HARVARD
Journal on Legislation

Volume 38, Number 1 Winter, 2001

Essays

Articles

Recent Developments

Harvard Journal on Legislation
Publications Center
Harvard Law School
1541 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4400
hlsjol@law.harvard.edu
www.law.harvard.edu/studorgs/jol

Editorial Policy: The Journal specializes in the analysis of legislation and the legislative process. It focuses on legislative reform and on organizational and procedural factors that affect the efficiency and effectiveness of legislative decision-making. The Journal is especially interested in publishing articles that examine public policy problems of nationwide significance and propose legislation to resolve them.

Submissions: The Journal welcomes unsolicited manuscripts. Interested authors interested should send their manuscripts and all related correspondence to the Articles Editor at the above address. Manuscripts should be typed, double-spaced, and submitted in duplicate, with a diskette if possible. The Journal does not accept submissions via e-mail.

Subscriptions: Subscription rates for the 2001 volume (Volume 38) are $28.00 domestic; $34.00 foreign surface mail ($36.00 to Canada); $46.00 foreign airmail. Individual issues from the current volume can be obtained for $14.00 (plus $2.00 per copy for foreign mailing). All correspondence concerning subscriptions should be addressed to the Subscriptions Manager, Publications Center, Harvard Law School, 1541 Massachusetts Avenue, Cambridge, MA 02138, (617) 495-3694. E-mail: ssulliva@law.harvard.edu. Unless otherwise requested by the subscriber, the *Journal* is mailed at bulk rate. For some overseas subscribers, delivery via air mail may be more reliable than standard surface rate service. Claims for missing issues of Volume 38 will be honored only until January 2002.

Back Issues: Past volumes are available exclusively from William S. Hein & Co., Inc., 1285 Main Street, Buffalo, NY, 14209, 1-800-828-7571, wsheinco@class.org. Contact William S. Hein & Co. for information on prices for bound volumes.

ESSAY

THE MEANINGS OF PERMANENCE: A CRITICAL ANALYSIS OF THE ADOPTION AND SAFE FAMILIES ACT OF 1997

LIBBY S. ADLER*

In 1997, Congress passed the Adoption and Safe Families Act. The Act amends Titles IV-B and IV-E of the Social Security Act, which govern states' federally funded child-protective efforts. Under the terms of the Act, states must conduct a permanency hearing within twelve months after a child enters foster care to determine whether the child will be returned to the family of origin or be "freed" for adoption. In this Essay, Professor Adler argues that this requirement forces courts and state decision-makers to choose between two stark alternatives—termination of parental rights and family reunification—and reflects a limited vision of the ideal family, to which only original and adoptive families conform. Professor Adler argues that this pervasive "ideology of the ideal family" is a pillar of American legal consciousness that throughout the history of American child welfare policy has sidelined nonconforming approaches and profoundly and detrimentally affected the lives of foster children. She brings to the foreground a pattern of legal consciousness and proposes that lawmakers embrace a wider array of permissible family structures to make room for a broader range of possible outcomes.

I. THE PREVAILING FAITH IN PERMANENCE

In 1997, the 105th Congress passed, and President Clinton signed, the Adoption and Safe Families Act ("ASFA").[1] ASFA amends Titles IV-B and IV-E of the Social Security Act, which govern federally funded child protective efforts by states.[2] These efforts include removal of children from their families of origin, provision of social services, termination of parental rights, and placement of children in foster and adoptive homes.[3] ASFA's driving policy is to achieve permanence for children in the foster care system.[4]

---

* Assistant Professor of Law, Northeastern University. L.L.M., Harvard Law School, 1998; J.D., Northeastern University, 1994; A.B., University of Michigan, 1989. My thanks go to Jerry Frug, Duncan Kennedy, Karl Klare, Martha Minow, Mary O'Connell, and Lucy Williams for their helpful comments; Kerry-Ann Powell for her research assistance; and Wendy Parmet and Jane Scarborough for their continuing guidance and support.

[1] Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified in scattered sections of 42 U.S.C. (1998)).

[2] 42 U.S.C. §§ 620–628, 670–679a (1998).

[3] *Id.*

[4] 143 CONG. REC. S12,668–71 (daily ed. Nov. 13, 1997) (statement of Sen. DeWine (R-Ohio)).

This Essay critiques ASFA and its driving principle, as well as the ideological framework out of which they grew.[5] It argues that many of the most committed proponents of child welfare reform have been unable to extricate themselves from the limiting terms of American child welfare policy discourse, and that the principle of permanence is a product of that discourse.

The prevailing faith in permanence is misplaced and should be abandoned, not because children do not benefit from living in safe, permanent homes, but because policymakers and reformers are mistaken in their belief that the principle of permanence resolves the terrifying dilemmas associated with child welfare practice.[6]

Child welfare advocates conceived of permanence in the 1970s as a way of tackling the problem of "foster care drift,"[7] a term used to describe the shepherding of children through a series of foster homes, sometimes for years, while state agencies attempt to provide the services necessary to enable safe family reunification.[8] Child welfare advocates condemn "foster care drift" as insensitive to children's sense of time and threatening to their future ability to form attachments.[9] The emphasis on permanence was a direct response to this problem.[10]

---

[5] While this Essay focuses on federal law, ASFA had state forerunners. *See generally* James M. McCoy, *Reunification—Who Knows the Child's Best Interests?*, 53 J. Mo. Bar. 40 (1997).

[6] *Cf.* Duncan Kennedy, *Form and Substance in Private Law Adjudicaton*, 89 Harv. L. Rev. 1685, 1775 (1976) [hereinafter *Form and Substance*] (describing the "moment of terror" at which rationality fails to help us choose between contradictory values); Mark Kelman, A Guide to Critical Legal Studies 289 (1987) (explaining how legal discourse suppresses, rather than solves, policy dilemmas). As will become clear in Part II.E, the principle does not help decision-makers choose between preserving and terminating family relationships. Although this Essay addresses a single federal statute in its historical and theoretical context, my goal is to contribute to a larger intellectual project of bringing to the foreground entrenched and largely invisible patterns of thought that limit our ability to generate meaningful reform. *See, e.g.*, Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 Harv. L. Rev. 1497, 1498 (1983) [hereinafter *The Family and the Market*] (arguing that "reforms are limited by their premises, by the unexamined assumptions upon which they are based"); Deborah Stone, Policy Paradox: The Art of Political Decision Making, xi (1997).

[7] *See, e.g.*, Marsha Garrison, *Why Terminate Parental Rights?*, 35 Stan. L. Rev. 423, 426–42 (1983); Roger J.R. Levesque, *The Failures of Foster Care Reform: Revolutionizing the Most Radical Blueprint*, 6 Md. J. Contemp. Legal Issues 1, 5 (1995).

[8] *See, e.g.*, Jill Sheldon, Note, *50,000 Children are Waiting: Permanency, Planning and Termination of Parental Rights Under the Adoption Assistance and Child Welfare Act of 1980*, 17 B.C. Third World L.J. 73, 76–80 (1997).

[9] *See* David J. Herring, *Inclusion of the Reasonable Efforts Requirement in Termination of Parental Rights Statutes: Punishing the Child for the Failures of the State Child Welfare System*, 54 U. Pitt. L. Rev. 139, 144–50 (1992).

[10] *See Adoption 2002: The President's Initiative on Adoption and Foster Care* [hereinafter *Adoption 2002*] (defining permanency as when "a child has a safe, stable, custodial environment in which to grow up, and a life long relationship with a nurturing caregiver"), *at* http://www.acf.dhhs.gov/programs/cb (issued Dec. 14, 1996).

In its first effort to address the problem of foster care drift, Congress enacted the Adoption Assistance and Child Welfare Act of 1980 ("CWA").[11] The central policy goal of the CWA was a version of permanence that emphasized family preservation, meaning that states were encouraged to make reasonable efforts to keep families together or enable their reunification.[12] The CWA discouraged termination of parental rights except where the child's safety was so imperiled as to make reunification untenable.[13]

A dramatic increase in foster care caseloads in the 1980s, however, overwhelmed family preservation resources.[14] Egregious incidents of child abuse, occurring as state agencies made futile attempts to preserve troubled families,[15] urged a rereading of the reasonable efforts requirement to permit expedited termination of parental rights when states were pessimistic about repairing family dysfunction.[16]

ASFA purports to "clarify" the policies embodied in the CWA, largely by amending two important provisions of Title IV-E.[17] First, ASFA amends the reasonable efforts requirement by limiting the circumstances under which states must persevere in their efforts to preserve original families, encouraging expeditious termination of parental rights instead.[18] Second, ASFA requires states to conduct a permanency hearing within twelve months after a child enters foster care to determine whether the child will be returned to the family of origin or be "freed" for adoption.[19]

The cardinal principle of child welfare policy over the last two decades under both CWA and ASFA regimes has been *permanence.*[20] The aim of this policy is to synthesize the advantages of family preservation and expeditious termination of parental rights.[21] The difficulty is that the

---

[11] Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (codified as amended in scattered sections of 42 U.S.C. (1998)); *see also* Alice C. Shotton, *Making Reasonable Efforts in Child Abuse and Neglect Cases: Ten Years Later*, 26 CAL. W. L. REV. 223, 224–25 (1990).

[12] *See* Pat McElroy & Cynthia Goodsoe, *Family Group Decision Making Offers Alternative Approach to Child Welfare*, YOUTH L. NEWS, May-June 1998, *available at* http://www.youthlaw.org/family98.pdf.

[13] *See* Shotton, *supra* note 11, at 223; *see also* McCoy, *supra* note 5, at 40.

[14] *See* Levesque, *supra* note 7, at 8–12.

[15] *See, e.g.*, McCoy, *supra* note 13, at 40–42; Sheldon, *supra* note 8, at 83–85.

[16] *See, e.g.*, Mona Charen, *Needed: Homes for 50,000 Children*, ATLANTA J. & ATLANTA CONST., Apr. 26, 1995, at A15; Alexandra Dylan Lowe, *New Laws Put Kids First: Reforms Stress Protection Over Preserving Families*, A.B.A. J., May 1996, at 20; 143 CONG. REC. S12,668–71 (daily ed. Nov. 13, 1997) (statement of Sen. DeWine).

[17] *See* 143 CONG. REC. S12,668–71 (daily ed. Nov. 13, 1997) (statement of Sen. DeWine).

[18] 42 U.S.C. § 671(a) (15) (1998).

[19] *Id.* § 675(5). This represents a departure from the previous rule under the CWA, which provided for periodic dispositional hearings to consider the child's future status. *Compare id. with* Pub. L. No. 96-272, § 475(5) (c), 94 Stat. 500 (1998).

[20] *See, e.g.*, Garrison, *supra* note 7, at 442–55.

[21] *See, e.g.*, 42 U.S.C. § 629(b) (1998) (expanding family preservation services while

problem of impermanence itself arises out of decision-makers' profound ambivalence over which strategy to employ in a given factual circumstance.

Some circumstances are so dire that they demand termination of parental rights, just as some families undoubtedly ought to be provided with appropriate services and preserved. Many cases would garner a powerful consensus about which course of action is the right one. This Essay, however, focuses on the "hard cases,"[22] i.e., cases that would be likely to engender official ambivalence, making it difficult, even painful, to decide whether to preserve or coercively terminate a parent-child relationship.

Innovation for children in the hard cases, has been hampered by unexamined premises underlying American child welfare policy.[23] These premises are features of what I will call the "ideology of the ideal family."[24] In Part II of the Essay, I argue that this ideology drives ASFA and its immediate predecessor, the CWA. In Part III, I trace this ideology through the history of American child welfare policy and in Part IV, I argue that the ideology appears repeatedly in influential strains of classical and contemporary liberal legal thought. Taken together, these Parts demonstrate that the ideology of the ideal family is a pillar of American legal consciousness[25] that has sidelined nonconforming policy proposals[26] and has had an untold and profound impact on the lives of foster children. In Part V, I urge that we broaden our vision of family beyond the idyllic and embrace messy and imperfect family structures. I propose that the law change to lend greater support to child welfare innovations that defy the ideology of the ideal family. This change will require renouncing faith in the promise of permanence to save us from the pain of de-

---

limiting the length of time during which they must be delivered).

[22] By "hard cases," I mean cases that would be likely to cause a court to feel ambivalent and so delay making a final disposition, letting a child remain in foster care "limbo" while periodically revisiting the watered-down question of the child's "future status." *See infra* note 45.

[23] *See The Family and the Market*, *supra* note 6, at 1498.

[24] Frances Olsen has employed similar terminology, describing the "ideology of the family [as] a structure of images and understandings of family life." Frances Olsen, *The Politics of Family Law*, 2 LAW & INEQ. 1, 3 (1984) [hereinafter *Politics of Family Law*]. I use the ideology of the ideal family similarly, but I also want to emphasize that the images and understandings create an ideal, or fantasy, that excludes some possibilities for reform. *See The Family and the Market*, *supra* note 6, at 1499 (Part I is entitled THE IDEOLOGY OF THE FAMILY AND THE MARKET).

[25] Cf. Duncan Kennedy, *From the Will Theory to the Principle of Private Autonomy: Lon Fuller's "Consideration and Form,"* 100 COLUM. L. REV. 94, 97–98 (2000) (explaining the concept of "American legal consciousness").

[26] *See* Marsha Garrison, *Parents' Rights vs. Children's Interests: The Case of the Foster Child*, 22 N.Y.U. REV. L. & SOC. CHANGE 371, 390 (1996). *Cf.* KELMAN, *supra* note 6, at 269, 290.

ciding[27] whether to preserve families or terminate the rights of parents whose children's welfare is uncertain.

II. THE STATUTE

Two sections of ASFA have been viewed as most critical to achieving permanence for children: (1) the amendments to the reasonable efforts requirement; and (2) the hearing requirement.[28] This Part examines those sections in detail, discusses the policy challenges they were designed to address, and argues that they do not achieve their central purposes.[29]

A. Reasonable Efforts

The CWA introduced the *reasonable efforts* requirement to federal law.[30] Until ASFA was passed in 1997, the relevant statutory provision required that a state's eligibility for federal foster care funding be contingent upon the creation of a state plan that is approved by the Secretary of Health and Human Services ("HHS").[31] The state plan must provide that "in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home."[32]

As commentators have noted, the reasonable efforts requirement lacked definition, leaving significant discretion to the states to determine what kinds of efforts were "reasonable."[33] Furthermore, the CWA stopped short of actually mandating that states "implement a concrete, enforceable plan."[34] HHS promulgated regulations listing services that states

---

[27] *Cf.* STONE, *supra* note 6, at 243 (discussing the pain of making difficult decisions).

[28] *See, e.g.*, Bill Grimm, *But Will Anything Change for Children? Adoption and Safe Families Act Brings Big Changes in Child Welfare*, YOUTH L. NEWS, Nov-Dec. 1997, at 1, *available at* http://www.youthlaw.org/adopt97.pdf.

[29] For a more comprehensive overview of ASFA, including, e.g., addition of the requirement that foster parents be notified of hearings concerning the children in their care, Adoption and Safe Families Act of 1997, 42 U.S.C. § 675(5), use of the Federal Parent Locator Service for child welfare services, 42 U.S.C. § 653, and provision of continuing health insurance coverage for children with special needs, 42 U.S.C. §§ 671(a), 673(a)(2), see *id.*

[30] Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. § 671(a) (15).

[31] *Id.* § 671(a).

[32] *Id.*

[33] *See, e.g.*, Herring, *supra* note 9, at 143; Jessica A. Graf, Note, *Can Courts and Welfare Agencies Save the Family? An Examination of Permanency Planning, Family Preservation, and the Reasonable Efforts Requirement*, 30 SUFFOLK U. L. REV. 81, 100 (1996).

[34] Michael J. Bufkin, Note, *The "Reasonable Efforts" Requirement: Does It Place Children at Increased Risk of Abuse or Neglect?*, 35 U. LOUISVILLE J. FAM. L. 355, 370 (1997); *see also* Suter v. Artist M., 503 U.S. 347 (1992) (typically cited for the absence of a private right of action to enforce the reasonable efforts requirement against states).

might include in their plans, such as day care, vocational rehabilitation, homemaker services, and substance abuse counseling.[35] Nothing in the statute or regulations, however, *required* that states actually provide any of these services.[36]

States lacked guidance in other areas as well. Senator Mike DeWine (R-Ohio), one of ASFA's sponsors, argued that "too often, reasonable efforts, as outlined in the statute, have come to mean unreasonable efforts."[37] In too many cases, Senator DeWine asserted, the CWA was read to require efforts to reunite families that were "families in name only."[38] It was clear, Senator DeWine said, that "the Congress of the United States in 1980 did not intend that children should be forced back into the custody of adults who are known to be dangerous and . . . abusive."[39]

To rectify what Senator DeWine described as a "serious[ ] misinterpret[ation] by those responsible for administering our foster care system,"[40] Congress limited the circumstances under which states must make reasonable efforts to preserve troubled families. Reasonable efforts are no longer required if the parent has subjected the child to aggravated abuse,[41] murdered a child, committed injurious felony assault against a child, or had his or her parental rights to another child involuntarily terminated.[42]

Prior to 1997, federal law did not specifically require that states deliver any particular services to troubled families; ASFA now goes further by explicitly endorsing *denial* of reunification services under some cir-

---

[35] 45 C.F.R. § 1357.15(e)(2) (1995).
[36] *Id.*
[37] 143 CONG. REC. S12,668–69 (daily ed. Nov. 13, 1997) (statement of Sen. DeWine).
[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] Aggravated abuse is defined by state law.
[42] 42 U.S.C. § 671(a)(15) (1998).

> (A) in determining reasonable efforts to be made with respect to a child... the child's health and safety shall be the paramount concern . . . .
> (D) reasonable efforts . . . shall not be required . . . if a court of competent jurisdiction has determined that—
> (i) the parent has subjected the child to aggravated circumstances (as defined in State law, which definition may include but need not be limited to abandonment, torture, chronic abuse, and sexual abuse);
> (ii) the parent has—
> (I) committed murder . . . of another child of the parent;
> (II) committed voluntary manslaughter . . . of another child of the parent;
> (III) aided or abetted, attempted, conspired, or solicited to commit such a murder or such a voluntary manslaughter; or
> (IV) committed a felony assault that results in serious bodily injury to the child or another child of the parent; or
> (iii) the parental rights of the parent to a sibling have been terminated involuntarily. . . .
>
> *Id.*

cumstances. If a state agency determines that it is not reasonable to reunify the family or allow the child to remain with the family, a court may determine that this assessment itself satisfies the reasonable efforts requirement.[43]

When a state denies reunification services under this amended provision, ASFA specifies that a permanency hearing shall be held within thirty days after the judicial determination that reasonable efforts were not required.[44] The next section examines the amended hearing requirement.

B. Permanency Hearings

Prior to the enactment of ASFA, federal law provided that a "dispositional" hearing be held within the first eighteen months and periodically thereafter to consider the "future status" of each child in temporary state custody.[45] At each dispositional hearing, the court or administrative tribunal reviewed the child's case to determine whether continued placement was in the child's best interest.[46]

Federal law imposed no limit on the length of time a child might spend in "temporary" state custody.[47] Children whose multiple dispositional hearings resulted in neither their return to their families of origin nor termination of parental rights often "aged out" of the foster care system without having their cases finally adjudicated.[48]

The national average length of stay in foster care under the CWA was three years.[49] ASFA supporters such as Senator Chuck Grassley (R-Iowa) lamented that "[t]hat is three birthdays, three Christmases, and that is going through the first, second, and third grades, without having a mom and dad."[50] Senator Grassley argued that "[t]hese children are the most vulnerable of all; their lives begin with abuse and neglect by their own parents and for many, they experience systemic abuse by languishing in long-term foster care."[51]

---

[43] Foster Care Eligibility Reviews and Child and Family Services State Plan Reviews, 63 Fed. Reg. 50,058, 50,073 (Sept. 18, 1998).

[44] 42 U.S.C. § 671(a)(15)(E).

[45] *Id.* § 675(5)(C).

[46] Patricia Tate Stewart, *Keeping Families Together/Reasonable Efforts*, DEL. LAW., Fall 1994, at 9.

[47] *See generally* Jennifer Ayres Hand, Note, *Preventing Undue Terminations: A Critical Evaluation of the Length-of-Time-Out-of-Custody Ground for Termination of Parental Rights*, 71 N.Y.U. L. REV. 1251 (1996). States, however, sometimes imposed time limits on themselves. *Id.* at 1261–67.

[48] *See* Sheldon, *supra* note 8, at 74.

[49] 143 CONG. REC. S12,668–73 (daily ed. Nov. 13, 1997) (statement of Sen. Chuck Grassley).

[50] *Id.*

[51] *Id.*

In an effort to be more "responsive to a child's sense of time, Congress moved the timing for the 'dispositional hearing' [and] renamed it the 'permanency hearing.'"[52] The permanency hearing must be held within twelve months of the date on which a child enters foster care,[53] or within thirty days of a court determination that reasonable efforts are not required.[54]

The permanency hearing is designed to produce a "permanency plan."[55] ASFA contemplates four such plans. The child must be: (1) returned to the parent;[56] (2) placed for adoption, in which case the state will petition to terminate parental rights;[57] (3) referred for legal guardianship;[58] or (4) placed in another planned living arrangement.[59] It is not yet clear how often courts will employ the fourth option. Unless the "another planned living arrangement" exception comes to engulf the rule, ASFA effectively requires that within twelve months of the child entering foster care, the state will make a decision as to whether a foster child's case will end in family reunification or termination of parental rights.[60]

If the family has not satisfactorily demonstrated within twelve months that the family ought to be reunited, the state must endorse one of the other plans, which, given the choices, seems likely to mean termination of parental rights. This is not to say the statute requires that family reunification or termination of parental rights *occur* within twelve months, nor that family reunification efforts be terminated at that time. Instead, a parent must be complying with the case plan, making "significant measurable progress" towards achieving the goals of the plan, and

---

[52] Foster Care Eligibility Review and Child and Family Services State Plan Reviews, 63 Fed. Reg. 50,058, 50,072 (Sept. 18, 1998); *see also* 42 U.S.C. § 675(5)(C) (1998).

[53] 42 U.S.C. § 675(5)(C).

[54] *Id.* § 671(a)(15)(E).

[55] *Id.* § 675(5)(C).

[56] *Id.*

[57] *Id.*

[58] *Id.* Legal guardianship is defined as a "judicially created relationship" that is intended to be "permanent and self-sustaining" as evidenced by the transfer of physical and legal custody of the child to the caretaker. *Id.* § 675(7). Guardianship under ASFA differs from adoption in three ways: first, the original parents might be required to pay child support to the guardian; second, the child can still draw government benefits associated with his or her relationship with the original parents and inherit from and through the original parents; and third, the original parents may have standing to reassert their rights in the event that a guardian dies or becomes incapacitated. *See Adoption 2002*, *supra* note 10, at Chapter II. Notwithstanding these differences, ASFA goes a long way toward making guardianship more like adoption and less like foster care. Most importantly, it is designed to preclude continuing court supervision so as to give the impression of a permanent family relationship. *Id.*

[59] "Another planned living arrangement" is authorized only when a state agency shows a state court a compelling reason that none of the other three options would be in the best interests of the child. *See* 42 U.S.C. § 675(5) (C).

[60] According to *Adoption 2002*, *supra* note 10, at Chapter II, only two sets of circumstances justify turning to the fourth option: when there is an older child in a stable foster home with ties to an original family, and when there is a child with a serious disability who would not be guaranteed adequate services and who is in a stable relationship.

"diligently working towards reunification."[61] Under these circumstances, the plan will remain in place at the permanency hearing as long as the state and court expect reunification to occur within a timeframe that is "consistent with the child's developmental needs."[62] Otherwise, the state will establish an alternative plan at the permanency hearing.[63]

C. Shifting Emphasis

The goal of permanence is common to both the CWA and ASFA, but while the CWA embodied a preference for family preservation, ASFA favors expeditious termination of parental rights. Permanence encompasses both of these conflicting policy preferences.[64] ASFA shifted the balance in favor of expeditious termination in two ways. As discussed, ASFA amended the reasonable efforts requirement, endorsing the denial of reunification services under certain, specified circumstances. This was not, however, the most crucial locus of the shift. Cases in which parents inflicted aggravated abuse against their children or were convicted of homicide of another child—i.e, those circumstances that now serve to exempt states from making reasonable efforts—were not the hard cases[65] prior to the 1997 amendments.

To advance the cause of permanency in the hard cases, Congress imposed a kind of "fish or cut bait" discipline on the foster care process by instituting the permanency hearing. The requirement that an ultimate disposition be issued within twelve months of a child's entering foster care leaves little time for ambivalence. Furthermore, the limited range of options available to courts under ASFA forces courts to choose quickly between stark alternatives, as the next section demonstrates.

---

[61] Foster Care Eligibility Reviews and Child and Family Services State Plan Reviews, 63 Fed. Reg. 50,058, 50,072 (Sept. 18, 1998).

[62] *Id.*

[63] *Id.*

[64] Permanence is what political scientists might call a "valence issue" in that it "elicits a single, strong, and fairly uniform emotional response and does not have an adversarial quality." BARBARA NELSON, MAKING AN ISSUE OF CHILD ABUSE 27 (1984). Who would oppose the proposition that every child ought to have a stable, loving, permanent home? Political scientists use the term "valence issue" to describe the "noncontroversial generalities" used by political candidates such as "national strength" or "better public education," to avoid arousing a negative reaction from voters. *Id.* Valence issues are described with a "*lack of specificity*" and "*reaffirm the ideals of a civic life*." *Id.* at 28. Nelson contrasts "valence issues" with "position issues," which "engender alternative and sometimes highly conflictual responses." *Id.* at 27. People of wildly different views on child welfare policy might agree in principle on permanence, though that agreement could easily unravel over whether to achieve it by preserving or terminating family relationships. *See* Stone, *supra* note 6, at 11–12 (using the term "motherhood issue" to describe this same phenomenon).

[65] *See supra* note 22.

D. Permanence in Action

Judge Francis Foley, presiding over a child protection session of the Superior Court of Connecticut, issued a slew of decisions in the year following the enactment of ASFA in which he cited ASFA in support of his rulings terminating parental rights to children in the Connecticut foster care system.[66] One decision involved a six-year-old boy named Luke whose original parents were beset by mental illness, domestic violence, and severely deficient homemaking skills.[67] Luke's mother voluntarily relinquished her parental rights, but his father hoped to retain visitation rights while Luke remained in long-term foster care.[68] Judge Foley terminated the legal relationship between Luke and his father on the grounds that ASFA required a "change in focus."[69]

According to Judge Foley, ASFA "seeks to provide States the necessary tools and incentives to achieve the original goals of [the CWA]: safety; permanency; and child and family well-being."[70] To comply with ASFA, Judge Foley concluded, "courts should try to effectuate the declared goals of either returning the child home or placing the child in [sic] adoption."[71]

None of the new exemptions to the reasonable efforts requirement specifically authorized denial of preservation services to Luke and his father.[72] It was the permanency hearing that forced the termination in Luke's case. Luke's father did not ask that Luke be placed permanently with him,[73] and since ASFA effectively provides for only two outcomes—permanent placement with the family of origin or termination of parental rights—termination was all that seemed to be left to Judge Foley at the permanency hearing.[74] Under the CWA, Luke might have remained in foster care indefinitely while his father continued to visit, but the strict requirements of ASFA's permanency hearing foreclosed that outcome.

This is not to say that Luke's story is necessarily over. Even the strict requirements of the permanency hearing may not always achieve permanence for children in the foster care system.

---

[66] *See, e.g.*, In the Interest of Luke A., 1998 WL 779553 (Conn. Super. Ct. Nov. 3, 1998); In the Interest of Michael C., 1998 WL 550761 (Conn. Super. Ct. Aug. 20, 1998); In the Interest of Christopher H., 1998 WL 553187 (Conn. Super. Ct. Aug. 19, 1998); In the Interest of Katherine Marie M., 1998 WL 525444 (Conn. Super. Ct. Aug. 12, 1998); In the Interest of Savanna M., 1998 WL 263371 (Conn. Super. Ct. May 15, 1998).

[67] In the Interest of Luke A., 1998 WL 779553, at *1–*2.

[68] *Id.*

[69] *Id.* at *3–*6.

[70] *Id.* at *4.

[71] *Id.* at *5.

[72] *See id.* at *1–*2; *supra* note 42 and accompanying text.

[73] *See In the Interest of Luke A.*, 1998 WL 779553, at *2.

[74] 42 U.S.C. § 675(5)(c) (1998).

E. Impermanence of the Permanency Plan

The apparent finality of the "fish or cut bait" approach may be misleading. Imagine a case in which the court terminates parental rights and makes the child available for adoption. While the image of a clean break[75] may appeal powerfully to policymakers, many children whose parents' rights are terminated do not start life anew as policymakers imagine.

For one thing, the shortage of adoptive homes means that many children will continue to drift among foster care placements.[76] This problem is especially acute among older children, children of color, and children with disabilities.[77] Without a ready adoptive home, very little *permanence* results from the decision to terminate parental rights.[78]

Even if the child is among the fortunate and is placed with a loving, adoptive family, termination does not always lead to the kind of permanence that policymakers have in mind. This is particularly true for older children. Joyce Pavao, a family therapist who specializes in issues raised by adoption,[79] observed that after a child bid farewell to his original family and was adopted by a new family,

> [t]he same child . . . would go out to the telephone booth and call his grandmother the day after the adoption was finalized. The same grandmother he had called every week all of the other years before being adopted. The same grandmother he had visited while he was in foster care.[80]

---

[75] *See* Garrison, *supra* note 26, at 387–88 (discussing the "legal rebirth" and "fresh start" of adoption); *see also* JOYCE MAGUIRE PAVAO, THE FAMILY OF ADOPTION 93 (1998) (describing the movement in the 1930s to close adoption records and original birth certificates to create the sense that an adopted child was "reborn").

[76] *See* Martin Guggenheim, *The Effects of Recent Trends to Accelerate the Termination of Parental Rights of Children in Foster Care—An Empirical Analysis in Two States*, 29 FAM. L.Q. 121, 125–34 (1995).

[77] *Id.* at 134 (discussing placement of children of color); IRA M. SCHWARTZ & GIDEON FISHMAN, KIDS RAISED BY THE GOVERNMENT 84 (1999) (explaining that older children are least likely to be adopted and disabled children experience a high rate of adoption disruption).

[78] The federal government has made efforts to increase the number of adoptive homes for foster children. *See* 42 U.S.C. § 673A. At least two obstacles, however, could inhibit progress on this front: (1) the availability of infants from abroad, *see, e.g.*, Michael S. Serrill, *Going Abroad to Find a Baby*, TIME, Oct. 21, 1991, at 86, and (2) improvements in assisted reproductive technologies, *see, e.g.*, Rebecca Mead, *Eggs for Sale*, NEW YORKER, Aug. 9, 1999, at 56. On the other hand, decreased availability of infants—due to falling birthrates, increased access to abortion and growing acceptance of non-marital child bearing—has somewhat improved the odds of adoption for older children. *See* Garrison, *supra* note 26, at 376; Serrill, *supra* at 86.

[79] *See* PAVAO, *supra* note 75, at xii.

[80] *Id.* at 97 (criticizing the trend in the 1980s of sealing adoption records and impounding birth certificates of older children).

Somehow, the sense of having had a clean break and being in a permanent, new home has eluded this child. Social workers would tell the adoptive parents that these lingering connections were illegal and would not help the child bond to the new family.[81] According to Pavao, "[t]here was no true understanding of the need that these children had for connection to the people who had been positive and present in their very complicated, and often traumatic, lives."[82]

Next, imagine a family that makes progress on its case plan to the satisfaction of the state agency, leading the court to "fish," i.e., to reunite the original family. Imagine, though, that a few months after reunification, a neighbor or school counselor contacts the agency to report new allegations of abuse. If the allegations are substantiated, the agency must reassess the case, perhaps recommending removal or even termination. The case was adjudicated to finality in name only, because the system must remain available for every child, regardless of whether he or she has been in the system on a prior occasion.[83]

These examples demonstrate that ASFA's promise of permanence is illusory, particularly in the hard cases. The permanency hearing cannot possibly deliver the certainty or finality that it was designed to provide. The potential for disruption of the permanency plan persists as long as: (1) there remains a possibility of renewed cause for concern over the child's safety; (2) we have a shortage of adoptive homes; and (3) children miss their families.

But the larger, more fundamental reason for skepticism is that the principle of permanence contains exactly the dilemma that it sets out to resolve, i.e., between family preservation and termination of parental rights.[84] In the hard cases, this dilemma gives rise to ambivalence; ambivalence gives rise to indecision; indecision gives rise to foster care drift, which is the very problem that the principle of permanence arose to fix. The goal of the permanency hearing is to hasten decision. In many cases, however, the background truths that engendered the official ambivalence remain and harbor the potential to disrupt the permanency plan at any moment.

As will become clear, I do not profess to resolve the decision-maker's dilemma in the hard cases. Instead, I propose that lawmakers make room for a broader range of outcomes and thereby diminish the

---

[81] *Id.*

[82] *Id.*

[83] Garrison, *supra* note 26, at 391 (reporting, prior to ASFA's passage, that "as many as four out of ten foster children who are discharged to their parents simply wind up in foster care again"). Adoptive families face similar risks of impermanence. As *Adoption 2002* points out, "all caregivers are subject to existing criminal and civil child abuse and neglect laws." *Adoption 2002*, *supra* note 10.

[84] *Cf.* Duncan Kennedy, *A Semiotics of Legal Argument*, 42 SYRACUSE L. REV. 75, 97–103 (1991) [hereinafter *Semiotics*] (describing "nesting," i.e., "the reproduction, within a doctrinal solution to a problem, of the policy conflict the solution was supposed to settle").

centrality of this dilemma. The seeming irrepressibility of the dilemma results from a limited vision, or ideology, of the ideal family to which only original and adoptive families conform. In Parts III and IV, I highlight homologous conundrums throughout the history of American child welfare policy and in liberal legal thought on child-rearing to establish that the contradiction embodied in the principle of permanence results from a pervasive ideology.

III. A SHORT HISTORY OF AMERICAN CHILD WELFARE POLICY

The rivalry between family preservation and expeditious termination of parental rights is merely the most recent in a constellation of contradictory values that has existed for nearly two centuries. Peel away the contemporary policy terminology and the rivals will begin to seem familiar—just new lyrics to the same old song. The appearance of these values throughout the history of American child welfare policy discourse creates a sense of being trapped in an irresolvable conundrum, where striking a new compromise between old rivals seems like the best that we can do.[85]

A. From the Colonial Period Through the Progressive Era

The history of American child welfare policy has been traced back to the practice of indentured servitude during the colonial period.[86] Children born into families too poor to care for them left their homes to provide labor to more fortunate families.[87] This arrangement shed some of its *quid pro quo* character over time, taking on a more altruistic, charitable appearance, but continued to consist largely of removing children from poor families and placing them with wealthier ones.[88] Eventually, "neglect . . . replaced poverty as the legal basis for depriving parents of . . . their children, but for the most part, poverty was simply equated with neglect."[89]

In the first half of the nineteenth century, fear of social upheaval, moralism toward the poor, and the spirit of charity spurred the founding

---

[85] *See Adoption 2002*, *supra* note 10 (explaining that federally issued guidelines "attempt to strike a delicate balance between the child's urgent need for safety and permanency, and agency and court efforts to help parents overcome the problems that result in child maltreatment or make their home unsafe for their child"); *cf.* DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION 135, 147, 149 (1997) [hereinafter CRITIQUE OF ADJUDICATION] (on the "semioticization" of policy discourse).

[86] *See* Garrison, *supra* note 7, at 434.

[87] *See* LEROY ASHBY, ENDANGERED CHILDREN: DEPENDENCY, NEGLECT, AND ABUSE IN AMERICAN HISTORY 14–16 (1997) (providing a detailed account of the history of American child welfare).

[88] *See id.* at 41–42; Garrison, *supra* note 7, at 435.

[89] Garrison, *supra* note 7, at 435.

of orphanages of a decidedly sanctimonious and culturally biased character.[90] Administrators of Protestant institutions, for example, sought to rescue Catholic and Jewish children from their parents' presumptively deficient immigrant households. Jewish administrators from Germany thought likewise of Jewish families from Russia.[91]

By the turn of the century, orphanages began to fall from favor.[92] Reformers argued that the oppressive atmosphere and rigid discipline undermined the goals of cultivating good character and individualism in institutionalized children.[93] Further, while reformers maintained the impulse to rescue neglected children, they simultaneously lamented the separation of children from their mothers for both sentimental and economic reasons.[94]

In 1909, President Theodore Roosevelt hosted a national conference on child welfare at the White House, at which participants proclaimed that "[h]ome life . . . is the highest and finest product of civilization."[95] Conference participants endorsed the preservation of natural families when it was possible and the approximation of family life when it was not.[96] In the years following the conference, orphanages were displaced by three new approaches to child welfare: mothers' pensions, placing-out, and cottage format institutions.

1. Mothers' Pensions

In the first two decades of the twentieth century, "mothers' pensions"—precursors to contemporary public assistance—were adopted by most states.[97] The idea behind the pension movement was to provide an income sufficient to enable single mothers to stay at home with their children rather than spend long days working in dangerous industrial

---

[90] *See* ASHBY, *supra* note 87, at 46–69; *see also* LINDA GORDON, PITIED BUT NOT ENTITLED 23 (1994) (arguing that "orphanage" is really a misnomer and explaining that "[t]he majority of children in 'orphanages' were actually not orphans, but children whose mothers could not support them"); JOEL F. HANDLER & YEHESKEL HASENFELD, THE MORAL CONSTRUCTION OF POVERTY 45–48 (1991) (explaining that orphanages were preceded by poorhouses, which were founded on essentially the same mix of attitudes).

[91] *See* ASHBY, *supra* note 87, at 46–71. Quakers opened an orphanage for African American children; after it was destroyed by a racist mob, they opened another. *See id.* at 32–33.

[92] *Id.* at 88.

[93] *Id.*; WINIFRED BELL, AID TO DEPENDENT CHILDREN 4 (1965).

[94] *See* HANDLER & HASENFLED, *supra* note 90, at 63–65 (discussing the "sentimental cult of motherhood"); *see also* BELL, *supra* note 93, at 3–4 (discussing the turn-of-the-century belief that traditional homes had "clear economic value").

[95] BELL, *supra* note 93, at 4.

[96] *See* ASHBY, *supra* note 87, at 79.

[97] *See* THEDA SKOCPOL, PROTECTING SOLDIERS AND MOTHERS 424–79 (1992) (observing inter alia that pensions were adopted in spite of resistance from Catholic and Protestant charities, which tended to favor removal of neglected children from their homes).

jobs.[98] While this approach represented a step away from moralism toward the poor by recognizing that economic hardship contributed to neglect, the pensions often came with "suitable home" provisions that excluded mothers who, for example, failed to go to church or used tobacco.[99] Winifred Bell described the suitable home policies as creating a "partnership" between the mother and the state in which the state would grant financial support to mothers who demonstrated that they were "proper and competent custodians of their children."[100] The goal of the partnership was to ensure that "a small group of needy children would remain in their own homes and be so supervised and educated as to become assets, not liabilities, to a democratic society."[101]

Pension administrators wanted to help, but also sought to modify the behavior of, Catholic, Jewish, and African American families.[102] In addition to including "suitable home" provisions, lawmakers required mothers to take classes in cooking, nutrition, and other subjects that often imposed particularist cultural norms.[103] African American families drew lesser financial benefits from the pension systems because reformers were slow to institute pensions in predominantly African American neighborhoods and because many administrators separately maintained smaller budgets for African American recipients.[104]

2. *Placing-Out*

The first two decades of the twentieth century also witnessed a resurgence of "home-finding,"[105] or "placing-out"[106] of children with surrogate families. This practice was reminiscent of indenture and prescient of contemporary foster care. By 1910, home-placing had all but supplanted large orphanages as the placement of choice for children removed from their families of origin.[107]

---

[98] *See id.* at 425; ASHBY, *supra* note 87, at 94. Sadly, the income was never really sufficient to achieve the goal of enabling mothers to devote themselves to childcare full-time. *See* BELL, *supra* note 93, at 15. As a result, many mothers continued to perform wage work, leaving their children "improperly supervised." *Bell, supra* note 93, at 16.

[99] *See* ASHBY, *supra* note 87, at 96; GORDON, *supra* note 90, at 45.

[100] BELL, *supra* note 93, at 5.

[101] *Id.*

[102] *See* GORDON, *supra* note 90, at 46–48.

[103] For example, some of the classes discouraged the use of garlic in cooking. *Id.*

[104] *See id.*

[105] ASHBY, *supra* note 87, at 90.

[106] *E.g.*, GORDON, *supra* note 90, at 24, 45.

[107] *See* ASHBY, *supra* note 87, at 90.

3. Cottage Format Institutions

Finally, the period saw the rise of "anti-institutional institutions" designed to imitate "the features of a true home."[108] In these cottage format institutions, "children resided with small groups in cottages, each with a matron or supervisor."[109] Children performed household chores while learning "the virtues of democracy and good citizenship," even "electing their own legislature" in one of what came to be called "junior republics."[110]

B. The New Deal Era

According to one view, child abuse and neglect received little attention between 1920 and 1960.[111] During the New Deal Era, many reformers dedicated themselves to what they perceived to be larger social and economic concerns. One advisor to President Franklin D. Roosevelt chided those whose interest was in the treatment of children in their homes, calling them "'pantry snoopers' who were more interested in meddling in the lives of individual families than in providing a necessary income."[112]

But child welfare policy was not so much dormant in the years surrounding the New Deal as it was inseparable from welfare policy generally.[113] Although child welfare received little attention as an independent field, the "necessary income" provided by public assistance programs continued to be conditioned on "suitable home" requirements that required welfare agencies to promote the interests of dependent children.[114] Public assistance during the New Deal era was both an income-maintenance and child welfare measure.[115] Policymakers sought to ensure that funds were not spent on families that provided substandard homes for their children.[116] Apart from the suitable homes provision, however, child welfare policy developed very little and garnered very little public attention.[117]

---

[108] *Id.*
[109] *Id.* at 91.
[110] *Id.*
[111] *See id.* at 101–24.
[112] *Id.* at 91.
[113] Some state administrators did not differentiate between identification of neglect (a child welfare concept) and requiring a suitable home (as an eligibility criterion for public assistance). *See* BELL, *supra* note 93, at 30–31, 125–30. The conceptual tie between these administrative duties makes it especially ironic that in states with suitable home requirements, children on public assistance were *less* likely to receive child welfare services than were children in states without such requirements. *See id.* at 169–70.
[114] *See id.* at 32.
[115] *Id.* at 152.
[116] *See id.* at 31.
[117] *See* ASHBY, *supra* note 87, at 101–24; NELSON, *supra* note 64, at 11–12 (arguing

C. Child Welfare Policy from 1960 to 1980

With the 1962 publication of pediatrician Dr. C. Henry Kempe's famous article, *The Battered-Child Syndrome*, in the *Journal of the American Medical Association* ("*JAMA*"),[118] child abuse achieved national attention, gaining coverage in popular magazines and professional journals.[119] Dr. Kempe suggested that many children who presented as having suffered an "accident" were in fact victims of abuse.[120] The publication of his article is often cited as the moment of the contemporary "discovery" of child abuse.[121]

Dr. Kempe disclaimed the virtual equation of poverty with neglect that drove child welfare policy throughout the New Deal era.[122] Although most published cases of abuse had involved parents with "psychopathic or sociopathic personalities" or from "borderline socioeconomic groups," Dr. Kempe argued that abusive parents did not necessarily fall into these categories.[123] Dr. Kempe's rediscovery of child abuse in a medical context has been held responsible for contributing to the "myth of classlessness" that surrounded child welfare policy in the 1960s and 1970s.[124]

Policymakers drew on the work of Dr. Kempe and others to advance an image of abuse as "a problem knowing no barriers of class, race, or culture."[125] Some politicians invoked this image to divorce efforts against abuse from unpopular poverty programs.[126] Well-intentioned policymakers working to enact child welfare legislation promoted the classless image of abuse in spite of contradictory scholarship suggesting that "poor people actually abused or neglected their children more" and that child abuse was related to stresses associated with poverty, such as joblessness, inadequate housing, and other factors.[127]

Initial governmental responses to the "rediscovered" problem of child abuse consisted of a profusion of state mandatory reporting laws, reporting hotlines, federally funded demonstration projects, and public

---

that in "the 1950s, public interest in [child] abuse . . . was practically nonexistent, and even social workers did not rate it highly as a professional concern.").

[118] C. Henry Kempe, M.D., et al., *The Battered-Child Syndrome*, 181 J. AM. MED. ASS'N 17–24 (July 7, 1962) [hereinafter *Battered Child Syndrome*].

[119] NELSON, *supra* note 64, at 13. Although Kempe wrote the Article credited with bringing child abuse to the attention of the public, "it was the work of radiologists like John Caffey, P.V. Woolley, and W.A. Evans [in the 1950s] which alerted pediatricians [such as Kempe] to the . . . problem of child abuse." *Id.* at 12.

[120] *Battered Child Syndrome*, *supra* note 118, at 20.

[121] *See* JOHN M. HAGEDORN, FORESAKING OUR CHILDREN: BUREAUCRACY AND REFORM IN THE CHILD WELFARE SYSTEM 32 (1995).

[122] *Battered Child Syndrome*, *supra* note 118, at 18; *see also* Garrison, *supra* note 7, at 435.

[123] *Battered Child Syndrome*, *supra* note 118, at 24; NELSON, *supra* note 64, at 13.

[124] NELSON, *supra* note 64, at 15.

[125] *Id.*

[126] *Id.*

[127] *Id.* at 14–15.

awareness campaigns.[128] Extreme physical abuse received the most attention from lawmakers, though child neglect and the legal limits of parental discipline were in some ways the more difficult issues.[129] In 1974, Congress overwhelmingly passed the Child Abuse Prevention and Treatment Act ("CAPTA"),[130] providing federal funds to states that met guidelines for reporting, investigating, and providing treatment.[131]

The new reporting outlets dramatically increased child abuse reports. In 1967, there were fewer than 10,000 reports of child abuse and neglect nationally.[132] By 1976, this number had grown to nearly 669,000.[133] The upsurge led to a dramatic increase in state agency investigations and removal of children from their homes.[134]

In hard cases, child welfare investigators tended to err on the side of removal.[135] Most children deemed neglected came from poor families, with children of color disproportionately represented.[136] Agency staff were reluctant to return children to their families of origin,[137] yet there was a shortage of adoptive placements, especially for children of color, older children, and children with health problems.[138] As a result, many children remained in foster care for long periods of time, frequently being dragged through multiple placements and eventually "aging out" of the foster care system and into adulthood.[139] This phenomenon, called foster care drift,[140] inspired the next generation of calls for reform.

One such call came from the National Association of Black Social Workers ("NABSW"). NABSW was concerned about the disproportionate number of African American children being removed from family homes, many of whom were placed with white families, which sought to

---

[128] *See* HAGEDORN, *supra* note 121, at 32–34.

[129] *See* NELSON, *supra* note 64, at 108. I agree with Nelson that these issues would have been more difficult, in the sense that neglect and the limits of parental discipline raise tough questions of line-drawing in areas where reasonable people could disagree. Is an empty refrigerator in a poor household evidence of child neglect? Is corporal punishment ever an acceptable form of discipline? Reformers avoided these thorny questions by focusing on extreme physical abuse, a phenomenon likely to garner a powerful consensus of disapproval.

[130] Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247, 88 Stat. 4 (codified as amended in scattered sections of 42 U.S.C. (1998)).

[131] ASHBY, *supra* note 87, at 135–36.

[132] *Id.* at 136.

[133] *Id.*

[134] *See* HAGEDORN, *supra* note 121, at 32–34.

[135] *See id.* at 89.

[136] *See* Michael S. Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 STAN. L. REV. 623, 629 (1976) [hereinafter *Standards for Removal*].

[137] Garrison, *supra* note 7, at 439.

[138] *See id.* at 438–39.

[139] *See* Sheldon, *supra* note 8, at 73–74; Shotton, *supra* note 9, at 224.

[140] *See supra* note 7 and accompanying text.

adopt in greater numbers.[141] Calling transracial placement of African American children a "form of genocide," NABSW resolved in 1972 that "Black children should be placed only with Black families whether in foster care or for adoption."[142] NABSW argued that "Black children belong, physically, psychologically and culturally in Black families in order that they receive the total sense of themselves and develop a sound projection of their future."[143]

Native Americans, too, criticized the disproportionate removal of tribal children and placement of those children predominantly with white families.[144] Child welfare agencies were accused of misidentification of neglect due to insensitivity toward Native American culture, one facet of which was shared responsibility for child care within extended families.[145]

Another critique of the existing child welfare system came from an alliance of liberals and conservatives concerned about state intervention in the family. Professor Michael Wald of Stanford University argued that the state intervened too often in families, particularly in cases of neglect.[146] In 1975 and 1976, he proposed new standards and procedures to govern child removal and termination of parental rights.[147] His stance was explicitly anti-interventionist, based on the longstanding American "principle of family autonomy and privacy,"[148] and the "basic tenet of our laws that parents have broad freedom with regard to childrearing."[149]

While Professor Wald's position was inspired by a commitment to cultural tolerance[150] and wariness of classism and racism in the removal and termination processes,[151] his more conservative allies feared an "anti-family climate" and excessive state intrusion into the sphere of patriarchal authority.[152] One religious conservative wrote that "[s]panking is God's idea," and should not be mistaken for abuse.[153]

Child psychologists also played a significant role in the debate. Doctors Joseph Goldstein, Anna Freud, and Albert J. Solnit wrote two influential books in which they argued that each child has a single psy-

---

[141] *See* ELIZABETH BARTHOLET, FAMILY BONDS 94 (1993).

[142] *Id.* at 94–95.

[143] *Id.*

[144] *See* ASHBY, *supra* note 87, at 142–43.

[145] *See id.* at 143 (observing that "[s]ignificantly, no [American] Indian language includes the words *orphan* or *adoption*").

[146] Michael S. Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*, 27 STAN. L. REV. 985, 987 (1975) [hereinafter *A Search for Realistic Standards*].

[147] *See generally Standards for Removal*, *supra* note 136; *Search for Realistic Standards*, *supra* note 146.

[148] *Search for Realistic Standards*, *supra* note 146, at 987.

[149] *Id.* at 989.

[150] *Id.* at 992.

[151] *See Standards for Removal*, *supra* note 136, at 629.

[152] ASHBY, *supra* note 87, at 153.

[153] *Id.* at 149.

chological parent and that disrupting the continuity of the relationship with that parent causes severe consequences for the child's psychological development and ability to form attachments.[154] While Goldstein, Freud, and Solnit explicitly disclaimed the notion that the psychological parent had to be a biological parent,[155] opponents of removal except in extreme circumstances relied heavily on their work.[156]

Against this backdrop, federal child welfare policy shifted dramatically.[157] Responding to tearful tales of children drifting through multiple foster care placements, growing mistrust of government intruders, and increasing cognizance of the implications that intervention has for the continuity of diverse religious and cultural traditions, Congress passed two important federal statutes. The first was the Indian Child Welfare Act of 1978,[158] which established federal standards discouraging the removal of children from Native American settings and radically enhanced tribal control over children on reservations.[159] The second was the Adoption Assistance and Child Welfare Act of 1980 ("CWA").[160]

D. Child Welfare Policy Since 1980

The CWA amended Title IV-B of the Social Security Act, which makes funds available to states for social services, and created Title IV-E of the Social Security Act, which provides federal reimbursement for

---

[154] *See* JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD (1973) [hereinafter BEYOND]; JOSEPH GOLDSTEIN ET AL., BEFORE THE BEST INTERESTS OF THE CHILD (1979).

[155] *See* BEYOND, *supra* note 154, at 17, 19. Interestingly, Goldstein, Freud, and Solnit's theory also has been used to justify "swift termination of parental rights in order to 'free' the child for adoption." Garrison, *supra* note 26, at 376.

[156] *See, e.g.*, NELSON, *supra* note 64, at 90.

[157] In the 1960s, when policymakers focused primarily on abuse, the solutions logically included reporting outlets, investigations and removal. In the 1970s, however, reformers came to regard foster care drift as the central policy challenge and permanence became the preferred solution. *See* Garrison, *supra* note 26, at 376; MARTHA ALBERTSON FINEMAN, THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM 157–61 (1991) (arguing that the use of narratives to promote specific policy outcomes "operates by presenting simplistic, dichotomous images: negative images, or 'horror stories,' . . . and corresponding positive images, or 'fairy tales,' of an idealized [solution]"). Since the 1970s, the goal of child welfare policy has been to eradicate foster care drift, and the idealized solution is the permanent family. As Fineman observed, "in describing or illustrating a 'problem,' [the narratives] also suggest the 'solution.'" FINEMAN, *supra*; *see also* STONE, *supra* note 6, at 245, 248 (discussing how to control which alternatives show up on the list of possible policy choices, and "issue framing"—or choosing what particular dimension of the policy challenge to present as the central issue); *Adoption 2002*, at Chapter I (recounting anecdotes of children in the foster care system designed to demonstrate the value of permanence).

[158] Indian Child Welfare Act, Pub. L. No. 95-608, 92 Stat. 3069 (codified as amended in scattered sections of 25 U.S.C. (1962)).

[159] 25 U.S.C. § 1901 (1962).

[160] Adoption Assistance and Child Welfare Act, Pub. L. No. 96-272, 94 Stat. 500 (codified as amended in 42 U.S.C. §§ 620-628, 670–679 (1998)).

state foster care expenditures.[161] Largely through the reasonable efforts requirement,[162] the CWA de-emphasized foster care and encouraged placement of children in permanent homes through either reunification of the original family or adoption.[163]

At the time of congressional deliberations on the CWA, there was cause for optimism about the prospect of delivering social services that would help preserve troubled families. Several programs were experimenting with innovative strategies for working with families in crisis, such as immediate response and home visits that were available twenty-four hours a day.[164] These experiments persuaded advocates that "by utilizing the appropriate tools, many families previously thought 'hopeless' could actually provide adequate homes for their children."[165]

Optimism soon waned in the wake of several high-profile incidents of egregious abuse that were attributed to under-intervention on the part of social services agencies[166] or to "confusion" over the meaning of the reasonable efforts requirement.[167] At about this time, sexual abuse also gained recognition.[168] The dual goals of family preservation and the best interests of children seemed irreconcilable.[169] Meanwhile, families facing addiction, homelessness, and HIV overwhelmed family preservation resources.[170] With more than 500,000 children in the foster care system nationally, expenditures skyrocketed.[171]

President Ronald Reagan launched an attack on federal public assistance programs, decrying "the breakdown of the American family" and popularizing the image of the "welfare queen."[172] Calls for "individual responsibility" came into vogue.[173] In the early to mid-1990s, conserva-

---

[161] 42 U.S.C. §§ 601, 670–679a (1998); *see also* 63 Fed. Reg. 50,058, 50,061 (1998).

[162] *See supra* notes 30–35 and accompanying text.

[163] Sheldon, *supra* note 8, at 77.

[164] Shotton, *supra* note 11, at 224–25. The CWA itself provided for periodic dispositional hearings to evaluate each family's progress under its case plan and consider the child's future status. 42 U.S.C. § 675(5) (C) (1998). For a discussion of permanency hearings, see *supra* notes 45–51 and accompanying text.

[165] Shotton, *supra* note 11, at 224–25.

[166] *See, e.g.*, DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189 (1989) (ruling in response to the severe beating that left four-year-old Joshua DeShaney permanently brain-damaged that the due process clause did not provide a private cause of action against the state agency that neglected to intervene aggressively despite evidence of abuse); RICHARD J. GELLES, THE BOOK OF DAVID: HOW PRESERVING FAMILIES CAN COST CHILDREN'S LIVES (1996) (Gelles tells the story of 15-month-old David Edwards, who was murdered by his mother, to demonstrate the over-emphasis on family preservation).

[167] *See* 63 Fed. Reg. 50,058, 50,061 (1998).

[168] ASHBY, *supra* note 87, at 160–61. Almost as quickly, backlash groups, such as the False Memory Syndrome Foundation, formed to take the position that allegations of sexual abuse were often unfounded. *See id.* at 164.

[169] *See generally* Bufkin, *supra* note 34.

[170] *See id.* at 373; Levesque, *supra* note 7, at 8–9.

[171] *See* 63 Fed. Reg. 50,058, 50,061 (1998).

[172] ASHBY, *supra* note 87, at 166–67.

[173] *See, e.g.*, 63 Fed. Reg. 50,058, 50,061 (1998).

tive sociologist Professor Charles Murray and Speaker of the House Newt Gingrich named illegitimacy as the primary source of America's social ills and proposed to address it by eliminating public assistance and bringing back orphanages to care for poor children.[174] In 1996, Congress eliminated Aid to Families with Dependent Children ("AFDC") and replaced it with "block grants" to states designed to eliminate federal entitlements and reduce federal expenditures.[175] ASFA passed with overwhelming bipartisan support the following year.[176]

E. Historical Patterns

The dueling outcomes of family preservation and expeditious termination of parental rights reflect a deeper ambivalence over how best to respond to families in which the safety and welfare of children are in doubt. An examination of reformist discourse at each transition reveals a set of familiar, homologous contradictions that have beleaguered child welfare policy perhaps since its inception as an altruistic, protective enterprise. The three most apparent contradictions are: family privacy (or parental autonomy) versus child rescue; cultural relativism versus transcendent morality (or civic virtue); and social responsibility (for poverty) versus personal responsibility.

Orphanages, for example, faced charges of moralism, cultural bias, and excessive uniformity.[177] The three approaches that replaced orphanages—mothers' pensions, placing out, and cottage format institutions—reflected a preference for home life, actual or approximated. This repositioned the fulcrum slightly in favor of family autonomy and moral and cultural diversity. Mothers' pensions also reflected a sense of social responsibility for poverty. At the same time, however, all three approaches retained some elements of child rescue and moralism. Cottage format institutions, for example, purported to instill civic virtue. Mothers' pensions came with suitable home provisions designed to ensure child protection, moral uprightness, and social control.

During the New Deal era, when the sense of social responsibility for addressing poverty was at an all-time high, there were few developments in the necessarily intrusive field of child protection aside from the evolution of the suitable home provisions.[178] Social responsibility and respect for family privacy predominated, but the suitable home provisions ensured that some universal standards for child-rearing were maintained.

---

[174] *See* ASHBY, *supra* note 87, at 176; David Van Biema, *The Storm Over Orphanages*, TIME, Dec. 12, 1994, at 58.

[175] Welfare Reform Bill, Pub. L. No. 104-193, 110 Stat. 2105 (1994) (codified as amended in scattered sections of 42 U.S.C.).

[176] *See Adoption 2002*, *supra* note 10.

[177] *See supra* 90–94 and accompanying text.

[178] *See supra* notes 111–117 and accompanying text.

In the 1960s and 1970s, following Dr. Kempe's observation that child abuse was not limited to the poor, policy development in the area of child welfare exploded.[179] Extreme abuse was emphasized to justify aggressive new interventions, while tough issues such as the legal limits of parental discipline and the socio-economic facets of child abuse were downplayed.[180] A dialogue around these issues might have forced increased cognizance of cultural diversity and poverty as a social concern, but during this period, countervailing values predominated.

The next generation of reformers (including NABSW, Professor Wald, and religious conservatives) targeted the racism, classism, and anti-family posture of the child welfare system, charging the system with over-intervention at the expense of religious and cultural freedom and family privacy.[181] As a result, the CWA introduced the requirement that states make reasonable efforts to preserve troubled families.[182] This shifted the balance back in favor of cultural diversity and parental autonomy, eschewing the imposition of "universal" standards on religious and cultural subgroups or the poor.

In the Reagan era, however, when issues such as drug abuse and HIV seemed overwhelming, and the poor were blamed for their own circumstances, policymakers grew impatient with cultural tolerance and failing family preservation services.[183] Policymakers stressed personal responsibility and devoted little thought to social responsibility or cultural difference. Before long, CWA's emphasis on family preservation was reversed with the passage of ASFA in 1997.[184]

Each development reacted against the last, moving the ball endlessly between irreconcilable poles.[185] Reformist efforts alternatively appealed to the values listed in one or the other of the columns below.

---

[179] *See supra* notes 119–140 and accompanying text.

[180] *See supra* notes 122–127 and accompanying text.

[181] *See supra* notes 141–156 and accompanying text.

[182] *See supra* notes 161–164 and accompanying text.

[183] *See supra* notes 170–177 and accompanying text.

[184] This was the year after the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRA") was enacted. Pub.L. No. 104-93, 110 Stat. 2105 (codified as amended in scattered sections of 42 U.S.C.). While ostensibly the PRA and ASFA deal with different subject matter, they are discursive complements in that they both flow from the prevailing value cluster of the 1980s and 1990s. Both gained support at a time when calls for personal responsibility, child rescue, and family values predominated. Consider also the Multiethnic Placement Act of 1994 ("MEPA"), Pub.L. No. 103-382, 108 Stat. 3518, and the Interethnic Placement Provisions ("IEP"), Pub.L. No. 104-188, 110 Stat. 1755, together codified at 42 U.S.C. § 671(a)(18) (1998), which prohibit delaying or denying foster or adoptive placement to match for race. These statutes were passed just three and two years prior to ASFA over objections concerning the threat that transracial placement might pose to diverse cultural traditions, embodying instead the values of universality and child rescue.

[185] In *The Family and the Market*, *supra* note 6, at 1498–99, Frances Olsen associates three dichotomies that she argues structure thought and limit prospects for reform. She explains that her "three dichotomies are distinct: none is logically dependent upon another and none necessarily entails another. Nevertheless, deep ties exist among them . . . ." *Id.* at

family privacy/ parental autonomy	child rescue
cultural relativism/ respect for diversity	universal standards/ civic values
social responsibility for poverty	personal responsibility

Each policy was born of a critique that the last policy was over-interventionist (and therefore threatening to the values in column 1) or under-interventionist (and therefore threatening to the values in column 2). Each, in turn, subjected itself to the contrary critique. The cycle appears endless and the options seem hopelessly limited.

Forever in search of just the right balance, reformers rely on policy arguments that invoke one or the other side of each of these contradictions at each transition. In doing so, they have created what feels like a trap between two things we value deeply but cannot have simultaneously.[186]

IV. Conflicting Values: Child-Rearing in Liberal Legal Thought

This trap is not unique to policy discourse; theoretical discourse on child-rearing is strikingly similar.[187] This Part identifies a handful of instances in liberal theory where the ideology of the ideal family, along with its attendant conundrums, is in evidence. By climbing to this high level of abstraction, I hope to illuminate the conundrums where they appear most starkly and demonstrate the senselessness of trying to resolve them rationally.[188]

The liberal tradition includes many writers who historically have idealized the family as a haven or private realm from which to escape the individualist brutality of politics and the market.[189] In the words of

---

1499. The central aim of this historical account has been to demonstrate the appearance and reappearance of the values I have identified. While none of the values listed logically entails the others, they seem to turn up in clusters at each phase.

[186] *See* Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 Tex. L. Rev. 387, 387 (1984) [hereinafter *Statutory Rape*].

[187] It is difficult to describe the precise nature of the relationship between the theoretical and policy levels of discourse. I am not prepared to prove that one causes the other, though I believe that there is a dialogic relationship between them and they arise out of the same consciousness, *cf. From the Will Theory*, *supra* note 25, at 97–98, or out of "a shared vision of the social universe that . . . shapes [a] society's view of . . . what social reforms are possible." *The Family and the Market*, *supra* note 6, at 1498.

[188] *See Politics of Family Law*, *supra* note 24, at 3–4 ("In family law . . . the literature tends to rationalize and criticize existing doctrine on a low level of abstraction, and to focus attention primarily upon some proposed reform. . . . [In this way] their work contributes to the apologetic project of legitimating the status quo."). From a higher level of abstraction, we can see that some aspects of family that seem natural are, in fact, facets of an ideology rife with internal contradiction.

[189] *See* Christopher Lasch, Haven in a Heartless World: The Family Besieged

Christopher Lasch, "[a]s business, politics, and diplomacy grow more savage and warlike, men seek a haven in private life, personal relations, above all in the family—the last refuge of love and decency."[190] The public sphere is hostile in this view, typified by individualism and self-interest, while family, the site of marriage and child-rearing, is distinguished by love and altruism.[191]

Some liberal writers, often identified with the "civic republican" strain of liberalism,[192] have taken a more complex view of the private family. These writers focus on the peculiar position of child-rearing at the cusp of the public/private divide.[193] Because family life is the sphere in which children are nurtured and prepared to assume the responsibilities of citizenship, the public sphere has a legitimate claim of interest in the proper functioning of families. "Family and home . . . serve not as havens from a dominant culture, but as vehicles for teaching the primacy of the common good."[194]

One foundational example is Jean-Jacques Rousseau's *Emile*.[195] *Emile* reads like a highly idealized child-rearing manual, but it is really a work of political theory.[196] It urges the cultivation of civic virtue in children so that they might mature into the kind of citizens[197] who are dedi-

---

xix (1979); Wald, *supra* note 146, at 987. Not all liberal writers consider politics to reside in the same sphere as the market—at least not all levels of politics. Alexis de Tocqueville identified local politics as among the institutions with the potential to promote community as a counter-ideal to individualism, which predominates in the market. Alexis de Toqueville, DEMOCRACY IN AMERICA, PART II, 103–95 (Henry Reeve trans., Knopf, Inc. 1945) (1840); *see also* ROBERT N. BELLAH ET AL., HABITS OF THE HEART 85 (1985) (explaining and concurring with de Toqueville). But see Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057 (1980), for a critical account of this ideal as applied to cities. Frances Olsen argues that although the women's "private" sphere of family and home life has been contrasted with the "public" sphere of the marketplace and government, this characterization can be misleading. It is perhaps more accurate to see two dichotomies: one between the "public" market and the "private" family, and the other between the "public" state and the "private" civil society. *The Family and the Market*, *supra* note 6, at 1501.

[190] *See* Lasch, *supra* note 189, at XIX. Lasch proceeds to lament that "[d]omestic life . . . seems increasingly incapable of providing these comforts." *Id.*

[191] *See Form and Substance*, *supra* note 6, at 1717–18 (describing altruism); *Politics of Family Law*, *supra* note 24, at 6 (arguing that "[t]he 'liberal' family . . . is thought to be a voluntary collection of individuals held together by bonds of sentiment").

[192] *See, e.g.*, Kathleen M. Sullivan, *Rainbow Republicanism*, 97 YALE L.J. 1713, 1720 (1988).

[193] *See, e.g.*, Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787, 1826–59 (1995).

[194] Sullivan, *supra* note 192, at 1720.

[195] JEAN-JACQUES ROUSSEAU, EMILE (Allan Bloom trans., Basic Books 1979) (1762).

[196] EMILE is "phenomenology of the mind posing as Dr. Spock." *Id.* at 3 (statement from Bloom's introduction).

[197] To be precise, Rousseau urged that *boys* be prepared for citizenship, and that *girls* be prepared "for their roles as virtuous and noble wives." JEAN BETHKE ELSHTAIN, PUBLIC MAN, PRIVATE WOMAN: WOMEN IN SOCIAL AND POLITICAL THOUGHT 160 (2d ed. 1993). "Rousseau's public world . . . is in a fundamental way dependent upon[ ] a virtuous private sphere that serves as a training ground of future citizens [i.e., men] and protectors of private values [i.e., women] alike." *Id.* at 165. Elshtain concludes that "[w]ithout women to

cated not merely to their private interests, but also to the interests of their community.[198] Rousseau described carefully contrived learning experiences designed to instill a sense of duty[199] and compassion[200] in children, while averting such vices as fear[201] and envy.[202]

What is unmistakable in Rousseau's presentation, most notably in his choice of form, is his cognizance of the public sphere's stake in the work of the private sphere, i.e., child-rearing. As Jean Bethke Elshtain has put it: "Rousseau requires that a resonant, vibrant, constant private world be sustained as one of the *necessary* social preconditions of his ideal polity .... [W]ithout someone to tend the hearth, the legislative hallways would grow silent and empty, or become noisily corrupt."[203] Child-rearing, traditionally regarded in liberal theory as a private activity conducted in the sacrosanct familial domain, has a distinctly public dimension in Rousseau's thought.

In *A Theory of Justice*,[204] Rawls addresses the crucial role of child-rearing in the assurance of continued reproduction of a citizenry with the "sense of justice [that] makes [our] secure association together possible."[205] His idealized process is elaborate. First, a child must learn to respect authority by adhering to the injunctions of his or her parents.[206] Then, the child must learn the value of association and begin to appreciate familial roles such as son, daughter, husband and wife.[207] Eventually, the child must abstract from the lessons of a small-scale cooperative association and develop a sense of the principles of justice that govern social relations generally.[208]

Rawls ascribes to child-rearing enormous import to the larger community. Like Rousseau, Rawls sees families as the primary locus of the moral maturation necessary for adult association, i.e., good families breed good citizens. Appreciation of the centrality of family life coupled with a view that secure political association requires more than a collection of individuals engaged in the unhampered pursuit of their various

---

guard, nurture, and renew the private sphere, Rousseau's public world cannot exist." *Id.*

[198] *See id.* at 39–40.

[199] *See id.* at 51.

[200] *See id.* at 223–26.

[201] *See id.* at 63.

[202] *See id.* at 223–26.

[203] *Id.* at 165. Elshtain, whose inquiry primarily concerned gender under the public/private distinction, also put it this way: "the basis of male public citizenship would disintegrate if his private world collapsed, as the citizen is also, necessarily, a husband-father, the head of a household." *Id.* at 162.

[204] JOHN RAWLS, A THEORY OF JUSTICE (1971).

[205] *Id.* at 463.

[206] *Id.*

[207] *Id.* at 467.

[208] *Id.* at 468–79. Rawls draws on theories of moral development written by Piaget, Kohlberg, Rousseau, and others to make this point. *See id.* at 461–63.

self-interests leads to the conclusion that the public has an interest in child development and is justified in intervening in family life.[209]

This theme has found contemporary expression in the work of legal scholar Anne Dailey.[210] Dailey has elaborated on the republican vision of family, going so far as to reconceptualize family as a public institution.[211] Dailey points to *Bellotti v. Baird*,[212] in which the Supreme Court upheld the constitutionality of a state law requiring parental notification before a minor may obtain an abortion.[213] The *Bellotti* Court acknowledged the importance of parental authority not only for its own sake, but also because it "is necessary to prepare children for their 'eventual participation in a free society.'"[214] As Dailey points out, the Court declined to rest solely on the principle of family privacy, instead attributing a "political meaning" to the "'private' family" that is necessary to the "development of future citizens and the maintenance of a liberal democratic order."[215]

Like her predecessors, Dailey appreciates the state's interest in the family and, in particular, in the necessity of "the loving authority of the parental role . . . [in] the promotion and encouragement of a responsible citizenry."[216] Nevertheless, Dailey also appreciates the need for limits on the state's claim and the need for some range of family autonomy, arguing that "[t]he family's role in nourishing and sustaining diverse moral traditions is what in part distinguishes our liberal democracy from totalitarian political regimes committed to the elimination of the 'private' spheres of social life."[217] Dailey does not, therefore, abandon the private family altogether.

Although family privacy is necessary to reproduce the diversity that a liberal democracy requires, Dailey urges "limits [on] the degree of family diversity a liberal democracy may tolerate."[218] She explains, "[c]hildren raised in the shadow of domestic tyranny will be ill-equipped to assume the obligations of political liberty."[219] She questions whether a liberal society should tolerate child-rearing that is "incompatible with the child's future ability to participate in the broader political or civil community. In extreme cases of course the state justifies intolerance of such family values by labelling [sic] the behavior 'child abuse' and removing children from the home."[220] Viewed from this perspective, the label "child

---

[209] *Cf.* BEYOND, *supra* note 154, at 7.

[210] Anne C. Dailey, *Constitutional Privacy and the Just Family*, 67 TUL. L. REV. 955, 997–1008 (1993).

[211] *Id.*

[212] 443 U.S. 622, 638–39 (1979).

[213] Dailey, *supra* note 210, at 957.

[214] *Id.* at 957.

[215] *Id.* at 957–58.

[216] *Id.* at 958.

[217] *Id.* at 959.

[218] *Id.*

[219] *Id.* at 1024.

[220] *Id.* at 959 n.7.

abuse" represents the point at which the sphere of parental autonomy bumps up against the needs of the community; it is the boundary around the acceptable range of family diversity.[221]

Family, according to Dailey, has two roles in a liberal democracy. On the one hand, family fosters diverse values, but on the other hand, it is responsible for instilling a set of uniform, civic values. Family is responsible for both diversity and universality in a liberal democracy.[222] Overstatement of the state's interest in family threatens the diverse moral traditions that family autonomy preserves, but unfettered family autonomy threatens the development of those civic values that enable our "secure association."[223]

In an effort to resolve this contradiction, Dailey proposes a theory of "family justice"[224] in which the family reflects values consistent with those of the political structure and helps sustain "a healthy democratic order."[225] The family is held to a standard of justice that is not based merely on "political justice writ small" but instead reflects "a vision of the particular role that the family and parental authority play in a liberal democracy."[226]

Dailey's theory of family justice provides scant guidance as to exactly how much diversity a liberal democracy can tolerate.[227] What Dailey does tell us is that family law should not interfere with diverse community traditions as long as those traditions are consistent with "our broader political ideals."[228] She argues that family law ought to "promote the development of individuals who possess diverse community values," but who also "share a broader conception of political justice."[229]

Dailey's formulation is less than satisfying because it contains exactly the contradiction that it sets out to resolve.[230] The problem she pres-

---

[221] *See* Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REFORM 835, 835 (1985) [hereinafter *Myth of State Intervention*] (arguing that "[d]octrines of family privacy are no longer thought to justify societal neglect of beaten wives or abused children").

[222] Dailey appears to recognize the tension between these two goals—she uses the word "yet" to transition between her two points. *See* Dailey, *supra* note 210, at 959, 1023.

[223] *See supra* notes 204–208 and accompanying text.

[224] Dailey, *supra* note 210, at 1021–30. I suspect that the name of her theory intentionally recalls Rawls's *A Theory of Justice*.

[225] *Id.* at 1024. Dailey is frank that her theory "is not a determinative legal concept or doctrine [and] cannot be reduced to a simple formula with great predictive power." *Id.* at 1027. Dailey does, however, give us a sense of how her theory would bear on judicial review of a statute requiring parental notification before a minor may obtain an abortion. *See id.* at 1027–30.

[226] *Id.* at 1024.

[227] *See id.* at 1026 ("[T]here can be no hard and fast rules governing the limits of family authority, as each case will turn on the degree to which the particular family life frustrates the broader political goals.").

[228] *Id.*

[229] *Id.*

[230] *See Semiotics*, *supra* note 84, at 361 (arguing that a reconstructive theory (such as Dailey's) "looks . . . like the reification or fetishism of theory").

ents consists of conflicting urges between preserving diverse moral traditions and assuring the continuation of common civic values. Restated in the form of *one insofar as it does not jeopardize the other*, this opposition also stands as her solution. Dailey argues that "there can be no hard and fast rules," and that "each case will turn on the degree to which the particular . . . frustrates the broader."[231] This disclaimer, however, does little to forestall the inevitable: it must be one or the other. In each case, the moment of decision will be upon us. Dailey's contribution is her identification and articulation of conflicting urges, but her theory of family justice provides no more than a pretense to their resolution.[232]

The problem with the theory of family justice is not unlike the problem with the principle of permanence, the reasonable efforts requirement, and even the label "child abuse." Each term embodies contradictory values, but none "indicate[s] which of the two values . . . the decisionmaker should choose in a given case."[233] A unifying theory like the theory of family justice might appear to "strike a balance" or "harmonize a tension" at a high level of abstraction, but the contradiction between the values embedded in Dailey's theory becomes inescapable when the time comes to choose between them.

Dailey may incorporate both diversity and uniformity, or autonomy and its limits, in her theory, just as Congress and HHS may call for "reasonable efforts"—that is, preservation of the parent-child relationship unless an assessment by the state agency indicates that the parent-child relationship should be terminated—but in the end, there is no harmonizing the conflicting desires to rescue the child and preserve her family. It must be one or the other, and we still don't know how to choose.

V. Transcending the Ideology of the Ideal Family

Up to this point, I have tried to highlight the coexistence of conflicting values or impulses in child welfare policy and in liberal legal thought on child-rearing. The series of contradictions that I have attempted to bring to the fore are pervasive and deeply related features of an ideology of the ideal family.

At this point I will amend the list to account for the theoretical discourse and the terms of the contemporary debate.

---

[231] Dailey, *supra* note 210, at 1026.

[232] *Cf. Statutory Rape*, *supra* note 186, at 387 (arguing within the context of rights theory that "[t]he right to privacy and the right to protection exist in fundamental conflict").

[233] *Id.* at 388.

family preservation	termination of parental rights
cultural relativism/diversity	universal/civic values
family autonomy/privacy	interests of the community
	child rescue
social responsibility for poverty	personal responsibility

Cultural relativism and diversity compete with universal and civic values; family autonomy and privacy compete with the interests of the community as well as with the value of rescuing children; social responsibility for poverty vies against personal responsibility.

Academic writers reproduce these contradictions in their efforts to resolve them. From nearly the colonial period, critics of prevailing child welfare practices have drawn their arguments from one column, only to prompt reforms that invite critiques from the other. The CWA was born of one set of critiques; ASFA arose out of the contrary set.

The solution is not to choose one side over the other. I am not arguing that child welfare policy ought to do more to promote family preservation or more to promote expeditious termination of parental rights; more to respect family autonomy or more to secure the safety of children; more to sustain diverse cultures or more to ensure that certain universal standards are upheld. Instead, I write out of conviction that the painful decision between risking harm to a child and coercively terminating a family relationship can be made neither by reference to the principle of permanence nor by reliance on one or the other of a pair of coexisting yet contradictory values. The best these value sets can do is justify a decision *post hoc*.[234] Legal and policy arguments that invoke rationales from one cluster of values or the other merely enable us to avert our eyes temporarily from the agonizing choice that awaits decision-makers every time the legal system identifies a family in which the safety and welfare of a child is in doubt.[235]

I make no claim to having discovered a new resolution to the terrible dilemmas associated with child welfare practice. Child welfare policy cannot be perfected by "fiddl[ing] with the location of the boundary between" family preservation and termination of parental rights, or diversity and universality.[236] Rather than continuing to fiddle, I propose that we diminish the importance of these dilemmas by expanding the field of options available to decision-makers and treating family preservation and termination of parental rights as two choices among many, rather than as two exclusive alternatives. To do so, we must expand our understanding of family as well.

---

[234] *Cf. Form and Substance*, *supra* note 6, at 1723, 1762, 1776.
[235] *Cf.* STONE, *supra* note 6, at 243.
[236] *Cf. Statutory Rape*, *supra* note 186, at 430.

The related field of juvenile delinquency provides some useful insights. In the 1970s, Massachusetts closed its reform schools for juvenile offenders.[237] According to his own account, then-Commissioner of the Massachusetts Department of Youth Services, Jerry Miller, fought funding battles, political patronage, and entrenched (if unsubstantiated) notions of reform[238] to shut down what he called "warehouses"[239] and replace them with a range of "community-based alternatives."[240] Massachusetts placed youths in universities, prep schools, Outward Bound programs, specialized foster care, group homes, art schools, military schools, therapeutic community drug programs, and, in some cases, in their own homes with supportive family services.[241]

A study comparing implementation across the state found lower rates of recidivism in regions that had drawn from a diversity of programs when placing individual youths.[242] As Miller concluded, "[a] diversity of good alternative programs lowers recidivism. A narrow choice of poor programs does not."[243]

Miller went on to work in the juvenile justice system in Pennsylvania, where he found hundreds of juvenile offenders living in an adult prison called Camp Hill.[244] About a year prior to Miller's arrival, the governor had assembled a group of probation officers, youth workers, judges, psychologists, and psychiatrists to reclassify the inmates and devise a way to get the juveniles out of the adult prison environment.[245] Although about a dozen inmates were returned to the community, 95 percent were classified as needing maximum or medium security institutionalization.[246]

Miller proposed that he and the governor take a second look at the problem before implementing the plan.[247] He assembled a new team of diagnosticians and provided them with a wide range of possible program placements.

> The full spectrum of real and possible options was described, from Outward Bound and wilderness camping programs to group homes; from halfway houses to hiring advocates for youth; from foster care to specialized monitoring, where the

---

[237] *See* JEROME G. MILLER, LAST ONE OVER THE WALL: THE MASSACHUSETTS EXPERIMENT IN CLOSING REFORM SCHOOLS (2d ed. 1998).

[238] *See id.*

[239] *Id.* at 61.

[240] *Id.* at 177.

[241] *Id.* at 190.

[242] *Id.* at 221–22.

[243] *Id.* at 222.

[244] *Id.* at 230.

[245] *Id.* at 230–31.

[246] *Id.*

[247] *See id.* at 231.

> monitor would be paid a full salary to look after an individual youth; from vocational and educational programs to residential and nonresidential drug treatment programs; from house arrest to small residential treatment programs for emotionally disturbed youngsters; from day treatment to small, locked, secure programs for juveniles who were at risk of committing violence . . . . Whereas earlier diagnosticians had been left only the choice to institutionalize or to parole, the new group had a wide range of options to consider.[248]

The orientation had a startling effect. The new group of experts concluded that 90% (360) of the boys were fit for some form of community placement.[249] Only 10% (40) of the boys were deemed so dangerous that institutionalization was necessary.[250] By providing the experts with "an array of options between the extremes," Miller encouraged them to approach the inmates in a "thoughtful, graduated manner."[251] The experts "felt at less risk if they recommended something other than prison."[252] As Miller concluded, "[t]he treatment options in the mind of the diagnostician determined the diagnosis of the person being evaluated."[253]

Miller's experiences resulted in three key lessons for my purposes. First, when everything seemed to ride on a choice between two lousy alternatives, lock-up or parole, juveniles re-offended at a higher rate than they did when decision-makers had a broad field of placement options from which to choose. Fewer options were less effective than more options.

By analogy, the choice between family preservation and termination of parental rights cannot possibly accommodate the breadth of needs in the foster care population, any more than the choice between lock-up and parole accommodated the circumstances among juvenile offenders. More options will accommodate more children.

---

[248] *Id.* at 231–32.
[249] *Id.* at 232.
[250] *Id.*
[251] *Id.*
[252] *Id.*
[253] *Id.*

> This is the reverse of what we commonly assume happens in diagnosis and classification of offenders. We assume that we measure the delinquent against medical, psychological, and sociological criteria and prescribe treatment accordingly. In fact, the theory-diagnosis-treatment flow runs backward. The diagnostician looks first to the means available for handling the client, then labels the client, and finally justifies the label with psychiatric or sociological theory. Diagnosis virtually never determines treatment; treatment dictates diagnosis. The task of the diagnostician is to validate the means of handling already available. The implications are overwhelming.

Id.

Second, when faced with two poor choices, the first group of diagnosticians in Pennsylvania chose the one that appeared to them less risky, i.e., lock-up, because the prospect of a violent re-offense worried the diagnosticians more than the harm that could result from imprisonment. In the context of child welfare, the more risk-averse choice is termination of parental rights because the prospect of child abuse, according to prevailing instincts, is more severe than the harm done by termination of parental rights. Termination, therefore, is likely to emerge as the privileged alternative.[254]

Finally, Miller's experience suggests that the range of placement options known to the diagnosticians drove the diagnoses of juveniles in the Pennsylvania system. When lock-up and parole were the only options and alternative forms of treatment or care were invisible, diagnoses that implicitly would have called for these alternatives were also inconceivable. As Miller observed, "[t]he task of the diagnostician is to validate the means of handling already available."[255]

Likewise, the limited range of permanency plans available under ASFA limits our ability to see the need for more placement options. ASFA tries to cure the ambivalence that decision-makers experience in the hard cases by forcing a prompt decision between two choices that cannot possibly be appropriate for all foster children. It would be preferable to regard official ambivalence as dissatisfaction with either of the existing options—dissatisfaction that might be alleviated by a broader field of alternatives.

The range of fact-patterns in the foster care system is endless, but a few examples will suffice to demonstrate. Joyce Pavao tells of a sister and brother, ages eight and four respectively, who had been in foster care for four years with a couple in their sixties.[256] The couple's biological and adopted children were grown, and the couple did not feel they could adopt two more young children.[257] Further, the children were especially close with one of their social workers, who had been one of the most consistent adults in their lives.[258] It was possible that the children might sabotage any placement plan because it would cut them off from the social workers and foster parents whom they loved and were the only adults they had ever trusted.[259] Nevertheless, the children were freed for adoption and were to be placed in a permanent home.[260] Taking all this into

---

[254] *Cf.* STONE, *supra* note 6, at 242–56 (arguing that we should "always be on the lookout for Hobson's choices. Whenever you are presented with an either/or choice, you should be tipped off to a trap. You can disengage it by imagining different alternatives . . . and by expanding the range of consequences you bring into the analysis.")

[255] MILLER, *supra* note 237, at 232.

[256] *See* PAVAO, *supra* note 75, at 98–99.

[257] *Id.* at 99.

[258] *Id.*

[259] *Id.*

[260] *Id.*

consideration, Pavao and her colleagues determined that the only way the children could be adopted would be in a kind of "open adoption" in which the adoptive parents allowed the children to view the current foster parents as a kind of grandparents and the social worker as a kind of aunt.[261]

The family structure necessary to meet the needs of these children was not discrete, impenetrable, or ideal. It would involve a tangle of relationships. Rigid adherence to the ideology of the ideal family might have condemned these children to another round of loss, but Pavao and her associates thought broadly.

Marsha Garrison tells a less satisfying story of two children, aged sixteen and seventeen, who had been living as foster children for four years with their paternal aunt.[262] Their father regularly visited them but made it clear that he was not prepared to undertake full custodial responsibility.[263] When the agency petitioned the court to terminate the father's rights, the trial court refused on the grounds that termination would provide no real benefit to the children and would unjustly relieve the father of his obligation to pay child support.[264] The appellate court reversed, declaring that these children should have stability in their lives and "know the security of being wanted, loved, and cared for by adoptive parents."[265] This case cries out for a kinship guardianship, but, as Garrison observes, "abstractions, permanence and adoption, determine[d] the result . . . imped[ing] recognition of messy, individual realities."[266]

Recall also the stories of Luke[267] and the children who sneak out of their adoptive homes to telephone the grandmothers to whom they are no longer legally related.[268] Empirical studies uniformly suggest that children benefit from continued contact with their original parents after being removed from their custody[269] and these anecdotes bolster those findings.

---

[261] *Id.* at 100.

[262] *See* Garrison, *supra* note 26, at 391–92 (citing *In re* Shamell J., 609 N.Y.S.2d 185 (App. Div. 1994)).

[263] *Id.* (citing *In re* Shamell J., 609 N.Y.S.2d 185 (App. Div. 1994)).

[264] *Id.* at 392 (citing *In re* Shamell J., 609 N.Y.S.2d 185 (App. Div. 1994)).

[265] *See id.* (citing *In re* Shamell J., 609 N.Y.S.2d 185 (App. Div. 1994)).

[266] *See id.* (citing *In re* Shamell J., 609 N.Y.S.2d 185 (App. Div. 1994)). A kinship guardianship would have been possible under two provisions of federal law. First, as noted in Part II.B, guardianship is one of the permanency plans contemplated in ASFA. *See supra* note 58 and accompanying text. Second, federal law requires that

> in the case of a child who has been in foster care under the responsibility of the State for 15 of the most recent 22 months . . . the State shall file a petition to terminate parental rights . . . unless . . . at the option of the State, the child is being cared for by a relative.

42 U.S.C. § 675(5) (E) (1998). I retell Garrison's story because she so persuasively demonstrates the power of faith in the abstract permanent family.

[267] *See supra* notes 67–73 and accompanying text.

[268] *See supra* note 80 and accompanying text.

[269] *See* Garrison, *supra* note 7, at 461–69.

My point is not that every adoption should be an open adoption, nor should kinship guardianship replace termination and adoption in every case. Rather, the goal should be to think broadly and seek the best arrangement for a situation that begins in anguish.

Notwithstanding the main thrust of ASFA, innovative programs around the country, such as the Massachusetts Families for Kids in Roxbury, Massachusetts, are taking steps along this path.[270] Child welfare advocates on the cutting edge are making greater use of extended family kinship networks and more flexible formulations of guardianship than the one envisioned in ASFA; they are experimenting with joint decision-making with families of origin, foster families, and other members of the child's community (such as clergy); and they are arranging for visitation by original and foster parents.[271]

Furthermore, there is evidence that federal lawmakers have some inkling that this might be a useful direction. *Adoption 2002: The President's Initiative on Adoption and Foster Care* ("Adoption 2002") acknowledges that "traditional adoption does not meet the needs of all children in public foster care. Legal options for permanent and legally secure placement should be broad enough to serve the needs of all children who are not able to return to their home of origin . . . ."[272] This document goes on to suggest that state laws contemplate post-adoption contact between original family members and adopted children, as well as between foster family members and adopted children, noting that these sorts of contacts "may prevent the child from running away or disrupting a new placement."[273] *Adoption 2002* also recommends that states provide for non-adversarial case resolution. For example, it may useful to provide mediation to settle the terms of placement for children in the child welfare system, or to provide Family Group Conferencing, in which family (including extended family) and others, such as the family's clergy, collectively make decisions for children whose interests they have in common.[274] That the President has embraced these procedural mechanisms is encouraging because of the broad range of outcomes that implicitly must be available when multiple parties are given license to negotiate their varied interests.

I do not offer any one of these options as my own. Rather, my proposal is that we broaden our vision so these proposals and perhaps unknown others begin to appear centrally on our national radar.

---

[270] *See generally* McElroy & Goodsoe, *supra* note 12.
[271] *Id.*
[272] *Adoption 2002*, *supra* note 10, at Chapter II.
[273] *Id.*
[274] *See id.* at ch. 5.

VI. CONCLUSION

As Frances Olsen has observed, "family law makes our present forms of family life seem 'natural.' In this way, family law encourages minor reforms and individual adjustments, while discouraging imaginative speculation or creative changes in family structure."[275] Child welfare reform has been stymied in precisely this manner. Reformist thinking has taken place within the confines of an unspoken ideology fraught with contradictory premises. Unconsciously devoted to an ideal vision of family, reformers of each age have been trapped between conflicting impulses, balancing them as best they could, but subjecting each arrangement to the demon of the impulse accorded less weight.

Permanence is the latest manifestation of the ideology of the ideal family. It sets up a duel between preserving and terminating family relationships. ASFA advantages termination for the time being, but history suggests that the impulse to preserve families and the diverse cultures they have been credited with sustaining will not go quietly.

The proposals in Part V were drawn from somewhere other than the "fiddling arsenal," but they seem awkward in national policy debate. This is because none of them speaks directly to how we ought to balance family preservation against termination of parental rights, diversity against civic values, or social against personal responsibility. None of the proposals discussed in Part V resolves the terrible conundrum between preserving or coercively terminating family relationships in hard cases, but central to my thesis is that the search for resolution replicates or perhaps even exacerbates the problem. Instead of continuing the quest for resolution, we should broaden our frame and diminish the dilemma's importance.

The dilemma is a creature of our own ideology and we can change it—and we *should* change it—for the sake of children in the hard cases, for whom neither of the two conflicting options seems right. Rather than sanctioning only two foster care outcomes with the imprimatur *permanent*, we should stretch our field of vision and embrace a broad range of family structures, even if they seem to us now to be imperfect.

---

[275] *Politics of Family Law*, *supra* note 24, at 2 (citations omitted).

ESSAY

A LITE TOUCH ON BROADBAND: ACHIEVING THE OPTIMAL REGULATORY EFFICIENCY IN THE INTERNET BROADBAND MARKET

JULIAN EPSTEIN*

This Essay argues that broadband technology, which is revolutionizing the burgeoning Internet community, should not be subjected to heavy-handed governmental regulations mandating open access to the technology. Rather, the author asserts that a mere clarifying amendment to the Telecommunications Act of 1996 will create the necessary safeguards against possible monopoly control of the broadband market and the inefficiencies that would accompany such monopolization. This "hands off" approach will also optimize competition and innovation.

Broadband is revolutionary Internet transmission technology that will allow Internet data transmissions at speeds far greater than currently exist through the use of conventional narrowband telephone lines. By providing the effective equivalent of "turbocharge horsepower," broadband will enable the transmission of robust products and services, such as video and audio on demand, local and long distance telephone service, and a wide range of faster connections to the celestial electronic commerce ("e-commerce") marketplace up to one thousand times faster than conventional narrowband transmissions.

Broadband architectures can be constructed in several ways, including retrofitting existing cable and telephone architectures and deploying wireless, satellite, and new fiber constructions, either separately or in conjunction with one another.[1]

Fearing that cable's unique fiber/co-axial architecture[2] will quickly become the broadband technology of choice, a wide range of regional bell

---

* Democratic Chief Counsel & Staff Director, House Committee on the Judiciary. JSD, Stanford Law School (ABD); JD, Georgetown University Law Center, 1996; AB, University of Michigan, 1984. I would like to acknowledge and thank Samara Ryder for her, as always, invaluable edits and suggestions.

[1] NATIONAL CABLE TELEVISION ASSOCIATION, THE CABLE TELEVISION HANDBOOK § 3 (1997) [hereinafter NCTA 1997 CABLE HANDBOOK]; BARBARA ESBIN, INTERNET OVER CABLE: DEFINING THE FUTURE IN TERMS OF THE PAST 75 (Fed. Communications Comm'n, OPP Working Paper No. 30, 1998) [hereinafter ESBIN FCC PAPER]; Lennard G. Kruger & Angele A. Gilroy, *Broadband Internet Access: Background and Issues*, CONGRESSIONAL RESEARCH SERVICE ISSUE BRIEF, Oct. 25, 2000, at 4-6 [hereinafter CRS ISSUE BRIEF].

[2] NCTA 1997 CABLE HANDBOOK, *supra* note 1. Fiber/co-axial architecture is a network system developed by the cable industry that uses a blend of fiber and coaxial cable to bring interactivity, greater channel capacity, increased signal strength, and better reliability

operating companies ("RBOCs") and Internet companies have formed the OpenNet Coalition ("OpenNet").[3] OpenNet argues that, like local telephone facilities, cable's pipeline should be "open," thereby enabling any of the nation's over six thousand Internet Service Providers ("ISPs") to license the use of the cable in order to deliver their broadband services.[4]

Using a wide range of efficiency arguments, OpenNet asserts that an open access requirement will prevent potential monopolization of the Internet access market and the inefficiencies that would surely ensue were one architecture to achieve monopoly status.[5] Such inefficiencies would include the crippling of competition among ISPs, reduced innovation in equipment and application markets, and unprecedented control by a prospective monopolist over the content of the Internet superhighway.[6] Other possible anticompetitive costs could include "network effects"[7] and leveraging—a process whereby a monopolist uses its market power to move into adjacent industries.[8]

---

to users. The hybrid fiber coaxial ("HFC") architecture replaces the previous coaxial trunk with a fiber-optic trunk. The fiber terminates at the node, where the signal is then carried over an upgraded high bandwidth coaxial cable to the customer. HFC networks require fewer amplifiers and offer clearer signal transmission, which facilitate two-way transmission. These new HFC networks are often linked by fiber into regional hubs that enable the industry to deliver a wide range of telecommunications and information services—including Internet access, telephony, and digital television. For further discussion about technical aspects of architecture, see ESBIN FCC PAPER, *supra* note 1, at 75; DEBORAH A. LATHEN, BROADBAND TODAY 18 (Fed. Communications Comm'n Staff Report to William Kennard, 1999) [hereinafter FCC REPORT].

[3] *Hearing on Open Access to Cable Broadband Internet Systems before the Federal Communinications Comm'n*, 106th Cong. 1 (2000) (testimony of Greg Simon, Co-Director, OpenNet Coalition) [hereinafter *Hearing on Open Access*]; *see also The Internet Freedom Act: Hearing on H.R. 1686 Before the House Comm. on the Judiciary*, 106th Cong. 1–6 (2000) [hereinafter *Internet Freedom Act Hearing II*] (statement of Dave Baker, Vice President, Law and Public Policy, EarthLink, Inc. on behalf of the OpenNet Coalition). For general information, including mission and membership information, concerning OpenNet, see http://www.openNETcoalition.org (last visited Nov. 20, 2000).

