomes*

Class treatment can severely hamper a defendant's prospects at trial by "skewing trial outcomes."[43] Evidence indicates that the aggregation of claims increases both the likelihood that a defendant will be found liable and the size of any damages award

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[36] *Id.* at 1298.

[37] *Id.*

[38] *In re* General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 784 (3d Cir. 1995), *cert. denied*, 516 U.S. 824 (1995).

[39] Castano v. American Tobacco Co., 84 F.3d 734, 746 (5th Cir. 1996).

[40] In re *General Motors Corp.*, 55 F.3d at 784-85.

[41] H.R. REP. No. 106-320, *supra* note 7, at 10 (citation omitted). The Committee also explained that "[b]ecause the cases are brought on behalf of thousands (and sometimes millions) of claimants, the potential exposure for a defendant is enormous .... [P]laintiffs' counsel can use this potential exposure to coerce settlements that offer minimal benefits to the class members . . . ." *Id.*

[42] *See* McNeil & Fanscal, *supra* note 27, at 490.

[43] *Castano*, 84 F.3d at 746.

which may result.[44] Defendants are far more likely to be found liable in cases with large numbers of plaintiffs than in cases involving one or just a few plaintiffs.[45] In addition, juries tend to treat all plaintiffs alike, regardless of their individual circumstances, so that the presence of one severely injured plaintiff will likely increase the damages awarded to all.[46]

D. *Class Actions Allow Plaintiffs' Counsel to Benefit at the Expense of Unnamed Class Members*

In theory, a plaintiff's lawyer is supposed to be the servant of his client. In class action practice, however, the roles of servant and master are often reversed, leaving the plaintiffs' lawyers as the only real winners.[47]

1. Plaintiffs' Lawyers, Not Their Clients, Call the Shots

The class action system allows lawyers, not their clients, to decide when and whether to file lawsuits. While some class actions undoubtedly spring from the concerns of injured consumers, many arise simply as a result of the creativity of entrepreneurial contingency fee lawyers. A newspaper investigation of class actions filed in the Mobile County Circuit Court in Alabama reported that in a number of cases, "plaintiffs had no plans to sue, and no idea they might have cause to, until a lawyer or a friend of a lawyer told them they'd been wronged."[48]

Class action lawyers may recruit their friends or employees to serve as named plaintiffs, the parties who are supposed to represent the interests of all unnamed class members.[49] However, unnamed class members—the real parties in interest—may not want their claims adjudicated in the forum chosen or under the strategies selected. They may not even want to be plaintiffs.

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[44] *See* McNeil & Fanscal, *supra* note 27, at 491. *See also* Kenneth S. Bordens & Irwin A. Horowitz, *Mass Tort Civil Litigation: The Impact of Procedural Changes on Jury Decisions*, 73 JUDICATURE 22 (1989).

[45] *See* McNeil & Fanscal, *supra* note 27, at 491.

[46] *See id.*

[47] *See* Jim Moran, *A Class Action Should Be A Federal Case*, WALL ST. J., May 6, 1998, at A22.

[48] Eddie Curran, *Have Class, Need Plaintiff*, MOBILE REGISTER, Dec. 28, 1999, at 1A.

[49] *See id.*

Lawyer-driven class actions can put class members' rights at risk by proceeding on a lowest-common-denominator basis. Experienced class action defense attorney John Beisner told Congress that class members with more serious and complex claims may simply be "lumped into" the rest of the class and not given the individual attention they need.[50] Moreover, plaintiffs' lawyers may dispense with certain claims for tactical reasons—such as waiving fraud claims because they require individual demonstrations of reliance that can defeat class status.[51] Or they may, to achieve certification, seek to consolidate claims from many different states under one state's law, even though that state's law may defeat some class members' claims.

These practices do a disservice to class members. In one case pending before the Fifth Circuit, plaintiffs seek certification of a nationwide class of claims alleging solely *economic* injuries.[52] The plaintiffs argue that common legal issues predominate because Georgia law governs the claims of plaintiffs from across the country.[53] The application of Georgia law, however, would preclude the claims of many out-of-state class members.[54] Plaintiffs' counsel seem willing to sacrifice the claims of out-of-state class members in order to obtain the coercive power of a class certification.

Unnamed class members, particularly those without legal training, have little say in how their claims are handled. Notices of class actions or proposed settlements provide little or no information about rights to class members not versed in legalese. As argued above, class members may therefore miss opportunities to make the crucial decision to opt out of a plaintiff class.

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[50] *See* John H. Beisner, Prepared Statement of John H. Beisner, O'Melveny & Myers LLP, Washington, D.C., Before the Subcomm. On Administrative Oversight and the Courts of the U.S. Senate Comm. on the Judiciary, Hearing on S. 353: "The Class Action Fairness Act of 1999" 10 (May 4, 1999), *available in* Federal News Service.

[51] *See id.*

[52] *See* Spence v. Glock, *appeal docketed*, No. 99-40533 (5th Cir. May 6, 1999).

[53] Brief for Appellees at 39–43, *Spence* (No. 99-40533) (5th Cir. Sept. 9, 1999).

[54] *See, e.g.*, Flintkote Co. v. Dravo Corp., 678 F.2d 942 (11th Cir. 1982) (observing that Georgia precedent barred recovery in tort for "economic loss" resulting from a defective product where there was no personal injury or damage to other property).

2. Plaintiffs' Lawyers Can Generate Windfall Fees While Leaving Their Clients Empty-Handed

The opportunity to generate large fees is a major cause of the increase in the number of class actions filed recently. Stanford University Law Professor Deborah Hensler observes, "[l]awyers are entrepreneurial, they're part of the capitalist economy, and there are very powerful economic incentives to bring these types of lawsuits."[55]

Entrepreneurial plaintiffs' lawyers can draft broad claims so as to pull in the greatest possible number of potential class members. A large class gives a plaintiffs' attorney leverage against a defendant and creates the potential to generate lucrative windfall fees with low marginal investment. These fees often are obtained at the expense of the lawyer's own clients.

Kamilewicz v. Bank of Boston Corp[56] provides a perfect example. That case involved allegations that the Bank of Boston had over-collected escrow monies from homeowners and profited from the interest.[57] The settlement, approved by an Alabama judge, awarded up to $8.76 to individual class members.[58] The plaintiffs' lawyers received more than $8.5 million in fees, which were debited directly from individual class members' escrow accounts.[59]

One *Bank of Boston* class member, a Dallas lawyer, recalled learning about the settlement after investigating a $144.25 charge identified as "Misc. Disburse." on his 1994 escrow statement.[60] "It was just unfathomable to me," the class member said.[61] "When I mentioned this to my legal colleagues, they said, 'No, that could not have happened. You couldn't get a court to bless that.' To a person, that's the reaction I got."[62]

Similarly, a Florida court in 1998 approved a $349 million settlement of a class action brought against tobacco companies

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[55] Eddie Curran, *On Behalf of All Others: Legal Growth Industry Has Made Plaintiffs of Us All*, MOBILE REGISTER, Dec. 26, 1999, at 1A.

[56] 92 F.3d 506 (7th Cir. 1996), *cert. denied*, 520 U.S. 1204 (1997). *See also* Hoffman et al. v. BancBoston Mortgage Corp., No. CV-91-1880 (Cir. Ct., Mobile County, Ala., Jan. 24, 1994) (referred to in *Kamilewicz*).

[57] *See id.* at 508–09.

[58] *See id.*

[59] *See* Barry Meier, *Math of a Class-Action Suit: 'Winning' $2.19 Costs $91.33*, N.Y. TIMES, Nov. 21, 1995, at A1.

[60] *See* Eddie Curran, *You Win, You Pay*, MOBILE REGISTER, Dec. 29, 1999, at 1A.

[61] *Id.*

[62] *Id.*

by flight attendants who claimed injuries from exposure to secondhand smoke.[63] The individual flight attendants received nothing, but their attorneys received $49 million in fees and expenses.[64] The rest of the settlement was applied to fund scientific research.[65] The settlement was approved over the objections of thirty-five class members, who said that their attorneys had breached their duty to the class, the settlement did not provide any benefit to the class members, and the class representatives did not adequately represent the class as a whole.[66]

Other examples of class members' claims being given short shrift by their own lawyers abound. In 1998, an Illinois court allowed a settlement offering $15 Cellular One vouchers to class members and $1 million to their lawyers.[67] A California court gave each of two million class members free phone service minutes, discounts on cellular phone accessories, or $20 in cash, subject to reduction by over $9.5 million in attorneys' fees.[68] Another California court gave class members in a suit against personal computer retailers discounts of seven percent or $25 (whichever amount was smaller) toward new purchases.[69] The attorneys in the case received $890,000.[70] A Texas court gave $5.50 refunds to each class victim of alleged insurance overcharges, while reserving $10 million for the victims' lawyers.[71]

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[63] *See* Broin v. Philip Morris Cos., Inc., 641 So.2d 888 (Fla. Dist. Ct. App. 1994), *rev. denied*, 654 So.2d 919 (Fla. 1995).

[64] *See Settlement of Broin Class Action Approved by Florida Judge*, 1 NO. 6 DIET DRUGS LITIG. RPTR. 17, Mar. 1998, at 17 [hereinafter *Broin Settlement*].

[65] *See id.*

[66] *See id.*

[67] *See* Michelle Singletary, *Coupon Settlements Fall Short*, WASH. POST, Sept. 12, 1999, at H1.

[68] *See* Martin Kassman, *Judge OKs Coupons for Class Members*, RECORDER, Feb. 24, 1998, at 4.

[69] *See* Greg Miller, *Accord Entitles Thousands to Computer Rebate*, L.A. TIMES, June 18, 1998, at D3.

[70] *See id.*

[71] *See Class Action Lawsuit: Examining Victim Compensation and Attorneys' Fees: Hearing Before the Subcommittee on Administrative Oversight and the Courts of the Senate Judiciary Comm.*, 105th Cong. 32 (1997) (statement of Hon. Paul V. Niemeyer, U.S. Circuit Judge, Court of Appeals for the Fourth Circuit; Chair, Advisory Committee on Civil Rules, Judicial Conference of the United States).

III. A New and Inviting Forum for Class Action Litigation

Plaintiffs' lawyers are targeting state courts as a new and inviting forum for class litigation. While federal courts must perform rigorous analyses of whether the claims before them merit class treatment, many state courts take a more lax approach, encouraging plaintiffs' lawyers to manipulate the system to get their cases heard before state judges.

A. *Why Not Federal Court?*

The key to success for a plaintiffs' counsel is often getting a case certified for class treatment. Whether or not a suit has merit, class certification threatens a defendant with the prospect of a bet-the-company trial, where intangibles often weigh in plaintiffs' favors and verdicts are often huge. After class certification, settlement is often a defendant's only rational option.[72]

Federal courts are becoming more reluctant to grant class certification.[73] Before allowing plaintiffs to proceed as a class, federal courts must question closely whether the claims satisfy the requirements set forth in Rule 23 of the Federal Rules of Civil Procedure.[74] Rule 23 requires that a party requesting class certification satisfy four criteria:

> 1. *Numerosity*: The class must be so large that it would be impractical to try the cases individually;[75]
> 2. *Commonality:* The questions of law and fact must be common to all class members;[76]
> 3. *Typicality:* The claims of the named plaintiffs on the lawsuit must be typical of the entire class;[77] and
> 4. *Representation*: The named class members and their lawyers must be ethical and capable to represent the interests of the class as a whole.[78]

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[72] *See* Eddie Curran, *Critics Blast Alabama Judges' 'Drive by' Rulings*, Mobile Register, Dec. 28, 1999, at 9A.

[73] *See, e.g.*, Castano v. American Tobacco Co., 84 F.3d 734 (5th Cir. 1996); *In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1299 (7th Cir. 1996), *cert. denied*, 516 U.S. 867 (1995); *In re* American Med. Sys., Inc., 75 F.3d 1069, 1085 (6th Cir. 1996).

[74] *See, e.g.*, General Tel. Co. v. Falcon, 457 U.S. 147, 161 (1982) (requiring a "rigorous analysis" of Rule 23 prerequisites); *Castano*, 84 F.3d at 740 (5th Cir. 1996).

[75] *See* Fed. R. Civ. P. 23(a)(1).

[76] *See* Fed. R. Civ. P. 23(a)(2).

[77] *See* Fed. R. Civ. P. 23(a)(3).

[78] *See* Fed. R. Civ. P. 23(a)(4).

Under subdivision (b)(3) of Rule 23, a provision often used to certify classes in consumer cases, a party must satisfy two additional criteria:

> 5. *Predominance:* The issues of law and issues of fact that are common to members of the class must predominate over (be greater than) the issues of law and fact that are not in common;[79] and
> 6. *Superiority:* Class treatment is truly the best method for resolving the plaintiffs' claims.[80]

1. Predominance and Commonality

The United States Supreme Court has spoken with precision on the issue of predominance. In *Amchem Products, Inc. v. Windsor*,[81] "hundreds of thousands, perhaps millions, of individuals" allegedly injured by past exposure to asbestos-containing products sought certification of a settlement class under Rule 23(b)(3).[82] The Court found that the proposed settlement class failed to satisfy Rule 23(b)(3)'s predominance requirement.[83] The Court explained the case's certification-defeating factual variations among class claims:

> In contrast to mass torts involving a single accident, class members in this case were exposed to different asbestos-containing products, in different ways, over different periods, and for different amounts of time; some suffered no physical injury, others suffered disabling or deadly diseases.[84]

Issues of law also varied significantly among claims. For example, common defenses such as individual responsibility[85] varied under the laws of the several states implicated.[86]

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[79] *See* Fed. R. Civ. P. 23(b)(3).
[80] *See id.*
[81] 521 U.S. 591 (1997).
[82] *Id.* at 597.
[83] *See id.* at 623–25. The Court also ruled that the proposed class failed to satisfy Rule 23(a)(4)'s adequacy-of-representation requirement. *See id.* at 625.
[84] *Id.* at 609.
[85] *See* VICTOR E. SCHWARTZ, COMPARATIVE NEGLIGENCE (3d ed. 1994).
[86] In a few states, plaintiff fault is a complete defense to liability. *See id.* at Appendix B (text of all states' comparative negligence statutes). In a majority of states, however, the defense of contributory fault applies only if a plaintiff is more at fault than a defendant. *See id.* Other states allow plaintiffs to recover some amount if the defendant bears at least some (*e.g.*, one percent) responsibility. *See id.*

The *Amchem* opinion makes absolutely clear that federal class certification is inappropriate in toxic tort cases. Common issues do not predominate in these cases.

Most lower federal courts have followed the Supreme Court's lead in rigorously analyzing class certification motions. The Fifth Circuit, for example, reversed a district court's grant of class certification to a national class of smokers.[87] The court cited numerous variations in state law in its decision.[88] Similarly, the Sixth Circuit denied class certification to claims involving penile implants.[89] That court noted that "strict adherence to Rule 23 in products liability cases involving drug or medical products which require FDA approval is *especially* important."[90]

2. Representation

Federal courts take the fair representation requirement seriously. They are unlikely to approve settlements that enrich plaintiffs' counsel at the expense of their clients. For example, the Fourth Circuit, in a case alleging injuries associated with Dalkon Shield IUD contraceptives, refused to allow class attorneys to receive an additional ten percent in fees from an unanticipated surplus of settlement funds set aside for class members.[91] The court indicated that allowing the additional fees would be unreasonable because few of the claims went to arbitration or trial, most did not require extensive preparation, and it was clear early on that the claims would settle.[92] The court also implied that the attorneys were acting only for their own interest because none of the 10,000 class members joined the attorneys in their appeal for more compensation.[93]

There are other examples of federal courts acting responsibly in policing sweetheart settlements. In 1998, a New York federal court, in a gender discrimination case, rejected a proposed settlement that provided an estimated $13.2 million in attorneys'

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[87] *See* Castano v. American Tobacco Co., 84 F.3d 734 (5th Cir. 1996).
[88] *See id.* at 746.
[89] *See In re* American Med. Sys., Inc., 75 F.3d 1069, 1085 (6th Cir. 1996).
[90] *Id.* at 1089 (emphasis added).
[91] *See In re* A.H. Robins Co., Inc., 86 F.3d 364 (4th Cir. 1998), *cert. denied sub nom.* Bergstrom v. Dalkon Shield Claimants Trust, 519 U.S. 993 (1996).
[92] *See id.*
[93] *See id.*

fees, while allocating $15 million to ambiguously defined anti-discrimination initiatives over a four-year period.[94]

In 1997, another federal court rejected a proposed settlement of a class action filed against American Honda Finance Corp.[95] In rejecting the settlement that would have given the class members coupons worth between $75 and $150 and the lawyers $140,000 in fees, the judge said that "a $140,000 attorneys' fee award . . . is more than just suspect. It is wholly inappropriate."[96]

In 1996, the Sixth Circuit Court of Appeals affirmed a federal district court decision denying a request for $33 million in fees by plaintiffs' lawyers who settled a products liability class action against a heart valve manufacturer.[97] The district court instead awarded the attorneys about $10.25 million (plus expenses and the right to petition for ten percent of future payments for the following ten years), ruling that early settlements in the case significantly reduced the attorneys' risk and that awarding the requested amount would be excessive.[98]

B. *Plaintiffs Benefit from Lax State Court Control over Class Actions*

Unlike the scrupulous practice of federal judges, some state judges have taken laissez-faire attitudes toward class certification. As a result, entrepreneurial contingency fee attorneys can bypass the rigorous review given by federal judges and obtain certification of questionable claims and approval of outrageous settlement agreements. This practice can lead to absurd results: over a recent two-year period, a state court in rural Alabama certified almost as many class actions (thirty-five cases) as all 900 federal district courts did in a year (thirty-eight cases).[99]

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[94] *See* Martens v. Smith Barney, Inc., 181 F.R.D. 243 (S.D.N.Y. 1998).

[95] *See* Clement v. American Honda Finance Corp., 176 F.R.D. 15 (D. Conn. 1997).

[96] *Id.* at 32. *See also* Joe Stephens, *Lawyers Get Cash, Class Action Plaintiffs Get Coupons; The Results Get a Bit 'Kafkaesque' Out There, Judge Says*, WASH. POST, Nov. 22, 1999, at A7.

[97] *See* Bowling v. Pfizer, Inc., 102 F.3d 777 (6th Cir. 1996).

[98] *See id.* at 780.

[99] *See* John B. Hendricks, Statement on Mass Torts and Class Actions Before the Subcomm. On Courts and Intellectual Property of the House Comm. on the Judiciary on behalf of the U.S. Chamber of Commerce (Mar. 5, 1998), *available in* Federal Document Clearing House Congressional Testimony.

1. Laissez-Faire Enforcement of Existing Standards

Many states adopted the federal class action rule, Rule 23, when they created their own class action procedures.[100] Courts in these states often follow federal courts' approaches when making their class certification decisions.[101]

This approach is not a matter of federalism; rather it makes sense, both practically and as a matter of public policy. As a practical matter, federal courts are familiar with the benefits and drawbacks of using the class action. Federal courts' experience here could help guide state judges who are less familiar with the often subtle issues implicated by class litigation. As a matter of policy, it makes sense for federal and state courts to use similar standards in certifying class actions. Otherwise, systematic abuse such as forum shopping becomes inevitable.

Abuse is occurring now. Some state courts are so lax in their application of class certification standards that fundamental due process protections are threatened. In one instance an Alabama judge certified a nationwide class of persons who alleged that their house siding was defective,[102] while a federal district judge later rejected class certification in an action against the same defendant and presenting identical legal issues.[103] The federal judge found that the parties' due process rights, among others, rendered class treatment impossible.[104]

Similarly, an Alabama state court judge certified a nationwide class of consumers who had purchased allegedly defective sport utility vehicles.[105] The state court plaintiffs claimed, *inter alia*, that design and manufacturing defects caused the vehicles to roll over and that the defendant fraudulently marketed the vehicle.[106] A federal judge in the Eastern District of Louisiana had earlier

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[100] *See* H.R. REP. No. 106-320, *supra* note 7, at 5 (stating that 38 states have adopted the amended Federal Rule 23, sometimes with slight modifications).

[101] *See, e.g., Ex parte* AmSouth Bancorp., 717 So. 2d 357, 362 n.5 (Ala. 1998) ("This Court has previously recognized that Rule 23, Ala. R. Civ. P., is virtually identical to the corresponding federal rule. Thus, when interpreting Rule 23 of the Alabama Rules of Civil Procedure, this Court has traditionally looked to federal cases construing Rule 23, Fed. R. Civ. P., as persuasive authority." (citations omitted)).

[102] *See* Naef v. Masonite Corp., No. CV-94-4033 (Cir. Ct., Mobile County, Ala., Nov. 15, 1995).

[103] *See In re* Masonite Hardboard Siding Prods. Liab. Litig., 170 F.R.D. 417, 424 (E.D. La. 1997).

[104] *See id.* at 427.

[105] *See* Rice v. Ford Motor Co., No. CV-93-965 (Cir. Ct., Green County., Ala., Aug. 26, 1993).

[106] *See* Complaint, *Rice* (No. CV-93-965).

been confronted with similar factual and legal claims against the same defendant in a similar lawsuit, but had *refused* to certify a nationwide class because he concluded that certifying a class in such a case would result in denial of due process and jury trial rights.[107] While the state and federal lawsuits were separate actions, the state court was faced with the exact same issues in resolving the class certification motion as was the federal court.[108] The state court judge certified the class anyway, without explaining why or whether he believed the federal court's determination to be erroneous.[109]

2. Drive-By Class Certifications

Some state judges engage in so-called "drive-by" class certifications—the certification of a class at the request of plaintiffs' counsel before defendants have been served with a complaint or been given an opportunity to answer.[110] Class certification, one of the most important decisions in a case, is thus sometimes made with neither the defendant's knowledge nor his opportunity to respond.

In a lawsuit filed against a major automobile manufacturer in a Tennessee state court, plaintiffs filed several inches of documents with their complaint.[111] By the end of the same day the lawsuit was filed, the court certified a nationwide class of 23 million automobile owners—one of the largest class actions ever certified by any court.[112] In its certification order, the court stated that it had conducted a "probing, rigorous review" of the matter,[113] a practical impossibility given the few hours allotted the review and the utter lack of thoughtful response to the plain-

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[107] *See In re Ford Motor Co. Bronco II Prod. Liab. Litig.* 177 F.R.D. 360 (E.D. La. 1997) (variations in state laws and facts of case defeat predominance prong of FED. R. CIV. PRO. 23(b)(3), but plaintiffs' proposed solution—applying the law of one state to the claims of class members from 51 jurisdictions—was barred by due process problems).

[108] *Compare* FED. R. CIV. PRO. 23(b)(3) *with* ALA. R. CIV. PRO. 23(b)(3) (both requiring that common issues of law and fact predominate).

[109] *See* John W. Martin, Jr., Statement of John W. Martin, Jr., Vice President-General Counsel, Ford Motor Company, Before the Courts and Intellectual Property Subcomm. of the House Comm. on the Judiciary Hearing on Mass Torts and Class Actions (Mar. 5, 1998), *available in* Federal Document Clearing House Congressional Testimony; John H. Beisner, *The State Court Class Action Crisis,* in UNDERSTANDING CLASS ACTIONS 2 (1998 presentation at the Manhattan Institute's Center for Judicial Studies).

[110] *See* H.R. REP. No. 106-320, *supra* note 7, at 8.

[111] *See* Martin, *supra* note 109.

[112] *See id.*

[113] *Id.*

tiff's motion. This practice of *ex parte* certification offends notions of due process and fundamental fairness.

Many plaintiffs' lawyers argue that no harm is done in such circumstances because the certifications are conditional, allowing defendants to challenge them subsequently. But where certification decisions are made against out-of-state defendants by a plaintiff-friendly state court judge, it can be very much an uphill battle for the defendant to change the judge's mind after the fact.

3. Easy Approval of Questionable Class-Action Settlements

In states where judges are elected, some judges may feel political pressure to approve large class action settlements so as to project an image of looking out for consumer interests and bringing large sums of money into their jurisdictions. Other judges may fall victim to prospects of economic or professional goodwill from plaintiffs' lawyers, giving only cursory review of their settlement offers.

Several class action settlements approved by state courts are notable in this regard. A California stockbroker protested two class action settlements in which she was a plaintiff.[114] She recouped about $700 of her investments "—little more than $1 per share—while attorneys got $11 million."[115]

In a proposed $25 million settlement between a large insurance company and 1600 of its employees arising from disputes over travel expenses, attorneys are expected to receive $7.5 million in fees.[116] Employees will each receive $10,000, but will lose their jobs and be rehired as independent agents.[117]

A California court approved a class action settlement of an action brought against computer monitor manufacturers on the ground that they misrepresented their screen size to consumers.[118] Under the settlement, the plaintiffs' lawyers collected a fee of approximately $6 million.[119] The class members, however, received a $13 coupon toward the purchase of a new computer monitor or system costing hundreds of dollars, with the option of

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[114] *See* Russ Britt, *Judicial Conference, Prop. 201 May Reform Group-Lawsuit Practice, If Not, It's . . . Class Wars*, L.A. DAILY NEWS, Mar. 24, 1996, at B1.

[115] *Id.*

[116] *See id.*

[117] *See id.*

[118] *See* Marc Fisher, *Class Actions' Big Winners: The Lawyers; Huge Fees Contrasted With Plaintiff Benefits*, WASH. POST, May 25, 1997, at A1.

[119] *See id.*

holding the coupon and redeeming it about three years later for $6 in cash.[120]

IV. REGULATION BY LITIGATION: A NEW AND TROUBLING USE FOR CLASS ACTIONS

An emerging trend in litigation is the increasing tendency of some judges and plaintiffs' lawyers to attempt to regulate society.

Some judges and plaintiffs' lawyers believe that the normal political processes have been blocked by special interests and that only the judiciary can make things right. Former Clinton Administration Labor Secretary Robert Reich astutely observed that "[t]he era of big government may be over, but the era of regulation by litigation has just begun."[121]

A. *The Birth of Regulation by Litigation*

The trend of regulation by litigation first arose during government recoupment lawsuits against the tobacco industry. Activist trial courts in a few of these cases departed from fundamental legal principles in order to tip the scales and allow government plaintiffs to achieve their public policy goals through litigation.[122]

What changes did these courts make? Some departed from the fundamental tort principle that no one indirectly harmed by a tortfeasor's acts has a greater legal claim against the tortfeasor than does the victim who is directly and physically injured.[123] For example, one court allowed a state to maintain a direct claim against tobacco companies for recoupment of health care costs.[124] Allowing the action gave the state a more powerful claim than any to which the directly injured individuals would have been

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[120] *See id.*

[121] Robert B. Reich, *Regulation Is Out, Litigation Is In*, USA TODAY, Feb. 11, 1999, at A15.

[122] *See* Victor E. Schwartz, *The Remoteness Doctrine: A Rational Limit on Tort Law*, 8 CORNELL J.L. & PUB. POL'Y. (forthcoming Spring 1999).

[123] *See, e.g.*, ARTHUR LARSON, 2 LARSON WORKERS' COMPENSATION, Desk Edition, § 75:00 (Matthew Bender Co. 1999).

[124] *See* Texas v. American Tobacco Co., 14 F. Supp. 2d 956, 962 (E.D. Tex. 1997) (quoting Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 602 (1982)).

entitled, because the state was not subject to the powerful assumption-of-risk defense.[125]

As a result of the advantage given the government plaintiffs in these actions, the tobacco companies were forced to settle en masse rather than risk multi-billion dollar judgments.[126] Not all of the defendant tobacco companies could have met the oppressive bonding requirements—up to 200% of the judgment in some states—that would have been necessary to appeal the trial courts' decisions.[127] These cases were not class actions—the governments filed suit on their own behalf. Nevertheless, they forged the tactical weapons now used by private contingency fee lawyers in class action suits.

B. *Personal Injury Lawyers Refine the Trend*

Personal injury lawyers who partnered with state attorneys general in the tobacco litigation saw first-hand the coercive effect of massive coordinated lawsuits. Now they seek to use class actions to regulate other industries, bypassing the legislative branch entirely. These lawyers have refined the approach they developed in the tobacco litigation, employing deliberate and recognizable tactics.

First, the lawyers vilify the target company or industry to shift public opinion against the defendant.[128] They want the court of public opinion to hold the defendant liable before there is ever a judicial trial.

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[125] Three states passed legislation to facilitate the state's victory in court. See FLA. STAT. ch. 409.910 (1997); 1998 Vt. Acts & Resolves 142 (codified in part at VT. STAT. ANN. tit. 33, §§ 1904, 1911 (1998)); MD. CODE ANN., HEALTH-GEN. I § 15-120 (1998). *See generally* Robert A. Levy, *Tobacco Medicaid Litigation: Snuffing Out the Rule of Law*, 22 S. ILL. U. L.J. 601 (1998).

[126] *See* John Fund & Martin Morse Wooster, *The Dangers of Regulation Through Litigation*, 11 (American Tort Reform Foundation 2000).

[127] *See, e.g.*, Ala. Code § 12-12-73 (2000) (requiring supersedeas bond "in twice the amount of the judgment"); Iowa R. App. Pro. Rule 7(b) (West 1999) (in appeal of money judgment, "the penalty of such bond shall be one hundred twenty-five percent of the amount thereof, including costs . . . ."). *Cf.* N.J. R. App. Pro. R. 2:9-6 (West 1999) (unless court orders otherwise, bond "shall be conditioned for the satisfaction of the judgment in full, together with interest and trial costs, and to satisfy fully such modification of judgment, additional interest and costs and damages as the appellate court might adjudge").

[128] *See* John Coale, *The Public Policy Implications of Lawsuits Against Unpopular Defendants: Guns, Tobacco, Alcohol and What Else* (presentation before The Federalist Society on Law and Public Policy Studies, Nov. 11, 1999) (transcript on file with authors).

Next, the lawyers persuade their allies in government to sign on to and popularize attacks against the target industry through hearings, introduction of legislation, press conferences, and public statements.[129] They encourage this help by giving massive amounts in campaign contributions to their friends.[130]

Finally, once they have softened up an industry, the lawyers file massive, coordinated lawsuits, often based on dubious legal claims, in order to leverage lucrative settlements out of the defendants.[131] In the case of the managed care industry, plaintiffs' attorneys have given the sword of class action litigation a sharper point: they use the threat of dropping stock prices due to class action litigation as a weapon to force quick settlements and promises of better behavior from skittish defendants.[132]

1. A Case Study: New Style Class Actions Against Health Maintenance Organizations

In September 1999, a handful of personal injury lawyers, who are expected to reap hundreds of millions of dollars for their work in the state tobacco cases,[133] announced that they would file coordinated class action lawsuits against health maintenance organizations ("HMOs") in order to "level the playing field" between the managed care industry, health care consumers, and medical professionals.[134] They have since filed numerous putative nationwide class actions, including at least five in federal court in Hattiesburg, Mississippi.[135]

Plaintiffs' lawyers have made clear that there is a regulatory purpose to these suits. Plaintiffs' lawyer Richard Scruggs, who

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[129] *See id.*

[130] The American Tort Reform Foundation recently announced a Web site, *Tracking the Trial Lawyers* (visited Feb. 20, 2000) <http://www.triallawyermoney.org>, that provides quarterly updated contribution numbers and the tools necessary to analyze them. The site not only tracks trial lawyer political action committees, but also those of individual trial lawyers and tobacco settlement law firms, their partners, and employees.

[131] *See* Coale, *supra* note 128; Bill Pryor, Curbing the Abuses of Government Lawsuits Against Industries (presentation before the American Legislative Exchange Council) (Aug. 11, 1999) (transcript on file with authors).

[132] *See infra* text accompanying notes 145-147.

[133] *See* Milo Geyelin, *Lawyer Seeks Early HMO Settlement: Five More Suits Filed Against Health Insurers*, WALL ST. J. EUR., Nov. 25, 1999, at 11.

[134] Laurie McGinley and Milo Geyelin, *Attorneys Prepare Suits Against HMOs: Class-Action Strategy Used Against Tobacco Industry Is Readied for New Push*, WALL ST. J., Sept. 30, 1999, at A3.

[135] *See REPAIR Files Class-Action Suits Against Cigna, Foundation, Three Other Plans*, 9 MANAGED CARE WK. 42, Nov. 29, 1999; Philip Connors, *Former Insider Helps in Suits Against HMOs*, WALL ST. J., Nov. 26, 1999, at B1.

made a reported $1 billion for coordinating some of the government tobacco suits,[136] styled these HMO suits as "the last line of defense for millions of men, women and children who were sold a bill of goods at the expense of their health. They have asked us to change this unconscionable health care system through the courts and that is what we will do."[137] But just as in the tobacco litigation, the novel claims asserted in the HMO class actions are dependent on convincing a court to assume the role of regulator and to reject existing principles of law.

At least one complaint alleges that managed care companies violated the Racketeer-Influenced and Corrupt Organizations (RICO) Act[138] by failing to disclose the details of certain incentive-based cost containment programs.[139] It alleges that incentive-based business practices could hurt the quality of care in the future.[140] The plaintiffs allege *no actual injury*, for example, that they were not provided coverage for a medical condition under their health coverage plans.[141] Plaintiffs' failure to even allege actual injury flouts the law[142] and suggests that other motivations are at work.

Mr. Scruggs has suggested that he never wants these cases to go to trial, that he simply wants to see them settled.[143] While Mr. Scruggs has claimed that his goal "is not to simply shake a settlement out of the industry,"[144] he has counseled stock analysts and institutional investors about the potentially disastrous effect that class action litigation could have on prices of managed care stocks.[145] Mr. Scruggs has said, "[i]f HMO investors were smart, they'd lean on their companies to see if we can work something out."[146] The price of managed care stocks dropped dramatically at the time these lawsuits were announced and subsequently plum-

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[136] *See* Eddie Curran, *A Class Action Prescription*, MOBILE REG., Dec. 30, 1999, at 10A.

[137] *Id.*

[138] 18 U.S.C. §§ 1961-8 (1994).

[139] *See* Maio v. Aetna, No. CIV.A.99-1969, 1999 WL 800315, at *1 (E.D. Pa. Sept. 29, 1999).

[140] *See id.*

[141] *See id.* at *2.

[142] *See, e.g.*, 18 U.S.C. § 1964(c); Sedima, S.P.R.L. v. Imrex Co., Inc., et al., 473 U.S. 479, 496 (1985) (plaintiff has standing in a civil RICO action only if he has been injured in his business or property by the conduct constituting the violation).

[143] *See* Collin Levey, *Three Ways to Shake Down an HMO*, WALL ST. J., Jan. 3, 2000, at A19.

[144] *Id.*

[145] *See id.*; Geyelin, *supra* note 133.

[146] *Levey*, *supra* note 143.

meted to half their 1999 highs.[147] Mr. Scruggs's attempts have serious consequences for retirees, people close to retirement, and other shareholders who count on their investments to provide them with financial security.

C. *Regulation by Class-Action Litigation Usurps the Role of Legislatures*

The attempts by some trial lawyers and judges to regulate entire industries through class action litigation has adverse impacts on our society. The lawsuits interfere with the lawmaking functions of Congress and state legislatures and can lead to bad public policy. Robert Reich, who coined the term "regulation by litigation,"[148] has observed that "[t]he strategy may work, but at the cost of making our frail democracy even weaker .... This is faux legislation, which sacrifices democracy to the discretion of administration officials operating in secrecy."[149]

1. The Role of the Legislature

Legislatures are in the best position to consider far-reaching and complex public policy issues. They can collect information from a wide and diverse range of sources to help them decide how and whether the law should be changed.

Legislatures also are situated uniquely to respond to public concerns. They make decisions in the open. Any citizen can be heard on an issue. If citizens want a law changed, they can petition their representatives. If they are unhappy with the legislature's response, they can vote their representatives out of office. In our democratic system, if far-reaching public policy changes are to be made, the public should have the opportunity to weigh in on those changes.

Finally, legislatures make law prospectively. This helps ensure that citizens have fair notice about important legal changes. As the United States Supreme Court noted in a landmark decision regarding punitive damages, "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a per-

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[147] *See id.*

[148] Reich, *supra* note 121.

[149] Robert B. Reich, *Don't Democrats Believe in Democracy?*, WALL ST. J., Jan. 12, 2000, at A22.

son receive *fair notice* . . . of the conduct that will subject him to [liability]."[150]

2. The Role of the Court

Courts are not lawmakers and are not well-equipped to make broad public policy decisions, as is required to accommodate the new legal theories presented by trial lawyers in the new style class actions. Courts are best suited to develop incrementally existing legal principles over time.

Judges decide controversies one case at a time. They are presented with a limited set of facts in each lawsuit. And this input is often colored by the arguments of opposing counsel, who are seeking to serve purely private interests. The focus on individual cases does not provide comprehensive access to broad information, and judicial changes in tort law may not provide fair and prospective notice to everyone affected.[151]

3. State Court Influence over National Public Policy

When class actions are filed in state courts, state judges are able to dictate national public policy from local courthouse steps. Many state class actions involve class members from across the country and claims aggregating billions of dollars.

To facilitate the certification of such nationwide or interstate class actions, some state courts have declared the laws of their forum to apply to all claims in an action, even where that state law is inconsistent with the laws of the jurisdictions where other claims arise.[152] In short, some state courts are federalizing state law claims, declaring the laws of one state to apply in all jurisdictions.[153] The United States Supreme Court declared this practice to constitute a denial of due process in *Phillips Petroleum Co. v. Shutts*,[154] but it continues.[155]

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[150] BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574 (1996) (emphasis added).

[151] *See BMW*, 517 U.S. at 574.

[152] *See* Walter E. Dellinger, Statement of Walter E. Dellinger Before the House Judiciary Comm. Hearing on H.R. 1875: "The Interstate Class Action Jurisdiction Act of 1999" (July 21, 1999), *available in* Federal Document Clearing House Congressional Testimony.

[153] *See id.*

[154] 472 U.S. 797 (1985).

[155] *See* Dellinger, *supra* note 152.

In other interstate class actions, state courts have ruled on the law of other jurisdictions, effectively telling other states what their laws mean. When a jury or a judge holds a corporate defendant accountable under such legal schemes, that defendant must shape its behavior across the nation to comply with the court's policy decisions.

For example, in *Avery v. State Farm Mutual Automobile Insurance Co.*,[156] an Illinois trial court entered a judgment of almost $1.2 billion against State Farm in favor of a purported nationwide class of State Farm policyholders.[157] The case arose out of a longstanding State Farm practice (shared by other automobile insurers), which was fully disclosed to policyholders, of using non-Original Equipment Manufacturer (OEM) parts to repair cars after accidents.[158] State Farm and others followed this policy to create and assure a competitive market with OEM parts and to reduce repair costs.[159] Since State Farm is a mutual insurance company, its policy holders directly benefited from any savings from the use of non-OEM parts.[160]

State insurance regulators and legislators throughout the United States, as well as consumer groups, have supported the use of non-OEM parts.[161] The majority of states expressly permit insurers to specify non-OEM parts, either by statute or regulation.[162]

Nevertheless, in *Avery* an Illinois trial court and jury nullified considered judgments made by regulators and legislatures throughout the country about the use of non-OEM parts.[163]

The certification of a class in this case was misguided. Plaintiffs claimed that all non-OEM parts used by policyholders were inferior to OEM parts, and that State Farm had breached its contractual obligation to policy holders and committed fraud whenever it specified such parts.[164] When the case went to trial, plain-

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[156] No. 97-L-114, 1999 WL 955543 (Ill. Cir. Ct. Oct. 8, 1999).

[157] *See id.*

[158] *See* Memorandum of State Farm Mutual Automobile Insurance Company in Support of its Motion for Direct Appeal Pursuant to Rule 302(b) at 2, *Avery* (No. 97-L-114) [hereinafter State Farm Memorandum].

[159] *See id.*

[160] *See id.* at 8–9.

[161] *See, e.g.*, Motion Of State Farm Mutual Automobile Insurance Company For Direct Appeal Pursuant To Supreme Court Rule 302(b), Exs. F, G, and I through N, *Avery* (No. 97-L-114); Motion Of Center For Auto Safety, Inc. And Public Citizen, Inc. For Leave To File An *Amicus Curiae* Brief In Support Of Appellant's Request For A Direct Appeal Under Supreme Court Rule 302(b) at 1-2, *Avery* (No. 97-L-114).

[162] *See* State Farm Memorandum, *supra* note 158, at 10 (citing statutes).

[163] *See Avery*, 1999 WL 955543.

[164] *See id.*

tiffs submitted little evidence that all non-OEM parts were inferior or that there was no variance.[165] Nevertheless, the trial court permitted the jury to make a group judgment on a class action.[166] The plaintiffs in the class came from states throughout the nation, but the trial court swept under the rug the fact that the claims of each policyholder arose under different states' laws.[167]

The case has been appealed,[168] but in the current climate of state versus federal forums with different rules and different policies, the outcome cannot be predicted. *Avery* illustrates how lower state courts may shape aspects of national public policy. Basing public policy on such private interests is unwise.

V. CLASS ACTION ABUSE: WHAT CAN AND SHOULD BE DONE TO STOP IT

Many of the abuses of the class action system occur when state courts are asked to adjudicate complex and high-stakes cases involving interstate claims. The Class Action Fairness Act of 1999,[169] now pending in Congress, would provide a fairer and more impartial federal court forum for interstate class actions. The legislation has been the subject of numerous hearings in both the House and Senate: it has been reported out of the House Judiciary Committee twice,[170] passed by the full House once,[171] and reported out of the Senate Judiciary Subcommittee on Administrative Oversight and the Courts once.[172]

A substantially similar measure was enacted into law as part of the federal Year 2000 Readiness and Responsibility Act ("Y2K Act").[173] The Y2K Act established procedures and legal

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[165] *See generally Avery*, No. 97-L-114 (Ill. Cir. 1999).

[166] *See Avery*, 1999 WL 955543.

[167] *See, e.g.*, Order and Findings that Action May Be Maintained as a Class Action For Breach of Contract, Consumer Fraud, and Equitable Relief Claims, *Avery* (No. 97-L-114); Ordering Regarding Law to be Applied to Class Members' Claims, *Avery* (No. 97-L-114).

[168] *See* Notice of Appeal, *Avery* (No. 97-L-114).

[169] S. 353, 106th Cong. (1999) (introduced by Sen. Grassley (R-Iowa)).

[170] *See* H.R. REP. No. 106-320, *supra* note 7; H.R. REP. No. 105-702 (1998).

[171] *See* 145 CONG. REC. D1025-01 (Sept. 23, 1999).

[172] *See* 144 CONG. REC. D956 (daily ed. Sept. 10, 1998) (favorably reporting the Class Action Fairness Act of 1998, S. 2083, 105th Cong. (1998)).

[173] Year 2000 Readiness and Responsibility Act, Pub. L. No. 106-37, 106 Stat. 185 (1999).

standards for lawsuits stemming from Year 2000 computer date-related failures.[174]

A. *Changes in Jurisdictional and Removal Statutes Would Eliminate Game-Playing by Plaintiffs' Counsel*

The approach taken by Congress does not affect Rule 23 itself.[175] Instead, the approach provides for a limited change in the laws governing the jurisdiction of federal courts.[176] Specifically, the legislation eliminates the federal jurisdiction loopholes exploited by plaintiffs' counsel in their attempts to keep cases before a state tribunal.[177]

The legislation preserves the rights of persons to obtain class treatment of the claims in their lawsuit.[178] It also preserves and helps fulfill the original purpose of federal diversity jurisdiction: to assure a fair forum when an out-of-state defendant is sued.[179] The legislation *would not* limit the ability of anyone to file a class action lawsuit or change anyone's right to recovery.[180]

The proposed federal legislation would amend the federal diversity-of-citizenship statute[181] to grant original jurisdiction in the federal courts to hear interstate class actions where any member of the proposed class is a citizen of a state different from any defendant[182]—a change from complete diversity to minimal diversity.

