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ARTICLE

THE CASE FOR REGULATING COLLABORATIVE REPRODUCTION: A CHILDREN'S RIGHTS PERSPECTIVE

HELEN M. ALVARÉ*

There is little regulation of collaborative reproduction—the use of the eggs, sperm, or embryos of a third party to create a child biologically unrelated to at least one intending parent. This Article argues that the dearth of regulation should be assessed from a children's rights perspective and accordingly adjusted. After examining the effects of the experimental reproductive technologies, it concludes that traditional family law preferences and policies are undercut by the deliberate creation of collaboratively reproduced children. The lack of regulation might stem from constitutional protection afforded parents in the right of privacy and substantive due process cases. The author, however, contends that collaborative reproduction implicates the rights of children and requires a separate balancing of rights not contemplated in the other cases. Collaborative reproduction also requires regulation because of its spill over effects on the acceptability of cloning. The Article concludes by offering several possible regulatory responses to the problems posed by collaborative reproduction.

Trying to draw the line where we are trying to draw it, between carelessness and brutality, is like insisting that falling is flying—until you hit the ground—and then trying to outlaw hitting the ground.[1]

While some people contend that cloning-to-produce-children would not take us much further down a path we have already been traveling, we would emphasize that the precedent of treating children as projects cuts two ways in the moral argument. Instead of using this precedent to justify taking the next step of cloning, the next step might rather serve as a warning and a mir-

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[1] WENDELL BERRY, SEX, ECONOMY, FREEDOM AND COMMUNITY 141 (1993).

ror in which we may discover reasons to reconsider what we are already doing.[2]

INTRODUCTION

Use of new reproductive technologies, including those requiring donated eggs, sperm, or embryos, has become a part of the American landscape. Radio traffic reports are sponsored by the "Genetics and IVF Institute of Virginia. Have a baby or your money back! Guaranteed!"[3] Amidst the crime reports and high school graduation announcements in local weekly newspapers, increasingly there appear solicitations to "donate"[4] eggs to a "loving, infertile couple." In this saturated context, it takes fairly dramatic news to provoke real concerns about the future: the offer of $50,000 for the eggs of a beautiful woman with a privileged education;[5] baby girl Jaycee[6] with five potential—though no legally certain—parents; or progress in developing an artificial womb.[7]

Provocative stories such as these have the power to provoke public discussion and invite examination of conscience because they appear to contradict, both implicitly and explicitly, preferences and sentiments about family life present in the fabric of American culture. Specifically, there is the feeling—which is also always a hope—that every person should be embraced within a loving, accepting family. Included also is the hope that, in and through the family as a school of love, each member might learn over time how to give love to other family members as well as to persons in the wider world.[8] Procreation stories featuring financial

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[2] PRESIDENT'S COUNCIL ON BIOETHICS, HUMAN CLONING AND HUMAN DIGNITY: AN ETHICAL INQUIRY § 5 (2002), *available at* http://www.bioethics.gov/cloningreport.

[3] *Traffic Update* (WMZQ 98.7, Washington, D.C., radio broadcast Aug. 1, 2002).

[4] Critics note with irony the use of the language of "donation." Donors are paid. *See* Kenneth Weiss, *Growing Market for 'Perfect' Human Eggs*, NEWSDAY, June 19, 2001, at C6, *available at* 2001 WL 9237338 (quoting Arthur Caplan, director of the University of Pennsylvania Center for Bioethics as stating "[t]here is all this talk of donation, helping another couple . . . . But clearly it's a business, selling the best available stock that money can buy").

[5] *See* Weiss, *supra* note 4, at C6.

[6] *In re* Buzzanca, 61 Cal. App. 4th 1410 (Ct. App. 1998) (reversing the decision of the trial court that Jaycee had no legally recognized parents among the five persons involved in her conception: the sperm donor, the egg donor, the surrogate mother, and the formerly married couple who had arranged for her conception).

[7] Gareth Cook, *Man-made Artificial Womb Could Someday Allow Fetuses to Develop Outside Human Body, but Thorny Issues are Sure to Follow*, BOSTON GLOBE, Mar. 31, 2002 (Magazine), at 5.

[8] *See, e.g.*, Katharine Bartlett, *Re-expressing Parenthood*, 98 YALE L.J. 293, 295 (1988) ("[T]he law should focus on parental responsibility . . . and express a view of parenthood based upon the cycle of gift. . . ."); H.R. REP NO. 103-8, pt.1, at 38 (1993) (testimony of Dr. Eleanor S. Szanton) ("Babies, for their part, who have already begun the process of learning to love and trust their parents are better able to form and to use trusting, warm relationships with other adults."). The Supreme Court "has recognized that natural

incentives, rejection of children, and technological substitutes for mothers challenge those hopes and feelings.

Family law is charged with supporting this vision through discrete preference and policy choices. In the arena of parent-child relations, family law adopts a set of presumptions judged to create a promising environment for children. These include presumptions about the desirability of maintaining the tie between children and their natural parents, the benefits of two-parent households, and some degree of respect for the human embryo.[9]

It appears, however, that even the less sensational uses of artificial reproductive technologies ("ART"s) can contradict the presumptions and policy choices found in family law. This is the case with the set of practices that are the focus of this Article, sometimes called collaborative reproduction: the use of the eggs, sperm, or embryos of a third party to create a child to be reared by one or more persons biologically unrelated to the child ("the intending parents").[10] With collaborative reproduction, the child may be conceived specifically to be raised by one or two intending parents, who may be married or unmarried. The intending parent(s) will attempt to select the child's characteristics by choosing a donor or donors with desired traits to be the source of the eggs, sperm, or embryos used to create the child.

There is little doubt that there are children created collaboratively who, like adopted children, experience and stimulate loving family relationships. There is also little doubt about the depth of longing for healthy relationships felt by intending parents. Nevertheless, this Article questions how families created by means so different from natural procreation challenge or alter family life and existing family law preferences. It further considers how unregulated collaborative reproduction creates a slippery slope towards the acceptance of cloning. Indeed, cloning supporters agree that collaborative reproduction has challenged foundational ideas about how families can appropriately be created to the point where cloning becomes simply a step, not a leap, from acceptable social mores.[11] In fact, cloning supporters have argued that cloning is superior to collaborative reproduction because it does not involve the potentially messy web of relationships among donors, recipients, and children inherent in collaborative reproduction.[12]

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bonds of affection lead parents to act in the best interests of children," Parham v. J.R., 442 U.S. 584, 603 (1979), and that children so formed contribute significantly to the preservation of American democracy. *See* Prince v. Massachusetts, 321 U.S. 158, 168 (1944).

[9] *See infra* Part III.A.

[10] *See generally* JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES, 119–45 (1994).

[11] *See infra* Part IV.

[12] *See* N.Y. STATE TASK FORCE ON LIFE & THE LAW, ASSISTED REPRODUCTIVE TECHNOLOGIES: ANALYSIS AND RECOMMENDATIONS FOR PUBLIC POLICY 395–96 (1998). This task force was created by executive order in 1985 to make recommendations regarding

Nevertheless, even though collaborative reproduction contradicts many of family law's extant preferences, and even though it paves the way for cloning, collaborative reproduction is subject to minimal regulation in the United States.[13] Perhaps this comes as no surprise given our "'rights-based' political culture,"[14] in conjunction with the traditional judicial affirmation of "the private realm of family life which the state cannot enter."[15] Such generalities, however, cannot be the final word in an area of law so fraught with consequences for children. There has been an unfortunate history of vaulting adults' interests over the needs and vulnerabilities of children in the areas of family law critical to the well-being of children. Family law historians have chronicled this phenomenon, for example, in custody[16] and adoption[17] law. Collaborative reproduction also intimately affects children's well-being: it affects children's genetic identities, as well as their physical and emotional health. Expert observers of collaborative reproduction, even those generally favoring use of ARTs, have concluded that existing law and practices are driven primarily by adult desires rather than children's needs. An ethicist has succinctly observed that "[i]n most infertility clinics, desire and money serve as surrogates for child welfare."[18] The lack of regulation is additionally troubling given an industry reaping tremendous profits from "species urge"[19] needs.

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public policy issues on, *inter alia*, assisted suicide, life-sustaining treatment, organ and tissue transplantation, and assisted reproductive technologies. *See* N.Y. State Task Force on Life & the Law, *available at* http://www.health.state.ny.us/nysdoh/taskfce/factsht.htm (last visited Nov. 14, 2002). Its report contains summaries and analyses of many states' laws on the subject. *See id.*

[13] *See* Judith F. Daar, *Regulating Reproductive Technologies: Panacea or Paper Tiger?*, 34 HOUS. L. REV. 609, 637–65 (1997). *See generally* Jean Macchiaroli Eggen, *The "Orwellian Nightmare" Reconsidered: A Proposed Regulatory Framework for the Advanced Reproductive Technologies*, 25 GA. L. REV. 625 (1991); Alexander N. Hecht, *Wild Wild West: Inadequate Regulation of Assisted Reproductive Technology*, 1 HOUS. J. HEALTH L. & POL'Y 227 (2001); Laura M. Katers, *Arguing the "Obvious" in Wisconsin: Why State Regulation of Assisted Reproductive Technology Has Not Come to Pass, and How It Should*, 2000 WIS. L. REV. 441 (2000).

[14] Kathryn Venturatos, *The Process of Regulating Assisted Reproductive Technologies: What We Can Learn From Our Neighbors—What Translates and What Does Not*, 45 LOY. L. REV. 247, 266 (1999).

[15] Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

[16] *See* MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 234–68 (1985).

[17] *See* HARRY D. KRAUSE ET AL., FAMILY LAW: CASES, COMMENTS AND QUESTIONS 307–08 (4th ed. 1998).

[18] George J. Annas, *Fertility Clinics Hardly Letter-Perfect*, BOSTON GLOBE, Nov. 30, 1997, at D1. *See also* Daar, *supra* note 13, at 636 ("It seems that current practices within the fertility field reflect not so much a philosophy about the moral and legal status of reproductive material, but a sense of the needs and desires of those actively participating in that market.").

[19] ROBERTSON, *supra* note 10, at 24 (advising at least a hermeneutic of suspicion for the industry).

This Article will explore the need for appropriate regulatory responses to collaborative reproduction. Part I will describe the processes of collaborative reproduction. It will pay particular attention to the steps between the formation of an intent to collaboratively reproduce, and the birth of the child, especially those steps that affect the family relationships eventually formed. It will consider how donor gametes and embryos are obtained, how they are selected by intending parents, and how they are fertilized and implanted in a woman. It will also consider the background choices and inherent risks assumed or imposed by participants in collaborative reproduction processes.

Part II will set forth the types and extent of federal and state laws presently regulating collaborative reproduction. It will attempt to characterize the concerns evidenced by the regulations. There are relatively few regulations of collaborative reproduction, considering the risks to the parties involved, the size of the industry, the vulnerabilities of its clients, the large monetary sums transacted, and the potential effects on the adults and especially the children involved. Part II will suggest possible reasons for this relative dearth of laws, attending in greatest detail to the claim that collaborative reproduction might enjoy constitutional protection.

Part III will discuss the family law preferences that collaborative reproduction implicates and appears to contradict. These include the preferences for married, two-parent households; the maintenance of relationships between parents and their biologically related children; and some degree of respect for the human embryo. It will also reveal that collaborative reproduction threatens a paradigm of the parent-child relationship deeply embedded in American family law. It will then consider some objections to regulation and demonstrate the weak or erroneous nature of those objections.

Part IV will demonstrate how the laissez-faire approach to collaborative reproduction appears to be encouraging proponents of human cloning, a fact that has not escaped the President's Council on Bioethics.[20] It will set forth the reasons proffered by a strong majority opposition to cloning in the United States—the same reasons which also counsel against collaborative reproduction. Based on the findings of Parts III and IV, Part V will propose several types of legislation that will better account for the interests of children conceived by means of collaborative reproduction.

I. THE PROCESSES OF COLLABORATIVE REPRODUCTION

Collaborative reproduction, for the purposes of this Article, includes the various processes by which "intending parent(s)" use the embryos or

[20] *See* PRESIDENT'S COUNCIL ON BIOETHICS, *supra* note 2, at § 5.

gametes (sperm or eggs), of one or more donors to conceive a child that the intending parents will legally rear.[21] A child born through collaborative reproduction is not the biological offspring of both intending parents, though he may be the biological child of one intending parent. In the case of a person who intends to single-parent a child born of collaborative reproduction, the child may be related to that intending parent, but at least one donor gamete will have been used. Whether it is a single person or a couple seeking collaborative reproduction, it is possible that the intending parent(s) are wholly biologically unrelated to the child. Without listing every possible combination, collaborative reproduction can involve as few as one person in addition to the intending parent(s), to as many as three with a surrogate.

Scientific[22] and legal[23] literature provide many straightforward, clinical descriptions of the medical processes necessary to bring about collaborative reproduction. This Article, too, will provide brief descriptions of these processes as necessary to understand their basic mechanisms. It will also attend to matters not discussed in much detail in other sources, namely, the physical and personal choices and interactions required in the many steps of collaborative reproduction. These matters include the recruitment of "donors,"[24] donation procedures, donor selection, fertilization methods, pre-implantation screening, embryo disposition, and "selective reduction," the terminating of one or more fetuses growing in a woman's uterus to reduce the number of live births.[25] By examining the choices and implications of the scientific processes, rather than their mechanisms alone, the description will contribute to an understanding of how collaborative reproduction affects the family relationships it creates. The steps of the collaborative reproduction process—spanning weeks, months, or even years—involve intimate bodily functions and deeply felt emotional longings about oneself and children. It is apparent that the steps will have immediate and even long-term effects on familial relations. It should be noted here that while some of the processes to be considered in this Article—fertilization, pre-implantation screening, embryo

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[21] The definition of collaborative reproduction might also describe surrogate motherhood, which is the gestation of a child in the womb of a woman who will not be the legal parent. *See* Lori B. Andrews, *Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood*, 81 VA. L. REV. 2305 (1995). In order to attend thoroughly to one topic, however, and due to the large scope of and ongoing attention paid to the surrogacy question, surrogacy will not be treated in this Article.

[22] *See generally* ENCYCLOPEDIA OF REPRODUCTIVE TECHNOLOGIES (Annette Burfoot ed., 1999).

[23] *See, e.g.*, Lori B. Andrews & Lisa Douglass, *Alternative Reproduction*, 65 S. CAL. L. REV. 623, 641–46 (1991); Weldon E. Havins & James J. Dalessio, *The Ever-Widening Gap Between the Science of Artificial Reproductive Technology and the Laws Which Govern that Technology*, 48 DEPAUL L. REV. 825, 832–34 (1999).

[24] *See supra* note 4 and accompanying text.

[25] *See generally* Stacey Pinchuck, *A Difficult Choice in a Different Voice: Multiple Births, Selective Reduction and Abortion*, 7 DUKE J. GENDER L. & POL'Y 29 (2000).

disposition, and selective reduction—may arise even when a couple employs their own gametes, their frequent and regular use in collaborative reproduction suggests that the total effect of collaborative reproduction cannot be understood apart from them.

A. Collaborative Reproduction as a Response to Infertility

Collaborative reproduction in the United States can be understood as a response to a significant amount of infertility. Infertility is described by the Centers for Disease Control and Prevention ("CDC") as an inability to become pregnant for twelve months or more.[26] The American Society for Reproductive Medicine ("ASRM"), a leading medical society in this area, estimates that infertility affects ten percent of Americans of reproductive age (ages fifteen to forty-five), totaling six million Americans.[27] Despite the infertility rate, centralized or comprehensive record keeping about collaborative reproduction does not exist. Data reported by the CDC show, however, the number of "cycles"[28] of ARTs performed annually and the percentage of total births in the United States today caused by ARTs.[29] In 1996, the first year when the CDC published full data, more than 64,000 cycles of ART were undertaken in the United States.[30] As of 1999, the most recently measured year, ARTs caused 0.08% of all births, and 86,822 cycles of ARTs were performed; ten percent of these cycles involved the use of donor eggs or embryos for a total of 8132 donor eggs or embryos in 9066 cycles.[31] Interestingly, the subject of the use of donor sperm is not examined by the CDC's reports on ARTs. An older but comprehensive study of the matter, however, estimated that as of 1979, at least 7000–10,000 children each year were born as a result of artificial insemination by donor ("AID").[32] A 1988 paper estimated that

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[26] NAT'L CTR. FOR HEALTH STATS., CTRS. FOR DISEASE CONTROL & PREVENTION, FERTILITY, FAMILY PLANNING AND WOMEN'S HEALTH: NEW DATA FROM THE 1995 NATIONAL SURVEY OF FAMILY GROWTH 7 (Series 23, No. 19, 1997), *available at* http://www.cdc.gov/nchs/datawh/statab/pubd.htm#Infertility.

[27] *See* AM. SOC'Y FOR REPROD. MED., PATIENT'S FACT SHEET: INFERTILITY, *at* http://www.asrm.org/Patients/FactSheets/infertility-fact.pdf (last visited Nov. 14, 2002); CTRS. FOR DISEASE AND CONTROL & PREVENTION, 1999 ASSISTED REPRODUCTIVE TECHNOLOGY SUCCESS RATES: NATIONAL SUMMARY AND FERTILITY CLINIC REPORTS 3 [hereinafter 1999 ART REPORT] (stating that in 1995, thirteen percent of 60 million American women of childbearing age reported using an infertility service "at some time" in their lives), *available at* http://www.cdc/nccdphp/drh/ART99/faq.htm#1 (last visited Nov. 14, 2002).

[28] A "cycle," according to the CDC, is the series of assisted reproductive processes beginning with egg donation and ending either with a pregnancy and delivery of a child, or, unsuccessfully, at a point before these events. *See* 1999 ART REPORT, *supra* note 27, at 6.

[29] *Id.*

[30] CTRS. FOR DISEASE CONTROL & PREVENTION, 1996 ASSISTED REPRODUCTIVE TECHNOLOGY SUCCESS RATES: NATIONAL SUMMARY AND FERTILITY CLINIC REPORTS (1998), *available at* http://www.cdc.gov/nccdphp/drh/archive/art96/index.htm.

[31] *See* 1999 ART REPORT, *supra* note 27, at 3.

[32] *See* M. Curie-Cohen et al., *Current Practice of Artificial Insemination in the United*

"approximately 500,000 people in the United States today were born and are alive as a result of AID."[33]

B. Sperm Donation

The artificial insemination of donor sperm into the uterus of a woman, or AID, has been occurring in the United States long before the last several decades' explosion in newer ARTs.[34] Its frequency is unknown because of the privacy observed by doctors and their patients. According to the most recent CDC survey, of the 232 reporting laboratories performing procedures on human eggs, sperm or embryos in connection with an ART, 51.3% offered services in connection with sperm donation.[35] Figures in this area, however, are incomplete: doctors are not required to report these procedures to either federal or state authorities in most cases,[36] and women may obtain donor sperm without resort to a doctor, clinic, or laboratory.

Sperm donation is often sought by married couples in which the husband is infertile, but its use is not limited to such situations. It might be used, for example, because a man fears passing on a genetic defect.[37] AID is also regularly used by single women who wish to bear a child without benefit of a husband or other partner. In 1999, eighty-three percent of fertility clinics reported that they would inseminate single women.[38] No extant law in the United States requires fertility clinics to distinguish between single and married women for AID services. In addition, a woman who orders sperm on the Internet—with no requirement to indicate marital status and no state laws reserving AID to married women[39]—does not become dependent on the services of a local fertility clinic or doctor who may choose to restrict services to married women.

1. Donor Recruitment and Selection

Donor sperm may be obtained from a personal acquaintance or from a doctor, fertility clinic, or sperm bank. Information on such purely private transactions is largely hidden from public view. Therefore, this Part

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States, 300 NEW ENG. J. MED. 585, 587 (1979).

[33] Leah J. Dickstein, *Effects of the New Reproductive Technologies on Individuals and Relationships in* PSYCHIATRIC ASPECTS OF REPRODUCTIVE TECHNOLOGY 123, 124 (Nada Stotland ed., 1990).

[34] *See* Rona Achilles, *Artificial Insemination, in* ENCYCLOPEDIA OF REPRODUCTIVE TECHNOLOGIES 149, 150 (Annette Burfoot ed., 1999).

[35] CTRS. FOR DISEASE CONTROL & PREVENTION, FINAL REPORT: SURVEY OF ASSISTED REPRODUCTIVE TECHNOLOGY: EMBRYO LABORATORY PROCEDURES AND PRACTICES 36 (Jan. 29, 1999), *available at* http://www.cdc.gov/nccdphp/drh/pdf/ARTsurvey.pdf.

[36] *See infra* Part II.B.

[37] Achilles, *supra* note 34, at 151.

[38] *See* 1999 ART REPORT, *supra* note 27, at 57.

[39] *See infra* Part II.

will consider the more transparent transactions in which donor sperm is received from a fertility clinic or doctor.[40]

Facilities that offer donor sperm for sale to the public must first solicit donors to establish a stable and plentiful supply. Sperm donors are recruited regularly on the campuses of colleges and universities, particularly medical schools.[41] One sophisticated Web site presentation claims that

> Our donors are recruited from the school campuses of western Montana and eastern Washington. All of our donors were either currently involved with or had finished their higher education at the time of their participation in our donor program. All donors are between 18 and 35 years of age in order to minimize genetic abnormalities.[42]

Another Web site seeking to attract donors announces: "We have a minimum height requirement of 5'11" with weight needing to be proportionate to height. Our donors must be between 18 and 37 years of age. Additionally, they must have graduated from, or be currently attending a 4-year college or university."[43] Some donors undergo a preliminary telephone interview, which includes multiple questions about their own health and the health of their families. If provisionally accepted, they are asked to come to a laboratory and give many sperm samples over the course of several days. Their sperm may then be tested for genetic and infectious diseases, its "fresh semen quality," and its ability to successfully survive freezing for later use.[44] A complete physical exam may also be required, involving further donations of blood, urine, and semen.[45]

Often, a long questionnaire containing several hundred questions is then administered. Donors are asked about matters including their health; the health of their parents, grandparents, or siblings; their reproductive history; their own and their parents' and siblings' occupations and education; and their skills and personality traits.[46] They may also be asked about their character, their hobbies and club involvement, their use of alcohol, drugs, or psychiatric treatment, their college grades, and their

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[40] Stories and information about the practice of obtaining sperm from banks or fertility clinics have attracted a good deal of media and academic interest. There are also many Web sites containing abundant information about donating and ordering sperm. *See infra* notes 42–49.

[41] *See* LORI B. ANDREWS, CLONE AGE 80 (1999).

[42] Northwest Andrology & Cryobank, *Donor Standards, at* http://www.nwcryobank.com/donor_standards.asp (last visited Nov. 14, 2002).

[43] Zygen Laboratory, *Becoming an Anonymous Semen Donor, at* http://www.zygen.com/coinfo2.htm (last visited Sept. 28, 2002).

[44] *Id.*

[45] Fairfax Cryobank, *Fairfax Cryobank Prospective Donors, at* http://www.fairfaxcryobank.com/cryo/prospect_donor.cfm (last visited Nov. 14, 2002).

[46] *See id.*

willingness to take an IQ test.[47] Finally, applications may inquire into the donor's sexual orientation, religious identification, and reasons for donating.[48] Not surprisingly, what finds its way into print and is offered to intending parents is superficially appealing: "My wife is currently pregnant. I figured I'm fertile enough to donate . . . I figured [this] is a good way to make some extra money to buy the things I will need for my new baby."[49] A sample online profile provided from another sperm bank reads

> I am not in a relationship currently and I would like to help those that need help with starting their own loving family. I have friends who have been in the position of wanting children, but couldn't. I felt for them. Last year, it occurred to me to call OPTIONS.[50]

If a donor is selected after review of his laboratory results and questionnaire, he is usually asked to make a six-month to one-year commitment to the laboratory, providing samples two to three times per week, and appearing for a blood test months after the donor relationship is over in order to continue testing for disease.[51]

It is difficult to find information about the conditions under which donations are given. According to a recognized expert in reproduction policy, Professor Lori Andrews, donors at medical facilities will be taken to private masturbatoriums, "softly lit rooms filled with *Playboy* and *Penthouse* magazines,"[52] and will be told to masturbate, ejaculating their semen into a sterilized cup.[53] There is very little written about this step, and nothing available regarding its possible emotional or other impact on the offspring created. After ejaculation, the donor will give the cup to an employee of the facility who will mark it with identifying information and possibly forward it to a laboratory for a variety of tests, including the screening for infectious diseases.

Results of the CDC's 1999 questionnaire for "embryo laboratories," asking about infectious disease testing, show that 59% of 232 labs reported that they tested sperm for syphilis; nearly 50% percent tested for Hepatitis B; 44% and 29%, respectively, tested for HIV I and HIV II;

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[47] *See id.*

[48] *See, e.g.*, Fertility Options, *Sperm Donor Profile (Sample)*, *at* http://www.fertilityoptions.com/html_pub/z0003.htm (last visited Nov. 14, 2002).

[49] Northwest Andrology & Cryobank, *Donor Details, at* http://www.nwcryobank.com/donor_details.asp?ID=12 (last visited Nov. 14, 2002).

[50] Fertility Options, *supra* note 48.

[51] *See* Zygen Laboratory, *supra* note 43.

[52] ANDREWS, *supra* note 41, at 35.

[53] *See* Sharon Krum, *American Beauty, Here is Lauren Bush, This Year's Model. Americans Want Her Looks, Her Figure, Even Her Brains. But Most of All, They Want Her Eggs*, INDEP.(London), June 17, 2001, at 1.

41% tested for Hepatitis C; and 27% to as few as 11% reported testing for diseases such as chlamydia, gonorrhea, herpes, and rubella.[54]

It appears that donors receive, on average, fifty dollars per sample,[55] with some clinics voluntarily limiting the number of times any one donor can donate.[56] The Northwest Andrology and Cryobank Company, without giving precise figures, advertises that: "All donors are frozen in very limited quantities, in order to guarantee that the number of pregnancies created from any one donor are limited."[57]

Donors are regularly required to sign an agreement disclaiming all parental rights in any child created with their sperm. As will be discussed in Part II, legislation in this area is neither ubiquitous nor consistent. Thus, despite contractual agreements, a variety of conflicts can arise regarding the rights of and obligations to children created through collaborative reproduction.

Once a bank or fertility clinic has a stable and plentiful supply, it will advertise its products and services both to physicians and directly to the public. The Internet has become a common source of this information.[58]

2. *Recipients Choosing Among Donors*

Intending parents have the opportunity to review the "donor profiles" that are compiled from the information provided by donors. In some cases, sperm banks categorize their profiles according to educational attainment. A fee schedule from the Fairfax Cryobank of Virginia indicates that the cost to recipients of sperm from a man with a college degree is approximately $200, from a man with a doctoral degree, about $300, and from a donor with minimal available information, $135.[59] Other sources refuse to provide this type of information. As the director of one fertility clinic noted, "[i]f we enabled them to search for PhDs, that would be the only donors they would look at."[60]

The fees for the recipient vary according to location and to the provision of any additional services. For mail-order customers, Fertility Options estimates a cost of $4,160 for the first cycle of insemination.[61] Costs

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[54] *See* CTRS. FOR DISEASE CONTROL & PREVENTION, FINAL REPORT, *supra* note 35, at 71.

[55] ANDREWS, *supra* note 41, at 80. *See also* Zygen Laboratory, *supra* note 43 (reporting an income to sperm donors of $400.00 per month for two weekly donations).

[56] ANDREWS, *supra* note 41, at 81.

[57] Northwest Andrology & Cryobank, *supra* note 42.

[58] *See, e.g.*, Sperm Bank Directory.com, http://www.spermbankdirectory.com (last visited Nov. 14, 2002).

[59] Fairfax Cryobank, *Fee Schedule*, *at* http://www.fairfaxcryobank.com/cryo/donors/categs/cfm (last visited Nov. 14, 2002).

[60] Martha Frase-Blunt, *Ova Compensation?: Women who Donate Eggs to Infertile Couples Earn a Reward*, WASH. POST, Dec. 4, 2001, at F1.

[61] Fertility Options, *Fee Schedule, at* http://www.fertilityoptions.com/html_pub/guid_

for sperm range from $200 for pre-washed frozen semen to $410 for "sex-selected frozen semen."[62] Customers may order a variety of shipping methods, from an overnight delivery of a liquid nitrogen tank at a cost of $210,[63] to a $15 "cup with dry ice" that lasts for two hours and is available only to locals.[64] The differing pricing schemes for sperm donation, aside from commodification issues discussed later in the Article, show the profit potential motivating the industry and counsel for regulation.

C. Egg Donation

Conceiving babies from eggs donated by a woman who does not intend to rear any resulting child is a relatively recent practice. The first reported case of a child conceived using a donor egg was in 1983.[65] Today, the practice is increasingly common: eighty-four percent of the clinics responding to the CDC's 1999 survey of fertility clinics offered donor eggs,[66] totaling, in one year, over 9000 cycles using donor eggs. Twenty-nine hundred children were born from donor eggs in 1999.[67] A 2001 *Los Angeles Times* investigative report estimated that there are 7000 egg donations per year. It further reported that professionals in the egg donation business believe that these numbers have and will continue to double every three to four years.[68]

Egg donations may come about in one of two ways: an individual or couple seeking an egg donor may recruit a relative or acquaintance,[69] or, more commonly, may select an unknown donor through an established clinic or private broker.[70] In the early days of egg donation, women undergoing fertility treatments who produced more eggs than they could use were asked to donate their excess eggs. After the development of egg freezing, or "cryopreservation," however, women more often saved their eggs for their own possible later use. Still, half of *in vitro* fertilization ("IVF") clinics use patients as egg donors, even offering IVF at a reduced price if patients make their extra eggs available to other women.[71]

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fa.htm (last visited Nov. 14, 2002).

[62] *Id.*

[63] Zygen Laboratory, *Services and Fees Schedule*, *at* http://www.infertility.to/sperm.html (last visited Nov. 14, 2002).

[64] *Id.*

[65] *See* Mark A. Damario et al., *Ovum Donation*, *in* INFERTILITY: A COMPREHENSIVE TEXT 775, 790 n.10 (Machelle M. Seibel ed., 1997).

[66] *See* 1999 ART REPORT, *supra* note 27, at 57.

[67] *Id.*

[68] *See* Kenneth Weiss, *Egg Brokers: Eggs Buy a College Education*, L.A. TIMES, May 27, 2001, at A1.

[69] *See, e.g.*, Anne Vilen, *The Family Way*, WASH. POST, Feb. 13, 2000 (Magazine), at 18, *available at* 2000 WL 2285317.

[70] *See* N.Y. STATE TASK FORCE ON LIFE & THE LAW, *supra* note 12, at 243.

[71] *See* ANDREWS, *supra* note 41, at 97–98.

Stories concerning the recruitment of stranger egg donors have attracted a substantial amount of news coverage. One widely covered story involved wealthy intending parents advertising for the eggs of beautiful, intelligent, tall, and athletic women. Literally hundreds of media outlets reported on the 1999 advertisement placed by broker Darlene Pinkerton in the newspapers of some of the nation's most prestigious universities:

> Pay your tuition with eggs. Egg Donor Needed. Intelligent, athletic egg donor needed for loving family. You must be at least 5'10." Have a 1400+ SAT score. Possess no major family medical issues. $50,000. Free medical screening. All Expenses Paid.[72]

Another California agency advertised in the *Stanford Daily* a $100,000 payment for the eggs of a Caucasian woman under thirty "with proven college-level athletic ability preferred."[73] A now infamous, and still extant, Web site offers viewers paying a monthly fee the opportunity to view pornographic pictures of female models and bid at auction on their eggs.[74] Also occurring, though less publicly, are searches by fertility clinics for Jewish and Asian egg donors, the scarcity of which has made them "so sought after that many agencies will pay them higher fees even if they've never donated before."[75]

Egg donors, like sperm donors, are also regularly recruited on the Internet. One Internet outlet, Options National Fertility Registry, claims to receive calls from over two hundred prospective donors daily.[76] A woman wishing to be an egg donor must ordinarily fill out a lengthy questionnaire. A sample donor history form used by the Northwest Andrology and Cryobank Company is sixteen single-spaced pages long and requests information, including physical characteristics, sexual history, medical history, family medical history, personal philosophy, personality, childhood memories, degree of religious fervor, and musical and athletic abilities.[77] Another clinic tells donors that they should "range from at-

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[72] Weiss, *supra* note 68, at A1. Options National Fertility Registry advertises regularly in sixty campus newspapers and coordinates 1000 egg transfers per year. *See ABC World News Saturday: Future Shock* (ABC television broadcast, Aug. 21, 1999) (on file with author). *See also*, N.Y. STATE TASK FORCE ON LIFE & THE LAW, *supra* note 12, at 244 (some egg donation programs advertise "in a variety of venues, including radio, student newspapers, hospital newsletters, city newspapers, and alternative newspapers").

[73] *ABC World News Saturday: Future Shock*, *supra* note 72.

[74] *See* Meghan Daum, *Baby Gift*, HARPER'S BAZAAR, Apr. 1, 2000, at 222. After logging onto this Web site, additional pornographic images and Web site information will be sent to one's computer without invitation. *See id.* The additional information is not relevant to egg donation. *See id.*

[75] *Id.*

[76] *ABC World News Saturday: Future Shock*, *supra* note 72.

[77] *See* Northwest Andrology and Cryobank, *Egg Donor Questionnaire*, *at* http://www.nwcryobank.com/donor_question.asp (last visited Nov. 14, 2002).

tractive to strikingly beautiful."[78] It further expresses a preference for donors who already have children of their own as proof of fertility as well as a hedge against future feelings of regret, and requests photos of existing children for potential recipients to view.[79]

Monetary inducements are used to lure donors. It is a "simple fact that most donors are not as economically well-off as most recipients."[80] Some donors say that money is their primary objective: "'It was the dollar figure that attracted me,' said Rachel . . . 'I opened it up and saw that it was $50,000 and said, "all right."'"[81] Others claim altruistic motives: "'I thought it would be a wonderful experience to help an infertile couple.'"[82] Aside from the most widely publicized cases involving large sums of money used to attract beautiful, intelligent women with privileged educations, the reports of the average payments made to egg donors do not vary widely. A network television investigation series estimated that donors are paid approximately $2,000 per retrieval, increased in increments of $500 for each subsequent donation up to a maximum of nearly $4,000.[83] Egg Donation, Incorporated offers $5,000 per donation.[84]

1. Donor Testing, Fertilization, and Implantation

Once the potential recipient selects a willing donor for further inquiry, the donor is asked to undergo a series of tests measuring physical, possibly psychological, and genetic traits.[85] If she is selected, the processes of egg retrieval and the various methods of fertilization follow. Laboratory tests of egg donations might screen for HIV, hepatitis, syphilis, gonorrhea, and chlamydia, among other diseases.[86] An egg donor will also meet personally with a physician for a full physical exam. If, after this testing, the donor is selected, her ovaries will be hyperstimulated with hormonal drugs daily for about two weeks in an often painful process designed to produce the "superovulation" of fifteen to twenty eggs.[87] While waiting for her eggs, the donor is carefully monitored.[88] Finally,

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[78] The Egg Donor Prog. & the Surrogacy Prog., *Information for Donors*, *at* http://www.eggdonation. com/info-don.htm (last visited Nov. 14, 2002).

[79] *See* Daum, *supra* note 74, at 227.

[80] *Id.* at 225.

[81] Kenneth Weiss, *Big Money Offers to Egg Donors Fuel Ethical Debate*, PLAIN DEALER, June 13, 2001, at 3E.

[82] Frase-Blunt, *supra* note 60, at F2.

[83] *See* Daum, *supra* note 74, at 222; *ABC World News Saturday: Future Shock*, *supra* note 72.

[84] *See* The Egg Donor Prog. & the Surrogacy Prog., *supra* note 78.

[85] Debra Melani, *Sacrificing for a Dream: Aunt and Niece Endure Exams and Shots for Surrogate Pregnancy*, ROCKY MOUNTAIN NEWS, July 19, 2001, at 1D.

[86] *See* 1999 ART REPORT, *supra* note 27, at 1.

[87] Daum, *supra* note 74, at 227 (noting that a woman's ordinary monthly cycle produces one).

[88] *See, e.g.*, Damario, *supra* note 65, at 791.

the eggs are removed either surgically, with some anesthesia, or transvaginally.[89] Despite the frequency of egg donations, retrieval procedures are still regarded as onerous and even dangerous to donors.[90]

The eggs may then be transferred immediately from the donor to the recipient, in which case the recipient, too, has been preparing her body hormonally.[91] A recipient of "fresh" eggs will ordinarily have three or four inserted into her uterus, at which point the recipient may have sexual intercourse with her husband or another male partner, or receive sperm from a known or unknown male via artificial insemination.[92] The eggs may also be transferred to a petri dish for ex-utero fertilization using one of the means discussed below in Part I.E. In recent years, women also have the option to freeze their eggs for later use. Like sperm donors, egg donors will sign an agreement waiving all parental rights and responsibilities with respect to any child conceived from their eggs. ASRM Guidelines specifically advise: "Donors and recipients and their partners should execute documents that define or limit their rights and duties with regard to any offspring."[93]

2. Donor Selection by Intending Parent(s)

Even the more ordinary cases of egg donation require an intending parent to judge the desirability of numerous characteristics of the potential donor. The Internet has become a common place to look for donor profiles. A sample donor profile available to potential donors at the Web site of Eggdonation.com shows a stunning young blond woman named "Angel," posed as a model, along with a claim that the donors are "extraordinarily bright and attractive as well as kind-hearted."[94] Pictures of donors are regularly included alongside the information provided in donors' applications.[95] Interestingly, one does not see fee schedules explicitly pricing eggs according to the educational accomplishments of their donors, although this could be changing.[96]

Reports vary concerning the ways that intending parents subjectively assess donor profiles, with some evidence that parents are influenced

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[89] *See id.*

[90] *See* Ethics Comm. of the Am. Soc'y for Reprod. Med., *Financial Incentives in the Recruitment of Oocyte Donors*, 74 FERTILITY & STERILITY 216, 217 (2000) (discussing "mortality risks," risks of impaired fertility, and psychological consequences).

[91] *See id.*

[92] *See id.*

[93] Am. Soc'y for Reprod. Med., *Guidelines for Oocyte Donation*, 77 FERTILITY & STERILITY S6, S8 (Supp. V 2002).

[94] *See* Egg Donor Prog. & Surrogacy Prog., *supra* note 78.

[95] *See id.*

[96] "Conceptual Options in San Diego breaks its list into two groups, 'donors' and higher priced 'extraordinary donors.' One of those on the extraordinary list is Valerie a stunning brunet (sic), a third-year medical student, 5 feet 8, a . . . professional ballerina, competitive equestrian and award-winning athlete." Weiss, *supra* note 68, at A1.

considerably by external appearance and other evidence that parents minimize the importance of aesthetic beauty. The standard information sheet for the Center for Reproductive Health states that

> Physical characteristics of the . . . donor such as skin color, eye color, hair color and body build are matched as closely as possible to the characteristics of the intended recipient couple . . . . Many ethnic groups will desire donors with a specific belief. The clinic does its best to meet the patient's wishes. However, this requires a large and constant supply of donors. Although the Center for Reproductive Health has a very large source of donor oocytes [eggs], the probability of meeting every recipient's wishes cannot be guaranteed.[97]

One reporter looking at four hundred donor profiles concluded that most of the women were "ordinary looking."[98] On the other hand, medical personnel involved in donor selection regularly report that prospective parents are strongly influenced by the appearance as well as the accomplishments of donors: "agencies report a steady stream of would-be parents smitten by the human tendency to want to improve on nature. For recipient couples, beauty often plays as large a role as any other characteristic."[99] According to the director of a very large egg donation program in California, he

> can show pictures of a number of donors to a couple, and the husband in particular, will always choose the prettiest, even if she looks nothing like his wife . . . . [O]thers want children who might grow up to be ballet dancers or geniuses. They might quiz the donor about her tennis game or measure her shoulders![100]

Fertility centers further report that parents increasingly are going well beyond health inquiries in the search for other intangible desired qualities.[101]

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[97] Ctr. for Egg Donation, *Matching Donors and Recipients*, *at* http://www.eggdonation.net/english.html (last visited Nov. 14, 2002).

[98] Daum, *supra* note 74, at 227.

[99] Weiss, *supra* note 68, at A1.

[100] Krum, *supra* note 53, at 1.

[101] *See ABC World News Saturday: Future Shock*, *supra* note 72.

3. Newer Developments in Donor Eggs

a. Cryopreservation

The CDC's 1999 ART Report found that the American embryology labs began performing "oocyte cryopreservation" in 1994, the same year the first frozen egg birth occurred in the United States.[102] Successfully freezing eggs, however, remains more difficult than successfully freezing sperm.[103]

b. Young Eggs and Beyond

Doctors regularly use the eggs of younger women with their older recipient patients.[104] According to the CDC's 1999 ART Report, egg donors are typically in their twenties or early thirties, and egg recipients are typically over thirty-six, with the most likely recipient over forty years of age.[105] The use of eggs from young donors was extended to its logical extreme in 1994 with the suggestion that women use the eggs of aborted female fetuses; at twenty-two weeks gestation, females have the maximum number of eggs they will ever have in their lifetimes, untouched by environmental and other hazards. This possibility created a furor when it was publicized, and it lacks ASRM approval; presently, it is not offered in the United States.[106]

D. Embryo Donation

It was first proposed that an embryo could be donated by flushing it out from one uterus and implanting it in another, but this technique has not been pursued.[107] Instead, because other ARTs such as *in vitro* fertilization regularly involve the production of numerous and unused extra embryos, recipients have normally obtained donor embryos from this source.[108] Clinics ask potential donors to execute agreements regarding the disposition of any unused embryos, and include embryo donation as an explicit option.[109] These agreements further require donating parents

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[102] *See* 1999 ART REPORT, *supra* note 27, at 1.

[103] *See id.*

[104] ANDREWS, *supra* note 41, at 100.

[105] *See* 1999 ART REPORT, *supra* note 27, at 1.

[106] *See* ANDREWS, *supra* note 41, at 213–16; Am. Soc'y for Reprod. Med., *Use of Fetal Oocytes in Assisted Reproduction*, 67 FERTILITY & STERILITY S6, S6–S7 (Supp. I 1997).

[107] *See* ANDREWS, *supra* note 41, at 19.

[108] *See* N.Y. STATE TASK FORCE ON LIFE & THE LAW, *supra* note 12, at 240–41. At the Jones Institute of Eastern Virginia Medical School, seventeen percent of 1800 clients donated embryos over ten years. *See* Liz Szabo, *The Price of Becoming Pregnant When Fertility Treatments Succeed, Some Parents Face a Dilemma: What to do with Extra Embryos?*, VIR. PILOT & LEDGER-STAR, Apr. 23, 2001, at A1.

[109] Once embryos are created with IVF and not implanted in the womb of the woman

to waive all rights to any children born as a result of their embryo donations. The ASRM guidelines instead suggest that the recipient, and not the donor, "must take full responsibility for the embryos and any child or children that may result from the transfer."[110]

Fifty-one percent of all fertility clinics offered embryo donation in 1999.[111] The CDC does not collect statistics on, and it is difficult to find, the total number of ART cycles involving the use of donor embryos. It is worth noting, however, that since the development of embryo cryopreservation, it is estimated that 100,000 to 200,000 embryos are in frozen storage in the United States today,[112] although no source claims to have precise figures.

There are also clinics that offer human embryos, not as a byproduct of IVF, but through the deliberate merging of particular eggs with particular sperm in order to "make a variety of embryos with different pedigrees."[113] The egg and sperm donors involved in any embryo donation are usually anonymous to the intending parents, though, of course, extensive personal and medical histories of the donors are available to the recipients for selection of desirable traits.[114] According to the fertility programs involved, the process of embryo donation is no more complicated than that of any other ART involving only one donor.[115]

The widespread appeal of embryo donation is due, in part, to its cost; it is less expensive than creating one's own embryo from scratch. In Virginia, a state with numerous prominent fertility clinics, it costs $2,600 for a donor embryo as compared to the $9,400 to $11,600 necessary to complete an IVF cycle involving a donor gamete or gametes.[116]

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for whom they were initially created, there are a variety of ways clinics may handle them. According to the CDC, 49.6% of labs discard some excess embryos immediately with patient consent and 6.5% do the same without patient consent. *See* CTRS. FOR DISEASE CONTROL & PREVENTION, FINAL REPORT, *supra* note 35, at 66. Forty-six percent culture the embryos until they die naturally, with patients' consent, and another twelve percent do the same without patient consent. *See id.* Eighteen percent donate some embryos to another couple with the patient's consent; none do this without the patient's consent. *See id.* Twenty-two percent donate some embryos for IVF or related training with patient consent, but 3.9% donate embryos for the same purpose without patient consent. *See id.* Twenty-three percent donate embryos for research with patient consent and none do so without consent. *See id.*

[110] Am. Soc'y for Reprod. Med., *Guidelines for Oocyte Donation*, *supra* note 93, at S10.

[111] *See* 1999 ART REPORT, *supra* note 27, at 57.

[112] *See* Jackie Jadrnak, *Legal Chill Surrounds Frozen Embryos,* ALBUQUERQUE J., Apr. 1, 2001, at A1; Snowflakes Embryo Adoption, *Message for Adoptive Parents* (estimating 100,000 embryos in storage), *at* http://www.snowflakes.org/Adoptive.htm (last visited Nov. 14, 2002).

[113] Gina Kolata, *Clinics Selling Embryos Made for 'Adoption,'* N.Y. TIMES, Nov. 23, 1997, at A1.

[114] *See* Jadrnak, *supra* note 112, at A1.

[115] *See* Szabo, *supra* note 108, at A1.

[116] *See* Jadrnak, *supra* note 112, at A1.

Unique to the United States in embryo donation is embryo "adoption." This process differs from embryo donation not mechanically but primarily because traditional adoption procedures may be brought to bear on the embryo transfer.[117] Agencies offering this adoption service have sprung up recently, with perhaps the best-known being the Snowflakes Embryo Adoption Agency, a Christian organization.[118] The agency advertises its service on the Internet where adoptions are "open, with couples exchanging letters, biographies, and photos. Donor and recipient parents detail what they are looking for in each other, then choose and meet the family that appeals to them."[119] One couple required, for example, that the couple adopting their embryo be Christian, college graduated, and married for at least seven years.[120] The cost of the adoption process is approximately $7,000.[121] As with adoptions of born children, the agency requires home studies and investigations of any past child-abuse convictions.[122] Lawyers may draft "embryo adoption" contracts.[123] Snowflakes reports that to date, there are approximately 1050 embryos who have been adopted.[124]

E. Fertilization and Implantation

There are different ways in which sperm and eggs are brought together for fertilization using ARTs, regardless of whether one is using a couple's own gametes, donor sperm alone, a donor egg alone, or both donor sperm and donor egg. Fertilization is the penetration of the female egg by the male sperm, causing the fusion of nuclei to create an embryo with a new genetic blueprint.[125] Some methods for bringing about fertilization with donor gametes take place within the intending mother's body, "in utero"; others occur "ex utero," in the laboratory.[126] Each will be described briefly in this Part.

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[117] *See* Snowflakes Embryo Adoption, *at* http://www.snowflakes.org (last visited Nov. 14, 2002).

[118] *Id.*

[119] Sheryl Gay Stolberg, *Adoption of Leftover Embryos Emerging as an Option for Some Couples*, MILWAUKEE J. SENTINEL, Mar. 19, 2001, at 1G. *See also* Snowflakes Embryo Adoption, *supra* note 117.

[120] *See* Stolberg, *supra* note 119, at 1G.

[121] *See id.*; Jadrnak, *supra* note 112, at A1.

[122] *See* Snowflakes Embryo Adoption, *supra* note 117.

[123] *See* Stolberg, *supra* note 119, at 1G.

[124] Snowflakes Embryo Adoption, *supra* note 117.

[125] OFF. OF TECH. ASSESSMENT, U.S. CONG., INFERTILITY: MEDICAL AND SOCIAL CHOICES, OTA-BA-358, at 41 (1988).

[126] *Id.*

1. Artificial Insemination by Donor

Artificial Insemination by Donor ("AID") is the insertion of an instrument containing male semen into a woman's uterus (known as intrauterine insemination or "IUI") or near her cervix.[127] AID may be done by a woman at home or by a doctor. At home, a woman may use a device as simple as a plastic kitchen implement used to baste meat to inject semen into her uterus while she lies on her back.[128] In fact, some fertility Web sites publish explicit directions for at-home insemination.[129] Alternatively, a woman may go to a doctor for this procedure.

2. In Vitro Fertilization

In vitro fertilization ("IVF"), once the talk of the scientific community and the public, has become the daily bread and butter of the ART industry. With IVF, the embryo is created literally "in glass," *in vitro*. After eggs and sperm are obtained by any of the methods described above, IVF involves the placement of semen and eggs into a petri dish containing a specialized medium where they will form the embryo.[130] After two or three days, the embryos are evaluated and then implanted in a woman, or frozen for later use.[131] The first child born of this process was Louise Brown in England in 1978; in the United States the first IVF child was born in 1981. By 1999, it is estimated that 300,000 IVF children were created in the United States.[132]

While it is ordinarily the case that the federal government's National Institutes of Health ("NIH") investigates new technologies of this significance, the NIH did not fund any initial studies of IVF.[133] Still, clinics in the United States opened at a rapid pace, immediately competing commercially for patients. According to Lori B. Andrews, "*in vitro* was done on women in 1978, but not on baboons until 1979 and chimps until 1983. This led embryologist Don Wolf to quip that perhaps women were serving as the model for nonhuman primates."[134]

Doctors regularly create more embryos than are used in an individual ART cycle, generating commentary from both the scientific and ethi-

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[127] *See id.*

[128] *See, e.g.*, FertilityPlus, *At-Home Insemination Instructions*, *at* http://www.fertilityplus.org/faq/homeinsem.html#syringe (last visited Nov. 14, 2002).

[129] *See id.*

[130] *See* Neri Laufer et al., *In Vitro Fertilization*, *in* INFERTILITY: A COMPREHENSIVE TEXT 703, 721 (2d ed. 1997).

[131] *See id.* at 720.

[132] *See* ANDREWS, *supra* note 41, at 209.

[133] *See id.* at 32–33; Lori B. Andrews & Nanette Elster, *Regulating Reproductive Technologies*, 21 J. LEG. MED. 35, 38 (2000).

[134] *See* ANDREWS, *supra* note 41, at 33.

cal communities.[135] Excess embryos are created for a number of reasons, particularly to increase the probability of success and maintain the high "take home baby rate" of IVF clinics.[136] According to the president of the ASRM, fertility "specialists today can't reliably predict how many embryos it will take to conceive a baby."[137] Therefore, in order to ensure the highest possible take home baby rates—required to be accurately published[138]—doctors implant as many as ten embryos[139] in the hopes that at least one of the embryos will successfully implant in a woman's uterus. As a result, one in three IVF births produces multiples, for example twins or triplets,[140] a fact that has caused a flurry of criticism from the medical community for both health and ethical reasons.[141] Multiples are at a greater risk for obstetrical and neonatal complications.[142] The ASRM recommends that doctors implant only two to five embryos in a woman, depending upon the patient's age and probability for a successful pregnancy,[143] but no law requires observation of this recommended limit.[144]

3. Intracytoplasmic Sperm Injection

A variation on IVF known as Intracytoplasmic Sperm Injection ("ICSI") consists of a woman's eggs being harvested from her ovaries and then injected directly with sperm without the need for IVF's petri dish or other growth medium.[145] It was successful for the first time in 1992.[146] While ICSI was initially considered merely a response to a male's low sperm count or decreased sperm motility, today, it is used where neither of these conditions exists.[147] By 1997, more than one-third

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[135] Am. Soc'y for Reprod. Med., *Guidelines for Cryopreserved Embryo Donation*, 77 FERTILITY & STERILITY S9, S10 (June 2002). The concerns have become prevalent among the general public through the embryonic stem cell debate. *See id.*

[136] ANDREWS, *supra* note 41, at 52.

[137] Szabo, *supra* note 108, at A2.

[138] *See* Fertility Clinic Success Rate and Certification Act, 42 U.S.C. § 1263a-1 (2000). *See also infra* Part II.B.3.

[139] *See* Andrews, *supra* note 41, at 48.

[140] *See* 1999 ART REPORT, *supra* note 27, at 20.

[141] Am. Soc'y for Reprod. Med., *Guidelines on Number of Embryos Transferred, in* PRACTICE COMMITTEE REPORT 1, 1 (NOV. 1999), *available at* http://www.asrm.org/media/practice/practice.html; Ctrs. for Disease Control & Prevention, *Use of Assisted Reproductive Technology—United States, 1996 and 1998*, 51 MORBIDITY & MORTALITY WKLY. REP. 97, 101 (Feb. 8, 2002) ("Multiple births disproportionately contribute to infant and maternal morbidity and mortality rates. Data in this report indicate a need to reduce multiple births associated with ART."), *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5105a2.htm.

[142] *See* Laufer, *supra* note 130, at 724.

[143] *See* Am. Soc'y for Reprod. Med., *Guidelines on Number of Embryos Transferred*, *supra* note 141, at 1.

[144] *See infra* Part II.B.6.

[145] *See* Andre Van Steirteghem et al., *Assisted Fertilization Techniques, in* INFERTILITY: A COMPREHENSIVE TEXT 752, 754–55 (2d ed. 1997).

[146] *See id.*

[147] *See id.*

of all IVF treatments used ICSI methods.[148] Of all embryo laboratories responding to a CDC survey, ninety-four percent offered ICSI.[149]

The statistics are alarming as research indicates the possibility of defects in children conceived by ICSI.[150] In 1999, reports of the "novelty and the many unknown aspects of ICSI" suggested a "slightly increased risk of sex-chromosomal anomalies among children conceived after ICSI."[151] Those findings, however, are dismissed as inconclusive by some proponents of ICSI,[152] even as the ASRM states that ICSI "may be associated with a higher incidence of congenital defects."[153] The precise source of such defects is not certain. In a recent report, the National Institute of Child Health and Human Development has suggested that the defects might arise because of abnormal sperm processing during the course of their injection in the female egg.[154]

4. Zygote or Gamete Intrafallopian Transfer

Two additional variations on IVF are utilized in response to varying infertility problems. In the case of male infertility, zygote intrafallopian transfer ("ZIFT") may be employed. With ZIFT, a woman's egg is retrieved in the same way as with standard IVF, but after fertilization with sperm in a petri dish, the embryo is transferred directly into the woman's fallopian tube, rather than the uterus.[155] Another variation on IVF is known as gamete intrafallopian transfer ("GIFT"). In GIFT, the retrieved eggs and sperm are placed into the fallopian tube so that fertilization may take place in the mother's body.[156]

F. Post-Fertilization Tests

Once an individual or couple is willing to allow a human embryo to be created outside of a mother's uterus, a host of additional technological interventions on the embryo become possible.

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[148] *See id.* at 756.

[149] *See* 1999 ART REPORT, *supra* note 27, at 2; ANDREWS, *supra* note 41, at 210.

[150] *See* Jennifer J. Kurinczuk, *Birth Defects in Infants Conceived by Intracytoplasmic Sperm Injection: An Alternative Interpretation*, 315 BRIT. MED. J. 1260, 1260 (1997).

[151] Van Steirteghem et al., *supra* note 145, at 756.

[152] *Id.*

[153] Am. Soc'y for Reprod. Med., *Does Intracytoplasmic Sperm Injection (ICSI) Carry Inherent Genetic Risks?*, PRACTICE COMMITTEE REPORT 1 (Nov. 2000), *available at* http://www.asrm.org/Media/Practice/icsi.pdf (characterizing ICSI "no longer . . . as an experimental procedure").

[154] *See* REPROD. SCI. BRANCH, NAT'L INST. OF CHILD HEALTH & HUMAN DEV., REPORT TO THE NACCHD COUNCIL 30 (Sept. 2002) (testing ICSI procedures with animals), *available at* http://www.nichd.nih.gov/publications/pubs/counrs/index.htm.

[155] *See* Advanced Fertility Center for Chicago, *at* http://www.advancedfertility.com/gift.htm (last visited Nov. 14, 2002); OFF. OF TECH. ASSESSMENT, *supra* note 125, at 255.

[156] *See id.*

1. Pre-implantation Genetic Testing

After embryos are formed, but before they are placed in a woman's uterus, a patient may seek—or a doctor may recommend—pre-implantation genetic testing. The doctor will make such a recommendation if a genetically determined disorder is prevalent in either of the parents or their families.

Pre-implantation genetic testing is not yet widespread, and the number of disorders tested for is relatively few. Where available, doctors can test embryos for cystic fibrosis, sickle cell anemia, and Alzheimer's,[157] among other disorders. Despite the currently limited use and application of genetic research, it is proceeding rapidly and with enthusiasm. Consequently, the number of genetic tests possible for an embryo is quite likely to increase as patients and doctors increasingly seek more control over the qualities of offspring.[158] These tests are accomplished by removing one cell of an approximately eight-celled embryo, and testing it for the presence or absence of a certain gene or genes. After the results are disclosed, the parents may decide to implant, destroy, or save the embryos.[159] It is also possible to screen embryos for sex-linked genetic disorders.[160] One report puts the cost of such diagnostic tests at $12,000,[161] another at $3,000.[162]

2. Sex Selection

Sex selection is another pre-implantation technique available to prospective parents.[163] This method involves processing male sperm in order to select those with X or Y chromosomes, thereby selecting the sex of the offspring.[164] One company charges $375 for such a test and claims to have a three-to-one success rate screening for girls and a four-to-one rate for boys.[165] While initially touted as a method to avoid passing on a sex-specific disease, sex-selection now has clearly passed into the realm of

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[157] *See* Denise Grady, *Baby Spared Mother's Fate by Genetic Tests as Embryo*, N.Y. TIMES, Feb. 27, 2002, at A16.

[158] *See* Julian Savulescu, *Deaf Lesbians, "Designer Disability," and the Future of Medicine*, 325 BRIT. MED. J. 771, 774 (Oct. 5, 2002); Lindsey Tanner, *Disputed Genetic Testing Hits Market*, AP ONLINE (Sept. 30, 2002), *available at* 2002 WL 101072007.

[159] Lori B. Andrews, *Regulation of Experimentation on the Unborn*, 14 J. LEG. MED. 25, 40 (1993).

[160] *See infra* Part I.F.2.

[161] *See* Grady, *supra* note 157, at A16.

[162] *See* Tanner, *supra* note 158, at 2.

[163] *See* Lisa Belkin, *Getting the Girl*, N.Y. TIMES, July 25, 1999, at A26.

[164] Northwest Andrology & Cryobank, *Sex* Selection, at http://www.nwcryobank.com/sex_selection.asp (last visited Nov. 14, 2002).