[4] *Hearing on Open Access*, *supra* note 3, at 1 (testimony of Greg Simon); *see also Internet Freedom Act Hearing II*, *supra* note 3, at 1–6 (statement of Dave Barker).

[5] *Cable Takes the Early Lead*, INDUSTRY STANDARD, Oct. 11, 1999; *see also* Randy Barrett, *Cable, Phone Lines in Battle for Supremacy*, INTER@ACTIVE WK., Jan. 25, 1999, at 69; *Top Seven Cable Operators to Capture 95% of Market*, BROADBAND DAILY, June 3, 1999; *Internet Freedom Act and Internet Growth and Development Act of 1999: Hearing on H.R. 1686 and H.R. 1685 Before the House Comm. on the Judiciary*, 105th Cong. 28 (1999) [hereinafter *Internet Freedom Act Hearing I*] (statement of George Vradenburg, Senior Vice President, America Online).

[6] *Supra* note 5.

[7] "Network Effects" is economists' nomenclature referring to a market phenomenon in which a new customer's demand for a product or system is positively related to the number of other entities using the product or system. Network effects are neither inherently efficient nor inefficient. In some cases, network effects create certain economies of scale and may help select the best industry standards. Alternatively, they can be inefficient as they tend to reinforce monopolies and discourage innovation. This is especially likely in closed proprietary systems in dynamic industries.

[8] Leveraging occurs when a firm uses its current monopoly power to gain monopoly power in an adjacent industry. For example, if company Alpha had monopoly power in the Internet transmission market, it could then leverage its way into the ISP market by denying

OpenNet further stresses that the effectiveness of such "open-access" requirements has been demonstrated by the Telecommunications Act of 1996 ("1996 Act"),[9] which requires RBOCs to open their "networks"[10] to competitors. The 1996 Act is widely credited with promoting competition, innovation, better service, and lower prices to consumers in local telephone markets.[11] Open access proponents contend that extending similar requirements to the cable broadband network will achieve the same consumer benefits and eliminate the regulatory inequity imposed on RBOCs—the major broadband competitors—who are required to open their local loops,[12] and therefore their broadband service, to their competitors.[13] Finally, open access advocates argue that open access requirements will create market efficiencies by encouraging the use of state of the art routers and other technologies that will accommodate multiple ISPs, who will surely seek access to this optimal pipeline.

In this Essay, I argue that such government regulation of the Internet is, at present, unjustified, economically counterproductive, and unprecedented in antitrust and regulatory law. This is because cable broadband controls less than five percent of the Internet transmission market that shows signs of vigorous competition—competition that is promoted by government abstention. Open access requirements should be governmentally mandated only if the broadband market "tips"—giving cable broadband monopoly power—and then only if the new "cable monopolists" abuse that power. Premature regulation where no market failure exists could prove counterproductive by deterring investment in competing networks, and by establishing inefficient price regulations whose terms would be subject to intense controversy and arbitrariness. Such a heavy-handed approach could also, ironically, create undesirable "network effects" by fostering a single industry standard in an industry where competing architectures are likely to spawn more innovation than a single standard.

It would be unwise, however, to totally dismiss OpenNet's premonitions about the dangers of potential monopolization and the undesirable

---

access to all ISPs except those affiliated with Alpha. In such a case, Alpha can "leverage" itself into both the ISP market and other e-commerce markets. For further discussion on leveraging, see United States v. Griffith, 334 U.S. 100, 108 (1948) (holding that a defendant's use of monopoly power over theaters in certain cities to obtain exclusive distribution in other cities where its theaters faced competition constituted illegal monopolization).

[9] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

[10] *Id.*

[11] *Hearing Before the Subcomm. on Antitrust, Business Rights and Competition of the Senate Comm. on the Judiciary*, 106th Cong. (2000) (prepared statement of Joel I. Klein, Assistant Attorney General of the United States) [hereinafter *Antitrust Hearing*]; Tim Sloan, *Creating Better Incentives Through Regulation: Section 271 of the Communications Act of 1934 and the Promotion of Local Exchange Competition*, 50 FED. COMM. L.J. 309 (1998).

[12] A local loop is the wire that connects a home or business to a telephone company's central office.

[13] Telecommunications Act of 1996.

effects that could be wrought. High technology markets are dynamic, and when a market "tips" in favor of one network, it does so rapidly, creating competitive ills that are arguably hard, if not impossible, to undo.

"Tipping" is a phenomenon whereby the market (e.g., consumers) chooses one network or standard over the other, to such an extent that the losing network cannot survive.[14] The dangers of rapid "tipping"—where a competing network standard today can become the dominant standard of tomorrow, positioning its proprietary owner to engage in significant harmful conduct—in the essential telecommunications market is a reality that policymakers cannot afford to ignore, as the consequences could be dire.[15] Thus, while an unfettered market appears to deliver optimal competition, innovation, and protections against anticompetitive behavior, ignoring realistic scenarios of bottlenecks, or monopolistic or oligopolistic behavior, is unwise. Therefore, I argue that the 1996 Act should be legislatively clarified to empower the Federal Communications Commission ("FCC"), in consultation with the antitrust division of the Department of Justice, to take swift action in the event of "tipping" or market failure. Such a "regulatory-lite" approach would not interfere with the present day competitive marketplace, but could function as an early intervention system to be activated only in the event of market failure or anticompetitive conduct.

I. BACKGROUND

A. *The Internet Today*

The Internet is one of the most far-reaching technological innovations of the twentieth century. Conceived in the late 1960s as a Defense Department experiment, Internet usage has tripled in the past four years.[16] Today, over 150 million people use it for commerce, entertainment, personal communication, "Web surfing," and other purposes.[17]

The Internet continues to exhibit remarkable growth. Forty percent of American households have access today[18] through one of six thousand ISPs, and are connected by way of a simple local telephone call.[19] Sixty

---

[14] Mark A. Lemley & David McGowan, *Legal Implications of Network Economic Effects*, 86 CAL. L. REV. 479, 496 (1998).

[15] *Id.* at 497–98.

[16] Brian Lowry, *Sydney 2000/Summer Olympic Games*, L.A. TIMES, Sept. 29, 2000, at U1.

[17] FCC REPORT, *supra* note 2, at 16.

[18] U.S. DEP'T OF COMMERCE, FALLING THROUGH THE NET: TOWARD DIGITAL INCLUSION XV (Oct. 2000), *available at* http://www.esa.doc.gov/fttn00.pdf.

[19] *Internet Freedom Act II*, *supra* note 3, at 3 (statement of Dave Baker, Vice President, Law and Public Policy, Earthlink, Inc., on behalf of the OpenNet Coalition).

percent of households are expected to be online within five years.[20] In 1998 alone, e-commerce over the World Wide Wide generated over $300 billion in sales.[21] No other single technological innovation—not even the telephone—has, with a single sweep, so vastly changed the way we shop, communicate and entertain.

Today, a bold new technology known as broadband will dramatically change the Internet industry as we know it. In its simplest terms, broadband means a bigger pipeline through which the vast information on the Web—movies, music, teleconferences, three-dimensional imagery—can pass at speeds from 100 to 1000 times faster than the more traditional narrowband technology, the conventional transmission protocol, that represents 95% of online connections today.[22] Downloading the movie *Titanic*, for instance, takes over forty-two hours using conventional narrowband connections.[23] Innovative broadband technology would accomplish the task in less than nine minutes.[24] Furthermore, this technology allows a consumer, or end user, not only to download information electronically, but also to send information ("upload") at lightning speeds.

The most promising of the competing broadband architectures may be the retrofitting of existing cable lines, a strategy that AT&T, with considerable backing from Wall Street, has undertaken.[25] However, other broadband systems are also being developed. The RBOCs, created by the historic breakup of the old AT&T monopoly, are also developing variations of Digital Subscriber Line ("DSL") technologies.[26] Satellite companies, such as Hughes Electronics, are attempting to develop the upload capacity to match the tremendous download capacity that satellites offer.[27] Other companies are advancing more terrestrial wireless and "fixed" wireless technologies, using primarily microwave or radio frequencies.[28] Each of these technologies has its individual strengths and weaknesses, which will be discussed later in the Essay.[29]

---

[20] *Internet Freedom Act Hearing I*, *supra* note 5, at 63 (statement of George Vradenberg). It is important to note that Vradenberg's testimony represented the views of America Online, which, at the time, was part of the OpenNet coalition. However, since its announced merger with Time Warner Inc., which is the second largest owner of cable lines, America Online has since withdrawn from the OpenNet coalition and now argues that market-based solutions to the question of cable network access are preferable to government regulation.

[21] FCC REPORT, *supra* note 2, at 16.

[22] *Internet Freedom Act Hearing I*, *supra* note 5, at 27.

[23] Karin Schill, *Light and moderate users of Net might stick with dial-up modems*, DALLAS MORNING NEWS, Mar. 30, 2000, at 1F.

[24] *Id.*

[25] CRS ISSUE BRIEF, *supra* note 1, at 5.

[26] *Internet Freedom Hearing II*, *supra* note 3, at 2 (statement of Robert Sachs, President and CEO, Nat'l Cable Television Ass'n).

[27] FCC REPORT, *supra* note 2, at 18.

[28] *Id.*

[29] *See infra* Part I.C.

Perceiving what they believe to be the likely emergence of cable broadband market potency, OpenNet has adopted the battle cry of "open access."[30] Broadly defined, open access would thereby require that access to the cable broadband pipeline be provided to unaffiliated ISPs on non-discriminatory terms. Such a requirement would prevent AT&T from "bundling" what its critics argue is its prospective monopolistic control of broadband service with its own or affiliated ISPs, or otherwise exclusively control the information superhighway.[31] In short, OpenNet insists that prospective market domination would put AT&T and other cable networks in a position to eliminate competition in the ISP market, gouge consumers with higher access rates, dictate the pace of innovation in equipment and services, leverage their market power into adjacent markets, and potentially control content.[32]

B. *Current Narrowband Internet Architecture*

Conceived by Rand Corporation researcher Paul Baran in 1964,[33] the contemporary narrowband Internet architecture is composed not of a single entity but of an interconnected web of communications networks, computers, and databases that can put vast amounts of information at users' fingertips. Users access the system with a local telephone call to an ISP, which then connects users to the various national backbone net-

---

[30] *Internet Freedom Act Hearing II*, *supra* note 3, at 1-6.

[31] Ex Parte Brief of Professor Mark A. Lemley and Lawrence Lessig, Federal Communications Commission, Application for Consent to the Transfer of Control of Licenses, CS Docket No. 99-251 at 20 [hereinafter Lessig Brief].

[32] *Id.*; *see also* FRANCOIS BAR ET AL., DEFENDING THE INTERNET REVOLUTION IN THE BROADBAND ERA: WHEN DOING NOTHING IS DOING HARM (Berkeley Roundtable on the Int'l Econ., E-conomy Working Paper No. 12, 1999) [hereinafter BRIE REPORT].

[33] *See generally* JOHN NAUGHTON, A BRIEF HISTORY OF THE FUTURE (2000). In 1964, Rand Corporation Researcher Paul Baran designed a computer-communications network that had no hub, no central switching station, and no governing authority. In this system, each message was cut into tiny strips and stuffed into "electronic envelopes" called "packets." Each was marked with the address of the sender and the intended receiver. The packets were then released like confetti into the web of interconnected computers, where they were tossed back and forth over high-speed wires in the general direction of their destination and reassembled when they arrived. This method gave birth to today's "packet-switching" system whereby information is broken into bits and bytes as it leaves the sender, and the packets are then individually routed over different lines and reassembled before they arrive at the recipient location. *Id.* Until the early 1990s, the Internet was a research and educational network, and there were only a handful of commercial ISPs. This changed in the early 1990s, when the U.S. National Science Foundation ("Foundation") made the Internet viable for commercial traffic. The Internet had been formed in the United States in the 1960s by the Department of Defense in response to the Pentagon's need for a military command and control system that would continue to operate in the event of nuclear war. *Id.*

works,[34] provided by PSINet, UUNet (wholly owned by MCI WorldCom), Sprint, and others.[35]

The current system supports data transmissions in the narrowband range (up to about fifty-six Kbps) through the use of narrowband (28.8 baud) analog telephone modems that convert analog signals and enable the transmission of bits and bytes through a process known as packet switching.[36] While fifty-six Kbps speeds were sufficient to accommodate nearly all data transmissions in the Internet's nascent years, today these connections are far too laggard to transmit the robust products that will soon dominate e-commerce,[37] such as complex interactive services (audio and video on demand) and other services involving graphics, animations, video, and sound—services that today are generally available only to large businesses using non-Internet technologies, such as T-1 lines.[38]

---

[34] KEVIN WERBACK, DIGITAL TORNADO: THE INTERNET AND TELECOMMUNICATIONS POLICY 15–16 (Fed. Communications Comm'n, OPP Working Paper No. 29, 1997). The "backbone" of the Internet was originally funded by the National Science Foundation and consisted of a 56 Kilobits per second ("Kbps") network linking five supercomputer centers (the "NSFnet"). *Id.* In May 1993, the Foundation radically altered the architecture of the Internet because the government wanted to get out of the backbone business. To this end, the Foundation phased out federal support for the Internet backbone and encouraged commercial entities to set up private backbones. *Id.* Although federal support for the NSFnet backbone ended on April 30, 1995, the National Science Foundation has continued to provide funding to facilitate the transition of the Internet into a privately operated network. The Foundation designated a series of Network Access Points ("NAPs")—on ramps—by which private commercial Internet providers could "interconnect" to the backbone. In 1994, the Foundation announced that NAPs would be built in San Francisco, New York, Chicago, and Washington, D.C. There are now 11 major NAPs in the United States. *Id.* In addition to private multilateral exchange points, such as the NAPs, many of the largest private backbone providers have negotiated bilateral "peering" arrangements to exchange traffic with each other. *Id.* Several new companies have built nationwide backbones that are rated upwards of 45 Megabits per second. Despite this increase in capacity, usage has increased even faster, leading to concerns about congestion. The research and education community, with the support of the White House and several federal agencies, recently announced the "Internet II" or "next-generation Internet" initiative to establish a new high-speed Internet backbone dedicated to non-commercial uses. *Id.*

[35] Mid-level or regional computer networks provide Internet access to large organizations, such as universities and federal agencies, in a given geographic area. There are about 20 mid-level networks in the United States, such as CERFnet in New York state, BARRnet in the San Francisco area, and Erols in the Northeast. Other regional or national Internet providers have entered the backbone market by leasing capacity from facilities-based long distance providers. Most users access the Internet through local or national ISPs that usually do not have their own backbone infrastructure (e.g., America Online and MindSpring). Customers usually dial into the ISPs through local telephone lines and the ISPs, in turn, connect to regional or national Internet providers that are connected to the backbone. Some larger users have dedicated connections using high speed phone lines between a local area network at the customer's premises and the Internet.

[36] For a discussion of packet switching, see *supra* note 33.

[37] *Internet Freedom Act Hearing I*, *supra* note 5, at 27; BRIE REPORT, *supra* note 32, at 12.

[38] T-1 lines are two pairs of copper wire that can carry 24 DS-O signals at a rate of 1.544 Mbps and have the capacity to carry large bandwidth video and audio signals, allowing such services as real-time video conferencing. Because of the high costs associated with T-1 lines, they are generally only available to business customers.

C. *Broadband Technology*

The Internet's thirst for broadband connection technology cannot be overstated. Industry watchers speculate that Internet traffic will grow from 50% to 90% of all communications traffic in the next several years.[39] This is due not only to more sophisticated video, audio, and graphic transmissions, but also to the phenomenon known as "conversion,"[40] whereby traditional communications services, such as telephone and cable, may be "bundled" together over the same communications architecture. In addition, the "always on"[41] feature of broadband means that the same wire can now be used for a host of non-traditional communications services, such as home security, home automation, and a vast array of other purposes heretofore the domain of futuristic novels. Broadband is expected to be deployed to over 3.6 million subscribers by the end of 2000,[42] and to 78 million before the end of the decade.[43] It is therefore likely to become the dominant communications pipeline.

1. Cable Broadband

Cable broadband involves the retrofitting of existing cable wires, known as hybrid fiber-coaxial ("HFC"),[44] primarily to enable transmissions from, as well as to, the end user.[45] Because HFC lines can already send nearly any type of signal downstream to the end user with the greatest available speed and clarity, cable broadband has become the odds-on

---

[39] *Internet Freedom Act Hearing I, supra* note 5, at 60 (statement of Mike Salsbury, Executive Vice-President and General Counsel, MCI WorldCom). For the past three years, MCI Worldcom has increased capacity for its UUNET backbone by over 1000% each year to handle peak traffic loads. Other backbone providers, including AT&T, Sprint, PSINet, and GTE, have also increased their capacity. *Id.* Qwest, Level3, and Williams are building new networks to handle the burgeoning flow. *Id.* Approximately 47 different backbone providers are now competing. All but three of the 197 LATAs are now served by four or more Internet backbone networks, and the capacities of the Internet backbone networks have exploded from 1.2 terabits per second in 1996 to 21.7 terabits per second in 1999, a twentyfold increase. *Id.*

[40] "Conversion" is a commonly used term to refer to the capacity of communications systems to deliver multiple communications signals that could previously only be delivered separately. The emergence of broadband technologies is a simplistic, but good, example of conversion, as cable lines will be able to deliver not just video signals, but also telephony and Internet service. Telephone lines, likewise, will also be used for video signals and Internet service.

[41] The "always on" feature means that there is no dial up requirement in cable broadband to access the World Wide Web, Internet or Intranet services. For a general discussion, see ESBIN FCC PAPER, *supra* note 1, at 76.

[42] KAGAN MEDIA APPRAISALS, THE STATE OF BROADBAND COMPETITION 5 (2000) (compiled for the Nat'l Cable Television Ass'n).

[43] FCC REPORT, *supra* note 2, at 9.

[44] These new HFC networks are often linked by fiber into regional hubs, which enable the industry to deliver a wide range of telecommunications and information services, including Internet access, telephone service, and digital television.

[45] ESBIN FCC PAPER, *supra* note 1, at 75.

favorite on Wall Street in the quest for communications superiority.[46] Upgraded cable systems can, depending upon usage conditions, download data at speeds ranging from three to ten Mbps and upload data at speeds ranging from 128 Kbps to ten Mbps.[47]

The architecture of cable broadband involves the construction of a new facility—an entire end-to-end Internet Protocol ("IP"), and an IP networking infrastructure.[48] This means the creation of novel Internet backbone connectivity, routers, servers, and network management tools. In the words of the FCC, cable companies are essentially "construct[ing] sophisticated, community-wide end-to-end 'intranets.'"[49]

Like other broadband technologies, cable broadband is not without its glitches. Cable architecture is a shared system on which speed declines as the number of users in a particular neighborhood increases and system performance deteriorates due to network path interference.[50] A shared system is also prone to hackers and security risks. It is believed, however, that there are technical solutions to remedy these problems.[51]

Despite these problems, investment in broadband technology continues to grow. With its recent acquisition of cable giant Tele-Communications, Inc. ("TCI") in March 1999 for $54 billion[52] and its April 1999 announced purchase of MediaOne for $54 billion,[53] AT&T is planning the most aggressive broadband rollout. With these acquisitions, AT&T will become the biggest player in cable, with systems reaching no less than 65% of cable households in the United States.[54] AT&T plans to offer a bold package of integrated broadband, local and long-distance telephone, cable, and other services through its newly reconstructed cable pipeline.[55]

In all, cable operators are expected to spend $33 billion by 2001 to develop broadband technologies.[56] As of August 1999, approximately

---

[46] *See Internet Freedom Act Hearing I*, *supra* note 5 (testimony of Scott Cleland, Managing Dir., The Legg Mason Precursor Group); ESBIN FCC PAPER, *supra* note 1, at 75–76.

[47] CRS ISSUE BRIEF, *supra* note 1, at 4.

[48] An end-to-end network refers to a self-contained network in which communications to and from a user must be initiated and received over the same network. For a useful discussion of end-to-end networks see Lessig Brief, *supra* note 31.

[49] FCC REPORT, *supra* note 2, at 23.

[50] Return path interference refers to a signal degradation that occurs with upstream communications (those sent by the user). This problem occurs due to signal interference that occurs when the shared system is accommodating multiple users. *See* ESBIN FCC PAPER, *supra* note 1, at 77; FCC REPORT, *supra* note 2, at 19.

[51] ESBIN FCC PAPER, *supra* note 1, at 77. Such solutions are in the developmental stages and include the utilization of "dark fibers" (a second unused transmission line) and reduction in size of neighborhood nodes. *Id.*

[52] *AT&T Completes Acquisition of TCI*, N.Y. TIMES, Mar. 10, 1999, at C6.

[53] *An Internet Play for Widows and Orphans*, N.Y. TIMES, May 9, 1999, at (3)1.

[54] Richard Siklos & Amy Barrett, *The Net-Phone-TV-Cable Monster*, BUS. WK., May 10, 1999, at 30. This figure is including TCI's and MediaOne's wholly owned systems and various partnerships. *Id.*

[55] *See generally* AT&T's broadband Web site, *at* http://www.broadband.att.com/cgi-bin/index.fcg (last visited Nov. 20, 2000).

[56] Carol Wilson, *Broadband: Get ready for the Gale*, ZDNET REP., June 26, 1999, *at*

1.45 million (up from 300,000 in 1998) of the 32 million homes with capacity for the service (up from 15 million in 1998) had subscribed to it.[57] The cable industry projects dramatic increases in cable subscriptions, estimating a significant share of the 3.6 million projected broadband subscribers will be registered by the end of 2000, and that a similar upward trend will continue thereafter.[58] The FCC predicts that by the end of 2001 cable modems will be available in 46.7 million of the 73 million homes currently wired for cable, and that cable broadband will attract 11 million subscribers by 2005.[59]

The market is sanguine about cable's prospects in this budding market. Microsoft, for instance, has invested a whopping $5 billion in AT&T's broadband program to ensure its access to the 2.5 to 5 million set-top boxes that AT&T plans to deploy.[60] And, giving fuel to OpenNet's cries for open access, AT&T had previously signed a contract with @Home to be the exclusive provider of ISP service over AT&T's network (although it will expire by the end of 2002).[61] While AT&T has subsequently signed a non-exclusive contract with Mindspring,[62] OpenNet argues that AT&T is free to employ exclusionary practices to shut out the vast majority of ISPs that are not affiliated with AT&T at any time in the future. Expected cable broadband access costs are $30 to $50 per month.[63]

2. Digital Subscriber Line ("DSL") Broadband over Telephone Lines

The RBOCs that, together with GTE, own most local telephone networks, are also engaged in an aggressive retrofitting of their existing local telephone architecture—twisted pair copper wire local loops—to develop their version of broadband, known as DSL. Because technology works over the existing telephone line network, DSL is significantly less expensive to deploy on a broad scale than cable or new fiber construction. There are many types of DSL technology,[64] such as ADSL and

---

http://www.zdnet.com/zdnn/stories/news/0,4586,2281201,00.html.

[57] KAGAN MEDIA APPRAISALS, *supra* note 42.

[58] *Information Freedom Act Hearing II*, *supra* note 3, at 2 (testimony of Robert Sachs).

[59] FCC REPORT, *supra* note 2, at 26.

[60] John Browning & Spencer Reiss, *Manager's Journal: The New AT&T: Already a Dinosaur...*, WALL ST. J., May 13, 1999, at B8; John Markoff, *Microsoft Hunts Its Whale, the Digital Set-Top Box*, N.Y. TIMES, May 10, 1999, at C1.

[61] *AT&T Rivals Cautious on Cable Access*, WASH. POST, Dec. 6, 1999, at A16.

[62] *Id.*

[63] AT&T broadband Web site, *supra* note 55.

[64] Bruce Stewart, *DSL Superguide*, ZDNET, June 24, 1999, *at* http://www.zdnet.com/zdhelp/stories/main/0,5594,2278795,00.html. Symmetrical DSL is generally considered the most attractive for businesses who employ video conferencing and other advanced interactive services, as the upload and download speeds of 756 Kbps are equal. Asymmetrical DSL is generally most attractive for consumers and "surfers" as it allows for more rapid download speeds of 1.5 Mbps, but sacrifices upload speeds. *Id.*

HDSL, all of which differ in the speeds and range from the "central office"[65] at which they can transmit.[66] The local loop—the connection that runs between homes and local telephone wiring centers or switching offices—runs today at narrowband speeds ranging between 28.8 and 128 Kbps.[67] Through DSL, the copper loop allows users to have access to broadband residential access speeds over their existing phone lines, which can run upwards of 1.5 Mbps.[68] In addition, because the analog phone service can be split off from data transmissions, users can utilize phone service and Internet access over the same lines simultaneously.[69] DSL's other major advantage over cable is that it is unshared, so speed will not slow down as the number of users increases.

Like cable broadband, however, DSL has its own technological limitations. DSL can only transmit broadband signals to users from within a 4000- to 22,000-foot radius of the central office, depending on the type of DSL used (see chart below) and the signal progressively degrades as users move further away from the central office.[70] Differences in how the lines are constructed—for example the number of loading coils put in a line to improve voice reception—can also affect speed. Nevertheless, it is believed that DSL technology can serve the majority of telephone customers relatively rapidly, without having to install new lines or remove existing equipment.[71]

Type of DSL	Down Speed	Up Speed	Distance From Central Office
High Speed rate (HDSL)	1.5 mbps	1.5 mbps	12,000 ft.
Symetric (SDSL)	768kbps	768 kbps	10,000
Asymetric (ADSL)	1.5 kbps	640 kbps	18,000
Very high rate (VDSL)	51.8Mbps	2.3 Mbps	4,000
Lite (G.Lite)	1.5 Mbps	384 kbps	22–25,000

Source: FCC REPORT, *supra* note 2, at 21.

[65] A "central office" is a telecommunications facility, generally serving 10,000 telephone lines, where local calls are switched.

[66] DSL is a packet switching service, which means that it routes "bits and bytes" of information over divergent routes in the same manner as information flows over the traditional Internet. By comparison, Integrated Services Digital Network ("ISDN") lines require the full use of a typical voice circuit.

[67] *See* 3com Solutions, *at* http://www.3com.com/solutions/dsl/dsl_what_is_dsl.html (last visited Nov. 20, 2000).

[68] Speed "upstream" (back to the Internet or data service) can vary, but is generally only one-third the speed available "downstream" (from the Internet to the personal computer).

[69] This is because voice and Internet traffic will travel over the same line at different frequencies. In addition, information is routed only when packets are sent from the computer (i.e., when you type on the keyboard) and may travel over any number of routes to its ultimate destination. Connections are only used when needed, which is why DSL and similar services are often called "point-to-point" or "connectionless."

[70] *See supra* note 67.

[71] FCC REPORT, *supra* note 2, at 20.

The fastest DSL speeds—achieved with the VDSL and HDSL technologies—are very costly and have short ranges. Cheaper versions, such as ADSL, are also widely available, and while slower than cable modem speeds, may satisfy a considerable part of consumer thirst for bandwidth.[72] G.Lite,[73] while not technically a DSL technology, is an innovative "cousin" that operates over existing phone lines and can be purchased off-the-shelf and installed by the consumer.[74] G.Lite has the least expensive installment costs and monthly fees, and has the advantages of a long transmission range and sufficiently rapid download speeds.[75] Its major disadvantage is its slow upload speed, which will limit its applications in the ever-growing market for interactive services.[76]

Despite these limitations, the RBOCs have inaugurated an aggressive rollout of DSL services, announcing multi-billion-dollar capital investments. The RBOCs plan to offer DSL services to over 50 million customers by the end of 2000.[77]

3. Wireless Broadband

There are also various types of nascent wireless networks that are being deployed at rapid rates. While satellite delivery download speeds are rapid, upstream transmissions require the traditional fifty-six Kbps telephone modem connections, which are slow.[78] With the proper satellite portals and positioning, however, satellite broadband has the benefit of a global reach at all times.[79]

Showing some interest in bundling satellite television and broadband services, AOL recently invested $1.5 billion to create a two-way "spaceway" using sixteen satellites to provide "bandwidth-on-demand," at six Mbps.[80] Hughes Electronics, the major satellite cable operator, has also

---

[72] FCC REPORT, *supra* note 2, at 20.

[73] Jim Thompson, *Move Over Cable, Here Comes G.Lite*, InternetNews—ISP News, *at* http://www.internetnews.com/isp-news/print/0,,8_143521,00.html (last visited Dec. 1, 2000).

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] *Internet Freedom Act Hearing I*, *supra* note 5, at 61 (prepared statement of Mike Salsbury, Executive Vice President and General Counsel, MCI WorldCom); *see also* KAGAN MEDIA, *supra* note 42, at 11. Southwestern Bell, investing over $6 billion, plans to offer service to 9.5 billion customers by the end of year; Bell Atlantic plans to reach 16 million; Ameritech plans to make DSL available to 70% of its customers; Bell South plans service for 5.1 million customers; and US West has announced its lightning-fast plan to add ADSL to 5.5 million of its customers in 40 cities. *Id.* In addition, several competitive local-exchange carriers ("CLECs"), such as Covad, NorthPoint, and Rhythms NetConnections, are marketing DSL over resold local phone lines almost exclusively to businesses at a cost of 80 to 200 dollars per month. *Id.* Analysts predict that 30 million telephone lines will be qualified to support DSL services by early 2000. *Id.*

[78] CRS ISSUE BRIEF, *supra* note 1, at 6; KAGAN MEDIA, *supra* note 42, at 14–19.

[79] CRS ISSUE BRIEF, *supra* note 1, at 6; KAGAN MEDIA, *supra* note 42, at 14–19.

[80] CRS ISSUE BRIEF, *supra* note 1, at 6; KAGAN MEDIA, *supra* note 42, at 14–19.

invested in broadband services.[81] DirectPC now has about 100,000 Internet subscribers using satellite connections, and Jupiter Communications predicts it will have as many as one million subscribers by 2003.[82] At least three other major companies plan deployment of satellite broadband systems.[83]

Teligent and Winstar have also teamed up with long distance carriers to provide a rapid fixed wireless Internet service,[84] although these mostly microwave signals have range and signal attenuation limitations.[85] Finally, some communications companies are building entirely new facilities, the most promising of which are optical fiber-to-the-home ("FTTH") networks. While transmission capabilities are optimal, the high costs of such networks will limit the deployment of these systems.[86]

II. THE CALL FOR OPEN ACCESS

Fearing the possible market domination of the broadband market by cable companies, most particularly AT&T, a coalition of powerful companies—primarily the RBOCs and ISPs[87]—formed OpenNet, seeking the legislative mandate of open access.[88] Enlisting two of the main technology power brokers on Capitol Hill, Representative Rick Boucher (D-Va.) and Representative Robert Goodlatte (R-Va.), key lobbyists such as former White House Press Secretary Mike McCurry, and key academics such as Stanford Law School Professor Lawrence Lessig, OpenNet has mounted a major legislative campaign in Congress to pass the Internet Freedom Act.[89] If enacted, this bill would require cable broadband com-

---

[81] CRS ISSUE BRIEF, *supra* note 1, at 6; KAGAN MEDIA, *supra* note 42, at 14–19.

[82] CRS ISSUE BRIEF, *supra* note 1, at 6; KAGAN MEDIA, *supra* note 42, at 14–19.

[83] *See* FCC REPORT, *supra* note 2, at 30. Other potential service providers include Loral (CyberStar), Lockheed Martin (Atrolink), Skybridge, and Teledesic, which plans to utilize 288 satellites in low earth orbit ("LEO") to provide two-way digital transmissions, at low costs, 24 hours a day, to over 90% of the earth's surface, and 100% of the earth's population by 2003. FCC REPORT, *supra* note 2, at 30.

[84] *See* FCC REPORT, *supra* note 2, at 29; KAGAN MEDIA, *supra* note 42, at 14.

[85] J. ATKIN & D. ERNST, FERRIS, BAKER WATTS, INC., BRING ON THE BANDWIDTH: AN INVESTOR'S GUIDE TO COMPETITIVE BROADBAND SERVICES 45 (July 1999).

[86] Craig Kuhl, *Fiber-to-the-home deployment inches forward: Providers eye the path to full service offerings*, COMM. ENGINEERING & DESIGN, Oct. 2000, at 2, *available at* http://www.cedmagazine.com/ced/0010/104.htm.

[87] AOL was a driving force behind the formation of OpenNet as evidenced by the coalition's selection of AOL to represent its views in congressional hearings. *See Information Freedom Act Hearing I*, *supra* note 5. Since the merger, AOL has pulled out of the coalition, depriving OpenNet of one of its most influential voices on Capitol Hill. *See supra* note 20.

[88] *See* http://www.openNETcoalition.org (last visited Nov. 20, 2000).

[89] *See* H.R. 1686, 106th Cong. § 1 (1999). The Internet Freedom Act would make it a presumptive violation of the Sherman Antitrust Act for a broadband service provider, i.e., a cable Internet access provider, to give preferential terms and conditions (other than terms justified by demonstrable cost differentials) to its own ISP service as compared to non-affiliated ISPs. *See id.* § 102. In addition, it would be a presumptive antitrust violation

panies to lease their systems to unaffiliated ISPs at nondiscriminatory rates.[90] The OpenNet coalition has also mounted considerable efforts at the state and local levels, most notably in Portland, Oregon; Fairfax, Virginia; San Francisco, California; and Broward County, Florida.[91]

A. *The Broadband Market Could Dangerously Tip, Resulting in Less Competition and Innovation*

The most potent argument for open access is the dangerous possibility of rapid market "tipping" in cable broadband's favor, which could invite, in turn, network effects, leveraging, diminished, or in some cases quashed, competition, and control of Internet content. According to Software Industry Association President Ken Wasch, who is known for his advocacy of proprietary rights of technology companies, "[t]he ability of any provider of broadband services to gain an unfair advantage through monopoly control of its services and intentionally preclude consumer access to multiple internet service providers (ISPs) is a worrisome development."[92] Indeed, a Forrester Research study predicts that by 2002 cable modems will occupy 80% of the wireline broadband market, leaving DSL and other lines with only 20% of the market.[93] Similarly Scott Cleland, an economist widely respected as a neutral expert in telecom-

---

(subject to treble damages) if a broadband service provider unreasonably restrains the ability of another service provider to compete in its provision of broadband services. *See id.* The Bill also makes it unlawful for a broadband Internet provider to engage in "unfair methods of competition or unfair or deceptive acts or practices," in order to give preferential treatment to an affiliated ISP. *Id.* § 103. These provisions would effectively create a common carrier requirement for cable Internet access and would require cable Internet access providers to "unbundle" their affiliated ISPs from their cable modem service. The bill also provides relief to RBOCs by eliminating the provision in the 1996 Act prohibiting InterLATA transmissions of data provided certain conditions are met, such as if the local loop is opened for ISPs seeking to use an RBOC's DSL services. *See id.* §§ 202(b), 715(b). The long distance restriction was also known as the "inter-LATA" restriction. This is because the Modification of Final Judgment ("MFJ"), *see infra* note 150, created 197 local access and transport areas or ("LATAs") representing areas across which RBOCs are not permitted to offer telecommunications services. For example, under the MFJ, Michigan Bell (Ameritech) could not complete a call from Detroit to Lansing since it would cross a LATA; instead Michigan Bell was required to hand off the call to a long distance company who completed the call for the consumer. (Note: LATAs are not synonymous with area codes).

[90] *Internet Freedom Act Hearing I*, *supra* note 5 at 19, 24.

[91] *See* FCC REPORT, *supra* note 2, at 13–14.

[92] *Internet Freedom Act Hearing I*, *supra* note 5 (statement of Ken Wasch, President, Software Indus. Ass'n.).

[93] Kenneth Clemmer, Meghann MacKenzie & Shelley Morrisette, *Consumers are Ready for Broadband Technologies*, FORRESTER BRIEF, Sept. 16, 1998, *available at* http://www.forrester.com/Home/0,3257,1,FF.html. *But see* Dick Kelsey, *Report—DSL Will Overtake Cable*, NEWSBYTES, July 5, 2000, at 1 (predicting that demand for DSL will overtake cable broadband deployment), *at* http://www.newsbytes.com/news/00/151679.html; Corey Grice, *DSL Could Pull Ahead In High Speed Race*, CNET NEWS.COM, Mar. 1, 2000, at 1 (predicting DSL deployment will outstrip cable broadband), *at* http://news.cnet.com/news/0-1004-200-1561720.html.

munications markets, agrees that markets today generally see the cable industry as having the best broadband multiple service, which it will be able to bundle with Internet service and telephony.[94] According to Cleland, the markets reflect that while RBOCs have performed impressively over the last few years with DSL rollout, they will not be able to keep up with cable broadband.[95]

B. *A Cable Monopolist Could Eliminate Competition in the ISP Market*

If such tipping does occur, the most immediate and devastating casualty could occur in the ISP industry. Today, 6000 ISPs are critical mid-level contestants in the Internet economy and their fierce rivalry is bringing competitive prices, innovative services such as instant mail and better system caching, better content through webcasting and a host of technological innovations such as search engine applications and improved hyperlinking to the market—efficiencies that naturally flow from vigorous competition. Further, AOL has shown with its announced merger with Time Warner that ISPs are now potential competitors in a highly concentrated economy.

Were a single entity to control entry into the dominant Internet pipeline it could effectively quash this present competitive health among ISPs by precluding their access to the affiliated or favored ISPs.[96] Alternatively, a prospective monopolist could also use its market power[97] to leverage itself into the ISP market by becoming its own ISP. In turn, that entity could then "leverage" into many fields of e-commerce by using its own ISP to direct content towards its own products and services.[98] Such a constricted ISP market would also logically be expected to reduce demand for innovative services and applications as there would be less competitive impetus to develop them in order to capture a market share that the monopolist already has. Kenneth Arrow's warnings that monopolists will innovate less than firms in very competitive markets[99] ap-

---

[94] *Internet Freedom Act Hearing I*, *supra* note 5, at 46 (prepared statement of Scott Cleland); *see also* Lessig Brief, *supra* note 31, at 21.

[95] *Internet Freedom Act Hearing I*, *supra* note 5, at 46 (prepared statement of Scott Cleland); *see also* Lessig Brief, *supra* note 31, at 21.

[96] This ability to quash competition in the ISP market would depend on whether the market "tipped" in favor of cable architecture out of a belief by customers that it offers the best service. In such a situation, cable companies would have the power to select which ISP can "play" or get access to its service, and thus the principal pipeline to the Internet.

[97] In antitrust terms, market power (sometimes referred to as "monopoly power" in a defined market) is the point at which a single market player has the power to "control market prices or exclude competition" in a defined market. AMERICAN BAR ASSOCIATION, SECTION ON ANTITRUST, ANTITRUST LAW DEVELOPMENTS 230 (1997).

[98] This strategy is known as "leveraging," whereby a monopolist uses its market power in one market (in this case the broadband architecture market) to leverage, or gain access to another monopoly in an adjacent market (in this case the ISP market) by denying competing ISPs access to the architecture. *Supra* note 8.

[99] *See* UNIVERSITIES-NATIONAL BUREAU COMM. FOR ECONOMIC RESEARCH, THE RATE

pears prescient, as the monopolist would be able to pick the winners and losers in the ISP market based on how those ISPs may promote the interests of the putative monopolist, and not on what competitive strength the ISPs bring to the market.[100]

C. *Leveraging and Content Control: A Rogue Content Supercop on the Superhighway?*

The potential to restrict the now unrestricted free flow of information on the information superhighway by a monopolist of the transmission pipeline would be the most alarming of consequences in a tipped market. While perhaps a fantastical speculation, such censorship, private or public, were it to occur, would be widely considered anathema to the fundamental commercial and expressive freedom of the Internet economy.

Simply put, were one party to control the dominant transmission pipeline of the Internet, that party would arguably be one small step away from controlling Internet content. For instance, a broadband monopolist could simply require that ISPs, as a condition of access to its transmission pipeline, hyperlink content to sites containing its affiliated products or otherwise handicap the sites of its competitors.[101] Alternatively, the owner of the dominant pipelines could enable links to company Web sites that pay it a premium, thereby creating dislocations in the electronic commerce marketplace and entry barriers for startups and small e-commerce companies. Through such restrictions on ISPs, it could also block access to sites it may not like for arbitrary reasons.

Indeed, part of what Microsoft was accused of was bundling its operating systems with its browser[102] precisely because its browser could direct users to Microsoft related products and services, while disadvantaging competing services. In that case, the Court found such practices illegally created anticompetitive dislocations in numerous markets, such as Web browsing.

Such abusive control of market power to control content would utterly pervert the open nature of the Internet, and unarguably subvert the benefits of free competition in the vigorous e-commerce marketplace. In such a circumstance, an open access mandate would be clearly justified.

AND DIRECTION OF INVENTIVE ACTIVITY: ECONOMIC AND SOCIAL FACTORS 609–25 (National Bureau of Economic Research, Special Conference Series No. 13, 1962).

[100] For example, a broadband monopolist may hypothetically require, as a precondition to broadband access, that ISPs contract only with the monopolist or that their service direct users to affiliated content.

[101] *See Internet Freedom Act Hearing I*, *supra* note 5, at 22 (statement of William Barr, Executive Vice President and General Counsel, GTE Corp.).

[102] U.S. v. Microsoft Corp., 84 F. Supp. 2d 9 (D.D.C. 1999).

D. *Network Effects Could Dampen Competition in Equipment Markets*

Network effects occur when a market of competing systems tips towards one of those systems, causing a bevy of related applications and related industries to build their products and services to be compatible only with the "winning" standard—a phenomenon that further accelerates the quietus of losing architecture.

Network effects are neither inherently efficient or inefficient. [103] A single industry standard may create economies of scale, as investment capital, equipment and applications industries can be adapted to the most superior standard.[104] However, such a single standard can also snuff out new innovations that would occur were competing industry networks to operate simultaneously—an efficiency that would certainly exist if applications in one network were utilized in the competing networks. While no empirical data persuasively argues that efficiencies or inefficiencies of such network effects exist in the broadband network, it is unwise to dismiss the dangers of a single standard, with the potential for proprietary control in the broadband market.[105] For example, a cable monopolist could design unique Internet protocols, e.g., technical standards for the routing of information, and effectively require ISPs and equipment manufacturers to adapt their services and products to such protocols.[106] Such a technological regimen could further constrain equipment and application innovation by firms, who would otherwise pursue a host of nascent technological innovations that could operate more effectively with some or all of the architectures.[107] As such, network effects in the Internet architecture market could severely diminish a dynamic lifeblood of the industry: the synergy of new innovations in information technology which in turn fosters more innovation. Former Justice Department antitrust litigator David Rubinfeld explains:

> Assume, for example, that a firm is considering the possibility of innovating in one or more product markets that are complementary to the product controlled by a dominant firm. The com-

---

[103] For a discussion about costs and benefits of network effects, see Daniel L. Rubinfeld, *Antitrust Enforcement in Dynamic Network Industries*, 43 ANTITRUST BULL. 859, 864 (1998) (citations omitted) (arguing that network effects can be efficient by creating efficient economies of scale, but can be inefficient if a single firm controls a proprietary standard and if that firm excludes or otherwise inhibits competitors and innovators from utilizing it).

[104] Rubinfeld, *supra* note 103, at 864–65.

[105] *See* FCC REPORT, *supra* note 2, at 42. Some of the panelists warned that AT&T will be in a position to totally dominate cable, Internet access, and Internet content, thus gaining the ability to set standards for the entire industry. *Id.*

[106] For example, manufacturers of routers, such as Cisco and Nortel, could arguably be coerced by marketplace pressures to design routers that would accommodate only cable's architecture.

[107] Rubinfeld, *supra* note 103, at 875.

> petitor is unlikely to make such an effort unless it expects to earn (at a minimum) a normal economic rate of return. As a result, the dominant firm can for predatory reasons make the innovations of competitors unprofitable—in a variety of ways. First, it can calculate the maximum price consumers would be willing to pay for a "system" comprised of its product and that of the newly developed complement, and charge consumers enough for its monopolized component that the innovator is unable to charge sufficiently for its complement to enable the innovator to earn a reasonable return. Second, the dominant firm can make it clear that its product is or will be designed so as to be incompatible with the innovator's product. Third, it can discourage the innovator by offering or making plans to offer a close substitute for the competitor's innovative product at a "predatory" price. Finally, by threatening to integrate its dominant product together with its (perhaps somewhat late-to-market) version of the innovator's product, the monopolist may be able uniquely to avail itself of ubiquity in distribution—making success of the innovator's product unlikely.
>
> Why should the dominant firm discourage the competitor's innovative efforts? One answer is horizontal—the firm may wish to discourage innovation that might create a product or products that threaten the firm's current market position. Another answer, however, is vertical—the dominant firm might wish to discourage innovation in a complementary market. Such innovation by the firm could create substantial benefits and be (on balance) in the social interest.[108]

A single proprietary standard may also create a perverse incentive to "dumb down" technology in order to create a shield against antitrust suits. Cable broadband is a shared system, meaning that a greater number of ISPs using it will tend to decrease transmission speeds.[109] In the absence of mandated open access, cable companies may choose to use less than optimal architecture components such as non-state-of-the-art routers so as to save short-term costs and more importantly, to have in place an architecture they can assert does not accommodate multiple ISPs.[110] This could shield cable companies from antitrust suits as they could argue that denial of access to ISPs is determined by economic and technological considerations, not competitive animus.[111] Such a calculus may protect

---

[108] *Id.* at 867–68.

[109] *See supra* note 50.

[110] Lessig Brief, *supra* note 31, at 23–25.

[111] *Id.* at 26 (analogizing to Microsoft, Lessig asserts inferentially that a monopolist in control of an industry standard could argue that technological limitations justify its prac-

cable broadband companies in court, but would surely discourage deployment of the most innovative router and other network components.

This argument has been extended more generally in support of open access by industry experts. MCI's Executive Vice President and General Counsel, Michael Salsbury, captures the view:

> The lesson here regarding the long distance industry, the local marketplace, and the Internet, is what I would call the lesson in open platforms. Where policymakers create and maintain open markets, where a multiplicity of providers and users can interact in a myriad of mutually beneficial ways, all will derive the full benefits of competition. This openness feeds on itself, multiplying the effect still further .... Just imagine, if you could, how history would have been changed profoundly if the two graduate students who created Mosaic—the software underlying the world's first Web browser for Netscape—had been prevented from bringing the fruits of their innovation to the open platform of the Internet.[112]

E. *Ex Post Intervention Is Inefficient*

As stated earlier, ex post intervention may be less efficient if the market does in fact "tip" towards a dominant standard. This is because large scale investments are made in the equipment and design markets of the losing architecture as well as in their application markets—investments that might otherwise be harnessed to the winning standard—which may have limited or no use to the dominant standard. In addition, many consumers who choose the "losing" architecture are nevertheless reluctant to switch to the winning architecture for convenience reasons, thus perpetuating expenditures and reliance on systems that have little future market. Further ex post efforts in the courts and legislatures often take many years, cost enormous sums of money, and create market uncertainty during their pendency. The legislative and legal action surrounding the divestiture of the AT&T monopoly and efforts to open up the Regional Bells—under essential facility-like theories—consumed decades and untold sums of money.[113] By contrast, an open-access regimen for cable operators in Canada, which was imposed ex ante, has avoided many of these protracted battles and costs.[114]

---

tices, which can, in turn, provide the basis for an affirmative defense in an antitrust action).

[112] *Internet Freedom Act Hearing I*, *supra* note 5, at 60–61 (prepared statement of Mike Salsbury, MCI).

[113] FCC REPORT, *supra* note 2, at 45. For discussion about continuing legal disputes over the statutes and regulations, see Sloan, *supra* note 11.

[114] FCC REPORT, *supra* note 2, at 45.

F. *Regulatory Parity Is Efficient*

Finally, there is a present regulatory asymmetry: the RBOCs, but not the cable companies, are required under the 1996 Act to provide open access for their communications services, including their broadband services.[115] This asymmetry arguably provides an unfair government subsidy to cable providers that can distort the competitive marketplace's natural selection of winners and losers.[116] This handicap may discourage investment in the RBOCs' broadband construction,[117] as investors are likely to believe the government-imposed handicap on the RBOCs will reduce their return.[118] Such a "hedging" by investors is likely to impede the benefits of fair competition, in which investment in technologies would be dictated by innovative prowess, not government subsidy.

III. ANALYSIS

The lynchpin of the open access argument is that cable broadband is likely to achieve monopoly power in the Internet architecture market, which it is then likely to abuse. Such attainment of market power would only result if the market tips towards a cable broadband market. All indicators, however, point to brisk competition between broadband architectures.[119] Further, considerable data suggests that the potential for continued vigorous competition between the vying architectures would be constrained by heavy-handed ex ante government regulations.[120]

Projections of tipping are highly unreliable because of uncertainties in the technology. For example, if cable broadband can solve the problem of signal degradation with large numbers of users, then it may have an edge; alternatively, if DSL technologies, such as VDSL, can match its upstream speeds with downstream speeds and lengthen the operating radius from the central office, then RBOCs may have a competitive technology because it can be deployed over existing telephony networks and does not require the construction of an entirely new network. In addition, it is not known how the elasticity of consumers' demand for DSL changes as bandwidth increases. Consumers may not have a high demand for the fastest broadband speed at premium costs; if not, then less expensive DSL technologies, such as G-Lite, may be better situated to capture large shares of the market.

---

[115] Telecommunications Act of 1996, Pub. L. No. 104-104, §§ 251, 271, 110 Stat. 56.

[116] *Internet Freedom Act Hearing I*, *supra* note 5, at 22–23 (prepared statement of William Barr).

[117] *Id.* (prepared statement of William Barr).

[118] *Id.* (prepared statement of William Barr).

[119] FCC REPORT, *supra* note 2, at 23-30; KAGAN MEDIA, *supra* note 42, at 8-19.

[120] *See* FCC REPORT, *supra* note 2, at 33.

A. *Ex Ante Intervention May Discourage Investments in Competing Technologies Producing Network Effects*

The most undesirable result that premature regulatory intervention could produce is the disincentive to invest in competing architectures, as would-be competitors may choose to simply "free ride" on the cable network rather than invest in expensive competing facilities.[121] Ironically, such ex ante intervention could thereby encourage network effects and dominant standards that open access advocates supposedly denounce.[122] In fact, it is the absence of cable competition that dissuaded the RBOCs from investing in DSL technology in the 1980s for fear of cannibalization of its T-1 lines.[123] This assessment was echoed recently by the FCC:

> The ILECs (incumbered local exchange careers, generally the RBOCs) aggressive deployment of DSL can be attributed in large part to the deployment of cable modem service. Although the ILECs have possessed DSL technology since the late 1980s, they did not offer the service for concern that it would negatively impact their other lines of businesses.[124]

Last year, the FCC convened a series of monitoring sessions made up of industry representatives across a wide spectrum of technology companies to discuss the emergence of the broadband marketplace.[125] As a result of the meetings, the FCC found that there was "little disagreement among the panelists that cable investment inherently spurs investment in DSL and vice versa."[126] Even Wall Street observers have noticed the healthy competition brought on by a competitive marketplace: "We detect a dramatic change in the attitude of the local phone companies toward DSL deployment . . . [T]here are several forces driving the local phone companies to accelerate their DSL deployment. Most notable is the rollout of cable modems by cable companies. . . ."[127]

Indeed, the pace of DSL deployment has been unprecedented since the advent of the cable broadband rollout.[128] @Home, AT&T's ISP

---

[121] *Id.*; *Internet Freedom Act Hearing I*, *supra* note 5, at 55.

[122] In an open-access regime, a cable network would not be able to engage in exclusionary behavior or leveraging actions to which open access advocates most forcefully object.

[123] *Internet Freedom Act Hearing II*, *supra* note 3, at 7 (prepared testimony of Robert Sachs).

[124] *Id.* (prepared testimony of Robert Sachs).

[125] FCC REPORT, *supra* note 2, at 31.

[126] *Id.* at 33.

[127] J.P. Morgan Report, *DSL: The Bells Get Serious, 1999 promises to be the year of the DSL Deployment*, Mar. 19, 1999. For further discussion, see KAGAN MEDIA, *supra* note 42, at 8-13.

[128] *Internet Freedom Act Hearing I*, *supra* note 5, at 55; KAGAN MEDIA, *supra* note 42, at 8–13.

affiliate, announced its rollout of cable broadband service in San Francisco in September 1997.[129] By November 1997, PacBell, the regional bell company, followed suit offering its version of DSL.[130] @Home announced cable broadband service for San Diego in early 1997,[131] and PacBell followed in September 1998.[132] Likewise, it was not until @Home launched its cable broadband offering in Phoenix in May 1997,[133] and Denver in June 1998,[134] that US West followed with its DSL rollout in October 1997[135] and June 1998.[136] SBC accelerated its deployment timetable by two years and reduced its price by over 30% to $21.95 per month (for DSL speeds of 384 kbps).[137] Similarly, US West in May dropped its price for 256 kbps DSL service 25% to only $29.95 per month, indicating a competitively healthy market delivering efficiencies to the consumer.[138] ISPs, such as AOL, have also announced deals with Hughes Electronics and others to develop satellite and fiber facilities.[139] Only since cable's aggressive pursuit of the broadband gold have these alternate network architectures increased.

Some projections indicate that the RBOCs' competitive advantage in being able to offer incrementally increasing prices according to incrementally increasing speeds—an advantage that telephony DSL technologies have over the cable architecture—will mean that DSL may achieve parity of market share with cable broadband by the year 2002,[140] but only if the DSL industry has the competitive incentive to develop their own broadband networks.[141] After pulling together industry experts, the FCC observed:

> [I]t is fairly clear that the rate of deployment of one technology influences the rate of the other . . . [M]oreover, it appears that

---

[129] *Internet Freedom Act Hearing I*, *supra* note 5, at 55; KAGAN MEDIA, *supra* note 42, at 8–13.

[130] *Internet Freedom Act Hearing I*, *supra* note 5, at 55; KAGAN MEDIA, *supra* note 42, at 8–13.

[131] *Internet Freedom Act Hearing I*, *supra* note 5, at 55; KAGAN MEDIA, *supra* note 42, at 8–13.

[132] *Internet Freedom Act Hearing I*, *supra* note 5, at 55; KAGAN MEDIA, *supra* note 42, at 8–13.

[133] *Internet Freedom Act Hearing I*, *supra* note 5, at 55; KAGAN MEDIA, *supra* note 42, at 8–13.

[134] *Internet Freedom Act Hearing I*, *supra* note 5, at 55; KAGAN MEDIA, *supra* note 42, at 8–13.

[135] *Internet Freedom Act Hearing I*, *supra* note 5, at 55; KAGAN MEDIA, *supra* note 42, at 8–13.

[136] *Internet Freedom Act Hearing I*, *supra* note 5, at 55; KAGAN MEDIA, *supra* note 42, at 8–13.

[137] KAGAN MEDIA, *supra* note 42, at 11–12.

[138] *Internet Freedom Act Hearing I*, *supra* note 5, at 55 (statement of Mark Rosenblum, Vice President, AT&T).

[139] *Id.* (statement of Mark Rosenblum).

[140] *Id.* at 3 (prepared testimony of Robert Sachs).

[141] FCC REPORT, *supra* note 2, at 33.

> the lack of an "open access" requirement for cable-delivered broadband services has pushed independent ISPs to enter into agreements with non-cable broadband services [sic] providers and thereby has accelerated the pace of deployment. Specifically, there is encouraging evidence that independent ISPs are entering into agreements with LECs and CLECs, and satellite providers to deliver high-speed Internet access.[142]

B. *Ex Ante Intervention may Dampen Investor Enthusiasm in Cable Architecture, Thereby Limiting the Innovative Potential of that Architecture*

In addition to discouraging investment in competing infrastructures, government regulation of price and access may also hinder private investment in the cable broadband infrastructure.[143] Investors may be more reluctant to invest in the cable architecture where potential returns are encumbered with government price regulations.[144] During a Congressional hearing last fall, AT&T declared that government regulations would "discourage, rather than encourage, investment and competition, and harm rather than help consumers."[145] The cable industry publicly warned that even a "light touch" of regulation will undermine Wall Street confidence in investment, which is needed to encourage investment.[146]

C. *Nondiscriminatory Pricing may Defeat Economies Of Scale that Could be Passed on to Consumers*

An ex ante government regulation that mandates open access to the cable network for all ISPs on a one-size-fits-all nondiscriminatory basis may also distort natural marketplace forces that would otherwise optimize benefits to consumers.[147] For example, a broadband provider may

---

[142] *Id.* at 46.

[143] *Id.* at 33; *see also Internet Freedom Act Hearing I*, *supra* note 5, at 97 (prepared testimony of Tod Jacobs, Senior Telecommunications Analyst, Sanford C. Bernstein & Co., Inc.).

[144] FCC REPORT, *supra* note 2, at 33; *see also Internet Freedom Act Hearing I*, *supra* note 5, at 97 (prepared testimony of Tod Jacobs).

[145] *Internet Freedom Act Hearing I*, *supra* note 5 (statement of Mark Rosenblum).

[146] FCC REPORT, *supra* note 2, at 34.

[147] Included among the difficulties in adopting an open-access requirement is that there is no consensus as to how to define open access. One model could be to simply require that a network owner be forbidden from allowing an ISP to contract for Internet service over its network. This de minimus approach may, however, lend itself to exclusionary schemes whereby a network owner could engage in de facto exclusionary practices simply through price discrimination, e.g., charging prohibitive access fees to ISPs it seeks to exclude. Another model might require "nondiscriminatory" access, which would prohibit the network owner from charging differing rates to ISPs, and therefore would ensure a competitive level playing field. The problem with this approach is that, as stated above, it ignores plau-

discount access for an ISP that, because of superior service, can attract a large number of subscribers. The ISP may seek to build on its success by offering its subscribers discounted rates or services, such as video webcasting, interactive products or superior system caching. An ex ante government regulation requiring nondiscriminatory open access could prevent such desirable consumer benefits derived from natural market dynamics.[148]

D. Ex Ante Government Intervention in Cable Broadband Would Establish a Bad Precedent of Government Regulation of Technologies that Have less than One Percent Market Share Simply Because they are Promising Technologies

Ex ante regulation of nascent systems that control less than 5% of the Internet access market—as cable broadband currently does—is also unprecedented in both the courts, through antitrust decrees, and in Congress, through mandated regulations.[149] Furthermore, such regulation at this point could send socially undesirable signals to entrepreneurs in new technologies that the federal government will establish price and access regulations not based on the conduct of the entrepreneur, but on the prospect of his or her technology achieving future dominance in the marketplace.

The efficiencies of government mandated price or access regulation are evident only when markets fail. Courts have mandated open access in the context of antitrust suits under an "essential facilities" doctrine when a monopolist denies access to a facility that is essential for commerce in a particular industry, and where the costs of entry are prohibitive (as was the case with the 1984 breakup of AT&T).[150]

When access is denied for anti-competitive reasons—in order to drive competitors out of business—a court may require open access in order to achieve the socially desirable results of increased competition, innovation, and lower consumer prices. However, neither the courts nor

---

sible marketplace rationales for offering differing fees to ISPs for volume discounts and other potentially valid reasons. Finally, there are hybrid approaches, similar to those attempted in the 1996 Act for opening up the local RBOC monopoly, which are not easy to extrapolate to broadband networks because of the differing nature of local telephony and broadband networks. The FCC has acknowledged that defining a standard could invite controversy. FCC REPORT, *supra* note 2, at 36.

[148] *Id.*

[149] AMERICAN BAR ASSOCIATION, *supra* note 97, at 276–82. Legal mandates to open facilities have occurred in exceedingly rare circumstances and only in instances where a firm achieved market power control over a facility whose access was deemed essential for competitors to compete in the marketplace. *Id.*

[150] U.S. v. American Tel. & Tel., Co., 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.*, 460 U.S. 1001 (1983) This case is sometimes referred to as the Modification of Final Judgment ("MFJ").

Congress have ever imposed such requirements where a market share is so negligible and where the promise of competition is evident.

Current, vibrant competition within the ISP market will likely further accelerate competition between broadband competitors. The FCC notes that "[w]e also believe that customer demand for choice ultimately will compel cable operators to open their systems to unaffiliated ISPs."[151] Furthermore, there is no indication that AT&T plans to engage in exclusionary behavior. Indeed, it is reasonable to argue that after investing tens of billions of dollars in broadband structure, AT&T would want to include AOL's 18 million customers and the tens of millions of other Internet subscribers who utilize other ISPs.[152]

While in a perfect world, a non-proprietary open access regime is the preferred network facilities paradigm because it invites optimal innovation and competition, it is preferable when it is privately employed rather than government-mandated on a non-monopoly market,[153] as investors are likely to be circumspect if new systems with promising prospects are encumbered with regulation.[154] Furthermore, the one major benefit of open systems—the right of others to develop application technologies and services that integrate with the proprietary closed system—is, to a large extent, protected by the fair use doctrine in copyright law. While the fair use doctrine will not provide any relief to those who may be denied access to the network, it may protect the right of equipment manufacturers and software developers to develop systems applications, such as routers and search engines.[155]

E. Leveraging Is Effectively Discouraged by Existing Antitrust Laws

The theoretical concerns that a putative broadband monopolist could leverage power into adjacent markets may be sufficiently addressed by existing antitrust laws. Such laws prevent the exploitation of market power to dominate adjacent markets through bundling or tying schemes.[156] Microsoft's illegal use of its market power in operating systems to leverage control in the Web browser market and other applications, and the consequent ruling that such conduct is illegal, provides ample notice that bundling or tying by a monopolist in order to leverage into secondary markets is considered impermissible in high technology industries.[157] In the aftermath of the Microsoft suit, prudent executives are unlikely to

---

[151] FCC REPORT, *supra* note 2, at 42.

[152] *Id.* at 35.

[153] For a discussion of inefficiencies of government regulations requiring open access in the broadband market where there is no monopolistic control of an essential facility, see *id.* at 41–46.

[154] *Id.* at 33–34 (prepared testimony of Tod Jacobs); *see also supra* note 143.

[155] *See* 17 U.S.C. § 107.

[156] AMERICAN BAR ASSOCIATION, *supra* note 97, at 282.

[157] U.S. v. Microsoft Corp., 84 F. Supp. 2d 9 (D.D.C. 1999).

invite the threat of litigation and onerous discovery that impermissible leveraging would bring.[158]

F. *Regulatory Parity Is an "Apples and Oranges" Argument*

The notion of regulatory parity between competitors makes intuitive sense in efficiency terms because a level playing field will promote fair competition. But it does not necessarily follow that the RBOCs' regulatory burden should be extended to cable broadband. The telephone open access requirements exist because incumbent local carriers still control over 98% of a non-price-regulated telephone market,[159] and are designed to cure the monopolistic entry barriers of the entrenched local telephone incumbents. In the absence of any showing of entry barriers or anticompetitive exclusion, the importation of a regulatory regimen designed for a particular market circumstance (monopoly control over the local telephone service) to an entirely different market circumstance (the cable broadband network which controls less than 5% of Internet traffic) has little merit. Furthermore, there is no evidence of "investor hedging in the DSL market explainable by the lack of regulatory parity with the cable industry."[160] To the contrary, DSL investments continue to soar.

G. *Defining Terms of Open Access Could be Elusive and Time-Consuming and Could Trigger Years of Costly Litigation and Marketplace Uncertainty*

While ex post antitrust litigation is time-consuming and costly, creating a regulatory framework to implement open access may bring its own litigation and transaction costs,[161] as was witnessed in the open access requirements for local telephony in the 1996 Act.[162] A similar effort with cable broadband could create years of legislative stalemates over definitions, investor uncertainty and hedging while the legislation is pending, and could encourage litigation after it passes. Canada's experience in legislatively mandating open access for its cable systems is a

---

[158] *Discovery and the Non-Party; Effective Use of Existing Protections Can Guard Against Unwarranted Expenses*, NAT'L L.J., June 26, 2000; *see also* Jerold S. Solovy & Robert L. Byman, *Digital Discovery*, NAT'L L.J., Dec. 27, 1999, at A16.

[159] *See Antitrust Hearing*, *supra* note 11 (prepared Statement of Joel I. Klein, Assistant Attorney General of the United States). *See generally* Sloan, *supra* note 11; *Internet Freedom Act Hearing I*, *supra* note 5, at 101 (prepared statement of Tod Jacobs).

[160] *Internet Freedom Act Hearing I*, *supra* note 5, at 101 (prepared statement of Tod Jacobs).

[161] FCC REPORT, *supra* note 2, at 38.

[162] *Id.* at 45. For discussion of continuing legal disputes over the statutes and regulations, see Sloan, *supra* note 11.

story of endless fighting in the courts and legislature, and thus, mounting costs and uncertainties in the markets.[163]

H. *There Is No Evidence that AT&T is Dumbing down Routers or Other Network Elements in Order to Justify Denying Access to Unaffiliated ISPs*

It would appear to be self-defeating for cable companies to use inferior routers and other network components to justify denying access to unaffiliated ISPs, as such self-handicapping could impede the economic reality of a network that will see ever increasing demand for capacity. Cable's own technological problems inherent in the cable architecture dictate that they will need as much "juice" as technology will afford them in order to solve the natural bottlenecks inherent in shared systems.[164] "Dumbing down" their architecture would be the management decision equivalent to "cutting off the nose to spite the face," especially in the current rush for greater speed. In fact, the FCC found no evidence that AT&T would develop an architecture that would foreclose modifications to allow ISPs to use its pipeline.[165]

IV. PROPOSAL: A "REGULATORY-LITE" APPROACH WOULD CREATE A SOCIALLY DESIRABLE BALANCE

On balance, it appears that prospective, or ex ante, regulation of a now competitive market could discourage investment without achieving any appreciable competitive protections. It would be unwise to embark on an open access regime like that required by the 1996 Act. The efficiencies brought on by free market competition should not be subject to government regulation in the absence of market failure or monopolistic abuse, and certainly not due to mere anticipation that a particular technology—which commands a mere 5% of the market today[166]—will achieve a dominant market share. Such regulation would tend to discourage investment in competing facilities and technologies, and would bog down market players in time-consuming and costly lobbying of legislators and litigation in the courts.

Nevertheless, it is important to acknowledge the undesirable effects of market tipping—where the market cannot sustain more than one

---

[163] FCC REPORT, *supra* note 2, at 45.

[164] ESBIN FCC PAPER, *supra* note 1, at 76–77.

[165] *See* FCC REPORT, *supra* note 2, at 43.

[166] In October 1999, the FCC estimated that all broadband users (including DSL and wireless) constituted only 3% of all Internet subscribers. FCC REPORT, *supra* note 2, at 34. *But see* KAGAN MEDIA, *supra* note 42, at 3 (predicting that broadband customers could dramatically increase to 12.5% of all Internet subscriptions—over 6 million subscribers—by the end of 2000).

dominant architecture—in favor of cable broadband. Undesirable network effects involving a single proprietary or closed standard could stifle innovation in the ISP and network equipment markets, enable undesirable control of Internet content, and invite a host of possible monopolistic abuses, such as leveraging.

The single greatest danger of the free market approach is that dynamic industries in the high tech arena may tip rapidly.[167] While there is no evidence of tipping at the present time,[168] the catastrophic consequences of early tipping are arguably more severe than those of premature legislation as "unscrambling the egg" becomes exceedingly difficult. Rubinfeld explains the benefits of ex ante intervention:

> [I]f it is appropriate for antitrust to intervene in tipping markets, it is essential that intervention take place at an early stage. Once the point is passed at which expectations in the marketplace have been significantly affected, it will be more difficult to intervene successfully. One implication of this is that it can be easier and more effective from a policy perspective to open existing interfaces, for example, by requiring that operating system APIs (application programming interfaces) be made publicly available at an appropriately early date than it will be to change an existing standard. Second, intervention can be inefficient, particularly in the long run, if it penalizes dominance that is the result of innovative efforts and not the result of fortuitous events or anticompetitive practices. Such a policy will "have the effect of taxing technological improvements," and taxing something generally means you get less of it. (To be sure, ill-considered intervention can also be inefficient even in the short run, to the extent that it prevents even a dominant firm from responding aggressively, but fairly, to competition.).[169]

The trick, then, is to have in place a competitive safety net in the event of such early and rapid tipping, that will not deter investment in competing technologies. The optimal balance of such competing needs is to have an administrative mechanism that allows government action only when necessary, but more rapidly than the courts or Congress would be able to act in the event of early tipping.

---

[167] *See* Daniel L. Rubinfeld, Former Deputy Assistant Attorney General for Antitrust, Competition, Innovation, and Antitrust Enforcement in Dynamic Network Industries, Address to the Software Publishers Association 12-13 (1998), *at* http://www.usdoj.gov/atr/public/speeches/1611.htm.

[168] *See supra* note 166.

[169] Rubinfeld, *supra* note 103, at 871–72.

This could be achieved easily by amending section 716 of the 1996 Act,[170] which gives the FCC an undefined mandate to ensure the deployment of advanced telecommunications services such as broadband. A modest legislative fix could clarify the otherwise oblique authority of the FCC, together with the Department of Justice, to step in and require open access remedies through administrative rulemaking only if necessitated by a possibility of monopoly power.[171]

In order to maintain investor confidence that the markets will remain unburdened with regulations, it would be necessary to have a standard of restraint unless (1) one architecture shows an imminent danger of monopolistic power, and (2) the dominant architecture network owner engages in undesirable conduct such as exclusionary behavior, leveraging or content restrictions. Such authority should not be triggered merely because of access price differentials for ISPs, which may be economically justified.

The benefit of such a system is that it maintains a sufficient competitive tension between architecture owners for them to compete vigorously. It also will serve the productive purpose of assuring investors in equipment and service markets that they are unlikely to be excluded from Internet access, thus encouraging them to innovate. We should not fear that such a regulatory-lite approach will discourage cable investors, as it is undesirable to encourage investors who bank on reaping the profits of monopolistic abuse or other anticompetitive conduct. This regulatory-lite approach would also address concerns regarding regulatory parity by placing cable operators on par with the local telephone monopoly only if the cable network and broadband network achieve parity in market power in the broadband market.

Finally, such an approach remains neutral on whether network effects of a single standard are more or less efficient for the Internet economy, but stands for the proposition that if network effects do occur in this vital industry, the system will not be closed so as to stifle the creativity and ingenuity that is the mothers' milk of the Internet miracle.

V. CONCLUSION

The difficulty for policymakers seeking optimal social benefits in the Internet economy is predicting how markets will respond to new innovations. It is generally unwise to encumber nascent systems with burdensome regulations to protect competition before the potential for market share can be adequately assessed. However, dynamic markets such as the Internet economy move more rapidly than non-dynamic markets. While such markets are engines of innovation, early tipping can occur in such a

---

[170] Telecommunications Act of 1996, Pub. L. No. 104-104, § 716, 110 Stat. 56.

[171] *See* AMERICAN BAR ASSOCIATION, *supra* note 97, at 276–82.

way as to severely impair competition, innovation and the free flow of information. In such cases, ex ante intervention should be swift and surgical in order to restore the competitive vibrancy of the Internet economy.

ARTICLE

INFORMATION TECHNOLOGY IN THE WAR AGAINST INTERNATIONAL BRIBERY AND CORRUPTION: THE NEXT FRONTIER OF INSTITUTIONAL REFORM

STEVEN R. SALBU*

Bribery of public officials has become a worldwide epidemic, prompting an international debate on how to best combat corruption. In this Article, Professor Salbu surveys recent reform efforts aimed at curbing corruption. In particular, he discusses two broad categories of reform: legislative and institutional. Both domestic and extraterritorial legislation, he argues, have proven to be ineffective and inefficient. Instead of further legislative reform, efforts should be shifted to altering underlying institutions in order to remove incentives for corruption. Through the diffusion of information technology, the world can better monitor bribery, and a level of value convergence will be reached in which corruption is more universally disfavored.

I. THE DEBATE ON CORRUPTION

Bribery of public officials is a serious international problem.[1] While most scholars agree that we need to eliminate corruption, the means they recommend are varied,[2] and commentators often disagree about the merits of particular solutions.[3]

During the past few years, I have participated in this public policy debate in a series of law review articles. These articles have moved toward the recommendation of the present Article: that the next frontier of anti-corruption reform should be a shift from extraterritorial legislation

---

* Bobbie and Coulter R. Sublett Centennial Professor, University Distinguished Teaching Professor, University of Texas at Austin. Ph.D., Wharton School of the University of Pennsylvania, 1990; M.A., Wharton School of the University of Pennsylvania, 1986; J.D., College of William and Mary, 1980; M.A., Dartmouth College, 1980; B.A., Hofstra University, 1977.

[1] *See* David A. Gantz, *Globalizing Sanctions Against Foreign Bribery: The Emergence of a New International Legal Consensus*, 18 NW. J. INT'L L. & BUS. 457, 457 (1998).

[2] *See, e.g.*, Sarh J. Kpundeh & Irene Hors, *Corruption and Integrity Improvement Initiatives in Developing Countries*, U.N. Development Programme, Management Development and Governance Division, Bureau for Development Policy, *at* http://magnet.undp.org/Docs/efa/corruption.htm (last visited Aug. 27, 2000); Daniel Kaufmann, *Corruption: The Facts*, FOREIGN POL'Y, Summer 1997, at 114.

[3] *See, e.g.*, *infra* notes 5–6.

to institutional change generally, and to global information technology ("IT") diffusion specifically.

This stream of research began with a critique of the Foreign Corrupt Practices Act ("FCPA"), which focused specifically on the flaws of the statute as it existed in 1997.[4] Two subsequent articles suggested that even the least flawed extraterritorial legislation—the FCPA if it were perfected—would be troublesome in terms of both cultural imperialism[5] and transnational discord.[6] In this first set of writings on corruption, I joined a small minority of commentators suggesting that application of a universal rule of law in this arena is inadvisable and counterproductive.[7]

In a subsequent piece, I examined an important dynamic regarding extraterritorial legislation: the tension between claims of pluralism and evolving conceptions of community.[8] My most recent work examines institutional or structural dynamics that influence bribery and corruption, suggesting that legislation has been troublesome, and that more viable reforms may be effected through broader public policy changes.[9] Social conditions commonly viewed as causes or bulwarks of corruption, such as poverty[10] and low public-sector salaries[11] in developing nations, may be our most promising targets.[12] I have also focused recently on very precise public policy questions, recommending that reform efforts concen-

---

[4] Steven R. Salbu, *Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act*, 54 WASH. & LEE L. REV. 229 (1997) [hereinafter *Critical Analysis*].

[5] *See* Steven R. Salbu, *Extraterritorial Restriction of Bribery: A Premature Evocation of the Normative Global Village*, 24 YALE J. INT'L L. 223 (1999) [hereinafter *Premature Evocation*]. This Article was part of a colloquy with Professor Phil Nichols of the University of Pennsylvania. For his part of the exchange, see Philip M. Nichols, *Regulating Transnational Bribery in Times of Globalization and Fragmentation*, 24 YALE J. INT'L L. 257 (1999).

[6] *See* Steven R. Salbu, *The Foreign Corrupt Practices Act as a Threat to Global Harmony*, 20 MICH. J. INT'L L. 419 (1999) [hereinafter *Threat to Global Harmony*]. This Article was part of an exchange with Professor Phil Nichols. For Professor Nichols's side of the discussion, see Philip M. Nichols, *Are Extraterritorial Restrictions on Bribery a Viable and Desirable International Policy Goal Under the Global Conditions of the Late Twentieth Century? Increasing Global Security by Controlling Transnational Bribery*, 20 MICH. J. INT'L L. 451 (1999).

[7] *See, e.g.*, David Kennedy, *The International Anti-Corruption Campaign*, 14 CONN. J. INT'L L. 455, 458 (1999) (critiquing the anti-corruption campaign on these and other grounds).

[8] Steven R. Salbu, *Battling Global Corruption in the New Millennium*, 31 LAW & POL'Y INT'L BUS. 47 (1999).

[9] Steven R. Salbu, *A Delicate Balance: Legislation, Institutional Change, and Transnational Bribery*, 33 CORNELL INT'L L.J. (forthcoming 2000) [hereinafter *A Delicate Balance*].

[10] *See* Sebastian Freiku, *Poverty, Recipe for Bribery and Corruption*, GHANIAN CHRON., Oct. 25, 1999, LEXIS AFR. NEWS SERV. (stating that bribery and corruption have been attributed to poverty in Ghana).

[11] *See* Charles Moskos, *Subsidize and Control Their Pay and Pensions*, U.S. NEWS & WORLD REP., Dec. 29, 1997–Jan. 5, 1998 (observing that, while raising public sector compensation isn't enough to expunge corruption, it is an "indispensable first step").

[12] *See A Delicate Balance, supra* note 9.

trate more on the demand side of bribery[13] than they have in the past, and that any extraterritorial legislation be curtailed to encompass only petty bribery.[14]

The present Article continues where these previous articles left off. It contends that the global diffusion of modern information technology is not only a desirable end in itself, but also a powerful weapon in the war against international bribery. The Article recommends that developed nations battling international corruption redirect resources toward the establishment and rapid diffusion of Internet technology throughout the world, and especially in nations with emerging economies.

Part II provides a brief background, exploring the issues presently facing the global economy with regard to bribery and corruption. Part III provides a history of the modern anti-corruption movement, looking at three types of change agents: corporations, non-government organizations, and governments. Part IV argues that anti-bribery legislation is both ineffective and inefficient. Part V suggests that the "frontier of the next frontier," i.e., of institutional change, is public policy aimed at optimizing the speed of global information technology diffusion. It then explains how enhanced information technology diffusion in developing nations can curb corruption, particularly when effective administrative supports are in place. Part VI concludes by discussing how enhanced access to global information technology would drive inclusive transnational colloquy by closing the global digital divide, thereby fostering a worldwide value convergence on corruption issues.

II. BACKGROUND

Imagine a place where the wealthiest people are government officials and state leaders, not entrepreneurs and business executives. Such places exist. In parts of Africa, for example, "the richest people . . . are heads of state and ministers," and corruption has made politics the most promising route to vast riches.[15]

Although these places may be the most prominent breeding grounds for bribery, they are not the only ones. Corruption remains a serious

---

[13] The demand side of bribery refers to demands or requests for bribes by public officials; the supply side of bribery refers to offers of bribes to public officials. A corrupt transaction can be initiated in either way. While the extraterritorial legislative approach criminalizes only the supply side, some suggest that most bribes are initiated by demand. *See, e.g.*, JYOTI N. PRASAD, THE IMPACT OF THE FOREIGN CORRUPT PRACTICES ACT OF 1977 ON U.S. EXPORT 29 (1993) ("On the basis of available information, one can conclude that corrupt payments are far more often asked of then [sic] offered by multinationals."). If this is true, the laws are likely to be ineffectual because they are poorly matched to the underlying realities of corrupt transactions.

[14] *See A Delicate Balance*, *supra* note 9.

[15] George B.N. Ayittey, *How the Multilateral Institutions Compounded Africa's Economic Crisis*, 30 LAW & POL'Y INT'L BUS. 585, 589–90 (1999).

problem in the United States,[16] though American government officials are probably less likely than officials in Africa to become wealthy by taking bribes.[17] Differences around the world are a matter of magnitude; beyond these differences, corruption is pandemic.[18]

Corruption is an age-old phenomenon.[19] One author dates government corruption to the first gathering of human beings into tribal councils.[20] What has changed is the attention the problem is receiving. Over the past several decades, the world has come to recognize corruption as a very serious political, social, ethical, and economic problem.[21] More than ever, countries around the globe are trying to hold high-level public officials accountable for accepting corrupt payments, through both criminal prosecution and loss of leadership position.[22]

Bribery causes an array of social ills, including waste of government and corporate resources,[23] market distortion,[24] sub-optimal resource allo-

---

[16] *See* FRANK ANECHIARICO & JAMES B. JACOBS, THE PURSUIT OF ABSOLUTE INTEGRITY: HOW CORRUPTION CONTROL MAKES GOVERNMENT INEFFECTIVE 9 (1996) (noting that corruption has always played a role in U.S. politics).

[17] For purposes of this discussion, a "bribe" will be defined as "an incentive offered to encourage someone to break the rules of an organization he nominally represents and deliver an (unfairly) favorable outcome." Elaine Sternberg, *Relativism Rejected: The Possibility of Transnational Business Ethics*, *in* EMERGING GLOBAL BUSINESS ETHICS 148 (W. Michael Hoffman et al. eds., 1994).

[18] *See* Sandrine Tolotti et al., *Nations United in Sleaze*, 43 WORLD PRESS REV. 18 (1996) (noting that virtually no government or "pressure group"—a group lobbying for change—is unsoiled by corruption).

[19] For a brief discussion of age-old corrupt practices, see Vito Tanzi, *Corruption Around the World: Causes, Consequences, Scope and Cures*, 45 INT'L MONETARY FUND STAFF PAPERS 559 (1998).

[20] DONALD N. WOOD, POST-INTELLECTUALISM AND THE DECLINE OF DEMOCRACY: THE FAILURE OF REASON AND RESPONSIBILITY IN THE TWENTIETH CENTURY 216 (1996).

[21] *See* Robert S. Leiken, *Controlling the Global Corruption Epidemic*, FOREIGN POL'Y, Winter 1996, at 55 (observing that the issue of corruption is being transformed by revolutionary shifts in public opinion).

[22] *See, e.g.*, Ellen J. Shin, Note, *The International Monetary Fund: Is it the Right or Wrong Prescription for Korea?*, 22 HASTINGS INT'L & COMP. L. REV. 597, 602–03 (1999) (describing the recent criminal prosecution of high-level Korean government officials); *Starting a New Way of Governing: President-elect Vincente Fox Quesada*, TIME INT'L, July 17, 2000, at 16 (describing the new Mexican leader's plan to reduce corruption in the nation's government).

[23] *See* Cynthia Kemper, *Law Aims at More than Bribes*, J. COM., Mar. 30, 1999, at 4A (quoting international lawyer James Preston that corruption "'diverts economic resources away from legitimate business competition'"); Nancy Bord, *International Corruption: So What?*, WORLD & I, Apr. 1999, at 86, 86 ("The losers from corruption are people who live in economies whose resources are wasted and whose political systems are hamstrung by institutions that condone and reinforce corrupt practices.").

[24] *See* Ernesto Hernandez-Cata, *The Role of Multi-Lateral Institutions in African Development*, 30 LAW & POL'Y INT'L BUS. 708, 709 (1999) (discussing bribery in relation to market distortions).

cation,[25] unfair competition,[26] faulty or dangerous public works,[27] lapses in exercise of regulatory responsibility,[28] discouragement of investment,[29] economic underdevelopment,[30] poverty,[31] and the undermining of government legitimacy,[32] democracy,[33] and rule of law.[34]

These products of corruption feed and exacerbate future corruption. The interaction between poverty and corruption is a good example of this cyclical effect. Bribery increases poverty by shifting resources to the corrupt elite and away from the masses.[35] Poverty then encourages more corruption, as underpaid minor public officials seek sustenance by taking illicit payments.[36] The increase in corruption again increases poverty, completing a self-perpetuating cycle.

---

[25] Resources that ostensibly are going to public benefit are diverted to private benefit, reducing the quality and cost-effectiveness of public works. *See* NEIL H. JACOBY ET AL., BRIBERY AND EXTORTION IN WORLD BUSINESS: A STUDY OF CORPORATE POLITICAL PAYMENTS ABROAD 142 (1977) (noting that bribery entails investment for private rather than public benefit).

[26] *See* Jong Bum Kim, *Korean Implementation of the OECD Bribery Convention: Implications for Global Efforts to Fight Corruption*, 17 UCLA PAC. BASIN L.J. 245, 248 (1999/2000) (observing that corruption in Korea in the late 1990s undermined fair competition in that economy).

[27] *See* JEFFREY P. BIALOS & GREGORY HUSISIAN, THE FOREIGN CORRUPT PRACTICES ACT: COPING WITH CORRUPTION IN TRANSITIONAL ECONOMIES 147 (1997) (explaining "deadweight losses" associated with bribery, which entail purchasing inferior products).

[28] *See, e.g.*, MARSHALL B. CLINARD, CORPORATE CORRUPTION: THE ABUSE OF POWER 124 (1990) (discussing reports of bribes to Italian Ministry of Health officials that led to the approval of new pharmaceuticals).

[29] *See* Paul Starobin, *Why Putin Has to Bust the Bureaucrats*, BUS. WK. INT'L ED., Aug. 14, 2000, *available at* 2000 WL 24484647 (attributing a loss of billions of investment dollars in Russia to foreigners' fears of shakedowns).

[30] *See Bribonomics*, ECONOMIST, Mar. 19–26, 1994, at 86 (associating bribery with slowing of economic growth in most circumstances); Justin Pugsley, *Corruption Under the Light*, PROJECT FIN., Sept. 1999, at 34 (noting that organizations such as Transparency International and the World Bank believe corruption hinders economic growth).

[31] *See* Michael Smith, *Call to Step Up Fight on Offshore Bribery*, SUNDAY BUS., Aug. 29, 1999, at 7 ("'Bribery and corruption contribute to world poverty and bring no economic value to a business transaction. They are like a tax.'") (quoting Caux Round Table Chairman Winston Wallin).

[32] Ángel Ricardo Oquendo, *Corruption and Legitimation Crises in Latin America*, 14 CONN. J. INT'L L. 475, 475 (1999).

[33] *See* Brian C. Harms, Note, *Holding Public Officials Accountable in the International Realm: A New Multi-Layered Strategy to Combat Corruption*, 33 CORNELL INT'L L.J. 159, 161 (2000) (calling corruption a serious threat to the establishment of democratic regimes).

[34] James Wolfensohn, *A Back-to-Basics Anti-Corruption Strategy*, 3 ECON. PERSP. 4 (Nov. 1998), *at* http://www.usinfo.state.gov/journals/ites/1198/ijee/wolfen.htm.

[35] *See* J. Brian Atwood, *Corruption: A Persistent Development Challenge*, 3 ECON. PERSP. 4 (Nov. 1998) (stating that Nigeria's infrastructure and social services have deteriorated because corruption diverts funds from public coffers), *at* http://www.usinfo.state.gov/journals/ites/1198/ijee/atwood.htm.

[36] *See* Colloquy, *The Experts Roundtable: A Hemispheric Approach to Combating Corruption*, 15 AM. U. INT'L L. REV. 759, 780–81 (2000) (containing observations of Ambassador Beatriz M. Ramaccioti that corruption and poverty are interdependent and that corruption exacerbates unequal distribution of wealth by diverting funds from the masses "to the enrichment of private interests").

The effects of corruption also reinforce one another, as when artificially high contract prices fuel hyperinflation, reductions in gross national product and per capita income, and unemployment.[37] Moreover, corruption in specific sectors may lead to particular social ills. For example, Posner refers to corruption of police as a "key business method[]" of organized crime that supports not only illicit businesses like "loansharking, prostitution, gambling, and narcotics," but also the infiltration of organized crime into legitimate fields.[38]

According to one recent source, multinational companies set aside substantial portions of foreign project budgets for the payment of bribes.[39] A growing global recognition of the severity of this problem[40] is both reflected in and attributable to efforts of groups such as Transparency International, whose annual corruption surveys rank nations in a "Corruption Perceptions Index"[41] and a "Bribe Payers Index."[42] During the recent period of increasing awareness, advocacy groups and other commentators have suggested a variety of institutional and legislative reform measures to reduce corruption around the world.[43]

The anti-corruption movement does have its detractors. Rajagopal, for example, views the entire anti-corruption discourse as "re-legitimating particular conceptions of development, rule of law, democracy and human rights that are elitist, statist and Eurocentric."[44] Anderson refers in passing to arguments that bribery serves valuable social functions, including the promotion of commerce in some regions and among some

---

[37] Konyin Ajayi, *On the Trail of a Spectre-Destabilization of Developing and Transitional Economies: A Case Study of Corruption in Nigeria*, 15 DICK. J. INT'L L. 545, 546 (1997).

[38] RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 242 (4th ed. 1992).

[39] *See* Graham Lawton, *Fighting Back Against the Bribery Culture*, CHEMISTRY & INDUSTRY, Dec. 7, 1998, at 957 (noting that some companies routinely set aside as much as 20% of foreign project budgets for bribes).

[40] *See* Stephen H. Willard et al., *International Investment, Development, and Privatization*, 33 INT'L LAW. 231, 240 (1999) (describing anti-bribery and anti-corruption "major initiatives" in 1998).

[41] For the most recent version, see TRANSPARENCY INT'L, 1999 CORRUPTION PERCEPTIONS INDEX, *at* http://www.transparency.de/documents/cpi/index.html (last modified Aug. 23, 2000).

[42] For the most recent version, see TRANSPARENCY INT'L, BRIBE PAYERS INDEX (ranking 19 leading exporters), *at* http://www.transparency.de/documents/cpi/index.html (last modified Aug. 27, 2000). *See also* Press Release, Transparency Int'l, New Poll Shows Many Leading Exporters Using Bribes (Oct. 26, 1999) [hereinafter *New Poll*], *available at* http://www.transparency.org/documents/cpi/cpi-bpi_press-release.html.

[43] Most extant legislative reforms are aimed exclusively at one particular form of corruption: bribery of public officials. This focus is significant given the fact that bribes to private parties can incur many of the same costs that are associated with bribes to public officials. *See, e.g.*, D. Kirk Davidson, *When Does a Gift to a Doctor Become a Bribe?*, MKTG. NEWS, Apr. 24, 1995, at 15 (discussing the conflict of interest when prescription drug sales representatives provide gifts to doctors, potentially undermining the doctors' objectivity in prescribing drugs).

[44] Balakrishnan Rajagopal, *Corruption, Legitimacy and Human Rights: The Dialectic of the Relationship*, 14 CONN. J. INT'L L. 495, 496 (1999).

groups.[45] In addition, although globalization has benefited some countries, it has also worked to the detriment of others,[46] arousing suspicion of Western-driven anti-corruption initiatives.[47]

Naysayers, however, are the exception rather than the rule in the realm of anti-corruption colloquy. Only a small minority of commentators oppose the movement in principle.[48] Part III presents a brief history of the modern anti-corruption reforms that have arisen from the majority's pleas for change.

III. THE MODERN ANTI-CORRUPTION MOVEMENT

Widespread criticism of corruption has led to a modern global reform movement that began in the last quarter of the twentieth century. This movement has developed in various organizational forums, including private firms, non-governmental organizations ("NGOs"), and governments.[49]

A. Private Firms

Passage of the Foreign Corrupt Practices Act in the late 1970s[50] spurred some United States companies[51] to adopt a variety of compliance

---

[45] *See* David A. Anderson, *The Aggregate Burden of Crime*, 42 J.L. & ECON. 611, 613 (1999) (acknowledging arguments that bribery may promote commerce and that "particular religions, age groups, and special interest groups would each have a perspective on what should be punishable under the law").

[46] *See* Jim Chen, Commentary, *Globalization and Its Losers*, 9 MINN. J. GLOBAL TRADE 157, 161–62 (2000) ("[G]lobalization has subordinated people, places, and things to skills, mobility, and ideas. Insofar as this shift widens the gap between haves and have-nots, globalization bears the blame for the fading of the dream of development as a universal norm.").

[47] *See* Barbara Crutchfield George et al., *On the Threshold of the Adoption of Global Antibribery Legislation: A Critical Analysis of Current Domestic and International Efforts Toward the Reduction of Business Corruption*, 32 VAND. J. TRANSNAT'L L. 1, 19 (1999) (noting that critics have grown weary of U.S. promotion of the FCPA abroad and that they have accused the U.S. of engaging in ethical imperialism).

[48] *See* Mark J. Murphy, *International Bribery: An Example of an Unfair Trade Practice?*, 21 BROOK. J. INT'L L. 385, 422 (1995) ("Most of the world condemns bribery as wrong.").

[49] These different organizational forums, as venues for change, reflect a broader question in business ethics regarding the extent to which moral behavior should be encouraged by external forces, such as governments and NGOs, or by corporations, or both. *See* Chiaki Nakano, *Attempting to Institutionalize Ethics: Case Studies from Japan*, 18 J. BUS. ETHICS 335, 335 (1999) (discussing two main approaches to making businesses more ethical: use of external force via government and activist groups, and internal ethics-oriented corporate policymaking).

[50] 15 U.S.C. §§ 78dd-1, 78dd-2 (1977).

[51] While some companies have developed policies in response to the FCPA, many more have declined to make any salient changes. *See* Mary Jane Sheffet, *The Foreign Corrupt Practices Act and the Omnibus Trade and Competitiveness Act of 1988: Did They Change Corporate Behavior?*, 14 J. PUB. POL'Y & MKTG. 290, 294–300 (1995) (finding that most companies did not institute any formalized changes in response to the FCPA and

measures, including revised corporate policies, new accounting procedures, and reforms in the management of personnel.[52] Private companies have begun to articulate standards governing potentially corrupt practices, including gift-giving, bribery, conflicts of interest, and nepotism.[53] Some firms have developed elaborate sets of rules and regulations governing the tendering of consideration under a variety of conditions.[54]

Hess and Dunfee offer more generalized "C^2 Principles," patterned after the anti-apartheid Sullivan Principles.[55] These principles provide policies and procedures that companies can adopt to develop credible, coherent anti-corruption standards.[56] Relatively broad standards like the C^2 Principles are less likely to offend than highly elaborated rules and regulations, since they can adjust to subtle cultural differences.

In contrast, stricter, more specific and detailed rules have been adopted in some instances, but their advantages are offset by substantial disadvantages. The primary strength of a clearly articulated, precisely elaborated policy is its ability to provide employees with guidance and with specific solutions to difficult ethical challenges.[57] The biggest drawback is the classic disadvantage of bureaucracy: rigid and inflexible rules generally tend to encourage mindless conformity rather than to foster good-faith personal ethical engagement.[58]

As many companies tried to outlaw undesirable behaviors through systems of standards or corporate codes, others took a lighter-handed approach, attempting to imbue their corporate cultures with a basic sense of virtue and honor.[59] These companies have emphasized core values such

---

its subsequent amendments).

[52] Christopher F. Corr & Judd Lawler, *Damned if You Do, Damned if You Don't? The OECD Convention and the Globalization of Anti-Bribery Measures*, 32 VAND. J. TRANSNAT'L L. 1249, 1324–43 (1999).

[53] *See* Gary M. Wederspahn, *Exporting Corporate Ethics*, GLOBAL WORKFORCE, Jan. 1997, at 29 (observing that corporate standards governing many enumerated aspects of business ethics are intended to make ethical compliance routine).

[54] *See* David A. Andelman, *Bribery: The New Global Outlaw*, MGMT. REV., Apr. 1998, at 49, 50–51 (noting the importance of corporate compliance programs and company procedures that help employees understand the boundaries of corruption).

[55] David Hess & Thomas W. Dunfee, *Fighting Corruption: A Principled Approach—The C^2 Principles (Combating Corruption)*, 33 CORNELL INT'L L.J. (forthcoming 2000).

[56] *Id.*

[57] *See* Alison Maitland, *'Tis the Season to be Wary: Those Innocent-Looking Festive Hampers and Raffles Could be a Subtle Form of Corporate Bribery, says Alison Maitland*, FIN. TIMES, Dec. 16, 1999, at 20 (suggesting that a clear policy on gift-giving is an effective means of avoiding ethical violations among well-meaning but unwary workers).

[58] *See* Meg Greenfield, *Going By the Rules*, NEWSWEEK, Jan. 11, 1988, at 64 (observing that today, "we have rules—rules about gifts, dinner checks and freebies, rules that cover as many contingencies as the fertile and suspicious mind of an ethics cop can envision," and describing this as a "rote and reflex" approach to ethics, calculated to deter thinking).

[59] *See* Patrick E. Murphy, *Character and Virtue Ethics in International Marketing: An Agenda for Managers, Researchers and Educators*, 18 J. BUS. ETHICS 107, 110–11 (1999) (noting the capacity to translate individual virtues into part of a corporate culture).

as empathy, fairness, integrity, respect, and trust.[60] To the extent that these are universal values that exist across cultures, they can be inculcated and applied without disrespect to cultural differences.[61]

The melding of virtue ethics into a corporate culture is subtler than the imposition of highly detailed, inflexible corporate codes. Virtue approaches give greater leeway to decision-makers and actors to tackle difficult questions personally, exercising individual judgment in good faith. This is especially important when codes of conduct are inadequate to the task of understanding fine differences and distinctions in human behavior across the world's cultures.[62]

Indeed, bribery and corruption can be hard to define and delineate across subtle cultural lines.[63] The process becomes complicated as decision-makers try to remain faithful to personal beliefs while showing respect for other world views.[64] This challenging task is possible within the framework of virtue ethics. In contrast, rigid rules and regulations cannot account for cultural differences. Moreover, they undermine the free, good faith exercise of personal judgment.