This expanded jurisdiction would not include disputes that are truly local in nature.[183] Accordingly, the House legislation would exempt from its reach the following: (1) *intrastate cases*—cases in which a "substantial majority" of the class members are citizens of the same state and the claim will be governed primarily

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[174] *See generally* H.R. CONF. REP. No. 106-212 (1999); 145 CONG. REC. H5198-99 (daily ed. July 1, 1999).

[175] Indeed, the Rules Enabling Act places the authority to promulgate and modify federal court rules in the hands of the federal judiciary, subject to Congressional acquiescence. *See* 28 U.S.C. §§ 2071-7 (1994).

[176] *See* The Interstate Class Action Jurisdiction Act of 1999, H.R. 1875, 106th Cong. §§ 3, 4; The Class Action Fairness Act of 1999, S. 353, 106th Cong. §§ 3, 4.

[177] *See* H.R. 1875 §§ 3, 4; S. 353 §§ 3, 4.

[178] *See* H.R. REP. No. 106-320, *supra* note 7, at 11–12 (1999).

[179] *See id.*

[180] *See id.*

[181] 28 U.S.C. § 1332 (1994).

[182] *See* H.R. 1875 § 3(b); S. 353 § 3.

[183] *See id.*

by that state's law;[184] (2) *limited scope cases*—cases involving fewer than one hundred class members or where the aggregate amount in controversy is less than $1 million;[185] and (3) *state action cases*—cases where the primary defendants are states or state officials, or other government entities against whom the district court may be foreclosed from ordering relief.[186] The proposed Senate legislation requires the federal district court to abstain from hearing the action if a majority of the parties are residents of the same state and the claims asserted will be governed primarily by the laws of the state, or the primary defendants are government entities or officials.[187]

The proposed legislation also would eliminate some of the tactics used by plaintiffs' lawyers to avoid removal of a state class action to federal court.

First, unnamed class members (plaintiffs) would be allowed to remove to federal court class actions in which their claims are being asserted.[188] Under current rules, only defendants are permitted to remove.[189] The legislation would allow unnamed class members to remove a case if they are concerned the state court has not or will not protect their interests, as, for example, in a coupon settlement case.[190]

Second, parties could remove without the consent of any other party.[191] Current removal rules, which apply only to defendants, require the consent of all defendants to remove an action.[192] The proposed change would prevent plaintiffs' lawyers from adding defendants to their cases in order to destroy diversity.[193]

Third, removal to federal court would be available to *any* defendant, regardless of whether the defendant is a citizen of the state in which the action was brought.[194]

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[184] *See* H.R. 1875 § 3(b)(2)(A)(i).
[185] *See id.* § 3(b)(2)(A)(ii).
[186] *See id.* § 3(b)(2)(A)(iii).
[187] *See* S. 353 § 3(3).
[188] *See id.* § 4.
[189] *See* 28 U.S.C. § 1441(a) (1994).
[190] *See* S. 353 § 4.
[191] *See id.*
[192] *See* 28 U.S.C. § 1441(a) (1994); Chicago, Rock Island & Pac. Ry. Co. v. Martin, 178 U.S. 245, 248 (1900); Tri-Cities Newspapers, Inc. v. Tri-Cities Pressman & Assistants' Local 349, 427 F.2d 325, 326-7 (5th Cir. 1970).
[193] *See* H.R. REP. No. 106-320, *supra* note 7, at 7.
[194] *See* S. 353 § 4.

Fourth, the current time bar to removal of class actions to federal court[195] would be eliminated, although the requirement that removal occur within thirty days of notice of grounds for removal would be retained.[196]

B. *Changes in Notice Provisions Protect Putative Class Members' Interests*

The current Senate class action reform bill also would require that any written notice to the class contain a "short summary written in plain, easily understood language" and provide other information about the content of the notice.[197] For example, if the notice is sent to inform class members of a proposed settlement, the notice would have to explain the benefits of the settlement, the rights the class members will lose by entering into the settlement, the obligations imposed on the defendants, and certain information about their attorneys' fees.[198]

This legislation would ensure that class members are aware of their rights and that lawyers cannot draft intentionally misleading or obscure notices that hide counsel-friendly settlements that do not serve the class members' interests.

C. *Limitations on Attorneys' Fees*

The current Senate legislation would also set limits on the amount of fees recoverable by lawyers for the plaintiffs' class. It provides that the lawyers' total fees and expenses cannot exceed a "reasonable percentage" of the following: the damages and prejudgment interest actually paid to the class; future financial benefits to the class based on the cessation of alleged improper conduct by the defendants; and the costs actually incurred by all defendants in complying with the terms of an injunction order and settlement agreement.[199] One attorney has noted that "[t]hese are very modest fee limitations" and "'percentage of fund' fee awards in class actions are usually wholly unwarranted."[200] While

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[195] *See* 28 U.S.C. § 1446(b) (1994).
[196] *See id.*; H.R. REP. No. 106-320, *supra* note 7, at 12.
[197] S. 353 § 2.
[198] *See id.* § 3.
[199] *See id.* § 2.
[200] Beisner, *supra* note 50, at 23.

giving plaintiffs' counsel a percentage of the plaintiffs' recovery in an individual case can be justified, giving class counsel a percentage of the entire class recovery hands them a "major, totally unjustifiable windfall."[201]

VI. Conclusion

Class actions have their proper place in our legal system. Class actions work when common issues of law and fact predominate, representation is fair, and judicial economy can be achieved. Where federal courts follow these rules and a few state courts do not, however, chaos, forum-shopping, and denials of due process of law prevail, thus necessitating change. Change also is needed when class actions are used to enrich a few attorneys, substitute for legislatures, or serve as tools for extorting unfair settlements.

The proposed federal class action diversity jurisdiction reform legislation will not cure *all* misuses of the class action device. Nevertheless, it is a welcome start toward that goal and should be enacted now.

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[201] *Id.*

SYMPOSIUM

SOCIAL ISSUE LITIGATION AND THE ROUTE AROUND DEMOCRACY

JEFF REH*

The increasing use of litigation to effect social reform has raised concerns about the extent to which lawsuits—and the threat of lawsuits—should be used as regulatory devices. Using cities' lawsuits against gun manufacturers as a context, Jeff Reh argues that litigation is an undemocratic substitute for legislation.

In October 1998, the Honorable Marc Morial, mayor of New Orleans, Louisiana, filed a lawsuit on behalf of his city against various firearm manufacturers for the costs associated with the criminal and negligent misuse of handguns in New Orleans.[1] Morial's theory of liability was premised upon the contention that the manufacturers had failed to build internal locks in their products to prevent their unauthorized use and had failed to incorporate other features deemed by the mayor to increase firearm safety.[2]

One month later, the mayor of Chicago, the Honorable Richard Daley, filed his own suit against gun manufacturers.[3] The Chicago suit claimed that because firearm manufacturers failed to prevent criminal access to guns and firearms were a public nuisance, the manufacturers should reimburse the City of Chicago for $435 million incurred in fighting gun-related crime and in paying for the costs of gun misuse.[4]

Between October 1998 and February 2000, twenty-one other city mayors and four county executives filed lawsuits against gun manufacturers similar to those initiated by mayors Morial and

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* General Counsel for Beretta U.S.A. Corp. Beretta U.S.A. Corp., a manufacturer of semi-automatic handguns, supplies the standard service sidearm for the United States Armed Forces, as well as providing sidearms to law enforcement and civilian customers in the United States and Canada.

[1] *See* Morial v. Smith & Wesson Corporation., No. 19 98-18578, 2000 WL 248364 (La. Civil Dist. Ct., Feb. 28, 2000).

[2] *See id.*

[3] *See* City of Chicago and County of Cook v. Beretta U.S.A. Corp., No. 98 CH 15596 (Ill. Cir. Ct. Cook County).

[4] *See id.*

Daley.[5] Three private citizens and the National Association for the Advancement of Colored Persons (NAACP) also initiated similar suits.[6]

Public reaction to the lawsuits has been generally negative.[7] Opinion polls and news editorials revealed a general sentiment that it was unfair to blame gun manufacturers for subsequent criminal misuse over which they had no control.[8] Critics of the lawsuits point out that areas in the country with the highest percentage of gun ownership have the lowest crime rates.[9] Several commentators express serious concern about the short and long-term national economic consequences of suing industries simply because their products can be misused.[10] Critics fear that these suits could eventually target the automobile, alcohol, and entertainment industries, as well as the internet.[11] Other critics decry the suits as diversionary, blame-making attempts by city officials to draw attention away from the failure of the city mayors to do

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[5] *See, e.g.*, Complaint, City of Boston v. Smith & Wesson, No. 99-2590 (Mass. Sup. Ct. Suffolk County filed June 3, 1999); Complaint, City of Camden v. Berretta U.S.A. Corp., No. L451099 (N.J. Super. Ct. Camden County filed June 2, 1999); Complaint, Camden County v. Beretta U.S.A. Corp., No. 99CV2518 (D. N.J. filed June 1, 1999); California *ex rel.* Renne, v. Arcadia Machine & Tool, No. 303753 (Cal. Super. Ct. San Francisco filed May 25, 1999); Complaint, California *ex rel.* Co. of Los Angeles, v. Arcadia Machine & Tool, No. BC214794 (Cal. Super. Ct. Los Angeles County filed Aug. 6, 1999); Complaint, Archer & City of Detroit v. Arms Technology, Inc., No. 99-912658 (Mich. Cir. Ct. Wayne County filed Apr. 26, 1999); Complaint, Ganim and City of Bridgeport v. Smith & Wesson, Inc., No. CV99-036-1279 (Conn. Super. Ct. Dist. of Fairfield filed Jan. 27, 1999); Complaint, White and City of Cleveland v. Hi-Point Firearms, No. 381897 (Hamilton County, Ohio Ct. of Common Pleas filed Apr. 8, 1999); Complaint, James and City of Newark v. Arcadia Machine & Tool, No. L-6059-99 (N.J. Super. Ct. Essex County filed June 9, 1999); Complaint, City of St. Louis v. Cernicek, No. 992-01209 (Cir. Ct. St. Louis, 22d Jud. Cir. filed Apr. 30, 1999).

[6] *See* Ceriale v. Smith & Wesson, No. 99L05628 (Ill. Cir. Ct. Cook County, May 20, 1999); NAACP v. A.A. Arms, Inc., (E.D.N.Y., July 16, 1999); Smith v. Navegar, No. 98 L 13465 (Ill. Cir. Ct. Cook County, June 9, 1998); Young v. Bryco Arms, No. 98 L 6684 (Ill. Cir. Ct. Cook County, June 9, 1998).

[7] A Reuters poll released January 6, 1999 found that only 19.3% of persons surveyed supported the suits. *See* Bill Hoffmann, *Americans Don't Back Gun Suits—Survey*, N.Y. POST, Jan. 8, 1999, at 018. A December 31, 1998 CNN poll found that 92% of participants believed that gun manufacturers should not be held liable for gun violence. *See Should gun manufacturers be held liable for gun violence?* (visited Jan. 5, 1999) <http://www.cnn.com/POLL/results/1067781.html>.

[8] *See, e.g.*, *An Uncivil Action*, NEW REPUBLIC, Mar. 1, 1999, at 9; George F. Will, *Handguns and Hired Guns*, WASH. POST, Jan. 24, 1999, at B07; *Courtroom Cowboys*, WALL ST. J., Nov. 16, 1998, at 38; *Gun Suit Misses the Mark*, BUS. INS., Nov. 16, 1998, at 8; *Now Let's Fleece Gun Manufacturers*, ATLANTA J., Jan. 7, 1999, at A18; John Lott, *Keep Guns Out of Lawyers Hands*, WALL ST. J., June 23, 1998, at 20.

[9] *See supra* note 8.

[10] *See id.*

[11] *See id.*

the job for which they were hired—to reduce crime in their jurisdictions.[12]

Some have critiqued the city lawsuits on different grounds, expressing concern that the sheer cost of defending the cases could bankrupt the firearm industry and deprive American citizens of an important means of self or community defense.[13] Firearms, they argue, provide private persons as well as federal, state, and, ironically, local law enforcement agencies with a valuable tool for fighting crime.[14] The manufacture of firearms is a protected industry in many countries for the very reason that the civil and national defense of the nation may depend upon the ability to make and own firearms.[15] Such an important national interest, the argument goes, should not be undermined by a group of local officials acting out their own agenda.[16]

More troubling, however, is that these suits undermine the democratic process. Gun control advocates and other instigators of the lawsuits have been refreshingly candid in acknowledging that the suits were brought because legislative bodies had failed to require firearm manufacturers to adopt the various remedies sought in the lawsuits.[17] For example, shortly after the city of New Orleans filed its lawsuit, its attorney, Wendell Gauthier, said, "I think legislatures need our help."[18] John P. Coale, a plaintiff's attorney involved with Gauthier's efforts, stated the issue even more bluntly when he said, "[t]he legislature has failed."[19]

Whether disclosed by candor or not, this is, in fact, exactly what the lawsuits seek to do.[20] Mayors in the cities that have brought suit—and their private litigant counterparts—are using litigation as a substitute for regulating firearm design and distribution through legislative means. Thus, when Coale says "The

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[12] *See id.*
[13] *See id.*
[14] *See id.*
[15] *See id.*
[16] *See id.*
[17] *See* E. Tyler, *Tobacco-Busting Lawyers on New Gold-Dusted Trails*, N.Y. TIMES, Mar. 10, 1999, at A1.
[18] *Id.*
[19] *Id.*
[20] *See, e.g.*, Memorandum of Decision on Defendants Motion to Dismiss, at 34, *in* Ganim and the City of Bridgeport v. Smith & Wesson, No. X05-CV-99-0153198S (Conn. Super. Ct. Dec. 10, 1999) ("'[T]he statutory pattern evinces a legislative intent to regulate the flow of handgun sales and restrict the right to sell to those establishing the requisite qualifications.' . . . It is clear to this court that the plaintiffs seek to act or have the court act to control the flow of handguns in a more comprehensive manner.").

legislature has failed," he is really saying that the legislature has not done what he wants it to do.[21]

In fact, the United States Congress, state legislatures, county commissions, and city councils across the country have considered and acted upon—sometimes by rejecting—many of the points raised in the city lawsuits.[22] The distribution of firearms is already one of the most heavily regulated activities in this country; a plethora of federal, state, and local laws, as well as the voluntary acts of firearms industry members themselves, restrict firearm sales.[23] Legislatures throughout the country, including Congress, have addressed design considerations numerous times.[24] Gun control advocates, however, point out that Congress exempted firearms from the regulatory authority of the Consumer Product Safety Commission ("CPSC"), which they interpret as a failure of the legislative process.[25] What these advocates do not mention is that Congress specifically exempted firearms from CPSC jurisdiction because Congress did not want firearm design control—and thus the potential to ban firearm manufacturing—in the hands of a few regulators. When Congress exempted firearms from CPSC jurisdiction, it did so as an affirmative act to protect the exercise of Second Amendment rights in this country.[26]

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[21] *Big Guns: Plaintiff's Lawyers Declare Themselves the "Fourth Branch of Government" and Go After Firearms*, REASON, Oct. 1999, at 60; Attorney General Bill Pryor, *Trial Lawyers Target Rule of Law*, ATLANTA CONSTITUTION, Jan. 13, 1999.

[22] *See infra* notes 23, 24.

[23] There are approximately 20,000 laws regulating firearms in the United States. Profs. Daniel D. Polsby & Dennis Brennan, *Taking Aim at Gun Control*, A HEARTLAND POLICY STUDY, Oct. 30, 1995.

[24] Examples of such legislation include firearm design controls enacted in California in 1999 (SB15, SB23, and AB106), in Massachusetts in 1998 ("Massachusetts Gun Control Act of 1998") and in Maryland in 1989 (Art. 27, §§ 36F–36J).

[25] *See* Robert T. Delfay, A Failure to Communicate, Address Before The Center on Crime, Community and Culture, Open Society Institute, (July 15, 1999).

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> If consumer products do include firearms, authority is granted to the Commission to set certain standards with respect to consumer products which include, among other things, requirements as to performance, composition, design, construction, and other matters. Failing in meeting those standards subject to certain administrative review provisions, the consumer product can be denied in commerce entirely. Therefore, what we have, no more nor less, is a gun control bill by administrative rule rather than by act of Congress. Now, I want to say that I support a regulation of weapons. The House Judiciary Committee is now considering a gun control bill of sorts and I expect to support a reasonable bill. But the Congress ought to consider it, and the Congress ought to adopt the law and not delegate its responsibility to a commission. . . .

CONG. REC. at 31406 (1972). *See also* Committee for Handgun Control, Inc. v. Consumer Product Safety Comm., 388 F. Supp. 216 (D.D.C. Dec. 19, 1974).

The courtroom provides an excellent means of resolving factual disputes in a particular action, but jurors are not chosen to decide the wide-ranging policy considerations that lie within the sphere of legislative authority. Litigation which seeks to define the distribution or design of firearms according to the opinion of twelve jurors, instead of through the informed opinion of numerous elected officials, can fail to account for broader, equally important policy considerations such as the number of lives saved and the costs avoided through defensive gun use, the deterrent effect on criminal activity associated with private gun ownership, the role that widespread private firearm ownership has played in the history of United States military effectiveness, and even the simple fact that the American citizenry has chosen through laws authorizing personal firearm ownership, and have economically endorsed through their daily purchase of firearms, the very products that the lawsuits against the firearm industry seek to restrict or change.

Equally troubling is the notion that someone who is unable to convince a majority of elected officials in their state as to the wisdom of their viewpoint would then resort to harassing litigation to extort adherence to their opinions. Each city that has sued the firearms industry could require, through legislation, that guns sold within its boundaries have numerous safety features. Each city could seek to control the distribution requirements for firearms in their jurisdiction or even ban such sales. Instead, the mayors have filed lawsuits to compel adherence to their demands on a national scale. Mayor Daley was blunt in stating that since handgun ownership is illegal in Chicago, other people in Illinois should not be allowed to purchase handguns in neighboring counties.[27] Many of the suits complain about the ease with which firearms are purchased in other states.[28] Thus, these mayors admittedly seek to control the distribution and design of firearms, not only in the jurisdiction in which they are elected, but throughout the United States. The city lawsuits (and, equally,

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[27] *60 Minutes* (CBS television broadcast, Feb. 14, 1999). Mayor Dailey's Complaint against the firearm industry similarly includes the assertion that citizens of Chicago should not be allowed to *legally* purchase handguns elsewhere in the state. *Chicago*, *supra* note 3, ¶ 15.

[28] *See, e.g.*, Complaint, City of Boston v. Smith & Wesson, No. 99-2590, at 8 (Mass. Sup. Ct. Suffolk County filed June 3, 1999); City of Camden v. Beretta U.S.A. Corp., No. L451099, at 11 (N.J. Super. Ct. Camden County filed June 2, 1999); Complaint, Camden County v. Beretta U.S.A. Corp. No. 99CV2518, at 9 (D. N.J. filed June 1, 1999).

similar private lawsuits) are an attempt by a handful of people to federalize their particular judgments about firearm issues without the approval of the American electorate.

These suits also violate the separation of powers. A mayor who succeeds in using the courts to obtain his ends might soon forego the legislative process altogether. State legislatures throughout the country have begun to reign in these circumventive attempts by blocking city lawsuits through legislation,[29] but the very fact that legislative countermeasures are being brought into play confirms the seriousness of the issue. The lawsuits against the gun industry are no longer about product design or distribution, or even only about Second Amendment rights. They now involve an end run around democracy and the breakdown of the separation of powers. Consequently, these lawsuits are undemocratic and improper.[30]

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[29] To date, 14 states have done so, and bills are pending in 20 other states for the same purpose. *See NRA-ILA Fax Alert* (last modified Feb. 18, 2000) <http://www.nraila.org>.

[30] Trial judges are already beginning to dismiss the municipal lawsuits, citing, among other reasons, the improper regulatory nature of the cases. *See* Order on Pending Motion to Dismiss, at 4, Penelas v. Arms Technology, Inc., No. 99-01941 CA-06 (Fla. Cir. Ct. Dec. 13, 1999) ("In seeking this relief, the County explicitly seeks to regulate aspects of the manufacture, sale and distribution of firearms. Only the Florida legislature has the standing to authorize such a claim."); *see also* Cincinnati v. Beretta U.S.A. Corp., No. A9902369 (Ohio Ct. of Common Pleas Oct. 7, 1999). For recent rulings dismissing private party suits against firearm manufacturers as an improper circumvention of legislative prerogative, see Forni v. Ferguson, No. 132994/94, at 14–15 (N.Y. Sup. Ct. Aug. 2, 1995), *aff'd*, 232 A.D.2d 176, 648 N.Y.S.2d 73 (1996) ("At oral argument of this motion, I told counsel that I personally hated guns and that if I were a member of the legislature, I would lead a charge to ban them. However, I do not hold that office. Rather, I am a member of the [j]udiciary and must respect the separation of the function."); McCarthy v. Sturm, Ruger & Co, Inc., 916 F. Supp. 366, 372 (S.D.N.Y. 1996), *aff'd*, 119 F.3d 148 (2d Cir. 1997) ("[Plaintiffs] claims seek legislative reforms that are not properly addressed to the judiciary. [As] Judge Schlesinger wrote in *Forni* . . . , I too would work to ban ammunition like the Black Talon if I was a member of the New York legislature. As judges, though, we both are constrained to leave legislating to that branch of government."); Whitfield v. Matasareanu, No. EC 023-123 (Cal. Super. Ct. May 4, 1999).

Characteristics of lawsuits improper in these regards include the facts that the pertinent legislative body has already considered and either regulated or refused regulation of the activity in question, that, in the municipal litigation context, the plaintiff already has the authority to regulate the activity in question or, equally telling, has had that authority pre-empted by state or federal regulation, that the sought-after remedy implicates broader public policy concerns, that the claims are remote, general or speculative in nature, that the product involved is not defective in that it functions as intended and because the risks associated with the product are known.

NOTE

THE CONDITION DILEMMA: A NEW APPROACH TO INSURANCE COVERAGE OF DISABILITIES

JENNIFER S. GEETTER*

Recent cases have radically changed the scope of the American with Disabilities Act (ADA), fundamentally altering and reshaping protections for the disabled. In light of the Seventh Circuit's controversial opinion in Doe v. Mutual of Omaha, *there is a pressing need for a clear standard to define what medical care legally can be excluded from insurance coverage. In this Note, Jennifer Geetter argues that an approach seeking a correlative and causation relatedness standard steered by impartial medical science would better serve the interests of insureds and would provide insurance companies with a clear outline of their privileges and limitations.*

The scope and intent of the Americans with Disabilities Act (ADA),[1] passed in 1990, continue to be debated today. Although it is clear that the purpose of the ADA is to protect disabled people from discrimination,[2] contentious debate persists over what constitutes a disability[3] or discrimination. While the ADA does

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* B.A., Columbia College, Columbia University, 1997; Member, Harvard Law School Class of 2001. This Note could not have been written without the assistance and encouragement of the entire staff of the New York State Task Force on Life and the Law. Additionally, I am extremely grateful to Justine A. Levin, a graduate fellow at the Rockefeller University in Neuroscience and Genetics, for her invaluable assistance in surveying and analyzing the medical literature for examples to explore the proposals contained in this Note. This Note bears her indelible mark, and her commitment to this Note illustrates the best partnership between science and law.

[1] 42 U.S.C. § 12101(b)(1) (1994).

[2] "It is the purpose of this chapter . . . to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities . . . [and] to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities." 42 U.S.C. §12101(b) (1994).

[3] The Supreme Court did recently begin to answer this question. *See* Sutton v. United Airlines, 527 U.S. 471, 119 S. Ct. 2139 (1999). In this case involving airline employees with severe myopia, the court addressed what happens when corrective measures can be used to control disability. The Supreme Court held that any condition that can be completely corrected does not constitute a disability, since no "major life activity" is limited once the condition is corrected. *See* 119 S. Ct. at 2149. Therefore, the employee is not entitled to ADA protection when her employer terminates her employment based on the corrected condition. Courts are now beginning to apply this articulated standard. *See, e.g.*, Krocka v. City of Chicago, Nos. 98-2250, 98-2478 and 98-3880, 2000 WL 137441 (7th Cir. Feb. 8, 2000) (holding that the use of Prozac is a corrective measure for clinical depression); Ivy v. Jones, 192 F.3d 514 (5th Cir. 1999) (finding the use of a hearing aid is a corrective measure for a hearing loss); Fjellstad v. Pizza Hut of Am., 188 F.3d

not attempt to remove all of the hurdles the disabled face, it does ban discrimination based on the personal status of being disabled. Unlike choices made on the basis of someone's race,[4] a person's disability may frequently influence employment or insurance policy determinations without violating the law. An important task, therefore, is for courts to distinguish between an insurance company's legitimate decision-making based on disability and unfair discrimination that violates the ADA.

Adequate health insurance coverage is vital to the disabled. Securing affordable coverage, however, can prove difficult if an insurance company fears that reimbursement for care related to a disability will be too costly to justify insuring the disabled person. Insurance companies use actuarial science[5] to estimate the risks of covering applicants for insurance. Insurers convert these risks into actuarial tables[6] to set rates or to limit the scope of coverage. Advocates for the disabled argue that denying coverage or setting increased rates based on an individual's disability constitutes discrimination.[7] They state that "but for" the applicant's disability, she would not have been denied coverage or would have received coverage at a lower premium rate. Insurance companies respond that they calculate the risk of insuring a specific medical disability, but do not intentionally target the disabled. Just as they consider an applicant's age, gender, occupation and family medical history,[8] they factor in an applicant's disability in trying to predict the extent of future requests for medical care reimbursement.

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944 (8th Cir. 2000) (declining to apply the test because employee continued to be substantially disabled as a result of an uncorrectable prominent weakness in her arms). For a lengthy discussion of what constitutes a disability, see Smauel R. Bagenstos, Subordination, Stigma, and "Disability," 86 VA. L. REV. 101 (2000).

[4] 42 U.S.C.A. § 2000e-2(a)(1) (1994) ("It shall be an unlawful employment practice for an employer . . . to discriminate against any individual . . . because of . . . race.").

[5] *See, e.g.*, MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 12 (10th ed. 1998) (actuarial science relates to the "statistical calculation" of risk).

[6] *See, e.g.*, BLACK'S LAW DICTIONARY 36 (6th ed. 1990) (actuarial table is a "form of organized statistical data which indicates the life expectancy of a person and which is admissible in evidence through expert witness. Such table are used by insurance companies in determining premiums.").

[7] *See, e.g.*, Doe v. Mutual of Omaha, 999 F. Supp. 1188, 1191 (N.D. Ill. 1998) *rev'd*, 179 F.3d 557 (7th Cir. 1999), *cert. denied*, 68 U.S.L.W. 3327, 68 U.S.L.W. 3424, 68 U.S.L.W. 3432, 10 A.D. Cases 64 (U.S., Jan 10, 2000) (NO. 99-772). Plaintiffs "allege that . . . policy caps on AIDS and ARC (AIDS related condition) benefits violate the ADA's prohibition against discrimination on the basis of disability." *Id.*

[8] *See, e.g.*, Bonanza Insurance Services, *Individual Health Insurance Quote* (visited Mar. 28, 2000) <http://www.rightrates.com/HealthQuote.html>. This insurance rate service asks many questions on family, gender, tobacco use, medical history, age and other categories to determine a proper rate.

Most courts considering this question have concluded that the ADA cannot be read to require insurers to abandon actuarial principles and to cover all disabilities regardless of risk.[9] This does not mean, however, that the ADA provides no supervision of the decisions made by insurers. For reasons discussed in this Note, the ADA has a proper role in protecting the disabled from unfair insurance policy decisions that violate its mission. Courts must supervise how insurance companies make their decisions to ensure that objective actuarial science, rather than animus against the disabled, motivates policy decisions. Thus, the ADA demands that courts mind the gap between unfair discrimination against disabled persons and appropriate distinctions between classes of risk.[10]

In what may prove to be a disturbing trend, insurance companies can exclude a disability, classify additional medical care that is tangentially related to the disability as care for the excluded disability, and then deny reimbursement.[11] For example, an insurance company legally might exclude coverage for Alzheimer disease, but cover bone fractures. If an Alzheimer's patient becomes disoriented and breaks her hip after falling down a flight of stairs, should her insurance company be allowed to deny treatment for her painful hip fracture under the premise that the injury is a result of her Alzheimer disease?

Despite this pressing question, the concept of determining where a medical condition begins and ends, which directly implicates access to insurance, has received scant legal attention until recently. On June 2, 1999, however, the Seventh Circuit Court of Appeals announced in *Doe v. Mutual of Omaha* an opinion that could radically alter the scope of the ADA. Upholding coverage caps for care related to Human Immunodeficiency Virus (HIV), the court concluded that the ADA requires only minimal supervision of insurance policies.[12] It applied such a broad definition of HIV that a wide range of conditions could

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[9] *See infra* note 57.

[10] As Mary Crossley has noted, our society must address difficult questions involving the rights of the disabled, society's interest in protecting and obligation to protect those with disabilities, and community standards of how scarce medical resources are to be distributed. *See* Mary Crossley, *Medical Futility and Disability Discrimination*, 81 IOWA L. REV. 179, 181 (1995).

[11] *See, e.g., Mutual of Omaha*, 179 F.3d at 565 (Evans, J., dissenting) (stating that Mutual of Omaha's policy is akin to a camera store that "lets disabled customers in the door, but then refuses to sell them anything but inferior cameras.").

[12] *See id.* at 564–65.

be categorized as HIV-related, and therefore potentially exempted from reimbursement.

Insurance companies in the Seventh Circuit now have wide leeway to organize coverage to exclude many conditions. Should the Seventh Circuit's approach be followed in other circuits, judicial scrutiny of insurance policies will be minimal. Consequently, health insurance coverage available to the disabled could be curtailed significantly as these loose constructions of the definitions of disease and disability become so broad that even conditions that bear only a tenuous connection to the excluded disability will be denied treatment. This is the "condition dilemma"—the unresolved question of how a disability's medical and legal boundaries should be drawn under the ADA. To resolve the dilemma, courts must provide guidelines to indicate when a disabled person's medical care can fairly and accurately be described as treatment for the disability.

This Note traces the recent developments in ADA jurisprudence that have led to the condition dilemma and suggests a possible course for the future. Part I reviews the judicial system's attempts to demarcate the protections granted by the ADA. Part II elaborates on the condition dilemma and focuses on an analysis of *Mutual of Omaha*. Part III offers an alternative methodology, the "condition-extension test," to the Seventh Circuit's analysis and approach.

I. LEGAL BACKGROUND

Although viewed as a major victory for the disabled, the ADA's track record in protecting the interests of the disabled is inconsistent.[13] Rare efforts by the courts to take an expansive view of the ADA have been met with fears that the ADA will cripple business[14] and extend beyond Congress's original intent.[15]

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[13] *See* R. Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 C.R.-C.L. L. REV. 99, 108 ("Defendants prevailed in 448 of 475 [ADA] cases (94%) at the trial court level and in 376 of 448 instances (84%) in which plaintiffs appealed these adverse judgments."). *See also* David Orentlicher, *Rationing and the Americans with Disabilities Act*, 271 JAMA 308, 308 (noting with surprise the federal government's reliance on the ADA in rejecting Oregon's plan to ration medical care, and stating that "[w]hen limitations in health care coverage have been challenged under other laws protecting the disabled, courts have not been sympathetic").

[14] *See, e.g.*, Ford v. Schering-Plough Corp., 145 F.3d 601, 608 (3d Cir. 1998).

[15] *See, e.g.*, Sutton v. United Airlines, 527 U.S. 471, 119 S. Ct. 2139, 2147 (finding

Consequently, the ADA remains a modest tool to protect the disabled.

An expansionist understanding of what constitutes a disability would at first glance seem to favor the disabled. While an expansionist list of court recognized disabilities might afford more people legal recourse to the ADA, however, a broad definition of what conditions fall within the realm of a recognized disability actually could leave more people uninsured. If an insurance company can refuse to cover a disability, and if many different conditions are held to be offshoots and symptoms of that disability, then less insurance coverage will be available.

To understand this complexity, it is important to understand the status of ADA jurisprudence. The ADA is divided into five titles. This Note focuses on Titles I and III.[16] Title I governs the relationship between employer and employee, and covers instances in which insurance is provided to employees by the employer. Title III deals with public accommodations and is thought by some courts to govern the relationship between insured and insurer.[17]

A. *Title I*

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment . . . .
>
> [T]he term "discriminate" includes . . . participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes . . . an organi-

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that the ADA's reference to 43,000,000 Americans suffering from disabilities as strong evidence of congressional intent to limit the scope of the ADA and prevent it from becoming all-inclusive).

[16] Title II, 42 U.S.C. § 12131 (1994), governs public entities; Title IV, 47 U.S.C. § 225 (1994), governs telecommunications; Title V, 42 U.S.C. § 12181 (1994), deals with miscellaneous issues.

[17] See *infra* Part I.B for a discussion of Title III.

> zation providing fringe benefits to an employee of the covered entity . . . .)[18]

Courts have recognized that a "fringe benefit" of employment includes insurance benefits administered by the employer, such as disability, life, and health insurance.[19] To bring a Title I suit alleging discrimination in the administration of such benefits, a plaintiff must first demonstrate that she is disabled[20] and then show that she "with or without reasonable accommodation can perform the essential functions" of the employment position.[21] The employer then must make reasonable accommodations for the employee, or show that making such accommodations would pose an undue hardship.[22] Thus, to challenge an insurance policy administered by an employer, an employee must document that she is a qualified individual with a disability. Once this standing has been established, a court can evaluate whether the insurer constructs or administers its policy in a discriminatory fashion.

Courts have split on the question of whether a plaintiff has a Title I claim if she had a controllable disability (i.e., one that did not prevent her from performing her job responsibilities) when hired but later became totally disabled and unable to work;[23] for

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[18] 42 U.S.C.A. § 12112(a)–(b) (1994).

[19] *See, e.g.*, Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104, 1107 (9th Cir. 2000); Equal Employment Opportunity Comm'n v. Staten Island Sav. Bank, Nos. 99-6011, 99-6035, 2000 WL 297510, *5 (2d Cir. Mar 23, 2000).

[20] *See* 42 U.S.C. § 12102 (1994). The ADA includes three definitions of disability. One must either (1) have a mental or physical condition that substantially limits a major life activity, (2) have a record of such a medical or physical condition, or (3) be perceived as having such a physical or mental condition. *See id.* For a detailed discussion of these definitions, especially the difficulties inherent in documenting the perception of disability, see Peter David Blanck & Mollie Weighner Marti, *Attitudes, Behavior and the Employment Provisions of the Americans with Disabilities Act*, 42 VILL. L. REV. 345 (1997).

[21] *See* 42 U.S.C. § 12111(8) (1994). *See also* Philip G. Peters, Jr., *When Physicians Balk at Futile Care: Implications of the Disability Rights Laws*, 91 NW. U. L. REV. 798, 808 (1997).

[22] *See* 42 U.S.C.A. § 12111(9) (1994). The ADA contains guidance as to the extent of reasonable accommodations. The text reads:

> The term "reasonable accommodation" may include—(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

Id.

[23] As commentators have noted, this is especially problematic for people with mental disabilities. *See, e.g.*, Nicole Martinson, *Inequality Between Disabilities: The Different Treatment of Mental Versus Physical Disabilities in Long-Term Disability Benefit Plans*, 50 BAYLOR L. REV. 361 (1998).

example, an individual who began her job with treatable depression can no longer work after a year because the depression became much more severe.

Adopting a restricted reading, some courts have reasoned that once an individual becomes totally disabled, she is no longer a "qualified individual with a disability" who can perform the "essential functions" of her job. Therefore, her situation lies outside the purview of the ADA.[24] This approach leaves employees who become totally disabled after starting work with no legal remedy under Title I to challenge the terms and administration of their insurance policies.

In contrast, other courts hold that the ability of the employee to meet employment obligations when hired establishes her as a "qualified" individual, and any subsequent inability to work is precisely the hardship that the ADA was enacted to cover.[25] These courts note that the restrictive view of the ADA severely curtails the ability of disabled employees to bring suits under Title I.[26]

The analysis of *Mutual of Omaha* will significantly impact a disabled person's access to proper health insurance under either

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[24] Parker v. Metropolitan Life Ins. Co., 121 F.3d 1006, 1008 (6th Cir. 1997) (holding that employees who become totally disabled after starting work are not covered by the ADA). *See also* Gonzales v. Garner Food Services, Inc., 89 F.3d 1523, 1528 (11th Cir. 1996); Equal Employment Opportunity Comm'n v. CNA Ins. Co., 96 F.3d 1039, 1044 (7th Cir. 1996); Weyer v. Twentieth Century Fox Corp., 198 F.3d 1104, 1108–09 (9th Cir. 2000).

[25] *See, e.g.*, Castellano v. City of N.Y., 142 F.3d 58, 68 (2d Cir. 1998) (holding that a plaintiff suing under the ADA need only have been qualified to work when hired); Conners v. Maine Med. Ctr., 42 F. Supp. 2d 34, 45 (D. Me. 1999); Lewis v. Aetna Life Ins. Co., 982 F. Supp. 1158, 1162 (E.D. Va. 1997); Ford v. Schering-Plough Corp., 145 F.3d 601, 608 (3d Cir. 1998) (stating that "Title I of the ADA does permit disabled individuals to sue their former employers regarding their disability benefits").

[26] *See, e.g.*, *Lewis*, 982 F. Supp. at 1162–63.

> Under [the restrictive] interpretation, [plaintiff] would lack standing to sue under Title I until he had claimed benefits under the disability policy. In order to obtain benefits, however, [plaintiff] would be required to show that he was totally disabled and unable to perform the functions required by his position. By doing so, [plaintiff] would render himself unable to maintain suit as a "qualified individual with a disability" pursuant to Title I. Such an interpretation would effectively prevent any plaintiff from challenging an employer's provision of disability benefits as discriminatory under Title I of the ADA. So enormous a gap in the protection afforded by Title I would be clearly at odds with the expressed purpose of the ADA.

Id. See also Conners, 42 F. Supp. 2d at 44.

> Such a construction of the statute would result in the situation that just when an employee becomes eligible for disability benefits offered by his or her employer, he or she is at the same moment ineligible to assert his or her right to receive those benefits free of discrimination based on his or her disability.

Id.

interpretation. A totally disabled individual living in a jurisdiction using the more restrictive Title I standard will find that under the *Mutual of Omaha* approach, once she loses her Title I claim, she has no recourse to challenge her insurance policy. Alternatively, if an insurance policy construes the boundaries of her disability broadly, as under *Mutual of Omaha*, then the disabled person may find that much of her medical care costs cannot be reimbursed. In jurisdictions allowing a totally disabled individual's access to a Title I claim, *Mutual of Omaha* may still wield influence over the court. The defendant insurance company will have a decided advantage if the court adopts the *Mutual of Omaha* position that medical care for a condition can rightfully be excluded if treatment for that condition is characterized as treatment for the disability. Thus, the Seventh Circuit's analysis of Title III may significantly inform and shape the scope of Title I.

B. *Title III: Does the ADA Regulate the Content of Insurance Policies for the Disabled?*

> No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.[27]

As with Title I, courts differ over the intent and coverage of Title III, which prohibits discrimination in places of public accommodations and requires "reasonable accommodation" of people with disabilities.[28] Basic Title III protection pertains to physical egress and ingress into public places and is widely recognized for requiring businesses to be handicapped-accessible. Title III also may cover insurance policies purchased from, or administered by, an insurance company.[29] For individuals who

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[27] 42 U.S.C.A. § 12182(a) (1994).

[28] 42 U.S.C.A. § 12182(b)(2)(A) (1994). The ADA prohibits three types of discrimination in public accommodations. Public accommodations cannot: 1) use criteria in order to "screen out" the disabled; 2) refuse to accommodate the disabled, unless doing so would significantly hamper or alter the service provided; and 3) refuse to provide auxiliary aids for the disabled. *See id.*

[29] Insurance companies are explicitly mentioned in the statute: "The following private

lack recourse to Title I, a suit under Title III directly against the insurance company that administers the insurance policy may be the last resort.[30] Such situations compel courts to decide if Title III merely governs physical access to an insurance company's premises, or if Title III also governs the content of the insurance policy.

Courts have split on this question and have adopted three approaches. First, some courts opt for a restricted interpretation, arguing that Title III only refers to access to physical structures.[31] Under this model, if a plaintiff does not face discrimination in accessing the physical premises of the insurance company (as a place of public accommodation), the insurer has not violated the ADA.

As a second approach, some courts rule that the ADA covers more than mere physical access to a place.[32] Rather, ability to contract with insurance companies in receiving a policy represents part of public accommodations doctrine.[33] Courts adopting this model contend that, should the more restrictive reading be adopted, an absurd result would follow: phone solicitations that

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entities are considered public accommodations for purposes of this subchapter, if the operations of such affect commerce . . . insurance office." 42 U.S.C. §12181(7)(F) (1994).

[30] Unfortunately for disabled plaintiffs, circuits in which Title I has been held to be inaccessible once the plaintiff is totally disabled are also the circuits in which a more conservative Title III analysis has been adopted. *See, e.g.*, Parker v. Metropolitan Life Ins. Co., 121 F.3d 1006, 1014–15 (6th Cir. 1997). Thus, the Title III analysis is most relevant to individuals who buy their insurance directly as opposed to having it provided by the employer and also to individuals living in circuits that preserve access to Title I, even after complete disability.

[31] *See, e.g.*, Ford v. Schering-Plough, 145 F.3d 601, 612–13 (3d Cir. 1998); *Parker*, 121 F.3d at 1011; Doe v. Mutual of Omaha, 179 F.3d 557, 559–60 (7th Cir. 1999). When physical access is the issue, plaintiffs suing via Title I will not have a claim. The courts reasoned that the employee does not physically access the insurance company so Title III does not apply. *See Parker*, 121 F.3d at 1011. Further, since the employer purchased the insurance plan on behalf of the employee, it was the employer who interacted with the insurance company. The employee could not have purchased the plan directly; therefore, the employee cannot, by definition, access the insurer's place of business. For an in-depth discussion of why the ADA only covers physical access to insurance offices, see Luke A. Sobota, *Does Title III of the Americans with Disability Act Regulate Insurance?*, 66 U. CHI. L. REV. 243 (1999).

[32] *See, e.g.*, Kraul v. Methodist Med. Ctr., 95 F.3d 674, 677–78 (8th Cir. 1996); Carparts Distribution Ctr., Inc. v. Automotive Wholesaler's Ass'n of New England, Inc., 37 F.3d 7, 19 (1st Cir. 1994); Conners v. Maine Med. Ctr., 42 F. Supp. 2d 34, 46 (D. Me. 1999); Kotev v. First Colony Life Ins. Co., 927 F. Supp. 1316, 1321 (C.D. Cal. 1996) (holding that "the plain language of Title III covers [plaintiff's] claim [to coverage for his HIV-infected wife] because its scope is not limited to the mere denial of physical access to places of public accommodation").