[165] *See id.*

the commonplace as evidenced on the Web site of a large fertility center that advertises "gender-selected frozen semen" to any buyer for $410.[166]

3. Selective Reduction

One final technique that has developed alongside the new reproductive technologies is selective reduction. This is not a method of fertilization, nor is it related to determining the traits of the intended child. Called a "staple of infertility therapy,"[167] selective reduction requires the termination of one or more otherwise healthy fetuses growing in a mother's womb to avoid a multiple or very high-order multiple pregnancy.[168] Selective reduction can be employed in either a natural pregnancy or one initiated with technological assistance.[169] The procedure has gained greater notoriety due to the frequency of multiple pregnancies arising from ARTs.

Fertility clients report pressure from doctors to reduce their multiple pregnancies in order to increase the chance for successful delivery of a healthy child.[170] The process of selective reduction is similar to abortion techniques, except that a doctor performing selective reduction intends to leave one or more fetuses alive at the end of the procedure.[171] A doctor injects potassium chloride into the heart of one or more of the fetuses.[172] Usually, the other fetuses survive, but there always exists the chance that all of the fetuses will be lost. In 1999, between seven and thirteen percent of selective reduction procedures resulted in the loss of all fetuses.[173] Among the women who have undergone a selective reduction procedure, there is an extremely high rate of depression.[174] As one patient wrote, it is "one of life's tragic ironies. You've unsuccessfully tried for years to have a baby . . . . Finally it happens . . . . But there's a hitch."[175] The psychological and physical effects of selective reduction procedures cannot lightly be dismissed.

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[166] Fertility Options, *Fee Schedules*, *at* http://www.infertility.to/sperm.html (last visited Nov. 14, 2002).

[167] Mark I. Evans, *Selective Reduction for Multifetal Pregnancy: Early Options Revisited*, 42 J. REPROD. MED. 771, 771 (Dec. 1997).

[168] *See id.* at 773.

[169] *See id.* at 771.

[170] *See* Meredith O'Brien, *Selective Reduction: A Painful Choice*, BABY ZONE 1, *at* http://www.babyzone.com/pregnancy/selective_reduction.asp (last visited Nov. 14, 2002).

[171] *See* Evans, *supra* note 167, at 771.

[172] *See id.*

[173] *See* ANDREWS, *supra* note 41, at 58.

[174] *See id.*

[175] O'Brien, *supra* note 170, at 1.

II. EXISTING REGULATION AND THE LOOMING CONSTITUTIONAL QUESTION

A. The Dearth of Regulation

Part I presents a picture of a multi-billion-dollar industry in an environment of high emotion and deep desires—desires that are as "primary as the need to eat or sleep."[176] The industry is in the business of selling superior genetic inheritances for high fees. Even individuals who approach collaborative reproduction with a "simple" desire for a child will soon find themselves tempted to buy the makings of the best possible child.[177] Sperm donors may be exposed to pornography weekly for months or years; egg donors will undergo often painful procedures to "superovulate"; embryos will be screened, tested, and frozen; and some women who started the process for the love of children will find themselves terminating fetal lives by selective reduction. When the processes of collaborative reproduction are "done," there may remain eggs, sperm, and embryos to be frozen, destroyed, or donated to a stranger; high order multiple births with complications; and possibly post-selective-reduction depression. All of the children created will be estranged from one or both of their biological parents. Many will be raised in single-parent homes. These are the results if everything goes mostly as planned.

Despite these consequences, the regulatory approach to ARTs in the United States might be described as laissez-faire. Lori Andrews has gone so far as to describe our "dominant social value" in this area as "show me the money."[178] Many articles have addressed the relative dearth of regulation;[179] it is not the aim of this Part to review every federal and state regulation in this area. Rather, this Part will offer a characterization of the kinds of concerns that have risen to the level of regulatory interests and those that have not. An examination of possible reasons for the scarcity of regulations will follow—particularly the claim that regulations would run afoul of constitutional proscriptions.

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[176] ANDREWS, *supra* note 41, at 25.

[177] *See generally* LEE M. SILVER, REMAKING EDEN: CLONING AND BEYOND IN A BRAVE NEW WORLD (1997) (discussing dangers of cloning and reproductive technologies generally).

[178] Andrews & Elster, *supra* note 133, at 45.

[179] *See id.*; Daar, *supra* note 13, at 609; Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parenting*, 113 HARV. L. REV. 835 (2000); Weldon E. Havins & James J. Dalessio, *Ever-Widening Gap Between the Science of Artificial Reproductive Technology and the Laws Which Govern that Technology*, 48 DEPAUL L. REV. 825 (1999); Hecht, *supra* note 13.

B. Acknowledged Regulatory Interests

The patchwork of federal and state laws concerning ARTs may be characterized broadly as attempts to facilitate transactions in gametes and embryos by allowing the reassignment of parental rights from biological donors to intending parent(s); to prevent the transmission of some diseases; to prevent fraud on customers and promote truth in advertising; and to provide some protection for human embryos. First, the laws concerning assignment of parental rights share some features across state lines but leave substantial gaps as some fail to address the unmarried parent or the use of donor eggs or embryos. The second interest, disease prevention, is also widespread, although the precise levels of protection for recipients of gametes varies with individual state laws. The third interest, consumer protection, has been pursued most aggressively through federal law, although some states have used false advertising and consumer fraud laws against fertility clinics.[180] The fourth interest in protecting human embryos has recently gained some momentum, but is also unevenly expressed across state laws. Taken together, this patchwork of laws expresses a rough national consensus to allow private intent and invention to govern, with an injection of minimal safeguards concerning commercial fraud, health, nascent human life, and parental assignment. Virtually no regulatory attention is devoted to the effects of collaborative reproduction—both its processes and its results—on children or on family relations and structures. Some guidelines have been suggested by professional societies such as the ASRM, but these are voluntary rather than compulsory.[181]

1. Legal Parentage of Children Conceived

Parental assignment laws for children conceived with donor gametes or embryos do not reflect direct regulation of collaborative reproduction. Instead, they are an indispensable condition of most donors' and recipients' willingness to participate in collaborative reproduction. In fact, the subject matter most often treated in legislation at the state level concerning collaborative reproduction is the legal parentage of children conceived with the use of AID.[182] By the year 2000, at least thirty-five states had statutes providing that the consenting husband of a married recipient would be the legal father of any child conceived through IVF.[183] Such laws reveal a preference for the traditionally defined, two-parent family

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[180] *See* N.Y. STATE TASK FORCE ON LIFE & THE LAW, *supra* note 12, at 422.

[181] *See* Am. Soc'y for Reprod. Med., *Psychological Assessment of Gamete Donors and Recipients and Psychological Guidelines for Embryo Donation*, 77 FERTILITY & STERILITY S5, S5 (Supp. I 1997).

[182] *See infra* notes 184–216 and accompanying text.

[183] *See* Andrews & Elster, *supra* note 133, at 36 n.2.

rather than a family structure consisting of three parents, one-parent, or two parents including the sperm donor. Some other states simply cut off any parental rights of a sperm donor, without reference to the marital status of recipients.[184] Altogether, these laws may be characterized as facilitating the use of AID by allowing the intentions of donors and recipients to be effected.

Interestingly, while legislation assigning parental status after AID is prevalent, analogous legislation concerning egg donation is conspicuously absent. In fact, only five states have enacted specific legislation on this topic.[185] In general, these statutes provide that a married recipient and her husband are the parents of a child from an egg donation. The legal parentage of children conceived by single woman using egg donation is not addressed, leaving such determinations to be made contractually between the parties, or by a court in the event of a dispute.

Similarly, only a few states have legislation assigning parental status in the event of embryo donation. Louisiana treats such donations like adoption and makes them available only to married couples.[186] Texas and Florida provide simply that donors are not the parents of a child conceived using artificial reproduction, without affirmatively assigning parentage.[187]

2. *Screening Donors*

Several surveys have found considerable inadequacies and inconsistencies in fertility clinics' screening of donor materials.[188] State laws, where they exist, may require a variety of limited tests on proposed sperm donations. Some laws require only HIV testing,[189] while others require syphilis and hepatitis testing as well.[190] Screening of both egg and

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[184] *See, e.g.*, CAL. FAM. CODE § 7005(b) (West 1994) (conditioning parental assignment on the participation of a licensed physician); COLO. REV. STAT. § 19-4-106-2 (2000); WYO. STAT. ANN. § 14-2-103 (Michie 2001).

[185] *See* FLA. STAT. ANN. § 742.14 (West 1997) (stating that donors relinquish all rights and obligations with respect to resulting children); N.D. CENT. CODE §§ 14-18-01 to -07 (1997); OKLA. STAT. ANN. tit. 10, § 555 (West 1998); TEX. FAM. CODE ANN. § 160.702 (Vernon 2002); VA. CODE ANN. § 20-158 (Michie 2000) (making intended mother the legal mother and relieving egg donor of all rights and obligations).

[186] LA. REV. STAT. ANN. § 9:130 (West 2000).

[187] FLA. STAT. ch. 742.14 (1997); TEX. FAM. CODE ANN. § 160.702 (Vernon 2002).

[188] *See, e.g.*, Elizabeth A. Conrad et al., *Current Practices of Commercial Cryobanks in Screening Prospective Donors for Genetic Disease and Reproductive Risk*, 41 INT'L J. FERTILITY & MENOPAUSAL STUD. 298, 303 (1996); Note, *FDA Approved?: A Critique of the Artificial Insemination Industry in the United States*, 30 U. MICH. J.L. REFORM. 823, 836–37 (1997) [hereinafter *FDA Approved?*].

[189] *See, e.g.*, DEL. CODE ANN. tit. 16, § 2801 (1995); GA. CODE ANN. § 44-5-151 (2002); 20 ILL. COMP. STAT. ANN. 2310/2310-330 (2001), MD. CODE ANN., HEALTH-GEN. I § 18-334 (2000); OKLA. STAT. tit. 63, § 2151.1 (1997).

[190] *See, e.g.*, CAL. HEALTH & SAFETY CODE § 1644.5 (West 2002); IND. CODE ANN. § 16-41-14-5 (West 1998).

sperm donations is necessary to comply with the law of a few states.[191] In the absence of laws specifically applicable to gamete donors, fertility clinics may be subject to existing state laws covering other donations—namely, tissue and bodily fluid donations.[192] There are no federal laws requiring screening, although the Food and Drug Administration has proposed an oversight system for the collection, processing, screening, and distribution of sperm.[193] Federal law does, however, penalize HIV positive persons who knowingly donate or sell semen, among other bodily fluids.[194]

3. Clinic Oversight

The most prevalent federal regulation affecting collaborative reproduction requires fair advertising of clinic success rates. After the ART explosion in the mid-1980s, the United States Office of Technology Assessment published its 1987 survey of business practices in the fertility industry.[195] Following a series of hearings, Congress passed the Fertility Clinic Success Rate and Certification Act ("FCSRCA"), requiring fertility clinics to provide pregnancy success statistics to the CDC in a standardized form.[196] The CDC has published these figures annually since 1996. The FCSRCA also promised that a model program would be developed for the inspection and certification of laboratories that handle embryos and for reporting procedures to the Department of Health and Human Services.[197] According to the *Encyclopedia of Reproductive Technology*, however,

> the American Society for Reproductive Medicine . . . effectively exercised its influence by shaping the legislation in order to ensure that laboratory inspectors had no authority over the clinical practices of physicians. The selection, screening and matching of ova donors and recipients were categorized as "medical services" beyond the reach of systematic regulation.[198]

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[191] *See, e.g.*, VA. CODE ANN. §§ 32.1–45.3 (Michie 2001); N.H. REV. STAT. ANN. §§ 168-B:10, 168-B:14 (2001).

[192] *See* N.Y. STATE TASK FORCE ON LIFE & THE LAW, *supra* note 12, at 246.

[193] *See* Human Semen for Artificial Insemination, 21 C.F.R. §§ 1260, 1270 (1993). *See also FDA Approved?*, *supra* note 188, at 837–38.

[194] Protection Against the Human Immunodeficiency Virus, 18 U.S.C. § 1122(a) (2002).

[195] OFF. OF TECH. ASSESSMENT, *supra* note 125.

[196] Fertility Clinic Success and Certification Act, 42 U.S.C. § 263a-1 (2002).

[197] *Id.*

[198] ENCYCLOPEDIA OF REPRODUCTIVE TECHNOLOGIES 320–22 (Annette Burfoot ed., 1999).

Furthermore, as no funds were appropriated in a timely manner to implement the legislation, no model program has ever been proposed, leaving individuals and couples without any assurance that they will "receive only nonexperimental procedures, be provided with full information, or be offered counseling of any kind."[199]

According to a number of studies, the FCSRCA has hardly prevented clinics from operating unfairly with their patients.[200] Furthermore, according to one respected report, "the only local authority monitoring the development and use of new reproductive techniques is likely to be the local hospital institutional review committee, which often includes in its membership colleagues of the researcher who is requesting project approval."[201] Thus, the federal foray into regulation has left the clinics largely unfettered, with the exception of a requirement to report accurate success rates.

A handful of states have enacted their own reporting laws,[202] but these tend to require reporting information only about limited types of procedures—for example AID or IVF, but not both—making it difficult for the public to assess clinics' overall success rates. Only a few states have enacted laws requiring clinic certification.[203] More common is self-regulation for members of professional societies such as the Society for Assisted Reproductive Technologies ("SART")[204] or the ASRM.[205] Such societies issue reports and guidelines, and compliance is made a condition of continuing membership.

4. Embryo Manipulation

State legislation concerning the handling of embryos and fetuses created by ARTs is often confusing or vague. The statutes tend to use different terminology and inconsistently define words like "therapeutic," "embryo," and "fetus." It is therefore difficult to determine with certainty which stages of unborn life are protected and which aspects of collaborative reproduction might be affected. Candidates for procedures in

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[199] *Id.* at 322.

[200] *See, e.g.*, Meena Lal, Comment, *Role of the Federal Government in Assisted Reproductive Technologies*, 13 SANTA CLARA COMPUTER & HIGH TECH. L.J. 517, 533 (1997) (claiming fraud remains commonplace).

[201] ENCYCLOPEDIA OF REPRODUCTIVE TECHNOLOGIES 321–22 (Annette Burfoot ed., 1999).

[202] *See, e.g.*, IDAHO CODE § 39-5403 (Michie 2002); OR. REV. STAT. § 677.365 (2001) (requiring doctors to report all children born as a result of AI, but not IVF, to state vital statistics office); PA. CONS. STAT. ANN. § 3213(e) (West 2000) (requiring the production of quarterly reports similar to those required by the federal government); VA. CODE ANN. § 54.1-2971.1 (Michie 2001) (requiring clinics to disclose success rates to patients).

[203] *See, e.g.*, ARK. CODE ANN. § 23-85-137 (Michie 1999); LA. REV. STAT. ANN. § 9:128 (West 2000).

[204] Assisted Reproductive Technologies, *at* http://www.sart.org.

[205] Am. Soc'y for Reprod. Med., *at* http://www.asrm.org.

which the embryo could be harmed or even destroyed include: embryo donation, cryopreservation, fertilization, and pre-implantation testing.

State statutes also vary widely in terms of the level of protection they provide for human embryos. They may require that every embryo be implanted,[206] forbid nontherapeutic experimentation,[207] or even criminalize embryo experimentation.[208] Of twenty-four state laws restricting fetal research, three contain language construed to ban pre-implantation testing because it is not, by definition, therapeutic for the embryo and not always directed toward the transplantation.[209]

There is no federal law specifically banning research on human embryos, although federal funding for research in this area is quite limited.[210] No funding is available, for example, for experiments on embryos created specifically for research or for the direct destruction of embryos. Only limited funding is available for research on stem cells from embryos specifically destroyed to obtain such cells.[211] Thus, federal law, while it does not outright protect human embryos, expresses some respect through funding limits.[212]

5. Payment to Donors

While Louisiana and Florida forbid the exchange of money for gametes or embryos,[213] Virginia, home of several world-famous fertility clinics, explicitly allows their sale.[214] There is certainly the possibility that existing statutes concerning sale of body parts, fetuses, or fetal tissue might be interpreted to limit direct commercial trafficking in gametes and embryos. Even if this were done, clinics might respond only by taking greater care to associate their pricing for transfers of gametes and em-

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[206] *See, e.g.*, LA. REV. STAT. ANN. §§ 9:123, 9:129 (West 2000) (recognizing human embryo outside the womb as "juridical person" and forbidding manipulation save for purposes of the "complete development of human in utero implantation."); N.M. STAT. ANN. § 24-9A-1(D) (Michie 2002) (defining fetuses to include embryos requiring implantation in utero of each fertilized egg or embryo).

[207] *See, e.g.*, 18 PA. CONS. STAT. ANN. § 3216(a) (2000) (protecting an "unborn child" from fertilization onwards against any nontherapeutic medical procedure).

[208] *See, e.g.*, N.D. CENT. CODE § 14-02.2-01 (1997) (banning all research or experimentation on human fetuses, possibly including embryos); R.I. GEN. LAWS § 11-54-1 (2000) (banning research and experimentation, possibly from fertilization).

[209] *See* Andrews, *supra* note 159, at 40–41.

[210] *See* Consolidated Appropriations Act FY-2001, Pub. L. No. 106-554, § 510, 114 Stat. 2763 (2000) (prohibiting use of funds on research "in which a human embryo or embryos are destroyed, discarded, or knowingly subjected to risk of injury or death greater than that allowed for research on fetuses in utero" under the Public Health Act).

[211] *See id.*

[212] *See id.*

[213] FLA. STAT. ANN. § 873.05 (West 1994); LA. REV. STAT. ANN. §§ 9:122, 9:130 (West 2000).

[214] VA. CODE ANN. § 32.1-289.1 (Michie 2001) (exempting ova from general ban on sale of body parts).

bryos with the labor of donors and with laboratory procedures, thereby escaping commercial laws.[215]

B. What Is Left Unsaid

Reflecting on the sum of current regulations, what is not regulated is more remarkable than what is. Regarding gamete and embryo recipient qualifications, for example, only New Hampshire imposes age and health requirements.[216] No state or federal law distinguishes between participants who are married or unmarried, heterosexual or homosexual. It is left to individual clinics to decide whether the very young or the much older woman or man can become a recipient. No law presently limits the number of donations per donor, though some clinics limit these voluntarily.[217] No law limits the number of embryos that may be implanted simultaneously in a woman's uterus or the availability of selective reduction. No law regulates advertisements for and about donors, no law limits the price for "donations," and no law constrains the grounds on which intending parents might choose donors.

Finally, only fourteen states have laws concerning the preservation of records related to ARTs.[218] These laws do not always guarantee that the rearing parents, the donors, or the children will be able to identify important medical history or one another in the future.[219] For the most part such statutes only regulate record-keeping about husbands' consent to AID procedures, though a noticeable few do require retention of some donor information.[220]

C. Why Is the Sky the Limit?

1. Some Brief Considerations

Considering the picture of the industry drawn in Part I, and the picture of existing regulation drawn above in this Part, the obvious question emerges: why the dearth of regulation? One possible reason is economic: the reproductive technology industry is reported to take in $2 billion an-

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[215] *See* N.Y. STATE TASK FORCE ON LIFE & THE LAW, *supra* note 12, at 258–59.

[216] N.H. REV. STAT. ANN. § 168-B:13 (2001) (allowing IVF or pre-embryo transfers only for women twenty-one years of age or older).

[217] *See, e.g.*, N.Y. STATE TASK FORCE ON LIFE & THE LAW, *supra* note 12, at 272–73; Thomas Maier, *Daddies Unlimited: No Rules on How Many Babies Donors Can Father*, NEWSDAY, Apr. 29, 1997, at B29 (reporting that one individual semen donor was responsible for the conception of more than fifty children).

[218] *See* N.Y. STATE TASK FORCE ON LIFE & THE LAW, *supra* note 12, at 372–73.

[219] *See id.* at 374.

[220] *See, e.g.*, OHIO REV. CODE ANN. § 3111.36(A) (2000); N.Y. COMP. CODES R. & REGS. tit. 10, § 52-2.9(c) (2001).

nually.[221] In part because of looser rules than those of European countries, the United States attracts customers from around the world.[222] The industry is also associated with scientific discoveries that bring additional power and income to the domestic technology sector, including discoveries in stem cell research and genetics.

A second possible reason for the current state of regulation could be the inherent difficulty of making hard and fast rules suitable for a complex and constantly changing industry. In the last twenty years, artificial insemination has developed from a technique used primarily by married persons in the privacy of the doctor-patient relationship, to one used frequently by single persons at home with "mail order" semen. Genetic preselection of embryos has moved from a science fiction scenario to a *fait accompli*. The size and scope of the legislative project—even the definition of the individual and the social dilemmas to be approached—may appear too large and too rapidly changing a target for legislatures.

The fading of family law's traditional preferences concerning the family form is a third possible reason for the lack of regulation. Increasingly, nontraditional groupings of adults and children are seen to function as traditional families. Fewer legislatures and courts make strict delineations between the rights and obligations of persons who are partners or parents by the traditional means of marriage, adoption, or natural childbearing, and the rights and obligations of those who become partners or parents by other means.[223] For example, unmarried fathers, gay partners, or heterosexual cohabitants may now possess rights and obligations that were not previously acknowledged.[224] It is not difficult to understand how some observers have concluded that the creation of families by means of collaborative reproduction does not require special regulatory attention. A more complete consideration of this phenomenon as it applies to collaborative reproduction will be undertaken in Part II.C.2.

It is also possible that the nation's ongoing struggles with abortion have dampened legislators' will to regulate the new reproductive technologies.[225] Statutes expressing opinions about the status of embryos created in the course of collaborative reproduction, or the scope of various persons' interests in and rights respecting such embryos could be interpreted as commentary upon the existing state of the abortion right. Proposed statutes could end in stalemate after being endorsed and fought

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[221] *See* Andrews, *supra* note 159, at 48.

[222] *See* Weiss, *supra* note 68, at A1.

[223] *See generally* JANE CARBONE, FROM PARTNERS TO PARENTS (2000); Harry D. Krause & David D. Moya, *What Family for the 21st Century?*, 50 AM. J. COMP. L. 101 (2002).

[224] *See, e.g.*, Stanley v. Ill., 405 U.S. 645 (1972) (unwed father); Marvin v. Marvin, 557 P.2d 106 (Cal. 1976) (cohabitants); Braschi v. Stahl Assocs. Co., 543 N.E.2d 49 (N.Y. 1989) (gay partners).

[225] *See* Eggen, *supra* note 13, at 668.

over by groups on either side of the abortion debate, on statutory effects other than those intended by the drafters.

Another reason for the absence of regulation might be a reluctance to tread in an area filled with so much human longing for something as natural and beautiful as a baby. Public criticism of the practices of the ART industry can be interpreted by persons suffering infertility as a personal judgment. After writing an article about couples bidding for the eggs of beautiful, Ivy League coeds, one reporter received many letters from readers accusing her of heartlessness toward the infertile. Wrote one reader, "I sat at the dining table and cried . . . . How can I make you understand the level of grief that I feel."[226] Anyone who has ever testified before a legislature or watched a hearing touching personal, medical issues can attest to the pressures created by emotional testimony.

2. *Introduction to Constitutional Arguments About ARTs*

In addition to the possible practical and normative explanations for the dearth of regulation of collaborative reproduction, it is important to consider the constitutional elephant in the living room: the argument that collaborative reproduction might enjoy constitutional protection and that government involvement should therefore be minimal.[227] The constitutional arguments are extended from the body of Supreme Court cases concerning pregnancy, parenting, and the family rather than a definitive Supreme Court pronouncement. Combined with the belief that family relations created through collaborative reproduction are not wholly different from those created through natural conception,[228] the constitutional objection may act as a powerful impediment to regulation.

One constitutional position argues that the fundamental "right to make reproductive decisions includes the right of an infertile couple to utilize medically assisted reproduction, such as *in vitro* fertilization and donated embryos."[229] Other observers contend that the trajectory of all Supreme Court cases concerning procreation points toward a concomitant constitutional right to decide *how* to conceive children:[230]

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[226] Sandy Banks, *"Last" Chance for Couples Frustrated by Infertility*, L.A. TIMES, June 12, 2001, at E1.

[227] *See, e.g.*, Note, *Reproductive Technology and the Procreation Rights of the Unmarried*, 98 HARV. L. REV. 669, 685 (1985); Barbara Kritchevsky, *Unmarried Woman's Right to Artificial Insemination: A Call for an Expanded Definition of Family*, 4 HARV. WOMEN'S L.J. 1, 26–39 (1981).

[228] *See* John A. Robertson, *Procreative Liberty and the Control of Conception, Pregnancy and Childbirth*, 69 VA. L. REV. 405, 428 (1983) (explaining that ARTs involve the same interests and values as coital reproduction when used by married couples where one or both spouses are infertile); John Robertson, *Assisted Reproductive Technology and the Family*, 47 HASTINGS L.J. 911, 929 (1996) ("[T]he 'prevailing paradigm' of a couple raising offspring is preserved and the third party is absent").

[229] Andrews & Elster, *supra* note 133, at 45 (citations omitted).

[230] *See, e.g.*, Note, *Reproductive Technology and the Procreation Rights of the Unmar-*

> [t]hese cases, viewed as a coherent whole, reveal that the constitutional right protected by the Court thus far is not likely a narrow right to be free from forced sterilization, to obtain birth control, or to obtain an early term abortion. Rather, the right is one of procreational autonomy, the fundamental right to decide whether, when, and how to bear or beget a child.[231]

After briefly reviewing the constitutional arguments, this Article will show, however, that Supreme Court precedent could not be extended to shield collaborative reproduction from additional regulation. This is because the values concerning family and procreation that inhere in the steps of collaborative reproduction are not those values protected by the Supreme Court's cases involving more traditional means of reproduction. Rather, those decisions propose: considering parental rights as limited by responsibilities;[232] promoting the ideal that children should have substantial, long-term stability and security in their family relations with preferably two, married biological parents;[233] and protecting the notion that family life ought to preserve and promote American democracy and community.[234]

Collaborative reproduction, by design and practice, is procreation outside of marriage. The process may pose significant physical and emotional risks to the children created and to the people who create them, although these risks are not yet well-studied. Furthermore, and more fundamentally, collaborative reproduction has the potential to undermine an understanding of the family that Supreme Court decisions portray as important to both individuals and the nation: family as a "given" versus "chosen" community, in which legitimate freedoms correspond to mutual duties and duties to the wider society. For these discrete but also foundational reasons, it does not appear that constitutional protection would easily be extended to collaborative reproduction practices. The following will summarize the arguments in favor of constitutional protection for collaborative reproduction, suggest their shortcomings, and propose a reading of the relevant Supreme Court cases that would indicate that collaborative reproduction would not find a ready home in the panoply of Supreme Court decisions touching upon parenting, procreation, and the family. It will also point out that the values and interests expressed in

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ried, *supra* note 227, at 677.

[231] Elizabeth Price-Foley, *Constitutional Implications of Human Cloning*, 42 ARIZ. L. REV. 647, 695 (2000). *See also* Note, *Reproductive Technology and the Procreation Rights of the Unmarried*, *supra* note 227, at 675 (arguing that the existing cases represent "stages in the elaboration of a more general right that guarantees the individual a substantial measure of control over all aspects of procreation").

[232] *See infra* text accompanying notes 313–322.

[233] *See* Lehr v. Robertson, 463 U.S. 248, 256–57 (1983) (noting that "state laws almost universally express an appropriate preference for the formal family").

[234] *See* Murphy v. Ramsey, 114 U.S. 15, 45 (1885); *Lehr*, 463 U.S. at 257.

these cases provide guidance about what types of regulatory interests in collaborative reproduction might appropriately be asserted in the future. Thus, it will overcome the contention that there are constitutionally based impediments to regulation of collaborative reproduction and proposes, instead, constitutionally grounded family interests that could support regulation.

3. Constitutional Arguments

Arguments for the extension of constitutional protection to collaborative reproduction are generally of two types. The first posits that individuals have a substantive due process liberty interest in making decisions concerning family matters generally, including matters related to children.[235] These arguments rely on Supreme Court decisions recognizing parental rights to send children to nonpublic schools,[236] to obtain foreign language instruction for their children,[237] and to direct their children's education in the free exercise of their religion.[238] They also claim that the Constitution extends some protection to quasi-parent-child relationships—those not formed by the traditional ties of blood, marriage, or adoption—against "arbitrary governmental interference."[239] Finally, they sometimes claim that the state is not free to interfere with non-traditional familial living arrangements, relying particularly upon the Supreme Court's holding that a zoning ordinance may not forbid a grandmother from residing with her sons and grandsons.[240]

Other commentators argue that access to ARTs, including collaborative reproduction, is constitutionally protected by relying on cases that appear to grant a positive right to procreate.[241] In *Skinner v. Oklahoma*,[242] for example, the Supreme Court struck down, on Equal Protection grounds, a state statute requiring mandatory sterilization for criminals convicted of two felonies of moral turpitude. The Court stressed the importance of protecting the defendant's procreative capacity, saying: "We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the [human] race."[243] Similarly, in *Cleveland*

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[235] *See, e.g.*, Kritchevsky, *supra* note 227, at 4.

[236] Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925).

[237] Meyer v. Nebraska, 262 U.S. 390 (1923).

[238] Wisconsin v. Yoder, 406 U.S. 205 (1972).

[239] *See* Kritchevsky, *supra* note 227, at 38 (citing Smith v. Org. of Foster Families for Equality & Reform, 431 U.S. 816 (1977)).

[240] Moore v. City of East Cleveland, 431 U.S. 494 (1977).

[241] *See* Note, *Reproductive Technology and the Procreation Rights of the Unmarried*, *supra* note 227, at 674 (arguing that these cases likely would defeat states' attempts to justify restrictions on access to ARTs).

[242] 316 U.S. 535 (1942).

[243] *Id.* at 541.

Board of Education v. LaFleur, the Supreme Court upheld female teachers' right to bear children without being subject to a law imposing mandatory leave for pregnant women and new mothers.[244] The Court held that the Due Process Clause of the Fourteenth Amendment protected personal marriage and family choices.[245]

Finally, there are arguments based on Supreme Court cases that appear to offer constitutional protection to a realm of private decision-making on matters related to procreation. In contrast to the arguments above, these assert that access to ARTs would receive constitutional protection, not because they are "about family" or preserving the capacity to procreate as against state action, but simply because they are decisions about the very private subject of procreation itself.[246] These arguments rely on the Supreme Court's contraception and abortion "right of privacy" cases. These include *Griswold v. Connecticut*,[247] *Eisenstadt v. Baird*,[248] *Carey v. Population Services International*,[249] *Roe v. Wade*,[250] and *Planned Parenthood v. Casey*.[251]

In *Griswold*, the Court found that a penumbral right of privacy covered married persons' decisions to use contraceptives.[252] Justice Goldberg's concurrence went further, calling the traditional family a "relation as old and as fundamental as our entire civilization."[253] He also found it "difficult to imagine what is more private or more intimate than a husband and wife's marital relations."[254]

Yet as clearly as *Griswold v. Connecticut* located the right of privacy concerning contraception within marriage,[255] *Eisenstadt v. Baird* located it in the individual.[256] In so doing, the *Eisenstadt* Court used language that facially appeared to define a constitutionally protected zone of privacy around virtually all individual decisions regarding procreation: "If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[257] This expansive perspective on privacy might,

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[244] 414 U.S. 632 (1974).
[245] *See id.* at 639–40.
[246] *See, e.g.*, Eggen, *supra* note 13, at 644–48.
[247] 381 U.S. 479 (1965).
[248] 405 U.S. 438 (1972).
[249] 431 U.S. 678 (1977).
[250] 410 U.S. 113 (1973).
[251] 505 U.S. 833 (1992).
[252] *Griswold*, 381 U.S. at 485.
[253] *Id.* at 496.
[254] *Id.* at 495 (Goldberg, J., concurring) (quoting Poe v. Ullman, 367 U.S. 497, 552 (1961) (Harlan, J., dissenting)).
[255] *Id.* at 485–86 ("The very idea is repulsive to the notions of privacy surrounding the marriage relationship.").
[256] Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).
[257] *Id.*

argue the opponents of regulation, constitutionally protect access to ARTs as merely procreative decisions.

Carey v. Population Services International, in upholding the single minor's right of access to contraception, appeared to conflate the privacy right with the right to make procreative decisions, as in *Eisenstadt*.[258] The *Carey* Court cited *Eisenstadt*, among other cases, as standing for the proposition that "[t]he *decision* whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices" about marriage, procreation, contraception, family relationships, child rearing, and education.[259]

Perhaps the Court's most expansive rendering of the reach of procreative liberty—with language almost philosophical and theological—came in *Planned Parenthood v. Casey*. *Casey* upheld some, but not all, of Pennsylvania's abortion regulations and affirmed *Roe v. Wade*[260] while denominating abortion a constitutional "liberty" interest.[261] The *Casey* plurality noted that

> Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relations, child rearing, and education . . . [T]hese matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.[262]

Were the expansive pronouncements of *Casey* and *Eisenstadt* taken at face value, they would appear to grant constitutional protection to virtually all decisions concerning procreation, parenting, and family. The decision to use others' gametes and embryos would, by definition, be included among such decisions and would be folded into the category of privacy rights begun in *Griswold*.[263]

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[258] Carey v. Population Serv. Int'l, 431 U.S. 678, 685 (1977).

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

[260] 410 U.S. 113 (1973).

[261] Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 850 (1992).

[262] *Id.* at 851.

[263] Relying on Lifchez v. Hartigan, 735 F. Supp. 1361 (N.D. Ill. 1990) (enjoining the state from enforcing a statute making a physician performing IVF the custodian of the embryo under a child abuse act from 1877), *aff'd* without opinion, *sub nom.* Scholberg v. Lifchez, 914 F.2d 260 (7th Cir. 1990), Lori B. Andrews claims that infertile couples have a constitutionally protected right to access collaborative reproduction. *See* Andrews & Elsters, *supra* note 133, at 45. Sounding *Casey*'s themes, Professor John Robertson sees the Supreme Court's privacy cases as affirming the "notion that individuals have a right to choose and live out the kind of life that they find meaningful and fulfilling." Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, *supra* note 228, at 430. This right includes, Robertson believes, access to collaborative reproduction for married persons. *See id.* He expresses uncertainty regarding whether such rights would be extended to the unmarried but asserts that single persons also have "valid interests in

For a number of reasons, it is difficult to conclude that collaborative reproduction merits constitutional protection as an extension from any of the cases discussed above. First, with respect to arguments from cases about the rights of families, the Court's decisions to date involve traditional subject matters for family decision making, such as children's education and extended family household composition. To the extent that the cases mention rights regarding procreation at all, they do so only in the context of marriage and coital conception. *Meyer v. Nebraska*'s pronouncement is typical, speaking about rights to "marry, establish a home and bring up children, [which are] essential to the orderly pursuit of happiness by free men."[264] Thus, *Meyer* upheld the rights of parents to choose foreign language instruction for their children.[265] The family choices in these cases are very different in kind and in effect upon children from the choices implicated in collaborative reproduction. The latter are not about marrying but about creating children outside of the marital context. They are less about setting up a home or bringing up children than about contracting to conceive children by new means, or about the freedom to select desired traits in a child.

Second, cases extending protection for nontraditional family arrangements are also not easily extended to collaborative reproduction. All such cases involve the preservation of relations between children and their biological relatives. Thus, it was preserving the connection between a grandmother and her grandsons that deserved constitutional recognition in *Moore v. City of East Cleveland.*[266] In *Smith v. OFFER*, blood ties were protected as the court declined to extend the rights of foster parents at the expense of the natural parents.[267] Furthermore, even in conceding a willingness to support an unwed biological father's relationship with his child, the Court in *Lehr v. Robertson* cautioned that society's preference for the unitary marital family was strong:

> The institution of marriage has played a critical role both in defining the legal entitlements of family members and in developing the decentralized structure of our democratic society. In recognition of that role, and as part of serving the best interests of children, state laws almost universally express an appropriate preference for the formal family.[268]

Additionally, marriage has explicitly been noted as the context for procreation in the only two Supreme Court cases treating affirmative

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reproducing." ROBERTSON, *supra* note 10, at 38.

[264] Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

[265] *Id.*

[266] Moore v. City of East Cleveland, 431 U.S. 494, 504 (1977).

[267] Smith v. OFFER, 431 U.S. 841, 846 (1977).

[268] Lehr v. Robertson, 463 U.S. 248, 256–57 (1983).

rights to procreate. The *Skinner* Court, for example, automatically paired marriage and procreation as rights.[269] The *La Fleur* Court did likewise, affirming "freedom of personal choice in matters of marriage and family life . . ."[270] Marital rights are inapposite to collaborative reproduction because collaborative reproduction necessarily involves procreation with at least one biological parent outside the marriage, if the recipient is even married at all. The combination of family life with marital rights suggests that regulating collaborative reproduction would not run afoul of the affirmative rights of procreation found in *Skinner*[271] and *La Fleur*.

Skinner and *La Fleur* are difficult to marshal on behalf of a constitutional right to procreate by all means available due to their limited factual settings. In his comprehensive article on constitutional rights in marriage and kinship, Professor Bruce Hafen observed that *Skinner* spoke precisely about the capacity to procreate "but only in the context of state action that would have resulted in permanent sterilization."[272] *La Fleur* affirmed procreative rights only in the context of statutory employment penalties for procreating teachers. These narrow holdings do not readily transfer to collaborative reproduction regulation.

Also limited, the "right of privacy" cases concern only a right to avoid procreation through contraceptives, not to affirmatively conceive a child.[273] In the contraception and abortion cases, it appears the Court was actually protecting individuals' right to avoid procreation or parenting in situations that could prove problematic for them, their children, and society. Thus, it is possible for Professor Bruce Hafen to characterize the right of privacy cases as protecting the ability to avoid "long-term commitments to one's own potential offspring"[274] in order to preserve values of personal autonomy. Intended parents use collaborative reproduction, however, not to avoid offspring, but to create them.

The Court has not supported rights to procreate generally, let alone among the unmarried. Justice Brennan wrote specifically in *Carey* that the Court was not answering the "difficult question whether . . . the Constitution prohibits state statutes regulating sexual activity among adults."[275] Even Justice Brennan's majority opinion in *Eisenstadt* "conced[ed] the legislature a full measure of discretion in fashioning means to

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[269] *See* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

[270] Cleveland Bd. of Educ. v. La Fleur, 414 U.S. 632, 639 (1974).

[271] It should be mentioned that the *Skinner* Court highlighted the risk that the sterilization law at issue might promote eugenics. *Skinner*, 316 U.S. at 541. Collaborative reproduction, not as a matter of state policy, but as a result of cumulated individual decisions about what makes an attractive donor, may also produce outcomes with eugenic overtones.

[272] Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship and Sexual Privacy: Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 531 (1983).

[273] *See, e.g.*, Annie MacLean Massie, *Restricting Surrogacy to Married Couples: A Constitutional Problem? The Married Parent Requirement in the Uniform Status of Children of Assisted Conception Act*, 18 HASTINGS CONST. L. Q. 487, 504–05 (1991).

[274] Hafen, *supra* note 272, at 534.

[275] Carey v. Population Serv. Int'l, 431 U.S. 678, 694 n.17 (1977).

prevent fornication."[276] The *Roe* Court specifically disavowed equating the abortion right with the "right to do with one's body as one pleases."[277] In fact, as pointed out by both Professors John Robertson and Marsha Garrison, there remain a "range of existing restrictions on nonmarital procreational choice," such as "laws against fornication, adultery, incest, and bigamy."[278] These laws are not likely to be struck down as unconstitutional.[279]

There is also language in the contraception and abortion decisions indicating that the Court believed its decisions were necessary to give individuals the freedom to avoid problematic family situations detrimental to social stability. Regularly following the Court's announcement of the constitutional right at issue in each case, the Court laments the difficulties that would be created if a person—usually the would-be mother—were not able to prevent or terminate a pregnancy. In *Eisenstadt*, for example, the Court stated that a single person's lack of access to contraception could lead to "an unwanted pregnancy, for the child, illegitimacy, and for society, a possible obligation of support."[280] In *Roe*, the Court similarly listed the societal effects of an unwanted pregnancy.[281]

In sum, the cases show a willingness to accord constitutional protection to means deemed necessary to avoid procreating in situations where the Court is convinced that individual and social harms might otherwise result. There is difficulty in extracting affirmative rights to procreate—let alone a right to use donor gametes and embryos—from the abortion and contraception cases. This is a troublesome conclusion for supporters of constitutional protection for collaborative reproduction. Collaborative reproduction always creates children outside of the formal marital context, often into single parent settings. Rather than avoid, it may lead to difficulties and uncertainties in family relations—even if legal parentage is formally, statutorily defined—because of the deliberate severance of the relationship between the donor "parent" and the child.[282]

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[276] Eisenstadt v. Baird, 405 U.S. 438, 449 (1972).

[277] Roe v. Wade, 410 U.S. 113, 154 (1972).

[278] Garrison, *supra* note 179, at 854 (citing ROBERTSON, *supra* note 10, at 38).

[279] *Id.*

[280] *Eisenstadt*, 405 U.S. at 452–53.

[281] *Roe*, 410 U.S. at 153 ("There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it.").

[282] The potential for such difficulties is illustrated by cases involving fathers and other partners seeking to avoid responsibilities for children born to their spouses or partners using AID. *See, e.g.*, People v. Sorensen, 437 P.2d 495 (1968) (describing a husband's refusal to pay child support and why he is found guilty of willful failure to support the child born by artificial insemination to his marriage); Dunkin v. Boskey, 98 Cal. Rptr. 2d 44 (Ct. App. 2000) (holding that a cohabiting, unmarried partner of a woman who bore a child using AID, had support obligations similar to a husband in the same situation).

That the Supreme Court will not likely extend its current jurisprudence to protect collaborative reproduction is also evident in the methods and principles the Court uses to determine what family interests rise to the constitutional level. Three methods or principles appear particularly relevant. Not all of them are agreed upon by a majority of the members of the Court. Because they are responsible for outcomes in recent cases, however, they are worthy of note and, together, lead to the conclusion that a constitutional right of access to donor gametes or embryos is not likely to be found.

a. Narrow Definition of Interests

In *Michael H. v. Gerald D.*,[283] Justice Scalia stated that the Supreme Court should refer to "the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified"[284] when searching for unenumerated constitutional rights. Furthermore, longstanding societal traditions limiting the asserted interest would cut against constitutional protection.[285] Justice O'Connor, however, argued that the Court had not limited itself to this method of analysis but had grounded constitutional rights in less specific but relevant traditions.[286] Nevertheless, Justice Scalia's thoughts are not without historical support. They are, rather, a recent application of the oft-cited sentiment of Justice White that the Court "is the most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution."[287]

Another recent decision highlighted the Court's concerns about asserted constitutional interests that do not have precise textual support. In *Washington v. Glucksberg*,[288] the Court considered a claimed constitutional interest in determining the time and manner of one's death.[289] Noting that constitutional pronouncements would take the issues out of legislative debates, the Court cautioned for judicial humility when "creating" constitutional rights.[290] Following this caution, the Court engaged in a two-pronged substantive due process analysis requiring, first, a

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[283] 491 U.S. 110 (1989).
[284] *Id.* at 127 n.6.
[285] *See id.*
[286] *Id.* at 132 (O'Connor, J., concurring in part).
[287] Moore v. City of East Cleveland, 431 U.S. 494, 544 (1977) (White, J., dissenting).
[288] Washington v. Glucksburg, 521 U.S. 702 (1997).
[289] *Id.* at 722.
[290] *Id.* at 720 ("By extending constitutional protection to an asserted right or liberty interest, we to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore exercise the utmost care whenever we are asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the members of the Court.").

search of the nation's history and traditions for deeply rooted fundamental rights,[291] and second, a limited "'careful description'" of the liberty interest being asserted.[292] The Court resisted a historical analysis that would have directed it to search the nation's traditions for a broad personal autonomy right that would include the right to die.[293] It looked instead for the presence of a more precise description of the liberty interest:[294] "a right to commit suicide which itself includes a right to assistance in doing so."[295]

Were the Court to apply this analysis to collaborative reproduction, it would be unlikely to find a specific constitutional right to conceive and parent a child using gametes from a person other than one's spouse. The types of choices offered by ARTs are of recent vintage and lack specific historical support. Conversely, there is a long history of laws and social policies banning or discouraging procreation outside of marriage. This tradition has been recently reinvigorated at the national level with laws and programs designed to encourage abstinence among singles[296] and to encourage unmarried parents to marry.[297]

b. Considering the Rights of All Affected Persons

The Supreme Court has acknowledged that the recognition of the constitutional rights of some family members, or would-be family members, necessarily affects the rights and interests of other family members. The Court has further recognized that this dynamic should form a part of the very analysis through which it determines the existence of a claimed constitutional interest in the family setting. For example, in *Smith v. Organization of Foster Families for Equality and Reform*,[298] writing for the majority, Justice Brennan noted that recognizing liberty interests in foster parents would, by definition, undercut natural parents' rights to their relationships with their children.[299] This theme was echoed by Justice

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[291] *Id.* at 721.

[292] *Id.*

[293] *Id.* at 724 (quoting Brief for Respondents at 10).

[294] *Id.* at 723.

[295] *Id.*

[296] *See* Separate Program for Abstinence Education, 42 U.S.C. § 710(b)(1) (2002) (providing allotments from the Department of Health and Human Services to states for programs promoting "abstinence from sexual activity," with special attention to "those groups which are most likely to bear children out-of-wedlock").

[297] *See* Alan J. Borsuk, *Kids May Pay for City's High Rate of Single Moms*, MILWAUKEE J. SENTINEL, July 3, 2002, at 1A.

[298] 431 U.S. 816 (1977).

[299] *Id.* at 846 ("It is one thing to say that individuals may acquire a liberty interest against arbitrary governmental interference in the family-like associations into which they have freely entered, even in the absence of biological connection or state-law recognition of the relationship. It is quite another to say that one may acquire such an interest in the face of another's constitutionally recognized liberty interest that derives from blood relationship, state-law sanction, and basic human right—an interest the foster parent has rec-

Scalia in *Michael H.*, in which he analogized an approach to finding constitutional interests which overlooked others' interests to an inquiry about a constitutional right to fire a gun that neglected to consider the effect on the human target.[300]

Even the abortion cases reflected some consideration for the interests of all parties affected by the declaration of a constitutional right. The *Roe* Court took pains to assert that if the "fetus is a 'person' within the language and meaning of the Fourteenth Amendment" the "appellant's case [for a constitutional right to abortion], of course, collapses."[301] And even if the prenatal life is not a constitutional person, the Court held that

> it is reasonable and appropriate for a State to decide that at some point in time, another interest, that of health of the mother or that of potential human life, becomes significantly involved. The woman's privacy is no longer sole and any right of privacy she possesses must be measured accordingly.[302]

The *Casey* Court was equally explicit in taking account of the interests of all affected persons.[303]

A number of lower courts have also adopted this contextual manner of seeking constitutional interests in the family setting. In *Johnson v. Calvert*, for example, the California Supreme Court evaluated the claim of a gestational surrogate who claimed a constitutional right to privacy that granted her parental rights.[304] The court juxtaposed interests, stating that any parental rights the surrogate might successfully assert could come only at the natural mother's expense.[305] In *Jhordan C. v. Mary K*, when evaluating the claim of a child's genetic mother to have a constitutional right to a relationship with her child exclusive of the biological father, the court again observed that it had to consider the interests of all persons who might be part of the family.[306] Before determining whether particular persons possessed "family autonomy" rights to legal parentage, other interests must be weighed.[307]

The cases suggest that the interests of children conceived by means of collaborative reproduction should form a significant part of any analysis of the rights of parents to undertake collaborative reproduction processes. But the effects on children born through collaborative reproduction

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ognized by contract from the outset.")

[300] Michael H. v. Gerald D., 491 U.S. 110, 124 n.4 (1989).

[301] Roe v. Wade, 410 U.S. 113, 156 (1973).

[302] *Id.* at 159.

[303] *See* Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 871 (1992).

[304] 851 P.2d 776, 781 (Cal. 1993).

[305] *See id.*

[306] *See* Jhordan C. v. Mary K, 179 Cal. App. 3d 386, 396 (Ct. App. 1986).

[307] *See id.*

are, at best, unknown because so few studies have addressed the topic.[308] It is unknown, for example, whether children suffer physical effects from the technological processes of collaborative reproduction or emotional effects of not knowing their biological identities.[309] A child may indeed react negatively to the knowledge that she'd "started life in a small plastic dish after [her] father masturbated in the next room."[310] A growing number of anecdotes about children searching for donor parents indicate feelings of loss as a result of conception from an unknown donor, but again, this is little studied.[311]

At worst, the technological methods of fertilization, pre-implantation genetic testing, cryopreservation, and selective reduction are risky or even fatal to embryonic or fetal life, and therefore, incompatible with the notion that one individual's constitutional rights should not cause harm to others with recognized interests. Surely, as evidenced by the abortion cases and the allowance of some embryo research, neither the federal government nor the states have made the value of embryonic and fetal life paramount. Nevertheless, the existence of limits on fetal and embryonic research in a growing number of states, and the language in abortion cases allowing some state abortion regulation show respect for developing life. Should the rights of all affected lives be considered in any search for constitutional rights in the family arena, it does not appear that access to collaborative reproduction will find constitutional protection.

c. Rights from Duties

A third principle for determining the limits of constitutional protection for collaborative reproduction stems from the notion that constitutional rights in the family context should correspond to and enable parents to fulfill their duties toward their children. This is a longstanding principle: "The Power, then, that Parents have over their Children, arises from that Duty which is incumbent on them, to take care of their Off-

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[308] *See, e.g.*, Michelle A. Mullen et al., *In Vitro Fertilization—Risks*, *in* ENCYCLOPEDIA OF REPRODUCTIVE TECHNOLOGY 255 (Annette Burfoot ed., 1999) (stating that the "long term effects as a result of IVF conception are unknown. Future issues particularly when donor gametes or donor embryos are involved, may arise"); Leah J. Dickstein, *Effects of the New Reproductive Technologies on Individuals and Relationships*, *in* PSYCHIATRIC ASPECTS OF THE NEW REPRODUCTIVE TECHNOLOGIES 123–24 (Nada Stotland ed., 1988) ("To date, least is known about the effects on children"); REPROD. SCI. BRANCH, NAT'L INST. OF CHILD HEALTH & HUMAN DEV., *supra* note 154, at 30.

[309] *See* Kathleen Coswell, *Opening the Door to the Past: Recognizing the Privacy Rights of Adult Adoptees and Birth Parents in California's Sealed Adoptions Records While Facilitating the Quest for Personal Origin and Belonging*, 32 GOLDEN GATE U. L. REV. 271, 284, 286 (2002).

[310] ANDREWS, *supra* note 41, at 99.

[311] *See, e.g.*, Dennis Bueckert, *Dad Was a Sperm Donor*, WINNIPEG FREE PRESS (Canada), June 3, 2001, at B2 (noting the formation of the New Reproductive Alternatives Society, a "support group for donor insemination families").

spring."[312] From the earliest cases concerning parents' rights over children's education, unwed fathers' rights,[313] and the abortion and contraception cases, the Supreme Court has consistently articulated the rights-generated-through-duty principle. In the course of any inquiry regarding claimed rights associated with procreation and parenting, the Supreme Court has undertaken some inquiry into the degree to which exercise of the claimed right might contribute to the well-being of children for their own sake and for society's. This inquiry, in turn, appears intrinsically related to the often repeated theme of the family's contribution toward democracy and social progress. Over 117 years ago, in *Murphy v. Ramsey*, the Court said that marriage is "the sure foundation of all that is stable and noble in our civilization; . . . the best guaranty of that reverent morality which is the source of all benificent progress in social and political improvement."[314] The same theme was sounded nineteen years ago in *Lehr v. Robertson* when the Court described the marital family as playing a "critical role" in democratic society.[315]

Cases making the specific connection between parental duties and rights include *Meyer v. Nebraska*,[316] in which the Court concluded that parents had duties that followed from their control over their children.[317] Two years later in *Pierce v. Society of Sisters*, in upholding parents' right to send their children to religious schools, the Supreme Court echoed the correspondence between parental rights and duties: "The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[318] A later case, *Prince v. Massachusetts*, involved the scope of a guardian's right to rear a child according to her religious beliefs, in violation of child labor laws.[319] The *Prince* Court again tied parental rights to duties, this time duties owed to the larger community: "A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies."[320]

Finally, the Supreme Court's "unwed father" cases also place claimed constitutional rights concerning parenting into the context of

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[312] JOHN LOCKE, SECOND TREATISE ON GOVERNMENT § 58 (Thomas P. Peardon ed., Liberal Arts Library 1952).

[313] *See, e.g.*, Stanley v. Illinois, 405 U.S. 645 (1972); Quilloin v. Wolcott, 434 U.S. 246 (1978); Lehr v. Robertson, 463 U.S. 248, 257 (1983) (establishing that when unwed biological fathers assume their parental duties, their constitutional liberty interests in maintaining their parental rights will be recognized).

[314] Murphy v. Ramsey, 114 U.S. 15, 45 (1885).

[315] *Lehr*, 463 U.S. at 257.

[316] Meyer v. Nebraska, 262 U.S. 390 (1923).

[317] *See id.* at 400.

[318] Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925).

[319] *See* Prince v. Massachusetts, 321 U.S. 158, 166 (1943) (noting that the family provided essential tools to the appropriate upbringing).

[320] *Id.* at 168.

parental duties. In *Lehr v. Robertson*,[321] for example, the Court observed that an unwed father, who had acted paternally by participating substantially in the rearing of his children, was entitled to a hearing on his fitness as a parent before the state could take the children into its custody: "[T]he Court has emphasized the paramount interest in the welfare of children and has noted that the rights of the parents are a counterpart of the responsibilities they have assumed."[322] The *Lehr* Court found that parental responsibility could create parental rights.[323] Similarly, as indicated in Part II.C.2, the Supreme Court's decisions on contraception and abortion indicate that the Court may recognize constitutional rights where it is helpful to promote parental duties. Conversely, where there is an absence of parental duties, the presence of parental rights is not clear.

Access to collaborative reproduction appears unrelated to the exercise of any parental duties. Collaborative reproduction is, rather, an outgrowth of a desire to have a child—and not an adopted child, but an infant whose conception is directed by an intending parent. It is difficult to conceive of a duty to children, and to the wider society, that is served by the conception of children by means of collaborative reproduction.

It is not sufficiently concrete or responsive to assert that the duty or benefit is in the fact of the child's existence versus nonexistence. Indeed, the opposite might be true. It is possible that, for the sake of the child as well as the wider society, one should avoid creating children using technology that experiments with their health; deliberately estranging children from their biological parents; and creating children without the benefits of stability, the network of love, and the biological relationships available in two-parent families. Courts have long recognized the role traditional family settings play in the communication of the mature freedom necessary for American democracy. That not all children are treated to such an environment is no reason to replicate possibly problematic environments deliberately using new reproductive technologies; rather, it is a reason to work harder to provide the best environment whenever possible.

In sum, the constitutional arguments against greater regulation of collaborative reproduction techniques fail because they rely upon inapplicable precedent. They also ignore the means used to find constitutional rights concerning procreation, parenting, and families. In the end, it is regulation of collaborative reproduction that promotes the values upheld by the Supreme Court in the cases concerning procreation, parenting, and family.

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[321] Lehr v. Robertson, 463 U.S. 248 (1983).
[322] *Id.* at 257.
[323] *See id.* at 261.

III. LOOKING TO TRADITIONAL FAMILY LAW PREFERENCES AND PRINCIPLES

As noted in the Introduction, certain areas in family law have operated at first purely according to the interests of adults. It would be more than unfortunate if this pattern were repeated in one of the newest areas potentially affecting family life. If collaborative reproduction compromises the welfare of children in the name of adult desires, then appropriate investigations should ensue and existing impediments to regulation should be overcome. Concerns about the power and size of the industry, the difficulties of legislating on complex and changing matters, and fears of unleashing an abortion debate or taking on constitutional questions ought not to stand in legislators' way. Some children's interests are suggested in the above review of constitutional cases concerning procreation, parenting, and family. This Part demonstrates that these concerns have been incorporated into existing family law rules, and argues that they can and should be applied to collaborative reproduction.

Existing regulations tend to facilitate collaborative reproduction by providing some assurance to recipients that progenitors are free of some diseases, that clinics' published success rates are true, and that the mutual intent of donors and recipients regarding parental assignment will be honored. As described in Parts II.A and .B, even in these categories, existing regulations are far from comprehensive or adequate. A variety of abuses by doctors and laboratories continue to occur.[324] Infected donors may fail to disclose their illnesses,[325] and donor gametes are sometimes used in situations where the law has no mechanism for assigning parentage. Prior articles have addressed these lacunae,[326] and they will not be further addressed in detail here.

This Part will propose that regulations should first respond to problems raised by the steps of collaborative reproduction processes. Many of these steps remain experimental or near-experimental. Collaborative reproduction also sets up the regular possibility of multiple births and their attendant problems. Collaborative reproduction can further initiate a "predetermining" mind set on the part of parents about the characters and abilities of their children, promoting eugenics effects.

The second set of problems concerning family relations arise because collaborative reproduction always creates either single-parent

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[324] *See, e.g.*, Fasano v. Nash, 723 N.Y.S.2d 181 (2001) (describing a cause of action for negligence by a patient in whom a doctor implanted the embryos of another woman); James v. Jacobson, 6 F.3d 233 (4th Cir. 1993) (describing a doctor who had used his own sperm for artificial insemination of a patient who had not consented).

[325] *See, e.g.*, Johnson v. Superior Ct. & Cal. Cryobank, 95 Cal. Rptr. 2d 864 (Ct. App. 2000).

[326] *See, e.g.*, Daar, *supra* note 13, at 222. *See generally* ANDREWS, *supra* note 41, at 31–49.

families or families in which the two parents, married or unmarried, heterosexual or homosexual, are partly or completely biologically unrelated to the child. These problems have analogs outside the context of ARTs that might provide guidance. Laws and policies favoring the maintenance of ties between children and their biological parents, and those favoring two-parent families are relevant to collaborative reproduction's regular creation of antithetical situations.[327]

A. Family Law Preferences

There remains today, as for centuries back, a solicitousness for ties between children and their natural parents. Individuals prize the ties for the deep experiences of intimacy, continuity, security and unconditional love they promise. In turn, the law gives deference to the bonds formed between biologically related family members out of respect for the extralegal origins of such relations[328] and for the "intangible fibers that connect parent and child," which give "strength, beauty, and flexibility" to our society.[329] The law guards natural family relations to perpetuate those traditions,[330] to restore children to previously existing family units,[331] and to safeguard traditional family notions even in situations where the child has not known a biological parent at all,[332] a scenario regularly occurring for collaboratively reproduced children. It is a preference visible not only in the laws pursuing family reunification after parental abuse or neglect, but also in the adoption arena, with its strict requirements for truly vol-

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[327] Interestingly, some participants in collaborative reproduction affirm the value placed on maintaining biological connections when they pursue collaborative reproduction precisely so that one member of a couple will have biological progeny. *See* Weiss, *supra* note 68, at A1 ("The woman settled on egg donation . . . partly for her husband. 'He is such a good man; I've got to pass on his genes.'").