B. Non-Governmental Organizations

Non-Governmental Organizations have joined the fight in recent years. Notable examples are the World Bank and the International Monetary Fund ("IMF").[65] The World Bank has devoted three million dollars to "promote corporate and civic governance" in the fight against corruption, and its Sanctions Committee recently penalized five firms for

---

[60] *See id.* at 107.

[61] For one detailed explication of this approach, see RUSHWORTH M. KIDDER, SHARED VALUES FOR A TROUBLED WORLD: CONVERSATIONS WITH MEN AND WOMEN OF CONSCIENCE (1994) (discussing universal values that transcend cultural and sovereign differences).

[62] From this discussion, it is probably apparent that I am suspicious of highly detailed, precise corporate codes that mandate particular lines of conduct under conditions of ambiguity, since such codes undermine the making of intelligent, thoughtful ethical judgment calls. *See* Steven R. Salbu, *True Codes Versus Voluntary Codes of Ethics in International Markets: Towards the Preservation of Colloquy in Emerging Global Communities*, 15 U. PA. J. INT'L BUS. L. 327 (1994).

This is not to suggest, however, that imbuing corporate culture with broader virtues is without perils of its own. Most notably, it can be hard to distinguish corporate culture development programs from socialization, indoctrination, and brainwashing.

[63] *See Premature Evocation*, *supra* note 5, at 232–34.

[64] *See* Meryl Davids, *Global Standards, Local Problems*, 20 J. BUS. STRATEGY 38 (1999) (observing that companies drafting ethics codes "must strike a balance between being sensitive to foreign cultures and their own internal sense of right and wrong").

[65] Activities of both of these organizations have come under attack recently, as the concepts of "globalization" and "economic development" are being criticized for "failure to consider development in a broad, humanistic context, and for correspondingly narrow focus on economic growth alone." Martha Nussbaum, *Globalization Debate Ignores the Education of Women*, CHRON. HIGHER EDUC., Sept. 8, 2000, at B16.

violating procurement guidelines.[66] Likewise, the IMF began in 1997 to deny financial assistance to nations so pervaded by corruption as to undermine economic recovery.[67]

The United Nations played a symbolic role in the war against corruption in 1996, when it adopted its Declaration Against Corruption and Bribery in International Commercial Transactions ("Declaration").[68] Posadas summarizes the Declaration's functions:

> [I]t encourages states to bar tax deductions on bribery payments; develop accounting standards and practices that can help avoid and combat corruption and bribery; develop business codes and best practices against corruption; examine the possibility of legislating "illicit enrichment by government officials without demonstrable cause" as a criminal offense; provide mutual legal assistance and cooperation; and ensure that bank secrecy does not hinder corruption investigations and proceedings.[69]

The most influential NGO in the war against corruption has been Transparency International ("TI"). TI's corruption indices, which measure national reputations for both the tendering[70] and the taking[71] of bribes, are widely disseminated and frequently discussed.[72] They have placed a global spotlight on the world's most egregious players.[73] Because of TI's promising role in reducing global corruption and leveling the global playing field, companies like General Electric and Boeing have provided financial support,[74] combining the efforts of private firms and NGOs.

---

[66] Paul Sweeney, *The World Bank Battles the Cancer of Corruption*, GLOBAL FIN., Oct. 1999, at 110.

[67] Matthew Shabat, Comment, *SEC Regulation of Attorneys Under the Foreign Corrupt Practices Act: Decisions on Efficiency and Their Role in International Anti-Bribery Efforts*, 20 U. PA. J. INT'L ECON. L. 987, 1019 (1999).

[68] G.A. Res. 51/191, U.N. GAOR, 51st Sess., Agenda Item 12, Annex, U.N. Doc. A/RES/51/191 (1996).

[69] Alejandro Posadas, *Combating Corruption Under International Law*, 10 DUKE J. COMP. & INT'L L. 345, 375 (2000).

[70] This ranking is TI's "Bribe Payers Index." *See* TRANSPARENCY INT'L, BRIBE PAYERS INDEX, *supra* note 42.

[71] This ranking is TI's "Corruption Perceptions Index." *See* TRANSPARENCY INT'L, 1999 CORRUPTION PERCEPTIONS INDEX, *supra* note 41.

[72] *See* Leslie Alan Horvitz, *Telling Bids from Bribes*, INSIGHT ON THE NEWS, Nov. 20, 1995, at 34, 34 (noting a "heated reaction" to TI's index in a number of countries).

[73] *See* Thomas Omestad, *Bye-bye to Bribes*, U.S. NEWS & WORLD REP., Dec. 22, 1997, at 39 (observing that TI's index has "shamed elites from Malaysia to Pakistan, where a low score hastened the fall of . . . [a] graft-ridden government").

[74] Norman Bowie & Paul Vaaler, *Some Arguments for Universal Moral Standards*, *in* INTERNATIONAL BUSINESS ETHICS: CHALLENGES AND APPROACHES 160, 167 (George Enderle ed., 1999).

Given the difficulty of managing global problems within a framework of conflicting national sovereignties, NGOs and other "intermediary groups" can play a crucial role in mediating between business and government approaches to corruption.[75] While NGOs may or may not be objective, one of their greatest strengths lies in their potential to add a layer of objectivity between the goals of business and the goals of government.[76] In the same way, NGOs can serve a mediating role among nations that have conflicting interests, goals, and values.[77] The NGOs' ideological platforms can be analogous to model legislation proposed by an entity characterized as non-partisan, at least as between potentially conflicting countries.[78]

Finally, NGOs can play a role as "communities that socialize their members."[79] If an NGO's membership reflects a cross-section of the global population, it has the potential to act as a socializing force that cuts across national boundaries.[80] When NGOs aid in the creation and coalescing of a clear global agenda, they render two important services: they contribute to the development of a global value consensus, and they improve the likelihood that nations will be able to attack corruption without trammeling legitimate cultural differences.

C. Government: The United States

A parallel anti-corruption movement has gained momentum in government, in the form of increasingly rigorous legislation. The legislative battle against transnational bribery in the twentieth century began when

---

[75] *See* Richard T. DeGeorge, *Developing Ethical Standards for International Business: What Roles for Business and Government?*, *in* THE ETHICS OF BUSINESS IN A GLOBAL ECONOMY 79, 91 (Paul B. Minus ed., 1993) (recognizing the importance of intermediary groups in the enforcement of informal standards where official means of effective international enforcement are lacking).

[76] *See* Martha L. Schweitz, *NGO Participation in International Governance: The Question of Legitimacy*, 89 AM. SOC. INT'L L. PROC. 415, 417 (1995) (discussing business, government, and NGOs as three sectors in society that serve "distinct functions").

[77] *See* Robert O. Keohane & Joseph S. Nye, Jr., *Power and Interdependence in the Information Age*, FOREIGN AFF., Sept.-Oct. 1998, at 81 (identifying NGOs as "particularly effective in penetrating states without regard to borders").

[78] The potential of NGOs in this regard is increased by the growing interdependence between NGOs and the world's corporations. *See* William Briggs, *Next for Communicators: Global Negotiation*, COMM. WORLD, Dec. 1998/Jan. 1999, at 12 (predicting "a global economy dominated by interlocking, transnational corporations and non-governmental organizations" wherein governments and organizations cannot survive in isolation).

[79] Timothy L. Fort, *The Corporation as Mediating Institution: An Efficacious Synthesis of Stakeholder Theory and Corporate Constituency Statutes*, 73 NOTRE DAME L. REV. 173, 175 (1997).

[80] For example, NGOs can function as "transnational issue networks," through which ethical ideas spread internationally. For further discussion of this concept, see Kathryn Sikkink, *Nongovernmental Organizations and Transnational Issue Networks in International Politics*, 87 AM. SOC. INT'L LAW 413, 413–15 (1995).

the United States adopted the Foreign Corrupt Practices Act in 1977,[81] following a series of government investigations into corporate corruption.[82] The statute criminalizes corrupt offerings, payments and gifts, along with promises and authorizations of these forms of consideration, by designated parties to foreign officials and other designated classes.[83]

Since inception, the FCPA's scope has been broad. It creates potential liability for United States firms not only for their own actions abroad, but also for the actions of their foreign subsidiaries, joint venture partners, consultants,[84] and local counsel.[85] While the FCPA's extensive reach has stirred controversy,[86] the law's extraterritoriality is not subject to serious jurisdictional challenge. As the Third Restatement of Foreign Relations indicates, a state can pass laws regarding "conduct outside its territory that has or is intended to have substantial effect within its territory,"[87] as well as "the activities, interest, status, or relations of its nationals outside as well as inside its territory."[88]

Despite its global impact, the FCPA leaves gaps in the war against corruption. While the FCPA has an impressive reach with regard to bribery of public officials, it does not touch two related areas of corruption: business-to-business bribes and business-to-quasi-public official bribes. Because it applies only to payments made to "foreign officials,"[89] the FCPA leaves these two areas unregulated.

Corruption of private arbitrators, for example, is a serious problem,[90] but one that is not covered by the language of the FCPA. Likewise, the marketing practices of drug manufacturers can include kickbacks that evoke the same concerns as other forms of corruption,[91] but these incen-

---

[81] 15 U.S.C. §§ 78dd-1, 78dd-2 (1977).

[82] *See* DONALD R. CRUVER, COMPLYING WITH THE FOREIGN CORRUPT PRACTICES ACT: A GUIDE FOR U.S. FIRMS DOING BUSINESS IN THE INTERNATIONAL MARKETPLACE 2–4 (1994) (describing the SEC's "voluntary disclosure" program, which identified over 450 illicit payments).

[83] 15 U.S.C. §§ 78dd-1, 78dd-2 (1977). This statute has been amended twice since its inception. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107, 1415–25 (1988); 15 U.S.C. §§ 78dd-1, 78dd-2 (2000).

[84] Kenneth Winer, *Doing it Right—Overseas Compliance Programs Take on New Importance in a Global Economy*, BUS. L. TODAY, Nov./Dec. 1999, at 45, 45.

[85] *See* Raquel A. Rodriguez, *A Lawyer's Guide to Working with Foreign Clients and Counsel*, GP SOLO & SMALL FIRM LAW., Oct.-Nov. 1999, at 14, 17, WL Legal Periodicals Library, TP-All File (advising caution that local counsel hired abroad do nothing to violate FCPA).

[86] *See* Kenneth U. Surjadinata, Comment, *Revisiting Corrupt Practices From a Market Perspective*, 12 EMORY INT'L L. REV. 1021, 1026–28 (1998) (examining several criticisms of the FCPA).

[87] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1)(c) (1987).

[88] *Id.* § 402(2).

[89] 15 U.S.C. §§ 78dd-1(a) (1), 78dd-2(a)(1) (2000).

[90] For a brief discussion of this problem and its status under areas of the law other than the FCPA, see William W. Park, *Duty and Discretion in International Arbitration*, 93 AM. J. INT'L L. 805, 816–21 (1999).

[91] *See* Thomas N. Bulleit, Jr. & Joan H. Crause, *Kickbacks, Courtesies or Cost-*

tives fall outside the FCPA because the recipients are not foreign officials. Transparency International founder Fritz Heimann also suggests that because the FCPA focuses on transaction-related corruption, it leaves other forms of corruption unmonitored.[92] At least one international accord addresses some of the FCPA's limitations by expanding coverage to commercial, or "business-to-business," bribery.[93]

D. Government: Expansion Beyond the United States

Until very recently,[94] the United States stood alone in enacting a comprehensive criminal ban on extraterritorial bribery.[95] A handful of other countries had enacted broad laws that encouraged "prosecution of bribery of foreign officials [only] in certain situations."[96]

The unilateral nature of the FCPA was troublesome for several reasons. For years, commentators lamented that it placed the United States at a "severe competitive disadvantage"[97] in bidding for international public contracts,[98] as United States companies lost contracts awarded to corrupt international competitors that were unconstrained by rigorous criminal laws.[99] Department of Commerce data indicated that losses to United States firms were substantial.[100]

Effectiveness?: Application of the Medicare Antikickback Law to the Marketing and Promotional Practices of Drug and Medical Device Manufacturers, 54 FOOD & DRUG L.J. 279 (1999) (discussing corruption in medical decision-making and its coverage under a domestic U.S. federal law).

[92] *See* Fritz F. Heimann, *Should Foreign Bribery be a Crime?*, TI Best Practice Documentation, *at* http://www.transparency.de/documents/source-book/c/cvI/i9.html (Sept. 20, 1994).

[93] *See infra* notes 115–117 and accompanying text (discussing the scope of the Council of Europe Criminal Law Convention).

[94] *See* Lucinda A. Low & Michael L. Burton, *Corruption is Target of Multilateral Efforts: The Convention on Combating Bribery of Foreign Officials Has 29 Signatories*, NAT'L L.J., May 4, 1998, at C05 (observing that two decades of unilateral U.S. legislation have recently yielded to global anti-corruption efforts).

[95] *See* Stanley S. Jutkowitz & Stephen P. Candelmo, *International Anti-Bribery and Fair Competition Act of 1998*, PA. L. WKLY., Feb. 22, 1999, at 12.

[96] Nora M. Rubin, Note, *A Convergence of 1996 and 1997 Global Efforts to Curb Corruption and Bribery in International Business Transactions: The Legal Implications of the OECD Recommendations and Convention for the United States, Germany, and Switzerland*, 14 AM. U. INT'L L. REV. 257, 260 n.4 (1998).

[97] Scott P. Boylan, *Organized Crime and Corruption in Russia: Implications for U.S. and International Law*, 19 FORDHAM INT'L L.J. 1999, 2016 (1996).

[98] *See* HOMER E. MOYER ET AL., FIGHTING FOREIGN CORRUPTION: MULTILATERAL EFFORTS CAN CREATE LEVEL PLAYING FIELD 1–2 (1997) (observing that the unilateral nature of the FCPA was a source of irritation to U.S. firms, as competitors from other nations "exploited the competitive advantages that the FCPA created for them").

[99] Absence of legislation in other countries may be attributable to a belief by some governments that "profits from overseas activities override the stigma of supporting corruption." Michael Skol, *Out from Under the Table: Governments Forge Ahead with Anti-Corruption Efforts*, BUS. MEX., Feb. 1996, at 23, 23, LEXIS, Academic Universe, North/South America News Sources.

[100] *See, e.g.*, Steven Froot, *US Anti-Corruption Philosophy Gains Ground*, 25 CHINA

Some considered compliance with the accounting provisions overly burdensome and expensive.[101] Others believed that the unique extraterritoriality of the FCPA might have "adverse effects on our relations with other nations."[102] At the same time, some saw the failure of others to adopt equally stringent anti-corruption policies as contributing to the serious problem of global corruption.[103]

Many who theoretically supported the philosophy and goals of the FCPA were also concerned about the effects on the competitiveness of United States firms, and therefore had reservations about the unilateral nature of the legislation.[104] Global attitudes toward bribery have changed rapidly, however, creating an environment in which this unilateralism would prove short-lived.[105] The United States has backed an initiative to get other nations to adopt their own extraterritorial anti-bribery legislation.[106] This has led to a number of international pacts,[107] most notably the conventions recently adopted by the Organization for Economic Cooperation and Development ("OECD")[108] and the Organization of American States ("OAS"),[109] which require signatory nations to enact legislation

---

BUS. REV. 26, 26 (1998) (referring to a 1996 Commerce Department report that U.S. businesses lose billions of dollars worth of contracts in this process).

[101] Diane P. Caggiano, Note, *The Foreign Corrupt Practices Act: The Case for Multilateral Cooperation*, 5 N. ENG. INT'L & COMP. L. ANN. 277, 290 (1999), *available at* http://www.nesl.edu/annual/vol5/caggiano.htm.

[102] AMERICAN ENTERPRISE INSTITUTE FOR PUBLIC POLICY RESEARCH, CRIMINALIZATION OF PAYMENTS TO INFLUENCE FOREIGN GOVERNMENTS 10 (1977).

[103] *See New Data Show the U.S. Falls Among the Top 10 Nations for Paying Bribes*, PREVENTING BUS. FRAUD, May 2000, at 8 (arguing that the absence of a rigorous regulatory anti-bribery framework is accompanied by attitudes that are tolerant of bribery). This combination arguably creates and perpetuates an environment in which corruption can thrive.

[104] *See* Andelman, *supra* note 54, at 49 (noting that the FCPA's penalties historically outweighed its rewards, as U.S. companies found the Act a deterrent to doing business abroad).

[105] *See Hearing on the OAS Inter-American Convention Against Corruption Before the Senate Comm. on Foreign Relations*, 106th Cong. (2000) (prepared statement of Nancy Zucker Boswell, Managing Director, Transparency International USA) (stating that, after two decades of unilateral U.S. legislation, there has been "a profound change in attitude" leading other nations to follow suit).

[106] *See* Matt Morley, *Combating Bribery*, NAT'L L.J., Mar. 27, 2000, at B7 (discussing the Organization for Economic Cooperation and Development Convention as a means of fostering anti-bribery standards around the world without subjecting U.S. businesses to further competitive disadvantage).

[107] Unsuccessful efforts toward multilateralization existed before the fruitful initiatives of the late 1990s. For discussion of some of these, see Lisa Harriman Randall, Note, *Multilateralization of the Foreign Corrupt Practices Act*, 6 MINN. J. GLOBAL TRADE 657, 676 (1997).

[108] Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, S. Treaty Doc. No. 105-43 (1998), *available at* http://www.oecd.org/daf//nocorruption/20nov1e.htm.

[109] Inter-American Convention Against Corruption, Mar. 29, 1996, S. Treaty Doc. No. 105-39 (1998), *available at* http://www.oas.org/en/prog/juridico/english/Treaties/b-58.html.

similar to the FCPA.[110] Some commentators believe that these transnational agreements have the potential to alter global attitudes regarding corruption.[111] Others question whether accords like the OECD Convention are elitist, reflecting "the political, economic, and cultural interests of the developed, 'Westernized' nations . . . ."[112]

Other regional efforts have received less notice than the work of the OECD and OAS. The Pacific Basin Economic Council promulgated its Charter on Standards for Transactions Between Business and Government in 1998,[113] in an effort to move toward greater accountability, integrity, and transparency.[114] The Council of Europe Criminal Law Convention on Corruption ("European Convention"), through which over twenty European signatories are cooperating to battle transnational bribery,[115] was adopted in early 1999.[116] In at least one important way, the European Convention is more expansive than other recent initiatives: it extends beyond bribery of public officials and covers business-to-business bribery as well.[117]

---

[110] *See* Kari Lynn Diersen, *Foreign Corrupt Practices Act*, 36 AM. CRIM. L. REV. 753, 765 (1999).

[111] *See, e.g.*, Barbara Crutchfield George et al., *The 1998 OECD Convention: An Impetus for Worldwide Changes in Attitudes toward Corruption in Business Transactions*, 37 AM. BUS. L.J. 485 (2000).

[112] Christopher J. Duncan, Comment, *The Foreign Corrupt Practices Act Amendments: Moral Empiricism or Moral Imperialism*, 1 ASIAN PAC. L. & POL'Y J. 16:1, 16:3 (2000).

[113] PACIFIC BASIN ECONOMIC COUNCIL, CHARTER ON STANDARDS FOR TRANSACTIONS BETWEEN BUSINESS AND GOVERNMENT (Mar. 24, 1998), *at* http://www.pbec.org/policy/1998/igmstandards.htm.

[114] Helmut Sohmen, *Critical Importance of Controlling Corruption*, 33 INT'L LAW. 863, 864 (1999). "Transparency" is a concept referred to frequently in the war against corruption. It describes mechanisms that permit public scrutiny of government processes, including access to information sufficient to permit meaningful review. *See* Robert H. Sutton, Note, *Controlling Corruption Through Collective Means: Advocating the Inter-American Convention Against Corruption*, 20 FORDHAM INT'L L.J. 1427, 1455 n.188 (1997) (referring to the Organization of American States's conception of transparency).

[115] *See* Stuart H. Deming, *Foreign Corrupt Practices*, 33 INT'L LAW. 507, 508–09 (1999) (describing the Council of Europe Criminal Law Convention and discussing both its adoption and its major components).

[116] *Criminal Law Convention on Corruption*, Eur. Consult. Ass., *available at* http://www.coe.fr/eng/legaltxt/173e.htm (1999). Article 7 requires signatory parties to criminalize under domestic law the intentional "promising, offering or giving, directly or indirectly, of any undue advantage to any persons who direct or work for, in any capacity, private sector entities, for themselves or for anyone else, for them to act, or refrain from acting, in breach of their duties." *Id.* art. 7. Article 8 requires signatory parties to criminalize under domestic law the intentional

> request or receipt, directly or indirectly, by any persons who direct or work for, in any capacity, private sector entities, of any undue advantage or promise thereof for themselves or for anyone else, or the acceptance of an offer or a promise of such an advantage, to act or refrain from acting in breach of their duties.

Id. art. 8.

[117] *See* Deming, *supra* note 115, at 509.

IV. LEGISLATIVE REFORM

Generally, extraterritorial anti-bribery legislation has yielded disappointing results. Specifically, it is both ineffective and inefficient.

A. Effectiveness

Before the late 1990s, extraterritorial anti-bribery legislation existed only in the United States, in the form of the FCPA.[118] Most of the world's nations traditionally have had laws prohibiting only domestic bribery, i.e., bribery of public officials within their own borders.[119] If legislation criminalizing bribery were effective, one would expect these ubiquitous domestic laws to have an impact on global corruption. Even the historically unilateral FCPA would be expected to have an effect on global corruption, given the United States' share of international business transactions in many industries.[120]

It is impossible, of course, to say with scientific certainty whether worldwide legislation has had a notable effect on corrupt practices. We cannot compare bribery rates in the real world with bribery rates in a hypothetical, unregulated world. Since we cannot know how much corruption would have prevailed in the absence of existing statutes, we cannot know the degree to which the statutes have influenced behavior.[121]

As a result, reflections on the efficacy of legislation in this area are speculative. We can, however, read the signals and observe legislative shortcomings in the proliferation of bribery throughout the world at the end of the twentieth century.[122] Unfortunately, bribery of foreign officials continues to be commonplace, despite the FCPA and worldwide domestic laws that prohibit corrupt behavior.[123]

Data consistently support this contention. For example, a 1996 United States Commerce Department report noted 139 known instances of foreign bribery on $64 billion worth of contracts between 1994 and

---

[118] *See* Jutkowitz & Candelmo, *supra* note 95.

[119] *See* Low & Burton, *supra* note 94.

[120] *See, e.g.*, Alice Haemmerli, *Insecurity Interests: Where Intellectual Property and Commercial Law Collide*, 96 COLUM. L. REV. 1645, 1646 (1996) (noting the U.S. domination of the global market for software, films, and records, totaling over $75 billion per year of business).

[121] *See* James B. Jacobs, *Dilemmas of Corruption Control*, Princeton University-Central European University Joint Conference on Corruption, Oct. 29–Nov. 6, 1999 (observing that corruption presently has no workable measures, and recognizing the difficulties in accurately determining whether corruption decreases following the implementation of reforms), *at* http://www.coc.ceu.hu/jacobs.html.

[122] *See* Russ Banham, *Do-it-yourself Intelligence*, WORLD TRADE, Feb. 1999, at 48, 49 ("Despite the two-decades-old US Foreign Corrupt Practices Act, corporate corruption [and] bribery . . . are flourishing.").

[123] *See* Murphy, *supra* note 48, at 385.

1996.[124] Assuming that most bribes are furtive and escape detection, this figure likely reflects a small fraction of actual violations.

Perhaps among the most telling indicia are survey response data indicating that over 90% of directors of United States firms believe they face corrupt competitors when bidding for contracts in developing nations.[125] This proliferation of corruption could be attributable solely to non-United States bidders, in which case the problem could not be blamed on the ineffectuality of the FCPA.[126] Under this implicit theory, proponents of FCPA multilateralization suggest that continued post-enactment corruption supports, rather than undermines, their position.[127] They contend that the historic absence of an FCPA equivalent in all nations but one explains the high incidence of corruption, which could be reduced if only other countries followed the United States's lead.[128]

The assumption behind this line of reasoning is that modern corruption is attributable to non-United States firms. This assumption is flawed.[129] Much of the corruption faced by United States firms bidding for overseas contracts continues to be attributable to United States competitors.[130] Reports and news stories from the 1990s suggest that United States firms, including some of the most prominent companies in the world, have continued to engage in corrupt behavior despite the FCPA's serious threat of criminal sanctions.[131]

---

[124] *See* Froot, *supra* note 100, at 26.

[125] *See* Peter Montagnon, *Bribes Believed Widespread in U.S.*, PLAIN DEALER, Oct. 18, 1998, at 4H.

[126] We do know that non-U.S. company bribes pose a serious threat to the competitiveness of U.S. firms bidding on international contracts. *See* Senator Jesse Helms, *Convention on Combating Bribery of Foreign Officials in International Business Transactions*, July 16, 1998 (indicating that billions of dollars of contracts have been lost to international competitors paying bribes), *at* http://www.fas.org/irp/congress/1998_rpt/e105-19.htm. This does not tell us, however, what percentage of all lost contracts are attributable to bribes made by U.S. firms in violation of the law. Perhaps because statistics are frequently cited in support of FCPA multilateralization, they focus on international competitors and ignore domestic ones.

[127] *See, e.g.*, Lawrence W. Newman, *The New OECD Convention on Combating Bribery*, N.Y.L.J., Mar. 29, 1999, at 3 (suggesting that multilateralization under the OECD Convention should reduce corruption by holding other nations' businesses to standards like that of the FCPA).

[128] *See id.*; *see also* Stanley S. Arkin, *Bribery of Public Officials: Leveling the Playing Field*, N.Y.L.J., Feb. 19, 1998, at 3 (observing that the FCPA's penalties have not been imposed on non-U.S. competitors, who have thereby received a windfall of unearned government contracts "as a result of the absence of analogs to the FCPA in other countries").

[129] *See infra* notes 130–133 and accompanying text.

[130] *See, e.g.*, Nancy Dunne, *US Presses Drive Against Business Bribery*, FIN. TIMES, Feb. 24, 1999, at 7 (observing that there were hundreds or thousands of U.S. bribes to Latin American officials during the two-year period from 1994 to 1996).

[131] *See, e.g.*, Scott Doggett & Annette Haddad, *Commercial Bribery Under Attack*, L.A. TIMES, Mar. 20, 2000, at C2 (discussing Lockheed's 1990s violation). For a catalog of hundreds of FCPA text-enforcement actions and cases, see FOREIGN CORRUPT PRACTICES ACT REPORTER, *available at* http://www.businesslaws.com/toc4.htm (last modified July 2000).

In addition, research by Sheffet reveals that most United States companies have done nothing in response to the FCPA.[132] Transparency International's recent Bribe Payers Perceptions Index ranked the United States only ninth best out of nineteen in terms of corporations' "propensity to bribe senior public officials."[133] All of these figures suggest that the FCPA has had limited, if any, success in curtailing global corruption.

Another potential flaw in the reasoning of FCPA multilateralization supporters concerns the ubiquity of domestic anti-bribery laws. As noted earlier, most nations outlaw bribery in some manner within their own borders.[134] If domestic legislation is ubiquitous and bribery nonetheless continues to thrive around the world, then the effectiveness of legislation is itself questionable. When worldwide domestic laws have failed to put a dent in the problem, it is hard to see why extraterritorial laws would be different.

Is it fair to submit a law's failures as evidence of its ineffectiveness? Who would seriously suggest that we eliminate all criminal laws punishing murder simply because they have failed to eliminate the practice? It is unrealistic to expect that murder laws will ever stop murder; we simply hope that they reduce the incidence of murder. Lower murder rates are strong justification for laws and penalties, provided the costs of the laws' stringency are outweighed by the likely degree of deterrence.[135]

Conversely, at some point laws and penalties can become sufficiently harsh, and deterrence sufficiently ineffectual, so as to render the laws and penalties unjustifiable. Some opponents of the death penalty, for example, contend that its harshness cannot be supported if its deterrent effect is negligible.[136] Analogously, an ineffective or moderately effective FCPA may exact unacceptable costs in terms of overreaching, potential international tensions and potential cultural imperialism.

Furthermore, murder may be distinguishable from corruption, such that legislation against the former may be more defensible than legislation against the latter. The FCPA's failures are fundamentally different from failures of murder laws because the violators are likely to differ in meaningful ways. Drug use, domestic violence, passion, and other dynamics are virtual guarantors that murder laws will experience a sub-

---

[132] *See* Sheffet, *supra* note 51, at 294-300.

[133] TRANSPARENCY INT'L, BRIBE PAYERS INDEX, *supra* note 42.

[134] *See* Andrea D. Bontrager Unzicker, Note, *From Corruption to Cooperation: Globalization Brings a Multilateral Agreement Against Foreign Bribery*, 7 IND. J. GLOBAL LEGAL STUD. 655, 655 (2000).

[135] *See* Neal Kumar Katyal, *Deterrence's Difficulty*, 95 MICH. L. REV. 2385, 2401 (1997) ("[I]nstead of examining whether a penalty deters a particular activity, it is also important to inquire about the cost of that deterrence.").

[136] *See* Panel Discussion, *Human Rights and Human Wrongs: Is the United States Death Penalty System Inconsistent With International Human Rights Law?*, 67 FORDHAM L. REV. 2793, 2819–20 (1999).

stantial degree of failure.[137] These "anti-rationality" factors all reflect a degree of desperation that no legislation can ever surmount.[138]

Contrast the most pernicious kinds of corruption—the recent FCPA violations of large United States firms such as Lockheed[139] and Young and Rubicam[140]—in which highly ranked officials, presumably functioning with level heads, make rational business decisions in the absence of emotion. We cannot expect legislation to inhibit highly distraught murderers who commit acts in the heat of passion. It seems reasonable, however, to require that anti-corruption legislation significantly control grand-scale illegal payments by prominent executives who make concerted business decisions and have much to lose by violating the law. If the tide still swells in the face of rigorous statutory proscription, the legislative approach may be ineffectual.

Perhaps the greatest problem with the effectiveness of extraterritorial legislation is its failure to challenge the compelling causes of both the supply and demand of corrupt payments.[141] In their rush to contain global corruption via legislative fiat, governments engage in a potentially frustrating exercise of deterrent force[142] that fails because it addresses the symptoms rather than the causes of bribery.[143] Efforts that punish mani-

---

[137] *See* William C. Bailey & Ruth D. Peterson, *Murder, Capital Punishment, and Deterrence: A Review of the Evidence and an Examination of Police Killings*, 50 J. Soc. Issues 53, 54 n.2 (1994) ("[I]t is contended that most murders are emotionally charged and spontaneous events; they are 'acts of passion.'").

[138] For discussion of the role of desperation in weakening sanctions and neutralizing misgivings, see Andrew von Hirsch et al., Criminal Deterrence and Sentence Severity: An Analysis of Recent Research 36 (1999).

[139] *See* David A. Andelman, *Bribery: The New Global Outlaw*, Mgmt. Rev., Apr. 1998, at 49, 49 (discussing Lockheed's plea of guilty to FCPA violations in 1995). Lockheed also was alleged to have made illicit payments to Japanese government officials in the 1970s, prior to the enactment of the FCPA. For discussion of this earlier case, see *Selling the Lockheed TriStar*, *in* Business Ethics: Corporate Values and Society 138 (Milton Snoeyenbos et al. eds., 1983).

[140] *See* Joanne Lipman, *Young and Rubicam Pleads Guilty to Settle Jamaica Case*, Wall St. J., Feb. 12, 1990, at B4 (reporting the indictment of Young and Rubicam for FCPA violations and settlement via a plea of guilty and payment of $500,000 in fines).

[141] *See* Miguel Schloss, Executive Director, Transparency International, Combating Corruption for Development, Address before the 2ª Conferencia de Responsibilidad Social Empresarial en las Américas, São Paulo (June 25, 1999) ("[T]o assure better results [than legislation], a greater focus is needed on the underlying causes of corruption and on mutually supporting mechanisms between governments, business practices in the private sector and civil society."), *at* http://www.transparency.de/documents/speeches/ms_brazil_ethos.html.

[142] This futility may be grounded in beliefs that extraterritorial laws lack legitimacy. Such attitudes undermine the laws' deterrence function, which relies on a belief that the laws are morally appropriate or legitimate. *See* von Hirsch et al., *supra* note 138, at 3 (stating that legal compliance occurs because a law's audience considers the law to be morally appropriate and legitimate).

[143] *See* Randall, *supra* note 107, at 678–79 (suggesting that OECD's initiative may not result in significant reductions in global corruption and that "perhaps the U.S. should look elsewhere for ways of effecting meaningful change in the transparency of world business transactions").

festations without understanding their roots are doomed to inefficacy.[144] To work, anti-bribery measures must accurately identify and address the foundations and structures that enable, encourage, and support corruption. This proposition is consistent with the recommendations for public policy reform in Part V.

B. Efficiency

We have seen that legislative solutions have not effectively curbed corruption. Legislation also has a second limitation: it is inefficient. As discussed below, legislative reform creates both fixed and variable costs, while institutional reform creates only fixed costs.

1. Legislative Reform

Legislative change is effectuated in two ways—through self-enforcement and through externally imposed law enforcement. Self-enforcement occurs when prospective violators are given notice of a law and its potential punishments and make independent decisions to abide by the legislation's edicts.[145] Self-enforcement is highly efficient because the only expenses incurred by the government are the expenses of enacting the statute: drafting and editing the law, debating the law, negotiating its terms, and voting on its passage. All iterations of compliance are charged against this single set of fixed costs.

This is not to say that self-enforcement of legislative mandates comes easily. Self-enforcement can be an uphill battle when a law conflicts with deeply embedded political, social, and economic realities.[146] Consider Stephan's observations concerning the extent to which corruption can become institutionalized into a rational response, deeply engrained in a given culture:

> In many places and in many instances, corruption represents a successful adaptation to the world in which people find themselves. In particular, much of what we decry as corruption in the former socialist states represents a rational response to a certain social environment. Behaviors that seem self-defeating to out-

---

[144] *See* Julie B. Nesbit, Note, *Transnational Bribery of Foreign Officials: A New Threat to the Future of Democracy*, 31 VAND. J. TRANSNAT'L L. 1273, 1314 (1998) ("For anti-corruption reforms to successfully control transnational bribery, they must be based on an understanding of the causes of corruption.").

[145] Self-enforcement is the basic premise behind the theory of deterrence in criminal law. For a detailed discussion, see Katyal, *supra* note 135.

[146] *See* Joseph LaPalombara, *Structural and Institutional Aspects of Corruption*, 61 SOC. RES. 325 (1994) (observing the tendency, despite the existence of criminal laws, "to use access and influence over governments as a comparative advantage in the market place" through informal, corrupt systems of power and influence).

> siders make sense to people who grew up in these societies and learned how to cope with the conditions of their world.[147]

Under these circumstances, every act of compliance with legislative edict can conflict with a culture's survival mechanisms. While altering these mechanisms can bring about efficient, wholesale change, laws that fight culture are likely to suffer from low levels of compliance.[148]

The second category of legislative enforcement—externally imposed enforcement through the efforts of law enforcement bodies—is necessary to legislative reform efforts, but is highly inefficient. It is needed to spur self-enforcement processes.[149] If violators are not prosecuted, self-enforcement will decline because the threat of penalty is devalued and the law is not taken seriously.[150] Nonetheless, imposed enforcement[151] by law enforcement bodies is inefficient because it incurs not only fixed costs,[152] but also variable costs[153] associated with investigation and prosecution of suspected violations.

2. *Institutional Reform*

Institutional reform is more efficient than legislative reform because *all* increments of change are chargeable solely against a single set of fixed costs,[154] and never against variable costs. Institutional reform is

---

[147] Paul B. Stephan, *Rationality and Corruption in the Post-Socialist World*, 14 CONN. J. INT'L L. 533, 533 (1999).

[148] *See* Bruce Zagaris & Shaila Lakhani Ohri, *The Emergence of an International Enforcement Regime on Transnational Corruption in the Americas*, LAW & POL'Y INT'L BUS., Winter 1999, at 53, 90 (stating that embedded behavioral patterns can be resistant to corruption reform).

[149] *See* Susan Rose-Ackerman, *The Political Economy of Corruption*, *in* CORRUPTION AND THE GLOBAL ECONOMY 31, 40 (Kimberly Ann Elliott ed., 1997) (observing that a high likelihood of detection and punishment will cause supply and/or demand for bribes to fall).

[150] *See id.* ("The expected cost of bribery is the probability of being caught times the probability of being convicted times the punishment levied."); Katyal, *supra* note 135, at 2386 (observing that "increasing the penalty on an activity will mean that fewer people will perform it").

[151] "Imposed enforcement" refers to enforcement by law-enforcement agencies or bodies, as opposed to all forms of "self-enforcement," through which decision-makers voluntarily comply with legislative mandates.

[152] The fixed costs of imposed enforcement are predominantly aimed at monitoring and surveillance. If law enforcement agencies are to pose a real threat to potential violators, the latter must believe there is a chance that their infractions will be discovered. This requires dedication of personnel to broad-based surveillance mechanisms and to systems that respond to tips and complaints.

[153] The variable costs of imposed enforcement begin upon development of suspicion of a particular infraction. Once this occurs, enforcement personnel must investigate, gather evidence, put together a case, go through various legal processes, prosecute, and perhaps appeal (or respond to an appeal). These variable costs of law enforcement are enormously expensive.

[154] These "fixed costs" are the costs of developing and implementing the broad social reform.

self-enforcing by its nature. Consider one kind of institutional reform: the fight against poverty.

Poverty contributes to corruption. Lambsdorff explains that "low salaries force public servants to supplement their incomes illicitly while high salaries mean higher losses if a public servant gets caught."[155] Under this theory, the negative effects of poverty, as well as the positive effects of subsistence-level wages, are automatic. Once poverty is alleviated, the result is triggered across the relevant population, so that public servants no longer are forced to supplement their incomes.[156] Likewise, once higher salaries are in place, the effect of increased bribe-associated net costs is triggered in all instances, as every prospective bribe-taker automatically faces stiffer losses for corrupt behavior.

This system is efficient because, unlike legislative change, institutional change is chargeable exclusively to fixed costs in all cases, rather than in only a portion of cases. The net result is that institutional change is likely to be a cheaper social alternative than legislative reform.

Institutional change is more efficient than legislation in another sense. Despite Congress's intentions, the FCPA has not significantly clarified the ambiguous line between acceptable and unacceptable payments and consideration, particularly across borders.[157] Congress's intent in passing the FCPA was to "set forth ethical standards for American companies," thereby relieving courts of the need to "'define prohibited behavior on a case-by-case basis without any statutory guidelines.'"[158] Whatever else the FCPA may do, it does little to elaborate either standards or guidelines for companies making difficult ethical decisions, or for courts evaluating these decisions.[159]

This omission is not surprising. Legislation rarely, if ever, provides highly specific guidance for compliance under conditions of cultural pluralism and complexity, or indeed under any conditions at all. The omission does, however, highlight the inefficiency of legislation. Recall that

---

[155] DR. JOHANN GRAF LAMBSDORFF, CORRUPTION IN EMPIRICAL RESEARCH—A REVIEW (Transparency Int'l, Working Paper, Nov. 1999), *at* http://www.transparency.de/documents/work-papers/lambsdorff_eresearch.html.

[156] Of course, this does not mean that bribery will cease to exist. It does, however, mean that bribery actuated solely by need (and hence not at all by greed) will be averted.

[157] *See* GEORGE C. GREANIAS & DUANE WINDSOR, THE FOREIGN CORRUPT PRACTICES ACT 97 (1982) (observing, with regard to the first version of the legislation, that "[t]he line between improper and proper payments is too ill-defined to admit of risk-taking with regard to potential liability").

[158] John Christopher Anderson, *Respecting Human Rights: Multinational Corporations Strike Out*, 2 U. PA. J. LAB. & EMPLOYMENT L. 463, 500 (2000) (quoting Gregory J. Wallance, *Linked to Slavery* Doe v. Unocal *Asks Whether American Companies Should Be Held Responsible for the Human Rights Abuses of the Foreign Governments that Are Their Business Partners, in Corporate Compliance: Caremark and the Globalization of Good Corporate Conduct 1998*, at 1207, 1210 (PLI Corp. Law & Practice Course, Handbook Series No. B- 1057, 1998)).

[159] Apart from providing a few examples of activities that qualify as routine government action, the statute lacks detail and precision. *See* 15 U.S.C. § 78m(b)(2)(A) (2000).

institutional or structural changes are self-enforcing, so that each decision-maker has a personal ethical response to the particular structural improvement and polices his or her own behavior in accordance with that personal response. Given natural self-interest,[160] such ethical self-monitoring is unlikely to be overly cautious or risk-averse.

In contrast, legislation that lacks standards or guidance also lacks precision. Risk-averse actors respond very differently to imprecise criminal laws than to their personal ethical codes. Fearing incarceration and fines under the statute, they are subject to a chilling effect, avoiding lawful and ethical activities, in which they would engage if subject solely to the jurisdiction of conscience.[161] This discouragement of lawful commerce, like any artificial impediment to free, voluntary transactions, is inefficient.[162]

V. THE FRONTIER OF THE FRONTIER: GLOBAL INFORMATION TECHNOLOGY DIFFUSION

In earlier writings, I have questioned the wisdom of the FCPA and its pending international progeny on the basis of legal concerns,[163] ethical concerns,[164] and geopolitical concerns.[165] I wrote these articles to demonstrate that extraterritorial anti-corruption legislation bears substantial costs that tend to be forgotten or neglected as the world moves enthusiastically to embrace reform. I left the logical next question—What kinds of policies have the potential to replace extraterritorial legislation?—largely unaddressed.

This Part examines one important public policy target that has powerful potential to fight corruption: global diffusion of information technology. I select information technology diffusion because it appears to be a promising anti-corruption tool in light of the recognized structural foundations of bribery.

---

[160] The premise of natural human self-interest is a cornerstone of neoclassical economics. *See* Norman W. Spalding III, Note, *Commodification and its Discontents: Environmentalism and the Promise of Market Incentives*, 16 STAN. ENVTL. L.J. 293, 298 (1997) (referring to the neoclassical economic concept "that people are naturally self-interested and thus . . . inclined to act in furtherance of their own desires").

[161] Another way of stating this is to say that the vague FCPA will be over-inclusive. *See* Surjadinata, *supra* note 86, at 1023 ("[T]he FCPA's overinclusive ambit prohibits some welfare-maximizing transactions.").

While a possible benefit could be greater compliance, we have already seen that statutes, both domestic and extraterritorial, have had questionable impact on worldwide corruption. The reality is that the legal threat may be most effective on those who already are most conscientious, i.e., those whose borderline, lawful activities are chilled by the vague law. Likewise, the legal threat may be least effective against the most egregious violators.

[162] *See id.* at 1023–24 (discussing potential inefficiencies of anti-corruption legislation generally, and overly broad anti-corruption legislation specifically).

[163] *See Critical Analysis, supra* note 4.

[164] *See Premature Evocation, supra* note 5.

[165] *See Threat to Global Harmony, supra* note 6.

What are these foundations? Bosworth-Davies has identified a number of social conditions that support or encourage corruption, including "weak political institutions, excessive use of patronage and nepotism, lack of accountability, low public sector salaries and general economic weakness."[166] Rance Lee adds several others: "inadequate management controls and lack of adequate technology for monitoring, poor recruitment and selection procedures (including nepotism), poor working conditions and facilities, lack of public information, and generally inadequate capacity to meet the demand for government services."[167]

It is unlikely that these structural underpinnings account for all corrupt behaviors. It is also unlikely that they are a complete inventory of the institutional forces that support corruption. They are a good starting point, however, and each of them does appear to have a logical relationship with either the encouragement or the facilitation of bribery. Global information technology diffusion directly responds to several of Bosworth-Davies's and Lee's factors of corruption.

Specifically, this Part addresses the potential role of global information technology diffusion in mitigating monitoring inadequacies, poor public access to information, and low levels of accountability. Section A explains in detail the connection between worldwide access to information technology and the war against corruption. It begins with an explanation of the relationship between technology diffusion and two critical anti-corruption tools: transparency and democracy. The section then examines how IT diffusion supports anti-corruption whistle-blowing. Finally, it explains why closing the digital divide is especially important to the critical task of reducing corruption in emerging economies. Section B then discusses the ancillary role of administrative improvements in maximizing information technology's anti-bribery potential.

A. The Connection Between Worldwide Access to Information Technology and the War Against Corruption

Lee posits "lack of public information" as a contributor to international corruption.[168] Others confirm this relationship. For example, noting the role information access has played in recent reform efforts, Hotchkiss identifies the connection between information technology and anticorruption initiatives:

---

[166] Rowan Bosworth-Davies, *Corruption: The Prisoner's Dilemma*, FIN. TIMES BUS. REP., FRAUD REP., Nov. 1, 1997, at 6.

[167] Kimberly Ann Elliott, *The Problem of Corruption: A Tale of Two Countries*, 18 NW. J. INT'L L. & BUS. 524, 527 n.11 (1998) (citing Rance P.L. Lee, *Bureaucratic Corruption in Asia: The Problem of Incongruence Between Legal Norms and Folk Norms*, *in* BUREAUCRATIC CORRUPTION IN ASIA: CAUSES, CONSEQUENCES AND CONTROL 69, 101–03 (Ledivina V. Cariño ed., 1986)).

[168] *Id.*

> A . . . factor coincident with the end of the Cold War was the arrival of the information revolution. The widespread use of fax machines, cellular and satellite telephones, satellite television, and the Internet vastly diminished the amount of control governments had over the information their citizens received and over information published about them. Even relatively restrictive regimes . . . find that expatriates using the Internet are capable of launching corruption critiques that get worldwide notice.[169]

Likewise, Husted notes that while bribery is facilitated by government monopolies over essential resources, "countervailing actions," including "advances in transportation and communications technology," counteract monopoly-facilitated corruption.[170]

Rapid diffusion of information technologies around the globe is critical to the war against corruption because of the interdependent relationship among technology, transparency, and democracy. I shall refer to this connection as the "technology-transparency-democracy nexus."

1. The Technology-Transparency-Democracy Nexus

Burgeoning information technology is critical in the war against corruption because it is closely linked to the important goal of transparency. The more freely information becomes available, the harder it is for wrongdoers to hide their infractions.[171] It is not surprising that the global war against corruption escalated in the late 1980s, a period of expanded freedom and democratization around the world.[172] Conversely, the most egregious corruption often thrives in closed or formerly-closed markets and in nations that lag in the technology revolution.

In Russia, for example, technological progress has been slow.[173] Post-communist economic reforms intended to increase efficiency and

---

[169] Carolyn Hotchkiss, *The Sleeping Dog Stirs: New Signs of Life in Efforts to End Corruption in International Business*, 17 J. PUB. POL'Y & MKTG. 108, 109 (1998).

[170] Bryan W. Husted, *Wealth, Culture, and Corruption*, 30 J. INT'L BUS. STUD. 339, 341–42 (1999) (citation omitted).

[171] *See* Ann Florini, *The End of Secrecy*, FOREIGN POL'Y, Summer 1998, at 50 (characterizing transparency as opposite to secrecy, and associating transparent processes with revelation of information).

[172] *See* Herbert L. Bernstein, *Foreword: Small World*, 10 DUKE J. COMP. & INT'L L. 275, 277 (2000) ("It was not before 1988 that the collapse of the communist bloc, the rise of market economies, and more open international trade in most parts of the world provided a new impulse for combating corruption in a coordinated international effort.").

[173] LOREN R. GRAHAM, WHAT HAVE WE LEARNED ABOUT SCIENCE AND TECHNOLOGY FROM THE RUSSIAN EXPERIENCE? 85 (1998) (noting that while the Soviet Union prior to dissolution had the largest scientific establishment in the world, technological progress was slow); Harley Balzer, *Dismantling Russia's Technotopia: Six Ministries in Search of an Industrial Policy*, *in* COMMERCIALIZING HIGH TECHNOLOGY: EAST AND WEST 51, 52 (Judith B. Sedaitis ed., 1997) (observing that technology in modern Russia "is not interna-

establish competitiveness in world markets actually coincided with several indicia of economic decline.[174] Without thriving information technologies, privatization in Russia has lacked transparency,[175] resulting in a well-organized[176] "shadow" economy[177] in which corruption is rampant.[178]

Russia's experience demonstrates how corruption thrives under conditions of opacity. This dynamic was exacerbated in Russia by the rapid development of property rights, which created opportunities for abuse when property reform outpaced development of a strong, efficient government.[179] While democratic capitalist institutions are no guarantor of social order, they do support positive reforms[180] by girding the transparency that is such an important part of the battle.[181] Rose-Ackerman succinctly explains this dynamic: "The protection of civil liberties and free speech, which generally accompanies democratic elections, makes open and transparent government possible. In contrast, non-democratic states are especially susceptible to corrupt incentives because their rulers have the potential to organize government with few checks and balances."[182]

---

tionally competitive").

[174] *See* Igor Filatotchev et al., *Downsizing in Privatized Firms in Russia, Ukraine, and Belarus*, 43 ACAD. MGMT. J. 286, 287 (2000) (stating that Russia's abandonment of communism corresponded with sharp declines in both output and investment, as well as structural crisis).

[175] Commentators today generally tend to focus on the ways in which flawed privatization has led to corruption in post-Communist Russia. While opportunities for corruption have indeed been a function of imperfectly conceived privatization, corruption preceded the movement away from communism in the old U.S.S.R. *See* Eugene Solomonov, Comment, *U.S.-Russian Mutual Legal Assistance Treaty: Is There a Way to Control Russian Organized Crime?*, 23 FORDHAM INT'L L.J. 165, 165 (1999) (referring to organized crime and corruption in the U.S.S.R. in the 1960s).

[176] *See* Christopher M. Pilkerton, *Traffic Jam: Recommendations for Civil and Criminal Penalties to Curb the Recent Trafficking of Women from Post-Cold War Russia*, 6 MICH. J. GENDER & L. 221, 225–27 (1999) (describing corruption in Russia as entrenched in organized crime).

[177] *See* Yuliya Mitrofanskaya, Critical Essay, *Privatization as an International Phenomenon: Kazakhstan*, 14 AM. U. INT'L L. REV. 1399, 1418 (1999) (associating rampant corruption in Russia with a lack of transparency in privatization and the development of the "Russian shadow" economy).

[178] *See* John C. Coffee, Jr., *Privatization and Corporate Governance: The Lessons from Securities Market Failure*, 25 IOWA J. CORP. L. 1, 19 (1999) ("By virtually all accounts, Russian privatization has involved a spectacular series of blunders and been thwarted by pervasive corruption.").

[179] *See* Curtis J. Milhaupt & Mark D. West, *The Dark Side of Private Ordering: An Institutional and Empirical Analysis of Organized Crime*, 67 U. CHI. L. REV. 41, 45 n.15 (2000) ("[R]apid property rights developments created greater opportunities to exploit inefficiencies in state structures. Some systems compound the problem of weak property rights enforcement with weak government, which leads to public corruption rather than to privately organized crime.").

[180] Skip Kaltenheuser, *A Little Dab Will Do You?*, WORLD TRADE, Jan. 1999, at 58, 59–60 (1999) (quoting former United States Ambassador to Venezuela Michael Skol's statement that anti-corruption reform is a product of democratization and free markets).

[181] *See* Davids, *supra* note 64, at 41 (referring to openness and trust as moral values that are "an integral part of successful capitalism").

[182] Susan Rose-Ackerman, *Political Corruption and Democracy*, 14 CONN. J. INT'L L. 363, 363 (1999).

Free, democratic institutions are a powerful force against corruption, and this force is strengthened when democracy receives other critical forms of systemic sustenance. Specifically, democratic capitalism, technology, and transparency all reinforce one another in a complex web of mutual support. How do these three dynamics build upon each other?

Freedom and democracy enhance competition and efficiency,[183] thereby supporting private enterprise in which technology thrives.[184] The relationship is symbiotic: information technology returns the favor by driving a free economy's growth.[185] Improved technology also supports transparency, as the Internet gives more people unprecedented access to information.[186] Like technology, transparency supports the continued maintenance of a liberal democracy.[187] Democracy's liberties and freedom then continue to bolster openness and transparency.[188] In an interdependent, mutually reinforcing manner, technology-driven openness and transparency help to cement democratic institutions. Enhanced free flow of information creates checks and balances, and therefore accountability.[189] This technology-transparency-democracy nexus is a powerful, mutually reinforcing triptych.

Specifically, advancements in information technology can have a tremendous impact on bribery. Whereas other social anti-corruption reforms, such as amelioration of poverty, often reduce incentives for bribe-seeking, IT innovations enhance both formal and informal social control mechanisms that increase disincentives for bribe-seeking. The logic here

---

[183] *See* Duane Windsor & Kathleen A. Getz, *Regional Market Integration and the Development of Global Norms for Enterprise Conduct*, 38 BUS. & SOC'Y 415, 418 (1999) (noting the tendency of free trade to promote competition and efficiency).

[184] *See* Jeff Madrick, *Democracy Has the Edge When It Comes to Advancing Growth*, N.Y. TIMES, Apr. 13, 2000, at C2 (crediting democracy with a central role in economic growth and development, and observing the enhanced importance of this phenomenon in the information age).

[185] *See* Jonathan B. Sallet, Technology and Democracy, Presentation at the Twelfth Annual Aspen Institute Conference on Telecommunications Policy (Aug. 11, 1997), *at* http://www.econstrat.org/sallet.htm.

[186] *See* James W. Jones & Bayless Manning, *Getting at the Root of Core Values: A "Radical" Proposal to Extend the Model Rules to Changing Forms of Legal Practice*, 84 MINN. L. REV. 1159, 1182 (2000) (associating the Internet with growing access to information).

[187] *See* Jacqueline Klosek, *The Development of International Police Cooperation within the EU and Between the EU and Third Party States: A Discussion of the Legal Bases of Such Cooperation and the Problems and Promises Resulting Thereof*, 14 AM. U. INT'L L. REV. 599, 648 (1999) (referring to transparency and openness as hallmarks of democracy).

[188] *See* Arthur A. Goldsmith, *Slapping the Grasping Hand: Correlates of Political Corruption in Emerging Markets*, 58 AM. J. ECON. & SOC. 865, 875–76 (1999) (noting that pluralistic political systems thwart concealment of abuse of office, as democratization supports disclosure of secrets).

[189] *See* Florini, *supra* note 171, at 50 ("[T]ransparency is spreading as part and parcel of two other trends: democratization and globalization. With the spread of democratic norms, it seems right that powerful entities such as states and corporations should be held accountable for their behavior.").

is simple: advancements in IT enhance access to information, thereby increasing transparency[190] and the danger that both bribe-payers and bribe-seekers will be exposed.[191] This danger enhances formal control mechanisms of the law by increasing the risk of prosecution; it enhances informal control mechanisms by increasing the risk of reputational harm and potential ostracism.[192]

2. Information Technology as a Support for Whistle-Blowing

Before development of the Internet, public expression by social critics and whistle-blowers[193] was more easily restrained than it is today. Most critics lacked meaningful, sustained access to media, which were governed by editorial boards exercising gatekeeper control.[194] Relationships between governments and the press could also inhibit the ability of whistle-blowers to expose government indiscretions.[195] To get their word out, critics had to develop relationships with editors and prove themselves worthy of print, or else pay for their own publications. Each of these hurdles was a serious impediment to critical public expression. Moreover, voices of prospective critics and whistle-blowers could be systematically suppressed by powerful bureaucracies that maintained control over the formal media that dominated pre-Internet societies.[196]

Rapid advances in technology since the mid-1990s have supported unprecedented speech, colloquy, and criticism in many parts of the

---

[190] *See* Newal K. Agnihotri, *Basic Requirements for Developing Countries*, PRESIDENTS & PRIME MINISTERS, Jan.–Feb. 2000, at 37, 38 (identifying complete media freedom across radio, television, print, and the Internet as the optimal way of implementing transparency).

[191] *See* RICHARD HEEKS, INFORMATION TECHNOLOGY AND PUBLIC SECTOR CORRUPTION (Information Systems for Public Sector Management, Working Paper No. 4, 1998) (observing that computer technology can help detect corrupt practices, and that this dynamic may discourage corrupt behavior), *at* http://www.man.ac.uk/idpm/ispswpf4.htm.

[192] The risk of reputational harm actually works to discourage both the supply and demand side of bribery. Not only are bribe-payers more likely to be discovered and ostracized in business transactions; bribe-takers potentially embarrass their governments. *See, e.g.*, Sunny Goh, *Why China Must Ease Cyber Grip*, STRAITS TIMES (Sing.), June 21, 2000, at 32 (reporting embarrassment to Beijing when news spread about a corruption scandal at a high level of government).

[193] Whistle-blowers are recognized as effective agents in the war against corruption. *See, e.g.*, Michelle Celarier, *What's a Bribe Anyway?*, CFO, Nov. 1998, at 67 (acknowledging whistle-blowing as "usually the best means by which corrupt practices are brought to the attention of the government").

[194] *See* Debra Goldman, *The Shape of Things to Come*, MEDIAWEEK, Sept. 18, 1995, at 410 (observing that the content of increasingly fragmented media is "no longer under the media's absolute editorial control").

[195] W. Russell Neuman, *Political Communications Infrastructure*, ANNALS AM. ACAD. POL. & SOC. SCI., July 1996, at 9, 19 ("It is well documented that despite a strong tradition of investigative journalism, the close relationships between government officials and publishers, editors, and journalists can restrict or slow public awareness of indiscretion.").

[196] *See* Keohane & Nye, *supra* note 77, at 83 (observing that pre-Internet flows of information were "heavily controlled by large bureaucracies").

world.[197] Today, the Internet facilitates whistle-blowing in several ways. It provides hundreds of sources of guidance and support for prospective whistle-blowers,[198] who may be reluctant to challenge higher authorities.[199] It also permits everyone to post their beliefs on Web pages, bulletin boards, and chat rooms.[200] The Internet can accommodate anonymous postings, increasing the likelihood that would-be whistle-blowers will voice their concerns without fear of reprisal.[201] This remarkable facilitation of communication and discussion increases the number of people who can expose corruption that comes to their attention.[202] The future role of this dynamic in discouraging bribery will be enormous, provided the necessary technology is in place.

Computer technologies of the past decade have also altered the ease, speed, and scope of research.[203] Computerized databases allow us to find, in a matter of seconds, collections of related documents from around the world.[204] In the past, such searches were done manually, and could consume weeks of effort.[205]

Finally, Internet searches provide more inclusive results for all, even those at universities containing major collections, because computerized databases pool worldwide resources.[206] This dynamic can create a world of watchdogs who have access to all the information necessary to unearth and expose corruption. Computerized databases make it harder to hide, as

---

[197] *See* Keohane & Nye, *supra* note 77, at 83 (explaining how the Internet has expanded global information flows).

[198] *See* James E. Fisher et al., *Whistleblowing on the Web*, B.C. INTELL. PROP. & TECH. F., June 4–5, 1999, *at* http://www.bc.edu/bc_org/avp/law/st_org/iptf/commentary/content/1999060405.html.

[199] *See* David L. Sobel, *The Process that "John Doe" is Due: Addressing the Legal Challenge to Internet Anonymity*, 5 VA. J.L. & TECH. 3, ¶ 16 (2000) (noting the possibility that whistle-blowers will be intimidated if they lack assurances of anonymity), *at* http://www.vjolt.net/vol5/symp2000/v5:1a3-sobcl.html.

[200] *See* Greg R. Notess, *Communications and Community on Web Sites*, ONLINE, July-Aug. 1999, at 65 (describing the function of the Internet's various communication applications—"e-mail, chat sessions, discussion forums, Usenet groups, guest books, and e-mail lists"—in building a community).

[201] *See* George P. Long III, Comment, *Who Are You?: Identity and Anonymity in Cyberspace*, 55 U. PITT. L. REV. 1177, 1198 (1994) (recognizing the connection between Web-based anonymity assurances and whistle-blower willingness to speak out).

[202] *See* Neuman, *supra* note 195, at 19–20 (observing that the Internet greatly increased the capacity for many critics to discuss and debate issues and to unearth and publicize information).

[203] *See* Nick Morris, *Search and Find*, ACCOUNTANCY, Dec. 1993, at 67 (noting the speed, ease, and price of doing online research).

[204] *See id.* (observing that information service providers create easy, fast access to many computerized databases around the world).

[205] *See* Robert S. Houghton, *Databases* (observing that computerization of records enables us to sift through data in seconds rather than weeks or years), *at* http://www.bc.edu/bc_org/avp/law/st_org/iptf/commentary/content/1999060405.html (Sept. 27, 1998).

[206] *See* Nina Bernstein, *Lives on File: The Erosion of Privacy*, N.Y. TIMES, June 12, 1997, at A1 ("The Internet, where every keystroke can be archived, is now the most dramatic embodiment of what technology and commerce afford in the real world: the pooling of ever more vast stores of data and the easy retrieval of individual specks . . . .").

the impediments to investigation are lowered and vastly more people are able to police business and government.[207]

Just as IT advances in the 1990s enhanced transactional transparency, we can expect future advances to continue the process. Although it is rarely emphasized as an institutional weapon against bribery, IT may be the single most promising anti-corruption tool of the new century.

3. The Importance of Closing the Global Digital Divide

While conditions of technology-driven transparency vary widely around the globe, growing privatization and the spread of democratic institutions[208] are moving us in the right direction. Access to information will be facilitated in developing nations as technology rapidly spreads.[209] Already, the resulting transparency is cleaning up markets in countries like India.[210] Enhanced democracy and honest, open markets are especially crucial to emerging economies, which affect the world as "among the most dynamic, most influential, and therefore among the most watched components of the global economy."[211] Indeed, the very existence of emerging economies appears to depend on the openness and freedom that are supported by IT.[212]

If technology is a key to transparency and reform, then the spread of technology around the globe is a crucial policy goal in the war against corruption. Today, computer-driven searches are available to ever-increasing numbers of people around the world. Information searching capability is no longer limited to those with access to well-stocked libraries or other depositories of documents.[213]

---

[207] Indeed, watchdogs are cropping up on the Internet. *See, e.g.*, *About Corporate Watch* (explaining the activities of a group called "Corporate Watch: The Watchdog on the Web"), *at* http://www.corpwatch.org/trac/about/about.html (last visited Aug. 28, 2000).

[208] *See* William Megginson & Stephen J. Kay, *Privatization*, FOREIGN POL'Y, Spring 2000, at 14 (observing the transition of privatization from "novelty" to "global orthodoxy," and noting the connection between privatization and democratization).

[209] *See* Florini, *supra* note 171, at 51 (associating transparency with recent dramatic technological advances).

[210] *See* Krishna Guha, *Making Steady Headway: Reducing Insider Trading is an Uphill Battle, But New Technology is Helping to Bring Greater Transparency to the Market*, FIN. TIMES, Apr. 28, 1999, at 4 (discussing how technology and resulting transparency are improving transactional rectitude in equity markets in India).

[211] Philip M. Nichols, *A Legal Theory of Emerging Economies*, 39 VA. J. INT'L L. 229, 230 (1999).

[212] Emerging economies are, by definition, economies that meet two criteria: rapid economic development, and "government policies favoring economic liberalization and the adoption of a free-market system." Robert E. Hoskisson et al., *Strategy in Emerging Economies*, 43 ACAD. MGMT. J. 249, 249 (2000).

[213] For this reason, the burgeoning Internet has the potential to create, eventually, information access parity between developed and developing nations, as the latter gain greater access to basic information technologies. *But see* Subbiah Arunachalam, *Information Technology: What Does it Mean for Scientists and Scholars in the Developing World?*, BULL. AM. SOC'Y FOR INFO. SCI., Apr.-May 1999, at 21 (noting that a wide gap in infor-

We need to ensure that the technology-transparency-democracy nexus is exploited to its fullest potential, and that the speech of good-faith whistle-blowers is widely supported. How do we do this? A crucial step will be to ensure that all countries begin to see growth in Internet access equivalent to that experienced by nations such as the United States, the United Kingdom, the Netherlands, and Germany.[214] Worldwide transparency depends on closing the global digital divide, thereby eliminating enormous cross-regional disparities in access to information.[215]

Those countries most vulnerable to the ills of corruption, i.e., developing nations,[216]are also the countries least likely to have widespread access to basic modern information technologies.[217] Nations in sub-Saharan Africa, for example, are falling behind in the technology revolution.[218] In an opening address to the Information Society and Development Conference in South Africa, South Africa's Deputy President Thabo Mbeki stated the problem succinctly:

> [T]he challenge of building the basic information and communication infrastructure, both in South Africa and in most developing countries, remains colossal and perhaps not even properly understood. For this reason the so-called "Media Revolution" seems to be substantially ignoring the developing world. We need to ensure that the path to the Information Society does not widen the gap between rich and poor, developed and developing countries.[219]

Developing countries without strong formal speech protections may find the Internet to be the best protector of the free colloquy that feeds

---

mation technology access still exists between scholars in the developing and developed worlds).

[214] *See* Vesna Tomic, *Internet Spreads its Reach*, TELEPHONY, Mar. 16, 1998, at 32 (identifying rapid growth in Internet usage in these nations).

[215] *See* Arunachalam, *supra* note 213, at 21 (indicating that many developing countries presently lack infrastructure such as computers, networks, and bandwidth needed to participate in worldwide production and dissemination of information).

[216] *See* Rumu Sarkar, Critical Essay, *The Legal Implications of Financial Sector Reform in Emerging Capital Markets*, 13 AM. U. INT'L L. REV. 705, 721 (1998) (observing the particular importance of rooting out corruption in developing nations); Skip Kaltenheuser, *The Real Cost of Doing Business*, WORLD TRADE, June 1997, at 80 (observing that bribery is particularly debilitating in developing nations, which are badly harmed when funds for hospitals, schools, etc., are improperly allocated).

[217] *See* Robert Pascal, *The Global Media*, 18 FOCUS 3 (1998) (describing the lack of information technology in Third-World nations as a "famine").

[218] *See* Roderick A. MacLeod & Elisha R.T. Chiware, *Lessons to be Learned: Information Technology Training in a Developing Country Academic Library*, 14 LIBRARY MGMT. 24 (1993) (discussing the slow information technology automation experienced by developing nations of sub-Saharan Africa).

[219] Thabo Mbeki, Deputy President of South Africa, Science, Medicine and Technology, Address at G7 Information Meeting (May 1996), *in* AFRICA NEWS, May 1996, *available at* LEXIS, World Archive News.

anti-corruption reforms.[220] Repressive governments cannot fully control renegade communications in cyberspace.[221] Technologically, it is impossible to filter out all voices expressing social criticism and exposing government corruption.[222] As soon as one voice is quelled, others emerge and find a way to be heard.[223] Moreover, should a nation approach perfect domestic technological control over communications, the global nature of the Internet will encourage critical expression from outside countries.[224]

Once the technology is in place, voices will speak and be heard, and reforms will move inexorably forward. For this reason, nations like the United States, which have marketed extraterritorial legislation most aggressively, may find that their resources are better directed at closing the global gap in access to information technology.[225] This "technology diffusion" approach has several advantages over the current "extraterritorial legislation" approach. First, it avoids the danger of judicial overstepping because it is a social solution rather than a legal solution. Second, it averts any ill will that may be engendered by United States legislative multilateralization efforts.[226] Third, it provides an increment of benevolence and goodwill because it aids in the building of necessary communications infrastructures in developing nations. Finally, for all the reasons provided in Part IV, it may be more effective and efficient than extraterritorial legislation at fighting corruption.

B. Ancillary Administrative Improvements

If global technology diffusion is to be a serious force in the war against corruption, technological advancements should be accompanied by administrative systems that exploit the burgeoning potential for transparency. Of course, the spread of interactive computer networks will support the dispersal of information, even without the creation and imple-

---

[220] *See* Joe S.M. Kadhi, *Internet Plays Increasing Role in Africa's Free Press*, FREE! THE FREEDOM FORUM ONLINE, Sept. 1, 1999 (discussing the Internet as a force for democracy in Africa, creating a platform for speech even under oppressive government regimes), *at* http://www.freedomforum.org/technology/1999/9/1africafreepress.asp.

[221] *See* Neuman, *supra* note 195, at 17 (attributing the incapacitation of censorship to a growth in quantity and diversity of communications).

[222] *See id.*

[223] *See id.*

[224] *See id.* (stating that a government closure of one critical pamphleteer could be followed by the emergence of dozens more, coming across international borders from sources beyond the control of the censor).

[225] Promising technologies are being developed that may make this expensive, ambitious goal more feasible. For example, a French telecommunications company is working toward closing the digital divide by using satellite technology to increase worldwide broadband capacity. *See* James Cappoli, *Net Access Delivered from Above*, RURAL TELECOMM., July-Aug. 1999, at 8 (describing Alcatel's "Skybridge" project, the aim of which is to provide global high-speed Internet access).

[226] *See generally Threat to Global Harmony, supra* note 6, at 440–43.

mentation of standards for accountability. Nonetheless, for technology to cast its brightest light on transactions and have an optimal effect on corruption, it must be supported by administrative systems that emphasize and require openness.[227]

Specifically, better and stricter accounting and control procedures enhance transparency,[228] thereby strengthening the technology-transparency-democracy nexus. Consider that many indicia of entrenched corruption—"off the books" accounts, sham corporations, bogus transactions, uninformed boards of directors, and the absence or ineffectuality of outside audit procedures[229]—are symptoms of low-accountability social structures. If these structural weaknesses are mainstays of corrupt systems, their shoring should reduce opportunities and temptations to pay or take bribes. The development of corporate policy statements on bribery[230] and committees to train employees to comply with clear corporate policy[231] are potential administrative steps that create more robust anti-bribery structures.

Likewise, the development of audit committees to enforce company policies[232] is a structural innovation likely to deter illicit payments.[233] It is also consistent with the spirit of the FCPA's record-keeping provisions.[234] Indeed, as of 1994, Pitman and Sanford observed an increase in the number of internal audit departments that reported directly to audit committees within boards of directors, rather than to company controllers.[235] This modification places a check on financial dealings within a company, building on the traditional but oft-neglected "watchdog" role of company boards.[236] Independent audit committees build on the concept of audits as

---

[227] Administrative requirements of openness increase the number of chances that suspect transactions will be exposed to the light of day. The transactions are visible not only to random, haphazard observation, but also to organized, systematic observation.

[228] *See* Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 93 AM. J. INT'L L. 161, 191 (1999) ("Key elements of good governance and transparency should include, at a minimum, international generally accepted accounting principles, budget transparency, independent audit function, anticorruption mechanisms and public participation.").

[229] Robert A. Bassett, *Canadian Companies Beware: The U.S. Foreign Corrupt Practices Act Applies to You!*, 36 ALBERTA L. REV. 455, 471 (1998).

[230] Don Zarin, *Doing Business Under the Foreign Corrupt Practices Act Compliance Programs*, 943 PLI/CORP. 525, 532–35 (1996).

[231] *See id.*

[232] J. Lee Johnson, Comment, *A Global Economy and the Foreign Corrupt Practices Act: Some Facts Worth Knowing*, 63 MO. L. REV. 979, 996 (1998).

[233] This likelihood of deterrence is inferred from the fact that most FCPA prosecutions have been under the legislation's audit provisions rather than its anti-bribery provisions. Timothy Martin, *Foreign Bribery Law: A Positive Step But It May Not Go Far Enough*, NAT'L POST , Feb. 9, 1999, at C06. An audit appears to be an effective mechanism for uprooting corrupt practices.

[234] *See* 15 U.S.C. § 78m(b) (2) (A) (2000).

[235] Glenn A. Pitman & James P. Sanford, *The Foreign Corrupt Practices Act Revisited: Attempting to Regulate "Ethical Bribes" in Global Business*, 30 INT'L J. PURCHASING & MATERIALS MGMT. 15 (1994).

[236] For discussion of the gap between the official role and the actual role of directors as

"powerful tools for ferreting out slush funds for bribes"[237]—tools that "stiffen[ ] the spines of accountants in demanding explanations for ambiguous accounting entries."[238]

Along these lines, the greatest contribution of multinational accords like the OAS Convention is not their highly touted criminalization provisions for transnational bribery. These conventions have a more promising capacity: to institutionalize reforms around the world in the form of systemic changes toward accountability and transparency in government procurement procedures.[239] For example, Article III of the OAS Convention reflects a commitment among signatories toward open, equitable, efficient government procurement and hiring systems.[240] Openness in this area might mimic United States regulation of senior government employees, many of whom must provide detailed disclosure of property and income.[241] Global regulations that demand accountability can provide a framework in which technology-generated transparency can most effectively uproot corruption.

VI. CONCLUSION: TECHNOLOGY DIFFUSION AND THE FORGING OF SHARED VALUES IN A GLOBAL COMMUNITY

We have seen the role that global information technology diffusion can play in fighting corruption around the world. Bridging the global digital divide creates a forum for critical and dissident voices in all nations, and especially in nations where speech and other individual freedoms are historically under-protected. Enhanced access to information technology fights corruption more effectively and efficiently than the extraterritorial criminalization approach that is the backbone of current United States-driven policy.

Where will a new global colloquy take us in the war against corruption? The world has become increasingly interdependent,[242] and this trend will only escalate in the twenty-first century.[243] Technology is the driving

---

corporate watchdogs, see MYLES L. MACE, DIRECTORS: MYTH AND REALITY (1971).

[237] Seth Goldschlager & Stanley J. Marcuss, *Let's Have an Anti-Bribery Convention That Really Works*, INT'L HERALD TRIB. (Neuilly-sur-Seine, Fr.), July 18, 1997, at 8.

[238] *Id.*

[239] *See* Lucinda A. Low et al., *The Inter-American Convention Against Corruption: A Comparison with the United States Foreign Corrupt Practices Act*, 38 VA. J. INT'L L. 243, 251 (discussing aspects of the OAS Convention aimed at increasing transparency and accountability in government procurement processes).

[240] Inter-American Convention Against Corruption, Mar. 29, 1996, art. III(5), art. III(6), 35 I.L.M. 724.

[241] 5 C.F.R. § 2634.301–.305 (1997).

[242] *See* GEOFF MULGAN, CONNEXITY: HOW TO LIVE IN A CONNECTED WORLD 1 (1997) (observing that the world has become increasingly interdependent and interconnected, and that this "connexity" creates both constraints and opportunities).

[243] *See* Mehmet Bozacioglu, *The Globalization of Business: Technology and Trade Implications—An International Study of How Businesses are Deploying Information Technology to Build Global Communications Infrastructures*, GLOBAL TECH. BUS. REP. (observing

force behind this trend, as transportation and communication advancements have figuratively shrunk the world,[244] forcing distant peoples to interact in unprecedented ways, and to unprecedented degrees.[245]

Not surprisingly, this interdependence is most widely acknowledged in those areas where spillovers are most noticeable—areas like environmental law and policy. As a result, we have become aware of the need for a global approach to environmental protection.[246] In the future, we cannot avoid recognizing similar realities with regard to other aspects of political, social, and economic interaction in a shrinking world.

As technology has been the source of global interdependence, so it provides the tools that may aid in the development of shared world values. "Advances in technology have furthered the world's converging views on bribery. Through the Internet and e-mail, people around the world can exchange articles, images, and ideas .... This exposure has the tendency to promote democracy and human rights."[247] By virtue of this dynamic, information technology diffusion will play a critical role in the development of a true global village.

One of the hallmarks of the post-Cold War era is a growing regional and global value convergence.[248] A gradual but ever-developing alignment of world ideologies contributes to the unprecedented number of cooperative international anti-bribery efforts over the past five years.[249] Increasingly amicable nations, whose value systems continue to converge, are more likely to band together to seek global solutions to global problems.

While some of these solutions undoubtedly are better than others,[250] transnational cooperative efforts to curb bribery are a positive force for

---

the current trend of globalization of business), *at* http://www.gtbusiness.com/globalrpt.html (last visited Aug. 30, 2000).

[244] *See* Patrick Butler et al., *A Revolution in Interaction*, 1 McKinsey Q. 4 (1997) (observing growing global interaction, driven by technology, and suggesting that converging technologies are about to expand global interaction capacities by a factor of between two and five).

[245] *See* Bozacioglu, *supra* note 243 ("Because of technology, issues commonplace in the company's domestic market ... have become concerns to be handled on an international scale.").

[246] *See* Paula C. Murray, *The International Environmental Management Standard, ISO 14000: A Non-Tariff Barrier or a Step to an Emerging Global Environmental Policy?*, 18 U. Pa. J. Int'l Econ. L. 577, 581 (1997) ("There has been an increasing awareness, in the United States as well as abroad, that a more global approach to environmental protection is necessary to safeguard the earth's precious resources.").

[247] Unzicker, *supra* note 134, at 672.

[248] *See* Cesar Gaviria, *Reshaping the Hemisphere*, Wash. Post, Apr. 16, 1998, at A21 ("Once divided by Cold War conflicts of interest, [the Americas] today are united by unprecedented convergence of ideals and values.").

[249] *See id.* For discussion of the international efforts to which I refer here, see *supra* Part III.D.

[250] This is an oblique reference to my suggestion, especially in earlier writings, that extraterritorial legislation is a sub-optimal policy approach to the problem of global corruption. *See supra* notes 4–6. Although some of the solutions that cooperating nations create may have negative side-effects or may be controversial, the general trend toward an international dialogue and attempts to create international solutions are positive.

future change. The best solutions will help to establish and maintain an international conversation, through which people from different cultures can debate a variety of perspectives regarding the control of corruption. The process can lead to a gradual global value convergence through four steps: mutual exposure, dialogue, negotiation, and resolution. While none of these steps requires the adoption of modern information technology, all of them are facilitated and expedited by the Internet. The resulting global conversation can support a more cohesive world community, increasingly capable of forging truly legitimate global policies.[251]

[251] I emphasize "legitimate" global policies to note that cross-border solutions should ideally be accepted by all the nations they affect. If all the world's sovereignties were to agree on a set of anti-corruption remedies, the remedies would be legitimate by virtue of universal support.

ARTICLE

STATE CONSTITUTIONAL RESTRICTIONS ON LEGISLATIVE PROCEDURE: RETHINKING THE ANALYSIS OF ORIGINAL PURPOSE, SINGLE SUBJECT, AND CLEAR TITLE CHALLENGES

MARTHA J. DRAGICH*

State constitutions generally contain numerous procedural limitations on the state's legislative process, and courts occasionally invalidate laws that are found to have been passed in violation of these requirements. Professor Dragich argues that the courts have not provided well-reasoned analysis in these cases and argues that the goals of the procedural limitations are, at times, being frustrated by their lax enforcement. This Article focuses on three forms of procedural challenges in an attempt to explain where the courts have erred and to provide a more coherent method of analyzing these claims in the future.

State constitutions contain a variety of provisions governing legislative procedures.[1] Unlike substantive limits, procedural restrictions regulate only the process by which legislation is enacted.[2] Common examples are original purpose, single subject, and clear title restrictions.[3] Original purpose clauses prohibit the amendment of a bill so "as to change its original purpose."[4] Single subject rules limit each bill to one subject.[5] Clear title rules require that the subject of the bill be clearly expressed in

---

* Associate Professor of Law and Director of the Law Library, University of Missouri-Columbia. J.D., University of Minnesota, 1983; M.A., University of Minnesota, 1983; B.A., University of Minnesota, 1978. I wish to thank Dean Timothy J. Heinsz for his support of this project; Professor Michelle Cecil for helpful comments; librarian Cindy Shearrer and law students J. Matthew Miller and Heather Richenberger for research assistance; Kathy Smith for preparation of the manuscript; and Lowell Pearson for everything. All errors are mine.

[1] *See, e.g.*, Robert F. Williams, *State Constitutional Limits on Legislative Procedure: Legislative Compliance and Judicial Enforcement*, 48 U. PITT. L. REV. 797, 798 (1987).

[2] *See* People v. Cervantes, 723 N.E.2d 265, 266 (Ill. 1999); Michael W. Catalano, *The Single Subject Rule: A Check on Anti-Majoritarian Logrolling*, 3 EMERGING ISSUES IN STATE CONST. LAW 77, 77; *see also* Williams, *supra* note 1, at 799 (contrasting substantive and procedural limitations).

[3] *See* Williams, *supra* note 1, at 798–99. Other procedural limitations exist, but less frequently serve as the basis for challenging legislation. *See, e.g.*, MO. CONST. art. III, § 20 (requiring a quorum and public sessions); *id.* § 25 (establishing time limits for introduction of bills); *id.* § 28 (requiring bills reviving, reenacting, or amending prior laws to be set forth in full).

[4] *E.g.*, MO. CONST. art. III, § 21.

[5] *See, e.g., id.* § 23.

the bill's title.[6] These provisions are designed to eradicate perceived abuses in the legislative process, such as hasty, corrupt, or private interest legislation.[7] They are intended to promote open, orderly, and deliberative legislative processes,[8] and can be found in almost all state constitutions.[9]

The genesis of state constitutional restrictions on legislative procedure has been recounted elsewhere.[10] The clear title rule, for example, was first adopted in 1798 in Georgia[11] and the single subject rule first appeared in 1818 in Illinois.[12] Most other states followed suit in the mid-nineteenth century.[13] Constitutional restrictions on legislative procedure have survived[14] and have been re-adopted in modern constitutions despite criticism that they allow the invalidation of legislation on "technical" grounds.[15]

State constitutional restrictions on legislative procedure, unlike legislative rules adopted by the two houses of Congress,[16] provide an avenue

---

[6] *See, e.g., id.*

[7] *See* Williams, *supra* note 1, at 798. The adoption of the clear title rule, for example, can be traced to the infamous Yazoo land scandal perpetrated by the Georgia legislature in 1795. *See* Millard H. Ruud, *No Law Shall Embrace More Than One Subject*, 42 MINN. L. REV. 389, 391–92 (1958); William D. Popkin, *The Collaborative Model of Statutory Interpretation*, 61 S. CAL. L. REV. 541, 554 (1988); *see also* Cady v. Jardine, 193 S.E. 869, 870 (Ga. 1937) (holding that the title of an act, "to create the office of commissioner of roads and revenues," was broad enough to cover a provision in the law to designate the commissioner).

[8] Williams, *supra* note 1, at 798; Popkin, *supra* note 7, at 553–54.

[9] *See* Williams, *supra* note 1, at 798; Popkin, *supra* note 7, at 554; 1A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 17.01, at 1 (5th ed. 1992) (single subject); *id.* § 18.01, at 25 (clear title). Appendix I to this Article is a chart showing which state constitutions currently include original purpose, single subject, and clear title provisions. In contrast, the federal constitution imposes few procedural requirements; most congressional procedures are set by standing rules of the House and Senate. ABNER J. MIKVA & ERIC LANE, LEGISLATIVE PROCESS 110–11 (1995); Williams, *supra* note 1, at 798.

[10] *See, e.g.*, Popkin, *supra* note 7, at 533–54; Ruud, *supra* note 7, at 389–90 (history of single subject rule); *id.* at 391–92 (history of clear title rule); Catalano, *supra* note 2, at 78–80 (history of single subject rule).

[11] *See* Ruud, *supra* note 7, at 391–92; *see also* Cady v. Jardine, 193 S.E. 869, 870 (Ga. 1937).

[12] *See* Ruud, *supra* note 7, at 389.

[13] *See id.* at 453–55 (chart showing, for each state, the date of adoption of a single subject restriction); Williams, *supra* note 1, at 798 (noting that procedural limitations were adopted "throughout the nineteenth century").

[14] In a rare exception, when Illinois adopted a new constitution in 1970, it dropped the clear title rule but retained the single subject rule. *See* Aaron Chambers, *State's Single Subject Rule Subject to Numerous Interpretations*, CHI. DAILY L. BULL., Apr. 22, 2000, at 1.

[15] Williams, *supra* note 1, at 799–800 (describing such criticism); *see also Republicans in Illinois Feud Over Gun Control*, N.Y. TIMES, Dec. 29, 1999, at A16 [hereinafter *Republicans Feud*] (describing as a "technicality" the Illinois Supreme Court's invalidation of a gun control measure for violation of the single subject rule).

[16] Because Congress enforces its own rules and because there are few procedural limitations in the federal Constitution, there are few procedural challenges that can be made to a federal statute. *See* MIKVA & LANE, *supra* note 9, at 118; RONALD D. ROTUNDA & JOHN E. NOWAK, 2 TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 10.9, at

for challenging statutes, and such litigation is fairly common.[17] The large number of procedural challenge cases seems surprising since State courts consistently proclaim that statutes are presumed constitutional.[18] The Missouri Supreme Court, for example, has long insisted that

> [t]he use of these procedural limitations to attack the constitutionality of statutes is not favored. A statute has a presumption of constitutionality. We interpret procedural limitations liberally and will uphold the constitutionality of a statute against such an attack unless the act *clearly and undoubtedly* violates the constitutional limitation. The burden of establishing [a statute's] unconstitutionality rests upon the party questioning it.[19]

Other states likewise favor a liberal construction[20] of procedural restrictions.[21] Courts have used a variety of phrases to express the high standard

---

122 (3d ed. 1999) (procedural rules of both houses of Congress are "beyond judicial challenge").

[17] *See* Catalano, *supra* note 2, at 80 (stating that single subject challenges "continue on a rather regular basis"). A Westlaw search run by the author in the Allstates database on August 9, 2000 returned 87 state highest court cases involving single subject, clear title, or original purpose challenges from 1990 to date. These cases came from 28 states, though they tended to be concentrated in a handful of states. Missouri had 10 cases, Washington and Illinois each had 8, Alabama and West Virginia each had 6, Iowa and Wyoming each had 5, Ohio had 4, and Maryland had 3 during this period. Appendix II to this Article lists the cases by state. Single subject cases involving appropriations bills and cases involving laws enacted by the initiative process have been excluded. Both types of cases present special considerations outside the scope of this Article. *See* Arangold Corp. v. Zehnder, 718 N.E.2d 191, 197–98 (Ill. 1999) (noting that appropriations bills are exempt from single subject requirements under ILL. CONST. art. IV, § 8(d)); State *ex rel.* Caleb v. Beesley, 949 P.2d 724, 727–28 (Ore. 1997) (comparing separate constitutional provisions requiring that measures enacted by initiative and laws enacted by the legislature embrace single subjects).

[18] *See, e.g.*, People v. Wooters, 722 N.E.2d 1102, 1106 (Ill. 1999); State *ex rel.* Ohio Acad. of Trial Lawyers v. Sheward, 715 N.E.2d 1062, 1099 (Ohio 1999); Pierce v. State, 910 P.2d 288, 306 (N.M. 1995).

[19] C.C. Dillon Co. v. City of Eureka, 12 S.W.3d 322, 327 (Mo. 2000) (en banc) (internal quotation marks and citations omitted) (brackets in original). Similar language appears throughout the Missouri cases. *See, e.g.*, State v. Miller, 45 Mo. 495, 497 (Mo. 1870) (noting that such provisions are given a "very liberal interpretation"); State *ex rel.* Niedermeyer v. Hackmann, 237 S.W. 742, 743 (Mo. 1922) (en banc) (commenting that it is "uniformly held" that such provisions are to be "liberally construed"); State *ex rel.* Normandy Sch. Dist. v. Small, 356 S.W.2d 864, 877 (Mo. 1962) (en banc) (Storckman, J., dissenting) (stating that if constitutionality is in doubt, "such doubt must be resolved in favor of [the statute's] validity"); Westin Crown Plaza Hotel Co. v. King, 664 S.W.2d 2, 5 (Mo. 1984) (en banc) (stating that the court is "allowed to make every reasonable intendment to sustain the constitutionality of the statute"); Hammerschmidt v. Boone County, 877 S.W.2d 98, 102 (Mo. 1994) (en banc) (noting that the court interprets procedural limitations liberally).

[20] In this Article, the phrase "liberal construction" is used—consistent with the language used by the Missouri Supreme Court—to mean that procedural challenges are disfavored.

[21] *See, e.g.*, People v. Cervantes, 723 N.E.2d 265, 267 (Ill. 1999); Associated Builders & Contractors v. Ventura, 610 N.W.2d 293, 299 (Minn. 2000); *Ohio Acad. of Trial Lawyers*, 715 N.E.2d at 1099; State *ex rel.* Tomasic v. Unified Gov't of Wyandotte County, 955

to be applied in these cases, stating that statutes will be held unconstitutional, for example, only if "clearly, plainly and palpably so,"[22] only if shown "beyond a reasonable doubt" to violate the constitution,[23] or only in case of a "manifestly gross and fraudulent violation."[24] As a result of these high standards, state courts uphold legislation against procedural challenges "more often than not."[25] The Minnesota Supreme Court observed that from the late 1970s until 2000, it had decided five single subject/clear title cases, upholding the statute in every case.[26] In 1984, a Missouri judge indicated that the Missouri Supreme Court had not sustained a procedural challenge in twenty years.[27]

Why, then, do litigants continue to raise original purpose, single subject, and clear title claims? One explanation of this behavior is that "[s]uch challenges are easy to make because all that is necessary is reference to the face of the statute."[28] Another explanation is that each of these cases, depending as it does on the specific text of a particular enactment, is sui generis.[29] As such, there is always a chance that a court will sustain a challenge to one piece of legislation even though it has rejected challenges to many other statutes. A more cynical explanation is that procedural challenges offer litigants one last chance to attack legislation they were unable to defeat during the legislative process.[30] Overall, these explanations suggest that procedural challenges remain common because although they are low-return, they are also low-risk.

P.2d 1136, 1145–46 (Kan. 1998); Utilicorp United, Inc. v. Iowa Util. Bd., 570 N.W.2d 451, 458 (Iowa 1997); Md. Classified Employees Ass'n v. State, 694 A.2d 937, 943 (Md. 1997); *In re* Boot, 925 P.2d 964, 971 (Wash. 1996); Keyserling v. Beasley, 470 S.E.2d 100, 102 (S.C. 1996); McIntire v. Forbes, 909 P.2d 846, 853 (Or. 1996); Accounts Mgmt., Inc. v. Williams, 484 N.W.2d 297, 299 (S.D. 1992); Billis v. State, 800 P.2d 401, 430 (Wyo. 1990).

[22] *Utilicorp United*, 570 N.W.2d at 454.

[23] Beagle v. Walden, 676 N.E.2d 506, 507 (Ohio 1997); Westvaco Corp. v. S.C. Dept. of Revenue, 467 S.E.2d 739, 741 (S.C. 1995).

[24] State *ex rel.* Ohio AFL-CIO v. Voinovich, 631 N.E.2d 582, 586 (Ohio 1994).

[25] Catalano, *supra* note 2, at 80 (referring to single subject challenges).

[26] *Associated Builders & Contractors*, 610 N.W.2d at 300.

[27] Westin Crown Plaza Hotel Co. v. King, 664 S.W.2d 2, 7 (Mo. 1984) (en banc) (Welliver, J., dissenting). Between 1984 and 1994, that trend continued unabated. A Westlaw search conducted by the author returned no case decided after *Westin Crown Plaza Hotel* that invalidated a statute under article III, sections 21 or 23 of the Missouri Constitution until *Hammerschmidt v. Boone County*, 877 S.W.2d 98 (Mo. 1994) (en banc).

[28] Catalano, *supra* note 2, at 82.

[29] *See* Kincaid v. Mangum, 432 S.E.2d 74, 81 (W. Va. 1993) (citing 1A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 17.03, at 9 (4th ed. 1985)) (indicating that there is no accurate mechanical rule); Porten Sullivan Corp. v. State, 568 A.2d 1111, 1121 (Md. 1990) (stating that a court ordinarily must decide on a case-by-case basis); *see also* M. Albert Figinski, *Maryland's Constitutional One-Subject Rule: Neither a Dead Letter Nor an Undue Restriction*, 27 U. BALT. L. REV. 363, 370 n.48 (1998) (noting that each case must be decided on its own facts).

[30] *See, e.g.*, Williams, *supra* note 1, at 824; Harold Stearley, Case Note, *Missouri's Single-Subject Rule: A Legal Tool to Attack Environmental Legislation?*, 7 MO. ENVTL. L. & POL'Y REV. 41, 48 (1999).

Whatever their motivations, these claims have begun to pay off. The Minnesota Supreme Court, for example, "sound[ed] an alarm that [it] would not hesitate to strike down" legislation violating single subject and clear title provisions.[31] The Missouri Supreme Court has heard ten procedural challenge cases since 1994,[32] finding violations in five of them.[33] The Illinois Supreme Court sustained only one single subject challenge from 1970 to 1996,[34] but it has sustained four challenges since 1997.[35]

A recent Illinois decision led to a nationally publicized furor in the Illinois legislature.[36] In *People v. Cervantes*,[37] the Illinois Supreme Court struck down the Safe Neighborhoods Law for violation of the single subject restriction.[38] The law had been in effect nearly five years at the time of the decision.[39] The scope of the Illinois court's ruling—striking down the entire enactment[40]—is important. The court found that the Safe Neighborhoods Law was intended to address neighborhood safety problems relating to "gangs, drugs, and guns."[41] Two portions of the law were found to constitute separate subjects: provisions amending the WIC (Women, Infants, and Children nutrition program) Vendor Management Act, and provisions relating to the licensing of secure residential youth care facilities.[42] The Illinois Supreme Court discerned "no natural and logical connection" between these provisions and neighborhood safety.[43] The portion of the Safe Neighborhoods Law challenged in *Cervantes* related not to the WIC vendor management program or the licensing of residential youth care facilities, but to weapons.[44] Because the entire act

---

[31] *Associated Builders & Contractors*, 610 N.W.2d at 301.

[32] *Hammerschmidt*, 877 S.W.2d at 98; Akin v. Dir. of Revenue, 934 S.W.2d 295 (Mo. 1996) (en banc); Carmack v. Dir., Mo. Dep't. of Agric., 945 S.W.2d 956 (Mo. 1997) (en banc); Fust v. Attorney Gen., 947 S.W.2d 424 (Mo. 1997) (en banc); Mo. Health Care Ass'n v. Attorney Gen., 953 S.W.2d 617 (Mo. 1997) (en banc); Stroh Brewery Co. v. State, 954 S.W.2d 323 (Mo. 1997) (en banc); Nat'l Solid Waste Mgmt. Ass'n v. Dir., Dept. of Natural Res., 964 S.W.2d 818 (Mo. 1998) (en banc); St. Louis Health Care Network v. State, 968 S.W.2d 145 (Mo. 1998) (en banc); Corvera Abatement Tech., Inc. v. Air Conservation Comm'n, 973 S.W.2d 851 (Mo. 1998) (en banc); C.C. Dillon Co. v. City of Eureka, 12 S.W.3d 322 (Mo. 2000) (en banc).

[33] *See* Appendix II.

[34] Fuehrmeyer v. City of Chicago, 311 N.E.2d 116 (Ill. 1974).

[35] People v. Cervantes, 723 N.E.2d 265 (Ill. 1999); People v. Wooters, 722 N.E.2d 1102 (Ill. 1999); People v. Reedy, 708 N.E.2d 1114 (Ill. 1999); Johnson v. Edgar, 680 N.E.2d 1372 (Ill. 1997).

[36] *See Illinois Legislators Try to Come to a Compromise on the Safe Neighborhoods Act* (National Public Radio broadcast, Dec. 15, 1999) (transcript available on LEXIS) [hereinafter *Legislators Compromise*]; *Republicans Feud*, *supra* note 15.

[37] 723 N.E.2d 265 (Ill. 1999).

[38] *Id.* at 266.

[39] *Id.*

[40] It appears that severability was argued only on the motion for rehearing, which the court denied. *Id.* at 274 (McMorrow, J., dissenting upon denial of rehearing).

[41] *Cervantes*, 723 N.E.2d at 270.

[42] *Id.* at 270–71.

[43] *Id.* at 270.

[44] *Id.* at 266 (describing indictment on gunrunning charge).

was ruled unconstitutional, however, the defendant's gunrunning charge was dismissed. In fact, prosecutors were "forced to dismiss" firearms charges against numerous defendants.[45] Five years after initial passage of the Safe Neighborhoods Law, the Illinois legislature found itself sharply divided on the merits of reenacting the gun control provisions.[46] The measure has not been reenacted even though the Governor called a special session of the legislature for that purpose.[47]

The Safe Neighborhoods Law exemplifies one consistent thread among recent procedural challenge cases: major changes were introduced into the challenged bills very late in the legislative process. This type of legislative procedure runs directly counter to the open, rational, and deliberative model the constitutional restrictions contemplate.[48] Bills enacted in a hasty, apparently deceptive, or ill-considered process thus seem to invite procedural challenges. To return to *Cervantes*, the original Senate bill, relating to community service sentencing, was amended in the House so as to replace its entire contents with new provisions, now described as the "Safe Neighborhoods Law."[49] The Senate refused to concur with the House amendment.[50] A conference committee was formed, and that body deleted the entire House amendment and substituted another entirely new bill, 157 pages long and containing three components.[51] That version then passed the Senate and the House and was signed by the governor.[52] Similarly, in a Missouri case, *St. Louis Health Care Network v. State*,[53] a substitute bill was offered on the last day of the legislative session for a bill originally relating to the Missouri Family Trust.[54] The substitute bill contained provisions relating to nonprofit corporations, charitable gift annuities, and same-sex marriages.[55] In both cases, the timing and scope of the changes raised suspicion.