[33] *See, e.g., Conners*, 42 F. Supp. 2d at 46 (holding that the insurance plan administrator constitutes the place of public accommodation).

refuse to sell to the disabled would be legal, whereas similar refusals of sales on the *premises* of the business would not.[34]

This approach does not require that an insurance policy cover every disability, however. Under this interpretation, an insurer does not violate the ADA when an insurance policy becomes less valuable to an insured because that insured's specific disability is not covered or only has limited coverage. For example, such courts argue, Title III requires a book store to sell a blind person books but does not require the store to stock Braille books.[35] This middle approach has been expressly adopted in at least three circuits[36] and has not been expressly rejected in two.[37] Courts adopting this standard have disagreed, however, on the appropriate level of scrutiny.[38]

A third alternative approach, and the most expansive, suggests that the ADA governs the content of insurance policies.[39] No circuit, however, has yet adopted the stance that Title III requires an insurance company to cover every disability. The debate over whether Title III controls the content of insurance policies is essentially a debate about drawing the line between discriminating against a disabled person, and making appropriate choices based on the presence of a disability.

Authorities arguing against extensive scrutiny of insurance coverage of disabilities contend that the ADA merely prohibits providing coverage for a condition, such as a broken arm, to the

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[34] *See, e.g., Carparts*, 37 F.3d at 19.

[35] *See, e.g.,* Doe v. Mutual of Omaha, 179 F.3d 557 (7th Cir. 1999).

[36] *See, e.g., Carparts*, 37 F.3d at 7; Pallozzi v. Allstate Life Ins. Co., 198 F.3d 28 (2d Cir. 1999), *rev'd* No. 98-7552, 2000 WL 122129 (2d Cir. Jan. 13, 2000); *Mutual of Omaha*, 179 F.3d at 557.

[37] *See, e.g.,* Ford v. Schering-Plough, 145 F.3d 601 (3d Cir. 1998); Parker v. Metropolitan Life Ins. Co., 121 F.3d 1006 (6th Cir. 1997).

[38] *See, e.g., Pallozzi*, 198 F.3d at 33 (discussing the circuit split).

[39] *See, e.g., Carparts*, 37 F.3d at 20 (raising the issue in dicta but refusing to decide); Chabner v. United of Omaha Life Ins. Co., 994 F. Supp. 1185, 1193 (N.D. Cal. 1998) (stating that insurance underwriting is covered by Title III of the ADA); Cloutier v. Prudential Ins. Co. of Am., 964 F. Supp. 299, 302 (N.D. Cal. 1997); Doukas v. Metropolitan Life Ins. Co., 950 F. Supp. 422, 425–26 (N.H. 1996) (finding that "under the plain language of Title III, the Act would extend to the substance or contents of an insurance policy where, as here, the plaintiff has been denied access to insurance because of his or her disability"); Anderson v. Gus Mayer Boston Store of Del., 924 F. Supp. 763, 780 (E.D. Tex. 1996) (stating that the complete denial of coverage, with no explanation of risk classifications, is prohibited by Title III); Lewis v. Aetna Life Ins. Co., 982 F. Supp. 1158, 1168 (E.D. Va. 1997) ("Both a decision to deny coverage on the basis of mental disability and to provide inferior coverage for mental disabilities target the mentally disabled for inferior treatment."). *But see Pallozzi* 198 F.3d at 34–35 (announcing a more cautious approach, yet holding that the ADA does regulate underwriting practices in specific circumstances).

non-disabled but not to the disabled.[40] This more restrictive view has been described as the "equal benefits requirement" under which "every person has access to the same package of benefits, [but] not that all individuals receive treatment tailored to their needs."[41]

Proponents supporting a high level of scrutiny of insurance policies state that in order for the Title III "privileges" of public accommodation to be equal between the non-disabled and the disabled, the disabled must be able to receive coverage for their disabilities.[42] If a disability is not covered, the disabled receive a less valuable product than the non-disabled and hence are denied the privilege of adequate insurance that the non-disabled receive.

Three primary reasons combine to support the interpretation that Title III requires at least some supervision of the content of insurance policies, without requiring that insurance policies cover every disability. First, Title III's safe harbor provision (§ 501(c))[43] supports this contention by essentially prohibiting insurance plans from unfairly underwriting risks.[44] Insurance companies can continue their traditional practice of underwriting that denies coverage for certain conditions so long as the exclusion is not inconsistent with state insurance law[45] and does not commit "subterfuge."[46] Unless insurance companies design risk-

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[40] *See, e.g., Conners*, 42 F. Supp. 2d at 53–54 ("[A] benefits plan that distinguishes between disabilities is conceptually different from a benefits plan that distinguishes between the disabled and the non-disabled . . . if all individuals are denied the same benefits and no differential treatment between the disabled and nondisabled occurs in the initial provision of benefits, no discrimination under the ADA has taken place.").

[41] Orentlicher, *Rationing and the ADA*, *supra* note 13, at 309. For a discussion of why future health care plans might elicit a different response from the Supreme Court, see *id.* at 309–10.

[42] *See, e.g.*, Karen M. Volkman, *The Limits of Coverage: Do Insurance Policies Obtained Through an Employer and Administered by Insurance Companies Fall within the Scope of Title III of the Americans with Disabilities Act?*, 43 ST. LOUIS U. L.J. 249 (1999); *Pallozzi*, 198 F.2d at 31 (stating that insurance policies are the "most conspicuous" "good or service" provided by an insurance office).

[43] 42 U.S.C. § 12201(c) (1994). See *infra* Part II.A for a more detailed discussion of the safe harbor provision. *See infra* note 60 for the text of § 501(c).

[44] *See id.*

[45] State insurance regulations generally require that coverage decisions be based on actuarial principles. *See, e.g.*, 215 ILL. COMP. STAT. ANN. 5/351B-4(j) (West 1993); 215 ILL. COMP. STAT. ANN. 5/364 (West 1993); N.Y. INS. LAW § 4224(b) (McKinney 1999); FLA. STAT. ch. 626.9541. *See also*, Pallozzi v. Allstate Ins. Co., 198 F.3d 28, 32 (2d Cir. 1999) ("If the ADA were not intended to reach insurance underwriting under any circumstances, there would be no need for a safe harbor provision exempting underwriting practices that are consistent with state law . . . . Considering the net effect of these provisions, it seems clear to us that Title III was intended by Congress to apply to insurance underwriting.").

[46] *See, e.g.*, First Colony Life Ins. Co., 927 F. Supp. 1316, 1322 (C.D. Cal. 1996)

evaluation principles to torpedo the spirit and purpose of the ADA, they can continue to classify risks out of their coverage, even if such classifications have a negative impact on the disabled.[47] While courts generally defer to insurers' actuarial calculations, some courts have expressed guarded reservations about the methods of these calculations.[48] Thus, § 501(c) represents Congress's intent to allow insurance companies to continue traditional business practices only so long as those practices are justifiable.[49]

This judicial oversight into insurance policies does not mean that insurance companies must cover all disabilities, however. The United States Supreme Court reached this conclusion through an interpretation of the Rehabilitation Act[50] in *Alexander v. Choate*.[51] The Court upheld a Tennessee Medicaid policy that limited reimbursement for in-patient care to fourteen days per

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("[Defendant] has not explained why insurers would need this 'safe harbor' provision under Title III if insurers could never be liable under Title III for conduct such as the discriminatory denial of insurance coverage.").

[47] The EEOC has issued guidelines to aid courts in isolating instances of subterfuge. EEOC Interim Guidance on Application of ADA to Health Insurance, Daily Lab. Rep. (BNA) No. 109, at E-3 (June 9, 1993). The Supreme Court has described subterfuge as a "scheme" in the Age Discrimination in Employment Act (ADEA) context. *See* Public Employees Retirement Sys. of Ohio v. Betts, 492 U.S. 158, 171 (1989). It is not clear, however, that the Supreme Court intended its definition of subterfuge to apply to health insurance plans. *See* Maxwell J. Mehlman et al., *When Do Health Care Decisions Discriminate Against Persons With Disabilities?*, 22 J. HEALTH POL., POL'Y & L. 1385, 1405 (1997).

[48] *See, e.g.*, *Pallozzi*, 198 F.3d at 35; Carparts Distribution Ctr., Inc. v. Automotive Wholesaler's Ass'n of New England, Inc., 37 F.3d 12, 20 (1st Cir. 1994) (contemplating in dicta that the ADA might govern the content of insurance policies).

[49] *See, e.g.*, H.R. REP. No. 101-596, at 259 (1990), *reprinted in* 1990 U.S.C.C.A.N. 565.

> The Committee added § 501(c) to make it clear that this legislation will not disrupt the current nature of insurance underwriting or the current regulatory structure for self-insured employers or of the insurance industry in sales, underwriting, pricing, administrative and other services, claims, and similar insurance related activities based on classification of risks as regulated by the States. However, the decision to include this section may not be used to evade the protections [of the ADA].

Id.

[50] Section 504 of the Rehabilitation Act, 29 U.S.C. 794 (1994), prohibits discrimination against the disabled by entities receiving federal assistance and is considered the predecessor to, and model for, the ADA. As such, courts hearing cases under the ADA are likely to consider precedential any cases decided based on § 504. *See* Mary A. Crossley, *Of Diagnoses and Discrimination: Discriminatory Nontreatment of Infants with HIV Infection*, 93 COLUM. L. REV. 1581, 1617 (stating that "the ADA can and should be construed as prohibiting discriminatory nontreatment based on disability, in much the same way that section 504 can be construed as prohibiting nontreatment based on handicap.").

[51] 469 U.S. 287 (1985).

year.[52] Plaintiffs argued that such a limitation discriminated against people with disabilities because they would, as a group, require more hospitalization than their non-disabled counterparts, and therefore they received a less valuable product that would provide them with fewer hospital privileges.[53] The Supreme Court, however, ruled that because non-disabled and disabled enrollees possessed the same policy, no discrimination existed.[54] Although the Supreme Court has not yet ruled on the similar issues raised by the ADA, the commonality of purpose and statutory language between the Rehabilitation Act and the ADA combined with the precedential deference given to Rehabilitation Act rulings for current ADA cases suggests that the court would rule similarly concerning the ADA.[55]

Finally, if Congress intended such a sweeping change of the insurance industry and of health care delivery by requiring coverage of every disability regardless of risk, then such an intention would be explicit in the Act itself.[56] While deducing the motivation of Congress is not simple, the complete absence in the Act of any unambiguous language concerning universal insurance coverage of disabilities makes such a reading of the ADA unlikely.

II. Defining Disability: The Condition Dilemma

Despite the incongruent court conclusions on Title III, courts generally agree that the ADA does not require insurance policies to cover every single disability.[57] With this understanding, courts must now decide two subsequent questions:

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[52] *Id.* at 289.

[53] *See id.*

[54] *See id.* at 302. Circuit precedent under Title II also suggests that the ADA does not require that insurance plans be equally valuable to different groups. *See, e.g.*, Rodriguez v. City of N.Y., 197 F.3d 611, 619 (2d Cir. 1999) (holding that the ADA only requires that once personal-care services are offered to some Medicaid recipients they be offered to all, even if some recipients need extra "safety monitoring" to take advantage of these services).

[55] For a discussion of how future health care plans might elicit a different response from the Supreme Court, see Orentlicher, *Rationing and the ADA*, *supra* note 13, at 309.

[56] *See* Ford v. Schering-Plough, 145 F.3d 601, 608 (3d Cir. 1998).

[57] *See, e.g.*, Parker v. Metropolitan Life Ins., Co., 121 F.3d 1006, 1012 (6th Cir. 1997); *Carparts*, 37 F.3d at 20; Doukas v. Metropolitan Life Ins. Co., 950 F. Supp. 422, 428 (N.H. 1996).

1. Even if the ADA allows insurance companies to exclude disabilities, does the Title III § 501(c) safe harbor provision mean that courts can supervise policies to ensure that they do not discriminate unjustly against the disabled?

2. If so, how can courts determine that insurance companies fairly decide what care is related to the person's disability and what care is unrelated?

Answering these questions leads to the heart of the condition dilemma. Since courts interpret the ADA to permit insurance companies to exclude disabilities from coverage, mechanisms must be developed to police the boundary between lawful and unlawful exclusions. One parameter that courts will have to monitor is the way an insurance company defines a disabled person's condition. Too broad a definition results in unlawful discrimination.

A. *Section 501(c)*

As the previous discussion on Title III illustrates, those courts holding that the ADA requires them to supervise insurers' actuarial procedures[58] and those holding that the ADA does not require such supervision[59] both find support in the existence of the safe harbor provision of § 501(c).[60] In *Mutual of Omaha*, the

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[58] *See, e.g.*, Kotev v. First Colony Life Ins. Co., 927 F. Supp. 1316, 1322 (C.D. Cal. 1996); *Pallozzi*, 198 F.3d at 31–32.

[59] *See, e.g.*, Ford v. Schering-Plough, 145 F.3d 601, 611 (3d Cir. 1998); Doe v. Mutual of Omaha, 179 F.3d 557, 562 (7th Cir. 1999).

[60] 42 U.S.C. § 12201(c) (1994). Section 501(c) reads:

> [Titles] I through III . . . and Title IV of this Act shall not be construed to prohibit or restrict—
>
> (1) an insurer, hospital or medical service company, health maintenance organization, or any agent, or entity that administers benefit plans, or similar organizations from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or
>
> (2) a person or organization covered by this chapter from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or
>
> (3) a person or organization covered by this chapter from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that is not subject to State laws that regulate insurance.
>
> Paragraphs (1), (2), and (3) shall not be used as a subterfuge to evade the purposes of [Titles] I and III of this [Act].

Seventh Circuit accepted the logic of the latter approach. It stated that § 501(c) is a "backstop" for the insurance industry to reinforce the fact that Title III "regulates only access and not content."[61] Actions constituting subterfuge under the ADA, prohibited by § 501(c), are limited to refusing to sell insurance to a disabled person or offering a policy designed to deter the disabled person from purchasing the policy.[62] Further, the Seventh Circuit contends, Congress could not have intended to involve the federal judiciary in supervising the content of all retail products sold through places of public accommodation since this would greatly expand the scope of the ADA and heavily burden federal judges.[63]

Following from this premise, if the ADA was not enacted specifically to regulate insurance, then applying the ADA prospectively to insurance violates the McCarren-Ferguson Act.[64] This Act prohibits using a federal statute to interfere with state insurance law unless the federal statute was specifically enacted to regulate insurance.[65] Thus, in determining when an insurance company is discriminating against a disabled person, the Seventh Circuit answers that targeting a disabled person because of that disability is unlawful, but taking actions that significantly harm the disabled for non-malicious reasons is not unlawful.

If federal courts adopt this approach and refuse to supervise insurers, then insurers will have an incentive to raise premiums for the disabled or to place unrealistic caps on coverage for disabilities to the extent that disabled persons—because they are disabled—will not be able to secure insurance. As long as a court does not detect a "scheme" to subvert the ADA, the insur-

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[61] *Mutual of Omaha*, 179 F.3d at 562.

[62] *See id.* It is interesting that the Seventh Circuit considers a refusal to sell an insurance policy entirely as discrimination. Given its argument that courts should not inquire into the actuarial principles that underpin such decisions, it is not clear how the Seventh Circuit would evaluate an instance in which the significantly higher risk of medical care reimbursement costs made it unprofitable to insure a disabled person. Further, it is unclear how the Seventh Circuit would evaluate a plan that, given its raised premiums for disabled persons, essentially placed insurance coverage out of their financial reach.

[63] *See id.* at 560.

[64] 15 U.S.C. § 1012(b) (1994).

[65] A federal act cannot "invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance." 15 U.S.C. § 1012(b) (1994). The McCarren-Ferguson Act is understood "to apply not only to federal statutes that 'invalidate, impair, or supersede' state laws, but also to federal statutes that would 'interfere with a State's administrative regimen.'" Pallozzi v. Allstate Life Ins. Co., 198 F.3d 28, 33 (2d Cir. 1999) (quoting Humana, Inc. v. Forsyth, 525 U.S. 299, 309–10 (1999)).

ance policy will not be successfully challenged, and disabled enrollees will have little ammunition to battle discrimination.[66]

Title III § 501(c) suggests an alternative approach to *Mutual of Omaha*'s result. Insurers are a business and as such must make business choices, including assessments of risk. Section 501(c) recognizes that insurers must be allowed to measure bona fide risks using actuarial science. Risk classification allows insurance companies to guarantee that they will have sufficient funds to cover claims and to limit the degree to which healthy people subsidize the care of less healthy people.[67] However, § 501(c) places limits on the range of choices available to insurers.[68] Section 501(c) allows insurers to underwrite risks provided that the methodology used to arrive at calculations of risk are legitimate, and not designed to subvert the mission of the ADA. If insurance companies use sound methods and objectively weigh risks and costs, then the ADA will not interfere with their policy making because discrimination against disabled persons does not motivate the insurers' decisions.[69] However, if the insurers' methodology discourages the disabled from seeking insurance, or unfairly limits coverage for disabled persons, then the policy discriminates against disabled persons, and is a subterfuge of the ADA. Thus, § 501(c) qualifies discrimination against the disabled in insurance policies.

Legislative history also suggests that the ADA requires courts to supervise the actuarial soundness of insurance plans. Several

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[66] *See supra* note 47.

[67] *See* Orentlicher, *Rationing and the ADA*, *supra* note 13, at 310; *see also* Karen A. Clifford & Russel P. Iuculano, *AIDS and Insurance: The Rationale for AIDS-Related Testing*, 100 HARV. L. REV. 1806, 1807–09 (1987) (discussing methods of insurance risk underwriting).

[68] Contrary to the Seventh Circuit's contention that a broad reading of the safe harbor provision would require Title III to be read as regulating "the content not only of insurance policies but also of all other products and services, since [Title III] is not limited to insurance," *Mutual of Omaha*, 179 F.3d at 562, the safe harbor provision itself refers only to organizations that offer "benefit plans" or are involved in "underwriting risks, classifying risks, or administering such risks." 42 U.S.C.A. §12201(c) (1994). Therefore, the safe harbor provision can be read to require court supervision of insurance plans without embroiling the federal judiciary in a wholesale supervision of all retail goods.

[69] *See* Chabner v. United of Omaha Life Ins. Co., 994 F. Supp. 1185, 1195 (N.D. Cal. 1998) ("While sound actuarial principles may include elements of discretion and judgement based on individual circumstances, they must also include reference to some sort of actuarial date either in the form of actuarial tables or clinical studies" documenting the increased risk, in order not to violate the ADA.). *See also* Lewis v. Aetna Life Ins. Co., 982 F. Supp. 1158, 1169 (E.D. Va. 1997) (holding that the ADA does not require that every disability be covered, but that "sound actuarial principles" underpin decisions concerning the scope of coverage).

courts have cited extensively from the legislative record in support of their conclusion that the ADA does require some supervision of insurance policies.[70] The legislative history is worth quoting at length. As stated in the House of Representatives Report:

> Under the [ADA], a person with a disability cannot be denied insurance or be subject to different terms and conditions of insurance based on disability alone, if the disability does not impose increased risks. Moreover, while a plan which limits certain kinds of coverage based on classification of risk would be allowed under this section, the plan may not refuse to insure or limit the amount, extent, or kind of coverage available . . . solely because of physical or mental impairment, except where the refusal, limitation, or rate differential is *based on sound actuarial principles* or is related to actual or reasonably anticipated experience.[71]

The House Report continues:

> Specifically, [the safe harbor provision] makes it clear that insurers may continue to sell and to underwrite individuals applying for life, health, or other insurance on an individually underwritten basis, or to service such products, so long as the standards used are based on sound actuarial data and not on speculation. . . .[72]

The Senate Report summarized the safe harbor provision as follows:

> [The safe harbor provision] is intended to afford to insurers and employers the same opportunities they would enjoy in the absence of this legislation to design and administer insurance products and benefit plans in a manner that is consistent with basic principles of insurance risk classification. With such a clarification, this legislation could arguably find violative of its provisions any action taken by an insurer or employer which treats disabled persons differently under an insurance or benefit plan because they represent an increased hazard of death or illness.[73]

Thus, Congress intended the safe harbor provision to act as a check on the discretion of insurance companies to construct policies that depart from actuarial principles. Since the ADA is "specifically related to the business of insurance" because the

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[70] *See, e.g., Lewis*, 982 F. Supp at 1166.
[71] H.R. REP. No. 101-485 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267.
[72] *Id.*
[73] S. REP. No. 101-116, at 84 (1990).

safe harbor provision targets insurance policies directly, the McCarren-Ferguson Act preclusion[74] does not apply.[75]

If this approach, guided by § 501(c), is applied, courts will begin to supervise the actuarial methods of insurance companies in order to determine whether a request for reimbursement involves an excluded or capped disability, or conversely, an unrelated condition. While courts might worry that this will embroil the federal judiciary in complicated fact finding pursuits, this need not be so. If insurers know that plaintiffs can challenge their actuarial policies, insurers will be more careful to prevent such lawsuits by relying on consistent and fair actuarial methods.

Such an approach balances the legitimate needs of the insurance industry with the legal rights of the disabled. In some ways, this question of "relatedness" is not new. Courts have been asked in other contexts to decide when consideration of an individual's disability is appropriate and how it should be factored.[76]

B. University Hospital: *Relatedness in the Medical Treatment Context*

Cases involving severely disabled newborns epitomize the condition dilemma.[77] Survey evidence suggests that physicians are less likely to pursue aggressive life-sustaining treatment for newborns who test HIV-positive.[78] Commentators and physicians have begun to address the question of "how medical decisionmakers may legitimately take into account HIV infection or other disabilities in making treatment decisions and recommendations."[79] This question, however, is not limited to HIV or to children. Physicians need to navigate the delicate divide between avoiding unfair discrimination against disabled patients on the

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[74] *See supra* text accompanying notes 64–65.

[75] *See* Pallozzi v. Allstate Life Ins. Co., 198 F.3d 28, 33–34 (2d Cir. 1999).

[76] *See, e.g.*, Doe v. N.Y. Univ., 666 F.2d 761, 775 (2d Cir. 1981) (discussing how an applicant's handicap should be considered in determining qualification for medical school admissions).

[77] *See, e.g.*, United States v. University Hosp., State Univ. of N.Y. at Stony Brook, 729 F.2d 144 (2d Cir. 1984).

[78] *See* Crossley, *Of Diagnoses and Discrimination, supra note* 50, at 1582–87, 1605–06 (reviewing findings of such studies and noting how physicians are looking for guidance in determining when they can withhold care).

[79] *Id.* at 1589.

one hand and exercising their medical judgment by taking into account the specific medical conditions—that is, the disabilities—that might hamper the efficacy of the denied treatment on the other.

Courts have developed a relatively unified approach to deal with this difficult issue. In *United States v. University Hospital, State University of New York at Stony Brook*,[80] the Second Circuit heard a petition by the United States to open the sealed medical records of baby Jane Doe.[81] Doe was born severely disabled with multiple debilitating handicaps.[82] After hearing her prognosis and learning that their daughter would be severely retarded, Doe's parents refused aggressive treatment for Doe's spina bifida, opting instead for a conservative approach of good nutrition, antibiotics and the dressing of her exposed spinal sac.[83] The Department of Health and Human Services (HHS), charged with monitoring claims of discrimination against disabled newborns, expressed concern that the hospital unlawfully denied medical care to Doe because of her disabilities.[84] HHS requested that University Hospital release Doe's medical records so that HHS could conduct a discrimination investigation under the Rehabilitation Act.[85] University Hospital refused and the litigation ensued.[86]

To determine whether the Rehabilitation Act required University Hospital to turn over the medical records to HHS, the court first needed to determine whether any unlawful discrimination had occurred.[87] The United States argued that Doe's mental retardation qualified as a disability and that a baby who was not retarded would have received the corrective surgery needed to treat spina bifida.[88] The Second Circuit rejected this argument, holding that Doe was not "otherwise qualified" since it was be-

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[80] 729 F.2d 144 (2d Cir. 1984).
[81] *See id.* at 146.
[82] *See id.*
[83] *See id.*
[84] *See id.* at 149.
[85] *See id.*
[86] *See id.*
[87] The parents' decision was not directly covered under the Rehabilitation Act, since that legislation only affects actors receiving federal funds. The only avenue for enforcing the Act in this case was to demonstrate that the Hospital, a recipient of public funds, had an obligation not to let discrimination occur on its premises. *See id.*
[88] *See id.* at 150.

cause of other disabilities that she would need corrective surgery.[89] The court explained:

> Doe establishes that section 504 prohibits discrimination against a handicapped individual only where the individual's handicap is unrelated to, and thus improper to consideration of, the services in question. As [University Hospital] point[s] out, however, where medical treatment is at issue, it is typically the handicap itself that gives rise to, or at least contributes to, the need for services.[90]

Furthermore, the court, wary of embroiling courts in difficult medical fact-finding missions, stated:

> Where the handicapping condition is related to the condition(s) to be treated, it will rarely, if ever, be possible to say with certainty that a particular decision was "discriminatory." . . . [I]t would invariably require lengthy litigation primarily involving expert testimony to determine whether a decision to treat, or not to treat, or to litigate or not to litigate, was based on a "bona fide medical judgement . . . ."[91]

Other courts have followed the Second Circuit's reliance on a relatedness analysis to discern instances of discrimination.[92]

A less frequently adopted interpretation suggests that § 504 of the Rehabilitation Act would apply to some cases in which a handicapped individual was denied medical treatment.[93] Under this rationale, more medical decisions would be subject to court scrutiny. A severely disabled individual who might get minimal

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[89] *See id.* at 156.

[90] *Id.*

[91] *Id.* at 157.

[92] In *Doe v. New York University*, a case dealing with a bi-polar individual who was denied admission to N.Y.U. Medical School, the court stated:

> "[O]therwise qualified handicapped individual." . . refers to a person who is qualified in spite of her handicap and that an institution is not required to disregard the disabilities of a handicapped applicant, provided the handicap is relevant to reasonable qualifications for acceptance . . . but may take an applicant's handicap into consideration, along with all other relevant factors, in determining whether she is qualified for admission.

Doe v. N.Y. Univ., 666 F.2d 761, 775 (2d Cir. 1981). *See also* Johnson by Johnson v. Webb Thompson, 971 F.2d 1487, 1493 (10th Cir. 1992) (adopting reasoning of *University Hospital*). *But see* Bowen v. American Hosp. Ass'n, 476 U.S. 610, 625 (1986) (declining to rule on applicability of the Rehabilitation Act to severely handicapped individuals, instead ruling by plurality that rules that required hospitals to take an active role in making sure that handicapped infants received heroic measures were unconstitutional).

[93] *See, e.g., Bowen*, 476 U.S. at 655 (White, J. dissenting) (disagreeing on grounds that difficulties in applying § 504 and deciding which cases it covers "do not support the categorical conclusion that the section may never be applied to medical decisions about handicapped infants").

benefit from the medical care in question would still be entitled to receive treatment under the Act if a non-disabled patient would receive the care. Although a doctor may believe that the patient's dim prognosis rendered medical intervention of little likely benefit, the doctor's judgment as to the futility of the situation would be irrelevant.[94]

Thus, the threshold question remains unanswered: if the ADA requires doctors—or insurers—to provide care that is available to the non-disabled to the disabled as well, how are providers to determine whether a denial of coverage is discriminatory or is legitimately related to the disability itself?[95] Critics of the federal-level response to the *University Hospital* decision focused on this question. One commentator expressed discomfort with the idea of forcing doctors to perform heroic measures on severely disabled children:

> While it may be logically and morally correct to say that, except for having Down's syndrome, Baby Doe was similarly situated to an infant of normal intelligence with an esophageal blockage and therefore should not have been denied the benefit of treatment, it makes no sense to apply this line of reasoning to an infant whose need for medical treatment is generated by a condition that, by definition, is never present in nondisabled infants. Stated more generally, the argument is that the nondiscrimination principle is logically inapplicable to a disabled patient who seeks medical treatment somehow related to her disability because nondisabled but otherwise similarly situated patients do not exist.[96]

A number of cases have also featured adults suffering from debilitating illnesses that included a complex web of symptoms and conditions.[97] Although the ADA was largely interpreted to demand that treatment available to the non-disabled also be de-

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[94] *See, e.g., id.* at 655 (White, J. dissenting) (stating that an "esophageal obstruction . . . would not be part and parcel of the handicap of a baby suffering from Down's syndrome, and the infant would benefit from and is thus otherwise qualified by having the obstruction removed in spite of the handicap"); Glanz v. Vernick, 750 F. Supp. 39, 45 (D. Mass 1990) (holding that plaintiff adequately stated claim when she was denied treatment for an ear perforation because she had AIDS).

[95] Commentators have noted that the ADA itself does not answer this question. *See, e.g.*, Lawrence O. Gostin, *The Americans with Disabilities Act and the U.S. Health System*, HEALTH AFF., Fall 248, 251 (1992) ("The ADA does not completely clarify the distinction between genuine exercise of clinical judgment and unlawful discrimination.").

[96] Crossley, *Of Diagnoses and Discrimination*, *supra* note 50, at 1645.

[97] *See, e.g.*, Glanz v. Vernick, 756 F. Supp. 632 (D. Mass. 1991) (holding that individual's HIV-positive status was only relevant to ear surgery insofar as infection posed risks to the patient and the physician).

livered to the disabled, it was entirely unclear when disability should medically matter. Commentators have grappled with the question of when certain medical conditions are a legitimate reason for denying organ transplantation[98] and when debilitating illnesses such as cancer would limit the efficacy of traditional treatments for unrelated conditions, such as heart disease.[99] This debate over relatedness directly carries over into the world of insurance. In that field, rather than asking if a doctor must provide care for condition *X* given the presence of disability *Y*, insurance companies are denying coverage for *X*, given the presence of, and limitations on coverage for, *Y*.

C. Doe v. Mutual of Omaha

While cases like *University Hospital* govern the medical community's response to disabled patients under the ADA, the ADA should be read to govern the principles that determine when an insurance company's decision to deny coverage is legally related to the insured's disability. *Mutual of Omaha* represents the Seventh Circuit's attempt to establish the legal difference between legitimately denying treatment and discriminating against a disabled person in violation of the ADA. The Seventh Circuit's novel conclusion defining the boundaries of HIV in this case warrants serious attention due to its potential long-term implications for the disabled and for the role that the ADA will play on the American legal landscape.

In *Mutual of Omaha*, John Doe and Richard Smith (pseudonyms provided by the court) took out health insurance policies from the Mutual of Omaha Insurance Company.[100] Both plaintiffs were HIV-positive.[101] Their policies carried a lifetime limit on coverage of $1,000,000, with the stipulation that should this

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[98] *See, e.g.*, David Orentlicher, *Destructuring Disability: Rationing of Health Care and Unfair Discrimination Against the Sick*, 31 HARV. C.R.-C.L. L. REV. 49, 58 (1996) (noting that the ADA "suggest[s] that transplant programs can use eligibility criteria as long as they really help distinguish among different candidates for organ transplantation in terms of the candidates' likelihood of benefiting from the transplant . . . .[T]his conclusion is consistent with judicial opinions interpreting similar provisions in the Rehabilitation Act when rationing decisions have been challenged.").

[99] *See* Peters, *supra* note 21, at 805 (contending that only rarely should physician's assessment of patient's predicted quality of life be permitted to influence medical care).

[100] *See* Doe v. Mutual of Omaha, 999 F. Supp. 1188, 1190 (N.D. Ill. 1980).

[101] *See id.* at 1190.

limit be exceeded, coverage would be reinstated if the insured did not submit any claims for reimbursement for two full years.[102] Both policies, however, contained further limitations on coverage for care for AIDS or AIDS-related conditions (ARCs). Doe's policy limited coverage for AIDS and ARCs to a $100,000 lifetime cap, while Smith's policy had a lifetime cap of $25,000.[103] These caps could not be extended.[104]

The trial court, reviewing the interpretation of Title III, concluded that since the defendant's policies would lead to different coverage for the same disease, the plaintiffs' allegations were sufficient to state a claim for discrimination.[105] To illustrate the discriminatory nature of these policies, the trial court cited an example provided in the plaintiffs' brief.[106] Should an HIV-negative person contract pneumonia and require medical attention, the plaintiffs argued, the cost of such medical attention would be covered so long as the $1,000,000 cap was not exceeded.[107] Should an HIV-positive insured individual contract pneumonia, however, coverage would not be available if that individual had exceeded the cap on AIDS care, since the insurer classified pneumonia as an ARC.[108] Medical coverage for a given disease would therefore vary not upon the disease itself, but solely upon whether the insured was HIV-positive.[109] In ruling for the plaintiffs, the trial court held that such a difference in treatment between the disabled and the non-disabled was precisely the sort of discrimination that the ADA prohibited.[110]

This victory was short-lived, however, as Mutual of Omaha appealed the decision and prevailed at the circuit level. The Seventh Circuit departed from the reasoning of the lower court in two prominent ways. First, the court held that Title III does not regulate the content of insurance policies.[111] The court based this

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[102] *See id.*

[103] *See id.*

[104] *See id.* David Orentlicher refers to this type of insurance as "rationing by service" and notes that it "can . . . subject the sickest persons to unfair discrimination. Rationing by service may result in coverage for persons with a milder form of an illness while leaving those with a more severe form of the same illness uncovered." Orentlicher, *Destructing Disability*, *supra* note 98, at 54.

[105] *See Mutual of Omaha*, 999 F. Supp. at 1196–97.

[106] *See id.* at 1196.

[107] *See id.* at 1190.

[108] *See id.* at 1196.

[109] *See id.*

[110] *See id.* at 1196–97.

[111] *See* Doe v. Mutual of Omaha, 179 F.3d 557, 563 (7th Cir. 1999).

finding on an examination of legislative intent, stating that if Congress had intended to "impose so enormous a burden on the retail sector of the economy . . . it would have made its intention clearer and would at least have imposed some standards."[112] The court therefore rejected the argument that plaintiffs were entitled to a policy that was equal in value to what would be available to a non-disabled insured.[113]

The second holding is more controversial and significant. The court explicitly addressed the legality of including conditions within the AIDS cap, such as pneumonia, that are considered ARCs but are also contracted by HIV-negative individuals. The Seventh Circuit held that the ADA does not prohibit an insurance company from placing such conditions under its AIDS and ARCs reimbursement cap.[114]

The court, noting that "HIV doesn't cause illness directly," argued that "opportunistic infections" are the primary medical conditions associated with being HIV-positive.[115] The court stated:

> What the AIDS caps in the challenged insurance policies cover, therefore, is the cost of fighting the AIDS virus itself and trying to keep the immune system intact plus the cost of treating the opportunistic diseases to which the body becomes prey when the immune system has eroded to the point at which one is classified as having AIDS.[116]

In addition to potentially classifying care that someone who is HIV-positive might require as falling under the AIDS and ARCs cap, the court redefined "disease" so as to insulate insurers from any accusation that they are reimbursing the costs of medical care for non-disabled persons but not for disabled persons for what appears to be the same disease.[117] The court reasoned:

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[112] *Id.* at 560.

[113] *See id.* at 559 (illustrating the point by stating that a shoe store could not forbid a one-legged person from entering its premises, but it would not be required to sell to the person a single shoe if it normally sold shoes by the pair).

[114] *See id.* at 560–61. This holding directly contradicts the EEOC's guidelines. *See* EEOC Interim Enforcement Guidance on the Application of the Americans with Disabilities Act of 1990 to Disability-Based Distinctions in Employer Provided Health Insurance, No. N-915.002, *reprinted in* EEOC Compl. Man. (CH) P 6902 at 5313–19 (June 8, 1993) (stating that caps violate the ADA if they result in different treatment of persons with disabilities).

[115] *See Mutual of Omaha*, 179 F.3d at 560–61.

[116] *Id.* at 561.

[117] *See id.*

> It is true that as the immune system collapses because of infection by HIV, the patient becomes subject to opportunistic infection not only by the distinctive AIDS-defining diseases but also by a host of diseases to which people not infected with HIV are subject. Even when they are the same disease, however, they are far more lethal when they hit a person who does not have an immune system to fight back with. *Which means they are not really the same disease.*[118]

This interpretation of Title III has a dramatic effect on insurance coverage for the disabled. Current law permits insurance companies to cover some conditions but to refuse to cover others, but does not permit an insurance company to cover a condition for non-disabled persons but to deny coverage to disabled persons. Rather than interpreting Mutual of Omaha's policy as an attempt to cover pneumonia for the non-disabled (HIV-negative) but not to cover pneumonia for the disabled (HIV-positive), as did the trial court, the Seventh Circuit held that pneumonia contracted by HIV-negative individuals is *an entirely different condition* from pneumonia contracted by HIV-positive individuals. This legal distinction allows Mutual of Omaha to place coverage limitations on reimbursement in a way it previously could not, freeing it from providing the actuarial justification that would normally be required under § 501(c) of the ADA. Quite tellingly, Mutual of Omaha conceded that it had no actuarial justification for its cap.[119]

The court's decision extended beyond the limits of the HIV context. The opinion provided an alternative scenario that would be governed by its holding: "If a health insurance policy that excluded coverage for cancer was interpreted not to cover the pneumonia that killed a patient terminally ill with cancer, this would not be 'discrimination' against cancer."[120] Since the court's opinion is not limited to the intricacies posed by HIV, lower courts are already citing this case as support for the broader proposition that courts are not to use the ADA to supervise the content of insurance policies under Titles I and II.[121] Insurers therefore have wide latitude to make their policies unappealing

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[118] *Id.* (emphasis added).
[119] *See id.* at 562.
[120] *Id.* at 561.
[121] *See, e.g.*, Micek v. City of Chicago, No. 98 C 6757, 1999 WL 966970 (N.D. Ill. Oct. 4, 1999) (dismissing suit against an insurer that refused to cover hearing aids for the chronically hearing impaired, even though it covered most other medical devices and did reimburse for hearing aids to correct short-term hearing loss).

to the disabled, with the net result being less coverage for the disabled. Thus, *Mutual of Omaha* goes beyond merely categorizing the conditions that disproportionately affect those with HIV; indeed, it divides illnesses into disabled and non-disabled categories and cauterizes coverage for the nation's disabled.

This leads to the "condition dilemma," the fundamental question of how to tally our health conditions. As doctors unravel the complicated links between different medical conditions, the boundaries separating one illness from another begin to disintegrate, and the distinctions between relative risk,[122] symptom[123] and co-morbid condition[124] blur. Consider the following hypothetical: an insurance company does not cover treatment for throat cancer. Chemotherapy is clearly treatment for cancer, and therefore could rightly be excluded. In advanced stages of throat cancer, however, when the patient can no longer swallow, a feeding tube may be necessitated by the onset of malnutrition. Is the feeding tube *treatment* for the disability of cancer? This is the condition dilemma.

As medical science improves and the elements that contribute to illness and health become better understood, an increasing number of factors will be recognized as being related to people's illnesses. Medical science will be better equipped to understand the interrelations between myriad conditions. This knowledge undoubtedly will aid physicians by alerting them to predispositions for additional medical conditions and will help them focus on the factors that may be contributing to an illness. Because the Seventh Circuit offered no guidance as to when a condition should or should not fall under a cap, the trend toward construing the ADA in a pro-defendant way[125] suggests that more, rather than fewer, conditions will fall under caps or be "defined out" of the ADA.

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[122] Risk factor is the layman's term for relative risk, which is "the ratio of the risk of disease among those exposed to a risk factor to the ratio among those not exposed." STEDMAN'S MEDICAL DICTIONARY 1576 (27th ed. 2000).

[123] "Any morbid phenomenon or departure from the normal in structure, function or sensation, experienced by the patient and indicative of disease." *Id.* at 1742.

[124] "Co-morbidity is a concomitant but unrelated pathologic or disease process; usually used in epidemiology to indicate a co-existence of two or more disease processes." *Id.* at 387.

[125] *See supra* note 13.

III. AN ALTERNATIVE APPROACH: THE CONDITION EXTENSION TEST

An alternative approach must be developed to counter the significant drawbacks of the Seventh Circuit's analysis in *Mutual of Omaha*. Medical classifications of disease are independent of the severity and incidence considerations referenced by the Seventh Circuit.[126] One prominent medical dictionary defines disease as an "interruption, cessation, or disorder of body functions, systems or organs . . . [a] morbid entity characterized usually by at least two of these criteria: recognized etiologic agents(s), identifiable group of signs and symptoms, or consistent anatomical alternations."[127] This definition focuses on the chemical derivations of the disease and its tell-tale symptoms. No mention is made of severity or incidence, suggesting that the Seventh Circuit's reliance on such considerations may have been misguided.

Developing an alternative to the Seventh Circuit approach serves the interests of both the disabled and insurance communities. Medical problems that occur within and without a specific disabled population need to be classified so that insureds and insurance companies know whether coverage can legitimately be refused. Now that courts have interpreted the ADA to permit insurance companies to isolate certain disabilities and to exclude them, some reliable and consistent methodology must be developed to determine when an insured is actually seeking reimbursement for an excluded disability rather than for a separate condition. Courts' interpretations of the ADA created the condition dilemma, and this dilemma requires a responsible resolution to protect the disabled.

If dividing the same chemical or symptomatic condition into multiple and distinct diseases is inappropriate, one alternative is to determine when a symptom or disease is so related to the dis-

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[126] It is difficult to determine on what basis the court arrived at its conclusion that certain opportunistic infections were different diseases when contracted by individuals with AIDS, since no medical authorities were cited as support for this proposition. While the opinion did cite Anthony S. Fauci & H. Clifford Lane, *Human Immunodeficiency Virus (HIV) Disease: AIDS and Related Disorders*, 2 HARRISON'S PRINCIPLES OF INTERNAL MEDICINE 1791, 1824–45 (1998) for the proposition that opportunistic infections are the real danger to an HIV-positive person, there are no citations to support the court's statement that pneumonia contracted by a person who is HIV-positive is a distinct disease from the pneumonia contracted by someone who is HIV-negative.

[127] STEDMAN'S, *supra* note 122, at 509.

ability that to treat the symptom or disease is to treat the disability.[128] This approach to evaluating a patient's medical status will be referred to here as the "condition-extension test." This test is so named because it determines when a secondary medical condition can be fairly and accurately characterized as an extension of the primary condition. The condition-extension test will avoid a medical "decision-maker's reliance on the mere existence of disability as a proxy for an individualized, factual assessment of the disabled person's condition."[129] In addition, this test will accomplish the goals of disability protection jurisprudence outlined by the Supreme Court, namely, that disability law take into account "two powerful but countervailing considerations—the need to give effect to the statutory objectives and the desire to keep [statutory protections] within manageable bounds."[130]

A. *Construction of the Test*

The condition-extension test is two-pronged. First, an insurance company would be required to document that the two conditions in question were statistically correlated to the appropriate significance level.[131] Absent a showing that the medical community understood the two conditions to be correlated (i.e., statistically linked), the insurance company could not exclude coverage. If the insurance company demonstrates correlation, it would then need to satisfy the second prong—the causation requirement—by documenting that the conditions were understood within the medical community to be conditional extensions of one another. This second prong traverses the murky distinction

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[128] *Cf.* Crossley, *Of Diagnoses and Discrimination*, *supra* note 50, at 1662. Crossley suggests how to apply the ADA to medical decision-making with respect to severely disabled infants. She argues that the ADA should apply "to all medical decision making" but that "its antidiscrimination mandates [only prohibit] nontreatment based on the mere existence of disability, while allowing consideration of the medical effects of the disability." *Id.* at 1664. Crossley seems to support incorporating a relevancy analysis into ADA antidiscrimination law. While she disagrees with the relatedness analysis announced in *University Hospital* as it pertains to disabled newborns, she does support an approach where the ADA applies only when doctors take into account "irrelevant" factors. She calls this the "medical effects approach," which "seeks to identify illegitimate discrimination by distinguishing between decisions made based on the mere existence of disability and those made after considering the medical effects of disability." *Id.* at 1651.