[328] Smith v. Org. of Foster Families for Equality & Reform, 431 U.S. 816, 845 (1977).

[329] Lehr v. Robertson, 463 U.S. 248, 256 (1983). *See also* Prince v. Massachusetts, 321 U.S. 158, 168 (1943) ("A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies."); Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925) (stating that children should be prepared for "additional obligations" to society at large).

[330] *Smith*, 431 U.S. at 843 ("[T]he usual understanding of 'family' implies biological relationships, and most decisions treating the relation between parent and child have stressed this element.") (citations omitted).

[331] *See* Stanley v. Illinois, 405 U.S. 645, 651 (1972) (holding that the state could not remove children from the care of an unwed biological father without due process following the mother's death, where the father had demonstrated his commitment to parenting by caring for the children for years prior to the mother's death).

[332] *Cf.* Santosky v. Kramer, 455 U.S. 745, 760 (1981) (lamenting that "some losses cannot be measured" when the judge removed a three day old child from his natural parents for neglect).

untary surrender of parental rights[333] and its allowance for revocation of contractual agreements, even after surrender.[334]

Family law's preference for two parents, a father and a mother, is grounded in (1) well-documented concerns for the child's economic well-being;[335] (2) a widespread social preference for stability;[336] and (3) a variety of other contributions that an intact, two parent family makes toward a child's healthy development, opportunities, and sense of security.[337] Economic concerns are addressed through child support laws and the concomitant development of effective ways to assure continuity of child support payments from reluctant, absentee parents.[338] Additionally, there are economic, personal, and social considerations in suggestions to reform no-fault divorce laws to create obstacles for divorce proceedings for persons with small children.[339] The preference for two parent child rearing also lies behind the movement to consider joint custody of children following a divorce.[340]

Statutes protecting human embryos, while not family law per se, also manifest preferences about offspring that are contradicted by collaborative reproduction. Certain collaborative reproduction techniques can damage or destroy the developing embryo. In *Casey*, the Supreme Court reminded states that they are permitted to express an interest in the embryo even at the "earliest stages."[341] About one-fifth of the states have legislated to protect embryos at different developmental stages from harmful experimentation.[342] Several more have laws specifically forbid-

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[333] *See, e.g.*, Doe v. Clark, 457 S.E.2d 336 (S.C. 1995) (allowing a mother to revoke pre-birth consent for adoption).

[334] *See, e.g.*, COLO. REV. STAT. § 19-5-104 (1995) (allowing revocation until an adoption is finalized); PA. CONS. STAT. ANN. § 2711 (same).

[335] *See, e.g.*, Sara McLanahan, *Consequences of Single Motherhood*, *in* SEX PREFERENCE AND FAMILY: ESSAYS ON LAW AND NATURE 310 (David M. Estlund & Martha Nussbaum eds., 1997) ("Loss of economic resources accounts for about 50 percent of the disadvantages associated with single parenthood.").

[336] *See, e.g.*, William A. Galston, *Causes of Declining Well-Being Among U.S. Children*, *in* SEX PREFERENCE AND FAMILY: ESSAYS ON LAW AND NATURE 294 (David M. Estlund & Martha Nussbaum eds., 1997) ("Large majorities believe that both mothers and fathers should spend more time with children.").

[337] *See, e.g.*, Galston, *supra* note 336, at 299, 301 ("The economic disadvantages of unwed motherhood are matched by noneconomic problems."); McLanahan, *supra* note 335, at 307 ("Children who grow up with only one of their biological parents . . . are disadvantaged across a broad array of outcomes."); DAVID BLANKENHORN, FATHERLESS AMERICA: CONFRONTING OUR MOST SERIOUS SOCIAL PROBLEM 14 (1995).

[338] *See, e.g.*, Child Support Recovery Act of 1992, 18 U.S.C. § 228 (2002).

[339] *See, e.g.*, William Galston, *Needed: A Not-So-Fast Divorce Law*, N.Y. TIMES, Dec. 27, 1995, at A15.

[340] *See, e.g.*, *In re* Marriage of Weidner, 338 N.W.2d 351, 359 (Iowa 1983) ("Joint custody is preferred because, properly tailored to the parties' circumstances, joint custodial arrangements will often go a long way toward encouraging both parents to share the rights, responsibilities, and frequently joyful and meaningful experiences of raising their children.").

[341] Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 872 (1992).

[342] *See supra* notes 206–208 and accompanying text; ARIZ. REV. STAT. ANN. § 36-2302

ding fetal research.[343] The ongoing controversy over abortion and embryonic stem cell research, and the current strict federal limits on funding the latter research, indicate that this area of concern is not as dormant as *Roe* and *Casey* might first suggest. Collaborative reproduction techniques that may damage or destroy the developing embryo necessarily implicate the same concerns as the abortion and embryonic stem cell research areas and require a careful weighing of the preferences and policies implicit in both.

B. To Apply or Not To Apply Family Law Preferences to Collaborative Reproduction

In an article on how to resolve parenting questions arising out of ARTs, Professor Marsha Garrison argues for greater similarity between the laws governing parentage applicable to naturally and to technologically conceived children.[344] Garrison explicitly recognizes the law's preferences for two-parent families and for unity with biological parents.[345] She also notes that the law does not regularly step in to forbid the many coital conceptions that do not result in preferred familial circumstances. Instead, rather than bar those circumstances, the law simply takes a "responsibility" approach that she concludes should govern technological conception as well.[346] Therefore, Garrison suggests that donor responsibility laws, rather than out-right bans would be the correct method of regulation.

Garrison also indicates, and rightly so, the risks of proposing legislation based upon "broad value assertions rather than statements of fact."[347] This point ought to be taken seriously with collaborative reproduction, especially considering the strong opinions, emotions, and desires inherent in the debate. Garrison's caution can, nevertheless, be honored by legislation that brings technological conception more closely in line with existing family law preferences. The law should not allow collaborative reproduction to recreate behaviors widely assumed to be problematic for children. To adopt the sentiments of Lori Andrews, "How can you argue that two wrongs make a right? Bad things are happening in another area and so we should allow bad things to happen here. I don't think that follows."[348]

(West 1993) (protecting fetuses and embryos).

[343] *See, e.g.*, FLA. STAT. ANN. § 390.0111(6) (West 2002).

[344] Garrison, *supra* note 179, at 922–23.

[345] *Id.* at 895–96.

[346] *Id.* at 912 (citation omitted).

[347] *Id.* at 895.

[348] *The Point with Greta Van Sustern: Human Cloning, Scientific Marvel or Weird Science?* (CNN television broadcast, Feb. 12, 2001) [hereinafter "*The Point*"] (interview with Lori B. Andrews on cloning), *available at* http://www.cnn.com/TRANSCRIPTS/0102/12/tpt.00.html.

Certainly, many couples who conceive naturally fail to place children into families "most likely to succeed." For several reasons, however, collaborative reproduction ought not be allowed to inflate them. First, there are real differences between natural and technological conception that make the latter a good candidate for regulation. Second, public alarm about the effects of certain family situations on children is increasing, reflecting a public climate ripe for regulation. Third, laissez-faire treatment of collaborative reproduction can and has led to arguments for similar treatment of human cloning, a result presently at odds with majority sentiment in the United States.

1. Increasing Public Alarm

There is public disagreement today about what degree of respect is owed to embryonic or fetal life, stages of life often compromised by collaborative reproduction. This is reflected in the patchwork of laws on the subject. There appears, however, to be some significant support for treating embryonic life with a degree of respect.[349] The national debate over embryonic stem cell research[350] as well as relatively recent state laws recognizing the special status of embryos[351] reflect real concern about embryo experimentation.

It is evident that many children today are living in single parent households or otherwise away from their biological parents, situations that collaborative reproduction knowingly creates. Meanwhile, the law increasingly takes a hands-off approach to persons' sexual lives, repealing, weakening, or declining to enforce laws regulating activities that place children in potentially problematic situations.[352] Correspondingly, the law increasingly treats children conceived outside of traditional marriage like children conceived within traditional marriage.[353]

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[349] A 2001 poll concluded that approximately sixty-seven percent of Americans surveyed support stem cell research if it does not require the destruction of embryos. Off. of Comm., U.S. Conf. of Cath. Bishops, *New Poll: Americans Oppose Destructive Embryo Research, Support Alternatives*, June 8, 2001, *available at* http://www.usccb.org/comm/archives/2001/01-101.htm (last visited Nov. 14, 2002). *See also* NAT'L BIOETHICS ADVISORY COMM., ETHICAL ISSUES IN HUMAN STEM CELL RESEARCH ii (1999) (comments of President Clinton) ("We believe that most Americans agree that the embryo should be respected as a form of human life.").

[350] *See, e.g.*, William Safire, *Stem Cell Hard Sell*, N.Y. TIMES, July 5, 2001, at A1; 147 CONG. REC. H4916-02 (2001) (debating human cloning and embryonic stem cell research).

[351] *See infra* text accompanying notes 207–213 and accompanying text.

[352] *See* RICHARD A. POSNER & KATHARINE B. SILBAUGH, GUIDE TO AMERICA'S SEX LAWS 98–110 (1996) (stating that by 1996 only half of the states still banned adultery and a majority of states had repealed their laws banning fornication).

[353] *See, e.g.*, Levy v. Louisiana, 391 U.S. 68 (1968) (awarding damages to an illegitimate child on the wrongful death of the mother); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972) (upholding right of illegitimate child to biological parent's workers' compensation benefits).

On the other hand, federal and state lawmakers have recently devoted substantial attention to encouraging abstinence before marriage and to preventing out-of-wedlock pregnancy.[354] Serious studies about the harmful and long-term effects of single parenting on children are proliferating.[355] In addition, if pregnancy does occur out of wedlock, state laws are holding absent biological fathers responsible with new and stronger mechanisms.[356] The frequency of out of wedlock pregnancies and the increasing number of absentee parents who fail to pay support are generating real alarm and renewing the cry for regulation. Clearly, individual decisions to plan and create single-parent households will not receive automatic deference when contrary to longstanding social and family law preferences.

Some downplay the effects of collaborative reproduction, pointing to the small number of collaboratively reproduced children. Professor John Robertson suggested that the number of children born through gamete donation and surrogacy will always be small.[357] Professor Leon Kass similarly suggests that "if the single cases [of collaborative reproduction] are so innocent . . . multiplying their performance [should not] be so offputting . . . ."[358] This is not an argument, however, that alleviates the cumulative impact of collaborative reproduction on notions of family life. Indeed, the total numbers of collaboratively reproduced children have likely reached the hundreds of thousands today.[359] Furthermore, Robertson's account fails to consider the thousands of individuals trying and failing to conceive through collaborative reproduction, the thousands of medical personnel, donors, affected family members, and the hundreds of thousands of investors and ordinary citizens affected by the new technologies. America's is an increasingly gene-crazed culture that receives the messages about family that are sent through the collaborative reproduction debate. The arguments about the proportionately small number of successful collaborative reproduction processes cannot, empirically or in principle, succeed.

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[354] The federal government is offering funding to states specifically to encourage abstinence and avoid unwed parenting. *See supra* text accompanying note 296.

[355] *See* McLanahan, *supra* note 335, at 310 (noting that, in addition to economic disadvantages, children in single parent households struggle with a lack of regular parental involvement and supervision; difficulties accessing community resources; and disruptions in ongoing relationships with peers, teachers, and others).

[356] *See* Marsha Garrison, *Autonomy or Community?: An Evaluation of Two Models of Parental Obligation*, 86 CAL. L. REV. 41, 44 (1998); Child Support Recovery Act of 1992, Pub. L. No. 102-521, 106 Stat. 3403 (1992).

[357] *See* Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, *supra* note 228, at 421

[358] Leon R. Kass, *Wisdom of Repugnance*, NEW REPUBLIC, June 2, 1997, at 25.

[359] *See supra* text accompanying notes 26–34. *See also* Antonia Regaldo, *Could a Skin Cell Someday Replace Sperm or Egg?*, WALL ST. J., Oct. 17, 2002, at B1 (citing the ASRM's figure that 30,000 children are born from ARTs each year as of 1999).

2. Differences from Coital Reproduction

There are real differences between coital and collaborative reproduction that demonstrate that the latter ought still to be regulated, despite the absence of out-of-wedlock procreation regulation. First, coital procreation is often unexpected while collaborative reproduction is deliberately planned and brought about over a relatively long period of time. This is not to recommend carelessness respecting procreation, but to point out that the legal culture regularly expresses greater disapproval of intentionally—as opposed to merely negligently—created harms. It is possible to perform animal testing to understand the physical risks of techniques commonly used for collaborative reproduction. Additionally, the emotional and social consequences of collaborative reproduction are observed in families that have already used such technologies. The effects must be studied and the implications understood; without a thorough understanding, the call for regulation may go unheeded.[360]

A second difference between collaborative and coital reproduction is the experimental quality of technologies regularly implicated in a course of collaborative reproduction. All new reproductive technology methods are experimental at their inception,[361] and it is worth remembering not only that some are never fully animal-tested, but that some are taken up for commercial use in the year of their first success, as was the case with the use of cryopreserved eggs.[362] This commercially driven haste affects the embryos involved and may also permanently affect the born children. Even today, scientists are still studying possible harms to children created using frozen embryos,[363] frozen eggs,[364] IVF, and ICSI.[365] In contrast, coital reproduction is not experimental. Problems that may arise in coitally conceived pregnancies are not due to the knowing alteration of the conditions affecting the development of embryonic or fetal life. To concede that the outcome will be unknown in any given pregnancy, due to factors outside the control of the parents or doctor, is different from suggesting that a pregnancy is being conducted experimentally.

A final reason to limit collaborative reproduction, while not similarly regulating coital conception, rests with the types of choices and the monetary expenditure required in collaborative reproduction. Intending parents are always put in the position of choosing and paying for donor traits that a parent hopes will appear in a child. These practices are the

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[360] *See supra* text accompanying notes 309–310 (concerning the continued practice of some ART techniques despite the knowledge that outcomes for children are insufficiently scientifically researched).

[361] ANDREWS, *supra* note 41, at 26.

[362] *See infra* Part I.C.3.a.

[363] *See* Damario et al., *supra* note 65, at 790–800.

[364] Shari Roan, *Egg Banking Offers Hope to Women Research*, L.A. TIMES, Nov. 17, 1997, at S1.

[365] *See infra* Part I.E.3.

bread and butter of collaborative reproduction, yet they appear to contradict an impulse near the heart of family relations and family law: the notion that parents do not choose their children according to their own tastes and preferences but that parents should love and nurture whomever their children will be.

The numerous choices that collaborative reproduction necessitates are described at length in Part I. Parent(s) choose a donor based upon factors such as education, appearance, health, height, talents, and even hobbies. It is true that collaborative reproduction experts attempt to educate the public about the lack of certainty in genetic inheritance. Nevertheless, particular donor qualities are the but-for reason one donor is selected over another. News reports quoting intending parents regularly indicate that the choice of donor depends upon the traits the parents intend and hope the child will have. This protracted, intense focus at the beginning of collaborative reproduction might well affect the parent-child relationship that follows.

This sense of expectation may also be exacerbated by the large sums of money paid by clients of fertility clinics. Fertility clinics offering "Ph.D semen" obviously intend to encourage the belief that it will produce brighter children, and they charge twice the price for that expectation. Parents seeking an egg donor believe that a tall, Ivy League educated athlete's eggs will produce like children, and offer more than the going rate for her eggs. Expectations are being created through the cost of the gametes or embryos, several thousand dollars for fertilization and implantation procedures, thousands more for donor screening and for pre-implantation genetic screening of the embryo,[366] and possibly even several thousand more for selective reduction. Expectations of this type are ordinarily associated with a luxury good or service, not with a child. The new attitude of parents involved in the collaborative reproduction setting can be, "I want the best child, the way I want the best car, and I'm willing to pay for it."[367]

Collaborative reproduction confronts parents not only with a choice among donors but also with a choice among embryos, a say in the child's sex, and a choice over the number of children to be born. Collaborative reproduction thus jeopardizes the idea of parents as recipients of a very vulnerable gift, as lovers of an unknown person. It puts parents in the position both of attempting to choose who a child will be, and of risking that child's physical well-being before and possibly after birth. The interests of the parents are, again and again, made paramount in contravention

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[366] *See* Fertility Options, *supra* note 61 (charging $950 minimum medical screening fee); Allison Sherry, *Genetic Testing's Promise, Danger, Denver Clinical Trial is at the Forefront of Fertility Science*, DENVER POST, Oct. 8, 2002, at A1 (reporting that a Denver fertility clinic charges about $10,000 for *in vitro* fertilization and another $3,000 for pre-implantation genetic testing).

[367] Weiss, *supra* note 81, at 3E (quoting Alex Capron).

of a bedrock principle of family law that the interests of the child should prevail.

The choices that inhere in collaborative reproduction seem to contradict an important paradigm of the parent-child relationship, one on which family law is generally based. This paradigm holds that merely by virtue of the birth of "this child" to "this parent," this parent has been "chosen" to love "this child." Parents are to be the chosen ones, not, as with collaborative reproduction, the choosers. One sees this paradigm expressed in a number of family law contexts. In the adoption context, it is often said that homes "should be selected for children, rather than children for homes."[368] It is also expressed in child custody cases in which a custodial parent is chosen according to the child's best interests, even if a court has to contradict a parental agreement.[369] It is expressed in the law refusing to enforce a contract in which parents have chosen to deny a child the support of one or both parents: the law will require both parents to contribute support.

There are arguably good reasons for each choice posed in collaborative reproduction: the desperate desire for a child, the hope of avoiding a genetic disease, and the yearning to give a child the best chance for happiness as a parent understands it. Altogether, however, these choices easily lead to parent-child relations far removed from presumptive norms. Perhaps no one parental prerogative risks the paradigm; it is their sum total that creates serious concern.[370]

It might be argued, however, that the same expectations created through choices offered by collaborative reproduction are created naturally in parents who hope that their own traits will be inherited. There is even a sophisticated biological argument that the selection of one's mate implicates the evolutionary drive to select one's children. But there are important differences between selecting a partner and a child. Choosing a partner is first about forming an adult relationship; over time and only later, if at all, do aspirations for children arise. The time lapse between choosing a spouse and naturally conceiving a child, and the difference in focus between sexual intercourse and a day spent with donor profiles surely indicate that parents' expectations about children are more directly expressed through collaborative reproduction. Demographic data buttresses the claim that choosing a spouse is not equivalent to choosing a child. Data shows that people are having fewer children than parents of several decades ago.[371] Additionally, American society now places greater

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[368] ALFRED KADUSHIN & JUDITH A. MARTIN, CHILD WELFARE SERVICES 533 (4th ed. 1988).

[369] *See* AM. L. INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION, PRINCIPLES GOVERNING THE ALLOCATION OF CUSTODIAL AND DECISIONMAKING RESPONSIBILITY FOR CHILDREN: ANALYSIS AND RECOMMENDATIONS § 2.07 (2000).

[370] *See infra* Part IV.

[371] NAT'L CTR. FOR HEALTH STATS., U.S. CENSUS BUREAU, FERTILITY OF AMERICAN

emphasis on satisfaction as between spouses, and only later on the satisfaction that children might bring. The preceding suggests that real differences exist in the strength of the impulse to "select" one's child through a spouse and to select a child through collaborative reproduction. It is weak to counter the desirability for regulation of collaborative reproduction with conclusory statements arguing that decisions in natural and technological procreation are the same.

IV. RELIANCE ON COLLABORATIVE REPRODUCTION AS PRECEDENT FOR CLONING

> Technology enables people to substitute for a random outcome their own all too predictable wishes.[372]

There is tremendous support in the United States today for a ban on the cloning[373] of human beings.[374] A July 2002 report of the President's Council on Bioethics favored a permanent moratorium on human cloning for reproductive purposes in the United States.[375] There are several arguments for a ban on human cloning that have garnered particular public support, as evidenced by their frequent repetition. This Part will describe these arguments, point out how they echo concerns about collaborative reproduction raised in Parts II and III, and show how they strengthen the case for additional regulation of collaborative reproduction.

Participants in the cloning debate have recognized the influence of existing collaborative reproduction practices on cloning arguments. They understand that the public has begun to accept collaborative reproduction, whether proactively or passively through non-regulation. As a result, opponents of cloning are busy attempting to distinguish collaborative reproduction from cloning, while cloning proponents are claiming that collaborative reproduction and cloning are ethically and practically similar.[376]

WOMEN: JUNE 2000 at 3 (Oct. 2001), *available at* http://census.gov/prod/2001pubs/pdo-543rv.pdf.

[372] MARILYN STRATHERN, AFTER NATURE: ENGLISH KINSHIP IN THE LATE TWENTIETH CENTURY 188 (1992).

[373] By "cloning," I am referring to somatic cell nuclear transfer in order to create a genetically identical human being intended to be born. This is not intended to include other processes, such as embryo division, which have also been referred to as cloning, *see* N.Y. STATE TASK FORCE ON LIFE & THE LAW, *supra* note 12, at 389–91, nor to the use of cloned embryos as a source of embryonic stem cells.

[374] Ninety percent of citizens polled oppose the cloning of human beings designed to result in the birth of a live human being. *Focus on the Family Criticizes Daschle's Delay in Cloning Ban*, U.S. NEWSWIRE, June 17, 2002 (citing a Gallup/USAToday/CNN poll).

[375] *See* PRESIDENT'S COUNCIL ON BIOETHICS, *supra* note 2, at § 5.

[376] *See The Point*, *supra* note 348 (comments of Professor Gregory Pence) (revealing the similarity in arguments for cloning and ART in advocating for cloning).

Cloning proponents emphasize the similarity between creating genetic replicas of oneself, as in cloning, and selecting donors to match the genetic traits of others.[377] In fact, proponents argue that cloning presents an even better opportunity for creating discrete family relationships than collaborative reproduction because it eliminates the "the need to introduce third parties into private relationships and, in the case of egg donation, to subject those third parties to substantial medical risks."[378]

In fact, while it cannot be denied that there are some real distinctions between collaborative reproduction and cloning, it is true that there are sufficient similarities so that collaborative reproduction may be said to invite cloning. Also, due to these similarities, the root objections to the cloning apply rather easily to collaborative reproduction. What follows will examine these objections and consider their applicability to collaborative reproduction.

A. Harm to Experimental Creations Before "Perfection" of Techniques

A preliminary roadblock to cloning in the minds of many is summarized in one science reporter's comments:

> [I]f you were willing to sustain lots of miscarriages, lots of forced abortions because many of the fetuses would be deformed; if you were willing to risk the almost certain fate that some of these children would be born and would die soon after; that any of the children who were born and who were viable might suffer all sorts of ill effects like the mammals that have been cloned so far . . . . If you are willing to take all of those risks, you could probably clone someone pretty soon.[379]

Litanies such as these have led even supporters of collaborative reproduction to argue against cloning.[380] Leon Kass, chair of the President's Council on Bioethics, argued that the physical risks of cloning made any attempt to clone an "unethical experiment."[381] Further, cloning research deliberately creates these risks whereas normal reproductive risks are not created from "purposeful intervention," but from genetic chance.[382]

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[377] *See* N.Y. STATE TASK FORCE ON LIFE & THE LAW, *supra* note 12, at 395–96.

[378] *See id.* (weighing the desirability of evicting third parties from individuals' and couples' decisions to have children); David Orentlicher, *Cloning and the Preservation of Family Integrity*, 59 LA. L. REV. 1019, 1020 (1999) (arguing that cloning eliminates the need for third party genes—a principle objection Orentlicher sees to collaborative reproduction—and is therefore a *better* and beneficial alternative).

[379] *The Point*, *supra* note 348 (comments of Lisa Beyer, Senior Editor, *Time Magazine*).

[380] *See id.* (comments of Lori B. Andrews).

[381] Kass, *supra* note 358, at 22.

[382] *See* Lori B. Andrews, *Is There a Right to Clone? Constitutional Challenges to Bans on Human Cloning*, 11 HARV. J. L. & TECH. 643, 667 (1998).

Like cloning, the techniques required for collaborative reproduction continue to go through an experimental period.[383] Fertility drugs, the processes of embryo cryopreservation, the selection of the appropriate medium for fertilization and growth of the embryo, ICSI, and IVF are all relatively recent discoveries. Scientists are still studying their effects.[384] It is possible that children created through collaborative reproduction will suffer harms—physical as well as psychological—that will not be known for some years.

B. Family Mix-ups

A second common objection to cloning is the way in which it perverts normal family relationships, creating a twin of a child's mother or parents of a child's grandparents.[385] Cloning also promotes the "usually sad situation of the 'single-parent child.'"[386] In addition, it invokes incestuous overtones where, for example, a man is married to the adult version of his daughter. Arguing that nuclear family relations are already corrupt does not support the perpetuation of such matters.[387]

Collaborative reproduction similarly alters family relationships. It may inflate the numbers of quasi-parental figures in the child's life to as many as five: two social or intending parents, two gamete donors, and a surrogate mother. Like cloning, it can create two familial identities in one person, for example by making a biological parent out of an aunt or a grandmother. Like cloning, it can even create incestuous situations. In 2001, a French woman used her brother's sperm to create two embryos, one of which was carried to term by a surrogate mother, and the other by herself.[388]

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[383] *See id.*

[384] *See, e.g.*, Achilles, *supra* note 34, at 152 ("[B]ut long term studies have yet to be undertaken to evaluate outcomes of various methods of insemination where more invasive therapies and drug treatments have been employed to assist with conception . . . .").

[385] *See* Kass, *supra* note 358, at 22.

[386] *Id.*

[387] *See id.* (stating that one bad scenario does not justify creating another bad scenario).

[388] *U.S. Doctor Says Sixty-Two-Year-Old Woman Carrying Brother's Baby Not Unethical*, AGENCE FRANCE PRESSE (France), June 21, 2001. A tremendous controversy ensued in France, which has an age cutoff for the use of certain ARTs, when a doctor from the United States performed an *in vitro* fertilization for a fifty-eight-year-old French woman using donor eggs and the sperm of her brother, fifty-two years old, who was recovering from a suicide attempt which left him permanently disabled. *Id.* One of the children was carried to term by the sister and another by a younger American surrogate. *Id.*

C. Individuality

The loss of individuality and uniqueness is another persistent and important objection to cloning.[389] Genetic uniqueness is associated with a child's eventual independence from his parents, and cloning necessarily removes the uniqueness that leads to independence.[390] Professor Andrews has even argued that cloning is a new form of slavery in violation of the Thirteenth Amendment because it constrains individuals with genetic expectations.[391] Although the arguments recognize that genes are not the whole of a person's destiny, the very selection of particular genes suggests the power of genetic makeup over identity.[392] Professor Andrews further argues that cloning will not fully satisfy a person's urge to shape another life; this desire will likely lead to genetic engineering, the manipulation of specific human genes to produce or avoid specific traits.[393]

Like cloning, though admittedly not to the same degree, collaborative reproduction involves the attempt to choose the traits of a child. Fertility clinics and intending parents invest much effort into the compilation, advertisement, or review of donor profiles in order to effectuate a particular choice. As discussed more fully in Part III.B.2, this is different from choosing a spouse, despite hopes that a child may inherit certain of his or her traits. Collaborative reproduction is a choosing of traits with the child's creation directly and solely in mind. Like cloning also, the techniques of collaborative reproduction open the door to genetic manipulation; once the embryo is ex-utero and available for inspection and even alteration, the scientific and medical imperatives toward health and improvement become difficult to resist.

D. Commodification

Another trenchant objection to cloning is its potential to cast human beings as products: "We believe that life is a creation, not a commodity, and that our children are gifts to be loved and protected, not products to be designed and manufactured by human cloning."[394] Cloning research attempts to marshal scientific and technological resources toward the production of human beings. Such production can quickly become sub-

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[389] *See* Andrews, *supra* note 382, at 667 (noting America's foundational respect for individuality).

[390] *See* Kass, supra note 358, at 22–23 (stating that a child loses his independence when he is "the designed result of someone's artful project").

[391] *See* Andrews, *supra* note 382, at 668; U.S. CONST. amend. XIII.

[392] *See* Kass, *supra* note 358, at 25 (arguing that the desire to replicate certain qualities through genes is manifest through the selection of particular donors).

[393] *The Point*, *supra* note 348 (comments of Lori B. Andrews) (arguing that genetic engineering is but another way to assume power and control over another individual).

[394] President's Satellite Remarks to the Southern Baptist Convention, WKLY. COMPILATION OF PRES. DOCS. 987, 988 (June 11, 2002), *available at* 2002 WL 14547488.

ject to the commercial imperative toward standardization and modernization.[395] The reproductive technology industry has already proven itself unable to resist attempting to attract the well-off with advertisements for only the most obviously successful and typically appealing progenitors.[396] Beyond harm to individuals, there is also the possibility of social harm from a decline in genetic diversity if too many of the same persons or "type" of persons are created.

Similarly, collaborative reproduction, employs technological processes in order to "make" children. Providers of collaborative reproduction services already use commercial techniques to attract certain donors and offer their services for very high prices, generally paid by the white and the wealthy.[397] Finally, like cloning, collaborative reproduction risks creating too many children from the same donors.

E. Power Imbalance

A final objection to cloning is that it could lead to an excess of parental power over children.[398] Lori Andrews has said that cloning represents the potential for "[a]buses of the power to control another person's destiny—both psychological and physical—of an unprecedented order." It is true that this is an uncertain harm, yet according to Andrews, there are bans on other behaviors with speculative effects, such as incest, because they are likely to lead to excessive parental power over children.[399]

Despite an intending parent's simple desires for a child, the processes of collaborative reproduction place the intending parent(s) in the position of directly attempting to choose many features of the child. These may include features such as the child's height, sex, and any genetic predisposition for sports, hobbies, and intelligence. Parents who would engage in cloning would "take at the start a decisive step which contradicts the entire meaning of the open and forward-looking nature of the parent-child relations"[400] and replace it with a limited, known future path.

Collaborative reproduction, like cloning, can undermine the reality that children, the "given," will often do the unexpected, virtually entirely outside of parental control.

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[395] *See* Kass, *supra* note 358, at 23.

[396] *See The Point*, *supra* note 348 (comments of Lisa Beyer) ("Some of these parents have a lot of money and some may be willing to underwrite this kind of venture [cloning]. That's certainly the market that these scientists who have announced their intentions are looking at.").

[397] Twila L. Perry, *Race Matters: Change, Choice and Family Law at the Millennium*, 33 FAM L. Q. 461, 471–72 (1999).

[398] *See* Kass, *supra* note 358, at 23.

[399] Andrews, *supra* note 382, at 669.

[400] Kass, *supra* note 358, at 24.

> When a couple now chooses to procreate, the partners are saying yes to the emergence of new life in its novelty, saying yes not only to having a child but also, tacitly, to having whatever child this child turns out to be . . . [they] are tacitly confessing the limits of [their] control.[401]

The problems of too much parental control are evident in both cloning and collaborative reproduction and suggest that both should be regulated.

V. CONCLUSION AND RECOMMENDATIONS

There are a number of ways legislators might approach regulation of collaborative reproduction. Some ways will reach beyond the precise borders of collaborative reproduction, affecting processes employed regularly not only there, but in ARTs that do not employ donor gametes and embryos. Others will look to collaborative reproduction alone. This Part will suggest various types of legislation primarily to protect the interests of children affected by collaborative reproduction.

First, at the very least, the time has come to fund studies about the long term effects—physical, emotional, social—of collaborative reproduction on children. Research grants given by the National Institutes of Health can create a federal response to the need. States can jointly pursue such studies.

Second, legislators at the state and federal levels could also act now to avoid more of the physical risks collaborative reproduction poses to children, whether these arise at the embryonic or the fetal stage of development. Before any particular ART process "goes commercial," it should be more carefully scrutinized, and more animal testing should be conducted.

Third, were there a public and legislative will to extend additional protection to life at the embryonic stages, the law could limit the proliferation of "leftover" embryos by limiting the number that can be created simultaneously, and by requiring that all those created up to this limit be implanted. Limits could also be placed on the number of embryos a doctor could implant simultaneously in a woman in order to avoid the physical and psychological risks posed by multiple births and by selective reduction.

Fourth, the law could assign parental responsibility for technologically conceived children born to single parents also to the donor parent in order to preserve two-parent support for the child.[402] This would likely reduce the number of donors dramatically.[403] Lawmakers might also go

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[401] *Id.*

[402] *See* Garrison, *supra* note 179, at 909–12.

[403] *See id.*

further and simply prevent the use of collaborative reproduction by unmarried persons at all.

Fifth, legislators might address the use of collaborative reproduction by married persons. Hearings regarding the impact of collaborative reproduction upon marriage—a currently fragile though still preferred institution—would be a useful precursor to any action. To preserve the full, traditional understanding of marriage and parenting, a state could choose to ban collaborative reproduction even for the married, and especially if it found that it might detrimentally affect marriage. A state might also choose to allow married persons to resort to collaborative reproduction only after a determination of infertility, mandatory counseling for all parties, and resolution of inquiries similar to some of those used in the adoption context regarding the parties' suitability for parenthood. This would mirror the direction taken by one of the surrogacy statutes proposed in the Uniform Status of Children of Assisted Conception Act.[404]

Sixth, to combat some of the larger and less tangible social problems associated with collaborative reproduction, a complex legislative strategy might act to take some of the choices or information about donors out of the process. Even to suggest this is to realize how directly such a strategy strikes at the value of having choices—a value evident in many public conversations about sexual relations and family forms. This approach also necessitates the hard work of deciding the kinds of knowledge that should be available to intending parents, as well as the social implications of those categories of knowledge included. Should we include race? Health and disabilities? Education and employment? All of these categories are fraught with controversy. Still, the notion of prohibiting parents from seeking "designer babies" already has some supporters. In 2000, the California Legislature considered, but failed to pass, a bill that would have forbidden intending parents from choosing gamete donors based on the donor's physical or psychological profile.[405] Echoes of support for such regulation might also be found in scientists' reluctance to employ pre-implantation genetic diagnoses for reasons other than physical health.[406]

Finally, legislation might also seek to reduce the purely economic motivations of egg and sperm donation by capping donor compensation. At the very least, such regulation could demand greater efforts to comply with state laws forbidding the sale of body parts. Clinics would be required to demonstrate a correlation between the costs of obtaining or processing donations and the costs charged to intending parents.

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[404] UNIFORM STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT OF 1988 § 5 (Alt. A), 9B U.L.A. 184 (Supp. 1999).

[405] *See* S.B. 1630, § 1703 (Cal. 2000)

[406] *See* Tanner, *supra* note 158, at 2 (noting that defenders of genetic testing proffer health reasons for testing, not designer baby rationales).

If legislation took some of the "choosing" out of collaborative reproduction and perhaps simultaneously took some of the money out of it, lawmakers would have addressed a host of persistent worries about collaborative reproduction concerning elitism, predetermination, and standardization. They would also likely find that, while collaborative reproduction would continue, it would occur much less frequently.

Surely, it is difficult to approach the topic of regulating collaborative reproduction in a nation that seems already to have voted with its feet. It is also difficult to approach a topic so fraught with human longing. On the other hand, it is possible that Americans have not "voted," but have rather drifted to the place where they are now. Americans have not yet turned their full attention to the implications of collaborative reproduction. The cloning debate provides an immediate opportunity and an imperative to focus. It provides the occasion to review the deepest values and paradigms in existing family law. It is time to reconsider collaborative reproduction, before even attempts to outlaw "hitting the ground"[407] are preempted.

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[407] BERRY, *supra* note 1, at 141.

ARTICLE

REDEFINING REALTOR RELATIONSHIPS AND RESPONSIBILITIES: THE FAILURE OF STATE REGULATORY RESPONSES

ANN MORALES OLAZÁBAL*

For much of the twentieth century, residential real estate transactions conformed to a "traditional" model—the seller engaged a broker, who listed the home in a multiple listing service, where it was noticed and purchased by a buyer, with a commission paid to the broker by the seller from the sale proceeds. While the listing/selling broker model endured for decades, it was laden with problems—it left the buyer unrepresented, created agency relationships that were counterintuitive to the parties, and often left both the consumer and realtor unsure of the precise nature of their legal relationship. Over the last fifteen years, state legislatures have set out to address these ills, enacting legislation to increase disclosure requirements, create new realtor roles, and redefine existing ones. While these reforms have added consumer choice and flexibility to the marketplace, they have not done enough to alleviate consumer confusion. After providing a comprehensive survey of state reforms, this Article argues that new laws must focus on imposing concrete duties upon licensees—most notably, other-party duties—in order to provide meaningful consumer protection. Indeed, rather than relying on increased disclosure requirements and broader consumer choice, states must enact laws that proactively protect buyers and sellers in order to eliminate the confusion produced by both the traditional model and a diverse and complicated set of reforms.

I. INTRODUCTION

Today's real estate brokers and salespeople play an integral role in an exceedingly common business transaction: the purchase and sale of residential real estate. In 2001, over 72 million families owned homes, reflecting the highest American homeownership rate ever, 67.8%.[1] Also in 2001, more than 6.2 million single-family homes were sold, and nearly four out of five consumers used real estate brokers to assist them with either their purchase or sale or both.[2]

For much of the twentieth century, residential real estate transactions tended to conform to a specific "traditional" model—the seller engaged a

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[1] KEVIN J. THORPE, 2002 NATIONAL ASSOCIATION OF REALTORS® PROFILE OF HOME BUYERS AND SELLERS 2 (Kate Anderson ed., 2002).

[2] *Id.* at 2, 5.

real estate broker, the "listing broker," who listed the home in a multiple listing service, where it was noticed by a "cooperating" or "selling" broker, shown to prospective purchasers, and ultimately purchased by one of them, with a commission paid to the brokers by the seller from the sale proceeds.[3] In this classic setting, the selling broker was a subagent of the seller through the multiple listing contract and an agreement to split the commission.[4] This traditional listing/selling broker model—where the buyer typically went unrepresented in the transaction—was the norm.[5]

As the form and substance of the industry expanded, and realtors became more central to the real estate transaction, their precise duties and loyalties became less clear. Commentators have for some time agreed that the traditional listing/selling broker model creates agency relationships that are counterintuitive to the parties and that, all too often, neither consumer nor realtor seems to know exactly what is expected or required within the context of the legal relationship.[6] The agent that works with the buyer is, in fact, often a seller's subagent.[7] This could easily be overlooked by the seller (who could be held vicariously liable for the licensee's conduct), misunderstood by the buyer (who may believe that the agent working with her actually represents her), and sometimes even confused by the subagent or licensee (who may also erroneously see her role as "representing" the buyer).

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[3] L.A. REG'L OFF., FED. TRADE COMM'N, RESIDENTIAL REAL ESTATE BROKERAGE INDUSTRY 7, 9 (Dec. 1983) [hereinafter "FTC REPORT"]. For example, in the period from 1978 to 1981, 81% of sellers of single-family homes engaged brokers to assist them in selling their homes, 92% of sellers using brokers had their homes listed in multiple listing services, and 66% of sales involved cooperating brokers. *Id.* at 8 fig. I-1.

[4] *Id.* at 18, 142, 176, 180.

[5] *Id.* at 7, 22–24.

[6] *See, e.g.*, Robert S. Hulett, *New Real Estate Legislation Includes Sweeping Changes*, IND. LAW., June 23, 1999, at 13 (discussing discomfort and confusion experienced by agents and buyers regarding duties under subagency practice); J. Clark Pendergrass, Note, *The Real Estate Consumer's Agency and Disclosure Act: The Case Against Dual Agency*, 48 ALA. L. REV. 277, 277 (1996) ("Confusion among home buyers and sellers as to the real estate broker's role in residential real estate transactions is a problem common to Alabama and the nation."); Roy T. Black, *Proposed Alternatives to Traditional Real Property Agency: Restructuring the Brokerage Relationship*, 22 REAL EST. L.J. 201, 205 (1994) (coining the term "accidental agency" for the situation where unintending seller's agents or subagents are deemed by the buyer and/or the court to be the buyer's agent); Guy P. Wolf & Marianne M. Jennings, *Seller/Broker Liability in Multiple Listing Service Real Estate Sales: A Case for Uniform Disclosure*, 20 REAL EST. L.J. 22, 31 (1991) ("even experienced real estate brokers are not fully aware of the agency relationships created in real estate transactions . . . nor can they be certain of the extent of their duties and liabilities."); Matthew M. Collette, Note, *Subagency in Residential Real Estate Brokerage: A Proposal to End the Struggle with Reality*, 61 S. CAL. L. REV. 399, 403 (1988) (describing the traditional subagency relationship as "counterintuitive in light of actual experience."); Joseph M. Grohman, *A Reassessment of the Selling Broker's Agency Relationship with the Purchaser*, 61 ST. JOHN'S L. REV. 560, 581–84 (1987); Paula C. Murray, *The Real Estate Broker and the Buyer: Negligence and the Duty to Investigate*, 32 VILL. L. REV. 939, 947–48 (1987); FTC REPORT, *supra* note 3 at 22–24, 69.

[7] *See generally* FTC REPORT, *supra* note 3.

Contributing to the confusion, there is very little standardization in licensing laws and agency rules regulating realtors.[8] Moreover, judicial decisions regarding realtor liability are far from uniform; the case law in this area was and continues to be in a state of disarray in many jurisdictions.

These problems have not gone unnoticed. Beginning more than a decade ago, state legislators enacted a variety of new initiatives to address many of the ills created by the traditional model. Most focused on requiring disclosure of the realtor's agency relationship to the consumer; others went much further, redefining the role of the real estate licensee, thereby ostensibly benefiting both licensees and consumers.[9] Beginning in the mid-1990s, many state legislatures and administrative agencies began to limit realtor liability by creating statutory safe harbors and by explicitly defining realtors' duties to both clients and non-clients. Forms of representation beyond the traditional model began to surface and gain legal recognition. Among them is the "buyer's broker," who is engaged and paid by the buyer, and whose fiduciary duties run exclusively to the buyer.[10] Most recently, a number of states have passed laws that clear the way for real estate brokers to act in a "non-agent" capacity, essentially as agents of the transaction rather than of either of the parties, owing reduced fiduciary obligations, if any.[11]

Very little has been written about these new forms of realtor "representation," or "non-representation," in part due to their novelty and the resulting dearth of court analysis.[12] Nonetheless, a growing number of real estate licensees can now operate as statutorily limited real estate agents, sheltered from the decade-old explosion of realtor liability lawsuits.[13] In evaluating the efficacy of this wave of reform, regulators should examine what role the new real estate licensee plays and ask whether there is sound public policy behind the statutorily created "non-

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[8] *See infra* Part IV.

[9] *See* Natasha Washington, *'Broker Bill' Intended to Inform Consumers*, DAILY OKLAHOMAN, June 6, 1999, at Real Estate 3; Kenneth R. Harney, *Study Faults Most State Agent-Disclosure Laws*, WASH. POST, July 4, 1992, at E1; Ruth Ryon, *New State Laws Assist, Confuse Professionals*, L.A. TIMES, Dec. 20, 1987, at Real Estate 20. California was one of the first states to pass disclosure legislation. *See infra* note 250.

[10] Katherine A. Pancak et al., *Real Estate Agency Reform: Meeting the Needs of Buyers, Sellers, and Brokers*, 25 REAL EST. L.J. 345 (1997).

[11] *See infra* notes 128–144 and accompanying text.

[12] Several earlier articles generally describe these new forms of real estate agency representation and non-representation. *See generally* Patricia A. Wilson, *NonAgent Brokerage: Real Estate Agents Missing in Action*, 52 OKLA. L. REV. 85 (1999); Pancak, *supra* note 10; Ronald Benton Brown et al., *Real Estate Brokerage: Recent Changes in Relationships and a Proposed Cure*, 29 CREIGHTON L. REV. 25 (1995); Black, *supra* note 6.

[13] *See* Ann Morales Olazábal & René Sacasas, *Real Estate Agent as "Superbroker": Defining and Bridging the Gap Between Residential Realtors' Abilities and Liabilities in the New Millennium*, 30 REAL EST. L.J. 173 (Winter 2001–2002) (noting that the number of reported decisions involving real estate salesperson or broker defendants for the years 1987–2000, as compared with the previous ten years, signals an "explosion" of realtor liability litigation.)

agent." It is also important to consider whether these reforms are serving realtor interests at the expense of consumers, whether consumers are properly educated regarding the new realtor liability limitations, and whether the existing disclosure statutes are sufficient.

Appeals for reform of the real estate agency system, at least in the residential context, have been made on numerous occasions over the past decade and a half.[14] Rather than calling for widespread reform of a largely entrenched, highly political system,[15] this Article examines the recent changes to real estate licensing laws, analyzing the various state systems and, in so doing, provides the reader with a framework for comparing the individual state statutes and regulatory schemes. The Article also identifies those practices and procedures in place that appear to be best suited to this complicated setting, and it points out state statutes that are clearly deficient.

The author reviewed all fifty states' licensing laws and relevant administrative code provisions. The Article thus analyzes all existing state legislation and regulation of real estate licensees, as well as a number of germane judicial opinions. As a backdrop, Part II more fully develops the history of real estate agency representation. Part III looks at the problems associated with the traditional listing/selling broker model. Part IV follows with a classification of the fifty states' current statutory models for agency representation, by number and type of realtor roles available, reviewing each of the various options available in today's marketplace. Part V considers the default level of representation that is automatically afforded to an unrepresented party, concluding that, despite attempts at reform, the vast majority of state regulatory schemes still encourage the traditional model. Part VI quantifies the level of consumer protection provided by state statutes by categorizing each state according to the number and weight of duties owed by licensees to parties other than their clients, or to their clients when the agent is acting other than in a true agency capacity.

After all fifty regulatory settings have been viewed through these filters, Part VII considers current real estate agency disclosure statutes, reviewing the various approaches taken to consumer education about new "agency" relationships and specific client representations of individual licensees. This Part concludes that, regardless of type, required disclo-

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[14] *See, e.g.*, Wilson, *supra* note 12, at 100–07; Brown, *supra* note 12, at 79–83; Michael K. Braswell & Stephen L. Poe, *Residential Real Estate Brokerage Industry: A Proposal for Reform*, 30 AM. BUS. L. J. 271, 326–33 (1992); Collette, *supra* note 6, at 449–57.

[15] The larger the profession, the more likely that the state will regulate it, and that such regulation will be in the interests of the regulated occupation. *See, e.g.*, KENNETH J. MEIER, REGULATION: POLITICS, BUREAUCRACY, AND ECONOMICS 175–201 (1985). For the proposition that "majority rule combined with problems of organizing change implies that some policy changes will occur rarely," see Thomas Romer & Howard Rosenthal, *Modern Political Economy and the Study of Regulation, in* PUBLIC REGULATION: NEW PERSPECTIVES ON INSTITUTIONS AND POLICIES 93 (Elizabeth E. Bailey ed., 1987).

sures likely do not suffice to adequately alert consumers to their new options nor to warn them of the inherent limitations of liability and other concerns. Part VIII then examines the counterintuitive relationships and consumer confusion that remain and concludes that these are unlikely to be resolved by disclosure requirements and consumer education. The Article thus concludes that disclosure should not be viewed as a viable alternative to providing substantive statutory protections for unrepresented parties in the form of substantial other-party-duties. Instead, states should concentrate on further bolstering licensee duties.

II. HISTORICAL UNDERPINNINGS

The real estate men[16] of the late nineteenth century tended to function mostly as speculators who purchased property from the seller and then sold it at a profit directly to buyers, as auctioneers or as mere middlemen bringing buyers and sellers together through early exchanges modeled after the then-primitive stock exchanges.[17] At the turn of the century, real estate dealers organized and eventually agreed that contractual listing arrangements and cooperative selling via local multiple listing boards or exchanges would best serve the fledgling profession.[18] Thus, beginning in that period, the principle of exclusive agency arrangements for the listing of real estate for sale was generally deemed "correct,"[19] and from 1912 forward, the National Association of Real Estate Boards ("NAREB")[20] encouraged universal adoption of the exclusive seller agency relationship.[21] In addition, it adopted the practice of written listing (seller agency) agreements, allowing brokers to participate in the first

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[16] PEARL JANET DAVIES, REAL ESTATE IN AMERICAN HISTORY ix (1958).

[17] *Id.* at 17–23, 55, 101–03. As early as the 1860s, real estate firms specializing in property management had also surfaced. *See id.* at 32.

[18] *Id.* at 98–99, 114–15. One practitioner of the time warned that "the curse of the busines were [sic] brokers who offer property without authority, not knowing whether they can deliver." *Id.* at 114.

[19] *Id.* at 114.

[20] The first association of real estate dealers was the National Association of Real Estate Exchanges, formed in Chicago in 1908. FTC REPORT, *supra* note 3, at 85. This group later became known as NAREB. The name was changed again in 1972 to the National Association of REALTORS® ("NAR"). *Id.* NAR is currently the nation's largest professional association consisting in 2001 of more than 760,000 real estate professionals. Kevin A. Roth, 2001 MEMBER PROFILE: DEMOGRAPHIC, ECONOMIC, AND PROFESSIONAL CHARACTERISTICS OF REALTORS® (2001) [hereinafter NAR MEMBER PROFILE].

[21] DAVIES, *supra* note 16, at 114. As a matter of fact, the exclusive listing contract favored by NAR was not the predominant form of listing agreement until sometime after 1950. FTC REPORT, *supra* note 3, at 109. By the late 1970s, an average of ninety-three percent of real estate brokerage firms were members of the Multiple Listing Service ("MLS"), which does not accept open listings and can also exclude "exclusive agency" listings. *Id.* at 109, 131. MLS's preferred form of listing is the "exclusive right to sell," which requires the seller to pay a commission to the broker if the property is sold during the listing period, even if the seller finds the buyer on her own. *Id.* at 17, 131. For a more complete exposition of the history of MLS and its requirements, see generally *id.* at 107–42.

multiple listing systems.[22] By 1910, many local real estate boards had embraced the written listing agreement with exclusive seller agency and cooperative selling, as well as commonly accepted rules on commission splitting between listing and selling brokers.[23]

In the period from 1910 to 1919, NAREB promoted state licensing laws[24] and promulgated a national code of ethics,[25] both of which were originally designed to exclude deceptive or incompetent practitioners.[26] At or about that same time, the designation "Realtor®"[27] was coined to designate those real estate men who were members of NAREB and who had adopted its code of ethics.[28] Subsequently in the 1920s through the 1940s, NAREB, the regional and local boards, and individual realtors were instrumental in a host of state and national projects that improved the position of the middle class homeowner.[29] These reforms also insured realtors' long-term success by creating perpetual demand for residential realty services in the marketplace.

The initial push towards establishing regulatory licensing laws also came in the 1920s, and by the late 1950s all states except Rhode Island and New Hampshire had such statutes.[30] By the end of the 1970s, every state had a licensing statute or regulatory scheme addressing qualifications for obtaining the necessary real estate salesperson's or broker's license, and regulations governing realtors' activities and conduct.[31] These statutes typi-

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[22] DAVIES, *supra* note 16, at 114.

[23] *Id.* at 115.

[24] S. DAVID YOUNG, RULE OF EXPERTS 14 (1987) (citing 1 DANIEL B. HOGAN, THE REGULATION OF PSYCHOTHERAPISTS 228 (1979)) ("110 statutes licensing 24 occupations were enacted between 1911 and 1915 alone").

[25] DAVIES, *supra* note 16, at 100. NAREB's 1913 code of ethics enumerated "The Dut[ies] of Real Estate Men Toward Their Clients" and "The Dut[ies] of a Real Estate Man to Other Real Estate Men." *Id.*

[26] *Id.* at 101 (stating that the primary objective of ethics code was "enforcement of good practice"). For the proposition that any industry group with political power will seek to control entry via regulation, including occupational licensing, see generally George J. Stigler, *Theory of Economic Regulation*, 2 BELL J. ECON. & MANAG. SCI. 3, 5, 13 (1971).

[27] The appellation "REALTOR®" is a registered membership mark that identifies and may be used only by real estate salespersons, brokers, and appraisers who are members of NAR and who subscribe to its code of ethics. The generic legal term "realtor," as used in the case law and in other legal commentary, is used throughout this Article to refer to any real estate licensee, whether or not that realtor is a REALTOR® member of NAR.

[28] DAVIES, *supra* note 16, at 110–14.

[29] These major initiatives included modernizing and establishing limitations on real estate taxation, creating federally funded home mortgage insurance, creating a stable long term mortgage money supply, inventing and federally approving of mortgages with longer terms than five years, and reducing the required down payment from one-third to twenty percent. *Id.* at 142, 169–72, 174–79, 207. *See also* FLA. ASS'N OF REALTORS®, HISTORY OF THE FLORIDA ASSOCIATION OF REALTORS® 5 (1987).

[30] DAVIES, *supra* note 16, at 104, 164 (citing the Supreme Court's ruling in Bratton v. Chandler, 260 U.S. 110 (1922) as the impetus for instituting state licensing laws governing real estate personnel).

[31] FTC REPORT, *supra* note 3, at 101 (stating that all states and the District of Columbia have state licensure laws that include "requirements and proscriptions concerning the business practices of real estate licensees").

cally listed those activities that were prohibited, on penalty of disciplinary action, rather than by affirmatively dictating realtors' duties to the public.[32] By implication, they only recognized the historical listing/cooperating broker model.

State licensing statutes did not, however, dictate the form of agency representation then prevalent. Instead, the entrenchment of the listing/cooperating or "traditional" agency representation model was a direct result of the multiple listing systems in use nationwide.[33] For years, these dominant real estate exchanges had permitted cooperating or selling agents (those working with buyers) to split the commission to be paid by the seller only if the cooperating agent agreed to be a subagent of the seller.[34] Under this system, neither buyer nor seller had to have cash in hand to pay for the services of the realtor(s) with whom they worked; rather, all real estate agents were paid out of the proceeds at closing, if and when a willing buyer and seller had been matched. This encouraged homeownership, furthering the American Dream by facilitating real estate sales to people of all income levels.[35] It had a dark side, however: the listing/selling agency model by definition left the buyer unrepresented.[36] It also created unintended potential liabilities for sellers and a lack of clarity for licensees in determining to whom their fiduciary obligations ran.[37] These problems, inherent in the seller subagency model, are discussed below.

III. The Dark Side of Seller Subagency Practice

The difficulties associated with the traditional seller subagency representational model arise from its failure to conform to the practical reality of the relationships between licensees and the consumers with whom they work.[38] It is generally acknowledged that the three primary problems engendered by subagency practice are: (1) buyers are unfairly left unrepresented in the transaction, usually without realizing it; (2) sellers are in

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[32] In 1978, licensing statutes typically regulated realtors' conduct by establishing grounds for revocation or suspension of their licenses. *See, e.g.*, FLA STAT. ch. 475.25 (1977); 63 PA. CONS. STAT. § 440 (1978).

[33] FTC REPORT, *supra* note 3, at 15, 84, 142.

[34] The offer of subagency was originally express. In 1976, the California Supreme Court ruled that NAR could no longer restrict MLS access to REALTORS®. Marin County Bd. of Realtors v. Palsson, 549 P.2d 833, 845 (Cal. 1976). Thereafter in 1980, the NAR changed the MLS concept to a "blanket unilateral offer of subagency." Collette, *supra* note 6, at 431. *See also* Douglas C. Kaplan, *Phoenix*, 69 FLA. BAR J. 77, 77 (1995) (calling the offer "compulsory").

[35] *See generally* Murray, *supra* note 6, at 956 (noting that payment of the brokerage fee is the crucial element in establishing a broker/buyer relationship and discussing cash flow problems faced by buyers in the context of engaging realtors).

[36] *See* Grohman, *supra* note 6, at 563 ("[T]he purchaser, without an attorney, is the least protected and most vulnerable party in a real estate transaction.").

[37] *See infra* notes 49–57 and accompanying text.

[38] *See* Collette, *supra* note 6, at 403–04.

peril of being held vicariously liable for unknown agents' conduct; and (3) licensees may be at risk of owing fiduciary duties to two principals whose positions are adversarial, due in large part to imprecise, dynamic common law obligations as well as the possibility that unintended and undisclosed dual agency may be imposed judicially after-the-fact.[39] Each of these issues is discussed in more detail in the subsections that follow.

A. The Problem of the Unrepresented Buyer

Historically, in most jurisdictions where two real estate licensees ostensibly "represented" the parties in a residential real estate transaction, both licensees' fiduciary obligations ran to the seller only.[40] Both realtors—including the one that "worked with" the buyer—had an obligation to obtain the best price for the seller.[41] Buyers were owed no duties of loyalty, confidentiality, or disclosure of material facts about the transaction or the property.[42] Compounding the unfairness of this lopsided contractual setting, the buyer typically was unaware that he was unrepresented. To the contrary, in most cases the unrepresented buyer believed that the licensee with whom he worked—the selling or cooperating agent he had "engaged" and who had found the property for him—was actually his agent. Indeed, seventy-four percent of buyers surveyed in the early 1980s believed the cooperating broker represented them and not the seller.[43] Not remarkably given the practical setting, more than seventy percent of sellers held the same erroneous belief.[44]

Probably the most common and unfortunate consequence of this situation was that buyers whose interests were not being protected freely revealed vital confidential information, unintentionally compromising the integrity of the negotiation and the fairness of its result. For example, seventy-three percent of buyers surveyed in the 1980s reported telling the cooperating broker the highest price they were willing to pay for a home.[45] There is some indication that not all cooperating brokers actually followed through with their fiduciary obligation to divulge this critical piece of information to the seller during negotiations.[46] Nonetheless, the

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[39] *See* Pancak, *supra* note 10, at 345; Collette, *supra* note 6, at 404, 434–35.

[40] *See, e.g.*, Pancak, *supra* note 10, at 349. It is noteworthy that a minority of jurisdictions have for some time adopted the view that the broker engaged by and working with the buyer is the buyer's agent from a legal standpoint. *See* Collette, *supra* note 6, at 415. *See also infra* note 172 (referring to Arizona's common law practice consistent with this idea). The unrepresented buyer, then, is not a problem associated with traditional subagency practice in these states.

[41] *See* Collette, *supra* note 6, at 424.

[42] *Id.* at 448.

[43] FTC REPORT, *supra* note 3, at 69. *See also* Collette, *supra* note 6, at 99.

[44] FTC REPORT, *supra* note 3, at 191.

[45] *Id.* at 3, 27.