A court's description of the legislative procedure leading to passage of the bill at issue sometimes indicates that the court's willingness to overturn the law is based on a suspicion that the process was tainted. For

---

[45] *Republicans Feud*, *supra* note 15; *see also* Bob Chiarito, *Experts Predict Raft of Appeals in Wake of 'Safe Neighborhoods' Ruling*, CHI. DAILY L. BULL., Jan. 20, 2000, at 1 (stating that over 2,600 weapons convictions would be affected by the *Cervantes* ruling).

[46] *Republicans Feud*, *supra* note 15; *Legislators Compromise*, *supra* note 36.

[47] *See* Aaron Chambers, *Court Rejects Rehearing of 'Safe Neighborhoods Law' Ruling*, CHI. DAILY L. BULL., Jan. 31, 2000, at 1 (stating that the law has not been reenacted because legislators cannot agree on gun provisions).

[48] *See* Williams, *supra* note 1, at 798; Popkin, *supra* note 7, at 553–54.

[49] *Cervantes*, 723 N.E.2d at 268.

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] 968 S.W.2d 145 (Mo. 1998) (en banc).

[54] *Id.* at 146. The Missouri Family Trust is intended to "encourage[ ], enhance[ ], and foster[ ] . . . the provision of medical, social, or other supplemental services for persons with a mental or physical impairment." MO. REV. STAT. § 402.199 (2000).

[55] *St. Louis Health Care Network*, 968 S.W.2d at 146. The law was invalidated for violation of the clear title requirement. *Infra* notes 170–173 and accompanying text.

example, the Maryland Court of Appeals described the "transmogrifi[cation]" of a one-page bill concerning a specific tax into "lengthy emergency legislation" extending to government ethics and county taxing authority.[56] Similarly, the Supreme Court of Appeals of West Virginia explained how a bill on thoroughbred racing became "an omnibus bill which encompassed authorization for all agency rules considered that year."[57] In *National Solid Waste Management. Ass'n v. Director, Department of Natural Resources*,[58] the Missouri Supreme Court described a more subtle, but no less important, last-minute change:

> Two days before the end of the 1995 legislative session, the House of Representatives tacked onto the tail-end of the 31-page Senate Bill 60 . . . an amendment . . . that . . . expanded the subject of the bill from one that originally encompassed only "solid waste management" to one encompassing both "solid waste management" and "hazardous waste management."[59]

The court described these practices as exactly those the constitutional procedural limitations are designed to prevent.[60]

Recognizing that state courts are beginning to review procedural challenges more rigorously, this Article attempts to provide guidance for the resolution of such cases. Part I examines the history, purposes, and standards of original purpose, single subject, and clear title restrictions, using Missouri's provisions as examples. Part I also identifies paradigmatic cases of each of the procedural violations with the hope of more sharply differentiating the three claims.

Parts II through V present a case study of ten Missouri cases decided since 1994, supplemented with notable cases from other states. Part II begins with a brief description of the Missouri cases. These cases together address all three of the constitutional restrictions, and do so in more depth and variety than do the recent cases of any other single state. As such, they constitute a compact yet well-developed body of law for analysis. Part II concludes by presenting a preliminary assessment of the Missouri Supreme Court's analysis of these claims.

Part III uses the Missouri cases as a basis from which to develop a framework for analysis of original purpose, single subject, and clear title claims. The proposed analytical framework is tested against cases re-

---

[56] Porten Sullivan Corp. v. State, 568 A.2d 1111, 1114 (Md. 1990).

[57] Kincaid v. Mangum, 432 S.E.2d 74, 77 (W. Va. 1993). The court also noted that the bill did not set out the rules in full, but rather referred legislators to the state register for the contents of the rules. *Id.* at 78.

[58] 964 S.W.2d 818 (Mo. 1998).

[59] *Id.* at 819; *see also* Migdal v. State, 747 A.2d 1225, 1232 (Md. 2000) (holding that an act that protected individuals from being appointed as resident agents and which protected certain companies from derivative suits violated the single subject restriction).

[60] *Solid Waste Mgmt.*, 964 S.W.2d at 820.

cently decided in Missouri and other states. In most cases, the proposed analysis would mandate the result actually reached. The proposed analysis, however, may provide greater clarity to guide the decision of future cases. In a few cases, it would mandate a different result.

Part IV briefly discusses the particular bill versions relevant to the analysis of each claim. It argues that certain violations cannot be proven if the court looks only at the version of the bill finally passed.

Finally, Part V discusses potential remedies, concluding that severance of the offending provisions is the proper remedy under some, but not all, circumstances. As the *Cervantes* case illustrates, consideration of the remedy is necessary to strike an appropriate balance between competing interests: enforcement of the constitutional restrictions, on one hand, and deference to the legislature's policy choices, on the other.

I. THE CONSTITUTIONAL REQUIREMENTS

This Part defines the requirements of original purpose, single subject, and clear title rules and discusses the historical bases of, and purposes served by, each. The three procedural requirements are related in that they are parts of a comprehensive constitutional design to control the legislative process.[61] Moreover, the three provisions all were adopted at around the same time,[62] and all reflect suspicion of, and disillusionment with, the legislative process.[63] But the requirements themselves, and the

---

[61] *See* Williams, *supra* note 1, at 798 (describing the inclusion, in "virtually all state constitutions," of a "wide range of limitations on state legislative processes"); Popkin, *supra* note 7, at 553–55 (describing the adoption of procedural and substantive requirements to discourage private interest legislation).

[62] *See* Williams, *supra* note 1, at 798. Williams confirms that the types of procedural limitations discussed here were not found in the earliest state constitutions. *Id.* at 798. In Missouri, article III, section 21 (original purpose) dates back to the Constitution of 1875 (as article IV, sections 24, 25, and 26), while article III, section 23 (single subject and clear title) dates back to the Constitution of 1865 (as article IV, section XXXII). Similarly, many states adopted these procedural limitations in the last half of the nineteenth century. *See, e.g.*, ALA. CONST. art. IV, § 2 (single subject and clear title limitations were adopted in 1875); *id.* § 19 (original purpose limitation was adopted in 1875); COLO. CONST. art. V, § 21 (single subject and clear title limitations were adopted in 1876); *id.* § 17 (original purpose limitation was adopted in 1876); MICH. CONST. art. IV, § 24 (all three provisions were originally codified in 1850 as MICH. CONST. of 1850, art. VI, §§ 20, 25); MONT. CONST. art. V, § 11(3) (single subject and clear title provisions were adopted in 1889); *id.* § 11(1) (original purpose provision was adopted in 1889); PA. CONST. art. III, § 3 (single subject and clear title limitations were adopted in 1874); *id.* § 1 (original purpose rule was adopted in 1874); WYO. CONST. art. 3, § 24 (single subject and clear title rules were adopted in 1889); *id.* § 20 (original purpose rule was adopted in 1889). By contrast, Texas adopted single subject and clear title provisions in 1845, TEX. CONST. art. III, §§ 35(a), 35(b), and added the original purpose rule in 1876, *id.* § 30.

[63] *See* State v. Miller, 45 Mo. 495 (1870) (observing that provisions were "designed to strike down a most vicious and corrupt system which prevailed in our legislative bodies"); Jack L. Landau, *The Intended Meaning of "Legislative Intent" and Its Implications for Statutory Construction in Oregon*, 76 OR. L. REV. 47, 86 (1997) (describing state constitutional amendments in the nineteenth century); LAWRENCE M. FRIEDMAN, A HISTORY OF

purposes they serve, are distinct.[64] As such, each rule calls for its own test for compliance, depends on the consideration of a particular version of the bill, and raises distinct concerns with respect to remedies. As a first step, this Article attempts to outline the rationales for each requirement, using paradigmatic cases of each violation in order to provide context for the analytical discussion that follows in Part III.[65]

A. Original Purpose

Missouri's original purpose provision is typical. It reads in pertinent part:

> No law shall be passed except by bill, and *no bill shall be so amended in its passage through either house as to change its original purpose.* Bills may originate in either house and be amended or rejected by the other. Every bill shall be read by title on three different days in each house.[66]

By its text, section 21 not only establishes the original purpose rule, but also implies a limitation of the rule and hints at the rule's underlying rationale. The text makes clear that the original purpose rule does not prohibit amendments to a bill during the course of its consideration and passage. In fact, it explicitly permits either house to amend bills originating in the other house.[67] The Missouri Supreme Court has indicated that "Article III, § 21 was not designed to inhibit the normal legislative processes, in which bills are combined and additions necessary to comply with the legislative intent are made."[68] At least one other state agrees that the original purpose rule should not be applied in such a way as to "unduly hamper the legislature."[69]

In essence, the original purpose rule is "designed to prevent the enactment of . . . statutes in terms so blind that legislators themselves . . . [would fail] to become apprised of the changes in the laws."[70] The final

---

AMERICAN LAW 122 (1985) (describing scandals leading to the perception that legislatures were captive to special interests); J. WILLARD HURST, THE GROWTH OF AMERICAN LAW 37–38 (1950) (describing early 19th-century hostility to the legislative process).

[64] *See* Williams, *supra* note 1, at 799 (noting that there are important differences among constitutional limitations on legislative procedures).

[65] The single subject and clear title rules are considered together because they are generally contained in the same constitutional provision. *See infra* note 82.

[66] MO. CONST. art. III, § 21 (emphasis added).

[67] *Id.* I assume that the power of either house to amend bills from the other house necessarily includes the lesser power of either house to amend its own bills.

[68] Stroh Brewery Co. v. State, 954 S.W.2d 323, 326 (Mo. 1997) (en banc) (quoting Blue Cross Hosp. Serv., Inc. of Mo. v. Frappier, 681 S.W.2d 925, 929 (Mo. 1984) (en banc)).

[69] Barclay v. Melton, 5 S.W.3d 457, 459 (Ark. 1999).

[70] Lincoln Credit Co. v. Peach, 636 S.W. 2d 31, 38 (Mo. 1982) (en banc) (quoting State v. Ludwig, 322 S.W.2d 841, 847 (Mo. 1959) (en banc)); *see also* Billis v. State, 800 P.2d

sentence of section 21 supports this rationale. It provides for the reading by title of each bill on three different days in each house.[71] The rule protects the legislative process by allowing bills to be read and monitored by title alone. That is, a legislator is entitled to read bills as originally introduced and to decide, on that basis, how extensively to monitor each bill's progress. Legislators are assured that the purpose of a bill will not have changed dramatically following its introduction. This same reasoning serves to provide adequate notice to members of the public who wish to monitor pending legislation.

The original purpose rule also reinforces the deadline for introduction of new bills by preventing legislators from disguising new bills as amendments to existing bills.[72] Accordingly, the original purpose rule is concerned with *changes* in content of the bill. By aiding legislators in monitoring hundreds of bills introduced in each legislative session, the original purpose rule helps legislators to represent the desires of their constituents.

Though only a few of the recent cases involve original purpose claims, the outcomes are instructive.[73] In *Barclay v. Melton*,[74] a bill that "had as its sole purpose the creation of a tax credit for dependents" was amended by deleting all of the provisions contained in the introduced version and replacing them with new contents.[75] As passed, the bill "assess[ed] a tax surcharge against . . . residents of [certain] school districts."[76] The Arkansas Supreme Court concluded that the change from a tax credit to a tax surcharge was a change in the bill's original purpose.[77]

401, 428 (Wyo. 1990) (stating that the goal of the original purpose rule is "to preclude last-minute, hasty legislation and to provide notice to the public of legislation under consideration") (quoting Anderson v. Oakland County Clerk, 353 N.W.2d 448, 455 (Mich. 1984)).

[71] Mo. CONST. art. III, § 21.

[72] *See* 1 SINGER, *supra* note 9, § 9.05, at 580. In Missouri, article III, section 25 provides that new bills cannot be introduced after the 60th day of the session. *See infra* note 272 and accompanying text. Illinois lawmakers reportedly have adopted a new strategy following the *Cervantes* decision: the introduction of some 800 "shell bills." The "shell bills" are left blank until later amended in "any way [lawmakers] see fit." *Numerous Interpretations, supra* note 14, at 1. This strategy may succeed because the Illinois Constitution lacks an original purpose clause. *See* Appendix I.

[73] *See* Appendix II. In only two cases did the court find a violation.

[74] 5 S.W.3d 457 (Ark. 1999).

[75] *Id.* at 459.

[76] *Id.* at 460.

[77] *Id.* The only original purpose challenge ever sustained by the Missouri Supreme Court involved a similar change. In *Allied Mutual Insurance Co. v. Bell*, 185 S.W.2d 4, 6 (Mo. 1945), a bill originally introduced to eliminate the deduction of premiums paid for reinsurance was changed so as to establish a tax on premium receipts. In both cases, the change in the bill had the effect of enacting the opposite result—essentially changing from a tax decrease to a tax increase.

Changes less extreme than this about-face seem not to trigger invalidation on original purpose grounds.[78] *Advisory Opinion No. 331*[79] appears to be unusual in this regard. There, the Alabama Supreme Court ruled that a bill whose original purpose was "to make appropriations for the ordinary expenses of . . . the government" was unconstitutionally altered so as to change its original purpose when provisions limiting the powers of government officials to make necessary expenditures were added.[80] According to the court, the purpose of the bill changed "from one of making general appropriations . . . to one of . . . repealing and changing other provisions of law . . . ."[81] This bill represents a more subtle change. As finally passed, it contained two contradictory elements: provisions authorizing expenditures and provisions limiting the same expenditures. This case adds credence to the notion that a change in direction is fundamental in establishing an original purpose violation.

B. Single Subject and Clear Title

In most states, the single subject and clear title rules are combined in one section of the constitution.[82] The combined rule is commonly phrased: "[n]o bill shall contain more than *one subject*, which shall be *clearly expressed* in its title."[83] In some states, a bill must embrace "one subject, and matters properly connected therewith."[84] Exceptions are commonly made for certain types of bills,[85] such as "general appropria-

---

[78] For example, although the Missouri Supreme Court found no violation, this Article considers *C.C. Dillon Co. v. City of Eureka*, 12 S.W.3d 322 (Mo. 2000) (en banc), a good example of an original purpose violation. The bill, as introduced, concerned the definition of a particular position on a transportation commission. *Id.* at 325. As finally passed, the bill included additional provisions relating to employment in transportation agencies, as well as provisions authorizing cities and counties to regulate billboards. *Id.* Given the dramatic change in scope of the bill, it is difficult to accept the conclusion that the purpose of this bill did not change. Even if we accept (as the court did) that the bill's subject is "transportation" and that billboards are "fairly relate[d]" to that subject, *id.* at 328, the facts of the case still suggest that an original purpose violation occurred. The introduction of the billboard provisions came when the bill "was being taken up for the third reading," long after the constitutional deadline for introduction of new measures had passed. *Id.* at 325. Legislators who read the original bill, and thereafter monitored it by title, would have had no reason to suspect the enormous change in the scope and objectives of the bill. Thus, this Article argues that the amendment pertaining to billboards runs afoul of the original purpose rule. *See infra* notes 223–229 and accompanying text.

[79] 582 So. 2d 1115 (Ala. 1991).

[80] *Id.* at 1117–18 (relying on the bill's title for a description of its original purpose).

[81] *Id.* at 1118.

[82] 1A SINGER, *supra* note 9, § 17.01, at 1–2; *see also, e.g.*, MD. CONST. art. III, § 29 ("[E]very law . . . shall embrace but one subject, and that shall be described in its title."); N.Y. CONST. art. 3, § 15 ("No private or local bill . . . shall embrace more than one subject, and that shall be expressed in the title.").

[83] MO. CONST. art. III, § 23 (emphasis added). The text of this section is unchanged from the 1875 Constitution, where it appeared as article IV, section 28.

[84] IOWA CONST. art. III, § 29.

[85] 1A SINGER, *supra* note 9, § 17.01, at 1 (describing exceptions in 15 states for reve-

tion bills, which may embrace the various subjects and accounts for which moneys are appropriated,"[86] and bills revising or codifying the law.[87] It is well-established that even when combined, the single subject/clear title provision sets forth two independent requirements—that a bill have only one subject, and that the bill's title clearly express that subject.[88] The common phrasing of the rule suggests that clear title analysis cannot proceed until the subject of the bill has been determined and found to be "single."[89]

1. Single Subject

Two reasons are thought to support the single subject requirement: the prevention of logrolling[90] and the preservation of a meaningful role for the governor.[91] Simply stated, the single subject rule exists "to secure to every distinct measure of legislation a separate consideration and decision, dependent solely upon its individual merits."[92] One leading com-

---

nue bills, appropriations bills, and codification acts).

[86] MO. CONST. art. III, § 23.

[87] *See, e.g.*, ALASKA CONST. art. II, § 13 ("Every bill shall be confined to one subject unless it is . . . one codifying, revising, or rearranging existing laws."); ILL. CONST. art. 4, § 8(d) ("Bills, except bills . . . for the codification, revision, or rearrangement of laws, shall be confined to one subject."); IND. CONST. art. 4, § 19 ("An act, except an act for the codification, revision or rearrangement of laws, shall be confined to one subject . . . ."); LA. CONST. art. 3, § 15(A) ("Every bill, excepting . . . bills for the rearrangement, codification, or revision of a system of laws, shall be confined to one subject."); *see also Ex parte* Coker, 575 So. 2d 43, 48–49 (Ala. 1991) (opinion of Almon, J., on application for rehearing) (discussing the codification exception to the single subject rule).

[88] *See* Corvera Abatement Tech., Inc. v. Air Conservation Comm'n, 973 S.W.2d 851, 861 (Mo. 1998) (en banc) ("two distinct limitations"); Patrice v. Murphy, 966 P.2d 1271, 1274 (Wash. 1998) ("two separate prohibitions"); Utilicorp United, Inc. v. Iowa Util. Bd., 570 N.W.2d 451, 455 (independent but closely related requirements); Md. Classified Employees Ass'n v. State, 694 A.2d 937, 942 (two distinct but related requirements); McIntire v. Forbes, 909 P.2d 846, 853 (Or. 1996) (separate but related requirements); *see also* Ruud, *supra* note 7, at 391 (stating that single subject and clear title provisions, though linked in a single amendment, "have independent operation; independent historical bases; and separate purposes"); 1A SINGER, *supra* note 9, § 17.01, at 2 (stating that the two "independent provisions serv[e] distinct constitutional purposes").

[89] *Cf. McIntire*, 909 P.2d at 853 (stating that the rule "sets distinct requirements for the body of an act, the title of the act, and the relationship between the body and the title").

[90] Logrolling is the "practice of procuring diverse and unrelated matters to be passed as one 'omnibus' through the consolidated votes of the advocates of each separate measure, when perhaps no single measure could have been passed on its own merits." 1A SINGER, *supra* note 9, § 17.01, at 2. Single subject cases are replete with references to logrolling and omnibus bills. *See, e.g.*, People v. Cervantes, 723 N.E.2d 265, 274 (Ill. 1999); Associated Builders & Contractors v. Ventura, 610 N.W.2d 293, 299 (Minn. 2000); Ohio Acad. of Trial Lawyers v. Sheward, 715 N.E.2d 1062, 1098 (Ohio 1999); Brower v. State, 969 P.2d 42, 69 (Wash. 1998); *Patrice*, 966 P.2d at 1274 (Wash. 1998); State *ex rel.* Tomasic v. Unified Gov't of Wyandotte County, 955 P.2d 1136, 1165 (Kan. 1998); *Md. Classified Employees Ass'n*, 694 A.2d at 943; Beagle v. Walden, 676 N.E.2d 506, 507 (Ohio 1997); Bayh v. Ind. State Bldg. & Constr. Trades Council, 674 N.E.2d 176, 179 (Ind. 1996); *McIntire*, 909 P.2d at 854; Kincaid v. Mangum, 432 S.E.2d 74, 76 (W. Va. 1993).

[91] *See* Hammerschmidt v. Boone County, 877 S.W.2d 98, 102 (Mo. 1994) (en banc).

[92] Ruud, *supra* note 7, at 390 (quoting Minnesota v. Cassidy, 22 Minn. 312, 322

mentator observed, "limiting each bill to a single subject" allows legislators to "better grasp[ ] and more intelligently discuss[ ]" the issues presented by each bill.[93] Without the rule, the danger is that "several minorities [may combine] their several proposals as different provisions of a single bill and thus consolidat[e] their votes so that a majority is obtained for the omnibus bill where perhaps no single proposal . . . could have obtained majority approval separately."[94]

Furthermore, the single subject rule protects the governor's veto prerogative by "prevent[ing] the legislature from forcing the governor into a take-it-or-leave-it choice when a bill addresses one subject in an odious manner and another subject in a way the governor finds meritorious."[95] The rule is "intended to prohibit [ ] anti-majoritarian tactic[s]."[96] In a word, the single subject rule protects the *decision* of the legislators and governor on each individual legislative proposal.

Hammerschmidt v. Boone County[97] is a classic case of a single subject violation. Two very narrow bills relating to the conduct of elections were combined,[98] and thereafter provisions relating to the form of county governance were added.[99] There was no "rational unity"[100] between the provisions relating to election procedures and those relating to county governance, and no reason except "tactical convenience"[101] for combining them in a single bill. Election procedures and county governance cannot be reconciled as parts of any single subject. No title could be written to express a single subject incorporating both of these elements.

Another good example is *People v. Cervantes*,[102] an Illinois case. A bill originally relating to community service sentencing was amended several times during the course of its consideration.[103] As passed, the bill expanded the offenses for which a minor can be tried as an adult, permitted longer sentences for felonies committed in furtherance of the ac-

---

(1875)).

[93] Ruud, *supra* note 7, at 391.

[94] *Id.* at 391; *see also* Catalano, *supra* note 2, at 79.

[95] *Hammerschmidt*, 877 S.W.2d at 102.

[96] Catalano, *supra* note 2, at 79. Courts also suggest that the single subject rule facilitates deliberation. *See, e.g.*, People v. Reedy, 708 N.E.2d 1114, 1120 (Ill. 1999). Ruud notes that the purpose of facilitating orderly deliberation, however, "relates to legislative procedure; [these rules do] not aim to eradicate devices designed to pervert the rule of majority vote but rather to eliminate rambling, discursive deliberations." Ruud, *supra* note 7, at 391. If the single subject rule were designed only to facilitate deliberation, it "could have been left to the legislative rules to treat." *Id.* at 391.

[97] 877 S.W.2d 98 (Mo. 1994) (en banc).

[98] The court apparently assumed that the subjects of these two original bills were fairly related to each other, so that the combined bill contained a single subject—elections. *Id.* at 99. This assumption seems correct.

[99] *Id.* at 100.

[100] Ruud, *supra* note 7, at 411.

[101] *Id.* at 411.

[102] 723 N.E.2d 265 (Ill. 1999).

[103] *Id.* at 268–69.

tivities of a gang, amended sentences for driving while intoxicated, adjusted sentences for drug offenses, and amended various other sentencing provisions.[104] All of these provisions were found to be related to the amended bill's subject matter, neighborhood safety.[105] Portions of the bill relating to the licensing of youth correctional facilities and welfare program vendor fraud, however, were held to relate to other subjects unconnected with neighborhood safety.[106]

2. Clear Title

Two distinct purposes support the clear title requirement.[107] Most importantly, the requirement "is designed to assure that the people are fairly apprised . . . of the subjects of legislation that are being considered in order that they have [an] opportunity of being heard thereon."[108] Secondarily, by requiring the title to express the whole subject of the bill,[109] the rule "defeats surprise within the legislative process"[110] and prohibits a legislator from "surreptitiously inserting unrelated amendments into the body of a pending bill."[111] These two purposes reflect a widespread concern with special interest legislation in the nineteenth century.[112] The clear title rule, properly understood, safeguards openness and honesty in the legislative process and facilitates public participation.

There are two common variations of clear title violations: overly broad, "amorphous"[113] titles and under-inclusive titles.

---

[104] *Id.* at 269.

[105] *See id.* at 270.

[106] *Id.* at 271–73.

[107] *See* Porten Sullivan Corp. v. State, 568 A.2d 1111, 1118 (Md. 1990) (stating that the goals of single subject and clear title rules "are related [but] can also be quite distinct").

[108] *Hammerschmidt*, 877 S.W.2d at 102; *see also* 1A SINGER, *supra* note 9, § 18.02, at 27 (stating that the primary purpose of the clear title rule is to ensure reasonable notice to legislators and the public); State *ex rel.* Lambert v. County Comm'n, 452 S.E.2d 906, 915 (W. Va. 1994); Patrice v. Murphy, 966 P.2d 1271, 1274 (Wash. 1998); La. Seafood Mgmt. Council v. Louisiana Wildlife & Fisheries Comm'n, 715 So. 2d 387, 394 (La. 1998); McCoy v. VanKirk, 500 S.E.2d 534, 546 (W. Va. 1997); Tenn. Mun. League v. Thompson, 958 S.W.2d 333, 338 (Tenn. 1997).

[109] *See* Natural Solid Waste Mgmt. Ass'n v. Dir., Dept. of Natural Res., 964 S.W.2d 818, 821 (Mo. 1998) (en banc) (discussing "commonality" of subjects in a bill).

[110] *Hammerschmidt*, 877 S.W.2d at 101; *see also* Utilicorp United, Inc. v. Iowa Util. Bd., 570 N.W.2d 451, 455 (Iowa 1997); *Lambert*, 452 S.E.2d at 915; Associated Builders & Contractors v. Ventura, 610 N.W.2d 293, 300 (Minn. 2000); Hussey v. Chatham County, 494 S.E.2d 510, 511 (Ga. 1998); *Tenn. Mun. League*, 958 S.W.2d at 336.

[111] *Hammerschmidt*, 877 S.W.2d at 101; *see also* 1A SINGER, *supra* note 9, § 18.02, at 27; McGlothren v. E. Shore Family Practice, 742 So. 2d 173, 177 (Ala. 1999); *McCoy*, 500 S.E.2d at 546; Lutz v. Foran, 427 S.E.2d 248, 251 (Ga. 1993).

[112] *See* Popkin, *supra* note 7, at 553 (suggesting that the concern with private interest legislation is behind all state constitutional restrictions on legislative procedure).

[113] St. Louis Health Care Network v. State, 968 S.W. 2d 145, 147 (Mo. 1998) (en banc) (referring to the title: "related to certain incorporated and non-incorporated entitites").

St. Louis Health Care Network v. State[114] is a paradigmatic case of an amorphous title so broad that it gave no notice of the contents of the bill.[115] This Article classifies *St. Louis Health Care Network* as a clear title case rather than a single subject case precisely because the title is so vague that one cannot discern from it what the bill itself provides. Clear title is properly the basis on which this case was resolved.

National Solid Waste Management Ass'n v. Director, Department of Natural Resources[116] is a paradigmatic case of an under-inclusive title. The title—"relating to solid waste management"—accurately described the subject of most of the bill's provisions, but failed to give any hint of its application to hazardous waste.[117] As a result, the title failed to provide notice of a portion of the bill's subject. The court assumed that the bill's two aspects, solid waste and hazardous waste, could be reconciled as part of a broader subject,[118] but because the title failed to express the full extent of the bill's subject, the court invalidated the law.[119]

The preceding analysis demonstrates that the original purpose, single subject, and clear title provisions, though related, are distinct. The original purpose requirement allows legislators to monitor vast numbers of bills by reference to their titles, confident that each bill's original purpose will remain reasonably constant throughout the process of consideration. It also secures adequate time for the consideration of each proposal by preventing late amendments that drastically alter the bill. The single subject rule assures that legislators and the governor can make a choice based upon the merits of legislation on each subject by preventing them from having to swallow unrelated bitter provisions with the sweet. Finally, the clear title rule protects the right of the public to know the subjects of legislation being considered and to voice opinions on measures of concern to them, and protects against fraudulent or surreptitious legislation.

II. The Case Study

Missouri's constitution contains typical original purpose,[120] single subject,[121] and clear title[122] provisions. Litigation challenging statutes for alleged violations of these procedural requirements has long been a sta-

---

[114] *Id.*

[115] *Id.* at 145. This bill also suffered from a single subject violation. *Id.* at 146 (describing provisions relating to venue, terms of office for directors of nonprofit corporations, charitable gift annuities, and same-sex marriage).

[116] 964 S.W.2d 818 (Mo. 1998) (en banc).

[117] *Id.* at 821–22.

[118] *See id.*

[119] *Id.*

[120] Mo. Const. art. III, § 21.

[121] *Id.* § 23.

[122] *Id.* § 23.

ple of the Missouri Supreme Court's docket.[123] But the flow of cases has recently swelled: since 1994, the Missouri Supreme Court has decided no fewer than ten.[124] These ten decisions serve as a case study for analysis of the three procedural challenges. Because nearly every state's constitution contains similar procedural requirements, this Article's analysis is relevant not only for Missouri, but for most other states as well. This Part presents a chronology of the ten recent cases discussed throughout the Article. It then offers a preliminary assessment of the Missouri Supreme Court's analysis.

A. Chronology

In 1994, the Missouri Supreme Court decided *Hammerschmidt v. Boone County*.[125] *Hammerschmidt* was the first case to invalidate a statute on procedural grounds in three decades.[126] As such, the case marks a turning point in the Missouri Supreme Court's posture toward, and analysis of, procedural claims. The plaintiff in *Hammerschmidt* challenged a 1993 statute that authorized certain counties, including Boone County, to adopt county constitutions.[127] The new statute also authorized the county to call an election for the purpose of having voters approve the initiation of the process of framing a county constitution.[128] These provisions governing the drafting of county constitutions were inserted by adoption of an amendment on the house floor after two separate bills had been combined into a single piece of legislation and reported out of committee.[129] Missouri House Bill 551 originally dealt with voter registration by mail.[130] Missouri House Bill 552 originally concerned mail ballots.[131] According to its title, the bill as finally passed "relat[ed] to elections."[132] The plaintiff claimed single subject and clear title violations.[133] The Missouri Supreme Court held that the bill contained two subjects: elections and

---

[123] *See, e.g.*, State v. Miller, 45 Mo. 495, 497 (Mo. 1870) (noting that the single subject and clear title provision "has of late been several times before this court"); State *ex rel.* Normandy Sch. Dist. v. Small, 356 S.W.2d 864, 876 (Mo. 1962) (Storckman, J., dissenting) (describing a series of school cases alleging single subject and clear title violations); National Solid Waste Mgmt. Ass'n v. Dir., Dept. of Natural Res., 964 S.W.2d 818, 819 (Mo. 1998) (en banc) (noting that the court has had "numerous opportunities" in recent years to examine such claims).

[124] *See supra* note 32. Appendix II indicates which of the three claims were raised and decided in each case.

[125] 877 S.W.2d 98 (Mo. 1994).

[126] *See supra* note 27.

[127] *Hammerschmidt*, 877 S.W.2d at 100 (describing H.B. 551, 87th Gen. Assem., 1st Sess. (Mo. 1993), and H.B. 552, 87th Gen. Assem., 1st. Sess. (Mo. 1993)).

[128] *Id.*

[129] *Id.* at 99.

[130] *Id.*

[131] *Id.*

[132] *Id.*

[133] *Id.* at 100–01.

county governance.[134] The court severed the portion relating to county governance and allowed the rest of the statute to stand.[135]

In 1996, the court decided *Akin v. Director of Revenue*,[136] a case that raised original purpose and single subject claims.[137] The bill at issue was called the "Outstanding Schools Act."[138] Most of its provisions established new educational programs, but the bill also amended tax rates and deductions.[139] The tax provisions raised revenue to pay for only the new educational programs.[140] The court found no original purpose or single subject violation.[141]

The following year, the court decided four cases. *Carmack v. Director of Missouri Department of Agriculture*[142] raised only a single subject claim.[143] This case involved a lengthy bill "relating to economic development."[144] The bill included a provision regarding the compensation formula when the state veterinarian orders the slaughter of diseased livestock.[145] Closely following *Hammerschmidt*'s analysis, the court found that the bill contained more than one subject.[146]

Fust v. Attorney General[147] involved a tort reform bill intended to "assure[ ] just compensation for certain person's [sic] damages."[148] In addition to modifying tort liability and insurance rules and trial procedures in cases involving punitive damages, the bill established a "tort victims' compensation fund."[149] The latter provision was challenged on single subject and clear title grounds.[150] The court found no violation.[151]

In *Missouri Health Care Ass'n v. Attorney General*,[152] the court considered a bill regulating long-term care.[153] The Department of Social Services was to enforce most of the bill's provisions and was mentioned in the bill's title. One provision, however, regulated advertising by nursing homes, and was to be enforced by the Attorney General.[154] The plain-

---

[134] *Id.* at 103.
[135] *Id.* at 104.
[136] 934 S.W.2d 295 (Mo. 1996).
[137] *Id.* at 297.
[138] *Id.*
[139] *Id.*
[140] *Id.* at 302.
[141] *Id.*
[142] 945 S.W.2d 956 (Mo. 1997).
[143] *Id.* at 958.
[144] *Id.* at 957.
[145] *Id.*
[146] *Id.* at 961.
[147] 947 S.W.2d 424 (Mo. 1997).
[148] *Id.* at 427.
[149] *Id.*
[150] *Id.*
[151] *Id.* at 428.
[152] 953 S.W.2d 617 (Mo. 1997).
[153] *Id.* at 619.
[154] *Id.* at 623.

tiff raised original purpose, single subject, and clear title claims.[155] The court held that the bill contained two subjects, violating the single subject requirement.[156]

The final case decided in 1997 posed the question of how the procedural requirements apply when a bill results from a combination of bills introduced separately. *Stroh Brewery Co. v. State*[157] involved amendments to liquor control laws.[158] The final bill was a culmination of three measures which originally regulated separate, and relatively narrow, aspects of the sale of alcoholic beverages. Prior to passage, a provision was added requiring beer sold in Missouri to bear a label indicating where it was produced.[159] The plaintiff claimed original purpose and single subject violations.[160] The court found no violation.[161]

In 1998, the court decided three more cases. *National Solid Waste Management Ass'n v. Director, Department of Natural Resources*[162] involved a bill regulating solid waste management, a matter defined as distinct from hazardous waste,[163] but a last-minute amendment extended certain provisions of the bill to apply to hazardous waste as well.[164] The bill's title, however, only referred to solid waste.[165] The plaintiff raised all three procedural challenges.[166] The court found a clear title violation, holding that the title was fatally under-inclusive.[167] The court then "accomplished" severance "by restricting the application of the statute"[168] to solid waste, of which the title gave adequate notice.[169]

The next case, *St. Louis Health Care Network v. State*,[170] was also decided on clear title grounds, although the plaintiff raised all three claims.[171] The bill's title, "relating to certain incorporated and non-incorporated entities," was held to be so broad as to be meaningless and incapable of expressing any single subject.[172] Because the bill's title gave

---

[155] *Id.* at 619.
[156] *Id.* at 623.
[157] 954 S.W.2d 323 (Mo. 1997).
[158] *Id.* at 324-25.
[159] *Id.* at 325.
[160] *Id.* at 324.
[161] *Id.*
[162] 964 S.W.2d 818 (Mo. 1998).
[163] *Id.* at 820.
[164] *Id.*
[165] *Id.*
[166] *See id.* at 819.
[167] *Id.* at 821.
[168] *Id.* at 822. Severance "by application" occurs when, because the provisions are not capable of severance in fact, the court "limit[s] [the] statute to less than all of the applications called for by its own terms." 2 SINGER, *supra* note 9, § 44.15, at 542. Some courts disapprove of this practice because it "amounts to judicial amendment" of the statute. 2 SINGER, *supra* note 9, § 44.15, at 542.
[169] *Solid Waste Mgmt.*, 964 S.W.2d at 822.
[170] 968 S.W.2d 145 (Mo. 1998).
[171] *Id.* at 146.
[172] *Id.* at 148.

no meaningful notice of its contents, the entire bill was held unconstitutional.[173]

Corvera v. Abatement Technologies, Inc. v. Air Conservation Comm'n[174] involved another bill that combined three measures that had been introduced separately.[175] The three original bills related to asbestos abatement, underground storage tanks, and water well drillers.[176] The combined bill's title said it related to "environmental control."[177] The plaintiff challenged the bill on single subject and clear title grounds.[178] The court found both requirements to be satisfied and upheld the statute.[179]

Finally, in March 2000, the court decided *C.C. Dillon v. City of Eureka.*[180] Throughout the legislative process, the bill in *Dillon* related, according to its title, to "transportation."[181] Originally, the bill was very narrow, creating a legislative oversight committee on transportation and defining a single position on a transportation commission.[182] As passed, the bill contained several provisions relating to organizational structure, salaries and employment in the Department of Transportation, and also allowed cities and counties to regulate billboards.[183] The bill was challenged on original purpose, single subject, and clear title grounds.[184] The court found no violation.[185]

B. Preliminary Assessment

Together, these ten cases provide a compact case study for analysis of original purpose, single subject, and clear title claims while simultaneously offering multiple variations on each claim. Their facts involve a variety of legislative topics as well as several common legislative practices.

This case study suggests several preliminary conclusions. First, the presumption of statutory validity still appears to hold, although its effect is not as overwhelming as in the past. Second, litigants generally raise more than one of the procedural claims (and often all three)—perhaps because they cannot differentiate among them under the recent cases. Finally, among the three claims, courts are more likely to find single

---

[173] *Id.* at 149.
[174] 973 S.W.2d 851 (Mo. 1998).
[175] *Id.* at 860.
[176] *Id.*
[177] *Id.*
[178] *Id.*
[179] *Id.* at 862.
[180] 12 S.W.3d 322 (Mo. 2000).
[181] *Id.* at 329.
[182] *See* S. 883, 89th Gen. Assem., Reg. Sess. (Mo. 1998) (as introduced).
[183] *Dillon*, 12 S.W.3d at 326.
[184] *Id.* at 324–25.
[185] *Id.* at 328–30.

subject and clear title violations. The Missouri Supreme Court appears reluctant to decide original purpose claims, as its posture in the original purpose cases has been exceedingly deferential.

One cannot help but wonder why the Missouri Supreme Court has heard so many procedural challenges. This Article offers two explanations. First, the court's still-deferential posture encourages (at least indirectly) litigation of these claims.[186] The court did sustain procedural challenges in *Hammerschmidt*, *Carmack*, *Missouri Health Care Ass'n*, *Solid Waste Management*, and *St. Louis Health Care Network*. As a result, the court's posture in procedural challenge cases appears less deferential than it was as recently as two decades ago.[187] But in other cases, particularly *Stroh* and *Dillon*, the court found no violation despite considerable evidence of a hasty process, including last-minute alterations of the bills. The court in these latter two cases adopted an extremely deferential posture. The Missouri cases may bear out the conclusion that lax enforcement leads to an increased number of violations.[188]

The second reason for the increased number of claims is that the ambiguities of recent decisions of the Missouri Supreme Court may encourage litigants to bring suit. The court's inability to articulate meaningful standards stems primarily from its failure to separate the three claims properly, particularly with respect to the underlying rationales they are designed to serve.[189] For example, *Hammerschmidt* describes the single subject rule as a "corollary" to the original purpose rule, and notes that "[t]ogether, these constitutional provisions serve 'to facilitate orderly legislative procedure.'"[190] The opinion goes on to list five purposes collectively served by the three constitutional requirements: to facilitate understanding and discussion of the issues presented by each bill; to prevent logrolling; to defeat surprise in the legislative process; to provide fair notice to the public of the subjects of legislation being considered;

---

[186] *See* Associated Builders & Contractors v. Ventura, 610 N.W.2d 293, 301 (Minn. 2000) (asserting that "the more deference shown by the courts . . . , the bolder become those who would violate [the constitutional restrictions]" and implying that challenges would follow) (quoting State *ex. rel.* Mattson v. Kiedrowski, 391 N.W.2d 777, 785 (Minn. 1986) (Yetka, J., concurring)). *See generally* Chambers, *supra* note 14 (indicating that the Illinois single subject rule had been "dormant," causing lawmakers to think "the high court had given them the leeway to build larger bills"); Williams, *supra* note 1, at 800 (suggesting that increased judicial enforcement could result in greater legislative compliance).

[187] In 1984, one judge charged, "it is time this Court developed meaningful standards to evaluate legislation challenged under §§ 21 and 23." Westin Crown Plaza Hotel Co. v. King, 664 S.W.2d 2, 7 (Mo. 1984) (Welliver, J., dissenting) (observing that the court had not sustained a procedural challenge in 20 years).

[188] *See Associated Builders & Contractors*, 610 N.W.2d at 301; Chambers, *supra* note 14 (stating that the increased number of cases stems from the legislature's recent tendency toward "carelessly enacting bigger bills").

[189] *Cf.* Chambers, *supra* note 14 (asserting that the increased number of single subject challenges in Illinois stems from the Illinois Supreme Court's failure to "state[ ] clearly what standard the rule demands").

[190] 877 S.W.2d at 101 (quoting Ruud, *supra* note 7, at 391).

and to preserve intact the governor's veto power.[191] The opinion fails to articulate which of these purposes is fulfilled by each provision.

This Article contends that much of the difficulty evident in the recent cases flows directly from the *Hammerschmidt* opinion. To some extent, its muddling of the claims is attributable to rhetorical imprecision. The words "subject" and "purpose," for example, are sometimes used interchangeably in ordinary speech.[192] That the Missouri Supreme Court has done likewise in its opinions is part of the problem. The *Hammerschmidt* opinion discusses all three constitutional limitations—original purpose, single subject, and clear title—even though the plaintiff raised only the latter two, and the court decided only the single subject claim. In a particularly confusing passage, the court stated: "To the extent the bill's *original purpose* is properly expressed in the *title* to the bill, we need not look beyond the *title* to determine the bill's *subject*."[193] Subsequent cases continued to treat distinct claims as if they were the same. In *Akin*, for example, the court's discussion of the original purpose claim seems to rely on a single subject analysis.[194] More recently, the court asserted that its analysis of germaneness for an original purpose claim could serve without further elaboration to decide whether all provisions of the bill fairly related to each other for purposes of a single subject claim.[195] The failure to classify claims rigorously is a large part of the confusion.[196]

In *Hammerschmidt*, the court compounded rhetorical imprecision in analyzing the three claims by outlining an analytical framework not called for by the case itself and unsupported by the constitution and the

---

[191] *Id.* at 101–02. This passage is essentially repeated in *Stroh*, 954 S.W.2d at 325–26.

[192] *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1847 (1981). The third definition of purpose links it with subject: "A subject under discussion." *Id.*

[193] *Hammerschmidt*, 877 S.W.2d at 102 (emphasis added). *Fust* contains an equally mystifying passage describing how violations of the clear title mandate may occur:

> First, the *subject* may be so general or amorphous as to violate the *single subject requirement*. Second, the *subject* may be so restrictive that a particular provision is rejected because it falls outside the scope of the *subject*.

Fust v. Attorney Gen., 947 S.W.2d 424, 428 (Mo. 1997) (en banc) (citation omitted).

[194] Akin v. Dir. of Revenue, 934 S.W.2d. 295, 302 (Mo. 1996) (en banc) (finding no original purpose violation because "each provision of the bill related to education").

[195] C.C. Dillon Co. v. City of Eureka, 12 S.W.3d 322, 329 (Mo. 2000) (en banc).

[196] As an example, one commentator incorrectly stated that "every single subject case which has reached the level of appeal has been on the basis of an alleged violation of the clear title provision." Stearley, *supra* note 30, at 47 (citing *Mo. Health Care Ass'n*, *Fust*, *Hammerschmidt*, and Missourians to Protect the Initiative Process v. Blunt, 799 S.W.2d 824 (Mo. 1990)). To the contrary, *Missouri Health Care Ass'n* and *Hammerschmidt* were decided on the subject claim, but the court used the title to determine subject. *Hammerschmidt*, 877 S.W.2d at 102–03; Mo. Health Care Ass'n v. Attorney Gen., 953 S.W.2d 617, 622-23 (Mo. 1997) (en banc). *Fust* decided both claims. *Fust*, 947 S.W.2d at 428–29. *Initiative Process*, 799 S.W.2d at 826, decided a subject claim regarding a proposed constitutional amendment, for which there is no clear title requirement. *See* MO. CONST. art. III, § 50.

court's precedents.[197] Most notably, the court relied too heavily upon the bill's title to determine its subject. Subsequent cases attempted to follow *Hammerschmidt*'s prescriptions, but, not surprisingly, *Hammerschmidt*'s rhetorical imprecision and analytical weakness have led to confusion surrounding the proper test for compliance with the constitutional requirements.[198] Precise analytical separation of the original purpose, single subject, and clear title provisions is a difficult task, but it is essential to the proper resolution of such cases.

III. THE PROPER ANALYSIS

This Part provides a framework for analyzing original purpose, single subject, and clear title claims. The most salient characteristic of this framework is that it treats each of the constitutional procedural restrictions independently, and links the test for compliance with each to the specific objectives it is designed to serve. Thus, a critical step in the analysis of original purpose claims is to distinguish purpose from subject and to focus on changes during the legislature's consideration of the bill. In analyzing single subject claims, it is essential to examine the provisions of the bill to determine their relationship to each other, not merely to the bill's title. For clear title claims, it is necessary to examine the title in relation to the body of the bill to assess whether adequate notice was provided. To frame the discussion, this Part presents in more detail the Missouri Supreme Court's analysis of each claim. It then outlines the test for compliance, taking account of the purposes each particular constitutional prohibition is designed to serve.[199] This Part also applies the proposed analysis to selected recent cases in order to test its validity.

A. Original Purpose

Missouri's original purpose rule prohibits a bill from being amended during the course of its consideration "so . . . as to change its original purpose."[200] The Missouri Supreme Court has been extremely deferential in its approach to original purpose claims.[201] In the ten cases under dis-

---

[197] First, the court concludes that a bill's subject includes all matters that "fall within or reasonably relate" to its "general core purpose." 877 S.W.2d at 102. Then the court looks to the title of the bill to determine the bill's purpose or subject. *Id.* Finally, if the title is "amorphous," the court turns to the "organization of the constitution" for guidance in determining what is a single subject. *Id.* at 102 n.3.

[198] *See infra* notes 313–315.

[199] At least one court has recognized that decisions must take account of the reasons behind the rule. *See* Porten Sullivan Corp. v. State, 568 A.2d 1111, 1121 (Md. 1990). Many of the opinions recite the reasons behind the constitutional restrictions. *See supra* notes 70, 90–91, and 109–111.

[200] MO. CONST. art. III, § 21. For similar provisions in other states, see Appendix I.

[201] The annotations to article III, section 21 reveal only one case in which the court invalidated a statute on original purpose grounds: *Allied Mutual Insurance Co. v. Bell*, 185

cussion, the court reached the original purpose claim only three times, in *Akin*, *Stroh*, and *Dillon*. Each time, the court found that no change in the bill's purpose had occurred. Original purpose challenges were raised, but not decided, in *Missouri Health Care Ass'n*, *Solid Waste Management*, and *St. Louis Health Care Network*. Highest state courts have decided only three original purpose claims since 1990,[202] finding violations in two of them.[203]

In *Akin*, the subject of the bill at issue, according to the court, was "education."[204] Because there is no requirement that the bill's *purpose* be expressed in the title, the bill's purpose must be discerned from its provisions. Part of the bill was identified as the "Outstanding Schools Act,"[205] which reduced class size, created the "A+ Schools Program," increased teacher training, and upgraded vocational and technical education, among other things.[206] The challenged provision allowed specified new tax revenues to be "transfer[red] monthly from general revenue . . . to the outstanding schools trust fund established in . . . this act."[207] The court held that the tax measure was part and parcel of the purpose of the act: to improve education in Missouri's schools.[208] Though the tax provision affected general taxes,[209] its purpose was not to raise general revenue but to finance the specific educational programs established by the bill.[210] The addition of the tax provision did not change the purpose of Missouri Senate Bill 380.

Stroh and *Dillon* are more problematic. The *Stroh* opinion fails to identify the purpose of the bill independently of its title.[211] The court appeared to characterize the purpose of the bill as one to amend the liquor control law.[212] Accordingly, the court stated that the test was whether the

---

S.W.2d 4 (Mo. 1945). *See* MO. ANN. STAT., MO. CONST. art. III, § 21 (West 2000). Judge Price, dissenting in *Solid Waste Management*, made the opposite point that the court's duty is to defer to the legislature, upholding legislation unless it "'clearly and undoubtedly' violates the constitutional limitation." Nat'l Solid Waste Mgmt. Ass'n v. Dir., Dep't of Natural Res., 964 S.W.2d 818, 823 (Mo. 1998) (en banc). Judge Price authored the court's opinions in *Stroh* and *Dillon*, the two original purpose cases this Article characterizes as most deferential. However, both of these decisions were unanimous, suggesting that the court shares Judge Price's deferential approach, at least in the original purpose cases.

[202] Barcklay v. Melton, 5 S.W.3d 457 (Ark. 1999); Advisory Opinion No. 331, 582 So. 2d 1115 (Ala. 1991); Billis v. State, 800 P.2d 401 (Wyo. 1990).

[203] *Barcklay*, 5 S.W.3d at 459–60; *Advisory Opinion No. 331*, 582 So. 2d at 1117–18.

[204] Akin v. Dir. of Revenue, 934 S.W.2d 295, 301 (Mo. 1996) (en banc). The opinion later identifies the purpose of the bill as relating to "education." *Id.* at 302.

[205] *Id.* at 297.

[206] S. 380, 87th Gen. Assem., 1st Sess., § 1 (Mo. 1993).

[207] *Id.* § A.1.

[208] *Akin*, 934 S.W.2d at 302.

[209] Specifically, the measure increased the corporate income tax rate and limited the deduction for federal income taxes paid by individuals and corporations. *Id.* at 297.

[210] *Id.* at 302 (discussing the single subject claim).

[211] *Stroh*, 954 S.W.2d at 326 (noting that the "title stated the purpose of the bill").

[212] *Id.* at 325.

bill's provisions were germane to that purpose.[213] The bill at issue in *Stroh* was a combination of three separately introduced bills that concerned various aspects of the sale of alcoholic beverages.[214] The combined bill went forward as House Committee Substitute for Senate Bill 933.[215] As introduced, Missouri Senate Bill 933 contained only one section, relating to auctions of vintage wine.[216] As finally passed, the substitute bill "'relat[ed] to intoxicating beverages.'"[217] It repealed eight statutory sections and enacted nine new sections.[218] The new sections involved a variety of matters concerning intoxicating beverages, including the challenged provision on beer labeling.[219] The court ruled that neither Missouri Senate Bill 933's original title nor its original text restricted the bill's original purpose to the regulation of vintage wine auctions.[220] The court stated that "[f]urther language of specific limitation, such as 'for the sole purpose of'" would be required to support an original purpose claim.[221] Because all versions of the bill "amended chapter 311 . . . the purpose of [the bill] [was] consistent throughout its legislative history."[222] The court's analysis confuses purpose with subject and gives short shrift to the limitation that article III, section 21 imposes.

Dillon continues along the same path of extreme deference in analyzing original purpose. There, a bill "relating to transportation" was amended to include provisions allowing cities and counties to regulate billboards more restrictively than does the state.[223] The bill originally repealed one section relating to the chief highway engineer[224] and enacted in its place two new ones pertaining to "the position of the chief executive officer . . . of the highways and transportation commission."[225] As passed, it repealed five sections and added seven new ones.[226] The new provisions concerned accounting for transportation project funds; highway patrol members' salary increases; the organization of the Missouri Department of Transportation; audits of the highway commission; and—the provision at issue—city and county regulation of billboards.[227] Reciting the test that new matter must be "germane" to the bill's original pur-

---

[213] *Id.* at 326.
[214] *Id.* at 324–25.
[215] *Id.* at 325.
[216] *Id.* at 326.
[217] *Id.* at 327.
[218] *Id.* at 325.
[219] *Id.*
[220] *Id.* at 326.
[221] *Id.*
[222] *Id.*
[223] *Dillon*, 12 S.W.3d at 325.
[224] *See* S. 883, 89th Gen. Assem., Reg. Sess. (Mo. 1998) (referring to the repeal of Mo. REV. STAT. § 226.040 (Supp. 1997)).
[225] *Dillon*, 12 S.W.2d at 326; Mo. S. 883 (repealing Mo. REV. STAT. §§ 43.020, 71.228, 226.005, 226.040, 226.140).
[226] *Dillon*, 12 S.W.2d at 326.
[227] *Id.*

pose, the court found the requirement satisfied because billboards "have been inextricably linked to highway transportation by federal and state legislation."[228] This linkage between state and federal legislation demonstrated that "these subjects are germane to one another."[229] The very statement of the court's conclusion in *Dillon* begs the question of a change in original purpose. Indeed, the provision at issue permitted local, not state, regulation of billboards, making the purported connection between billboards and highway transportation irrelevant. In both *Stroh* and *Dillon*, the court adopted an overly deferential posture, assumed that purpose and subject were the same, and examined only the bills' titles. Proper analysis of compliance with the original purpose limitation requires a reexamination of all three of these elements.

1. Deferential Posture

The Missouri Supreme Court appears reluctant to decide original purpose claims.[230] This reluctance probably reflects a desire to avoid examining the entire legislative process, as would be required in order to decide an original purpose claim. Doing so could appear to offend the dignity of the legislature as a coordinate branch of government.[231] Origi-

---

[228] *Id.* at 327. In *Solid Waste Management*, Judge Price suggested a similar role for federal environmental legislation to establish a "close relationship" between hazardous and solid waste. 964 S.W.2d at 824 (Price, J., dissenting); *cf.* Figinsky, *supra* note 29, at 382–83 (describing the use of federal/state cooperation in welfare programs to establish a "nexus" between child support enforcement provisions and AFDC). Comments on the propriety of using federal law in this manner are beyond the scope of this Article. For present purposes, it is sufficient to note that the original purpose of the bill at issue in *Dillon* did not in fact extend to all aspects of transportation.

[229] *Dillon*, 12 S.W.3d at 328.

[230] In *Missouri Health Care Ass'n*, *Solid Waste Management*, and *St. Louis Health Care Network*, the court passed over this claim to decide the case on either single subject or clear title grounds. In each of these cases, the court's recitation of the facts suggests that an original purpose violation might have occurred. *See Mo. Health Care Ass'n*, 953 S.W.2d at 619–20; *Solid Waste Mgmt.*, 964 S.W.2d at 819; *St. Louis Health Care Network*, 968 S.W.2d at 146. To be fair, the court sometimes advances a reason for taking up one of the other challenges instead. In *Solid Waste Management*, the court assumed arguendo that the bill's original purpose encompassed all of the provisions eventually passed, although the court held that the bill contained a clear title violation. 964 S.W.2d at 820. In *St. Louis Health Care Network*, the court first took up the state's first point on appeal, which happened to be a clear title argument. 968 S.W.2d at 147. In *Missouri Health Care Ass'n*, the court simply announced that the "dispositive issue" was the single subject claim. 953 S.W.2d at 622. These reasons do not eliminate suspicion that the court prefers to avoid the original purpose inquiry.

[231] It is well established that judges overstep their bounds when they pass judgment on the value or worthiness of the legislature's purpose. *See* KENT GREENAWALT, STATUTORY INTERPRETATION: 20 QUESTIONS 270 (1999) ("[E]xcept when statutory terms invite judges to appraise issues from a moral perspective, judges should rarely rely explicitly on their own moral views in statutory cases.") Thus, courts often decline to delve too deeply into the legislative process. *See* Unified Sch. Dist. No. 229 v. State, 885 P.2d 1170, 1173 (Kan. 1994) ("[T]he wisdom or desirability of the legislation is not before us."); Keyserling v. Beasley, 470 S.E.2d 100, 101 (S.C. 1996) ("[T]he determination of the social and eco-

nal purpose analysis also would be frustrated, to some degree, by the lack of published legislative history in Missouri and many other states. Nevertheless, the original purpose claim is of equal import with any other constitutional claim.[232] Thus, the court should not shy away from deciding an original purpose claim when the facts suggest that a change in original purpose has occurred.[233]

The Missouri Supreme Court should recognize that an overly deferential posture is no more faithful to separation of powers principles than is an overly active one.[234] The people, through the constitution, have established limitations on the powers of all branches of government, including the legislative branch. Original purpose provisions are important limitations on the legislative process, born of deep distrust of corrupt legislative practices.[235] That distrust has not abated,[236] and the procedural

---

nomic desirability of [the statute] is not before this Court."). Courts also likely recognize that the "purpose" of a measure includes a wide range of considerations, including the need to introduce measures of interest to constituents, even if the legislator believes nothing will come of them. *See* MIKVA & LANE, *supra* note 9, at 27 (stating that "legislators will introduce legislation in response to almost any demand from constituents, lobbyists, or other interest groups"). *See generally* Michael A. Rebell & Robert L. Hughes, *Efficacy and Engagement: The Remedies Problem Posed by* Sheff v. O'Neil*—and a Proposed Solution*, 29 CONN. L. REV. 1115, 1132–34 (1997) (describing, in the context of institutional reform litigation, the state courts' heightened "sensitivity to the constitutional authority of coordinate branches of the government" and linking deferential posture to the fact that most state court judges are elected).

[232] The Missouri Supreme Court has not given this provision equal weight. The court has shown a willingness to engage in a rigorous analysis of single subject and clear title claims. The same cannot be said for its original purpose analysis in *Stroh* and *Dillon*, where there were substantial changes in the objectives of the legislation prior to passage. *See supra* notes 157–161 and accompanying text; *supra* notes 180–185 and accompanying text.

[233] The courts of other states seem to share Missouri's distaste for examining the legislative process. *See, e.g.*, Bayh v. Ind. State Bldg. and Constr . Trades Council, 674 N.E.2d 176, 179 (Ind. 1996) (announcing that "political proceedings behind the passage of an Act are not the proper consideration of a judicial body").

[234] *Cf.* Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 72 (1992) (responding to a separation of powers argument that the court should not infer a private cause of action by saying that "selective abdication of the sort advocated here would harm separation of powers principles in another way, by giving judges the power to render inutile causes of action authorized by Congress through a decision that no remedy is available").

[235] Williams, *supra* note 1, at 798–99; Popkin, *supra* note 7, at 553–54. Term limits express a similar distrust. *See* Linda Cohen & Matthew Spitzer, *Term Limits*, 80 GEO. L.J. 477, 480 (1992) (describing the view of proponents of term limits that legislators are unresponsive to voters, most interested in their own careers, and beholden to special interests); Einer Elhauge, *Are Term Limits Undemocratic?*, 64 U. CHI. L. REV. 83, 88 (1997) (describing the argument for term limits that long legislative service makes legislators "corrupt, arrogant, cynical, unprincipled, resistant to reform, sympathetic to special interest groups, and out of touch with their electorate"); Adrianne G. Threatt, *The Impact of Term Limits on the Congressional Committee System*, 6 GEO. MASON L. REV. 767, 771 (1998) (describing the desire of term limits proponents to eliminate the voice of special interests and shift the focus from local to national interests).

[236] Term limits, added in recent years to many state constitutions, are the most recent expression of the need to keep the legislature in check. *See* Threatt, *supra* note 235, at 767 (stating that "many states" adopted term limits in the 1990s); Editorial, *Scaring Mississippi Voters*, WALL ST. J., Oct. 30, 1995, at A18 (listing 23 states that adopted term limits be-

limitations have not been repealed.[237] The legislature acts illegitimately when it ignores constitutional limitations on its procedures. The constitution implicitly directs the court to enforce these limitations, as litigation is the only way for the people to challenge statutes enacted through faulty processes. In such cases, the court's duty is not to defer to the legislative process but to enforce the terms of the constitution.[238] This argument in no way contravenes the notion that courts should not second-guess legislatures. The notion there is one of deference to *results*.[239] Courts are not empowered to substitute their own wisdom for that of the legislature. This Article speaks of deference only to *process*, and argues that deference to a flawed process is improper.

2. *Distinguishing Purpose from Subject*

A second problem in the Missouri original purpose cases is the court's failure to distinguish purpose from subject. In *Akin*, for example, the court stated that the test for original purpose claims is whether the bill as passed includes "matters not germane to the object of the legislation *or unrelated to its original subject*."[240] The court held that "the purpose of S. 380 was consistent throughout, that purpose being a bill relating to education."[241] Education is not a "purpose" but a "subject." Purpose and subject are not the same. According to one dictionary, "purpose" is "an end or aim" or "an object, effect or result aimed at [or] intended."[242]

---

tween 1990 and 1995); Elhauge, *supra* note 235, at 85 (stating that 24 states had adopted term limits); U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 917 n.39 (1995) (Thomas, J., dissenting) (noting that 16 states had adopted some form of term limits prior to 1994 and that 6 more states did so in the 1994 elections).

[237] *See* Williams, *supra* note 1, at 800 (noting that limits on legislative procedure have survived and "continue to reflect important policies relating to the nature of the deliberative process").

[238] See State *ex rel.* Ohio Acad. of Trial Lawyers v. Sheward, 715 N.E.2d 1062, 1100 (Ohio 1999) (indicating that non-enforcement of a constitutional restriction on legislative procedure "would be no less than an abdication" of its duty) (internal quotation marks and brackets omitted); Porten Sullivan Corp. v. State, 568 A.2d 1111, 1118 (Md. 1990) (holding that despite the general posture of deference to the legislature, procedural restrictions are "still part of our Constitution . . . [and] not to be treated as a dead letter"); Kincaid v. Mangum, 432 S.E.2d 74, 82 (W. Va. 1993) ("[T]he question of whether the legislature might perform a task more efficiently if it did not have to follow the constitution is essentially irrelevant. Since the constitution applies, the question of whether efficiency takes primacy over other goals must be taken to have been answered by our constitutional framers.") (quoting State v. A.L.I.V.E. Voluntary, 606 P.2d 769, 778–79 (Alaska 1980)) (internal quotation marks and brackets omitted); Patrice v. Murphy, 966 P.2d 1271, 1274 (Wash. 1998) (holding that the court's role is to "vouchsaf[e]" "serious constitutional interests").

[239] *See supra* note 231.

[240] 934 S.W.2d at 302 (emphasis added). According to the court, the appellant characterized the alleged constitutional defect as a "chang[e] [in] subjects during the legislative process." *Id.* at 297.

[241] *Id.*

[242] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1847 (1981). Only the third definition of purpose links it with subject: "A subject under discussion." *Id.*

"Subject," on the other hand, is "something that forms a basis (as for action, study, [or] discussion): as . . . something concerning which something is said or done: a thing . . . treated of."[243] Perhaps simpler, "subject" corresponds to grammatical subject and to the "subject term" of a logical proposition;[244] "purpose" corresponds to the grammatical or logical predicate.[245] The Supreme Court of Appeals of West Virginia recognized this distinction when it commented that the legislature "undertakes to legislate upon a particular subject for the accomplishment of a certain object."[246]

This confusion is understandable: the bill titles themselves identify subjects but not purposes. There is, of course, no requirement that the purpose be expressed in the bill's title. And in Missouri, as in most states, there is no published legislative history indicating how sponsors or drafters have characterized their purposes.[247] Thus, the only way to determine a bill's purpose is by a careful reading of its provisions. The Missouri Supreme Court's opinions seldom attempt to identify the purpose as this Article defines it, preferring simply to substitute the subject recited in the bill's title. For example, the court has referred to "education"[248] and "transportation"[249] as "purposes." Plainly, these are *subjects*, i.e., matters treated in bills. A bill's *purpose* is to achieve some end or result with respect to its subject.

More important than dictionary definitions in distinguishing purpose from subject is the constitution itself. Missouri's constitution contains distinct limitations concerning the purpose and subject of a bill.[250] The limitations are contained in two separate sections adopted ten years apart. Having adopted the single subject limitation in 1865,[251] the people of Missouri apparently believed additional restrictions on the legislative process were necessary. The original purpose limitation was adopted in 1875[252] and should be understood to have separate meaning and effect. The single subject rule primarily protects legislators and the governor in the moment of final decision on a bill.[253] It does so by prohibiting the bundling together of unrelated provisions to force the passage of provi-

---

[243] *Id.* at 2275.

[244] *Id.*

[245] *Id.* at 1786 (defining "predicate" as "something that is affirmed or denied of the subject in a proposition in logic").

[246] Kincaid v. Mangum, 432 S.E.2d 74, 80 (W. Va. 1993) (quoting Simms v. Sawyers, 101 S.E. 467 (W. Va. 1919)).

[247] MORRIS L. COHEN, ROBERT C. BERRING, & KENT C. OLSON, HOW TO FIND THE LAW 189 (1989) (stating that there is "far less legislative history information available on the state level" than there is for federal statutes).

[248] *Akin*, 934 S.W.2d at 302.

[249] *Dillon*, 12 S.W.3d at 328.

[250] *See* MO. CONST. art. III, §§ 21, 23.

[251] *See supra* note 62.

[252] *See supra* note 62.

[253] *See supra* Part I.B.1.

sions a legislator or governor abhors along with those she favors. The original purpose rule ensures that the result sought remains more or less constant (though the details may vary). This restriction goes well beyond the simple prohibition on multiple subjects by limiting the legislature's options even with respect to a single subject.

The leading treatise suggests that original purpose provisions help enforce other constitutional limitations on the legislature.[254] For example, an original purpose provision prevents legislators from evading the constitutional limit on the time for introduction of bills by substituting entirely new content into bills already introduced.[255] In fact, several of the recent Missouri cases have involved the insertion into pending bills of new legislative proposals after the deadline for introducing new bills had passed.[256] The original purpose limitation must be understood as going beyond the single subject rule to create an independent restriction on the legislative process.

The opinions, however, reveal that in cases presenting both original purpose and single subject challenges, the Missouri Supreme Court simply performs the same analysis twice. Consider *Dillon*: "Our analysis in determining that billboards are *germane* to transportation [the original purpose analysis] also supports our determination ... that billboards *fairly relate* to, or are *naturally connected* with, transportation [the single subject test]."[257] The court is correct in that "germane," "related," and "connected" all mean about the same thing. "Germane" means "having a close relationship."[258] Almost indistinguishably, "related" means "having relationship: connected by means of an established or discoverable relation."[259] "Connected" means "having the parts or elements logically re-

---

[254] *See* 1 SINGER, *supra* note 9, § 9.05, at 580.

[255] An Ohio case illustrates the link between various procedural restrictions. Ohio's constitution contains a typical provision requiring each bill to be considered on three separate days in each chamber. OHIO CONST. art. II, § 15(C). The plaintiffs claimed that a statute was enacted in violation of this provision when the version of the bill finally passed was considered only once in each house. State *ex rel.* Ohio AFL-CIO v. Voinovich, 631 N.E.2d 582, 587 (Ohio 1994). The Ohio Supreme Court ruled that there was no violation of the three-consideration rule provided that the subject matter of the original bill was not "vitally alter[ed]," *id.* at 589, and that the bill passed was not "completely different in content" from the original, *id.* at 588. Though the Ohio constitution does not contain an original purpose provision, the Ohio court implicitly recognized that other procedural restrictions are rendered ineffectual if a bill's content can be changed dramatically, especially near the end of the legislative session. *Id.* at 589.

[256] *See, e.g.*, St. Louis Health Care Network v. State, 968 S.W.2d 145, 146 (Mo. 1998) (describing proposals inserted on the last day of the session); National Solid Waste Mgmt. Ass'n v. Dir., Dept. of Natural Res., 964 S.W.2d 818, 819 (Mo. 1998) (describing proposals inserted two days before the end of the session). The situation appears much the same in other states. *See, e.g.*, Migdal v. State, 747 A.2d 1225, 1226–27 (Md. 2000) (describing numerous changes to a bill during the last days of a session, including "tacking on" to one bill the text of another bill which had been killed in committee the week before).

[257] 12 S.W.3d at 329 (emphasis added).

[258] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 951 (1981).

[259] *Id.* at 1916.

lated."[260] Hence, while the constitution sets out two independent requirements, the Missouri Supreme Court uses an identical test for both. This ignores the substantive distinction between the two and frustrates the constitutional attempt to regulate the legislative process.

The root of the problem is the court's over-reliance on the title of the bill to resolve both original purpose and single subject claims.[261] The court looks first at the title to determine the purpose or subject. With respect to purpose this is an impossible task, for section 21 itself establishes no requirement that the bill's purpose be reflected in its title.[262] In *Stroh*, the Missouri Supreme Court explicitly linked analysis of the original purpose requirement to the bill's title when, in a discussion of bill titles, it stated that "only clear and undoubted language limiting purpose will support an article III, section 21 challenge."[263] The court went on to examine the title of the bill at issue to determine whether its language was so confined.[264] The court reduced analysis of the bill's purpose to the title alone. This analytical framework departs from the court's precedents. In *Lincoln Credit Co. v. Peach*,[265] for example, the court remarked that the title "can be changed without violating Art. III, § 21."[266] It is the purpose itself that must not change.

In determining whether an original purpose violation has occurred, the court should read all the provisions of the bill as introduced, determine the bill's objective, then read all of the provisions of the bill as passed, instead of simply relying on the title. If the overall objective of the bill as passed is consistent with the objective of the bill as introduced, there is no original purpose violation. The proper analysis assigns no role to the title of the bill.

3. Test for Compliance

The real difficulty in original purpose analysis is identifying the appropriate level of generality at which to define the original purpose. Defining purpose at too high a level of generality equates with excessive deference, but defining purpose too narrowly "inhibit[s] the normal legislative process[ ]."[267] The test for original purpose violations asks

---

[260] *Id.* at 480.

[261] *See infra* notes 301–331 and accompanying text.

[262] MO. CONST. art. III, § 21. The word "title" appears in section 21 only once, in the provision requiring that each bill be read by title on three different days in each house. *Id.* The reading of bills by title gives the title a practical function, but does not suggest that the title is in any way relevant to the legal analysis of an original purpose claim.

[263] *Stroh*, 954 S.W.2d at 326.

[264] *See id.*

[265] 636 S.W.2d 31 (Mo. 1982).

[266] *Id.* at 38. This passage is quoted in *Akin*, 934 S.W. 2d at 302, suggesting that the departure in *Stroh* is a recent one.

[267] *Stroh*, 954 S.W. 2d at 326.

whether new matters are germane to the original purpose of the bill.[268] This test allows amendments to a bill extending or limiting its scope provided the new matter is germane.[269] By allowing amendments so long as they are germane to the original purpose, this test balances the harms that could be caused by an overly deferential posture towards the legislature against those that could be caused by constant interference with the legislative process.

Some may argue that even this method of characterizing original purpose unduly restricts the legislature. After all, if a legislator has the votes to pass a measure not included in a bill already filed, the court should not stand in the way of passage of that measure.[270] The reply is two-fold. First, legislators have several options for introducing new measures. When introducing bills in the first place, legislators can draft them broadly enough to call for a reasonably expansive definition of their purpose. As the *Stroh* court describes it, the sponsor has a "strategic choice whether to introduce a bill whose broad purpose will accommodate late amendments that may in turn help the bill's chance of passage, or to introduce a narrower bill, protecting the bill from undesired amendments but perhaps lessening its likelihood of passage."[271] The constitution does not require a *narrow* purpose. Holding legislators to the "strategic choice" of drafting a narrow bill rather than allowing a change in purpose does not overstep the court's bounds. Moreover, Missouri legislators can file new bills at any time through the sixtieth day of the legislative session.[272] The constitution allows sufficient flexibility for the legislature to do its work.

Second, if legislators have not taken advantage of those constitutional options during the session, prevention of a non-germane measure's enactment is exactly what the constitution requires. As noted earlier,[273] the addition of the original purpose rule to the Missouri Constitution in 1875 must have been meant to accomplish something beyond what the single subject and clear title rules already required. One theory is that the original purpose rule serves to enforce the constitution's separate limitation on the time when new bills can be introduced.[274] The time limitation seems intended to prevent passage of new measures without sufficient

---

[268] *Akin*, 934 S.W.2d at 302.

[269] *See Stroh*, 954 S.W.2d at 326 (citing Lincoln Credit Co. v. Peach, 636 S.W.2d 31, 38 (Mo. 1982)).

[270] *Cf.* Patrick D. Hughes, *Revisiting the Single-Subject Rule*, CHI. DAILY L. BULL., Feb. 9, 2000, at 15 ("The bills got the votes, and they were signed; that should be that.") (referring to single subject violations.).

[271] 954 S.W.2d at 326 (focusing on the title rather than provisions of the bill to define purpose).

[272] MO. CONST. art. III, § 25; *see also* 1 SINGER, *supra* note 9, § 9.04, at 579 (describing variations of this rule in other states).

[273] *See supra* note 252 and accompanying text.

[274] *See supra* notes 254–256 and accompanying text.

time for consideration. The danger of less-than-careful consideration is the same whether it occurs with respect to a new bill or new contents inserted into a bill introduced earlier for other purposes.

Returning to the Missouri cases, a reading of the original bill involved in *Akin* reveals that it was designed to establish a variety of specific programs to improve education. The bill as introduced did not purport to treat all or even most aspects of the subject of "education."[275] Fairly read, its purpose was to create specific programs to improve public education. Defining purpose to match the scope of the provisions actually introduced does not eviscerate section 21's provision that bills may be amended during the course of consideration. Many details of the programs could be changed. Different programs designed to achieve the same results as those originally proposed could be substituted without changing the purpose of the bill and without violating section 21. In fact, the court held that a tax measure, which was a new matter altogether, could later be added to the bill as a mechanism for funding the programs without violating the original purpose rule because it was germane to the implementation of the programs delineated in the original bill. But other matters, such as a change in the age until which children are required to attend school, would be off-limits because they fall outside the original purpose of the bill.[276]

Dillon is at the other end of the spectrum. There, the original bill was extremely limited.[277] While the bill title announced its subject to be "transportation," the bill itself only set out to change the definition of a particular position on a transportation-related commission. Though the court accepted the argument that the bill's original purpose related to the broad subject of transportation,[278] the bill's provisions simply bely that conclusion.[279] The broadest purpose fairly attributable to this bill as filed

---

[275] Missouri Senate Bill 380, 87th Gen. Assem., 1st Sess. (Mo. 1993), establishes a "Commission on Performance," *id.* § 2; calls for statewide curriculum guidelines, *id.* § 3, a statewide assessment system, *id.* § 4, and annual performance bonus awards, *id.* § 8; links school accreditation to tax levy, *id.* § 9; sets criteria for approving teacher training programs, *id.* § 10; adjusts the state aid funding formula, *id. passim*; and provides for the distribution of the proceeds of riverboat gambling to various education funds, *id.* §§ 11–17.

[276] A change in the age until which children are required to attend school would not be permissible even though it is encompassed within the bill's *subject*, education.

[277] S. 883, 89th Gen. Assem., 2d Sess. (Mo. 1998), is a two-page bill that repeals one statutory section and enacts two new sections.

[278] *Dillon*, 12 S.W.3d at 327 (describing the argument that the "bill as introduced pertained only to transportation" and stating that "Dillon's burden, then, is to demonstrate that billboards are . . . not germane to transportation").

[279] As a matter of fact, the Missouri Senate's Web page describes the bill as "establishing accountability provisions for the Department of Transportation." http://www.senate.state.mo.us/98bills/bills/SB883.htm (last visited Nov. 15, 2000). The "Current Bill Summary" states that the conference committee version of the act "contain[s] provisions for accountability for the Missouri Highways and Transportation Commission and the Department of Transportation." *Id.* This description, while not authoritative, strongly suggests that the bill's purpose was not nearly as broad as "transportation." Significantly, the description continues: "Provisions about billboards, the Highway Patrol, the State Auditor,

would be to modify the salaries and terms of employment of persons employed by the Department of Transportation and related boards and commissions and, perhaps, to alter the organizational structure of the department itself.[280] Under this reading, the matters later added to Missouri Senate Bill 883 pertaining to highway patrol salaries and to the organization of the Department of Transportation would be within the original purpose. Those relating to accounting for transportation project funds and to audits of the highway and transportation commission would probably be invalid. The provisions allowing cities and counties to regulate billboards would clearly fall outside the purpose of the bill as originally introduced and are in no way germane to a bill proposing to alter the conditions of employment of state transportation workers.

Stroh is a closer case. The final bill in that case was a combination of three bills originally introduced as separate measures.[281] Combining bills is common and the court approves of this tactic: "Article III, §21 was not designed to inhibit the normal legislative processes, in which bills are combined and additions necessary to comply with the legislative intent are made."[282] The *Stroh* opinion focuses on the fact that all three bills amended portions of chapter 311 of the Missouri Revised Statutes, relating to intoxicating beverages.[283] The provisions of the three original bills suggest that their purposes are best characterized as regulating the employment of persons under twenty-one years of age in selling or handling intoxicating liquor;[284] prohibiting distillers, wholesalers, brewers, and other suppliers from having any financial interest in retail businesses that sell intoxicating liquors and from furnishing any equipment, credit, or property to retail dealers;[285] and regulating auctions of vintage wine.[286] Each of these purposes is narrower than the general subject of intoxicating beverages. The question is how to analyze original purpose in the context of combined bills. Section 21 provides that "*no bill* shall be so

---

and contractors are also included." *Id.*

[280] *See* S. 883, § A (repealing MO. REV. STAT. § 226.040 (Supp. 1997) (concerning the appointment of a chief engineer and other employees of the transportation commission) and enacting two new sections, section 226.008 of the Revised Statutes of Missouri (establishing the Joint Committee on Transportation Oversight), and section 226.040 of the Revised Statutes of Missouri (requiring appointment of a director of the Missouri Department of Transportation and other officers of the department)).

Even this reading is arguably much more expansive than the bill itself, but that may be appropriate in order to allow the legislature sufficient leeway to exercise its will. The court has repeatedly held that amendments to the bill may extend or limit its scope; "even new matter is not excluded if germane." Stroh Brewery Co. v. State, 954 S.W.2d 323, 326 (Mo. 1997) (en banc) (citing Lincoln Credit Co. v. Peach, 636 S.W.2d 31, 38 (Mo. 1982)).

[281] *Stroh*, 954 S.W.2d at 324–25.

[282] *Id.* at 326 (quoting Blue Cross Hospital Serv., Inc. of Mo. v. Frappier, 681 S.W.2d 925, 929 (Mo. 1985)).

[283] *Id.* at 327.

[284] H.R. 1470, 88th Gen. Assem., 2d Sess. (Mo. 1996).

[285] S. 814, 88th Gen. Assem., 2d Sess. (Mo. 1996).

[286] S. 933, 88th Gen. Assem., 2d Sess. (Mo. 1996).

amended . . . as to change *its* original purpose."[287] The court focused on Missouri Senate Bill 933, the bill into which the other two bills were combined, and struggled to find a way to hold that its original purpose had not been changed.[288] Missouri Senate Bill 933's original purpose was exceptionally narrow, and the court's conclusion that a bill regulating wine auctions could encompass a beer labeling provision[289] is strained. The better procedure for combined bills would be to permit the original purpose of each bill to survive in the combined bill—essentially adding them together.[290] Doing so would hold the legislature to its original purposes, as the constitution requires, but would also permit the practice of combining bills.[291] In *Stroh*, the combined purpose of the three original bills concerns restrictions on the sale of intoxicating beverages.[292] Each bill attempted to regulate a dangerous aspect of the sale of liquor: the danger that underage persons will have access to liquor; the danger that suppliers will induce sales of their products by providing samples, advertising materials, dispensing fixtures, or other gifts to retailers; and the danger that fraud may occur in auctions of vintage wines. Reading the combined purpose to encompass all of these matters would allow the addition of provisions relating to the issuance or conditions of liquor licenses to stand. But the provision at issue, a trade protection provision relating to labeling of beer sold in Missouri, which was added during floor debate on the combined bill,[293] would fall outside the original purpose because a provision aimed at providing a competitive advantage in the marketplace to Missouri's beer producers is not germane to the original purpose of any of the bills as introduced.

The court has considerable discretion in defining the original purpose, though it must do so by analyzing the original bill's provisions, not merely its title. And the test for germaneness is generous: it is not all that difficult to show a relationship between two provisions, as *Akin*'s holding demonstrates.[294] But the court must enforce section 21 as it would any other constitutional provision. It should not strain to find "germane" additions clearly unrelated to a bill's original purpose under the guise of getting out of the legislature's way.

---

[287] MO. CONST. art. III, § 21 (emphasis added).

[288] *Stroh*, 954 S.W.2d at 324–27.

[289] *Id.* at 325 (describing the bill); *id.* at 326 (finding no original purpose violation).

[290] This argument assumes that the combined purposes all relate to a single subject, as they did in *Stroh*.

[291] This proposal might seem to permit logrolling, but that evil is addressed by the single subject rule, not the original purpose rule. Under the proposal, the combined bill would still be required to have a single subject (here, intoxicating beverages) and, for that matter, to have that subject clearly expressed in the bill's title.

[292] 954 S.W.2d at 327.

[293] *Id.* at 325.

[294] *See Akin*, 934 S.W.2d at 302.

B. Single Subject

Article III, section 23 of the Missouri Constitution requires that each bill be limited to one subject.[295] The Missouri Supreme Court has long held article III, section 23 to be mandatory, not discretionary.[296] But procedural limitations are interpreted liberally.[297] As a result, the phrase "one subject" is read broadly, "but not so broadly that the phrase becomes meaningless."[298] The current test for compliance with the single subject rule, articulated in *Hammerschmidt*, has two elements. First, *Hammerschmidt* directs the court to look at the title to determine the bill's subject.[299] This prong departs from the court's precedents by ignoring the bill's provisions. In addition, *Hammerschmidt* looks to the separate headings of the constitution in order to define what constitutes a single subject.[300] This prong is the result of *Hammerschmidt*'s crossing of two lines of cases and is a poor fit for statutes. This section argues that single subject analysis must focus on the bill's provisions, and identifies an alternative external source for assessing single subject violations.

1. Relationship Among Provisions

Although the single subject restriction inherently relates to a bill's contents, recent Missouri Supreme Court opinions focus on the title to measure compliance with the rule. This practice arises, at least in part, from the rhetorical imprecision recounted above. The confusion is compounded by *Hammerschmidt*'s pronouncement that the bill's title determines its subject.[301] This test is a significant divergence from prior case

---

[295] MO. CONST. art. III, § 23. Section 23 provides two narrow exceptions not relevant to this Article. The clear title provision of section 23 is discussed in the next section.

[296] *See* Hammerschmidt v. Boone County, 877 S.W.2d 98, 102 (Mo. 1994) (en banc) (citing State v. Miller, 45 Mo. 495 (1870)). Most other states agree. *See, e.g.*, Associated Builders & Contractors v. Ventura, 610 N.W.2d 293, 299 (Minn. 2000); Tenn. Mun. League v. Thompson, 958 S.W.2d 333, 336 (Tenn. 1997); Utilicorp United, Inc. v. Iowa Util. Bd., 570 N.W.2d 451, 454 (Iowa 1997); McIntire v. Forbes, 909 P.2d 846, 846 (Or. 1996); Pierce v. State, 910 P.2d 288, 306 (N.M. 1995); Billis v. State, 800 P.2d 401, 430–31 (Wyo. 1990). Ohio holds the rule to be directory only. State *ex rel.* Ohio Acad. Trial Lawyers v. Sheward, 715 N.E.2d 1062, 1098 (Ohio 1999).

[297] *Hammerschmidt*, 877 S.W.2d at 102; *see also supra* notes 18–27 and accompanying text.

[298] *Hammerschmidt*, 877 S.W.2d at 102.

[299] *Id.*

[300] *Id.* The implication is that a single subject must fall within one of the headings of the constitution.

[301] *Id.* at 102 n.3. This confusion is not unique to Missouri. In Illinois, some of the opinions state that the bill's provisions must relate to each other. *See, e.g.*, People v. Cervantes, 723 N.E.2d 265, 267 (Ill. 1999) ("[A] legislative act violates the single subject rule when the General Assembly includes . . . unrelated provisions that by no fair interpretation have any legitimate relation to one another."). Other opinions require only that all matters included within the enactment "have a natural and logical connection" to a single subject—the subject expressed in the title. Arangold Corp. v. Zehnder, 718 N.E.2d 191, 199 (Ill.

law, which stated that in determining a single subject claim, a court had to decide "whether all provisions of the bill fairly relate to the same subject, have a natural connection therewith or are incidents or means to accomplish its purpose."[302] Moreover, commentators have described the single subject rule as requiring "unity" of subject matter.[303] This description makes clear that the rule is addressed to the provisions of the bill, not the title.[304] Put another way, "there must be some rational unity between the matters embraced in the act."[305]

This test's focus on the provisions of the bill has a long history. In 1870, the Missouri Supreme Court emphasized in *State v. Miller*[306] that the "character of the act was to be determined by its provisions, and not by its title."[307] The *Miller* court was faithful to this test in resolving the case before it, holding that "the *provisions* of the act treat of subjects which have a natural connection."[308]

If section 23 establishes two distinct requirements,[309] then the single subject clause must have a meaning separate from that of the clear title clause which follows it. That is, the single subject rule requires more than that the subject of the bill be expressed in the title. Section 23 by its terms speaks of the bill, not the title. The bill itself has a subject, and the title is a shorthand way of describing that subject for easy reference.[310] In order to appreciate the complexity and scope of the subject, it is neces-

---

1999). These divergent standards were the subject of a heated argument between the majority and the dissent in the most recent Illinois case. Premier Prop. Mgmt. v. Chavez, 728 N.E.2d 476, 483 (Ill. 2000) (adopting *Arangold* rule); *id.* at 489 (Harrison, C.J., concurring in part and dissenting in part) (arguing that *Cervantes* controls).

[302] *Hammerschmidt*, 877 S.W.2d at 102 (quoting Westin Crown Plaza Hotel Co. v. King, 664 S.W.2d 2, 6 (Mo. 1984)). Many states articulate the rule this way. *See, e.g., Cervantes*, 723 N.E.2d at 267 ("natural and logical connection"); Associated Builders & Contractors v. Ventura, 610 N.W.2d 293, 300 (Minn. 2000) ("logically connected"); McIntire v. Forbes, 909 P.2d 846, 856 (Or. 1996) ("logical or natural connection").

[303] *See* Ruud, *supra* note 7, at 390; 1A SINGER, *supra* note 9, § 17.02, at 7.

[304] Similarly, the Supreme Court of Oregon recited a test emphasizing that "the provisions of the law" must "relate directly or indirectly to the same subject." McIntire v. Forbes, 909 P.2d 846, 854 (Or. 1996) (quoting State v. Shaw, 29 P. 1028, 1029 (Or. 1892)). Applying this test, the Oregon court declared, requires that the court first "examine the body of the act to determine whether (without regard to an examination of the title) [it] can identify a unifying principle logically connecting all provisions in the act." *Id.* at 856.

[305] Ruud, *supra* note 7, at 411 (quoting State *ex rel.* Test v. Steinwedel, 180 N.E. 865, 868 (Ind. 1932)); *see also In re* Boot, 925 P.2d 964, 971 (Wash. 1996).

[306] 45 Mo. 495 (1870).

[307] *See id.* at 498 (citing People v. McCann, 16 N.Y. 58 (1857)).

[308] *Id.* at 500 (emphasis added).

[309] *See, e.g.*, Carmack v. Dir., Mo. Dep't of Agric., 945 S.W.2d 956, 959 (Mo. 1997) (en banc); *see also supra* notes 82–90 and accompanying text.

[310] *Cf.* 1A SINGER, *supra* note 9, § 18.07, at 47 ("[W]hen a statute is attacked because of duality or plurality of subject matter, the attack is upon the body of the act, not simply on the title."); McIntire v. Forbes, 909 P. 2d 846, 854 (Or. 1996) (stating that the "principal purpose" for the single subject rule is to "guard against logrolling" in the "*body* of an act"); *id.* at 857 (describing the function of the title to "identify and express a unifying principle logically connecting all provisions in the Act").

sary to read the provisions of the bill. Thus, proper analysis of a single subject claim would follow *Miller*'s test.

In its recent cases, the Missouri Supreme Court seems to have abandoned analysis of the bill's provisions in favor of over-reliance on the title to determine whether or not the bill contains a single subject.[311] *Hammerschmidt* appears to be the source of the problem. The *Hammerschmidt* court "conclude[d]" that "[t]o the extent the bill's original purpose is properly expressed in the title to the bill, we need not look beyond the title to determine the bill's subject."[312] The court picked up this theme in *Carmack* and subsequent cases.[313] *Missouri Health Care Ass'n* flatly recites that "the test for whether a bill contains a single subject focuses on [its] title."[314] *Fust* states even more explicitly that "the single subject test is *not* whether individual provisions of a bill relate to each other."[315] *Fust*'s statement exposes *Hammerschmidt*'s error. Article III, section 23 requires precisely that the bill contain a single subject. There is simply no way to make that determination without comparing the bill's provisions to each other.

In subsequent single subject cases, the court has struggled to apply the *Hammerschmidt* test. In *Corvera*, for example, the court determined the subject from the bill's title, "environmental control," and found all of the bill's provisions fairly related to that subject.[316] The *Corvera* case tests this Article's insistence that a bill's subject be measured by its provisions. The bill finally passed was a combination of three separate bills.[317] Its provisions created the Emergency Response Commission—an agency charged with responding to releases of hazardous substances, regulating underground storage tanks, and regulating asbestos abatement projects.[318] A reading of these provisions, particularly those relating to underground storage tanks (a water pollution problem) and asbestos (an

---

[311] The Illinois Supreme Court seems to have done likewise in its most recent single subject case. *See* Premier Prop. Mgmt. v. Chavez, 728 N.E.2d 476, 483–84 (Ill. 2000). The majority insists that the only requirement is that the provisions bear a relationship to a single subject, apparently the one expressed in the title. *Id.* The dissent argues that the provisions must relate to *each other* so as to form a single subject. *Id.* at 489–90 (Harrison C.J., dissenting). Similarly, the Supreme Court of Alabama relied on the title to decide a single subject claim in *Town of Brilliant v. City of Winfield*, 752 So. 2d 1192, 1200 (Ala. 1999).

[312] 877 S.W.2d at 102 (citing no authority for this proposition). There is no requirement that the bill's original purpose be expressed in the title. This statement is an example of the Missouri Supreme Court's failure to distinguish purpose from subject. But even if this statement is understood to refer to the expression of the subject in the title, it departs from precedents requiring analysis of the relationship among the bill's provisions.

[313] According to *Carmack*, "*Hammerschmidt* directs that we look first to the [bill's] title to determine its subject." 945 S.W.2d at 959.

[314] 953 S.W.2d 617, 622 (Mo. 1997) (en banc).

[315] 947 S.W.2d 424, 428 (Mo. 1997) (en banc) (emphasis added).

[316] 973 S.W.2d 851, 862 (Mo. 1998) (en banc).

[317] *Id.* at 860 (describing Missouri House Bills 77, 78, and 356, cited *infra* note 349).

[318] *Id.*

air pollution problem), suggests that they are distinct subjects.[319] *Corvera* poses the question of the level of generality at which a subject can no longer be considered "single." The issue is whether "pollution" is a single subject, or whether "water pollution" and "air pollution" are two separate subjects. If they are separate, they can still be harmonized, and the legislature did so by writing the title broadly to encompass both aspects within "environmental control." But the fact that the legislature harmonized the subjects under an umbrella title does not relieve the court of responsibility for determining whether the bill's provisions in fact concern a single subject.[320]

The single subject rule, as noted above, exists primarily to prevent logrolling and to protect a governor's veto. One cannot be sure that the bill at issue in *Corvera* is not an example of logrolling. It could well be that neither the original bill "relating to . . . underground storage tanks"[321] nor the original bill "for the purpose of regulating certain . . . asbestos abatement projects"[322] appeared able to garner a majority to permit passage on its own, but by combining the minority committed to passage of the one with the minority advancing the other, passage of both may have been assured. If so, the combined bill embodies exactly the evil the single subject rule exists to prevent, and should be held invalid. It may be, however, that both bills could have passed separately but were combined to make for more orderly, comprehensive legislation protecting the environment.[323] Such legislation should be held valid. Missouri's lack of recorded legislative history makes it impossible to know what happened in

---

[319] I leave aside the question of the bill's creation of a commission to enforce provisions of Missouri and federal law relating to hazardous substances. H.R. 77/78/356, 85th Gen. Assem., 1st Sess. § A (Mo. 1989). The court concluded that substantive provisions and enforcement provisions together constitute a single subject under the "incidents or means" portion of the single subject test. *Corvera*, 973 S.W.2d at 862.

[320] Ironically, the court has implicitly recognized that it is necessary to examine a bill's provisions to determine what the subject is, but it has usually done so in the context of clear title challenges. In other words, the court examines the provisions in order to see whether the title clearly expresses their content for purposes of determining the validity of the title. *See* National Solid Waste Mgmt. Ass'n v. Dir., Dept. of Natural Res., 964 S.W.2d 818, 820 (Mo. 1998) (en banc) (hypothesizing that the subject of the bill could be environmental control); *cf. Mo. Health Care Ass'n*, 953 S.W.2d at 623 n.2 (single subject case hypothesizing that the subject of the bill could be long-term care if the title were revised accordingly). A further irony is the court's admission in *Missourians to Protect the Initiative Process v. Blunt*, 799 S.W.2d 824 (Mo. 1990) (en banc), a case concerning the single-subject rule for petitions proposing constitutional amendments, that "the Court must make an independent examination of the proposed amendment to determine if there is a discernable single subject among its provisions." *Id.* at 832 (arising under Mo. CONST. Art. III, § 50).

[321] H.R. 78, 85th Gen. Assem., 1st Sess. (Mo. 1988).

[322] H.R. 77, 85th Gen. Assem., 1st Sess. (Mo. 1988).

[323] *Cf.* 1A SINGER, *supra* note 9, § 17.02, at 2 (asserting that the single subject rule should not "cause the number of statutes required to effect a purpose to be needlessly multiplied").

this case. Although the single subject rule ordinarily assumes that log-rolling occurred,[324] one cannot say the *Corvera* decision is wrong.

The Missouri Supreme Court's misplaced emphasis on the title as determinative of the subject, however, led to the wrong result in *Dillon*. There, the bill's title, "relating to transportation," never changed, even though new provisions were added during the course of consideration.[325] The court relied on this fact to hold that no single subject violation occurred, even though the final version of the bill included provisions allowing local governments to regulate billboards.[326] The court appeared to reason that because the title remained constant, it necessarily followed that no new subjects were added to the bill.[327] This is a non sequitur.

The Missouri Supreme Court's penchant for forcing the title to carry the whole weight of the analysis flows from the tendency to assume that all three constitutional limitations depend on the same rationale. It is true that the original purpose and single subject requirements would operate in a cumbersome manner at best without adequate bill titles. But the title is only the means, not the end. The single subject rule assures legislators and the governor that no extraneous (and unpalatable) matters have been slipped into bills they otherwise support. This protection concerns the provisions of the bill, not its title. That the title serves as a shorthand mechanism for describing the subject of the bill is irrelevant in measuring compliance with the single subject restriction.

Rules requiring unity of subject matter do not restrict the breadth of an act.[328] The legislature must be allowed to treat a problem in a comprehensive way rather than in separate components,[329] but the subject may not be so broad as to be meaningless.[330] Going back to *Corvera*, one may wonder whether a subject like "environmental control" can truly be "single." A hypothetical bill on that subject could span hundreds of pages and cover topics including agricultural runoff, underground storage tanks,

---

[324] Ruud, *supra* note 7, at 399.

[325] 12 S.W.3d 322, 326–27 (Mo. 2000) (en banc).

[326] *Id.* at 325.

[327] *Id.*

[328] *See* 1A SINGER, *supra* note 9, § 17.02, at 7; *see also* People v. Cervantes, 723 N.E.2d 265, 267 (Ill. 1999) (subject may be "as comprehensive as the legislature chooses"); McIntire v. Forbes, 909 P.2d 846, 856 (Or. 1996) ("legislature may choose a *comprehensive* subject"); Jaksha v. State, 486 N.W.2d 858, 874 (Neb. 1992) (single subject permissible "no matter how broad").

[329] *See* Unified Sch. Dist. No. 229 v. State, 885 P.2d 1170, 1194 (Kan. 1994) (discussing comprehensive bill relating to public education); *In re* Boot, 925 P.2d 964, 971 (Wash. 1996) (discussing comprehensive bill relating to violence prevention).