[129] *Id.* at 1654. For Crossley's discussion of the benefits of the medical effects model, see *id.* at 1650–62.

[130] Alexander v. Choate, 469 U.S. 287, 299 (1985).

[131] *See infra* note 137 for definitions of statistical significance.

between correlation and causation.[132] It is the judgment that having disability *X* caused condition *Y*. It asks whether it is possible to tell a story that links *Y* with *X*, leaving little room for an alternative explanation. Therefore, before an insurance company could take the potentially devastating step of denying reimbursement for condition *Y*, it would need to convince the trier of fact that *X* and *Y* are not merely correlated, but rather that the requested treatment for secondary condition *Y* (for example, end-stage renal failure) is effectively treatment for the primary condition *X* (for example, Type II diabetes).[133]

Medical literature reports varying degrees of relatedness. For example, the literature reports some preliminary findings on the relationship between Alzheimer disease and depression.[134] It alternatively documents that individuals who have hypertension are at a greater risk for stroke,[135] and that people with HIV have a worse outcome if they develop Kaposi's sarcoma than do HIV-negative patients who also develop Kaposi's sarcoma.[136] Each of these distinct classifications will have a different place in the insurance context. These differences will be further examined in Section C below.

The determination of relatedness is the battleground for insurers. Given the current prevailing judicial interpretation of the ADA, insurers have a tremendous incentive to push under the umbrella of an excluded disability as many additional conditions as possible, further limiting the available coverage. The condition-extension test represents one method of governing this unruly and unsettled area of ADA jurisprudence.

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[132] "Correlation is the mutual or reciprocal relation of two or more items or parts, while causation is the relating of causes to the effects they produce. The pathogenesis of disease and epidemiology are largely concerned with causality." STEDMAN'S, *supra* note 122, at 414.

[133] *See* Eberhard Ritz et al., *End-Stage Renal Failure in Type II Diabetes: A Medical Catastrophe of Worldwide Dimensions*, 34(5) AM. J. KIDNEY DISEASES 795, 796 (1999).

[134] *See infra* note 153.

[135] *See* Ralph L. Sacco et al., *Risk Factors and their Management for Stroke Prevention: Outlook for 1999 and Beyond*, 53 (SUPP 4) NEUROLOGY S15, S18 (1999).

[136] Kaposi's sarcoma is a rare blood vessel cancer believed to be caused by a virus and is overwhelmingly present in the AIDS community. It is rarely life-threatening in HIV-negative individuals. *See* Sarah Watstein, THE AIDS DICTIONARY 153–55 (1998).

B. *The Need for the Condition Extension Test*

The condition-extension test addresses the lack of predictability and reliability in insurance policy coverage. For insurers and insureds to have an informed negotiation over what will be covered and to what extent in a policy, insurance companies need a predictable means of establishing when a condition is sufficiently related to an underlying disability. Although lacking perfect certitude, medical science can establish the degree to which two or more conditions are statistically correlated.[137] Thus, while medical science might indicate that having *X* increases the risk of contracting *Y*, medical science can also indicate that treatment for *Y* is not treatment for *X*. Even though insurance companies are permitted to exclude coverage for disabilities, they should not be allowed to exclude coverage for every additional medical condition for which a disability creates a greater risk of development, but does not directly cause.

C. *Application of the Condition-Extension Test*

Any effective tool to protect insurers and insureds alike must keep up with the rapid pace of discoveries occurring in medical science. As conditions become less interrelated due to medical advances that curb the devastating effects of the condition, or new understandings of the make-up and course of an illness focus on its interaction with other conditions, the relatedness factor declines[138] or is disputed.[139] On the other hand, in the future,

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[137] *Cf.* Doe v. N.Y. Univ., 666 F.2d 761, 777 (2d Cir. 1981) (noting that the appropriate standard for determining whether student's mental illness rendered her not otherwise qualified was whether there was "significant risk" that her condition would be related to her performance in medical school). Statistical significance means that "statistical methods allow an estimate to be made of the probability of the observed degree of association between variables and from this the statistical significance can be expressed, commonly in terms of the P value" with the term "significant" meaning the "reliability of a finding or, conversely, the probability of the finding being a result of chance (generally $< 5\%$)." STEDMAN'S, *supra* note 122, at 1641, 1693. Therefore, for the purposes of this Note, the term "significant" will be used to refer to a statistical significance.

[138] For instance, recent studies have found that the correlation between certain illnesses and AIDS is declining. *See* A. Mocroft et al., *Changes in AIDS-Defining Illnesses in a London Clinic, 1987–1998*, 21 J. ACQUIRED IMMUNE DEFICIENCY SYNDROMES 401, 404 (1999) (examining incidence of AIDS-defining conditions in the HIV-positive population and finding a statistically significant decrease in incidence).

[139] For example, it was thought for some time that the popular medication for the

scientists may discover new correlations and causations to underlying disabilities. Using the condition-extension test would require insurers to update their coverage and to protect the disabled from outdated and misinformed classifications of diseases and disabilities.

The two-prong test is best illustrated by example. The following hypotheticals explore the different types of medical scenarios that might confront a court and demonstrate how the condition-extension test could resolve the question of coverage exclusion.

1. Hypothetical One: Prong One Correlation Is Proven and Prong Two Causation Is Proven

Certain disabilities, like non-insulin-dependent diabetes mellitus ("Type II diabetes"),[140] are especially debilitating because of the large number of associated potential complications, including coronary artery disease, congestive cardiac failure, stroke, and complications of peripheral vascular disease.[141] In addition, hyperglycemia[142] is found in people with Type II diabetes.[143] Some of the main complications of having hyperglycemia in

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treatment of inflammatory bowel disease (IBD), 6-mercaptopurine, caused malignant neoplasms (cancer). In other words, developing malignant neoplasms was often the result—a sort of bizarre symptom—of IBD and its subsequent treatment. However, recent studies have indicated that there may not be such a significant relationship. *See* Burton I. Korelitz, *Malignant Neoplasms Subsequent to Treatment of Inflammatory Bowel Disease with 6-Mercaptopurine*, 94 AM. J. GASTROENTEROLOGY 3248, 3248 (1999).

[140] The Supreme Court has heard claims of discrimination under the Rehabilitation Act in which plaintiffs were diagnosed as having diabetes mellitus, which includes Type II diabetes. The Court assumed, without deciding, that such a condition constituted a disability. *See* Lane v. Pena, 518 U.S. 187 (1996); Atascadeor State Hosp. v. Scanlon, 473 U.S. 234 (1985); Rouse v. Plantier 182 F.3d 192 (3d Cir. 1999) (accepting, without discussion, that diabetes mellitus is a disability under the ADA).

[141] *See* S. Edwin Fineberg, M.D., *The Treatment of Hypertension and Dyslipidemia in Diabetes Mellitus*, 26(4) DIABETES 951, 951–52 (1999) (reviewing treatment options for Type II diabetes and reporting an increased risk for these complications in Type II diabetes patients versus non-Type II diabetes patients). *See also* Markku Laakso, *Hyperglycemia and Cardiovascular Disease in Type 2 Diabetes*, 48 DIABETES 937, 937 (1999); James R. Gavin III, M.D., *New Classification and Diagnostic Criteria for Diabetes Mellitus*, 1(3) CLINICAL CORNERSTONES 1, 1 (1998).

[142] Hypergylcemia is "an abnormally high concentration of glucose in the circulating blood, seen especially in patients with" Type I and II diabetes. STEDMAN'S, *supra* note 122, at 849.

[143] *See, e.g.*, *Rouse*, 182 F.3d at 194 (expert testimony in an ADA dispute established that "a characteristic of insulin-dependent diabetes is an abnormally high amount of sugar in the blood due to insulin deficiency"); Gavin, *supra* note 141, at 4 ("[A]ny symptomatic person with a . . . glucose level [greater than] 200mg/dL . . . is defined as having diabetes.").

Type II diabetes are microvascular[144] and neuropathic complications "which do not occur in people without diabetes."[145] Hyperglycemia is a requirement for the development of neuropathic complications, such as retinopathy.[146]

Consider David, who has hyperglycemia and Type II diabetes. His insurance company caps coverage for care for diabetes, which he exceeds prior to his diagnosis with a retinopathy. Could David's insurance company deny reimbursement for the treatment of the retinopathy? The insurer could unquestionably satisfy prong one. Studies document that there is a statistical correlation between Type II diabetes and hyperglycemia, and between hyperglycemia and diabetic retinopathy. David's insurer will also likely satisfy prong two. Using scholarly studies, the insurer will be able to inexorably link Type II diabetes with hyperglycemia and ultimately with the retinopathy. Because hyperglycemia is a necessary condition to develop diabetic retinopathy, treatment for the retinopathy may fairly be described as extended treatment for the Type II diabetes. In other words, the retinopathy is a natural complication of Type II diabetes, and the insurance cap would apply.

2. Hypothetical Two: Prong One Correlation Is Proven but Prong Two Causation Is Inconclusive

a. *Risk of contracting disease.* The Rehabilitation Act has recognized obesity as a disability.[147] Studies demonstrate that pa-

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[144] *See* Mark L. Moster, M.D., *Neuro-opthamology of Diabetes*, 10 CURRENT OPINION IN OPTHAMOLOGY 376, 376 (1999) (stating that visual complications may be "related to the vascular, neuropathic, or metabolic changes induced by" Type II diabetes).

[145] Richard C. Eastman, M.D. et al., *Prevention and Treatment of Microvascular and Neuropathic Complications of Diabetes*, 26(4) DIABETES 791, 793–94 (1999). *See also* Wan Nazaimoon et al., *Systolic Hypertension and Duration of Diabetes Mellitus are Important Determinants of Retinopathy and Microalbuminuria in Young Diabetics*, 46(3) DIABETES RES. & CLINICAL PRAC. 213, 221 (1999) (stating that 10% of Type II diabetes mellitus patients developed a retinopathy within five years of diagnosis and prevalence increased to 42.9% for patients with a diagnosis of ten years or older).

[146] *See* Eastman, *supra* note 145, at 793–94. *See also* P.E. Stranga, M.D. et al., *Ocular Manifestations of Diabetes Mellitus*, 10 CURRENT OPINION IN OPTHAMOLOGY 483, 483 (1999).

[147] *See, e.g.*, Cook v. State of R.I., Dep't of Mental Health, Retardation, and Hosps., 10 F.3d 17, 23 (1st Cir. 1993). It is not clear whether obesity would be considered a disability under the ADA. The majority of cases on obesity dealt with employees arguing that they could no longer perform the "major life activity" of working because of obesity. The courts responded that since the employees could work in a different capacity, they were not disabled under Title I. *See, e.g.*, Walton v. Mental Health Ass'n of S.E. Pa., 168 F.3d 661, 665 (3d Cir. 1999) (determining that the inability to perform a specific job because of obesity does not substantially limit the major life activity of

tients who are clinically obese are at a greater risk for additional health problems.[148] For instance, they develop gallstones at a significantly higher rate than do non-obese patients.[149] Jane, who is obese, takes out a health insurance policy that has a lifetime cap of $20,000 on reimbursement for treatment of obesity. After experiencing extreme abdominal pain, she consults her physician, who diagnoses her with gallstones, a common symptom of gallbladder disease.

Could Jane's insurance company deny reimbursement for medical costs incurred in treating her gallbladder disease? The insurance company would find ample evidence documenting a correlation as required by the test's first prong. It would then have to present medical evidence narrating the relationship between the two conditions to document causation. Jane can offer her own evidence to persuade the trier of fact that it was not probable that obesity caused her gallbladder disease.[150] Ultimately, to secure coverage, Jane will have to convince the trier of fact that there are too many other reasons why she might have developed gallbladder disease to support a finding of causation. Given the current medical understanding of these two diseases, she is unlikely to be successful. Thus, in this case, despite the inconclusive[151] nature of the causation evidence, the facts may still be strong enough to satisfy the second prong favoring the insurance companies.

Inconclusivity also can operate the other way. Consider Sarah, who suffered from depression ten years ago and has recently

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working); Pepperman v. Montgomery County Bd. of Educ., No. 99-1366, 1999 WL 1082546, at *1–2 (4th Cir. Dec. 2, 1999) (per curiam) (finding that the inability to walk fast due to obesity is not a disability). Some jurists, however, have not ruled categorically that obesity could not be a disability under the ADA, especially if it prevented the individual from participating in a major life activity like lifting, walking or eating. *See, e.g.*, Land v. Baptist Med. Ctr., 164 F.3d 423, 426 (Arnold, J., dissenting) ("[W]hen in the physician's assessment . . . the obesity is severe enough to substantially limit a major life activity, the participant then meets the definition of" a disabled person.).

[148] *See* Aviva Must, Ph.D. et al., *The Disease Burden Associated With Overweight and Obesity*, 282 JAMA 1523, 1523 (1999). Obesity is associated with cardiovascular disease, Type II diabetes, hypertension, stroke, dyslipidemia, osteoarthritis, and some cancers. These factors may differ across racial and ethnic lines. *See id.*

[149] *See, e.g., id.* at 1526; Charles H. Halstead, *Obesity: Effects on the Liver and Gastrointestinal System*, 2 CURRENT OPINION IN CLINICAL NUTRITION AND METABOLIC CARE 425, 426–27 (1999) (citing a study that found a sevenfold higher risk for gallstones in obese versus non-obese women); F. Xavier Pi-Sunyer, *Comorbidities of Overweight and Obesity: Current Evidence and Research Issues*, 31(11) SUPP MEDICINE & SCIENCE IN SPORTS & EXERCISE S602, S603 (1999).

[150] *See infra* Part III.E.1 Concerns About Expert Testimony.

[151] "Inconclusive" in this Note refers to a lack of consensus in the medical literature concerning the correlation between two conditions.

been diagnosed with Alzheimer disease (AD). Her insurer excludes coverage for depression. Statistical evidence shows that pre-clinical AD patients[152] have a higher rate of depression than non-demented patients, suggesting a significant correlation between depression and AD.[153] Therefore, an insurance company might be able to satisfy prong one. However, it should not be able to support the causation prong, as scientific evidence cannot substantiate the claim that depression causes AD.[154] Rather, depression may be a susceptibility factor for the pathogenesis of disease or a tragic harbinger of the dementia to come. While there is a relationship between the two conditions, Sarah's insurer cannot tell a convincing story that depression caused Sarah to develop AD, and therefore, any denial of coverage would not be based on sound actuarial principles.

b. *Risk of developing a disease.* The first two examples in this section dealt with the risk of contracting a disease. This next example of an inconclusive second prong explores the subtle difference of the risk of actually developing a disease once the disease has been contracted.

The Supreme Court has recognized that HIV is a disability for the purposes of the ADA.[155] While tuberculosis (TB) is considered a significant complication of being HIV-positive,[156] the majority of individuals who contract TB are HIV-negative.[157] However, when exposed to the TB bacteria, an HIV-negative individual usually remains healthy and only develops a latent infection, while an HIV-positive individual is more likely to progress to the active disease. The immunological factors contributing to this

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[152] "Pre-clinical" refers to the time "before the onset of disease." STEDMAN'S, *supra* note 122, at 1437.

[153] *See* A.K. Berger et al., *The Occurrence of Depressive Symptoms in the Preclinical Phase of AD: A Population-Based Study*, 53 NEUROLOGY 1998, 2000 (1999) (indicating that "AD patients had [significantly] more depressive symptoms at [the pre-clinical phase] than their non-demented counterparts," and noting that depressive symptoms in pre-clinical AD individuals is not "merely a by-product of self-perceived cognitive difficulties").

[154] *See* Carl E. Speck et al., *History of Depression as a Risk Factor for Alzheimer's Disease*, 6(4) EPIDEMIOLOGY 366, 366 (1995) ("A history of depression before the onset of symptoms of AD, however, may be an independent risk factor for AD.").

[155] *See* Bragdon v. Abbott, 524 U.S. 624, 631 (1999).

[156] AIDS DICTIONARY, *supra* note 136, at 282 ("HIV-positive people have a higher risk of developing active TB disease.").

[157] Tuberculosis has also been significantly linked to illegal drug use, being older than 60 years of age, over-crowding, foreign birth, and malnutrition. *See* Venkatarama K. Rao, M.D. et al., *The Impact of Comorbidity on Mortality Following In-Hospital Diagnosis of Tuberculosis*, 114(5) CHEST 1244, 1247–48 (1998).

discrepancy are unknown, but the tendency of an HIV-positive individual to develop active TB more easily is probably due to the body's inability to mount a sufficient immune response.[158]

Two friends, Jason (infected with HIV) and Michael (not infected with HIV, but weakened from a recent bout with the flu), visit a hospital maternity ward together to congratulate a friend who has just delivered a child. As a result of exposure to TB in the hospital, both contract the disease and become symptomatic. Does it make sense for Michael to receive coverage when he contracts TB and for Jason to be denied coverage since he has exceeded the cap on care related to being HIV-positive?

Under the condition-extension test, a court would first ask an insurer to show that developing TB is significantly correlated with being HIV-positive. The medical literature would document that among people who are infected with TB, people who are HIV-positive are more likely to become symptomatic[159] and nonresponsive to medication than those who are HIV-negative.[160] Jason's insurer, therefore, could document a correlation between developing symptomatic TB and being HIV-positive. Because a sizeable number of HIV-negative individuals also get TB (often because their immune system is also weakened in some way), however, Jason's insurer could not tell a story that being HIV-positive necessarily means a person will develop symptoms of TB, and would therefore fail prong two.

This is essentially the scenario, using different conditions, described in *Mutual of Omaha*. In the Seventh Circuit's hypothetical, an insurance policy excluded cancer, but not pneumonia.[161] If the insurance company argues that the weakening from cancer increased the risk of developing pneumonia, the Seventh Circuit places its imprimatur of approval on the denial of coverage. Since the opinion proffers no guidance as to the extent to which one event (having cancer) is related to another (developing pneumonia), however, scenarios like this hypothetical are left

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[158] *See* Peter L. Alpert et al., *A Prospective Study of Tuberculosis and Human Immunodeficiency Virus Infection: Clinical Manifestations and Factors Associated with Survival*, 24(4) CLINICAL INFECTIOUS DISEASE 661, 663 (1997) (stating that people who are HIV-positive developed extrapulmonary TB at a significantly higher rate than HIV-negative people). *See also* AIDS DICTIONARY, *supra* note 136, at 282.

[159] *See, e.g.*, M. Moore et al., *Cross-Matching TB and AIDS Registries: TB Patients with HIV Co-Infection, United States, 1993–94*, 114 PUBLIC HEALTH REPORTS 269, 271–73 (1999).

[160] *See id.* at 276.

[161] *See supra* text accompanying note 120.

ambiguous, leaving insureds uncertain about the true extent of their coverage. The condition-extension test would not allow a denial of coverage in either the TB or the cancer instance.

3. Hypothetical Three: Prong One Correlation Is Inconclusive and Prong Two Causation Is Unproven

As discussed in the second hypothetical, people suffering from obesity face an array of additional health risks.[162] Bill is morbidly obese and has exceeded his insurance company's $5000 cap on coverage for obesity. After a routine colorectal exam, he is diagnosed with colon cancer, for which obese people may be at a higher risk.[163] The association between obesity and colon cancer is inconclusive, however. Some studies have found a positive association between obesity and colon cancer, while others have found no such correlation.[164] Consequently, the relationship between obesity and colon cancer should not meet the requisite level of statistical correlation to satisfy prong one. Since the plaintiff bears the initial burden of documenting that the insurer's decision was not based on actuarial principles, such an inconclusive result might be held in the insurance company's favor.[165] If so, the plaintiff would turn to prong two for additional justification that the exclusion of coverage was unlawful.[166] The condition-extension test limits the power of insurance companies to create concentric circles linking the initial disability with orbiting deteriorating health.

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[162] *See supra* note 148.

[163] Obesity has been found to be a risk factor for many cancers, including endometrial, breast, gallbladder, cervical and ovarian cancer among women, and prostate and colon cancer among men. *See* Pi-Sunyer, supra note 149, at S603.

[164] *See, e.g.*, Ean S. Ford, *Body Mass Index and Colon Cancer in a National Sample of Adult US Men and Women*, 150 AM. J. EPIDEMIOLOGY 390 (1999). The study noted, however, that the relationship between obesity and colon cancer is not well understood, and it is not clear whether obesity causes colon cancer. *Id.* at 396.

[165] Courts may disagree over whether demonstrating inconclusivity satisfies the burden of proof or whether a more scientifically unanimous denial of correlation is required. *Cf.* Chabner v. United of Omaha Life Ins. Co., 994 F. Supp. 1185, 1193–94 (N.D. Cal. 1998) (If defendant produces "evidence that the differential [in rates] was based on the [actuarial principles], [plaintiff] must overcome that evidence and ultimately prove otherwise."). *But see* Anderson v. Gus Mayer Boston Store of Del., 924 F. Supp. 763, 779 (E.D. Tex. 1996) ("The ADA puts the burden on those actors classifying risks to show both their rationality and permissibility.").

[166] The plaintiff would be able to tell multiple stories showing why he developed colon cancer.

4. Hypothetical Four: Prong One Correlation Is Unproven and Prong Two Causation Is Unproven

The condition-extension test might also prevent a cascade of reimbursement denial for those suffering from chronic and life-changing conditions. Angela, a schizophrenic, after exceeding her nominal coverage for schizophrenia, visits her general physician who notices signs of malnutrition and open sores. Can Angela's insurance company, which normally provides nutritional and basic medical care coverage, deny her request for reimbursement for dietary supplements, visits to a nutritionist, and prescription antibiotics for her infections?

Studies document that sufferers of schizophrenia are not at a higher risk for self-neglect—a constellation of symptoms including poor nutrition.[167] These problems also affect many people who do not have schizophrenia and may be due to socioeconomic status.[168] While it is possible that Angela's schizophrenia led to these conditions, it is not certain. Thus, the insurance company could not prove the statistical burden of either prong, and Angela's coverage could not be denied.

This scenario mimics the Seventh Circuit's observation in *Mutual of Omaha* that an insurance company could not refuse to reimburse care for a broken leg for someone who is HIV-positive.[169] While the court does not indicate explicitly why this would be unlawful, presumably it understood that there would be no sound actuarial reason for an insurance company to refuse care for a broken leg simply because the person requesting reimbursement is HIV-positive. The only explanation for such a denial of coverage would be discrimination against a disabled person. Perhaps the Seventh Circuit opinion also recognized that there must be limitations on the extent to which an insurance company can deny coverage for one medical condition because of the existence of a disability. However, the absence of interpretive limiting instructions turns the opinion into a manipulative tool of insurance companies. The condition-extension test provides those missing guidelines.

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[167] *See, e.g.*, Larry S. Goldman, M.D., *Medical Illness in Patients with Schizophrenia*, 60 (SUPP. 21) J. CLINICAL PSYCHIATRY 10, 11 (1999).

[168] *See* Christine M. Kennedy, *Childhood Nutrition*, 16 ANN. REV. NURSING RES. 3, 4 (1998).

[169] *See* Doe v. Mutual of Omaha, 179 F.3d 557, 561 (7th Cir. 1999).

D. *Benefits of the Condition-Extension Test*

The preceding hypotheticals illustrate that the instances of coverage denial would be rare. Yet, in theory, such an approach would be neither pro-plaintiff nor pro-defendant. Since the ADA is currently interpreted to mean that, while an insurer need not cover every disability, it cannot deny reimbursement of an otherwise covered condition to the disabled, insurers are presumably already required to have in place some means of categorizing medical conditions. Allowing insurers to limit the confines of care for a disability without regard to scientific data disproportionately shifts power to the insurer. The two-prong condition-extension test reapportions power more evenly between insurer and insured.

The condition-extension test does benefit the disabled plaintiff in ways that the *Mutual of Omaha* approach lacks. The primary criticism of the *University Hospital* line of cases[170] that established the relatedness principle in the medical context is that it "unwisely insulates from challenge all treatment decisions that arise out of the patient's disability, no matter how patent the prejudice."[171] This criticism does not apply to the use of a condition-extension test in the insurance context because physicians would not be determining how effective a treatment would be or the extent of the patient's quality of life. Rather, a treatment plan would already be plotted, and the inquiry would turn to insurance coverage, with the physician asked to testify in court regarding the correlation and causation prongs. Although the test would generally be objective, common sense indicates that any bias exhibited would tend to be pro-patient because doctors may have an interest in lobbying that the care they recommend be covered by insurance companies.

While insurance companies might have legitimate reasons for their policies, the temptation exists for them to deny coverage first and explain later because of the limited judicial review of the content of insurance policies. The condition-extension test could correct that skewed incentive for unfairness by requiring insurance companies to abide by medical determinations of relatedness. *Mutual of Omaha* illustrates how important this might be, as the insurance company conceded that it had not consid-

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[170] *See supra* note 92.

[171] Peters, *supra* note 21, at 800.

ered any actuarial justification for its inclusion of certain types of conditions under the HIV disability cap.[172] Forced to justify their choices, insurance companies will no longer find it cost-effective to simply make policies and later construct an *ex post* justification that will likely be recognized by a court as subterfuge.[173] Under the condition-extension test, *Mutual of Omaha* might very well come out the same, as a medical evaluation might suggest that the conditions discussed in the opinion are associated with HIV. The condition-extension test would require the Mutual of Omaha Insurance Company to articulate its justification, however, thereby limiting its ability to deny coverage without a satisfactory explanation.[174] This would also help insureds better select plans.

The ADA is already sensitive to the need for reliable tests to discern where actuarial science ends and discrimination begins. In addition to the subterfuge provision in Title III, Title I also places restrictions on the means by which an employer can decide whether someone who is disabled can execute job responsibilities. The ADA requires that employment tests be administered "in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability . . . such tests results accurately reflect . . . whatever . . . factors that the test purports to measure."[175] Further, it prohibits the use of "selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals

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[172] *See Mutual of Omaha*, 179 F.3d at 562.

[173] This higher standard for overcoming an allegation of Title III subterfuge is demonstrated in the bench opinion in *Mason Tenders District Council Welfare Fund v. Donaghey*, No. 93 CIV. 1154, 1993 WL 944580 (S.D.N.Y. Nov. 19, 1993). The court ruled that pension plans governed by ERISA were required to meet ADA guidelines, and thus provide documentation to prove its caps on AIDS coverage were not subterfuge: "I think subterfuge and pretext in the context of this argument are interchangeable. You have carved out this one assumption based on actuarial assumptions, and there will have to be a trial on this issue." *Id.* at *8. Furthermore, the court refused to apply the definition of subterfuge that the Supreme Court has used in ADEA cases. *See supra* note 47. Commentators have noted that the defendant will have a difficult time demonstrating a satisfactory actuarial justification. *See, e.g.*, Karen Donovan, *Health Fund Held Subject to ADA in AIDS Exemption*, 16 NAT'L L.J. 2 (1993).

[174] The issue of proof is all the more urgent since courts generally place the burden of proof of demonstrating discrimination on the plaintiff. *See, e.g.*, Pallozzi v. Allstate Life Ins. Co., 198 F.3d 28 (2d Cir. 1999) (holding that the burden of proof for showing discrimination should rest with the plaintiff, a system patterned after the Supreme Court's decision in *Public Employees Retirement Sys. of Ohio v. Betts*, 492 U.S. 158 (1989) concerning the ADEA). Since plaintiffs shoulder this burden, a carefully constructed test that allows them to turn to the medical testimony of experts will be crucial.

[175] 42 U.S.C. § 12112(b)(7) (1994).

with disabilities."[176] As a result, an employer cannot manipulate tests to avoid hiring the disabled. Likewise, the condition-extension test would place logical limits on the ways insurance companies could craft their policies to avoid the maximum amount of reimbursement.

The condition-extension test would also fit neatly into current discrimination suits under the ADA, which follow a predictable pattern. First, a plaintiff must satisfy the basic elements of a prima facie case.[177] The burden then shifts to the defendant to offer a non-discriminatory reason for the denial of the service.[178]

Courts have expressed some willingness to shift the burden in discrimination cases to ease the plaintiff's burden in disputes under Title VII of the Civil Rights Act of 1964. Noting that the ADA is a "sibling statute"[179] to Title VII, some courts have argued that they should consider the approach to the burden of proof in Title VII disputes when confronting similar issues in the ADA arena.[180] In *St. Mary's Honor Center v. Hicks*,[181] the Supreme Court noted that under Title VII the plaintiff must first establish a prima facie case by a preponderance of the evidence.[182] If the plaintiff meets this burden, the prima facie case "in effect creates a presumption" of unlawful discrimination.[183] Such a presumption places a burden on the defendant to produce evidence that its actions were not unlawfully discriminatory.[184] Ultimately, the final burden rests upon the plaintiff to show that the defendant's rationale was mere pretext for discrimination.[185] If courts uniformly impose this Title VII burden shifting in ADA

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[176] 42 U.S.C. § 12112(b)(6) (1994).

[177] *See, e.g.*, Amir v. St. Louis Univ., 184 F.3d 1017, 1027 (8th Cir. 1999) (commenting on 42 U.S.C. § 12182(a) and (b)(2)(A)(ii) (1994)). The elements include showing that she is disabled, that the defendant is a private entity with a place of public accommodation, that the defendant took adverse action against the plaintiff based upon her disability, and that the defendant failed to make reasonable modifications that would accommodate the plaintiff's disability without fundamentally altering the nature of the public accommodation. *See id.*

[178] *See, e.g., id.* at 1017. *Cf.* Doe v. N.Y. Univ., 666 F.2d 761, 776–77 (2d Cir. 1981) (utilizing a similar burden shifting premise under the Rehabilitation Act).

[179] Ford v. Schering-Plough, 145 F.3d 601, 606 (3d Cir. 1998).

[180] *See, e.g., Ford*, 145 F.3d at 606 ("[T]he ADA's accompanying House report states that the purpose of the ADA is 'to provide civil rights protections for persons with disabilities that are parallel to those available to minorities and women.'") (internal citations omitted).

[181] 509 U.S. 502 (1993).

[182] *See id.* at 506.

[183] *Id.*

[184] *See id.*

[185] *See id.* at 507.

cases, insurance companies would need to be prepared to convincingly support their coverage denying decisions.

The Rehabilitation Act also offers guidance in assigning burdens. In *Doe v. New York University*, the court recognized that, unlike discrimination cases involving race, religion, national origin or gender, the defendant will typically acknowledge considering the plaintiff's disability, but will argue that consideration of the disability was based on appropriate factors.[186] The court held that:

> In a suit under [the Rehabilitation Act] the plaintiff may make out a prima facie case by showing that he is a handicapped person under the Act and that, although he is qualified apart from his handicap, he was denied [an opportunity] because of his handicap. The burden then shifts to the [defendant] to rebut the inference that the handicap was improperly taken into account by going forward with evidence that the handicap is relevant [to the defendant's decision]. The plaintiff must then bear the ultimate burden of showing by a preponderance of the evidence that in spite of the handicap he is qualified.[187]

Under this model, a plaintiff would have to document that the insurer did not apply sound actuarial principles in denying coverage. To do so, the plaintiff would present evidence following the two-prong condition-extension test.

Thus, in insurance coverage disputes, the plaintiff would need to document that she was disabled; that she purchased a product (insurance) from a place of public accommodation;[188] and that the insurer took adverse action by denying coverage for medical care that the insured believes is not significantly related to her excluded disability. The insurer would then have to respond by actuarially justifying the decision. The burden shifts back to the plaintiff, who must show that the given reason is really pretext to hide a discriminatory action. However, by placing a significant burden of proof on the defendant to rebut the prima facie case, insureds will receive more protection since insurance companies will be less likely to deny coverage without adequate reason.

The condition-extension test might also require that courts shift their understanding of how the safe harbor provision of

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[186] *See* Doe v. N.Y. Univ. 666 F.2d 761 (2d Cir. 1981).

[187] *Id.* at 776–77 (internal citations omitted).

[188] Insurance companies are specifically mentioned in the ADA as places of public accommodation. *See* 42 U.S.C. § 12181(1)(7)(f) (1994).

§ 501(c) works in building a defense to a discrimination suit. In *Ford v. Schering-Plough*,[189] the Third Circuit, relying on a Supreme Court definition of subterfuge as "scheme," held that a plaintiff must demonstrate that an insurance plan is adopted specifically to evade the purposes of the ADA.[190] Under the new proposed standard, plaintiffs could prove specific discriminatory intent by documenting that the insurance companies did not correctly draw the boundaries of the care generated by the disability.[191] Since § 501(c)(3) already requires insurance companies to provide statistical support for their coverage decisions to show that such decisions are actuarially sound, satisfying both prongs of the condition-extension test would show that the policies are based on sound actuarial methods and not a "scheme" to subvert the ADA.

By requiring a demonstration of the justification for the insurance policies, the condition-extension test incorporates medical science into the courtroom. It is telling that the paragraph in *Mutual of Omaha* explaining the separate disease ruling cites no medical authorities.[192] With court decisions requiring a clearer definition of a statistically related condition, judicial interpretation should naturally be informed by the professionals most capable of understanding disease.[193] Physicians and medical scientists can best testify to causality, explaining to the jury the likelihood that disability *X* has caused the development of condition *Y*.[194]

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[189] 145 F.3d 601 (3d Cir. 1998).

[190] *See id.* at 611.

[191] *Cf.* Henderson v. Bodine, 70 F.3d 958 (8th Cir. 1995) (noting this disincentive for fairness: "We do not believe it is unfair to expect [defendant] and its sophisticated health insurance providers to promptly provide some general evidence that [high dose chemotherapy treatment] is not an accepted therapy for breast cancers like [plaintiff's]. After all, such coverage issues lie at the heart of a health insurance provider's expertise . . . .").

[192] *See* Doe v. Mutual of Omaha, 179 F.3d 557, 561 (7th Cir. 1999).

[193] *See* Crossley, *Of Diagnoses and Discrimination*, *supra* note 50, at 1654. In discussing a medical effects approach to care for critically ill infants, Crossley argues that medical assessment should be part of an ADA analysis and ultimately indicates that a "high level of statistical correlation" between an infant's condition and the ineffectiveness of available treatment would make a decision not to treat acceptable. *Id.* Likewise, a physician's determination that the insured's condition is significantly related to the uncovered disability would justify denial of insurance coverage under the ADA. *See id.*

[194] In the toxic torts arena, physicians already evaluate a series of potential causes for a plaintiff's injury and sequentially eliminate them, leaving the defendant's action as the only possible remaining cause. Courts have accepted this type of medical expert testimony, called differential diagnosis. The type of testimony proposed in this paper would be even more exacting since it would require an established significance level before even progressing past prong one. *See generally* Michael Kent, Jr., *Daubert,*

E. *Potential Points of Concern*

1. Concerns About Expert Testimony

Undoubtedly, the condition-extension test has its drawbacks. Reliance on medical experts to testify as to the relatedness between the disability and the medical condition will increase the number of claims and force juries and judges to evaluate complex medical testimony.[195] This test will predictably create a battle of the experts, with doctors on both sides offering competing calculations of relatedness. Juries, however, are fact finders. As society has grown more technical, juries are increasingly asked to hear complicated claims. And while judicial burden is a consideration, it should not be a barrier to a compassionate and legitimate interpretation of the ADA. If this test were adopted, a consensus could begin to emerge concerning the degree of relatedness between conditions, decreasing the need for litigation.

The Supreme Court's decision in *Daubert v. Merrell Pharmaceuticals Inc.*[196] also clarifies the process for admitting expert testimony under the Federal Rules of Evidence. Rule 702 reads: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."[197] Under this standard, evidence is admissible if it will assist a jury in deciding the matter of controversy. Expert testimony need not be universally accepted by the general scientific community.[198] Instead, the jury decides which expert's testimony to heed.

The *Daubert* court understood that expert testimony is not a "perfect science." Although dispute and disagreement will follow expert testimony,[199] *Daubert* does expect that the testimony

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Doctors and Differential Diagnosis: Treating Medical Causation Testimony as Evidence, 66 DEF. COUNS. J. 525 (1999).

[195] *See generally* United States v. Univ. Hosp., 729 F.2d 144, 157 (2d Cir. 1984) (arguing that relatedness will "invariably require lengthy litigation primarily involving conflicting expert testimony").

[196] 509 U.S. 579 (1993).

[197] FED. R. EVID. 702.

[198] The Court discusses extensively what types of testimony will "assist" the trier of fact. It requires that the testimony pertain to "scientific knowledge" and not merely be "subjective belief or unsupported speculation." *Daubert*, 509 U.S. at 590.

[199] *See id.* at 590 ("Of course, it would be unreasonable to conclude that the subject of scientific testimony must be 'known' to a certainty; arguably, there are no certainties in

be based on a reliable methodology.[200] This standard would give plaintiffs and defendants leeway to introduce experts to testify on the degree of relatedness between a disability and a subsequent medical condition. Because the condition-extension test is based on the scientific method, experts would be required to testify as to the degree of statistical significance between conditions, satisfying the *Daubert* requirement that expert testimony be based on sound principles.

A testifying medical expert would review the patient's file and make a determination, based on his expertise, as to whether the excluded disability caused the secondary medical condition. To prove the reliability of the expert's testimony, counsel could supplement the expert's testimony with scholarly articles and studies[201] to verify that her testimony is based on sound scientific principles and is generally accepted in the community.[202]

2. Other Concerns with the Condition-Extension Test

Another potential problem is doctors' unwillingness to act as intermediaries between their patients and the insurance companies. When a disability is excluded from coverage, doctors will no doubt feel pressure to "find" unrelatedness; and when a disability is covered, doctors will no doubt feel pressure to "find" relatedness. In both cases, the physician's testimony may be the decisive factor as to whether the patient receives the care. Unfortunately, physicians already play this undesirable role, and

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science."). *See also* Ruiz-Troche v. Pepsi Cola of Puerto Rico Bottling Comp., 161 F.3d 84, 85 (1998) (stating that expert testimony "should be tested by the adversary process—competing expert testimony and active cross-examination—rather than excluded from jurors' scrutiny for fear that they will not grasp its complexities or satisfactorily weigh its inadequacies.").

[200] *See Daubert*, 509 U.S. at 592–93. *See also Ruiz-Troche*, 161 F.3d at 81 (arguing that courts should "focus on an expert's methodology, rather than his conclusions" in determining admissibility).

[201] *See* FED. R. EVID. 803(18) (experts can reference "learned treatises" in explaining or corroborating their testimony). *See also* Graham v. Wyeth Lab., 906 F.2d 1399, 1413 (10th Cir. 1990) (suggesting, without deciding, that an American Medical Association report, if left unredacted, could be submitted as a learned treatise as long as the plaintiff's witness established the relevancy of the report and the defendant had an opportunity to cross-examine the witness and challenge the report); Constantino v. Herzog, No. 99-7476, 2000 WL 149263, at *6 (2d Cir. Feb. 10, 2000) (stating that publication in an esteemed journal that subjects its contents to close scrutiny and peer review might sufficiently attest to the article's reliability).

[202] *See, e.g.*, Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311, 1316 (9th Cir. 1995); *Ruiz-Troche*, 161 F.3d at 84 (1998) (finding that "publication and peer review demonstrate a measure of acceptance of the methodology within the scientific community").

our current health insurance system demands that physicians be partners in defining the care that insurance companies cover.

Perhaps the most damaging criticism is that this relatedness analysis will deny medical care to disabled people who desperately need it. This is no doubt true. But courts have already decided that disabilities need not be covered. The condition-extension test attempts to fairly determine what is the disability, and to draw the boundaries of that disability as narrowly as possible to ensure that the disabled have access to as much medical care as possible under current judicial interpretations.

IV. Conclusion

Recent cases have radically changed the scope of the ADA, fundamentally altering and reshaping protections for the disabled. With several circuits agreeing that disabilities can be excluded from insurance coverage under Title III, one area of potential legal controversy will be to define what care falls within the purview of the exclusion.

The Seventh Circuit opinion in *Mutual of Omaha* offers one such legal roadmap. However, its lack of scientific underpinning and clear application guidelines limits its viability as a solution. There are simply too many situations in which insurance companies can argue, without foundation, that a condition is related to an uncovered disability with no oversight or restriction.

An alternative approach seeking a correlative and causation relatedness standard steered by impartial medical science will better serve the interests of the insureds and will provide insurance companies with a clear outline of their privileges and limitations. Placing a burden on insurance companies to justify their choices will protect the insured from outdated understandings of disability and will prevent insurance companies from wagering that an insured will not bring suit.

The ADA requires a balance between the often competing interests of the disabled and the insurance industry. Importing an analytical structure that is neither facially pro-disabled nor pro-business can help balance these interests as fairly as possible.

RECENT LEGISLATION

FEDERAL HOUSING SUBSIDIES

With the federal budget in surplus for the foreseeable future,[1] the Clinton Administration and Congress have just fought another round on low-income housing funding. Rather than returning to the traditionally liberal "supply-oriented" approach of directly increasing the low-income housing stock, which was popular from Franklin D. Roosevelt's presidency through the mid-1970s, President Clinton has embraced voucher subsidies as a market-based poverty alleviation measure. In support of this policy, the Administration contends that vouchers are more cost effective than new government-funded construction, and help low-income workers move closer to their jobs and secure more stable housing.[2]

Against the backdrop of 1997 and 1998 congressional freezes on new vouchers,[3] followed by a modest increase in 1999,[4] Congress initially eliminated from the proposed Fiscal Year 2000 budget all 100,000 incremental housing vouchers requested by the Administration.[5] In final budget negotiations, Congress changed course, allocating $346,560,000 for 60,000 new incremental housing vouchers in Title II of Public Law 106-74, the Fiscal Year 2000 appropriations bill for the Departments of Vet-

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[1] This year, the federal budget surplus is estimated to be approximately $167 billion. *See* Martin N. Baily, *Boom v. Boom: '90s Beat the '80s*, WALL ST. J., Feb. 25, 2000, at A18.

[2] *See* The White House, Office of the Press Secretary, Statement by the President (Dec. 29, 1999) (visited Feb. 25, 2000) <http://www.pub.whitehouse.gov/urires/I2R?urn:pdi://oma.eop.gov.us/1999/12/29/4.text.1> [hereinafter Clinton]. *See also* John F. Harris, *Clinton Will Request Expansion of Rental Subsidies*, WASH. POST, Dec. 29, 1999, at A5.

[3] *See* Department of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, Fiscal Year 1998, Pub. L. No. 105-65, Title II, 111 Stat. 1344 (1997); Department of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, Fiscal Year 1997, Pub. L. No. 104-134, Title I, 110 Stat. 1321 (1996). *See also* U.S. DEP'T OF HOUSING AND URB. DEV., WAITING IN VAIN: UPDATE ON AMERICA'S RENTAL HOUSING CRISIS (visited Apr. 25, 2000) <http://www.huduser.org/publications/affhsg/waiting/execsum.html> [hereinafter HUD].

[4] For fiscal year 1999, $283,000,000 was set aside for 50,000 new vouchers, with a strong tie-in to welfare-to-work initiatives. *See* Department of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, Fiscal Year 1997, Pub. L. No. 105-276, Title II, 112 Stat. 2461, 2470 (1998). *See also* Clinton, *supra* note 2.

[5] *See* Alan Fram, *House GOP Yields on Budget, Gives Clinton Billions More*, TIMES-PECAYNE (New Orleans, La.), Oct. 8, 1999, at A8.

erans' Affairs, and Housing and Urban Development, and Independent Agencies.[6]

In light of skyrocketing rents and a record 5.3 million households experiencing worst-case housing needs,[7] the modest voucher funding enacted during the last session of Congress will make a disappointingly small dent in an increasingly severe housing crisis. Although it appears that the battle over how to spend housing resources has been resolved, perhaps too rigidly, in favor of "demand-oriented" housing vouchers rather than "supply-oriented" new construction, the debate continues over how much funding to commit to low-income housing. For Fiscal Year 2001, the Administration has requested $690 million for 120,000 new low-income vouchers,[8] which would mark a significant increase over this year's funding and may confront stiff opposition in Congress.