[46] Some commentators have opined that from time to time cooperating brokers, also confused by the counterintuitive nature of the actual agency relationship, may have acted

inherent conflict of interest posed by the cooperating broker working with the buyer but being legally obligated as a seller subagent created a real economic hazard—particularly for the buyer who was not represented but who mistakenly believed he was.[47] Making matters worse, with no fiduciary duties running in their favor, buyers generally ended up with no legal recourse when details of the transaction were negligently misrepresented, or when their best interests were simply left unattended.[48]

B. Problems for Sellers

The chief predicament subagency practice created for sellers was vicarious liability for subagent conduct. In those jurisdictions that did provide some legal recourse for the buyer, the possibility of a seller being held liable for the misrepresentations or omissions of a subagent who worked exclusively with the buyer—and whom the seller may never have met—could become a costly shock.[49]

The root of this evil was the use of "form listing agreements," which typically included an express grant of authority to the listing agent to appoint subagents to assist the listing agent in procuring a buyer.[50] Through the Multiple Listing Service ("MLS"), then, the cooperating broker who found a buyer automatically became the seller's subagent.[51] The seller's so-called "consent" to appointment of a subagent was part and parcel of a form listing agreement containing many other provisions of greater interest to seller and broker alike (such as the amount of commission and proposed listing price). As a result, the buyer's consent to subagency may well have been an automatic consequence of signing a listing agreement rather than a common subject of discussion between broker and agent. This is evident from the fact that surveyed sellers generally were unaware of the legal relationship with and concomitant vicarious liability for cooperating brokers who were their subagents.[52] Therefore, this same subagency practice that was detrimental to buyers also had its negative consequences for sellers, albeit for different reasons

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in the buyer's best interest. *See, e.g.*, Collette, *supra* note 6, at 418–19.

[47] The cooperating broker (seller's subagent) was actually caught in a classic "catch 22" because she was also at risk for being sued by the seller for breach of fiduciary duty, either for failure to divulge the buyer's confidential information or for divulging the seller's lowest selling price. *Id.* at 405.

[48] *See infra* note 207 and accompanying text; Speigner v. Howard, 502 So. 2d 367, 371 (Ala. 1987).

[49] *See, e.g.*, McCarty v. Lincoln Green, Inc., 620 P.2d 1221, 1224 (Mont. 1980) (holding vendor vicariously liable for misrepresentations of seller's agent working with buyers); Dyer v. Johnson, 757 P.2d 178, 181 (Colo. Ct. App. 1988) (holding sellers vicariously liable to buyers for dual agent's misrepresentations); Denlinger v. Mudgett, 559 A.2d 661, 662 (Vt. 1989) (holding vendors vicariously liable for misrepresentations of their agent).

[50] *See* Braswell, *supra* note 14, at 275; Collette, *supra* note 6, at 406.

[51] Collette, *supra* note 6, at 406.

[52] *See, e.g.*, Collette, *supra* note 6, at 446 (citing FTC REPORT, *supra* note 3, at 191).

and perhaps in different jurisdictions, depending on the state of the common law.[53]

C. Problems for Brokers

A third interrelated problem that arose out of seller subagency practice was the fact that courts actually began to hold cooperating brokers liable to buyers.[54] This is true despite the fact that the cooperating licensee was by contract an agent of the seller, and the judicial creation of a fiduciary duty in favor of the buyer put this licensee in the untenable and legally impermissible position of acting as an undisclosed dual agent.[55]

In addition to a small but growing body of case law stretching to hold seller's subagents liable to buyers, in a few instances even a seller's exclusive agent, the listing agent, was held liable to a buyer.[56] Consistent with the nature of a precedent-based jurisprudential system, and in light of the apparently growing propensity of both sellers and buyers to sue, case law relevant to real estate agents' duties was expanding quickly in a very piecemeal fashion.[57]

The inevitable result was growing uncertainty on the part of realtors as to the precise obligations they owed, to whom, and under what conditions.[58] Thus, subagency practice was not only unfair to buyers and occasionally problematic for sellers, but it had downsides for licensees as well. Eventually, something had to change.

IV. FROM TRADITIONAL AGENCY AND SUBAGENCY TO NON-AGENCY FORMS OF REPRESENTATION[59]

In the early 1990s, under increasing pressure from consumer protection organizations and entrepreneurial brokers who conceived of an "exclusive buyer's agent" market niche for themselves, the National Association of Realtors ("NAR") studied agency alternatives. In 1992, the

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[53] *Compare* cases cited *supra* note 49, *with* Harben v. Hutton, 739 S.W.2d 602 (Tenn. Ct. App. 1987) (indicating that licensee working with buyers had no contact with sellers, so sellers were not liable for his misrepresentation of extent of renovations).

[54] *See infra* note 82.

[55] For a complete discussion of the negative aspects of subagency practice, see Collette, *supra note* 6, at 435–36.

[56] *See, e.g.*, Svendsen v. Stock, 979 P.2d 476, 502 (Wash. Ct. App. 1999); Lawyers Title Ins. Corp. v. Vella, 570 So. 2d 578, 584-85 (Ala. 1990); Reda v. Sincaban, 426 N.W.2d 100, 103 (Wis. Ct. App. 1988); Ernestine v. Baker, 515 So.2d 826, 827-28 (La. Ct. App. 1987).

[57] *See* Olazábal & Sacasas, *supra* note 13.

[58] One commentator pointed out that decisions relating to subagency had put California case law into a "state of abject confusion." Collette, *supra* note 6, at 412. As California's basic agency law and system of seller subagency was no different than what was in place across the nation, this state of affairs was not an isolated problem.

[59] For a listing of each state by realtor role, default position, and other-party duties, see *infra* Appendix.

group agreed to eliminate seller-subagency as a condition of participation in a regional or local multiple listing service.[60] This very practical deregulation paved the way for the new forms of agency representation that are discussed below.[61]

State licensing statutes now contemplate a variety of agency relationships between licensees and prospective buyers and sellers. Some states employ a quasi-traditional agency model that differs very little from the historically used listing/cooperating broker representation model. These states, referred to as Type I states, generally recognize and permit only four kinds of agency relationships: listing brokers representing sellers, subagents representing buyers, buyer's brokers, and disclosed dual agents. Type I states occupy one end of the spectrum of consumer choice and are in the minority.

A larger number of states, designated Type II states, have added to the foregoing forms of representation a hybrid realtor-client relationship called "designated agency."[62] This practice is similar to the disclosed dual agency that is practiced in Type I states, but rather than a single broker or licensee representing both parties to the transaction, different licensees affiliated with the same broker are assigned or designated to "separately" represent the buyer and seller in so-called "intra-company" or "in-house" sales. Designated agency, while somewhat flawed by definition and certainly not as protective as exclusive buyer agency, may provide the buyer with better representation than he would have had with simple subagency or even disclosed dual agency.

Type III states have taken an altogether different approach to realtor representation. Rather than focus on the realtor's role and attendant du-

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[60] Pancak, *supra* note 10, at 352 (citing NAR HANDBOOK ON MULTIPLE LISTING POLICY—RESIDENTIAL §1.2 (1993)). Accordingly, since 1992, NAR's policy with respect to MLS has been "Cooperation and Compensation" with and for selling brokers. *Id.*

[61] In 1992 NAR appointed an advisory group to study non-agency as an option. The report ultimately issued by that group recommended a number of reforms to be promoted and lobbied for in the individual states. These included creating a "statutory agency" relationship with express well-defined duties along with supersession of the common law of agency, providing clearer guidance on disclosed dual agency practice and expressly allowing designated agency, and promulgating agency disclosure forms and rules. NAT'L ASS'N OF REALTORS®, REPORT OF THE PRESIDENTIAL ADVISORY GROUP ON THE FACILITATOR/NON-AGENCY CONCEPT (1993), *cited in* Pancak, *supra* note 10, at 352.

[62] The agency relationships available in each of the categories tend to be only somewhat cumulative. Many Type IV statutes also incorporate dual agency and/or designated agency practice. *See, e.g.*, GA. CODE ANN. § 10-6A-3 (2000) (defining customers and clients, also providing for sellers' agents, buyers' agents, dual agency, designated agency, and transaction brokerage); N.M. ADMIN. CODE tit. 16, § 61.1.7 (2001) (defining clients and customers and providing for exclusive agents, dual agents/facilitators, designated agents, and nonagency options). But not all do. *See, e.g.*, FLA. STAT. ch. 475.278 (2000) (no dual or designated agency); KAN. STAT. ANN. § 58-30,103 (2001) (designated but no dual agency); MINN. STAT. § 82.197(4) (2001) (no designated agency); N.J. ADMIN. CODE tit. 11, § 5-6.9 (2002) (no provision for designated agency); MD. CODE ANN., BUS. OCC. & PROF. § 17-530(a)(4) (2002) ("intra-company agent" is not designated but dual agent); OKL. STAT. tit. 59, §§ 858-351 to -355 (2000) (no dual or designated agency).

ties, Type III states' laws divide residential realty consumers into "customers" and "clients" who are afforded different levels of service and legal duties. Realtors are no longer true agents; instead their duties and obligations—as well as those areas in which they have no responsibilities at all—are set forth in state statutes and regulations. Clients in some Type III states are owed more numerous and specific duties than they would have been under the common law of agency, but in a number of Type III states, customers—those not represented—end up worse off than they would have been even under the confused state of the common law before legislative or administrative intervention.

Finally, on the other end of the choice spectrum, a full half of states have ventured into somewhat uncharted territory by sanctioning various other limited forms of agency that do not qualify as fiduciary relationships under the common law, including "transaction brokers," "facilitators," and "non-agents." These states are denominated Type IV. While in some states these new forms of representation have served to ameliorate the subagency problem, in others the focus of the new "limited agency" relationship appears to be on reducing realtor liability rather than improving the lot of the consumer.

The various forms of agency representation permitted by the fifty states' statutes and regulations governing real estate licensees, as well as related issues, are addressed in more detail below.

A. Type I: Quasi-Traditional Representation Model Incorporating Buyer Agency and Statutorily Recognized Disclosed Dual Agency

Type I states, while still allowing and, in fact, encouraging traditional seller subagency, have legislated so as to permit parties to the residential real estate transaction to select from two new options. These are the buyer's broker and disclosed dual agency.

1. Exclusive Agents Represent Buyers and Sellers Separately

Today, no state statutory or regulatory scheme retains only the traditional listing/selling model in which all agents always represent the seller. Instead, every state's code has recognized the existence of the buyer's agent[63] in either express or implied terms.[64] Realtors who act as

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[63] This change in the historical representation model did not come about without a struggle. *See, e.g.*, John Curley, *Bill French Smoothed Out a Bumpy Life After Becoming Sold on the Buyer*, ST. LOUIS POST-DISPATCH, Mar. 4, 2001, at E1 (quoting Buyer's Agent, Incorporated founder Tom Hathaway, as saying "when I started, the Board of Realtors threatened to run me out of town."); Velarde v. Osborn, No. 37789-2-I, 1997 Wash. App. LEXIS 1404 (Aug. 25, 1997) (evaluating a defamation suit between realtors over opinions regarding legality of "nonagency options"); FTC REPORT, *supra* note 3, at 20–22 (discussing travails of "alternative brokers").

[64] Some states' licensing statutes expressly provide for buyer agency in addition to

fiduciaries for either a buyer or a seller—but not both—in a residential real property transaction are sometimes called "single agents" or "exclusive agents."[65]

California's statute provides a good example of a Type I jurisdiction that has simply added buyers' brokers to the existing, traditional listing/selling agency scheme.[66] California contemplates that realtors working with buyers will represent sellers in a traditional cooperating broker role, absent an agreement to the contrary with the buyer.[67] The statute defines "selling agent" in terms reminiscent of the traditional model:

> "Selling agent" means a listing agent who acts alone, or an agent who acts in cooperation with a listing agent, and who sells or finds and obtains a buyer for the real property, or an agent who locates property for a buyer or who finds a buyer for a property for which no listing exists and presents an offer to purchase to the seller.[68]

Though the term "buyer's agent" or "buyer's broker" is left undefined in the state's licensing statute, the statute does provide that the selling agent

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seller agency. *See, e.g.*, HAW. ADMIN. R. 16-99-3.1(a) (2001) ("real estate broker who acts as the agent of the buyer"); KAN. STAT. ANN. § 58-30,102(f) (2001) (similar); OR. REV. STAT. § 696.800(1)(a)(B) (2001) (defining agent as, *inter alia*, a licensee with a "service contract with a buyer to represent the buyer"). Other states' statutes or regulations refer to buyer agency or the buyer's agent only by implication or only in required or approved forms. *See, e.g.*, LA. REV. STAT. ANN. §§ 9:3891 to -99 (West 2002) (implying that buyers may also enter into agency relationships with licensees); MASS. BD. OF REGISTRATION OF REAL EST. BROKERS & SALESPERSONS, MANDATORY AGENCY DISCLOSURE—AGENCY RELATIONSHIP (copy on file with author) (describing "buyer's agent"); MASS. GEN. LAWS ch. 112 §§ 87PP-87DDD1/2 (Law. Co-op. 2002); MASS. REGS. CODE tit. 254, §§ 2.00–7.00 (2002); UTAH ADMIN. CODE 162-6.1.11.2 (2002) (referring to "buyer's agent" without defining or otherwise establishing the role statutorily).

[65] *See, e.g.*, MISS. REAL EST. COMM'N R. & REGS. IV(E)(2)(i) (2001) (defining "single agency"); NEB. REV. STAT. § 76-2414 (2001) (defining "single agent"); N.M. ADMIN. CODE tit. 16, § 7.20 (2001) (defining "exclusive agency"). New Mexico is not a Type I state.

[66] CAL. CIV. CODE § 2079. Alaska's statute is similar, in that it contemplates seller's agents, buyer's agents, and disclosed dual agents only. *See* ALASKA STAT. § 08.88.396 (Michie 2001). *See also* ARK. CODE ANN. § 17-42-108 (Michie 2001); DEL. ADMIN. CODE tit. 24, ch. 2900 REC Rule 10.3.1 (2001) (silent as to dual agency); HAW. ADMIN. R. § 16-99-3.1 (2001); MASS. REGS. CODE tit. 254, § 3.00 (2001); MISS. REAL EST. COMM'N. R. & REGS., § IV (October 2001); NEB. REV. STAT. § 76-2401 (2001); N.Y. REAL PROP. LAW § 443(4) (McKinney 2001); R.I. GEN. LAWS § 5-20.6-1 (2001); S.C. CODE ANN. § 40-57-137(A) (Law. Co-op. 2000); UTAH ADMIN. CODE 162-6.1.11.1 (2001); VT. REAL EST. COMM'N R. 1.8 (2001); W.V. REAL EST. COMM'N, NOTICE OF AGENCY RELATIONSHIP (on file with author); *infra* note 172 (discussing Arizona's unique approach to seller and buyer agency).

[67] CAL. CIV. CODE §§ 2079.13–.24 (Deering 2001). *See also infra* Part V. California's statute provides that nothing therein precludes an agent from selecting some other form of agency relationship that is not expressly excluded by section 2079, as long as it is disclosed and confirmed as required by the statutory scheme. *See* CAL. CIV. CODE § 2079.20 (Deering 2001).

[68] *Id.* § 2079.13(n). *See also* MD. CODE ANN., BUS. OCC. & PROF. § 17-530(a)(3) (2001).

may "with a Buyer's consent, agree to act as agent for the Buyer only," thereby becoming a "buyer's agent."[69] Thus, according to the express statutory language, if the buyer fails to "consent" or the licensee fails to "agree" to a buyer's agency relationship, the licensee working with a buyer will presumably act as a subagent of the seller, just as she had in the traditional agency setting.[70]

California's licensing statute, like most of the other quasi-traditional Type I statutory schemes, does little to ensure that buyers are represented in a residential realty transaction.[71] California's Civil Code prohibits a selling agent who is also the listing agent from becoming a buyer's exclusive agent,[72] and it provides that a listing agent is *not* precluded from also being a selling agent (i.e., working with the prospective buyer) without becoming a dual agent.[73] These provisions ensure that a seller who lists her property with a realtor will be represented by an agent in the transaction, but they also have the effect of leaving the buyer unrepresented.[74]

Other Type I states are less explicit than California in ensuring that a seller will be represented by a realtor. As a practical matter, however, because most sellers list their properties for sale, they will have entered into an agency relationship with a real estate broker.[75] Therefore, express statutory protection of the seller is not critical. Like California, the other Type I states recognize the possibility of the buyer's broker but do nothing to promote buyer representation.[76] As a result, in Type I states, chances are quite good that a buyer will still work with a seller's subagent.

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[69] CAL. CIV. CODE § 2079.16 (Deering 2001).

[70] *See* Schmidt & Co. v. Berry, 228 Cal. Rptr. 689 (Ct. App. 1986) (citing 1 MILLER & STARR, CURRENT LAW OF CALIFORNIA REAL ESTATE § 4:18 (1985 Supp.)) (stating that there is an agency relationship between the cooperating broker and the seller).

[71] That said, all parties are now given at least constructive notice of the existence of any agency relationships so that any unrepresented party can either seek representation or proceed unrepresented with caution. CAL. CIV. CODE § 2079.16 (Deering 2001). See *infra* Part VII for a discussion of agency relationship disclosures.

[72] CAL. CIV. CODE § 2079.18 (West 2001).

[73] *Id.* § 2079.22.

[74] California's licensing statute permits the formation of other agency relationships not otherwise prohibited. *See* CAL. CIV. CODE § 2079.20 (Deering 2001). Presumably then, a seller could negotiate a listing agreement with a realtor that provides for something other than a (fiduciary) agency relationship.

[75] Eighty percent of home sellers use the services of a realtor. KEVIN A. ROTH, THE 2000 NAT'L ASS'N OF REALTORS® PROFILE OF BUYERS AND SELLERS 50 (2000) [hereinafter BUYERS AND SELLERS PROFILE]. Of the remaining sellers, four percent sell to a relative or friend, and sixteen percent sell to a stranger without the assistance of a real estate licensee. *Id.* Sellers who do not engage a realtor to market their properties, but who instead choose to sell "by owner," may be unrepresented as well. Undoubtedly, some buyers and sellers who are not "represented" by realtors have engaged the services of an attorney instead.

[76] The other Type I states are Alaska, Arkansas, Arizona, Delaware, Hawaii, Massachusetts, Missippi, Nebraska, New York, Rhode Island, South Carolina, Utah, Vermont, and West Virginia.

2. *Disclosed Dual Agency*

In addition to permitting subagency practice and authorizing exclusive buyer agency, Type I states (and nearly all other states) now also expressly allow some form of disclosed dual agency.[77] Dual agency can occur where (1) a single licensee represents both buyer and seller in the transaction, or (2) a brokerage firm represents both buyer and seller in the transaction, though different licensees might have brought the buyer and seller to the firm.[78] In a characteristic scenario, the prospective buyer "engages" a licensee to help her find a home.[79] As is commonplace, the licensee begins by showing the buyer properties listed by the licensee, so as to avoid splitting the commission if the buyer chooses one of these properties.[80] If the buyer selects a property listed by the licensee, a dual agency can result[81] if either the buyer has engaged the licensee as an exclusive buyer's broker, or a court imposes an implied agency relationship between the selling agent (seller's subagent) and the buyer *ex post facto*.[82]

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[77] Florida, which is a Type IV state, has expressly abolished the dual agent, disclosed or otherwise. FLA. STAT. ch. 475.01 (2001). Other states are silent on the topic of dual agency. *See, e.g.*, DEL. CODE ANN. tit. 24, § 2931 (2001); DEL REAL EST. COMM'N R. § 10.0 (2001) (Type I state).

[78] A majority of states expressly recognize and permit what they call the "in-house" or "intra-company" sale. This is also called "designated agency." *See infra* Part IV.B. Maryland's statute provides for intra-company agents but considers these licensees to be dual agents. MD. CODE ANN., BUS. OCC. & PROF. § 17-530(4) (2001).

[79] The use of the term "engage" in this Article is intended to be ambiguous. It is possible that the buyer will engage the licensee as a buyer's broker. It is more likely, however, that the buyer will seek the assistance of the licensee, who will share a commission out of the proceeds of the sale and will act either as a seller's subagent or a transaction broker or other type of non-agent. At least one state denominates a written client representation agreement a "brokerage engagement." GA. CODE ANN. § 10-6A-3(4) (2002).

Likewise, the term "represent" as used in these statutes is also vague and perhaps confusing. *See infra* note 301.

[80] Richard Kindleberger, *The Middlemen Get Put in the Middle*, BOSTON GLOBE, Dec. 12, 1992, at 37 (noting that "if a firm steers a buyer to one of its listings, it does not have to split the fee, typically 6 percent of the sale price"). *See also* FTC REPORT, *supra* note 3, at 7 (stating that a "broker commonly will inform a prospective buyer of the broker's own listings first").

[81] *See, e.g.*, R.I. GEN. LAWS § 5-20.6-8 (2001). Other results are possible as well. Recall that the seller is nearly always represented by a licensee in an agency capacity as a consequence of the listing agreement. If the licensee assisting the buyer has not entered into an exclusive agency agreement with him, the licensee may continue to work with the buyer while actually representing only the seller in a fiduciary capacity. This is the traditional setting.

[82] *See, e.g.*, Van Dusen v. Snead, 441 S.E.2d 207 (Va. 1994) (finding that a seller's agent was actually a "purchasers' agent" where buyers alleged they "engaged" the agent, and finding dual agency legally impossible); Runde v. Vigus Realty, Inc., 617 N.E.2d 572, 576 (Ind. App. 1993) (holding claim by buyers based on gratuitous agency was permitted to proceed against seller's agent); Lewis v. Long & Foster Real Est., Inc., 584 A.2d 1325, 1330 (Md. 1991) (explaining rationale for holding selling agents liable to buyers); Stefani v. Baird & Warner, 510 N.E.2d 65, 68 (Ill. App. Ct. 1987) (holding, where selling agent is engaged by buyer with respect to a particular property, she is deemed buyer's agent).

Other relatively recent cases have held sellers' agents liable to buyers on non-agency theories as well. *See, e.g.*, Carter v. Gugliuzzi, 716 A.2d 17, 21 (Vt. 1998) (affirming judgment

Type I states, like most other states, now expressly permit dual agency, provided that it is disclosed to the parties, and they consent to it in writing.[83] Statutes that recognize disclosed dual agency generally attempt to address the multiple master problem by creating a limited form of agency between a licensee and her clients, who have divergent interests.[84] In the disclosed dual agent setting, the licensee may owe some fiduciary obligations to both parties.[85] Typical statutes require the licensee to forewarn a buyer and seller who use the same agent that their interests conflict and that the licensee will not afford the same degree of loyalty or level of confidentiality as she would in the exclusive agency representation setting.[86] Dual agency provisions also often require the licensee to expressly advise the clients that they are not obligated to consent to dual agency.[87]

In reality, the dual agent disclosure requirement just codifies the common law rule prohibiting dual agency without consent of both principals.[88] Therefore, as Type I states have only added this option (in addi-

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for buyer against listing broker based on Consumer Fraud Act); Dawson v. Hummer, 649 N.E.2d 653, 662 (Ind. Ct. App. 1995) (stating that denying summary judgment for listing agent was proper where claim by buyers was based on constructive fraud); Ernestine v. Baker, 515 So.2d 826, 827–28 (La. Ct. App. 1987) (holding listing agent liable to buyers based on negligent misrepresentation theory). *Cf.* Lee Hawkins Realty, Inc., v. Moss, 724 So.2d 1116, 1121 (Miss. Ct. App. 1998) (holding selling agent liable to buyer). For a discussion of cases holding to the contrary, see *infra* note 172 and accompanying text. For scholarly literature on this subject, see generally Constance Frisby Fain, *An Overview of Real Estate Agent or Broker Liability*, 23 REAL EST. L.J. 257 (1995) (discussing cases in which realtors have been held liable for failure to disclose property defects); Diane M. Allen, Annotation, *Real-Estate Broker's Liability to Purchaser for Misrepresentation or Nondisclosure of Physical Defects in Property Sold*, 46 A.L.R. 4th 546 (1986) (discussing numerous older property defect cases in which licensees were both held liable and not held liable).

[83] *See, e.g.*, OHIO REV. CODE ANN. § 4735.71 (West 2002); TEX. REV. CIV. STAT. ANN. art. 6573a, § 15C(h) (Vernon 2001).

[84] *See, e.g.*, OR. REV. STAT. § 696.815 (2001) (establishing parameters of "disclosed limited agency"); COLO. REV. STAT. 12-61-806(1) (2001) (establishing that dual agent is limited agent for buyer and seller and has only statutorily enumerated duties); IND. CODE ANN. § 25-34.1-10-7 (West 2001) (declaring disclosed dual agent, known as "limited agent," has only those duties set forth in statute). *Cf.* MISS. REAL EST. COMM'N R. & REGS. IV(E2)(f) (2001) (expressly retaining "demanding common law standards of disclosed dual agency"); N.Y. REAL PROP. LAW § 443(4), (6) (McKinney 2001) (expressly recognizing licensees' representation of both seller and buyer in a given transaction if consented to in writing, and providing that the common law of agency shall apply thereto).

[85] *See, e.g.*, IDAHO CODE § 54-2088(2) (Michie 2002); OR. REV. STAT. § 696.815(2) (2001).

[86] *See, e.g.*, IDAHO CODE § 54-2088(2) (Michie 2002); N.Y. REAL PROP. LAW § 443(4) (McKinney 2002); VT. REAL EST. COMM'N R. § 4.4(c) (2001).

[87] *See, e.g.*, GA. CODE ANN. § 10-6A-12(a)(5) (2002); IND. CODE ANN. § 25-34.1-10-12(a)(5) (2002); NEV. REV. STAT. § 645.252(1)(d)(4) (2001). In addition, some statutes expressly provide that if a buyer working with a licensee chooses a property listed by the licensee or an affiliated licensee, and the buyer refuses to agree to a disclosed dual agency at that point, the licensee is released from any further obligation to the buyer. *See, e.g.*, MINN. STAT. ANN. § 82.197(4) n.3 (2001); R.I. GEN. LAWS § 5-20.6-8(c) (2001); VA. CODE ANN. § 54.1-2139 (Michie 2002).

[88] *See, e.g.*, Pendergrass, *supra* note 6, at 287 (explaining that Alabama's Real Estate Consumer's Agency and Disclosure Act, in creating "limited consensual dual agency"

tion to buyer's brokers), they have not changed the available legal relationships much for most consumers. Nevertheless, the articulation of specific realtor duties owed by the licensee and the heightened level of prescribed disclosure to the multiple masters are new features of the statutorily adopted disclosed dual agency phenomenon. Both of these serve to protect the realtor while also benefiting the clients, who presumably will be better-informed of the pitfalls involved.[89]

B. Type II: "Designated Agency"[90] Is Added

A sizable group of states has gone further than to just recognize exclusive buyers' and sellers' agents and disclosed dual agency. Type II states provide for so-called "designated agency"[91] as well. In a typical case, a prospective buyer engages a "licensee" to find him a home. The realtor begins by showing properties she has listed. If the buyer is not interested in any of these, he might be shown or might ask to see other properties listed by the licensee's brokerage firm. If the buyer ultimately seeks to buy a property listed by a different licensee affiliated with the same brokerage firm, the broker may "designate" the individual licensees involved to act as quasi-exclusive representatives of the seller and buyer. This is known as the "intra-company" or "in-house" sale.[92]

Designated agency practice appears to have come about as a logical response to the inherent conflict of interests posed by dual agency. Rather than deem a licensee's broker and all licensees associated with that broker also to be agents of the client,[93] Type II statutes regularly provide for

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status for realtors, "merely codifies the general rule under Alabama common law").

[89] *See infra* Part VII.B.5.

[90] The use of this term may be confused by the practice in some states of calling licensees with different kinds of licenses "designated brokers" or "designated agents" regardless of whether they have been designated in the manner described in this Part so as to avoid common law dual agency. *See, e.g.*, N.D. CENT. CODE §§ 43-23-06.1(1), (4) (2001) (defining "appointed agent" and "designated broker," respectively); MO. REV. STAT. § 339.710(12) (2002)(defining "designated broker" as the broker designated by each real estate firm to act on its behalf).

[91] *See, e.g.*, CONN. GEN. STAT. § 20-325i (2002) ("designated buyer agents and seller agents"); IND. CODE ANN. § 25-34.1-10-12.5 (West 2002); ME. REV. STAT. ANN. tit. 32, § 13271(2) (West 2001) ("appointed agent"); NEV. REV. STAT. § 645.253 (2002); N.C. REAL EST. COMM'N, WORKING WITH REAL ESTATE AGENTS (describing "designated agency"), N.D. ADMIN. CODE § 70-02-03-17 (2002) ("appointed agents"); OHIO REV. CODE ANN. § 4735.72(B) (West 2002) (in-company dual agency); OR. REV. STAT. § 696.815(4) (2001) (in-company representation); TEX. REV. CIV. STAT. ANN. art. 6573a, § 15C(k) (Vernon 2001) ("appointed licensee"); WASH. REV. CODE ANN § 18.86.020(2) (West 2002); VA. CODE ANN. § 54.1-2139(E) (Michie 2002) ("designated representative").

[92] *See, e.g.*, OR. REV. STAT. § 696.800(4) (2001) (defining "in-company transaction"). Affiliated licensees who are designated to work with different parties to the same transaction in North Dakota and Iowa are called "appointed agents." N.D. ADMIN. CODE § 70-02-03-17 (2002); IOWA CODE § 543B.5(3) (2002). In Montana, this type of realtor role would be called "in-house buyer [or seller] agent designate." MONT. CODE ANN. § 37-51-102 (12)–(13) (2001).

[93] Under the common law, every principal (whether seller or buyer) has as his agents

the affiliated individual licensees to act as exclusive agents of the individual party to the transaction with whom they are working.[94] Each designated or appointed agent owes her client the same duties that would be owed by exclusive or single agents to their clients, including a limited duty of confidentiality.[95]

Indiana's statute is illustrative. It defines a designated agency or "in-house agency relationship" as "an agency relationship involving . . . clients who are represented by different licensees within the same real estate firm."[96] It further provides, in pertinent part:

> (a) An individual licensee affiliated with a principal broker represents only the client with which [sic] the licensee is working in an in-house agency relationship. A client represented by an individual licensee affiliated with a principal broker is represented only by that licensee to the exclusion of all other licensees . . . .
>
> * * *
>
> (c) A licensee representing a client in an in-house agency relationship owes the client duties and obligations set forth in this chapter . . . .[97]

One of the downfalls to designated agency is that there is a greater chance for breach of confidentiality when the agents involved in a transaction are housed in the same office.[98] Because of the unique confidentiality

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the broker and all licensees in a firm. Robert E. Kroll, Comment, *Dual Agency in Residential Real Estate Brokerage: Conflict of Interest and Interests in Conflict*, 12 GOLDEN GATE U. L. REV. 379, 388 (1982) ("where buyer and seller are represented by two sales agents of a single broker or brokerage firm, the situation is the same as if the broker himself were representing both principals").

[94] State statutes differ in their treatment of the broker in an "in-house" sale. In some states, the broker is still considered a dual agent, while the individual salespeople working with the clients are considered single agents for the clients they represent. *See, e.g.*, OR. REV. STAT. § 696.815(4) (2001). A variation is where the broker represents neither party. *See, e.g.*, IND. CODE ANN. § 25-34.1-10-12.5(a) (West 2002). Other states' statutes and regulations are silent with respect to the broker's role. *See, e.g.*, CONN. GEN. STAT. § 20-325(I) (2002); NEV. REV. STAT. § 645.253 (2002).

[95] *See infra* note 99.

[96] IND. CODE § 25-34.1-10-6.5 (2002). *Accord* CONN. GEN. STAT. § 20-311(6) (2002). For the other state statutes that are considered Type II "designated agency" provisions, see ME. REV. STAT. ANN. tit. 32, § 13271(2) (West 2002); NEV. REV. STAT. § 645.253 (2002); N.C. REAL EST. COMM'N, WORKING WITH REAL ESTATE AGENTS (on file with author); N.D. CENT. CODE § 43-23-06.1(1) (2001); OHIO REV. CODE ANN. § 4735.51(I) (West 2002); OR. REV. STAT. § 696.815(4) (2002); TEX. REV. CIV. STAT. ANN. art. 6573a, § 15C(k) (Vernon 2001); VA. CODE ANN. § 54.1-2139 (Mitchie 2001); WASH. REV. CODE ANN. § 18.86.020(2) (2002).

[97] IND. CODE ANN. § 25-34.1-10-12.5 (West 2002).

[98] *See, e.g.*, Joe Blundo, *Change in Real Estate Law Adds New Wrinkle to Home Buying*, COLUMBUS DISPATCH, Dec. 8, 1996, at 1J ("How can two agents who work in an office with an obvious financial interest in getting a deal closed be expected to keep secrets?");

concerns posed by designated agency practice, a few Type II statutes contain additional precautions to protect the clients' confidences.[99] Indiana's statute, for example, prohibits designated agents from disclosing "material or confidential information obtained from the client to other licensees, except to the principal or managing broker for the purpose of seeking advice or assistance for the client's benefit."[100] It also requires the broker and her licensees to "take reasonable and necessary care to protect any material or confidential information disclosed by a client to the client's in-house agent."[101] North Dakota's regulations go even further to protect clients' confidential information. Any North Dakota real estate agency that represents both buyers and sellers in residential real estate transactions must maintain a written policy manual setting forth the brokerage's procedures for preventing breaches of client confidence stemming from the informal sharing of information, the arrangement of office space, and the personal relationships of the appointed agents.[102]

With appropriate safeguards, designated agency is really no different than exclusive agency—it ensures that each party is individually represented by an agent who will maintain the client's confidences and who

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Sarah P. Jones, *Brokering a Peace*, BOSTON HERALD, Feb. 7, 1997, at 37 ("[Y]ou've got an enormously increased possibility that confidential information will pass side by side in those desks . . . . Not on purpose, of course, but papers do get left around.").

[99] The duty of nondisclosure or confidentiality is owed by licensees not just in Type II states and not just in the "in-house" or designated agency context. In many states, this duty is also owed by a licensee to her clients and sometimes even to all parties to the transaction. Typical statutory provisions prohibit disclosure to the buyer that the seller is willing to sell the property at a price less than the listing price or disclosure to the seller that the buyer is willing to pay a price greater than the offering price. Other specifics may be included in the definition of confidential information. *See, e.g.*, CONN. GEN. STAT. § 20-325h (2001) (including information related to party's assets and liabilities); FLA. STAT. ch. 475.278(2)(a)(6) (2000) (including information that a party will agree to financing terms other than those offered); MD. CODE ANN., BUS. OCC. & PROF. § 17-528(h) (2001) (including facts relating to a party's negotiating strategy); MO. REV. STAT. § 339.710(8) (2000) (including information made confidential by the client's written instructions). *See generally infra* Part VI.

Other states' definitions of information that must be kept confidential are even broader. *See, e.g.*, S.D. CODIFIED LAWS § 36-21A-127 (Michie 2001) (stating that the duty of confidentiality includes duty not to disclose "information given to the licensee in confidence, or any information obtained by the licensee that the licensee knows a reasonable individual would want to keep confidential"); UTAH ADMIN. CODE 162-6.2.16.1 to -.2 (2001) (stating that licensee may not disclose any information "which would likely weaken the [party's] bargaining position if it were known"); WIS. STAT. § 452.133(1)(d) (2000) (similar).

[100] IND. CODE ANN. § 25-34.1-10-12.5(c) (West 2002).

[101] *Id.* § 25-34.1-10-12.5(d). Subsection (e) statutorily eliminates imputation of knowledge and information between clients, licensees, and the principal or managing broker in the in-house sale. *See id.* § 25-34.1-10-12.5(e). This is a common provision in statutes that feature designated agency.

[102] N.D. ADMIN. CODE § 70-02-03-17 (2001). *See also* CONN. GEN. STAT. § 20-325h (2001); GA. CODE ANN. § 10-6A-13(c) (2000); 201 KY. ADMIN. REGS. 11:410 § 2(2)-(4) (2001); MICH. COMP. LAWS § 339.2517(7) (2001); VA. CODE ANN. § 54.1-2139(E) (Michie 2000). *Cf.* ILL. ADMIN. CODE tit. 68, § 1450.207 (2000) (requiring all licensees in possession of confidential information to take reasonable precautions to safeguard it from unauthorized disclosure).

will place the party's best interests first. Not all laws providing for designated agency are as clear as they could be, though. North Carolina's administrative regulations, for example, instruct that in the designated agency context, "the broker or salesperson so designated shall represent only the interest of the buyer . . . ."[103] The licensing statute and regulations are silent, however, as to what duties, if any, may be owed by the designated agent to his or her client.[104]

From the consumer's perspective, no form of dual or designated agency is particularly desirable, and critics have spoken out against both practices.[105] Ideally, the agent representing a seller or buyer would be entirely independent, free from financial and other ties to the opposing party that might be inherent in the designated agency situation.[106] Many commentators, particularly consumer advocacy groups and exclusive buyer agency firms, argue that the entire system should be changed to require brokers to represent either buyers or sellers and not both.[107] The reality of the residential real estate marketplace, however, renders designated agency a necessary evil. The economic and practical aspects of the marketplace may pressure firms to represent both buyers and sellers.

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[103] *See* N.C. ADMIN. CODE tit. 21, r. 58A.0104(*l*) (2002) (agents designated to represent buyers); N.C. ADMIN. CODE tit. 21, r. 58A.0104(k) (agents designated to represent sellers).

[104] In fact, the only guidance is found in a state Real Estate Commission brochure, which notes: "Some firms also offer a form of dual agency called 'designated agency' where one agent in the firm represents the seller and another agent represents the buyer. This option (when available) may allow each 'designated agent' to more fully represent each party N.C. REAL EST. COMM'N, WORKING WITH REAL ESTATE AGENTS, *available at* http://www.ncrec.state.nc.us/consumers/WorkingWith.asp. To provide more guidance, the statute should be amended to clarify the implication that designated agents representing buyers owe the same duties to their clients that are owed by other licensees representing buyers, and the same for designated agents representing sellers. This could easily be accomplished by adding language to the quoted section as follows: "In addition to the duty of confidentiality set forth herein, the broker or salesperson designated to represent a buyer owes to the buyer the duties set forth in § _____." Maine's statute is similarly vague with respect to the duties of an "appointed agent." *See* ME. REV. STAT. ANN. tit. 32, § 13271(2) (West 2001) (defining "appointed agent" but making no reference to its duties).

[105] *See, e.g.*, Douglas C. Kaplan, *Time to End "Let's Pretend,"* 71 FLA. BAR J. 97, 98–99 (May 1997) ("Only in a world of fantasy would salespeople within one office not share communications and disclosures with each other and with the principal broker. This [designated] agency design appears to be little more than a house of cards built upon a foundation of dual agency."). *See generally* Vickie J. Brady, Comment, *The "Brokerage Relations" Addition to the Illinois Real Estate License Act: The Case of the Legalized Conflict of Interest*, 22 S. ILL. U. L.J. 725 (1998); Sandra Nelson, Note, *The Illinois Real Estate "Designated Agency Amendment": A Minefield for Brokers*, 27 J. MARSHALL L. REV. 953 (1994).

[106] There are other distressing incentives inherent in the system. For example, except where an exclusive buyer's agent is employed and paid by the buyer separately, commissions paid to the realtors are based on the sales price of the home. *See* Wilson, *supra* note 12, at 91. Accordingly, the agents in the transaction, whether representing seller or buyer, get higher commissions the higher the sales price. *Id.*

[107] *See, e.g.*, Nelson, *supra* note 105, at 978 (citing *Consumer Advocates Call for Revolutionary Real Estate Reforms*, REAL EST. INSIDER, Apr. 26, 1993, at 3) (quoting Ralph Nader as advocating that buyer brokers eliminate dual agency, which he describes as "a maneuver for the big guys to have it both ways," and calling for buyer brokers to make elimination of dual agency their number one priority).

Firms that do a high volume of intra-company sales have the highest median net profit margins, the number and percentage of buyer agency transactions is not high enough to persuade sellers' agents to give up seller-side representation, and designated agency allows firms to not only increase their commissions but also better "control" sales transactions.[108]

Unless and until the market or legislation turns exclusive buyer and seller agency firms into the norm,[109] designated agency is a compromise that can work. Indeed, law firms have effectively represented clients on opposite sides of deals and even litigation for years.[110] While some have argued, in the context of legal "Chinese walls," that protection policies are difficult to enforce,[111] there is no reason to believe that real estate professionals—whose "Chinese walls" will be temporally shorter, more focused in scope, and necessarily less complex than those of law firms—are incapable of effectuating policies that will protect client confidences. In addition, private rights of action against offending licensees and administrative discipline, including the suspension or revocation of a broker or agent's license, could go a long way in insuring that licensees comply.

C. Type III: Two-Tiered Service

In a small number of states, the legislatures have chosen to avoid denomination of realtors' roles altogether. Rather than necessarily identifying licensees as exclusive or single seller's or buyer's agents, or subagents, these states' statutes focus almost entirely on licensees' duties. In so doing, they create two categories of consumers: customers and clients. Customers are generally defined as consumers with whom the licensee does not have an agency relationship; clients are those who have entered into an agency or other brokerage agreement with the licensee.[112] Logically,

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[108] *See* Nelson, *supra* note 105, at 966 n.95.

[109] Another alternative that would eliminate the need for the designated agency role is a complete overhaul of the existing system, perhaps by way of federal legislation. Congress could replace the exclusive right to sell listing agreements with the open listing agreement, making MLS information available to brokers and consumers alike. This would require the seller to pay a commission only to the "selling" broker, whether that is the listing broker or any other agent who found a buyer via the MLS or otherwise. This would also encourage brokers to charge fees for services rendered and would increase competition among brokers, thereby reducing overall costs to sellers and buyers. *See* Braswell, *supra* note 14.

[110] To create "[judicially] unassailable" "Chinese walls," one commentator suggests that specific institutional mechanisms and timeliness of implementation are key. John Robert Parker, *Private Sector Chinese Walls: Their Efficacy as a Method of Avoiding Imputed Disqualification*, 19 J. LEGAL PROF. 345 (1995). According to Parker, stiff penalties (termination) and physical separation are indicative of an effective screen. *Id.* at 348. *See also* Christopher J. Dunnigan, Note, *Conflict of Interest: The Art Formerly Known as the Chinese Wall: Screening in Law Firms: Why, When, Where, and How*, 11 GEO. J. LEGAL ETHICS 291 (1998)(providing complete history of "Chinese wall" concept and addressing screening in the context of successive legal representation conflicts of interest).

[111] *See* Dunnigan, *supra* note 110, at 298–99.

[112] A few other states define customers and clients similarly but do not use these categories to define licensee duties to individuals in each category. *See, e.g.*, IND. CODE ANN.

then, in Type III states clients are owed more expansive duties than are mere customers, for whom more limited "ministerial acts" are performed.

In Illinois,[113] for example, a licensee can perform services for an unrepresented customer that are "informative or clerical in nature and do not rise to the level of active representation."[114] These "ministerial" acts include many of the typical functions of the old "real estate agent," such as responding to phone inquiries about availability and price of both listings and services, attending open houses and answering questions about the property, setting appointments to view a property, responding to questions from walk-in consumers, accompanying an appraiser to visit a property, describing a property and its condition, and completing information for a consumer's offer or contract for purchase.[115] "Safe harbor" provisions accompany ministerial act provisions, expressly stating that performance of these activities shall not be construed to form a brokerage relationship with the buyer, nor does it violate the broker's engagement with the seller.[116] Thus, agents working in a two-tiered structure may per-

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§§ 25-34.1-10-5 to -6 (Michie 2001); 201 KY. ADMIN. REGS. 11:400 (5)(a) (2001). Nearly all states' statutes define the word "client" in analogous terms. *See, e.g.*, MD. CODE ANN., BUS. OCC. & PROF. § 17-528(f) (2001).

[113] Like many others, Illinois's statute defines the term "customer" in terms of ministerial acts. *See* 225 ILL. COMP. STAT. 454/1-10 (2001) ("'Customer' means a consumer who is not being represented by the licensee but for whom the licensee is performing ministerial acts.").

[114] 225 ILL. COMP. STAT. 454/1-10 (2001). Other safe harbors, clearly designed to protect licensees, also appear in the various state statutes. For example, many statutes provide that a licensee representing a seller may safely show other properties to a buyer and may list other "competing" properties without liability to the client. *See, e.g.*, COLO. REV. STAT. § 12-61-804(4) (2001); ME. REV. STAT. tit. 32, § 13273(1)(G) (2001). Likewise, licensees representing buyers may show the same property to other buyers without liability to any buyer client. *See, e.g.*, 63 PA. CONS. STAT. § 455.606a (f) (2001); S.C. CODE ANN. § 40-57-137(I) (Law. Co-op. 2001). Illinois and Louisiana laws eliminate as a potential issue for litigation the fact that licensees "will receive a higher fee or compensation based on higher selling price or lease cost." 225 ILL. COMP. STAT. 454/15-15(c) (2001); LA. REV. STAT. ANN. § 9:3893(C) (West 2001). Some states' statutes protect licensees from liability in any action arising out of matters for which the licensee advised the consumer to obtain other professional advice. *See, e.g.*, KAN. STAT. ANN. § 58-30,106(b) (2001).

[115] *See* GA. CODE ANN. § 10-6A-3(12), § 10-6A-14 (2000) (similar); IOWA ADMIN. CODE r. 193E-1.1 (1997) (similar); KAN. STAT. ANN. § 58-30,102(n) (2001) (similar); LA. REV. STAT. ANN. § 9:3891(12) (West 2001) (similar); MO. REV. STAT. § 339.710(17) (2000) (similar); S.D. CODIFIED LAWS § 36-21A-128 (Michie 2001) (defining "informative acts that do not constitute representation" similarly); VA. CODE ANN. § 54.1-2130 (Michie 2001) (defining ministerial acts as "those routine acts which a licensee can perform for a person which do not involve discretion or the exercise of the licensee's own judgment"); ME. REV. STAT. tit. 32, § 13271(9) (2001) (similar); IDAHO CODE § 54-2083(10) (Michie 2001) (defining ministerial acts as "reasonably necessary and customary acts typically performed by real estate licensees in assisting a transaction to its closing or conclusion").

[116] 225 ILL. COMP. STAT. 454/15-25(b) (2001). *See also* GA. CODE ANN. § 10-6A-5(c) (2000) (similar); KAN. STAT. ANN. §§ 58-30,106(e), 58-30,107(e) (2001) (providing the corollary for buyer's agents); LA. REV. STAT. ANN. § 9:3894(A) (West 2001) (similar); DEL. CODE ANN. § 2900, r. 10.0 (2001) ("The broker, any cooperating broker, and any salesperson working with either, without breaching the fiduciary responsibilities to the seller, may, among other services, provide a potential purchaser with information about the attributes of properties and available financing, show properties, and assist in preparing an

form a wide array of services for customers, yet the law does not impose the fiduciary obligations that some unsuspecting buyers may expect.[117]

This two-tiered service model is employed by the statutes of Idaho,[118] Illinois,[119] Iowa,[120] Louisiana,[121] Nevada,[122] and Wisconsin,[123] among other states.[124]

D. Type IV: Transaction Brokerage

In addition to making available to consumers the realtor relationship options provided in Type I and Type II states, Type IV states also offer a completely new legislatively created option called "transaction brokerage" or something similar.[125] Transaction brokers are not agents. Instead, they tend to act more as middlemen or go-betweens, real estate licensees who are beholden to the transaction first and foremost, and who do not individually represent either party.

The notion of a transaction broker or "non-agent"—whose responsibilities would be delineated by state statute rather than the common law of agency—was first suggested in 1992 and was debated by NAR at its national meeting in 1993.[126] While NAR ultimately chose not to endorse

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offer to purchase."); OHIO REV. CODE ANN. § 4735.69 (Anderson 2001) (providing more limited list of acts that fall within the safe harbor); S.C. CODE ANN. § 40-57-137(L) (Law. Co-op. 2000) (similar). *Cf.* MD. CODE ANN., BUS. OCCUP. & PROF. § 17-532(h)(1) (2001) (creating safe harbor only if client consents in the brokerage agreement to the provision of ministerial acts to the other party); VA. CODE ANN. §§ 54.1-2131(C), 54.1-2132(C) (Michie 2001) (giving safe harbor for licensee who provides ministerial acts, but only to the extent "not inconsistent with" duties to client); IND. CODE ANN. § 25-34.1-10-10(e)(2) (Michie 2001) (similar).

[117] *See infra* Part VIII.C.

[118] *See, e.g.*, IDAHO CODE § 54-2083(4), (6) (Michie 2000) (defining client and customer, respectively); *id.* § 54-2086 (duties to customers); *id.* § 54-2087 (duties to clients).

[119] *See, e.g*, 225 ILL. COMP. STAT. 454/1-10 (2001) (defining client and customer); *id.* 454/15-15 (duties of licensees representing clients); *id.* 454/15-25 (licensees' relationship with customers).

[120] *See, e.g.*, IOWA CODE § 543B.5(9)–(10) (2001) (defining client and customer); *id* § 543B.56(1)–(2) (providing duties of licensees "to all parties in a transaction" and "to a client," respectively).

[121] *See, e.g.*, LA. REV. STAT. ANN. § 9:3891(4), (7) (West 2001) (defining client and customer); *id.* § 3893 ("duties of licensees representing clients"); *id.* § 3894 ("licensees relationship with customers").

[122] *See, e.g.*, NEV. REV. STAT. § 645.252 (2001) (defining duties owed to all parties to a real estate transaction); *id.* § 645.254 (defining duties owed to clients with a brokerage agreement); *id.* § 645.009 (defining client).

[123] *See, e.g.*, WIS. STAT. § 452.133(1)–(2) (2000) (defining "duties to all parties" and "duties to a client," respectively); *id.* § 452.01(3s), (3m) (2000) (defining client and customer).

[124] Some states that have created the customer/client distinction for defining licensees' duties have also elected to establish a "transaction broker" or similar role. This is the case in Alabama, Kansas, Kentucky, New Mexico, South Dakota, and Tennessee. Each of these states, then, is a Type IV state. *See infra* Part IV.D.

[125] In 2000, eight percent of NAR's member-REALTORS® described their practice as primarily "transactional" agency. NAR MEMBER PROFILE, *supra* note 20, at 23 tbl. III-7.

[126] Brown, *supra* note 12, at 28–29; *see also* Pancak, *supra* note 10, at 352–53.

the idea,[127] the non-agent concept nonetheless has been adopted by many states in varying forms since 1994.

As one might expect, no two statutory non-agents or transaction brokers are precisely the same. The next Section looks at the typical statutory definitions of transaction brokerage, and, more importantly, the usual duties and responsibilities associated with this new form of realtor representation.

1. Statutory Definitions

The purest form of "transaction broker"—also referred to as a "transaction coordinator," "transaction licensee," or "facilitator"[128]—is a broker devoted to the transaction itself, representing *neither* party as a fiduciary.[129] This is the transaction broker at work in most Type IV states.[130]

Colorado created the first transaction broker by statute in 1994.[131] Colorado law today defines a transaction broker as:

> a broker who assists one or more parties throughout a contemplated real estate transaction with communication, interposition, advisement, negotiation, contract terms, and the closing of such real estate transaction *without being an agent or advocate for the interests of any party to such transaction* . . . .[132]

Other states that recognize a similar transaction broker role are Florida, Georgia, Kansas, Montana, New Jersey, South Dakota, and Wyoming.[133]

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[127] Pancak, *supra* note 10, at 352–53.

[128] Montana calls its equivalent of the transaction broker a "statutory broker." MONT. CODE ANN. § 37-51-102(24)(a) (2001). For ease of reference, the term "transaction broker" will refer to licensees in all states that define transaction brokerage basically in this way.

[129] Compare Virginia's "independent contractor," which is defined as "a licensee who acts for or represents a client other than as a [licensee who represents the client and has statutorily prescribed duties only] and whose duties and obligations are governed by a written contract between the licensee and the client." 18 VA. ADMIN. CODE § 135-20-10 (West 2001). While this may signify a variant form of agency representation, it does not qualify as a transaction broker as that term is used in this Article because, by definition, the licensee is representing a client in some agency capacity, however it is defined by the written agreement. A number of states explicitly permit this type of contracting, which functions to augment the duties otherwise statutorily owed by a licensee, without calling the licensee an "independent contractor." *See, e.g.*, MD. CODE ANN., BUS. OCC. & PROF. § 17-532 (2001). Note, however, that the converse is not necessarily true. Maryland and a number of other states expressly prohibit waiver of a licensee's statutorily prescribed duties. *See, e.g., id.* § 17-532(g); OR. REV. STAT. § 696.805(4) (2001); 63 PA. CONS. STAT. § 455.606(a) (2001); WASH. REV. CODE § 18.86.030 (2001).

[130] *See infra* notes 132–133.

[131] Recall that NAR studied the non-agency concept in the early 1990s and ultimately chose not to endorse it. Brown, *supra* note 12, at 29; Pancak, *supra* note 10, at 352. This apparently did not dissuade individuals and local real estate boards from suggesting and/or lobbying for state adoption of such a licensee role.

[132] COLO. REV. STAT. § 12-61-802(6) (2001) (emphasis added).

[133] *See* GA. CODE ANN. § 10-6A-3(14) (2000) ("'Transaction broker' means a broker

Two states, Missouri and Tennessee, use the term "transaction broker" to refer to more than one category of licensee. In addition to the traditional transaction broker, Missouri's real estate licensing law adds any agent who "assists one or more parties to a transaction and who has not entered into a specific written agency agreement to represent one or more of the parties" or "assists another party to the same transaction either solely or through licensee affiliates," provided that both the buyer and seller have notice.[134] Essentially, this language contemplates neutral licensees working with one or both parties but representing neither in an agency capacity, and it includes what would be called "designated" agents or brokers in other states.

A few states vary the definition to encompass a somewhat different group of realtors. For example, in Alabama, a "transaction broker" is defined as a "licensee who assists one or more parties in a contemplated real estate transaction without being an agent or fiduciary or advocate for the interest of that party to a transaction."[135] By implication, this form of "transaction broker" could have an agency relationship with one party but not the other—a listing agent or seller's subagent providing assistance to a buyer.[136] In those cases where the transaction broker represents one party but not the other in a fiduciary capacity, the arrangement is really

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who has not entered into a client relationship with any of the parties to a . . . real estate transaction and who performs only ministerial acts on behalf of one or more of the parties . . . ."); N.J. ADMIN. CODE tit. 11, § 5-6.9(a)(7) (2001) ("'Transaction broker' . . . works with both parties in an effort to arrive at an agreement on the sale or rental of real estate and facilitates the closing of a transaction, but does not represent either party, and has no agency relationship with either party"). Some states streamline the definition by removing the reference to the specific tasks performed by the licensee. *See, e.g.*, FLA. STAT. ch. 475.278(2)(a) (2000) ("A transaction broker provides a limited form of representation to a buyer, a seller, or both in a real estate transaction but does not represent either in a fiduciary capacity or as a single agent."); MONT. CODE ANN. § 37-51-102(24)(a) (2001) ("'Statutory broker' means a broker or salesperson who assists one or more parties to a real estate transaction without acting as an agent or representative of any party to the real estate transaction."); KAN. STAT. ANN. § 58-30,102(s) (2001) ("'Transaction broker' means a broker who assists one or more parties with a real estate transaction without being an agent or advocate for the interests of any party to such transaction"); S.D. CODIFIED LAWS § 36-21A-1(20) (Michie 2000) (defining "transaction broker" similarly); WYO. STAT. ANN. § 33-28-301(a)(iv) (2000) (defining "intermediary" in similar terms); MICH. COMP. LAWS § 339.2517(9)(k) (2001) (defining "transaction coordinator").

[134] MO. REV. STAT. § 339.710(22) (2000). Tennessee's statute describes a transaction broker in terms very similar to those in subparagraphs (b) and (c) of the Missouri statute. *See* TENN. CODE. ANN. § 62-13-102(8) (2001).

[135] ALA. CODE § 34-27-81(17) (2001). *See also* OKLA. STAT. tit. 59, § 858-351(5) (2001) (defining "transaction broker" as "a broker who provides services by assisting a party in a transaction without being an advocate for the benefit of that party"); 63 PA. CONS. STAT. § 455.201(6) (2001) (defining "transaction licensee" as one "who provides . . . services . . . without being an agent or advocate of the consumer").

[136] Some licensing schemes that do not provide for transaction brokers also accomplish the same thing by permitting an agent to perform "ministerial acts" for the other party to the transaction (a "customer") without creating an agency relationship with the customer and without violating fiduciary duties to the licensee's own client.

no different than the traditional model, with the buyer perhaps erroneously believing he is represented in an agency capacity.[137]

2. Duties

Some commentators have erroneously assumed that the transaction broker, if not a fiduciary, owes no duties to the parties involved in a real estate transaction.[138] If this were true, the transaction broker might be dangerous indeed.[139] Fortunately for consumers, however, most states that permit transaction brokers have vested them with at least a few statutory duties.

The number and extent of the duties a transaction broker owes differ from state to state. On one end of the spectrum, neither Michigan's licensing statute nor its administrative regulations enumerate any duties incumbent upon its "transaction coordinator."[140] Kentucky law requires only honesty and fairness of its transaction brokers.[141] New Hampshire

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[137] This is the case with some transaction brokers in Missouri and all transaction brokers in Tennessee. *See supra* note 134 and accompanying text.

[138] *See, e.g.*, Neal Gendler, *New Laws Touch on Agent Disclosure, Escrow Funds and Mortgage Insurance*, MINN. STAR-TRIB., July 27, 1996, at 4H (stating that a nonagent "owes the customer none of the fiduciary responsibilities of the client relationship"); Washington, *supra* note 9, at 3 (stating that transaction brokers "do not represent either party and there is no liability involved"); H. Jane Lehman, *Association to Redefine Agent Roles*, WASH. POST, Nov. 20, 1993, at E1 (stating that facilitators are "middlemen with no responsibilities other than matching up buyers and sellers"); Cyd King, *Transaction Brokers Ease Liability Concerns*, ARK. DEM.-GAZ., July 5, 1998, at BM16 (stating that a transaction broker is a "glorified paper shuffler"); Kindleberger, *supra* note 80, at 37 (stating that a facilitator is "only a finder or middleman").

[139] Indeed, even when fiduciary duties *are* in place, unfortunate consumers have been the victims of realtor malfeasance, for example in cases involving self-dealing. In a troubling but apparently common scenario, the listing agent makes a secret profit by buying the property directly from the seller and then selling it to a buyer of whom the agent was already aware. *See, e.g.*, Letsos v. Century 21-New West Realty, 675 N.E.2d 217, 220 (Ill. App. Ct. 1996); Ellison v. Alley, 842 S.W.2d 605, 607 (Tenn. 1992); Nguyen v. Scott, 253 Cal Rptr. 800, 806 (Ct. App. 1988); Licari v. Blackwelder, 539 A.2d 609, 611 (Conn. App. Ct. 1988); Johnson Realty, Inc. v. Hand, 377 S.E.2d 176, 178–79 (Ga. Ct. App. 1988); Chien v. Chen, 759 S.W.2d 484, 497 (Tex. Ct. App. 1988); Falle v. Metalios, 517 N.Y.S.2d 534, 536 (App. Div. 1987). This occurs despite the fact that nearly all states require licensees to disclose their status as principals to the transaction, usually in writing.