[330] *See* State *ex rel.* Ohio Acad. Trial Lawyers v. Sheward, 715 N.E.2d 1062, 1100–01 (Ohio 1999) (hypothesizing that if stretched enough, the single subject rule would allow all provisions to come in under one of only two subjects: civil law and criminal law). Similarly, the dissenting judge in the most recent Illinois case disagreed with the majority's conclusion that "property" constituted a single subject. Premier Prop. Mgmt. v. Chavez, 728 N.E.2d 476, 489 (Ill. 2000) (Harrison, C.J., concurring in part and dissenting in part) (stating that "a taxonomy so broad is useless").

and sewage treatment (all related to water quality); automobile emissions, factory emissions, and asbestos (all related to air quality); transportation of hazardous wastes; disposal of medical wastes; protection of endangered species; and numerous others. But as long as "there is no blatant disunity among the provisions of a bill and there is a rational purpose for their combination in a single enactment," the act is valid.[331]

Because diverse matters may properly be combined in a single bill, it is sometimes hard to judge whether a bill contains a single subject on the basis of its contents alone. In cases like *Corvera*, it may be necessary to refer to an external source. I turn now to the question of how to determine compliance.

2. Test for Compliance

If reference to an external source is necessary to determine whether a statute contains a single subject, courts should look to the chapter headings of the Missouri Revised Statutes. If a bill amends multiple chapters, the court should presume that the bill contains multiple subjects. This presumption, however, can be overcome by a showing that the provisions fairly relate to the same subject or are means of accomplishing the subject of the bill.

Hammerschmidt confused single subject analysis by using the structure of the constitution, not the chapter headings of the statutes, as the external source for determining unity of subject matter. After the court determined the subject of the bill from its title, the opinion went on to describe the process for determining the subject when the title is not clear. In a footnote, the court mused about overly broad titles:

> [W]here the challenge to a law is . . . to the number of subjects it contains and the bill's title fails to express the subject of the bill with reasonable precision, *we look to the Constitution as a whole*. . . . The organization of the constitution creates a presumption that matters relating to separate subjects therein should . . . not be commingled under unrelated headings. The organizational headings of the constitution are strong evidence of what those who drafted and adopted the constitution meant by "one subject."[332]

This test, derived from *Initiative Process*, is a poor fit for statutes, however, for three primary reasons: the constitutional requirements for amendments differ from those for laws, constitutional provisions are by

---

[331] 1A SINGER, *supra* note 9, § 17.02, at 7.

[332] 877 S.W.2d at 102 n.3 (emphasis added). The court derived this test from *Missourians to Protect the Initiative Process v. Blunt*, 799 S.W.2d 824, 831 (Mo. 1990) (en banc).

nature much broader than statutory provisions, and many statutes cover topics not reflected in any constitutional heading.

First, the simple importation of the test for determining the subject of a constitutional amendment into the line of cases involving statutes is unsupported by the constitution's text. Though similar to the single subject provision of article III, section 23, the requirement for initiative petitions differs in important respects.[333]

Second, constitutional provisions are by their very nature much broader than statutory provisions. The text of a constitutional amendment bears little resemblance to the text of an ordinary statute.[334] A constitution is an organic document broadly delineating the rights of the people and the powers of government. The Missouri Constitution contains only twelve articles and within those articles just twenty-four subheadings. Its provisions are typically general and brief. Statutes, on the other hand, impose specific duties, establish procedures, define particular crimes and set penalties, and regulate innumerable aspects of daily life. The Revised Statutes of Missouri are divided into forty-one titles and currently include over 450 separately numbered chapters.[335]

These differences suggest that the Missouri Supreme Court took a wrong turn in *Hammerschmidt* by importing the single subject test from *Initiative Process* to a case involving a run-of-the-mill statute. The notion that what constitutes a single subject in a constitutional amendment is a single subject in a bill is mistaken.[336] But this test does provide an anal-

---

[333] Article III, section 50 provides in relevant part:

> Petitions for *constitutional amendments* shall not contain more than one amended and revised article of this constitution, or one new article which shall not contain more than one subject and matters properly connected therewith. . . . Petitions for *laws* shall contain not more than one subject which shall be expressed clearly in the title. . . .

MO. CONST. art. III, § 50 (emphasis added). Section 50 repeats verbatim for laws the subject and title provisions of section 23. In other words, a statutory enactment must contain only one subject whether it is passed by the legislature or adopted via the petition process. For constitutional amendments, on the other hand, section 50 requires that petitions pertain only to one amended article of the current constitution. This provision effectively confines such petitions to one of the 12 broad subjects reflected in the current constitution. Secondarily, section 50 requires that any proposed new article contain only one subject. The inclusion of this provision strengthens the argument that each of the constitution's existing articles treats one broad subject.

[334] One need only recall the oft-repeated pronouncement of Chief Justice Marshall that "it is a Constitution we are expounding" to appreciate the strength of this distinction in American law. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819). State constitutions, however, are typically less broad and less static than the federal constitution.

[335] *See* MO. REV. STAT. Analytical Table of Chapters (1994). According to the preface, titles are used for convenience only and are not part of the law. MO. REV. STAT. vii (1994). Chapters furnish the basis for citation of Missouri statutes. *Id.*

[336] *See* Ruud, *supra* note 9, at 407–08 (describing efforts of two states to use constitutional provisions as guides for single subject analysis and concluding that they were unsound except insofar as they made appropriations measures a subject unto themselves).

ogy by which to devise a comparable test for statutes. For statutes, the analogous subject index is the list of chapter headings of the revised statutes. New legislation necessarily amends or adds to the compiled statutes and must be fit into this subject structure. Reference to the structure of the revised statutes affords an easier and more coherent basis for assessing the subjects of bills.[337]

Third, *Hammerschmidt*'s constitutional structure test is of limited value because the subjects of many statutes simply are not reflected in the articles and headings of the constitution.[338] In such cases, the *Hammerschmidt* test provides no guidance. *Stroh* provides an example of such a statute. All three bills involved in that case concerned intoxicating beverages.[339] This subject simply does not appear in the structure of the constitution.[340] All three bills did, however, purport to amend chapter 311 of the Revised Statutes of Missouri, the liquor control law of the state.[341]

Missouri Health Care Ass'n allows a comparison of the use of the constitution and statutes as external sources for measuring compliance with the single subject rule. The court accepted the bill's title, "relating to the department of social services" ("DSS") as its subject, and then checked the bill's provisions to see whether they were connected with DSS.[342] The opinion does not explicitly refer to the structure of the constitution as a subject guide, but its holding implicitly follows this approach by focusing on which agency is charged with enforcing each of the bill's provisions.[343] This Article's proposed test would reach the same result. Provisions of the bill amending chapters 198 (nursing homes) and 660 (relating to DSS itself), though found in separate parts of the code, all relate to the same subject—the regulation by DSS of care provided by nursing homes. The provisions amending chapter 407 (merchandising

---

The dissenting judge in *Initiative Process* apparently believed the majority judged the subject of the proposed constitutional amendment more strictly than it had judged statutes. *Initiative Process*, 799 S.W.2d at 839 (Rendlen, J., dissenting). He commented that constitutional provisions "are to be given a broader construction" than statutes. *Id.* (citing Boone County Court v. State, 631 S.W.2d 321, 324 (Mo. 1982) (en banc)).

[337] *But see* Beagle v. Walden, 676 N.E.2d 506, 509–10 (Ohio 1997) (Pfeifer, J., concurring in part) (noting that the constitution does not require all provisions of a bill to affect the same chapter of the Revised Code); Geja's Café v. Metropolitan Pier and Exposition Auth., 606 N.E.2d 1212, 1220 (Ill. 1992) (holding that the constitution does not prohibit the amendment of an existing statute that contains multiple subjects).

[338] *Compare* MO. CONST. Contents (1945) *with* MO. REV. STAT. Analytical Table of Chapters (1994).

[339] *See supra* notes 211–222.

[340] *See* MO. CONST. Contents (1945).

[341] H.R. 1470, 88th Gen. Assem., 2d Sess. (Mo. 1996); S. 814, 88th Gen. Assem., 2d Sess. (Mo. 1996); S. 933, 88th Gen. Assem., 2d Sess. (Mo. 1996).

[342] 953 S.W.2d at 622.

[343] The court found provisions concerning the trade practices of nursing homes—provisions enforced by the attorney general, not DSS—to constitute a second subject. *Id.* at 623. Some of the state's executive agencies are defined not in the constitution, but in statutes. Thus, reference to the constitution to see which agency enforces a particular provision often will be fruitless.

practices), however, plainly constitute a second subject relating to trade, not long-term care.

The *Missouri Health Care Ass'n* opinion raises an important question about the reach of the *Hammerschmidt* test: whether all provisions relating to any program administered by a single agency can constitute a single subject. The constitutional structure test would hold that everything that falls within article IV, section 37 of the Missouri Constitution, defining "Social Services," constitutes a single subject. Recourse to the structure of the Revised Statutes of Missouri would yield a different result. DSS has an exceptionally broad mandate, with responsibilities toward children and their parents, the elderly, troubled youth, and the poor.[344] Its divisions include Aging, Child Support Enforcement, Family Services, Medical Services, and Youth Services.[345] These divisions administer diverse programs ranging from adoption to child abuse, nursing homes, home energy assistance, and Medicaid.[346] These unrelated programs are found in chapters 453, 210, 198, 660, and 208 of the Revised Statutes of Missouri, respectively.[347] Under the proposed test, the placement of these matters in separate chapters would create a presumption that they are separate subjects not to be contained in one bill.[348] The proposed test comports with the ordinary understanding that child abuse and nursing home care, for example, are separate subjects.

Corvera offers another opportunity to apply the proposed test. There, the bill's provisions relating to asbestos projects amended chapters 643 ("air conservation") and 701 ("state standards"), while those relating to underground storage tanks were added to chapter 292.[349] The proposed test establishes a presumption that provisions amending different chapters pertain to different subjects, not a single subject. The ultimate question remains whether all the provisions are "fairly related" to each other and thus constitute a single subject. Focusing on the fact that all provisions of the bill regulate environmental hazards, the court found

---

[344] *See* MO. REV. STAT. § 660.010 (1994) (establishing DSS); OFFICIAL MANUAL: STATE OF MISSOURI 521 (1999) (describing DSS).

[345] *See* OFFICIAL MANUAL, *supra* note 344, at 523–35.

[346] *See id.*

[347] MO. REV. STAT. Analytical Table of Chapters at XI–XXVI.

[348] The presumption, however, is secondary to the "fairly related" test. If the provisions of the bill are "fairly related" to each other, then they constitute one subject regardless of their codification into different chapters. Indeed, the "unquestioning use of the classification of subjects in the law as a basis for determining compliance with the one-subject rule is . . . unsound." Ruud, *supra* note 7, at 411 (describing the use of various elements of a state's jurisprudence—constitution, statutes, and common law—to determine unity of subject). As Ruud points out, subjects are classified in the law for a variety of reasons, many of which bear scant relation to the single subject rule. *Id.* (listing history, legal theory, convenience, and functional relationships as common reasons for classifying law in a particular manner). Resorting to the classification of subjects in the law can, however, serve as a "practical guide" to distinguish subjects "reasonably relat[ed]" from those combined for "tactical convenience only." *Id.*

[349] *See* H.R. 77/78/356, 85th Gen. Assem., 1st Sess. (Mo. 1989).

no single subject violation.[350] In the end, the decision in *Corvera* rests on the presumption that the statute is constitutional.[351] This presumption means that if alternative readings are possible, the court is bound to adopt the constitutional one.[352] Though the title does not define the subject, the words selected by the legislature to describe the bill may be persuasive.[353] Here, the legislature described the subject of the bill as "environmental control," and the court determined that the term "environment" includes a "complex" of factors relating to "climate, soil, and living things."[354] On that theory, the court correctly held that the bill contained a single subject.

To sum up, the subject of a bill should be measured by the content of its provisions. The provisions must relate to each other and together must constitute a single subject. The title must express the subject, but the title is not its test. When guidance is needed to determine whether a bill's provisions in fact constitute a single subject, the court should resort to the organization of the statutes themselves. This proposal is a limited one, however. It establishes a presumption that matters within a single chapter of the revised statutes constitute a single subject, and that matters found in different chapters deal with separate subjects. The presumption can be overcome, however, by demonstrating that the provisions themselves in fact "fairly relate" to the same subject or are "incidents" or "means" of accomplishing it.

C. Clear Title

This Article has argued at length that the Missouri Supreme Court relies too heavily on a bill's title to measure original purpose and single subject violations. The ironic result in some of the clear title cases is that the court sidesteps real analysis of the title. In *Corvera*, for example, the court took up the clear title claim first.[355] It found that the title "relating to environmental control" was capable of expressing a single subject.[356] It then concluded (without discussing the bill's provisions) that the title in fact clearly expressed the content of the bill.[357] Only then did the court determine whether the bill contained a single subject.[358] This is back-

---

[350] *Corvera*, 973 S.W.2d at 862.

[351] *Id.*

[352] *Id.*

[353] According to the Oregon Supreme Court, "if the court has *not* identified a unifying principle logically connecting all provisions in the act," it should, as a second step, "examine the title of the act with reference to the body of the act . . . to determine whether the legislature . . . has . . . expressed in the title[ ] such a unifying principle. . . ." McIntire v. Forbes, 909 P.2d 846, 856 (Or. 1996).

[354] *Corvera*, 973 S.W.2d at 861 (discussing the title of the bill).

[355] *Id.* at 861–62.

[356] *Id.* at 860, 862.

[357] *Id.*

[358] *Id.*

wards. Article III, section 23 requires that the bill *contain* a single subject which (additionally) must be clearly *expressed* in its title.[359] The single subject analysis must come first.[360] As the court stated in *Solid Waste Management*, "[t]he mere fact that two subjects in a bill can be reconciled as part of a broader subject, and thus satisfy . . . [the] single subject [rule], does not, in itself, mean that the broader subject has been clearly expressed in the title."[361] This section considers the analysis of clear title claims.

The clear title rule exists primarily to ensure that the public has "sufficient notice of the contents of the act."[362] Logically, a bill's title may violate the rule in two ways.[363] First, it can be worded so broadly as to provide no meaningful notice of the bill's contents. Second, the title's wording can be so specific as to fail to express the totality of the bill's subject matter. Clear title problems usually fall into one of these two categories. Among the ten recent Missouri cases, there is one of each type: *St. Louis Health Care Network* involved an overly broad title, while *Solid Waste Management* involved an under-inclusive title. Together, these two cases set the outer limits of clear title analysis under Missouri law.

1. Breadth of Title

In 1998, the court decided *St. Louis Health Care Network* and *Solid Waste Management*. *St. Louis Health Care Network* involved a bill whose title said it "relat[ed] to certain incorporated and non-incorporated entities."[364] Commenting that the phrase "incorporated and non-incorporated entities" "could define most, if not all, legislation passed by the General Assembly,"[365] the court ruled the title "far too broad" to express any single subject.[366] The court observed that "it is difficult to imagine a broader phrase that could be employed in the title of legislation."[367] In this rare situation, the court need not determine the subject of the bill. No matter what the subject of the bill's provisions turns out to be, this title cannot adequately express that subject.[368] This case establishes that overly broad

---

[359] MO. CONST. art. III, § 23.

[360] One exception is discussed, *infra* notes 365–368 and accompanying text.

[361] 964 S.W.2d at 821; *see also Mo. Health Care Ass'n*, 953 S.W.2d at 623 n.2.

[362] *Corvera*, 973 S.W.2d at 862; *see also* 1A SINGER, *supra* note 9, § 18.02, at 27; *supra* notes 107–118.

[363] *Cf.* 1A SINGER, *supra* note 9, § 18.08, at 54-55 (discussing severability of provisions in bills).

[364] 968 S.W.2d at 146.

[365] *Id.* at 148 (noting that the phrase encompasses "businesses, charities, civic organizations, governments, and government agencies").

[366] *Id.*

[367] *Id.* at 147.

[368] The bill bearing this broad title covered matters ranging from venue to same-sex marriage, confirming that the bill did not contain a single subject. *Id.* at 146.

titles are facially invalid; reference to the contents of the bill is not necessary to the analysis in such cases, and such reference cannot save the statute.

Solid Waste Management concerns the opposite problem—a title that is narrower than the bill itself.[369] The bill's title, "relating to solid waste management," provided no notice that some of the bill's provisions related to hazardous waste management as well.[370] The fact that solid waste management and hazardous waste management could be understood as parts of a single subject was irrelevant because the title, as written, did not express the broader subject; it expressed only a portion of it.[371] *Solid Waste Management* establishes that a bill title that "descends to particulars and details" is "affirmatively misleading" if it fails to mention all aspects covered by the bill.[372] Thus, an "under-inclusive" title violates the clear title requirement.[373] Resolution of this type of clear title claim requires reference to "some source extrinsic to the title itself,"[374] namely, to the contents of the bill. A bill's title, whether broad or narrow, must above all be "accurate" and "clear."[375]

The most recent Missouri case, *Dillon*, marked a step back from the progress made in *Solid Waste Management* and *St. Louis Health Care Network*. The bill title referred only to "transportation," but the bill included provisions allowing cities and counties to regulate billboards.[376] The *Dillon* court recognized that the bill title at issue was, if anything, under-inclusive.[377] Additionally, in finding provisions regulating billboards to be clearly expressed in the bill title "transportation," the court reiterated its original purpose analysis, which assumed that the federal highway funding requirement that states regulate billboards establishes a connection between billboards and transportation.[378] The court, therefore, found no violation of the clear title requirement.[379]

An Iowa Case, *State v. Taylor*,[380] provides a comparison. The bill at issue in that case contained seventy-four sections calling for, among other things, training for gang-affected youth; restricting access by juveniles to drugs, tobacco, and alcohol; establishing community programs for at-risk juveniles; combatting child abuse; creating weapon-free school zones; and appropriating funds for juvenile programs and serv-

---

[369] *See* 964 S.W.2d at 821–22.

[370] *Id.* at 820.

[371] *Id.* at 821–22; *see also* Mo. Health Care Ass'n v. Attorney Gen., 953 S.W.2d 617, 623 n.2 (Mo. 1997) (en banc).

[372] 964 S.W.2d at 821.

[373] *Id.*

[374] *Id.*

[375] *Id.* at 821.

[376] *Dillon*, 12 S.W.3d at 324.

[377] *Id.* at 329. The court seemed to turn the underinclusivity analysis upside down when it concluded that "billboard regulation is not underinclusive of transportation." *Id.*

[378] *Id.* at 327–28 (original purpose); *id.* at 329 (clear title).

[379] *Id.* at 328–29.

[380] 557 N.W.2d 523 (Iowa 1996).

ices.[381] It also criminalized the act of trafficking in stolen weapons by an adult, "without reference to juvenile justice concerns."[382] The bill's title described it as "relating to juvenile justice."[383] The Iowa Supreme Court found the title deficient because it failed "to indicate that the legislation addresses a weapons law which bears no specific relationship to juveniles."[384] Here, the title was broad and properly encompassed a wide variety of initiatives relating to juveniles. The title suggested, however, that the legislation applied only to offenses relating to juvenile delinquency,[385] and hence was under-inclusive. The title gave no notice that the bill included an adult weapons offense. Focusing on the notice function of bill titles, the Iowa court commented that as the legislation becomes broader in scope, "the legislature's obligation to provide greater specificity in the act's title necessarily increases."[386]

2. *Test for Compliance*

In Missouri, as in other states, the test for compliance with the clear title rule focuses on whether the title actually provided notice of the contents of the bill. The title must "indicate in a general way the kind of legislation that was being enacted."[387] The title need not give specific details of the bill's contents,[388] nor be the best possible title.[389] Because the main rationale behind the clear title rule is providing notice to the public,[390] the test for compliance should focus on the likely understanding of the average person.[391] The title must call attention to the subject matter of the bill[392] in such a way as to provoke a reading of the bill[393] or lead to an

---

[381] *Id.* at 526.
[382] *Id.*
[383] *Id.* at 527.
[384] *Id.*
[385] *Id.*
[386] *Id.* at 527.
[387] Nat'l Solid Waste Mgmt. Ass'n v. Dir., Dep't of Natural Res., 964 S.W.2d 818, 821 (Mo. 1998) (en banc) (quoting Fust v. Attorney Gen., 947 S.W.2d 424, 429 (Mo. 1997) (en banc)); *see also* Lutz v. Foran, 427 S.E.2d 248, 251 (Ga. 1993).
[388] St. Louis Health Care Network v. State, 968 S.W.2d 145, 147 (Mo. 1998) (en banc); *see also* Utilicorp United, Inc. v. Iowa Util. Bd., 570 N.W.2d 451, 455 (Iowa 1997) (holding that the title need not be an index of the bill); Louviere v. Mobile City Bd. of Educ., 670 So. 2d 873, 876 (Ala. 1995) (same); Pierce v. State, 910 P.2d 288, 306 (N.M. 1995) (same).
[389] Associated Builders & Contractors v. Ventura, 610 N.W.2d 293, 301 (Minn. 2000) ("We held 'it is not essential that the best or even an accurate title be employed, if it be suggestive in any sense of the legislative purpose.'") (citations omitted).
[390] *See supra* notes 107–112 and accompanying text.
[391] *See, e.g.*, McGlothren v. E. Shore Family Practice, 742 So. 2d 173, 177 (Ala. 1999) (holding that the test is whether the "average legislator or person" would be informed of the purpose of the enactment); Patrice v. Murphy, 966 P.2d 1271, 1275 (Wash. 1998) (explaining that the clear title rule requires notice to the general public).
[392] Jaksha v. State, 486 N.W.2d 858, 874 (Neb. 1992).
[393] McCoy v. Vankirk, 500 S.E.2d 534, 546 (W. Va. 1997).

inquiry into the body of the act.[394] The title should not force the reader to "search out the commonality" of subjects contained in the bill but not mentioned in the title.[395]

Accordingly, analysis of the sufficiency of the title ordinarily requires a comparison with the provisions of the bill. Some states have articulated a requirement that the act conform to the title.[396] Because the constitutional provisions require the title to express the subject of the bill, however, it seems more helpful to phrase the test the other way around: the title must conform to the bill.[397]

The Missouri Supreme Court's analysis of the title in *Dillon* paid insufficient attention to the contents of the bill in question. As finally passed, the bill was about two subjects: the state transportation bureaucracy and local regulation of billboards. The bill's title, "relating to transportation," was actually far broader than the provisions of the bill itself, which concerned mainly positions, salaries, and the organizational structure of the Department of Transportation and related commissions. The subject of this bill was not really "transportation" but rather employment matters within the transportation department. The title in *Dillon* was also under-inclusive as related to the billboard provisions in the bill as enacted. The court attempted to address this problem by imagining a relationship between transportation and billboards,[398] but the fact that such a relationship may exist is irrelevant to article III, section 23, which requires that the title actually reflect the contents of the bill, not merely that some relationship between the title and bill could theoretically exist.[399] The title in *Dillon* gave no notice of the bill's actual contents and was therefore misleading, and should have been held invalid under the rationale of *Solid Waste Management.*

The dissenting opinion in *Solid Waste Management* created confusion about the test for compliance with the clear title rule by conflating it with the compliance test for the single subject rule. In *Solid Waste Man-*

---

[394] *In re* Boot, 925 P.2d 964, 971 (Wash. 1996).

[395] Nat'l Solid Waste Mgmt. Ass'n v. Dir., Dep't of Natural Res., 964 S.W.2d 818, 821 (Mo. 1998) (en banc).

[396] *See, e.g., id.*; Tenn. Mun. League v. Thompson, 958 S.W.2d 333, 336–37 (Tenn. 1997).

[397] *See* Pierce v. State, 910 P.2d 288, 306 (N.M. 1995) (finding the title "sufficiently related to the contents of the bill to pass muster"). The fact that the title may be changed to reflect amendments to the bill during the course of its consideration supports this understanding. *See Solid Waste Mgmt.*, 964 S.W.2d at 821 (noting consistent approval of title amendments during bill consideration).

[398] *See Dillon*, 12 S.W.3d at 327–29. The court relied on the connection between federal highway funding and state regulation of billboards to save this bill. *Id.* That there may be such a connection in other contexts does not mean that this bill's title accurately expressed the content of its provisions. Interestingly, Judge Price offered a similar theory in *Solid Waste Management*, turning to federal environmental law to "demonstrate[ ] the close relationship between hazardous and solid waste." 964 S.W.2d at 824 (Price, J., dissenting).

[399] *Cf.* McIntire v. Forbes, 909 P.2d 846, 856 (Or. 1996) (requiring, in the context of single subject analysis, that the title be examined "with reference to the body of the act").

agement, the majority and dissenting opinions disagreed about the meaning of the words "relating to" as used in most bill titles in Missouri.[400] The dissent argued that use of the words "relating to" in the title of a bill incorporates within the title's ambit anything "relating to" the subject actually expressed therein,[401] but this standard is actually the single subject test: to determine the bill's subject from its provisions, one examines the provisions to see whether their topics are so related or connected as to form a single subject. The test for titles is whether they clearly express the subject, not the subject plus other matters related to it. The subject has already been defined, and there is no need to consider additional matters that may somehow be "related" to it. In fact, to do so contravenes the purpose of the clear title rule, which is to provide accurate notice of the bill's contents.

Overly broad and under-inclusive titles violate the clear title requirement. To be valid, the title must clearly express the bill's actual subject. Thus, analysis of the title ordinarily must examine the bill's provisions, not proceed only in the abstract. A bill whose title fails to provide meaningful notice of the bill's contents is unconstitutional.

IV. Relevant Version of Bill

In two recent opinions, the Missouri Supreme Court laid down rules concerning the version of the bill to be examined in determining whether the original purpose, single subject, and clear title rules have been violated. In *Stroh*, the court stated that the "original purpose of a bill must . . . be measured at the time of the bill's introduction."[402] Later in the same opinion, the court added that the "determination of whether a bill violates the . . . single subject requirement is made concerning the bill as it is finally passed."[403] Most recently, in *Dillon*, the court addressed clear title cases, stating that that "rule necessarily applies to the version of the bill that passed, not the introduced version."[404] The court's statements were unaccompanied by any explication of the rules or by citation to prior authority. As a result, these new rules leave open several questions.

With respect to original purpose, the court recognized the obvious point that it is not sufficient to measure original purpose violations against the final version alone.[405] The court stated that original purpose must be measured at the time of the bill's introduction.[406] But because the

---

[400] *Compare Solid Waste Mgmt.*, 964 S.W.2d at 822 *with id.* at 823 (Price, J., dissenting).

[401] *Id.* at 823 (describing "relating to" as a phrase of "connection, not restriction").

[402] 954 S.W.2d 323, 326 (Mo. 1997) (en banc).

[403] *Id.* at 327.

[404] 12 S.W.3d 322, 329 (Mo. 2000) (en banc).

[405] *Stroh*, 954 S.W.2d at 326.

[406] *Id.*

notion of a change in purpose is inherently comparative, the court must also read the provisions of the final version and determine whether the bill's purpose changed during its consideration.[407] Because the original purpose rule protects the integrity of the legislative process, its test for compliance must focus on developments throughout the process of consideration.[408] If only the end result were examined, changes that occurred during the process, in violation of section 21, would never be detected.[409]

The proper time for determining compliance with the single subject rule is a harder question. As noted, the court in *Stroh* declared that single subject violations are measured against the version of the bill finally passed.[410] At first blush, this rule seems doubtful—after all, the single subject rule refers to "a bill," not "an Act."[411] But the primary rationale for the single subject rule is to safeguard the moment of decision at the end of the process—the vote of legislators or the signature of the governor. Thus, measuring compliance with the single subject rule by reference to the version of the bill presented for decision is correct.

Clear title claims present the hardest question. According to *Dillon*, the title that counts is the one attached to the bill as finally passed.[412] The leading treatise comments:

> [I]t would violate the letter and spirit of the constitutional safeguard against stealthy legislation to hold that the subject of a bill must be clearly expressed in its title during the progress of the measure through the legislature, but that any misleading or delusive title may be attached to it when it is presented to the governor for approval.[413]

The earlier *St. Louis Health Care Network* case in effect applied this rule, though without comment.[414] Reflection on the purposes served by the clear title rule, however, suggests that the court takes too limited a view of the relevant time. The same concern for accuracy of the title at the last stage of the legislative process—when the bill is presented to the governor—should prevail at all earlier stages of the bill's consideration. If the

---

[407] The *Stroh* court in fact compares Missouri Senate Bill 933, 88th Gen. Assem., 2d Sess. (Mo. 1996), as introduced, with Missouri House Bill 933, 88th Gen. Assem., 2d Sess. (Mo. 1996), as finally passed. 954 S.W.2d at 326.

[408] The court recognizes as much in *Akin* by indicating that the bill's original purpose remained the same "throughout the legislative process." 934 S.W.2d 295, 302 (Mo. 1996) (en banc).

[409] *See* Williams, *supra* note 1, at 799.

[410] *See supra* note 403 and accompanying text.

[411] MO. CONST. art. III, § 23.

[412] *See Dillon*, 12 S.W.3d at 329.

[413] 1A SINGER, *supra* note 9, § 18.01, at 25 (quoting Weis v. Ashley, 81 N.W. 318 (Neb. 1899)).

[414] *See* St. Louis Healthcare Network v. State, 968 S.W.2d 145, 147 (Mo. 1998) (en banc).

purpose of the clear title rule is primarily to provide notice to the public throughout the legislative process and to provide an opportunity to comment on pending legislation, then the title must be clear at every stage. It is not sufficient for the title to express the bill's subject clearly only at the end of the process, when the time to comment has passed. Moreover, article III, section 23 speaks of "bills," not of "acts." It provides that "*no bill* shall contain more than one subject which shall be clearly expressed in *its* title."[415] Literally, every bill's subject shall be clearly expressed in its title. So read, the provision covers introduced bills, amended bills, substitute bills, and bills finally passed. The clear title limitation applies at every stage of the legislative process, from introduction through signature into law.

That bills' titles are commonly rewritten while the legislation is under consideration also supports the argument that the title must be clear at every stage. The Missouri Supreme Court recently remarked that changing the bill's title as the bill is amended during the course of consideration "is not a novel proposition."[416] It is a "process that the legislature has routinely used" and one the court "has consistently approved."[417] In *Corvera*, for example, each of the bills as introduced bore a title accurately expressing the particular aspect of the environment it purported to control,[418] and the combined bill's title was rewritten to conform to the broader scope of the substitute bill.[419] In *Solid Waste Management*, by contrast, the original title remained the same even after the bill was amended, and resulted in a clear title violation.[420] The bill bore the title "relating to solid waste" throughout the process, even after the bill was amended at the very end of the legislative session to apply to hazardous waste.[421] Thus, during most of the time when members of the public might have been expected to monitor the legislation and comment on it, the title gave adequate notice of the bill's contents. The fact that the title became unclear only at the very last minute did not dissuade the court from finding a clear title violation. Similarly, in *St. Louis Health Care Network* the title was accurate at the start but was changed when the bill was amended, and in such a way as to "obscure" the contents of the amended bill.[422] Together, these cases suggest that as long as there is still time to learn of the bill and comment on it, the constitution requires a title that fairly apprises the public of the actual subject of the pending

---

[415] MO. CONST. art. III, § 23 (emphasis added).

[416] Nat'l Solid Waste Mgmt. Ass'n v. Dir., Dep't of Natural Res., 964 S.W.2d 818, 821 (Mo. 1998) (en banc).

[417] *Id.*

[418] 973 S.W.2d 851, 860 (Mo. 1998) (en banc) (describing bills "for the purpose of regulating certain asbestos abatement projects"; "relating to ... underground storage tanks"; and "relating to water well drillers").

[419] *Id.* (describing a bill "relating to environmental control").

[420] 964 S.W.2d at 819.

[421] *Id.* at 820.

[422] *See St. Louis Health Care Network*, 968 S.W.2d at 149.

legislation. A contrary holding would permit one of the evils the clear title rule aims to prevent: "surreptitious[ ] insert[ion] of related amendments into the body of a pending bill."[423] When a case arises in which a title that was defective during a substantial part of the process is revised to become clear only at the very end, the court should reconsider its position in *Dillon* that only the final title matters.[424]

V. REMEDY

In some states, the constitutional provisions themselves provide a remedy for violation of the relevant procedural restriction, answering the question whether a violation necessarily invalidates the entire enactment.[425] For example, Iowa's single subject and clear title rule provides that "if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title."[426] The Oregon provision is identical.[427] The Washington Supreme Court has interpreted that state's constitution to provide that "if only one subject is embraced in the title, then any subject not expressed in the title . . . may be rejected, and the part that is expressed in the title be allowed to stand."[428]

By contrast, in Missouri and many other states, neither the constitution nor its interpretation by the courts sets forth an across-the-board rule as to the effect of an original purpose, single subject, or clear title violation. As a result, the proper remedy for such a violation remains uncertain, and courts have come to a variety of conclusions about the answer. As noted above, the Illinois Supreme Court's invalidation of the entire Safe Neighborhoods Law sparked a furious response, particularly because the court refused to consider severance, even on rehearing.[429] This response indicates that courts must consider severance in arriving at a proper balance between enforcing the constitutional restrictions and unduly hampering the legislature's ability to act.

Few of the ten recent Missouri cases discuss the specific remedy for a constitutional procedural violation. In some, no violation was found, while in others the statute as a whole was held unconstitutional.[430] *Hammerschmidt*, however, embarked on a discussion of remedies, specifically

---

[423] Hammerschmidt v. Boone County, 877 S.W.2d 98, 101 (Mo. 1994).

[424] *See Dillon*, 12 S.W.3d at 329.

[425] *See* 2 SINGER, *supra* note 9, § 44.12, at 534.

[426] IOWA CONST. art. III, § 29.

[427] OR. CONST. art. IV, § 20.

[428] Patrice v. Murphy, 966 P.2d 1271, 1276 (Wash. 1998) (quoting Power v. Huntley, 235 P.2d 173 (Wash. 1951)) (internal quotation marks omitted).

[429] *See* Chambers, *supra* note 47, at 2 (noting that the court "turned down a suggestion that it should sever the law's [invalid] provisions").

[430] *See* Appendix II.

addressing the severance of unconstitutional provisions.[431] *Hammerschmidt* recognized that the court must reconcile conflicting mandates in deciding what remedy is appropriate when one of the constitutional limitations on legislative procedure is violated.[432] On one hand, courts "bear[ ] an obligation to sever unconstitutional provisions of a statute" when they can do so without rendering the remainder meaningless.[433] On the other hand, the court implies that when "the procedure by which the legislature enacted a bill violates the Constitution," the entire enactment may be tainted.[434] If so, severance may be improper.

A threshold question, then, is whether original purpose, single subject, and clear title violations necessarily taint the entire bill, so that no valid provisions remain.[435] This Part explores that question and concludes that, at least in some situations, these violations invalidate only a portion of the enactment. Even so, applying severance in these cases is often difficult.

A. Severance Analysis

Severance analysis requires two steps. First, the legislature must have intended that the provisions of the act be severable.[436] Missouri's severance statute,[437] like those of many states, expresses that intent with respect to all statutes, though one commentator suggests that such blanket severability provisions "are treated only as aids to interpretation and not as commands."[438] Second, the provisions must be capable of severance.[439] Generally, this means that "the valid portion of an enactment must be independent of the invalid portion and must form a complete act within itself."[440] Missouri's statute requires severance unless "the valid provisions of the statute are . . . dependent upon the void provision . . . or unless . . . the valid provisions, standing alone, are incomplete . . . ."[441] Independence depends on whether "the legislature would have enacted the valid provisions without the void one."[442] Completeness requires that the "valid provisions, standing alone, are [ ]complete and [ ]capable of

---

[431] 877 S.W.2d 98, 103–04 (Mo. 1994).

[432] *Id.* at 103.

[433] *Id.* (citing MO. REV. STAT. § 1.140 (1986)).

[434] *Id.* (stating that severance is a "more difficult issue" when the process of enactment was flawed).

[435] *Cf. id.* (finding that where "the procedure by which the legislature enacted a bill violates the Constitution, . . . the entire bill is unconstitutional unless the Court is convinced beyond reasonable doubt" that one subject is controlling).

[436] 2 SINGER, *supra* note 9, § 44.03, at 495.

[437] MO. REV. STAT. § 1.140 (1969).

[438] 2 SINGER, *supra* note 9, § 44.11, at 531.

[439] *Id.* § 44.03, at 495.

[440] *Id.* § 44.04, at 501 (footnote omitted).

[441] MO. REV. STAT. § 1.140 (1969).

[442] *Id.*

being executed in accordance with the legislative intent."[443] Both steps of the analysis boil down to legislative intent, a problematic concept in the context of procedural violations.

B. Application of Severance to Procedural Violations

The Missouri Supreme Court appears to accept severance as a remedy for constitutional procedural violations. While the court has not recently invalidated any provision on original purpose grounds, its decisions in *Hammerschmidt* and *Carmack* severed the provisions found to violate the single subject rule from an otherwise complete, coherent, and valid bill.[444] One of the court's clear title violation cases applies severance;[445] the other does not.[446] In these decisions, the court appears to balance severance against invalidation of the whole statute in the abstract, instead of discussing remedies in connection with the specific violation found to have occurred. As a result, the court's analysis of remedies is incomplete. Further analysis is required in order to determine whether the same rules actually govern severance in all procedural violation cases.

Solid Waste Management complicated the remedy question by overlooking the requirement that the void provisions be capable of severance. There, the bill's title and most of its provisions related to solid waste, but one provision also encompassed hazardous waste.[447] The Missouri Supreme Court recited its duty to sever the offending provisions, but found it impossible to do so given the wording of the enactment.[448] Instead, the court "restrict[ed] the application of the statute" to the valid portion—solid waste.[449] As the court admitted, this amounts to rewriting the statute,[450] disregarding the usual rule that courts have no power to rewrite a statute.[451]

---

[443] *Id.*

[444] *Hammerschmidt*, 877 S.W.2d at 104 (severing provisions concerning county governance from a bill concerning election procedures); Carmack v. Dir., Mo. Dep't of Agric., 945 S.W.2d 956, 961 (Mo. 1997) (severing provisions concerning diseased livestock from a bill relating to economic development).

[445] Nat'l Solid Waste Mgmt. Ass'n v. Attorney Gen., 964 S.W.2d 818, 822 (Mo. 1998) (en banc).

[446] St. Louis Health Care Network v. State, 968 S.W.2d 145, 145 (Mo. 1998) (en banc).

[447] *Solid Waste Mgmt.*, 964 S.W.2d at 819–20.

[448] *Id.* at 822. According to the court, section 260.003 of the Missouri Revised Statutes "refers to a 'permit, license, or grant of authority [ ] issued or renewed . . . *pursuant to this chapter.*'" The court observed that the statute's reference to "this chapter," chapter 260, "encompasses the separate regulatory schemes for both solid waste management and hazardous waste management." *Id.*

[449] *Id.* (citing Associated Indus. v. Dir. of Revenue, 918 S.W.2d 780, 784 (Mo. 1996) (en banc)).

[450] *Id.*

[451] *See Associated Indus. v. Dir. of Revenue*, 918 S.W.2d at 785; 2 SINGER, *supra* note 9, § 44.14, at 541 (describing the "reluctance to engage in judicial legislation").

This ruling also contradicted one of the very cases relied upon for support, *Associated Industries of Missouri v. Director of Revenue*.[452] In *Associated Industries*, the United States Supreme Court had found that a Missouri statute violated the Commerce Clause in certain situations;[453] on remand, the Missouri Supreme Court decided the statute was "completely invalid" and struck it down "in toto."[454] The court concluded that severance was not an option because Missouri's severance statute "does not address the 'as applied'" situation.[455] It also specified that the court "ha[d] no power to rewrite the statute," so the only remedy was to "strike it down in its entirety."[456] Yet in *Solid Waste Management*, the court justified severance in just such a situation by reference to *Associated Industries*.

The standard test for resolving severance issues, and the focus of *Associated Industries*, is legislative intent.[457] This test raises thorny questions in the context of procedural violations. First, the intent test promises to be difficult to apply in the absence of substantive legislative history. In *Associated Industries* itself, the court examined the history of the enactment of a provision similar in its terms to the one that severance by application would have created.[458] That earlier enactment was "never implemented" and was "ultimately repealed" and replaced with the enactment invalidated by the United States Supreme Court.[459] With this information in hand, the Missouri Supreme Court was on firm ground in inferring that the legislature did not intend severance. In the case of most statutes, however, there is no such history. Nor is it likely that other sources exist from which to obtain the information the severance test requires. The intent test forces many courts considering severance to turn to speculation.[460]

More importantly, the question of legislative intent plays out differently in cases of the procedural violations. *Associated Industries* involved a statute that, as to some applications of its terms, exceeded the legislature's taxing power.[461] The text of the enactment at issue suggested that

---

[452] 918 S.W.2d 780 (Mo. 1996) (en banc).

[453] Associated Indus. of Mo. v. Lohman, 511 U.S. 641, 643 (1994).

[454] *Associated Indus. v. Dir. of Revenue*, 918 S.W.2d at 781.

[455] *Id.* at 784.

[456] *Id.* at 785.

[457] *See* 2 SINGER, *supra* note 9, § 44.03, at 495; *Associated Indus. v. Dir. of Revenue*, 918 S.W.2d at 784.

[458] *See id.* at 784–85.

[459] *Id.* at 785.

[460] *Cf. id.* at 785 (refusing "to speculate that the General Assembly would have approved the statute as now limited").

[461] The legislature enacted a use tax that violated the Commerce Clause of the United States Constitution. Associated Indus. of Mo. v. Lohman, 511 U.S. 641, 643 (1994). That is, the General Assembly enacted a statute that exceeded its substantive power to tax under article X of the Missouri Constitution (taxation) and the Tenth Amendment of the United States Constitution (reserving to the states powers not delegated to the United States).

the Missouri General Assembly was aware of constitutional limitations on its taxing power and intended to act up to the limits of that power.[462] The Missouri court concluded that the legislature would not have enacted the "patchwork" tax scheme that was left after the limits of the state's taxing power were determined.[463]

In the context of the Missouri constitution's procedural limitations, however, the question is not the extent of the legislature's substantive power.[464] Under article III, sections 21 and 23, the legislature has no power to enact any bill in contravention of the procedural limitations. These provisions, by their terms, contemplate no range of authority. To illustrate, the legislature has the substantive power to tax so long as it does not contravene provisions of the state or federal constitutions. But it cannot enact a tax, even if substantively permissible, by means of a bill "amended . . . so as to change its original purpose,"[465] or "contain[ing] more than one subject,"[466] or failing to "clearly express[ ]" that subject in its title.[467] Legislative intent to enact a bill violating one or more of these restrictions is irrelevant. The prohibitions exist precisely to eliminate legislation by means the people find odious. In *Missouri Health Care Ass'n*, for example, the legislature may well have intended to enact a single bill regulating care in nursing homes and also regulating representations nursing homes make in advertising. In fact, passage of the two measures may have been feasible only in combination.[468] If so, the bill represented a classic case of logrolling, and violated the single subject rule. Legislative intent to combine two separate subjects cannot be used to defeat the constitutional prohibition. And if passage of the two measures depended on their combination, it would be deceptive to maintain that the legislature intended to pass one without the other.

---

[462] *Associated Indus. v. Dir. of Revenue*, 918 S.W.2d at 785 (noting that "the legislature contemplated in general that there would be constitutional exceptions" to the tax it enacted).

[463] *Id.*

[464] *See* Ruud, *supra* note 7, at 399 ("[T]he one-subject rule is not concerned with substantive legislative power.").

[465] MO. CONST. art. III, § 21.

[466] *Id.* § 23.

[467] *Id.*

[468] As the court noted, the two subjects could have theoretically been reconciled as parts of the larger subject of "long-term care," but the legislature failed to do so, referring in the bill's title only to the provisions relating to standards of care (enforced by the Department of Social Services) and not to advertising. Mo. Health Care Ass'n v. Attorney Gen., 953 S.W.2d 617, 623 n.2 (Mo. 1997) (en banc). This example highlights the difficulty of distinguishing cases of comprehensive legislation on a broad topic (valid) from cases of logrolling (invalid). This difficulty leads courts to "assume" that logrolling is behind any enactment involving multiple subjects, without inquiring into the specific facts. Ruud, *supra* note 7, at 399.

C. Linking Remedy to Rationale

Constitutional restrictions on legislative procedure in most states are "mandatory," not merely "directory," and hence are judicially enforceable.[469] The court in *State v. Miller*[470] stated:

> [W]e consider [the single subject and clear title provision] equally obligatory and mandatory with any other provision in the constitution; and where a law is clearly and palpably in opposition to it, there is no alternative but to pronounce it invalid.[471]

As constitutional prohibitions, these rules take priority over the general severance statute or specific severability provisions.[472] Consequently, the courts are duty-bound to enforce these rules in cases where the legislature has been found to violate them.

The question of the specific remedy by which such enforcement occurs, however, runs headlong into judicial reluctance to trample on legislative prerogative. This reluctance finds expression in the "cardinal principle" that courts are "to save and not to destroy" legislation.[473] The severance remedy generally tries to balance courts' duty to enforce constitutional requirements against the mandate to uphold legislation wherever possible. In the context of procedural violations, the legislative intent test requires some refinement. In these cases, the court should link its analysis of remedies to the particular procedural violation found. In doing so it must take account of the rationales behind the procedural limitations.[474] If the purposes of the prohibition are fulfilled in the particular case, the act should be held valid.[475] If not, severance should be ordered only when the enactment does not embody the evil the procedural restriction was designed to prevent. Enforcement of constitutional procedural limitations in some cases requires complete invalidation of the enactment. The remedy for each violation is discussed below.

---

[469] *See* Ruud, *supra* note 7, at 393 (stating that only Ohio holds the single subject rule to be directory). *McIntire v. Forbes*, 909 P.2d 846 (Or. 1996), raised the question whether the Oregon courts were authorized to review legislative acts for compliance with constitutional procedural rules. The Oregon Supreme Court concluded that such rules are judicially enforceable. *Id.* at 853.

[470] 45 Mo. 495 (1970).

[471] *Id.* at 498 (discussing MO. CONST. art. IV, § 32, the forerunner of art. III, § 23).

[472] *See* State *ex rel.* Normandy Sch. Dist. v. Small, 356 S.W.2d 864, 879 (Mo. 1962) (en banc) (Storckman, J., dissenting).

[473] 2 SINGER, *supra* note 9, § 44.09, at 526 (quoting Tilton v. Richardson, 403 U.S. 672 (1971)).

[474] Ruud, *supra* note 7, at 402.

[475] *Id.*

1. Original Purpose

The Missouri Supreme Court's reluctance to sustain original purpose challenges (and the dearth of such cases in other states) may moot any discussion of the remedy for such a violation. But because this Article argues that the court should modify its overly deferential posture towards this claim, it offers a few comments on the appropriate remedy.

This Article posits that the rationale behind the original purpose rule is to facilitate an orderly legislative process.[476] The rule allows legislators to monitor the large volume of legislative proposals by title, assuring them that drastic changes in the bills' objectives have not been made. The original purpose rule also serves to enforce the constitutional deadline for introduction of new measures. This rule ensures adequate time for the consideration of each measure, whether introduced as a new bill or as an amendment to a bill already pending. These rationales reflect a concern with the entire legislative process from beginning to end.

The original purpose rule prohibits any change in purpose. This is a unitary concept: either the purpose changed or it did not. When a bill's purpose changes midstream, the whole bill is tainted. In such a case, severance is improper. Furthermore, severance analysis requires a determination that the valid provisions are independent of the void ones. A true change in the bill's purpose affects the entire bill, so it is hard to see how any portion of it could be considered independent of the rest. When a bill has been transformed during the course of its consideration, it is utterly impossible to say what portion of some earlier version the legislature would have intended to pass. Severance analysis simply does not fit this claim.

2. Single Subject

Unlike the unitary concept of original purpose, the prohibition on multiple subjects lends itself to severance analysis. A court reviewing a bill containing multiple subjects can theoretically isolate distinct subjects and perhaps determine which of them is the primary one, as *Hammerschmidt* directs.[477] If the portion of the bill relating to the primary subject can stand on its own as a complete enactment, and if the legislature would have passed that portion independently of the rest, then that portion should be preserved. Only the portions relating to additional subjects would be severed.[478] This analysis, however, may discount the possibility that logrolling was involved.

---

[476] *See supra* notes 70–71 and accompanying text.

[477] *See Hammerschmidt*, 877 S.W.2d at 103.

[478] *But see* Ruud, *supra* note 7, at 399–400 (suggesting that the inclusion of multiple subjects renders the entire act "suspect" and therefore, makes the use of severance "manifestly unsound"); State *ex rel.* Normandy School Dist. of St. Louis County v. Small, 356

The Missouri Supreme Court seems to treat multiple subjects as inherently independent for purposes of the remedy. In *Hammerschmidt* and *Carmack*, the court identified one subject as primary and severed the rest of the enactment. Closer analysis is necessary. The single subject rule assumes that "unrelated subjects were combined into one bill in order to convert several minorities into a majority" and "declares that this perversion of majority rule will not be tolerated."[479] As a result,

> [t]he entire act is suspect and so it must all fall. If this is the rationale for the constitutional rule . . . , then it is manifestly unsound to employ severability to save the provisions dealing with one of the subjects. The necessary assumption that this will carry out the legislative purpose, assented to by a majority of the legislators, cannot be made.[480]

The question of legislative intent boils down to which provisions, if any, served as the inducement for passage of the act.[481] When logrolling is at work, each provision theoretically serves as the inducement for someone's vote. Logrolling taints the entire act. In such cases, the court can hardly be justified in choosing from the act the subject which, if submitted alone, the legislature would have enacted.[482] The only exception, according to one commentator, is for bills clearly containing "riders," which are relatively minor, unrelated provisions inserted into much larger bills comprehensively treating other subjects.[483] There, the bulk of the bill clearly would have passed; the rider was attached to it so as to secure passage which it could not obtain on its own.[484] This exception is limited, and hard to detect in the absence of published legislative history.[485] Unless it is possible to determine with certainty that a portion of the act was primary and would have been passed without the inducement provided by other provisions attached to it, the court should invalidate the entire enactment.

On this ground, it is hard to say whether severance was proper in *Hammerschmidt* and *Carmack*. *Hammerschmidt* looks like a case of two distinct subjects being combined in one bill for tactical reasons only. But there is no evidence that the legislature would not have passed the elec-

---

S.W.2d 864, 879 (Mo. 1962) (Storckman, J., dissenting) (noting that a severability statute cannot prevail over a constitutional mandate, and suggesting that a single subject violation taints the whole act).

[479] Ruud, *supra* note 7, at 399.

[480] *Id.* (citations omitted).

[481] *Id.*; *see also* 2 SINGER, *supra* note 9, § 44.06, at 516–17 (discussing inducements for passage of legislation).

[482] Ruud, *supra* note 7, at 400.

[483] *Id.* at 399–400.

[484] *Id.* at 400 (stating that riders most often are attached to general appropriations acts, which are assured of passage).

[485] *Id.* (noting that it is "troublesome" to determine when the rider situation exists).

tions provisions alone, and those provisions are complete. *Carmack* appears to involve a rider. The rest of the bill is complete and it is doubtful that the insertion of the unrelated provision was essential to the bill's passage. In these cases, severance properly balances concerns about log-rolling against the mandate to preserve legislation to the extent possible.

This analysis suggests that severance would also have been proper in the Illinois case, *People v. Cervantes*.[486] In a bill comprehensively addressing the subject of neighborhood safety, two provisions were found to treat separate subjects.[487] The invalid provisions relating to welfare vendor fraud and juvenile detention facility licensing could have been severed without rendering the Safe Neighborhoods Law incomplete or unworkable. There is no evidence that the invalid provisions were necessary to ensure the bill's passage. The Illinois Supreme Court should have considered severance in this case.[488] By failing to do so, it invalidated the entire law nearly five years after its passage. By this time, changes in the make-up of the legislature and in the political agenda of the day made it impossible to reenact the valid portions of the law.[489] The Illinois Supreme Court in *Cervantes* tread too heavily on the legislature's prerogative.

3. Clear Title

As for clear title violations, the Missouri Supreme Court has properly connected the remedy with the particular manner in which the bill's title violated the rule. *St. Louis Health Care Network* involved a title so broad as to be meaningless.[490] The court held the whole bill unconstitutional; there was no discussion of severance.[491] Though the court did not say so explicitly, invalidation is the only proper remedy for this type of title violation. The purpose of the clear title rule is to provide notice of the bill's contents, and if the title is so amorphous as to provide no notice whatsoever, the whole act must be invalidated.[492]

---

[486] 723 N.E.2d 265 (Ill. 1999).

[487] *Id.* at 272.

[488] The Governor of Illinois filed an amicus brief requesting that the court consider severing the invalid provisions and allowing the remainder of the Safe Neighborhoods Law to stand. Brief of Amicus Curiae Governor George H. Ryan in Support of the Petition for Rehearing Filed by Plaintiff-Appellant People of the State of Illinois at 7 (filed Jan. 24, 2000). The court denied the motion for rehearing. 723 N.E. 2d 265 (Ill. 1999).

[489] Chambers, *supra* note 47.

[490] *See* St. Louis Health Care Network v. State, 968 S.W.2d 145, 147–49 (Mo. 1998) (en banc).

[491] *See id.* The court's holding may simply respond to the procedural posture of the case, which sought a declaratory judgment of unconstitutionality. *Id.* at 146.

[492] *See* 1A SINGER, *supra* note 9, § 18.08, at 54; *cf.* Ruud, *supra* note 7, at 402 (asserting that if the title gives adequate notice, the act should be held valid).

Solid Waste Management, on the other hand, involved an under-inclusive title.[493] The court implicitly recognized that the bill's title gave adequate notice as to most of its provisions. Accordingly, the court limited the statute to those applications within the title.[494] The rationale behind the clear title rule is, by definition, satisfied as to some portion of the bill when the title is under-inclusive. The question is whether the portion adequately expressed in the title meets the independence and completeness requirements for severance. If so, severance of the remainder is proper.

As noted earlier, however, the invalid portion of the bill in *Solid Waste Management* was not in fact capable of severance.[495] Both the valid and the invalid matters were subsumed within the textual phrase "pursuant to this chapter" which delineated the application of the provision.[496] Thus, the court restricted the statute to apply only to matters expressed in the title. Accomplishing severance by restricting the provision's application to a subset of what its terms cover is a bad idea because then the text of the statute no longer means what it says. This action "amount[s] to judicial amendment" of the statute,[497] a practice *Associated Industries* specifically disavowed.[498] The proper remedy when the void provisions are incapable of severance is to invalidate the statute altogether.

In sum, the rationales underlying the three distinct constitutional limitations suggest that severance is the proper remedy for certain single subject and clear title violations. In single subject cases, severance is proper when logrolling was not involved and when severance can be accomplished without rewriting the statute. As long as logrolling was not at work, severance affords appropriate deference to the legislature without eviscerating the constitutional prohibition. Clear title violations involving under-inclusive titles also permit severance if the statute is in fact capable of severance. Under-inclusive titles give notice as to some, but not all, of the bill's contents. In these cases, the purpose of the rule is served as to the portion of the bill expressed in the title. Overbroad titles, however, taint the entire bill and render the whole enactment void. Original purpose violations have the same effect. In these cases, severance is improper.

---

[493] *See Solid Waste Mgmt.*, 964 S.W.2d at 821.

[494] *Id.* at 822.

[495] *See supra* notes 447–463 and accompanying text. A complete discussion of severance by application is beyond the scope of this Article.

[496] *Solid Waste Mgmt.*, 964 S.W.2d at 822.

[497] 2 SINGER, *supra* note 9, § 44.15, at 542.

[498] *See* Associated Indus. of Mo. v. Dir. of Revenue, 918 S.W.2d 780, 785 (Mo. 1996).

VI. CONCLUSION

Constitutional restrictions on legislative procedure are intended to prevent ill-considered, surreptitious, or corrupt legislation. Though litigants employ these restrictions to seek invalidation of legislation for a variety of reasons, the facts of recent cases suggest that legislatures occasionally resort to procedures that the original purpose, single subject, and clear title rules were designed to eliminate.[499] Courts must walk a fine line between enforcing these constitutional requirements and unduly interfering with the legislative process.

Recent Missouri cases illustrate several permutations of each type of procedural violation, and also highlight difficulties in the analysis of these claims. First of all, courts, commentators, and litigants sometimes fail to distinguish the three procedural claims and to address their separate underlying rationales. As a result, the test for compliance with each of the procedural requirements is confusing. In a few cases, rhetorical imprecision, analytical weakness, or an overly deferential posture led to the wrong result.

State constitutions place safeguards on the legislative process in the form of original purpose, single subject, and clear title restrictions, and courts should not ignore them. As the Missouri Supreme Court stated in *State v. Miller*, "where a law is clearly and palpably in opposition to [the constitutional limitation], there is no other alternative but to pronounce it invalid."[500] As long as the people of the states continue to impose constitutional restrictions on legislative procedure, state courts will be called upon to decide cases challenging legislation on these grounds. If Missouri's experience is any guide, the failure to apply rigorous, consistent standards for decision of such cases will only increase the flow.

---

[499] *See* Williams, *supra* note 1, at 800 (discussing Pennsylvania's legislature).
[500] 45 Mo. 495, 498 (Mo. 1870) (discussing single subject violations).

APPENDIX I

	Single Subject	*Clear Title*	*Original Purpose*
Ala.	Art. IV, § 45	Art. IV, § 45	Art. IV, § 61
Alaska	Art. II, § 13	Art. II, § 13	
Ariz.	Art. IV, Pt. 2, § 13	Art. IV, Pt. 2, § 13[1]	
Ark.			Art. 5, § 21
Cal.	Art. 4, § 9	Art. 4, § 9	
Colo.	Art. 5, § 21	Art. 5, § 21[2]	Art. 5, § 17
Conn.			
Del.	Art. II, § 16	Art. II, § 16	
Fla.	Art. 3, § 6	Art. 3, § 6	
Ga.	Art. 3, § 5	Art. 3, § 5	
Haw.	Art. III, § 14	Art. III, § 14	
Idaho	Art. III, § 16	Art. III, § 16[3]	
Ill.[4]	Art. 4, § 8(d)		
Ind.	Art. 4, § 19		
Iowa	Art. III, § 29	Art. III, § 29	
Kan.	Art. II, § 16	Art. II, § 16	
Ky.	§ 51	§ 51	
La.	Art. 3, § 15(A)[5]	Art. 3, § 15(A)	Art. 3, § 15(C)[6]
Me.			
Md.	Art. III, § 29	Art. III, § 29	
Mass.			
Mich.	Art. IV, § 24[7]	Art. IV, § 24	
Minn.	Art. IV, § 17	Art. IV, § 17	
Mo.	Art. III, § 23	Art. III, § 23[8]	Art. III, § 21
Miss.		Art. IV, § 71	Art. IV, § 60
Mont.	Art. V, § 11(3)	Art. V, § 11(3)	Art. V, § 11(1)
Neb.	Art. III, § 14	Art. III, § 14	
Nev.	Art. IV, § 17	Art. IV, § 17	

[1] Provides that act containing objects not expressed in title is void only as to the portion not expressed.

[2] Provides that act containing objects not expressed in title is void only as to the portion not expressed.

[3] Provides that act containing objects not expressed in title is void only as to the portion not expressed.

[4] Illinois formerly had a clear title requirement but dropped it in the constitutional revision of 1970. *See* Chambers, *supra* note 14.

[5] Refers to single "object."

[6] Prohibits amendment of bill "to make a change not germane to the bill as introduced."

[7] Refers to "one object."

[8] Formerly provided that where subject is not expressed in title, act is void only as to portions not expressed. MO. CONST. of 1865, Art. IV, §32.

N.H.			
N.J.	Art. 4, § 7[9]	Art. 4, § 7, ¶ 4	
N.M.	Art. IV, § 16	Art. IV, § 16[10]	
N.Y.[11]	Art. 3, § 15	Art. 3, § 15	
N.C.			
N.D.	Art. IV, § 13	Art. IV, § 13	
Ohio	Art. II, § 15(D)	Art. II, § 15(D)	
Okla.	Art. V, § 57	Art. V, § 57[12]	
Or.	Art. IV, § 23	Art. IV, § 20	
Pa.	Art. III, § 3	Art. III, § 3	Art. III, § 1
R.I.			
S.C.	Art. III, § 17	Art. III, § 17	
S.D.	Art. III, § 21	Art. III, § 21	
Tenn.	Art. II, § 17	Art. II, § 17	
Tex.	Art. III, § 35(a)	Art. III, § 35(b)[13]	Art. III, § 30
Utah	Art. VI, § 22	Art. VI, § 22	
Vt.			
Va.	Art. IV, § 12[14]	Art. IV, § 12	
Wash.	Art. 2, § 19	Art. 2, § 19	
W. Va.	Art. VI, § 30[15]	Art. VI, § 30	
Wis.[16]	Art. 4, § 18	Art. 4, § 18	
Wyo.	Art. 3, § 24	Art. 3, § 24[17]	Art. 3, § 20

[9] Refers to "one object."

[10] Provides that act containing objects not expressed in title is void only as to the portion not expressed.

[11] Applies only to "private or local bills."

[12] Provides that act containing objects not expressed in title is void only as to the portion not expressed.

[13] Provides that the "legislature is solely responsible for determining compliance" with the clear title rule.

[14] Refers to "one object."

[15] Refers to "one object."

[16] Applies only to "private or local" bills.

[17] Provides that act containing objects not expressed in title is void only as to the portion not expressed.

APPENDIX II

1. *Original Purpose Cases Finding Violation*

Advisory Opinion No. 331, 582 So. 2d 1115 (Ala. 1991)[18]
Barclay v. Melton, 5 S.W.3d 457 (Ark. 1999)

2. *Original Purpose Cases Finding No Violation*

C.C. Dillon Co. v. City of Eureka, 12 S.W.3d 322 (Mo. 2000) (en banc)
St. Louis Health Care Network v. State, 968 S.W.2d 145 (Mo. 1998) (en banc)[19]
Nat'l Solid Waste Mgmt. Ass'n v. Dir., Dep't of Natural Res., 964 S.W.2d 818 (Mo. 1998) (en banc)[20]
Stroh Brewery Co. v. State, 954 S.W.2d 323 (Mo. 1997) (en banc)
Akin v. Dir., Dept. of Revenue, 934 S.W.2d 295 (Mo. 1996) (en banc)
Billis v. State, 800 P.2d 401 (Wyo. 1990)
Mollman v. State, 800 P.2d 466 (Wyo. 1990)
Heggen v. State, 800 P.2d 475 (Wyo. 1990)
Cambio v. State, 800 P.2d 482 (Wyo. 1990)

3. *Single Subject Cases Finding Violation*

Ex parte Springer, 619 So. 2d 1267 (Ala. 1992)
State v. Thompson, 750 So. 2d 643 (Fla. 1999)
Martinez v. Scanlan, 582 So. 2d 1167 (Fla. 1991)
People v. Cervantes, 723 N.E.2d 265 (Ill. 1999)
People v. Wooters, 722 N.E.2d 1102 (Ill. 1999)
People v. Reedy, 708 N.E.2d 1114 (Ill. 1999)
Johnson v. Edgar, 680 N.E.2d 1372 (Ill. 1997)
State v. Taylor, 557 N.W.2d 523 (Iowa 1996)
Giles v. State, 511 N.W.2d 622 (Iowa 1994)
Migdal v. State, 747 A.2d 1225 (Md. 2000)
Porten Sullivan Corp. v. State, 568 A.2d 1111 (Md. 1990)
Associated Builders & Contractors v. Ventura, 610 N.W.2d 293 (Minn. 2000)
Mo. Health Care Ass'n v. Attorney Gen., 953 S.W.2d 617 (Mo. 1997) (en banc)

---

[18] Concerns an appropriations bill, but relevant for original purpose claim.
[19] Claim raised but not decided.
[20] Claim raised but not decided.

Carmack v. Dir., Mo. Dep't of Agric., 945 S.W.2d 956 (Mo. 1997) (en banc)
Hammerschmidt v. Boone County, 877 S.W.2d 98 (Mo. 1994) (en banc)
State *ex rel.* Ohio Acad. of Trial Lawyers v. Sheward, 715 N.E.2d 1062 (Ohio 1999)
State *ex rel.* Hinkle v. Franklin County Bd. for Elections, 580 N.E.2d 767 (Ohio 1991)
Campbell v. White, 856 P.2d 255 (Okla. 1993)
Johnson v. Walters, 819 P.2d 694 (Okla. 1991)
McIntire v. Forbes, 909 P.2d 846 (Or. 1996)
Tenn. Mun. League v. Thompson, 958 S.W.2d 333 (Tenn. 1997)
Wash. State Legislature v. State, 985 P.2d 353 (Wash. 1999)
Kincaid v. Mangum, 432 S.E.2d 74 (W. Va. 1993)

4. *Single Subject Cases Finding No Violation*

Town of Brilliant v. City of Winfield, 752 So. 2d 1192 (Ala. 1999)
Ex parte Coker, 575 So. 2d 43 (Ala. 1990)
Lutz v. Foran, 427 S.E.2d 248 (Ga. 1993)
Kinsela v. State, 790 P.2d 1388 (Id. 1990)
Premier Prop. Mgmt. v. Chavez, 728 N.E.2d 476 (Ill. 2000)
Arangold v. Zehnder, 718 N.E.2d 191 (Ill. 1999)[21]
People v. Dunigan, 650 N.E.2d 1026 (Ill. 1995)
Geja's Café v. Metro. Pier & Exposition Auth., 606 N.E.2d 1212 (Ill. 1992)
Bayh v. Ind. State Bldg. & Constr. Trades Council, 674 N.E.2d 176 (Ind. 1996)
Iowa Dep't of Transp. v. Iowa Dist. Court, 586 N.W.2d 374 (Iowa 1998)
Utilicorp United, Inc. v. Iowa Utils. Bd., 570 N.W.2d 451 (Iowa 1997)
State v. Mabry, 460 N.W.2d 472 (Iowa 1990)
State *ex rel.* Tomasic v. Unified Gov't of Wyandotte County, 955 P.2d 1136 (Kan. 1998)
Kan. Pub. Empls. Ret. Sys. V. Reimer & Kroger Assocs., Inc., 941 P.2d 1321 (Kan. 1997)
Unified Sch. Dist. No. 229 v. State, 885 P.2d 1170 (Kan. 1994)
Harding v. K.C. Wall Products, Inc., 831 P.2d 958 (Kan. 1992)
Doherty v. Caleasien Parish Sch. Bd., 634 So. 2d 1172 (La. 1994)
Md. Classified Employees Ass'n, Inc. v. State, 694 A.2d 937 (Md.

[21] Concerns a "budget implementation bill," which apparently differs from an appropriations bill. 718 N.E.2d at 195 (describing "actual state budget" adopted on same day as "budget implementation bill").

1997)
Metro. Sports Facilities Comm'n v. County of Hennepin, 478 N.W.2d 487 (Minn. 1991)
C.C. Dillon Co. v. City of Eureka, 12 S.W.3d 322 (Mo. 2000) (en banc)
Corvera Abatement Techs. v. Air Conservation Comm'n, 973 S.W. 2d 851 (Mo. 1998) (en banc)
St. Louis Health Care Network v. State, 968 S.W.2d 145 (Mo. 1998) (en banc)[22]
Nat'l Solid Waste Mgmt. Ass'n v. Dir., Dept. of Natural Res., 964 S.W.2d 818 (Mo. 1998) (en banc)[23]
Stroh Brewery Co. v. State, 954 S.W.2d 323 (Mo. 1997) (en banc)
Fust v. Attorney Gen., 947 S.W.2d 424 (Mo. 1997) (en banc)
Akin v. Dir., Dept. of Revenue, 934 S.W.2d 295 (Mo. 1996) (en banc)
Jaksha v. State, 486 N.W.2d 858 (Neb. 1992)
Beagle v. Walden, 676 N.E.2d 506 (Ohio 1997)
State *ex rel.* Ohio AFL-CIO v. Voinovich, 631 N.E.2d 582 (Ohio 1994)
Keyserling v. Beasley, 470 S.E.2d 100 (S.C. 1996)
Westvaco Corp. v. S.C. Dep't of Revenue, 467 S.E.2d 739 (S.C. 1995)
Accts. Mgmt., Inc. v. Williams, 484 N.W.2d 297 (S.D. 1992)
State v. Broadaway, 942 P.2d 363 (Wash. 1997)
In re Boot, 925 P.2d 964 (Wash. 1996)
State v. Thorne, 921 P.2d 514 (Wash. 1996)
Wash. Fed'n of State Employees v. State, 901 P.2d 1028 (Wash. 1995)
Appalachian Power Co. v. State Tax Dep't, 466 S.E.2d 424 (W. Va. 1995)
State *ex rel.* Marockie v. Wagoner, 446 S.E.2d 680 (W. Va. 1994)
City of Brookfield v. Milwaukee Metro. Sewerage Dist., 491 N.W.2d 484 (Wis. 1992)
Billis v. State, 800 P.2d 401 (Wyo. 1990)
Mollman v. State, 800 P.2d 466 (Wyo. 1990)
Heggen v. State, 800 P.2d 475 (Wyo. 1990)
Cambio v. State, 800 P.2d 482 (Wyo. 1990)

5. *Clear Title Cases Finding Violation*

State v. Taylor, 557 N.W.2d 523 (Iowa 1996)
St. Louis Health Care Network v. State, 968 S.W.2d 145 (Mo. 1998)

---

[22] Claim raised but not decided.
[23] Claim raised but not decided.

(en banc)
Nat'l Solid Waste Mgmt. Ass'n. v. Dir., Dept. of Natural Res., 964 S.W.2d 818 (Mo. 1998) (en banc)
McIntire v. Forbes, 909 P.2d 846 (Or. 1996)
Tenn. Mun. League v. Thompson, 958 S.W.2d 333 (Tenn. 1997)
Patrice v. Murphy, 966 P.2d 1271 (Wash. 1998)

6. *Clear Title Cases Finding No Violation*

McGlothren v. E. Shore Family Practice, 742 So. 2d 173 (Ala. 1999)
Louvier v. Mobile County Bd. of Educ., 670 So. 2d 873 (Ala. 1995)
Hussey v. Chatham County, 494 S.E.2d 510 (Ga. 1998)
Lutz v. Foran, 427 S.E.2d 248 (Ga. 1993)
Kinsela v. State, 790 P.2d 1388 (Idaho 1990)
Utilicorp United, Inc. v. Iowa Utils. Bd., 570 N.W.2d 451 (Iowa 1997)
Yeoman v. Commonwealth, 983 S.W.2d 459 (Ky. 1998)
Commonwealth Revenue Cabinet v. Smith, 875 S.W.2d 873 (Ky. 1994)
La. Seafood Mgm't Council v. La. Wildlife & Fisheries Comm'n, 715 So. 2d 387 (La. 1998)
C.C. Dillon Co. v. City of Eureka, 12 S.W.3d 322 (Mo. 2000) (en banc)
Corvera Abatement Techs. v. Air Conservation Comm'n, 973 S.W.2d 851 (Mo. 1998) (en banc)
Stroh Brewery Co. v. State, 954 S.W.2d 323 (Mo. 1997) (en banc)
Fust v. Attorney Gen., 947 S.W.2d 424 (Mo. 1997) (en banc)
Hammerschmidt v. Boone County, 877 S.W.2d 98 (Mo. 1994) (en banc)[24]
Pierce v. State, 910 P.2d 288 (N.M. 1995)
Thompson v. McKinley County, 816 P.2d 494 (N.M. 1991)
Westvaco Corp. v. S.C. Dep't of Revenue, 467 S.E.2d 739 (S.C. 1995)
Accounts Mgmt., Inc. v. Williams, 484 N.W.2d 297 (S.D. 1992)
Brower v. State, 969 P.2d 42 (Wash. 1998)
State v. Broadaway, 942 P.2d 363 (Wash. 1997)
In re Boot, 925 P. 2d 964 (Wash. 1996)
Wash. Fed'n of State Employees v. State 901 P.2d 1028 (Wash. 1995)
McCoy v. VanKirk, 500 S.E.2d 534 (W. Va. 1997)
State *ex rel.* Lambert v. County Comm'n of Boone County, 452 S.E.2d 906 (W. Va. 1994)
State *ex rel.* Marokie v. Wagoner, 446 S.E.2d 680 (W. Va. 1994)

[24] Claim raised but not decided.

City of Brookfield v. Milwaukee Metro. Sewerage Dist., 491 N.W.2d 484 (Wis. 1992)
Billis v. State, 800 P.2d 401 (Wyo. 1990)
Mollman v. State, 800 P.2d 466 (Wyo. 1990)
Heggen v. State, 800 P.2d 475 (Wyo. 1990)
Cambio v. State, 800 P.2d 482 (Wyo. 1990)

ARTICLE

THE ROAD FROM WELFARE TO WORK: INFORMAL TRANSPORTATION AND THE URBAN POOR

NICOLE STELLE GARNETT*

Individuals struggling to move from welfare to work face numerous obstacles. This Article addresses one of those obstacles: lack of transportation. Without reliable transportation, many welfare recipients are unable to find and maintain jobs located out of the reach of traditional forms of public transportation. Professor Garnett argues that lawmakers should remove restrictions on jitney services, allowing entrepreneurs to provide low-cost transportation to their communities. This reform would not only help people get to work, but it could also provide jobs for low-income people.

[Angela Jackson] gets up at 6 a.m. and is out the door with her two children and heading to day care by 6:30. By 6:50, she's waiting for the No. 9 Metro bus in front of the Wal-Mart on Route 1. It takes her to Old Town Alexandria, where she . . . wait[s] for another bus. It winds through Alexandria and eventually drops her near the Burlington Coat Factory in Baileys Crossroads, where she is paid $6.50 an hour as a clerk. Distance: about 11 miles. Time from home to work: two hours plus.[1]

If Laura Garcia had a car, it would take half an hour to get from her live-in housekeeping job . . . to a second domestic job . . . . Without one, she rides a train, a bus and then another train, spending four hours and $30 for a round trip. If Luis Alvarez had a car, he would drive home . . . after working a double shift here, tending a cash register by day at Burger King and another by night at a Friendly's ice cream parlor. Instead, he must pay

---

* Assistant Professor of Law, Notre Dame Law School. J.D., Yale Law School, 1995; B.A., Stanford University, 1992. I thank Bob Ellickson, Richard Garnett, John Nagle, George Priest, and Peter Schuck for their helpful comments on previous drafts of this Article. I am also grateful for the financial support of the Program for Studies in Capitalism, Yale Law School, which made this project possible. Finally, I am indebted to Hector Ricketts of Queens Van Plan and Vincent Cummins of Brooklyn Van Line for introducing me to the world of the "dollar vans" and teaching me more about the need for quality community-based transportation than any academic study ever could. Notre Dame research librarian Patti Ogden and law students Mary Clark, Christopher Keegan, and Richard Weicher provided valuable research assistance. Mistakes are my own.

[1] Alice Reid, *For Many New Hires, Getting There Is Half the Battle*, WASH. POST, Dec. 23, 1996, at B1.

> $14 for a cab, since Westchester County's Bee-Line bus system has no late service on the No. 19 line.[2]

Four years ago, Congress enacted landmark legislation overhauling the federal welfare system. Congress required welfare recipients to obtain employment within two years and prohibited states from using federal welfare funds to assist adults for more than five years during their lifetimes.[3] Opponents, including many respected policy experts, warned that these provisions would wreak havoc on hundreds of thousands of poor families with young children.[4] The currently booming economy so far has been able to absorb individuals leaving the welfare rolls, and early results of the new program have substantially exceeded expectations.[5] This is not to say that the transition to the new regime has been

---

[2] Jane Gross, *Poor Without Cars Find Trek to Work Can Be a Job*, N.Y. TIMES, Nov. 18, 1997, at A1.

[3] The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105, 2112–61 (codified as amended at 42 U.S.C. §§ 601–619 (2000)), eliminated the 60-year-old federal welfare entitlement program, Aid to Families with Dependent Children, and replaced it with a new program, Temporary Assistance for Needy Families("TANF"). TANF gives states a great deal of leeway in implementing federal welfare policy. Federal welfare funds are now distributed to states in the form of lump-sum "block grants," which states are free to spend toward achieving the broad goals established by Congress, subject to a few limitations, including work requirements and time limits. *Id.* § 103.

[4] *See, e.g.*, 141 CONG. REC. 25,130 (1995) (statement of Sen. Moynihan (D-N.Y.)) ("If this administration wishes to go down in history as one that abandoned, eagerly abandoned, the national commitment to dependent children, so be it. I would not want to be associated with such an enterprise, and I shall not be."); Mary Jo Bane, Editorial, *Stand By for Casualties*, N.Y. TIMES, Nov. 10, 1996, § 4, at 13; Editorial, *A Children's Veto*, WASH. POST, July 25, 1996, at A28; E.J. Dionne, Jr., Editorial, *In the Wake of a Bogus Bill*, WASH. POST, Aug. 5, 1996, at A19; Daniel P. Moynihan, Editorial, *When Principle Is at Issue*, WASH. POST, Aug. 4, 1996, at C7; Merri Rosenberg, *Overhaul of Welfare Prompts Uncertainties*, N.Y. TIMES, Aug. 25, 1996, § 13 (Westchester Weekly), at 8; Isabel Sawhill & Sheila Zedlewski, Editorial, *A Million More Poor Children: Even if more of their mothers are working*, WASH. POST, July 26, 1996, at A27.

[5] *See, e.g.*, Carey Goldberg, *Most Get Work After Welfare, Studies Suggest*, N.Y. TIMES, Apr. 17, 1999, at A1; Judith Havemann, *Tough Steps Credited for Welfare Dip: Heritage Foundation Study Sees Economy Having Little Impact on Caseloads*, WASH. POST, May 10, 1999, at A2; Nancy L. Johnson, Editorial, *The Results Are In: Welfare Reform Works*, WALL ST. J., Aug. 24, 1999, at A18; Michael Kelly, Editorial, *Assessing Welfare Reform*, WASH. POST, Aug. 4, 1999, at A21; Carol Kleiman, *Firms Share Secret of Work Programs*, CHI. TRIB., Aug. 22, 1999, § 6, at 1; Gretchen Odegard, Letter, *Welfare Reform a Success*, WASH. POST, Jan. 10, 2000, at A18. *But see* Christina Duff, *Why a Welfare "Success Story" May Go Back on the Dole*, WALL ST. J., June 15, 1999, at A20; Peter Edelman, *Clinton's Cosmetic Poverty Tour*, N.Y. TIMES, July 8, 1999, at A27; Peter Edelman, Letter, *Who Is Worrying About the Children?*, WASH. POST, Aug. 11, 1999, at A18; George Melloan, Editorial, *"Save the Problem!" Is the Battle Cry of Bureaucrats*, WALL ST. J., Aug. 31, 1999, at A23; Shailagh Murray, *Drop in Food-Stamp Rolls Is Mysterious and Worrisome*, WALL ST. J., Aug. 2, 1999, at A20; Hanna Rosin & John F. Harris, *Welfare Reform Is on a Roll; Working Poor Still Struggle, Study Says*, WASH. POST, Aug. 3, 1999, at A1; Donna St. George, *Aid Cuts Make It Hard for Some Going From Welfare to Work*, WASH. POST, Feb. 25, 1999, at B5; Kathy Sawyer, *Poorest Families Are Losing Ground; Female-Headed Households' Gains Erode as Welfare Reform Starts, Study Says*, WASH. POST, Aug. 22, 1999, at A7.

entirely smooth or that the current welfare reform "honeymoon" will continue indefinitely.[6] Even in this robust economy, individuals struggling in good faith to move from welfare to work consistently run up against a number of roadblocks. This article addresses one such roadblock: the fact that welfare recipients often lack reliable transportation to and from work.[7]

Due in large part to the suburbanization of the American economy, inadequate transportation drastically limits the job prospects of low-income individuals, especially those who live in inner-city neighborhoods.[8] Since Congress enacted welfare reform legislation, federal, state,

---

[6] *See, e.g.*, SARAH BRAUNER & PAMELA LOPREST, WHERE ARE THEY NOW: WHAT STATE'S STUDIES OF PEOPLE WHO LEFT WELFARE TELL US (Urb. Inst., New federalism: Issues and Options for States, No. A-32, 1999) (arguing that the available data offer an unclear picture of welfare reform); CENTER ON URB. & METRO. POLICY, BROOKINGS INST., THE STATE OF WELFARE CASELOADS IN AMERICA'S CITIES 1 (1999) (finding that some urban counties have experienced increases in welfare caseloads disproportionate to those in non-urban counties); *see also* Raymond Hernandez, *Most Dropped From Welfare Don't Get* Jobs, N.Y. TIMES, Mar. 23, 1998, at A1; Editorial, *Less Poverty, Sharper Pain*, WASH. POST, Dec. 26, 1999, at B6; Pamela Loprest, *Long Ride From Welfare to Work*, WASH. POST, Aug. 30, 1999, at A19; Sam Mistrano, *Welfare Clock Will Run Out Before Job Supply Catches Up*, L.A. TIMES, July 16, 1999, at A15; *Study Says Welfare Changes Made the Poorest Worse Off*, N.Y. TIMES, Aug. 23, 1999, at A13; Michael M. Weinstein, *Economic Scene: When Work Is Not Enough; Without Training, Success of Welfare Overhaul May Falter*, N.Y. TIMES, Aug. 26, 1999, at C1; Editorial, *Welfare Happy Talk*, WASH. POST, Aug. 25, 1999, at A16.

[7] *See generally* U.S. GEN. ACCOUNTING OFFICE, WELFARE REFORM: TRANSPORTATION'S ROLE IN MOVING FROM WELFARE TO WORK (1998) [hereinafter WELFARE TO WORK] (discussing the need for additional transportation to link welfare recipients and jobs); ANNALYNN LACOMBE, U.S. DEP'T OF TRANSP., WELFARE REFORM AND ACCESS TO JOBS IN BOSTON 2 (1998) [hereinafter JOBS IN BOSTON] (discussing transportation impediments faced by welfare recipients in Boston); Claudia Coulton et al., *Housing, Transportation, and Access to Suburban Jobs by Welfare Recipients in the Cleveland Area*, *in* THE HOME FRONT: IMPLICATIONS OF WELFARE REFORM FOR HOUSING POLICY 123 (Sandra J. Newman ed., 1999) [hereinafter CLEVELAND STUDY] (discussing transportation shortcomings in Cleveland). For accounts of this problem in the popular press, see Eric Bailey, *From Welfare Lines to Commuting Crush: Many Reentering Work Force Live Far From Jobs; Experts Fear Transit Woes May Slow Reform*, L.A. TIMES, Oct. 6, 1997, at A1; Carla Crowder, *Welfare Recipients Hit Bumps on Road to Work: Transportation Problems Present an Extra Challenge as People Begin New Jobs*, DENVER ROCKY MTN. NEWS, Feb. 2, 1998, at 5A; David Goldberg, *A Long Road to Self-Sufficiency: As Welfare Recipients Find Work, Many Stumble on a Simple Obstacle—Transportation To And From The Job*, ATLANTA J. & CONST., Oct. 6, 1997, at E8; Jane Gross, *Poor Without Cars Find Trek to Work Can Be a Job*, N.Y. TIMES, Nov. 18, 1997, at A1; Evan Halper, *Public-Transportation Drawbacks Hurt Welfare-to-Work Transitions*, PHILA. INQUIRER, Mar. 4, 1999, at B3; Pat Kossan, *On Welfare Road Without Wheels: Recipients Must Get to Jobs or Lose Benefits*, ARIZ. REPUBLIC, Feb. 8, 1998, at A1; Michael K. McIntyre & James F. Sweeney, *The Workout Before Work: Without a Car, People Who Live in the City and Work in the Suburbs Face an Arduous Commute; Others Have No Way to Get There at All*, PLAIN DEALER (Cleveland), July 27, 1997, at 1A; Alice Reid, *For Many New Hires, Getting There is Half the Battle*, WASH. POST, Dec. 23, 1996, at B1.

[8] *See infra* notes 16–41 and accompanying text. For a discussion of the effects of suburbanization on the job prospects of inner-city residents, see generally Michael H. Schill, *Deconcentrating the Inner City Poor*, 67 CHI-KENT L. REV. 795, 798–808 (1991) (discussing the "spatial mismatch" hypothesis as a cause of concentration of poverty in the United States); Q. Shen, *Location Characteristics of Inner-City Neighborhoods and Em-*

and local officials have implemented a wide range of programs designed to alleviate the long-standing and seemingly intractable problems caused by inadequate transportation.[9] They have, however, overlooked one important alternative: amending the laws that prohibit low-income "bootstraps capitalists" from providing low-cost, private, commuter van—or "jitney"—service to fill in the gaps inevitably left by even the best public transportation system. The prohibitions on such services make little sense in this era of welfare reform, especially because the experiences of two American cities (Miami and New York), where such services operate in the informal economy, demonstrate that jitneys could serve the dual purposes of taking people to work and putting people to work.[10]

Part I of this Article explains why adequate transportation constitutes a necessary component of any welfare reform effort. Part II summarizes current efforts to augment transportation alternatives available to the poor. Part III sets forth evidence, both historical and current, that private jitney services operated by low-income entrepreneurs could fill the transportation gaps that inhibit welfare reform efforts. The discussion concentrates on evidence from New York City and Miami, where such services have proven invaluable to poor residents. Part IV outlines how the law currently precludes such services. The Article concludes with Part V's proposal for legislative reforms that would harness the potential of willing entrepreneurs while at the same time addressing the legitimate health and safety concerns raised by lawmakers.

I. WELFARE AND TRANSPORTATION: THE EVIDENCE

Social scientists and policymakers have long known that inadequate transportation contributes significantly to the economic isolation that plagues America's inner cities. In the late 1960s, for example, California Governor Edmund G. Brown established the "McCone Commission" to investigate the root causes of the civil unrest that culminated in the Watts riots in Los Angeles.[11] One of the commission's major findings concerned the transportation problems of Watts residents:

---

ployment Accessibility of Low-Wage Workers, 25 ENV'T & PLANNING B: PLANNING AND DESIGN 345, 353–54 (1997). *But cf.* Brian D. Taylor & Paul M. Ong, *Spatial Mismatch or Automobile Mismatch? An Examination of Race, Residence, and Commuting in US Metropolitan Areas*, 32 URB. STUD. 1453, 1454 (1995) (discussing the link between job access and inadequate transportation).

[9] *See infra* text accompanying notes 140–168.

[10] *See infra* notes 202–281 and accompanying text. Throughout this Article, I use the term "informal economy" rather than "underground economy" or "black market" because, as the discussion that follows will demonstrate, the activities of illegal jitneys operating in Miami and New York are so highly visible that they can hardly be considered "underground" in any true sense of the term. *See* Richard A. Epstein, *The Moral and Practical Dilemmas of an Underground Economy*, 103 YALE L.J. 2157, 2164 (1994).

[11] GOVERNOR'S COMM'N ON CIVIL DISORDERS, VIOLENCE IN THE CITY—AN END OR A BEGINNING? 65 (1965).

> Our investigation has brought into clear focus the fact that the inadequate and costly public transportation currently existing throughout the Los Angeles area seriously restricts the residents of the disadvantaged areas such as south central Los Angeles. This lack of adequate transportation handicaps them in seeking and holding jobs, attending schools, shopping, and in fulfilling other needs. It has had a major influence in creating a sense of isolation, with its resultant frustrations, among the residents of south central Los Angeles.[12]

These concerns were echoed several years later in the final report of the National Advisory Commission on Civil Disorders, or Kerner Commission, which was created by President Lyndon Johnson in response to widespread urban rioting. President Johnson directed the Kerner Commission to answer three basic questions: (1) "What happened?" (2) "Why did it happen?" and (3) "What can be done to prevent it from happening again?"[13] In answering the final question, the commission blamed the economic isolation of the inner cities, concluding that "[p]roviding employment for the swelling Negro ghetto population will require society to link these potential workers more closely with job locations."[14] The commission suggested that one way to accomplish this goal is "by creating better transportation between ghetto neighborhoods and new job locations."[15]

A. The "Spatial Mismatch" Hypothesis

As the Kerner Commission's recommendation suggests, the chronic poverty and resulting welfare dependency that plague many inner-city neighborhoods can be explained in part by changes in the American economy. During the past forty years, jobs have disappeared from America's inner cities. The decline has been particularly precipitous in the mass production industries that traditionally provided high-paying jobs for individuals with little formal education.[16] Many economists and sociologists argue that increases in urban poverty and dwindling numbers of well-paying "blue-collar" jobs are inextricably intertwined.[17] Manu-

---

[12] *Id.*

[13] NAT'L ADVISORY COMM'N ON CIVIL DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 1 (1968).

[14] *Id.* at 217.

[15] *Id.*

[16] *See generally* Schill, *supra* note 8, at 798–808.

[17] *See, e.g.*, WILLIAM JULIUS WILSON, WHEN WORK DISAPPEARS 25–41 (1996).

> In the twenty-year period from 1967 to 1987, for example, Philadelphia lost 64% of its manufacturing jobs; Chicago lost 60%; New York City lost 58%; and Detroit lost 51%. In absolute numbers, these percentages represent the loss of 160,000 jobs in Philadelphia, 326,000 in Chicago, 520,000 in New York . . . , and 108,000 in Detroit.

facturing jobs are often supplanted (if they are replaced at all) by white-collar jobs in service-oriented industries,[18] transforming American cities "from centers of the production and distribution of goods to centers of administration, finance, and information exchange."[19] This transformation does not bode well for many low-skilled, entry-level workers facing welfare time limits and job requirements, as white-collar employers tend to require specialized skills and higher levels of education.[20]

Although the disappearance of manufacturing jobs from American cities is frequently attributed to the globalization of industry, another major trend—suburbanization—has contributed substantially. Since World War II, the United States has experienced a radical population shift. While the majority of the United States population now resides in large metropolitan areas,[21] the residential population *within* these metropolitan areas "has been de-concentrating since at least the First World War."[22] For example, between 1970 and 1990 there was a decrease in the number of workers residing in central cities, and by 1990 only thirteen percent of black workers lived in urban cores.[23] Metropolitan employment has undergone a similar trend. While major metropolitan counties continue to capture the lion's share of the nation's employment growth,[24] employment *within* metropolitan areas has been deconcentrating.[25] In the mid-1970s, the metropolitan employment balance shifted to the suburbs, and it has continued to disperse at a rate of approximately one percent per year.[26] "Between 1970 and 1990, the percentage of white workers

---

Id. at 29–30.

[18] *See* John D. Kasarda, *Industrial Restructuring and the Changing Location of Jobs*, *in* STATE OF THE UNION: AMERICA IN THE 1990s 239–40 (R. Farley ed., 1995).

[19] PAUL JARGOWSKI, POVERTY AND PLACE 118 (1996) (quoting John D. Kasarda, *Urban Industrial Transition and the Urban Underclass*, 501 ANNALS AM. ACAD. POL. & SOC. SCI. 526, 528 (1989)); *see also* Saskia Sassen, *The Informal Economy: Between New Developments and Old Regulations*, 103 YALE L.J. 2289, 2294 (1994) (suggesting that the result of the "decline of mass production as the main engine of national growth and the shift to services as the leading economic sector . . . is a tendency toward increased economic polarization").

[20] *See* Kasarda, *supra* note 18, at 246–47 (showing that many major cities have experienced sizable employment losses in industries with low mean levels of employee education and gains in industries that employ better-educated workers). During the 1980s, for example, New York City lost 135,000 jobs in industries in which workers averaged less than 12 years of education and gained almost 300,000 jobs in industries in which workers averaged more than 13 years of education. *Id.*

[21] Mark Alan Hughes, *A Mobility Strategy for Improving Opportunity*, 6 HOUSING POLICY DEBATE 271, 273–74 (1995).

[22] Taylor & Ong, *supra* note 8, at 1454.

[23] Katherine M. O'Regan & John M. Quigley, *Cars for the Poor*, ACCESS, Spring 1998, at 20, 20–21. Furthermore, statistics have indicated that blacks have not been making the transition to the suburbs at the same pace as whites. In each of the 12 largest metropolitan areas, the percentage of blacks living in the central city "was at least four times as high" as the percentage of whites. Hughes, *supra* note 21, at 276.

[24] Kasarda, *supra* note 18, at 220.

[25] Taylor & Ong, *supra* note 8, at 1454.

[26] Kasarda, *supra* note 18, at 235.

with central city jobs declined from 50% to 20%, and the percentage of black workers fell from 61% to 37%."[27] By 1980, 50% of all jobs were located in the suburbs nationwide, with even higher concentrations in the suburbs of major metropolitan areas.[28] The suburbanization of employment has not been uniform; rather, it has been concentrated in those industries that traditionally employ large numbers of individuals lacking formal education and training.[29] "Today, 70% of all jobs in manufacturing, retailing, and wholesaling are located in the suburbs."[30]

As American jobs have become increasingly deconcentrated, American poverty has become increasingly concentrated. In 1959, less than one-third of the country's poor lived in the urban centers of major metropolitan areas.[31] Today, almost one-half of the nation's welfare recipients do, while less than 30% of the population as a whole does.[32] As of 1990, the central cities of the twelve largest metropolitan areas were poorer than their suburbs.[33] "In the nation's one hundred largest central cities, nearly one in seven census tracts is at least 40% poor," with the number of such tracts doubling since 1970.[34]

Many social scientists observing these dual trends—deconcentrating employment and concentrating poverty—attribute the persistent economic dislocation that plagues America's inner cities to the "spatial mismatch" between low-income individuals (especially low-income minority residents) and entry-level employment opportunities.[35] The spatial mismatch hypothesis—first proposed by John Kain in 1964[36]—has

---

[27] O'Regan & Quigley, *supra* note 23, at 20.

[28] Harry J. Holzer, *The Spatial Mismatch Hypothesis: What Has the Evidence Shown?*, 28 URB. STUD. 105, 107 (1991).

[29] Kasarda, *supra* note 18, at 246. These industries are more likely to locate in the suburbs if there is readily available land and accessibility to major highways. Holzer, *supra* note 28, at 106; *see also* FARRELL BLOCH, ANTIDISCRIMINATION LAW AND MINORITY EMPLOYMENT: RECRUITMENT PRACTICES AND REGULATORY CONSTRAINTS 124 (1994) (arguing that new businesses "shun urban locations" because of high crime rates and because they want to "avoid buying land from several different owners, paying high demolition costs for old buildings, and arranging parking for employees and customers").

[30] JOBS IN BOSTON, *supra* note 7, at 3.

[31] WILSON, *supra* note 17, at 11.

[32] JOBS IN BOSTON, *supra* note 7, at 3.

[33] *See* Hughes, *supra* note 21, at 279 (indicating that in Milwaukee, Chicago, Detroit, and Philadelphia, cities were four times poorer; in Washington/Baltimore, New York, St. Louis, and Denver, cities were three times poorer; and in Kansas City, Dallas/Fort Worth, San Francisco/Oakland, and Los Angeles, cities were twice as poor).

[34] WILSON, *supra* note 17, at 14. In these tracts, during a typical week in 1990 there were only 65.5 employed persons for every 100 unemployed adults, a figure that stands in sharp contrast to the situation in nonpoverty areas, which contained 182.3 employed persons for every 100 who did not work. WILSON, *supra* note 17, at 19.

[35] *See, e.g.*, Schill, *supra* note 8, at 798–808 (discussing the "spatial mismatch" hypothesis as the cause of the concentration of poverty in the United States).

[36] John Kain, *Housing Segregation, Negro Employment, and Metropolitan Decentralization*, 82 Q.J. ECON. 175, 197 (1968) (concluding that "the empirical findings do suggest that postwar suburbanization of metropolitan employment may be further undermining the position of the Negro, and that the continued high levels of Negro unemployment in a full

spawned a wealth of empirical studies investigating the connection between job location and urban poverty. Proponents claim that the suburbanization of entry-level jobs contributes to urban unemployment in two ways. First, the decentralization of workers and employment has radically altered the "typical" commute. Between 1970 and 1990, the number of non-poor workers commuting from city residences to city jobs plummeted.[37] During the same time, the rate of "cross-commuting" between suburban homes and suburban jobs or "reverse commuting" between central city homes and suburban jobs increased by twenty-eight percent among all workers, and almost doubled among black workers.[38] By 1990, the number of suburb-to-suburb commuters outnumbered suburb-to-central-city commuters by at least a three–to–one margin,[39] with the "working poor" slightly more likely to "reverse commute" to the suburbs than non-poor workers.[40] As commutes become longer and more expensive, many low-skilled workers rationally determine that certain employment options do not make economic sense. Moreover, the remote location of employment opportunities may impede the job search efforts of inner-city residents.[41]

B. Spatial Mismatch or Transportation Mismatch?

While the spatial mismatch hypothesis has had enormous influence in policy discussions, scholars have long debated the extent to which job proximity, standing alone, affects the employment prospects of the urban poor.[42] For example, three years after the publication of Kain's article,

---

employment economy may be partially attributable to the rapid and adverse (for the Negro) shifts in the location of jobs"); *see also* Richard Arnott, *Economic Theory and the Spatial Mismatch Hypothesis*, 35 URB. STUD. 1171, 1171–72 (1998) (attributing the theory to Kain).