After examining the current low-income housing crisis and its paradoxical relation to the nation's economy, this Essay revisits the debate between "demand-oriented" and "supply-oriented" government intervention strategies, with particular emphasis on comparative costs, poverty concentration, and effects on employment patterns. In the end, this Essay concludes that Public Law 106-74's federal low-income housing subsidy measures have four major shortcomings, namely: (1) it lacks flexibility in state use of funding; (2) it does not provide funding for housing location assistance; (3) it neglects to coordinate land-use planning efforts; and (4) it does not provide adequate funds to reign in the nation's housing crisis.

Amid extraordinary national prosperity, the poverty rate dropped to 12.7% in 1998,[9] with child poverty at its lowest rate since 1980.[10] Across all racial groups, more poor people are

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[6] *See* Department of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, Fiscal Year 2000, Pub. L. No. 106-74, Title II, 113 Stat. 1047, 1056 (1999). *See also* Eric Pianin, *Hill Negotiators Agree on VA-HUD Spending Bill*, WASH. POST, Oct. 8, 1999, at A7.

[7] *See* HUD, *supra* note 3, at 1.

[8] *See* James Bennet, *Clinton to Seek $1 Billion for 'Skills Gap,'* WASH. POST, Jan. 29, 1999, at A12. *See* Clinton, *supra* note 2. By historical standards, Clinton's proposed increase was modest. From 1978 through 1984, an average of 230,000 additional households were provided federal rental assistance each year. This dropped to approximately 126,000 per year from 1985 to 1995. *See* HUD, *supra* note 3, at 2.

[9] This number is down from 13.3% in 1997, lifting 1.1 million people from poverty. *See* JOSEPH DALAKER, U.S. CENSUS BUREAU, POVERTY IN THE UNITED STATES: 1998 v (1999).

[10] *See id.*

working, and their wages are rising.[11] The unemployment rate has fallen to four percent, the lowest rate in thirty years.[12] Workers at all levels are experiencing wage gains.[13] Ironically, the strength of the United States economy is exacerbating an already severe housing crisis for lower-income Americans. As incomes for upper-class Americans have increased faster than those for lower- or middle-class Americans,[14] rents have skyrocketed.[15] The number of households living in substandard housing or paying more than one-half of their income in rent has reached an all-time high.[16] Even with wages increasing in inflation-adjusted terms, they are not rising fast enough to account for the accelerating rent burdens.[17]

Meanwhile, the number of available low-income rental units has plummeted.[18] In *Waiting in Vain: Update on America's Rental Housing Crisis*, the Department of Housing and Urban Development ("HUD") describes the 1996 congressional freeze on new housing vouchers as a "historic reversal of Federal housing policy" that was "devastating to low-income families and senior citizens."[19] HUD contends that, now more than ever, federal housing assistance efforts must increase steadily just to keep up with increased low-income housing needs because the opportunity costs of not investing in more lucrative unsubsidized real estate has led many private owners to opt out of HUD-

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[11] *See* Megan Twohey, *No Room Amid the Boom*, NATIONAL J., Jan. 29, 2000, at 315.

[12] *See* U.S. Dep't of Labor, Office of Public Affairs, Statement by Secretary of Labor Alexis M. Herman on the January Employment Situation (Feb. 4, 2000) (visited Apr. 25, 2000) <http://www.dol.gov/dol/opa/public/media/press/opa/opa2000036.htm>.

[13] *See* Twohey, *supra* note 11, at 315. *See also* William Julius Wilson, *All Boats Rise. Now What?*, N.Y. TIMES, Apr. 12, 2000, at A31.

[14] *See* Twohey, *supra* note 11, at 315. *See also* MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY 12 (1995) (arguing that, with regard to the economic gap between classes, a focus on income rather than wealth may understate the problem, especially from a racial perspective. Persistent, vast wealth discrepancies between African Americans and whites with similar achievements and credentials presents another daunting social policy dilemma).

[15] *See* Twohey, *supra* note 11, at 315.

[16] The number now stands at 5.3 million. *See* HUD, *supra* note 3, at 1.

[17] Between 1995 and 1997, rents increased faster than income for the 20% of American households with the lowest incomes. The Consumer Price Index for residential rent rose 6.2% between 1996 and 1998, compared with a 3.9% rate of inflation during the same period. *See* HUD, *supra* note 3, at 1, citing the Bureau of Labor Statistics.

[18] Over the past 25 years, the low-income housing stock has been in decline, with a precipitous drop of 19% (1.3 million units) between 1996 and 1998. Adjusted for inflation, the number of units that rent for less than $300 fell from 6.8 million to 5.5 million in the period from 1996 to 1998 in spite of recent increases in construction of multifamily houses. *See* HUD, *supra* note 3, at 1–4.

[19] HUD, *supra* note 3, at 1–2.

assisted subsidy contracts.[20] In 1998 alone, 13,000 low-income units were taken out of the Section 8 program.[21] By 2004, two-thirds of all project-based Section 8 contracts will expire, affecting almost 14,000 properties, each containing one million subsidized housing units.[22]

The result is a severe housing crunch, with an increasing number of low-income renters competing for a diminishing number of affordable housing units.[23] Predictably, this crunch has led to increased waits for public housing units and vouchers, and many cities have closed waiting lists due to their enormous size.[24] While they are waiting, low-income families and seniors have limited options. The average household that receives HUD assistance needs to spend more than seventy-five percent of its already low income to rent a typical unsubsidized unit.[25] The relative inelasticity of the housing market is one of the main reasons low-income families face difficulty finding affordable housing alternatives.[26] Although some alternatives—such as increasing the number of occupants per unit—do exist, housing demand is less responsive to changes in price than many other goods. When rents are too high, families begin to pay for housing with money previously earmarked for food, clothing, and health care. More of the poor now work, but having a full time, low paying job may not be sufficient to resolve worst-case housing needs.[27]

Government proposals for addressing the affordable housing shortage can be divided into two basic categories: "supply-oriented" and "demand-oriented." Supply-oriented approaches focus on direct government intervention in the supply of low-income housing by constructing new units and subsidizing de-

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[20] *See id.* at 4.

[21] *See id.* at 1.

[22] *See* U.S. DEP'T OF HOUSING AND URB. DEV., OPTING IN: RENEWING AMERICA'S COMMITMENT TO AFFORDABLE HOUSING, (visited Apr. 25, 2000) <http://www.hud.gov/pressrel/optingin.html>.

[23] By 1995, 10.5 million low-income renters, which was up 70% since 1970, were competing for a pool of low-income units that fell from 6.5 million to 6.1 million during the same period. *See* Twohey, *supra* note 11, at 315.

[24] *See* HUD, *supra* note 3, at 1. From 1996 to 1998, the average waiting time for vouchers rose from 26 to 28 months. From 1998 to 1999, the number of families on the waiting lists increased 10 to 25%. *See id.*

[25] *See id.*

[26] *See* WILLIAM G. GRIGSBY, HOUSING MARKETS AND PUBLIC POLICY 82 (1967); Allison D. Christians, *Breaking the Subsidy Cycle: A Proposal for Affordable Housing*, 32 COLUM. J.L. & SOC. PROBS. 131, 135 (1999).

[27] *See* HUD, *supra* note 3, at 2.

velopers,[28] while demand-oriented approaches provide recipients with financial assistance to purchase housing on their own.[29] The rationale for "supply-oriented" programs is that insufficient low-income housing would be built without direct government intervention.[30] Regardless of the demand for low-priced housing, builders often choose to build high-priced residences that pose less risk and are more profitable, since housing construction involves fixed costs that cannot be reduced below a certain level.[31] Administrative rules and requirements further reduce the profitability of constructing low-income housing.[32] Public subsidies and tax credits can help, but such programs are often not sufficient to compete with market rents.[33] Consequently, as mentioned earlier, many Section 8 landlords choose to opt out of their contracts, exacerbating the shortfall in affordable units.[34]

Starting in 1974, Congress significantly cut funding for supply-oriented programs and began to shift resources toward demand-oriented subsidies.[35] The primary motivation for the shift was the significant cost savings of demand-oriented programs.[36] Under the current system, which President Clinton is currently proposing to expand,[37] all participating tenants receive a subsidy equal to the difference between thirty percent of their income and the Fair Market Rent ("FMR") limit in their area.[38] Since the government's share of the rent is fixed under Title II of Public Law 106-74, recipients whose rent exceeds the FMR pay more

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[28] *See* Michael H. Schill, *Distressed Public Housing: Where Do We Go From Here?*, 60 U. CHI. L. REV. 497, 524 (1993).

[29] *See id.* at 524.

[30] *See* Christians, *supra* note 26, at 137–38.

[31] *See id.*

[32] *See id.* at 136.

[33] *See* HUD, *supra* note 3, at 4.

[34] *See id.*

[35] *See generally* William H. Apgar, *Which Housing Policy is Best?*, 1 HOUS. POL'Y DEBATE 1, 5 (1990); Schill, *supra* note 28, at 525.

[36] *See* JAMES E. WALLACE ET AL., ABT ASSOCIATES, INC., PARTICIPATION AND BENEFITS IN THE URBAN SECTION 8 PROGRAM: NEW CONSTRUCTION AND EXISTING HOUSING (1981). *But see* Jennifer J. Curhan, *The HUD Reinvention: A Critical Analysis*, 5 B.U. PUB. INT. L.J. 239, 245–46 (1996) (citing studies claiming that demand-oriented approaches are more costly than supply-oriented approaches).

[37] Under the Quality Housing and Work Responsibility Act of 1998, vouchers and certificates were combined, largely perpetuating the voucher model. *See* Quality Housing and Work Responsibility Act, Pub. L. No. 105-276, 112 Stat. 2461 (1998). *See generally* Peter W. Salsich, Jr. & Nathan A. Orr, *Legislative Note—Congress Approves Major Housing Legislation*, 8 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 175, 175 (Winter 1999) (analyzing the Quality Housing and Work Responsibility Act).

[38] *See* Schill, *supra* note 28, at 525.

than thirty percent of their income.[39] Although vouchers do not involve direct construction of low-income housing, demand-oriented advocates argue that vouchers stimulate an increase in low-income housing stock through "filtering," or the passing down of older housing units from higher-income inhabitants to lower-income ones.[40]

In addition, unlike supply-oriented government interventions, which contribute to the "concentration effects" of poverty by building or subsidizing low-income housing increases in the inner city, vouchers give recipients mobility, helping them escape cyclical poverty while promoting racial and socioeconomic integration.[41] Vouchers therefore also help mitigate the "spatial mismatch," between where lower-income Americans live and where they work.[42] Although demand-oriented proposals offer significant benefits, namely cost effectiveness, reduction of concentration effects, and "spatial mismatch" alleviation, Public Law 106-74's

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[39] *See* Apgar, *supra* note 35, at 3–5. Unlike direct subsidies to landlords under the Section 8 program, vouchers have fewer perverse economic incentives since beneficiaries do not benefit from collusion and are inclined to resist increases in rent that do not carry with them a corresponding improvement in housing services or quality. *See id.* at 5. Furthermore, vouchers are less likely than Section 8 certificates, or other supply-oriented government programs, to encourage "over-consumption" of housing because those who rent apartments for less than the FMR retain a portion of the subsidy. *See id.* at 3–4.

[40] Under the "filtering" theory, dwellings that are occupied by one group become available to the next lower income group as technological obsolescence, style obsolescence, and deterioration cause decline either in the sales price or the rental value. When the rich move into new homes, they free up older units that are subsequently rented at lower rates by households in the next tier down of income. In this way, households of successively lower incomes sequentially occupy a unit. Everyone in the market theoretically moves up, thereby freeing units at the bottom for low-income tenants without ever actually building new low-income housing. *See generally* GRIGSBY, *supra* note 26, at 85 (describing and analyzing critiques of the filtering theory).

[41] *See generally* WILLIAM J. WILSON, THE TRULY DISADVANTGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY (1987) (arguing that the exodus of middle-class and working-class African Americans removes an important "social buffer" that could otherwise deflect the full impact of prolonged joblessness by acting as role model. Those that remain are a concentrated group of the most "truly disadvantaged," a "ghetto underclass" experiencing "social dislocation" and self-reinforcing crime, joblessness, out-of-wedlock births, and welfare dependency). *See also* Michael H. Schill, *Deconcentrating the Inner City Poor*, 67 CHI.-KENT L. REV. 795 (1991) (advocating demand-oriented housing policies as a tool for addressing the "concentration effects" Wilson describes).

[42] *See generally* Schill, *supra* note 41, at 796–804 (describing the "spatial mismatch" problem facing poor Americans who live in the inner city); *see also* PAUL A. JARGOWSKY & MARY J. BANE, GHETTO POVERTY IN THE UNITED STATES, 1970–1980, *in* THE URBAN UNDERCLASS 235, 253 (Christopher Jencks & Paul E. Peterson eds., 1991) (demonstrating that a large percentage of the inner city poor are high school dropouts); JOHN H. MOLLENKOPF, THE CONTESTED CITY (1983) (giving a historical account of the de-industrialization of the inner city and the growth of high-tech, financial sector, and service jobs in downtown areas).

modest use of such measures has four major shortcomings that need to be addressed.

First, Public Law 106-74 is short-sighted in failing to give states some flexibility in using Title II funding for housing construction. In a 1990 article, entitled "Which Housing Policy is Best," the United States Assistant Secretary for Housing at HUD, William Apgar, contended that "housing vouchers or similar demand subsidies may be appropriate in some contexts, but economic theory and recent empirical analysis suggest that such subsidies are 'not the best at all times and under all situations.'"[43] His argument is that, in a high rent environment, the apparent cost advantages of demand-side subsidies may be reduced as the cost of new construction rises less rapidly than the rent for decent available housing.[44] Apgar also argued that, under some circumstances, housing vouchers may themselves contribute to a "strong upward pressure on rents," which adversely affects the non-subsidized poor.[45] In the absence of an entitlement to rental assistance, according to Apgar, the fate of the poor who are still waiting for housing assistance must also play a prominent role in federal housing policy.

He suggests that demand-oriented policies may have other perverse effects. For example, in metropolitan areas characterized by significant disinvestment in inner-city neighborhoods, a housing allowance program, which requires recipients to live in housing that meets certain minimum standards, might further destabilize the housing market by compelling households to move out of areas with high vacancy rates and low-quality housing into areas with low vacancy rates and upward pressure on rents.[46] Arguably, such a migration could lead to the worst possible result: abandonment pressures in the inner city, excess demand pressures elsewhere, and no effect on supply that could control price increases.[47]

The limitations of "filtering" present another concern about the efficacy of an exclusively demand-oriented strategy. In a booming real estate market, where developers are increasingly

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[43] Apgar, *supra* note 35, at 1.

[44] *See id.*

[45] *Id.* at 10. *But see* John C. Weicher, *Comment on William Apgar's "Which Housing Policy is Best,"* 1 HOUSING POL'Y DEBATE 33 (1990) (contesting the empirical validity of Apgar's arguments and contending that rent burdens, not the availability of severely inadequate housing, is the greatest obstacle faced by low-income tenants).

[46] *See* Apgar, *supra* note 35, at 10.

[47] *See id.*

opting out of their Section 8 contracts, the removal of housing from the overall stock may prevent housing from filtering down. Furthermore, the lack of family mobility not only may be a problem, but also the filtering down of housing may also not necessarily be accompanied by a filtering up of occupants.[48] For instance, zoning ordinances, historical preservation, and conservation efforts can limit where new building may take place.[49] Due to such constraints, "downward movement, even in constant dollars, [is] the exception, confined to at most about one-quarter of the stock."[50]

In addition, private owners sometimes contribute to abandonment pressures by neglecting maintenance or leaving neighborhoods to avoid the effects of declining prices on property values.[51] Alternatively, owners may have a long-term motive to see a neighborhood bottom out and become attractive to a new set of buyers.[52] Such neglect may often bring about "gentrification," the process of renewal and rebuilding, whereby middle-class and upper middle-class people move into a once-deteriorating area, displacing poorer residents.[53] Buildings are condemned, sold to speculators, and subsequently rebuilt as higher-income housing.[54] Although gentrification offers significant benefits, such as increased tax revenues, improved schools, and new businesses, gentrification hurts the poor by raising rents and decreasing the affordable housing supply.[55] In light of such concerns, it would be preferable for federal housing assistance legislation to give states the discretion to use funds for supply-oriented programs

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[48] Alternatively, with generally rising real incomes, a group of dwellings may be occupied by successively higher income groups as the relative values of the units decline. Other difficulties include removal of houses from the supply when new households are formed, when there is a change in tenure or land use, abandonment, demolition, or gentrification. *See* GRIGSBY, *supra* note 26, at 61, 87, 107–10; Christians, *supra* note 26, at 137.

[49] *See, e.g.*, Christians, *supra* note 26, at 140–41 (discussing how zoning ordinances prevent the construction of affordable housing).

[50] GRIGSBY, *supra* note 26, at 155; Christians, *supra* note 26, at 137.

[51] *See* GRIGSBY, *supra* note 26, at 100. *See also* Duncan Kennedy, *The Effect of the Warranty of Habitability on Low Income Housing: "Milking" and Class Violence*, 15 FLA. ST. U. L. REV. 485, 489 (1987) (arguing that landlords in deteriorating neighborhoods have an incentive to charge tenants the highest possible rents while neglecting maintenance.)

[52] *See* Christians, *supra* note 26, at 138.

[53] *See id.* at 139. *But see, e.g.*, ROLF GOETZE, UNDERSTANDING NEIGHBORHOOD CHANGE (1979) (providing a positive and normative account of the process of gentrification).

[54] *See* Christians, *supra* note 26, at 139.

[55] *See id.* at 140.

when necessary. For example, states where urban vacancy rates for affordable units[56] remain at less than four percent[57] for two or more years could opt out of the voucher program and receive their federal housing funding as a block grant, specifically earmarked for both new construction and new vouchers. By allowing state and local governments to meet the specific housing needs of their communities, and also acknowledging the preference for demand-oriented subsidies, such legislation would, in the end, be more economically efficient, help de-concentrate the poorest communities, and combat "spatial mismatch," while also recognizing the regional affordable housing market conditions.

Second, federal appropriations for housing assistance should also provide funding for programs that help aid recipients find available housing. Besides lack of personal income, other obstacles prevent the urban poor from moving out of the inner-city. For instance, zoning restrictions and amenities drive suburban rents beyond the affordable range.[58] Also, in spite of several federal regulations meant to address the issue, significant housing discrimination, which is often based on racial prejudice, still exists.[59] Search assistance programs aimed at connecting recipients with landlords willing to rent to them have therefore produced more favorable results than non-search assisted programs.[60] Furthermore, since voucher programs are of no value unless beneficiaries can actually use them, funding for search assistance programs is especially important in tight rental markets.

Third, there is also a need for coordinated land-use planning that integrates the poverty de-concentration priorities of supply-oriented policies with zoning oversight and overall regional transportation, conservation, and anti-sprawl initiatives. In the early 1970s, Congress almost succeeded in passing federal land-use planning legislation, which would have given states grants to

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[56] In this context, "affordable" refers to units rented at below FMR.

[57] This percentage figure is suggested in Raymond J. Struyk, *Comment on William Apgar's "Which Housing Policy is Best?*, 1 HOUSING POL'Y DEBATE 41, 46 (1990) (arguing that, in many markets, adding more units at about the FMR will simply cause additional units to leave the stock).

[58] *See* Schill, *supra* note 41, at 811–12.

[59] *See* Peter P. Swire, *The Persistent Problem of Lending Discrimination: A Law and Economic Analysis*, 73 TEX. L. REV. 787, 793 (1995). *See also* OLIVER & SHAPIRO, *supra* note 14, at 136–47.

[60] *See* Curhan, *supra* note 36, at 250–51.

establish such programs.[61] The proposal would have linked federal funding with state and local programs that involved large-scale development and had a significant environmental impact.[62] During the last few years, there has been a resurgent interest in coordinated land-use planning, focusing on combating the ecological, economic, and aesthetic consequences of "sprawl," a phenomenon involving low population density and an inefficient allocation of resources. Anti-sprawl advocates see land-use planning as an opportunity to re-think regional transportation strategies, residential housing patterns, and land conservation.[63]

In the context of urban housing policy, the discourse surrounding anti-sprawl policies offers an exciting opportunity to incorporate the goals of federal housing policy, such as deconcentrating poverty and the alleviation of "spatial mismatch," into regional land-use coordination strategies. The federal government could play a leadership role by funding and catalyzing statewide land-use strategies that integrate disparate areas of concern including transportation, conservation and environmental protection, economic development, and poverty deconcentration.[64] If efforts to assist poor inner city workers that move to the suburbs are given priority in "livability" efforts,

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[61] *See* Land Use Policy and Planning Assistance Act of 1972, S. 632, 92d Cong. (1972) (passed the Senate on September 19, 1972). The House version of the bill, the National Land Use Policy Act of 1972, H.R. 721, 92d Cong. (1972), was not acted on. *See* 118 CONG. REC. H15,278 (daily ed. Sept. 19, 1972). In 1973, Senator Jackson reintroduced the legislation, which again passed the Senate. *See* S. 268, 93d Cong. (1973). The House version, however, was defeated. *See* Land Use Planning Act, H.R. 10,294, 93d Cong. (1973); 120 CONG. REC. H5019, H5042 (daily ed. June 11, 1974).

[62] *See* Shelby D. Green, *The Search for a National Land Use Policy: For the Cities' Sake*, 26 FORDHAM URB. L.J. 69, 117 (1998) (describing the approach as preferable to the current federal approach to land use, which she describes as an "intricate matrix" that is "without logic").

[63] *See, e.g.*, Mike Snyder, *"Smart growth" re-examines sprawl; Movement aims to harness regional development patterns, transportation policy*, HOUS. CHRON., Mar. 19, 2000, at A1.

[64] Additionally, local zoning boards and courts approving zoning regulations must be proactive to avoid community pressures that *de facto* exclude the poor from the suburbs through seemingly innocuous regulations such as lot sizes, setback requirements, expensive subdivision exactions, and no-growth ordinances that ensure that housing costs will exceed the ability of even voucher recipients to pay. *See, e.g.*, Southern Burlington County NAACP v. Township of Mount Laurel, 290 A.2d 465 (N.J. Super. 1972) (finding that municipal zoning ordinances and budgetary policies had exhibited economic discrimination and deprived the poor of adequate housing and the opportunity to secure construction of subsidized housing); Southern Burlington County NAACP v. Township of Mount Laurel, 336 A.2d 713 (N.J. 1975) (requiring that municipalities' land use regulations provide a realistic opportunity for low- and moderate-income housing); Southern Burlington County NAACP v. Township of Mount Laurel, 456 A.2d 390 (N.J. 1983) (holding that the State Development Guide Plan serves as a remedy for violations of the Mount Laurel doctrine).

significant strides can be made on all fronts. On the other hand, without factoring in how land-use planning could affect those in need of suburban affordable housing, land-use coordination strategies could inadvertently add to the obstacles faced by poorer Americans who try to move out of the inner-city.[65]

The fourth and greatest shortcoming of Public Law 106-74's federal housing assistance measures is the number of qualified low-income people who are, literally, left out in the cold. Greater efforts need to be made to assist those on waiting lists for housing vouchers. Currently, there are thirty-five million poor people in the United States.[66] Collectively, public housing, Title II vouchers, and Section 90 project-based programs account for 4.3 million subsidized units.[67] The working poor who qualify for housing assistance, but do not receive any federal housing assistance, are falling steadily further behind,[68] spending an average of seventy-five percent of their income on rent,[69] with corresponding decreases in money available for food, clothing, education, and health care.

In light of these figures, the Administration's proposal for 120,000 new vouchers is a modest first step to fully addressing the nation's affordable housing crisis and should be enacted. The states also need to do their part to insulate the poor from the adverse rent consequences of the booming economy and provide affordable housing opportunities. In the wealthiest country in the history of the world, more must be done to prevent the working poor from having to choose between hunger and homelessness.

—*Quentin A. Palfrey*

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[65] I am indebted to Professor Michael Schill for raising concerns about the compatibility of these two agendas.

[66] *See* U.S. BUREAU OF THE CENSUS, POVERTY RATE DOWN, HOUSEHOLD INCOME UP—BOTH RETURN TO 1989 PRE-RECESSION LEVELS, CENSUS BUREAU REPORTS, (visited Feb. 25, 2000) <http://www.census.gov/Press-Release/cb98-175.html>.

[67] 1.3 million in public housing, 1.5 million in vouchers and certificates, and 1.5 in Section 8 project-based properties. *See* HUD, *supra* note 3, at 2.

[68] In 1995, 40% of working poor renters spent more than 50% of their income on rents and utilities. This trend continued in the ensuing years, as rents increased faster than incomes for the 20% of Americans with the lowest incomes. *See* Twohey, *supra* note 11, at 315–16.

[69] *See* HUD, *supra* note 3, at 1.

FINANCIAL SERVICES REFORM

1999 marked not only the end of a decade of remarkable economic growth, but also the historic demise of federal banking regulations that had been in place for over six decades. On November 12, 1999, after twenty years of effort by industry lobbyists and lawmakers,[1] the Gramm-Leach-Bliley Financial Modernization Act[2] was signed into law, having passed Congress with overwhelming support in both the House and the Senate.[3] The legislation repeals the 1933 Glass-Steagall Act,[4] which separated commercial banking from investment banking, and amends the 1956 Bank Holding Company Act ("BHCA"),[5] which separated banks from insurance companies. The legislation's reform measures allow commercial banks, securities firms, and insurance companies to enter one another's businesses or merge more easily[6] under a new type of Financial Holding Company ("FHC").[7]

An understanding of the significance of the Gramm-Leach-Bliley Act requires a brief examination of the inception of the Glass-Steagall Act and the BHCA. The Glass-Steagall Act, born out of the United States's worst depression, encapsulated the then-prevailing belief that the involvement of banks in securities transactions had caused the extensive failure of commercial banks and the 1929 stock market crash.[8] Spearheaded by Senator Carter Glass, congressional inquiries led many lawmakers to conclude that banks had engaged in risky investments and in

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[1] *See* Kathleen Day, *Banking Accord Likely to Be Law; Clinton Hails Hard-Reached Agreement*, WASH. POST, Oct. 13, 1999, at A1. *See also* Linda B. Tigges, *Functional Regulation of Bank Insurance Activities: The Time Has Come*, 2 N.C. BANKING INST. 455 (1998). Ten attempts have been made over the past 20 years to pass financial services reform legislation. *See id.*

[2] Gramm-Leach-Bliley Financial Modernization Act, Pub. L. No. 106-102, 113 Stat. 1338 (1999).

[3] The Senate easily passed the bill by a vote of 90-8, *see* 145 CONG. REC. S13,917 (1999), and the House also approved it by a lopsided vote of 362-57. *See* 145 CONG. REC. H11,551 (1999).

[4] The Glass-Steagall Act is the name commonly used to refer to §§ 16, 20, 21, 32 of the Banking Act of 1933, 12 U.S.C. §§ 24, 78, and 377–378 (1994 & Supp. II 1997) (repealed 1999).

[5] 12 U.S.C. §§ 1841–1850 (1994 & Supp. II 1997) (amended 1999).

[6] Citicorp's purchase of Travelers Insurance in 1998 is evidence that this process of consolidation had begun. Without the new law, insurance operations might have been excluded from the post-merger entity. *See* Laura J. Cox, Note, *The Impact of the Citicorp-Travelers Group Merger on Financial Modernization and the Repeal of Glass-Steagall*, 23 NOVA L. REV. 899, 922 (1999).

[7] *See* Gramm-Leach-Bliley Act §§ 101–103, 113 Stat. at 1341–51 (1999).

[8] *See generally* GEORGE J. BENTSON, THE SEPARATION OF COMMERCIAL AND INVESTMENT BANKING: THE GLASS-STEAGALL ACT REVISITED AND RECONSIDERED (1990).

reckless stock market speculation. Populist sentiment, however, not careful inquiry, prompted the passage of the Glass-Steagall Act.[9] In light of disclosures of disreputable practices and dishonest dealings by National City Bank, the predecessor to Citibank, public mistrust of speculative securities dealings carried over into commercial banking, thereby hastening the enactment of the Glass-Steagall regulatory measures.[10]

Over two decades later, Congress passed the BHCA, which restricted bank holding companies from acquiring or retaining ownership or control of the voting shares of non-banking entities, in particular, insurance companies.[11] The BHCA required compliance with section 7 of the Clayton Act,[12] as well as sections 1 and 2 of the Sherman Antitrust Act,[13] in its regulation and approval of mergers, consolidations, and acquisitions among banks and bank holding companies.[14] In addition to requiring the Board of Governors of the Federal Reserve System ("the Fed") to approve mergers and acquisitions among banking entities, Congress granted both antitrust agencies—i.e., the Department of Justice ("DOJ") and the Federal Trade Commission ("FTC")—and banking agencies—i.e., the Office of the Comptroller of the Currency ("OCC"), the Federal Deposit Insurance Corporation ("FDIC"), and the Fed—the authority to review the competitive consequences of such transactions.[15]

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[9] *See* Carter H. Golembe, *History Disputes Tales of Pre-1933 Securities Irregularities by Banks*, BANKING POL'Y REP., Apr. 3, 1995, at 3. *See also* ROBERT E. LITAN, WHAT SHOULD BANKS DO? 27 (1987) (citing *Stock Exchange Practices: Hearings Before a Subcomm. of the Senate Comm. on Banking and Currency on S. Res. 84 and S. Res. 239*, 72d Cong. (1933)). Ferdinand Pecora, chief counsel of Senator Glass's banking subcommittee, led hearings investigating major abuses involving large commercial banks and their securities affiliates. *See id.* The hearings examined loans, which were made to securities purchasers to support artificially elevated securities prices and poorly performing stocks, that were dumped into trust accounts managed by banks. *See id.*

[10] *See* Golembe, *supra* note 9, at 3.

[11] *See* 12 U.S.C. §§ 1841–1850 (1994 & Supp. II 1997) (amended 1999).

[12] 15 U.S.C § 18 (1994) (prohibiting mergers or acquisitions where "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly").

[13] 15 U.S.C. §§ 1–2 (1994) (prohibiting, respectively, "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . " and unilateral monopolization or attempted monopolization by combination or conspiracy).

[14] *See* 12 U.S.C. § 1828(c) (1994 & Supp. 1996).

[15] *See* 12 U.S.C. § 1842 (1994). In banking mergers, the DOJ's Antitrust Division normally has authority to assess anticompetitive effects and pursue appropriate remedies, such as divestitures, while the FTC has concurrent jurisdiction to review those mergers that require filing pursuant to the Hart-Scott-Rodino Act. *See* 15 U.S.C. § 18(a) (1994).

The Gramm-Leach-Bliley Act, which is over four hundred pages in length, is a complex piece of legislation that modifies much of existing federal banking law. The Act repeals the Glass-Steagall prohibitions against the affiliation of Fed member banks with entities involved in securities activities and against officials of securities entities from having supervisory positions in member banks.[16] The legislation fosters further consolidation within the financial services industry by allowing new FHCs to own subsidiary corporations involved in any activity deemed to be financial in nature,[17] and by preempting any state law designed to prevent such consolidation.[18] The Fed will regulate the new FHCs in concert with other appropriate federal agencies.[19]

The Gramm-Leach-Bliley Act establishes a number of safeguards designed to mitigate the adverse consequences that may arise from consolidation within the financial services industry. Bank holding companies seeking FHC status must be, at a minimum, "well-capitalized" and "well-managed."[20] In addition, the bank holding company must pass minimum Community Reinvestment Act ("CRA") requirements,[21] although the Act does not grant the Fed any remedial powers, such as requiring dissolution of a holding company because of a poor CRA rating.[22] The legislation also restricts cross-marketing arrangements within FHCs between the bank and non-financial subsidiaries.[23] Another provision calls for a report on the impact of financial modernization on lending to small businesses and farms.[24] Furthermore,

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[16] *See* Gramm-Leach-Bliley Financial Modernization Act, Pub. L. No. 106-102, §§ 101–103, 113 Stat. 1338, 1341–51 (1999).

[17] *See id.* §§ 102–103, 113 Stat. at 1341–51.

[18] *See id.* § 104, 113 Stat. at 1352.

[19] *See id.* § 103, 113 Stat. at 1342–51.

[20] *See id.* § 103(a), 113 Stat. at 1346.

[21] *See id.*, 113 Stat. at 1346–47. The Community Reinvestment Act was passed in 1977 as a response to discriminatory lending practices. The CRA mandated that federal regulators encourage banks to lend to formerly underserved markets. Regulators implemented this mandate, in part, by devising a rating system that measured the extent to which a single bank serves undercapitalized markets. When a bank seeks to merge, one of the factors regulators consider is the bank's CRA rating. *See, e.g.*, Keith N. Hylton & Vincent D. Rougeau, *Lending Discrimination: Economic Theory, Econometric Evidence, and the Community Reinvestment Act*, 85 GEO. L.J. 237, 241–44 (Dec. 1996). Whether the CRA rating scheme for bank mergers should be preserved in the Gramm-Leach-Bliley Act proved to be one of the most contentious issues during its drafting and passage. *See, e.g.*, Day, *supra* note 1, at A1.

[22] *See* Gramm-Leach-Bliley Financial Modernization Act, Pub. L. No. 106-102, § 103, 113 Stat. 1338, 1346–47 (1999).

[23] *See id.* § 103(a), 113 Stat. at 1348–49.

[24] *See id.* § 109, 113 Stat. at 1362.

the legislation includes privacy safeguards for customers.[25] For instance, regulatory agencies must establish standards to protect the confidentiality and integrity of customer information.[26] Institutions generally also may not disclose private account information to nonaffiliated third parties.[27] Finally, the Act requires institutions that operate automatic teller machines ("ATMs") to post notice of any fees charged for use of ATMs, and to provide notice of fees upon issuance of an ATM card.[28]

Few provisions of the Gramm-Leach-Bliley Act directly confront the antitrust issues, which will likely arise due to the its facilitation of consolidation within the financial services industry.[29] The legislation amends the BHCA by requiring the Fed to notify the FTC of any merger or acquisition involving nonbanking interests, and also expands the categories of mergers and acquisitions that must be reported to the FTC pursuant to the Hart-Scott-Rodino Act.[30] Additionally, to protect against the possibility of institutions becoming "too big to fail,"[31] the legislation requires that the Fed and the Department of Treasury study whether the FHCs and banks that it spawns should maintain portions of their capital as subordinated debt.[32]

Commentators have generally praised the enactment of the Gramm-Leach-Bliley Act, mainly because the prior existing fed-

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[25] Privacy concerns were an aspect of the legislation that drew much attention. *See, e.g.*, Day, *supra* note 1, at A1; Michael Schroeder, *Clinton Signs Financial Services Bill, But Cautions about Privacy Shortfalls*, WALL ST. J., Nov. 15, 1999, at A41.

[26] *See* Gramm-Leach-Bliley Act §§ 501, 113 Stat. at 1436–37.

[27] *See id.* §§ 501–502, 113 Stat. at 1438–39. Significantly, the exceptions to the nondisclosure policy are broad. An institution may provide nonpublic personal information to third parties if the institution notifies the customer and gives her a chance to "opt-out." *See id.* § 502(e), 113 Stat. at 1438–39.

[28] *See id.* §§ 702–703, 113 Stat. at 1463–64. Fees charged by ATMs have recently become a controversial consumer welfare issue. *See, e.g.*, Peter Pae, *ATM Fees Spreading, Study Says; More Banks Impose Charges; Fees Rise*, WASH. POST, Apr. 2, 1998, at C1.

[29] *See, e.g.*, Joseph Kahn, *A NEW FINANCIAL ERA: THE IMPACT; Financial Services Industry Faces a New World*, N.Y. TIMES, Oct. 23, 1999, at C1.

[30] *See* Gramm-Leach-Bliley Act § 131, 113 Stat. at 1382; 15 U.S.C. § 18(a) (1994) (requiring that mergers and acquisitions between companies meeting certain minimum assets thresholds, or certain minimum ownership thresholds, be reported to the FTC, and that the merger or acquisition not be consummated until the appropriate waiting period has expired).

[31] An institution becomes "too big to fail" when its failure poses risks to a particular economic system. The Federal Deposit Insurance Corporation (FDIC) first articulated the doctrine while protecting both insured and uninsured depositors in certain extremely large banks (assets greater than $500 million) at risk of failing in the 1980s. *See* Arthur R. Wilmarth, Jr., *Too Big to Fail, Too Few to Serve? The Potential Risks of Nationwide Banks*, 77 IOWA L. REV. 957, 994 (1992).

[32] *See* Gramm-Leach-Bliley Act § 108, 113 Stat. at 1361–62.

eral banking regulations were seen as artificial and obsolete.[33] The legislation's predicted impact includes more convenience for consumers, expansion of available services, and lower fees.[34] In response to the anticipated conglomeratization of the financial services industry, lobbyists and regulators argued that reform was necessary to make American institutions more competitive at home and in global markets.[35] In the long run, deregulation could translate into lower prices for innovative products that would come to market more quickly than under the old regulations.[36] Moreover, supporters point out that more diversified financial services conglomerates will be better insulated from the boom and bust of the business cycle.[37]

Given the spate of merger activity in the last several years,[38] and while the reform of federal regulations has been greeted by the financial services industry with almost universal enthusiasm and by its critics with tempered skepticism,[39] noticeably absent from the discourse is an in-depth analysis of the anticompetitive consequences and antitrust enforcement issues that the Act raises.

On its face, the Act relies on the present regulatory structure (encompassing the DOJ's Antitrust Division, the FTC, the OCC, the FDIC, and the Fed) to continue to implement traditional merger oversight and to protect against the dangers of concentration. The evidence, however, suggests that, in light of the its reform measures, new procedures or safeguards may be necessary.

The DOJ and the FTC have already established a step-by-step process by which they determine whether any particular combination of firms will have anticompetitive consequences. The *Hori-*

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[33] *See, e.g.*, Ron Chernow, *The New Deal's Gift to Wall Street*, WALL ST. J., Nov. 11, 1999, at A26 (arguing that the Securities Act of 1933 was much more instrumental than the Glass-Steagall Act in assuring transparency within securities markets and facilitating the consumerization of securities investing); Randall Smith & Deborah Lohse, *Financial Firms Already Know How to Avoid Barrier Rules*, WALL ST. J., Oct. 22, 1999, at C1 (pointing out that the lines between commercial banks, investment banks, and insurance were becoming more and more blurry).

[34] *See* Michael Schroeder, *Congress Passes Financial Services Bill*, WALL ST. J., Nov. 5, 1999, at A2.

[35] *See, e.g.*, Day, *supra* note 1, at A1.

[36] *See id.*

[37] *See Leaders Killing Glass-Steagall: Not Before Time, America's Congress Has Decided to Repeal This Bad Law.*, ECONOMIST, Oct. 30, 1999, at 18.

[38] The United States is in the midst of a tremendous merger wave. The value of mergers in 1998 was 10 times the value of mergers in 1992, and the total value of all mergers was over $1.6 trillion. *See* Richard G. Parker & David A. Balto, *The Merger Wave: Trends in Merger Enforcement and Litigation*, 55 BUS. LAW. 351, 351 (1999).

[39] *See, e.g.*, Kathleen Day, *Reinventing the Bank; With Depression-Era Law About to Be Rewritten, the Future Remains Unclear*, WASH. POST, Oct. 31, 1999, at H1.

zontal Merger Guidelines,[40] promulgated jointly by the agencies, identify five core parts to a merger analysis: market definition, competitive effects, entry, efficiencies, and the failing firm defense. A merger analysis typically begins by identifying the product market and geographic markets in which the firms participate.[41] Once the agencies define the proper market, they may assess the extent of concentration that the combination would create.[42] If a merger significantly enhances a firm's share of the market, the *Guidelines* require that the agencies next determine what would be the merger's competitive effect.[43] Competitive effects analysis involves identifying the specific ways that a combination will undermine competition.[44] The most common type of competitive effect—or at least the easiest one to measure or to prove—is a unilateral effect, wherein a combination allows a single firm to have sufficient market share to implement a price increase unilaterally, or to reduce output.[45] Finally, the *Guidelines* require that the agencies assess the extent to which possible new entry or efficiencies resulting from the combination will mitigate its anticompetitive consequences. If a merger involves a failing firm or a failing division, the *Guidelines* mandate that the agencies take this factor into account.[46] The *Guidelines*' primary concern is market power: "[M]ergers should not be permitted to create or enhance market power or facilitate its exercise."[47]

A unilateral competitive effect may result where the merged firms each have products that act as close substitutes to one another so that the merged entity would produce the two best products.[48] In this scenario, a financial conglomerate could increase the price of one product without bearing any net profit loss that might result from losing customers to a competitor. Assuming the conglomerate offers two similar financial products, custom-

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[40] *1992 Horizontal Merger Guidelines*, 57 Fed. Reg. 41,561 (1992) [hereinafter *Guidelines*].

[41] *See id.* § 1.0, at 41,554.

[42] *See id.*

[43] *See id.* § 2.0, at 41,558.

[44] *See id.* § 2.0, at 41,558.

[45] *See id.* § 2.2, at 41,560.

[46] *See id.* §§ 3–5, at 41,561–63.

[47] *Id.* § 0.1, at 41,553 (defining market power as "the ability profitably to maintain prices above competitive levels for a significant period of time").

[48] *See* James F. Rill, *Speech Before ABA Section of Antitrust Law*, 62 BNA ANTITRUST & TRADE REG. REP. No. 1560, at 488 (1992). *See also* Michael A. Greenspan, *Geographic Markets in Bank Mergers: A Potpourri of Issues*, 2 N.C. BANKING INST. 1, 15 (1998).

ers unwilling to bear the increased costs simply would switch to the second best product offered by the same conglomerate without switching to another competing institution.[49]

Two possible explanations may account for a consumer's hesitancy to switch to a competing institution. First, consumer perception heavily influences a consumer's loyalty to a particular financial institution and, as a result, a consumer's preference for switching products rather than switching institutions.[50] A consumer's perception of an institution may be shaped by factors such as the competitive prices it offers, its size and prestige, and the convenience of one-stop shopping. For instance, if a financial conglomerate were to increase the price of its best product, it may be irrelevant that the institution's second best product may also be available at a competing institution on more favorable terms so long as the customers perceive that the second best product originates from the same institution that offers the first best product.[51]

A second explanation for the consumer's unwillingness to switch institutions may rest in the high costs associated with switching institutions.[52] Conglomerates of commercial banking, securities, and insurance likely will provide all of a customer's financial needs.[53] The benefits of one-stop shopping, however, may be outweighed by the high transaction costs involved in transferring multiple accounts between two competing institutions. The costs of switching institutions for all products, or for one product, could likely offset any benefits gained from obtaining the lower price, unless the price difference is substantial. Also, switching all accounts to a new institution for the benefit of one product may neither be beneficial nor practical and is unlikely to occur. Furthermore, establishing multiple accounts at various institutions to get the best overall deal defeats the purpose of one-stop shopping. Lastly, transferring one account from a conglomerate to a competing institution raises privacy concerns, thereby resulting in significant monitoring costs.

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[49] *See* Rill, *supra* note 48, at 488.

[50] *See* Neal R. Stoll & Shepard Goldfein, *Merger Enforcement for the Nineties and Beyond*, N.Y.L.J., Apr. 21, 1992, at 3.