Disclosure of a licensee's interest in the property that is the subject of the real estate transaction is required as part of licensees' overall duties to the parties, presumably creating a private right of action for damages or rescission in some states. *See, e.g.*, ALA. CODE § 34-27-84(a)(6) (2002); CONN. AGENCIES REGS. § 20-328-2a (2002); IOWA CODE ANN. § 543B.56(3) (West 2002).

[140] *See* MICH. COMP. LAWS ANN. § 339.2517 (West 2002); MICH. ADMIN. CODE r. 339.22309 (2002). Presumably, since Michigan's licensing law does not supersede the common law with respect to agency relationships and duties, the common law will dictate a transaction coordinator's duties to the parties to the real estate contract. *See infra* note 246 (supersession provisions).

[141] A Kentucky transaction broker "assists the parties to a potential real estate transaction as a real estate broker in communication, interposition and negotiation, to reach an agreement between or among them, without acting as agent for any party." 201 KY. ADMIN. REGS. 11:400 § 5(1)(a) (2001). The Kentucky transaction broker must treat both buyer and seller as "customers." In turn, all licensees "are required to deal honestly and fairly with

"non-agents" and New Jersey transaction brokers have a further obligation to warn prospective buyers of any known adverse material facts about the property.[142] Facilitators in Minnesota owe an additional statutory duty of limited confidentiality and must perform any other contractual duties.[143] Finally, in Georgia, transaction brokers must also account for property belonging to the parties that is placed under their control, present offers and other communications in a timely manner, and disclose known material adverse facts about the property or transaction.[144]

While consumers have benefited from the wider array of agency relationships made available over the past few decades, examining choice alone does not paint a full—or accurate—picture of the protection provided to consumers. In fact, the degree of choice does not necessarily even correlate with the level of consumer protection a given statute provides. To evaluate that level of protection, an examination of the default representation status of an otherwise "unrepresented" party and the duties licensees will owe him by legal implication is necessary to give a fuller sense of the challenges faced by consumers. These topics are discussed in the next two Parts.

V. DEFAULT POSITION

States' statutes differ markedly in their default positions—the level of representation that the licensee must afford to the typical buyer (or seller in a "for sale by owner" setting) if he does not engage in a contract or otherwise actively seek out representation. The various statutes and regulations provide for default to seller agency, default to buyer agency, default to "customer status," or default to transaction brokerage for the passive consumer. Some statutes create no default at all, simply providing for a number of different possible relationships. In almost all states—with or without a statutory presumption—the default for the passive unrepresented consumer will tend towards the traditional model.[145] The statutory provisions creating the different default positions are explained below, beginning, as before, with the traditional model and then moving

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customers." *Id.*

[142] N.H. CODE ADMIN. R. ANN. [Real Est. Comm'n] 701.02 (2002) (requiring non-agent to disclose to prospective buyers any material facts relating to "physical, regulatory, mechanical or onsite environmental" defects in the property); N.J. ADMIN. CODE tit. 11, § 5-6.9 (2002) (requiring all licensees to disclose material adverse facts about the relevant real estate and/or a buyer's financial ability to perform the proposed contract).

[143] MINN. STAT. § 82-197(4)(V), (6) (West 2001).

[144] GA. CODE ANN. § 10-6A-14(b) (2002).

[145] Of course, local custom may vary. In some areas, for example, it may be common practice for licensees to automatically offer transaction brokerage to unrepresented buyers or sellers. The "default" position, as discussed in this Article, refers to the position (vis-à-vis agency representation) in which an unrepresented party would find himself based on the statute and without the benefit of any such atypical local custom. *See* Ronald J. Mass, *Agency Disclosure: A Real Estate Broker's Responsibility*, 11 S.C. LAW. 39 (1999).

along the spectrum to those categories of states that provide the greatest default protection to the passive or uninformed consumer.

A. Category A: Traditional Model Prevails

In the majority of states, the default position faced by a buyer who does not actively seek to be exclusively represented is still the traditional listing/selling broker model, with both licensees representing the seller and the buyer remaining unrepresented. This result may be due to an explicit provision in the licensing statute that the default for licensees is seller agency/subagency.[146] In the more common case, however, the traditional model as default arises as a practical consequence of requiring agency representation agreements to be in writing.[147] This is the case in Alabama,[148] Iowa,[149] Kansas,[150] Missouri,[151] New Hampshire,[152] New Jersey,[153] North Carolina,[154] Utah,[155] Vermont,[156] Wisconsin,[157] and Wyoming.[158]

While the requirement that agency agreements be in writing may appear to be even-handed, it is not. Sellers, who in most cases sign a listing agreement,[159] are likely to be represented by a listing agent and possibly also a cooperating or selling subagent. On the other hand, buyers in these states remain unrepresented unless and until they contract in writing with

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[146] Rhode Island law provides that "real estate agents are considered to be the agent of the seller of real estate unless there is an agreement in writing to the contrary between the buyer(s) and agent, and the agreement is disclosed to all parties." R.I. GEN. LAWS § 5-20.6-2(a) (2001). Missouri's regulations state, in describing the purpose of the regulation governing brokerage service agreements, that "[i]n a cooperative listing, the selling broker shall be presumed to be a subagent of the listing broker." MO. CODE REGS. ANN. tit. 4, § 250-8.090 (2002). Another regulation also contemplates that cooperative sales may involve sellers' agents working with another licensee representing the buyer as a transaction broker. *Id.* § 250-8.095(1)(A)(4).

[147] A variation is found in statutes that are silent with respect to listing agreements, but which require buyers' agency agreements (and dual agency agreements) to be in writing. *See, e.g.*, N.D. ADMIN. CODE §§ 70-02-03-05.1, 70-02-03-15.1.7(c) (2002). *Cf.* 63 PA. CONS. STAT. §§ 455.201, 455.606a(b) (2002) (stating that written agency agreements are not required but preventing agentes from collecting a commission without a written agency agreement).

[148] ALA. CODE § 34-27-81(3) (2002).

[149] IOWA CODE § 543B.5(2) (2001).

[150] KAN. STAT. ANN. § 58-30,102(b)–(c) (2001).

[151] MO. REV. STAT. § 339.780 (2001).

[152] N.H. REV. STAT. ANN. § 331-A:2(III-a) (2000).

[153] N.J. ADMIN. CODE tit. 11, § 5-6.9(a)(1) (2002).

[154] N.C. ADMIN. CODE tit. 21, r. 58A.0104(a) (July 2002).

[155] UTAH ADMIN. CODE 162-6.1.11 (2002).

[156] VT. REAL EST. COMM'N R. 4.7(a) (2001).

[157] WIS. STAT. ANN. § 452.01(1m) (West 2002).

[158] WYO. STAT. ANN. § 33-28-302 (Michie 2002) (requiring that any agreement for agency or transaction brokerage be written).

[159] Almost all states' licensing statutes and regulations incorporate a sort of Statute of Frauds, requiring listing agreements to be in writing in order for a licensee to recover a commission. *See, e.g.*, CONN. GEN. STAT. ANN. § 20-325a(b) (West 2002); 63 PA. STAT. ANN. § 455.302 (West 2002).

a broker.[160] While expressly allowing for buyer agency and perhaps other forms of agency representation, provisions that require all agency agreements to be in writing, without some other sort of presumption built in, encourage the traditional listing/selling agency model.

Licensing statutes in Nebraska, Maryland, and Washington take a seemingly different approach by making representation of the buyer the default for a licensee working with a buyer. Even in these states, however, this protection is severely undermined by the numerous exceptions contained in the statutes. Nebraska's statute, for example, provides that a licensee shall be considered a buyer's agent unless the licensee's broker has entered into one of the following other relationships: (a) a limited agency agreement with the seller, (b) a limited subagency agreement with the seller, (c) a dual agency agreement with the parties, or (d) another agency agreement (with either party) that provides for duties greater than those required of a "limited agent" under the licensing statute.[161] Maryland's statute, on the other hand, provides for a presumed buyer agency for any licensee who assists the buyer and is neither the listing agent or affiliated with the listing agent.[162] The exceptions to this presumption are considerable, however. The presumed buyer agency is nullified if "either the licensee or the buyer expressly declines to have the licensee act as a buyer's . . . agent."[163] While a buyer may not decline such representation, it is highly likely that the licensee would do so for two reasons. First, the buyer has no obligation to work exclusively with or to compensate the licensee who is acting as a presumed buyer's agent.[164] Second, and probably more importantly, a licensee acting as a presumed buyer's agent may show only those properties that are not listed by that licensee or her brokerage.[165] If a licensee shows properties listed by her firm, she is then acting as the listing agent and will no longer represent the buyer, except possibly in an intra-company capacity.[166] Even in these states, then, as a practical matter the default is most likely to be the traditional model.

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[160] An interesting downside for the industry that is presented by the written agency agreement requirement is a Tennessee case in which the parties to a commercial real estate contract successfully avoided paying the facilitator/licensee a commission in part because there was no written brokerage agreement. Coldwell Banker-Hoffman Burke v. KRA Holdings, 42 S.W.3d 868, 874–75 (Tenn. Ct. App. 2000). Notably, the facts of the case also permitted a finding that the licensee was not the procuring cause of the sale, despite the fact that she introduced the buyer to the property and participated in negotiations. *See id.* at 875–76.

[161] NEB. REV. STAT. § 76-2416(2) (2001). Washington's statute is similar. Licensees who provide real estate services to buyers are deemed buyers' agents unless any of the exceptions apply, i.e., the licensee is either the seller's agent or subagent, the licensee is a dual agent for both parties, the licensee is the seller, or the parties otherwise agree in writing. WASH. REV. CODE ANN. § 18.86.020 (West 2002).

[162] MD. CODE ANN., BUS. OCC. & PROF. § 17-533(a) (2001).

[163] *Id.* § 17-533(a) (2001). The result is the same if either the licensee or the buyer expresses a desire to terminate the presumed agency. *Id.* § 17-533(b)(1).

[164] *Id.* § 17-533(c).

[165] *Id.* § 17-533(d).

[166] *Id.* § 17-533(f). *See also supra* Part IV.B.

Finally, by definition, in Type III states the default position is for a consumer without a written agency[167] or other brokerage agreement[168] to qualify only as a customer.[169] This makes most sellers "clients" and most buyers customers.[170] In states with two-tiered service models, realtors may work with but do not represent customers.[171] This scenario creates

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[167] *See, e.g.*, GA. CODE ANN. § 10-6A-3(4), (6) (2002) (defining brokerage engagement as a "written contract" and client as one with brokerage engagement); IDAHO CODE §§ 54-2083(4), 54-2083(6), 54-2084 (Michie 2001) (stating that no agency relationship is established without a writing); KAN. STAT. ANN. § 58-30,102(c) (2001) (defining agency agreement as "written agreement setting forth the terms and conditions of the relationship between a broker and the broker's client"); MO. REV. STAT. § 339.780 (2000) (requiring agreements for brokerage services to be in writing); S.C. CODE ANN. § 40-57-137(C), (H) (Law. Co-op. 2000); S.C. REAL EST. COMM'N, ADVISORY (Feb. 1998) (on file with author) ("seller and buyer agency agreements must be in writing"); S.D. CODIFIED LAWS § 36-21A-130 (Michie 2001) (stating that agency agreements shall be in writing).

[168] The following states' statutes provide for two-tiered service, and do not require agency agreements to be in writing: Illinois, Kentucky, Mississippi, and Virginia. These states fall in Category B.

[169] Virginia's statute provides an example: "[u]nless a licensee enters into a brokerage relationship with such person, it shall be presumed that such person is a customer of the licensee rather than a client." VA. CODE ANN. § 54.1-2130 (Michie 2001). The definition of "brokerage relationship" is any contractual relationship in which the client engages the broker to procure a seller or buyer on the client's behalf. *Id.* This sort of ambiguity with respect to the creation of an agency relationship is a double-edged sword. By implication it permits both oral and implied agency agreements, leaving the licensee and the party free (absent a written agreement) to assert that an agency relationship exists or does not exist, depending on the factual circumstances. This opens the door to fact intensive litigation. Many licensing statutes have sought to avoid precisely this result by narrowing this potential loophole. *See, e.g.*, IDAHO CODE § 54-2084 (2001) ("No type of agency representation may be assumed by a brokerage, buyer or seller or created orally or by implication."). On the other hand, requiring agency relationships in writing also has the less-than-salutatory effect of encouraging the traditional listing/selling agency representation model. *See supra* notes 147–160 and accompanying text (discussing written agency agreements).

[170] Less than half of U.S. homebuyers report having engaged a real estate licensee in exclusive buyer agency agreements. BUYERS AND SELLERS PROFILE, *supra* note 75, at 23. The number of buyers who actually entered into enforceable agency relationships with the licensee with whom they are working is probably lower. Even in the post-disclosure era, buyers are probably not the best arbiters of whether they have legally entered into an agency arrangement with "their" agent in a given real estate transaction, particularly when the courts themselves are in flux on this subject. *See supra* note 82 (referring to *ex post facto* implied agency).

[171] Indiana and Louisiana have unique two-tiered service statutes. Their provisions do purport to create a default agency relationship. Louisiana's statute provides as follows:

> a licensee engaged in any real estate transaction shall be considered to be representing the person with whom he is working as [an] agent unless there is a written agreement between the broker and the person providing that there is a different relationship or the licensee is performing only ministerial acts on behalf of the person.

LA. REV. STAT. ANN. § 9:3892 (West 2001). Indiana's statute is nearly identical. *See* IND. CODE ANN. § 25-34.1-10-9.5 (West 2002). *Cf.* 225 ILL. COMP. STAT. ANN. 454/1-10 (West 2002) (defining "customer" as "a consumer who is not being represented by the licensee but for whom the licensee is performing ministerial acts"). For a discussion of what constitutes "ministerial acts" and the confusion that this may engender, see Part VIII.C.

Also notable is that neither of these statutes requires that agency agreements be in writing. For example, Louisiana defines agency as a "relationship in which a real estate

precisely the same danger that the traditional model did—a party or both parties may be confused as to the role the "agent" plays in the transaction, the responsibilities that "agent" has, and to whom they run.

B. Category B: Statutes Providing "Choice"

A number of states' statutes create no presumption,[172] instead providing for a variety of different realtor representation options and simply permitting the consumer to select one among them or none at all.[173] While consumers (buyers in particular) in Category B states ostensibly have a number of representational choices, it appears that by default most transactions are still likely to fall into the traditional listing/sellingagency model.[174] This is because absent local practice[175] or a particular competi-

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broker or licensee represents a client by the client's consent, whether express or implied, in an immovable property transaction." LA. REV. STAT. ANN. § 9:3891(1). *See also* IND. CODE ANN. § 25-34.1-10-0.5 (West 2002). Like Virginia's statute, Louisiana's statutes leave the door open for a mere "customer" to argue for the imposition of an implied agency relationship with the licensee "with whom he is working." *See supra* note 169. This argument would be particularly persuasive if the licensee engaged in more than ministerial acts for the "customer."

[172] Courts can also create a default presumption in any Category B state. For example, courts in Arizona have rendered the agent who works with the buyer a "buyer's agent," complete with fiduciary obligations owed to clients. *See, e.g.*, Alaface v. Nat'l Inv. Co., 892 P.2d 1375, 1383–84 (Ariz. Ct. App. 1994) (agent working with buyer is buyer's agent, even if seller is paying commission); Lombardo v. Albu, 14 P.2d 288 (Ariz. 2000) (referring to agent working with buyer as buyer's agent); Aranki v. RKP Invs., Inc., 979 P.2d 534 (Ariz. Ct. App. 1999) (same). The same would be true in Category A states. Further treatment of these judicially created anomalies is outside the scope of this Article.

[173] *See, e.g.*, FLA. STAT. ch. 475.278 (2000) (providing for "no brokerage" representational status); MICH. COMP. LAWS ANN. § 339.2517(2) (2001) (providing "none of the above" as an option on agency relationship disclosure form).

[174] Historically, there were numerous disincentives in place that resulted in few brokers rejecting subagency. *See generally* Collette, *supra* note 6, at 427–29 (discussing practical barriers, under former MLS system, to formation of any cooperating broker relationship other than subagency). It is possible, if not likely, that in many quarters this attitude has persisted, both in the minds of realtors and in their form documents.

Default to the subagency representation model also occurs in those states that have such scant statutory or regulatory provisions relative to forms of agency representation—these typically focusing on disclosure thereof rather than the creation of duties—that no default position is established. *See, e.g.*, ALASKA STAT. § 08.88.396 (Michie 2001); ARK. CODE ANN. § 17-42-108 (Michie 2001); ARK. REAL EST. COMM'N REGS. 8.1–8.5 (2001); DEL. CODE ANN. tit. 24, § 2931 (2001); DEL. ADMIN. CODE tit. 24, § 2900 (2000); HAW. ADMIN. R. § 16-99-3.1 (2002); MASS. REGS. CODE tit. 254, § 3.00(13) (2002).

Arizona's statutory and regulatory scheme falls into this category as well. ARIZ. REV. STAT. ANN. § 32-2101 (West 2002); ARIZ. ADMIN. CODE 4-28-1101 (2002). However, Arizona case law converts what would traditionally have been cooperating or selling agents into buyers' agents. *See supra* note 172.

[175] *See, e.g.*, Maas, supra note 145 (reporting that in response to legislative agency relationship changes, some local real estate brokerage firms have eliminated subagency practice, instead formulating firm-wide policies that require listing agents to be sellers' agents; other licensees who work with buyers to act as buyers' agents; and, where a buyer represented by the firm seeks to purchase one of the firm's listings, the licensees act as disclosed dual agents); Christopher Curran & Joel Schrag, *Does It Matter Whom an Agent Serves? Evidence From Recent Changes in Real Estate Agency Law*, 43 J. LAW & ECON.

tive setting, the onus is on the unsophisticated and relatively uninformed consumer to seek out a relationship other than the one that is easiest, most familiar, or most economically beneficial to the licensee.

California, Connecticut, Florida, Kentucky, Maine, Michigan, Minnesota, Nevada, Ohio, Oregon, New York, Texas, and West Virginia are all Category B states.[176]

C. Category C: Default Is Transaction Brokerage

Only five states' statutes are Category C,[177] in which transaction brokerage is the default position: Alabama, Oklahoma, New Mexico, Pennsylvania, and Tennessee.[178] Alabama's statute, for example, provides that "[i]n the absence of a signed brokerage agreement between the parties, the transaction brokerage relationship shall remain in effect."[179] Oklahoma's statute similarly provides that "if a broker does not enter into a

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265 (2000) (reporting a shift from seller agency to buyer agency in the Atlanta, Georgia market, resulting in downward pressure on home prices). Presumably, other uncharacteristic practices have developed in other discrete localities.

[176] CAL. CIV. CODE § 2079 (West 2002); CONN. GEN. STAT. §§ 20-311 to -329 (2001); FLA. STAT. ch. 475.278 (2001); 201 KY. ADMIN. REGS. 11:400 §5(1)(a) (2001); 32 ME. REV. STAT. ANN. §§ 13271–13281 (West 2001); MICH. COMP. LAWS § 339.2517 (2001); MINN. STAT. § 82.197 (2002); NEV. REV. STAT. § 645.005 (2001); OHIO REV. CODE ANN. § 4735.01 (Anderson 2001); OR. REV. CODE ANN. § 696.800 (2002); N.Y. REAL PROP. LAW § 443 (McKinney 2001); TEX. REV. CIV. STAT. ANN. art. 6373a, § 15C(c) (Vernon 2000); W.V. REAL EST. COMM'N, NOTICE OF AGENCY RELATIONSHIP (on file with author) (suggesting but not mandating written agency agreement).

[177] For a variety of reasons, a number of states that purport to make transaction brokerage the default do not actually fall into this category. Colorado's, Kansas's, and Missouri's licensing statutes also create a "presumption" that licensees are transaction brokers. In these states, however, this presumption is essentially eviscerated by its statutory exceptions. *See* COLO. REV. STAT. § 12-61-803(2) (1996) (making the default that of transaction broker except when licensee is the seller's agent or subagent); KAN. STAT. ANN. § 58-30,103(c) (2002) (same); MO. REV. STAT. § 339.720(1)–(2) (2001) (establishing transaction brokerage default except when licensee is seller's agent or subagent, buyer's agent, disclosed dual agent, a designated broker, or is just performing ministerial acts for a customer). In these states, the default is more likely to be the traditional agency representation model. Therefore, these are Category A states.

Likewise, Georgia's and Montana's statutes only appear to create a default transaction broker. *See* GA. CODE ANN. § 10-6A-3(14) (2000) (defining transaction broker as "a broker who has not entered into a client relationship with *any* of the parties to a particular real estate transaction and who performs only ministerial acts on behalf of one or more of the parties . . . .") (emphasis supplied); MONT. CODE ANN. § 37-51-102(24)(b) (2001) (licensee "is presumed to be acting as a statutory [transaction] broker unless . . . [licensee] has entered into a listing agreement with a seller or a buyer broker agreement with a buyer or has disclosed, as required by this chapter, a relationship other than statutory broker"). In each of these states the default is not transaction broker status; instead, the agent working with the unrepresented buyer could just as easily and perhaps more likely be a subagent under the statute. These states, therefore, are Category A states.

[178] *See supra* notes 161–166 and accompanying text (creating a statutory default to buyer agency, but with numerous exceptions that essentially vitiate the rule).

[179] ALA. CODE § 34-27-82(e) (1997).

written brokerage agreement with a party, the broker shall perform services only as a transaction broker."[180]

The other Category C states create a transaction broker default in a different manner. In New Mexico, Pennsylvania, and Tennessee, the definitions of facilitator, transaction licensee, and nonagent, respectively, dictates that licensees who work with unrepresented parties without written brokerage agreements do so as transaction brokers.[181]

The degree of protection provided by the transaction broker default over the traditional model default depends on the number of duties owed in a particular state.[182] In Oklahoma, transaction brokers owe significant duties to the party with whom they work—duties that nearly coincide with a single-party agents' duties:

> 1. To perform the terms of the written brokerage agreement, if applicable;
>
> 2. To treat all parties with honesty;
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> 3. To comply with all requirements of the Oklahoma Real Estate License Code and all applicable statutes and rules; and
>
> 4. To exercise reasonable skill and care including:
>
> a. timely presentation of all written offers and counteroffers,

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[180] OKL. STAT. tit. 59, § 858-352 (2001). Statutes like Oklahoma's permit but do not necessarily encourage seller subagency practice. Indeed, in Alabama and Oklahoma, where a licensee does not have a written subagency agreement with the seller, she must act as a transaction broker for the otherwise unrepresented buyer. Subagency agreements in this context may be entered into between the listing agent and the cooperating or selling agent who brings the buyer to the transaction. *See, e.g.*, CAL. CIV. CODE § 2079.13(o) (Deering Supp. 2001); IND. CODE ANN. § 25-34.1-10-9 (2001); IOWA ADMIN. CODE r. 193E-1.1(543B) (1997); S.C. CODE ANN. § 40-57-137(N) (Law. Co-op. 2001). They may also be created by way of a written authorization contained within the listing agreement. Oklahoma's transaction broker default, which requires any subagent to contract directly with the party represented, may present another effective way of handling the "unknown" subagent and vicarious liability problem. *See supra* note 135 at accompanying text.

[181] *See* N.M. ADMIN. CODE tit. 16, § 61.19.8(C) (2002) (mandating that a "nonagency" relationship include a "brokerage relationship providing real estate related services without Agency, . . . to Customers with no written agreement"); 63 PA. CONS. STAT. § 455.201 (2001) (defining a transaction licensee as "a licensed broker or salesperson who provides communication or document preparation services or performs acts described under the definition of 'broker' or 'salesperson' for which a license is required, without being an agent or advocate of the consumer"); TENN. CODE ANN. § 62-13-102(8)(a) (1997) (transaction broker is one who "assists one or more parties to a transaction who has not entered into a specific written agency agreement . . .").

[182] There is very little practical difference between the Class C default transaction brokerage in New Mexico, Pennsylvania, and Tennessee, on the one hand, and the treatment of "customers" in Iowa and Wisconsin, where *all parties*, including customers, are owed the same duties by licensees. *See* IOWA CODE § 543B.56 (2001); WIS. STAT. § 452.133 (2000). These latter states are not categorized as Class C because their statutes do not provide for transaction broker status. In a sense, though, in these two states the default position is irrelevant.

b. keeping the party for whom the transaction broker is providing services fully informed regarding the transaction,

c. timely accounting for all money and property received by the broker,

d. keeping confidential information received from a party confidential as required by Section 7 of this act,[183] and

e. disclosing information pertaining to the property as required by the Residential Property Condition Disclosure Act. [184]

The duties owed by licensees in the other Category C states are similar in scope.[185]

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[183] *See supra* note 99.

[184] OKLA. STAT. tit. 59, § 858-353 (2001). Oklahoma statutes require the seller to disclose material facts related to the condition of the property being sold, typically in the form of a written "Seller's Disclosure Statement." OKLA. STAT. tit. 60, § 833 (2001) (quoting the operative provision of Oklahoma's "Residential Property Condition Disclosure Act"). *See generally* Leroy Gatlin II, Note, *Reforming Residential Real Estate Transactions: An Analysis of Oklahoma's Disclosure Statute*, 22 OKLA. CITY U. L. REV. 735 (1997).

Many other states now also impose this requirement. *See, e.g.*, HAW. REV. STAT. §§ 508D-7 to 508D-14 (2000) (requiring sellers to provide such a disclosure form to buyers); KY. REV. STAT. § 324.360 (Banks-Baldwin 2002) (same); 68 PA. CONS. STAT. § 7301 (2001) (same). For sample forms in use currently, see, for example, 876 IND. ADMIN. CODE tit. 876, r. § 1-4-2 (2001); 201 KY. ADMIN. REGS. 11:350 (2001). In addition to the duties owed by transaction brokers, clients who have contractually engaged a licensee are also owed duties of "performing all brokerage activities for the benefit of the party for whom the single-party broker is performing services unless prohibited by law," and "obeying the specific directions of the party for whom the single-party broker is performing services that are not contrary to applicable statutes and rules or contrary to the terms of a contract between the parties to the transaction." OKLA. STAT. tit. 59, §§ 858-354(B)(4)(e), (g) (2001).

[185] ALA. CODE § 34-27-84 (1997) (requiring the following duties of all licensees: honesty, good faith, reasonable skill and care, confidentiality, accounting, presentation of all offers in a "timely and truthful manner," disclosure of conflicts of interest in writing); N.M. ADMIN. CODE tit. 16, §§ 61.1.7.6, 61.19.9(C) (2002) (stating that "duties required of all Licensees regardless of any contractual or non-contractual Brokerage Relationship" include disclosure of adverse material facts about the property, transaction or financial ability of the parties to complete the transaction, disclosure of any material interests of the licensee or her relatives in the transaction, timely presentation of offers, performance of any oral or written agreement, accounting, suggestion to obtain professional advice, compliance with fair housing and anti-discrimination laws, assistance to parties with complying with terms and conditions of contract required for closing, confidentiality); 63 PA. CONS. STAT. § 455.606a (2001) (listing duties owed by all licensees to all consumers, including reasonable care, honesty and good faith, prompt presentation of written communications, compliance with the state's Real Estate Seller Disclosure Act, accounting, provision of agency relationship information at an initial interview, timely disclosure of conflicts of interest or financial interest in recommended ancillary services, suggestion to seek professional advice for matters outside the scope of the realtor's services, assistance with tasks needed to complete the transaction, advice on compliance with relevant laws); TENN. CODE ANN. § 62-13-403 (1997) (stating that all licensees owe the following duties to the parties: reasonable skill and care, disclosure of adverse facts, confidentiality, honesty and good faith, disclosure of market conditions information upon request, accounting,

Without the benefit of the transaction broker presumption, all that an unrepresented buyer in Oklahoma would be entitled to from a licensee representing the seller would be the basic duty of honesty that is owed by single party licensees to the other party to the transaction.[186] Because Oklahoma's transaction broker provision imposes a good number of both general and detailed duties and because all licensees without a written brokerage agreement with a party are transaction brokers by default, unrepresented parties in Oklahoma are more protected than it might initially appear.

Reference to a statute's default representation status reveals something about the consumer protection provided in a given state. Not all states default to transaction broker status, however, and, of those, not all require as much of their transaction brokers as Oklahoma. In fact, when assessing whether the consumer is being served by these new licensing statutes and regulatory regimes, the number and weight of the duties imposed on licensees vis-à-vis other parties is a more useful gauge. Therefore, the next Part classifies state statutes by level of other-party duties.[187]

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disclosure of all conflicts of interest and any self dealing).

[186] *See* OKLA. STAT. tit. 59, § 858-354(B)(2) (2001) (duties of single agent licensee include duty "to treat all parties with honesty"). This is not the case in Alabama or in Tennessee, where all licensees owe all parties the duties set forth *supra* at note 185.

[187] In addition to other-party duties, a licensee obviously owes numerous duties to her client—the consumer with whom she has entered into a brokerage agreement. Rather than list these duties, a few states simply refer to these obligations as fiduciary. *See, e.g.*, ARIZ. ADMIN. CODE 4-28-1101(A) (2001) ("A licensee owes a fiduciary duty to the client, and shall protect and promote the client's interest."); N.Y. REAL PROP. LAW § 443(4) (McKinney 1989) (A licensee has, "without limitation, the following fiduciary duties to the [client]: reasonable care, undivided loyalty, confidentiality, full disclosure, obedience, and a duty to account."); OHIO REV. CODE ANN. § 4735.62 (Anderson 2000) ("In representing any client in an agency or subagency relationship, the licensee shall be a fiduciary of the client. . ."); 23 TEX. ADMIN. CODE § 531.1 (West 2001) ("A real estate broker or salesperson, while acting as an agent for another, is a fiduciary.")

A large percentage of states have redefined the realtor function altogether, removing the common law fiduciary obligations an agent owes to his principal or client and replacing them with concrete enumerated licensee duties that are specifically tied to the residential real estate transaction. *See, e.g.*, MONT. CODE ANN. § 37-51-313 (2001) (defining duties to govern relationships between brokers or salespersons and buyers or sellers and noting that statutory provisions "are intended to. . .replace the common law as applied to these relationships"). Even as redefined, the statutory duties owed to clients tend to include, among others, a number of common law fiduciary or fiduciary-like duties. *See, e.g.*, OHIO REV. CODE ANN. § 4735.62 (Anderson 2001) (listing specific real estate-related "fiduciary duties" owed by licensee to client). *See also* GA. CODE ANN. § 10-6A-5(2) (2000) (including as seller's agent's duties, "seeking a sale at the price and terms . . . acceptable to the seller" and "timely presenting all offers to and from the seller, even when the property is subject to a contract of sale"); 63 PA. CONS. STAT. § 455.606b(2) (2001) (stating that seller's agent's duties include, *inter alia*, the duty "to make a continuous and good faith effort to find a buyer for the property"). As such, those who are formally represented by a licensee are protected to a level that generally approximates what was available under the common law of agency.

VI. LICENSEES' STATUTORILY DEFINED OTHER-PARTY DUTIES

Contemporary amendments to most states' real estate licensing statutes have broken completely with the common law and have extended certain agency duties, like the duties of honesty and fairness and the duty to account for any party's funds, to those consumers that are not represented by the licensee. Using "other party" duties, these states have added substantive protections for all parties to a real estate transaction, whether or not these parties are represented by a licensee.[188] Some states have done more than others in creating these other-party duties.[189]

The levels of protection provided fall into four basic categories. At one end of the spectrum are Class 1 states, in which no duties are enumerated at all. Class 2 states impose only a duty of "honesty and good faith." Class 3 states go further, requiring licensees to disclose "material adverse facts" in the transaction. Finally, Class 4 states are those in which licensees are held to a duty of reasonable care to non-clients. Each group is examined in more detail below.

A. Class 1: No Statutorily Enumerated Other-Party Duties

A few states did not participate in the widespread reform of licensing statutes that occurred in the late 1990s. While these "Class 1" states have generally imposed a duty on licensees to disclose agency relationship information,[190] they have done nothing to change the common law with respect to the licensee's role as an agent for her principal.[191]

Utah's administrative regulations, for example, contemplate unrepresented buyers, but do not prescribe any duty towards them.[192] Alaska's and Hawaii's regulations are similarly silent with respect to any specific duties owed to either the agent's principal or to other actual or prospective parties to the transaction.[193] Michigan's statute has also avoided the

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[188] *See, e.g.*, IOWA CODE § 543B.56(d) (2001) (listing duties of licensees owed to *all parties* in a transaction); N.M. ADMIN. CODE tit. 16, § 61.19.9(C) (2002) (same); WIS. STAT. § 452.133 (2000) (same).

[189] The term "other-party duties" is used to include any duties that may be owed to a consumer or client other than the licensee's client. For example, if buyer and seller are represented separately by "exclusive agents," the term refers to those duties that are owed by each licensee to the other party to the transaction. The term also encompasses the duties owed by a single licensee to both parties to the transaction, if the licensee represents neither party in an agency capacity. Finally, it could also mean the listing agent's or selling/seller's subagent's duties to the frequently unrepresented buyer, or conversely a buyer's broker's duties to the seller, in the atypical case where the seller is unrepresented.

[190] *See infra* Part VII.A.

[191] Due to the failure of these states to adopt new realtor roles, three of the four Class 1 states are also Type I states.

[192] UTAH ADMIN. CODE 162-6.2.16 (2001) (setting forth duties owed by licensees to clients, when acting for seller, buyer, or as disclosed dual "limited" agent).

[193] ALASKA STAT. § 08.88.396 (Michie 2000); 12 ALASKA ADMIN. CODE tit. 64 (2002); HAW. REV. STAT. § 467-1 (2002); HAW. ADMIN. R. 16-99-1 (2002).

enumeration of licensee duties.[194] In all of these states where there is no statutory delineation of licensee duties, those that do exist can be found in the common law.[195]

Relying on the common law, however, creates a number of problems. For one, uncertainty may exist over which parties the licensee must serve since agents continue to work with buyers who have not expressly contracted with the licensee.[196] Moreover, with no statutory provision prohibiting it, "accidental" or implied agency may arise depending on the predisposition of the state's courts.[197] The resulting confusion and unpredictability was a driving force for other states to overhaul their licensing statutes. These efforts are described below.

B. Class 2: Simple Requirement of Honesty, Good Faith, and Fairness of All Licensees

Class 2 states impose a single other-party-duty,[198] to treat (1) the other party to the transaction, (2) any non-principal, and/or (3) all parties to the transaction honestly and/or fairly. Class 2 states include Arkan-

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[194] MICH. COMP. LAWS §§ 339.2517(1)–(2) (Supp. 2002). Michigan's statute does not delineate any duties either to the client or to parties other than disclosure of agency status and of any fees or commissions earned by referrals to related service providers. MICH. COMP. LAWS § 339.2517(1)–(2) (Supp. 2002); MICH. ADMIN. CODE r. 339.22321 (1999). Designated agents in Michigan owe a duty of limited confidentiality. *See* MICH. COMP. LAWS § 339.2517(7) (2001).

[195] *See* Horvath v. Langel, 267 N.W. 865, 869 (Mich. 1936) (finding that brokers and salespeople owe a fiduciary duty to seller); Andrie v. Chrystal-Anderson & Ass'n Realtors, Inc., 466 N.W.2d 393 (Mich. Ct. App. 1991) (holding that licensee owed duty to seller/principal to accurately present prospective buyer's offer, but owed no such duty to prospective buyers); Att'y Gen. v. Diamond Mortgage, 327 N.W.2d 805, 811 (Mich. 1982) (ruling that real estate brokers are subject to the Michigan Consumer Protection Act).

[196] The principal-agent doctrine in this area has suffered much erosion. *See* Price v. Long Realty, Inc., 502 N.W.2d 337 (Mich. App. 1993) (affirming jury verdict in favor of buyers against a licensee "engaged" by them, based on fraudulent misrepresentation and malpractice, with no discussion of precise relationship between plaintiffs and licensee).

[197] *See supra* note 82 (discussing *ex post facto* imposition of agency by courts). *See generally* Black, *supra* note 6.

[198] Many states, either by statute or regulation, create other duties that may indirectly inure to the benefit of the parties to the transaction. *See, e.g.*, ARIZ. ADMIN. CODE 4-28-1101(D) (2000) ("[A] licensee shall not allow a controversy with another licensee to jeopardize, delay, or interfere with the initiation, processing, or finalizing of a transaction on behalf of a client."); DEL. ADMIN. CODE tit. 24, § 2900 r. 10.2 (2002) (giving licensees who make "if we can't sell it we'll buy it" advertisements sixty days after expiration of original listing agreement within which to purchase the home and settle); HAW. ADMIN. REGS. §16-99-4(a) (2002) (calling for maintenance of client funds in trust); MONT. CODE ANN. § 37-51-313 (2001) (stating that seller's agents owe to buyers and buyer's agents owe to sellers a duty to "comply with all applicable federal and state laws, rules, and regulations"); N.J. ADMIN. CODE tit. 11, §§ 5-7.5, 5-7.6 (2002) (stating that collusion and discrimination with respect to commission rates and splits are prohibited). These sorts of duties are outside the scope of this Article.

sas,[199] Connecticut,[200] Kentucky,[201] Louisiana,[202] Oklahoma,[203] Rhode Island,[204] and Texas.[205] In a similar vein, licensees in Massachusetts must "present properties honestly and accurately" to non-principal parties.[206]

In contexts outside the residential real estate transaction, the statutory imposition of a basic duty of honesty and fair dealing might be unnecessary in light of the availability of common law claims for negligent misrepresentation or even fraudulent inducement. In a number of states that considered a non-client's claim for misrepresentation prior to the advent of these new licensing statutes, however, no duty could be imposed given the fiduciary relationship owed to the other party to the transaction and the concomitant lack of fiduciary relationship with the non-client.[207] Thus, these new statutory provisions have extended the

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[199] ARK. REAL EST. COMM'N R. 8.5(a) (2001) (The "obligation of absolute fidelity to the interest of the client or clients is primary, but does not relieve a licensee from the equally binding obligation of dealing honestly with all parties to the transaction.").

[200] CONN. AGENCIES REGS. § 20-325d-2 (2002) (outlining obligation of all licensees to "treat all parties to a real estate transaction honestly and fairly," regardless of representation articulated in state's Agency Disclosure Notice).

[201] 201 KY. ADMIN. REGS. 11:400 (2001) ("Licensees are required to deal honestly and fairly with [those not represented by them].").

[202] LA. REV. STAT. ANN. § 9:3894 (West 2001) ("Licensees shall treat all [parties not represented by them] honestly and fairly.").

[203] OKLA. STAT. tit. 59, § 858-354(B)(2) (2000) ("The single-party broker shall . . . treat all parties with honesty"). Recall that in Oklahoma, otherwise unrepresented parties who deal with a licensee will be owed those duties of a transaction broker. *See supra* text accompanying note 178. Oklahoma's statute expressly contemplates that a seller's agent might also represent a buyer as a transaction broker and, therefore, might owe him substantial duties beyond "honesty." OKLA. STAT. tit. 59, § 858-355(B)(2) (2001). On the other hand, if the seller and buyer are represented separately by a buyer's broker and seller's agent, each of the two licensees owes the other party honesty, in addition to the duties owed to their own clients. *Id.*

[204] R.I. GEN. LAWS §§ 5-20.6-6(b), (d) (2001) (stating that listing agent and seller's subagent must "[t]reat the buyer honestly and fairly."); *id.* § 5-20.6-6(c) (declaring that buyer's agent must "[t]reat the seller honestly and fairly.").

[205] 22 TEX. ADMIN. CODE § 531.1(1) (West 2001) (mandating that "the agent, in performing duties to the client, shall treat other parties to a transaction fairly").

[206] MASS. BD. OF REG. OF REAL EST. BROKERS & SALESPERSONS, MANDATORY AGENCY DISCLOSURE—AGENCY RELATIONSHIP (on file with author) ("All real estate licensees must, by law, present properties honestly and accurately."). *See also* S.C. CODE ANN. § 40-57-137(F) (Law. Co-op. 2001) (stating that seller's agents must treat buyers honestly and "may not knowingly give them false or misleading information about the condition of the property which is known to the licensee or, when acting in a reasonable manner, should have been known to the licensee"); *id.* § 40-57-137(K) (requiring same in terms of buyer's ability to perform terms of a transaction).

[207] *See, e.g.*, Mosca v. Kiner, 716 N.Y.S.2d 543, 544 (App. Div. 2000) (finding that listing agent had no duty to disclose matters of public record to buyers); Lopata v. Miller, 712 A.2d 24 (Md. 1997) (holding that selling agent had no duty to buyers); Harrington v. Mikell, 469 S.E.2d 627 (S.C. Ct. App. 1996) (finding no fiduciary relationship between seller's agent and buyer); Slavin v. Hamm, 621 N.Y.S.2d 393, 394–95 (App. Div. 1994) (ruling that seller/licensee had no fiduciary duty to purchasers); Moser v. Bertram, 858 P.2d 854, 855 (N.M. 1993) (holding listing agent had no fiduciary duty to buyer); McAdams v. Dorothy Edwards Realtors, Inc., 604 N.E.2d 607, 611 (Ind. 1992) (stating that seller's agent had no duty to act in buyer's best interest); Burman v. Richmond Homes Ltd., 821 P.2d 913, 922 (Colo. Ct. App. 1991) (holding that selling agent is seller's agent

common law, clarifying in Class 2 states that a duty of honesty and fair dealing is indeed owed to non-principals as well.

C. Class 3: Additional Requirement That Licensees Disclose Material Adverse Facts

As in Class 2 states, licensees in Class 3 states also owe a duty of honesty to non-principals, sometimes expressed in these states as the duty not to knowingly provide false information to the other party.[208] The twenty-five states[209] in Class 3 take another step towards increased protection for consumers, adding the duty to disclose "material adverse facts."[210] This duty has its roots in the landmark California case of *Easton*

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with no duty to purchasers); Allen v. Lindstrom, 379 S.E.2d 450, 456 (Va. 1989) (ruling that seller's agent has no duty to buyers; buyers are not third party beneficiaries of listing agreement); Proctor v. Holden, 540 A.2d 133, 143 (Md. Ct. Spec. App. 1988) (stating that selling agent who deals with buyers owes agency duties to seller only); Walter v. Murphy, 573 N.E.2d 678, 680 (Ohio Ct. App. 1988) (holding that listing agent had no fiduciary duty to buyers).

A few more recent cases appear to approve of fraud and/or fraudulent inducement claims brought by buyers. *See, e.g.*, Power v. Georgia Exterminators, Inc., 532 S.E.2d 475, 479 (Ga. Ct. App. 2000) (holding that buyer could not recover against listing agent for misrepresentations absent showing of scienter); Svendsen v. Stock, 979 P.2d 476, 502 (Wash. Ct. App. 1999) (stating that a listing agent is liable to purchasers for fraudulent concealment); Esposito v. Saxon Home Realty, Inc., 679 N.Y.S.2d 152, 152–3 (App. Div. 1998) (same); Simon v. Wilkinson Agency, Inc., 518 N.W.2d 154, 157 (Neb. Ct. App. 1994) (holding that negligent misrepresentation not recognized but fraudulent misrepresentation claim possible).

[208] *See, e.g.*, GA. CODE ANN. § 10-6A-5(b) (2000); IND. CODE ANN. §§ 25-34.1-10-10 to -11 (West 2001); OHIO REV. CODE ANN. § 4735.61 (Anderson 2001); VA. CODE ANN. §§ 54.1-2131(B), 54.1-2132(B) (Michie 2001).

[209] The twenty-five states in Class 3 are: Arizona, Colorado, Delaware, Florida, Georgia, Illinois, Indiana, Kansas, Maine, Maryland, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, South Dakota, Vermont, Virginia, and Wyoming.

[210] *See, e.g.*, DEL. ADMIN. CODE tit. 24, § 2900 r. 10.3.1.1–2 (2001) (requiring sellers' agents and buyers' agents to disclose "material facts about properties" and "disclose material facts about the transaction").

Notably, this duty ordinarily does not require licensees to affirmatively disclose information regarding "psychologically tainted" property. *See, e.g.*, MINN. STAT. § 82.197(6) (2001) (stating that licensees are not required to disclose fact or suspicion that property is or was occupied by a person with HIV/AIDS, that the property is subject to "perceived paranormal activity," that the property is a site of an accidental or natural death, or that a registered sex offender lives nearby); N.J. ADMIN. CODE § 11:5-6.4(d) (2002) (stating licensees are not required to disclose "social conditions" and "psychological impairments" except upon inquiry); S.D. CODIFIED LAWS §§ 36-21A-134.1 to -138.1 (Michie 2001) (maintaining that sellers' agents have no duty to disclose "sex offender information," but upon inquiry, buyers' agents must disclose any actual information they have in that regard). Washington, a Class 4 state, perhaps provides the most general and comprehensive safe harbor for licensees in this regard:

> The fact or suspicion that the property, or any neighboring property, is or was the site of a murder, suicide or other death, rape or other sex crime, assault or other violent crime, robbery or burglary, illegal drug activity, gang-related activity, political or religious activity, or other act, occurrence, or use not adversely affecting

v. Strassburger,[211] and its ramifications can be more or less substantial depending upon what information must be disclosed in each state and to whom.[212]

Differences in the various state statutes' definitions of "material adverse facts," though sometimes subtle, have an impact on the level of consumer protection provided. For example, Colorado's statute states:

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the physical condition of or title to the property is not a material fact.

WASH. REV. CODE § 18.86.010(9) (2002).

There is a large body of scholarly commentary on this topic. *See, e.g.*, Thomas D. Larson, Comment, *To Disclose or Not to Disclose: The Dilemma of Homeowners and Real Estate Brokers Under Wisconsin's "Megan's Law,"* 81 MARQ. L. REV. 1161 (1998); Flavio L. Komuves, Comment, *For Sale: Two-Bedroom Home with Spacious Kitchen, Walk-in Closet, and Pervert Next Door*, 27 SETON HALL L. REV. 668 (1997); Lori A. Polonchak, Comment, *Surprise! You Just Moved Next to a Sexual Predator: The Duty of Residential Sellers and Real Estate Brokers to Disclose the Presence of Sexual Predators to Prospective Purchasers*, 102 DICK. L. REV. 169 (1997); Ronald Benton Brown & Thomas H. Thurlow III, *Buyers Beware: Statutes Shield Real Estate Brokers and Sellers Who do not Disclose that Properties are Psychologically Tainted*, 49 OKLA. L. REV. 625 (1996); Ross R. Hartog, Note, *The Psychological Impact of AIDS on Real Property and a Real Estate Broker's Duty to Disclose*, 36 ARIZ. L. REV. 757 (1994); Michael D. Isacco Jr., *A Massachusetts Real Estate Broker's Duty to Disclose: The Quandary Presented by AIDS Stigmatized Property*, 27 NEW ENG. L. REV. 1211 (1993); Sharlene A. McEvoy, Caveat Emptor *Redux: "Psychologically Impacted" Property Statutes*, 18 W. ST. U. L. REV. 579 (1991).

[211] *See* Easton v. Strassburger, 199 Cal. Rptr. 383 (Ct. App. 1984). In *Easton*, the Court observed, "[the] real estate broker's relationship to the buyer is such that the buyer usually expects the broker to protect his interests." *Id.* at 388. According to the court, this trust and confidence derives both from "the potential value of the broker's service" and the broker's superior knowledge of the complexity of the transaction. *Id.* "[Many] buyers in fact justifiably believe the seller's broker is also protecting their interest in securing and acting upon accurate information and rely upon him, ..." *Id.* at 389. Accordingly, *Easton* held that brokers have a duty to disclose material facts "which through reasonable diligence" they should know. *Id.* at 390. The court also held that realtors have a duty "to conduct a reasonably competent and diligent inspection of the residential property listed for sale and to disclose to prospective purchasers all facts materially affecting the value or desirability of the property that such an investigation would reveal." *Id.*

Easton's duty towards prospective buyers was codified in CAL. CIV. CODE § 2079 (Deering 2001). *See generally* Ann J. Rosenthal & R. Stuart Phillips, *Tell It Like It Is: Sellers' Duties of Disclosure in Real Estate Transactions Under California Law*, 26 GOLDEN GATE U. L. REV. 473 (1996) (offering a fuller discussion of California law post-*Easton*).

[212] To a lesser extent, "by whom" may also be relevant. Some states require this disclosure by seller's agents to buyers and/or prospective buyers only. *See, e.g.*, MISS. REAL EST. COMM'N, WORKING WITH A REAL ESTATE BROKER (on file with author) (stating that seller's agent has duty to disclose to buyer all known facts that materially affect the value of the property and are not known to or readily observable by the parties); N.C. REAL EST. COMM'N, WORKING WITH REAL ESTATE AGENTS (May 1, 2001) (on file with author) (requiring seller's agent to provide "any 'material facts' (such as a leaky roof) about properties."); VT. REAL EST. COMM'N R. § 4.5(a) (2000); WYO. STAT. § 33-28-303(c) (Michie 2001). Some states require all licensees to disclose material adverse facts to prospective buyers. *See, e.g.*, 225 ILL. COMP. STAT. 454/15-25(a) (2001); MINN. STAT. § 82.197 (2002).

Finally, and outside the scope of this discussion, some statutes require licensees to disclose material adverse facts to their own clients. *See, e.g.*, GA. CODE ANN. §§ 10-6A-5(b) to -7(b) (2000); MD. CODE ANN., BUS. OCCUP. & PROF. § 17-532(c)(1)(iii) (2001); S.D. CODIFIED LAWS § 36-21A-132(3)(c) (Michie 2001).

"adverse material facts may include but shall not be limited to adverse material facts pertaining to the title and the physical condition of the property, any material defects in the property, and any environmental hazards affecting the property which are required by law to be disclosed."[213] Georgia's statute is unique in encompassing disclosure of adverse conditions within a mile of the property under consideration.[214] Minnesota's statute may be even more expansive in its simplicity: it requires disclosure of facts "which could adversely and significantly affect an ordinary purchaser's use or enjoyment of the property, or any intended use of the property."[215] Other states, on the other hand, limit facts that must be disclosed to those that would not reasonably be discovered by the party to whom the duty of disclosure is owed.[216]

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[213] COLO. REV. STAT. § 12-61-804(3)(a) (2001). *See also* MO. REV. STAT. § 339.710 (2000) (similar); NEB. REV. STAT. § 76-2403 (2001) (similar); S.D. CODIFIED LAWS § 36-21A-125 (Michie 2001) (similar); WYO STAT. § 33-28-303(c) (Michie 2001) (similar).

[214] Georgia law requires sellers' agents to disclose to buyers all known material adverse facts about the property, as well as:

> all material facts pertaining to existing adverse physical conditions in the immediate neighborhood within one mile of the property . . . and which could not be discovered by the buyer upon a diligent inspection of the neighborhood or through the review of reasonably available governmental regulations, documents, records, maps, and statistics.

GA. CODE ANN. § 10-6A-5(b) (2000).

[215] MINN. STAT. § 82.197(6) (2002). *See also* FLA. STAT. ch. 475.278 (2000) (requiring disclosure of "facts materially affecting the value of residential real property"); N.D. ADMIN. CODE § 70-02-03-15.1(7)(d) (2001) (stating that licensees must disclose to buyer facts that "may adversely and significantly affect that person's use or enjoyment of the property"); TENN. CODE ANN. § 62-13-102(10) (2001) (same, but Class 4 state).

Some Class 4 states provide equally expansive definitions, for example, requiring disclosure of such facts as "affect value and desirability of the property." *E.g.*, N.Y. REAL PROP. LAW § 443(4) (McKinney 2001). Others require the disclosure of facts that are "not apparent or readily ascertainable to a party." *E.g.*, OR. REV. STAT. §§ 696.805(2)(d), 696.810(2)(d) (2001). The fact that Class 4 states also frequently impose this duty merely multiplies the number of alternative definitions of "material adverse facts." For example, Iowa's statute requires licensees to disclose to all parties all material adverse facts except:

> (1) Material adverse facts known by the party.
>
> (2) Material adverse facts the party could discover through a reasonably diligent inspection, and which would be discovered by a reasonably prudent person under like or similar circumstances.
>
> (3) Material adverse facts the disclosure of which is prohibited by law.
>
> (4) Material adverse facts that are known to a person who conducts an inspection on behalf of the party.

IOWA CODE § 543B.56 (2001).

[216] *See, e.g.*, 225 ILL. COMP. STAT. 454/15-25 (2001) (directing all licensees to disclose to prospective buyers facts "pertaining to the physical condition of the property . . . that could not be discovered by a reasonably diligent inspection of the property by the [party not represented by the licensee]"); IND. CODE ANN. § 25-34.1-10-10 (West 2001) (imposing similar duty on seller's agent to disclose facts "that could not be discovered by a reasonable and timely inspection of the property by the buyer"); MISS. REAL EST. COMM'N,

Some states go further and require disclosure of adverse facts about the transaction, in addition to disclosures regarding the physical condition of or defects in the property itself. Arizona licensees must disclose "any information that the seller [or buyer] is, or may be, unable to perform."[217] Other states are more specific with respect to disclosure of the buyer's financial qualifications. For example, Maine's statute requires a buyer's agent to disclose to the seller "material facts about the buyer's financial ability to perform the terms of the transaction."[218] In some states the enumeration of these duties is simply a codification of existing case law;[219] for others, it represents an important extension and clarification of licensees' duties.[220]

WORKING WITH A REAL ESTATE BROKER (stating that seller's agent has duty to both parties to disclose material adverse facts "which are not known to or readily observable by, the parties in the transaction") (on file with author).

[217] ARIZ. ADMIN. CODE 4-28-1101(B) (2001). *See also* MO. REV. STAT. § 339.710(1)(e) (2000) (calling for disclosure of any "material limitation of the party's ability to perform under the terms of the contract"); S.D. CODIFIED LAWS § 36-21A-125(4) (Michie 2001) (same); MONT. CODE ANN. § 37-51-102(2)(a)(ii) (2001) (requiring disclosure of "buyer's ability or intent to perform"); NEB. REV. STAT. § 76-240316 (2001) (mandating disclosure of a "reasonable belief that another party will not be able to, or does not intend to, complete that party's obligations"). At least one Class 4 state also includes this obligation. IDAHO CODE § 54-2083(1) (Michie 2000) (defining material adverse facts as including any fact "which establishes a reasonable belief that a party to the transaction is not able to or does not intend to complete that party's obligations").

[218] ME. REV. STAT. ANN. tit. 32, § 13274(2) (2001). *See also* COLO. REV. STAT. § 12-61-805(3)(a) (2001) (same); GA. CODE ANN. § 10-6A-7(b) (2000) (same); KAN. STAT. ANN. § 58-30,113(b)(2)(G) (2001) (same); NEB. REV. STAT. § 76-2418(3)(a) (2001) (same). *Compare* N.M. ADMIN. CODE tit. 16, § 61.19.9(C) (2001) (requiring disclosure of "financial ability to the parties to the transaction to complete the transaction"), *with* N.J. ADMIN. CODE § 11:5-6.9 (2001) (barring buyer's agent from making misrepresentations regarding such material matters as "buyer's financial ability to pay").

[219] Several states have a duty to disclose the buyer's financial inability to perform. *See, e.g.*, Lombardo v. Albu, 14 P.3d 288, 291 (Ariz. 2000) (holding that buyer's agent has duty to disclose financial inability of buyer to seller); Givan v. ASK Realty, Inc., 788 S.W.2d 503, 505 (Ky. Ct. App. 1990) (same); Grunewald v. Warren, 655 So. 2d 1227 (Fla. Dist. Ct. App. 1995) (same in commercial real estate transaction). Others have such duties in connection with the condition of the property or title. *See, e.g.*, Carter v. Gugliuzzi, 716 A.2d 17, 21 (Vt. 1998) (affirming judgment based on Consumer Fraud Act against listing broker for failure to disclose to buyer known facts about unusually windy conditions in neighborhood); Haberstick v. Gordon A. Gundaker Real Est. Co., 921 S.W.2d 104, 107 (Mo. Ct. App. 1996) (finding listing agents liable to buyers for failure to disclose known environmental hazard on adjacent land); Seidel v. Gordon A. Gundaker Real Estate Co., Inc., 904 S.W.2d 357, 362 (Mo. Ct. App. 1995) (holding listing agent liable for failure to disclose sewer easement encroachments to buyer); Lawyers Title Ins. Corp. v. Vella, 570 So. 2d 578, 584–85 (Ala. 1990) (finding that listing agent had fiduciary duty to buyer to disclose existing IRS lien on property). *But see* Choung v. Iemma, 708 N.E.2d 7, 14 (Ind. Ct. App. 1999) (finding that the listing agent had no duty to disclose material defect in property where buyers relied on third party inspection under Indiana law, which requires disclosure only of material adverse facts that a buyer could not discover through his own reasonable inspection); Black v. Cosentino, 689 N.E.2d 1001, 1004 (Ohio Ct. App. 1996) (finding there was no duty to disclose open and obvious defect).

[220] *See, e.g.*, Burman v. Richmond Homes, Ltd., 821 P.2d 913, 919 (Colo. Ct. App. 1991) (refusing to find realtors liable for failing to disclose that property was in general improvement or tax district); Brady v. Dandridge, 379 S.E.2d 429, 430–31 (Ga. Ct. App.

Several other important features of the disclosure duty bear noting. Most states' statutes impose no obligation on the licensee to conduct an investigation on either a client's or a customer's behalf,[221] instead requiring licensees only to disclose those material adverse facts known to them.[222] Some even expressly exempt licensees from any obligation to verify their clients' material statements of fact about the property or transaction.[223]

While falling short of actually requiring an investigation, other statutes impose what might be interpreted as a limited duty of inquiry by defining "material facts" as those the licensee knows or should know.[224] This kind of provision opens up an issue of fact with respect to what a licensee should have known about a particular piece of property, party, or transaction.[225] In addition, it gives the potential plaintiff, buyer or seller, a

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1989) (finding that the listing agent had no obligation to guarantee purchasers' financial worthiness or whether their home sale would close); Blackmon v. First Real Est. Corp., 529 So. 2d 955, 956 (Ala. 1988) (holding that seller's agent had no duty to disclose malfunctioning sewage system to purchasers).