[37] *See* O'Regan & Quigley, *supra* note 23, at 21 (noting a decline of 21 percentage points for white workers, and 30 percentage points for black workers).

[38] *Id.*

[39] Kasarda, *supra* note 18, at 237. Intra-suburb commuting now represents the leading commuting trip type, with twice as many workers commuting within the suburbs as undertaking a "traditional" commute from a suburb to a central city. Craig N. Oren, *Getting Commuters Out of their Cars: What Went Wrong?*, 17 STAN. ENVTL. L.J. 141, 168 (1998).

[40] *See* O'Regan & Quigley, *supra* note 23, at 21.

[41] *See* Schill, *supra* note 8, at 799; Holzer, *supra* note 28, at 106. *See generally* Harry J. Holzer et al., *Work, Search, and Travel among White and Black Youth*, 35 J. URB. ECON. 320 (1994).

[42] *See, e.g.*, Schill, *supra* note 8, at 800–04 (discussing the scholarly debate); John F. Kain, *The Spatial Mismatch Hypothesis: Three Decades Later*, 3 HOUSING POL'Y DEBATE 371, 375–438 (1994) [hereinafter *Spatial Mismatch Hypothesis*] (providing a comprehensive literature review); D.T. Elwood, *The Spatial Mismatch Hypothesis: Are Jobs Missing in the Ghetto?*, *in* THE BLACK YOUTH EMPLOYMENT CRISIS 147–87 (R.B. Freeman & H.J. Holzer eds., 1986) (questioning whether job access affected youth employment rates); John M. Fitzgerald, *Local Labor Markets and Local Area Effects on Welfare Duration*, 14 J. POL'Y ANALYSIS & MGMT. 43, 51 (1995) (finding that local area characteristics are significant for black, but not white, workers); Holzer, *supra* note 28, at 109 (reviewing literature); Keith R. Ihlanfeldt & David L. Sjoquist, *The Effect of Job Access on Black and White Youth Employment: A Cross-sectional Analysis*, 28 URB. STUD. 255, 255–56 (1991)

two economists analyzing the same data rejected his conclusion, finding that residential segregation and job location could not explain the economic position of inner-city minorities.[43] While more recent studies generally have been supportive of the spatial mismatch theory,[44] a number of economists continue to dispute its validity.[45]

Many of the most powerful critiques come from social scientists who use commuting data to rebut the spatial mismatch hypothesis. These critics observe that average commuting distances do not vary significantly among demographic groups.[46] To the extent that there has been variation, relatively affluent white workers commute longer distances than do poor, inner-city minorities.[47] One study conducted by Brian Taylor and Paul Ong found that in both 1977 and 1985 white workers commuted, on average, almost a mile further than minority workers.[48] A similar pattern emerges when the commutes of high- and low-income individuals are compared: the 1990 National Personal Transportation Survey found that individuals earning more than $40,000 per year commuted, on average, over four miles further to work than individuals earning less than $10,000.[49] If inner-city minority residents do not, in fact, live farther from their jobs than white suburban residents, then a disappearance of jobs from urban centers cannot, taken alone, explain the persistently high levels of unemployment that plague America's inner cities. These and similar studies have led scholars like Christopher Jencks and Susan Mayer to conclude that the support for spatial mismatch theory "is so mixed that no prudent policy analyst should rely on it .... There is as much evidence against such claims as for them."[50]

(reviewing literature); JARGOWSKY, *supra* note 19, at 124–26 (reviewing literature); John D. Kasarda, *Urban Industrial Transition and the Underclass*, ANNALS AM. ACAD. POL. & SOC. SCI., 501, 526–47 (1989) (endorsing spatial mismatch theory); Holzer, *supra* note 28, at 105 ("[T]he 'spatial mismatch' hypothesis ... seems to be widely accepted in popular discussions of black employment problems. However, the empirical support for the hypothesis has always been quite hotly contested. Kain's original paper ... was almost immediately disputed ... and continues to be so to this day.").

[43] P. Offner & D. Saks, *A Note on John Kain's "Housing Segregation, Negro Employment, and Metropolitan Decentralization,"* 85 Q.J. ECON. 147, 150–51 (1971).

[44] *See* JARGOWSKY, *supra* note 19, at 124 (reviewing literature and finding emerging consensus).

[45] *See Spatial Mismatch Hypothesis*, supra note 42, at 375–93.

[46] For example, one study based upon data from the 1977 and 1983–84 Nationwide Personal Transportation Studies compared commute distances across income, industry group, sex, family status, metro size, place of residence, time of day, and trip purpose, and found no significant variations. Peter Gordon et al., *The Spatial Mismatch Hypothesis: Some New Evidence*, 26 URB. STUD. 315, 316–22 (1989). In fact, the commute distances of inner-city workers tended to be slightly shorter than for suburban workers. *Id.*; *see also* Paul Ong & Evelyn Blumenberg, *Job Access, Commute and Travel Burden among Welfare Recipients*, 35 URB. STUD. 77, 78–86 (1998); Taylor & Ong, *supra* note 8, at 1453.

[47] *See* Gordon, *supra* note 46, at 322; Taylor & Ong, supra note 8, at 1454, 1457.

[48] Taylor & Ong, *supra* note 8, at 1457.

[49] ALAN E. PISARSKI, NATIONWIDE PERSONAL TRANSPORTATION SURVEY: TRAVEL BEHAVIOR ISSUES IN THE 90S 59 fig. 36 (1992).

[50] Christopher Jencks & Susan Mayer, *Residential Segregation, Job Proximity, and*

Regardless of the extent to which inner-city poverty is attributable to a spatial mismatch problem, there is near-universal agreement about the theory's basic factual predicates—namely, that poverty, particularly among minorities, tends to be concentrated in inner-city neighborhoods and that suburbanization has meant the steady disappearance of entry-level jobs from neighborhoods with the highest concentrations of poor people.[51] These underlying facts lend credence to the conclusion that the availability of adequate transportation affects the job prospects of the urban poor. Even those scholars who remain the most skeptical of a link between job proximity and urban unemployment agree that the lack of access to reliable and efficient transportation impedes inner-city minority residents' job prospects. For them, it is inadequate transportation, rather than the spatial mismatch of entry-level workers and jobs *per se*, that impedes poor minorities' job prospects.[52]

These scholars observe that despite having shorter average commute *distances*, poor minority workers still spend significantly more *time* commuting to work than do more affluent white workers.[53] Taylor and Ong hypothesize that this apparent paradox results from minority workers' dependence upon public transportation, which is a significantly slower way to get to work than driving a private automobile.[54] According to the 1995 Nationwide Personal Transportation Survey, public transportation commutes take more than twice as long as private transportation commutes.[55] Between 1983 and 1990, mass transit travel times increased,

---

Black Job Opportunities, *in* INNER CITY POVERTY IN AMERICA 219 (Lawrence E. Lynn, Jr. & Michael G.H. McGeary eds., 1990).

[51] *See* Arnott, *supra* note 36, at 1171–72 ("There is little dispute about the empirical basis of the hypothesis: that there are, or at least have been, serious limitations on black residential choice; that there has been a steady dispersal of jobs from central cities; and that rates of employment and earnings of Afro-American workers are relatively low.").

> Although studies based on data collected before 1970 showed no consistent or convincing effects on black employment as a consequence of spatial mismatch, the employment of inner-city blacks relative to suburban blacks has clearly deteriorated since then. Recent research, conducted mainly by urban and labor economists, strongly shows that the decentralization of employment is continuing and that employment in manufacturing, most of which is already suburbanized, has decreased in central cities, particularly in the Northeast and Midwest.

WILSON, *supra* note 17, at 37

[52] *See* Taylor & Ong, *supra* note 8, at 1471.

[53] *See id.* at 1453, 1457. A more recent study, based on administrative data of AFDC recipients in the Los Angeles metro area, confirmed these results. Ong & Blumenberg, *supra* note 46, at 82.

[54] *See* Taylor & Ong, *supra* note 8, at 1459, 1460 (finding that transit commute times ranged 63% to 94% longer than driving alone).

[55] PATRICIA S. HU & JENNIFER R. YOUNG, U.S. DEP'T OF TRANSP., SUMMARY OF TRAVEL TRENDS: 1995 NATIONWIDE PERSONAL TRANSPORTATION SURVEY 42 (1999). Public transportation travels significantly slower than private automobiles. Taylor & Ong, *supra* note 8, at 1460.

despite the fact that the average commute distance decreased.[56] It is therefore not surprising that African American workers, who are nearly three times more likely to use public transit than white workers, face longer trips to work.[57]

One recent study of the Boston metropolitan area found that low-income workers living near the central business district actually have higher employment access than those living in the suburbs.[58] The researchers qualified that finding, however, noting that while most suburban jobs are readily accessible by car, only a small percentage are accessible by public transit.[59] They concluded:

> What really matters is perhaps not location *per se* but the lack of spatial mobility of a high percentage of low-wage workers to overcome the increasing spatial separation between jobs and residence. The great discrepancy in employment accessibility between auto drivers and transit riders shows clearly that much needs to be done to help low-wage workers who cannot afford a motor vehicle.[60]

Not surprisingly, welfare recipients are much less likely than wealthier individuals to own or have access to an automobile.[61] Without

---

[56] *See* PISARSKI, *supra* note 49, at 70-71 (finding that the commuting travel speed of mass transit service decreased from 19.7 miles per hour to 15.2 miles per hour at the same time that automobile commuting speed increased from 31.7 miles per hour to 34.7 miles per hour).

[57] *See* Taylor & Ong, supra note 8, at 1459. "Ongoing metropolitan dispersion of employment has made the private automobile an indispensable employment tool . . . ." *Id.* "The importance of the automobile in providing employment access to low-skilled, low-waged labour [sic] can hardly be overstated." *Id.* at 1471.

[58] Shen, *supra* note 8, at 353.

[59] *Id.* at 353–54.

[60] *Id.* at 359. A post-welfare reform survey of unemployed, low-skilled Detroit workers revealed large differences in the patterns of job-search behavior between those who owned cars and those who did not. Car owners' job searches tended to cover wider geographic areas and to yield a broader array of job opportunities. O'Regan & Quigley, *supra* note 23, at 24. Access to an automobile also has affected the outcomes of a program designed to improve employment prospects for non-custodial fathers of welfare-dependent children. An analysis conducted by the Manpower Demonstration Research Corporation concluded that "auto ownership was an 'important prerequisite' to participation in the program, to completion of the job-training program, and ultimately to getting jobs." *Id.*

[61] "Nationally, less than 6 percent of welfare families reported a car as a household asset in 1995." JOBS IN BOSTON, *supra* note 7, at 2. Underreporting undoubtedly artificially suppressed this ownership figure "because previous welfare eligibility rules limiting the value of assets may have led some recipients to 'hide' [car] ownership." *Id.* A more accurate figure is difficult to pinpoint. Kathryn Edin and Laura Lein's study of welfare mothers in four cities (Boston, Charleston, Chicago, and San Antonio) estimated that actual rates of ownership ranged between 8% and 45%. KATHRYN EDIN & LAURA LEIN, MAKING ENDS MEET: HOW SINGLE MOTHERS SURVIVE WELFARE AND LOW-WAGE WORK 33 (1997). A job readiness survey conducted by the California Department of Social Services found that 35% of welfare recipients do not have a driver's license and that, even among those who travel to work by car, only 65% own their own car. Evelyn Blumenberg, Steven Moga &

access to an automobile, welfare recipients seeking employment generally face four choices: stay at home, walk, carpool, or rely on public transportation. While data from the 1995 Nationwide Personal Transportation Survey indicate that the latter option is least preferred,[62] low-income individuals must rely on it to a greater extent than others.[63]

Commuting via public transportation is particularly problematic for those workers who live in inner-city areas and work in the suburbs. Most public transportation networks were designed decades ago to bring workers who live in suburban "bedroom communities" to their city jobs each morning and return them home in the evening.[64] These traditionally configured systems do not mesh well with the transportation needs of individuals struggling to go off welfare, many of whom must "reverse commute" from inner-city residences to the suburbs, where the bulk of entry-level jobs are now located. Rarely can conventional, fixed-route, public transportation systems adequately serve reverse commuters. Indeed, while the time differentials between automobile commutes and public transit commutes are large for all types of trips, the differences are most pronounced for those workers who commute from homes located in central-city neighborhoods to jobs located in the suburbs.[65] In 1990, for example, black workers using public transit to travel from central-city residences to suburban jobs averaged more than forty minutes commuting each way; one-way commute times in Chicago, Los Angeles and New York all exceeded fifty minutes.[66]

Commutes to suburban jobs from the homes of lower-skilled workers can take so long[67] that at times, frustrated workers are left feeling as

---

Paul Ong, GETTING WELFARE RECIPIENTS TO WORK: TRANSPORTATION AND WELFARE REFORM 9–10 (1998) (summary of conference proceedings) (on file author).

[62] For example, although public transportation use is highest among African Americans, it still accounts for only 8.1% of trips completed; walking accounts for 9.9%, and riding in a private car for 77.8%. J. Pucher et al., *Socioeconomics of Urban Travel: Evidence From the 1995 NPTS*, 52 TRANSP. Q. 15, 25 (1998).

[63] *See* Z. Andrew Farkas, *Reverse Commuting: Prospects for Job Accessibility and Energy Conservation*, 1349 TRANSP. RES. REC. 85, 89 (1992) (discussing public transportation in Baltimore). One 1992 survey of Los Angeles County residents, for example, found that public transportation accounted for only 4.5% of the trips taken by individuals in the highest income quintile, but for 56.3% of the trips taken by individuals in the lowest income quintile. Genevieve Giuliano & James E. Moore II, PUBLIC TRANSPORTATION IN LOW-INCOME COMMUNITIES: A CASE STUDY 7 (Calif. Dep't of Transp., draft final report, July 1999).

[64] *See* JOBS IN BOSTON, *supra* note 7, at 8; Farkas, *supra* note 63, at 85. For a description of the configuration of public transit see Craig N. Oren, *Getting Commuters Out of Their Cars: What Went Wrong?*, 17 STAN. ENVTL. L.J. 141, 169–70 (1998), and ANTHONY DOWNS, STUCK IN TRAFFIC 16–19 (1992).

[65] *See* JOBS IN BOSTON, *supra* note 7, at 7-8; WELFARE TO WORK, *supra* note 32, at 1–2; Ihlanfeldt & Sjoquist, *supra* note 42, at 225; Holzer, *supra* note 28, at 106.

[66] Kasarda, *supra* note 18, at 254; Downs, *supra* note 63, at 102; Farkas, *supra* note 63, at 85–86.

[67] *See* Oren, *supra* note 64, at 169–70; Robert Fishman, *America's New City: Megolopolis Unbound*, WILSON Q., Winter 1990, at 24, 24–45; Farkas, *supra* note 63, at 88.

though they "just can't get there from here." These facts hold true even in eastern seaboard cities with extensive transit systems. The Department of Transportation's study of metropolitan Boston, for example, found that the vast majority of entry-level job opportunities available to welfare recipients in the Boston metropolitan area are located in suburban areas that are either under-served or inaccessible by public transportation.[68]

Even when public transportation reaches a suburban job, reverse commuters frequently must transfer several times to reach their ultimate destinations.[69] These transfers increase not only commute times—some reverse commuters must wait as long as one hour between connections[70]—but also the likelihood that something will go wrong along the way, causing a delay that can have disastrous consequences. As a *Washington Post* article recently observed, "[w]hen buses do serve suburban employment centers, the commutes can be long, complicated and circuitous, with a high chance of missed connections, which can mean problems with a boss."[71]

Finally, limited operating schedules of most public transportation networks frustrate many entry-level workers. Just as most public transportation systems are configured to serve workers commuting from the suburbs into the city, the operating hours of public transportation services are tailored to serve those passengers as well. High-volume services tend to operate during traditional "peak" commuting hours in the morning and early evening.[72] Individuals who work during non-standard hours face long intervals between buses that lengthen already onerous commutes.[73] Others find that their shifts end *after* the final bus home has departed.[74]

These scheduling limitations impose a particular hardship on those who face welfare time limits and work requirements. Low-skilled workers are more likely to work during off-peak hours than the population as a whole.[75] One recent study found that working mothers with limited education are more likely to work in industries where non-traditional schedules are the norm—particularly in service industries, such as restau-

---

[68] JOBS IN BOSTON, *supra* note 7, at 7–8. Only 32% of potential employers in the Boston area were located within a quarter of a mile of public transit; 43% were located within half a mile, and 58% within a mile. *Id.*

[69] *See* Claire E. McKnight, *Transportation with Women in Mind*, J. URB. TECH., Fall 1994, at 1, 8.

[70] Jean Love, *Mass Transit: A Barren Promise*, ACROSS THE BOARD, July-Aug. 1992, at 42, 46.

[71] Reid, *supra* note 1.

[72] *See* CLIFFORD WINSTON & CHAD SHIRLEY, ALTERNATE ROUTE: TOWARD EFFICIENT URBAN TRANSPORTATION 35 n.19 (1998).

[73] *Cf.* Farkas, *supra* note 63, at 88.

[74] *See, e.g.*, JOBS IN BOSTON, *supra* note 7, at 8–9; U.S. GEN. ACCOUNTING OFFICE, WELFARE REFORM: TRANSPORTATION'S ROLE IN MOVING FROM WELFARE TO WORK 5 (1998) [hereinafter TRANSPORTATION'S ROLE].

[75] *See* Blumenberg et al., *supra* note 61, at 2 (noting that "the commutes of welfare recipients by public transportation are complicated by off-peak travel"); Coulton et al., *supra* note 7, at 134.

rants, health care, retail, and domestic service.[76] Researchers project that occupations with non-traditional hours will account for nearly thirty percent of all new job growth through 2005, suggesting that many individuals moving off the welfare rolls will work non-traditional hours.[77]

The interviews conducted for Wilson's 1996 study of inner-city Chicago demonstrate how the logistical difficulties of public transportation impede the job prospects of low-income individuals, at times precluding them from seeking and accepting employment.[78] One twenty-nine-year-old South Side resident commented:

> You gotta go out in the suburbs, but I can't get out there. The bus go out there, but you don't want to catch the bus out there, going two hours each ways. If you have to be at work at eight that mean you have to leave for work at six, that mean you have to get up at five to be at work at eight. Then when wintertime come you be in trouble.[79]

Another resident explained how the bus system's limited operating schedule precluded him from accepting a job in the suburbs:

> They are most likely hiring in the suburbs. Recently, I think about two years ago, I had a job but they say that I need some transportation and they say that the bus out in the suburbs run at a certain time. So I had to pass up that job because I did not have no transport.[80]

Still another observed, "From what I see, you know, it's hard to find a good job in the inner city 'cause so many people moving, you know, west to the suburbs and out of state . . . . Some people turn down jobs because they don't have no way of getting out there."[81]

These types of transportation problems were raised in congressional hearings concerning welfare reform legislation.[82] Since the enactment of

---

[76] *See* Harriet B. Presser & Amy G. Cox, *The Work Schedules of Low-Educated American Women and Welfare Reform*, MONTHLY LAB. REV., Apr. 1997, at 28.

[77] *See id.* at 32.

[78] *See* WILSON, *supra* note 17, at 38–40. Andrew Farkas's survey of low-income Baltimore residents reflected the same trends: nearly 30% of the respondents indicated that transportation difficulties would preclude them from accepting a job at any one of six major suburban job centers. Farkas, *supra* note 63, at 88–89

[79] WILSON, *supra* note 17, at 39.

[80] *Id.* at 40.

[81] *Id.*

[82] *See Impact of Welfare Reform on Children and Their Families: Hearing Before the Senate Comm. on Labor and Human Resources*, 104th Cong. 54–55 (1995) (statement of Sarah Cardwell Shuptrine, President, Southern Inst. on Children and Families) ("Lack of transportation was also identified [in the Institute's study on welfare dependency] as a barrier for welfare families who want to work . . . . [W]ithout reliable transportation, fami-

this legislation, Congress has recognized the impact of such problems. In 1998, for example, Congress enacted the Job Access and Reverse Commute Grant Program, finding that: "two-thirds of all new jobs are in the suburbs, [but] three-quarters of welfare recipients live in rural areas or central cities"; "even in metropolitan areas with excellent public transportation, less than half of the jobs are accessible by transit"; "many [welfare recipients] will be unable to get to jobs they could otherwise hold"; and "increasing the transit options for low-income workers, especially those who are receiving or have recently received welfare benefits, will increase the likelihood of those workers getting and keeping jobs."[83]

Two post-welfare reform studies support Congress's findings. The first, *Welfare Reform and Access to Jobs in Boston*, cited four factors that prevent Boston's relatively well-developed transit system from providing adequate access to entry-level jobs: (1) many new entry-level employment opportunities are concentrated in the outer suburbs, beyond the reach of existing transit service; (2) other areas of intense economic growth are served only by commuter rail, which often fails to provide direct access to employment centers and is not economically feasible for welfare recipients; (3) in many suburban areas, a substantial gap exists between transit routes and expanding employment areas; (4) even when direct access to suburban jobs is available via existing transit lines, the commutes take too long, involve numerous transfers, or the transit schedules differ from work schedules.[84]

The extent to which these transportation shortcomings impede welfare recipients' access to jobs is staggering. A welfare recipient living in Boston's inner city faces the following scenario: none of the potential employers in high-growth areas for entry level-work can be reached by public transit within thirty minutes; only 10% of all existing entry-level jobs are reachable via public transit within sixty minutes; 33% can be accessed within ninety minutes; and 45% cannot be reached within two hours.[85] These estimates represent the "best-case" scenarios.[86] They fail to consider "impediments such as inadequate hours of transit operation,

---

lies on welfare are much less likely to be able to become self sufficient."); *id.* at 230 (prepared statement of Jane L. Ross, Director, Income Security Issues, Health, Educ. and Human Servs. Div., U.S. Gen. Accounting Office) ("Many JOBS participants do not have reliable private transportation available to get their children to the child care provider and then the client to the JOBS component. Likewise, some communities lack the necessary public transportation to get participants where they need to go."); *Contract With America-Welfare Reform: Hearing Before the Subcomm. on Human Resources of the House Comm. on Ways and Means*, 104th Congress 1113 (Feb. 2, 1995) (testimony of welfare recipient Cheri Honkala) ("Meaningful welfare reform has to recognize that without child care, health care and transportation, low income mothers can't get and keep jobs.").

[83] 49 U.S.C. § 5309(a) (1998).

[84] JOBS IN BOSTON, *supra* note 7, at 8.

[85] *Id.* at 8–9.

[86] *Id.* at 9.

infrequent or unreliable transit service, or security concerns of recipients using isolated bus stops or transit stations during off-peak hours."[87]

The second study, *Housing, Transportation, and Access to Suburban Jobs by Welfare Recipients in the Cleveland Area*, yielded similar results.[88] While the authors concluded that "local labor markets should eventually adjust to the increased labor supply" resulting from welfare reform, they "questioned whether welfare recipients can effectively reach widely disbursed employment locations."[89] The researchers estimated that approximately 11,000 entry-level job openings are created each year in the Cleveland-Akron labor market.[90] Over 88% of these job openings are expected to occur outside the boundaries of the City of Cleveland, with a large percentage outside Cuyahoga County, in which Cleveland is located.[91] Meanwhile, 55% of area welfare recipients lived in Cleveland, and 72% in Cuyahoga County.[92] Even the most optimistic estimates of commute times facing Cleveland recipients seeking suburban employment—calculated for rush hour when service is most frequent and transfer times shortest—are discouraging. Only 929 entry-level jobs are expected to be available each year within a thirty-minute bus commute from one Cleveland neighborhood with a high concentration of welfare recipients.[93] "Inner-city residents can reach only 8 percent to 15 percent of the job openings within an average length commute on public transit."[94] Furthermore, these "optimistic" estimates likely are unattainable, particularly because the firms responsible for job creation are often dispersed and not amenable to large-vehicle modes of transportation, forcing passengers to walk long distances between jobs and transit stops.[95] Given these constraints, the study's authors "find transportation barriers that are difficult to overcome using traditional mass transit."[96]

C. The Hardest Cases: Women and Transportation

Even these pessimistic findings may underestimate the transportation barriers faced by individuals comprising the largest group of welfare recipients—single mothers.[97] Academic studies of women's labor force participation are characterized by one "remarkably consistent finding": although commute distances have been increasing generally, "women

---

[87] *Id.*
[88] *See* Coulton et al., *supra* note 7, at 123.
[89] *Id.* at 124.
[90] *Id.* at 132.
[91] *Id.*
[92] *Id.* at 131.
[93] *Id.* at 134.
[94] *Id.* at 135.
[95] *Id.* at 143.
[96] *Id.*
[97] *See* JOBS IN BOSTON, *supra* note 7, at 2–5.

work closer to home than do men."[98] To understand whether it is possible to structure transportation services so as to increase the probability that welfare reform will succeed, it is therefore necessary to understand why women's commutes are shorter than men's. Scholars have set forth a number of possible explanations. Some argue that women's shorter commutes are attributable to the fact that they earn lower wages, on average, than men, making long commutes economically irrational.[99] Others posit that women's shorter commutes are attributable to labor force characteristics—women work part-time[100] and pursue different (and less prestigious) occupations than men.[101] Still others argue that limitations on mobility resulting from women's higher rates of reliance on public transportation explain work-trip differences.[102]

The gender differences in commuting patterns, however, are most frequently linked to the fact that women continue to bear the lion's share of household responsibilities.[103] For example, one 1977 study found that women with the most demanding home roles (defined by marital status and ages of children) spent the least time traveling to work.[104] Many women, therefore, may find it impossible to fulfill all of their non-work responsibilities and devote a significant portion of the day to commuting.

Recent empirical research provides additional support for the domestic responsibility explanation. Not only do women make more trips per day than men,[105] but women's commutes are more likely to include a complex "trip chain" that combines work and non-work responsibilities.[106] The number of non-work-related "personal business" trips, including visits to doctors, banks, shopping centers, and day-care centers, has risen sharply for women.[107] Variation in the number and purpose of trips, however, does not hold across all age groups. Men and women tend to exhibit similar travel patterns before age twenty and after age fifty.[108]

---

[98] Susan Hanson & Ibipo Johnston, *Gender Differences in Work Trip Length: Explanations and Implications*, 6 URB. GEOGRAPHY 193, 193 (1985) (collecting studies).

[99] *See, e.g.*, Janice F. Madden, *Why Women Work Closer to Home*, 18 URB. STUDIES 181, 182 (1981).

[100] *See id.*

[101] *See* Hanson & Johnston, *supra* note 98, at 195–96 (collecting studies).

[102] *See id.* at 197 (collecting studies).

[103] *See* Julia A. Ericksen, *An Analysis of the Journey to Work for Women*, 24 SOC. PROBS. 428, 430–31 (1977); Hanson & Johnston, *supra* note 98, at 197 (collecting studies); Madden, *supra* note 99, at 182.

[104] Ericksen, *supra* note 103, at 433.

[105] *See* PISARSKI, *supra* note 49, at 41 (finding that in 1990, men made 3.04 trips per day and women made 3.13; in 1983, men and women made approximately the same number of trips per day, 2.88).

[106] MARTHA BIANCO & CATHERINE LAWSON, U.S. DEP'T OF TRANSP., TRIP-CHAINING, CHILDCARE, AND PERSONAL SAFETY: CRITICAL ISSUES IN WOMEN'S TRAVEL BEHAVIOR 124 (1999) (citing JAMES STRATHMAN & KENNETH DUEKER, UNDERSTANDING TRIP CHAINING: 1990 NPTS SUBJECT AREA REPORT (1994)).

[107] These personal business trips rose from 17% of all trips in 1983 to over 23% in 1990. PISARSKI, *supra* note 49, at 43.

[108] *Id.* at 42.

The travel pattern diverges only during women's child-rearing years, suggesting that the increase in number of trips is largely attributable to household responsibilities.[109] Gender differences in commute patterns are sharpest for households with children ages six to fifteen.[110] One study of the travel patterns of single mothers in Brentwood, Tennessee, found that ten percent of all non-work trips incorporated into morning commutes related to childcare.[111]

Household responsibilities affect commuting patterns in another important way—women with young children are more likely to work during non-traditional hours. This trend is especially pronounced for low-income women. One recent study found that "only slightly more than one-half (56.7 percent) of low-educated employed mothers work a standard, fixed daytime schedule during weekdays only."[112] Researchers found that women working non-standard hours did so to balance the competing demands of work and family.[113] Furthermore, the probability of working during non-standard hours increased with the number of children in the household.[114] Women with very young children were especially likely to cite childcare concerns as the main reason for working non-standard hours.[115]

These gender differences make quality, flexible transportation imperative to welfare reform, especially because the low-income single mothers that make up the bulk of current welfare caseloads take more and longer trips than married and higher-income mothers.[116] For these women, transportation that accommodates complex "trip chaining" is a necessary prerequisite to entering the labor force.[117] Not surprisingly, working women in general are becoming increasingly dependent upon automobiles.[118] As Sandra Rosenbloom has observed, "working women with children are particularly dependent on the car because it is the

---

[109] *Id.*

[110] *See* Mohammad M. Hamed & Fred L. Mannering, *Modeling Travelers' Postwork Activity Involvement: Toward a New Methodology*, 27 TRANSP. SCI. 381, 388 (1993) (finding that men are much more likely to return directly home from work than women). *But see* Hanson & Johnston, *supra* note 98, at 206 (statistical chart).

[111] *See* BIANCO & LAWSON, *supra* note 106, at 126 (citing D.Davidson, *Impact of Suburban Employee Trip Chaining on Trasnportation Demand Management*, 1321 TRANSP. RES. REC. 82–89 (1991)).

[112] Presser & Cox, *supra* note 76, at 27.

[113] *See id.* at 28–29.

[114] *Id.* at 29–30.

[115] *Id.* As would be expected, the most cited reason given by low-skilled working women for working non-standard hours is to satisfy the "requirement[s] of the job." *Id.* at 29.

[116] *See* JOBS IN BOSTON, *supra* note 7, at 3 (discussing research).

[117] *See* BIANCO & LAWSON, *supra* note 106, at 125; McKnight, *supra* note 69, at 5.

[118] The number of miles driven by women increased 76% between 1969 and 1990 (compared with a 46% increase for men during the same period). The distance driven more than doubled among women 16 to 34 years of age. JOBS IN BOSTON, *supra* note 7, at 3.

best—and perhaps only—way to balance the child care and domestic responsibilities they retain when they enter the paid labor force."[119]

Commuting by automobile, however, is simply not an option for many welfare recipients. Indeed, women as a whole continue to be much more dependent upon public transportation than men.[120] Low-income women without cars face the impediments confronted by all public-transportation-reliant individuals. Unfortunately, these impediments may prove too much of a burden, precluding many low-income, single mothers from fulfilling both their domestic and work responsibilities.

The need to engage in "trip chaining," for example, complicates the transfer and scheduling difficulties inherent in any public transportation commute. A transit-reliant mother must first negotiate the public transportation network to drop her child off at school or the daycare center. She may have to walk some distance between the transit stop and the daycare center (if it can be reached at all by public transit). After seeing her child safely off, she must, for all practical purposes, start over, renegotiating the network from the daycare center to work.[121] These intermediate stops increase not only the duration and cost of a commute, they also increase the probability of a delay occurring during one of the intermediate transfers. Furthermore, a working mother may find that transit schedules make it impossible for her to meet the opening and closing hours of daycare centers. Even when a bus is scheduled to arrive prior to closing, she may be unable to risk a delay.[122] Single mothers who work during non-standard hours will also run headlong into the limited operating schedules of most public transportation networks. Structuring a commute around the sparse off-peak schedule of most public transportation networks is frustrating for all transit-reliant individuals. Single mothers with young children, however, may find it impossible.[123]

Safety concerns may also cause women, particularly those who work during non-traditional hours, to shy away from public transportation. Although research on the relative safety of public transportation is limited, several patterns emerge from the studies that have been conducted. First, many individuals choose not to rely upon public transportation because of concerns about safety.[124] Women are more likely to be victim-

---

[119] SANDRA ROSENBLOOM, U.S. DEP'T OF TRANSP., TRAVEL BY WOMEN: DEMOGRAPHIC SPECIAL REPORTS 48 (1995).

[120] Hanson & Johnston, *supra* note 98, at 197, 208.

[121] *See* McKnight, *supra* note 69, at 5.

[122] *See id.* at 6.

[123] *See Impact of Welfare Reform on Children and Their Families: Hearings Before the Senate Comm. on Labor and Human Resources*, *supra* note 82, at 230 (prepared statement of Jane L. Ross).

[124] *See* Gerald L. Ingalls et al., *Public Fear of Crime and Its Role in Bus Transit Use*, 1433 TRANSP. RES. REC. 201 (1994); BIANCO & LAWSON, *supra* note 106, at 127 (discussing a study finding that 46.8% of potential riders perceived waiting at a bus stop as unsafe, and 44.4% expressed apprehension about transferring at a bus terminal).

ized on public transit than men,[125] and a larger percentage of women perceive risks to their safety.[126] Women are also more likely to respond to this perceived threat to their personal safety by not putting themselves in the way of danger, even if this means forgoing travel altogether.[127] Second, public transportation customers face the greatest danger while waiting at, and walking to and from, transit stops.[128] Due to the sporadic nature of off-peak transit operations, working the late shift exposes women to both of these dangers. Women who work late often must wait for a bus at a deserted bus stop and face long, solitary walks between their place of employment and the bus stop, and then another long walk between the bus stop and their homes.[129] Finally, although most crimes on public transit are committed during peak hours, the rates of occurrence are disproportionately high during off-peak, evening hours.[130]

II. CURRENT EFFORTS TO ADDRESS THE "TRANSPORTATION MISMATCH"

Officials charged with implementing welfare reform are struggling to address the transportation problems faced by welfare recipients. In a 1997 survey conducted by the United States Conference of Mayors of their member cities, eighty-four percent of the respondents cited transportation as an impediment to moving recipients into work.[131] Seventy-five percent of the respondents further reported, however, that they have programs under way or in the planning stages that address welfare recipients' transportation problems.[132]

A. Federal Efforts

The federal government has tackled transportation problems primarily by providing financial assistance to support state and local efforts. States are generally free to spend the $16.5 billion that the federal gov-

---

[125] *See* BIANCO & LAWSON, *supra* note 106, at 126 (discussing study by Levine and Wachs). *But see* McKnight, *supra* note 69, at 7.

[126] In one survey of rush-hour subway riders in New York City, "26 percent of women and 11 percent of men indicated that they were very worried about crime"; the reported level of fear increased to 52% of women and 28% of men after 8 p.m. McKnight, *supra* note 69, at 6.

[127] *See* BIANCO & LAWSON, *supra* note 106, at 127 (discussing study by Lynch and Atkins); McKnight, *supra* note 69, at 7.

[128] *See* McKnight, *supra* note 69, at 11.

[129] *See id.*

[130] *See* BIANCO & LAWSON, *supra* note 106, at 127 (discussing study by Pearlstein and Wachs).

[131] Press Release, U.S. Conference of Mayors, Mayors' Welfare Reform Survey Finds Problems With Job Availability, Transportation to Jobs, Child Care And Housing Needed By Welfare Clients (Nov. 21, 1997), *at* http://www.usmayors.org/uscm/news/press_ releases/press_archive.asp?doc_id=106.

[132] *Id.*

ernment disperses annually through the new federal welfare program, Temporary Assistance to Needy Families ("TANF"), on support services, including transportation, so long as the expenditures target welfare recipients themselves and do not supplement existing services that benefit the general public.[133] Shortly after Congress enacted the Welfare Reform Act, it also made additional funds available to states and municipalities for support services, such as transportation, in the Balanced Budget Act of 1997, which created the "Welfare-to-Work" program.[134] The Welfare-to-Work program was a response to the growing concern that "welfare recipients who have the least skills, education, employment experience and who live within high poverty areas may need additional assistance to obtain lasting jobs and become self-sufficient."[135] The Act appropriates a total of three billion dollars to augment state and local efforts to create job opportunities for the hardest-to-employ recipients, namely, those who have received welfare for at least thirty months, or are within twelve months of exhausting the time limits, and those who face certain statutorily defined barriers to employment.[136] Welfare-to-Work grants may be spent on transportation, but only to benefit the individuals targeted by the program, and then only for transportation services for individuals participating in a Welfare-to-Work activity, such as a job-training program.[137]

In 1998, Congress also created the Job Access and Reverse Commute Grant Program as a specific response to concerns that "many [welfare recipients] will be unable to get to jobs they could otherwise hold" because the dispersed nature of entry-level jobs makes them inaccessible by public transportation.[138] Through the program, which is administered by the Department of Transportation, Congress authorized $150 million per year to assist states and localities in developing transportation services to connect welfare recipients and other low-income persons to jobs and employment-related services.[139]

Several pre-welfare reform programs also attempt to address the importance of adequate transportation to welfare recipients. The Federal Transit Administration has been funding various experimental projects

---

[133] Personal Responsibility & Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified at 42 U.S.C. § 602(a)(1)(A) (2000)).

[134] Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251 (codified as amended at 42 U.S.C. § 603(a)(5)(C)(i) (2000)).

[135] Welfare-to-Work (WtW) Grants, 62 Fed. Reg. 61,588 (Nov. 18, 1997) (codified at 20 C.F.R. pt. 645).

[136] *See* U.S. GEN. ACCOUNTING OFFICE, WELFARE REFORM: IMPLEMENTING DOT'S ACCESS TO JOBS PROGRAM 3–4 (1998) [hereinafter ACCESS TO JOBS].

[137] 47 U.S.C. § 603 (1994).

[138] 49 U.S.C. § 5309(a) (1998).

[139] *See* ACCESS TO JOBS, *supra* note 136, at 1, 4. As with TANF and Welfare-to-Work funds, the Job Access program includes a cost-sharing requirement. Grant funds awarded for a project may not exceed 50% of the project's total cost. Funds from other federal programs, however, may be expended to meet the local financial responsibility. *See id.* at 4.

that tackle transportation problems.[140] The largest of these projects, JOBLINKS—a $3.5 million project administered by the Community Transportation Association of America—provides funds to transport recipients to jobs or employment training and to evaluate which types of transportation services are most effective in helping welfare recipients get to work.[141] The Department of Housing and Urban Development currently administers a four-year research demonstration program called "Bridges to Work."[142] The program, which provides employment, transportation, and support services to participants in five cities,[143] responds to the problems identified by spatial mismatch proponents. It is designed to determine whether the coordinated provision of jobs, transportation, and support services can overcome the geographic separation of jobs and welfare recipients.[144] Employers hiring workers through the program remain cautiously optimistic. One St. Louis employer observes, "We all have obstacles to working . . . . For some people, just getting to work is the obstacle. I feel like this program helps them become hurdlers."[145] Still, this employer expresses doubts; he has found in the past that employees with long commutes often quit when the distances become too difficult to manage.[146]

B. Current State and Local Efforts

Much to their credit, almost immediately after the enactment of welfare reform legislation, state and local government agencies charged with implementing the new "devolved" federal welfare program began to ex-

---

[140]

> According to an FTA official, the agency is supporting welfare-to-work initiatives by funding demonstration projects, working with state and local partners to encourage the development of collaborative transportation plans, providing states and localities with technical assistance, and developing a program that would increase the financial resources available for welfare initiatives.

TRANSPORTATION'S ROLE, *supra* note 74, at 7.

[141] "As of March 1998, JOBLINKS had funded 16 projects . . . in . . . 12 states" and provided smaller grants to states and local governments "to help people obtain jobs or attend employment training." *Id.* at 7–8.

[142] U.S. DEP'T OF HOUSING & URBAN DEV., FACT SHEET: BRIDGES TO WORK DEMONSTRATION LINKING INNER [SIC] CITY RESIDENTS TO METROPOLITAN WIDE OPPORTUNITIES, *at* http://www.huduser.org/publications/povsoc/btw/fact.html (last modified Apr. 27, 2000); Oscar Avila, *Program Links Jobs, Workers*, KAN. CITY STAR, Aug. 15, 1997, at A1.

[143] *See* ACCESS TO JOBS, *supra* note 136, at 9.

[144] In St. Louis, for example, Bridges to Work contracts with the Red Cross to provide a van service from residential neighborhoods to central bus depots. There, participants take a 40-minute bus ride to jobs arranged for them in suburban Chesterfield, Missouri. Participants initially take advantage of the service free of charge. After two months, they pay a subsidized rate of $37 per month. A four-year $4 million federal grant picks up the remainder of the tab. Avila, *supra* note 142.

[145] *Id.*

[146] *Id.*

plore ways to address the transportation difficulties that plague many low-income Americans. Since that time, these agencies have taken advantage of the various federal resources (supplemented by their own funds) to implement programs designed to help welfare recipients get to work.[147]

Many state and local governments now make public transportation available to welfare recipients either free of charge or at reduced rates for a limited time period.[148] Some jurisdictions have begun to add new bus routes, including routes specifically designed to address the needs of reverse commuters[149] or have incorporated smaller, more flexible, minibuses, enabling them to expand service to include lower-density routes.[150] Some social service agencies have contracted with private companies to provide commuter ride services for welfare recipients.[151] In addition, other agencies operate their own services tailored specifically to meet the needs of welfare recipients.[152] Recognizing the inherent limitations of public transportation, a number of jurisdictions also have undertaken efforts to make cars more accessible to welfare recipients.[153] The boldest of

---

[147] For a complete list of state and local programs designed to address "transportation mismatch" problems, see COMMUNITY TRANSP. ASS'N OF AMERICA, TRANSPORTATION AND WELFARE REFORM: STATES ON THE MOVE §§ III, IV, V [hereinafter STATES ON THE MOVE] *at* http://www.ctaa.org/ntrc/atj/ pubs/states-move (last visited Dec. 6, 2000)

[148] This is the case in Detroit, where welfare recipients who enter the workforce are permitted to commute to work, free of charge, on public buses for one month. *Id.* § IV. New Jersey has a similar program, "Get a Job, Get a Ride," which provides one month of free public transportation to any recipient exiting welfare for employment. *Id.* Delaware's "Get A Job*Get a Ride" program provides free public transportation for recipients during their first 30 days of work and also provides recipients with information about transit schedules. *Id.* § III. Illinois reimburses recipients for the cost of public transit passes, up to $88 per month. *Id.* In Tennessee, recipients receive $5 per day to cover the cost of public transportation (or a $5 voucher for gas if no public transportation is available). *Id.*

[149] *See generally* FED. HWY. ADMIN., U.S. DEP'T OF TRANSP., JOB ACCESS: MOVING TOWARD A SOLUTION, *at* http://www.fhwa.dot.gov/reports/challeng.htm (last visited Dec. 6, 2000).

[150] For example, rural Highland County, Ohio, contracts with a school district to provide transportation for welfare recipients during hours when school buses are otherwise idle. *See* STATES ON THE MOVE, *supra* note 147, § IV. Arkansas has implemented a similar program. *See id.* § III. Still other innovative programs include the New Jersey Department of Transportation's "Transit Training" program, which educates welfare recipients about how to use the State's public transportation systems. *See id.* § IV. Virginia has expanded the "training" concept even further, providing employers with a "Reality Check" program, which explains the frustrations faced by individuals who must negotiate spotty public transportation in order to get to work. *Id.*

[151] *See id.* § IV.

[152] In Detroit, for example, the agency charged with providing public transportation not only provides computerized scheduling of transportation services—essentially acting as welfare recipients' commuting travel agent—it further offers to transport welfare recipients, free of charge, from a bus stop to their place of employment. *Id.* § IV. Fairfax County, Virginia operates its own van-pool system, which provides daily rides for about 245 working welfare recipients; the county also provides free taxi service to accommodate recipients who work off-peak hours. Eric Lipton, *Fairfax Offers Welfare Recipients Rides to Work*, WASH. POST, Nov. 25, 1997, at B8.

[153] *See* STATES ON THE MOVE, *supra* note 147, § III.

these programs actually provide welfare recipients with a free car.[154] In other jurisdictions, welfare recipients are given the opportunity to purchase cars with low-interest or interest-free loans.[155] Many states have taken more modest steps like increasing the welfare-eligibility asset limit to permit recipients to purchase a car and providing recipients with mileage allowances or money for gas and/or repairs.[156] Finally, some local governments have begun to recruit volunteer drivers to transport recipients to and from job training programs and work.[157]

C. Policy Limitations

Each of the federal, state, and local policies discussed above has major limitations, which virtually ensure that inadequate transportation will continue to impede the efforts of individuals struggling to gain economic self-sufficiency. For example, while providing public transportation for free or reduced rates decreases the cost of commuting, it does nothing to alleviate any of the systemic problems with public transportation. Free transit passes serve no purpose if bus routes do not reach new suburban job centers. They also fail to make women's "trip-chains" easier, shorten lengthy commutes, or eliminate the need to make multiple transfers. Furthermore, free passes cannot help welfare recipients who

---

[154] *See generally* Monica Oui Frazier, Note, *License to Drive: Getting Welfare Recipients from the Cities to the Jobs*, 7 GEO. J. ON POVERTY L. & POL'Y 1 (2000) (discussing car-donation programs and advocating widespread adoption of policies matching recipients with cars). Fairfax County, Virginia began to provide recipients with used cars after recognizing that public transportation was unable to meet many recipients' transportation needs. Alice Reid, *On the Road from Welfare to Work; Pairing Clients and Cars, Fairfax Puts Jobs Within Reach*, WASH. POST, Feb. 2, 1999, at A1. Similarly, Nebraska will purchase a vehicle, worth up to $2,000, for a recipient who becomes employed; the state also provides insurance for three months as well as making an additional $500 available for taxes, licensing, and registration. STATES ON THE MOVE, *supra* note 147, § III. Columbia County, Pennsylvania teamed up with the local United Way to spearhead a project linking welfare recipients needing transportation to work with donated cars. *Id.* § IV. The State of Colorado coordinates a program, "Wrecks to Rides," which encourages people to donate cars to Goodwill. The cars are taken to high schools where students repair them for use by welfare recipients. *Id.* § III. In central Massachusetts, Lutheran Social Services operates a program—funded in part by a state grant—that pairs recipients with used, reconditioned vehicles. Bob Datz, *On the Road to Independence*, WORCESTER TELEGRAM & GAZETTE, July 8, 1999, at A1.

[155] Georgia's "Peach on Wheels" program works with used car dealers to enable recipients to purchase salvaged or auctioned cars with no interest or low-interest loans. *See* STATES ON THE MOVE, *supra* note 147, at § III. Tennessee's "First Wheels" project sells donated cars to recipients without interest. *Id.* Ventura County, California has proposed buying used public and private vehicle fleets and then selling them below market value to recipients through low-interest loans. Hilary E. MacGregor, *Plan Providing Low-Cost Car Loans for Needy Gets Green Light*, L.A. TIMES, Sept. 5, 1997, at B1.

[156] *See* STATES ON THE MOVE, *supra* note 147, § 3.

[157] *See id.*

face bus service that is sporadic and unreliable or that stops operating before the end of a late shift.[158]

The commuter van pools that several jurisdictions have established to serve individuals making the transition from welfare to the workforce address some of these policy limitations by tailoring services expressly to the needs of their clientele. These services promise to provide a much needed, immediate solution for those workers who benefit from them by virtually eliminating the transportation impediment to work. These commuter van pools, however, offer only a temporary and limited solution. Just as public transit authorities cannot hope to provide bus service to every conceivable destination, welfare reform agencies cannot provide individually tailored van service for every low-income worker who needs it.

Policies that help recipients secure access to cars represent a more permanent solution. Some of these initiatives, such as increasing the automobile asset limit for welfare eligibility, address glaring deficiencies in pre-welfare reform policies. Others, such as programs providing recipients with donated cars, offer tremendous relief for the fortunate beneficiaries. It is unlikely, however, that car-donation programs will provide widespread relief. Since there are 7.3 million welfare recipients,[159] it may not be feasible to provide all in need of transportation with a reliable automobile.

Most of these efforts share an additional flaw—they target only welfare recipients. Once the transition from welfare to work has been successful, *former* recipients are no longer eligible for the service. They find themselves back at square one with respect to transportation. Furthermore, programs that target welfare recipients provide no relief for individuals who may be barely hanging on to economic self-sufficiency. The loss of a reliable ride to work—a broken-down car or the dissolution of a car pool—could mean financial ruin. The policies addressed above do nothing to avoid these catastrophes. The urban poor benefit from those initiatives only after disaster lands them on welfare.

---

[158] Efforts to augment current public transportation services attempt to address these concerns. The decision of several jurisdictions to introduce new "reverse commuting" bus routes is a particularly promising development. Public transportation authorities can address an acute need for new service to a large employment center—a shopping mall or industrial park, for instance. However, at least two factors—limited public resources and the fixed-route model of public transportation—limit the effectiveness of these efforts. As long as resources remain finite and buses are constrained to fixed routes, they can never provide transportation to every dispersed suburban job destination. *See* COMMUNITY TRANSP. ASS'N OF AMERICA, WELFARE TO WORK, *at* http://www.ctaa.org/ntrc/atj/pubs/innovative/innov5.shtml (last visited Dec. 13, 2000).

[159] *See Group Questions Success of Overhaul*, FACTS ON FILE WORLD NEWS DIG., Sept. 30, 1999, at 708E3.

III. AN ALTERNATIVE APPROACH

In much of the world, especially in developing nations, low-cost jitneys operated by private entrepreneurs fill in transportation gaps like those that American policymakers struggle to address. "Jitney" services combine characteristics of bus and taxi services: like buses, jitneys provide shared-ride transportation service for unrelated passengers; like taxis, they accept street hails and frequently deviate from their usual routes.[160] In general, jitney service is provided in vans or minibuses and is operated by private entrepreneurs. After studying the operation of jitneys in six cities abroad, one scholar summarized their appeal as follows:

> They charge relatively low fares and provide wide coverage across a city, often serving poor areas that get no other service. Their operations are flexible so they can add service at peak times and quickly cover new neighborhoods. Their small size and cheap labor enables them to profitably provide frequent service in smaller neighborhoods and along narrow streets, as well as work the main thoroughfares. With fewer passengers, they often make fewer stops and faster time.[161]

Despite these substantial benefits, jitneys are virtually non-existent in the United States. As a 1984 Federal Trade Commission report found, "most [American] jurisdictions prohibit shared-ride service, including . . . jitney service."[162]

With few exceptions, most jurisdictions have taken a government-directed, command-and-control approach to addressing the transportation woes of America's inner-city poor. Policymakers have overlooked an important non-traditional solution to these transportation problems—namely, amending the legal restrictions that preclude private entre-preneurs from providing unsubsidized jitney services to low-income customers who desperately need them. This legal reform could serve two important purposes: historical and current experience demonstrate that jitney services not only take people to work, they also put people to work.[163] Because

---

[160] *See* Isaac K. Takyi, *An Evaluation of Jitney Systems in Developing Countries*, 44 TRANSP. Q. 163, 170 (1990) ("The archetypical urban jitney system consists of a constellation of loosely regulated owner-operated collective vehicles following more or less fixed-routes with some deviations as custom, traffic, and hour permit.").

[161] *Id.* at 171.

[162] MARK W. FRANKENA & PAUL A. PAULTER, FED. TRADE COMM'N, AN ECONOMIC ANALYSIS OF TAXICAB REGULATION 25 (1984).

[163] I am certainly not the first to suggest that relaxing the nearly ubiquitous restrictions on jitney services might help remedy the transportation problems that plague the poor. *See id.* at 155 (finding that prohibitions on jitney operations lack any "economic justification" and are part of a regulatory system that "impose[s] a disproportionate burden on low income people"); Glenn Garvin, *Flouting the Law, Serving the Poor,* REASON, June/July 1985, at 29; Sandi Rosenbloom, *Taxis, Jitneys & Poverty*, TRANS-ACTION, Feb. 1970, at 47;

jitneys are essentially illegal in this country, the arguments in favor of this path have tended to rely upon academic speculation. In the discussion that follows, I attempt to draw upon more concrete evidence—both historical and contemporary—to support the proposition that, if permitted to operate, jitneys could provide a safe, flexible, and reliable ride to work for former welfare recipients.

A. America's Historical Experience with Jitneys

Americans were not always strangers to jitney services. During a brief period around the turn of the century, jitneys flourished in nearly every major American city. The remarkable American jitney phenomenon allegedly began in Los Angeles on July 1, 1914, when L.P. Draper—having ascertained that his action was legal, because he held a chauffeur's license—picked up a passenger and transported him a short distance for a nickel.[164] The movement gained momentum rapidly, and this novel form of transportation exploded onto the American scene. By early 1915, jitneys began to appear in most American cities, literally sweeping the nation in a matter of months.[165] During a two-week period in Kansas City, the number of jitneys jumped from 0 to 200 cars carrying nearly 25,000 passengers a day. Two weeks later, the number of jitney patrons reached 45,000–50,000 per day.[166] At the peak of the phenomenon in 1915, more than 60,000 jitneys were operating in the United States.[167]

The instant popularity of jitneys was largely attributable to public dissatisfaction with the quality of service provided by urban street car companies.[168] In 1914, Americans depended almost entirely on the electric street railways for urban public transportation.[169] These monopolists had a reputation for arrogance and poor customer service.[170] From a customer's perspective, jitneys had significant advantages over street cars,

---

McKnight, *supra* note 69, at 12 (1994) (suggesting that women's transportation problems could be addressed by:

> vans operate[d] similar . . . to a bus but . . . provid[ing] more personalized service, frequently deviating from main streets to drop people directly at their [main] destinations . . . . In larger cities, these services could be encouraged by a change in policy and in regulations that prohibit small, informal transportation services from competing with publicly supported transit monopolies.).

[164] *See* Ross D. Eckert & George W. Hilton, *The Jitneys*, 15 J.L. & ECON. 293, 294–95 (1972). Although the source of the term is disputed, one possibility is that "jitney" meant nickel—the cost of the service—in the slang of the period. *See id.* at 294.

[165] *See id.* at 295.

[166] Carlos A. Schwantes, *The West Adapts the Automobile: Technology, Unemployment, and the Jitney Phenomenon of 1914–1917*, 16 W. HIST. Q. 307, 308 (1985).

[167] *Id.* at 309; *see also* Eckert & Hilton, *supra* note 164, at 295.

[168] *See* Eckert & Hilton, *supra* note 164, at 296.

[169] *See id.* at 293.

[170] Schwantes, *supra* note 166, at 309–10.

including, most importantly, speed. As technological advances enabled street railways to evolve from relatively small trolleys into longer and heavier streetcars, companies sacrificed speed for efficiency.[171] Bigger cars carried more passengers, requiring more and longer stops to pick up and discharge passengers.[172]

Meanwhile, carrying just four to five passengers (usually in a Ford Model T), jitneys were 150% to 200% faster than streetcars.[173] Large streetcars cars ran less frequently, making their frustrated passengers ripe for the picking by jitneys, which typically picked up passengers every two to six minutes.[174] Furthermore, jitneys' freedom from the rails gave them greater flexibility than the streetcars. A driver "did not customarily choose a destination until he picked up his first passenger. He would then post . . . that passenger's destination on his windshield and pick up additional passengers en route."[175] Drivers were also known to deliver passengers directly to their doors—"usually at a rate of two passengers for a quarter," although door-to-door service was provided free of charge in some cities.[176]

In light of the public's discontent with street cars, it is not surprising that jitneys quickly developed a loyal customer base. One jitney enthusiast proclaimed the service to be a "'new phase in the old struggle between class and mass. On one side is capital, represented by the traction interests, and on the other side are the jitney owners and their patrons.'"[177] A pro-jitney editorialist penned the following jingle:

> There was a little man
> Had a wooden leg;
> Hadn't any money,
> Didn't want to beg.
> So he took four spools,
> And an old tin can,
> Called it jitney
> And the blamed thing ran.[178]

---

[171] *Id.* at 311.

[172] *Id.*

[173] Eckert & Hilton, *supra* note 164, at 296, 301.

[174] *See* Schwantes, *supra* note 166, at 311–12.

[175] Eckert & Hilton, *supra* note 164, at 296 (citing *Jitneys at San Antonio*, 45 ELEC. RY. J. 1197 (1915)).

[176] *See id.* The jitneys also benefited from the decentralized nature of the industry. While jitney operators had associations in most cities, the vast majority of operators were individuals. "Collusive organization of the industry was difficult in part because so many operators provided service only in rush hours or on some other part-time basis. Some men drove as jitney operators for one or two hours before or after work, or both." *Id.* at 297. In some cities, a majority of jitneys probably made one or two round trips per day. *See id.*

[177] Schwantes, *supra* note 166, at 311 (quoting JOHN ANDERSON MILLER, FARES PLEASE! FROM HORSE-CARS TO STREAMLINERS 150 (1941)).

[178] *Id.* (quoting *Getting Rid of the Rails*, INDEP., May 31, 1915, at 342).

The enthusiastic newsman concluded, "It's bound to run. Nothing can stop the jitney now, no corporation, no legislation. The era of extortion and of corruption is over."[179]

The jitney phenomenon was also spurred on by outside economic forces. "By late 1914 the depression that began the previous year had idled an estimated one million workers in the United States .... [U]nemployment was highest in cities of the West Coast, ranging from 20% ... in Portland, to 16% in San Francisco, 13% in Seattle, and 11% in Los Angeles."[180] Many unemployed men were eager to capitalize on the public desire for an alternative to the streetcars, especially when operating a jitney meant food on the table. During hearings on jitney regulations in Kansas City, for example, several women testified that, thanks to jitneys, their previously unemployed husbands were "'independent and doing a good business.'"[181]

The astonishing success of jitneys did not go unnoticed by streetcar operators. While reliable figures for streetcar losses do not exist, the industry was undoubtedly dealt a severe blow, particularly in western cities where companies had recently invested large amounts of capital to extend lines to new suburbs.[182] One journalist observed that streetcar conductors, "looked as if they were running funeral cars, with few mourners."[183] The Electric Railway Journal referred to jitneys as "a menace," "a malignant growth," and "this Frankenstein of transportation."[184] In some cities, streetcar companies were forced to field their own fleets of jitneys as a defensive mechanism.[185]

At first, street railway companies took the position that jitneys were uneconomical and therefore doomed.[186] When the number of jitneys continued to skyrocket, streetcar executives argued that the drivers "were being swindled into a losing proposition by big business and deceitful

---

[179] *Id.*

[180] *Id.* at 313–14.

[181] *Id.* at 314 (quoting OREGON VOTER, May 22, 1915, at 107). Furthermore, men with a desire to work had, for the first time in history, inexpensive motorized transportation at their disposal. Ford introduced mass production of automobiles in 1913, and by 1916 the price of a Model T had fallen from $550 to $360. *Id.* at 313. "Ford sold more than one-third of a million Model T's in 1914 alone. The popularity of the Fords created a used car glut that lasted until the jitney boom emptied dealers' lots." *Id.* The public desire for a mass transportation alternative meshed nicely with the advent of inexpensive, mass-produced automobiles and the availability of a large pool of unemployed workers eager for gainful employment. *See id.* at 309.

[182] *See id.* at 315. By late 1914, "Los Angeles Railways was losing $600 per day in revenue, had laid off 84 motormen and conductors and withdrawn 21 cars on six lines." Eckert & Hilton, *supra* note 164, at 295.

[183] Schwantes, *supra* note 166, at 315 (quoting Sydney Strong, *A Nickel a Ride—When the Jitney Comes to Town*, 33 SURV. 647, 647 (1915)).

[184] Eckert & Hilton, *supra* note 164, at 299–300.

[185] *See, e.g.*, Schwantes, *supra* note 166, at 315.

[186] *See id.* at 314.

newspaper articles that described them as a 'gold mine'" when they were actually a "'gold brick whose gilding will soon wear off.'"[187]

The streetcar industry eventually struck back with a vengeance, launching a nationwide lobbying and public relations campaign aimed at driving jitneys out of existence.[188] Municipal governments readily endorsed the industry's (irreconcilable) arguments that jitneys were inefficient and uneconomical and that they could be put down only by regulation.[189] The disorganized jitney operators were at a substantial disadvantage in the political sphere, and their late efforts at organization were generally to no avail.[190] Less than eighteen months after the first jitney appeared on Los Angeles streets, anti-jitney ordinances were enacted in 125 of the 175 cities where jitneys competed with streetcars.[191] Most of the remaining municipalities—even those with only a few jitneys—followed suit within a year, as did a number of state governments.[192]

Anti-jitney regulations took a number of forms. Where they were not banned outright, jitney operators were forced to operate as common carriers, subject to franchising and licensing requirements.[193] Regulations designed to prevent part-time operators from "poaching" rush-hour customers forced jitneys to operate during the least profitable times of the day.[194] Others required jitney operators to specify fixed schedules and routes, banned them from operating on streetcar routes, or excluded them from profitable downtown areas altogether.[195] Cumulatively, all of these restrictions had their intended effect of eliminating the jitneys' competitive advantage, which was the ability to provide flexible service tailored to individual passengers' needs.[196]

In the end, the jitney phenomenon ended as quickly as it began, with jitneys regulated out of existence.[197] In some cities, tough ordinances eliminated them within a matter of days.[198] Due in part to an ordinance prohibiting them from operating in the downtown area, the number of jitneys operating in Los Angeles fell from one thousand in 1916 to thirty-two a year later.[199] Nationwide, the number of jitneys plummeted from an estimated peak of 62,000 in 1915 to 5,879 three years later.[200] By the

---

[187] *Id.* (quoting *The Jitney as a Gold Brick*, ERJ, May 15, 1915, at 919).
[188] *See id.* at 319–20.
[189] *See id.* at 321, 322; Eckert & Hilton, *supra* note 164, at 304–05.
[190] *See* Schwantes, *supra* note 166, at 322; Eckert & Hilton, *supra* note 164, at 305.
[191] Eckert & Hilton, *supra* note 164, at 319.
[192] *See id.*
[193] *See id.* at 308–10.
[194] *Id.* at 311.
[195] *Id.* at 311–13.
[196] *See id.* at 308–15.
[197] *See id.* at 307.
[198] *Id.* at 321.
[199] *Id.*
[200] *Id.* at 322.

early 1920s, the streetcar industry's victory was complete. Jitneys had virtually disappeared from the streets.[201]

B. Modern Jitneys in New York and Miami

Although the historical account provides important insight into the ways in which jitneys might serve the urban poor,[202] the case in favor of jitneys need not stand or fall on history alone. Policymakers can also rely on evidence that informal jitney services are, today, serving the transportation needs of the urban poor in a number of American cities. As one scholar recently observed, jitneys "occur informally, often illegally, in many large U.S. cities, particularly those with large immigrant populations from countries where informal transportation is frequently a major and legal part of the public transportation system."[203] Because of the legal impediments discussed below, these services are provided outside of the law, making it difficult to learn much about them beyond the fact that they exist. The discussion that follows, therefore, concentrates on New York and Miami, the two cities where informal jitneys are best established, most visible, and have been most widely studied.

1. New York's "Dollar Vans"

Due in large part to its stringent regulatory restrictions on the for-hire vehicle industry, New York City has always had large and vibrant informal transportation services.[204] For decades, New Yorkers by the millions (particularly those who do not live in lower Manhattan) have depended on illegal transportation services—or legal services that operate in extra-legal ways—to serve their daily transportation needs.[205] These services, which range from high-class limousine services to shabby "gypsy cab operations," are vitally important, particularly in peripheral neighborhoods that are under-served by public transportation and ignored by medallion-carrying "yellow cabs."[206] Residents of these neighborhoods, the majority of whom are low-income minorities, would find it difficult to function without them.[207]

Although jitneys have always played a role in New York's large informal transportation market, they gained prominence during a series of strikes by public transportation workers during the early 1980s.[208] Seem-

---

[201] *See id.* at 321–22; Schwantes, *supra* note 166, at 323.

[202] *See infra* notes 286–293 and accompanying text.

[203] McKnight, *supra* note 69, at 12.

[204] *See* Sigurd Grava, *We're Not Yellow, We Go Anywhere*, 42 TRANSP. Q. 349, 351 (1988).

[205] *See id.* at 350.

[206] *See id.* at 351.

[207] *Id.* at 350.

[208] *See* Howard Husock, *Enterprising Van Drivers Collide with Regulation*, CITY J.,

ingly overnight, hundreds of industrious New Yorkers, primarily Caribbean immigrants who were accustomed to using jitneys in their native countries, stepped forward to fill the void by providing inexpensive van services.[209] By necessity, commuters were introduced to a new type of transportation service, which many preferred to public buses.[210] Within a short time, the vans developed a loyal customer base. When the strike ended, transit officials found that neither the entrepreneurial van drivers, nor their customers, had any intention of returning to the way things were before.[211]

A great deal is known about the operation of these vans because they are highly visible and provoke the wrath of public transit officials and their allies in elective offices.[212] They have been the subject of a number of studies conducted by curious social scientists, industry advocates, and opponents, as well as government officials struggling to decide how to deal with this popular, but essentially illegal, service.[213] In the discussion that follows, I supplement this body of knowledge with my own personal observations. Between 1996 and 1998, I represented several operators of van services in Brooklyn and Queens who were challenging the state and local laws that restrict their operations.[214] Through my affiliation with these individuals, I gained a great deal of invaluable personal knowledge about New York's dollar-van industry.[215] I was able to spend considerable time riding in the vans, an experience that enabled me to interview passengers and drivers and observe the service first-hand.

During the 1980s and 1990s, the van industry grew despite persistent efforts by authorities to suppress it.[216] While current estimates about the number of passengers who rely on the vans vary widely, all of them are

---

Winter 1996, at 60.

[209] *See id.*

[210] *Id.*

[211] *See id.*

[212] *See, e.g.*, Willie James, Letter to the Editor, *Commuter Vans Are Risky Business*, WALL ST. J., Mar. 25, 1997, at A19; Willie James, Letter to the Editor, *Commuter Vans "Steal" Riders*, WALL ST. J., July 23, 1997, at A19; Jim Zarrolli, *Commuter Van Wars* (NPR radio broadcast, June 2, 1998), LEXIS, Nexis Library, NPR File.

[213] *See generally* N.Y. CITY DEP'T OF CITY PLANNING, COMMUTER VAN SERVICE POLICY STUDY 5–21 (1997) [hereinafter VAN STUDY] (reviewing literature and summarizing study findings).

[214] For information about this well-publicized effort, see generally Editorial, *Driving the Poor Out of Business*, WALL ST. J., Mar. 3, 1997, at A18; Editorial, *Let the Vans Roll*, WALL ST. J., July 14, 1997, at A14; Anthony Ramirez, *Judge Rejects Most of Law on Commuter Van Licenses*, N.Y. TIMES, Mar. 24, 1999, at B4.

[215] There are three types of jitney services in New York City: "feeder vans that transport residents of a neighborhood usually to and from subway stations, commuter express vans which operate routes from the outer boroughs to Manhattan, and car services which serve intra-borough markets." N.Y. CITY METRO. TRANSP. AUTH., VAN AND CAR SERVICE ISSUES AFFECTING NYCTA SURFACE OPERATIONS 4 (1992) [hereinafter MTA STUDY]. This section focuses on feeder vans. Because they generally charge one dollar, *id.*, this Article refers to them as "dollar vans."

[216] *See* Husock, *supra* note 208, at 60–64.

substantial. The Interborough Alliance of Community Transportation, an informal van industry association that has approximately 500 members,[217] estimates that vans carry as many as 40,000 people per day.[218] In 1992, the New York Metropolitan Transportation Authority, which operates public transportation in the city, estimated that competition from van services cost it thirty million dollars in potential revenue per year.[219]

While the vast majority of van services operate without any official authorization, a few services have limited authority to operate a "commuter van service."[220] Commuter vans may neither accept street hails nor operate on bus routes.[221] Even a casual observer of the vans in action quickly will realize that authorized "commuter van services" routinely defy both prohibitions. Unregulated jitney service is illegal in New York City.[222]

Dollar vans operate exclusively in the outer boroughs.[223] Most of the dollar vans' customers rely on the vans as a substitute for public "feeder" bus service that links more remote residential neighborhoods and subway stations.[224] In addition, the dollar vans fulfill a number of other transportation needs, carrying passengers to suburban shopping areas, school, and work.

Although normally operating along informal, semi-fixed routes (frequently the bus routes that the law places off limits), dollar van service is extremely flexible. Unlike public buses, the vans do not have established pick-up and drop-off points.[225] Drivers accept street hails (again running afoul of the clear prohibition against such conduct)[226] and are generally

---

[217] *See* Aff. of Hector B. Ricketts, President, Queens Van Plan, Inc., and President, Interborough Alliance of Community Transportation, at 2, Ricketts v. City of New York, 688 N.Y.2d 418 (N.Y. Sup. Ct. 1999) (No. 97-102455) (on file with author).

[218] *See* Editorial, *Council on Road to Van-dalism*, N.Y. DAILY NEWS, Aug. 4, 1997, at 26; Editorial, *Thwarting a Van Driver*, N.Y. TIMES, June 26, 1997, at A26; Zarrolli, *supra* note 212.

[219] MTA STUDY, *supra* note 215, at 8.

[220] *See* VAN STUDY, *supra* note 213, at 1 (explaining that that there are 361 authorized vans in New York City); *Council on Road to Van-dalism*, *supra* note 218 (indicating that there are "an estimated 5,000 such [van] operations—of which a mere handful have been licensed").

[221] N.Y., N.Y. ADMIN. CODE §§ 19-502(p), 19-529.1(a)(2) (1999).

[222] *See* MTA STUDY, *supra* note 215, at 9 (explaining that "commuter van services comply with the same regulations as feeder vans").

[223] *See id.* at 5.

[224] *See id.*

[225] This became clear from my personal observations of the industry.

[226] Consider the statement of an owner of one of the van services in New York City:

> First, the sheer volume of passengers that we carry each day makes it impossible for every single one of them to call ahead and arrange a ride. Second, because mass transit is so unreliable, it would be impossible for our customers to predict ahead of time when our services would be needed.

Aff. of Henry B. Ricketts, *supra* note 217, at 10.

willing, for a nominal fee to provide door-to-door service upon request.[227] It is also not unusual for drivers to make specialized arrangements to serve particular passengers' needs. One of my former clients, for example, arranged to provide door-to-door service for night-shift nurses who otherwise would have lacked safe and reliable transportation home.[228] A passenger told me that she had arranged for a van driver to pick up her young daughter every morning and transport her to school.[229] Van drivers make similar arrangements to provide transportation for community groups.[230]

In addition to their flexibility, riders use the dollar vans because they are faster[231] and make far fewer stops than public buses.[232] Also, the number of vans in circulation far exceeds available buses, and many drivers operate late into the night, ensuring that vans arrive at frequent intervals and that customers need not wait long for service, even during off-peak hours.[233] When asked to compare the vans to bus service, passengers complain that the buses are slow and unreliable and assert that they can cut their commuting time in half—saving as much as two hours each day—by relying on vans rather than public bus service. One Queens resident explained:

> My sons have to be to school early. To get there on time, they would have to wake up an hour earlier if they took the bus. The bus goes through its whole route; it travels all over the place. The van takes half the time. They can jump on the van and go straight to school. If they depended on the bus, I worry that they wouldn't get to school on time. . . . My husband works in Manhattan. . . . He has to be to work at 4:30 in the afternoon. If he's late, he can forget his job. The bus only comes every so often. In the winter sometimes not at all.[234]

Another told me:

---

[227] *See, e.g.*, VAN STUDY, *supra* note 213, at 8 ("Vans will often bring patrons close to their houses."); Aff. of Hector B. Ricketts, *supra* note 217, at 7.

[228] Aff. of Arthur V. Cummins, President, Brooklyn Van Lines, Inc., and Vice President, Interborough Alliance of Community Transportation, at 10–11, Ricketts v. City of New York, 688 N.Y.2d 418 (N.Y. Sup. Ct. 1999) (No. 97-102455) (on file with author).

[229] Aff. of Rose-Ann Patterson, at 2, Ricketts v. City of New York, 688 N.Y.2d 418 (N.Y. Sup. Ct. 1999) (No. 97-102455) (on file with author).

[230] *See, e.g.*, Aff. of Rev. Paulette Shields, Pastor, Center of Hope Congregational Church, at 3, Ricketts v. City of New York, 688 N.Y.2d 418 (N.Y. Sup. Ct. 1999) (No. 97-102455) (on file with author) (discussing his church's use of vans).

[231] *See, e.g.*, VAN STUDY, *supra* note 213, at 8.

[232] *See id.*

[233] *See* Aff. of Arthur V. Cummins, *supra* note 228, at 11.

[234] Aff. of Lena Barnes, at 2, Ricketts v. City of New York, 688 N.Y.2d 418 (N.Y. Sup. Ct. 1999) (No. 97-102455) (on file with author).

> I use the vans because they are faster and more convenient than the buses. The vans come every few minutes, but the buses come only every fifteen or twenty minutes. There have been times, when I was waiting at the bus stop, and I saw four or five vans go by me. Still, in all that time, the bus did not arrive. Situations like these have lead me to rely exclusively on the vans for transportation. . . . I also take the vans because they are more flexible than the buses. In my experience, once a van fills up with passengers, the driver does not make any more stops. Everybody is guaranteed a seat. The bus make many stops along the road, even after all the seats are taken. This makes my trip long and more uncomfortable. . . . I save at least one hour commute time each day by taking the vans.. . . . Whenever I had to take the bus, I would have to leave my house thirty minutes earlier for work, and I would get home thirty minutes later.[235]

The demand for this alternative to public transportation is particularly strong in remote communities like Far Rockaway, Queens, where residents frequently perceive that public transportation has slighted them. As Lebert Lindsey, an elder in a Far Rockaway church, explained:

> The whole community needs the vans. We are twelve miles from Jamaica out here and we are on a peninsula . . . . Ours is a poor community . . . . Time is important, and anything you can do to save time puts you on the gaining side. The vans take less than half the time of buses. I know that our church members would get warnings and suspensions for coming late to work because of the buses. I see a bus every now and then, but they only run sporadically . . . . The bus drivers are not from our community; they don't live with our problems . . . . I don't see how this community could survive without local transportation that is as cheap and efficient as the vans.[236]

As Lindsey's comment illustrates, the dollar van industry's success is partially attributable to cultural factors.[237] Many van drivers and customers are Caribbean immigrants who became accustomed to relying on jitney service in their homelands.[238] Van passengers are comfortable with the van drivers because the drivers frequently live in their neighborhoods

---

[235] Aff. of Pauline Dawkins, at 2–3, Ricketts v. City of New York, 688 N.Y.2d 418 (N.Y. Sup. Ct. 1999) (No. 97-102455) (on file with author).

[236] Aff. of Lebert Lindsey, at 3–4, 5, Rickets v. City of New York, 688 N.Y.2d 418 (N.Y. Sup. Ct. 1999) (No. 97-102455) (on file with author).

[237] *See* VAN STUDY, *supra* note 213, at 8.

[238] *See id.*

and are thus attuned to the unique needs of their communities.[239] One van passenger described the service in the following glowing terms:

> The van drivers are really courteous. Sometimes when I go to shop, the van drivers will take my packages and put them in the front. They'll put strollers in the front for people with children. I have been in the vans when there has been a long line for the van. The driver makes sure that the elderly and anyone who has a child or is handicapped gets on the van and has a seat before anyone else could get on the van. The van drivers really try to make the passengers feel that the van first is theirs. They wait for you, and I have been driven home at night. Even though it was off the van route, the driver took me to my door.[240]

In contrast, van passengers frequently speak with derision of the service provided by public buses. For example, the passenger above continued:

> I have taken the bus occasionally. The bus drivers are really crude. I have seen them snap when passengers ask them questions. Often when I have been on the bus, the driver will start to drive before you get a seat. You lurch forward and could get hurt. Bus drivers won't even make sure that children are sitting before taking off. This is public transportation, but they aren't courteous enough to make sure that children are sitting down.[241]

Passengers express support for van services because they provide jobs for many who were laid off from work and/or were unable to find other gainful employment. As Lindsey explained,

> The vans also provide jobs for people. They are owner operated. For many drivers, . . . this is their only means of making a living . . . . When they were laid off or lost their jobs, they turned to the vans. This is how they feed their family and keep their children in school.[242]

---

[239] *See id.* ("The commuter vans are also seen as more sensitive to the needs of the local community than the city-subsidized bus service. The vans are often operated by local entrepreneurs and patronizing them is seen as a way of investing in the community....").

[240] Aff. of Sherry Lee-Sing, at 2, Ricketts v. City of New York, 688 N.Y.2d 418 (N.Y. Sup. Ct. 1999) (No. 97-102455) (on file with author).

[241] *Id.* at 2–3. Another rider commented, "At night, I particularly appreciate the flexibility and courteousness of van services. . . . Bus service is as different as night and day from this level of courtesy." Aff. of Lorna Neblett, at 3, Ricketts v. City of New York, 688 N.Y.2d 418 (N.Y. Sup. Ct. 1999) (No. 97-102455) (on file with author).

[242] Aff. of Lebert Lindsey, *supra* note 236, at 4–5.

Thus, while causing service disruptions and increasing the costs of doing business, New York City's sporadic enforcement sweeps targeting illegal van operations have done little to curb enthusiasm for the industry. If anything, enforcement of the laws prohibiting jitney operations contributes to a sense of solidarity between van drivers and passengers.[243] Lindsey continued:

> As important as the vans are, I think it is a bleeding shame to see the police harass them .... The police say the vans cannot run along the bus route, but where are they supposed to operate? All the major roads here are bus routes .... It is sad that it is illegal to do something that is so vital to our community.[244]

Even the vans' most ardent opponents have acknowledged their advantages. For example, in 1992, the New York Metropolitan Transportation Authority ("MTA"), which operates public bus service in New York City, commissioned a study to determine how to respond to the competitive threat posed by illegal car and van services operating in the city.[245] The study recommended increased enforcement efforts against the illegal operations.[246] Before reaching this conclusion, however, the MTA admitted that "[f]eeder vans are strong competitors with the Transit Authority's local bus routes. They appeal to riders because they often offer more frequent service, are faster, charge less, and provide a seated ride, even in rush hour periods."[247] The MTA further acknowledged that "commuter vans have the advantage of being more flexible than buses"[248] and that "many van riders perceive transit as a poor alternative."[249]

---

[243] For a general discussion of the factors motivating the phenomenon of support for illegal entrepreneurial activities in low-income African American communities, see Regina Austin, *"An Honest Living": Street Vendors, Municipal Regulations, and the Black Public Sphere*, 103 YALE L.J. 2119 (1994).

> [F]or some poor blacks, breaking the law is ... the only way to survive. Thus, what is characterized as economic deviance in the eyes of a majority of people may be viewed as economic resistance by a significant number of blacks .... [M]any blacks rightly understand that the line between the legal and the illegal in the area of economic activity is ephemeral and that the determination of the precise point at which the line is drawn is a matter of political struggle. Accordingly, blacks need to be in the thick of the battle, fighting for their interests. That means condoning, abetting, and sometimes even engaging in illegal activity. Blacks must be especially vigilant with regard to the local regulation of entrepreneurial activity, because the well-being of the black public sphere hinges upon it.

Id. at 2119–20.

[244] Aff. of Lebert Lindsey, *supra* note 236, at 5.

[245] MTA STUDY, *supra* note 215, at 1.

[246] *Id.* at 19.

[247] *Id.* at 7.

[248] *Id.* at 10.

[249] *Id.* at 7.

2. Miami's Jitneys

Jitney service is also well-established in Miami, Florida. Miami's jitney industry is in many ways unique, especially because jitneys have long been a legal component of the city's transportation market. Prior to World War II, minority entrepreneurs began offering jitney service to low-income neighborhoods that were under-served by the city's public transportation system.[250] These services provided "essential transportation to minority workers commuting to service jobs in downtown Miami and Miami Beach."[251] Prior to 1981, the City of Miami had issued operating certificates to three jitney services, all of which were required to operate on fixed, pre-established routes, when solicited by street hails.[252] In 1983, however, concerned that jitney services were siphoning passengers and revenues away from public Metrobus service, the county placed a moratorium on the consideration of any additional applications for jitney licenses pending a comprehensive policy study.[253] The county subsequently enacted an ordinance that prohibited jitneys from operating on any existing Metrobus or jitney route if the service would "result in serious negative impact on existing transit or jitney ridership."[254] The county further prohibited the operation of jitneys in "transit core corridors"—that is, within "'one-half mile sectors of land centered along routes where current Metrobus service is provided every half-hour or more frequently.'"[255] Although the moratorium was subsequently lifted to permit authorization of several new services, the county has not issued new certificates since 1986.[256]

The Florida legislature passed a law in 1989 that prohibited "local governments from regulating private passenger motor courriers engaged in *intercity* transportation service."[257] Under the statute, private operators could provide "intercity" services between various municipalities within metropolitan Miami-Dade County without a license.[258] The Miami area was inundated with unlicensed jitney services, including "both licensed certificate holders who expanded their operations to new unlicensed routes, and new independent owner-operators, operating entirely without

---

[250] *See* URB. MOBILITY CORP. & KPMG PEAT MARWICK, MIAMI JITNEYS 6 (Prepared for the Office of Private Sector Initiatives, Fed. Transit Admin., Sept. 1992) [hereinafter MIAMI JITNEYS].

[251] *Id.*

[252] *Id.*

[253] *See id.* at 8.

[254] *Id.* at 9.

[255] *Id.* (quoting Metro-Dade Transp. Admin., Jitney Policy Report, Nov. 1983).

[256] *Id.* at 10. Taken together, these provisions "effectively precluded any further jitney services, other than those grandfathered in under the 1981 ordinance." *Id.* The county did approve six new routes in 1986, but subsequently cancelled them. *Id.*

[257] *Id.* at 13.

[258] *Id.* at 14.

any certificates."[259] The legislature responded by passing "a corrective amendment in September 1990, limiting the statutory exemption to 'intercounty' transportation."[260]

Since that time, county officials have conducted periodic enforcement sweeps, issuing citations to drivers and impounding hundreds of vehicles.[261] These enforcement efforts, however, have done little to curb the operation of illegal jitneys.[262] To the contrary, unlicensed jitneys have continued to proliferate, providing an impetus for county policymakers to consider a compromise solution.[263] The competing interests have not yet been able to reach agreement on a way to better incorporate the jitneys into Miami's transportation network. One compromise proposal was developed by Miami's mayor, but it was defeated by a 6-1 vote of the Board of County Commissioners.[264]

Because the majority of jitneys in Miami-Dade County operate without authorization, it is difficult to determine the precise scope of the industry. Prior to 1991, Miami had issued operating certificates to twelve jitney services.[265] In the wake of Hurricane Andrew, the county issued twenty-one emergency certificates, all of which have since expired.[266] There are at least seven jitney services that lack any operating authority.[267] Due to a number of factors, including periodic enforcement sweeps and the transient nature of many of the illegal operations, the number of jitneys constantly changes.[268] A study prepared for the Federal Transit Authority ("FTA") estimated that in 1992 there were 393 jitneys operating in metropolitan Miami.[269] These jitneys carried between 43,000 and 49,000 riders per day, or between 946,000 and 1,078,000 riders per month—numbers equivalent to "23–27 percent of the current weekday Metrobus ridership at 183,000 and 18–20 percent of the current weekday public transit system ridership . . . ."[270]

The markets served by jitneys in Miami and New York are similar. As in New York, the Miami jitneys' customer base is comprised largely

---

[259] *Id.*

[260] *Id.* The legislature did "grandfather" all jitney services operating prior to January 1, 1990, but "due to an acknowledged scrivener's error, the exemption was applied only to 'intracity' transportation, with the result that Dade County regained authority to regulate over all private transportation services." *Id.* The Legislature unanimously passed a corrective amendment but the governor vetoed it. *Id.*

[261] *See id.* at 15.

[262] *See id.*

[263] *See id.* at 15, 18.

[264] *Id.* at 16–18.

[265] *Id.* In discussing the three jitney services operating before 1981, the study indicates that the services lease their permits to drivers and operators who pay a flat fee and assume operating costs. *Id.* at 6.

[266] *Id.* at 19.

[267] *See id.* at 20.

[268] *Id.*

[269] *Id.* at 20–21.

[270] *Id.* at 24.

of low-income workers. The FTA study found that almost 78% of jitney riders earned less than $20,000,[271] and nearly 44% earned less than $10,000, per year.[272] Many jitney riders are recent immigrants. Indeed, only 46% of riders surveyed reported speaking English as their primary language.[273] Miami residents' reasons for relying on jitneys parallel those offered in New York. Sixty-five percent of riders surveyed reported that they chose jitneys because they were faster than Metrobus service.[274] Twenty-five percent cited cost.[275] The Miami jitneys also arrive at more frequent intervals than buses.[276] Again paralleling New York, jitneys appear to have established a loyal customer base. A majority of jitney riders indicated they "always ride the jitney" for their transportation needs, while only thirty-one percent indicated they chose "whichever vehicle arrives first."[277]

The structures of the jitney markets in the two cities diverge somewhat. In New York, the dollar vans serve individuals with traditional "radial" commutes from residential neighborhoods in the outer boroughs to jobs in downtown Manhattan.[278] In Miami, on the other hand, the jitney routes tend to reflect the more modern commuting patterns predicted by spatial mismatch theorists. In other words, they serve workers who must "reverse commute" from Miami to outer suburbs or "cross-commute" between the surrounding suburban communities in Dade and Broward counties.[279] The fact that many jitney services entered the market as a result of the statutory loophole for intercity services created in 1989[280] further suggests that cross-commuting is prevalent. There is also anecdotal evidence that jitneys take passengers to locations that public transportation does not serve.[281]

C. Lessons Learned: The Promise of Jitneys

Both contemporary and historical evidence suggest that poor urban dwellers could benefit substantially from jitneys. The jitneys' appearance

---

[271] *Id.* at 28.

[272] *Id.* at Part II: Exhibits.

[273] *Id.*

[274] *Id.* at 28.

[275] *Id.*

[276] *Id.* (discussing an informal study conducted by the Miami Herald in April 1991, which found that jitneys arrived at more frequent intervals than Metrobuses).

[277] *Id.* at 27.

[278] I personally observed these service characteristics, and discussed the predominant commuting patterns with jitney riders and drivers during my representation of jitney operators.

[279] Broward County tackled the problem of regulating jitneys more recently. *See, e.g.*, Robert McClure, *Broward Sets Sights on Regulating Jitneys*, FT. LAUDERDALE SUN-SENTINEL, Dec. 9, 1998, at 4B.

[280] *See* MIAMI JITNEYS, *supra* note 250, at 14.

[281] Alfonso Chardy, *Jitneys Take Workers Where Buses Don't*, MIAMI HERALD, July 20, 1998, at 10A.

and remarkable success early in this century was a response, in large part, to conditions similar to those that currently impede the efforts of many poor Americans to gain economic self-sufficiency. Specifically, the prevailing system of public transportation (the street railway) was unable to serve adequately the transportation needs of the urban workforce.[282] The street car service limitations that spurred the development of jitneys closely parallel the problems with modern public transportation. Street cars were cumbersome, overcrowded, and slow.[283] They arrived at infrequent intervals, forcing passengers to wait for long periods and prolonging their commutes to work.[284] Furthermore, street cars were tied to fixed routes and thus were unable to tailor their services to passengers' demands.[285]

When jitneys appeared, they seemed to offer the perfect antidote to each of these complaints. Jitneys were much faster than street cars because they were smaller and made fewer stops.[286] The large numbers of jitneys in circulation, especially during rush hour, ensured that passengers need wait no longer than a few minutes to catch a ride to work.[287] Furthermore, jitney drivers could easily deviate from heavily traveled routes to meet the demands of individual customers.[288] Jitney drivers could shape their service in many ways to fit niche markets or to comport with their own work schedules.[289] Finally, jitneys had the added benefit of providing an income for thousands of men who otherwise would have faced economic dislocation.[290]

The very factors that attracted passengers to jitney service during the early 1900s could also prove beneficial to welfare recipients struggling to enter the workforce today. The relative speed of jitney service makes it an attractive alternative to commuting long distances via public transportation. If modern-day jitneys could replicate the relative time advantages they enjoyed during their heyday in the early part of the century, their availability might well tip the balance for some welfare recipients in favor of accepting jobs in remote suburban locations. Jitneys' flexibility might serve as the perfect antidote to the problems that make public transportation ill-suited to serve the needs of low-skilled and low-income inner-city residents. If jitney service could adapt to market demand today as well as it did in 1916, we could expect entrepreneurs to create "niche"

---

[282] *See supra* notes 168–174 and accompanying text.
[283] *See supra* notes 168–174 and accompanying text.
[284] *See supra* notes 168–174 and accompanying text.
[285] *See supra* notes 168–174 and accompanying text.
[286] *See supra* notes 173–176 and accompanying text.
[287] *See supra* notes 173–176 and accompanying text.
[288] *See supra* notes 173–176 and accompanying text.
[289] *See supra* notes 173–176 and accompanying text. The evidence indicates that this specialization was quite common.
[290] *See supra* note 181 and accompanying text.

services that efficiently transport workers to dispersed suburban locations.

The parallels between 1916 and today are far from perfect. Jitneys' brief triumph occurred prior to (or at least at the cusp of) the widespread dispersal of population and employment.[291] Passengers generally lived and worked near central-city areas.[292] As such, the geographic scope of the jitneys' service was generally quite limited. Indeed, the jitneys' advantage over street cars was in trips of less than two and one-half miles in length.[293] If modern-day jitney service were merely to replicate this earlier model, it would do little to address the main transportation needs of the urban poor. On the other hand, if modern jitneys were to take advantage of their inherent flexibility to respond to market forces by providing reliable rides to dispersed suburban job locations, their reintroduction could be an important component of current welfare reform efforts.

Modern experience with illegal jitneys provides support for the latter conclusion. The very fact that jitney services have sprung into existence despite severe legal impediments provides powerful evidence that they satisfy a serious need. Moreover, empirical evidence suggests that the legal prohibitions that force certain industries "underground" tend to have a particularly detrimental effect upon traditionally marginalized groups—minorities, women, and the very poor.[294] As such, "underground economies provide comparatively greater opportunities for women and other groups traditionally subject to discrimination."[295] The jitney services in New York and Miami fit this pattern. Jitneys operate in the very neighborhoods that traditionally have suffered from a lack of adequate transportation, i.e., economically isolated minority neighborhoods in large urban centers, and are operated by entrepreneurs from those same communities.[296]

Furthermore, the proliferation of jitneys in cities like New York and Miami represents a response to a significant problem currently inhibiting welfare-reform efforts: the failure of legal transportation services to meet the demands of the urban poor.[297] Where they operate illegally in large

---

[291] *See supra* notes 164–167 and accompanying text.

[292] *See supra* note 22 and accompanying text.

[293] *See* Eckert & Hilton, *supra* note 164, at 296.

[294] For an excellent discussion of the role of the informal economy in the developing world, see generally HERNANDO DE SOTO, THE OTHER PATH: THE INVISIBLE REVOLUTION IN THE THIRD WORLD (1989).

[295] George L. Priest, *The Ambiguous Moral Foundations of the Underground Economy*, 103 YALE L.J. 2259, 2273 (1994); *see also id.* at 2259, 2260–62; Alejandro Portes and Jósef Böröcz, *The Informal Sector under Capitalism and State Socialism: A Preliminary Comparison*, SOC. JUST., Fall-Winter 1988, at 21–22 (observing that "members of discriminated ethnic and racial groups tend to be overrepresented as workers in informal enterprises").

[296] *See, e.g.*, VAN STUDY, *supra* note 213, at 8.

[297] *See supra* notes 225–249, 274–277 and accompanying text.

numbers, jitneys have a proven track-record of serving low-income workers. Riders report that without jitneys they would lack reliable transportation.[298] Jitneys are faster (cutting some commute times in half) and more reliable (arriving at more frequent intervals) than public bus service.[299] Jitneys are regularly available during off-peak hours of operation, when bus service is either sporadic or non-existent. As one rider observed:

> My son also uses van services on a daily basis to go to work at the Red Lobster in Valley Stream. He works in the afternoon and needs a dependable means of transportation. Because he goes to work during off-peak hours, he has to wait [a] long time for the bus to arrive. He has been late to work because he waited so long to catch the bus. The van services, however, are readily available all day long. I know if he takes a van, he will be on time for work.[300]

The flexible nature of the service is invaluable to many customers, particularly women concerned for their safety.[301] One woman explained the value of the "door-to-door" dollar van service as follows:

> Because I usually arrive home from work late at night, I am concerned about my safety. If I take the bus, I have to walk several blocks to get to my house. The streets in my neighborhood are not well lit . . . . One of my neighbors was mugged a block away not long ago. For an extra dollar, the van driver will take me [ ] directly to my gate and make sure that I enter safely. I take advantage of this door-to-door service option every night, never fail.[302]

Finally, jitneys sometimes go where public buses do not, enabling their low-income riders to maintain jobs that would otherwise be unreachable.[303]

---

[298] *See supra* notes 225, 244 and accompanying text.

[299] *See, e.g.*, VAN STUDY, *supra* note 213, at 8; *see also* Schwantes, *supra* note 166, at 312.

[300] Aff. of Lorna Neblett, *supra* note 241, at 4.

[301] *See, e.g.*, John Tierney, *Man With A Van*, N.Y. TIMES, Aug. 10, 1997, § 6 (Magazine), at 22 ("'When I'm working late, it's very scary waiting in the dark for the bus and then walking the three blocks home. With Vincent's van, I get home in less than half an hour. He takes me right to the door and waits until I get inside.'") (quoting Cynthia Peters, nurse and van customer).

[302] Aff. of Lorna Neblett, *supra* note 241, at 3

[303] *See* Chardy, *supra* note 281 (discussing "the lack of county buses to or from Miami International Airport—a major employment center—after 10:30 p.m. or before 6:30 a.m. That means workers on very late or very early shifts cannot get to work unless they have cars or use chartered bus or van services.").

Could these service characteristics be replicated elsewhere? In New York and Miami, the jitneys constitute a "home-grown" industry operated primarily by low-income entrepreneurs who tailor their services, for reasons of community solidarity as well as economics, to fit the needs of their neighbors.[304] Many drivers began operating jitneys because they perceived a need in their communities for better transportation. As such, the jitneys tend to fill in the gaps left by public transportation—providing the type of service that public buses cannot, or will not, provide. If permitted, entrepreneurs in other cities—"bootstraps capitalists" who understand their clientele's unique needs because they are from the same neighborhood—could fill the void left by public transportation by providing jitney services.

Jitneys could go a long way toward filling the gaps left by current efforts to address the transportation woes facing the urban poor. The proliferation of jitneys providing inexpensive, round-the-clock, flexible, reliable, and speedy transportation service that extends beyond the reach of current public transit networks would benefit thousands of low-wage workers who currently lack a reliable ride to work. Jitney services could respond to market demand in other cities by serving suburban job centers that are essentially unreachable by conventional mass transit, helping thousands of welfare recipients who face the daunting prospect of long "reverse commutes" to low-paying entry-level jobs. While, thus far, the jitney services that have sprung up despite legal obstacles frequently serve immigrants accustomed to using jitneys, removing legal impediments could lead to an expansion of the services in other poor communities.

Furthermore, because entry into the jitney market requires little formal training or capital investment, jitneys could also provide employment opportunities for current welfare recipients.[305] Especially in New York, there is ample evidence that many operators initially began operating jitneys when they lost another job.[306] Many drivers argue that jitney services constitute an economic lifeline that enables them to stay afloat

---

[304] *See* VAN STUDY, *supra* note 213, at 8; Aff. of Arthur V. Cummins, *supra* note 228, at 10–11 ("Every night, I pick up several groups of nurses from their jobs late at night and drive them home. Right now, there are twenty-six nurses who rely on my service."); Aff. of Melvipher "Pat" Harvey, Owner, Pat Carrier and Sons, Inc., at 3, Ricketts v. City of New York, 688 N.Y.2d 418 (N.Y. Sup. Ct. 1999) (No. 97-102455) (on file with author) ("Pat Carrier is dedicated to helping the community thrive. We work with three or four pastors from local churches. At their request, we often take senior citizens to the doctor or take children on field trips."); Aff. of Newland Nicholson, at 2, Ricketts v. City of New York, 688 N.Y.2d 418 (N.Y. Sup. Ct. 1999) (No. 97-102455) (on file with author) ("I go out of my way for my passengers. If it's raining or snowing outside, I drop them off at their gate. If it's dark, I drop them off at their gate. All the van drivers will do that.").