[51] *See id.*

[52] *See* Gina M. Kilian, *Bank Mergers and the Department of Justice's Horizontal Merger Guidelines: A Critique and Proposal*, 69 NOTRE DAME L. REV. 857, 876 (1994).

[53] *See* Gregory Elliehausen & John Walker, *Small Business Clustering of Financial Service and the Definition of Banking Markets for Antitrust Analysis*, 37 ANTITRUST BULL. 707, 735 (1992).

The consumers' propensity not to switch between competing financial institutions suggests that financial service conglomerates, formed as a direct consequence of the Gramm-Leach-Bliley Act, may acquire increased market power sufficient to affect anticompetitive price increases. Ordinarily, one assumes that a consumer facing an anticompetitive price increase will switch to another firm, thereby disciplining the original firm and constraining prices.[54] If a customer is less likely to switch between competing financial institutions because of either firm loyalty or high transaction costs, however, a firm may in fact gain a type of market power absent a concurring increase in that firm's market share. For example, *Commercial Bank A* merges with *Investment Bank B*. Suppose that the merger passes regulatory barriers because it does not result in an immediate increase of either banks' share in any relevant market, although both banks are substantially large nationally. *Customer X* originally had accounts at both banks before the merger. After the merger, the merged entity, *Bank AB*, maintains checking account fees, but raises brokerage fees by ten percent. Before the merger, *Customer X* would have switched to another investment bank to avoid the price increase; however, as a result of the merger, *Customer X* does not switch because she is loyal to *Bank B* and it would be very costly for her to move both her checking account and investment account.

The Act's proponents may argue that the hypothetical customer does not switch because the convenience value of one-stop shopping outweighs the fee increase, thus justifying the price increase on efficiency grounds. Although such an argument may well pass muster in an agency's analysis of a combination, there remains another concern: the additional amount of information about *Consumer X* that is available to the merged institution after the combination may allow it to price discriminate against her.[55]

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[54] *See Guidelines, supra* note 40, § 1.11, at 41,554.

[55] *See id.* § 1.12, at 41,555 ("Existing buyers sometimes will differ significantly in their likelihood of switching to other products in response to a 'small but significant and nontransitory' price increase. If a hypothetical monopolist can identify and price differently to those buyers ('targeted buyers') who would not defeat the targeted price increase by substituting to other products in response to a 'small but significant and nontransitory' price increase for the relevant product, and if other buyers likely would not purchase the relevant product and resell to targeted buyers, then a hypothetical monopolist would profitably impose a discriminatory price increase on sales to targeted buyers. This is true regardless of whether a general increase in price would cause such significant substitution that the price increase would not be profitable.").

This concern helps explain why consumer privacy was such a contentious issue during the bill's passage.[56]

Unilateral activity, and the ensuing market power, may also arise in markets where products are similar and where a large firm can restrict its output to gain further leverage.[57] A conglomerate, for instance, might decrease its output of loans to a particular segment of consumers, such as small businesses[58] without any sacrifice in net profits.[59] In large geographic markets where presumably many conglomerates will operate, the threat of this type of unilateral activity is minor, assuming that customers are both able and willing to switch institutions. On the other hand, such a reduction may be profitable in small markets where national conglomerates can easily displace small, individual financial service providers. For example, once a national conglomerate enters a small market and acquires, or edges out, existing fragmented financial service providers who normally cater to small to mid-sized businesses, it may prioritize its services to satisfy large business clients. Regional and national businesses, compared with their smaller, local counterparts, have larger portfolios that are more attractive to banks, which, for reasons of administrative efficiency, prefer to service one large account rather than multiple small ones.[60]

Recent studies have shown that large banks make significantly fewer small business loans in comparison with smaller, local banks.[61] Compared with loans to large businesses, loans to small businesses, whose creditworthiness is more difficult to determine, are much more costly for big banks.[62] Unlike loan manag-

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[56] *See supra* text accompanying note 25.

[57] *See Guidelines*, *supra* note 40, § 2.22, at 41,561.

[58] Small businesses are defined by the U.S. Small Business Administration (SBA) as firms with fewer than 500 employees. *See generally* Rebel A. Cole & John D. Wolken, *Financial Services Used by Small Businesses; Evidence from the 1993 National Survey of Small Business Finances*, 81 FED. RES. BULL. 629, 629 (1995).

[59] *See* Rill, *supra* note 48, at 488 ("[T]he lost mark-ups on the foregone sales may be outweighed by the resulting price increase on the merged base of sales.").

[60] *See, e.g.*, *Bank Mergers May Hurt Small Business Lending*, 8 ECON. UPDATE No. 3 (Federal Res. Bank of Atlanta, Ga.), July-Sept. 1995, at 2 (according to economist Larry Wall, small business loans may be less profitable for larger banks as a result of the costly "bureaucracy" involved in big bank lending decisions).

[61] *See* Arthur E. Wilmarth, Jr., *Too Good to be True? The Unfulfilled Promises Behind Big Bank Mergers*, 2 STAN. J. L. BUS. & FIN. 1, 36–37 (1995) (citing, among others, Joe Peek & Eric S. Rosengren's study of lending patterns in New England during 1993 and 1994 and Allen N. Berger & Gregory F. Udell's study of national lending patterns from 1986 to 1994). *See also* Cheryl R. Lee, *Amalgamation of the Southern California Banking Industry: San Diego a Microcosm*, 35 CAL. W. L. REV. 41, 123–24 (1998).

[62] *See* Wilmarth, *supra* note 61, at 39.

ers of local banks, who are more likely to authorize a small business loan based upon personal relationships and the owner's reputation within the community, the personnel of large banks usually lack such familiarity with those in the community and hence rely heavily on strict, numerical criteria to make loan determinations.[63]

The anticompetitive effects of unilateral activities are amplified in small or regional markets. Local providers of commercial banking, securities, and insurance are unlikely capable of competing against national conglomerates, whose entry into a local market may result in a wave of consolidation through the absorption of local competitors. This phenomenon of consolidation may result in small markets being highly concentrated, especially if these markets represent areas in which national conglomerates may not invest the resources to enter and compete against one another. Small and regional markets, therefore, may not only experience a vast reduction in choices for financial service providers, but also face the prospect of having to choose among the only few national conglomerates that are willing to invest the resources to enter and compete in such markets. Assuming that local choices will be severely reduced, small businesses and individual customers do not have sufficient assets and resources to obtain effective negotiation power in dealings with conglomerates. With limited local choices, small businesses and individual customers, due to resource and geographic constraints, may likely be unable to obtain financial services from providers outside of their community.

The DOJ, as authorized by section 3 of the BHCA,[64] section 7 of the Clayton Act, and its own merger guidelines, has reviewed bank mergers with the goal of preempting unilateral behavior.[65]

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[63] *See id.*

[64] Section 3 of the BHCA provides:

> The Board shall not approve (A) any acquisition or merger or consolidation under this section which would result in a monopoly, or which would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of banking in any part of the United States, or (B) any other proposed acquisition or merger or consolidation under this section whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

12 U.S.C. § 1842(c) (1994).

[65] *See* James F. Rill, *An Antitrust Screen for Merger Masters of the 1990s*, 27 MERG-

Nevertheless, given the heightened merger activity the Gramm-Leach-Bliley Act will likely foster, the DOJ should assess the anticompetitive effects of such deals with heightened scrutiny. In 1997, the DOJ's approach for reviewing the anticompetitive effects of mergers and acquisitions was liberalized by revisions of its *Guidelines*. "The overall effect of the revisions to the DOJ's Guidelines is that the DOJ has abandoned its past rigid position in merger analysis by explicitly denouncing pure reliance on market structure as the primary indicator of anti-competitiveness."[66] By adopting a less stringent approach in the evaluation of proposed bank mergers, the DOJ's approach has increasingly come to resemble that of the Fed.[67] The Act, under Title I, gives authority to the DOJ, along with the FTC, for antitrust review without specifically mentioning which standards to apply.[68] Consequently, the DOJ has to craft its own framework for reviewing the antitrust effects of mergers within the financial services industry.

Courts, in cases involving merger enforcement, have generally relied upon *United States v. Philadelphia National Bank*,[69] wherein the Supreme Court held that a high concentration of commercial banking facilities within a particular market by an institution established a rebuttable presumption of illegality.[70] In order to analyze the bank merger in question, the Supreme Court adopted the "cluster market" concept, whereby products and/or services commonly marketed together are regarded as belonging in one market, to determine the relevant product market.[71] Although the "cluster market" concept may be too evasive as a standard, it serves as a starting point for analyzing mega-mergers that involve closely related financial products and services. The fact that banks have minimally engaged in non-banking financial activities[72] demonstrates that industry has come to accept that commercial banking, securities, and insurance are in the same cluster and can be perceived as one product market. Absent specific mandates from the Gramm-Leach-Bliley Act, the DOJ, therefore, should evaluate mergers within the financial services

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ERS & ACQUISITIONS 52, 54 (1992).

[66] Kilian, *supra* note 52, at 858.

[67] *See* Lee, *supra* note 61, at 101.

[68] *See* Gramm-Leach-Bliley Financial Modernization Act, Pub. L. No. 106-102, § 131, 113 Stat. 1338, 1382 (1999).

[69] 374 U.S. 321 (1963).

[70] *See id.* at 363–65.

[71] *See id.* at 356–57.

[72] *See generally* Day, *supra* note 39, at H1; Smith & Lohse, *supra* note 33, at C1.

industry not only in with its *Guidelines* and existing antitrust statutes, but also by viewing the merged sectors of financial services as belonging to a singular product market.

In addition to the "cluster market" concept, the agencies should also consider whether a merger will result in a "too big to fail" institution. As mentioned earlier, the Gramm-Leach-Bliley Act overlooked the "too big to fail" doctrine, an important factor that is outside the traditional realm of antitrust law. Whether an institution is "too big to fail" is a function of market concentration: the institution has become so large that its potential collapse threatens an entire economic system, thus requiring preemptive government assistance.

In light of recent events demonstrating the risks that "too big to fail" institutions pose in today's economy,[73] the legislation's failure to attach importance to this concern should be remedied. As already mentioned, the Act's only mention of the "too big to fail" issue is a relatively trivial requirement that the Department of Treasury and the Fed conduct a study on whether the large banks FHCs that arise from deregulation should keep some portion of their capital as subordinated debt.[74] This provision begs the question of what would happen if a large commercial-investment-insurance hybrid with a speculative investment subsidiary gets into financial difficulty. The Fed retains broad discretionary powers as a result of the Act,[75] and since it was the Fed that has reacted in recent financial crises involving "too big

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[73] For example, in September 1998, a large financial firm operating in New York City, the hedge fund Long-Term Capital Management ("Long-Term"), nearly collapsed. A worldwide financial crisis, due to Long-Term's highly speculative investments in abstract financial instruments, was narrowly avoided. Despite being a purely private investment firm, with two Nobel laureates in its employ, the fund was able to secure public aid in its bailout, including advice and counsel from Chairman of the Board of the Federal Reserve Alan Greenspan. *See* Timothy Canova, *Banking and Financial Reform at the Crossroads of the Neoliberal Contagion*, 14 AM. U. INT'L L. REV. 1571, 1578 (1999) (arguing that the Long-Term incident demonstrates that the United States is not immune to such criticisms as a continuing lack of transparency in securities markets and susceptibility to cronyism); Timothy L. O'Brien & Laura M. Holson, *BLIND TRUST: A Special Report; A Hedge Fund's Stars Didn't Tell, And Savvy Financiers Didn't Ask*, N.Y. TIMES, Oct. 23, 1998, at A1 (describing Long-Term's secretive practices and the powerful investors associated with the fund). Many feared that if Long-Term was permitted to fail, the resulting financial shakeup could destabilize economic systems around the world. *See* Diana B. Henriques, *BACK FROM THE BRINK; The Fear That Made The Fed Step In*, N.Y. TIMES, Dec. 6, 1998, § 3, at 13 (describing the financial panic that might have ensued had Long-Term begun missing payments to creditors).

[74] *See* Gramm-Leach-Bliley Financial Modernization Act, Pub. L. No. 106-102, § 501, 113 Stat. 1338, 1436–37 (1999).

[75] *See id.* § 103, 113 Stat. at 1342–51.

to fail" institutions,[76] legislators may have assumed that it is capable of handling such concerns. Absent, however, is any debate of whether such reactionary oversight, given that most of the investments will be private, is an appropriate use of public funds. One might respond that most of a depository institution's investments are insured by the Federal Deposit Insurance Corporation (FDIC). Nevertheless, the problem posed by the "too big to fail" doctrine is that one firm's collapse will not just harm that firm's investors; rather, its collapse could have system-wide or market-wide implications.[77] Regardless, the legislation leaves the Fed to play catch up with any systemic crises that could result from deregulation of the financial services industry.

Second, the Gramm-Leach-Bliley Act fails to address an institutional competency issue lurking behind the "too big to fail" problem: whether the Fed is the best agency to handle a concentration analysis for determining if a post-merger institution is "too big to fail." Traditionally, the FTC and the DOJ have enforced the antitrust laws. As it is, the legislation does nothing to suggest that the FTC or the DOJ analyze "too big to fail" issues when reviewing a merger application. If it included such language, thus helping to ensure that proposed mega-institutions do not pose undue risk to the market should they fail, the legislation might prevent, in the spirit of the Clayton Act, a combination whose effect "may be substantially to lessen competition."[78] Instead, the Act leaves the Fed, an institution with uncertain antitrust competency,[79] to apply only remedial measures. Furthermore, reliance on such measures runs counter to a central idea of federal merger regulation, namely its prophylactic nature, since remedial action may not be able to fully compensate for the widespread harm caused by market-impairing mergers.[80] The Act, therefore, should have required the FTC and the DOJ to consider possible "too big to fail" effects when approving merger applications.

The Gramm-Leach-Bliley Act was one of the highest profile pieces of legislation enacted during the last session of Congress,

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[76] *See supra* note 73.

[77] *See* Canova, *supra* note 73, at 1581; Henriques, *supra* note 73, at 13.

[78] 15 U.S.C. § 18 (1994).

[79] *See* Henriques, *supra* note 73, at 14.

[80] *See, e.g.*, *Guidelines*, *supra* note 40, § 0.2, at 41,554 ("[T]he Guidelines reflect the congressional intent that merger enforcement should interdict competitive problems in their incipiency.").

and should prove to have an immediate impact on the structure of the American financial services industry. Undoubtedly, in the long run, the legislation will have overall benefits for consumers.[81] Nevertheless, it fails to consider adequately the anticompetitive implications of financial services concentration and neglects to articulate any new antitrust enforcement standards. As discussed, the legislation's possible consequences include unilateral effects that lead to elevated prices and reduced output, and high market concentration, particularly at the local market level, with adverse effects on individual consumers and small businesses. Also, from a broader perspective, conglomeratization could lead to ever larger, "too big to fail" firms that are insulated from market risk at a potentially high cost to American taxpayers. Instead of addressing these concerns, Congress has relegated them to marginal studies without clear guidance and specific mandates, and assumed that the Fed will be able to step in if a failing, post-merger mega-institution poses a significant risk to the economy. It is, therefore, incumbent upon regulatory agencies to clarify and promulgate standards and rules that will prevent the anticompetitive consequences that may result from the expected conglomerization within the financial services industry. The DOJ, along with the FTC, should assess mergers of commercial banking, securities, and insurance pursuant to Hart-Scott-Rodino requirements and in light of the Supreme Court's "cluster market" concept. The "cluster market" concept may prove especially relevant, since the DOJ and the FTC have not had to assess financial services consolidations of the magnitude anticipated. Moreover, any regulatory assessment should be subject to criteria espoused by the DOJ's *Horizontal Merger Guidelines*, particularly with regard to unilateral effects and market concentration. The Gramm-Leach-Bliley Act is historical both in its scope and potential benefits, and the issues raised in this Essay are but preliminary steps toward a more thorough evaluation of this legislation and of its consequences that only time will reveal.

—Adam Nguyen
Matt Watkins

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[81] *See, e.g.*, Chernow, *supra* note 33, at A26; John S. Gordon, *Manager's Journal: May Glass-Steagall Rest in Peace*, WALL ST. J., Oct. 26, 1999, at A26.

HATE CRIME PREVENTION

During the last session of Congress, Senator Ted Kennedy (D-Mass.) introduced Senate Bill 622,[1] the Hate Crimes Prevention Act (HCPA), a legislative response to the steady climb in nationally reported hate crimes and the increasing public support for harsher penalties against bias attacks.[2] In fact, the number of reported hate crimes has risen each year since 1991,[3] and a September 1999 Gallup poll found that seventy percent of Americans favor stiffer penalties for hate crimes.[4] The Senate passed the HCPA without dissent as an amendment to the Senate Commerce, Justice and State appropriations bill,[5] but it was subsequently removed by the Conference Committee, which could not resolve a conflict between the HCPA provisions and more limited hate crime legislation introduced by Senator Orrin Hatch (R-Utah).[6] The HCPA will likely again stand before Congress this year;[7] however, its passage seems doubtful since it lacks much needed support from the Republican leadership.[8]

The HCPA would amend Section 245 of Title 18 to enhance penalties for defendants convicted of injuring other persons because of real or perceived race, color, national origin, religion, gender, sexual orientation, or disability.[9] Although some states presently have and enforce their own hate crime statutes, the HCPA would give the Department of Justice (DOJ) broad discretion in prosecuting bias-motivated crimes in any jurisdiction.[10] The HCPA adopts the same definition for hate crimes as Section 280003(a) of the Violent Crime Control and Enforcement Act of 1994[11]: "a crime in which the defendant intentionally selects a victim, or in a case of a property crime, the prop-

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[1] S. 622, 106th Cong. (1999).

[2] *See Reported Hate Crimes on the Rise; Blacks Are Targeted Most, Records Show*, WASH. POST, Aug. 7, 1999, at A10 [hereinafter *Reported Hate Crimes*].

[3] *See id.*

[4] *See Jessica* Y. Lee, *Murky Future for Hate-Crime Bills*, NEW AM. NEWS SERVICE, Sept. 10, 1999, *available in* LEXIS, New Am. News Service database.

[5] *See* 145 CONG. REC. S9033 (1999).

[6] *See Effort to Broaden Hate-Crime Law Fails*, N.Y. TIMES, Oct. 20, 1999, at A20. *See also DNC: Republican Senate Strips Hate Crimes Prevention from HCPA*, U.S. NEWSWIRE, Oct. 19, 1999, *available in* LEXIS, U.S. Newswire database.

[7] *See* Richard Saltus, *To Honor King, Build On His Goals, Fellow Minister Says Keynote Speaker Talks Of Work To Be Done*, BOSTON GLOBE, Jan. 18, 2000, at B3.

[8] *See* Charles Babington, *Clinton Challenges Congress to Act On Taxes, Health Care, Gun Control*, WASH. POST, Jan. 28, 2000, at A1.

[9] *See* S. 622, 106th Cong. § 4 (1999).

[10] *See id.*

[11] *See id.* § 3.

erty that is the object of the crime, because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person."[12] The legislation would also provide grants to state and local authorities for combating hate crimes.[13]

Opponents of the HCPA have challenged the bill on several grounds. Critics not only claim that the HCPA would unduly encroach upon states' rights, exceeding the enumerated powers of the federal government, but also question the constitutionality of the HCPA's penalty-enhancement provision, arguing that the legislation would essentially penalize beliefs and speech protected by the First Amendment.[14] Another concern is that the HCPA, like other such hate crime efforts, would, in effect, privilege historically oppressed minorities, offering the victims of bias crimes a form of punitive entitlement.[15]

This Recent Legislation Essay will not only examine the problems that the HCPA was intended to address, but also argue against the various challenges raised by its critics. Furthermore, this Essay will assert that the HCPA is a critical step in halting the nationwide increase in hate crimes and protecting the civil rights of all Americans.

Historically, those seeking civil rights protection have turned to the federal government.[16] As legal scholar James Morsch writes:

> State and local prosecutors traditionally enjoyed a poor record of prosecuting members of racist organizations for crimes against minorities. As a result, victims of hate crimes relied on federal prosecutors to enforce civil rights statutes against perpetrators of hate crimes. Federal prosecutions of these crimes lessened the impact of local prejudices on the initiation of such actions and brought the full power of the national government to bear on the problem of hate-motivated violence.[17]

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[12] 28 U.S.C. § 994 note (1994).

[13] *See* S. 622, 106th Cong. § 6 (1999).

[14] *See infra* notes 45, 49–52 and accompanying text.

[15] *See infra* notes 76–78 and accompanying text.

[16] *See generally* FREDERICK M. LAWRENCE, PUNISHING HATE: BIAS CRIMES UNDER AMERICAN LAW (1999) (noting that those seeking civil rights protection have generally used federal law such as the Thirteenth Amendment).

[17] James Morsch, *Comment: The Problem Of Motive In Hate Crimes: The Argument Against Presumptions Of Racial Motivation*, 82 J. CRIM. L. & CRIMINOLOGY 659, 662 (1991).

The earliest federal civil rights legislation was enacted during the post-Civil War era when ex-slaves in recalcitrant Southern states sought to exercise rights guaranteed by the Fourteenth Amendment.[18] In particular, these statutes aided in the prosecution of crimes committed by members of the Klu Klux Klan in the former Confederate states.[19] Professors James B. Jacobs and Kimberly Potter note in *Hate Crimes* that:

> [F]ederal statutes did not aim to enhance punishment or to recriminalize conduct already covered by criminal law. At the time, these statutes provided the only de facto law enforcement option. If local law enforcement officers had investigated and prosecuted those who victimized the former slaves, there would have been no need for the federal laws.[20]

The legacy of such federal protection suggests that legislation like the HCPA could act as an umbrella, protecting minorities in states hesitant to punish hate crimes and remaining unused in others.

Today, ethnic, racial, and religious diversity is now a fast-approaching national reality. By 2050, researchers predict that the United States will be a country without any racial majority whatsoever.[21] A shift in the country's racial composition does not necessarily forecast heightened racial animosity or increased hate crimes; however, the advent of a thoroughly diverse society could result in an increased number of hate crimes, crimes motivated as much by anti-white tensions as by horizontal tensions across minority groups or by the relatively decreasing white majority. Regardless, the number of hate crimes has been, and likely will continue to be, on the rise.[22]

Although race and religious bias remain the principal motivations of American hate crimes,[23] many hate crimes are also based on the victim's sexual orientation.[24] Some might argue that ho-

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[18] *See* JAMES B. JACOBS & KIMBERLY POTTER, HATE CRIMES: CRIMINAL LAW AND IDENTITY POLITICS 36 (1998); Lu-in Wang, *The Transforming Power of "Hate": Social Cognition Theory And The Harms of Bias Related Crime*, 71 S. CAL L. REV. 47, 61–62 (1997).

[19] *See* JACOBS & POTTER, *supra* note 18, at 36.

[20] *Id.*

[21] *See* Robert Stacy MacCain, *Minorities to account for most future U.S. population rise; Higher domestic birthrates, immigration cited by study*, WASH. TIMES, Oct. 7, 1999, at A10.

[22] *See Reported Hate Crimes*, *supra* note 2, at A10.

[23] *See id.*

[24] *See* FEDERAL BUREAU OF INVESTIGATION, HATE CRIME STATISTICS 7 (1998) (reporting 1260 sexual-orientation criminal incidents).

mosexuals are most in need of federal protection because many states have been hesitant in addressing anti-homosexual hate crimes.[25] For instance, the 1999 ax handle beating death of Billy Jack Gaither is sometimes cited as a proof of the need for a federal hate crime law.[26] Mr. Gaither was a gay man who supposedly made an advance toward one of his alleged murderers.[27] Mr. Gaither's murder was neither reported nor prosecuted as a hate crime in Alabama.[28] This should not be that surprising: of the forty-two states that have hate crime statutes, less than half address crimes against homosexuals.[29] Meanwhile, the number of hate crimes against homosexuals has risen by ten percent each year.[30]

Long before the widely covered slayings of Matthew Shepard[31] and James Byrd[32] in 1998, the July 4th murder spree of Benjamin Nathaniel Smith[33] and the Los Angeles synagogue[34] shooting in 1999, Congress realized the need to combat hate crimes. In 1990, Congress overwhelming approved the Hate Crimes Statistics Act (HCSA),[35] which required the DOJ to gather data on bias crimes for five years to gauge the scope of what was, at that point, an unquantified problem.[36] Commenting on the passage of the Act, William Sessions, then director of the Federal Bureau of Investigation (FBI), stated, "Until now, we have been unable to ascertain the full scope of hate crimes in America."[37] Data col-

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[25] *See, e.g.*, Anthony S. Winer, *Hate Crimes, Homosexuals, and the Constitution*, 29 HARV. C.R.-C.L. L. REV. 387 (1994) (contending that, due to the brutal nature and prevalence of anti-homosexual hate crimes, states should include sexual orientation as a protected class).

[26] *See* Greg Barret, *Bias in Hate Crime Is Difficult to Assess, Reliably Track*, DES MOINES REG., Aug. 15, 1999, at (Nation World) 6.

[27] *See id.*

[28] *See id.*

[29] *See id.*

[30] *See* Lee, *supra* note 4.

[31] *See generally* James Brooke, *Gay Man Beaten and Left for Dead; 2 Are Charged*, N.Y. TIMES, Oct. 10, 1998, at A9.

[32] *See generally* Carol M. Cropper, *Black Man Fatally Dragged In a Possible Racial Killing*, N.Y. TIMES, June 10, 1998, at A16.

[33] *See generally* Bill Dedman, *Midwest Gunman Had Engaged In Racist Acts at 2 Universities*, N.Y. TIMES, July 6, 1999, at A1.

[34] *See generally* James Sterngold, *Suspect in Los Angeles Shootings Confesses to a Killing*, N.Y. TIMES, Aug. 13, 1999, at A18.

[35] Hate Crimes Statistics Act, Pub. L. No. 101-275, 104 Stat. 140 (1990) (codified as amended at 28 U.S.C. § 534 note (1994)). The Act easily passed the House by a vote of 368-47, *see* 135 CONG. REC. H3238 (1989), and passed the Senate by a vote of 92-4, *see* 136 CONG. REC. S1754 (1990).

[36] *See* 28 U.S.C. § 534 note (1994). *See also* Andrew Rosenthal, *President Signs Law For Study Of Hate Crimes*, N.Y. TIMES, Apr. 24, 1990, at B6.

[37] Jerry Seper, *FBI Chief Pledges to Make Hate-Crimes Data Priority*, WASH. TIMES,

lected by the FBI have shown how pervasive hate crimes are in American society: in 1998 alone, there were a reported 9,722 victims of hate crime offenses.[38]

In many respects, the HCPA is the logical culmination of the HCSA,[39] the Juvenile Justice and Delinquency Prevention Amendments of 1992,[40] the Violent Crime Control and Law Enforcement Act of 1994,[41] and the Church Arson Prevention Act of 1996 (CAPA),[42] some of which grew out of past hate crime legislation or out of sensational hate crimes. For instance, the rash of arsons targeting African American churches in the mid-1990s gave impetus to the creation of CAPA, which, besides reauthorizing the HCSA for another five years,[43] amended Section 247 of Title 18 to expand federal jurisdiction by punishing acts damaging religious property that affected interstate commerce.[44]

Opponents of hate crime legislation have challenged the HCPA on several grounds. One argument often raised is that the HCPA would unduly expand federal authority and thus infringe on the states' discretion in prosecuting criminal conduct. For instance, Senator Hatch remarked, "Before we take the step of making every criminal offense motivated by hatred a federal offense, we ought to equip states and localities with the resources necessary so that they can undertake these criminal investigations and prosecutions on their own."[45] Under the HCPA, however, federal involvement would not necessarily mean direct federal intervention, but would more likely take the form of federal

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Apr. 5, 1991, at A6.

[38] *See* FED. BUREAU OF INVESTIGATION, *supra* note 24, at 3.

[39] The Hate Crimes Statistics Act of 1990, like the HCPA, confronted significant conservative resistance at its inception, in part because it included "sexual orientation" as a class of hate crime victims. Senator Jesse Helms (R-N.C.) called the bill the "flagship of the militant homosexual legislative agenda." Amy Bayer, *Senators Pass Bill Requiring Data Gathering on Hate Crimes*, S.F. CHRON., Feb. 9, 1990, at A19.

[40] Juvenile Justice and Delinquency Prevention Amendments of 1992, Pub. L. No. 102-586, 106 Stat. 4982 (1992) (codified as amended at 42 U.S.C. §§ 5601-5785 (1994)). The Act, *inter alia*, provides funding for state programs that help prevent or reduce hate crimes committed by juveniles. *See* 42 U.S.C. § 5633(a)(10)(N) (1994).

[41] Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994) (codified in pertinent part as amended at 28 U.S.C. §§ 991-996 (1994)). The Act, *inter alia*, required the U.S. Sentencing Commission to provide sentencing enhancements for hate crimes. *See* 28 U.S.C. § 994 note (1994).

[42] Church Arson Prevention Act of 1996, Pub. L. No. 104-155, 110 Stat. 1392 (1996) (codified in pertinent part as amended at 18 U.S.C. § 247 (1994 & Supp. III 1997) and 28 U.S.C. § 534 note (1994 & Supp. III 1997)).

[43] *See* 28 U.S.C. § 534 note (1994 & Supp. III 1997).

[44] *See* 18 U.S.C. § 247(b) (1994 & Supp. IV 1998).

[45] Lee Davidson, *Hatch Opposes Measure to 'Federalize' Hate Crimes*, DESERET NEWS, May 11, 1999, at B4.

assistance to local and state authorities. As Deputy Attorney General Holder stated, "It must be emphasized that even with the enactment of the bill, state and local law enforcement agencies would continue to play the principal role in the investigation and prosecution of all types of hate crimes."[46] Furthermore, there do exist obvious precedents for federally expansive legislation like the HCPA, namely the Civil Rights Act of 1964. Since the Civil War, Congress has created over 3000 federal criminal offenses, offenses that conventionally were prosecuted by the states.[47] Lastly, such federalization may be necessary for more sophisticated, multistate hate crimes—such as those committed by national hate groups—where lack of coordination between state and local authorities could create complications.[48]

Even though the HCPA may not be the federal juggernaut that many states' rights advocates fear, criticisms of HCPA linger, such as the argument that hate crime legislation is a form of thought control, punishing beliefs and not just actions.[49] For example, James Q. Wilson argued in *The National Review* that the HCPA would penalize a criminal's beliefs by laying undue emphasis on motive, thereby constituting a form of legislated political correctness.[50] It is interesting that Wilson, however, would allow an exception for penalty enhancement for killings that target police officers because such "motive can be shown by objective evidence, not by speculating about subjective states."[51] Nonetheless, it remains to be seen how assessing a defendant's motives in the prosecution of a hate crime and assessing the motives of a defendant accused of killing a police officer can be distinguished. Proving that a defendant shoots a police officer because she is a police officer would seem no more objectively discernible than proving that a defendant shoots an African American because he is an African American.

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[46] *Hate Crimes: Hearing on H.R. 1082 Before the House Comm. on the Judiciary*, 106th Cong. 3 (1999) (statement of Eric Holder, Deputy Attorney General of the United States).

[47] *See* FREDERICK M. LAWRENCE, PUNISHING HATE: BIAS CRIMES UNDER AMERICAN LAW 115 (1999).

[48] *See* Thomas M. Mengler, *The Sad Reform of Tough on Crime: Some Thoughts on Saving the Federal Judiciary from the Federalization of State Crime*, 43 U. KAN. L. REV. 503, 517–18 (1995).

[49] *See, e.g.*, James Q. Wilson, *Justice; Hate And Punishment; Does The Criminal's Motive Matter?* NAT'L REV., Sept. 13, 1999, at 18; George Will, *Current Laws Enough to Punish Hate Crimes*, SAN ANTONIO EXPRESS-News, Oct. 19, 1998, at 13A.

[50] *See* Wilson, *supra* note 49, at 20.

[51] *Id.*

Wilson's concerns about thought control are, in effect, echoing the First Amendment concerns of those critical of hate crime statutes: such laws target and stifle unpopular beliefs and speech.[52] Arguably, the First Amendment challenges raised by many hate crime legislation critics overlook the routine assessment of a defendant's motivations in the criminal justice system since, as Professor Carol Steiker notes, "[d]eterminations about which motivations are good ones and bad ones are deeply inscribed in the law itself."[53] Therefore, those who contend that hate crime statutes infringe on constitutionally protected forms of expression fail to recognize the degree of subjectivity in assessing motives already inherent in criminal law, such as the introduction of mitigating or aggravating factors during the sentencing hearing.

In addition, harming or murdering a person because of his race, religion, gender, or sexual orientation has legal parallels with other civil rights violations currently prosecuted by federal law. The prosecution of employment discrimination under Title VII is analogous to the prosecution of hate crimes in that guilt hinges on a determination of the defendant's motivations.[54] In most states an at-will employee may normally be fired for any reason whatsoever;[55] under existing federal civil rights law, however, the same firing becomes illegal if based on ethnic, gender, religious prejudice, etc. [56] In such an instance, the determination of the employer's motive is necessary.[57] From this vantage, the HCPA appears to intrude upon First Amendment rights no more than Title VII. Furthermore, in *Hishon v. King & Spaulding*, where a female associate at a large Atlanta firm filed a claim against her employer for sexual discrimination, the Supreme

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[52] *See, e.g.*, Steven G. Gey, *What if* Wisconsin v. Mitchell *Had Involved Martin Luther King Jr.? The Constitutional Flaws of Hate Crime Enhancement Statutes*, 65 GEO. WASH. L. REV. 1014, 1070 (1997) (arguing that "the regulation of speech simply because it is in some way associated with criminal activity would permit the government to regulate an entire range of speech that is now beyond government control because of the strong political speech protections incorporated into the Brandenburg standard").

[53] Carol S. Steiker, *Identity and Equality: Punishing Hateful Motives: Old Wine in a New Bottle Reviews Calls for Prohibition*, 97 MICH. L. REV. 1857 (1999) (book review).

[54] *See* 42 U.S.C. § 2000e-2 (1994).

[55] *Hate Crimes: Hearing on H.R. 1082 Before the House Comm. on the Judiciary*, 106th Cong. (1999) [hereinafter *Hearings*] (statement of Prof. Frederick M. Lawrence).

[56] *See* 42 U.S.C. § 2000e-2 (1994). *See also Hearings*, *supra* note 55.

[57] *See Hearings*, *supra* note 55.

Court upheld Title VII in face of a challenge claiming that it infringed on the employer's freedom of expression.[58]

Even under the HCPA, one would be free to hate African Americans as much as one wishes, even to publish one's thoughts or assemble other like-minded individuals. If one were to select and kill an African American because of his race, however, the federal government, in order to protect the civil rights of all Americans, should be able to distinguish such an act from common murder due to the defendant's discriminatory motive. Viewing the victims of bias crimes as victims of discrimination, it would seem reasonable that the same sorts of federal resources made available to victim of employment or housing discrimination be made available to the victim of hate crimes since he is "unable to change the characteristic that made him a victim."[59]

It is true that, under most penalty-enhancement statutes such as the HCPA, the words and beliefs of someone convicted under a criminal statute can be used to prove bias, thereby raising First Amendment concerns.[60] Some have therefore contended that it is in assessing the *mens rea* that the HCPA may be infringing on free speech. For instance, Professors Jacobs and Potter claim, "[W]e must consider whether punishing crimes motivated by politically unpopular beliefs more severely than crimes motivated by other factors itself violates our First Amendment traditions."[61] Nevertheless, the Supreme Court has rejected the *mens rea* concerns raised by opponents of hate crime legislation. In *Wisconsin v. Mitchell*, the Court found that the First Amendment did not prohibit Wisconsin's hate crime penalty enhancement statute, which is similar to the HCPA.[62] After watching a film called *Mississippi Burning*, Todd Mitchell, a nineteen-year-old African American incited his friends to beat up a white boy. Mitchell was charged with aggravated assault.[63] The aggravated assault charge normally carried a sentence of two years under Wisconsin law; because a jury found that Mitchell had selected the victim on the basis of his race, however, the two-year maximum sentence was increased to seven years under the state's

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[58] *See* Hishon v. King & Spaulding, 467 U.S. 69 (1984).
[59] *See Hearings*, *supra* note 55.
[60] *See* Wisconsin v. Mitchell, 508 U.S. 476 (1993).
[61] JACOBS & POTTER, *supra* note 18, at 129.
[62] *See Mitchell*, 508 U.S. at 476.
[63] *See id.* at 479.

hate crime statute.[64] Chief Justice Rehnquist, writing for a unanimous court, claimed that "[t]raditionally sentencing judges have considered a wide variety of factors in addition to evidence bearing on guilt in determining what sentence to impose on a convicted defendant . . . . The defendant's motive for committing the offense is one important factor."[65] In other words, the use of motive under the penalty enhancement statute is the same as under previously enacted federal and state anti-discrimination laws. The Court also held that the penalty enhancement statute was not directed at expression, but was "aimed at conduct unprotected by the First Amendment."[66]

The Wisconsin hate crime statute "does not criminalize mere thought . . . . Rather, the statute penalizes acting upon a thought. Although preventing government from shaping our beliefs is one of its important underlying values, the First Amendment has never prohibited the state from sanctioning a person's thoughts when they are manifested in committing a crime."[67] Hate crime legislation opponents tend to overlook the distinction between protected and unprotected speech since violent acts, which are solely based on beliefs of racial or religious hatred, do not fall within the First Amendment's protectorate for acts of expression. As Chief Justice William Rehnquist writes, "the Constitution does not erect a *per se* barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment."[68]

In upholding penalty enhancement for crimes motivated by bias, the Court was, in part, relying on its earlier holding in *Barclay v. Florida*, wherein it upheld the submission of evidence of racial bias in the sentencing process.[69] The Court found that evidence regarding the defendant's racial animus could be used as an aggravating factor in the sentencing phase of a capital case that involved the murdering of a white man by a group of African Americans.[70]

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[64] *See* Wis. Stat. § 939.645 (1997-98).
[65] *Mitchell*, 508 U.S. at 485.
[66] *Id.* at 487.
[67] Note, *Recent Case: First Amendment—Bias-Motivated Crimes—Court Strikes Down Hate Crimes Penalty Enhancer Statute—State v. Mitchell*, 106 HARV. L. REV. 957, 960 (1993).
[68] *Mitchell*, 508 U.S. at 488 (quoting Dawson v. Delaware, 503 U.S. 159 (1992)).
[69] *See* Barclay v. Florida, 463 U.S. 939 (1983).
[70] *See id.*

The submission of evidence regarding bias does have constitutional limits. In *Dawson v. Delaware*, the Court remanded the defendant's death sentence because it found that consideration of his membership in the Aryan Brotherhood during the penalty hearing violated the First Amendment. The defendant had escaped from a Delaware prison; while at large, he killed a woman, stole her car and was ultimately tried and convicted in Delaware on first-degree murder.[71] At his sentencing hearing, evidence of the defendant's involvement in the Aryan Brotherhood was introduced.[72] The Court held that the introduction of his involvement with the Aryan Brotherhood while in prison was unconstitutional because it was not relevant to the murder and "proved nothing more than the [the defendant's] abstract beliefs."[73] Chief Justice Rehnquist noted, "Even if the Delaware group to which Dawson allegedly belongs is racist, those beliefs, so far as we can determine, had no relevance to the sentencing proceeding in this case."[74]

Dawson may appear to have serious implications on the HCPA's penalty enhancement provisions; however, it only applies to use of bias evidence not germane to a state penalty hearing for first-degree murder. On the other hand, under the HCPA, evidence of bias would be inherently relevant when determining penalty enhancement for hate crimes and should therefore be admissible. The distinction between *Dawson* and *Mitchell* is thus the distinction between the use of the defendant's motivations for prosecuting "bias-inspired conduct," which falls within the purview of criminal punishment, and the use of the defendant's abstract ideas and associations, which are protected by the First Amendment and are irrelevant in sentencing proceedings for the prosecution of non-hate crimes.[75]

In addition to concerns regarding federal expansionism and the First Amendment, critics of the HCPA claim that the bill targets white persons and is overly protective of minorities.[76] For instance, Wilson writes that Senator Kennedy and other HCPA supporters "are interested, in short, in making the criminal law an affirmative-action schedule. They want the law to be tough on

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[71] *See* Dawson v. Delaware, 503 U.S. 159, 160 (1992).
[72] *See id.*
[73] *See id.* at 167.
[74] *Id.* at 166.
[75] *See* Wisconsin v. Mitchell, 508 U.S. 476, 486 (1993).
[76] *See* Wilson, *supra* note 49, at 20.

people who kill blacks, immigrants, Jews, or gays and lesbians, all of whom to be sure, have been the object of some degree of social oppression."[77] The flaw in Wilson's argument stems from his conflation of the words "race" and "minority," or perhaps, the conflation of the words "race" and "non-white." The argument put forward by opponents of hate crime legislation often presumes that race, under the HCPA, is not a demographic category applicable to all persons, but is a special-interest group of minority victims. Critics believe that federal prosecutors will invoke the HCPA only in hate crimes against minorities but not when the victims are white. Wilson, for instance, claims that federal prosecutors will not "go around looking for white males who have been beaten up by black gangs."[78] Nevertheless, the FBI classified 989 of the 9,235 hate crime offenses as anti-white[79] and listed 958 of the 9,235 offenders as black.[80] The substantial number of anti-white hate crimes recorded by the FBI suggests, although contrary to Wilson's assertions, that those prosecuted for hate crimes under the HCPA would not only be white males.

Unlike Wilson, who contends that stricter enforcement of current laws should suffice to address the problem of hate crimes in America, other critics of the HCPA believe that although some hate crime legislation is needed, the HCPA simply goes too far. As mentioned earlier, during the last session of Congress, Senator Hatch introduced competing hate-crime legislation, Senate Bill 1406, which would increase federal funding for state prosecution of hate crimes, while limiting federal jurisdiction.[81] Senate Bill 1406 includes gender and age within its parameters of hate crimes, but excludes sexual orientation.[82] Because Senate Bill 1406 only "encourages" the development of a model statute with the cooperation and the consent of states rather than establishing a federal standard as proposed by the HCPA,[83] this legislation may likely not change the status quo: federal involvement still comes at the request of the individual states, making it

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[77] *Id.*
[78] *See id.*
[79] *See* FED. BUREAU OF INVESTIGATION, *supra* note 24, at 7.
[80] *See id.*
[81] *See* S. 1406, 106th Cong. (1999).
[82] *See* S. 1406, 106th Cong. § 1(d)(1)(A)(iii)(1999).
[83] *See* S. 1406, 106th Cong. § 1(c) (1999).

nearly impossible to ensure uniform protection of civil rights for all Americans.

In light of the inconsistency of state hate crime laws and enforcement, and the proven effective use of federal anti-discrimination laws, the HCPA is a necessary means for reining in the nationwide increase in hate crimes. Contrary to its critics, the HCPA does not unduly infringe upon states' rights, at least no more so than under previous civil rights legislation, and does not punish constitutionally protected beliefs. Furthermore, the legislation would benefit all Americans who fall victim to crimes based on bias. By extending federal prosecutorial sway and offering necessary federal assistance in addressing hate crimes throughout every state across the country, the HCPA would widen federal prosecutorial reach to states with inadequate hate crime laws and to states with no hate crimes laws whatsoever. The HCPA also creates a categorical formulation of hate crime across the country, effectively ending the current variance among states. If the HCPA were passed, someone convicted of a hate crime in Florida would be certain to receive the same sentencing enhancements as someone convicted of a hate crime in Alabama.[84] As a result of the HCPA, the ten states that have yet to even address the issue of hate crimes at all would be drawn in under the federal umbrella.[85]

Nonetheless, until the enactment of the HCPA or similar legislation, federal prosecutors can only act under limited circumstances with regard to hate crimes based on race, religion, or ethnicity, and cannot act at all with regard to hate crimes based on gender, sexual orientation, or disability—even when state and local officials are unwilling to prosecute. Left to their own devices, individual states have produced what is arguably a shoddy record of legislating against, prosecuting, or even reporting hate crimes.[86] On the other hand, the federal government, armed with

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[84] This assumes that the DOJ would prosecute both hypothetical cases.