[221] *See, e.g.*, GA. CODE ANN. § 10-6A-5(b) (2000) (stating that sellers' agents have no duty to "discover or seek to discover either adverse material facts pertaining to the physical condition of the property or existing adverse conditions in the immediate neighborhood); N.H. CODE ADMIN. R. ANN. Pt. Rea 701.02 (2001); WYO. STAT. § 33-28-303(d) (2001). *Cf.* N.J. ADMIN. CODE § 11:5-6.4(b) (2001) (imposing duty to make a "reasonable effort to ascertain material information" about properties with which the licensee is involved).

[222] *See, e.g.*, FLA. STAT. ch. 475.278(2)(a)(4), (3)(a)(9), (4)(a)(2) (2000); 225 ILL. COMP. STAT. 454/15-25 (2001); S.D. CODIFIED LAWS §§ 36-21A-134 to -138 (Michie 2001); VT. REAL EST. COMM'N R. § 4.5 (2000); VA. CODE ANN. § 54.1-2131(B) (Michie 2001). *Cf.* OHIO REV. CODE ANN. § 4735.67 (Anderson 2001) (stating that knowledge of material facts will be inferred if licensee acts with reckless disregard for the truth); ARIZ. ADMIN. CODE 4-28-1101 (2001) (requiring disclosure of "any [material adverse] information which the licensee possesses").

[223] *See, e.g.*, COLO. REV. STAT. §§ 12-61-804(3)(a) to -805(3)(a) (2001) (stating that the licensee has no obligation to verify any statements made by client "or independent inspector"); IND. CODE ANN. § 25-34.1-10-10(d) (Michie 2001) (stating that the licensee representing the seller owes no duty to conduct an independent inspection of property for the buyer "or to verify the accuracy of any statement, written or oral, made by the seller . . . or an independent inspector"); MONT. CODE ANN. § 37-51-313(3) (2001) (similar). *Cf.* OHIO REV. CODE ANN. § 4735.67(B) (Anderson 2001) (stating that licensee has no duty of verification unless "licensee is aware of information that should reasonably cause the licensee to question the accuracy or completeness of such statement").

[224] *See, e.g.*, MD. CODE ANN., BUS. OCCUP. & PROF. § 17-530(b)(5) (2001) (requiring licensees to disclose those facts that are "known or should be known" to them); MO. REV. STAT. § 339.710 (2000) (same); ME. REV. STAT. ANN. tit. 32, § 13273(2) (West 2001) (mandating that sellers' agents disclose those facts they "knew or acting in a reasonable manner, should have known"); OHIO REV. CODE ANN. § 4735.67 (Anderson 2001) ("For purposes of this division, actual knowledge of material facts shall be inferred to the licensee if the licensee acts with reckless disregard for the truth.").

Class 4 states tend to impose this same sort of obligation. *See, e.g.*, NEV. REV. STAT. § 645.252(1)(a) (2001); S.C. CODE ANN. §§ 40-57-137(C)(2)(c), (F), (H) (Law. Co-op. 2001).

[225] Wisconsin, a Class 4 state, uses standard of care language in defining adverse facts and material adverse facts in terms of what "is generally recognized by a competent licensee." WIS. STAT § 452.01(1e), (5g) (2000). *See also* IOWA CODE § 543B.5(14) (2001) (same). In both of these states, however, the licensee is already obligated to act with reasonable care, skill, and diligence towards all parties to the transaction. Therefore, the jury

broader net within which to ensnare licensees in litigation.[226] Statutes with duties of discovery go the furthest of the Class 3 statutes in protecting the unrepresented consumer, building in a sort of implied warranty about the property and the transaction.

Finally, perhaps adding the most teeth to this disclosure duty, two states, Arizona and Nebraska, require written disclosure of any material adverse facts.[227] Under Arizona's regulation, for example:

> A licensee participating in a real estate transaction shall disclose in writing to all other parties any information which the licensee possesses that materially and adversely affects the consideration to be paid by any party to the transaction, including:
>
> 1. Any information that the seller or lessor is or may be unable to perform;
>
> 2. Any information that the buyer or lessee is, or may be, unable to perform;
>
> 3. Any material defect existing in the property being transferred; and
>
> 4. The possible existence of a lien or encumbrance on the property being transferred.[228]

D. Class 4: Additional Duty of Reasonable Care Owed to Non-Clients

Beyond requiring licensees to treat other parties to the transaction honestly and fairly,[229] and to disclose known material adverse facts,[230] Class 4 states go even further in protecting non-principals. Specifically, these states generally impose upon licensees a duty of reasonable care to

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in a case against a licensee in either state would necessarily already be considering factual issues and comparing them against a standard of care.

[226] Conversely, the statutory imposition of specific licensee duties may also limit them to those that are statutorily enumerated. *See, e.g.*, Robinson v. Grossman, 67 Cal. Rptr. 2d 380, 385–86 (Ct. App. 1997) (refusing to expand listing agent's duty beyond what is called for by the relevant statute, CAL. CIV. CODE § 2079 (Deering 2001)).

[227] *See* ARIZ. ADMIN. CODE 4-28-1101(B) (2001); NEB. REV. STAT. §§ 76-2417(3)(a), 76-2418(3)(a) (2001).

[228] ARIZ. ADMIN CODE 4-28-1101 (2001).

[229] Of the Class 4 statutes, only Nevada's appears not to impose this obligation. *See* NEV. REV. STAT. § 645.252 (2001).

[230] Alabama's and Pennsylvania's statutes are the only Class 4 laws that fail to require disclosure of material adverse facts. *See* ALA. CODE § 34-27-84(a)(2) (1997); 63 PA. CONS. STAT. § 455.606(a)–(f) (2001).

all parties to the transaction.[231] Alabama,[232] California,[233] Idaho,[234] Iowa,[235] Nevada,[236] New York,[237] Oregon,[238] Pennsylvania,[239] Tennessee,[240] Washington,[241] West Virginia,[242] and Wisconsin[243] fall into this category.

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[231] *See, e.g*, NEV. REV. STAT. § 645.254(1) (2001). Some statutes outside of Class 4 also impose a duty of reasonable care in favor of the licensee's client. *See, e.g.*, GA. CODE ANN. §§ 10-6A-5 to -7 (2000) (maintaining that licensees representing both sellers and buyers have a duty of reasonable care to their clients); MONT. CODE ANN. § 37-51-313(2)(e), (4)(e) (2001) (same).

In some Class 2 and 3 states, however, poor legislative drafting leaves some ambiguity as to whom the duty of reasonable care is owed. *See, e.g.*, VA. CODE ANN. §§ 54.1-2131(A)(4), 54.1-2132(A)(4) (Michie 2002) (mandating that the "licensee engaged by a seller [buyer] shall . . . exercise ordinary care"). OKLA. STAT. tit. 59, § 858-354(B)(4) (2001) (providing that "the single-party broker shall . . . exercise reasonable skill and care" and enumerating a list of tasks, some of which apply to clients, and some of which do not); 22 TEX. ADMIN. CODE § 531.3 (West 2000) (imposing a duty of "competency," including the duty to "exercise judgment and skill in the performance of the work," on all licensees, with no indication to whom the duty runs).

In these states, or any which have provisions like them, it is possible that a duty of reasonable care could be extended to non-principals. If this were to happen, this would render any such statute Class 4.

[232] ALA. CODE § 34-27-84(a)(2) (1997). Notably, Alabama's code does not require disclosure of material adverse facts to either party. Instead, it provides that "a licensee may provide requested information which affects a transaction to any party who requests the information, unless disclosure of the information is prohibited by law or in this article." *Id.* § 34-27-84(b). The duties owed by licensees to all parties are honesty and good faith, reasonable skill and care, confidentiality, accounting, timely presentation of all offers and counter-offers during negotiation, and disclosure of any licensee conflicts of interest. *Id.* § 34-27-84(a).

[233] CAL. CIV. CODE § 2079.16 (Deering Supp. 2002) (stating that, beyond honesty, good faith, and disclosure of known and reasonably discoverable latent property defects, licensees owe duty of reasonable care).

[234] IDAHO CODE § 54-2086(1) (Michie 2000) (maintaining that non-clients are also owed reasonable skill, care, and accounting).

[235] IOWA CODE § 543B.56(1) (1997) (stating that all parties are owed duties of reasonable skill, care, and accounting).

[236] NEV. REV. STAT. § 645.252(2) (2001) (declaring that all parties are owed disclosure of conflicts of interest, disclosure of sources of compensation, and a duty of reasonable skill and care, in addition to honesty and good faith).

[237] N.Y. REAL PROP. LAW § 443(4) (McKinney Supp. 2002) (stating that duty of sellers' and buyers' agents to exercise reasonable skill and care is added to the requirement that they "deal honestly, fairly and in good faith" and disclose known material adverse facts).

[238] OR. REV. STAT. §§ 696.805(2), 696.810(2) (2002) (maintaining that sellers' and buyers' agents owe all principals and other agents the following duties in addition to Class 3 duties: reasonable care and diligence, timely communication and presentation of offers, accounting, and disclosure of licensee's conflicts of interest).

[239] 63 PA. CONS. STAT. § 455.606a(a) (2001).

[240] TENN. CODE ANN. § 62-13-403 (1997) (demanding reasonable skill and care, confidentiality, disclosure of publicly available market information upon request, accounting, and disclosure of any conflicts of interest).

[241] WASH. REV. CODE ANN. § 18.86.030 (West 1999) (stating that duties are owed to all parties to whom brokerage services are rendered).

[242] W. VA. REAL EST. COMM'N, NOTICE OF AGENCY RELATIONSHIP (May 1991) (on file with author) (establishing that all licensees owe all parties duties of reasonable care, honesty and good faith, non-discrimination, prompt presentation of offers to owner, disclosure of all material adverse facts that affect the value of the property, and dissemination of copies of all contracts).

[243] WIS. STAT. § 452.133(1) (2000) (stating that all parties are owed: diligent exercise

The inclusion of this duty in state licensing statutes is an important step forward for the consumer. By imposing a duty of reasonable care towards non-principals, Class 4 statutes open the door to negligence claims against realtors brought by all parties to the transaction, and potentially even to suits brought by other unsuccessful prospective buyers and sellers.[244] This broadens the scope of licensee liability as compared to what was previously available under the common law.[245] While particularly advantageous to the consumer, the express imposition of a duty of reasonable care to non-principals can also benefit licensees by creating the implication that, since duties that are owed are specifically enumerated, no other duties are owed.[246] This provides more certainty for all parties involved.[247]

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of reasonable skill and care in providing brokerage services, confidentiality, provision of "accurate information about market conditions that affect the transaction" upon request, accounting, and a presentation of contract proposals in an "objective and unbiased manner" by licensee negotiating on behalf of party).

[244] *See, e.g.*, 63 PA. CONS. STAT. § 455.606a(a)(1) (2001) (maintaining that the "licensee owes to all consumers to whom the licensee renders real estate services . . . reasonable professional skill and care . . . ."); WASH. REV. CODE ANN. § 18.86.030(1)(a) (West 1999) (same). This would not be the case in those states where careful drafting has limited the licensee's duty of reasonable care to only the parties to the real estate transaction. *See, e.g.*, TENN. CODE. ANN. § 62-13-403 (1997) (stating that "[a] licensee who provides real estate services in a real estate transaction shall owe *all parties to such transaction* . . . reasonable skill and care . . . ."); IOWA CODE §§ 543B.5(6), 543B.5(16) (1997) (enumerating duties owed by all licensees to "all parties in a transaction" and defining party as *inter alia* any "person seeking to sell, exchange, buy, or rent an interest in real estate").

[245] Negligence claims will fail where there is no duty to the plaintiff. *See, e.g.*, Speigner v. Howard, 502 So. 2d 367, 371 (Ala. 1987) (finding that seller's agent could not be held liable for negligence to buyer to whom he owed no duty); Dawson v. Tindell, 733 P.2d 407, 409 (Okla. 1987) (same).

[246] Many of today's licensing statutes supersede the common law, at least with respect to the duties owed by a licensee. *See, e.g.*, IOWA CODE § 543B.62(1) (1997) (holding that statutory licensee duties "supersede any fiduciary duties of a licensee to a party to a transaction based on common law principles of agency to the extent that those common law fiduciary duties are inconsistent with the duties specified" by the statute); IDAHO CODE § 54-2095 (Michie 2000) (declaring that provisions of the licensing statute control when found to be "in conflict with any other provision of Idaho law"); OKLA. STAT. tit. 59, § 858-360 (2001) (establishing that the duties and responsibilities of licensees set forth in the statute "shall replace and abrogate the fiduciary or other duties of a broker to a party based on common law principles of agency"); S.C. CODE ANN. § 36-21A-149 (Law. Co-op. 2001) (superseding the "duties of the parties under common law including fiduciary duties of an agent to a principal, to the extent inconsistent with this chapter"); OHIO REV. CODE ANN. §§ 4735.52, 4735.57(B) (Anderson 2000). *But see* OR. REV. CODE ANN. § 696.855 (2002) (applying common law); N.Y. REAL PROP. LAW § 443(6) (McKinney Supp. 2002) (declaring that "[n]othing in this section shall be construed to limit or alter the application of the common law of agency with respect to residential real estate transactions").

[247] Some gray area inevitably remains. For example, one commentator asks what is to become of an agent's traditionally implied "incidental powers" under the new statutory agency in effect in Missouri. *See* Valerie M. Seiverling, *The Changing Face of the Real Estate Professional: Keeping Pace*, 63 MO. L. REV. 581, 589 (1998) (discussing a 1997 version of Missouri's broker licensing statute and then-pending transaction broker amendment). Likewise, given Missouri's presumption of transaction brokerage status and its prohibition of agency without a written agreement, it is possible that a customer may be left

VII. Disclosure of Agency Relationships

The preceding Parts illustrate that state legislatures and relevant administrative agencies have redesigned their licensing statutes in different ways, sometimes creating new and different licensee roles and also enumerating different types and numbers of substantive legal duties now incumbent upon licensees. Some states offer minimal protection to unsophisticated, passive consumers. Other states have vigorously and extensively legislated consumer protections in the form of licensee duties to clients and non-principals alike.

The case for minimal protection can be made using the following *caveat emptor* argument. The real estate licensing laws of most states now provide the consumer with a number of realtor representation choices and impose at least a minimum set of substantive duties on licensees. This promotes competition, thereby lowering prices for everyone, while still providing a modicum of consumer protection. An informed consumer should be able to assess the alternatives and choose the licensee relationship that best suits him, and he should be presumed to look out for himself.[248]

This argument is premised, however, on an "informed consumer." Surely, as a matter of policy, a state may reasonably adopt any number of realtor roles while only providing minimum automatic protection via other-party duties but only if consumers are promptly and effectively informed of this state of affairs.

How are consumers made aware of their options and of any redefinition of realtor duties and obligations? All but one state today requires the licensee to disclose information about permissible agency relationships and/or the licensee's specific agency relationship to the parties.[249] Many state statutes and regulations also include an obligation to

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without a remedy where a transaction broker improperly performs more than the permitted ministerial acts. *See id.* at 592–93.

[248] A number of states expressly incorporate *caveat emptor*-type provisions into their statutes, regulations, or forms. *See, e.g.*, CAL. CIV. CODE § 2079.16 (Deering Supp. 2002) (stating that agency disclosure forms must include the following statement: "The above duties of the agent in a real estate transaction do not relieve a Seller or Buyer from the responsibility to protect his or her own interests"); OR. REV. CODE ANN. § 696.835 (2002) ("None of the affirmative obligations of a real estate licensee or agent in a real estate transaction under [statutory provisions] relieves a seller or a buyer from the responsibility to protect the seller's or buyer's own interests respectively"); R.I. GEN. LAWS § 5-20.6-6(e)(1) (2001) (same); S.D. REAL EST. COMM'N, AGENCY AGREEMENT ADDENDUM (Aug. 1998) (on file with author) (same); ME. REV. STAT. tit. 32, § 13274(2)(B) (2001) ("Nothing in this subchapter precludes the obligation of a buyer to inspect the physical condition of the property.").

[249] Neither Arizona's licensing statute nor its real estate related regulations contains an agency disclosure provision. ARIZ. REV. STAT. ANN. § 32-2101 (West 2002); ARIZ. ADMIN. CODE 4-28-1101 (2001). Perhaps this is because case law has deemed the licensee working with a buyer to be the buyer's agent, avoiding the counterintuitive seller subagency setting and its resulting consumer confusion. *See* ARIZ. REV. STAT. §§ 32-2101 to -2166 (West

disseminate general information about the basic duties owed by licensees who undertake the various legislatively created roles.

The earliest efforts to resolve the traditional subagency problem were the first agency disclosure statutes of the late 1980s.[250] While realtor advocacy groups and many legislatures realized that disclosure alone was not a panacea—and responded with a wave of revisions to licensing statutes and the redefinition of realtor roles—effective agency disclosure is still a critical component of many state statutes today. To evaluate the role agency disclosure plays in protecting consumers, this Part will examine the current state of agency disclosure statutes and assess their efficacy in light of their policy goals.

A. Agency Disclosure Statutes Today

While forty-nine states now formally require agents to disclose some information about agency relationships in a residential real estate transaction, there is an almost absolute lack of uniformity in the way that this disclosure is accomplished. Utah, for example, requires only that a written disclosure of the licensee's agency relationships, if any, be given prior to the parties' entering into a binding purchase and sale contract.[251] At the other end of the spectrum, a few states mandate early verbal and subsequent written agency disclosures of a prescribed form with signed acknowledgements of receipt.[252] In between these two poles are states that provide for informational brochures designed to explain agency relationships to the residential real estate consumer.[253] Distribution of these materials is optional in some jurisdictions and mandatory in others.[254] In

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2002). The only disclosure that is required is a disclosure of the identity of the broker(s) that will receive compensation in the transaction. *See* ARIZ. ADMIN. CODE 4-28-1101 (West 2000).

[250] California was one of the first states to pass agency disclosure legislation (effective January 1, 1988). CAL. CIV. CODE §§ 2374–2375 (Deering 1988) (thereafter renumbered § 2079). Disclosure of agency relationships is as far as some states have come. *See supra* notes 190–197 and accompanying text (discussing states that have failed or refused to legislate duties).

[251] UTAH ADMIN. CODE 162-6-2.7 (2001).

[252] *See infra* text accompanying notes 277–279.

[253] *See, e.g.*, MAINE REAL EST. COMM'N, AGENCY RELATIONSHIPS, *available at* http://www.state.me.us/pfr/olr/PDF/recagydis.pdf.

[254] *See, e.g.*, ALA. ADMIN. CODE r. 790-X-3.13(1) (2002) (making "Consumer Information Booklet" optional); LA. ADMIN. CODE tit. 46, § 3703 (2001) (stating that "[l]icensees shall provide the agency disclosure informational pamphlet to all parties"); NEB. REV. STAT. § 76-2421(1) (1996) (requiring that licensees provide a copy of the "brokerage disclosure pamphlet" to unrepresented parties with whom they work).

Some brochures are also or only available as "e-pamphlets," downloadable and/or printable from an agency Web site. *See, e.g.*, CAL. DEP'T OF REAL EST., DISCLOSURES IN REAL PROPERTY TRANSACTIONS (5th ed. 1999), *at* http://www.dre.cahwnet.gov/disclosures.htm; CAL. DEP'T OF REAL EST., REFERENCE BOOK: A REAL ESTATE GUIDE (2000), *at* http://www.dre.cahwnet.gov/pdf_docs/ref10.pdf; S.D. REAL EST. COMM'N, REAL ESTATE CONSUMER GUIDE, *available at* http://www.state.sd.us/dcr/realestate/consumer.htm.

yet other states, an explanation of agency relationships must be included in a standard form notice that also discloses the licensee's relationships in the transaction at hand.[255]

B. Technical Aspects of Disclosure Laws

The objective of agency disclosure laws is to reduce the confusion created by the counterintuitive nature of the traditional seller's subagency scenario and the newer forms of representation.[256] If the goal of disclosure is to convey agency relationship information to the consumer in a meaningful way, some disclosure statutes are better than others. By examining (1) the timing of disclosure, (2) to whom it is provided, (3) the manner of disclosure required, (4) whether a written acknowledgement is mandated, and (5) the substance of the disclosure language used, this Part will attempt to evaluate the efficacy of disclosure in general, as well as which forms of regulation best serve to give consumers notice of their level of representation in the real estate transaction.[257]

1. Timing

A major, if not the primary, impetus for agency disclosure laws is the danger that consumers may be unaware that the agent with whom they are working is actually an agent for the other party.[258] The concern is that it is possible, if not likely, that a buyer will reveal his top offer (or a seller his lowest acceptable price) to a licensee who has a fiduciary obli-

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Massachusetts also has a very informative Web site, containing more consumer information and lengthier explanations than does its mandatory agency disclosure form. Bd. of Reg. of Real Est. Brokers & Salespersons, http://www.state.ma.us/reg/consumer/fspagere.htm).

[255] *See infra* note 290 and accompanying text. Other statutes require only the distribution of the informational pamphlet or a form notice describing agency relationships but without disclosure of the relationship of the licensee that is working with the consumer. *See* N.J. ADMIN. CODE tit. 11, § 5–6.9 (2001); CAL. CIV. CODE § 2079 (Deering 2001); KAN. ADMIN. CODE § 86-4-26 (2001). *See also infra* notes 287, 290.

[256] *See, e.g.*, COLO. REV. STAT. § 12-61-801 (2001) (stating that the "public will best be served through a better understanding of the public's legal and that the working relationships with real estate brokers" and "public should be advised of" brokers' duties and obligations); FLA. STAT. ch. 475.272 (2000) (stating that the purpose of Brokerage Relationship Disclosure Act is "to eliminate confusion and provide for a better understanding on the part of customers in real estate transactions."). *See also* MASS. BD. OF REG. OF REAL EST. BROKERS & SALESPERSONS, MANDATORY AGENCY DISCLOSURE—AGENCY RELATIONSHIP FORM (on file with author) ("The purpose of this disclosure is to enable you to make informed choices before working with a real estate licensee.").

[257] A 1992 study of the adequacy of agency disclosures recommended that disclosures be written in a prescribed form, distributed at the first substantive meeting between consumer and realtor, and signed by the consumer. *See* STEPHEN BROBECK & CARLA FELDPAUSCH, REAL ESTATE AGENT DISCLOSURE TO HOME BUYERS: AN EVALUATION 2 (Consumer Federation of America, 1992).

[258] *See supra* text accompanying note 6.

gation to convey that information to the other party to the transaction.[259] Without this agency information—which would have told the consumer to keep his top or bottom dollar number closer to his vest—the consumer's bargaining position has clearly been compromised.

Thus, to be effective in eliminating one of the greatest harms posed by lack of agency information, disclosures should be made at the earliest feasible time—before confidential information has been divulged by the consumer. To accomplish this, some states mandate that disclosure be made so as to avoid eliciting confidential information from the consumer, leaving it to the licensee's discretion as to when the disclosure should be made.[260] The precise time at which a consumer might reveal confidential information, however, may be quite difficult to gauge. Perhaps that is why a number of states have instead chosen to mandate agency disclosure before certain enumerated events occur. Ohio's statute provides a good example:

> A licensee working directly with a purchaser in a real estate transaction, whether as the purchaser's agent, the seller's agent, or the seller's subagent, shall provide the purchaser with an agency disclosure statement . . . prior to the earliest of the following events:
>
> (a) Initiating a prequalification evaluation to determine whether the purchaser has the financial ability to purchase or lease the particular property;
>
> (b) Requesting specific financial information from the purchaser to determine the purchaser's ability to purchase or finance real estate in a particular price range;
>
> (c) Showing the property to the purchaser other than at an open house;
>
> (d) Discussing, with the purchaser, the making of an offer to purchase real property;

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[259] *Id.* A corollary to this problem is the case of late disclosure of and purported consent to dual agency, which is exemplified by the case of Brown v. FSR Brokerage, Inc., 72 Cal. Rptr. 2d 828 (Ct. App. 1998). In *Brown*, the listing agent also represented the buyer. *Id.* The agent allegedly persuaded the seller to sell his home for $2.4 million after telling the buyer he was fairly certain the seller would go that low. *Id.* at 829–30. The only evidence of "consent" to this dual agency was found among the papers the seller signed at the closing. *Id.* at 833–34. The court found the agent's conduct arguably coercive and permitted the case to proceed to a jury on the issue of whether such consent was valid, assuming it found that the seller had actually consented to the dual agency. *Id.*

[260] *See, e.g.*, ARK. CODE ANN. § 8.1(a)(1) (Michie 2001); COLO. ADMIN. CODE ch. 2 RE-35(a) (2001); IOWA CODE § 543B.57(2)(a) (2001); MICH. COMP. LAWS § 339.2517(1) (2001). *See also* 225 ILL. COMP. STAT. 454/15-35(b) (West 2001) (stating that in no event must such disclosure occur later than preparation of an offer).

(e) Submitting an offer to purchase or lease real property on behalf of the purchaser.[261]

This type of precise timing regulation gives a licensee ample guidance and aims to avoid a consumer's unintentional revelation of confidential information to a licensee not representing him.

Other statutes increase the risk of unintentional and prejudicial consumer revelations by allowing much more time to pass before a licensee's agency relationship must be disclosed. Sellers' agents in New Hampshire, for example, need only disclose their agency relationships to prospective buyers before showing any properties.[262] California, Georgia, Idaho, and West Virginia permit agency disclosure to be made or agency information to be distributed as late as "before an offer is made."[263] Montana requires

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[261] OHIO REV. CODE ANN. § 4735.58(B) (Anderson 2001). *See also* 201 KY. ADMIN. REGS. 11:400(4) (2001) (stating that a disclosure statement must be provided before the earliest of receiving confidential information, entering into an agreement for representation, submitting an offer, or concluding the second meeting); WASH. REV. CODE § 18.86.030 (2001) (requiring that a disclosure statement be provided before consumer signs an agency agreement or offer, consents to dual disclosed agency, or "waives any rights").

An alternative is to require disclosure at the first "substantive contact" with a prospective party. *See, e.g.*, DEL. CODE ANN. tit. 24, § 2931 (2001); N.M. STAT. ANN. § 61-29-10.2 (Michie 2001); S.C. CODE ANN. § 40-57-139(E) (Law. Co-op. 2001). The South Carolina code defines first "substantive contact" as either the point when the licensee prequalifies a potential buyer by requesting specific financial information from him or when the licensee shows a property (other than an open house) to the prospective buyer, whichever occurs first. *See, e.g.*, OR. REV. CODE § 696.800(3) (2001) (defining first substantive contact as "first face-to-face contact or first written communication, whichever occurs first, in which a prospective buyer's or seller's specific real property needs or financial information is discussed"); ALASKA STAT. § 08.88.396 (Michie 2001) (requiring seller's agent to "disclose in writing the licensee's agency relationship with the seller to each prospective buyer at the time that the licensee begins to provide specific assistance to locate or acquire real estate for the buyer"); CONN. GEN. STAT. § 20-325(d) (2001) (requiring disclosure at the beginning of the first meeting concerning the buyer's specific needs); 63 PA. CONS. STAT. § 455.608(a) (2001) (similar); MASS. REGS. CODE tit. 254, § 3.00(13) (2001) (stating that disclosure must be made at first meeting for purposes of discussing a particular property); 39 ME. ADMIN. CODE ch. 330(9)(B) (2001) (indicating when there is "substantive communication about a real estate transaction by either a face to face meeting or a written communication"). For statutes possibly providing for disclosure slightly sooner, see, for example, MD. CODE ANN., BUS. OCCUP. & PROF. § 17-530(b)(2) (2001) (at first scheduled face-to-face contact); TEX. REV. CIV. STAT. art. 6573a, § 15C (Vernon 2000) (at first contact).

Incidentally, twenty-eight percent of homebuyers surveyed by NAR in 1999 reported not having been presented with agency disclosure until the time the sale contract was written. BUYERS AND SELLERS PROFILE, *supra* note 75, at 23. Only thirty-eight percent of buyers indicated that they signed an agency disclosure at their first meeting with the real estate agent with whom they worked. *Id.*

[262] N.H. CODE ADMIN. R. ANN. Real Est. Comm'n 701.01(a) (2001). Of course, the licensee may have no agency relationship unless the home being shown is listed by that licensee or her brokerage firm. If the licensee has not agreed to be a buyer's agent, however, the agency relationship should be disclosed earlier to avoid the situation in which the listing agent learns confidential information that might prejudice the buyer in negotiations. The onus should be on the licensee to make that disclosure meaningful.

[263] CAL. CIV. CODE § 2079.14(d) (Deering 2001) (as soon as practicable before an of-

disclosure of agency relationships to parties not represented by the licensee "at the time negotiations commence,"[264] which may be marginally later in the process. Hawaii requires such disclosures only before preparation of a contract between buyer and seller.[265] Kansas licensees need only disclose their agency relationship in the purchase and sale contract.[266]

States that do not specify the time at which disclosures should be made[267] or that permit disclosure as late as the presentation of an offer ignore the problems that lack of disclosure breeds. All agency disclosure statutes should call for mandatory disclosures before confidential information is revealed. Because it is not always possible for the realtor to avoid the unsolicited revelation of confidential information, express statutory guidelines should err on the side of earlier agency disclosure by enumerating early events before which disclosure must occur.

2. *Audience*

The thrust of the agency disclosure requirements should be to provide agency information to parties not represented by the licensee and, perhaps more importantly, to the consumer who is altogether unrepresented. A number of states effectively accomplish this goal. Virginia, for example, requires a licensee to disclose his agency relationships to a prospective buyer or seller "who is not the client of the licensee and who is not represented by another licensee."[268] Similarly, South Carolina, Cali-

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fer); GA. COMP. R. & REGS. r. 520-1.08(2) (2000) (before first offer); IDAHO CODE § 54-2085(3) (Michie 2000) (agency disclosures and agency relationships must be determined and agreements executed before "preparation or presentation of a purchase and sale agreement."); W.VA. CODE § 174-1-29.1 (2000) (before any offer signed by any party).

[264] MONT. CODE ANN. § 37-51-314 (2001).

[265] HAW. ADMIN. CODE § 16-99-3.1(c) (2001). Practically speaking, this might result in disclosure before the offer is made if the buyer's first written offer is accepted by the seller, but this will certainly not always be the case. Recall that Utah's regulation also requires disclosure of agency relationships "prior to the parties entering into a binding agreement with each other." *See supra* note 251.

[266] KAN. STAT. ANN. § 58-30,110(a) (2001). A brochure describing agency relationships is to be given to prospective buyers and sellers "at the first practical opportunity." Unfortunately no brochure need be given to a consumer for whom only "ministerial acts" are being performed by the licensee. *Id.* at § 58-30,110(a)(3)(E). It is precisely in the non-representation setting that an informational brochure should be given and agency disclosure should be made. In Kansas, the unrepresented consumer may not be made aware of agency relationships until he reads that portion of the purchase and sale contract. As one can imagine, in some instances this may mean never.

[267] *See, e.g.*, IND. CODE ANN. §§ 25-34.1-10-10 to -11 (West 2001) (providing no guideline on when disclosure should be made); WYO. STAT. ANN. § 33-28-306(c) (2001) (stating that brokers shall provide notice of established agency relationships "to any other party to the transaction at the earliest reasonable opportunity."); NEB. REV. STAT. § 76-2421(1) (2001) ("at the earliest practicable opportunity during or following the first substantial contact").

[268] VA. CODE ANN. § 54.1-2138(A) (Michie 2001); 18 VA. ADMIN. CODE § 135-20-220

fornia, and Maryland licensees who work with potential buyers must disclose their agency relationships to the buyer.[269]

Disclosure to the licensee's own client or the party with whom the licensee is working is also desirable not only because it will help alleviate the unknown subagent problem[270] but because it clarifies the precise nature of the client's relationship with the licensee (i.e., exclusive agent versus transaction broker). This is particularly important in those states where agency agreements need not be in writing.[271] Many states do not require specific separate agency disclosures to the licensee's client, or they are unclear on this point.[272] In Indiana, for example, agents do have a duty to disclose agency relationships, but the statute does not indicate to whom such disclosure should be made, what form it should take, or when it must be made.[273] Agency disclosures should be made both to the client and the other party, as well as any unrepresented party.

Finally, some states also require agency disclosure to be made to other licensees.[274] Just as disclosure to other principals is desirable, so too is disclosure to other licensees, who might not otherwise be aware, for example, that a licensee working with a buyer is actually that consumer's true agent, and not a subagent or transaction broker.

3. Manner

The manner in which agency relationships are conveyed can have a substantial impact on whether they are understood by consumers. Be-

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(West 2001).

[269] S.C. CODE ANN. § 40-57-139(E) (Law. Co-op. 2001); CAL. CIV. CODE § 2079.14 (Deering 2001); MD. CODE ANN., BUS. OCC. & PROF. § 17-530(b)(3) (2001) (indicating disclosure can be made by the seller's agent if there is no cooperating agent).

[270] *See supra* notes 6, 47 and accompanying text.

[271] *See, e.g.*, statutes cited *supra* note 167.

[272] California and Maryland appear to fall into this category. *See, e.g.*, MD. CODE ANN., BUS. OCC. & PROF. § 17-530(b) (2001); CAL CIV CODE § 2079.14 (Deering 2001). New York and West Virginia law, by contrast, require licensees to disclose their agency relationships to all parties. N.Y. REAL PROP. LAW § 443(3) (McKinney 2001); W.VA. CODE § 47-12-17(d) (2000). While it might make sense to err on the side of over-disclosure, it is also possible that at some point, multiple versions of disclosure forms may reduce the overall effectiveness of the disclosures being made. Michigan's statute is more narrowly drafted, requiring licensees with any agency relationship(s) to provide disclosure to prospective sellers or buyers with whom they work. MICH. COMP. LAWS § 339.2517(2) (2001). *See also* WIS. STAT. § 452.145(2) (2000) (stating that disclosure must be made to any party to whom real estate services are provided). Some states eliminate the disclosure requirement where the person to whom disclosure would be made is represented by another licensee. *See, e.g.*, CONN. GEN. STAT. § 20-325d (2001); FLA. STAT. ch. 475.278(5)(b) (2000).

[273] IND. CODE ANN. §§ 25-34.1-10-10, 25-34.1-10-11 (2001). Indiana's relevant agency regulations are also completely silent on this topic. IND. ADMIN. CODE tit. 876, 1.1.1 (2001).

[274] *See, e.g.*, TENN. CODE ANN. § 62-13-405(d) (2001); TEX. REV. CIV. STAT. ANN. art. 6573a, § 15C(a)(2) (Vernon 2000); UTAH ADMIN. CODE 162-6-2-7.3 (2001).

cause verbal notice alone is generally viewed as insufficient,[275] most states require written disclosure of the agency relationship. In actuality, though, depending on how the written disclosure is accomplished, it may be less effective than verbal notification. Thus, in an effort to prevent the written disclosure notice from becoming *pro forma* or its being buried in a shuffle of other documents, North Carolina's regulations require that agents "review" the contents of the disclosure notice with the client or consumer, so as to determine in what capacity the licensee will serve.[276]

Other states have incorporated both verbal and written disclosure requirements in their licensing statutes or regulatory schemes in different manners. One such alternative to a verbal "review" format is adopted in Tennessee's statute.[277] There, the initial verbal disclosure of the licensee's relationship to an unrepresented party to the transaction must thereafter be confirmed in writing before the presentation of any offer.[278] A number of other states use this model.[279]

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[275] *See* BROBECK & FELDPAUSCH, *supra* note 257, at 126–27.

[276] N.C. ADMIN. CODE tit. 21, r. 58A.0104(c) (July 2002) (providing that "[i]n every real estate sales transaction, a broker or salesperson shall, at first substantial contact directly with a prospective buyer or seller, provide the prospective buyer or seller with a copy of the publication "Working with Real Estate Agents," review it with him or her, and determine whether the agent will act as the agent of the buyer or seller in the transaction). *See also* MINN. STAT. § 82.19(4) (2002) ("Minnesota law requires that early in any relationship, real estate brokers or salespersons discuss with consumers what type of agency representation or relationship they desire."); NEV. REAL EST. DIV., NRED POSITION STATEMENT (Apr. 1999) (stating that disclosures must be "presented, reviewed and explained" to consumer).

Some may argue that this treads uncomfortably close to the unauthorized practice of law. Brown, *supra* note 12, at 30, 78; Wilson, *supra* note 12, at 97, 105. At least one state's regulatory agency has attempted to assuage these concerns and perhaps to eliminate liability for licensees in that regard. *See* N.J. ADMIN. CODE tit. 11, § 5–6.9(f)(2001) (acknowledging that the purpose of the state mandated Consumer Information Statement is "to require licensees to provide basic and introductory information to the public. . . rather than a comprehensive explanation of agency law.").

[277] *See* TENN. CODE ANN. § 62-13-405 (2001).

[278] *Id.*

[279] *See, e.g.*, VA. CODE ANN. § 54.1-2138 (Michie 2001) (contemplating verbal agency disclosure during any "substantive discussion about a specific property," followed up with written disclosure no later than when "specific real estate assistance" is given to the party not represented by the licensee); N.J. ADMIN. CODE tit. 11, § 5-6.9(g)(3) (2001) (requiring verbal disclosure prior to first discussion about purchasing motivation or ability, with written notification of agency relationships in agency agreements and all offers and contracts); VT. CODE R. 04-030-290(4.5)(b) (2001) (requiring oral disclosure of existing agency relationships "as soon as reasonably necessary to avoid leading the buyer into a misplaced confidence" and written disclosure at the first substantial contact); IOWA CODE § 543B.57 (2001).

Arkansas's regulation requires agency relationship disclosures to be written. ARK. ADMIN. CODE R. 8.1–8.2 (2001). The regulation allows but does not mandate an early verbal agency relationship disclosure, which is followed by a required written disclosure "at a convenient time" that is no later than when the party "signs any document related to the transaction, such as an offer or lease/rental agreement." *Id.* On the other hand, Hawaii provides the least effective disclosure regime. *See* HAW. ADMIN. CODE § 16-99-3.1 (2001) (requiring verbal or written disclosure before an offer is presented to a seller, and written confirmation thereof in the purchase and sale agreement). The written confirmation in the

For sellers, who are usually represented by the listing agent, the form or manner of disclosure likely presents no problems.[280] Sellers generally will have sought out the licensee and will have discussed the agency relationship as part of the necessary detail of entering into the written listing agreement, whether or not such a discussion is mandated by statute or regulation.[281]

On the other hand, since the prospective buyer often goes unrepresented in the typical transaction, agency disclosure to buyers should be handled with more care. A single written disclosure may elude the buyer,[282] and even the combination of verbal and written disclosures could be insufficient if the statutory or regulatory requirement is too lax. For example, an early verbal disclosure to a prospective buyer might consist only of the words "You are my customer." While this disclosure might be followed by a possibly more informative written disclosure later on, the consumer may have already established erroneous assumptions about the nature of the relationship. This scenario would be an acceptable minimum under some existing statutes.[283]

As a practical matter, no diclosure can be structured such that every consumer will take note of (and, in fact, understand) the legal relationships involved in his transaction. Nevertheless, meaningful verbal explanation thereof by the licensee who is working with a consumer is vital to providing the buyer with notice and understanding.

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parties' contract perhaps is too little too late after a scant, but legally sufficient, verbal disclosure at some point prior to an offer.

[280] Likewise, in those states with the most statutory protection for unrepresented parties, the form of disclosure is less critical.

[281] To be comprehensive, any disclosure statute should also require the listing agent to discuss alternative agency relationships with the prospective seller.

[282] *See, e.g.*, N.M. STAT. ANN. § 61-29-10.2 (Michie 2001); N.M. ADMIN. CODE, tit. 16 § 61.19.9 (2001) (requiring agency disclosure at first substantive contact). A number of states require written disclosure more than once. *See, e.g.*, CONN. GEN. STAT. § 20-325(d) (2001) (mandating written agency disclosure at first contact during which personal needs are discussed, and requiring that written disclosure be signed by prospective buyer and attached to any offers made). As a matter of practical fact, the Connecticut buyer may never see the disclosure statement again after signing it at the first meeting.

[283] In many states the substance of disclosure is not mandated. *See infra* text notes 288–296 and accompanying text. There are also problems inherent in defining necessary terms like "client" and "customer." Webster's defines client as "a person who engages the professional advice or services of another," and customer as "one that purchases a commodity or service." WEBSTER'S NEW COLLEGIATE DICTIONARY 248, 318 (1983). Without checking the dictionary, or reading the statutory definition or other written disclosures, a consumer might reasonably assume these two words mean the same thing. *See also supra* note 79 and *infra* note 301 (discussing the ambiguity to lay people of the word "represent"). It is posited, however, that if a licensee said to a consumer simply "Please keep in mind during our conversations that *I do not represent you*," the consumer might understand that the licensee is in some sense his adversary.

4. Acknowledgement

Requiring the recipient to acknowledge in writing the receipt of the agency disclosures might afford consumers even more protection. That acknowledgement could provide useful evidence in future litigation, and it could also increase the likelihood that the disclosure will be noticed and meaningful.

From a litigation standpoint, evidence of compliance with the statutory minimum is desirable for both parties to the agency disclosure. A mandatory written form or notice distributed to the client or consumer and subsequently signed and returned to the licensee would serve that evidentiary purpose. This procedure would eliminate most disputes over whether the statutorily required notice had in fact been given. States that require a licensee to distribute a written form containing agency information and disclosures typically also require a separate acknowledgement of receipt from the recipient.[284] Some of these states require the realtor to keep the acknowledgement receipt as a business record for a minimum number of years.[285] This assists the realtor in creating proof of her compliance with the law.

More importantly, written acknowledgement could make disclosure more meaningful to the consumer. The requirement of obtaining the consumer's signature on a disclosure form may draw the consumer's attention to the document, reducing the possibility that disclosure of the agency relationship will become lost amongst the collection of documents a prospective buyer or seller amasses during proposed purchase or sale of a home.

Unfortunately, some states do not require separate acknowledgement of the nature of the agency relationship.[286] Instead they mandate only that

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[284] *See, e.g.*, LA. ADMIN. CODE tit. 46, § 3703 (2001), which requires the recipient to sign a "tear off" acknowledgement of receipt of the commission-mandated agency information and relationships disclosure form, which signature is witnessed by the licensee. *Id.* More common is the requirement of a single signature by the recipient. *See, e.g.*, MASS. REGS. CODE tit. 254, § 3.00 (13) (2001); OHIO ADMIN. CODE §§ 1301:5-6-05 to -06 (2001). Finally, some states require signatures by all parties to the transaction on such an agency disclosure form. *See, e.g.*, IOWA CODE § 543B.57 (2001).

[285] *See, e.g.*, LA. ADMIN. CODE tit. 46, § 3703(D) (2001) (indicating signed acknowledgement of receipt of agency relationships information brochure must be maintained by licensee for five years); MASS. REGS. CODE tit. 254, § 3.00(13)(b) (2001) (three years); CODE ME. R. 02-039 § 330(9)(F) (2001) (two years); OHIO ADMIN. CODE § 1301:5-6-06 (2001) (three years); VA. CODE ANN. § 54.1-2138(D) (Michie 2001) (three years). *See also* IDAHO CODE § 54-2085(1) (Michie 2000) (no prescribed number of years).

Other states do not require that signed acknowledgements of receipt of agency information be maintained by licensees as business records. *See, e.g.*, COLO. REV. STAT. § 12-61-808 (2001); NEB. REV. STAT. § 76-2421(5) (2001). An acceptable alternative in some states is for the signed disclosure form to be appended to the Purchase and Sale Contract. *See* MD. CODE ANN., BUS. OCC. & PROF. § 17-530 (2001); CONN. AGENCIES REGS. § 20-325d-2, 20-325-5 (2001).

[286] *See, e.g.*, ALA. ADMIN. CODE r. 790-X-3.13(2) (2001); GA. COMP. R. & REGS. r. 520-1-.08(2) (2001); WASH. REV. CODE § 18.86.120 (2001).

it be included in other lengthier transaction documents, such as the listing agreement, any offers, the purchase and sale agreement, or the ultimate contract for sale.[287] This likely draws the least attention to the agency relationship disclosure, and while this method does provide for written disclosure, it is quite possible that the purchaser will miss it altogether.

5. *Substance*

Beyond timing and manner of disclosure, an important inquiry regarding agency disclosure is the substance of what is conveyed. To this end, one must examine whether the disclosure is simple or detailed; whether it is phrased in the affirmative ("You are my client") or the negative ("I do not represent you"); and whether it is written in legalese or language that is understandable to the layman.

Predictably, states have taken multiple approaches. Some require that agency disclosures be made but mandate only their content and not their form;[288] others establish the precise language or paper form of disclosure to be made.[289] The required disclosure in many states includes a description of agency relationships from which the consumer and licensee can choose and of the licensees' duties when acting in the various

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[287] *See, e.g.*, N.J. ADMIN. CODE tit. 11, § 5-6.9 (2001) (requiring written disclosure of the agency relationship only in any written agency agreement, offers to purchase, and/or contracts for sale drafted by the licensee). The New Jersey statute also requires the dissemination of a "Consumer Information Statement" describing agency with realtors; it does not require, however, that the licensee also disclose the chosen agency relationship in that document. *Id.* The buyer must acknowledge receipt of the "Consumer Information Statement," and, where a sale or lease transaction is fully executed, the licensee must retain the signed acknowledgement of receipt as a business record for six years. *Id.* § 5-6.9(g)(1)(i). *See also* LA. ADMIN. CODE tit. 46, § 3703 (2001); LA. REAL EST. COMM'N, REAL ESTATE AGENCY DISCLOSURE: A CONSUMER GUIDE TO UNDERSTANDING AGENCY RELATIONS IN REAL ESTATE TRANSACTIONS, *available at* http://www.lrec.state.la.us.

Similarly, Texas requires verbal or written disclosure of a licensee's agency relationship at first contact with the consumer, with a written statement of agency relationships information to be provided at the first face-to-face contact. This form must be acknowledged but is not required to contain the licensee's agency relationship disclosure. *See* TEX. REV. CIV. STAT. art. 6573a, § 15C(d) (Vernon 2000). It is possible that the provision of the informational brochure or statement will spark another discussion of the licensee's specific relationship to the consumer. Nevertheless, the additional requirement that the licensee disclose that relationship (or lack thereof) in the informational form might still be prudent.

[288] *See, e.g.*, COLO. REV. STAT. § 12-61-808 (2001); DEL. CODE ANN. tit. 24, § 2900, R. 10.3 (2001) (mandating the form of the written confirmation to be included within the purchase and sale agreement); IOWA CODE § 543B.57(3) (2001); IOWA ADMIN. CODE r. 193E-1.37 (1997); MONT. CODE ANN. § 37-51-314(6) (2001); 49 PA. CODE § 35.284 (2001); N.M. ADMIN. CODE tit. 16, § 61.19.9(B) (2001); VT. REAL EST. COMM'N R. 4.5 (2002).

[289] *See, e.g.*, FLA. STAT. ch. 475.278 (2000) (setting forth various forms for different representational capacities); 201 KY. ADMIN. REGS. 11:400(5) (2001) (setting forth single form); MD. REGS. CODE tit. 09, § 11.08.01 (2001); MINN. STAT. § 82.197(4) (2001) (same).

alternative capacities.[290] In addition, the disclosure typically identifies the particular relationship the parties have chosen.[291]

Some states go further by including warnings in disclosure documents provided to consumers.[292] For example, New York mandates a written disclosure form, which warns that real estate agents are qualified only to give advice about real estate and that the parties should seek legal, tax, and other professional advice if necessary.[293] Idaho's statute requires a conspicuous statement warning the consumer that he is not represented unless and until he has entered into a written agreement with a broker.[294] North Dakota's form warns that the consumer should not divulge confidential information without first ascertaining his relationship with the licensee with whom he is working.[295] By contrast, Virginia's suggested form contains only a brief statement disclosing whom the licensee represents, with no informative descriptions of the various available agency relationships, no warnings about disclosure of confidential information, and no invitation to obtain professional advice.[296]

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[290] *See, e.g.*, CONN. AGENCIES REGS. § 20-325d-2 (2002); OHIO REV. CODE ANN. § 4735.57 (Anderson 2001); OHIO ADMIN. CODE § 1301:5-6-07 app. A (2001); WIS. STAT. § 452.135(2) (2001). *See also* NEV. REAL EST. DIV., DUTIES OWED BY A NEVADA REAL ESTATE LICENSEE/CONFIRMATION REGARDING REAL ESTATE AGENT RELATIONSHIP (1999), *available at* http://www.red.state.nv.us/forms/525.pdf; S.C. REAL EST. COMM'N, CONSUMER INFORMATION: AGENCY RELATIONSHIPS IN REAL ESTATE—WHEN BUYING OR SELLING REAL ESTATE, ARE YOU A CUSTOMER OR CLIENT?, *available at* http://www.llr.state.sc.us/POL/RealEstateCommission; S.D. REAL EST. COMM'N, REAL ESTATE RELATIONSHIPS DISCLOSURE (1998), *available at* http://www.state.sd.us/cr/realestate/agcydisc.pdf.

A less desirable alternative is to require the inclusion of the relevant language from the statutory provision or provisions. *See, e.g.*, CAL. CIV. CODE § 2079.16 (Deering 2001); WASH. REV. CODE § 18.86.120 (2001). While many statutes are relatively comprehensible to those trained in law, lay persons will likely have difficulty understanding statutes due to the legal terminology and complex sentence structures.

[291] *See, e.g.*, MICH. COMP. LAWS § 339.2517(2) (2001).

[292] Other statements are required by a number of states. *See, e.g.*, WYO. STAT. ANN. § 33-28-306 (a)(i) (Michie 2001) (requiring statement that broker's fees are negotiable); MO. CODE REGS. ANN. tit 4, § 250-8.096(1)(A)(2) (2001) (requiring statement identifying sources of licensees' compensation); 63 PA. CONS. STAT. § 455.608 (2001) (requiring statement that a recovery fund is available in the event of realtor malfeasance); N.H. CODE ADMIN. R. ANN. Rea 701.01(f)(2) (2001) (requiring statement regarding vicarious liability for agents' and subagents' conduct); OR. REV. CODE ANN. § 696.830 (2002) (same).

[293] N.Y. REAL PROP. LAW § 443(4) (McKinney 2001). *See also* R.I. GEN. LAWS § 5-20.6-6 (2001) (same).

[294] IDAHO CODE § 54-2085(2) (Michie 2002) (requiring, *inter alia*, a "conspicuous notice that no representation will exist absent a written agreement between the buyer or seller and the brokerage"). *See also* COLO. REV. STAT. § 12-61-808(2)(d)(I)(a) (2001) (stating that seller's agent or subagent who works with prospective buyers must disclose that she is not an agent for the buyer unless she enters into a written agreement to act as a buyer's agent); CONN. AGENCIES REGS. § 20-325d-2(4) (2002) ("Do not assume that a real estate brokerage firm or its agents are representing you or are acting on your behalf unless you have contracted in writing with that real estate brokerage firm."). *Cf.* ALA. ADMIN. CODE § 790-X-3.13(2) (2001) ("If you do not sign an agreement, by law the licensee working with you is a transaction broker.").

[295] N.D. ADMIN. CODE § 70-02-03-15.1(7) (2001).

[296] VA. CODE ANN. § 54.1-2138(A) (Michie 2001). The sum total of the suggested disclosure language is as follows: "Disclosure of brokerage relationship—The undersigned do

C. The Effectiveness of Disclosure Laws

Beyond the technical aspects of disclosure laws with respect to timing, manner, and substance, a more important consideration is the overall meaningfulness of the disclosures themselves. Despite the best legislative intentions, mandatory disclosures are likely less effective than anticipated.

First, the regulations requiring disclosures may be ignored or overlooked by licensees. Only sixty-six percent of homebuyers surveyed by NAR in 1999 reported having signed an agency disclosure statement, while thirty-four percent of buyers were either unsure whether they signed one or were sure they had not signed an agency disclosure.[297] Assuming that the vast majority of licensees comply with the law, a more benign (and perhaps more likely) explanation for this statistic may be that the homebuyer to whom a statutory disclosure was given did not see it, did not read it, or did not understand it to be an agency disclosure form.[298]

Second, the written disclosures contemplated by current statutes may not be conveying the intended meaning or even basic notice to the consumer who does read them. A full one-half of adults in the United States read only at the first to eighth grade level, and about half of that group (nearly a quarter of the adult population) reads below the fourth grade level.[299] Most of the current disclosure forms are written at a twelfth grade level or higher.[300] Thus, assuming that consumers who are provided

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hereby acknowledge disclosure that: The licensee [blank for "Name of Firm"] represents the following party in a real estate transaction: [blank] Seller(s) or [blank] Buyer(s). [blank] Landlord(s) or [blank] Tenant(s)." *Id.* This simplistic form of disclosure may be the most understandable to the layperson.

[297] BUYERS AND SELLERS PROFILE, *supra* note 75, at 23. Buyers fared even worse in a smaller study. According to the Massachusetts Office of Consumer Affairs, not one examiner posing as a "homebuyer" in its 1997 survey received an agency disclosure form from any of the forty-five top real estate firms in the state, despite the fact that Massachusetts state law has required such disclosure since 1993. June Fletcher, *New Rules: What Agents Won't Tell You*, WALL ST. J., Mar. 13, 1998, at B12.

[298] *Cf.* David W. Stewart & Ingrid M. Martin, *Intended and Unintended Consequences of Warning Messages: A Review and Synthesis of Empirical Research*, 13 J. PUB. POL'Y & MKTG. 1, 1 (1994) (noting that many consumers do not even read warnings).

[299] *See* IRWIN S. KIRSCH ET AL., EXECUTIVE SUMMARY OF ADULT LITERACY IN AMERICA: A FIRST LOOK AT THE FINDINGS OF THE NATIONAL ADULT LITERACY SURVEY (1993), *available at* http://nces.ed.gov//naal/resources/execsumm.asp#litskill.

[300] Utilizing the Flesch-Kincaid method, *see id.*, for determination of reading level, the author analyzed legislatively mandated or agency devised/approved disclosure forms from twenty-five states. *See generally* Mark Hochhauser, *Writing for Staff, Employees, Patients, and Family Members*, 76 HOSP. TOPICS 5–8 (Jan. 1998) (discussing reading comprehension problems and the need for simpler writing to reach the average consumer in the health care context).

A large majority of disclosure forms proved to be written at a reading level of twelfth grade or higher. Of the cross section of forms tested, only two were written at or below the eighth grade level: Florida's single agent notice, which is given to those consumers who are represented by the licensee, and Virginia's simple disclosure quoted *supra* at note 296.

disclosure forms actually read the prescribed disclosure information, it is still possible that they do not comprehend it.[301] Efforts could be made to rewrite these disclosures in a more universally understandable form.[302] Presumably, this would result in disclosures that are relatively short and that are presented in a user-friendly fashion. Until this happens, a significant number of consumers will still be operating in a context in which agency disclosure might as well not have been given at all.

VIII. RESIDUAL PROBLEMS IN THE WAKE OF REFORM

The stated purpose of many new agency laws is the reorganization and codification of agency duties and roles to recognize and reform the counterintuitive nature of the relationships inherent in the traditional subagency model.[303] But have the new laws achieved this purpose? Or have the new regulatory regimes simply succeeded in perpetuating—or worse, exacerbating—the problem of the unrepresented consumer and the other troubling aspects of subagency practice? This Part considers the effect those reforms have had on the market in an effort to determine

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The grade levels for the tested forms from each of twenty-five states are listed here: Alabama (Consumer Information Booklet > 12.0; Real Estate Brokerage Services Disclosure 7.8); Arkansas (> 12.0), California (> 12.0), Connecticut (> 12.0), Delaware (> 12.0), Florida (transaction broker notice, 10.3; single agent notice, 7.9; no brokerage notice > 12.0), Hawaii (> 12.0), Iowa (consumer information pamphlet, 10.7), Kansas (11.6), Kentucky (> 12.0), Louisiana (9.3), Nebraska (> 12.0), Massachusetts (10.5), Minnesota (> 12.0); Mississippi (11.3), Missouri (> 12.0), New Jersey (> 12.0), Nevada (> 12.0), Ohio (> 12.0), Oregon (> 12.0), South Carolina (> 12.0), South Dakota (Real Estate Consumer Guide > 12.0, Agency Disclosure Form, 11.5), Texas (> 12.0), Virginia (2.8), Wisconsin (> 12.0).

[301] Complicating the objective problem of reading level is the disclosure forms' troubling use of the highly ambiguous word "represent." This word could be interpreted in a number of ways, depending on who reads it. For example, Texas's statutorily mandated agency disclosure form provides that a "broker can assist you in locating a property, preparing a contract or lease, or obtaining financing without representing you." TEX. REV. CIV. STAT. art. 6573a, § 15C(d) (Vernon 2000). That statutory form also states: "A licensee who represents a party in a real estate transaction is that party's agent." *Id.* § 15C(c). While these are accurate statements of the law, they may not have meaning to the lay consumer. *See also* MINN. STAT. § 82.197(4) (2002) (indicating that a subagent is a broker or salesperson who is working with a buyer but represents the seller). In Minnesota, the buyer is the broker's customer and is not represented by that broker, where "customer" is not defined in the form. *Id. See also supra* notes 79, 283.

[302] North Dakota's administrative code requires that the obligatory written agency disclosures be given in "clearly understood terms." N.D. ADMIN. CODE § 70-02-03-15.1(7) (2001). The burden of accomplishing this, however, is on the brokerage firms and licensees themselves. Ideally, cognitive psychologists and marketing/consumer behavior specialists trained in assessing the impact of particular words, combinations of words, and visual formatting would be involved in the process.

[303] *See, e.g.*, GA. CODE ANN. § 10-6A-2 (2000) (indicating that codification of agency relationships will "prevent detrimental misunderstandings and misinterpretations of such relationships by both consumers and real estate brokers"); NEB. REV. STAT. § 76-2401 (2001) (similar).

whether they have achieved their intended purpose of alleviating the difficulties and confusion consumers face.

A. Consumer Confusion Created by Conflicting Terminology

The existence of novel and frequently conflicting terminology among the various states has created a new source of consumer confusion. In today's mobile society, many consumers are bound to participate in residential real estate transactions in more than one state. Even a well-informed consumer in one state may assume that terminology used in the profession is uniform and may thus be misled when purchasing a second home in another state.

There are many examples of this often perplexing nomenclature. In Minnesota, a "facilitator" is the equivalent of a transaction broker,[304] whereas in New Mexico, a "facilitator" is a disclosed dual agent.[305] A "limited broker" in Idaho is a qualified broker who does not have associate brokers or salespeople working with her,[306] a "limited agent" in Indiana and South Dakota is a disclosed dual agent,[307] and a "limited broker" in Minnesota is one who is licensed only to act as a principal in connection with a real estate transaction.[308] Then again, "limited agent" is the term used in a number of states to refer to the statutorily created and defined non-fiduciary licensee ("exclusive agent") capacity.[309]

In addition, the terms "non-agent"[310] and "no-brokerage" have been used in a few of the new licensing statutes. In New Hampshire, a "non-agent" is essentially a transaction broker.[311] Alternatively, "non-agents" in Idaho are only those licensees who work with a buyer or seller who is not represented by a licensee.[312] New Mexico law refers to the relationship between a licensee and a consumer with whom the licensee does not have

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[304] MINN. STAT. § 82.197(4)(V) (2002).