[305] *See infra* note 374 for a discussion of the potential costs of entering the jitney market.

[306] *See, e.g.*, Aff. of Everton Daswell, at 2, Ricketts v. City of New York, 688 N.Y.2d 418 (N.Y. Sup. Ct. 1999) (No. 97-102455) (on file with author).

financially and avoid welfare.[307] In both Miami and New York, jitneys have proven that they not only *take people to work*, but they also *put people to work*. These facts alone should lead legislators to question whether the current legal regime has become an anachronism.

III. Regulatory Impediments to Informal Jitney Services

One major obstacle stands in the way of jitney services: jitneys are, for all intents and purposes, illegal in most states in this country.[308] Jitneys never recovered from early legislative setbacks. Even today, a complex maze of federal, state, and local regulations work together to keep them off the road and out-of-bounds for customers seeking a reliable ride to work.[309] As with any legal issue that is primarily local, the laws regulating private transportation services are far from uniform.[310] In this case, the task of describing diverse laws is made more difficult by the fact that many jurisdictions prefer the "death by a thousand cuts" form of regulation to outright bans on jitney services.[311] To understand how the law might be changed to unleash jitney services' potential—and to enlist low-income entrepreneurs like those operating in New York and Miami in welfare reform efforts—it is necessary to understand how the law makes many Americans strangers to jitney services.

A. Federal Impediments

The regulation of local transportation services has traditionally been, and continues to be, the province of state and local governments. Although no federal law actually prohibits entrepreneurial efforts to operate jitney services in the United States, the federal government has not re-

---

[307] *See, e.g., id.* ("If I could not drive a van for a living, I don't know how I would support my family."); Aff. of Dennis Harry, President, Rockaway Commuter Line, Inc., at 5, Ricketts v. City of New York, 688 N.Y.2d 418 (N.Y. Sup. Ct. 1999) (No. 97-102455) (on file with author) ("Most [of his drivers] would never seek public aid; they would rather work than seek welfare."); Aff. of Melvipher "Pat" Harvey, *supra* note 304, at 5 ("One of my drivers was earning $25 each day. Now with the income he's earned driving, he was able to buy a home for his wife and children. That makes me feel good about my company. I have helped a man achieve the American Dream."); Aff. of Tivy Russell, at 2, Ricketts v. City of New York, 688 N.Y.2d 418 (N.Y. Sup. Ct. 1999) (No. 97-102455) (on file with author) ("When I worked in construction, it paid well. However, in construction, sometimes you work and sometimes you don't . . . . I started driving vans because I needed something more dependable to support my family."); *see also* Austin, *supra* note 243, at 2123 (discussing the importance of another "underground" industry—street vending—in reducing black unemployment).

[308] *See* Frankena & Paulter, *supra* note 162, at 25; Daniel B. Klein et al., Curb Rights: A Foundation for Free Enterprise in Urban Transit 107–10 (1997) (discussing how property rights could resolve the problems of free market transit that have plagued the few metropolitan areas that do allow jitneys).

[309] *See infra* notes 312–366 and accompanying text.

[310] *See infra* notes 323–325 and accompanying text.

[311] *See infra* notes 336–366 and accompanying text.

mained purely agnostic about state and local transportation policy. To the contrary, beginning with the 1964 Urban Mass Transit Act, Congress indicated its preference for centralized public transportation systems.[312] Since that time, Congress has provided hundreds of billions of dollars in subsidies for mass transportation projects.[313]

As is often the case, these federal subsidies come with strings attached. Congress requires recipients of federal transportation funds to adopt generous protection policies for unionized public transit workers. Specifically, section 13(c) of the Mass Transit Act requires entities receiving such funds to shield transit workers against the negative impacts of competition.[314] The Department of Labor has determined that compliance with section 13(c) requires entities receiving federal transportation funds to enter into a collective bargaining agreement, the "Model Section 13(c) Agreement for UMTA Operating Assistance," with transportation employees represented by unions.[315] Under the terms of the Model Agreement, when a recipient of federal transportation funds makes *any* change that places any employee "in a worse position with respect to compensation," it must pay him a "displacement allowance" equal to his previous salary and benefits.[316] This entitlement does not terminate until the employee secures employment with compensation equal to or exceeding his previous employment or six years following the displacement or dismissal, whichever comes first.[317] Proponents of competition claim that, as interpreted, section 13(c) provides unions with a powerful political weapon to prevent any effort to introduce privatized mass transportation services or to subject public transportation systems to competition.[318] While it is not clear whether legislative changes that allow private services such as jitneys to operate would trigger the statutory guarantees, budget-conscious policymakers have to be on guard against the possibil-

---

[312] Pub. L. 88-365, 78 Stat. 302 (1964) (originally codified at 49 U.S.C. §§ 1601–1621 (1988), recodified at 49 U.S.C. §§ 5301–5330, 5332–5338, 10531 (1994)) (also known as the Federal Transit Act).

[313] John Walters, *Bus-jacking the Revolution*, 75 POL'Y REV., Jan./Feb. 1996, at 8 (reporting that since 1964, the "government has showered mass transit projects with $200 billion in subsidies"); *see also* Cy Malloy, *Transportation Issues Remain on Track*, CONCRETE PRODUCTS, Sept. 20, 1998, at 57 (noting that Congress appropriated an additional $42 billion for public transportation projects in the 1998 Transportation Equity Assistance Act for the Twenty-First Century).

[314] Pub. L. 88-365, § 13(c), 78 Stat. 302 (1964) (codified at 49 U.S.C. § 5333 (1994)); *see also Walters*, *supra* note 313 (noting that section 13(c) of the 1964 Federal Transit Act "stipulates that any public transit worker 'negatively impacted' by competition may receive six years of salary and benefits").

[315] MODEL SECTION 13(C) AGREEMENT FOR UMTA OPERATING ASSISTANCE (on file with author). The American Public Transit Association and labor organizations representing public transportation workers agree that the terms of the agreement represent "fair and equitable" labor conditions. *Id.*

[316] *Id.* § 7(b).

[317] *Id.* §§ 6(a), 7(a).

[318] *Cf.* Walters, *supra* note 313.

ity. For example, section 13(c) forced Indianapolis Mayor Stephen Goldsmith to scrap his plans to permit independent, low-income entrepreneurs to operate van services in competition with city buses.[319]

B. State and Local Impediments

Most of the regulations that directly restrict the operation of private passenger transportation services, including jitney services, are found in state statutes and local ordinances.[320] Many of these restrictions represent the vestiges of outdated anti-jitney legislation. For example, in 1994, a federal district judge invalidated a Houston ordinance that prohibited the operation of jitneys with a seating capacity of fewer than fifteen passengers within city limits.[321] The court found that the "intended effect of the ordinance," which was enacted by referendum in 1924, "was to 'classify' jitneys out of business" in order "to protect streetcar companies from competition."[322]

Like the anti-jitney laws enacted in the early decades of this century, the restrictions that remain on the books today employ a variety of methods to "'classify' jitneys out of business."[323] Many jurisdictions prohibit jitneys altogether, either expressly[324] or by implication.[325] Jurisdictions that fall into the latter category often prohibit private companies from providing group passenger transportation services except in the most limited circumstances, such as services operated by hotels, tour buses, and airports.[326] Other jurisdictions permit limited "commuter van" or "shuttle bus" services to operate, but reduce their attractiveness as a commuting option by mandating that customers prearrange pick-up and drop-off times, and by prohibiting the services from offering rides to individuals who hail them from the street.[327] The few jurisdictions that al-

---

[319] *Id.*

[320] *See* MIAMI JITNEYS, *supra* note 250, at 1.

[321] Santos v. City of Houston, 852 F. Supp. 601, 609 (S.D. Tex. 1994) (holding that the ordinance violated the Sherman Antitrust Act, and the Equal Protection and Due Process Clauses of the federal Constitution).

[322] *Id.* at 603, 608.

[323] *Id.* at 608.

[324] *E.g.*, KAN. CITY, MO., CODE OF ORDINANCES ch. 76, art. II, § 76-43 (1999) ("No person shall drive, run or operate any jitney along or upon any street within the city at any time.").

[325] For example, some cities require all private transportation services to charge by metered fare, effectively precluding the operation of jitneys carrying unrelated passengers. *See, e.g.*, BATON ROUGE, LA., CODE OF ORDINANCES tit. 10, ch. 3, § 10:208 (2000). Others simply do not provide for the authorization of jitney services. *E.g.*, ATLANTA, GA., CODE OF ORDINANCES ch. 162, art. II, § 31 (2000) ("The following classifications of vehicles for hire are established: (1) Taxicabs; (2) Animal-drawn vehicles; (3) Limousines; (4) Extended Limousines; (5) Vans; and (6) Sedans.").

[326] *See, e.g.*, *supra* note 325.

[327] *See, e.g.*, N.Y., N.Y., ADMIN. CODE § 19-502(p) (1996); LANSING, MICH., CODIFIED ORDINANCES ch. 872.01 (1999).

low jitneys to exist legally generally require jitney providers to operate along fixed, franchised routes or in specified zones.[328] These restrictions deprive jitneys of the flexibility that gives them much of their competitive advantage by preventing jitneys from tailoring their services to meet the needs of urban workers struggling to reach dispersed suburban jobs.[329] Other jurisdictions prohibit private transportation services from operating on major thoroughfares, at least those that serve as public bus routes.[330]

Just as early anti-jitney legislation was designed to protect the revenues of streetcar services, contemporary anti-jitney laws promote the goal of shielding public transportation, especially public bus service, from private competition. In addition to placing public bus routes off-limits and otherwise restricting private services so as to eliminate any competitive advantage, most jurisdictions require all new transportation services to secure a "certificate of public convenience and necessity."[331] These requirements give public transportation authorities virtual veto-power over any new entrant that poses a competitive threat.[332] To secure the required certificate, the applicant must prove the service is something that the public as a whole needs and not something that only a portion of it desires.[333] The applicant thus bears the burden of rebutting evidence, usually submitted by existing public transportation providers who are entitled to intervene in the proceedings,[334] that the existing providers not only do not serve a public need, but also that they *could not be made to satisfy that need.*[335]

---

[328] *See, e.g.*, CHICAGO, ILL., MUN. CODE § 9-112-480 (1997); HOUSTON, TEX., CODE OF ORDINANCES § 46-354(a)–(e) (2000); L.A., CAL., MUN. CODE § 80.36.8 (1997).

[329] *See, e.g.*, CHICAGO, ILL., MUN. CODE § 9-112-480 (1997); HOUSTON, TEX., CODE OF ORDINANCES § 46-354(a)–(e) (2000); L.A., CAL., MUN. CODE § 80.36.8 (1997).

[330] *E.g.*, DADE COUNTY, FLA., METRO. CODE ch. 31, § 103(g)(4) (2000); N.Y., N.Y., ADMIN. CODE § 19-529.1(a)(2) (1999).

[331] William K. Jones, *Origins of the Certificate of Public Convenience and Necessity: Developments in the States, 1870–1920*, 79 COLUM. L. REV. 426, 427–28 (1979); *see also* 13 AM. JUR. 2D *Carriers* § 125 (2000) ("In many states there are statutes which require common carriers by motor vehicle to obtain a certificate declaring that the public convenience and necessity require such operation."); CHICAGO, ILL., MUN. CODE § 4-348-040 (1993); L.A., CAL., MUN. CODE § 71.12 (1996); 52 PA. CODE § 41.14 (1997); William B. Tye, *The Economics of Public Convenience and Necessity for Regulated Utilities*, 60 TRANSP. PRAC. J. 143, 143 (1993) (stating that firms are protected from the threat of competition in exchange for agreeing to comply with certain regulation constraints).

[332] *See* 52 PA. CODE § 41.12 (1996) ("The act provides the Commision with the discretion to determine the amount of competition which best serves the public interest.").

[333] *See* 13 AM. JUR. 2D *Carriers* § 130 (2000).

[334] Jones, *supra* note 331, at 427.

[335]

> A certificate should be granted only when the existing transportation facilities do not, and cannot be made to, meet the demands of public convenience .... In a proceeding to secure a certificate of public convenience and necessity for common carrier service by motor vehicle, the burden of showing the requisite public convenience and necessity, the inadequacy of existing transportation facilities or service, and that the applicant is a person of the character and responsibility to

The requirement that individuals seeking to enter the transportation business first secure a certificate of public convenience and necessity is a classic regulatory entry barrier.[336] Its practical (and intended) effect is to protect existing providers from competition.[337] One long-accepted justification for the requirement is the need for regulatory authorities to prevent "ruinous competition" among providers.[338] As public choice theory teaches, repeat players in the regulation game tend to "capture" the regulators.[339] "[T]he entrepreneur seeking entry generally must back his judgment with substantial resources, whereas the regulatory body risks nothing by denying entry and may indeed protect itself against troublesome problems of administration by protecting a familiar (if obsolete) incumbent."[340] Thus, even the best efforts and most fervent arguments of a would-be entrant tend to fall on deaf ears, regardless of their validity.

The laws restricting the operation of private van services in New York City vividly illustrate the legal roadblocks facing would-be entrepreneurs hoping to operate jitney services. In 1993, the state of New York passed legislation authorizing New York City to assume responsibility for regulating passenger van service within its boundaries.[341] The New York City Council took advantage of the invitation and passed a local law regulating van services.[342] Individuals must apply for authorization to operate a "commuter van service" within city limits.[343] The local law defines a commuter van as "a commuter van service . . . carrying passengers for hire in the city duly licensed as a commuter van by the Commission and not permitted to accept hails from prospective passengers in the street"[344] and that may operate only "on a pre-arranged regular daily basis."[345] The law further prohibits commuter vans from picking up or discharging passengers on any road used as a public bus route, barring access to virtually every major street in the city.[346]

An applicant for this limited authorization to operate a "commuter van service" bears the burden of proving that the proposed service "will

---

whom such certificate should be issued, is upon the applicant.

13 AM. JUR. 2D *Carriers* § 132 (2000) (citations omitted).

[335] *See* Tye, *supra* note 331, at 143.

[337] *See* Jones, *supra* note 331, at 427 ("[T]he essence of the certificate of public convenience and necessity is the exclusion of otherwise qualified applicants from a market.").

[338] Ford P. Hall, *Certificates of Convenience and Necessity*, 28 MICH. L. REV. 107, 108 (1929); *see also* Jones, *supra* note 331, at 428.

[339] *See, e.g.*, Jones, *supra* note 331, at 515.

[340] *Id.*

[341] N.Y. TRANS. L. § 80(5)(a) (McKinney 1993).

[342] Court Decisions, N.Y. L.J., Mar. 24, 1999, at 27 (explaining provisions of Local Law 115).

[343] N.Y., N.Y., ADMIN. CODE § 19-504.2(a) (1993).

[344] N.Y., N.Y., ADMIN. CODE § 19-502(p) (1996).

[345] *Id.* § 19-502(q).

[346] *See id.* § 19-529.1(a)(2).

be required by the present or future public convenience and necessity."[347] The law does not specify how an applicant might go about making such a showing, but applicants generally collect statements from potential customers indicating a need for their service.[348] The law provides opponents of the service the opportunity to rebut an applicant's effort to make the requisite "public convenience and necessity" showing. The city's Department of Transportation must provide for public notice and comment on the application as well as directly notify the New York Metropolitan Transportation Authority when an application is filed.[349] If an application is "protested by a bus line operating in the city," the Department of Transportation must also consider "the adequacy of the existing mass transit and mass transportation facilities" and "the impact that the proposed operation may have on any existing mass transit or mass transportation facilities."[350]

This system vests absolute discretion in the regulatory authorities.[351] The law neither provides guidance about how the Department of Transportation should make the requisite "public convenience and necessity" determination,[352] nor provides direction about how to evaluate the "adequacy of existing mass transportation."[353] In one case, an applicant submitted 938 support statements indicating that the proposed service was desperately needed to augment inadequate bus service, yet the city council never acted on the application.[354] The authority charged with issuing the license, the New York City Taxi and Limousine Commission, can deny the application even if the Department of Transportation finds that the service is necessary *and* that public transportation is inadequate.[355] Alternatively, the law authorizes the Taxi and Limousine Commission to refuse to act for 180 days, in which case the application is deemed denied.[356] City authorities are at no point required to provide a disappointed

---

[347] *Id.* § 19-504.2(e)(1).

[348] *See, e.g.*, Aff. of Arthur V. Cummins, *supra* note 228, at 5.

[349] N.Y., N.Y., ADMIN. CODE § 19-504.2(e)(3) (1993).

[350] *Id.*

[351] Technically, an unsuccessful applicant can ask a state court to review the city's decision. N.Y. C.P.L.R. art. 78 (McKinney 2000). Relief will be forthcoming, however, only if the court finds that the local authority's decision to deny an application constituted an abuse of discretion. The city is not required to provide any record explaining its decision, making it virtually impossible for a disappointed applicant to make such a showing. If the Taxi and Limousine Commission exercises its authority simply to do nothing, the court is left with nothing to review.

[352] N.Y., N.Y., ADMIN. CODE § 19-504.2(e)(1) (1993).

[353] *Id.* § 19-504.2(e)(3)(a).

[354] *See* Aff. of Arthur V. Cummins, *supra* note 228, at 5; Editorial, *Thwarting a Van Driver*, N.Y. TIMES, June 26, 1997, at A26; Editorial, *Let the Vans Roll*, WALL ST. J., July 14, 1997, at A14. Under intense political pressure and facing a lawsuit by the disappointed applicant, the city council struck a deal to authorize 40 vans. *See* Aff. of Arthur V. Cummins, *supra* note 228, at 10.

[355] *See* N.Y., N.Y., ADMIN. CODE § 19-504.2(e)–(f) (1993).

[356] *See id.* § 19-504.2(f)(1).

applicant with a record of their decision.[357] Finally, until recently, the city council had the power to veto any decision of the Taxi and Limousine Commission to grant an application for a commuter van service.[358]

Since the city assumed regulatory responsibility in 1994, virtually all applications for limited "commuter van service" licenses have been denied.[359] In some cases, the applicant successfully negotiated the administrative process, convincing the New York City Department of Transportation that the proposed service was "necessary" and that mass transportation was "inadequate."[360] Under pressure from unions representing public transportation workers, however, the New York City Council exercised its now-defunct authority to veto approval of the application.[361] The city has authorized approximately 300 commuter vans,[362] but most of these received their licenses from the State Department of Transportation prior to 1994.[363]

Even if the applicant is successful, securing authorization proves of little value to individuals operating van services in New York City because the operating restrictions placed upon commuter van services prevent them from legally providing the services their customers need and demand.[364] As a result, most authorized providers operate in clear derogation of at least two of the limitations placed upon them: vans accept street hails and pick up and discharge passengers on bus routes.[365] By operating in this fashion, the dollar vans manage to stay afloat financially and provide a valuable service. They also incite the wrath of public transportation officials and their political allies, and expose themselves to regular traffic citations and vehicle impoundments.[366]

---

[357] *See id.* § 19-504.2(f).

[358] *See id.* § 19-504.2(f)(3). A state trial judge recently invalidated this provision as *ultra vires*; the decision is on appeal. *See* Giuliani v. Council of City of New York, 688 N.Y.S.2d 413 (N.Y. Sup. Ct. 1999).

[359] *See* Aff. of Hector B. Ricketts, *supra* note 217, at 3.

[360] *See* Aff. of Arthur V. Cummins, *supra* note 228, at 5; Aff. of Hector B. Ricketts, *supra* note 217, at 6.

[361] *See, e.g.*, *Council on Road to Van-dalism*, *supra* note 218; *Dream On*, WALL ST. J., July 21, 1997, at A22 (discussing the city council's decision to "veto" Brooklyn Van Line's application for authorization to operate 40 commuter vans).

[362] VAN STUDY, *supra* note 213, at 3.

[363] Aff. of Hector B. Ricketts, *supra* note 217, at 3. State law requires the city to reissue "grandfathered" authorizations to these services. N.Y. TRANSP. LAW § 80(5)(a)(1)(iii) (McKinney 2000).

[364] *See* Aff. of Arthur V. Cummins, *supra* note 228, at 12–13 (discussing the restrictions and stating that "the current regulatory regime makes our service largely an outlaw activity"); Aff. of Hector B. Ricketts, *supra* note 217, at 9–10 (same).

[365] *Supra* note 228; Aff. of Arthur V. Cummins, *supra* note 228, at 12 ("The bus route prohibition not only increases traffic in residential areas; it also makes it impossible to provide the type of quality service that our passengers demand."); Aff. of Dennis Harry, *supra* note 307, at 6 ("The rules not allowing us to pick up or drop off passengers on bus routes are very difficult. Rockaway is a peninsula surrounded by the Bay and the ocean. The only main street . . . is a bus route. People do not like to go down . . . the other streets because it's so unsafe.").

[366] One observer notes:

V. A MODEST PROPOSAL FOR LEGAL REFORM

The notion that jitneys could fill in the gaps in public transportation that currently impede welfare-reform efforts is consistent with policies that many states promote, including policies that encourage welfare recipients to become transportation providers—adopted with apparent disregard for (or perhaps ignorance of) the laws that preclude such efforts.[367] Of course, lawmakers should not abdicate responsibility for regulating private passenger transportation services. Given concerns about passenger safety, the government has a legitimate interest in regulating such services. In light of the evidence that jitneys might provide the very type of transportation service that inner-city residents desperately need, the wisdom of keeping them off the streets is questionable.

My proposals for legal reform, therefore, are modest and straightforward. First, lawmakers should legalize jitney services by repealing laws that prohibit or restrict them and enact in their place laws that are more narrowly tailored to address legitimate public health and safety concerns. Second, given the limitations inherent in even the best public transportation systems, lawmakers should de-couple the regulation of private transportation services from policies designed to preserve and enhance public transportation. Jitneys should be viewed as a complement, not a threat, to public transportation.

A. Direct Impediments to Jitney Operations

Jitneys in New York and Miami manage to provide a valuable service despite laws that essentially prohibit their operation. This situation, however, is far from ideal from the perspective of either the jitney operators or the public. The legislative prohibitions stifle the entrepreneurial impulses of many would-be operators, keeping them off the streets altogether and depriving residents of a needed service. Those who choose to operate do so under the constant threat of legal sanction.[368] Furthermore, van operators may have difficulty securing financing to purchase new equipment or expand their service because investment in an illegal business is viewed as risky by traditional sources of capital.

Legal restrictions that force jitneys into the underground economy also hinder the government's ability to enforce legitimate health and

---

> Van drivers face the constant prospect of being cited by the police, and their vans seized, for providing the service that their customers demand. When this happens, passengers are left stranded by the side of the road, and drivers and service owners must spend a great deal of time and money defending against the charges.
>
> Aff. of Hector B. Ricketts, *supra* note 217, at 11.

[367] *See, e.g.*, FLA. STAT. § 445.025(1) (2000).

[368] *See* Aff. of Hector B. Ricketts, *supra* note 217, at 11.

safety regulations. Illegal jitney services generally operate without adequate liability insurance because a government-issued authorization is often a prerequisite for policies covering vehicles for hire.[369] Furthermore, because operators are subject to criminal sanctions simply by virtue of the fact that they are on the street, they have little incentive to provide adequate driver training or, in some cases, to invest in safe and reliable vehicles.[370] Finally, laws prohibiting certain forms of service, such as bans on accepting street hails, may lead drivers to operate recklessly[371] to avoid detection, sacrificing passenger safety to avoid criminal sanction. Due to these safety concerns, lawmakers cannot responsibly enlist jitney services in the welfare reform effort while legal restrictions prohibiting their operation remain on the books.

These problems are fairly easily rectified. In recognition of the valuable service that jitneys could provide, especially for low-income workers, lawmakers should legalize them.[372] In some jurisdictions, this means repealing laws that prohibit their operation altogether. In others, the law must be amended to recognize jitneys as a legal form of transportation service and provide for their authorization by the appropriate regulatory authority. Alternatively, lawmakers could eliminate operating restrictions that prevent existing forms of transportation services from legally providing the informal, flexible, unscheduled service that welfare recipients need to get to work.[373]

In place of these restrictions, lawmakers should adopt and enforce regulations that more directly address legitimate regulatory responsibilities. Concerns about passenger safety, for example, can be addressed through more narrow measures, including reasonable liability insurance

---

[369] *See, e.g.*, VAN STUDY, *supra* note 213, at 8–9 (discussing allegations that jitneys are unsafe and uninsured).

[370] Many of the operators in New York insist that concern for their passengers and their reliance on the vans as their soul source of income lead them to invest in safe equipment. *See, e.g.*, Aff. of Dennis Harry, *supra* note 307, at 4, 5; Aff. of Hector B. Ricketts, *supra* note 217, at 5. For an explanation of why informal norms and community ties might lead to such a result, see generally ROBERT ELLICKSON, ORDER WITHOUT LAW 123–264 (1996).

[371] Many commentators have criticized jitneys as being dangerous. *See* William Booth, *Miami's Jitney War: Entrepreneurs Drive Bus Riders Away*, WASH. POST, July 29, 1992, at A3; David Fleshler, *Road Warriors; Jitneys Bob and Weave in Battle for Riders Against Buses*, FT. LAUDERDALE SUN-SENTINEL, Oct. 29, 1998, at 1B; *For Safety's Sake, Encourage Legal Van Services*, NEWSDAY, July 25, 1997, at A42; Mitchell Landsberg, *L.A. Mounts Crackdown on Entrenched Bandit Taxis Safety: Thousands of Drivers Operate Without Licenses*, L.A. TIMES, Jan. 17, 2000, at A1; Garry Pierre-Pierre, *Livery Vans Are Feeling the Metrocard Pinch; Drivers Say Their Business Is Down and the Competition Is Up*, N.Y. TIMES, Jan. 14, 1999, at B1; *Crash Sparks Fierce Debate, More Regulation for Illegal Vans Backed, Stalled*, N.Y. DAILY NEWS, Jan. 12, 1999, at 2.

[372] *See, e.g.*, Sassen, *supra* note 19, at 2301–02 (arguing that "[f]rom an economic perspective, criminalization makes no sense" in poor communities because "[t]he informal economy is one of the few forms of economic growth evident in these communities").

[373] For a discussion of the impediments under existing legal forms of transportation, see generally *supra* notes 64–130 and accompanying text.

requirements, driver training courses, and regular vehicle inspections.[374] Sweeping operating restrictions, such as prohibitions on operating along major thoroughfares or accepting street hails, are not necessary to safeguard pedestrians or to maintain order on the public streets. These legitimate concerns can be addressed by more narrow measures. Indeed, in a recent book, scholars Daniel Klein, Adrian Moore, and Binyam Reja set forth an innovative proposal for the orderly integration of private transportation services such as jitneys. The authors advocate allocating property rights to the curbs along public streets among various transportation providers.[375] While this system of "curb rights" may prove more attractive in theory than in practice, more modest measures, such as establishing "van stops" along major roads, would accomplish the same goal.

B. Indirect Impediments to Jitney Operations

As the debate over jitneys in Miami and New York illustrates, many of the laws prohibiting or restricting private group transportation services are, like their earlier counterparts, motivated by the desire to protect public transportation from private competition. In both New York and Miami, for example, private transportation services are prohibited from operating on major thoroughfares that serve as public bus routes.[376] In both cities, efforts to authorize additional van services or to liberalize restrictions upon them are routinely defeated by deafening cries from public transportation authorities, their employees, and their political allies that the vans "steal" passengers from the public buses.[377]

Lawmakers should reconsider requirements that institutionalize a presumption in favor of public transportation, especially laws imposing

---

[374] In adopting such regulations, state and local regulators can draw important lessons from the federal experience of deregulating the transportation industries. As a general matter, the federal regulatory reform efforts have eliminated price and entry restrictions but have maintained strict health and safety regulations. *See generally* Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323, 1334–38 (1998) (describing deregulation of airlines, railroads, and trucking). These regulations undoubtedly will increase the cost of operating jitney services. Some potential entrepreneurs may be priced out of the market. On the other hand, legalizing jitney services may open up previously unavailable sources of capital. *Cf.* Aff. of Hector B. Ricketts, *supra* note 217, at 11 ("Because the grandfather authorizations are temporary and are only valid through 2000, the value of our businesses and our investments have been drastically reduced."). For example, money made available through "microloan" or "microenterprise" programs, which provide low-interest loans to entrepreneurs who might not otherwise qualify for credit, could help a willing operator get off the ground. *See generally* LISA J. SERVON, BOOTSTRAP CAPITAL: MICROENTERPRISES AND THE AMERICAN POOR (1999) (discussing microenterprise programs in the United States).

[375] *See* KLEIN ET AL., *supra* note 308, at 107–13.

[376] *See supra* note 330 and accompanying text.

[377] *See, e.g.*, Booth, *supra* note 371; Willie James, Letter to the Editor, *Commuter Vans 'Steal' Rides*, WALL ST. J., July 23, 1997, at A19; William T. Kenney, Jr., Letter to the Editor, *Commuter Vans 'Steal' Riders*, WALL ST. J., July 23, 1997, at A19.

nebulous "public convenience and necessity" requirements. Rather than letting the market determine whether the public "needs" a service that has never before been available, these provisions require the applicant to bear the onerous burden of rebutting the presumption that no need exists. The applicant must challenge current providers of mass transportation who, as repeat players, are more likely to have the ear of the regulator making the public convenience and necessity decision.[378] In the case of jitneys, public convenience and necessity requirements inevitably give public transportation authorities the opportunity to defeat an application for operating authority either by showing that they can, theoretically, satisfy the need identified or by demonstrating that the applicant's service will create "ruinous competition" by stealing passengers from them.[379] Even if the public convenience and necessity hurdle were theoretically surmountable, the burden of satisfying it would be onerous for the low-income entrepreneurs who would otherwise step forward to help their neighbors. Experience in New York and Miami suggests that many jitney operators are barely a step ahead financially of their low-income and working-class customers.[380] These "bootstraps capitalists" lack the resources and sophistication necessary to rebut the evidence that their well-financed opposition will inevitably amass against them in regulatory proceedings.[381] Therefore, amending the law to recognize jitneys as a legitimate form of transportation likely will prove an empty exercise so long as public convenience and necessity requirements remain in place. Eliminating the public convenience and necessity hurdle to authorization is a necessary prerequisite to enlisting the very individuals who are most familiar with their neighbors' transportation problems and thus most likely to lend a helpful hand in the welfare reform effort.[382]

---

[378] *See supra* notes 336–340.

[379] *See* Hall, *supra* note 338, at 108 (citing "ruinous competition" justification for public convenience and necessity requirements).

[380] *See* Aff. of Dennis Harry, *supra* note 307, at 5 ("My drivers work hard. Before they came to work for me, many of them were out of work, but they refused to go on unemployment. They own their own vans."); Aff. of Melvipher "Pat" Harvey, *supra* note 304, at 2 ("Before I started my van service I worked as a nurse's aide . . . . I saw that transportation services were inadequate where I worked . . . . Eventually, I decided that I could earn money by helping to fill the transportation void. So I bought a van . . . ."); Aff. of Hector B. Ricketts, *supra* note 217, at 8 ("Van services like Queens Van Plan provide jobs for workers who might otherwise lack employment. We provide opportunities for individuals of modest means to become entrepreneurs and investors."); *see also* Husock, *supra* note 208, at 62.

[381] *See* Aff. of Arthur V. Cummins, *supra* note 228, at 3–10 (describing his nearly four-year effort to obtain authorization); Aff. of Hector B. Ricketts, *supra* note 217, at 10 (discussing the Interborough Alliance of Community Transportation's futile efforts to help operators obtain authorization).

[382] Eliminating these requirement would also be in line with recent legal developments strongly favoring deregulation. *See generally* Kearney & Merrill, *supra* note 374 (discussing deregulation in railroads, airlines, trucks, telecommunications, electricity, and natural gas).

Traditionally, efforts to improve the transportation services available to the urban poor have focused on providing additional public transportation.[383] A complete discussion of the presumption in favor of public transportation is far beyond the scope of this article. However, the discussion above illustrates that inherent limitations in traditional mass transportation services likely make it impossible for public transportation authorities to serve adequately the needs of many central-city residents.[384] How lawmakers should respond to the potential competitive threat posed by jitneys is an important public policy question. Stifling competition by banning jitney services—which offer hope of filling in the gaps left by even the best public transportation system—is not the best response. The current system of regulation, which is heavily weighted in favor of the status quo, makes no sense when the status quo has proven so ill-equipped to address the transportation needs of the urban poor. A more appropriate response to jitneys' competitive threat would be to adopt policies that support and encourage both types of services.[385]

VI. CONCLUSION

When the government enters into a contract with a van service, at least some limited number of welfare recipients will be guaranteed a ride to work. The same cannot be said for the decision to liberalize restrictions on jitney services. The experience of Miami and New York suggests that, if permitted to operate, jitneys can contribute invaluably and permanently to efforts to improve the economic prospects of America's inner-city residents. Of course, in some cities, jitneys may be a total flop. Perhaps their remarkable success in New York and Miami is attributable to the presence of large numbers of immigrants accustomed to relying on

---

[383] *See generally* JUST TRANSPORTATION: DISMANTLING RACE AND CLASS BARRIERS TO MOBILITY (Robert D. Bullard & Glenn S. Johnson eds., 1997) (calling for additional public transportation services in poor minority neighborhoods); Anne Simmons, *A Ride to Work: TEA-21 and PRWORA*, 18 LAW & INEQ. 243 (2000) (arguing that increasing public transportation should be a welfare-reform requirement).

[384] *See* Farkas, *supra* note 63, at 88–92 (discussing limitations of public transportation in Baltimore and advocating that the government reduce regulations that inhibit the private sector from operating complementary transportation services).

[385] One possibility would be to support public transportation through increased public subsidies, if necessary. *See* Jones, *supra* note 331, at 509. If history has any predictive value, public transportation has little to fear from competition. All evidence indicates that substantial public investment in public transportation will continue even if competition by private jitney services were to undercut ridership substantially. Since 1964, Congress has spent nearly $200 billion subsidizing mass transportation projects. *See* Walters, *supra* note 313. During this same time, public transportation costs per vehicle mile increased, while ridership declined precipitously. *See* KLEIN ET AL., *supra* note 308, at 12. In 1992, there were, on average, 9.3 passengers per bus (with a capacity of 70); this figure includes rush hour traffic. *See id.* at 12. "Off-peak buses run virtually empty." *Id.* at 12. Between 1960 and 1992, the ratio of earnings (from passenger fares) to operating costs fell from 1.03 to 0.37; approximately 70% of the operating budgets of public transportation systems now come from taxpayers. *Id.* at 13.

jitneys to serve their transportation needs.[386] However, the question for legislators ought not to be whether jitneys will in fact successfully augment the transportation services available to our poorest citizens. Rather, the question should be whether it makes sense to maintain legal restrictions that hinder the development of transportation services that hold so much promise of improving the economic prospects of the very poor.

---

[386] *See, e.g.*, Sassen, *supra* note 19, at 2290 (suggesting that immigration may play a large role in the "informalization" of economic activities in advanced capitalist countries).

RECENT DEVELOPMENTS

JUVENILE OFFENDERS

In the wake of the shootings at Columbine High School, Representative Bill McCollum (R-Fla.) introduced into Congress House Bill 1501, the Consequences for Juvenile Offenders Act of 1999.[1] This legislation would establish a new standard of accountability for juvenile offenders who are tried within the federal system. Upon introducing House Bill 1501, later renamed the Violent and Repeat Juvenile Offender Accountability and Rehabilitation Act of 1999 (the "Violent and Repeat Juvenile Offender Act"),[2] Representative McCollum pointed to a significant increase in juvenile crimes, and correlated this increase with the low standards of "accountability" currently present in the overburdened juvenile system.[3] During his opening remarks at the Congressional Hearings on Juvenile Justice, McCollum voiced his concern that "there are insufficient consequences for juvenile offenders, who, after receiving a slap on the wrist, proceed to commit more violent crime."[4]

Central to the bill is a provision that gives federal prosecutors discretion to decide whether to try juvenile offenders as adults in criminal court, revoking, in most cases, the power of judicial review.[5] The proposed legislation also expands the scope of crimes for which a juvenile offender may be tried as an adult and lowers the age at which a juvenile may be criminally prosecuted in federal court from fifteen to fourteen.[6] Opponents of House Bill 1501 challenge that prosecutorial discretion will result in arbitrary and "politicized" decisions regarding a juvenile offender's fate. Critics further contend that harsher punishments for juveniles, particularly incarceration in adult facilities, will preclude the

---

[1] H.R. 1501, 106th Cong. (1999).

[2] The title of the bill was changed to conform to that of Senate Bill 254, which was tabled by the upper chamber in favor of House Bill 1501. On June 17, 1999, H.R. 1501 passed in the House by a vote of 287–139. 145 CONG. REC. H4476–H4573 (daily ed. June 18, 1999). On July 28, 1999, the bill—in amended form—passed the Senate by unanimous consent. 145 CONG. REC. S9450–59 (daily ed. July 28, 1999). The bill is currently held up in conference due to a dispute on certain gun control provisions. James Dao & Marc Lacey, *More Republicans Call for Action on Long-Stalled Gun Measure*, N.Y. TIMES, Mar. 17, 2000, at A15. As the provisions of the bill discussed in this piece are not in dispute between the two chambers, all citations to House Bill 1501 refer to the most recent version of the bill (Engrossed Senate Amendment).

[3] *Putting Consequences Back into Juvenile Justice at the Federal, State, and Local Levels: Hearing Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 106th Cong. (1999), [hereinafter *Juvenile Justice Hearings*] (statement of Rep. Bill McCollum), *available at* http://commdocs.house.gov/committees/judiciary/hju63893.000/hju63893_0F.htm.

[4] *Id.*

[5] H.R. 1501, § 102.

[6] *Id.*

possibility of reform and ultimately work against social welfare.[7] Evidence, particularly that obtained from states with similar juvenile justice policies, supports this criticism and indicates that although House Bill 1501 may temporarily satisfy concerned constituents, it will do little to improve the state of juvenile justice in the United States. Instead, it will adversely affect the due process rights, as well as the health and safety, of juvenile offenders.

To sufficiently understand the reforms advocated by Congress, it is important to place the Violent and Repeat Juvenile Offender Act in the historical context of juvenile justice in the United States. In 1899, Illinois adopted the first juvenile code, which established the country's first juvenile court and radically altered the manner in which the American justice system dealt with children.[8] Previously, juveniles were tried as adults in criminal courts where, under the common law defense of infancy, the age of the offender was merely a mitigating factor in the sentencing of a juvenile.[9]

During the nineteenth century, in the context of sweeping social, economic, and demographic changes in America, the social construction of childhood underwent a fundamental shift. Whereas childhood and adolescence had previously been regarded as essentially indistinct from adulthood, under this new conception youth became "institutionalized . . . as a period of dependency and exclusion from the adult world."[10] Progressive reformers during this period emphasized the malleability of children and advocated the need to protect them from "corrupting influences, particularly poverty, poor home and neighborhood conditions, and misguided or flawed parenting."[11]

Rehabilitation has been the goal of the modern juvenile justice system since its inception. Beginning in Illinois, reformers uniformly favored a separate system for adjudicating juvenile offenses that would address the specific needs of youth without imposing the rigid formalities associated with the adult criminal system.[12] Under the doctrine of *parens patrie*, juveniles were considered "wards of the state,"[13] and the government was thus perceived to have custodial powers over children. In adopting this role, the government became legally entitled to the same

---

[7] *See, e.g.*, Cathi J. Hunt, *Juvenile Sentencing: Effects of Recent Punitive Sentencing Legislation on Juvenile Offenders and a Proposal for Sentencing in the Juvenile Court*, 19 B.C. THIRD WORLD L.J. 621, 666 (1999); Sacha M. Coupet, *What to do with the Sheep in Wolf's Clothing: The Role of Rhetoric and Reality about Youth Offenders in the Constructive Dismantling of the Juvenile Justice System*, 148 U. PA. L. REV. 1303, 1310 (2000).

[8] Hon. Don W. Reader, *They Grow Up So Fast: When Juveniles Commit Adult Crimes: The Laws of Unintended Results*, 29 AKRON L. REV. 477, 479 (1996).

[9] Claude Noriega, *Stick a Fork in It: Is Juvenile Justice Done?*, 16 N.Y.L. SCH. J. HUM. RTS. 669, 672 (2000).

[10] Coupet, *supra* note 7, at 1310.

[11] *Id.*

[12] *See id.* at 1309–14.

[13] Noriega, *supra* note 9, at 673.

discretion exercised by the natural parents with respect to raising and disciplining the delinquent child. Within this protective framework, the juvenile court system focused on reforming juvenile offenders, rather than merely sanctioning them for their acts.[14]

In the 1960s and 1970s, criticism of the juvenile system began to surface.[15] Contrary to the conservative nature of today's debate, however, the focus of the critique during that period came from liberal reformers who were concerned that the juvenile courts were failing to accord juveniles their fundamental constitutional rights.[16] Justice Fortas's opinion in *Kent v. United States* is perhaps indicative of the prevailing sentiment regarding juvenile justice during the 1960s and 1970s: "There may be grounds for concern that the child receives the worst of both worlds; that he gets neither the protection accorded to adults, nor the solicitous care and regenerative treatment postulated for children."[17] This censure, and the subsequent high-profile reforms that followed,[18] placed a permanent microscope over the process of administering justice for juvenile delinquents in this country. Throughout this period of reform, however, critics of the juvenile justice system maintained the conviction that the goal of juvenile justice should be reformation.[19]

---

[14] *See* Coupet, *supra* note 7, at 1313.

[15] *See id.* at 1314–17; Eric Klein, Note, *Dennis the Menace or Billy the Kid: An Analysis of the Role of Transfer to Criminal Court in Juvenile Justice*, 35 AM. CRIM. L. REV. 371, 378–81 (1998).

[16] *See* Coupet, *supra* note 7, at 1314; Klein, *supra* note 15, at 378–80.

[17] *Kent v. United States*, 383 U.S. 541, 556 (1966); *see also In re* Gault, 387 U.S. 1, 4 (1967). Both *Kent* and *Gault* were seminal Supreme Court cases in which the court determined that the juvenile system deprived youthful offenders of their due process rights. In *Gault*, 15-year-old Gerald Gault and a friend were arrested for making a lewd telephone call to a neighbor. Gault, who was on probation at the time, was arrested and detained with no notice to his parents. The juvenile court held a series of informal hearings where no records or transcripts were kept, the complaining witness was never present, and Gault was not afforded the right to counsel. The judge subsequently committed Gault to Arizona's State Industrial School until his 21st birthday. In its holding, the Supreme Court rejected the doctrine of *parens patrie* and concluded that however benevolent the intentions, in practice, the results of the juvenile system had been less than satisfactory. The Court then held that juveniles were entitled to the same procedural due process protections accorded adults: the right to counsel; the right to notice of specific charges; the right to confront and cross examine witnesses; the right to remain silent; and the right to subpoena witnesses in defense. *Gault*, 387 U.S. at 30–31.

[18] Following the Supreme Court's decisions in *Kent* and *Gault*, juvenile hearings were required to "measure up to the essentials of due process and fair treatment." *Gault*, 387 U.S. at 30. Many critics contend that the decision in *Gault* ironically fostered a procedural and substantive covergence with adult criminal courts. *See, e.g.*, Barry Feld, *Juvenile and Criminal Justice Systems' Response to Youth Violence*, 24 CRIME & JUST. 189, 193 (1998). According to Professor Feld, by virtue of *Gault*'s emphasis on procedural formality, the focus of delinquency proceedings shifted from a child's best interests to proof of legal guilt in adversary proceedings, highlighting the connection between a youth's crime and subsequent sanctions. This shift may in fact have legitimated more punitive dispositions for young offenders. *Id.*

[19] *See* Klein, *supra* note 15, at 379–81. Klein argues that the Court's opinions in *Kent* and *Gault* emphasize procedural reform without abandoning the general notion that the purposes of the juvenile justice system are and should be reform and "promoting the wel-

It has only been in the last two decades, and most prominently in the past few years, that this country has witnessed a second ideological shift with respect to the juvenile justice system. Policymakers have begun to retreat from the vision of a rehabilitative justice system and have instead advocated a return to an increasingly punitive vision of juvenile justice.[20]

The rhetoric behind legislators' "get tough" philosophy is generally based on the perception that juvenile crime has dramatically increased in recent years.[21] Representative McCullom stated that, notwithstanding a recent drop in the rate of violent crimes, the juvenile crime rate "has more than doubled over the last three decades," citing teenagers as those responsible for the "largest portion of all violent crime in America."[22] McCollum continued:

> Older teenagers—ages 17 to 19—are the most violent of all age groups: more murder and robbery is committed by 18-year-old males than any other group, and more than one-third of all murders are committed by offenders under the age of 21. Simply and sadly put: Today in America no population poses a larger threat to public safety than juvenile offenders. And given the demographic trend involving a large youth cohort beginning to move through the crime-committing age group of 15 to 24 years, many criminologists project that juvenile crime may escalate substantially in the near future.[23]

Senator Orrin Hatch (R-Utah) similarly contends that, in 1997, juveniles accounted for nearly one fifth (18.7%) of all criminal arrests in the United States. Persons under eighteen committed 13.5% of all murders, over 17% of all rapes, nearly 30% of all robberies, and 50% of all arsons.[24]

According to several studies, however, the juvenile crime rate has been declining. One set of authors, upon analyzing the National Crime Victimization Survey, concluded that although the rate of serious juvenile violence peaked in 1994 at 1,230,000 incidents, serious violence by juveniles dropped by 33% between 1993 and 1997.[25] Moreover, the proportion of violent offenses committed by juveniles has not increased, but instead has remained relatively unchanged over the last twenty-five

---

fare of the child," rather than punishment. *Id.* at 381.

[20] Coupet, *supra* note 7, at 1317, 1318.

[21] *See Juvenile Justice Hearings*, *supra* note 3 (statement of Rep. Bill McCollum).

[22] *Id.* (statement of Rep. Bill McCollum).

[23] *Id.* (statement of Rep. Bill McCollum).

[24] 145 CONG. REC. S4982 (daily ed. May 11, 1999) (statement of Sen. Orrin Hatch).

[25] Coupet, *supra* note 7, at 1331 (citing COORDINATING COUNCIL ON JUVENILE JUSTICE AND DELINQUENCY PREVENTION, COMBATING VIOLENCE AND DELINQUENCY: THE NATIONAL JUVENILE JUSTICE ACTION PLAN 1 (1996)). Note, however, that this survey excluded murder and violence against children under the age of 12.

years.[26] In addition, the majority of juvenile court cases involve nonviolent property offenses rather than offenses inflicted upon another person.[27] In 1996, the Coordinating Council on Juvenile Justice and Delinquency Prevention reported that "only a fraction of youth (one-half of one percent) is arrested for violent crimes each year."[28]

Some experts assert that the perception of the rise in juvenile crime has been fueled, if not created, by the media's disproportionate coverage of high-profile incidents of violent teen behavior. As Professor Candice Zierdt observes, "almost every article written today concerning juvenile justice seems to publicize the most heinous crimes committed by juveniles. The resulting hysteria has caused the public to demand swift action to curb escalating juvenile crime...."[29] Another likely explanation for the increased attention juvenile crime has received from legislators concerns the demographic shift of juvenile crime, which is no longer confined by the boundaries of urban poverty and the inner city. Indeed, incidents of violence are occurring in suburban and rural areas at increased rates, bringing the problem closer to home for many Americans.[30] This has prompted increased pressure for judicial and legislative intervention and fueled the perception that juvenile crime is rampant and increasing.[31]

Since the mid-1990s, there have been several unsuccessful attempts by Congress to address the perceived rise in juvenile crime. In 1997, the House of Representatives proposed the Juvenile Crime Control and Delinquency Prevention Act,[32] which was designed to amend the Juvenile Justice and Delinquency Prevention Act of 1974[33] and emphasize a more punitive philosophy to juvenile justice.[34] This bill reflected a shift in the approach taken by Congress—for example, it included a proposal to rename the Office of Juvenile Justice and Delinquency Prevention, the

---

[26] *Id.* (citing COORDINATING COUNCIL ON JUVENILE JUSTICE AND DELINQUENCY PREVENTION, COMBATING VIOLENCE AND DELINQUENCY: THE NATIONAL JUVENILE JUSTICE ACTION PLAN 1 (1996)).

[27] *Id.*

[28] *Id.* (citing COORDINATING COUNCIL ON JUVENILE JUSTICE AND DELINQUENCY PREVENTION, COMBATING VIOLENCE AND DELINQUENCY: THE NATIONAL JUVENILE JUSTICE ACTION PLAN 1 (1996)).

[29] Candace Zierdt, *The Little Engine That Arrived at the Wrong Station: How to Get Juvenile Justice Back on the Right Track*, 33 U.S.F. L. REV. 401, 402 (1999). Professor Zeirdt also notes that statistics are often distorted to suggest an even greater rate of increase in juvenile violence. For example, one commentator cited statistics showing that between 1983 and 1992, the number of juveniles arrested for murder increased by 128%, but failed to explain that this statistic did not necessarily mean that the number of murders committed by juveniles has increased. Because juveniles tend to commit crimes in groups, in many cases several juveniles are responsible for the same crime. Thus, the number of arrests of juveniles for murder does not necessarily indicate a dramatic increase in the number of actual murders committed by juveniles. *Id.* at 412.

[30] Coupet, *supra* note 7, at 1332.

[31] *Id.*

[32] H.R. 1818, 105th Cong. (1997).

[33] 42 U.S.C. § 5601 (1974).

[34] Coupet, *supra* note 7, at 1326.

Office of Juvenile Crime Control and Delinquency Prevention.[35] That same year, the Senate Judiciary Committee considered Senate Bill 10, the Violent and Repeat Juvenile Offender Act of 1997.[36] The bill, which was never put to a vote,[37] similarly proposed "get tough" measures for juvenile offenders, including a provision that lowered the minimum age for trial of capital offenses from eighteen to sixteen.[38]

The issue of increased accountability for juvenile offenders once again surfaced on the legislative agenda of the 106th Congress in early 1999, and congressional hearings were held in March to provide background for what was to become House Bill 1501.[39] The fate of this legislation might have been similar to that of its predecessors had it not been for the violent shooting at Columbine High School and several other highly publicized events involving extreme juvenile violence.[40] Those events focused media attention on the ways juvenile delinquents are treated by the justice system and pushed the issue of juvenile justice to the legislative forefront.[41]

The Violent and Repeat Juvenile Offender Act includes a wide array of provisions regarding the prevention and adjudication of juvenile crime, with a focus on school and gang-related violence. The legislation offers grants for use by state and local governments to establish and coordinate projects for more effective investigation, prosecution, and punishment of crimes committed by juveniles.[42] States, encouraged to focus

---

[35] H.R. 1818, § 104; *see also* Coupet, *supra* note 7, at 1326. House Bill 1818 also provided states with financial incentives to reform their own juvenile systems:

> The bill conditioned eligibility for incentive grants upon states' enacting certain punitive juvenile justice reforms, including a requirement that all violent juvenile delinquents be fingerprinted and photographed and that records be made available to schools.

Coupet, *supra* note 7, at 1332; *see also* H.R. 1818, § 110.

[36] S. 10, 105th Cong. (1997).

[37] *See* Coupet, *supra* note 7, at 1326. A key reason for the lack of a vote on the Violent and Repeat Juvenile Offender Act of 1997 was the fact that the bill proposed to eliminate a longstanding requirement that federal courts only hear juvenile prosecutions in cases of concurrent jurisdiction or when the state declined to prosecute the juvenile. This raised the concern that the bill would serve to federalize juvenile crime. *Id.*

[38] S. 10, § 103.

[39] *See generally Juvenile Justice Hearings*, *supra* note 3 (statement of Rep. Bill McCollum).

[40] For example, in May 1998, 15-year-old Kip Kinkle of Eugene, Oregon went on a shooting rampage at his high school, killing his parents and two fellow high school students and injuring nearly a dozen others. *See* Sam Howe Verhovek, *Teenager to Spend Life in Prison for Shootings*, N.Y. TIMES, Nov. 10, 1999, at A14. One month after Columbine, a similar tragedy occurred when 15-year-old T.J. Solomon of Conyers, Georgia fired a .22 caliber rifle into a common area as approximately 150 students waited for the school day to begin. Six students were wounded. *See Gunman at School To Be Tried as Adult*, N.Y. TIMES, Aug. 11, 1999, at A12.

[41] House Bill 1501 was, in fact, introduced in the House on Apr. 21, 1999, just one day after the Columbine shooting.

[42] H.R. 1501, 106th Cong. § 1801(a) (1999).

on "accountability," will become eligible for grants from the Attorney General provided they establish "appropriate sanctions, which are graduated to reflect the severity or repeated nature of violations, for each act of delinquency," as well as a drug testing policy for juvenile offenders upon arrests for certain crimes.[43] Grants for teacher and parent training, school security devices, and the hiring of more prosecutors will also be made available to states under the terms of the bill.[44]

With respect to gang-related crime, House Bill 1501 sets increased penalties for recruiting members of a criminal street gang when recruits are intended to participate in a federal felony involving a controlled substance or a violent crime.[45] In addition, the bill mandates enhanced sentencing for anyone committing a federal offense if the offense was committed in connection with, or in furtherance of, the activities of a criminal street gang.[46]

House Bill 1501 also increases accountability for the possession of weapons. Possession by a juvenile of a handgun, ammunition, or semi-automatic assault weapon in a school zone, or transfer of such weapons or ammunition to a juvenile, are expressly prohibited by the bill and will result in increased penalties for offenders.[47]

Perhaps the most controversial element of the Violent and Repeat Juvenile Offender Act is the provision conferring upon United States Attorneys the authority to try juveniles fourteen years of age or older as adults in federal district courts.[48] Under this provision, referred to by legislators and legal scholars as a "prosecutorial waiver,"[49] juvenile and criminal courts would possess concurrent jurisdiction. A federal prosecutor's office would therefore be able to decide whether a particular case is appropriate for the juvenile process or whether the case should be prosecuted in a criminal court.[50] According to present law, the decision to try a juvenile as an adult is subject to the discretion of federal judges who, if petitioned by the prosecutor for a "transfer," may only transfer juveniles aged fifteen and older into the criminal courts.[51] While a prosecutor can appeal the denial of a transfer, the decision is reviewable only for abuse of discretion, "making reversal difficult and relatively rare."[52]

---

[43] *Id.* §§ 1801(c)(1)–(2).

[44] *Id.* §§ 344, 1201, 4119, 207(a)(5).

[45] *Id.* § 201(a).

[46] *Id.* § 208(b)(1).

[47] *Id.* §§ 751(a)(6)(B)(iii)(I), 751(a)(6)(C).

[48] *Id.* § 102(1)(B).

[49] *See* Francis Barry McCarthy, *The Serious Offender and Juvenile Court Reform: The Case for Prosecutorial Waiver of Juvenile Jurisdiction*, 38 ST. LOUIS U. L.J. 629, 632 (1994); Coupet, *supra* note 7, at 1318–19.

[50] McCarthy, *supra* note 49, at 632.

[51] *See* 18 U.S.C. § 5032 (2000). The commission of certain crimes of violence as well as the possession of firearms while committing an offense lower the age to 13. *Id.*

[52] *Juvenile Justice Hearings*, *supra* note 3 (statement of Kevin DiGregory, Deputy Assistant Att'y Gen., Criminal Div., U.S. Dep't of Justice).

During congressional hearings on the matter, Deputy Assistant Attorney General Kevin DiGregory of the Department of Justice's Criminal Division advocated the shift from judicial discretion to prosecutorial waiver. DiGregory argued that because of the relatively few juveniles coming into federal courts, federal judges often do not have the "training or experience needed to make sound waiver decisions."[53] Federal prosecutors, he explained, are "regularly trusted to make decisions about which persons to charge and what charges to bring. Federal judges, by contrast, adjudicate charges once brought; they do not ordinarily have a role in determining whether to prosecute."[54] DiGregory also stated that under the current judicial "transfer" process, a juvenile transferred to adult status is entitled to an interlocutory appeal, which is a lengthy process that can consume years. This not only has the effect of delaying justice in a single defendant's case, but may also, because of speedy trial requirements in cases involving multiple defendants, some of whom are adults, "force unwanted severances or multiple trials, with resultant burdens on victims and witnesses and on court resources."[55] In addition, as swift sanctions are often crucial to meaningful behavior modification among children and adolescents,[56] a lengthy appeals process could have adverse psychological consequences for the juvenile offender.

The most recent version of House Bill 1501 takes into account the concerns set forth by the Justice Department. The bill not only establishes the prosecutorial waiver, but also substantially limits judicial review.[57] Under House Bill 1501, prosecutors may bypass the juvenile courts altogether and decide to try a juvenile case directly in criminal court. The judge overseeing the case in criminal court may then determine, upon motion of the defendant and after a hearing, whether to issue an order to provide for the transfer of the defendant to juvenile status for purposes of proceeding against the defendant.[58] This limited form of judicial review, referred to as a "reverse waiver,"[59] is only applicable if the juvenile is under the age of sixteen at the time of the offense or in the case of serious violent felonies or serious drug offenses.[60] The "reverse waiver" differs from present law in two important respects. First, the burden of persuasion is placed on the juvenile to demonstrate by a preponderance of the evidence why adult prosecution is not in the interests

---

[53] *Id.* (statement of Kevin DiGregory).
[54] *Id.* (statement of Kevin DiGregory).
[55] *Id.* (statement of Kevin DiGregory).
[56] Robert E. Shepherd, Jr., *The Rush to Waive Children to Adult Court*, 10 CRIM. JUST. 39, 42 (1995).
[57] *See* H.R. 1501, 106th Cong. § 102(d) (1999).
[58] *See id.* §§ 102(a)–(e).
[59] *See Juvenile Justice Hearings*, *supra* note 3 (statement of Kevin DiGregory).
[60] *See* H.R. 1501, §§ 102(c), 102(d)(2).

of justice.[61] Second, the government has the opportunity for an expedited appeal if the court rules in the juvenile's favor.[62]

The Violent and Repeat Juvenile Offender Act further stipulates that juveniles may be tried in adult courts for violations of federal law which are serious violent felonies or serious drug offenses or conspiracies or attempts to commit such offenses if the United States Attorney certifies that "(i) there is a substantial Federal interest to warrant the exercise of Federal jurisdiction or (ii) that the ends of justice otherwise so require."[63] The language of this section, particularly the phrases "substantial Federal interest" and the "ends of justice otherwise so require," potentially extends further the prosecutor's discretion in determining which cases can be brought in criminal courts.[64] The bill similarly allows a prosecutor who is bringing suit against a juvenile in criminal court to join claims for "lesser offenses" with claims for the more "serious" offenses that have already been brought, in compliance with the Federal Rules of Criminal Procedure.[65] This provision could result in longer sentences for juvenile offenders since combining the offenses may leave judges in charge of sentencing less room for leniency.

While the Violent and Repeat Juvenile Offender Act provides for some safeguards against the incarceration of juveniles with adult prisoners, the requirements are considerably less than those imposed by present law. Current federal law mandates a "sight and sound" policy where ju-

---

[61] *Id.* § 102(d)(4). The bill offers a set of guidelines to be used in determining whether the adult prosecution of the defendant is in the "interests of justice":

> (A) the nature of the alleged offense, including the extent to which the juvenile played a leadership role in an organization, or otherwise influenced other persons to take part in criminal activities;
> (B) whether prosecution of the juvenile as an adult is necessary to protect property or public safety;
> (C) the age and social background of the juvenile;
> (D) the extent and nature of the prior criminal or delinquency record of the juvenile;
> (E) the intellectual development and psychological maturity of the juvenile;
> (F) the nature of any treatment efforts and the response of the juvenile to those efforts;
> (G) the availability of programs designed to treat any identified behavioral problems of the juvenile.

Id.; *see also* Randie P. Ullman, *Federal Juvenile Waiver Practices: A Contextual Approach for the Consideration of Prior Juvenile Delinquency Records*, 68 FORDHAM L. REV. 1329 (2000) (criticizing the arbitrary definitions for, and use of, prior delinquency records when determining whether to transfer juveniles to adult status).

[62] H.R. 1501, § 102(d)(5)(B); *see also Juvenile Justice Hearings*, *supra* note 3 (statement of Kevin DiGregory).

[63] H.R. 1501, § 102(a)(1).

[64] *See* Gregory A. Loken & David Rosettenstein, *The Juvenile Justice Counter-Reformation: Children and Adolescents as Adult Criminals*, 18 QUINNIPIAC L. REV. 351, 355 (1999).

[65] H.R. 1501, § 102(b).

veniles must be kept out of sight and earshot of adult prisoners.[66] House Bill 1501, however, redefines "prohibited physical contact" with adults, permitting "supervised proximity between a juvenile and an adult inmate that is brief and inadvertent, or accidental, in secure areas of a facility that are not dedicated to use by juvenile offenders and that are nonresidential, which may include dining, recreational, educational, vocational, health care, entry areas, and passageways."[67] While this redefinition does not remove the barriers between juvenile and adult inmates entirely, it is indicative of a new legislative willingness to treat juvenile offenders as indistinct from adults.[68]

Proponents of House Bill 1501 assert that the increased transfer of juveniles to adult courts will help to take the burden off juvenile courts. In recent years, juvenile courts have been forced to focus all of their attention on the more serious offenders due to finite resources and heavy caseloads.[69] As a result, juvenile courts have been unable to handle in a meaningful way first-time and lesser offenders who may, in fact, have the chance of being rehabilitated. According to Representative McCollum, under the current system, "only ten percent of violent juvenile offenders—those who commit murder, rape, robbery, and assault—receive any sort of secure confinement."[70] By allowing prosecutors to shift serious and repeat juvenile offenders into adult courts, proponents of the bill argue, the juvenile courts will be able to concentrate on juvenile delinquents who may be more amenable to the traditional methods of rehabilitation or more responsive to the types of punishments administered in juvenile detention facilities. At the same time, repeat and serious offenders tried as adults will face a stricter standard of "accountability" for their crimes, resulting in greater deterrence to future violence.[71]

Professor Francis Barry McCarthy offers a detailed analysis in support of prosecutorial waivers. In evaluating the three possible reforms that have been adopted by various state legislatures—"judicial transfers,"

---

[66] *See* Juvenile Justice and Delinquency Prevention Act, 42 U.S.C. § 5601 (1974); Klein, *supra* note 15, at 404.

[67] H.R. 1501, § 103(4)(B).

[68] Loken & Rosettenstein, *supra* note 64, at 355.

[69] *See Juvenile Justice Hearings*, *supra* note 3 (statement of Rep. Bill McCollum).

[70] *Id.* (statement of Rep. Bill McCollum). McCollum notes:

> Rates of secure confinement for violent juveniles are the same as they were in 1985 and have actually decreased over the last five years. Many juveniles receive no punishment at all: Nearly 40% of violent juvenile offenders who come into contact with the justice system have their cases dismissed. By the time the courts finally lock up an older teenager on a violent crime charge, the offender often has a long rap sheet with arrests starting in the early teens. According to the Justice Department, 43% of juveniles in state institutions had more than five prior arrests, and 20% had been arrested more than 10 times.

Id.

[71] *See id.* (statement of Rep. Bill McCollum); *id.* (statement of Kevin DiGregory).

"legislative waivers," and "prosecutorial waivers"—McCarthy determines that prosecutors, as opposed to judges and legislators, are the only possible participants in the juvenile justice system who are capable of making "individualized decisions."[72] In his discussion of "judicial transfers," which are the federal status quo, McCarthy asserts that juvenile court judges "simply do not want to transfer cases."[73] According to McCarthy, when a juvenile court waives its jurisdiction, it is acknowledging a failure of the juvenile court system and its philosophy.[74] Apart from any legal constraints, many juvenile court judges are extremely reluctant to send a juvenile to be criminally prosecuted, as they believe that a criminal prosecution represents the "writing off" of such a child. McCarthy contends that judges, "steeped in the child-focused philosophy of the juvenile court might be extremely reluctant to give up one last chance to try to help a child," even when that child has repeatedly offended or committed an extreme, "adult" crime.[75]

McCarthy argues that the "legislative waiver," which has been adopted by many states, veers too far to the opposite extreme. "Legislative waivers" involve the creation of state and federal statutes that automatically exclude certain types of crimes or chronic offenders from juvenile court jurisdiction.[76] McCarthy asserts that legislative waivers, while raising the level of accountability for juvenile offenders, are often a "simple answer to a complex problem."[77] Frequently, the offenses that are excluded by the legislature are not the best predictors of which children should be in criminal court.[78] The fundamental problem with legislative waiver is that it may "cast the net too widely," bringing children in front of a criminal court without taking their particular circumstances into account.[79]

After rejecting the two extremes of judicial and legislative waivers, McCarthy argues that the prosecutorial waiver offers the best course of action. He argues that the prosecutorial waiver provides individual con-

---

[72] McCarthy, *supra* note 49, at 656.
[73] *Id.* at 651.
[74] *Id.*
[75] *Id.* at 652.
[76] *Id.* at 632.
[77] *Id.* at 655.
[78] *Id.*
[79] *Id.* For example, in 1989, a nine-year-old boy was charged with murder, which is an excluded offense in Pennsylvania. Cameron Kocher killed a 12-year-old girl with an apparently deliberate rifle shot. Commonwealth v. Kocher, 602 A.2d 1308 (Pa. 1992). If convicted of intentional murder in Pennsylvania, Kocher faced life imprisonment. McCarthy questions whether a nine-year-old should be incarcerated for the rest of his life because he came within the definition of an excluded offense. McCarthy, *supra* note 49, at 652 n.136. Although the court splintered in its decision, some of the justices of the Pennsylvania Supreme Court thought that the answer was yes. *Id.* Ultimately, Kocher pleaded *nolo contendere* in adult criminal court to voluntary manslaughter and was placed on probation. *Id.*; *see also 13-Year-Old Pleads No Contest in Killing of Friend*, N.Y. TIMES, Sept. 3, 1992, at A16.

sideration for the juvenile offender and his or her particular circumstance, yet maintains the level of accountability necessary to prevent juvenile offenders from going unpunished and, therefore, undeterred.[80]

Critics of the prosecutorial waiver, on the other hand, assert that the decision to accord juveniles adult status, when placed in the hands of prosecutors, will be made in an arbitrary, capricious and perhaps even discriminatory manner.[81] Opponents caution that, due to political pressures, prosecutors, as compared to non-elected judges, are likely to decide the fate of a juvenile offender in response to the demands of their constituents, and, in highly publicized cases, the demands of the media. As one critic notes, the "'politicization' of crime appears to have forged an unbreakable link between the mercurial nature and often inaccurate rhetoric of public opinion, the desire to garner votes, and the resulting juvenile justice policy."[82]

A second risk of prosecutorial waivers under the provisions of the Violent and Repeat Juvenile Offender Act is that "[a] prosecutor's decision to file a case directly in adult criminal court is made unilaterally without the benefit of a hearing where defense counsel and probation officials can provide important information about the juvenile in question."[83] This limitation on judicial review greatly expands prosecutorial power, and may in some cases result in disparate treatment for minority youths. According to Professor Barry Feld, "[d]iscretionary decisions at various stages of the justice process amplify racial disparities as minority youths proceed through the system and result in more severe dispositions than for comparable white youths."[84] While Professor Feld's statement likewise pertains to the discretionary decisions of judges and legislators in some jurisdictions, he notes that, in comparison with other forms of juvenile transfer, "prosecutorial waiver suffers from all of the vagaries of individualized discretion and without even the redeeming virtues of formal criteria, written reasons, an evidentiary record, or appellate review."[85]

Additionally, critics are concerned that prosecutorial waivers will increasingly result in situations in which the child's individual circumstances will not be taken into account. Critics suggest that the high volume of cases may prevent prosecutors from giving thorough consideration to the decision of whether to pursue criminal prosecution. A hastily made decision to prosecute on criminal charges can have serious adverse consequences for a juvenile.[86] According to the testimony of Professor

---

[80] McCarthy, *supra* note 49, at 662.

[81] *See, e.g., id.* at 658 (citing Wallace J. Mlyniec, *Juvenile Delinquent or Adult Convict—The Prosecutor's Choice*, 14 AM. CRIM. L. REV. 29 (1976)).

[82] Coupet, *supra* note 7, at 1320.

[83] *Id.* at 1319 (citing Carol S. Stevenson et al., *The Juvenile Court: Analysis and Recommendations*, FUTURE OF CHILDREN, Winter 1996, at 9).

[84] Feld, *supra* note 18, at 231.

[85] *Id.* at 244.

[86] McCarthy, *supra* note 49, at 657–58.

Laurence Steinberg before the House Judiciary Committee, "there is no such thing as 'one size fits all,' even when we are talking about youngsters who have committed the very same offense."[87] While Steinberg acknowledged that "there are some offenders for whom punishment is a very appropriate response," he cautioned that for some juvenile offenders, harsher punishments will make them "more likely, not less likely, to re-offend."[88]

> This is especially likely if the punishment brings the nonviolent offender into contact with violent and more serious delinquents, or with adult criminals. Adolescence is a critical period in development, a period during which many decisions and choices have long-term implications for the successful transition into adulthood. A young person whose educational or occupational development is interrupted when it need not be—for instance, if a juvenile who actually is not dangerous is forced to spend time in a correctional institution—will end up at greater risk for later unemployment, mental health problems, and criminal activity. Surely none of us here wishes to respond to a juvenile offender in a way that is going to increase that juvenile's chances of becoming a danger to the community.[89]

Research tends to support Steinberg's assertions. Studies reveal that, upon release, juveniles incarcerated in adult facilities have higher rates of re-arrest, commit more serious re-arrest offenses, and are re-arrested more promptly than those housed in juvenile facilities.[90] Professor Feld cites one such study comparing recidivism rates of fifteen- and sixteen-year-old robbery and burglary offenders processed as adult offenders in two southeastern counties in New York with comparable youths processed as juveniles in two contiguous counties in northern New Jersey. The study found that the New York robbery offenders processed as adults had a higher rate and frequency of re-offending than did those processed in New Jersey as juveniles, although the outcomes for the burglary offenders did not differ between the two systems.[91] A similar study compared juveniles whom state prosecutors waived to criminal court in Florida with a matched set of equivalent cases retained in the juvenile justice system and found that the transferred youths re-offended more often, more quickly, and more seriously than did those youths confined in the juvenile correctional system.[92]

---

[87] *Juvenile Justice Hearings*, *supra* note 3 (testimony of Prof. Laurence Steinberg).
[88] *Id.* (testimony of Prof. Laurence Steinberg).
[89] *Id.* (testimony of Prof. Laurence Steinberg).
[90] Ullman, *supra* note 61, at 1346.
[91] Feld, *supra* note 18, at 235.
[92] *Id.*

In accounting for the high rate of recidivism among youths incarcerated as adults, scholars and experts point to several factors. First, adult prisons provide neither rehabilitative nor educational services to juvenile offenders. Whereas juvenile detention facilities must provide psychological counseling, substance abuse programs, and educational or vocational services to juvenile offenders, adult prisons are under no such obligation.[93] While these services may be offered at some adult facilities, juveniles housed there are not compelled to take advantage of these services, nor are they likely to be encouraged to do so.[94] Counseling programs and efforts to improve family relations are also rated much lower in adult facilities than in juvenile detention centers.[95]

Additionally, juveniles convicted as adults lose the secrecy of the juvenile court and obtain a criminal record and all of the attached stigma that serves as a hindrance later in life.[96] Labeled as "criminals," juvenile offenders are often alienated from family, friends, and employers upon their release from prison. Florida juvenile justice system researchers Donna M. Bishop, Charles E. Frazier, Lonn Lanza-Kaduce, and Lawrence Winner suggest that "[f]aced with that prospect [i.e., status transformation from 'redeemable youth' to 'unsalvageable adult'], youths may surrender self-restraint, accept the negative attributions of the culture that has excluded them, and seek out the companionship of others who tolerate or support continued deviation from societal norms."[97]

Another area of concern involves the incarceration of juveniles with adult prisoners. While House Bill 1501 prohibits direct, unsupervised conduct between juvenile and adult inmates, it significantly relaxes the prior restrictions on their contact.[98] Studies show that sexual and physical assault of juveniles is much more likely in adult facilities. While 36.7% of juveniles in juvenile facilities report being victims of violent attack, 45.7% of juveniles in adult facilities report such abuse.[99] In addition,

---

[93] Hunt, *supra* note 7, at 666.

[94] *Id.*; *see also* Margaret Talbot, *The Maximum Security Adolescent*, N.Y. TIMES MAG., Sept. 10, 2000, at 41.

[95] Ullman, *supra* note 61, at 1346.

[96] Klein, *supra* note 15, at 403. Increasingly, state and federal legislatures have eliminated or reduced protections of juveniles' anonymity. *See* Zierdt, *supra* note 29, at 420–21. For example, federal law now permits fingerprinting and photographing of juveniles who commit "adult felonies." Federal legislation also requires the transmission of information about certain juvenile offenses to the F.B.I., such as two convictions for violent felonies. *Id.* California now permits the disclosure of a juvenile's name to the public if the juvenile is at least 14 years old and has committed certain offenses. North Dakota requires juvenile courts to turn over certain information to school districts upon request in cases where the adjudication of a delinquency would have amounted to a felony for an adult. *Id.*

[97] Donna M. Bishop et al., *The Transfer of Juveniles to Criminal Court: Does it Make a Difference?*, 42 CRIME & DELINQUENCY 171, 184–85 (1996).

[98] *See* Loken & Rosettenstein, *supra* note 64, at 355.

[99] *See* Martin Forst et al., *Youth in Prisons and Training Schools: Perceptions and Consequences of the Treatment-Custody Dichotomy*, 40 JUV. & FAM. CT. J. 1, 9 (1989); *see also* Fox Butterfield, *States Revamping Laws on Juveniles as Felonies Soar*, N.Y. TIMES,

sexual assault of a juvenile is five times more likely in an adult facility than in a juvenile one.[100] Beatings by staff are nearly twice as likely for juveniles in adult facilities than for those housed in juvenile facilities, and attacks with weapons are nearly 50% more common.[101]

Incarceration of juveniles in adult facilities thus forces delinquent youths to adopt more violent outlooks. Juveniles in adult prisons repeatedly indicate that the only way to survive is to fight.[102] Erstwhile juveniles tend to maintain this belief upon release from prison.[103] In regard to the trial of the first thirteen-year-old to be tried as an adult under a new North Carolina law, the head of the Dangerous Offenders Task Force for Wake County, North Carolina, said: "It's kind of scary to think what kind of monster may be created. He could be released at the age of thirty-three after having been raised in the Department of Corrections with some of the most hardened criminals North Carolina has to offer."[104]

Florida, the first state to adopt a broad prosecutorial waiver policy, serves as an interesting test case. A recent study by the Justice Policy Institute determined that Florida prosecutors were responsible for sending nearly as many juveniles to adult court in 1995 as did all of the nation's judges combined.[105] Florida prosecutors have, in fact, become known as "very aggressive with juveniles [in order to] scare them straight."[106] In addition, the Institute's report, which is based on information from several sources—including the Florida Department of Corrections, the Florida Department of Juvenile Justice, and the United States

---

May 12, 1996, at 1. The case of 17-year-old Damico Watkins offers an example of violence against juveniles in adult facilities. Watkins was sentenced to seven to 25 years for serving as a lookout in a botched robbery of a pizza shop. On Apr. 25, 1996, he was stabbed to death in an Ohio adult prison by members of a white supremacist group. Klein, *supra* note 15, at 404–05; *see also* Butterfield, *supra*, at 1.

[100] *See* Forst et al., *supra* note 99, at 9.

[101] Klein, *supra* note 15, at 404–05; *see also* Forst et al., *supra* note 99, at 9. *But see* Feld, *supra* note 18, at 235. In spite of the rehabilitation rhetoric that surrounds the juvenile justice system, research indicates that some juvenile facilities, while not on par with their adult counterparts, are extremely dangerous environments. Well-documented evidence suggests a prevalence of staff violence, inmate aggression, and homosexual rape in juvenile prisons. Feld, *supra* note 18, at 235.

[102] Klein, *supra* note 15, at 405.

[103] *Id.*

[104] Richard Lacayo, *When Kids Go Bad*, TIME, Sept. 19, 1994, at 60.

[105] Gary Fields, *Report Critical of Prosecutors' Power Over Youths*, USA TODAY, Sept. 30, 1999, at 3A. In Florida, 7,000 juveniles were referred to adult court in 1995. By comparison, judges nationwide ordered that 9,700 juveniles be treated as adults. *Id.*; *see also* Louise D. Palmer, *Age of Innocence? Move to Try Juveniles as Adults Comes Under Scrutiny*, BOSTON GLOBE, Mar. 13, 1999, at A1. Palmer reports on a recent Florida case that exemplifies the risk of prosecutorial abuse. Anthony Laster, a mentally retarded 15-year-old, was transferred by a prosecutor to adult criminal court on charges of strong-arm robbery, battery, and extortion when he took two dollars out of a schoolmate's pocket in a threatening manner. Laster spent two months in prison—one month in an adult facility. Prosecutors subsequently dropped the charges after the schoolmate testified that he was not threatened. Palmer, *supra*.

[106] Palmer, *supra* note 105.

Justice Department—found that: (1) black juveniles were 2.3 times more likely than whites to be referred to adult court by Florida prosecutors; (2) youths tried as adults committed new crimes twice as fast after their release as those processed by the juvenile system; and (3) all juveniles transferred to adult court were more likely to commit another crime than those who were sent to the juvenile system.[107] These findings lend considerable credibility to the arguments made by opponents of House Bill 1501, reinforcing suspicions of potential prosecutorial abuse, discrimination, and eventual recidivism for juveniles who are convicted as adults.

While the Violent and Repeat Juvenile Offender Act has become a fertile breeding ground for controversy, facing particularly vocal opposition from such national groups as the Children's Defense Fund,[108] it remains unclear what effect this bill will have on the juvenile justice system if signed into law. The likelihood is that in spite of its harsh, punitive rhetoric, its ramifications will only directly be felt by a small proportion of the juveniles tried every year. Currently, the federal court system only handles a few hundred juveniles each year.[109] Most juvenile crimes are instead adjudicated in state courts, which have their own set of procedures and regulations regarding juvenile offenders.

Representative McCollum asserts that although only a small percentage of juvenile crimes are addressed in federal courts, the federal court system's procedures are outdated and must be modified in order to "play catch-up" with the states.[110] While many states have begun implementing "accountability-based" reforms, he argues, "there has not been a serious review and reform of many of the Federal juvenile justice procedures in Title 18 of the United States Code since they were first passed decades ago."[111]

At the same time, some commentators argue that the reforms advocated by Congress simply reflect "knee-jerk political responses" aimed to appeal to constituents who have become increasingly concerned about youth violence as a result of the increased media and political attention on high-profile incidents.[112] For some legislators in Congress, it may be more important to support measures that are "tough on crime" than to actually implement measures that will affect juvenile criminals in any substantive way.

This legislation, if signed into law, could have powerful indirect consequences. Not only will the federal government be following the trend of increased "accountability," but it will also be setting an example for the states to follow—that the federal government, which has always

---

[107] Fields, *supra* note 105.
[108] Coupet, *supra* note 7, at 1327.
[109] *Juvenile Justice Hearings*, *supra* note 3 (statement of Rep. Bill McCollum).
[110] *Id.* (statement of Rep. Bill McCollum).
[111] *Id.* (statement of Rep. Bill McCollum).
[112] Coupet, *supra* note 7, at 1332.

acted as an impediment to treating juveniles as adults, is now endorsing and condoning such punitive measures.[113] While some states have already implemented measures such as the prosecutorial waiver and extended the range of crimes for which juveniles can be tried as adults, others have maintained the status quo of strong reform-oriented juvenile court systems.[114] It is likely that as a high profile federal measure, the Violent and Repeat Juvenile Offender Act will provide an impetus for states to reform their procedures regarding juveniles and serve as a guide for shaping legislation.[115]

Given the strong bipartisan support for increased juvenile "accountability," it is likely that legislation similar to House Bill 1501 will be enacted by the 107th Congress. One can only hope that legislators will look to the studies and statistics that have emerged in recent years and temper their movement toward a system of prosecutorial waiver. As it stands now, House Bill 1501 threatens to compromise juveniles' due process rights as well as their health and safety.

—Tara Kole

---

[113] Klein, *supra* note 15, at 400.

[114] Craig Hemmens, Eric J. Fritsch & Tory J. Caeti, *Developments in the United States: The Rhetoric of Juvenile Justice Reform*, 18 QUINNIPIAC L. REV. 661 (1999). Professors Hemmens, Fritsch, and Caeti have classified each of the 50 states' juvenile justice laws into four categories: traditional, punitive, mixed, and balanced states. In examining state legislative declarations concerning juvenile justice, the authors found that 23 states still focus their juvenile justice policies on reform and rehabilitation, rather than punishment or accountability. *See id.* at 677. The majority of the remaining states were considered to have either balanced or mixed approaches that emphasized both reform and punishment, resulting in unclear policy goals. *See id.* at 678–79. Many states thus seem to be "lacking in direction." *Id.* at 679.

[115] *See* Palmer, *supra* note 105.

PAIN RELIEF PROMOTION ACT

Despite its relative brevity and seemingly modest direct affect—the modification of decades-old sections of the United States Code[1]—the Pain Relief Promotion Act of 1999[2] ("PRPA") has attracted a tremendous amount of controversy.[3] This controversy stems from the fact that the bill is in actuality a direct attempt to supercede Oregon's Death with Dignity Act ("ODDA"), which legalized physician-assisted suicide in that state.[4] The PRPA would counteract the ODDA by adding a few relatively simple sections to existing federal law—most notably a section limiting the ability of doctors to prescribe medication for the purpose of ending a patient's life.[5] Doctors who violate the act would face revocation of their licenses to dispense medicine regulated by the federal Controlled Substances Act ("CSA").[6] In addition, they would be forced to give up any controlled substances in stock and would be held criminally liable—with a twenty-year mandatory minimum sentence—for prescribing a drug for the purpose of causing death.[7] Because the PRPA would preempt a valid state law, it raises federalism concerns that will likely bring it under constitutional scrutiny if passed.

Congress would enact the PRPA pursuant to its constitutional power to "regulate commerce . . . among the several States."[8] This constitutional provision, commonly referred to as the Commerce Clause, "confers the most important domestic power of the federal government. It is the source of many of the regulatory laws Congress enacts regarding not only trade but also a range of other concerns—racial discrimination, environment, crime, safety, and many more."[9] Until recently, many scholars believed the case law "showed no practical limit on Congress' power under

---

[1] Controlled Substances Act, 21 U.S.C. §§ 801–971 (1994); Public Health Service Act, 42 U.S.C. § 299 (1994).

[2] H.R. 2260, 106th Cong. (1999); S. 1272, 106th Cong. (1999). For the purposes of this Recent Development, I will cite to S. 1272, which is identical to the version of H.R. 2260 reported from the House.

[3] *See, e.g.*, Jim Barnett, *GOP Reaffirms Pledge to Block Assisted Suicide*, PORTLAND OREGONIAN, Oct. 13, 2000, at A02; *No Pain Relief Here*, PROVIDENCE J., Oct. 3, 2000, at B04; Chris Moertel, *Federal 'Pain Relief Promotion Bill' Would Have Bad Side Effects*, STAR-TRIB. (MINNEAPOLIS), Sept. 25, 2000, at 11A.

[4] OR. REV. STAT. § 127.800–.897 (1997) [hereinafter "ODDA"]; *see also A Ban on Assisted Suicide*, N.Y. TIMES, Sept. 19, 2000, at A24 ("The bill is an effort to outlaw physician-assisted suicide nationwide, thereby preempting an Oregon state law that allows such medical assistance.").

[5] S. 1272, § 101.

[6] *Id.*; *see also* Joy Fallek, Note, *The Pain Relief Promotion Act: Will It Spell Death to "Death With Dignity" or Is It Unconstitutional?*, 27 FORDHAM URB. L.J. 1739, 1749–50 (2000).

[7] S. 1272, § 101; *see also* Fallek, *supra* note 6, at 1749–50.

[8] U.S. CONST. art. I, § 8, cl. 3.

[9] NORMAN REDLICH ET AL., UNDERSTANDING CONSTITUTIONAL LAW 97 (1999).

the Commerce Clause."[10] The landmark cases of *United States v. Lopez*[11] and *United States v. Morrison*,[12] however, renewed the debate about the extent of Congress's Commerce Clause authority and the proper role of Congress in our federal system.[13] If the PRPA is passed, it will be subject to a challenge in this now-uncertain area of constitutional jurisprudence.

In a speech to the Senate introducing the PRPA and urging its passage, Senator Don Nickles (R-Okla.) asserted that the purpose of the bill is to "provide[ ] federal support for training and research in palliative care," and to "clarif[y] federal law on legitimate use of controlled substances."[14] Specifically, Nickles explained that the bill is designed to establish that "federal law is intended to prevent use of these drugs for lethal overdoses, and contains no exception for deliberate overdoses approved by a physician."[15] Because the PRPA would preempt the ODDA, it is necessary to consider the history and provisions of that Oregon law.

The ODDA was passed in 1994 as a ballot initiative. It did not go into effect until the end of 1997, however, due to numerous judicial challenges.[16] Many scholars consider the ODDA to be a major legal development,[17] and members of Congress appear to share this belief. Senator Orrin Hatch (R-Utah) and Representative Henry Hyde (R-Ill.), for example, asked the head of the Drug Enforcement Administration ("DEA") to write "a policy statement threatening to charge any doctor participating in the Oregon Act with a violation of the [CSA]."[18]

---

[10] Anthony Barone Kolenc, Casenote, *Commerce Clause Challenges After* United States v. Lopez, 50 FLA. L. REV. 867, 873 (1998).

[11] 514 U.S. 549 (1995).

[12] 529 U.S. 598 (2000), 120 S. Ct. 1740 (2000).

[13] *See, e.g.*, Christine Devey, *Commerce Clause, Enforcement Clause, or Neither? The Constitutionality of the Violence Against Women Act in* Brzonkala v. Morrison, 34 U. RICH. L. REV. 567 (2000); Anna Johnson Cramer, Note, *The Right Results for all the Wrong Reasons: An Historical and Functional Analysis of the Commerce Clause*, 53 VAND. L. REV. 271 (2000); David B. Kopel & Glenn H. Reynolds, *Taking Federalism Seriously:* Lopez *and the Partial-Birth Abortion Ban Act*, 30 CONN. L. REV. 59 (1997).

[14] 145 CONG. REC. S14,774 (1999).

[15] *Id.*

[16] Christine Neylon O'Brien et al., *Oregon's Guidelines for Physician-Assisted Suicide: A Legal and Ethical Analysis*, 61 U. PITT. L. REV. 329, 329 (2000); Fallek, *supra* note 6, at 1741–42 (describing the political process that led to the passage of the ODDA and the judicial challenges that the law faced).

[17] *E.g.*, O'Brien et al., *supra* note 16, at 331–32 ("Oregon has blazed a trail for the nation, and fought a fight that may filter down to other states in years to come.... The Oregon Death With Dignity Act, for all its six pages of simplicity, leaves a broad wake."); Susan R. Martyn & Henry J. Bourguignon, *Now Is the Moment to Reflect: Two Years of Experience with Oregon's Physician-Assisted Suicide Law*, 8 ELDER L.J. 1, 2 (2000) (referring to the ODDA as a "turning point in American law" of the magnitude of the Civil Rights Act of 1964).

[18] Fallek, *supra* note 6, at 1742. The DEA did write a statement to that effect, but Attorney General Janet Reno issued an opinion that nullified it, holding that the CSA was not intended to overturn a state law allowing assisted suicide. Letter from Janet Reno, Attorney General of the United States, to Representative Henry Hyde, Chairman, Committee on the Judiciary, House of Representatives (June 5, 1998), *available at* <http://www.house.gov/judiciary/attygen.htm>; *see also* Fallek, *supra* note 6, at 1742.

The ODDA provides:

> An adult who is capable, is a resident of Oregon, and has been determined by the attending physician and consulting physician to be suffering from a terminal disease, and who has voluntarily expressed his or her wish to die, may make a written request for medication for the purpose of ending his or her life in a humane and dignified manner . . . .[19]

The act contains numerous provisions designed to ensure the decision is a voluntary one.[20] A patient seeking a physician-assisted suicide must make two oral requests separated by at least fifteen days in addition to an initial written request;[21] a consulting physician must confirm that the patient has a terminal illness;[22] the written request must be made in the presence of two witnesses;[23] the doctor must inform the patient of her diagnosis, prognosis, and options other than suicide;[24] and the doctor must wait two days after receiving the written request before issuing the prescription.[25] As a final matter, the ODDA requires a physician prescribing lethal medication to file a report with the state.[26]

Despite the heavy publicity that surrounded the ODDA, a study published in 1999 shows that few patients have received a prescription under its provisions. In 1998, the first year the ODDA was in effect, a total of twenty-three people received prescriptions to end their lives.[27] Of the twenty-three, only fifteen had chosen to take their lives by ingesting the prescribed medicine by the beginning of the next year.[28] The median number of days between a patient's first request for medication and death was twenty,[29] while the median number of days between a patient's receipt of the medication and death was a mere one.[30]

Although "[m]any people feared that if physician-assisted suicide was legalized, it would be disproportionately chosen by or forced on terminally ill patients who were poor, uneducated, uninsured, or fearful of

---

[19] OR. REV. STAT. § 127.805 (1997).

[20] Some commentators, however, have asserted that these safeguards are not being applied stringently enough to guarantee that the patient is voluntarily requesting the prescription. *See, e.g.*, Martyn & Bourguignon, *supra* note 17, at 4 ("[T]he Oregon assisted-suicide law has no teeth.").

[21] OR. REV. STAT. § 127.840.

[22] *Id.* § 127.820.

[23] *Id.* § 127.810.

[24] *Id.* § 127.815.

[25] *Id.* § 127.850.

[26] *Id.* § 127.865.

[27] Arthur E. Chin et al., *Legalized Physician-Assisted Suicide in Oregon—The First Year's Experience*, 340 NEW ENG. J. MED. 577, 578 (1999).

[28] *Id.* Of the other eight, six died from the underlying illness, and two were still alive at the time of the study. *Id.*

[29] *Id.* at 579 tbl.1.

[30] *Id.*

the financial consequences of their illness," the Oregon data provided "no evidence to support these fears."[31] The study showed that the demographic make-up of patients utilizing the ODDA did not differ significantly from the demographic make-up of a control group, with the exception that patients utilizing the ODDA were more likely to have never married.[32] In addition, the patients who chose to end their lives under the ODDA were more likely to fear loss of autonomy and loss of control over bodily functions than members of the control group.[33]

A more recent study indicates that in 1999, the number of people receiving lethal medication increased slightly.[34] Thirty-three patients received prescriptions under the act in that year.[35] Of these, twenty-six ingested the medication and died.[36] The median number of days between patients' first oral request for the drug and death increased to eighty-three days,[37] but the median number of days between receipt of the prescription and death only increased to seven days.[38] Once again, the data did not validate fears that physician-assisted suicide would be used only by the poor and uneducated.[39] When interviewed, patients expressed concerns similar to those expressed by patients who ended their lives under the ODDA in 1998, stating that they were motivated by fears of loss of autonomy, loss of control of bodily functions, and loss of the ability to engage in enjoyable aspects of life.[40]

The empirical studies thus illustrate that despite a slight increase in year two, the number of patients utilizing the ODDA remains small. Moreover, the statistics indicate that patients who chose physician-assisted suicide did so not for financial reasons, as feared by critics of the ODDA, but instead for quality of life reasons. Despite the limited impact of the ODDA, however, several members of Congress seek to supercede the act through passage of the PRPA.[41]

---

[31] *Id.* at 582.

[32] *Id.*

[33] *Id.* The control group consisted of terminally ill patients who did not request lethal medication. *Id.* at 577.

[34] Amy Sullivan et al., *Legalized Physician-Assisted Suicide in Oregon—The Second Year*, 342 NEW ENG. J. MED. 598, 599 (2000).

[35] *Id.*

[36] *Id.* Five patients died from their illnesses, and two were still alive at the time of the study. *Id.*

[37] *Id.* at 601.

[38] *Id.*

[39] *Id.* at 602 ("Although concern about possible abuses persists, our data indicate that poverty, lack of education or health insurance, and poor care at the end of life were not important factors in patients' requests for assistance with suicide.").

[40] *Id.* at 602–03.

[41] The fate of the PRPA holds interest for states other than Oregon. In November, 2000, Maine narrowly rejected a voter initiative that would have legalized physician-assisted suicide. Joyce Howard Price, *Maine Voters Say No to Assisted Suicide Among Ballot Issues; Gay 'Marriage' Struck Down in Two States*, WASH. TIMES, Nov. 8, 2000, at A15. Voters rejected the measure by a small margin, 52% to 48%, indicating a significant level of support for the issue. *Id.*

The PRPA would effectively overturn the ODDA by changing the definition of "legitimate medical purpose" under federal law.[42] Senator Nickles introduced the PRPA in the Senate as Senate Bill 1272[43] on June 23, 1999.[44] Representative Hyde introduced a companion measure, House Bill 2260,[45] in the House of Representatives on June 17, 1999.[46] The House Bill passed on October 27, 1999[47] and was sent to the Senate, but neither Senate Bill 1272 nor House Bill 2260 has been put to a vote in the upper chamber, in large part due to Senator Ron Wyden's (D-Or.) threat of a filibuster and his ability to garner enough support to avoid cloiture.[48]

Title I, section 101 of the PRPA rejects physician-assisted suicide as a legitimate use of federally regulated drugs:

> For purposes of this Act and any regulations to implement this Act, alleviating pain or discomfort in the usual course of professional practice is a legitimate medical purpose for the dispensing, distributing, or administering of a controlled substance that is consistent with public health and safety, even if the use of such a substance may increase the risk of death. Nothing in this section authorizes intentionally dispensing, distributing, or administering a controlled substance for the purpose of causing death or assisting another person in causing death.[49]

The bill thus states that while the prescription of medication for the purpose of *alleviating pain and suffering*—even if such medication runs the risk of increasing the possibility of death—is not prohibited, the prescription of medication for the purpose of *assisting suicide* is.[50] The bill

---

[42] *See infra* note 49 and accompanying text. A motivating factor for several congressional critics of the ODDA was a perception of some members of the public that the federal government had played a role in the implementation of that act. This perception stems from the fact that doctors acting pursuant to the ODDA prescribe drugs regulated under federal law. The director of the New York State Catholic Conference expressed such a view, stating that "43 persons have deliberately been put to death, aided by federal authorization by DEA agents." John M. Kerry, *The Real Point of the Pain Relief Promotion Act*, TIMES UNION, Oct. 9, 2000, at A10.

[43] S. 1272, 106th Cong. (1999).

[44] 145 CONG. REC. S7527 (1999).

[45] H.R. 2260, 106th Cong. (1999).

[46] 145 CONG. REC. H4614 (1999).

[47] 145 CONG. REC. H10,903 (daily ed. Oct. 27, 1999).

[48] Jim Barnett, *GOP Reaffirms Pledge to Block Assisted Suicide*, OREGONIAN, Oct. 13, 2000, at A2. In response, Senator Nickles has attached the PRPA to a year-end tax bill. Dan Morgan, *Congress Faces Battle Over Assisted Suicide*, COMMERCIAL APPEAL, Nov. 26, 2000, at A12. Senator Wyden has threatened to "take the floor to discuss Nickles' pain relief measure" if the Republicans move on the tax bill. Jim Barnett, *Wyden Continues Assisted Suicide Fight*, OREGONIAN, Nov. 1, 2000, at D9. As this issue goes to press, the bill remains stalled in the Senate.

[49] S. 1272, 106th Cong. § 101 (1999).