[85] *See* C.J. Karamargin, *Bill to Expand Federal Hate Crimes Law Introduced*, STATES NEWS SERVICE, Mar. 12, 1999, *available in* LEXIS, States News Service database.

[86] Only about 11,000 of the 16,000 local law-enforcement agencies report hate crimes to the FBI. *See* Greg Barrett, *Bias in Crime is Difficult to Assess, Reliably Track*, DES MOINES REG., Aug. 15, 1999, at (Nation World) 6. The Florida Department of Law Enforcement has a state hate crime law on the books; nevertheless, Miami-Dade County's annual reported hate crimes have recently been called into question as being suspiciously low, and the City of Miami, the largest city in Miami-Dade County, does not track hate crime statistics at all, as required by state law. *See* Editorial, *Numbers of Hate Crimes Disturbing*, SUN-SENTINEL, Aug. 7, 1999, at A14. In 1997, Alabama, Mississippi and Arkansas each reported no hate crimes to the FBI while New Hamp-

legislation providing itself with the authority to protect the civil rights of all Americans, has proved to be an effective force in fighting discrimination in America.[87] Such a proven track record for federal civil rights legislation justifies granting the federal government the power and resources to rein in another form of harmful discrimination that is prevalent nationwide: hate crimes.

—*Murad Kalam*

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shire and Hawaii did not even participate. *See* Greg Barrett, *Bias in Crime is Difficult to Assess, Reliably Track*, DES MOINES REG., Aug. 15, 1999, at (Nation World) 6.

[87] *See, e.g.*, ROBERT E. LOEVY, THE CIVIL RIGHTS ACT OF 1964: THE PASSAGE OF THE LAW THAT ENDED RACIAL SEGREGATION (1997) (contending that federal civil rights legislation has made significant progress ending racial segregation in American society).

SCHOOL VOUCHERS

In attempting to fulfill the constitutional guarantee of a "high quality education,"[1] to every child in the state, Florida, under the leadership of Governor Jeb Bush, recently enacted the A+ Plan for Education,[2] instituting the first statewide educational voucher program in the nation.[3] This legislation seeks to remedy the increasingly common problem of students, especially those from poor school districts, receiving an inadequate education at the hands of the state.[4] As expected, the program has been challenged on both state[5] and federal[6] constitutional grounds. This Recent Legislation Essay focuses solely upon the federal Establishment Clause challenge. Regardless of how the state challenge is finally decided, the design of the Florida program retains national implications as it serves as a model for many other states considering voucher initiatives.[7] Although the Supreme Court has yet to rule definitively on the constitutionality of school vouchers,[8] Florida's A+ Plan for Education should endure an Establishment Clause attack because it has two important qualities that the Court has emphasized in upholding programs that confer some benefit to religious institutions: religion-neutrality and distribution of aid through private decision-making.[9]

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[1] FLA. CONST. art. IX, § 1.

[2] *See* FLA. STAT. ANN. § 229.0537 (West Supp. 2000). The findings and intent of the statute recognize "that the voters of the State of Florida, in the November 1998 general election, amended s.1, Art. IX of the Florida Constitution so as to make education a paramount duty of the state." *Id.* § 229.0537(1).

[3] *See* Jodi Wilgoren, *School Vouchers Are Ruled Unconstitutional in Florida*, N.Y. TIMES, Mar. 15, 2000, at A20.

[4] School choice stirs emotions in players on both sides of the issue. Opponents fear school choice will lead to the denigration of the public school system. *See, e.g.*, Jodi Wilgoren, *Florida Voucher Program a Spur to 2 Schools Left Behind*, N.Y. TIMES, Mar. 14, 2000, at A18. ("Opponents fear vouchers would drain resources from troubled schools, leaving them worse off for the students who stay."). Proponents argue school choice is necessary to resuscitate public school systems already drowning in failure. *See, e.g.*, CLINT BOLOCK, TRANSFORMATION: THE PROMISE AND POLITICS OF EMPOWERMENT 53 (1998) ("[School Choice] can mean for the first time something approaching equal educational opportunities.").

[5] *See* FLA. CONST. art. IX, § 1 (education provision); FLA. CONST. art. IX, § 6 (public school funding clause of the education provision); FLA. CONST. art. I, § 3 (the religious establishment and freedom provision).

[6] U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion. . . . ").

[7] *See* Wilgoren, *supra* note 3, at A20.

[8] The Supreme Court denied review of school choice legislation that was upheld by the Wisconsin Supreme Court. *See* Jackson v. Benson, 578 N.W.2d 602 (Wis. 1998), *cert. denied*, 119 S.Ct. 466 (1998).

[9] Florida's voucher program, however, may have difficulty overcoming state constitutional objections. On March 14, 2000, Circuit Court Judge L. Ralph Smith Jr. for the

This legislation applies a grading system for Florida public schools, assigning each school a letter grade between "A" and "F."[10] The state will provide opportunity scholarships—i.e., vouchers—to students attending schools that receive an "F" for two consecutive years.[11] Using their vouchers, students can transfer to a public school that received a grade of "C" or better, a sectarian private school, or a non-sectarian private school.[12] The legislation gives parents of eligible students the choice of where to send their children. The parents *can* choose a religious private school, but nothing in the program compels them to make that decision. As a safeguard against religious discrimination, the legislation requires participating private schools to admit students on a random and religion neutral basis.[13] And importantly, schools may not compel any voucher student to state a certain belief, to pray, or to worship.[14]

Economist Milton Friedman first developed the idea of improving schools with a system that requires local public school monopolies to compete in a market to produce the best education.[15] The concept of "school choice" encompasses several possible variations of programs, ranging from plans restricting choice to public schools to plans where the government allows vouchers to be used to enroll in religious schools.[16] Programs may also vary in funding, eligibility, safeguards, and admini-

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Second Judicial Circuit of Leon County, Florida, ruled that a provision of the Florida Constitution forbids using public money for private school tuition. *See* Holmes v. Bush, Case No. CV 99-3370. *See also* Wilgoren, *supra* note 3, at A20. Judge Smith held that Article IX, § 1, of the Florida Constitution directs that the state provide an "adequate provision" for the education of Florida children, *only* through a system of public schools. *See id.* Since the legislation seeks to provide a "high-quality" education, in part, through private schools, Judge Smith found that the legislation violated the constitutional provision. The state plans to appeal. *See id.*

[10] *See* FLA. STAT. ANN. § 229.57 (West 1998 & Supp. 2000).

[11] *See* FLA. STAT. ANN. § 229.0537(2) (West Supp. 2000). As the legislation grandfathered ratings that the schools had received from the Florida Department of Education, students at two elementary schools in Pensacola, Florida are eligible for the program during the first year.

[12] *See id.*

[13] *See id.* § 229.0537(4)(e).

[14] *See id.* § 229.0537(4)(j).

[15] *See* Milton Friedman, *The Role of Government in Education*, *in* ECONOMICS AND THE PUBLIC INTEREST 123 (Robert A. Solow ed., 1955), *cited in* Kathleen M. Sullivan, *Parades, Public Squares and Voucher Payments: Problems of Government Neutrality*, 28 CONN. L. REV. 243, 247 n.22 (1996). Assuming that participating schools want to attract students, creating a market that allows individual parents to make the choice where to send their children gives the competing schools an incentive to improve their own educational system.

[16] *See* Suzanne H. Bauknight, *The Search for Constitutional School Choice*, 27 J.L. & EDUC. 525, 526 (1998) (outlining the different variations of school choice legislation).

stration.[17] As a result, the constitutionality of a specific program could depend upon its individual components.[18] For example, a program explicitly restricted to mostly religious private schools with no safeguards against religious discrimination would more likely raise Establishment Clause concerns than legislation that includes public schools, as well as secular and non-secular private schools, and also provides such safeguards.

In the 1971 decision of *Lemon v. Kurtzman*,[19] the Supreme Court devised the framework still recognized by courts when adjudicating Establishment Clause challenges against government programs.[20] In *Lemon*, the Court struck down legislation, enacted in Rhode Island and Pennsylvania, that supplemented nonpublic teacher salaries.[21] The Court established a three-prong test to analyze statutes under the Establishment Clause: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive entanglement with religion."[22] (citations omitted). Shortly after the *Lemon* three-prong test was developed, the Court used it on various occasions to strike down legislation that blurred the line between public funding and religion.[23]

In the 1973 decision of *Committee for Public Education and Religious Liberty v. Nyquist*,[24] the Supreme Court struck down a

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[17] *See id.* at 542–50 (comparing the specifics of the Milwaukee and Cleveland school choice programs).

[18] *See id.* at 548 (recognizing that because the Cleveland program is designed to be neutral, it is probably closer to a constitutionally valid plan than the Milwaukee program).

[19] 403 U.S. 602 (1971).

[20] *See, e.g.*, Agostini v. Felton, 521 U.S. 203, 222–23 (1997) (Noting that although the criteria used to assess whether aid to religion has an impermissible effect, the general principles have not changed); Jackson v. Benson, 218 N.W.2d 602, 612 n.5 (Wis. 1998) (recognizing that the continued authority of the test established by Lemon is uncertain, but applying it to the case anyway because the U.S. Supreme Court has not directly repudiated the test); Christopher D. Pixley, *The Next Frontier in Public School Finance Reform: A Policy and Constitutional Analysis of School Choice Legislation*, 24 J. Legis. 21, 50 (1998) ("Despite significant modification, this position continues to influence the Court's treatment of government aid to religious schools.").

[21] *See Lemon*, 403 U.S. at 606–07.

[22] *Id.* at 612–13. In *Agostini*, the court collapsed the second and third prongs into one category. *See infra* notes 74–75 and accompanying text.

[23] *See, e.g.*, Meek v. Pittenger, 421 U.S. 349, 363 (1975) (holding that the direct loan of instructional material and equipment to private religious schools has the unconstitutional primary effect of advancing religion); Sloan v. Lemon, 413 U.S. 825, 832 (1973) (striking down a statute providing a tuition subsidy to parents because its intended consequence "is to preserve and support religious-oriented institutions"). *See also* Pixley, *supra* note 20, at 50-53 (examining *Lemon* and the cases following *Lemon*).

[24] 413 U.S. 756 (1973).

New York statute providing maintenance and repair grants, tuition reimbursements, and income tax deductions to parents of children attending New York private schools.[25] Although the Court accepted the New York legislature's stated secular purpose in passing the program,[26] it struck down the provisions on Establishment Clause grounds because their effect "is to subsidize and advance the religious mission of sectarian schools."[27]

The *Nyquist* Court began its analysis by noting that "it is now firmly established that a law may be one 'respecting an establishment of religion' even though its consequence is not to promote a state religion."[28] On the other hand, the Court stated, "It is equally well established . . . that not every law that confers an 'indirect,' 'remote,' or 'incidental' benefit upon religious institutions is, for that reason alone, constitutionally invalid."[29] Without a clear line, the courts must carefully examine the individual law to determine "whether it furthers any of the evils against which the [Establishment] Clause protects."[30] In other words, it is the individual components of the program that make the constitutional difference.

After striking down the maintenance and repair provisions of the New York law that provided direct grants to sectarian schools,[31] the Court then turned to New York's tuition reimbursement program, which provided tuition assistance grants to individual parents.[32] Since the money went to the parents, the Court recognized that the grants do not directly support private sectarian schools, but declined to provide immunity to the program based upon that factor alone.[33] Next, the Court examined the subject matter of the program. The Court distinguished grants to religious schools from public services such as bus fares, police and fire protection, sewage disposal, highways, and sidewalks, because "such services provided in common to all citizens, are so separate and so indisputably marked off from the

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[25] *See id.* at 798.
[26] *See id.* at 773.
[27] *Id.* at 779–80.
[28] *Id.* at 771.
[29] *Id.*
[30] *Id.* at 772.
[31] *See id.* at 779–80.
[32] *See id.* at 781.
[33] *See id.*

religious function that they may fairly be viewed as reflections of a neutral posture toward religious institutions."[34]

Importantly, the *Nyquist* Court specifically reserved the question as to "whether the significantly religious character of the statute's beneficiaries might differentiate the present cases from a case involving some form of public assistance (e.g., scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited."[35] As will be discussed later, the Court's decision to withhold judgment on such matters is important when analyzing Florida's A+ Plan for Education, since the program specifically provides benefits without regard to the sectarian-nonsectarian or public-nonpublic nature of the institution benefited.

In several cases following *Nyquist,* from *Mueller v. Allen,*[36] in 1983, to *Agostini v. Felton,*[37] in 1997, the Supreme Court has, "piecemeal answered this question as it has arisen in varying fact situations."[38] In *Mueller v. Allen,* a group of Minnesota taxpayers challenged a state law that provided an income tax deduction for certain educational expenses, including tuition, textbooks, and transportation.[39] Since the law allowed parents of children in sectarian schools to receive such tax benefits, the claimants contended that the law violated the Establishment Clause by providing financial assistance to religious institutions.[40] The Court, however, upheld the law. Writing for the majority, Justice Rehnquist first emphasized that "the deduction is available for educational expenses incurred by all parents, including those whose children attend public schools and those whose children attend non-sectarian private schools or sectarian private

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[34] *Id.* at 781–82. The Court distinguished *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947) (upholding a New Jersey provision reimbursing parents for the costs of sending their children to school), and *Board of Educ. v. Allen*, 392 U.S. 236 (1968) (upholding a New York law authorizing the provision of secular textbooks to children attending both public and nonpublic schools). The Wisconsin Supreme Court characterized this distinction on the fact that "[t]he New York statute provided financial assistance rather than bus rides." *See* Jackson v. Benson, 578 N.W.2d 602, 614 (1998).

[35] *Committee for Pub. Educ. and Religious Liberty v. Nyquist,* 413 U.S. 756, 781–82 (1973).

[36] 463 U.S. 388 (1983).

[37] 521 U.S. 203 (1997).

[38] *Jackson*, 578 N.W.2d at 614. *See, e.g., Agostini*, 521 U.S. 203; Roseberger v. Rector and Vistors of Univ. of Virginia, 515 U.S. 819 (1995); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993); Witters v. Washington Dep't. of Serv. for the Blind, 474 U.S. 481 (1986); *Mueller*, 463 U.S. 388.

[39] *See Mueller*, 463 U.S. at 391.

[40] *See id.* at 392.

schools."[41] According to the Court, this all-inclusiveness reflects the program's neutrality.[42] Furthermore, "by channeling whatever assistance it may provide to parochial schools through individual parents, Minnesota has reduced the Establishment Clause objects to which its action is subject."[43] Similar to educational vouchers, the public funds in this case were "available only as a result of numerous, private choices of individual parents of school age children."[44] In other words, even though the state is providing a financial benefit, it does not exercise the control over whether a student will attend a religious school that direct funding might because the parents have sole discretion as to the distribution of state funds. This lack of state control over religion removes one of the most important evils against which the Establishment Clause protects.[45]

Three years later, in *Witters v. Washington Department of Services for the Blind*,[46] the Supreme Court was confronted with the issue of whether the State of Washington was precluded by the Establishment Clause from extending aid, via a state vocational rehabilitation assistance program, to a blind person studying at a Christian college who sought to, "become a pastor, missionary, or youth director."[47] The Court upheld the state assistance and reaffirmed the importance of both private decision-making by individuals and neutrality to support the program's constitutionality.[48] Writing for a unanimous Court, Justice Marshall first pointed out that, as was the case in *Mueller*, "any aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of the genuinely

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[41] *Id.* at 397.

[42] *See id.* at 398-99 (emphasizing that a program "that neutrally provides state assistance to a broad spectrum of citizens is not readily subject to challenge under the Establishment Clause.").

[43] *Id.* at 399.

[44] *Id.*

[45] Recall that Justice Powell, in *Nyquist*, framed the Supreme Court's Establishment Clause inquiry as "ascertaining whether it furthers any of the evils against which that Clause protects." Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 772 (1973).

The *Mueller* Court declined to undertake a statistical analysis of which classes would benefit the most under the law. In making this decision, the Court argued, "Such an approach would scarcely provide the certainty that this field stands in need of, nor can we perceive principle standards by which such statistical evidence might be evaluated." *Mueller*, 463 U.S. at 401. This restraint may weaken cases against school vouchers by foreclosing any evidence that participating schools are mostly religious.

[46] 474 U.S. 481 (1986).

[47] *Id.* at 482.

[48] *See id.* at 487–88.

independent and private choices of aid recipients."[49] Therefore, the Court found that any decision to support religious education is made by the individual rather than the state.[50] Second, the inquiry is not controlled by *Nyquist,* because Washington's program is "made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited."[51] Furthermore, Marshall claimed that the funding program was sufficiently religion-neutral since: (1) it does not create a financial incentive for students to undertake religious education, (2) it does not provide greater benefits to those recipients who apply their aid to religious education, (3) it does not limit the benefits to students at religious schools, and (4) a significant portion of the aid would not end up flowing to religious education.[52]

In *Zobrest v. Catalina Foothills School District,*[53] the Supreme Court continued on the path set by *Mueller* and *Witters* by holding that the Establishment Clause does not prevent a school district from providing a sign-language interpreter to a deaf student at a private religious school.[54] Drawing directly upon *Mueller* and *Witters*, Chief Justice Rehnquist, writing for the majority, reiterated that the Court has consistently upheld state programs that neutrally provide benefits to a broad class of citizens that are not defined in terms of religion, even though sectarian institutions may benefit.[55] Since the Individuals with Disabilities in Education Act (IDEA) provides benefits to qualifying children without reference to the sectarian-nonsectarian, or public-nonpublic nature of the school the child attends, the program in *Zobrest* did not create a financial incentive for parents to choose a religious school.[56] Therefore, this is a permissibly religion-neutral program. In addition, the Court emphasized that "any attenuated financial benefit that parochial schools do ultimately receive from the IDEA is attributable to the 'private choices of

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[49] *Id.* at 488.

[50] *See id.*

[51] *Id.* (quoting *Nyquist*, 413 U.S. at 782–83, n.38). The Court, in *Nyquist*, reserved the question of whether a program fitting these characteristics would survive Establishment Clause scrutiny. *See id.*

[52] *See Witters*, 474 U.S. at 488. This last factor could be troubling to some voucher programs. The first three factors, however, should assure the neutrality of Florida's program.

[53] 509 U.S. 1 (1993).

[54] *See id.* at 3; 20 U.S.C. § 1401 (1994).

[55] *See id.* at 8.

[56] *See id.* at 10.

individual parents.'"[57] Once again, the Court highlights facial neutrality and private choices of individuals as crucial components of a valid program.

One after another, each of the cases following *Lemon* and *Nyquist* blazed the trail for the Supreme Court's momentous holding in *Agostini v. Felton*,[58] which was delivered in 1997. In this case, the Court, directly reversing a decision from twelve years earlier,[59] held that a federally funded program providing supplemental, remedial instruction to disadvantaged children at sectarian schools does not violate the Establishment Clause.[60] The controversy involved Title I of the Elementary and Secondary Education Act of 1965,[61] enacted by Congress to "provide full educational opportunity to every child regardless of economic background."[62] Under the statute,[63] public funds were channeled to the states via "local educational agencies" (LEA's) and are available to all eligible children, regardless of whether they attend public schools.[64] A number of federal taxpayers challenged the City of New York Board of Education's provision of these services to private sectarian schools, declaring the program constituted an unconstitutional entanglement of church and state.[65] The issue in *Agostini* was whether "later Establishment Clause cases have so undermined *Aguilar*, that it is no longer good law."[66]

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[57] *Id.* at 12 (citation omitted). In a footnote, the Court states that the "respondent readily admits, as it must, that there would be no problem under the Establishment Clause if the IDEA funds instead went directly to James' parents, who in turn, hired the interpreter themselves." *Id.* at 13, n.11. This suggests that a program providing funds to parents, who then apply the funds to the school does not create an Establishment Clause problem. *See* Pixley, *supra* note 20, at 54 (outlining this argument).

[58] 521 U.S. 203 (1997). In fact, Justice O'Connor, writing for the majority, disputed the dissent's contention that this case even created "fresh law." *See id.* at 225; *see also id.* at 240–41 (Souter, J., dissenting).

[59] *See* Aguilar v. Felton, 473 U.S. 402 (1985) (holding that the Establishment Clause barred New York from sending public school teachers into parochial schools to provide remedial education through a federal government program to disadvantaged children). The companion case to this challenge was *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985).

[60] *See Agostini*, 521 U.S. at 208–09.

[61] 20 U.S.C. § 6301 et seq. (1994).

[62] *Agostini*, 521 U.S. at 209 *quoting* 1965 U.S.C.C.A.N. (79 Stat.) 1446, 1450.

[63] *See* 20 U.S.C. § 6312(c)(1)(F) (1994).

[64] *See Agostini*, 521 U.S. at 209. The statute, however, places a number of constraints on services provided to children enrolled in private schools. *See id.* at 210.

[65] *See Aguilar*, 473 U.S. at 414. This was in spite of a number of safeguards taken by the City of New York to avoid entangling church and state. For a description of these efforts, see *Agostini*, 521 U.S. at 210-12.

[66] *Agostini*, 521 U.S. at 217–18.

Writing for the majority in *Agostini*, Justice O'Connor began her analysis by recognizing that, although the general principles that the Court uses to evaluate whether government aid violates the Establishment Clause have not changed since *Aguilar* was decided,[67] the Court's understanding of the criteria used to assess a law's effect on religion has changed.[68] One significant difference is the departure from the rule that all government aid that directly benefits the educational function of religious schools is invalid.[69] To make this point, the Court invoked *Witters* and its criteria for neutrality. The program in *Witters*, which disbursed grants directly to students who used the money to pay for tuition at the educational institution of their choice, "was no different from a State's issuing a paycheck to one of its employees, knowing that the employee would donate part or all of the check to a religious institution."[70] The Court went on to caution, however, that past cases have found that certain criteria might have the effect of advancing religion because of the financial incentive created to undertake religious indoctrination.[71] This is not the case in *Agostini* because neither religious beliefs nor the attendance in a certain type of school play any role in allocating services.[72] The rules regarding the aid's distribution made the difference: "Where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a

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[67] Justice O'Connor elaborated: "[W]e continue to ask whether the government acted with the purpose of advancing or inhibiting religion, and the nature of that inquiry has remained largely unchanged . . . Likewise, we continue to explore whether the aid has the 'effect' of advancing or inhibiting religion." *Id.* at 222-23 (citations omitted).

[68] *See id.*

[69] *See id.* at 225. Justice O'Connor also found significant that through *Zobresti* the Court has "abandoned the presumption erected in *Meek* and *Ball* that the placement of public employees on parochial school grounds inevitably results in the impermissible effect of state-sponsored indoctrination or constitutes a symbolic union between government and religion." *Id.* at 223. This finding was important to *Agostini* because part of the services provided through the program required teachers to travel to the premises of religious schools. *See id.* at 211. The Court also rejected the Establishment Clause challenge to this aspect of the program. *See id.*

[70] *Id.* at 226.

[71] *See id.* at 230–31. An obvious example might be a voucher program that gives a larger grant, or additional benefits, to parents and students who choose religious schools over public schools or secular private schools. According to the Court, *Witters* and *Zobrest* are two examples of programs that do not create a financial incentive to undertake religious indoctrination. *See id.* at 231.

[72] *See id.* at 232. Therefore, the program does not "give aid recipients any incentive to modify their religious beliefs or practices to obtain those services." *Id.*

nondiscriminatory basis . . . the aid is less likely to have the effect of advancing religion."[73]

Finally, Justice O'Connor shifted focus to the *Lemon*'s entanglement prong, and acknowledged that the factors used to identify entanglement are similar to the factors used under the "effects" prong.[74] Therefore, she argued that it would be simplest to treat entanglement as an aspect of the inquiry into the statute's effect on religion.[75] After dismissing the argument that the program in *Agostini* created an excessive entanglement between government and religion,[76] Justice O'Connor summarized the three primary criteria now used to evaluate whether government aid has the effect of advancing religion: "it does not result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement."[77] Since the *Agostini* program passed all three criteria, the Court held that it was valid under the Establishment Clause.[78]

With regard to Florida's A+ Plan for Education, the United States Supreme Court has yet to directly review the constitutionality of a school voucher program.[79] As a result, one must analyze the individual components of Florida's program in light of the criteria established by the Court's previous decisions to ascertain its constitutionality, and also analyze how it, as a whole, fits into the broader principles that underlie the modern Court's Establishment Clause jurisprudence.

First, under the *Lemon* test, any statute, in order to survive an Establishment Clause challenge, must have a secular legislative

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[73] *Id.* at 231.

[74] *See id.* at 232.

[75] *See id.* at 233.

[76] *See id.* at 234. The Court began this inquiry by recognizing that "[i]nteraction between church and state is inevitable," and the Court has "always tolerated some level of involvement between the two." *Id.* at 233.

[77] *Agostini*, 521 U.S. at 234.

[78] *See id.* at 234–35. In making this determination, the Court, therefore, overruled *Ball* and *Aguilar*. Nevertheless, Justice O'Connor admonished lower courts not to conclude that the more recent cases have, by implication, overruled an earlier precedent. *See id.* at 237. "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Id.* (quoting Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989)). The United States District Court in the Northern District of Ohio made use of this language in a challenge to a school voucher plan when it held that it did not have the power to accept the argument that *Nyquist* has been overruled. *See* Simmons-Harris v. Zelman, 72 F. Supp. 2d 834, 850 (1999) (holding that the voucher portion of the Ohio Pilot Scholarship Program violates the Establishment Clause). As of April 2000, this case is awaiting appeal in the Sixth Circuit.

[79] *See supra* note 8.

purpose.[80] As recognized in *Mueller*, however, this analysis is usually perfunctory: "This reflects, at least in part, our reluctance to attribute unconstitutional motives to the states, particularly when a plausible secular purpose for the state's program may be discerned from the face of the statute." [81] The mission of the program seeks to improve Florida's educational system by moving children from failing schools to better schools through the provision of financial assistance to parents. Under a *Mueller* analysis, this would be a sufficiently secular purpose: "A state's decision to defray the cost of educational expenses incurred by parents—regardless of the type of schools their children attend—evidences a purpose that is both secular and understandable."[82]

A constitutional analysis of Florida's school voucher program is more difficult under the effects prong of *Lemon*.[83] In *Nyquist*, New York's educational program was held unconstitutional under the effects prong;[84] however, it is uncertain whether *Nyquist* would be applicable. The *Nyquist* Court did strike down a tuition grant program that, like most school voucher programs, provided financial assistance to parents whose children attended private schools.[85] Nevertheless, in *Nyquist*, the Court was not reviewing a religion-neutral program.[86] The tuition grants in *Nyquist* were limited to children attending nonpublic schools.[87] In fact, the court expressly reserved the question of the constitutionality of religion-neutral programs, such as the G.I. Bill, which provide public assistance or scholarships to individuals "without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited."[88] Florida's program explicitly fits this

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[80] *See Lemon*, 403 U.S. at 612–13.

[81] Mueller v. Allen, 463 U.S. 388, 394–95 (1983). *See also* Witters v. Washington Dep't of Serv. for the Blind, 474 U.S. 481, 485-86 (1986) (acknowledging that the analysis relating to the first prong of the test is simple); Jackson v. Benson, 578 N.W.2d 602, 612 (1998) (noting that the secular purpose of the program is virtually conceded).

[82] *Id.* at 395.

[83] *See, e.g.*, *Witters*, 474 U.S. at 486; *Mueller*, 463 U.S. at 396; *Jackson*, 578 N.W.2d at 612.

[84] *See* Public Educ. and Religious Liberty v. Nyquist, 413 U.S. 751, 779–80, 783 (1973). *See also* text following note 24.

[85] *See id.* at 783.

[86] *See id.* at 780 (recognizing that the aid is provided to children of exclusively nonpublic schools). *See also Mueller*, 463 U.S. at 398 (distinguishing *Nyquist* because the public assistance in *Nyquist* was provided only to parents of children in nonpublic schools).

[87] *See Nyquist*, 413 U.S. at 780.

[88] *See id.* at 782 n.38. The Court also distinguished past cases where the "class of beneficiaries included all schoolchildren those in public as well as those in private

category since students can use their vouchers at public, secular private schools, or non-secular private schools.[89]

With regard to determining whether Florida's program would have an unconstitutional effect on religion, Justice O'Connor, in *Agostini*, set out the criteria for such an analysis.[90] First, does the program result in government indoctrination of religion? In *Agostini*, such concerns were especially pertinent because the program in question placed full-time public employees on parochial school campuses.[91] The same concern does not exist with Florida's school voucher program because it does not require public school employees to work at private religious schools.[92] On the other hand, at least one court—a federal district court in Ohio—has found that a voucher program would result in religious indoctrination.[93]

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schools." *Id.*

The Supreme Court has affirmed the *Nyquist* Court's reservation on this question by subsequently approving public aid programs fitting into this neutral category in spite of *Nyquist's* decision on that particular New York program. *See, e.g.*, Agostini v. Felton, 521 U.S. 203, 234-235 (1997); Rosenberger v. Rector and Visitors of Univ. of Virginia, 515 U.S. 819, 845 (1995); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 13-14 (1993); Witters v. Washington Dept. of Serv. for the Blind, 474 U.S. 481, 489 (1986); Mueller v. Allen, 463 U.S. 388, 400 (1983). *See also* Jackson v. Benson, 578 N.W.2d 602, 614 n.9 (rejecting the argument that the case is controlled by *Nyquist* because the voucher program at issue in Wisconsin provided a neutral benefit to qualifying parents of school-age children in the Milwaukee Public Schools).

[89] *See* FLA. STAT. ANN. § 229.0537(1) (West Supp. 2000).

[90] *See Agostini*, 521 U.S. at 234.

[91] *Id.* at 223–25. This issue also was present in *Zobrest*. *See Zobrest*, 509 U.S. at 13. In fact, the *Agostini* court credited *Zobrest* with abandoning the presumption "that the placement of public employees on parochial school grounds inevitably results in the impermissible effect of state-sponsored indoctrination or constitutes a symbolic union between government and religion." *Agostini*, 521 U.S. at 223.

[92] *See* Michael W. McConnell, *Governments, Families, and Power: A Defense of Educational Choice*, 31 CONN. L. REV. 847, 855 (1999).

[93] *See* Simmons-Harris v. Zelman, 72 F. Supp. 2d 834, 849 (1999) ("It can fairly be said that because the Program does not make aid available generally without regard to the nature of the institution benefited, the Voucher program results in government-sponsored religious indoctrination."). The district court in *Simmons-Harris* followed *Nyquist* even though both public and private schools are eligible for assistance under the program. It did so, in spite of *Nyquist's* reservation of the question involving cases providing neutral assistance, because only private schools have chosen to participate in the program, and most of them are parochial, and because the program provides unrestricted tuition grants. *See id.* Both of these arguments are flawed. First, the district court departed from *Mueller's* warning that "[w]e would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law." *Mueller*, 463 U.S. at 401. Following the reasoning of the Ohio District Court, a court could come to a different conclusion about the constitutionality of the program each year depending upon which schools participate, and how parents make their choices. Similarly, two identical programs in different locations could receive different judgments by the same court. This approach "would scarcely provide the certainty that this field stands in need of." *Id.* In addition, it is logical that a new program might take a

In spite of what one court may have held, Florida's program does not constitute government indoctrination of religion. First, opportunity scholarships are provided to students at eligible public schools—those schools receiving an "F" for any two years in a four-year period.[94] The parents and students make the decision where to use the scholarships.[95] They can choose a sectarian private school, but they can also choose a non-sectarian private school, or a public school. The program merely grants poorer students an opportunity that richer students already possess: a quality education.[96] Second, the program explicitly safeguards against religious indoctrination by requiring all participating schools to agree to admit students on a random and religion-neutral basis, and to agree not to compel any voucher student to profess a specific belief, to pray, or to worship.[97]

The second criteria for determining whether a law has an unconstitutional effect on religion under *Agostini* is whether the program defines its beneficiaries with regard to religion.[98] The

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couple years to become established before garnering more widespread participation. Second, while the *Nyquist* court did criticize the unrestricted tuition grants, it refused to decide the question about tuition grants in the context of a neutral program. *See Nyquist*, 413 U.S. at 782 n.38. Both the *Nyquist* court's example of the G.I. Bill and the program upheld in *Witters* involve variations of unrestricted tuition funding. *See Witters*, 474 U.S. at 488.

[94] *See* FLA. STAT. ANN. § 229.0537(3) (West Supp. 2000). Pixley notes that "because tuition vouchers are redeemable at any school—public, private, religious, or for-profit—their primary effect is to expand educational alternatives for all parents." Pixley, *supra* note 20, at 52.

[95] Vouchers opponents argue that even though parents make the decision where to apply the aid, the state is still providing a benefit to religious schools. *See, e.g.*, *Simmons-Harris*, 72 F. Supp. 2d at 849 ("Even though parents must endorse their checks to the schools, the aid is given directly to participating schools."). The religious schools, however, must compete in a market for the funds, and the parents, not the government, decide whether to make the purchase.

[96] If voucher programs are unconstitutional on this basis, welfare programs that fail to limit the recipient's spending to non-religious avenues should be similarly condemned. In *Witters*, the Court analogized that "a State may issue a paycheck to one of its employees, who may then donate all or part of that paycheck to a religious institution, all without constitutional barrier; and the State may do so even knowing that the employee so intends to dispose of his salary." Witters v. Washington Dept. of Serv. for the Blind, 474 U.S. 481, 486–87 (1986).

[97] *See* FLA. STAT. ANN. § 229.0537(4) (West Supp. 2000). Nevertheless, this safeguard, while important, does not transform religious schools in the program into secular schools. Depending upon the school, religious indoctrination may still permeate both the lesson plans and the atmosphere. In addition, although students may not be directly compelled to take part in religious activities, it is possible that peer pressure could indirectly influence a student to participate. These safeguards only support the constitutionality of the program as a supplement to the necessary choice component. Religious indoctrination may still exist, but the significant constitutional fact is that the choice to undertake the indoctrination remains with the parent and the child.

[98] *See* Agostini v. Felton, 521 U.S. 203, 234 (1997).

Court recognized that the criteria used for identifying beneficiaries "might themselves have the effect of advancing religion by creating a financial incentive to undertake religious indoctrination."[99] Even though the government is not providing religious instruction, a program may still fail constitutional scrutiny if it is set up in such a way as to give the individual parents the incentive to choose private religious schools over secular schools, public or private. On its face, Florida's voucher program does not encourage parents to select religious schools since all participating schools are treated equally. In fact, the schools themselves must admit students on a religion-neutral basis.[100] With this requirement, the program removes religion from the decision as to where scholarship funding may end up, except to the extent that individual parents exercise their right to take religion into account when deciding where to send their children.

Justice O'Connor's last criterion requires assurance that the state program at issue does not create excessive entanglement between government and religion.[101] *Lemon* originally included this factor as one its three prongs to determine constitutionality, but *Agostini* collapsed it into the effects analysis.[102] An entanglement inquiry would conclude that excessive entanglement exists if "a comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions against the inculcation of religious tenets are obeyed and the First Amendment otherwise respected."[103] The Florida A+ Plan for Education does require administrative cooperation between private schools and the government, but such cooperation most likely is not enough to constitute excessive entanglement. For instance, in *Agostini*, the Court held that the fact that a program requires administrative cooperation between government and parochial schools is not sufficient by itself to create an excessive entanglement.[104]

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[99] *Id.* at 231.

[100] *See* FLA. STAT. ANN. § 229.0537(4) (West Supp. 2000).

[101] *See Agostini*, 521 U.S. at 234. *Agostini* explicitly requires that the entanglement "must be excessive before it runs afoul of the Establishment Clause." *Id.* at 233. *Agostini* also recognizes that the Court has always tolerated some level of involvement between government and religion. *See id.*

[102] *See supra* notes 74–75 and accompanying text.

[103] *See* Jackson v. Benson, 578 N.W.2d 602, 619 (1998) (quoting Lemon v. Kurtzman, 403 U.S. 602, 619 (1971)).

[104] *See Agostini*, 521 U.S. at 233-34; Hernandez v. Commissioner, 490 U.S. 680, 696–97 ("[R]outine regulatory interaction which involves no inquiries into religious doctrine, no delegation of state power to a religious body, and no 'detailed monitoring and

In light of *Agostini* and its predecessors, Florida's A+ Plan for Education would likely survive an Establishment Clause challenge. Since changes in the Court may affect how it would specifically apply the criteria of its previous holdings,[105] however, it is critical to understand the fundamental principles underlying the Court's Establishment Clause jurisprudence to foresee whether Florida's voucher program, or whether any other voucher program involving parochial schools, would be upheld. From its recent opinions, the Court has emphasized the importance of neutrality and the transfer of control from the state to the private choices of individuals,[106] accepting a certain degree of state-religion interaction so long as the state does not gain control over religion, or visa versa. By requiring neutral selection criteria in programs that distribute public aid,[107] the Court prevents the government from gaining leverage over religion, which the government could achieve by using selection criteria to acquire concessions from religious institutions. Additionally, by including public schools and secular private schools, Florida's A+ Plan for Education assures that the state does not favor any religious institutions. Furthermore, the program's safeguards prevent religious schools from gaining leverage against the state. For example, without such safeguards a top performing religious school could exact concessions from the state in exchange for opening up its school to a broader range of students. Such bargaining could create a situation in which the school and the state negotiate over selection criteria and financial assistance, thereby leading to favorable treatment for one religion over another, or religious schools over secular schools. In addition, the use of individual parents as the decision-makers reduces the likelihood of collusion between the state and religious institutions.[108]

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close administrative contact' between secular and religious bodies, does not of itself violate the entanglement command.").

[105] *See Bauknight*, *supra* note 16, at 541 (recognizing that changes in the Court might change the analysis, but predicting that the Court will likely maintain the neutrality analysis of *Mueller*, *Witters*, *Zobrest*, *Rosenberger*, and *Agostini*).

[106] *See* Agostini v. Felton, 521 U.S. 203 (1997); Rosenberger v. Rector and Visitors of Univ. of Virginia, 515 U.S. 819 (1995); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993); Witters v. Washington Dep't of Serv. for the Blind, 474 U.S. 481 (1986); Mueller v. Allen, 463 U.S. 388 (1983). *See also* Pixley, *supra* note 20, at 58 (noting the Court's "move away from the separationist standards of the *Lemon* test toward an analysis that accommodates the private choices of aid recipients").

[107] *See Agostini*, 521 U.S. at 231.

[108] Admittedly, like any situation where two entities mutually benefit from a relationship, the state and private schools, including religious schools, could develop a dependence upon each other. The state might count on many private schools to educate its

By focusing more on neutrality and transferring decision-making down to the individual, the Court is accepting, to a certain degree, some church-state relationships. There is no bright-line separation between church and state. Although some might disagree with even the slightest amount of collaboration, for better or for worse, the government has been playing an increasingly active role in our lives and religion has not disappeared. To demand a complete separation between state and religion would be unrealistic. Therefore, the question when analyzing the constitutionality of a state program that confers benefits to religious institutions should not be whether there is separation or not, but whether the relationship fits within the parameters established by the Court, which has shifted toward neutrality and decision-making by individuals.[109] The Court's approach allows religion to function in our society on an equal footing with other entities, but at the same time prevents either the state or religious institutions from gaining control over the other. Under this working concept, determining which programs are constitutionally permissive and which ones are not may be difficult. One therefore must analyze the specific facts of each program and, in light of the criteria established by the Court's recent decisions, determine "whether it furthers any of the evils against which that [the Establishment] Clause protects."[110] Until the Court directly reviews the constitutionality of a voucher program, however, one cannot be precisely sure where it will draw the line separating the "evil" from the constitutional.

—*Jarod Bona*

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children each year, while the private schools depend upon a constant flow of income. This relationship, however, should stay within Establishment Clause bounds so long as the choice whether, and where, to provide funds stays in the hands of parents.

[109] *See Bauknight*, *supra* note 16, at 541.

[110] Committee for Public Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 772 (1973).

STATE BANS ON CITY GUN LAWSUITS

Faced with the daunting problem of gun violence, thirty cities and counties have filed lawsuits against firearm manufacturers, dealers, and trade associations.[1] In response, a number of states have enacted laws prohibiting local governments from filing such suits,[2] with many of them apparently basing their laws on model legislation provided by the National Rifle Association (NRA).[3] These laws raise an important issue that must be re-

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[1] *See, e.g.*, Bill Miller, *District Suing the Gun Industry; Damages Sought for City's Carnage*, WASH. POST, Jan. 21, 2000, at A1 (reporting that Washington, D.C. was the 30th local government to file a lawsuit against the gun industry). Thirty local governments have sued the gun industry: Atlanta; Boston; Bridgeport, Conn.; Camden City, N.J.; Camden County, N.J.; Chicago; Cincinnati; Cleveland; Detroit; Gary, Ind.; Los Angeles City; Los Angeles County; Miami-Dade County; New Orleans; Newark, N.J.; San Francisco; St. Louis; Washington, D.C.; Wayne County, Mich.; and Wilmington, Del. *See id.* The city gun lawsuits are not class actions; each city is suing on its own behalf. The United States Department of Housing and Urban Development has proposed that the nation's 3200 public housing authorities file a class action lawsuit against the gun industry if the industry does not reach a settlement with the cities. *See* David Stout and Richard Perez-Pena, *Housing Agencies to Sue Gun Makers*, N.Y. TIMES, Dec. 8, 1999, at A1. For updated information regarding the city gun lawsuits, see Firearms Litigation Clearinghouse, *Firearms Litigation: Current Cases* (visited Feb. 21, 2000).

[2] Fourteen states have enacted legislation that bars city gun lawsuits in some form. Twelve states have enacted laws that prohibit local governments from suing gun manufacturers, trade associations, and dealers: Arizona, Arkansas, Georgia, Louisiana, Maine, Montana, Nevada, Oklahoma, Pennsylvania, Tennessee, Texas, and Utah. *See* ARIZ. REV. STAT. § 12-714 (Supp. 1999); ARK. CODE ANN. § 14-16-504(b)(2) (Michie Supp. 1999); GA. CODE ANN. § 16-11-184 (1999); LA. REV. STAT. ANN. § 40:1799 (West Supp. 2000); ME. REV. STAT. ANN. tit. 30-A, § 2005 (West Supp. 1999); MONT. CODE ANN. § 7-1-115 (1999); NEV. REV. STAT. § 12.107 (1999); OK. STAT. tit. 21, § 1289.24a (Supp. 2000); 1999 Pa. Laws 59 (to be codified at 18 PA. CONS. STAT. § 6120); TENN. CODE ANN. § 39-17-1314(c) (Supp. 1999); TEX. CIV. PRAC. & REM. CODE ANN. § 128.001 (West Supp. 2000) (allowing local governments to file gun lawsuits only with the advance approval of the state legislature); H.R. 199, 53rd Leg., (Utah 2000) (to be codified at UTAH CODE ANN. § 78-27-64). Two states, Alaska and South Dakota, have immunized the gun industry from all lawsuits, not merely those brought by local governments. *See* ALASKA STAT. § 09.65.155 (Michie Supp. 1999); S.D. CODIFIED LAWS § 21-58-1 to -4. (Michie Supp. 1999). Louisiana, in addition to enacting a law prohibiting city gun lawsuits, enacted another law amending the state products liability statute to provide more general protection to the gun industry. *See* LA. REV. STAT. ANN. § 9:2800.60.