[305] N.M. ADMIN. CODE tit. 16, § 61.1.7.21 (2001).

[306] IDAHO CODE § 54-2004(22) (Michie 2001).

[307] IND. CODE ANN. § 25-34.1-10-12 (West 2001); S.D. CODIFIED LAWS § 36 21A-140 (Michie 2001).

[308] MINN. STAT. § 82.20(13) (2000).

[309] *See, e.g.*, MO. REV. STAT. § 339.710(16) (2000); NEB. REV. STAT. § 76-2413 (2001). *Cf.* TENN. CODE ANN. § 62-13-102(9) (2001) (defining "limited agency" so as to relieve client of vicarious liability for agent's misrepresentations). On the other hand, Virginia's statute denominates a licensee whose duties are dictated by statute a "standard agent." VA. CODE ANN. § 54.1-2130 (Michie 2001).

[310] Any statute that supersedes common law and statutorily enumerates duties that are inconsistent with or fall short of traditional fiduciary obligations agents owe has created "non-agent" options. Despite common parlance, licensees in these states are no longer "agents" as defined by the common law.

[311] New Hampshire defines a non-agent as a licensee that "can only perform ministerial acts and is not obligated as an agent to either the buyer/tenant or seller/landlord." N.H. CODE ADMIN. R. ANN. [Real Est. Comm'n] 701.01(e) (2002).

[312] IDAHO CODE §§ 54-2083(11), 54-2086 (Michie 2002).

a brokerage relationship as "non-agency."[313] Florida law designates this same group of licensees as "no brokerage."[314] Realtor relationships with the same name, therefore, can actually be quite different depending upon the jurisdiction.

At a minimum, licensees who have not been engaged as agents, with attendant fiduciary duties to their clients, should refrain from using the term "agent" to describe themselves or their practice. Likewise, statutes and regulations should avoid the use of this term altogether—in favor of the more generic terms licensee, broker, or salesperson—unless describing one who is legally an agent.

B. Consumer Confusion Created by Transaction Broker Status

The creation of the transaction broker has probably not changed the practical setting for the consumer considerably. In the scenario where a transaction broker works with both parties but represents neither, the result is quite similar to that of the single licensee acting as a disclosed dual agent representing both parties to the transaction. This model existed prior to the revision of state licensing statutes and the promulgation of new regulations. The difference today is that a transaction broker may have reduced disclosure and consent requirements and likely owes fewer duties to the parties than under a disclosed dual agency agreement.[315] While this protects the licensee from liability, it does so at the expense of the consumer.

This type of transaction brokerage arrangement also creates the possibility that each party will mistakenly assume that the transaction licensee represents him in an agency capacity. The error, however, will probably operate to the buyer's detriment. Where the seller is not represented, he is likely to be aware of that fact—not having engaged the services of any realtor—and will act accordingly to protect himself. The prospective buyer, on the other hand, may reasonably assume that a licensee who is participating in the transaction represents him, particularly if he has sought the services of that realtor in the first instance.[316]

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[313] N.M. ADMIN. CODE tit. 16, § 61.1.7(CC) (2002). In New Mexico, "non-agency" also refers to a written brokerage relationship that expressly does not call for fiduciary duties. *Id.*

[314] FLA. STAT. ANN. § 475.278(4)(a) (West 2001). A number of other states refer to this relationship, by implication, as the licensee-customer relationship. *See supra* note 112 and accompanying text.

[315] Recall that in all states that permit disclosed dual agency, a written consent form is required. *See supra* note 83 and accompanying text. This is not the case with transaction broker status, which simply must be disclosed as part of the agency relationship disclosures in most states that permit it. *See supra* notes 142–144 and acompanying text.

[316] The confusion problem is precisely the same where the transaction broker represents one party (usually the seller) in an agency capacity and the other (usually the buyer) as a transaction broker. This situation is expressly contemplated in some states that provide for transaction brokers. *See, e.g.*, MO. REV. STAT. § 339.755(9) (2000); NEB. REV. STAT.

Confusion also remains a problem where two licensees are involved in the transaction but only the licensee working with the buyer is operating as a transaction broker. From the practical perspective of the parties, this representational model is no different than the seller subagency model. The buyer (and seller) may still believe that the transaction broker is legally the buyer's agent—complete with fiduciary obligations—when, in fact, she is not.[317]

C. *Consumer Confusion Perpetuated by "Ministerial Acts" Provisions*

Many state statutes expressly permit a licensee representing one party in an agency capacity to perform so-called "ministerial acts" for the other party.[318] These are performed for an unrepresented party without creating an agency relationship.

In a representative scenario, an interested buyer meets the listing realtor at an open house. Because the buyer does not perceive the need for separate representation, the seller's agent then willingly[319] performs ministerial acts for the buyer, including answering questions, assisting the buyer in filling out a contract offer, arranging for necessary inspections, and ultimately attending the closing. In fact, these are the acts that are most frequently performed by realtors. Some consumers may even believe these are the only services provided by realtors or the only services that they are qualified to perform. It is no wonder, then, that an unrepresented buyer may conclude that a realtor providing him with ministerial assistance "represents" him in some legal capacity, even when that realtor is the listing agent—legally the agent of the seller.[320] Indeed, it was precisely the rendering of ministerial services to unrepresented par-

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§ 76-2416(4) (2001).

[317] Of course, a buyer who finds himself in this setting has actually been assisted by the imposition of any affirmative statutory duties imposed upon the transaction broker in his favor. The seller, too, is better off because the transaction broker is likely not his subagent.

[318] It is not just two-tiered service states, however, that run into this problem. For example, without creating the customer/client distinction, New Hampshire's regulatory scheme establishes this same scenario. Sellers' or buyers' agency agreements must be written, and the statute expressly provides that sellers' and buyers' agents may perform ministerial acts for the other party to the transaction. *See* N.H. REV. STAT. ANN. §§ 331-A:25-b(II)(b), 331-A:25-c(II)(b) (2000); *see also* N.H. CODE ADMIN. R. ANN., Rea 701.01(e) (2001) (stating that "non-agents" may perform only ministerial duties).

[319] A seller's broker who sells the property without the participation of a buyer's broker or other cooperating broker does not have to split the six to eight percent commission with anyone.

[320] This is frequently the case with a cooperating broker (seller's subagent), who responds to a buyer's inquiries about property, shows him properties listed by other agents, arranges for inspections, and attends the closing. This realtor is even more likely to appear to the buyer as his "own" agent, while the statute clearly provides that the licensee has no agency relationship with such a customer.

ties that caused the legal and practical confusion inherent in the traditional agency representation model.

States that have expressly incorporated safe harbors for licensees who perform ministerial acts have gone a long way towards protecting the licensee from liability, either to her client or to the unrepresented party, to whom no fiduciary duty is owed. But in the process, they have exacerbated—and in fact codified—the negative features of the traditional seller subagency relationship, leaving the buyer dangerously unrepresented.

D. Attempts To Resolve the Danger to Sellers Imposed by the Persistence of Seller Subagency Practice

The employment of seller's subagents who work with buyers has long been perceived as the root of the consumer confusion regarding whom licensees represent. It also has acted as a catalyst for the promulgation of agency disclosure laws in all but one of the fifty states.[321] Despite new disclosure laws, the creation of various other new agency roles, and the explicit definition of agents' duties, the practice of seller subagency persists today. The two primary concerns here are intertwined: the notion that a subagent may be appointed without the principal's actual authorization, and the principal's vicarious liability for the subagent's conduct.

State statutes addressing these issues have taken different approaches. A number of them have eliminated the principal's (seller's) liability for the subagent's conduct.[322] This goes a long way towards addressing the problem. An alternative approach is to retain the principal's vicarious liability for the conduct of the subagent but require that the principal be made aware of this liability. Connecticut's statute[323] effectively accomplishes this end:

> No real estate broker shall make any unilateral offer of subagency or agree to compensate, appoint, employ, cooperate with or otherwise affiliate with a subagent for the sale or purchase of real property without the informed written consent of the person

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[321] *See supra* note 247.

[322] *See, e.g.*, N.Y. REAL PROP. LAW § 443(4) (McKinney 2002) (holding that neither buyer nor seller is vicariously liable for conduct of subagents); IND. CODE ANN. § 25-34.1-10-16 (West 2001) (stating that client is not vicariously liable for agents' misrepresentations unless client knew or should have known of the misrepresentation); NEB. REV. STAT. § 76-2426 (2001) (same); OHIO REV. CODE ANN. § 4735.68 (Anderson 2001) (stating that there is no vicarious liability for client who did not have actual knowledge of licensee's misrepresentation); TEX. REV. CIV. STAT. ANN. art. 6573a, § 15F(c) (Vernon 2002) (stating that neither party nor licensee is vicariously liable for subagents' misrepresentation or concealment unless party or licensee knew of a falsity and failed to disclose it). Indiana, Ohio, and Texas are not Type I states.

[323] Connecticut's statute is Type II. *See supra* Part IV.B.

> whom the real estate broker represents. Such written consent shall contain the name and real estate license number of the real estate broker to be appointed as the subagent and shall contain a statement notifying the person whom the real estate broker represents that the law imposes vicarious liability on the principal for the acts of the subagent.[324]

Notably, this statute requires the informed written consent of the seller.[325] Many states, however, simply require that "authority" to appoint subagents be given in writing.[326] This latter approach condones the historical practice of placing a "consent" or "authorization" to the appointment of subagents in the listing agreement, where it may never be read or noticed by the seller.[327] Thus, a seller might conceivably become liable for the conduct of a subagent he "constructively" authorized, but of whom he was in actuality unaware.[328] State statutes that do not eliminate vicarious liability for the conduct of these "unknown" subagents have maintained the original and arguably unfair situation for the seller.[329]

States that choose to retain vicarious liability for subagents should add a requirement that the licensee more clearly highlight this liability to the seller. A better solution, though, is to retain the tradition of nearly automatic authorization of subagents as necessary, but eliminate vicarious liability for unknown sublicensee's conduct.

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[324] CONN. GEN. STAT. § 20-325(f) (2001).

[325] *Compare* OHIO REV. CODE ANN. § 4735.64 (Anderson 2001) (offer of subagency prohibited without "knowledge and consent of the seller"), *with* S.C. CODE ANN. § 40-57-137 (Law. Co-op. 2001) (seller's "consent" required).

[326] *See, e.g.*, KAN. STAT. ANN. § 58-30,106(g) (2001) (establishing that seller may agree in writing to appointment of subagents); LA. REV. STAT. ANN. § 9:3898 (West 2001) ("subagency can be created only by written agreement"); MASS. BD. OF REG. OF REAL EST. BROKERS & SALESPERSONS, MANDATORY AGENCY DISCLOSURE—AENCY RELATIONSHIP FORM (on file with author) (allowing written authorization of subagent representation); MO. REV. STAT. § 339.780(2) (2001) (requiring all seller representation agreements to indicate whether subagency is permitted); WASH. REV. CODE § 18.86.010 (15) (2001) (establishing that the subagent is hired by "principal's agent where the principal has authorized the agent in writing to appoint subagents"); WYO. STAT. ANN. § 33-28-303(f) (Michie 2001) (establishing that seller may agree in writing to extend offer of subagency).

[327] *See* Collette, *supra* note 6, at 420 (noting that "in all probability, sellers rarely read or understand the contents of the standard form listing agreements they sign, nor do they give much thought to the scope of their authorization of sub-agency").

[328] The law has long required agents who employ subagents to do so only with the permission of the principal, unless the delegated act is "ministerial" or "mechanical." RESTATEMENT (SECOND) OF AGENCY § 78 (1957).

[329] For example, in Pennsylvania, a subagent who cooperates with a listing broker need not obtain a written agreement from the seller, yet vicarious liability is not statutorily eliminated. 63 PA. CONS. STAT. § 455.606(b)(3) (2001). *See, e.g.*, S.C. CODE ANN § 40-57-137(E) (Law. Co-op. 2001) (declaring no subagency without "knowledge and consent" of seller; vicarious liability not statutory eliminated). The vicarious liability problem is not limited just to subagents. *See* WYO. STAT. ANN. §§ 33-28-301 to -309 (2001) (declaring no statutory elimination of vicarious liability for licensee conduct); KAN. STAT. ANN. §§ 58-30,106(k), 58-30,107(h) (2001) (eliminating only principal's liability for punitive damages arising out of agent's failure to perform statutory duties owed to other party to transaction).

E. Safe Harbors and Other Statutory Protections for Licensees

As explained previously, the advent of new licensing laws has resulted in licensees being better protected now than ever before. If licensees faced any problems in connection with the historical subagency practice, they were related to the confusion over to whom their legal duties ran, the precise form and quantum of legal duties (given unpredictable changes in common law), and the possibility of accidental dual agency.

The first two problems have been eliminated in most states by legislative or regulatory articulation of precise duties, express direction as to whom they are owed, and outright abrogation of the common law. The specter of accidental dual agency has also been all but eradicated by the fact that in-house transactions are now specifically provided for and condoned by many state statutes. Finally, legislative safe harbors for seller's agents and subagents who deal with buyers have dealt with problems persisting as a result of the inherent conflict of interest posed by lingering subagency or the new problems posed by the sanctioned performance of ministerial acts for unrepresented parties.[330]

IX. CONCLUSION

The last fifteen years have witnessed a revolution in real estate licensing statutes. New realtor roles have been created and adopted, licensees' duties have been redefined, and agency relationship disclosure of some type is now the norm. Each state's definition of the various realtor roles tends to vary from the others' at least in small part, as do other substantive provisions in state statutes. As a result, the fifty states' statutory models for realtor relationships and disclosure, and the resulting level of consumer protection they provide, are different.

The adoption of new realtor roles certainly has added flexibility and more consumer choice to the marketplace. But this has not come without costs. The introduction of non-agency realtor roles and the redefinition of existing ones no doubt has caused some confusion in the short term for licensees as they have altered their practices and adjusted to the new

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[330] *See, e.g.*, COLO. REV. STAT. § 12-61-804(3)(b) (2001) (declaring that sellers' agents have no duty "to conduct an independent inspection of the property for the benefit of the buyer" and no duty to "independently verify the accuracy or completeness of any statement made by [the seller] or any independent inspector."); KAN. STAT. ANN. § 58-30,106(d)(2) (2001) (same); OR. REV. CODE ANN. § 4735.69(B) (2001) (establishing that licensee's provision of ministerial assistance to a party who is not her client does not create an implied agency relationship with that party); S.C. CODE ANN. § 40-57-137(F) (Law. Co-op. 2000) (declaring that licensee acting as seller's agent is "not liable to a buyer for providing the buyer with false or misleading information if that information was provided to the licensee by his client and the licensee did not know or have reasonable cause to suspect the information was false or incomplete")

statutory models. For the consumer, though, the situation is more grave—the confusion perpetuated or even created by the new statutes is not likely to be short term. Consumers do not buy and sell homes every day. Even repeat buyers or sellers may have moved to another state where the laws are different, or they may have had their only previous experience with a home purchase or sale prior to the adoption of the new statutes. With consumer confusion still pervasive in many states even after the passage of disclosure statutes, it is time to recognize the limits of disclosure.

Given the questionable efficacy of disclosure in solving the problem of the unrepresented consumer, legal reform must follow the lead of states that have imposed concrete duties upon licensees towards those that they do not represent in a fiduciary capacity, whether in the form of other-party duties, duties owed to all parties, or even duties owed by a transaction broker to her "client." This is where the real consumer protection, if any, is found in the new real estate broker licensing statutes. In fact, the level of imposition of other-party duties is the most appropriate yardstick by which to measure new real estate broker regulations; it accurately reveals how far the states have come in achieving the goal of protecting the public, while also encouraging free enterprise on the part of realtors.

Home ownership is an essential ingredient of the American way of life. Realtors get their slice of this enormous pie; they are engaged in and profit from the vast majority of the millions of home purchase and sale transactions nationwide each year. In their lobbying and public relations efforts, they are represented by a formidable national trade association as well as by local practitioner groups and boards.[331] The individual consumer, by contrast, is alone, lacking in political clout, frequently ill-informed about the state of the law despite disclosure laws, and apparently of least concern to the regulatory setting in some states. As a matter of public policy, state laws and regulations should not become vehicles for eliminating or reducing realtor liability at the expense of the consumer. Instead, state residential real estate licensing laws should seek proactively to protect sellers—and especially buyers—using the most protective statutes in existence today as their models.

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[331] FTC REPORT, *supra* note 3, at 82, 97.

APPENDIX: CLASSIFICATION OF STATES BY REALTOR ROLES, DEFAULT POSITION, AND OTHER-PARTY DUTIES

Alabama	IV C 4		Montana	IV A 3
Alaska	I B1		Nebraska	I A 3
Arizona	I B 3		Nevada	II B 4
Arkansas	I B 2		New Hampshire	IV A 3
California	I B 4		New Jersey	IV A 3
Colorado	IV A 3		New Mexico	IV C 3
Connecticut	II B 2		New York	I B 4
Delaware	I B 3		North Carolina	II A 3
Florida	IV B 3		North Dakota	II A 3
Georgia	IV A 3		Ohio	II B 3
Hawaii	I B 1		Oklahoma	IV C 2
Idaho	III A 4		Oregon	II B 4
Illinois	III B 3		Pennsylvania	IV C 4
Indiana	III A 3		Rhode Island	I A 2
Iowa	III A 4		South Carolina	I A 2
Kansas	IV A 3		South Dakota	IV A 3
Kentucky	IV B 2		Tennessee	IV C 4
Louisiana	III A 2		Texas	II B 2
Maine	II B 3		Utah	I A 1
Maryland	I A 3		Vermont	I A 3
Massachusetts	I B 2		Virginia	II B 3
Michigan	IV B 1		Washington	II A 4
Minnesota	IV B 3		West Virginia	I B 4
Mississippi	I B 3		Wisconsin	III A 4
Missouri	IV A 3		Wyoming	IV A 3

Key:

Realtor Roles
Type I: recognize buyers' brokers
Type II: add designated agency
Type III: two-tiered service
Type IV: add transaction brokers

Default Position
Class A: traditional model
Class B: "choice"/traditional model
Class C: transaction broker default

Other-Party Duties
Cat. 1: none enumerated
Cat. 2: honesty/good faith
Cat. 3: disclose material adverse facts
Cat. 4: include reasonable care

NOTE

THE BEST PHARMACEUTICALS FOR CHILDREN ACT OF 2002: THE RISE OF THE VOLUNTARY INCENTIVE STRUCTURE AND CONGRESSIONAL REFUSAL TO REQUIRE PEDIATRIC TESTING

LAUREN HAMMER BRESLOW*

On January 4, 2002, President Bush signed into law the Best Pharmaceuticals for Children Act, which is the government's most comprehensive legislation regarding pediatric research to date. The Act offers pharmaceutical companies a six-month exclusivity term in return for their agreement to conduct pediatric tests on drugs. It also provides public funding and organizes private funding to help conduct pediatric research on those drugs that pharmaceutical companies opt not to test in children. This Note reviews the history of pediatric research and traces the development of the Best Pharmaceuticals for Children Act's unique incentive and public funding structure. The Note contends that, while the Act is comprehensive and promotes important pediatric studies, its incentive structure forces consumers and taxpayers to bear the costs of testing pharmaceuticals in children instead of the manufacturers who research, develop, and market those drugs. Congress should consider mandating pediatric studies in any future enactment of the legislation.

In January of 2002, Congress passed the Best Pharmaceuticals for Children Act ("BPCA"), which was its second major attempt to increase the number of clinical tests performed on pediatric populations.[1] Congress passed the BPCA in response to the modest success of its earlier effort to promote pediatric clinical testing,[2] the pediatric exclusivity provision of the Food and Drug Administration Modernization Act of 1997 ("FDAMA").[3] With both the 1997 and 2002 efforts, Congress has attempted to address the dearth of information about the safety and effectiveness of drugs that children commonly use.[4] Indeed, before passage of

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[1] Best Pharmaceuticals for Children Act of 2002, Pub. L. No. 107-109, 115 Stat. 1408 (codified as amended in scattered sections of 21 U.S.C. and 42 U.S.C).

[2] *See* H.R. REP. No. 107-277, at 14 (2001) (explaining that while the incentive had been successful, it was not adequate to address the need for studies in certain drugs such as those with no patent protection or those for neonates); S. REP. No. 107-79, at 2 (2001) (noting the success of the 1997 legislation as well as the need to augment its provisions).

[3] Food and Drug Administration Modernization Act of 1997, Pub. L. No. 105-115, § 111, 111 Stat. 2296, 2305–09 (codified as amended in scattered sections of 21 U.S.C.).

[4] *See, e.g.*, S. REP. No. 105-43, at 151–53 (1997); S. REP. No. 107-79, at 1–2 (2002);

the FDAMA, few drugs were labeled for children, as neither Congress nor the Food and Drug Administration ("FDA") required pediatric testing of drugs, and drug companies rarely labeled drugs for children on their own.[5] A 1994 study found that six of the ten drugs most commonly prescribed to children had no pediatric labeling.[6]

The 1997 pediatric exclusivity provision did not require manufacturers to conduct pediatric clinical testing, but rather offered incentives to manufacturers in order to encourage such testing on a voluntary basis.[7] If a manufacturer agreed to conduct pediatric tests on a drug, it would receive a six-month extension on a pre-existing patent or exclusivity term.[8] Likewise, the BPCA does not require pediatric testing, but it does go a step further than the 1997 legislation, establishing a two-tiered approach to ensure research of drugs used by pediatric populations. Under this approach, a manufacturer may again opt to test its own drug in pediatric clinical trials and thereby earn the additional six-month term.[9] If a manufacturer does not wish to perform such pediatric studies, the BPCA allots funds to enable the FDA to contract for the testing of those drugs for which it believes pediatric studies would be beneficial.[10]

While the BPCA is a strong step forward for children's health, it comes at a significant price. The six-month patent extensions cost consumers hundreds of millions of dollars because of the delay in cheaper, generic drugs reaching the market.[11] In addition to the patent extensions, taxpayers will fund the drug studies that manufacturers refuse to conduct, which average about $3.87 million per drug.[12] For fiscal year 2002, Congress appropriated $200 million to that end.[13] For all other groups besides children—men, women, minority and ethnic groups—no such incentive structure or public funding is used to ensure adequate testing.[14] Instead, under the Food, Drug and Cosmetic Act pharmaceutical companies must complete safety and effectiveness tests on these groups as a condition of marketing their drugs.[15] This Note reviews the history of pediatric testing

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H.R. REP. NO. 107-277, at 13–14 (2002).

[5] As this Note will discuss, the FDA began to require pediatric testing in new and already marketed drugs in 1998. *See infra* Part II.B.

[6] FOOD & DRUG ADMIN., DEP'T OF HEALTH AND HUM. SERVS., THE PEDIATRIC EXCLUSIVITY PROVISION: JANUARY 2001 STATUS REPORT TO CONGRESS iii, 37 tbl. 7 (2001) [hereinafter 2001 STATUS REPORT TO CONGRESS].

[7] *See* 21 U.S.C. § 355a (1997) (amended 2002).

[8] *Id.*

[9] *See* Best Pharmaceuticals for Children Act of 2002, 21 U.S.C. § 355a.

[10] Best Pharmaceuticals for Children Act of 2002, 42 U.S.C. § 284m.

[11] 2001 STATUS REPORT TO CONGRESS, *supra* note 6, at 14–18.

[12] PUBLIC CITIZEN CONGRESS WATCH, PATENTLY OFFENSIVE: CONGRESS SET TO EXTEND MONOPOLY PATENTS FOR CIPRO AND OTHER DRUGS 2, *available at* http://www.citizen.org/documents/ACF34F.PDF (last visited Sept. 20, 2002).

[13] Best Pharmaceuticals for Children Act of 2002, Pub. L. No. 107-109, § 409i(d)(1)(A), 115 Stat. 1409, 1411.

[14] *See* H.R. REP. NO. 107-277, at 57 (2001).

[15] *See* Federal Food, Drug and Cosmetic Act of 1938, ch. 675, 52 Stat. 1040 (codified

to determine why children have been separated from the mainstream of drug testing and how Congress came to implement a program for pediatric testing.

Part I considers the reasons pharmaceutical companies have avoided pediatric research. It suggests that the pharmaceutical industry avoided pediatric research to dissociate itself from a history of pediatric testing that exploited and abused children. In addition, pharmaceutical companies sought to avoid tort liability that might arise from adverse drug reactions in children, as well as the scientific and ethical challenges specific to pediatric testing.

As Part II recounts, until the 1990s, the government, including Congress and the FDA, allowed pharmaceutical companies to avoid pediatric testing. The FDA's regulations placed only minimal requirements on pharmaceutical companies regarding pediatric testing. The result was that by the late 1990s, few drugs were labeled for children, leading to an unsafe medical environment for children, especially severely ill children taking many drugs.[16]

Part III discusses the FDA's efforts in the 1990s to address the lack of pediatric testing and labeling and reviews its attempt to bring pediatric studies into the mainstream of the Food, Drug, and Cosmetic Act. The FDAMA, however, continued to treat children as a special group of clinical subjects, refusing to mandate pediatric testing by the pharmaceutical industry. It also further separated children from adults by awarding pharmaceutical companies a patent or exclusivity extension for their decision to test in children.

Finally, Part IV addresses Congress's most recent enactment of pediatric testing legislation, the Best Pharmaceuticals for Children Act, which attempts to address many of the weaknesses of its 1997 predecessor, the FDAMA. Part IV concludes by arguing that Congress, under the BPCA, has continued to isolate children from mainstream research, and that this separation is costing taxpayers billions of dollars. Because the voluntary, incentive-based pediatric testing provision is unjust and costly, it should be reformed to allow for more stringent, cost-efficient regulation.

I. THE ISOLATION OF PEDIATRIC RESEARCH FROM THE MAINSTREAM OF CLINICAL TESTING

For much of American history, children were the primary subjects of clinical research.[17] Indeed, until the early 1970s, the government made

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as amended at 21 U.S.C. §§ 301–397).

[16] *See* Tamar Nordenberg, *Pediatric Drug Studies: Protecting Pint-Sized Patients*, FDA CONSUMER MAG., May-June 1999, at 24.

[17] *See generally* Susan E. Lederer & Michael Grodin, *Historical Overview: Pediatric Experimentation*, *in* CHILDREN AS RESEARCH SUBJECTS: SCIENCE, ETHICS, AND LAW 3, 4–

few efforts to regulate pediatric testing.[18] Physicians often abused their clinical freedom, conducting tests on children that were exploitative and dangerous.[19] As a result of this exploitation, pediatric clinical testing acquired a negative connotation, pushing private pharmaceutical companies away from the field of pediatric research and drugs.[20] Other factors, such as the high legal costs of harming children, also turned companies away from research on pediatric drugs.[21] The result of pharmaceutical companies' avoidance of pediatric medicine was that by the 1990s few marketed drugs had been tested for safety and effectiveness in children.

A. Pediatric Testing in the Nineteenth and Twentieth Centuries

One barrier to pediatric testing is the negative connotation associated with it as a result of a history of abuses in the field. Some of the earliest medical testing was performed on orphans and the children of physicians, rendering them the unprotected "guinea pigs" of a burgeoning field of medicines and vaccines.[22] The legal status of children contributed to their vulnerability to medical exploitation. Before the twentieth century, the law offered little protection to children, classifying them as chattel, property, and extensions of their parents.[23] Thus, childhood was not only dangerous because of rampant disease[24] but also because children had no legal recourse from abuse or abandonment, be it at home or under the care of a physician.[25]

In the 1870s, public outrage regarding the treatment of children led to the creation of organizations dedicated to children's rights.[26] At the same time, medicine and medical societies began to recognize the needs of children as distinct. Children's hospitals began to open in major cities,[27] and in 1873, the American Medical Association ("AMA") estab-

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18 (Michael A. Grodin & Leonard H. Glantz eds., 1994).

[18] *See* Kurt R. Karst, *Pediatric Testing of Prescription Drugs: The Food and Drug Administration's Carrot and Stick for the Pharmaceutical Industry*, 49 AM. U. L. REV. 739, 747 (2000).

[19] *See generally* Leonard H. Glantz, *The Law of Human Experimentation with Children*, *in* CHILDREN AS RESEARCH SUBJECTS: SCIENCE, ETHICS, AND LAW 103, 103 (Michael A. Grodin & Leonard H. Glantz eds., 1994) (providing a historical overview of pediatric testing).

[20] *See infra* Part I.

[21] *See infra* Part I.

[22] *See generally* Glantz, *supra* note 19, at 103 (providing a historical overview of pediatric testing).

[23] *See id.* at 103; Marvin R. Ventrell, *Rights and Duties: An Overview of the Attorney-Child Client Relationship*, 26 LOY. U. CHI. L.J. 259, 261 (1995).

[24] Lederer & Grodin, *supra* note 17, at 4–5.

[25] *See generally* Jill Elaine Hasday, *Parenthood Divided: A Legal History of the Bifurcated Law of Parental Relations*, 90 GEO. L.J. 299 (2002).

[26] *See, e.g.*, Ventrell, *supra* note 23, at 263.

[27] *See* Lederer & Grodin, *supra* note 17, at 6.

lished a separate division for women and children.[28] It would be almost fifty more years before the independent American Academy of Pediatrics was founded in 1930 to specifically promote children's welfare.[29]

While pediatric drug testing did lead to the eventual advancement of children's health, the means used to achieve that end exploited the vulnerability of children.[30] In fact, the development of vaccines for diseases such as smallpox and measles can be credited to physicians who used their own children and institutionalized children as subjects.[31] Children were inoculated with potential vaccines and then purposefully exposed to virulent strands of disease.[32] In the late 1800s, Alfred F. Hess, drector of the Hebrew Infant Asylum of New York, explained that using institutionalized children as research subjects was a great benefit to science because "the standardized conditions in the asylum approximated those 'conditions which are insisted on in considering the course of experimental infection among laboratory animals, but which can rarely be controlled in a study of infection in man.'"[33]

These experiments were often performed without parental consent, and activists began to protest against medical abuse that occurred when poor parents brought their children to public hospitals.[34] Nonetheless, well into the twentieth century, physicians continued to use children when testing drugs to treat diseases such as tuberculosis, scurvy, and rickets.[35] For example, Saul Krugman, a researcher associated with New York University, conducted hepatitis testing in severely mentally retarded children at Willowbrook State School from the 1950s through the 1970s.[36] While Krugman ostensibly obtained parental consent, these consents were later criticized for being coerced and uninformed.[37] Krugman had enticed parents to consent to the tests in exchange for a promise to aid

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[28] Anne M. Dellinger, Book Review, 21 J. HEALTH POL. POL'Y & L. 159, 160–61 (1996) (reviewing SUSAN E. LEDERER, SUBJECTED TO SCIENCE: HUMAN EXPERIMENTATION IN AMERICA BEFORE THE SECOND WORLD WAR (1995) and CHILDREN AS RESEARCH SUBJECTS: SCIENCE, ETHICS, AND LAW (Michael H. Glantz & Leonard Grodin eds., 1994)). Despite its interest in pediatric medicine, the AMA remained one of the strongest opponents of regulated medical research. William Williams Keen, the President of the AMA at the turn of the eighteenth century, adamantly resisted any regulations, arguing that claims of abuse were exaggerated. *Id.* The AMA did not change its position until after World War II. *Id.*

[29] Lederer & Grodin, *supra* note 17, at 6.

[30] Ann E. Ryan, Note, *Protecting the Rights of Pediatric Research Subjects in the International Conference on Harmonisation of Technical Requirements for Registration of Pharmaceuticals for Human Use*, 23 FORDHAM INT'L L. J. 848, 852–53 (2001).

[31] Lederer & Grodin, *supra* note 17, at 5.

[32] *Id.* at 4–9.

[33] *Id.* at 6 (quoting A. F. Hess, *The Use of a Series of Vaccines in the Prophylaxis and Treatment of an Epidemic of Pertussis*, 63 JAMA 1007 (1914)).

[34] *Id.* at 12.

[35] *See id.* at 15.

[36] Ryan, *supra* note 30, at 854.

[37] *Id.* at 854 n.47.

their children's entrance into a better care facility.[38] Technological advances in medicine did not spare children either. Researchers used X-rays on children to learn more about digestion and metabolism,[39] and physicians experimented on children to determine the effectiveness of surgical procedures such as vivisections.[40]

Other vulnerable groups such as African Americans and the elderly also suffered from exploitation.[41] It was the public exposure of this abuse that finally sparked sufficient public outrage to instigate legal change in the regulation of clinical studies.[42] In the *New England Journal of Medicine* in the late 1960s, Henry K. Beecher reported on twenty-two cases of clinical abuse in various age groups.[43] He highlighted two now-infamous studies: the Tuskegee study, in which black men were infected with syphilis over the course of forty years, and a cancer study conducted on elderly patients at the Jewish Chronic Disease Hospital.[44] At the same time, the American public and the international community increasingly accepted a definition of human rights that included control over one's body, which incorporated the right to decide whether to participate in a clinical study.[45]

In the 1970s, the Department of Health, Education and Welfare (now the Department of Health and Human Services ("HHS")) finally responded to the call for clinical standards by issuing new rules on the testing of human subjects.[46] Children did not benefit from this surge in public support for protective clinical guidelines, however, since the rules applied primarily to adults. Then in 1974, Congress enacted the National Research Act,[47] which created the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research ("National Commission") to create standards for the testing in children.[48]

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[38] Lederer & Grodin, *supra* note 17, at 17–18.

[39] Ryan, *supra* note 30, at 853.

[40] Lederer & Grodin, *supra* note 17, at 11–12.

[41] *See, e.g., id.* at 16.

[42] *See* Notice of Publication of the Executive Summary of the Report, "Ethical and Policy Issues in Research Involving Research Participants," by the National Bioethics Advisory Commission (NBAC), 66 Fed. Reg. 45,998, 45,998 (Aug. 31, 2001).

[43] Lederer & Grodin, *supra* note 17, at 16.

[44] *See id. See generally* Henry K. Beecher, *Ethics and Clinical Research*, 274 NEW ENG. J. MED. 1354 (1966); HENRY K. BEECHER, RESEARCH AND THE INDIVIDUAL: HUMAN STUDIES (1970).

[45] *See generally* Robert Mittendorff II, *Primum Non Nocere: Implications for the Globalization of Biomedical Research Trials*, FLETCHER F. WORLD AFF., Summer 2001, at 239, 241–42.

[46] *See* Protection of Human Subjects, 30 Fed. Reg. 18,914 (May 30, 1974) (codified at 45 C.F.R. pt. 46).

[47] National Research Act, Pub. L. No. 93-348, 88 Stat. 342 (1974).

[48] *See* Additional Safeguards for Children in Clinical Investigations of FDA-Regulated Products, 66 Fed. Reg. 20,589, 20,590 (Apr. 24, 2001) (to be codified at 21 C.F.R. pts. 50 and 56).

It was another four years, however, before the National Commission made recommendations for pediatric clinical standards.[49] HHS reviewed these recommendations and published a notice in 1978 stating that it would start making rules regarding pediatric studies;[50] it did not publish final rules until 1983.[51] The rules, while establishing strict guidelines and protections for child subjects, applied only to children tested in studies funded or supported by HHS.[52] An earlier FDA proposed rule to govern all pediatric testing, public and private, had been withdrawn.[53] Some regulations addressing adult clinical testing, however, gave the FDA some measure of control over private testing in children. For example, the Internal Review Boards ("IRB's"), which are required for all clinical studies to oversee relevant ethical and research activities,[54] were required to remain especially cognizant of vulnerable groups such as pregnant women, children and those mentally incapable of consent.[55]

The FDA also worked with The American Academy of Pediatricians ("AAP") to promulgate guidelines for private studies in 1977.[56] It was not until 2000, however, that Congress enacted the Children's Health Act of 2000 that required HHS to create rules specifically for testing children in private as well as public studies.[57] The final rules promulgated pursuant

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[49] Protection of Human Subjects, Research Involving Children: Report and Recommendations of the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research, 43 Fed. Reg. 2084 (Jan. 13, 1978).

[50] Protection of Human Subjects, Proposed Regulations on Research Involving Children, 43 Fed. Reg. 31,786 (July 21, 1978).

[51] Additional Protections for Children Involved as Subjects in Research, 48 Fed. Reg. 9814 (Mar. 8, 1983) (codified at 45 C.F.R. pt. 46).

[52] *Id. See also* Final Regulations Amending Basic HHS Policy for the Protection of Human Research Subjects, 46 Fed. Reg. 8366, 8367–68 (Jan. 26, 1981) (codified at 45 C.F.R. pt. 46).

[53] Protection of Human Subjects; Proposed Establishment of Regulations, 44 Fed. Reg. 24,106 (Apr. 24, 1979); Withdrawal of Certain Pre-1986 Proposed Rules; Final Action, 56 Fed. Reg. 67,440 (Dec. 30, 1991) (codified at 21 C.F.R. ch. 1). *See also* Additional Safeguards for Children in Clinical Investigations of FDA-Regulated Products, 66 Fed. Reg. 20,589, 20,590 (Apr. 24, 2001) (to be codified at 21 C.F.R. pts. 50 and 56) (explaining that only if a study was funded or conducted by HHS would the clinical guidelines apply).

[54] Circumstances in Which IRB Review Is Required, 21 C.F.R. § 56.103 (2002).

[55] Criteria for IRB Approval of Research, 21 C.F.R. § 56.111 (2002); IRB Membership, 21 C.F.R. § 56.107 (2002).

[56] Karst, *supra* note 18, at 747.

[57] Children's Health Act of 2000, 42 U.S.C. § 284h. Congress was prompted to enact this bill in light of the increased enrollment of children in clinical testing that resulted from the pediatric exclusivity provision of the Food and Drug Modernization Act as well as the 1998 final rule. Additional Safeguards for Children in Clinical Investigations of FDA-Regulated Products, 66 Fed. Reg. 20,589 (Apr. 24, 2001) (to be codified at 21 C.F.R. pts. 50 and 56). As will be discussed in Part III, the pediatric exclusivity program and the 1998 final rule encouraged and required, respectively, manufacturers to research new drugs as well as already marketed drugs on children, thereby increasing the number of studies that included pediatric populations. *See* 21 U.S.C. § 355a. *See also* Regulations Requiring Manufacturers to Assess the Safety and Effectiveness of New Drugs and Biological Products in Pediatric Patients, 63 Fed. Reg. 66,632 (Dec. 2, 1998) (codified at 21 C.F.R. pts. 201, 312, 314, and 601).

to the Children's Health Act of 2000, extended the rules governing HHS studies using children to any pediatric studies, public or private, within the jurisdiction of the FDA.[58] Despite these recent improvements in the regulation of pediatric studies, however, such studies have been left with a scarred reputation. It has become difficult to separate the notion of pediatric testing from unethical medicine. Accordingly, it is not surprising that pharmaceutical companies have opted to avoid pediatric testing.

B. Liability in the Courtroom: The Costs of Harming Children and Fetuses

Risk of tort liability is a second barrier to adequate pediatric pharmaceutical testing. Drug manufacturers often cite the risk of liability as one of the most important reasons that they avoid a certain area of drug manufacturing.[59] In particular, manufacturers have faced great liability due to vaccines and drugs that have adversely affected children, including fetuses.[60] In the case of vaccines, the degree of liability was so extreme that Congress had to intervene to protect vaccine manufacturers in order to ensure a steady and safe vaccine supply.[61]

The advent of vaccines and the subsequent national vaccination program has been considered one of the greatest public health programs in American history.[62] State governments,[63] with the strong endorsement of the federal government, mandated childhood immunizations for a variety of diseases before entrance into public school.[64] Indeed, government-mandated vaccines saved millions of children from death, painful disease, and disability.[65] Nonetheless, even when functioning as approved by the FDA, vaccines will predictably injure and kill a certain percentage of children.[66] In the 1950s and 1960s, companies faced product liability litigation as a result of adverse effects of vaccines in children.[67] By the 1970s and early 1980s, the crisis came to a head, as manufacturers claimed that they would not be able to maintain the vaccine industry if the federal government did not protect them from liability.[68] Between

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[58] *See* 21 C.F.R. §§ 50.51–56, 56.109, 56.111 (2002).

[59] *See, e.g.*, Shawn Pogatchnik, *Contraceptive Studies at Standstill, Study Finds*, L.A. TIMES, Feb. 15, 1990, at A24.

[60] *See infra* text accompanying notes 61–82.

[61] Daniel A. Cantor, *Striking a Balance Between Product Availability and Product Safety: Lessons from the Vaccine Act*, 44 AM. U. L. REV. 1853, 1858–60 (1995).

[62] *See* H.R. REP. No. 99-908, at 4 (1986) ("Vaccination of children against deadly, disabling, but preventable infectious diseases has been one of the most spectacularly effective public health initiatives this country has ever undertaken.").

[63] All fifty states and the District of Columbia have such programs. Elizabeth A. Breen, *A One Shot Deal: The National Childhood Vaccine Injury Act*, 311–12 (1999).

[64] Cantor, *supra* note 61, at 1870–71.

[65] Breen, *supra* note 63, at 311–12.

[66] *Id.* at 313–14.

[67] Russel G. Donaldson, Annotation, *Construction and Application of the National Childhood Vaccination Injury Act*, 129 A.L.R. FED 1 (1996).

[68] *National Childhood Vaccine Injury Compensation Act of 1985: Hearings on S. 827*

1980 and 1985, plaintiffs sought $3.5 billion against vaccine manufacturers; the number of manufacturers of the diphtheria, tetanus, pertussis ("DPT") vaccine the most risky vaccine, fell from eight to two, and, by 1986, the national vaccine stockpile fell below the Centers for Disease Control's six-month supply recommendation.[69]

In 1986, Congress passed the National Childhood Vaccine Injury Act ("NCVIA") in response to the looming crisis in the manufacture and supply of vaccines.[70] The Act established the National Vaccine Injury Compensation Program,[71] which was intended to protect the supply of vaccines, while at the same time ensuring that those who bore the costs of the adverse effects of testing were compensated in a timely and equitable matter.[72] To this end, the program sought to limit manufacturer liability while allowing for legitimate claimants to recover compensation through an administrative hearing.[73] Thus, Congress rescued manufacturers from an otherwise financially devastating flow of liability. Given that drug companies faced this kind of liability from a product that was approved by the FDA and actually credited with saving millions of lives, drug manufacturers greatly feared liability from a clinical test gone wrong.[74] They also avoided marketing drugs for children because of the potential risk. The vaccine lesson taught manufacturers that such an incident would be incredibly costly.[75]

Another reason drug companies have avoided testing on children stems from tort liability with respect to women's reproductive systems. Drug manufacturers claim that the legal repercussions of marketing drugs that adversely affect women's reproductive health and their fetuses have served as inhibitors to advancement and improvement of contraceptive drugs and devices.[76] The most commonly cited examples are the cases of Thalidomide, DES, Dalkon Shield, and Bendectin.[77] Indeed, one study found that the primary source of all tort injury recoveries for women came from medical injuries, primarily those from defective reproductive

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Before the Sen. Comm. on Labor and Human Resources, 99th Cong. 240 (1985) (statement of Robert Johnson, President, Lederle Lab.) (stating that the number of carriers willing to insure Lederle, a vaccine manufacturer, in 1985 dropped from twenty-six to eight).

[69] Cantor, *supra* note 61, at 1858–59.

[70] National Vaccine Injury Compensation Act, 42 U.S.C.A. §§ 300aa-1 to -34 (200).

[71] *Id.* § 300aa-10.

[72] H.R. REP. NO. 99-908, at 12 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6344, 6353.

[73] *See id.* at 6348.

[74] *See, e.g.*, *Consumerists Say Approvals No Product Safety Guarantee*, CHEM. MARKETING REP., May 21, 1990, at 9.

[75] *See, e.g.*, *Liability Nightmare*, NAT'L REV., Aug. 23, 1985, at 15.

[76] Cindy Skrzycki & Michael H. Gallagher, *The Risky Business of Birth Control*, U.S. NEWS & WORLD REP., May 26, 1986, at 42.

[77] *See generally* Sylvia A. Law, *Tort Liability and the Availability of Contraceptive Drugs and Devices in the United States*, 23 N.Y.U. REV. L. & SOC. CHANGE 339 (1997); Thomas Koenig & Michael Rustad, *His and Her Tort Reform: Gender Injustice in Disguise*, 70 WASH. L. REV. 1, 38–40 (1995).

drugs and devices.[78] Bearing out the claims of the industry, the National Academy of Science conducted a two-year study that concluded that United States pharmaceutical companies had "fled the field" of contraceptive research and development.[79] The study asserted that the exodus was directly related to the enormous tort liability that drug manufacturers faced in the field.[80] It noted that in the 1970s, eight firms were participating in the field of contraceptive drug development, but by the 1980s, the only company still actively participating was Ortho Pharmaceutical Corp.[81] The link between the contraceptive and vaccine cases was all too obvious to the pharmaceutical industry.[82] The industry would be resoundingly punished in the courtroom for injuring women's reproductive capabilities, their fetuses, or their children. Thus, the pharmaceutical industry generally sought to avoid pediatric liability by neither labeling nor marketing drugs for children.

C. General Difficulties in Testing Children

In addition to the negative connotations of testing on children and the potential exposure to enormous liabilities, pediatric research has structural impediments that make it difficult to undertake.[83] First, the issue of consent is highly complicated in the case of pediatric subjects.[84] The contemporary standard for voluntary, informed consent provides that

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[78] *See* Koenig & Rustad, *supra* note 77, at 53 (arguing that the "vast majority of mass torts leading to punitive damages awards affected products used exclusively by women. These products include the Dalkon Shield and Copper–7 IUDs, oral contraceptives causing kidney failure, and silicone-gel breast implants."). *See generally Vaccine Injury Compensation, 1984: Hearings on H.R. 556 Before the Subcomm. on Health and the Env't of the House Comm. on Energy and Commerce*, 98th Cong. 295 (1984) (statement of Dr. D.L. Shaw, Jr., Wyeth Laboratories) (stating that the company had stopped marketing the DTP vaccine "because of extreme liability exposure, cost of litigation and the difficulty of continuing to obtain adequate insurance").

[79] Pogatchnik, *supra* note 59, at 24.

[80] *Id.*

[81] *Id.*

[82] *Product Liability Reform Act: Hearings on S. 1400 Before the Subcomm. on the Consumer of the Sen. Comm. on Commerce, Science, and Transp.*, 101st Cong. 466 (1990) (statement of Richard Kingham, Partner, Covington & Burling) (testifying that "liability concerns in general, and particularly about punitive damages, have caused manufacturers to withdraw beneficial drugs from the market and reduce research and development activities that could yield important new drugs" and that concerns are greatest in litigation prone areas, such as vaccines and contraceptives).

[83] *See, e.g., Evaluating the Effectiveness of the Food and Drug Administration Modernization Act: Hearings Before the Subcomm. on Health of the House Comm. on Energy and Commerce*, 107th Cong. 97 (2001) [hereinafter *Hearings on Evaluating the Effectiveness of the FDA Modernization Act*] (statement of Timothy R. Franson, Vice President, Clinical Research and Regulatory Affairs, Lilly Research Laboratories, Eli Lilly and Company on behalf of the Pharmaceutical Research and Manufacturers of America) (describing the scientific, ethical, technical, and regulatory difficulties of pediatric testing).

[84] *See* Notice of Publication of the Executive Summary of the Report "Ethical and Policy Issues in Research Involving Research Participants," by the National Bioethics Advisory Commission, 66 Fed. Reg. 45,998, 46,000 (Aug. 31, 2001).

potential adult research subjects must be made aware of the risks and side effects involved as well as alternative treatments available, but the standard leaves much freedom in the hands of researchers to create and subjects to participate in any degree of risk in a given study.[85]

The 2001 regulations regarding clinical tests implemented a new set of rules to govern the ethics of testing and procurement of consent from children and their parents.[86] For any study including children, the IRB is charged with the task of ensuring that the child's assent and the parent's permission were informed.[87] This means that the IRB must consider the "ages, maturity, and psychological state of the children involved."[88] The IRB must also consider the degree of risk involved in a study in relation to the degree that study might directly benefit the child subject.[89] As risk increases, the IRB must ensure that the probability of direct benefit to the child subject increases.[90] The IRB may also consider other factors including the overall benefit of the study to the understanding of the given disease.[91]

Designing pediatric studies and obtaining the consent of children and their parents is, therefore, a highly complicated process that must account for degrees of risk and individual maturity levels of potential subjects. The terms of a valid consent are not necessarily clear.[92] Moreover, there are many points in design and consent that could lead to malpractice and tort liability for the sponsoring pharmaceutical company.[93]

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[85] General Requirements for Informed Consent, 21 C.F.R. § 50.20 (2002); Elements of Informed Consent, 21 C.F.R. § 50.25 (2002).

[86] *See generally* Additional Safeguards for Children in Clinical Investigations of FDA-Regulated Products, 66 Fed. Reg. 20,589, 20,590 (Apr. 24, 2001) (to be codified at 21 C.F.R. pts. 50 and 56).

[87] Requirements for Permission by Parents or Guardians and for Assent by Children, 21 C.F.R. § 50.55 (2002).

[88] *Id.* § 50.55(a).

[89] Clinical Investigations Not Involving Greater Than Minimal Risk, 21 C.F.R. § 50.51 (2002); Clinical Investigations Involving Greater Than Minimal Risk but Presenting the Prospect of Direct Benefit to Individual Subjects, 21 C.F.R. § 50.52 (2002).

[90] 21 C.F.R. §§ 50.51–.52.

[91] Clinical Investigations Involving Greater Than Minimal Risk and No Prospect of Direct Benefit to Individual Subjects, but Likely to Yield Generalizable Knowledge about the Subjects' Disorder or Condition, 21 C.F.R. § 50.53 (2002).

[92] *See* Ryan, *supra* note 30, at 854–55. *See, e.g.*, *supra* text accompanying notes 36–38 (explaining the case of Saul Krugman). Krugman was vilified for his testing of mentally disabled children in a state facility, even though he had received consent. *See* Ryan, *supra* note 30 at 854; Robert M. Nelson, *Children as Research Subjects*, *in* BEYOND CONSENT: SEEKING JUSTICE IN RESEARCH 47, 49–50 (Jeffrey P. Kahn et al. eds., 1998). He had offered the parents of his patients the hope of better care for their children. Ryan, *supra* note 30, at 854–55. Critics of the research characterized this inducement as coercive to parents desperate to help their children receive better care. Others question the legitimacy of even lesser inducements such as gift certificates to Toys 'R Us in exchange for consent. *See, e.g.*, Rachel Zimmerman, *Child Play: Pharmaceutical Firms Win Big on Plan to Test Adult Drugs on Kids*, WALL ST. J., Feb. 5, 2001, at A1.

[93] *See generally* Glantz, *supra* note 22, at 118–30.

Not only would this litigation be fact-intensive and costly, it could also generate damaging press coverage for that company.

Many other challenges also make pediatric testing unappealing to researchers. It is difficult to find consenting subjects. The pool of children with a given disease is smaller than the corresponding adult population, and the general unwillingness of parents to subject their children to tests limits children's availability.[94] Also, it is difficult to obtain patient compliance or collect data from young subjects.[95] Young children cannot always communicate their reactions or feelings well, and have limited patience, mood swings, and fatigue that can interfere with testing.[96]

Furthermore, pharmacologic and pharmakinetic differences between children and adults necessitate that researchers develop special studies for child subjects.[97] Children's organs and metabolisms change rapidly throughout infancy and childhood, requiring adjustments for the rate of elimination of a drug from a child's system.[98]

Thus, working with pediatric patients is both legally and technically more challenging than working with adults.[99] By opting not to perform pediatric studies, the companies could avoid the complex world of pediatric research, liability for drugs marketed for children, and complicated consent and scientific issues that could have led to high costs and legal liability.[100] These factors explain why children were excluded from mainstream pharmaceutical research and illustrate why children needed special regulatory and legislative attention.

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[94] *See* S. REP. NO. 105-43, at 51 (1997).

[95] *Id.*

[96] Gerald P. Koocher & Patricia Keith-Spiegel, *Scientific Issues in Psychosocial and Educational Research with Children*, *in* CHILDREN AS RESEARCH SUBJECTS: SCIENCE, ETHICS, AND LAW 47, 49 (Michael A. Grodin & Leonard H. Glantz eds., 1994).

[97] *See Off-Label Drug Use and FDA Review of Supplemental Drug Applications: Hearings Before the House Comm. on Gov't Reform and Oversight*, 104th Cong. 106–14 (1996) [hereinafter *Hearings on Off-Label Drug Use*] (statement of Ralph Kauffman, M.D., on behalf of the American Academy of Pediatrics).

[98] *See id.*; Regulations Requiring Manufacturers to Assess the Safety and Effectiveness of New Drugs and Biological Products in Pediatric Patients, 62 Fed. Reg. 43,899, 43,901 (Aug. 15, 1997) (codified at 21 C.F.R. pts. 201, 312, 314, and 601b).

[99] *See generally* Elizabeth J. Jameson & Elizabeth Wehr, *Drafting National Health Care Reform Legislation to Protect the Health Interests of Children*, 5 STAN. L. & POL'Y REV. 152, 152–55 (1993).

[100] *See Better Pharmaceuticals for Children: Assessment and Opportunities: Hearings Before the Sen. Comm. on Health, Educ., Labor and Pensions*, 107th Cong. 43–44 (2001) [hereinafter *Hearings on Better Pharmaceuticals for Children*] (statement of Janet Heinrich, Director, Health Care-Public Health Issues) ("[S]everal factors appear to have contributed to the lack of pediatric studies. Drug companies indicated that they had little incentive to perform pediatric studies on drugs they intended to market primarily to adults and that these drugs would provide little additional revenue from use in children. Companies also said they were concerned about liability and malpractice issues and the difficulty of attracting enough pediatric patients for studies because of the small number of children with a particular disease.").

D. Children as Therapeutic Orphans and Pediatrician Outrage

The fact that drug companies declined to market or label their drugs for the pediatric population did not prevent children from using those drugs on a regular basis. Coined "therapeutic orphans" because of the scarcity of pediatric drugs on the market, children have been forced to look to adult medicines for treatment.[101] In a practice called "off-label" prescribing,[102] pediatricians treat children's illnesses with medicines labeled for adults with the same affliction.[103] Such prescriptions are legal and are a part of mainstream medical practice.[104] Indeed, the AMA estimates that forty to sixty percent of all prescriptions are off-label.[105]

Neither the FDCA nor the FDA regulates off-label prescriptions, although the FDA does monitor and may take action where a drug is prescribed on a widespread basis for an off-label indication.[106] The AMA, however, adopted guidelines to which physicians must conform in off-label practice.[107] The AMA uses the same standard that the FDA uses for drug approvals, permitting physicians to prescribe off-label when such a prescription is based on substantial medical evidence.[108] Substantial medical evidence is defined as "two or more adequate and well-controlled studies performed by experts qualified by scientific training and expertise."[109] The obvious problem, however, is that it takes a great deal of time for substantial medical evidence to accrue. For example, it might take years before sufficient dosing information for children becomes available in references such as journal articles and pediatric handbooks.[110]

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[101] *See* S. REP. NO. 105-43, at 51–52 (1997); Ryan, *supra* note 30, at 855–57.

[102] "Off-label" means a prescription for ages or diseases other than those indicated on a drug's label. *See* Nicole Endejann, *Is the FDA's Nose Growing?: The FDA Does Not "Exaggerate Its Overall Place in the Universe" When Regulating Speech Incident to "Off-Label" Prescription Drug Labeling and Advertising*, 35 AKRON L. REV. 491, 502–05 (2002); Steven R. Salbu, *Off-Label Use, Prescription, and Marketing of FDA-Approved Drugs: An Assessment of Legislative and Regulatory Policy*, 51 FLA. L. REV. 181, 186–92 (1999).

[103] *See* Althea Gregory, *Denying Protection to Those Most in Need: The FDA's Unconstitutional Treatment of Children*, 8 ALB. L.J. SCI & TECH. 121, 130–31 (1997).

[104] *See* Veronica Henry, *Off-Label Prescribing: Legal Implications*, 20 J. LEGAL MED. 365, 365 (1999).

[105] *Id.*

[106] *See* Legal Status of Approved Labeling for Prescription Drugs; Prescribing for Uses Unapproved by the Food and Drug Administration: Notice of Proposed Rule Making, 37 Fed. Reg. 16,503 (Aug. 15, 1972); FOOD AND DRUG LAW: CASES AND MATERIALS 619 (PETER Barton Hutt & Richard A. Merrill eds., 2d ed., 1991) [hereinafter FOOD AND DRUG LAW].

[107] Gregory, *supra* note 103, at 128.

[108] *See* Henry, *supra* note 104, at 370.

[109] *Id.*

[110] Nordenberg, *supra* note 16, at 28. *See also Reauthorization of the Prescription Drug User Fee Act and FDA Reform: Hearings Before the Subcomm. on Health and Environment, of the House Comm. on Commerce*, 105th Cong. 118–24 (1997) [hereinafter *Hearings on FDA Reform*] (statement of Sanford N. Cohen, M.D., on behalf of the Ameri-

Unlike other areas of medicine in which some drugs might be prescribed off-label, pediatricians faced situations in which the majority of the drugs that they were prescribing to children were off-label, leaving children at continual risk of experiencing adverse reactions.[111] Some common childhood afflictions were, and still are in many cases, treated with pharmaceuticals without pediatric labeling.[112] These areas included depression, epilepsy, severe pain, gastrointestinal problems, allergies, and high blood pressure.[113] As the FDA explained in a 1992 proposed rule, the lack of labeling resulted in a situation in which pediatricians were forced to estimate proper dosages

> arbitrarily based on the child's age, body weight, or body surface area without regard for the interaction of those factors or age-related physiological and biochemical factors. As a result, children may be exposed to an increased risk of adverse reactions, or decreased effectiveness of prescription drugs, or may be denied access to valuable therapeutic agents.[114]

Pediatricians were worried they would improperly medicate their patients,[115] concerned about their own medical malpractice liability,[116] and angry that the FDA continued to fail to assist them in treating children.[117] As one physician complained, "We are operating in a vacuum . . . I might be able to treat [children's] cancer more aggressively, but I don't know how to safely do that."[118]

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can Academy of Pediatrics).