[50] A majority of the Supreme Court recognized this intent-based distinction in *Wash-*

explicitly mandates that the Attorney General "give no force and effect to State law authorizing or permitting assisted suicide or euthanasia"[51] and provides for "educational and training programs for local, State, and Federal personnel . . . on the legitimate use of controlled substances in pain management and palliative care, and means by which investigation and enforcement actions by law enforcement personnel may accommodate such use."[52] Although the bill itself does not impose criminal sanctions, persons distributing drugs in violation of the CSA face a mandatory prison term of twenty years.[53] The PRPA would therefore criminalize the behavior of a doctor who prescribed lethal medication under the ODDA.

Title II of the PRPA instructs the Administrator of the Agency for Health Care Policy and Research (the "Administrator") to carry out a program researching palliative care and provides that grants will be available for private palliative care research.[54] The bill defines palliative care as "the active total care of patients whose prognosis is limited due to progressive, far-advanced disease. The purpose of such care is to alleviate pain and other distressing symptoms and to enhance the quality of life, not to hasten or postpone death."[55] The PRPA authorizes the Administrator to develop and disseminate a protocol for palliative care.[56] The bill also allocates $5 million for research into effective palliative care.[57] Title II has engendered little controversy; indeed, many commentators

---

ington v. Glucksburg, 521 U.S. 702, 736–37 (1997). Justice O'Connor's concurrence, joined by four other justices, noted:

> The parties and amici agree that in [Washington and New York, both of which had laws prohibiting the assistance of suicide], a patient who is suffering from a terminal illness and who is experiencing great pain has no legal barriers to obtaining medication, from qualified physicians, to alleviate that suffering, even to the point of causing unconsciousness and hastening death.

Id. A previous congressional attempt to prohibit physician-assisted suicide, the Lethal Drug Abuse and Prevention Act ("LDAP"), H.R. 4006, 105th Cong. (1998), failed largely because of concerns that doctors would not appropriately treat pain due to fear of being prosecuted under the revised law. As noted in the text, the PRPA directly addresses this concern. *See* Fallek, *supra* note 6, at 1746–50 (describing the LDAP—including its failure to pass the House of Representatives—and describing the provisions of the PRPA). Senator Wyden, the most prominent opponent of the PRPA, has argued that the PRPA will still have a chilling effect on prescriptions for pain control. *See* Jim Barnett, *Election May Help Stall Pain-Relief Bill*, OREGONIAN, Sept. 20, 2000, at A08. This concern may have prevented Senator Nickles from garnering enough support for the PRPA to overcome the threatened filibuster by Senator Wyden. *See* Jim Barnett, *Republicans Push New Block to Assisted Suicide*, OREGONIAN, Oct. 6, 2000, at A01.

[51] S. 1272, § 101.

[52] *Id.* § 102.

[53] Controlled Substances Act, 21 U.S.C. § 841(b)(i)(c) (1994); *see also* Fallek, *supra* note 6, at 1749.

[54] S. 1272, §§ 201–202.

[55] *Id.* § 201.

[56] *Id.*

[57] *Id.* § 202.

have applauded this effort to improve the quality of palliative care available to patients.[58]

In his statements on the PRPA, Senator Nickles commented extensively on the ODDA and stated that the purpose of the PRPA was to overrule a statement made by Attorney General Janet Reno that the CSA does not, by itself, prohibit the use of drugs for medical practices a state deems legitimate.[59] By overturning that statement, the PRPA would effectively overrule the ODDA. As a result, "[t]here is little doubt that should the PRPA become law, supporters of Oregon's assisted-suicide law will challenge the Act as unconstitutional."[60] Opponents will likely challenge the constitutionality of the PRPA on the grounds that under the Supreme Court's new Commerce Clause jurisprudence, Congress lacks the power to enact the statute.[61]

Prior to the Supreme Court's decision in *United States v. Lopez*, it seemed that Congress could regulate any activity so long as that activity had an effect on interstate commerce.[62] The limitation on Congress's power enunciated in *Lopez* thus represented a significant break from precedent.[63] Although there has been some confusion about the proper test in the wake of *Lopez* and *Morrison*, there are four factors that emerge from the cases and scholarly literature as key questions that a court should consider in deciding whether Congress was authorized in passing a given statute: (1) the presence of a jurisdictional element to the legislation, (2) the extent to which the regulated activity is commercial, (3) the extent to which the regulated activity is an activity traditionally left to the states, and (4) the ability of the court to determine a stopping point for federal power. Applying these factors to the PRPA reveals a likelihood that the bill will survive a Commerce Clause challenge.

---

[58] *See, e.g.*, Kerry, *supra* note 42.

[59] *See* 145 CONG. REC. S14,775 (daily ed. Nov. 18, 1999); *supra* note 18.

[60] Fallek, *supra* note 6, at 1740.

[61] A recent amendment to the PRPA passed by the Senate Judiciary Committee (but not voted on by either house of Congress) makes Congress's reliance on the Commerce Clause explicit, stating, "the dispensing and distribution of controlled substances for any purpose affect interstate commerce." H.R. 2260, 106th Cong. § 2(6) (2000) (Reported in Senate).

[62] *See, e.g.*, Katzenbach v. McClung, 379 U.S 294 (1964) (upholding, against Commerce Clause challenge, the application of the Civil Rights Act to a restaurant based upon its purchase of food from interstate sources); Wickard v. Filburn, 317 U.S. 111 (1942) (holding that quotas imposed under the Agricultural Adjustment Act of 1938 could be applied, pursuant to the Commerce Clause power, to a farmer who grew wheat on his farm for his own consumption only). *See generally* Anna J. Cramer, *The Right Results for All the Wrong Reasons: An Historical and Functional Analysis of the Commerce Clause*, 53 VAND. L. REV. 271, 283–84 (2000) ("No limitation on the Commerce Clause power appeared in the case law to prevent the expansive nationalization of criminal law.").

[63] The Court in *Lopez* held that Congress can permissibly regulate (1) use of the channels of interstate commerce, (2) instrumentalities of interstate commerce or persons or things in interstate commerce, and (3) activities having substantial relation to interstate commerce. *See* 514 U.S. 549, 558 (1995). This piece addresses only the third category because the PRPA is not a regulation of the channels or instrumentalities of interstate commerce.

The phrase "jurisdictional element" refers to a procedure by which the application of a law is conditioned upon a finding that the case involves interstate commerce.[64] In both *Lopez* and *Morrison*, the Court observed that the challenged statute lacked a jurisdictional element guaranteeing that the regulated activity affected interstate commerce.[65] The PRPA also lacks a jurisdictional element—it requires neither that the individual distribution affect interstate commerce nor that the medication that is distributed pass in interstate commerce.[66]

In deciding *Lopez* and *Morrison*, however, the Court did not state that the jurisdictional element was a requirement. Instead, it emphasized that the presence of the element in the statutes under consideration would have lent support to the argument that they were within Congress's power.[67] Commentators seem to agree that a jurisdictional element is not a prerequisite for a court finding a statute valid under the Commerce Clause.[68] Thus, it does not appear that the PRPA's lack of a jurisdictional element is fatal to the bill.

Legislators might be able to bring a statute that is unconstitutionally broad within Congress's power by limiting the application of the law to cases in which the regulated activity is "in or affecting commerce."[69] It would be relatively easy for Congress to add a jurisdictional requirement

---

[64] Parker Douglas, Note, *The Violence Against Women Act and Contemporary Commerce: Principled Regulation and the Concerns of Federalism*, 1999 UTAH L. REV. 703, 713 (1999).

[65] *See* United States v. Morrison, 529 U.S. 598, 120 S. Ct. 1740, 1751–52 (2000) ("Like the Gun-Free School Zones Act ["GFSZA"] at issue in *Lopez*, § 13981 [of the Violence Against Women Act] contains no jurisdictional element establishing that the federal cause of action is in pursuance of Congress' power to regulate interstate commerce."); *Lopez*, 514 U.S. at 561 ("§ 922(q) contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce.").

[66] *See* S. 1272, 106th Cong. (1999).

[67] *See Morrison*, 120 S. Ct. at 1751–52; *Lopez*, 514 U.S. at 561–62.

[68] *See, e.g.*, Sara E. Kropf, *The Failure of* United States v. Lopez*: Analyzing the Violence Against Women Act*, 8 S. CAL. REV. L. & WOMEN'S STUD. 373, 402–04 (1999) (reviewing the case law and concluding that "the jurisdictional element is 'best interpreted as an alternative avenue to constitutionality rather than as a requirement'") (quoting Kerrie E. Maloney, *Gender-Motivated Violence and the Commerce Clause: The Civil Rights Provision of the Violence Against Women Act After* Lopez, 96 COLUM. L. REV. 1876, 1934 (1996)); Douglas, *supra* note 64, at 718 (arguing that the Court in *Lopez* devised three alternative tests—the jurisdictional element test being one of them—any one of which would satisfy the Commerce Clause's requirements); Johanna R. Shargel, Note, *In Defense of the Civil Rights Remedy of the Violence Against Women Act*, 106 YALE L.J. 1849, 1863 (1997) ("[T]he decisions lend support to the position that an actual jurisdictional element is not a prerequisite for the legitimate exercise of Congress's Commerce Clause power.").

[69] This tactic was used to remedy the GFSZA, which was struck down in *Lopez*. It has since been reenacted with a requirement that either the gun have moved in interstate commerce or that the possession otherwise have affected interstate commerce. *See* 18 U.S.C. § 922(q)(2)(A) (1994 & Supp. 1996). For a discussion of the revised GFSZA see Harry Litman & Mark D. Greenberg, *Federal Power and Federalism: A Theory of Commerce-Clause Based Regulation of Traditionally State Crimes*, 47 CASE W. RES. L. REV. 921 (1997).

to the PRPA,[70] but adding such language would limit the application of the law to cases involving drugs that have traveled in interstate commerce.

A second factor suggested by *Lopez* and *Morrison* is the extent to which the regulated activity is commercial in nature,[71] though courts have not set clear guidelines as to how to determine whether an activity is commercial.[72] In holding the Gun Free School Zones Act ("GFSZA") unconstitutional in *Lopez*, the Supreme Court stated, "Even *Wickard*, which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that the possession of a gun in a school zone does not."[73] In *Morrison*, the Court more explicitly relied upon the non-commercial nature of the regulated activity in striking down a statutory provision.[74] The Court observed that while it had never explicitly required that the regulated behavior be economic by nature, historically it has upheld only the regulation of economic behavior.[75] Courts applying the requirement since *Lopez* and *Morrison*, however, have consistently stretched the definition of "commercial" in order to classify a law as a regulation of commercial activity.[76]

---

[70] Congress could merely add the phrase "in or affecting interstate commerce" to Title I of the bill.

[71] *See* Glenn H. Reynolds & Brannon P. Denning, *Lower Court Readings of* Lopez, *or What if the Supreme Court Held a Constitutional Revolution and Nobody Came?*, 2000 WIS. L. REV. 369, 373 (2000) ("Rehnquist went on to describe factors relevant to determining the constitutionality of Category Three regulations. First, was the regulation connected to 'any sort of economic enterprise?'"); Shargel, *supra* note 68, at 1864 ("The *Lopez* opinion seemed in large part to be driven by the fact that the Gun-Free School Zones Act did not directly involve economic activity . . . .").

[72] *See, e.g.*, Kropf, *supra* note 68, at 395–96 ("*Lopez* ambiguously decides the issue of whether a regulated activity's economic nature functions as a threshold question of its constitutionality.... The most plausible reading is the middle ground: the activity need not be strictly economic but must at least relate to economic activity in some way...."). Commercial activity is defined as that which "[r]elates to or is connected with trade and traffic or commerce in general; is occupied with business and commerce." BLACK'S LAW DICTIONARY 270 (6th ed. 1990). Commerce is "[t]he exchange of goods, productions, or property of any kind; the buying, selling, and exchanging of articles." *Id.* at 269.

[73] *Lopez*, 514 U.S. at 560.

[74] *Morrison*, 120 S. Ct. at 1751 (noting that gender-motivated crime does not qualify as commercial activity).

[75] *Id.*

[76] The most striking recent example of a court straining to find that a regulated activity is commercial in nature is *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000). In that case, the court faced a challenge to a regulation limiting the ability of private landowners to kill red wolves because they qualify as an endangered species. The court upheld the federal statute as within Congress's Commerce Clause power. *Id.* at 486–87. In so holding, the court stated that this statute "regulates what is in a meaningful sense economic activity . . . . The protection of commercial and economic assets is a primary reason for taking the wolves." *Id.* at 492. It is not clear that the activity regulated in *Gibbs* is commercial activity, however, because the statute also forbids the killing of wolves for non-economic purposes. For additional examples of courts straining to classify regulations as commercial, see United States v. Gregg, 226 F.3d 253, 262 (3d Cir. 2000) (arguing that, unlike the Violence Against Women Act's civil remedy, a law banning both the obstruction of a reproductive

The PRPA regulates the "dispensing, distributing, or administering" of "a controlled substance for the purpose of causing death."[77] Under the ODDA, however, the patient need not necessarily purchase the medication from a physician. The physician can either dispense the medication himself[78] or provide the patient with a prescription, which would allow the patient to purchase the medication at a pharmacy.[79] Thus, the doctor may be dispensing a product—clearly a form of commercial activity—or providing medical assistance—which might be classified as either a commercial or non-commercial activity. The former activity fits squarely within the definition of commercial activity because it "relates to or is connected with trade and traffic" of a good.[80] In the latter activity, however, the doctor is not actually involved in the trade or traffic of a good, but her behavior is closely related thereto because the doctor is at least *enabling* commerce. Following the Court's rejection of the Commerce Clause arguments regarding the GFSZA in *Lopez* and the Violence Against Women Act ("VAWA") in *Morrison*,[81] it appears the Court is no longer willing to allow Congress to regulate an activity merely because it is related to or connected with commerce in some way. The Court's treatment of the PRPA, therefore, would in large part turn on the degree to which it found the treatment of patients and the prescription of medication to be commercial in nature.

One scholar has observed that "[t]here are a few areas which many commentators, including Supreme Court Justices, agree are generally the province of the states rather than the federal government: criminal law, education and family law."[82] The Court in *Lopez* asserted that some aspects of education and the family are areas of traditional state concern that the federal government may not regulate,[83] and in *Morrison* the

---

health facility and the intimidation of those entering the facility was a regulation of economic activity); United States v. Malone, 222 F.3d 1286, 1295 (10th Cir. 2000) (holding that the Hobbs Act, which regulates robbery and extortion, is a regulation of commercial activity); United States v. Bunnell, 106 F. Supp. 2d 60, 65 (D. Me. 2000) (holding that 18 U.S.C. § 922 (g)(8), which regulates, among other things, the possession of a firearm, is a regulation of economic activity).

[77] S. 1272, 106th Cong. § 101 (1999).

[78] OR. REV. STAT. § 127.815(3.01)(1)(L)(B) (1997).

[79] This is a bit of a simplification. In reality, the doctor must contact the pharmacy himself and then directly provide the pharmacy with the prescription—either in person or by mail. *Id.*

[80] BLACK'S LAW DICTIONARY 269–270 (6th ed. 1990).

[81] *See supra* notes 73–74 and accompanying text.

[82] Kropf, *supra* note 68, at 405.

[83] In *Lopez*, the Court dismissed the government's argument that the GFSZA was related to interstate commerce because guns in school affect the learning environment, which in turn affects interstate commerce:

> For instance, if Congress can, pursuant to its Commerce Clause power, regulate activities that adversely affect the learning environment, then, a fortiori, it also can regulate the educational process directly. Congress could determine that a school's curriculum has a "significant" effect on the extent of classroom learning.

Court articulated that some criminal statutes are simply beyond Congress's power.[84] Since the PRPA would criminalize the dispensation of lethal medication, it would be subject to challenge as a congressional usurpation of regulation in the field of criminal law, a field traditionally left to the states.

In reality, however, Congress frequently regulates certain aspects of the family,[85] education,[86] and crime.[87] For example, the criminal regulation of drugs is not an area that has traditionally been left to the states.[88] It is important to recognize that the Court's holding in *Morrison* was not that the regulation of *any* crime was beyond the Commerce Clause power of Congress, but rather that the regulation of violent crimes that have *traditionally been left to the states* is beyond that power.[89] The fact that the federal government has been involved in the criminal regulation of drugs for many years, therefore, provides a strong argument that the Court would not find the federal regulation proposed by PRPA to be a constitutionally invalid incursion into a realm of regulation traditionally left to the states.

Relying on the time-honored principle that the federal government is a government of limited powers,[90] however, the Supreme Court has indicated that it will not interpret the Commerce Clause in a way that would give Congress power to pass legislation regarding any and all aspects of life.[91] Professors Kopel and Richards term this refusal to accept bound-

---

> As a result, Congress could mandate a federal curriculum for local elementary and secondary schools because what is taught in local schools has a significant "effect on classroom learning," and that, in turn, has a substantial effect on interstate commerce.

514 U.S. 549, 565 (1995) (citation omitted). Thus, the Court felt that the government's argument would allow the federal government to mandate local curricula.

[84] 529 U.S. 598, 120 S. Ct. 1740, 1754 (2000).

[85] *See, e.g.*, 18 U.S.C. § 228 (1994) (making it a federal crime to fail to pay child support if the parent and child live in different states).

[86] *See Lopez*, 514 U.S. at 565–66 ("We do not doubt that Congress has authority under the Commerce Clause to regulate numerous commercial activities that substantially affect interstate commerce and also affect the educational process. That authority, though broad, does not include the authority to regulate each and every aspect of local schools.").

[87] *See, e.g.*, 18 U.S.C. § 922(g) (2000) (making it a crime for a felon to possess a firearm in or affecting commerce); 18 U.S.C. § 844(i) (2000) (making arson of a building in or affecting interstate commerce a federal crime).

[88] *See, e.g.*, Controlled Substances Act, 21 U.S.C. § 801–971 (1994). The CSA was passed in 1970. *See* 145 CONG. REC. S14,774 (1999) (referring to the CSA of 1970).

[89] 120 S.Ct. at 1754 (arguing that the VAWA civil remedy was part of the "police power, which the Founders denied the National Government and reposed in the States").

[90] *See, e.g.*, THE FEDERALIST No. 45, at 292–93 (James Madison) (Clinton Rossiter ed., 1961) ("The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.").

[91] *See Lopez*, 514 U.S. at 567–68 ("To [uphold the GFSZA] would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated, and that there never will be a distinction between what is truly national and what is truly local. This we are unwilling to do.") (citations omitted).

less legislative power the "non-infinity" principle.[92] This principle played a key role in the Court's invalidation of the GFSZA in *Lopez*. In that case, the Court cited its fears that if accepted at face value, the "costs of crime" and "national productivity" justifications for the GFSZA offered by Congress would allow that body to regulate virtually any activity under the Commerce Clause.[93] Similarly, in *Morrison* the Court suggested that it would not accept a rationale for Congressional authority under the Commerce Clause so broad that it would permit Congress to regulate any activity imaginable so long as it somehow touched upon interstate commerce.[94] The non-infinity principle, therefore, seems to have a significant impact on a court's determination of the constitutionality of a statute.[95]

On its face, the PRPA—an act regulating the dispensing of goods in a wholly intrastate manner—raises significant non-infinity concerns. Any attempt to defend the PRPA against a non-infinity challenge based on the effect of the deaths of the patients upon the national economy would likely fail, for it would suffer from the same flaw as the "costs of crime" and "national productivity" justifications that were rejected in *Lopez* and *Morrison*.[96] Proponents of the bill, however, could attempt to address the non-infinity requirement by distinguishing the PRPA as a bill that, unlike the GFSZA in *Lopez* or the VAWA in *Morrison*, is designed to regulate inherently commercial activity.[97] If the Court agrees that the relevant regulated activity is the distribution of medication—a commercial activity—proponents of the PRPA could provide a clear limiting rationale for

---

[92] David B. Kopel & Glenn H. Richards, *Taking Federalism Seriously:* Lopez *and the Partial-Birth Abortion Ban Act*, 30 CONN. L. REV. 59, 69 (1997) ("The second analytical principle that *Lopez* offers is one this Article calls the 'non-infinity principle.' In other words, for a Commerce Clause rationale to be acceptable under *Lopez*, it must not be a rationale that would allow Congress to legislate on everything.").

[93] "Under the theories that the Government presents in support of § 922(q), it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign." *Lopez*, 514 U.S. at 564.

[94] The Court explained:

> The reasoning that petitioners advance seeks to follow the but-for causal chain from the initial occurrence of violent crime (the suppression of which has always been the prime object of the States' police power) to every attenuated effect upon interstate commerce. If accepted, petitioners' reasoning would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption.

Morrison, 120 S. Ct. at 1752–53.

[95] *See, e.g.*, United States v. Pappadopoulos, 64 F.3d 522 (9th Cir. 1995) (ruling that applying the federal arson statute to a private home whose only tie to interstate commerce was the natural gas line violated the non-infinity principle). *But see* United States v. Cardoza, 129 F.3d 6 (1st Cir. 1997) (upholding a conviction under the federal felon-in-possession law, 18 U.S.C. § 922(g) (West Supp. 1997), because the ammunition in question had passed in interstate commerce).

[96] *See supra* notes 93–94 and accompanying text.

[97] *See supra* notes 77–80 and accompanying text.

Congress's authority under the Commerce Clause, thus addressing the concerns of the non-infinity principle. Proponents of the bill could argue that the non-infinity principle only comes into play when the legislation in question—such as the GFSZA or VAWA—regulates activity that is not itself interstate commerce, but merely affects interstate commerce. Since the PRPA directly regulates interstate commerce, the argument would conclude, the non-infinity principle is not relevant.[98]

Despite the inherent difficulty of predicting the outcome of Commerce Clause challenges in the post-*Lopez* era, an analysis of the PRPA using the four factors that emerge from that case and *Morrison* reveals that the legislation would likely be ruled constitutional. That said, there is something fundamentally unjust about a federal law explicitly designed to overturn an assisted suicide policy debated and voted upon by the residents of a sovereign state. An application of the four-factor test outlined in this piece, however, permits this result because it does not confirm the natural suspicion that the PRPA is an incursion on Oregon's right to regulate the behavior of its doctors. Adjudication of the constitutionality of the PRPA would provide the Supreme Court with an opportunity to fully articulate a new Commerce Clause rule that would better protect the federal-state balance of our nation without unduly limiting the power of Congress to address national concerns.

—*Robert A. Klinck*

[98] Some might criticize this rationale by arguing that this rule would make the commercial/non-commercial dichotomy dispositive in every case. The counter to this argument is that the commercial nature of the regulated activity is not *necessary* for a finding that a statute is consistent with the non-infinity principle, but it is *sufficient*. Under this explanation, commercial activity is always subject to federal regulation, while non-commercial activity is only subject to regulation if each instance of activity affects interstate commerce. *Lopez* and *Morrison* seem to adhere to this very rule. *See supra* notes 73–74 and accompanying text.

PRIMARY ELECTIONS

Perhaps the most interesting story of the 2000 presidential primary season was Senator John McCain's (R-Ariz.) surprising challenge to Governor George W. Bush (R-Tex.) for the Republican presidential nomination. After McCain's dramatic victory in Michigan on February 22, many political commentators believed that McCain had a serious chance of winning the nomination.[1] At the same time, however, many of these commentators noted a curious feature of the McCain phenomenon: the Senator was winning primaries and gaining electoral momentum despite the fact that he was not winning a majority of Republican votes.[2]

It was McCain's appeal to independent voters,[3] combined with state primary laws allowing such voters to participate in primary elections, that fueled his February surge. In New Hampshire, the site of McCain's first primary victory, he benefited immensely from the state's "semi-closed" primary law, which allows an independent voter to register as a party member and vote in that party's primary on the day of the primary election, and then, immediately after voting, to re-register as an independent.[4] In that state, McCain beat Bush by a small margin among registered Republicans but won the independent vote decisively to gain an impressive eighteen-point victory overall.[5] McCain performed in a similar manner in Michigan, actually finishing behind Bush among registered Republicans but gaining enough independent and Democratic votes through Michigan's open primary—in which any voter, regardless of party affiliation, may vote in any party's primary—to defeat Bush by eight points.[6]

The McCain campaign thus illustrated the importance of primary election laws as well as the variation of such laws among the states. Unlike general elections, which are fairly uniform in format across the country, primary elections vary greatly from state to state. Primaries can be classified into five basic categories—closed, semi-closed, open, blanket, and nonpartisan—and several of these categories feature variations.[7]

---

[1] *See, e.g., Mr. McCain's Michigan Surprise*, N.Y. TIMES, Feb. 23, 2000, at A20.

[2] *See, e.g.*, James Bennet & Keith Bradsher, *Republicans Again Courting Democrats and Independents*, N.Y. TIMES, Feb. 21, 2000, at A1.

[3] As used throughout this piece, the terms "independents" and "independent voters" refer to individuals not registered with a political party prior to election day.

[4] Independent or undeclared voters may effectuate such a re-registration by filing a pre-printed card with poll workers immediately after voting. N.H. REV. STAT. ANN. § 654:34(II)(b) (1999).

[5] Michael R. Kugay, *Poll Results Show Vulnerability in Calling Primaries Accurately*, N.Y. TIMES, Feb. 3, 2000, at A24; Richard L. Berke, *McCain and Bush Revving Up Their Campaigns: Bruised Frunt-Runner Rethinks Strategy*, N.Y. TIMES, Feb. 3, 2000, at A1.

[6] R.W. Apple, Jr., *Michigan Results Suggest Problems for G.O.P. in Fall*, N.Y. TIMES, Feb. 24, 2000, at A22; David Barstow, *Confidence Restored, McCain Trumpets His Conservatism and Reaches Out*, N.Y. TIMES, Feb. 24, 2000, at A23.

[7] This categorization is based on the structure laid out by the Supreme Court in *Tashjian v. Republican Party of Conn.*, 479 U.S. 208 (1986). While that case does not use the precise terminology used throughout this piece, Justice Marshall did recognize each of the

Primary election law in the United States thus consists of an odd collection of differing structures, each one creating its own political dynamic.

The Supreme Court's recent decision in *California Democratic Party v. Jones*,[8] however, dramatically shifted the landscape of primary election law. In that case, the Court invalidated California's blanket primary, holding that it infringed on political parties' First Amendment associational rights by allowing non-members to interfere with the party's choice of a standard-bearer.[9] In the process, the Court outlined a robust conception of the associational rights of political parties that calls into question whether a state can ever mandate that a party open its primary to non-members without the party's consent.

While *California Democratic Party* marked the end of the blanket primary, the effect of the decision on other types of primaries remains unclear. Although the majority indicated that nonpartisan primaries remain constitutional,[10] Justice Stevens intimated in his dissent that the Court's decision dictates the invalidation of all primaries except closed ones.[11] An analysis of the Court's reasoning in *California Democratic Party*, however, suggests that the semi-closed primary could survive the Court's constitutional analysis, though the open primary likely could not.

Of the five types of primaries, the most common are the two versions of the closed primary—the "classic closed" primary and the "semi-closed" primary.[12] The classic closed primary—the most basic type of primary—permits only party members who have been affiliated with the party for some specified amount of time to vote.[13] States with classic closed primaries set registration deadlines before the primary. If an individual does not register with a party by the deadline, he cannot vote in that party's primary. The registration deadline ranges from the day of the primary election to several weeks before the primary, but in all cases a classic closed primary requires an independent act of affiliation with the party before an individual can vote in a party primary.[14] Nineteen states

---

first four categories of primaries as analytically distinct. *Id.* at 222 n.11. While Justice Marshall did not differentiate nonpartisan primaries from blanket primaries, the Court has treated the nonpartisan primary as an independent class of primary in subsequent cases. *See* Cal. Democratic Party v. Jones, 120 S. Ct. 2402, 2414 (2000).

[8] 120 S. Ct. 2402 (2000).

[9] *Id.* at 2414.

[10] *Id.*

[11] *Id.* at 2420 (Stevens, J., dissenting).

[12] I have coined the terms "classic closed" and "semi-closed" to distinguish between the two types of closed primary. Although the Supreme Court has not used these terms, it has recognized this distinction. In *Tashjian*, the Court referred to "'closed' primaries of the classic sort" as distinct from those primaries that allow "a voter previously unaffiliated with any party to vote in a party primary if he affiliates with the party at the time of, or for the purpose of, voting in the primary." 479 U.S. at 222 n.11.

[13] *Id.*

[14] *See, e.g.*, N.Y. ELEC. LAW § 5-302.4 (McKinney 2000) (individuals must enroll with a party at least 25 days before the primary); COLO. REV. STAT. § 1-2-218.5 (1999) (indi-

use classic closed primaries.[15]

The semi-closed primary, like the classic closed primary, allows only voters registered with the party to vote in the party's primary.[16] However, registration is easier in a jurisdiction that uses the semi-closed primary. States with semi-closed primaries generally either allow unaffiliated voters to register with a party for the duration of that party's primary or they consider the act of participating in a party's primary the functional equivalent of registering with that party.[17] In essence, therefore, semi-closed primaries do not require an independent act of affiliation before allowing independent voters to vote in the party primary.

Semi-closed primaries take a variety of forms. Some, such as those in New Hampshire and Massachusetts, allow an unaffiliated voter to register with a party for the primary and then immediately re-register as an independent.[18] By contrast, Alabama considers the act of voting in a party's primary to be tantamount to registration.[19] Some states feature closed primary hybrids, in which unaffiliated voters may vote in a party primary if they have never voted in a primary before, but may not do so if they voted in another party's primary in the previous election cycle.[20]

---

viduals may affiliate with a party on the day of the primary).

[15] *See* COLO. REV. STAT. § 1-2-218.5 (1999); CONN. GEN. STAT. § 9-431 (1999); DEL. CODE ANN. tit. 15, § 3161 (1999); FLA. STAT. ANN. § 101.021 (West 1999); KAN. STAT. ANN. § 25-3301 (1993); KY. REV. STAT. ANN. §§ 116.045, 116.055 (Michie 1998); ME. REV. STAT. ANN. tit. 21-A, § 340 (West 1999); MD. ANN. CODE art. 33, §§ 3-302, 8-802 (1997); NEB. REV. STAT. § 32-312 (1998); NEV. REV. STAT. 293.287 (1999); N.M. STAT. ANN. § 1-12-7 (Michie 2000); N.Y. ELEC. LAW § 1-104.9 (McKinney 2000); N.C. GEN. STAT. §§ 163.119, 163.226.1 (1999); OKLA. STAT. tit. 26, § 1-104 (1999); OR. REV. STAT. § 254.365 (1999); PA. STAT. ANN. tit. 25, § 2832 (West 2000); S.D. CODIFIED LAWS § 12-6-26 (Michie 2000); UTAH CODE ANN. § 20A-3-104.5 (2000); W. VA. CODE ANN. § 3-1-35 (Michie 2000). Most of these statutes contain express provisions codifying the Supreme Court's holding in *Tashjian*, which stated that if a party wished to open its primary to non-members, the state could not block it from doing so. 479 U.S. at 224–25; *see, e.g.*, CONN. GEN. STAT. § 9-374 (1999); ME. REV. STAT. ANN. tit. 21-A, § 340 (West 1999); OR. REV. STAT. § 254.365 (1999).

[16] Arizona constitutes the one exception to this rule. Its statute expressly allows independent voters or members of parties "not entitled to continued representation on the ballot" to vote in a party primary. ARIZ. REV. STAT. ANN. § 16-467 (West 1999). Arizona amended its constitution in 1998 to create this voting arrangement, and actually has characterized the primary structure as an open primary. *See* ARIZ. CONST. art. VII, § 10. However, since the law expressly states that registered party members may only vote in their party's primary, Arizona's primary seems better described as a semi-closed primary than an open primary. *See* 2000 Ariz. Op. Att'y Gen. No. I00-019 (Aug. 11, 2000), 2000 WL 1179774, at *1.

[17] *See Tashjian*, 479 U.S. at 222 n.11.

[18] *See, e.g.*, N.H. REV. STAT. ANN. §§ 654:34(II), 654:34(V) (1997) (an unaffiliated voter can arrive at the primary, declare party preference, receive that party's primary ballot, and then re-register as an independent voter before leaving the polling place by returning a pre-printed card to a designated official); MASS. GEN. LAWS ch. 53, § 37 (1998) (an unenrolled voter may request a party's primary ballot and have that affiliation publicly announced and recorded, but will remain on the rolls as an unenrolled voter after the primary).

[19] *See* ALA. CODE § 17-16-14(b) (2000).

[20] *See, e.g.*, N.J. STAT. ANN. § 19:23-45.1 (West 1999); OHIO REV. CODE ANN.

Perhaps the most peculiar requirements are those imposed on independents by Indiana and Mississippi. Indiana allows voters to participate in a party's primary election if they supported the majority of the party's candidates in the past general election or, if they did not vote in the last general election, they promise to support the majority of the party's nominees in the upcoming general election.[21] Mississippi demands an even greater profession of loyalty: only individuals who intend to vote in the general election for all of the nominees selected in a particular party primary are eligible to vote in that primary.[22]

The semi-closed primary, therefore, varies widely from state to state, the various forms sharing only the requirement of party affiliation.[23] Overall, nineteen states use some form of semi-closed primary.[24]

In contrast to both the classic closed and semi-closed primaries, the open primary, which is currently employed in eight states, allows any voter—whether a party member or not—to participate in the party primary.[25] For example, a registered Democrat could choose to vote in his own party's primary, in the Republican primary, or in any other primary he found interesting. The only restriction imposed by the open primary is that an individual may only vote in one party's primary.[26] States with open primaries generally give each voter all of the primary ballots and ask them to mark only one.[27] No open primary state requires a voter to disclose the primary in which he voted.

---

§§ 3513.05, 3513.19 (West 1999).

[21] *See* IND. CODE § 3-10-1-6 (1997).

[22] *See* MISS. CODE ANN. § 23-15-575 (1999).

[23] The distinction between classic closed and semi-closed primaries becomes blurred at the extremes. There is little difference between Colorado's classic closed primary law, which allows an individual to register with a party on the day of the primary, COLO. REV. STAT. § 1-2-218.5 (1999), and Wyoming's semi-closed primary law, which states that "[r]equesting a partisan primary election ballot constitutes a declaration of party affiliation," WYO. STAT. ANN. § 22-5-212 (Michie 2000).

[24] *See* ALA. CODE § 17-16-14(b) (2000); ARIZ. REV. STAT. § 16-467 (1999); ARK. CODE ANN. § 7-7-307 (Michie 1995); GA. CODE ANN. § 21-2-224 (1998); ILL. REV. STAT. ch. 46, § 7-43(a) (1993); IND. CODE § 3-10-1-6 (1997); IOWA CODE § 43.41-.42 (1999); MASS. GEN. LAWS ch. 53, § 37 (1998); MISS. CODE ANN. § 23-15-575 (1999); MO. REV. STAT. § 115.397 (1997); N.H. REV. STAT. ANN. §§ 654:34(II), 654:34(V) (1997); N.J. STAT. ANN. § 19:23-45.1 (West 1999); OHIO REV. CODE ANN. §§ 3513.05, 3513.19 (West 1999); R.I. GEN. LAWS § 17-9.1-23 (1996); S.C. CODE ANN. §§ 7-5-120, 7-9-20 (Law. Co-op. 2000); TENN. CODE ANN. § 2-7-115 (2000); TEX. ELEC. CODE ANN. § 162.003 (Vernon 1997); VA. CODE ANN. § 24.2-545 (Michie 2000); WYO. STAT. ANN. § 22-5-212 (Michie 2000).

[25] *See* HAW. REV. STAT. § 12-31 (1999); IDAHO CODE §§ 34-402, 34-404, 34-904 (Michie 2000); MICH. COMP. LAWS § 168.575-.576 (1996); MINN. STAT. § 204D.08 (1992); MONT. CODE ANN. § 13-10-301 (2000); N.D. CENT. CODE § 16.1-11-22 (1999); VT. STAT. ANN. tit. 17, § 2363 (1999); WIS. STAT. §§ 5.37, 6.80 (2000); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 222 n.11 (1986).

[26] For instance, a voter cannot vote in the Republican primary for a gubernatorial candidate and the Democratic primary for a senatorial candidate; instead, he must choose one party per primary cycle. *See, e.g.*, MICH. COMP. LAWS § 168.576(2) (1996); MINN. STAT. § 204D.08(4) (1992).

[27] *See, e.g.*, HAW. REV. STAT. § 12-31 (1999) (each voter is given the primary election

In the nonpartisan primary, which is only in widespread use in Louisiana, all candidates for office appear on the same ballot.[28] If, for example, three Republicans, two Democrats, one Libertarian, and one Reform Party member decide to run for Governor, one primary ballot, provided to all registered voters, would list all seven names. If a candidate receives 50% or more of the primary vote, he is named the victor of the overall election.[29] If, however, no candidate receives 50% or more of the vote, the top two finishers advance to a general election, regardless of their party affiliation.[30] Thus, even if the top two finishers are from the same party, as was the case in an open seat election for Louisiana's Seventh Congressional District in 1996, both advance to the general election and all other parties are shut out.[31]

The blanket primary borrows elements from both the nonpartisan primary and the open primary but adds a few unique aspects of its own. Prior to *California Democratic Party*, only three states—Alaska, California, and Washington—used the blanket primary.[32] As in the case of a nonpartisan primary, all the candidates for an office appear on one ballot. In a blanket primary, however, the top finisher in each party advances to the general election.[33] As in the case of an open primary, a blanket primary permits voters to participate in any party's primary regardless of personal party affiliation. Unlike in an open primary, however, a blanket primary voter can participate in one party's primary for one office and another party's primary for a different office.[34]

All of the primary types except for the closed primary allow at least some non-members to play a role in selecting the party nominee, and it is

---

ballot of each party and instructed to mark only one); MICH. COMP. LAWS § 168.576(1) (1996) (election clerk distributes the ballot or ballots with instructions to mark only one); MINN. STAT. § 204D.08 (1992) (primary election ballot contains the candidates of all registered parties and voters are told to mark only one party's candidates); N.D. CENT. CODE § 16.1-11-22 (1999) (voters are given a consolidated primary ballot which lists all the parties and contains an instruction to vote in only one party's primary).

[28] *See* LA. REV. STAT. ANN. §§ 18:401B, 18:481, 18:511A (West 1999). Georgia employs the nonpartisan primary for special elections. GA. CODE ANN. § 21-2-540 (1998).

[29] For example, in 1998 each of the seven members of Louisiana's House delegation garnered over 50% of the vote in the first primary, precluding a run-off. *See* MICHAEL BARONE & GRANT UJIFUSA, THE ALMANAC OF AMERICAN POLITICS 2000, at 692, 700–18 (1999).

[30] *See id.* at 692.

[31] *See, e.g., id.* at 716–17.

[32] *See* ALASKA STAT. §§ 15.05.010, 15.25.090 (Michie 1999); CAL. ELEC. CODE § 2001 (West 2000); WASH. REV. CODE § 29.18.200 (1993).

[33] For instance, suppose Republican candidates capture first and second place in the primary vote while a Democrat comes in third. Whereas a nonpartisan primary would advance the two Republicans to a final round of voting if neither captured 50% of the vote, in a blanket primary, the Republican with the most votes and the Democrat with the most votes would advance to the general election. This is true even if a candidate wins more than 50% of the vote in the primary.

[34] Therefore, even if a registered Republican chooses to vote in the Democratic primary for governor, he can still vote in the Republican primary for all other offices. *See* Cal. Democratic Party v. Jones, 120 S. Ct. 2402, 2406 (2000).

that aspect of primary election law that creates constitutional tension. The constitutional problem arises from the fact that legislatures must balance the interests and constitutional rights of three entities in creating a workable primary structure: party members, non-members, and the state.[35]

For party members, the primary is the mechanism by which the party selects its standard-bearers and, in the process, defines its principles.[36] Therefore, state election laws that allow non-members to vote in a party's primary without the party's consent interfere with the party's ability to promote its policies and ideology at "the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community."[37] Individuals associate with political parties in order to further a common set of political ideas and principles, and the Court has held that a person's "freedom of association protected by the First and Fourteenth Amendments includes [the right to form] partisan political organization[s]."[38] The Court has further asserted that the "freedom to join together in the furtherance of common political beliefs 'necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only.'"[39] Given these precepts, it seems that it is a constitutional requirement that the power to define the primary electorate—the body possessing the authority to actualize a party's principles—be retained by party members.

Non-members and states also have interests at stake in the primary. To them, the primary serves as the preliminary stage of the election process, whereby voters winnow a field of possible office holders down to the finalists.[40] When non-members choose to vote in party primaries, they assert an associational interest with the party that has constitutional significance.[41]

---

[35] Although the Supreme Court has never explicitly laid out this framework, it has recognized each of the constitutional interests in various cases. *See* Tashjian v. Republican Party of Conn., 479 U.S. 208, 216 n.7, 217 (1986) (recognizing that members and non-members have associational interests that arise in the primary context and that the state has a constitutional interest in controlling the electoral process); Timmons v. Twin City Areas New Party, 520 U.S. 351, 358 (1997) (affirming a state's authority to enact reasonable regulations to reduce electoral disorder); Elrod v. Burns, 427 U.S. 347, 357 (1976) (plurality decision) (holding that the freedom to associate with others for political purposes is protected by the First and Fourteenth Amendments).

[36] Cal. Democratic Party v. Jones, 984 F. Supp. 1288, 1293 (1997).

[37] *Tashjian*, 479 U.S. at 216.

[38] *Id.* at 214.

[39] *Id.* (quoting Democratic Party of the United States v. Wisconsin *ex rel.* La Follette, 450 U.S. 107, 122 (1981)).

[40] *See Cal. Democratic Party*, 984 F. Supp. at 1293.

[41] *See Tashjian*, 479 U.S. at 216 n.6 (recognizing that an attempt by non-members to vote in a party primary is an assertion of an associational interest); Kusper v. Pontikes, 414 U.S. 51, 58 (1973) (recognizing that an individual's main purpose in exercising his right to associate with the political party of his choice is to gain a voice in selecting that party's

The states' interest stems from their substantial authority to regulate elections. States fund primaries and therefore can regulate the process to some degree.[42] The Court has recognized several state interests that provide a legitimate basis for state regulation of political parties and the electoral process. These interests include protecting the stability of the political system, preserving the integrity of the electoral process, and preventing voter confusion and misunderstanding.[43] In addition, under Article I, section 4 of the Constitution, states have substantial power to regulate the time, place, and manner of federal elections, and the Court has held that they enjoy a similar authority to regulate elections for statewide office.[44]

Each of the five primary types places emphasis on a different entity's interest. The closed primary gives the greatest weight to party members' interests, while the blanket primary gives precedence to the interests of the state and non-members. Over the past thirty years, the Supreme Court has developed a jurisprudence for resolving the constitutional tension created by favoring the right of one group over the rights of the others. A review of this jurisprudence reveals a trend toward favoring the associational rights of party members over the interests of the state and non-members.[45] The Court has usually frustrated state efforts to shape the primary electorate. In the most notable example, *Tashjian v. Republican Party of Connecticut*, the Court held that a state could not force a party to hold a classic closed primary if the party wished to include independents in its primary electorate.[46] The Supreme Court has also held that the associational rights of members trump those of non-members in the primary context,[47] and it has denied non-members in closed primary states the right to vote in party primaries.[48] However, a state can require a party

---

nominees and concluding that the associational rights of the individual and the ability to vote in a party's primary are inherently connected).

[42] *See* Cal. Democratic Party v. Jones, 120 S. Ct. 2402, 2416 (2000) (Stevens, J., dissenting).

[43] *See* Storer v. Brown, 415 U.S. 724, 734–36 (1974) (holding that the state has an interest in preventing splintered political parties and unrestrained factionalism and adopting electoral systems that further the state's interest in political stability); Rosario v. Rockefeller, 410 U.S. 752, 761 (1973) (holding that the state has an interest in preventing party "raiding" because "[i]t is clear that preservation of the integrity of the electoral process is a legitimate and valid state goal"); *Tashjian*, 479 U.S. at 220–22 (holding that the state has a legitimate interest in preventing voter confusion and in providing for educated and responsible voter decisions).

[44] *Tashjian*, 479 U.S. at 217.

[45] *See* Democratic Party of the United States v. Wisconsin *ex rel.* LaFollette, 450 U.S. 107, 120–26 (1981) (holding that a state cannot compel a party to seat delegates to its national convention elected in a primary that violates party rules); *Tashjian*, 479 U.S. at 224–25 (holding that a state cannot prevent a party from opening its primary to non-members); *Rosario*, 410 U.S. at 760–62 (holding that a party can limit the primary electorate to those individuals who have been enrolled as party members for some time before the primary).

[46] 479 U.S. at 225.

[47] *Rosario*, 410 U.S. at 757–58.

[48] Nader v. Schaffer, 417 F. Supp. 837, 845–47 (D. Conn. 1976), *summarily aff'd*, 429

to hold a primary or prohibit it from holding one.[49] A state can also mandate that a party show a certain modicum of support, through the collection of signatures or by some other device, before giving that party access to the primary process.[50] Further, none of the Court's decisions held that the associational rights of party members trumped both the interests of states and non-members combined.[51] In *California Democratic Party v. Jones*, the Supreme Court faced this question in evaluating the constitutionality of a state law that attempted to expand the primary electorate against the party's wishes.[52]

California Democratic Party arose out of a challenge by four political parties to Proposition 198 (The Open Primary Act), a 1996 ballot initiative that changed California's primary system from a classic closed primary to a blanket primary.[53] Proposition 198 passed with 59.51% of the vote, with exit polls indicating that it was supported by 61% of Democrats, 57% of Republicans, and 69% of independent voters.[54] The Democratic Party, the Republican Party, the Libertarian Party, and the Peace and Freedom Party challenged the ballot initiative and the conforming amendments to the State Election Code[55] as unconstitutional in-

---

U.S. 989 (1976).

[49] American Party of Tex. v. White, 415 U.S. 767, 781 (1974) ("It is too plain for argument . . . that the State may limit each political party to one candidate for each office on the ballot and may insist that intraparty competition be settled before the general election by primary election or by party convention.").

[50] *Id.*

[51] The only time such a situation would occur is when, as happened in *California Democratic Party*, the state attempted to expand the primary electorate against a party's wishes. In such cases, the state wants to expand the electorate and non-members want the same so they can vote in the primary. Party members, in contrast, wish to retain their exclusive control over who becomes the party's nominee, and are therefore opposed to expansion of the electorate. The closest the Court came to addressing such a situation prior to *California Democratic Party* was in *Democratic Party of the United States v. Wisconsin* ex rel. *LaFollette*. In that case, the Court confronted a Wisconsin law mandating an open primary in contravention of national Democratic Party rules. The Court sidestepped the issue of the constitutionality of the primary itself by holding that the national party's associational rights prevented Wisconsin from forcing the party to accept the state's delegates at its national convention. 450 U.S. 107, 120–22 (1981). Most cases in this area have involved either the state aiding the party in keeping out non-members through laws that restrict the primary electorate or party members and non-members attempting to expand the primary electorate in the face of opposition from the state. *See Rosario*, 410 U.S. at 760–62 (upholding a state law restricting the primary electorate to party members of a certain duration from challenge by non-members); *Tashjian*, 479 U.S. at 216 n.6 (striking down a state law preventing party members from opening the primary to non-members).

[52] 120 S. Ct. 2402, 2406–07 (2000).

[53] Proposition 198 read: "All persons entitled to vote, including those not affiliated with any political party, shall have the right to vote . . . at any election in which they are qualified to vote, for any candidate regardless of the candidate's political affiliation." Cal. Democratic Party v. Jones, 984 F. Supp. 1288, 1289–90 (1997) (quoting CAL. ELEC. CODE § 2001 (West 2000)). Although the Initiative was titled "The Open Primary Act," it actually created a blanket primary, as it permitted individuals to vote for any candidate of any party. *See supra* notes 32–34 and accompanying text.

[54] *Cal. Democratic Party*, 984 F. Supp. at 1291.

[55] *See* CAL. ELEC. CODE §§ 2001, 2151, 13102, 13203, 13206, 13230, 13300, 13301,

fringements on their freedom of association rights.[56] The District Court rejected their challenge and upheld the blanket primary,[57] and the Ninth Circuit affirmed the lower court's decision.[58]

The Supreme Court reversed, striking down the blanket primary with a 7-2 majority.[59] At the heart of the Court's holding was the idea that primaries are the mechanisms by which party members select their standard-bearers and define the party's principles.[60] The Court rejected the reasoning of the district court, which stressed an alternative conception of primaries as the "initial stage in a two-stage process by which the people choose their public officers."[61] The Court instead asserted that the party members' right to define the party's membership necessarily carries with it the right to exclude non-members, and that "in no area is the political association's right to exclude more important than in the process of selecting its nominee."[62] The Court observed that the primary process tends to determine the party's public policy positions and that even when those positions are predetermined, the primary winner becomes "the party's ambassador to the general electorate in winning it over to the party's views."[63]

The Court, therefore, saw two dangers arising from blanket primary laws. First, it found that blanket primaries force "political parties to associate with—to have their nominees, and hence their positions, determined by—those who, at best, have refused to affiliate with the party, and, at worst, have expressly affiliated with a rival."[64] Although the Court cited evidence demonstrating that crossover voting was prevalent in blanket primaries, it focused instead on the blanket primary's *potential* to

---

13302 (West 2000).

[56] *California Democratic Party* raises the interesting question of who gets to speak for the party and what it means for the party to give its consent. Given that a majority of the registered members of the Democratic and Republican parties apparently voted for Proposition 198, the defendants in *California Democratic Party* initially argued that the parties had consented to the blanket primary regardless of what their central committees said. The district court dismissed this argument, noting that the parties had procedures for decision-making and that the structure of decision-making procedures often shapes outcomes. *Cal. Democratic Party*, 984 F. Supp. at 1294 n.16. Analogizing to legislative politics, the district court stated that just as a poll of legislators on a subject could not substitute for a vote, exit polls could not be used to substitute for a party's decision-making procedures. *Id.* In essence, the district court found that since the party members had established a decision-making procedure and had delegated the authority to speak for the party to an official body, the members could not forgo that procedure and disempower that body by expressing through a referendum an opinion inconsistent with that of the party leadership. *See id.*

[57] *Id.* at 1288.

[58] Cal. Democratic Party v. Jones, 169 F.3d 646 (9th Cir. 1999) (adopting the district court's opinion).

[59] Cal. Democratic Party v. Jones, 120 S. Ct. 2402, 2405 (2000).

[60] *Id.* at 2408.

[61] *Cal. Democratic Party*, 984 F. Supp. at 1301 (quoting Storer v. Brown, 415 U.S. 724, 735 (1974)) (internal quotation marks omitted).

[62] *Cal. Democratic Party*, 120 S. Ct. at 2408.

[63] *Id.*

[64] *Id.* at 2409.

allow the crossover vote to be determinative. Even supposing that light crossover voting would only change the outcome of a handful of races, the Court held, "a single election in which the party nominee is selected by nonparty members could be enough to destroy the party."[65]

Second, the Court found that even when blanket primaries do result in a primary victor favored by the majority of party members, a party candidate might be forced to change positions to win in the altered primary electorate.[66] Therefore, regardless of whether the blanket primary would result in a change in the identity of party leaders, it would likely cause a change in the message of those leaders.[67] In fact, the Court noted that Proposition 198 was deliberately designed to encourage candidates to transform their messages so as "to curry favor with persons whose views are more 'centrist' than those of the party base."[68]

The Supreme Court's emphatic statement that the blanket primary constitutes a heavy burden on the parties' associational rights—the Court stated that it could "think of no heavier burden"[69]—contrasted markedly with the district court's finding that the burden was significant, but not severe.[70] This distinction is not merely one of semantics: the Supreme Court applies different tests to state election laws that burden First and Fourteenth Amendment associational rights to different degrees. Laws that impose severe burdens on a party's associational rights receive strict scrutiny, meaning that they must be narrowly tailored to advance a compelling state interest, while laws that impose lesser burdens get less strict review and usually can be justified by any important state regulatory interest.[71] In light of the Courts holding that the Open Primary Act imposed a severe burden on parties' associational rights by permitting non-party members to vote in party primaries without the party's consent,[72] it appears likely that any state primary law that mandates non-member participation in a party primary without party approval will be subject to strict scrutiny.

In addition to outlining a robust conception of parties' associational rights, the Supreme Court in *California Democratic Party* also downplayed the state's authority to regulate primary elections. While affirming the traditional legitimate bases for regulating the primary ballot, the Court minimized or rejected the new interests that California asserted to justify imposing the blanket primary.[73]

---

[65] *Id.* at 2410–11.
[66] *Id.* at 2411.
[67] *See id.*
[68] *Id.*
[69] *Id.*
[70] Cal. Democratic Party v. Jones, 984 F. Supp. 1288, 1300–01 (1997).
[71] *See, e.g.*, Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358 (1997); Anderson v. Celebrezze, 460 U.S. 780, 789 (1983).
[72] *Cal. Democratic Party*, 120 S. Ct. at 2412.
[73] *See id.* at 2412–14. California and the proponents of Proposition 198 asserted seven

The Court flatly rejected the first two interests California asserted: producing elected officials who better represent the electorate and encouraging candidate debate beyond the scope of partisan concerns.[74] The Court found that these asserted interests were equivalent to claiming a state interest in shaping the parties' messages.[75] Relying on its decision in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*,[76] the Court held that such an interest was inadmissible.[77]

The Court also dismissed the state's third asserted interest of guaranteeing "disenfranchised voters"—independent or minority-party voters who live in a district that is dominated by one party—an effective vote.[78] The Court ruled that the state's argument effectively asserted that non-members' associational rights should trump those of members, an argument the Court had rejected in the past.[79]

The Court did concede that the last four interests asserted by the state—promoting fairness among registered voters, ensuring greater voter choice, increasing voter participation, and preserving voter privacy—were legitimate grounds for regulating elections in some circumstances, but it found none of those interests sufficiently compelling in the blanket primary context to warrant the burden placed on the parties' associational rights.[80] The Court found that the fairness interest cut both ways—although a closed primary might be unfair to non-members, a blanket primary unfairly hijacked the party from its members.[81] The Court noted that because the blanket primary was designed to allow centrist candidates to triumph, it might increase voter choice for, and voter turnout by, centrists; however, this would broaden the range of choices for centrists only by reducing the range of choices for non-centrist party members.[82] Finally, while the Court recognized that individuals did have a legitimate privacy interest in keeping their party affiliation secret, it found that in-

---

interests they claimed justified the infringement on parties' associational rights. *Id.* The Court dismissed three of them and found the other four inapplicable in the blanket primary context. *Id.*

[74] *Id.* at 2412.

[75] *Id.*

[76] 515 U.S. 557 (1995).

[77] *Cal. Democratic Party*, 120 S. Ct. at 2412. In *Hurley*, the Court held that a Massachusetts public accommodations law could not force the South Boston Allied War Veterans Council to include a group with which it ideologically disagreed in its parade. The Court held that application of the law would have violated the council's First Amendment right to choose the content of its own message. *Hurley*, 515 U.S. at 557.

[78] *Cal. Democratic Party*, 120 S. Ct. at 2412–13.

[79] *Id.* at 2413; *see also Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 216 n.6 (1986). The Court also noted that if individuals who are not members of the area's majority party feel functionally disenfranchised, they possess the option of joining the majority party. The Court recognized that such a decision might be a hard choice, but countered that presenting non-members with this choice is superior to compelling members to alter their speech. *Cal. Democratic Party*, 120 S. Ct. at 2413.

[80] *Cal. Democratic Party*, 120 S. Ct. at 2413.

[81] *Id.*

[82] *Id.*

terest minimal compared to the burden the blanket primary placed on party members' associational rights.[83]

The Supreme Court's decision in *California Democratic Party* has therefore made it very difficult for states to expand primary electorates without the party's consent. Unless other states are able to cite interests more compelling than those proffered by California, it is unlikely that any blanket primary statute can withstand strict scrutiny.

The Court left open, however, the question of which primary structures remain constitutional after *California Democratic Party*. The classic closed primary most clearly survives the Court's decision. In many respects, it seems to be the baseline for the Supreme Court; by ensuring that only party members are permitted to vote in a party's primary, it fully protects the associational rights of the party.[84] The nonpartisan primary also appears unaffected by *California Democratic Party*. Unlike the other primary types, a nonpartisan primary does not involve selecting party nominees.[85] Since the primary does not serve as a mechanism for selecting the party's standard-bearers, party members lack an associational interest in the primary, and, therefore, state law does not infringe upon their First Amendment rights.[86]

The semi-closed and open primaries seem most in jeopardy of being ruled unconstitutional. Like the blanket primary, both types, as a practical matter, allow voters previously unaffiliated with a party to vote in that party's primary.[87] However, both differ significantly in structure from the blanket primary in ways that may mitigate the extent to which they infringe party members' associational rights.

The open primary shares much in common with the blanket primary. It allows all voters, regardless of affiliation, to vote in a party's primary, affecting both the party's nominees and message, and expanding the primary electorate. On its surface, therefore, the open primary appears to impose a heavy burden on the parties' freedom of association.

The open primary differs, however, from the blanket primary in one important way: whereas voters in blanket primaries vary their party selection from office to office, in open primaries, individuals can only vote in one party's primary. Having decided to vote in one's party primary, the

---

[83] *Id.*

[84] *See id.*

[85] *See id.* at 2414. The Court indicated in dicta that a state can use the nonpartisan primary to meet its interests in fairness, increased voter choice and participation, and voter privacy without infringing on party members' associational rights. *Id.*

[86] *Id*; *see also supra* notes 28–31 and accompanying text. The nonpartisan primary is in fact better classified as a general election with a run-off requirement. The Supreme Court recognized this point in 1997 when it ruled that Louisiana's "primary" violated a federal law requiring all congressional elections to be held on the same day. *See* Foster v. Love, 522 U.S. 67, 72–73 (1997). Prior to that decision, the Louisiana primary had been held six weeks before Election Day; as a result of the Supreme Court's ruling, the primary was moved to Election Day. *See* BARONE & UJIFUSA, *supra* note 29, at 692.

[87] *See supra* notes 16–27 and accompanying text.

voter foregoes the opportunity to influence any other party's nominating process. Voters in open primaries must therefore choose a party in a way that voters in a blanket primary do not. Justice Powell emphasized this point in his dissent in *Democratic Party of the United States v. Wisconsin* ex rel. *La Follette*. He contended that the act of choosing to participate in one party's primary is tantamount to affiliating with the party.[88] Powell viewed party membership as an act of individual self-definition, not as alignment with a particular ideology.[89] If an individual believes himself to be a Democrat and registers with the party, he joins the party regardless of whether his beliefs run counter to the party platform. Powell also found the difference between an open primary and a classic closed primary with same-day registration to be negligible. In each case, a previously unaffiliated voter could associate with the party and qualify to vote on the day of the primary.[90] Powell thus asserted that closed primaries differ from open primaries only in that the former compel public affiliation through registration with the party while the latter allow private association through the act of voting for a party candidate.[91]

In *California Democratic Party*, the Supreme Court relied on Powell's argument to hold open the possibility of distinguishing the open primary from the blanket primary.[92] Accepting Powell's reasoning, however, does not necessarily render the open primary constitutional. A law that requires at least a temporary, private affiliation with a political party before allowing an individual to vote in that party's primary burdens the party's associational rights less than a law that requires no affiliation at all. Nevertheless, the open primary may still severely restrict a party's First and Fourteenth Amendment rights and thus may warrant strict scrutiny. In *California Democratic Party*, the Court emphasized that a key component of a party's freedom of association was its right to define its membership, observing that the right to define members and exclude nonmembers is of critical importance during the primary process.[93] This right is limited when the state compels party members to enfranchise those voters unwilling to publicly associate with the party or unwilling to remain members of the party for a significant period of time.

---

[88] 450 U.S. 107, 130 n.2 (1981) (Powell, J., dissenting).

[89] *Id.* at 131–32 (Powell, J., dissenting). Although the holding of *California Democratic Party*, with its stress on the impact non-members might have on a party's message, may appear to run contrary to Powell's reasoning in his *La Follette* dissent, the majority opinion in the former case cited Powell's analysis approvingly and suggested that his conception of affiliation might be a way to distinguish open and blanket primaries on the constitutional level. *See Cal. Democratic Party*, 120 S. Ct. at 2410 n.8.

[90] *La Follette*, 450 U.S. at 133 (Powell, J., dissenting).

[91] *See id.* (Powell, J., dissenting)

[92] 120 S. Ct. at 2410 n.8.

[93] *Id.* at 2408.

Powell believed that this burden was minimal and could be justified by the state interest in increasing voter participation.[94] The present Court may, however, attach greater significance to the public nature of party affiliation. In *California Democratic Party*, the Court appeared to attach special significance to the fact that the blanket primary allowed non-members to alter the party's message and platform without ever expressing a public affiliation with the party.[95] The Court contrasted that situation with closed primaries in which "even when it is made quite easy for a voter to change his party affiliation and thus, in some sense, to 'cross over,' at least he must formally *become a member of the party*."[96] Moreover, as the Court noted in *Tashjian*, affiliating with a party publicly, even on a temporary basis, constitutes at least a partial endorsement of that party, regardless of an individual's actual policy positions.[97] Thus, the Court may find that an individual asserts a much stronger associational interest in the public affiliation context than he does in the private one, for in the former context not only is he willing to forego his opportunity to affect another party's nominations, but he also is willing to associate publicly with the party in whose primary he participates.

Ultimately, the constitutional problem with the open primary may be that it allows individuals who are unwilling to make this association to vote in a party primary and therefore help shape and define the party's principles. What seems to have most concerned the Supreme Court about the blanket primary was that it allows "non-speakers"—individuals who were not willing to affiliate themselves even temporarily with the party's agenda—to determine the content of the party's speech.[98]

A similar concern is present with the open primary, which also allows an individual to vote in a party primary without having to change his party affiliation; consequently, he never has to be identified with the party whose message he has affected. The Democrats who voted for McCain in Michigan's 2000 Republican presidential primary provide an excellent illustration of this point. McCain differs from Bush in a number of policy areas, most notably campaign finance reform, and in many respects the battle between the two men was over what the Republican Party represents.[99] By propelling McCain to victory and allowing him to claim Michigan's delegates at the Republican National Convention, the Democrats and independents who voted in the Republican primary caused the Michigan Republican Party to send a very different message than it would have sent had only its members voted. Yet regardless of

---

[94] *La Follette*, 450 U.S. at 136 (Powell, J., dissenting).

[95] *See supra* note 64 and accompanying text.

[96] 120 S.Ct. at 2409–10.

[97] *See Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 216 n.7 (1986).

[98] *Cal. Democratic Party*, 120 S. Ct. at 2409, 2412.

[99] *See* Dan Balz, *For Republicans, a Dynamic Change*, WASH. POST, Feb. 6, 2000, at A01.

whether McCain or Bush won the primary, those voters were in no way affiliated with that message since at no time were they members of the Republican Party. In essence, the open primary gave them the opportunity to define the principles of another party. In this respect the open primary applies just as heavy a burden to a party's associational rights as does the blanket primary, and, therefore, it is likely to be found unconstitutional for the same reasons.

In contrast, the semi-closed primary is more likely to survive precisely because of its party affiliation requirement. In such a primary, an individual must identify himself with the party and, therefore, the party's principles during the primary election, either before he votes or through his act of voting. Even if he disaffiliates from the party as soon as the primary ends, he has joined the group for a time and has associated himself with that group's message. Unlike their Michigan counterparts, previously unaffiliated New Hampshire voters had to become Republicans, and associate themselves with the Republican Party and its message, to vote for McCain. Semi-closed primary laws, therefore, do not allow nonspeakers to affect a party's speech. Rather, they make it easier for individuals to affiliate with, and thus become "speakers" in, the party.

California Democratic Party stands, at least in part, for the proposition that the party's right to define its membership becomes meaningless if it cannot limit membership to those individuals who are willing to identify themselves with the party and its message.[100] Since, under this proposition, any law that restricts the party's ability to enforce such a limit places a severe burden on the party's associational rights, it is likely that such laws will henceforth be subject to strict scrutiny by the Court. A party's interest in defining its membership, however, does not end with the right to limit participation in the primary to those individuals willing to affirm their party membership publicly. A party may, for example, want to limit its primary electorate to individuals who have been members for a certain length of time.[101] Such requirements, however, seem less central to party members' freedom of association than does the fundamental question of who is and who is not a party member. It is therefore arguable that so long as a state allows a party to restrict the right to vote in its primaries to those individuals who are willing to associate with the party, at least at the moment of voting, it need not defer to the party's wishes on how long that association must last.[102] While semi-

---

[100] *See Cal. Democratic Party*, 120 S. Ct. at 2408–10.

[101] *See* Rosario v. Rockefeller, 410 U.S. 752 (1973) (upholding a law stating that an individual must register as a party member by October 2 of the prior year to be eligible to vote in the party primary); *cf.* Kusper v. Pontikes, 414 U.S. 51 (1973) (striking down a law prohibiting an individual from voting in a party's primary if he voted in another party's primary in the previous 23 months).

[102] *See* Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358 (1997) ("Lesser burdens, however, trigger less exacting review, and a State's 'important regulatory interests' will usually be enough to justify 'reasonable, nondiscriminatory restrictions.'")

closed primary laws that allow only temporary party members to vote in party primaries clearly implicate the party's power to define its membership, they do not abrogate the party's core First Amendment interests.

California Democratic Party has wrought a fairly dramatic change on the primary landscape. The blanket primary no longer exists, and the open primary appears destined to follow it into extinction. This does not necessarily mean candidates like McCain will no longer prosper; after all, McCain's biggest victory came in New Hampshire's semi-closed primary. Nevertheless, with *California Democratic Party*'s reaffirmation of the primacy of party members' rights of association and the curtailment of some of the variation that has marked primary election law, it seems as though much of the unpredictability that has marked past primaries may be lost.

—*Charles E. Borden*

(quoting Burdick v. Takushi, 504 U.S. 428, 434 (1992)).

TRAFFICKING OF PEOPLE

In its last session, Congress addressed a growing problem faced by the United States and the world: the international trafficking of people. The Central Intelligence Agency ("CIA") estimates that as many as 50,000 persons, primarily women and children, are illegally trafficked into the United States every year and are often forced to live and work in slavery-like conditions.[1] Traffickers generally lure their victims—many of whom suffer from poverty, unemployment, and gender discrimination in their home countries—to the United States with false promises of employment opportunities. Once these victims reach the United States, however, traffickers force them to work as sweatshop laborers, domestic servants, agricultural workers, or prostitutes.[2] The rate of trafficking is rising due to its high profitability, the low risk to traffickers of detection and prosecution, and the persistent economic and social problems in the countries from which victims are taken.[3] It has emerged as a significant threat both to the rule of law and to the welfare of its victims.[4]

The Trafficking Victims Protection Act (the "Act"), recently passed by Congress as part of the Victims of Trafficking and Violence Protection Act of 2000,[5] aims to treat this problem both in the United States and at its sources. After months of conference debate over competing House and Senate versions of the Act, the House dropped its insistence that mandatory sanctions be imposed on countries that fail to cooperate in efforts to combat trafficking. By focusing on the needs of domestic law

---

[1] Amy O'Neill Richard, International Trafficking in Women to the United States: A Contemporary Manifestation of Slavery and Organized Crime iii (Nov. 1999), *at* http://www.odci.gov/csi/monograph/women/trafficking.pdf. Some sources estimate that as many as 100,000 persons may be trafficked into the United States each year. *See, e.g., International Trafficking in Women and Children: Prosecution, Testimonies, and Prevention: Hearing Before the Subcomm. on Near Eastern and South Asian Affairs of the Senate Comm. on Foreign Relations*, 106th Cong. (2000) [hereinafter *International Trafficking: Prosecution, Testimonies, and Prevention*] (testimony of William R. Yeomans, Chief of Staff, Civil Rights Div., U.S. Dep't of Justice), *at* http://frwebgate.access.gpo. gov/cgi-bin/getdoc.cgi?dbname=106_senate_hearings& docid=f:63986.wais; *International Trafficking in Women and Children: Hearing Before the Subcomm. on Near Eastern and South Asian Affairs of the Senate Comm. on Foreign Relations*, 106th Cong. (2000) [hereinafter *International Trafficking*] (testimony of Regan Ralph, Executive Dir., Women's Rights Div., Human Rights Watch), *at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_senate_hearings&docid=f:63986.wais.

[2] Richard, *supra* note 1, at v, 3; *International Trafficking*, *supra* note 1 (testimony of Frank E. Loy, Undersecretary of State for Global Affairs); *Trafficking of Women and Children in the Int'l Sex Trade: Hearing Before the Subcomm. on Int'l Operations and Human Rights of the House Int'l Relations Comm.*, 106th Cong. 14 (1999) [hereinafter *Trafficking of Women and Children*] (testimony of Theresa Loar, Dir., President's Interagency Council on Women, U.S. Dep't of State).

[3] Richard, *supra* note 1, at iii; *International Trafficking: Prosecution, Testimonies, and Prevention*, *supra* note 1 (testimony of William R. Yeomans).

[4] *See* Richard, *supra* note 1, at iii; *International Trafficking: Prosecution, Testimonies and Prevention*, *supra* note 1 (testimony of William R. Yeomans).

[5] Pub. L. No. 106-386, 114 Stat. 1464 (2000).

enforcement, rather than attempting to dictate foreign policy, the House avoided a threatened presidential veto[6] and allowed this laudable and necessary legislation to become law.

In a report released in November 1999, the CIA estimated that of the 700,000 to 2,000,000 women and children trafficked across international borders each year, 45,000 to 50,000 are smuggled into the United States.[7] Most of these victims originate from Thailand, Vietnam, China, Mexico, Russia, Ukraine, and the Czech Republic.[8] A smaller percentage come from the Philippines, Korea, Malaysia, Latvia, Hungary, Poland, Brazil, and Honduras.[9] The average age of victims brought to the United States is twenty years old.[10] While some traffickers kidnap their victims or purchase women and children from families willing to sell them, most women come to the United States willingly, expecting to work as waitresses, nannies, models, dancers, or factory workers.[11] Once in the United States, the traffickers take the victims' passports and travel documents, restrict their freedoms, and compel them to work without pay until their "smuggling debt" is repaid.[12] To force victims into submission, their captors often imprison, starve, torture, rape, and physically abuse them; many are thereby exposed to AIDS and other diseases, and some are worked or beaten to death.[13]

Much of the trafficking is committed by organized crime groups, particularly those in Southeast Asia, the former Soviet Union, and Eastern Europe.[14] On the domestic level, trafficking has been carried out primarily by smaller crime rings and loosely connected criminal networks.[15] Increasingly, however, larger organized crime groups are either taking over or collaborating with these smaller rings in order to take advantage of the trafficking industry's economic potential.[16] Trafficking in people yields billions of dollars annually and represents the fastest growing source of profits for organized criminal enterprises worldwide.[17] Domes-

---

[6] Joel Brinkley, *Vast Trade in Forced Labor Portrayed in CIA Report*, N.Y. TIMES, Apr. 2, 2000, at A22.

[7] Richard, *supra* note 1, at 3 (citing Briefing, CIA, Global Trafficking in Women and Children: Assessing the Magnitude).

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.* at 5; *International Trafficking*, *supra* note 1 (testimony of Frank E. Loy); *Trafficking of Women and Children*, *supra* note 2, at 15 (testimony of Theresa Loar).

[12] Richard, *supra* note 1, at 5; *International Trafficking*, *supra* note 1 (testimony of Frank E. Loy).

[13] Richard, *supra* note 1, at 1; *Trafficking of Women and Children*, *supra* note 2, at 14 (testimony of Theresa Loar).

[14] Richard, *supra* note 1, at 13.

[15] *Id.* at 13, 55–61.

[16] Christopher M. Pilkerton, *Traffic Jam: Recommendations for Civil and Criminal Penalties to Curb the Recent Trafficking of Women from Post-Cold War Russia*, 6 MICH. J. GENDER & L. 221, 229 (1999).

[17] *International Trafficking*, *supra* note 1 (testimony of Frank E. Loy); *Trafficking of*

tic law enforcement officials, however, have paid scant attention to criminal networks' involvement in trafficking and thus know little about the scope of international trafficking operations in the United States.[18]

A number of factors currently handicap domestic law enforcement efforts to combat trafficking. These include difficulty infiltrating international crime groups,[19] witnesses' fear of retaliation by traffickers,[20] ethnic communities' suspicion of local authorities,[21] and the lack of a comprehensive legal framework to combat trafficking.[22] While many government agencies share responsibility for combating the problem, they often approach and define the same crimes differently. Depending on which agency handles the investigation, for example, officials may categorize a trafficking case as an instance of alien smuggling, organized crime, civil rights violations, or labor exploitation.[23] This impedes attempts to track trafficking cases and inhibits coordination of federal, state, local, and international law enforcement efforts. As a result, law enforcement efforts incompletely address the problem of trafficking.[24]

Law enforcement officials in the United States currently prosecute traffickers under various criminal, labor, and immigration statutes. Because legislatures passed these laws to address different and often less serious offenses, the statutes tend to impose light penalties on those convicted and heavy burdens of proof on prosecutors.[25] The absence of a comprehensive anti-trafficking law, therefore, often leads to relatively minor sentences for perpetrators. For example, in a case involving more than seventy Thai laborers who were held captive, abused, and forced to work twenty-hour shifts in a sweatshop, most of the traffickers' sentences ranged from four to seven years; one defendant received only seven months.[26] In another case, traffickers kidnapped a Chinese woman and brought her to the United States where they forced her into prostitution. During this time, the woman's captors raped her and burned her with

---

Women and Children, *supra* note 2, at 15, 27 (testimony of Theresa Loar).

[18] *See* Richard, *supra* note 1, at vii–viii.

[19] *Id.* at 32.

[20] *Id.*

[21] Pilkerton, *supra* note 16, at 226.

[22] Richard, *supra* note 1, at 35.

[23] *Id.* at 31. Investigating agencies include the Departments of Justice, State, Treasury, and Labor, as well as the Immigration and Naturalization Service ("INS") and the Federal Bureau of Investigation. *Id.*

[24] *See id.* at 31, 35. The lack of a coordinated effort to combat trafficking has not only hampered law enforcement, but has also hurt victims. For example, in a case involving slave labor, the mishandling of the case by INS prolonged victims' enslavement by seven years. Although it opened the investigation in 1988, INS repeatedly missed opportunities to investigate. Finally, a raid conducted by the Department of Labor Standards Enforcement, in which INS played a secondary role, revealed the forced labor of more than 70 Thai workers. *Id.* at 36–37.

[25] *See id.* at 34–35; *International Trafficking: Prosecution, Testimonies, and Prevention*, *supra* note 1 (testimony of William R. Yeomans).

[26] Richard, *supra* note 1, at 33.

cigarettes. The traffickers received sentences ranging from two to four years.[27] Another group of traffickers confined, beat, and tortured seventy deaf Mexicans, and then forced the victims to peddle trinkets. Most of the traffickers involved received sentences ranging from one to eight years; the ringleader received fourteen years.[28] In another case, traffickers placed an advertisement soliciting Russian and Ukrainian women to fill positions as au pairs, sales clerks, and waitresses. Upon arrival in the United States, the women were forced to live in a Bethesda, Maryland massage parlor and provide sexual services. The court fined the parlor owner and prohibited him from doing business in Montgomery County. Rather than award the women any compensation, protection, or assistance, the court charged them $150 for their housing and had them summarily deported.[29]

Such sentences, when compared to those given in drug cases, can lead to the perception that trafficking in people is less dangerous, or less important, than trafficking in drugs. While the maximum federal sentence for dealing in ten grams of LSD is life in prison, the maximum punishment for selling a human being into involuntary servitude is only ten years in prison.[30]

The current treatment of trafficking victims who report their plight to authorities also complicates efforts to prevent and punish trafficking.[31] Despite the fact that prosecutors often cannot try cases without victims' testimony, when authorities uncover a trafficking operation, they usually intern the victims in Immigration and Naturalization Service ("INS") detention centers and jails and ultimately deport them.[32] This treatment criminalizes the victims and fosters the misperception that trafficking is analogous to illegal immigration or undocumented labor. On the rare occasion when INS delays deportation through the issuance of an "S" visa, which allows a victim possessing critical and reliable information that is essential to a criminal case to stay temporarily in the United States,[33] victims often fear testifying because of the threatened repercussions they face upon return to their countries of origin.[34] Thus, by limiting access to

---

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *See id.* at 32; *International Trafficking: Prosecution, Testimonies, and Prevention*, *supra* note 1 (testimony of William R. Yeomans).

[32] Richard, *supra* note 1, at 39; *see also* Gail Russell Chaddock, *Congress Takes Aim at Modern-Day Slavery*, CHRISTIAN SCI. MONITOR, Oct. 18, 2000, at 2.

[33] Richard, *supra* note 1, at 41. INS makes available only 200 "S" visas each year and, in addition to the restrictive standards of eligibility, imposes a heavy monitoring burden on prosecutors. The Trafficking Victims Protection Act responds to this problem through the creation of 5000 annual "T" visas that offer longer stays, allow family members to remain with the victims, and relax the standards of eligibility. Pub. L. No. 106-386, § 107(e), 114 Stat. 1464 (2000).

[34] Richard, *supra* note 1, at 32.

critical witnesses and discouraging other victims from coming forward, penalties in the United States and abroad can exacerbate both the plight of trafficking witnesses who step forward and the obstacles confronting domestic law enforcement.[35]

In response to the growing problem of trafficking, members of both parties in the 106th Congress presented an array of bills.[36] House Bill 3244, introduced by Representative Chris H. Smith (R-N.J.) in November 1999 as the Trafficking Victims Protection Act of 2000, emerged from this collection of competing resolutions to achieve passage in the House on May 9, 2000.[37] On July 27, 2000, the Senate passed the bill, but with significant amendments to the sections concerning the imposition of sanctions on countries that fail to cooperate in efforts to combat trafficking.[38] On October 6, 2000, the House agreed to the conference report on the bill,[39] which essentially deferred to the Senate's view that sanctions should be discretionary rather than mandatory, and on October 11, the Senate approved the report as well.[40] President Clinton signed the bill into law on October 28, 2000 as part of the Victims of Trafficking and Violence Protection Act of 2000.[41]

The Act directly addresses the problems law enforcement officials currently face in their efforts to combat trafficking. It increases the maximum penalty to twenty years imprisonment for those who force a person to perform labor through the use of physical restraint, threats of serious harm, or abuse of the legal system.[42] It also lowers the standard of proof required to convict a defendant for forced commercial sex acts or crimes involving minors.[43] Moreover, it raises the penalty to a maximum of life in prison if the trafficking involves kidnapping or aggravated sexual abuse; results in death; is effected by coercion, fraud, deceit, or misrepresentation against a minor; or if the victim is under the age of fourteen.[44]

In addition to addressing the needs of law enforcement, the Act offers various forms of assistance to victims of trafficking. It provides victims with access to information about their rights,[45] eligibility for benefits

---

[35] *See* 146 CONG. REC. H2684 (daily ed. May 9, 2000) (statement of Rep. Chris H. Smith (R-N.J.)).

[36] *See, e.g.*, H.R. 1238, 106th Cong. (1999); H.R. 3244, 106th Cong. (2000); S. 600, 106th Cong. (1999); S. 2414, 106th Cong. (2000); S. 2449, 106th Cong. (2000).

[37] 146 CONG. REC. H2687 (daily ed. May 9, 2000).

[38] 146 CONG. REC. S7781 (daily ed. July 27, 2000).

[39] 146 CONG. REC. H9036–48 (daily ed. Oct. 6, 2000).

[40] 146 CONG. REC. S10211–28 (daily ed. Oct. 11, 2000).

[41] 146 CONG. REC. D1168 (daily ed. Nov. 2, 2000).

[42] Pub. L. No. 106-386, § 112(a)(2), 114 Stat. 1464 (2000).

[43] *See id.* The Act mandates that when the victim is a minor, the trafficker may be convicted even absent knowledge that fraud, force, or coercion was used to cause that person to engage in a commercial sex act. *Id.*

[44] *Id.* § 112(a)(1)(B), 112(a)(2).

[45] *Id.* § 107(c)(3).

and services under governmental programs despite their alien status,[46] and shelter, medical care, food, and protection while they are in federal custody.[47] It creates a special visa status for victims who assist in law enforcement efforts and, after three years, permanent resident status for up to 5,000 persons a year who would likely face severe harm or hardship if removed from the United States.[48] Furthermore, the Act offers foreign aid for programs and initiatives that assist repatriated victims with integration, reintegration, or resettlement.[49] Finally, the Act sponsors public interest and awareness campaigns, domestically and abroad, and supports international efforts that seek to end trafficking and to enhance economic and educational opportunities for potential victims in their home countries.[50]

To address the problem on a global level, the Act calls for the establishment of an Interagency Task Force to Monitor and Combat Trafficking (the "Task Force"), consisting of the Secretary of State, the Director of the Agency for International Development, the Attorney General, the Secretary of Labor, the Secretary of Health and Human Services, and the Director of the CIA.[51] It directs the Secretary of State, acting as chair of the Task Force, to create an Office to Monitor and Combat Trafficking within the Department of State, with staff supplied by the member agencies of the Task Force.[52] The Task Force will evaluate the efforts of the United States and other nations to prevent trafficking and to protect and assist victims.[53] Its other duties will include expanding interagency procedures for collecting trafficking data,[54] facilitating international efforts to combat trafficking,[55] and reporting on the influence of the international sex tourism industry on the trafficking of women and children.[56]

The Act also requires the Secretary of State to publish an annual report evaluating the efforts of foreign governments to combat trafficking in the major countries of origin, transit, and destination.[57] This assessment will consider whether a government is tolerant of or involved in

---

[46] *Id.* § 107(b)(1)–(2).
[47] *Id.* § 107(c)(1).
[48] *Id.* § 107(e)–(f); *see also supra* note 33 (describing the new "T" visas).
[49] Pub. L. No. 106-386, § 107(a).
[50] *Id.* §§ 105(d), 106, 107(a). Initiatives to be implemented in these nations include job training; programs to increase participation of women in economic, political, social, and educational decision-making; programs to keep children in school; and educational curricula and public awareness campaigns concerning the dangers of trafficking and the protections available for victims. *Id.* § 106.
[51] *Id.* § 105(a)–(b).
[52] *Id.* § 105(c)–(e).
[53] *Id.* § 105(d)(2).
[54] *Id.* § 105(d)(3).
[55] *Id.* § 105(d)(4).
[56] *Id.* § 105(d)(5).
[57] *Id.* § 104.

trafficking; what steps it takes against officials and other individuals who commit, facilitate, or condone trafficking; what assistance it offers to victims and whether it refrains from prosecuting them; and whether it cooperates with other governments to extradite traffickers and engage in collaborative efforts to investigate and combat trafficking.[58]

In a similar vein, the bill establishes minimum standards for evaluating these governments' efforts.[59] These standards hold that the governments of such countries should prohibit severe forms of trafficking and punish offenses; prescribe punishments which reflect the serious nature of the offense of trafficking and are sufficiently stringent to deter such offenses; and make serious, sustained efforts to eliminate trafficking.[60] The bill calls for the Task Force to consider whether the country in question vigorously investigates and prosecutes acts of trafficking in its territory, particularly those committed or facilitated by public officials; whether it cooperates with other nations in investigating and prosecuting offenses and in extraditing those charged with trafficking; and whether it protects victims and encourages their assistance in investigation and prosecution.[61]

The original House and Senate versions of the Act differed with respect to the rigidity with which they mandated sanctions against countries whose efforts to stem the flow of trafficking the Task Force deemed insufficient. The Senate version left the President with discretion to determine the appropriate sanctions in such cases.[62] In contrast, the House version required that, beginning in fiscal year 2002, the United States impose sanctions and withhold non-humanitarian foreign assistance to nations not meeting minimum standards.[63] These sanctions included the denial of funding for educational and cultural exchange programs for officials or employees of such governments and the use of political pressure to discourage the International Monetary Fund and private banks from issuing development loans to these nations.[64]

The approach to sanctions taken by the House is not a novel one. It recalls the controversial format of the Freedom From Religious Persecution Act of 1998 ("FFRPA").[65] FFRPA created a new bureaucratic unit, the Office of Religious Persecution Monitoring,[66] which publishes annual

---

[58] *Id.*

[59] *Id.* § 108(a).

[60] *Id.*

[61] *Id.* § 108(b).

[62] S. 2414, 106th Cong. § 10(a) (2000) (Senate version of H.R. 3244); H.R. 3244, 106th Cong. § 10(a) (Engrossed Senate Amendment).

[63] H.R. 3244, §§ 10(a), 10(d)(1) (Engrossed in House).

[64] *Id.* The House version, however, did provide one potentially large exception: sanctions would not be imposed if the President determined that granting non-humanitarian foreign assistance to the country was in the national interest of the United States. *Id.* § 10(d)(3)–(4).

[65] Pub. L. No. 105-292, 112 Stat. 2787 (1998).

[66] *Id.* § 101(a).

reports that serve as the basis for mandatory denials of all non-humanitarian aid,[67] except when in the national interest.[68] The uncontroversial nature of protecting religious freedom engendered bipartisan support in Congress. The Clinton administration opposed the bill, however, citing both the potential for harm to important bilateral relations and the possibility of negative repercussions for those whom the Act sought to protect.[69]

Some commentators considered China to be the intended target of the legislation.[70] The congressional discussions of FFRPA, however, went well beyond concern about Chinese human rights abuses—members of Congress also expressed a growing impatience with the Clinton administration's foreign policy. Many legislators questioned the administration's management of foreign relations, and debate over the bill exposed Congress's disapproval of an executive policy of engagement that many legislators felt was more accurately characterized as appeasement.[71] Representative Smith—who would later introduce the Trafficking Victims Protection Act in the House—offered some of the harshest comments on the administration's approach.[72] The similarities between the FFRPA and House Bill 3244 offer insights into the approach taken by legislators on the latter bill and expose the concerns implicit in the congressional deliberations.[73]

United States relations with China, Russia, and Mexico—all countries that would likely be affected by a provision imposing mandatory sanctions against countries that failed to meet United States standards in combating trafficking—remain strained over perceived slights to their respective sovereignty. These perceptions are due, in part, to ongoing tension over issues such as arms proliferation, the drug trade, and human rights. If Congress had passed the House version of the Act, its mandatory sanctions regime likely would have further strained these relations, inhibiting both efforts to aid the thousands of victims trafficked into the United States and United States foreign policy as a whole.

---

[67] *Id.* § 102(b).

[68] *Id.* § 102(d); *see also* Darin W. Carlson, *Understanding Chinese-U.S. Conflict Over Freedom of Religion: The Wolf-Specter Freedom from Religious Persecution Acts of 1997 and 1998*, 1998 BYU L. REV. 563, 580 (1998).

[69] *See* 143 CONG. REC. E1755 (daily ed. Sept. 16, 1997) (including testimony of John Shattuck, Assistant Sec'y of State for Democracy, Human Rights and Labor).

[70] *See, e.g.*, Carlson, *supra* note 68, at 564.

[71] *See id.*

[72] *See Human Rights in China: Hearing Before the Subcomm. on Int'l Operations and Human Rights of the House Comm. on Int'l Relations*, 105th Cong. (1997), 1997 WL 676600 ("[T]he Clinton administration has coddled dictators as few have coddled before.").

[73] *See, e.g., International Trafficking: Prosecution, Testimonies, and Prevention, supra* note 1 (testimony of William R. Yeomans, statements of Sen. Sam Brownback (R-Kan.) and Sen. Paul Wellstone (D-Minn.)); 146 CONG. REC. S2631–32 (daily ed. Apr. 12, 2000) (statement of Sen. Wellstone); 146 CONG. REC. S2768 (daily ed. Apr. 13, 2000) (statement of Sen. Brownback).

The question remains whether sanctions should be employed at all. White House representatives testified before Congress that the sanctions proposed by the Act would jeopardize international cooperation, which remains crucial for successful enforcement efforts.[74] Senator Paul Wellstone (D-Minn.), a prominent supporter of the Act, responded to these concerns by stating:

> [W]e do need to have some way of really providing, if you will, the incentive for these governments to cooperate. . . . [T]here comes a point where there is a standard of reasonableness where you . . . ask those governments to meet a threshold of tests as to whether they're cooperating or not. And it seems . . . appropriate to name those countries that are unwilling to do so.[75]

Supporters of these so-called "shame sanctions" believe such legislation can be effective at motivating compliance with international standards.[76] Critics respond that coercion often does little to create the requisite voluntary assent that motivates positive change.[77] Moreover, the imposition of sanctions by one country serves as an invitation for worldwide condemnation of another. In so judging another nation, the United States implies the existence of an international moral hierarchy that refutes the presumption of equal stature among nations. Therefore, while shame sanctions do not change the political status of either nation, they can result in negative social and diplomatic repercussions.

Not surprisingly, nations that experience such sanctions resist reform. For instance, following the passage of the FFRPA, China refused to engage in any discussion of religious freedom within its borders, insisting that the United States had "ulterior motives" in passing the act.[78]

---

[74] *See International Trafficking: Prosecution, Testimonies, and Prevention*, *supra* note 1 (testimony of William R. Yeomans).

[75] *Id.* (statement of Sen. Wellstone).

[76] *See* Geoffrey Palmer, *New Ways to Make International Environmental Law*, 86 AM. J. INT'L L. 259, 281 (1992) (asserting that "[f]ew nations like to be regarded as international pariahs and shame as a sanction ought not to be underestimated"); Robert McLaughlin, *Improving Compliance: Making Non-State International Actors Responsible for Environmental Crimes*, 11 COLO. J. INT'L ENVTL. L. & POL'Y 377, 385 (2000) ("[T]he only truly universal enforcement mechanism available under current [international environmental law] is the force of public opinion.") (citing Palmer).

[77] *See, e.g.*, Jonathan Baert Wiener, *On the Political Economy of Global Environmental Regulation*, 87 GEO. L.J. 749, 788 (1999) (arguing that "the politics of shame" do not influence large countries); Wiener, *Global Environmental Regulation*, 108 YALE L.J. 677, 738 (1999) (stating that voluntary assent remains more powerful than majoritarian coercion); George William Mugwanya, *Realizing Universal Human Rights Norms through Regional Human Rights Mechanisms: Reinvigorating the African System*, 10 IND. INT'L & COMP. L. REV. 35, 49 (1999) (noting that shame sanctions are likely to be effective only in closely knit and interdependent geographic regions).

[78] Carlson, *supra* note 68, at 563 (quoting Ye Xiaowen, Dir., Bureau of Religious Affairs, P.R.C.).

China considered the FFRPA a proxy for American criticism of its domestic policy and a transparent attempt to dictate what that policy should be.[79] Because the economic costs of sanctions pale beside the ideological investment nations have in their own stature, states like China would rather face sanctions than effectively cede political power to the nation imposing sanctions.[80]

To avoid the resentment and counter-productive effects that often result from the public finger-pointing typically engendered by shame sanctions, some commentators have advocated reliance on the "direct contacts" model of foreign policy. Under this model, nations attempt to influence the policies of other nations by encouraging government interactions at the agency level rather than through communication between chief executives.[81] Policymakers call upon agency personnel both to cooperate with their foreign colleagues, through the sharing of information, and to pressure them, by threatening to withhold aid.[82] For example, agents within the Drug Enforcement Agency might use both their stature with their international colleagues and the promise to withhold or provide funding to influence another nation's drug policy. Agency officials are better suited for this diplomacy because they and their foreign counterparts share common technical language and professional values. Respective agencies can tailor their diplomacy toward different officials and different nations. At the same time, this method is less likely to lead to the perception that the United States is undermining a nation's sovereignty.[83]

Only as a secondary option do proponents of the "direct contacts" model advocate the "mobilization of shame."[84] Once again, however, the model calls for agency professionals, rather than the chief executive, to act. If contact and dialogue through professional channels fails, the direct contact model calls for more public communication of desired outcomes.[85] By substituting public reproof by professionals for economic sanctions imposed by governments, this approach is less likely to affront the national sovereignty of a foreign country, for again it is individual professionals, rather than states, who are the actors.[86] The direct contacts model could thus potentially benefit both foreign policy objectives, by not alienating important international partners, and domestic law enforcement

---

[79] *See* Carlson, *supra* note 68, at 603 (observing that "China will resist U.S. interests as long as it perceives that the United States is trying to take for itself the role of ruler and force China to play subject").

[80] *See id.* at 599.

[81] *See* Oscar Shachter et al., *Compliance and Enforcement in the United Nations System*, 85 AM. SOC'Y INT'L PROC. 428, 437–38 (1991).

[82] *See id.*

[83] *See* Carlson, *supra* note 68, at 602.

[84] Shachter, *supra* note 81, at 439.

[85] *Id.*

[86] *Id.*

objectives, by facilitating cooperative efforts in information collection and extradition.[87]

By ensuring that domestic concerns remain the primary impetus in the nation's efforts to confront the trafficking problem, and by encouraging cooperative international efforts rather than the use of shame sanctions to impact other nations' anti-trafficking efforts, the discretionary-sanction regime of the final version of the Act provides a constructive solution to the trafficking problem. In his testimony to the House International Relations Committee, Undersecretary of State for Global Affairs Frank E. Loy elaborated on the benefits of discretionary, rather than mandatory, sanctions:

> Economic sanctions would exacerbate the root causes of trafficking by making the targeted countries poorer and leaving the victims even more vulnerable to traffickers; [s]anctions imposed on countries would not punish the principal perpetrators—organized crime syndicates—but governments and people; [i]n the face of a sanctions regime[,] governments may seek to downplay the seriousness of the problem of trafficking to avoid either the direct or political consequences of sanctions, thus chilling the growing phenomenon of international collaboration; and [i]f a sanctions-regime is developed, governments and local populations could come to view the important work of local activists and NGO's to raise the profile of the problem of trafficking as a threat and cease collaboration with these important grassroots efforts.[88]

The mandatory-sanction regime imposed by the House version of the bill would not only have forestalled such collaborative international activities, but would also have diminished the potential impact and importance of the domestic provisions.

---

[87] *See, e.g., International Trafficking: Prosecution, Testimonies and Prevention, supra* note 1 (testimony of William R. Yeomans). In his testimony, Mr. Yeomans discussed the Clinton administration's view of the effects that sanctions might have on direct contacts with foreign law enforcement agencies:

> The administration opposes sanctions because, from the perspective of DOJ, if we are to root out this problem, we need to form close working relationships with law enforcement agencies in the countries from which people come. As soon as we impose sanctions or try to make an international pariah out of one of these countries, that cooperation shuts down. We will make more progress by working closely with law enforcement in those countries than by imposing sanctions and shutting down cooperation . . . . We need to be able to reach back to those countries. We have a number of instances where we have prosecuted people who have fled and gone back to these countries. We need their cooperation.

Id. (testimony of William R. Yeomans).

[88] *International Trafficking, supra* note 1 (testimony of Frank E. Loy).

Over the course of the debates on both the Trafficking Victims Protection Act and FFRPA, members of Congress avoided any frank discussion of the effectiveness of shame sanctions. Instead, they couched their references to such measures in a vocabulary of indignation and reproof of the offending nations and of the Clinton administration's foreign policy.[89] While shame sanctions have come into vogue in some academic circles, attention has focused primarily on the domestic implementation of sanctions rather than on their impact abroad.[90] Information on the costs and benefits of using these sanctions in foreign policy thus remains sparse. As the debate over the Act demonstrated, this lack of data often reduces consideration of a bill's sanctions provisions to a mere exchange of rhetoric rather than an analysis of important issues. It remains unclear what effects, if any, shame sanctions have on the problems they purportedly address and whether there are acceptable or comparable foreign policy alternatives to these controversial measures. Further analysis of international shame sanctions would therefore facilitate the development of a more effective foreign policy.

Only in the final days preceding passage of the Act did the House abandon its insistence on shame sanctions, thus saving the Act from a presidential veto.[91] Had it been vetoed, the bill that Senator Sam Brownback (R-Kan.) deemed "the most significant human rights legislation of this Congress"[92] would have experienced a potentially fatal setback.

—Sabrina Fève
Christina Finzel

---

[89] *See supra* note 72 and accompanying text.

[90] *See, e.g.*, Dan M. Kahan, *What do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591 (1996); Dan M. Kahan & Eric A. Posner, *Shaming White-Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines*, 42 J.L. & ECON. 365 (1999); Toni Massaro, *The Meanings of Shame Implications for Legal Reform*, 3 PSYCHOL. PUB. POL'Y & L. 645 (1997); Toni Massaro, *Shame, Culture, and American Criminal Law*, 9 MICH. L. REV. 1880 (1991).

[91] Brinkley, *supra* note 6.

[92] Melissa Lambert & Josh Meyer, *House OKs Crackdown on Trafficking in Sex*, L.A. TIMES, Oct. 7, 2000, at A20.