[3] *See* Randy McClain, *Administration Will Push Ban on Gun Suits*, ADVOCATE (Baton Rouge, La.), Mar. 15, 1999, at 1-A. Although successful in enacting state prohibitions of city gun suits in fourteen states, the NRA's nationwide lobbying efforts have not been without defeats. In Colorado and Oregon, bills that would have barred city gun lawsuits were vetoed by the governors of those states. *See* John Sanko, *Owens Vetos* [sic] *Library Funding Bill; Governor: Measure Doesn't Offer Enough Curbs on Material About Hate, Porn*, ROCKY MOUNTAIN NEWS (Denver, Colo.), June 3, 1999, at 7A; David Steves, *Oregon Governor to Allow School Districts to Request More Tax Money*, REGISTER GUARD (Eugene, Ore.), Sept. 7, 1999, at A1. Similar legislation in Florida, which additionally would have made it a felony for a local official to file such a suit, was withdrawn in the wake of school shootings. *See* Lucy Morgan, *School Tragedy Ends Push for Gun Bill*, ST. PETERSBURG TIMES, Apr. 27, 1999, at 5B.

solved before the merits of the city gun lawsuits are considered: whether the states can and should prevent cities from making their arguments in court.

Georgia's recently enacted law preempting city gun lawsuits,[4] which was the first of its kind in the nation,[5] provides an appropriate context in which to analyze this matter. Although the Georgia General Assembly has the authority to limit the local governments' power to sue the gun industry, it cannot do so retroactively as the state ban attempts to do.[6] Also, the Georgia law, like its counterparts in other states, is bad policy: local governments should have the autonomy to confront the problem of gun violence by seeking judicial remedies.

Each year, thousands of people die from gunfire, and many more are treated for firearm injuries.[7] The corresponding costs to local governments are enormous, including expenditures for police protection, medical services, and welfare, as well as the deterioration of cities that results from gun violence.[8] As one commentator notes, a local government's "potential damages can begin with a 911 call, cleaning blood from the street, and emergency medical care, and continue through support of an orphaned child."[9]

Lawsuits against gun manufacturers are not a new development: individuals have been filing such suits for over 150 years.[10] Cities became inspired, however, by the success of lawsuits filed against the tobacco industry by state attorneys general.[11] On October 30, 1998, the City of New Orleans became the first gov-

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[4] H.B. 189, 145th Leg. (Ga. 1999), 1999 Ga. Laws 4 (codified as amended at GA. CODE ANN. § 16-11-184 (1999)).

[5] *See* Kathey Pruitt, *Blocking of Gun Suit Now Law*, ATLANTA J. & CONST., Feb. 10, 1999, at 1B.

[6] *See infra* note 84 and accompanying text.

[7] *See* TOM DIAZ, MAKING A KILLING: THE BUSINESS OF GUNS IN AMERICA 8 (1999) (noting that in 1995, 35,957 Americans died by gunfire, while three times that number are treated for nonfatal firearm injuries each year).

[8] *See* Frank J. Vandall, *O.K. Corral II: Policy Issues in Municipal Suits Against Gun Manufacturers*, 44 VILL. L. REV. 547, 549 (1999).

[9] David Kairys, *Legal Claims of Cities Against the Manufacturers of Handguns*, 71 TEMP. L. REV. 1, 13 (1998).

[10] *See* Vandall, *supra* note 8, at 572. Gun lawsuits have become even more common in the last quarter-century. *See* DIAZ, *supra* note 7, at 208 (noting that "[e]ven in 1978, before the current wave of new research and thinking about gun industry liability began, losses in product liability cases were causing huge premium increases in the gun industry").

[11] *See* Fox Butterfield, *Results in Tobacco Litigation Spur Cities to File Gun Suits*, N.Y. TIMES, Dec. 24, 1998, at A1 (quoting Miami-Dade County Mayor Alex Penelas as saying that "[t]he success of the tobacco litigation had a tremendous impact on us").

ernmental entity in the United States to sue the gun industry.[12] The city authorities argued that gun companies failed to provide safety devices and warnings that would decrease the dangers associated with firearms.[13] Two weeks later, the City of Chicago filed its own lawsuit, together with Cook County, Illinois, seeking $433 million in damages.[14] Unlike the lawsuit filed by New Orleans, Chicago framed its lawsuit as a public nuisance claim rather than as a products liability claim, alleging that gun dealers, distributors, and manufacturers knowingly flooded suburban stores with more guns than needed, since dealers cannot legally sell guns within city limits.[15]

Critics immediately derided the city lawsuits as "wrongheaded and ill-advised."[16] They accused the cities of attempting to bankrupt gun companies through the expense of defending against such litigation in an "end run" around the legislative process.[17] Safety devices demanded by the lawsuits, they claimed, have not even been invented yet.[18] In short, gun advocates dismissed the city lawsuits as "frivolous" assaults on a legitimate industry.[19]

It is, therefore, no surprise that, since their inception, the city lawsuits have been doggedly challenged by the gun industry and gun advocates. The Second Amendment Foundation, a gun-rights advocacy group, filed suit against twenty-three mayors and the United States Conference of Mayors, alleging that the city lawsuits violate gun owners' constitutional rights to free expression and to bear arms.[20] Also, the NRA continued its effort to lobby for state laws barring the city suits.[21]

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[12] *See* Michael Perlstein, *Morial Files Suit Against Gun Makers; City Seeks Compensation for High Cost of Violence*, TIMES-PICAYUNE (New Orleans, La.), Oct. 31, 1998, at A1.

[13] *See id.*

[14] *See* Jim Allen, *City Officials Take Aim at Suburban Gun Sales; Lawsuit Says Dealers Flooding Area With More Weapons Than Needed*, CHI. DAILY HERALD, Nov. 13, 1998, at 11.

[15] *See id.* Chicago banned new registrations of handguns in 1983, effectively outlawing their possession. *See id.*

[16] Editorial, *Daley's Unwise Anti-Gun Gambit*, CHI. TRIB., Nov. 14, 1998, at 26.

[17] John R. Lott, Jr., *Will Suing Gunmakers Endanger Lives?*, CHI. TRIB., Nov. 17, 1998, at 19.

[18] *See* Fox Butterfield, *New Orleans Seeks Millions in Gun Suit*, N.Y. TIMES, Nov. 4, 1998, at A16 (quoting Richard Feldman, Executive Director of the American Shooting Sports Council).

[19] *See* James B. Irwin, *Outrageous Lawsuit Against Gun Manufacturers*, TIMES-PICAYUNE (New Orleans, La.), Dec. 18, 1998, at B6.

[20] *See* Julie B. Hairston, *Gun Group Sues Atlanta Mayor, 22 Others*, ATLANTA J. & CONST., Dec. 2, 1999, at 5C.

[21] *See* David Firestone, *Gun Lobby Begins Concerted Attacks on Cities' Lawsuits*, N.Y. TIMES, Feb. 9, 1999, at A1.

Nevertheless, the city gun lawsuits have had a number of effects on the industry. Bob's Sports Headquarters, a gun shop located in the suburbs of Chicago, agreed to strict guidelines for its firearms sales to settle the lawsuit brought by Chicago and Cook County, Illinois.[22] Fetla's Trading Company, a gun dealer, settled a lawsuit brought by Gary, Indiana by agreeing to cease the sale of handguns and pay the city $10,000.[23] Colt's Manufacturing Company announced that it would stop selling handguns to civilians other than gun collectors.[24] And, in the most significant development so far, Smith & Wesson agreed to a sweeping set of changes in the way it conducts its business.[25]

In early 1999, Atlanta Mayor Bill Campbell announced his intention to join the nationwide attack on the gun industry, stating that he planned to file suit that year.[26] Soon after, state legislators proposed bills that would bar Atlanta and other local governments from doing so.[27] On January 29, 1999, the Georgia House of Representatives passed House Bill 189, barring city

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[22] *See* Andrew Martin and Todd Lighty, *Gun Seller Ceases Fire Over Lawsuit; Shop Accepts Sales Curbs, City Says*, CHI. TRIB., Apr. 14, 1999, at 1. Bob's Sports agreed to stop selling guns to Chicago residents if the guns are illegal to possess within the city, and its owner agreed to testify on the city's behalf. *See id.*

[23] *See Settling Suit, Gun Dealer Ends His Business*, N.Y. TIMES, Dec. 4, 1999, at A18.

[24] *See* Mike Allen, *Colt's to Curtail Sale of Handguns*, N.Y. TIMES, Oct. 11, 1999, at A1.

[25] *See* James Dao, *Under Legal Siege, Gun Maker Agrees to Accept Curbs*, N.Y. TIMES, Mar. 18, 2000, at A1. As part of the federally brokered settlement, Smith & Wesson agreed to place a second, hidden set of serial numbers on new guns, to sell trigger locks with all new handguns, to develop "smart-gun technology" within three years, and to prohibit dealers and distributors from selling guns at gun shows unless the buyers passed background checks. *See id.* Although at least half of the local governments that filed lawsuits have agreed to the settlement, others, including Chicago, Camden County, New Jersey, and Wayne County, Michigan, have refused to do so because the agreement does not provide for monetary damages. *See id. See generally* U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, *Agreement Between Smith & Wesson and the Departments of the Treasury and Housing and Urban Development, Local Governments and States: Summary of Terms* (visited Mar. 22, 2000) <http://www.hud.gov/pressrel/gunagree.html> (summarizing the terms of the Smith & Wesson settlement).

[26] *See* Carlos Campos, *Atlanta Plans to Sue Gun Makers; Tobacco Precedent: Mayor Follows Chicago, New Orleans Examples, Is Determined to File This Year*, ATLANTA J. & CONST., Jan. 5, 1999, at 1B.

[27] Two different bills were proposed. Representative Bob Irvin (R-Atlanta) proposed legislation, House Bill 267, that would have prohibited local governments from filing most product liability lawsuits against any industry. *See* H.B. 267, 145th Leg. (Ga. 1999). *See also* Doug Nurse, *Bill Proposed to Block Atlanta's Gun Suit; GOP Legislator Says City's Plan to Litigate is Motivated by Greed and Would Set a Bad Precedent*, ATLANTA J. & CONST., Jan. 20, 1999, at 1A. One week later, Representative Curtis Jenkins (D-Forsyth) proposed alternative legislation, House Bill 189, which would have prohibited only city gun lawsuits. *See* H.B. 189, 145th Leg. (Ga. 1999). *See also* Charles Waltson, *Duel Brews on Barring Gun Suits*, ATLANTA J. & CONST., Jan. 27, 1999, at 1B.

gun lawsuits by a bipartisan vote of 146-25.[28] The bill headed to the Georgia Senate, where the Public Safety Committee unanimously approved it on February 2, 1999.[29] Before the full Senate could consider the bill, however, Atlanta filed its lawsuit on February 4, 1999.[30] The Senate passed the bill several days later, by a vote of 44-11,[31] and Governor Roy Barnes quickly signed it into law.[32]

The Georgia law was strongly supported by the NRA, which wields enormous power in the Georgia legislature and was heavily involved in House Bill 189's passage.[33] Representative Curtis Jenkins (D-Forsyth), who proposed the bill, has been the "point man for the [NRA] on previous gun-related legislation."[34] According to Representative Jenkins, the NRA was "a great help with this bill. They had all kinds of suggestions as we were drafting it."[35] James Baker, chief lobbyist for the NRA, said that the organization planned to "devote a lot of time and resources" to passing similar legislation and predicted that "[i]n the next year, I think we can probably get 25 or 30 more states to do the same thing."[36]

Atlanta's city officials and others denounced the new law. Mayor Campbell said, "We do not believe it is legal for the Georgia General Assembly to prohibit cities from filing lawsuits

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[28] *See* Charles Walston, *NRA-Backed Bill Senate Bound; Measure Blocks Plan to Sue Gun Makers*, ATLANTA J. & CONST., Jan. 30, 1999, at 3C. The House passed Representative Jenkins's bill, House Bill 189, which prohibited only local government lawsuits against the firearm industry, before it considered the bill proposed by Representative Irvin, House Bill 267, which would have protected all industries. *See id.*

[29] *See* Charles Walston and Carlos Campos, *Officials Vote to Block Gun Suits*, ATLANTA J. & CONST., Feb. 3, 1999, at 1B.

[30] *See* Jay Croft and Carlos Campos, *Defying Foes at Capitol, Atlanta Sues Gun Makers*, ATLANTA J. & CONST., Feb. 5, 1999, at 1A.

[31] *See* Peter Mantius, *Senate OKs Bill to Kill Gun Suit; Crucial Legislation: Four Metro Atlanta Lawmakers Reverse Positions in Favor of Bringing Bill to Vote*, ATLANTA J. & CONST., Feb. 9, 1999, at 4B. A proposed amendment that would immunize all industries from city lawsuits, not merely gun manufacturers, was defeated in the Senate by a vote of 33-22. *See id.*

[32] *See* Pruitt, *supra* note 5, at 1B.

[33] The NRA claims to have 93,000 members in Georgia, and the organization contributed $52,321 to state and local candidates in 1998. *See* Charles Walston, *NRA Mobilizes Forces at Capitol to Kill Lawsuit Filed by Atlanta*, ATLANTA J. & CONST., Feb. 7, 1999, at 5G.

[34] Walston, *supra* note 27, at 1B.

[35] Firestone, *supra* note 21, at A1.

[36] *Id.* This prediction proved to be overly optimistic, although the NRA was successful in passing legislation protecting the gun industry in several states. *See supra* note 2. Baker made a similar prediction one year later. *See* Francis X. Clines, *Ban on Suing Gun Makers is Gaining Steam*, N.Y. TIMES, Feb. 17, 2000, at A16 (quoting Baker as predicting that 15 to 20 more states would approve bans on city gun suits this session).

designed to protect the public's interests."[37] He also alleged that the legislation was unconstitutionally retroactive.[38] John Lowry of the Center to Prevent Handgun Violence asked, "If these lawsuits are as frivolous as the gun industry says . . . why is the industry so scared that it has to get the Legislature to try and do this?"[39]

Despite the new law, Atlanta's lawsuit survived a motion to dismiss in October 1999.[40] State Court Judge M. Gino Brogdon allowed the city's negligence claim to go forward, without ruling on whether the General Assembly had the power to retroactively bar the litigation.[41] Judge Brogdon's silence on this issue led to speculation from both sides about the legislation's retroactive effect.[42] Regardless, his ruling allowed the parties to commence the discovery process, marking the first time that the gun manufacturers were required to release information to a city that was suing the industry.[43] The gun manufacturers subsequently requested a writ of mandamus from Superior Court Chief Judge Thelma Wyatt Cummings Moore, asking that she order Judge Brogdon to dismiss the lawsuit.[44] She refused to issue the writ, calling the request "an indirect attempt to undo the acts of Judge Brogdon."[45]

Elsewhere in the nation, city gun lawsuits have met with mixed success. Judges dismissed lawsuits brought by Cincin-

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[37] Pruitt, *supra* note 5, at 1B.

[38] *See* Bill Rankin, *Change in State Law Could Derail Atlanta Suit*, ATLANTA J. & CONST., Feb. 7, 1999, at 5G.

[39] *Id.*

[40] *See* Ben Schmitt, *Fulton Judge Shoots But Doesn't Kill Atlanta Gun Suit*, FULTON COUNTY DAILY REP., Oct. 28, 1999, at 1. Judge M. Gino Brogdon did dismiss Atlanta's strict product liability claim, since a city is not a "natural person" and therefore cannot sue under the state's strict liability laws. *See id.*

[41] *See id.* Judge Brogdon rejected the city's argument that the retroactive provision was not part of the statute because it was not printed in the Official Code of Georgia Annotated. *See id.* The city's argument that the statute did not contain the retroactive provision was obviously flawed, as the retroactive provision is clearly part of the law signed by Governor Barnes. *See* 1999 Ga. Laws 4, § 3.

[42] *See* Ben Schmitt, *Lawyers Fill in Blanks in Atlanta Gun Suit Ruling*, FULTON COUNTY DAILY REP., Oct. 29, 1999, at 1.

[43] *See* Jay Croft, *Atlanta Scores a First in Firearms Lawsuit*, ATLANTA J. & CONST., Oct. 29, 1999, at 1A.

[44] *See* Jonathan Ringel, *Experts: Gun Suit Appeals Next; Superior Court Tactic Called Companies' First Step in Dismissing Case*, FULTON COUNTY DAILY REP., Feb. 23, 2000, at 1.

[45] *See id.* Unlike Judge Brogdon's decision, Judge Moore's ruling is appealable. *See id.* The gun industry's chances of winning such an appeal, however, are slim. *See id.* (quoting Professor E. R. Lanier as saying that the issues on appeal would be "exceedingly narrow" and that the chances of winning an appeal of a denial of mandamus are "virtually nil").

nati,[46] Bridgeport,[47] and Miami-Dade County.[48] With regard to the lawsuit filed by Chicago, an Illinois state judge dismissed the negligent entrustment claim, but reserved judgment on the public nuisance claim.[49] And, like the Atlanta lawsuit, the lawsuits filed by New Orleans[50] and by Cleveland[51] have survived motions to dismiss. Most of the city lawsuits remain pending.

Georgia's recently enacted law amended Section 16-11-184 of the Official Code of Georgia Annotated,[52] which already prohibited local governments from regulating firearms.[53] The legislation added two provisions to the code.[54] First, it added Section 16-11-184(a)(2), which states: "The General Assembly further declares that the lawful design, marketing, manufacture, or sale of firearms or ammunition to the public is not unreasonably dangerous activity and does not constitute a nuisance per se."[55] Second, it inserted Section 16-11-184(b)(2), which directly limits the authority of local governments to sue the gun industry:

> The authority to bring suit and right to recover against any firearms or ammunition manufacturer, trade association, or dealer by or on behalf of any governmental unit created by or pursuant to an act of the General Assembly or the Con-

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[46] *See* Cincinnati v. Beretta U.S.A. Corp., No. A9902369, 1999 Ohio Misc. LEXIS 27 (Ohio Ct. C.P. Sep. 27, 1999); Fox Butterfield, *Judge Dismisses Cincinnati's Suit on Firearms*, N.Y. TIMES, Oct. 8, 1999, at A12.

[47] *See* Ganim v. Smith & Wesson Corp., No. X06-CV-990153198S, 1999 Conn. Super. LEXIS 3330 (Conn. Super. Ct. Dec. 10, 1999); *Metro News Briefs: Connecticut; Judge Ousts City Lawsuit Against Makers of Guns*, N.Y. TIMES, Dec. 11, 1999, at B6.

[48] *See Gun Suit Voided in Miami*, N.Y. TIMES, Dec. 14, 1999, at A25 [hereinafter *Miami*].

[49] *See* Todd Lighty, *Negligence Tossed Out in Gun Suit; Manufacturers Still Face Nuisance Claim*, CHI. TRIB., Feb. 11, 2000, at 1. The city had argued that gun manufacturers and dealers negligently entrusted guns to suspected criminals. *See id.*

[50] *See* Pamela Coyle, *Judge: La. Gun Laws Unconstitutional; Industry Doesn't Warrant Special Treatment, He Says*, TIMES-PICAYUNE (New Orleans, La.), Feb. 29, 2000, at A9. The judge foreclosed some of the arguments advanced by New Orleans, ruling that the city may not pursue a negligent marketing or a public nuisance claim, and may not allege that gun makers hid the risks of their products. *See id. See also infra* note 111 (discussing the Louisiana ruling).

[51] *See* CENTER TO PREVENT HANDGUN VIOLENCE, *Federal Judge Rules Cleveland Can Sue Gun Manufacturers*, U.S. Newswire, Mar. 16, 2000, *available in* LEXIS, U.S. Newswire database. The Cleveland case is noteworthy because it marks the first substantive decision by a federal judge in a city gun lawsuit. *See id.*

[52] *See* 1999 Ga. Laws 4, § 1.

[53] *See* GA. CODE ANN. § 16-11-184(b)(1) (1999). This section provided that "No county or municipal corporation, by zoning or by ordinance, resolution, or other enactment, shall regulate in any manner gun shows, the possession, ownership, transport, carrying, transfer, sale, purchase, licensing, or registration of firearms, components of firearms, firearms dealers, or dealers in firearms components." *Id.*

[54] *See* 1999 Ga. Laws 4, § 1.

[55] GA. CODE ANN. § 16-11-184(a)(2) (1999).

> stitution, or any department, agency, or authority thereof, for damages, abatement, or injunctive relief resulting from or relating to the lawful design, manufacture, marketing, or sale of firearms or ammunition to the public shall be reserved exclusively to the state. This paragraph shall not prohibit a political subdivision or local government authority from bringing an action against a firearms or ammunition manufacturer or dealer for breach of contract or warranty as to firearms or ammunition purchased by the political subdivision or local government authority.[56]

The prohibition on city gun lawsuits is retroactive. The law states that it "shall apply to any action pending on or brought on or after the date this Act becomes effective."[57]

Therefore, the Georgia legislation has three effects. First, it forecloses certain claims against the firearm industry, namely that guns are unreasonably dangerous and that they are a nuisance per se, thereby affecting any lawsuit brought against the gun industry, whether by local governments or by private entities.[58] Second, it prevents local governments from filing new lawsuits against the gun industry, although it does reserve the state's own power to do so.[59] Third, it retroactively bars Atlanta's pending lawsuit.[60]

The legislative declaration may foreclose some arguments available in city gun lawsuits, but will probably not have a significant effect in this manner. Under the statute, the "lawful design, marketing, manufacture, or sale of firearms or ammunition to the public is not unreasonably dangerous activity and does not constitute a nuisance per se."[61] The legislature intended this provision to "embrace the rule of law" of *Rhodes v. R.G. Industries, Inc.*,[62] which rejected a claim that firearms were unreasonably dangerous, thus prohibiting the plaintiff from suing under Georgia's products liability laws.[63]

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[56] GA. CODE ANN. § 16-11-184(b)(2) (1999).
[57] 1999 Ga. Laws 4, § 3.
[58] *See* GA. CODE ANN. § 16-11-184(a)(2).
[59] *See* GA. CODE ANN. § 16-11-184(b)(2). The State of Georgia, however, is unlikely to exercise this power. State Attorney General Thurbert E. Baker, who had received an endorsement from the NRA, stated that he is "not aware of any basis for a lawsuit." Jonathan Ringel, *Gun Suit Gathers Foes As It Nears Filing Date*, FULTON COUNTY DAILY REP., Feb. 3, 1999, at 1 (quoting state Attorney General Baker).
[60] *See* 1999 Ga. Laws 4, § 3.
[61] GA. CODE ANN. § 16-11-184(a)(2).
[62] 325 S.E.2d 465 (Ga. Ct. App. 1984).
[63] *See* 1999 Ga. Laws 4, § 2; *Rhodes*, 325 S.E.2d at 467.

Although Atlanta's lawsuit did include a strict liability claim, that portion of the lawsuit was dismissed by Judge Brogdon for another reason: the City of Atlanta is not a "natural person" and thus lacks standing to sue under the state's products liability laws.[64] Atlanta's remaining negligence claims do not rely on the allegation that guns are unreasonably dangerous.[65]

Atlanta's lawsuit apparently does not include a public nuisance claim.[66] Nevertheless, even if the suit were to include such a claim, the legislative declaration would not necessarily prohibit it. Chicago's suit, which does assert a public nuisance claim, argues that the gun industry created a nuisance by intentionally flooding suburban gun stores with more guns than necessary so that they would illegally find their way into the city, not that guns are a nuisance per se.[67]

The law's central feature is that it prevents local governments from suing the gun industry.[68] Although this undeniably restricts the power of Georgia cities and counties, the relevant question is whether this measure is constitutionally permissible.

The general rule in Georgia, as elsewhere in the United States, is that cities are creations of the state and have only those powers granted to them by the legislature.[69] The Georgia constitution, however, provides for local government home rule, which allows cities and counties some measure of self-government.[70] Nevertheless, home rule is unlikely to provide any protection to local governments from state bans on city gun lawsuits. The power granted to local governments under Georgia's home rule system does not extend to matters that are preempted by the General Assembly through legislation.[71] Thus, the state govern-

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[64] *See* GA. CODE ANN. § 51-1-11 (1999); Schmitt, *supra* note 40, at 1.

[65] *See* Schmitt, *supra* note 40, at 1.

[66] *See id.*

[67] *See* Allen, *supra* note 14, at 11.

[68] *See* GA. CODE ANN. § 16-11-184(b)(2) (1999).

[69] *See, e.g.*, Kemp v. City of Claxton, 496 S.E.2d 712, 715 (Ga. 1998); City of Atlanta v. McKinney, 454 S.E.2d 517, 520 (Ga. 1995). *See also* Hunter v. City of Pittsburgh, 207 U.S. 161, 178–79 (1907) (holding that the federal constitution does not protect cities from state control).

[70] Under the Georgia constitution, the General Assembly is authorized to provide for the self-government of municipalities. *See* GA. CONST. art. IX, § 2, ¶ 2. This has been accomplished through the Municipal Home Rule Act of 1965, GA. CODE ANN. §§ 36-35-1 TO -8 (1999). The Georgia constitution directly provides for a similar form of home rule for counties. *See* GA. CONST. art. IX, § 2, ¶ 1. *See generally* R. Perry Sentell, Jr., *The Georgia Home Rule System*, 50 MERCER L. REV. 99, 105–06 (1998) (summarizing the history of Georgia's dual system for home rule).

[71] *See* Municipal Home Rule Act of 1965, GA. CODE ANN. § 36-35-3(a).

ment is within its rights to enact a law that prohibits cities from suing the gun industry.

The state constitution also enumerates supplementary powers for local governments.[72] Among these powers are the provision of police[73] and of health and emergency services.[74] In exercising their supplementary powers, local governments are "authorized to do whatever [is] necessary to carry out this goal."[75]

Atlanta and the other cities that have sued the gun industry allege that gun violence has caused them economic harm, which is reflected in such local expenditures as police protection and emergency services.[76] As noted above, provision of such services are powers of local governments under the Georgia constitution.[77] Thus, Georgia cities could argue that suing the gun industry is necessary to carry out these powers and that they are therefore immune from a state ban on city gun lawsuits.

This argument, however, would be unlikely to succeed. The supplementary powers provision of the Georgia constitution does prohibit the state from withdrawing the cities' powers, but it allows the General Assembly to "regulate, restrict, or limit" the exercise of such powers through general legislation.[78] Although it can be argued that a ban on city gun suits limits the ability of local governments to provide police and emergency services, it cannot be said that such a ban totally withdraws that power from local control. Therefore, the Georgia law banning city gun suits does not offend the supplementary powers provision of the Georgia constitution.

Another issue is the Georgia constitution's prohibition on local or special legislation.[79] Besides Atlanta, no city or county in Georgia had sued the gun industry when the ban on city gun lawsuits was enacted. Representative Jenkins, who proposed the legislation, denied that the bill targeted Atlanta.[80] According to Jenkins, he developed the idea for House Bill 189 in December

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[72] *See* GA. CONST. art. IX, §2, ¶ 3. This provision applies to both municipalities and counties. *See id.* It is sometimes characterized as "Amendment 19," because of its position on the 1972 general election ballot. *See* Sentell, *supra* note 70, at 113.

[73] *See* GA. CONST. art. IX, § 2, ¶ 3(a)(1).

[74] *See* GA. CONST. art. IX, § 2, ¶ 3(a)(3).

[75] Georgia Ass'n of the Am. Inst. of Architects v. Gwinnett County, 233 S.E.2d 142, 144 (Ga. 1977).

[76] *See supra* notes 8–9 and accompanying text.

[77] *See supra* notes 72–74 and accompanying text.

[78] GA. CONST. art. IX, § 2, ¶ 3(c).

[79] *See* GA. CONST. art. III, § 6, ¶ 4(a).

[80] *See* Walston and Campos, *supra* note 29, at 1B.

1998, before the city filed its lawsuit.[81] It was, however, his concern that "Atlanta might look at [the possibility of filing a lawsuit]" that spurred him to action.[82] Nevertheless, even if the General Assembly enacted the gun lawsuit ban in response to the Atlanta suit, the law does not violate the Georgia constitution. As written, it applies to all local governments, not merely Atlanta.[83]

Although the Georgia constitution does allow the state legislature to restrict the powers of local governments, there are some constitutional limits, including a prohibition on retrospective legislation. As noted above, the Georgia ban on city gun lawsuits applies to lawsuits not yet filed and lawsuits already pending, of which Atlanta's was the only one.[84] It is therefore retroactive in two ways. First, it bars a lawsuit that has already been filed. Second, it prevents cities and counties from suing for injuries they sustained prior to the enactment of the new law.

The Georgia courts should find the retroactive application of the law unconstitutional. The Georgia constitution provides that "[n]o bill of attainder, ex post facto law, retroactive law, or laws impairing the obligation of contract or making irrevocable grant of special privileges or immunities shall be passed."[85] The prohibition on retroactive laws applies only to those laws that affect vested rights.[86] Thus, the ban on city gun lawsuits is unconstitutional only if Atlanta or other local governments in Georgia had a vested right to sue prior to the law's enactment.

Under Georgia law, a right to sue becomes vested at the time an injury occurs.[87] In *Enger v. Erwin*,[88] the plaintiff filed a claim for alienation of affection, but while the lawsuit was pending,

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[81] *See* Firestone, *supra* note 21, at A1.

[82] *Id.*

[83] *See* GA. CODE ANN. § 16-11-184(b)(2) (1999).

[84] *See* 1999 Ga. Laws 4, § 3.

[85] GA. CONST. art. I, § 1, ¶ 10. The prohibition on retroactive laws in the Georgia constitution is substantially broader than the prohibition on such laws found in the United States Constitution. *Compare id. with* U.S. CONST. art. I, § 9, cl. 3; U.S. CONST. art. I, § 10. The United States Constitution's prohibitions on ex post facto laws apply only to criminal matters. *See* Marshall J. Tinkle, *Forward Into the Past: State Constitutions and Retroactive Laws*, 65 TEMP. L. REV. 1253, 1256 (1992). Georgia's constitution, like many state constitutions, provides greater protection. *See id.* at 1264.

[86] *See, e.g.*, Bituminous Cas. Corp. v. United States Auto. Assoc., 282 S.E.2d 198, 199 (Ga. Ct. App. 1981).

[87] *See, e.g.*, Hart v. Owens-Illinois, Inc., 297 S.E.2d 462, 464 (Ga. 1982); London Guar. & Accident Co. v. Pittman, 25 S.E.2d 60, 66 (Ga. Ct. App. 1943).

[88] 267 S.E.2d 25 (Ga. 1980).

the General Assembly abolished the cause of action.[89] The new statute expressly provided that it was to apply to pending claims.[90] The Supreme Court of Georgia held that the plaintiff's right to sue had vested at the time of the injury and therefore found the law's retrospective application unconstitutional.[91]

Similarly, in *Jackson v. Young*,[92] the plaintiff brought a negligence action against a twelve-year-old defendant.[93] While the lawsuit was pending, the legislature raised the age of discretion and accountability from ten to thirteen.[94] The court held, however, that the defendant did not become immune from liability as a result of the new law because the right to sue vested at the time of the injury, when the defendant was susceptible to suit under the statute then in effect.[95]

In *Cole v. Roberts*,[96] a decedent's son sued under Georgia's wrongful death statute.[97] Subsequent to his mother's death, however, the State had amended its wrongful death laws to confer exclusive standing to sue on surviving spouses.[98] Since the decedent's spouse was alive, the new law would operate to bar the son's suit.[99] The federal district court, applying Georgia law, held that the son's right to sue vested at the time of his mother's death.[100] Therefore, retroactive application of the law was unconstitutional.[101]

According to counsel for Smith & Wesson, the Georgia constitution's prohibition of retroactive laws is irrelevant to Atlanta's case: "The city is arguing that a municipality has a vested right. Only people have vested rights."[102] Such an argument is incorrect: local governments do have vested rights under Georgia law. In *DeKalb County v. State of Georgia*,[103] the issue was whether a

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[89] *See id.*
[90] *See id.*
[91] *See id.* at 26.
[92] 187 S.E.2d 564 (Ga. Ct. App. 1972).
[93] *See id.* at 565.
[94] *See id.*
[95] *See id.*
[96] 648 F. Supp. 415 (M.D. Ga. 1986).
[97] *See id.* at 416.
[98] *See id.*
[99] *See id.* The issue in the case was one of subject matter jurisdiction, since the son was a resident of Florida while his father, like the defendants, was a resident of Georgia. *See id.*
[100] *See id.* at 417.
[101] *See id.*
[102] Ben Schmitt, *Wording of State Code at Issue in Bid to Dismiss City's Gun Suit*, FULTON COUNTY DAILY REP., Oct. 21, 1998, at 1 (quoting Anne G. Kimball, Esq.).
[103] 512 S.E.2d 284 (Ga. 1999).

county had a vested right to certain tax proceeds collected by the state on the county's behalf prior to a change in state law.[104] The Supreme Court of Georgia ruled that the local government did have a vested right to identified tax proceeds.[105]

Therefore, the Georgia constitution's prohibition of retroactive legislation does apply to the state's ban on city gun lawsuits. The cities' right to sue the gun industry became vested at the time they sustained their injuries.[106] The injuries alleged by city lawsuits are the enormous expenditures made by local governments in response to gun violence, which had been occurring for years before the Georgia General Assembly acted.

Accordingly, not only is Atlanta's pending lawsuit protected from the retroactive ban, but also any other lawsuit that a local government may wish to file against the firearm industry. Because the other cities and counties in Georgia sustained injuries resulting from gun violence prior to the new law's enactment, they all have vested rights to bring suit.[107] Since the General Assembly does have the power to prohibit city gun lawsuits that arise from prospective injuries, any such lawsuits must be based on events that occurred prior to the enactment of the new legislation.[108]

Almost all state constitutions contain language barring retrospective laws.[109] Whether these state constitutional provisions should also be interpreted to prohibit similar state bans on city gun lawsuits is an issue that is beyond the scope of this Essay, since it depends on the particular language of the legislation as well as the respective state's case law.[110] It seems likely, however,

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[104] *See id.* at 285.

[105] *See id.* at 286. The court ruled, however, that because the tax proceeds were not identifiable (the tax returns in question omitted the location from which the taxes were collected), the county did not have a valid claim. *See id.*

[106] Prior to the enactment of Georgia's law barring city gun lawsuits, local governments like the City of Atlanta had the right to sue the gun industry. Atlanta's charter provides that the city "may sue and be sued, and plead and be impleaded in all courts of law and equity and in all action[s] whatsoever." Charter for the City of Atlanta, 1996 Ga. Laws 1019, § 1-102.

[107] Atlanta's race to file its lawsuit before the legislation was enacted was therefore of little consequence, since the relevant time is not when a suit is filed, but rather when the right to sue becomes vested.

[108] Georgia cities therefore might not be able to sue for abatement of a nuisance or for an injunction, since under the new law they have no vested right to sue for continuing injuries.

[109] *See* Tinkle, *supra* note 85, at 1254 (citing retroactivity provisions from the constitutions of forty-four states).

[110] Not all state statutes barring city gun lawsuits are retroactive. *Compare* 1999 Ga. Laws 4, § 3 ("The Act shall apply to any action *pending* on or *brought* on or after the

that a number of other state constitutions also prohibit retroactive bans on city gun lawsuits.[111]

Aside from the legal and constitutional implications of retroactive legislation that bars city gun lawsuits, such laws represent an undesirable policy choice. In essence, the NRA-backed laws enacted in Georgia and other states are part of the gun industry's litigation strategy in defending against the city gun lawsuits.[112] Adjudication of the lawsuits, however, should be left to the courts. If the lawsuits truly are "frivolous," as advocates of the gun industry claim,[113] then the courts will likely dismiss them.[114]

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date this Act becomes effective.") (emphasis added), *with* 1999 Alaska Sess. Laws 17, § 2 ("This Act applies to a civil action that *accrues* on or after the effective date of this Act.") (emphasis added).

[111] For example, this past February, a Louisiana judge ruled that the state's laws barring city lawsuits, *see* LA. REV. STAT. ANN. §§ 9:2800.60, 40:1799 (West Supp. 2000), were unconstitutionally retroactive, allowing New Orleans's gun lawsuit to proceed. *See* Pamela Coyle, *Judge: La. Gun Laws Unconstitutional; Industry Doesn't Warrant Special Treatment, He Says*, TIMES-PICAYUNE (New Orleans, La.), Feb. 29, 2000, at A9. The judge also held that the laws were invalid for several reasons in addition to retroactivity: they violated a state constitutional prohibition on local or special laws, they interfered with the city's home rule powers, and they violated the city's due process rights. *See id.* An attorney for the gun manufacturers said that they would appeal the ruling to the Louisiana Supreme Court. *See id.* (quoting Scott Delacroix, Esq.).

Professor M. David Gelfand, who represented the City of New Orleans in its lawsuit against the gun industry, had also argued that the laws were unconstitutional because they "violate . . . the separation of powers." Pamela Coyle, *City Debates Gun Makers Over 2 Laws; Constitutionality of Barring N.O. Lawsuit in Question*, TIMES-PICAYUNE (New Orleans, La.), Jan. 29, 2000, at A1. The judge apparently did not base his decision on this claim. *See* Coyle, *supra* note 50, at A9. Under federal law, the principle of separation of powers is offended only when a law purports to reopen a final judgment, not when the law is changed with regard to a pending case or even a case on appeal. *See* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 226–27 (1995).

[112] It is true that the NRA claims to represent the interests of gun owners, not the gun industry. *See* DIAZ, *supra* note 7, at 65. This claim, however, "may be a bit like trying to separate the dance from the dancer." DIAZ, *supra* note 7, at 65. Several years ago, a newspaper series on the NRA reported:

> The bond between the gun manufacturers and the NRA involves direct financial contributions, almost-always-favorable reviews of newly developed products in NRA publications like *American Rifleman*, and including NRA literature in the packaging of new guns. The NRA even organizes and promotes an annual show, at which manufacturers exhibit their wares.

Gregg Kruppa, *Gun Makers Have a Friend in the NRA; Guns Aiming for Profits*, BOSTON GLOBE, Dec. 19, 1993, at 35. For example, in hearings on the federal Brady Bill, which required waiting periods and background checks for gun purchases, "[t]he NRA always spoke for the industry." *Id.* (quoting a congressional staffer). Moreover, the NRA's recent defense of the industry from city gun lawsuits has provided the organization with a way to increase its membership and draw in greater financial contributions. *See* James Dao and Don Van Natta, Jr., *N.R.A. Is Using Adversity to Its Advantage*, N.Y. TIMES, June 12, 1999, at A10. Finally, although the state legislation is backed and promoted by the NRA, gun manufacturers have joined in the lobbying effort as well. *See* Jay Croft and Carlos Campos, *Gun Makers, NRA Vow to Fight City's Lawsuit*, ATLANTA J. & CONST., Feb. 5, 1999, at 1A.

[113] *See supra* note 19 and accompanying text.

[114] The reality, however, is that many of these suits may not be frivolous. In one recent

Indeed, three city lawsuits already have been dismissed, thereby suggesting that the courts are capable of this screening function.[115]

Nevertheless, the gun industry and its defenders insist that lawsuits against gun manufacturers encroach on what is properly a legislative function.[116] They argue that plaintiffs in city gun lawsuits are seeking to ban firearms through litigation because they failed to obtain such a result through the political process.[117] This argument, however, overlooks the fact that these lawsuits are ordinary damage suits.[118] The gun litigation does not raise novel or complex issues any more than the other lawsuits that courts consider every day.[119] Rather, like all tort suits, lawsuits against gun manufacturers are "simply questions of who should bear the loss."[120] In the case of the city gun lawsuits, the cities allege that it is the gun industry that should bear the losses that result from gun violence, not local governments. If successful, the city gun lawsuits would force the gun manufacturers to internalize these expenditures.[121] As a result, the gun industry might directly absorb the financial costs of their products' harm or pass them on to consumers.[122] In addition, the firearm industry may redesign guns to provide more safety features, or withdraw the most dangerous guns from the market altogether.[123]

At any time, of course, Congress and the state legislatures could choose to confront the problem of gun violence.[124] Currently, however, meaningful legislative solutions are absent. Firearms are exempted from the standard safety regulations that

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case, *Hamilton v. Accu-tek*, a federal jury awarded over $500,000 to plaintiffs seeking recovery from gun manufacturers on a negligent marketing theory. *See* 62 F. Supp. 2d 802, 848 (E.D.N.Y. 1999). And, like the Atlanta lawsuit, the lawsuits filed by New Orleans and by Cleveland have survived motions to dismiss. *See* CENTER TO PREVENT HANDGUN VIOLENCE, *supra* note 51; Coyle, *supra* note 50, at A9. Such success by those challenging the gun industry in court suggests that what the gun industry and gun advocates are really worried about is the legitimacy of these lawsuits.

[115] *See* Ganim v. Smith & Wesson Corp., No. X06-CV-990153198S, 1999 Conn. Super. LEXIS 3330 (Conn. Super. Ct. Dec. 10, 1999); Cincinnati v. Beretta U.S.A. Corp., No. A9902369, 1999 Ohio Misc. LEXIS 27 (Ohio Ct. C.P. Sep. 27, 1999); *Miami*, *supra* note 48, at A25.

[116] *See* David B. Kopel and Richard E. Gardner, *The* Sullivan *Principles: Protecting the Second Amendment from Civil Abuse*, 19 SETON HALL LEGIS. J. 737, 749 (1995).

[117] *See id.* at 751.

[118] *See* Vandall, *supra* note 8, at 575.

[119] *See id.* at 571–72.

[120] *Id.* at 571.

[121] *See id.* at 553.

[122] *See id.* at 553–54.

[123] *See id.* at 554–55.

[124] *See id.* at 574.

apply to most other consumer products.[125] Criminal laws only limit access to firearms for some people, such as children and felons, and only restrict the availability of a few categories of weapons, such as machine guns.[126] Under federal law, there is no agency that "has the power to ensure that a gun is designed and manufactured in such a way as to minimize its threat to human life."[127]

Therefore, although meaningful gun control legislation is one possible solution to the problem of gun violence in the United States, Congress and state legislatures remain reluctant to enact the broad measures that are necessary. In the meantime, it is appropriate for cities to seek a remedy for their alleged injuries in the courts.[128] State laws that prevent cities from suing the gun industry are thus undesirable because they deny local governments the ability to have their day in court on the issue of who should bear the financial burden of gun violence. Additionally, such laws overly restrict the flexibility of local governments to take appropriate steps to combat gun violence. Damages that result from gun violence vary from city to city.[129] Individual cities should be allowed the autonomy to confront the gun problem in the manner most suitable to their particular situations.

States do have the power to prevent cities from suing the gun industry, but that power is limited by constitutional prohibitions on retroactive laws. In Georgia and perhaps in other states as well, this limitation means that a state cannot stop its cities from recovering damages for injuries that they already have sustained. For this reason, Georgia's legislative effort to ban city suits against gun manufacturers is unconstitutional.

—*Brent W. Landau*

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[125] *See* 15 U.S.C. § 2052(a)(1)(E) (1994); DIAZ, *supra* note 7, at 12.

[126] *See* DIAZ, *supra* note 7, at 12.

[127] *Id.* at 13.

[128] *See* Vandall, *supra* note 8, at 574. City gun lawsuits would continue to be appropriate even if the states or the federal government passed meaningful gun legislation, because cities would still have a right to be compensated for past injuries.

[129] *See* Kairys, *supra* note 9, at 13.