[111] *See Hearings on FDA Reform*, *supra* note 110 (statement of Sanford N. Cohen, M.D., on behalf of the American Academy of Pediatrics); S. REP. NO. 107-79, at 3 (2001) ("Some drugs may have different adverse side effects or toxicities in children than in adults, so estimating dosages for children from dosages found to be safe and effective in adults may not be appropriate. The lack of pediatric studies and labeling information may lead to unintended medical errors and place children at risk of being under-dosed or over-dosed with medication.").

[112] Nordenberg, *supra* note 16, at 24.

[113] *Id.*

[114] Specific Requirements on Content and Format of Labeling, 57 Fed. Reg. 47,423, 47,424 (Oct. 16, 1992) (codified at 201 C.F.R. pt. 201).

[115] *See* Nordenberg, *supra* note 16 at 24 (quoting Rosemary Roberts, M.D., chair of the pediatric subcommittee of the FDA's Center for Drug Evaluation and Research, as stating that "[s]ome physicians won't even try a drug in a child if they don't have enough information.").

[116] *See* Henry, *supra* note 104, at 380; James M. Beck & Elizabeth D. Azari, *FDA, Off-Label Use, and Informed Consent: Debunking Myths and Misconceptions*, 53 FOOD & DRUG L.J. 71, 80 (1998).

[117] *See Hearings on Off-Label Drug Use*, *supra* note 97 (statement of Ralph Kauffman, M.D., on behalf of the American Academy of Pediatrics).

[118] Sheryl Gay Stolberg, *Children Test New Medicines Despite Doubts*, N.Y. TIMES, Feb. 11, 2001 at Sec. 1. p.1.

Historical examples buttressed pediatrician claims that poor labeling endangered children.[119] One of the most recent examples occurred in 1999, where seven newborns were forced into surgery after being treated with erythromycin, a commonly prescribed antibiotic, because there was no pediatric label warning against use in newborns.[120] Indeed, infamous adverse reactions go back many years. For example, in the 1960s, the antibiotic chloramphenicol was given to newborns, but their livers were too immature to break it down, leading to "gray syndrome."[121] Twenty-three babies died as a result.[122] Children have also experienced teeth staining, seizures and cardiac arrest, and hazardous interactions between drugs while using drugs not labeled for pediatric use.[123]

Using these examples as ammunition along with their own assertions that they felt ill-equipped to medicate childhood diseases, pediatricians pressed their case for better labeling. They argued that children could not be treated as "little adults"; they were different from adults, with their own set of metabolic and chemical designs.[124] Children, they argued, needed to be protected by special regulations that encouraged pediatric testing.[125]

Through the early 1990s, however, the federal government was complicit in the pharmaceutical companies' decision to avoid pediatric research. As the following Part discusses, the FDA's early attempts to protect children from unsafe medicines focused on restricting pharmaceutical marketing and labeling and not on the frequency or accuracy of pediatric research. By the 1990s, much to the dismay of the FDA, the result was a dismal record of pediatric testing that endangered children instead of protecting them.

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[119] *See Better Pharmaceuticals for Children: Assessment and Opportunities: Hearings Before the Sen. Comm. on Health, Educ., Labor and Pensions*, 107th Cong. 305 (2001) (statement of Senator Barbara Mikulski (D-Md.)).

[120] *Id. See also* 147 Cong. Rec. E2368 (daily ed. Dec. 20, 2001) (statement of Rep. Sheila Jackson-Lee (D-Tex.)) (noting that the lack of labeling for children was contributing to potentially fatal physician errors in the treatment of children).

[121] MILLER-KEANE MEDICAL DICTIONARY (2000). Gray syndrome, or gray baby syndrome, is a "potentially fatal condition seen in neonates." *Id.* An affected neonate becomes ashen, listless, weak, and prone to hypotension. *Id.*

[122] Nordenburg, *supra* note 16. *See also* Regulations Requiring Manufacturers to Assess the Safety and Effectiveness of New Drugs and Biological Products in Pediatric Patients, 62 Fed. Reg. 43,900, 43,901 (Aug 15, 1997) (codified at 21 C.F.R. pts. 201, 312, 314, and 601).

[123] Regulations Requiring Manufacturers to Assess the Safety and Effectiveness, 62 Fed. Reg. at 43,901.

[124] William Rodriquez et al., *Adverse Drug Events in Children: The U.S. Food and Drug Administration Perspective*, CURRENT THERAPEUTIC RES., Oct. 2001, at 714–15. *See also Hearings on FDA Reform*, *supra* note 110 (statement of Sanford N. Cohen, M.D., on behalf of the American Academy of Pediatrics).

[125] *See* Rodriquez et al., *supra* note 124, at 714–15; *Hearings on FDA Reform*, *supra* note 110 (statement of Sanford N. Cohen, M.D., on behalf of the American Academy of Pediatrics).

II. THE FDA'S EVOLVING ROLE AS THE PROTECTOR OF CHILDREN'S MEDICINE AND RESEARCH

The FDA did not initially require testing of new or marketed drugs on children. Through the 1990s, the FDA focused on ensuring that manufacturers did not label drugs for use on children unless they had first conducted pediatric tests to establish the drugs' safety and effectiveness in children.[126] While this policy served to protect children from false claims about drugs, it did little to ensure that there were sufficient numbers of drugs on the market that had been proven effective for children.[127] At the time that the FDA began to address the dearth of medicines tested for and marketed to children, only twenty percent of drugs were labeled for use in children[128] and six out of the ten leading drugs prescribed to children had never been tested in pediatric studies.[129]

A. A Brief History of the FDA and Its Initial Steps To Protect Children from Unsafe and Ineffective Drugs

The FDA's sluggishness in regulating pediatric testing and promoting a strong pediatric agenda is ironic given the considerable role that children played in both the birth and later empowerment of the FDA.[130] The tragic side effects of drugs on children propelled much of the legislation that led to the creation of the FDA in its modern incarnation. The first national statute dedicated to food and drug regulation was enacted after several children were killed from a diphtheria antitoxin that was infected with tetanus.[131] Subsequently, Congress enacted the Pure Food and Drug Act of 1906 ("PFDA"), which was the first legislation to prohibit misbranding and adulteration of drugs.[132] The PFDA created the Bureau of Chemistry to address the growing epidemic of unsanitary food production facilities and ineffective medicinal remedies marketed without regulation.[133] The Bureau was charged with removing ineffective

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[126] *See* Specific Requirements on Content and Format of Labeling for Human Prescription Drugs: Revision of the "Pediatric Use" Subsection on Labeling, 59 Fed. Reg. 64,239, 64,240 (Dec. 13, 1994) (codified at 21 C.F.R. pt. 201).

[127] *See generally* Nordenberg, *supra* note 16.

[128] S. REP. NO. 107-79, at 1 (2001).

[129] 62 Fed. Reg. 43,899, 43,900 (Aug. 15, 1997) ("These ten drugs were . . . prescribed over 5 million times in 1 year for pediatric patients in age groups for which the label carried a disclaimer or lacked adequate use information.").

[130] *See Hearings on Evaluating the Effectiveness of the FDA Modernization Act*, *supra* note 83 (statement of Richard Gorman, M.D., on behalf of the American Academy of Pediatrics).

[131] *See* FOOD AND DRUG LAW, *supra* note 106, at 8.

[132] Pure Food and Drug Act of 1906, ch. 3915, 34 Stat. 768 (repealed 1938). *See* FOOD AND DRUG LAW, *supra* note 106, at 4.

[133] Pure Food and Drug Act of 1906, ch. 3915, 34 Stat. 768 (repealed 1938). *See* Jeffrey E. Shuren, *The Modern Regulatory Administrative State: A Response to Changing Circumstances*, 38 HARV. J. ON LEGIS. 291, 299–300 (2001).

drugs from the market if it could prove a given drug did not work and that the seller actually knew this to be the case.[134] With no authority to require pre-market testing of drugs, however, the Bureau was left without the power to prevent hazardous drugs from reaching the market.[135]

A tragic result of this ill-conceived regulatory structure occurred in the 1937 "Elixir of Sulfanilamide" disaster.[136] In order to make the key element of sulfanilamide soluble, the manufacturer included diethylene glycol in the drug's formula.[137] Diethylene glycol, a solvent commonly used in antifreeze, had never been tested in humans.[138] In 1938, within two months of its being on the market, the formula caused fatal renal failure in over one hundred people, mostly children.[139]

This disaster motivated Congress to take further action with respect to the safety of marketed drugs.[140] In 1938, Congress repealed the Pure Food and Drug Act and enacted the Federal Food, Drug, and Cosmetic Act ("FDCA"), which created the FDA.[141] The FDCA gave the FDA authority to monitor and control new drugs. The FDA was authorized to require a manufacturer to demonstrate the safety and effectiveness of its drugs before that manufacturer could market them.[142] Still, the provision was limited to those drugs that were not yet marketed, offering the FDA no power to control already marketed drugs.[143]

It took another public health disaster involving children, however, before any significant changes were made to the FDCA. Senator Estes Kefauver (D-Tenn.) held hearings in the late 1950s and early 1960s to spark interest in strengthening the FDA, but his efforts did not receive great attention until the Thalidomide disaster in Europe.[144] In the late 1950s and early 1960s, women in Europe began to use Thalidomide to treat morning sickness.[145] Under the authority granted to the FDA by the FDCA, the examiner reviewing the Thalidomide application, refused to approve it because of the manufacturer's failure to provide certain evidence about the product's safety.[146] European women were not so fortu-

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[134] *See* Shuren, *supra* note 133, at 300; Mary T. Griffen, *AIDS Drugs and the Pharmaceutical Industry: A Need for Reform*, 17 AM. J.L. & MED. 363, 375–76 (1991).

[135] *See* Shuren, *supra* note 133, at 300.

[136] *Id.*

[137] *Id.*

[138] *Id.*

[139] *Id. See also* Rodriquez et al., *supra* note 124, at 712.

[140] Karst, *supra* note 18, at 746 n.33.

[141] Federal Food, Drug, and Cosmetic Act of 1938, ch. 675, 52 Stat. 1040 (codified as amended at 21 U.S.C. §§ 301–395 (2000)).

[142] 21 U.S.C. §§ 301–395 (2002). *See also* FOOD AND DRUG LAW, *supra* note 106, at 13.

[143] *See* Shuren, supra note 133, at 301–02.

[144] FOOD AND DRUG LAW, *supra* note 106, at 452.

[145] *See* Gregory, *supra* note 103, at 125 (1997); Shuren, *supra* note 118, at 301.

[146] Shuren, *supra* note 133, at 102.

nate, however, and Thalidomide caused severe deformities in thousands of babies.[147]

With the knowledge that the FDA had saved thousands of children and their families from a lifetime of suffering, Senator Kefauver's hearings took on a new life, and, in 1962, resulted in major amendments to the FDCA.[148] The Kefauver-Harris Amendments, as the new legislation came to be known,[149] confirmed the FDA's authority to determine which drugs could be marketed and empowered the FDA to pull unsafe or ineffective drugs from the market.[150] Thus, the effects of drugs on children prompted some of the most important public health movements in congressional history.[151]

Despite the fact that children served as the impetus for strengthening the FDA's authority over drugs, they hardly benefited from the new enabling legislation.[152] In fact, many critics later came to blame these regulations for the isolation of children from the mainstream of clinical research.[153] A pharmaceutical company could conduct clinical tests for a drug in adults and market that drug without ever considering that drug's effects on children.

In addition, as discussed in Part I, the FDA's earliest protections of children were regulations regarding the ethics of public clinical studies.[154] These regulations did not extend to private studies, nor did they require testing of drugs that were likely to be used in children.[155] Therefore, a manufacturer could claim a drug worked for children's illnesses despite the lack of a clinical foundation for this assertion.

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[147] *See* Gregory, *supra* note 103, at 125.

[148] FOOD AND DRUG LAW, *supra* note 106, at 452.

[149] Drug Amendments of 1962, Pub. L. No. 87-781, 76 Stat. 780 (1962) (codified as amended in scattered sections of 21 U.S.C. (2000)).

[150] *See* 21 U.S.C. § 321 (2000).

[151] *See* Shuren, *supra* note 133, at 302.

[152] *See* Henry, supra note 104, at 379 ("Infants and children have been referred to as therapeutic orphans. The irony of this situation is that both the 1938 and 1962 Amendments to the Food, Drug and Cosmetic statutes grew out of therapeutic catastrophes in children.").

[153] *See, e.g., FDA Modernization Act: Implementation of the Law: Hearings Before the Senate Comm. on Health, Educ., Labor and Pensions*, 107th Cong. 54–57 (2001) [hereinafter *Hearings on Implementation of the FDA Modernization Act*] (statement of Myron Genel, M.D., on behalf of the American Academy of Pediatrics) (crediting the amendments as taking away the incentive for pharmaceutical companies to research the safety and effectiveness of their drugs in children); *Hearings on Evaluating the Effectiveness of the FDA Modernization Act*, *supra* note 83 (statement of Christopher-Paul Milne, Assistant Director, Tufts Center for the Study of Drug Development).

[154] Additional Protections for Children Involved as Subjects in Research, 48 Fed. Reg. 9814 (Mar. 8, 1983) (codified at 45 C.F.R. pt. 46 subpt. D). *See also* Final Regulations Amending Basic HHS Policy for the Protection of Human Research Subjects, 46 Fed. Reg. 8366, 8367–68 (Jan. 26, 1981) (codified at 45 C.F.R. pt. 46).

[155] *See* Additional Protections for Children Involved as Subjects in Research, 48 Fed. Reg. 9814 (Mar. 8, 1983) (codified at 45 C.F.R. pt. 46 subpt. D); Final Regulations Amending Basic HHS Policy for the Protection of Human Research Subjects, 46 Fed. Reg. 8366, 8367–68 (Jan. 26, 1981) (codified at 45 C.F.R. pt. 46).

In 1979, the FDA made its first effort to limit these claims by pharmaceutical companies. The FDA promulgated a final rule that provided that if a pharmaceutical company marketed a drug to children, it would need to include pediatric information on its label.[156] Such information would necessitate pediatric testing.[157] Any drug that had not been tested for safety and effectiveness in children would need to indicate as much on its label.[158]

The FDA thought that this provision would prompt pediatric testing by drug manufacturers.[159] Instead, the opposite result ensued. Manufacturers simply chose to forego pediatric testing and use labels which stated that safety and effectiveness had not been established in children.[160] As admitted in a subsequent FDA proposed rule, the 1979 rule failed to improve pediatric research or health.[161] Despite being an attempt to protect children, the FDA regulation actually combined with historical pressures to reinforce the lack of pediatric testing.

B. The FDA Takes Steps To Promote Pediatric Labeling

In the 1990s, David Kessler, then FDA Commissioner, began to respond to pediatricians' concerns that children were therapeutic orphans in need of direct assistance from the FDA.[162] In 1992, the FDA proposed a rule that sought to revise and augment its 1979 predecessor concerning pediatric labeling.[163] The FDA was concerned that pharmaceutical companies were choosing labels without pediatric safety and effectiveness levels because they believed that in order to label a drug for children they would have to actually perform clinical testing in children.[164] The proposed rule sought to eliminate this misunderstanding by stating that a manufacturer did not necessarily have to complete pediatric clinical tests to qualify for a pediatric label.[165] In 1994, the final rule ("1994 rule") was

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[156] Labeling and Prescription Drug Advertising; Content and Format for Labeling for Human Prescription Drugs, 44 Fed. Reg. 37,434 (June 26, 1979) (codified at 21 C.F.R. pts. 201 and 202).

[157] *Id.*

[158] *Id.*

[159] Specific Requirements on Content and Format of Labeling for Human Prescription Drugs; Proposed Revision of "Pediatric Use" Subsection in the Labeling, 57 Fed. Reg. 47,423, 47,423–24 (Oct. 16, 1992) (codified at 21 C.F.R. pt. 201) (stating that "the 1979 regulations were intended to encourage drug labeling that would regularly provide adequate information about use of prescription drugs in children"). *See also* S. REP. NO. 107-79, at 3 (2001).

[160] Rodriquez et al., *supra* note 124, at 713. *See also* Gregory, *supra* note 103, at 129.

[161] Specific Requirements on Content and Format of Labeling, 57 Fed. Reg. at 47,423–24.

[162] *See Hearings on FDA Reform*, *supra* note 110 (statement of Sanford N. Cohen, M.D., on behalf of the American Academy of Pediatrics).

[163] Specific Requirements on Content and Format of Labeling, 57 Fed. Reg. at 47,423.

[164] *Id.* at 47,424.

[165] *Id.*

published in the hopes that it would increase pediatric labeling and offer pediatricians "more reliable information."[166]

Under the 1994 rule, pharmaceutical companies could use "adequate and well-controlled" adult studies in addition to pharmacokinetic, safety, and pharmacodynamic data to satisfy the pediatric labeling requirements.[167] While the 1994 rule did not make any new testing mandatory, it did require companies to review their existing data to determine if they could lead to pediatric information.[168] The 1994 rule maintained the requirement that any manufacturer who did not submit valid information regarding pediatric safety and effectiveness include a disclaimer on its labels stating that the drug had not been tested for safety and effectiveness in children.[169] The FDA hoped that this easing of pediatric labeling standards would provide an incentive for pharmaceutical companies to assemble data and avoid the disclaimer label.[170]

In addition, in the 1994 rule, the FDA noted that although it was not requiring pediatric testing for new drugs, it could have chosen to do so.[171] Along these lines, the general comments of the 1994 rule explain that the FDA may require new drug application holders to submit studies to determine whether the drug can be safely and effectively used in populations likely to receive it.[172] By explicitly letting manufacturers know that it was not taking advantage of its full authority under this new rule, the FDA went further than ever in stating its authority to require pediatric testing.[173] The FDA anticipated that this assertion of authority would inspire—and perhaps warn—drug sponsors to change their approach to pediatric labeling.[174]

To the dismay of the FDA and pediatricians, the 1994 rule did little to encourage pharmaceutical companies to label for pediatric populations.[175] As pharmaceutical companies faced few repercussions for re-

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[166] Specific Requirements on Content and Format of Labeling for Human Prescription Drugs; Revision of "Pediatric Use" Subsection in the Labeling, 59 Fed. Reg. 64,240 (Dec. 13, 1994) (codified at 21 C.F.R. pt. 201).

[167] *Id.* at 64,241.

[168] *See id.*; Regulations Requiring Manufacturers to Assess the Safety and Effectiveness of New Drugs and Biological Products in Pediatric Patients, 62 Fed. Reg. 43,901 (Aug. 15, 1997) (codified at 21 C.F.R. pts. 201, 312, 314, and 601).

[169] Specific Requirements on Content and Format of Labeling, 59 Fed. Reg. at 64,241.

[170] Specific Requirements on Content and Format of Labeling, 57 Fed. Reg. at 47,426.

[171] Specific Requirements on Content and Format of Labeling, 59 Fed. Reg. at 64,242.

[172] *Id.* at 64,243.

[173] *Id.* at 64,242–43.

[174] *See id.* at 64,242.

[175] Regulations Requiring Manufacturers to Assess the Safety and Effectiveness of New Drugs and Biological Products in Pediatric Patients, 63 Fed. Reg. 66,632, 66,632 (Dec. 2, 1998) (to be codified at 21 C.F.R. pts. 201, 312, 314, and 601).

> Pediatric labeling supplements were submitted for approximately 430 drugs and biologics, a small fraction of the thousands of prescription drug and biological products on the market. Of the supplements submitted, approximately 75 percent did not significantly improve pediatric use information. Over half of the total sup-

fusing to submit pediatric data, the FDA's rules again served only to further solidify the industry's ability to use a disclaimer and avoid pediatric research.[176] As a result, neither patent nor generic manufacturers made significant strides toward changing labels to reflect pediatric data.

It was not for the FDA's lack of effort that manufacturers failed to respond to the 1994 rule's call. The FDA's Center for Drug Evaluation and Research ("CDER") identified the ten drugs most commonly prescribed to children and requested that the manufacturers of such drugs adhere to the 1994 rule by reviewing their literature.[177] Few of the manufacturers complied.[178] While the FDA had received seven promises to conduct post-approval testing, by 1996, only one manufacturer had reported any results.[179] The FDA faced similarly poor results with new drugs, despite the fact that the 1994 rule expected the manufacturers of such drugs to consider pediatric labeling. In 1996, only thirty-seven percent of the new molecular entities likely to be used in children had pediatric labels pending approval.[180] The FDA's voluntary rule was considered a failure, and the FDA decided that it would need to take a more radical approach if it was going to improve the state of pediatric medicine.[181] Consequently, in 1997, the FDA proposed a new rule, under which the FDA would require the pediatric testing of new and marketed drugs.[182] There were three main parts to the 1997 proposal, all of which made it, in some form, into the 1998 final rule. First, the rule would apply to both new and marketed drugs, including biological products that were widely used in pediatric patients or indicated or prescribed for very significant or life threatening illnesses.[183] Second, the FDA would be able to require

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plements submitted simply requested the addition of the statement 'Safety and effectiveness in pediatric patients have not been established.' Others requested minor wording changes or submitted unorganized, unanalyzed collections of possibly relevant data. Approximately 15 percent (approximately 65) of the supplements provided adequate pediatric information for all relevant pediatric age groups, and another 8 percent (approximately 35) provided adequate pediatric information for some but not all relevant age groups.

Id.

[176] *See* Karst, *supra* note 18, at 748; *Hearings on FDA Reform*, *supra* note 110 (statement of Sanford N. Cohen, M.D., on behalf of the American Academy of Pediatrics); Gregory, *supra* note 103, at 129.

[177] Regulations Requiring Manufacturers to Assess the Safety and Effectiveness of New Drugs and Biological Products in Pediatric Patients, 62 Fed. Reg. 43,902 (Aug. 15, 1997) (codified at 21 C.F.R. pts. 201, 312, 314, and 601).

[178] *Id.*

[179] *Id.*

[180] *Id.*

[181] *Id. See also* Specific Requirements on Content and Format of Labeling for Human Prescription Drugs; Revision of "Pediatric Use" Subsection in the Labeling; Extension of Compliance, 61 Fed. Reg. 68,623, 68,623 (Dec. 30, 1996) (codified at 21 C.F.R. pt. 201).

[182] *See generally* Regulations Requiring Manufacturers to Assess the Safety and Effectiveness, 62 Fed. Reg. at 43,900, 43,902.

[183] *Id.* at 43,913.

information for all pediatric sub-populations, from neonates to teenagers, according to the actual use of the drug.[184]

Finally, the rule would allow both partial and full waiver of pediatric testing in certain products as well as deferment of such tests if appropriate in light of the need to release the drug to adult populations.[185] A company could receive a full waiver where studies on children were impossible or highly impractical, or where there was evidence that a drug would be ineffective or unsafe for children.[186] The FDA would grant a partial waiver when at least three conditions were satisfied: (1) the drug was not for a serious or life-threatening disease; (2) the drug was not likely to be used by a substantial number of patients in the age group in question; and (3) the applicant was able to demonstrate that reasonable attempts to make a pediatric formulation had failed.[187]

This proposed rule was far more aggressive than its passive predecessors in procuring pediatric testing. Rather than forcing the FDA to cajole manufacturers into tests, manufacturers now had to proactively demonstrate why they should not have to conduct pediatric testing. This groundbreaking proposal would elevate children from their status as therapeutic orphans and exploited clinical subjects. The pharmaceutical industry protested the proposed rule, claiming that it was neither legal nor necessary.[188]

Before the FDA finalized its rule, however, Congress enacted the FDAMA, bringing about a sweeping reform of the FDCA.[189] This legislation changed the landscape of pediatric testing.

III. The Creation of "Pediatric Exclusivity" and Its Impact on Pediatric Testing

The FDAMA overhauled the FDCA.[190] One of the most radical additions was Section 111, the Better Pharmaceuticals for Children Act, which was codified as the pediatric exclusivity provision.[191] The pediatric exclusivity provision sought to promote pediatric labeling by offering pharmaceutical companies a six-month extension in their patent or exclusivity period on a particular drug in exchange for conducting a pediatric

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[184] *Id.*

[185] *Id.* at 43,903–05.

[186] *Id.*

[187] *Id.* at 43,914.

[188] *See, e.g., Hearings on Implementation of the FDA Modernization Act, supra* note 153 (statement of Alan F. Holmer, President, Pharmaceutical Research and Manufacturers of America) (urging the FDA to "delay finalizing the August 11, 1997 proposed regulation until Congress, the pharmaceutical industry, and the agency are able to measure the effectiveness of Section 111.").

[189] *See* Food and Drug Administration Modernization Act of 1997, Pub. L. No. 105-115, 111 Stat. 2309 (codified as amended in scattered sections of 21 U.S.C.).

[190] *Id.*

[191] 21 U.S.C. § 355a.

study of that drug.[192] The provision was limited in scope as it was voluntary and affected only those companies that had drugs on patent or in an exclusivity term.[193] While most viewed the provision as a success for pediatric health, even the provision's most ardent supporters recognized its limitations and sought reforms.[194] This Part reviews the components of the provision, how it affected the 1997 proposed rule, and what its supporters and critics believed to be its strengths and weaknesses.

A. *The FDAMA's Pediatric Exclusivity Provision and the FDA's 1998 Final Rule*

1. The Food and Drug Administration Modernization Act's Pediatric Exclusivity Provision

The FDAMA's pediatric exclusivity provision is quite limited in length, but had an enormous impact on pediatric health. Although it did not require pediatric testing, an important incentive it did provide was that a manufacturer could extend its patent or exclusivity term for a new or already marketed drug by six months by conducting pediatric tests.[195] While the provision aimed to increase pediatric labeling, it did not require a label change for the six-month extension to commence.[196] The tests only needed to be completed.[197] The six-month extension was a financial boom for manufacturers. For example, pharmaceutical company Schering-Plough, faced with no competition from generic drugs, earned an additional $975 million in sales during the six-month patent extension on its drug Claritin.[198]

The provision outlined the procedure by which a drug company could procure the extension.[199] The FDA[200] was to issue a written request for a pediatric study to any manufacturer of a new or already marketed drug either on-patent or on its exclusivity term under the Drug Competi-

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[192] *Id.*

[193] *Id.*

[194] *See, e.g., Hearings on Better Pharmaceuticals for Children*, *supra* note 100 (statement of Janet Heinrich, Director, Health Care-Public Health Issues).

[195] *Id.* These sections outline how the six-month extension attaches to the patent term or the exclusivity terms under 35 U.S.C. § 156 (2000). Section 355a(a) applies to new drugs, and section 355a(c) applies to already marketed drugs.

[196] 2001 STATUS REPORT TO CONGRESS, *supra* note 6, at 25.

[197] *Id.*

[198] *User Fees, Pediatric Exclusivity Keys in FDAMA Reauthorization*, FOOD & DRUG LETTER, June 22, 2001 [hereinafter *User Fees*], *available at* 2001 WL 8214943.

[199] *See* 21 U.S.C. § 355a.

[200] The Act does not refer to the FDA, but rather to the Secretary of Health and Human Services ("HHS"). For purposes of describing the Act, the FDA and the Secretary of HHS are used interchangeably because, in practice, the FDA carries out the pediatric exclusivity provision. *See* Delegations from the Secretary of Health and Human Services to the Commissioner of Foods and Drugs, 21 C.F.R. § 5.10 (2002).

tion and Patent Term Restoration Act of 1984 ("Waxman-Hatch Act").[201] If the manufacturer agreed to the request and completes its pediatric studies for the drug within the requested timeframe, the six-month extension automatically began.[202] If the manufacturer wanted to perform the study but did not like the terms of the written request, it could negotiate with the FDA for different terms and come to a "written agreement."[203] In practice, manufacturers were held to higher standards in completing terms of written agreements as opposed to written requests, and it was actually more difficult for the manufacturer to meet its burden under the written agreement protocols.[204] In addition to making these agreements, the provision instructed the FDA to "develop [a] list of drugs for which additional pediatric information may be beneficial."[205] A drug did not need to be included on the list to be eligible for the exclusivity term subject to pediatric studies.[206]

Significantly, Congress included a section in the provision entitled "Relationship to Regulations."[207] In this section, Congress stated that if any rule promulgated by the Secretary of HHS required a manufacturer to complete a pediatric study and the required study met the "completeness, timeliness, and other requirements of this section, such study shall be deemed to satisfy the requirement for market exclusivity."[208] The Senate report explained that even though the Senate chose to make the legislative provision voluntary, it had supported the FDA's policy toward pediat-

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[201] 21 U.S.C. §§ 355a(a), (c); Drug Price Competition and Patent Term Restoration Act of 1984 ("Waxman-Hatch Act"), Pub. L. No. 98-417, 98 Stat. 1585 (codified at 35 U.S.C. § 355). The Waxman-Hatch Act established periods of exclusivity in addition to the patent term. *Id.* § 335j. It offers two main "exclusivity" terms: (1) up to five years of market exclusivity for a pioneer drug (on-patent drug) when its manufacturer completes research about that drug's usefulness for new indications and (2) 180 days generic exclusivity to the first generic to have its abbreviated new drug application approved by the FDA. 35 U.S.C. § 156.

[202] 21 U.S.C. § 355a(a), (c). Under FDA guidelines, a manufacturer can submit a proposal for a request to the FDA. *See Hearings on Better Pharmaceuticals for Children*, *supra* note 100 (prepared statement of Janet Woodcock, M.D., Director for Center for Drug Evaluation and Research, Food and Drug Administration). The FDA uses this proposal as a basis for its request. *Id.*

[203] 21 U.S.C. § 355a(d)(1).

[204] *See Hearings on Better Pharmaceuticals for Children*, *supra* note 100 (prepared statement of Janet Woodcock, M.D., Director for Center for Drug Evaluation and Research, Food and Drug Administration).

[205] 21 U.S.C. § 355a(b). The FDA created a draft list by the middle of March 1998. *See* National Pharmaceutical Alliance v. Henney, 47 F. Supp. 2d 37, 39 (D.D.C. 1999). The FDA received input for the list from: the American Academy of Pediatrics, Pharmaceutical Research and Manufacturers of America, National Pharmaceutical Alliance, Generic Pharmaceutical Industry Association, National Institutes of Health, Pediatric Pharmacology Research Units Network, National Association of Pharmaceutical Manufacturers, and U.S. Pharmacopoeia. *Id.*

[206] *See Hearings on Better Pharmaceuticals for Children*, *supra* note 100 (prepared statement of Janet Woodcock, M.D., Director for Center for Drug Evaluation and Research, Food and Drug Administration).

[207] 21 U.S.C. § 355a(i).

[208] *Id.*

ric testing thus far.[209] The Report remarked that the FDA's regulations "are clearly steps in the right direction, and the committee commends the FDA's initiatives in this area."[210] The language suggested support for further regulation along the lines of the 1997 proposed rule.

Thus, the "Relationship to Regulations" section ensured that the FDA could continue to make regulations that were broader than the congressional provision.[211] The only distinction would be that any manufacturer that satisfied the broader regulation and, thereby, satisfied the requirements of the Act, would benefit from a six-month patent or exclusivity extension, just like a manufacturer that voluntarily complied with the provision.[212] Congress avoided the controversial step of requiring pediatric studies while, at the same time, approving the authority of HHS to create regulations that promoted the policy of pediatric labeling.[213]

Despite these steps, Congress remained uncertain about whether a voluntary structure would be successful. The Senate referred to the voluntary provision as "a modest step toward a better resolution of [the] problem" of limited pediatric research and labeling.[214] Thus, Congress created some precautions to ensure that the legislation would be evaluated and reviewed. It instituted a provision requiring the Secretary of HHS to study and report on the "effectiveness of the program," the "adequacy of the incentive," the "economic impact of the program on taxpayers and consumers," and to make "suggestions for modification" by Janu-

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[209] S. REP. No. 105-43, at 52 (1997).

[210] *Id.*

[211] 21 U.S.C. § 355a(i).

[212] S. REP. No. 105-43, at 52.

[213] Pharmaceutical companies have a vested interest in avoiding pediatric studies. As long as off-label pediatric prescriptions are permissible, the manufacturers can avoid liability for an adverse reaction in a child if that drug was not indicated for use in children. *See* Specific Requirements on Content and Format of Labeling, 59 Fed. Reg. 64,242 (codified at 21 C.F.R. pt. 201) (stating that drug manufacturers, for example, were nervous that the 1994 rule would expose them to liability if they were forced to include pediatric labeling even though the data was not, in their view, sufficient); Rachel Zimmerman, *Drug Makers Find a Windfall Testing Adult Drugs on Kids*, WALL ST. J. INTERACTIVE ED., Feb. 5, 2001, at 1, 3 (arguing that publicity could hurt drug sales in all age groups).

Furthermore, pharmaceutical companies would need to overcome numerous financial, ethical, and scientific boundaries in order to conduct successful studies on an ongoing basis. *See supra* Part I. As the Senate report for the FDAMA noted:

> there is little incentive for drug sponsors to perform studies for medications which they intend to market primarily for adults and whose use in children is expected to generate little additional revenue. Pediatric studies pose ethical and moral issues relating to using new unapproved drugs in young patients. Second, there are substantial product liability and medical malpractice issues. Third, pediatric patients are more difficult to attract into studies. Fourth, for some drugs, pediatric use represents more difficult issues of drug administration and patient compliance than adult use.

S. REP. No. 105-43, at 51 (1997).

[214] *See* S. REP. No. 105-43, at 51 (1997).

ary 1, 2001.[215] Congress also included a January 1, 2002 sunset clause for the pediatric exclusivity provision.[216]

Upon implementation, the FDA broadly interpreted the incentive structure in the provision, maintaining that the six-month extension attached to the active moiety studied,[217] rather than just the drug.[218] Thus, a manufacturer could conduct a pediatric study in a drug with an active moiety and then receive a patent extension for all the drugs that used that active moiety.[219] The FDA believed that this interpretation was in tune with the purpose and language of the statute and was necessary to give effect to the incentive structure of the statute.[220] By applying the six-month extension to all the drugs that used a particular active moiety, the FDA attempted to further induce manufacturers to conduct studies because they would now be able to tap into an adult market in addition to the pediatric market, augmenting sales.[221]

Accordingly, by April of 2001, the FDA "issued [a total of] 188 written requests covering 155 drugs already on the market and 33 new drugs not yet approved."[222] These requests reached a broad range of drugs, ranging from those for cardiovascular disease and cancer to dermatological and dental treatments.[223] Despite the number of requests,

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[215] 21 U.S.C. § 355a(k).

[216] *Id.* § 355a(j).

[217] An active moiety is the "molecule or ion . . . responsible for the physiological or pharmacological action of the drug substance." 21 C.F.R. § 314.108 (2002).

[218] 2001 STATUS REPORT TO CONGRESS, *supra* note 6, at 7.

[219] *Id.*

[220] *Id.*

[221] Regulations Requiring Manufacturers to Assess the Safety and Effectiveness of New Drug Products and Biological Products in Pediatric Populations, 63 Fed. Reg. 66,632, 66,633 (Dec. 2, 1998) (codified at 21 C.F.R. pts. 201, 312, 314, and 601). Generic drug companies, led by the General Pharmaceutical Industry Association ("GPIA"), were dismayed by this interpretation, which could potentially cost generic manufacturers billions of dollars. *Generic Makers Fight for Level Playing Field*, CHAIN DRUG REV., Aug. 30, 1999, at RX 80. The six-month extension was already a setback for them because they now had to wait an extra six months before their drugs could hit the market. The application of the extension to all drugs containing a given moiety only further cut into the generic manufacturers' share of the pharmaceutical market. *See id.*; *Debate Over Exclusivity for Pediatric Provision Testing Heats Up; Generic Pharmaceutical Industry Association*, CHAIN DRUG REV., Apr. 26, 1999, at RX 38; 2001 STATUS REPORT TO CONGRESS, *supra* note 6, at 17. Generic manufacturers argued that the "moiety interpretation" of the provision "frustrates incentives for pediatric research by conferring lucrative benefits on 'innovator' drug manufacturers that are completely out of proportion to the useful pediatric data generated in return." National Pharmaceutical Alliance v. Henney, 47 F. Supp. 2d. 37, 39 (D.D.C. 1999) (internal citation omitted). GPIA sought a preliminary injunction against implementation of the FDA policy in the District Court of the District of Columbia. *Id.* at 38. The District Court denied the preliminary injunction, finding that the FDA was "entitled to the deference normally accorded to regulatory agencies." *Id.* at 38–40.

[222] *Hearings on Better Pharmaceuticals for Children*, *supra* note 100, at 4 (statement of Janet Heinrich, Director, Health Care-Public Health Issues). By September 30, 2002, the FDA had issued a total of 253 written requests. Pediatric Exclusivity Studies as of September 30, 2002, *available at* http://www.fda.gov/cder/pediatric/wrstats.htm.

[223] *Id.*

however, only twenty-eight drugs were granted exclusivity periods.[224] While most of these twenty-eight did result in a labeling change of some degree, only 37.5% of those pediatric labels resulted in a significant change in safety or dosing.[225] By the reauthorization discussions in 2001, only twenty-five percent of drugs had been studied in children—a five percent increase from the 1994 statistic.[226] Thus, while the pediatric incentive of the FDAMA sparked activity, it did not accomplish a sweeping change in the number of drugs with pediatric labeling.[227]

2. The 1998 Final Rule

As the FDA and the pharmaceutical industry negotiated the terms of a voluntary testing process, the FDA contemporaneously pursued rules that would make such testing mandatory. In the 1998 final rule, a modestly adapted version of the 1997 proposed rule, the FDA recognized the enactment of the FDAMA's pediatric exclusivity provision as an intervening event, but it did not believe that the provision should alter its present course of regulation.[228] The FDA believed that the FDAMA "specifically recognize[d the] FDA's intention to require pediatric studies by regulation" and extended the six months to any manufacturer who satisfied provisions of the FDAMA in satisfying FDA regulations.[229] Without such regulations, the FDA explained, the FDAMA would not provide a comprehensive policy with respect to pediatric labeling.[230] For example, the FDA noted that the FDAMA's incentives were insufficient to promote studies in smaller markets and in younger pediatric groups that are more

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[224] *Id.* at 45.

[225] Rodriquez et al., *supra* note 124, at 718. At the time the article was written, twenty-seven drugs had been granted pediatric exclusivity and, in the authors' estimation, only six of those drugs resulted in significant improvement in pediatric labeling. *Id.* The authors found that the following drugs had greatly improved labels: Midozolam, Etodolac, Fluxamine, Gabapentin, Loratadine, and Propofol. *Id.*

[226] S. REP. No. 107-79, at 1–2 (2001).

[227] The FDA itself may have been at fault for some of the delay. *See* Karst, *supra* note 18, at 767 (noting that some pharmaceutical companies believed the FDA purposefully withheld patent extensions). At least one court found that the FDA was reading its requirements too strictly. *See* Merck v. FDA, 148 F. Supp. 2d 27 (D.D.C. 2001). In *Merck*, the court granted Merck, the pharmaceutical company that sued the FDA, an injunction pending a trial on the merits to determine whether the FDA had fairly interpreted the language of the statute. *Id.* at 30. Subsequently, the FDA conceded that it had used an incorrect legal standard. Merck v. FDA, Civ. Action No. 01-01343(JR). The Merck lawsuit captures the sentiment of many in the industry that the FDA was doing a poor job of implementing the exclusivity program—that it was abusing its authority over drug companies and thwarting the potential incentive.

[228] Regulations Requiring Manufacturers to Assess the Safety and Effectiveness of New Drugs and Biological Products in Pediatric Patients, 63 Fed. Reg. 66,632, 66,633 (Dec. 2, 1998) (codified at 21 C.F.R. pts. 201, 312, 314, and 601).

[229] *Id.*

[230] *Id.*

difficult to test.[231] Additionally, the provision provided no incentive for manufacturers to study more than one age group for a given drug because any further studies would not result in a subsequent extension of the manufacturer's patent or exclusivity term.[232] Concerned about these gaps in the provision's incentive structure and trying to better balance pediatric labeling needs, children's vulnerability as test subjects, and the desirability of quick drug approval, the FDA promulgated the 1998 final rule.

The 1998 final rule empowered the FDA to require pediatric testing of already marketed drugs and instituted a presumption favoring pediatric testing and labeling for new drugs. The first part of the 1998 final rule addressed already marketed drugs. Under the rule, the FDA could require testing for products used by a substantial number of pediatric patients[233] or products that provided a meaningful therapeutic benefit[234] over an existing treatment for pediatric patients.[235] A pharmaceutical company could request a full or partial waiver under certain circumstances where the company could show good cause for not performing the tests.[236] A full waiver would be granted where the necessary studies would be "impossible or highly impractical" or where there was "evidence strongly suggesting that the product would be ineffective or unsafe in all pediatric age groups."[237] The manufacturer could seek a partial waiver for a specific sub-population for similar reasons.[238] Unlike the voluntary 1994 final rule and the FDAMA, the 1998 final rule authorized the FDA to punish manufacturers for noncompliance by deeming an existing drug misbranded or a new drug an unlicensed biologic.[239]

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[231] *Id.*

[232] *Id.*

[233] The 1998 final rule defined a substantial number of pediatric patients with the disease or condition for which the drug or biological product is indicated as 50,000. Regulations Requiring Manufacturers to Assess the Safety and Effectiveness, 63 Fed. Reg. at 66,636.

[234] The 1998 final rule explained that a "meaningful therapeutic benefit" is created if the drug provides a significant improvement over existing adequately labeled remedies or if the drug is indicated for diseases for which there are currently few products labeled for pediatric use and more therapeutic options needed. *Id.* at 66,635.

[235] 21 C.F.R. § 201.23(a), (b) (2002).

[236] *Id.* § 201.23(c)(1)–(2).

[237] *Id.* § 201.23(c)(1). If a waiver were granted because of safety or ineffectiveness concerns, the waiver would be conditioned on the manufacturer's labeling the drug to reflect that it was unsafe or ineffective. *Id.* § 201.23(c)(3).

[238] *See id.* § 201.23(c)(2). In addition to the two waiver conditions available for the full waiver, a partial waiver would be granted where the product: "(A) Does not represent a meaningful therapeutic benefit over existing therapies for pediatric patients in that age group, and (B) Is not likely to be used in a substantial number of patients in that age group, and (C) The absence of adequate labeling could not pose significant risks to pediatric patients." *Id.*

[239] *Id.* § 201.23(d). See Misbranded Drugs and Devices, 21 U.S.C. § 352 for the definition of "misbranded drug."

The 1998 final rule also established strict protocols for new drug applications with respect to pediatric testing.[240] Under the rule, each application for a new drug[241] needed to contain data that were "adequate to assess the safety and effectiveness of the drug product for the claimed indications in all relevant pediatric sub-populations."[242] The 1998 final rule, therefore, was distinct from both the 1994 proposed rule and the FDAMA pediatric exclusivity provision in that the FDA could require tests before the drug hit the market in *all* age groups, including those extremely young age groups, such as neonates, that manufacturers had particularly avoided.[243] The rule provided a waiver structure similar to that for already marketed drugs,[244] and it also contained a deferral clause, under which manufacturers could seek to defer pediatric studies until after the drug had been approved for adults.[245] The main reason for the deferral provision was that the FDA did not want to prevent adults from accessing beneficial drugs while pharmaceutical companies focused on pediatric studies.[246] The 1998 final rule, therefore, attempted to balance the medical needs of children and adults.

Many considered the 1998 final rule to be a great victory. As the Executive Director of the Pediatric AIDS Foundation, an organization active in the campaign for pediatric clinical testing, explained, "[w]e see the rule as a real victory . . . . For too long, children have been seen as an afterthought, with so many drugs not available to them. A child is not just half an adult to be given half the adult dose."[247] Others maintained, however, that the FDA did not have the authority to require that private companies test their drugs in children,[248] especially when the drugs at issue were not intended for children.[249] This claim rested on the assertion that the FDA could not predict what customary or usual uses of the involved drug would come to pass.[250]

To support the historic and legal argument that the FDA could not require testing without congressional authorization, industry advocates pointed to a 1992 statement made by former FDA Commissioner David

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[240] Pediatric Use Information, 21 C.F.R. § 314.55(a) (2002).

[241] The rule included in the definition of "new drug": a new active ingredient, new indication, new dosage form, new dosing regimen, or new route of administration. *Id.* § 314.55(a).

[242] *Id.*

[243] Regulations Requiring Manufacturers to Assess the Safety and Effectiveness of New Drugs and Biological Products in Pediatric Patients, 63 Fed. Reg. 66,632, 66,633–34 (Dec. 2, 1998) (codified at 21 C.F.R. pts. 201, 312, 314, and 601).

[244] 21 C.F.R. § 314.55(c); 21 C.F.R. § 201.23.

[245] 21 C.F.R. § 314.55(b).

[246] *Id.*

[247] Nordenberg, *supra* note 16, at 28.

[248] Regulations Requiring Manufacturers to Assess the Safety and Effectiveness, 63 Fed. Reg. at 66,657.

[249] *Id.*

[250] *Id.*

Kessler that the FDA did not have the authority to require a manufacturer to complete pediatric tests if the manufacturer did not indicate that the drug would be used by children.[251] They also argued that the FDA was bound by its previous voluntary approach to pediatric testing. Some of these opponents of the rule filed suit against the FDA, claiming that it had overstepped the bounds of the FDAMA.[252]

The FDA vigorously defended the 1998 final rule. In the "Legal Authority" section of the rule, the FDA justified its departure from Kessler's statement, arguing in part that "statements made in speeches, even by Commissioners, are informal expressions of opinion and do not constitute a formal agency position . . . [and] are not binding on the agency."[253] The FDA also pointed to its explanations in the 1992 and 1997 proposed rules and the 1994 final rule to demonstrate that the 1998 final rule did not suggest a drastic change in the FDA's interpretation of the FDAMA.[254]

Before 2002, it seemed as though the FDA had strong arguments in favor of its position based on the generous language of the FDAMA's Senate Report.[255] The reauthorization of the pediatric exclusivity provision in 2002, however, greatly transformed the law of pediatric clinical research and added another dimension to the litigation regarding the 1998 final rule.[256] The numerous and comprehensive changes to the pediatric exclusivity provision were the result of heated debate among critics and supporters of the provision as to how and whether the provision should be reauthorized.

B. The Successes of FDAMA's Pediatric Exclusivity Provision

In general, pediatricians, politicians, and children's health advocates have applauded the results of the pediatric exclusivity provision.[257] As Dr. Myron Genel of the American Pediatric Association told the Senate Committee on Health, Education, Labor, and Pensions in 1999, "rarely is

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[251] Karst, *supra* note 18, at 762.

[252] *See, e.g.*, Ass'n of Am. Physicians and Surgeons, Inc. v. FDA, No. CV. 00-02898, 2002 WL 31323411, at *1 (D.D.C. Oct. 17, 2002).

[253] Regulations Requiring Manufacturers to Assess the Safety and Effectiveness, 63 Fed. Reg. at 66,657.

[254] *Id.*

[255] S. REP. No. 105-43, at 52 (1997). *See also supra* text accompanying notes 209–210.

[256] *See* Ass'n of Am. Physicians, 2002 WL 31323411, at *4, *12 (noting that the 2002 legislation "reauthorized and expanded" the pediatric testing incentive set forth in the FDAMA and finding that with the legislation, Congress, "demonstrate[d] its intention to occupy the field").

[257] *See* S. REP. No. 107-79, at 4 (2001) ("The pediatric exclusivity provision has done more to generate clinical studies and useful prescribing information for the pediatric population than any other regulatory or legislative decision to date."). *See generally Hearings on Better Pharmaceuticals for Children*, *supra* note 100, at 6 (statement of Janet Heinrich, Director, Health Care-Public Health Issues).

it possible to witness such dramatic advances in such a short time."[258] Dr. Robert Ward, speaking on behalf of the American Academy of Pediatricians, noted that the numbers proved the success of the FDAMA's pediatric exclusivity provision: the FDA granted twenty-eight products exclusivity and eighteen of those contained new dosage, safety, or adverse event-reporting information.[259] In contrast to the seven years before the enactment of the FDAMA in which only eleven studies were completed,[260] these numbers were impressive. Indeed, the FDA itself reported that the "pediatric exclusivity provision has done more to generate clinical studies and useful prescribing information for the pediatric population than any other regulatory or legislative process to date."[261] Even pharmaceutical groups commended the legislation for inspiring them to undertake the complicated task of pediatric clinical research, admitting that prior federal regulations had done little to accomplish this end.[262]

Although some critics claimed that the incentive program was too costly, many pediatricians condemned the notion of putting any price tag on children's health.[263] Dr. Ward testified that while pharmaceutical groups may have benefited from the program, "the greatest windfall has been in the area of pediatric research and information now available for pediatricians . . . . Dollars and cents arguments can not adequately provide the evidence of the effectiveness or importance of this program."[264] In fact, some patient advocacy groups felt that the extension was not a sufficient incentive and wanted Congress to allow even longer exclusivity terms in some cases.[265] The importance of the provision is even clearer in light of claims by pharmaceutical groups that, but for the six-month incentive, they might not have conducted the work entailed in assembling a study to meet the guidelines for pediatric labeling.[266]

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[258] *Hearings on Implementation of the FDA Modernization Act*, *supra* note 153 (statement of Myron Genel, M.D., on behalf of the American Academy of Pediatrics).

[259] *Hearings on Better Pharmaceuticals for Children*, *supra* note 100, at 55 (statement of Robert Ward, M.D., on behalf of the American Academy of Pediatrics).

[260] *See id.*

[261] 2001 STATUS REPORT TO CONGRESS, *supra* note 6, at ii.

[262] *See, e.g.*, *Hearings on Evaluating the Effectiveness of the FDA Modernization Act*, *supra* note 83, at 96 (statement of Timothy R. Franson, Vice President, Clinical Research & Regulatory Affairs, Lilly Research Laboratories, Eli Lilly and Company on behalf of the Pharmaceutical Research and Manufacturers of America).

[263] *See id.* at 79 (statement of Richard Gorman, M.D., on behalf of the American Academy of Pediatrics).

[264] *Hearings on Better Pharmaceuticals for Children*, *supra* note 100, at 58 (statement of Robert Ward, M.D., on behalf of the American Academy of Pediatrics).

[265] *See* 2001 STATUS REPORT TO CONGRESS, *supra* note 6, at 24. For example, oncology groups argued that the exclusivity provision had not done enough to promote research in cancer drug therapies. *Id.*

[266] *See* Zimmerman, *supra* note 92, at 4–5. For example, Eli Lilly's spokesperson noted that the incentive was key to its decision to proceed with three pediatric studies for which it had already developed protocols but had not yet initiated. *Id.* at 4.

New pediatric labels were not the only signs of robust pediatric research activities.[267] Since the enactment of the FDAMA, the infrastructure for pediatric testing has grown dramatically. For example, the National Institute for Children's Health and Development ("NICHD"), which often works in conjunction with pharmaceutical companies, enlarged its pediatric testing capacity from seven to thirteen units to meet the demand for more pediatric studies.[268] This increase in the number of studies has resulted in more researchers being prepared to conduct pediatric studies and has generally furthered the science of pediatric research.[269] Moreover, in its report to Congress, the FDA estimated the savings that increased pediatric research would offer. The FDA conducted a study of five serious illnesses in which the hospitalization rates were much higher for children than adults.[270] It attributed a substantial portion of this higher hospitalization rate for children to the lack of informed drug treatment.[271] The FDA concluded that if this disparity could be reduced by just twenty-five percent, the populace would save $228 million annually.[272] Thus, the FDA argued that the cost of any effort to conduct pediatric studies must be viewed in light of the health care savings that such studies would produce.[273] An overwhelming consensus emerged among supporters of pediatric testing that Congress should not risk modifying and potentially ruining the exclusivity program.[274]

Moreover, many felt the voluntary program was the proper approach to pediatric testing.[275] The incentive gave companies more liberty to choose an approach best suited to them.[276] It also helped the drug industry to overcome the financial barriers in testing drugs that would be marketed to smaller markets.[277] Dr. Stephen Spielberg, Vice-President of the

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[267] *See* Stolberg, *supra* note 118, at 1.

[268] *See Hearings on Better Pharmaceuticals for Children*, *supra* note 100, at 43–45 (statement of Janet Heinrich, Director, Health Care-Public Health Issues).

[269] *See Hearings on Evaluating the Effectiveness of the FDA Modernization Act*, *supra* note 83, at 113 (statement of Christopher-Paul Milne, Assistant Director, Tufts Center for the Study of Drug Development) (explaining that the provision sparked an increase in research facilities and researchers).

[270] 2001 STATUS REPORT TO CONGRESS, *supra* note 6, at 14. *See also* S. REP. NO. 107-79, at 11 (2001).

[271] 2001 STATUS REPORT TO CONGRESS, *supra* note 6, at 14.

[272] *Id.*

[273] *Id.* (reporting that the Tufts Center for the Study of Drug Development estimates that the pediatric exclusivity provision saves up to $7 billion per year "by making treatments more effective for pediatric patients").

[274] *See generally User Fees*, *supra* note 198.

[275] Marilyn Elias, *Plan to End Pediatric Drug Trials Draws Fire; Lawsuit Says FDA Exceeds Its Powers By Ordering Tests*, USA TODAY, Apr. 3, 2002, at D9 (quoting a member of the Competitive Enterprise Institute as saying that the FDA "has no business telling private companies to add pediatric tests and label claims.").

[276] S. REP. NO. 105-43, at 51 (1997). *See also* Marc Kaufman, *Judge Rejects Drug Testing on Children; Ruling Finds FDA Overstepped Authority in Forcing Pediatric Studies*, WASH. POST, Oct. 19, 2002, at A9.

[277] *See, e.g.*, *Hearings on Better Pharmaceuticals for Children*, *supra* note 100 (state-

Jansen Research Foundation and a spokesperson for the Pharmaceutical Research and Manufacturers of America, explained that the incentives created an environment that promoted pediatric studies by the government's showing increased favor for companies that conducted them.[278] He reasoned that even if the biggest money-making drugs, or "blockbuster drugs," are tested before drugs for smaller markets, the overall effect of increased studies would be to create a stronger pediatric research environment.[279]

C. *Criticisms of the Pediatric Exclusivity Provision and Suggestions for Reform*

The pediatric exclusivity provision had numerous problems that even its most ardent supporters recognized.[280] In the introductory section of the 1998 final rule, the FDA noted, for example, that the provision did not promote study in more than one age group per drug and that it failed to give incentives to manufacturers of drugs that reached small markets or that were already off-patent.[281] As January 1, 2002, the sunset date, approached, criticism of the pediatric exclusivity provision became more intense and better defined.[282]

Concerns about the provision fell into four main categories: (1) its failure to address off-patent and off-exclusivity drugs, (2) the pharmaceutical companies' "windfall" from extended patent terms, (3) its failure to ensure testing in smaller markets such as neonates, and (4) its limited capacity to ensure pediatric labeling and dissemination of information.[283]

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ment of Stephen P. Speilberg, M.D., Ph.D., Vice-President, Pediatric Drug Development, Janssen Research Foundation, on behalf of the Pharmaceutical Research and Manufacturers of America) ("The difficulties of the studies and the small market for these drugs were acting as major impediments for pediatric drug development, and the basis of the legislation was that an incentive to do pediatric studies would overcome those obstacles.").

[278] *Id.*

[279] *Id.* ("Establishing and maintaining excellence in pediatric drug development is crucial to the success of the pediatric research incentive program, and to its goal of early, timely pediatric studies in the life cycle of medicines. This is driven to a great extent by the higher performing drugs within a company's portfolio. It is crucial for future drug development and innovation in pediatrics.").

[280] *See, e.g., Evaluating the Effectiveness of the FDA Modernization Act, supra* note 83 (letter dated June 11, 2001 from Abbey S. Meyers, President, National Organization for Rare Disorders, Inc.) ("The real issue is that some drug companies receiving pediatric exclusivity are reaping rewards far greater than their investment in pediatric clinical trials. The financial rewards can sometimes be so great that they focus their research on only the most lucrative drugs, rather than the drugs children need most. *Nevertheless, my testimony clearly supports reauthorization of the pediatric exclusivity.*") (emphasis added).

[281] Regulations Requiring Manufacturers to Assess the Safety and Effectiveness of New Drugs and Biological Products in Pediatric Patients, 63 Fed. Reg. 66,632 (Dec. 2, 1998) (codified at 21 C.F.R. pts. 201, 312, 314, and 601).

[282] *See, e.g., Hearings on Better Pharmaceuticals for Children, supra* note 100, at 55–60 (2001); *Hearings Evaluating the Effectiveness of the FDA Modernization Act, supra* note 83, at 165–66.

[283] *See Hearings on Evaluating the Effectiveness of the FDA Modernization Act*, supra

1. The Provision's Failure To Address Off-Patent and Off-Exclusivity Drugs

The lack of incentive for off-patent and off-exclusivity drugs[284] was a major area of concern, since pharmaceutical companies lacked incentives to research these drugs.[285] There was nothing in the provision that independently promoted the research of off-patent drugs.[286] This lack of incentive had huge implications for children's medicine as six of the ten drugs most widely prescribed to children were older antibiotics[287] that would not be included in the incentive structure.[288] Members of Congress began calling for reform, citing these drugs and others such as Ritalin—a drug that had not been tested for children but is commonly prescribed to children with Attention Deficit Disorder—as proof that the pediatric exclusivity provision needed to be reformed.[289]

Some members of Congress advocated the codification of the 1998 rule, which would address this problem. A significant reform proposal that received broad, though tentative, support, codification of the 1998 final rule would confirm the FDA's power to require pediatric testing without financial incentives.[290] Many supporters of the rule, however,

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note 83 (statement of Travis Plunkett, Legislative Director, Consumer Federation of America on behalf of the Patient and Consumer Coalition) (providing an outline of most of the main ideas considered); 2001 STATUS REPORT TO CONGRESS, *supra* note 6, at 18.

[284] Hereinafter, the term "off-patent drugs" will include drugs that are no longer on a patent term and those drugs that no longer have an exclusivity period under the Hatch-Waxman Act or the Orphan Drug Act. *See* Regulations Requiring Manufacturers to Assess the Safety and Effectiveness, 63 Fed. Reg. at 66,633.

[285] *See, e.g., Hearings on Better Pharmaceuticals for Children, supra* note 100, at 15–20 (statement of Sen. Mike DeWine (R-Ohio)); H.R. REP. 107-277, at 14 (2001) (noting that the exclusivity provision was inadequate because drugs without patent protection or exclusivity were not eligible for its incentive).

[286] The pediatric exclusivity provision did not use any language that referred to or encompassed drugs without patent or exclusivity terms. *See* Better Pharmaceuticals for Children Act, Pub. L. No. 107-109, 115 Stat. 1408 (2001) (codified at 21 U.S.C. § 355a); Zimmerman, *supra* note 92.

[287] 2001 STATUS REPORT TO CONGRESS, *supra* note 6, at 13. These ten drugs were prescribed 5 million times in 1994 and included albuterol inhalation solution for nebulizaiton, phenergan, ampicillin injections, auralgan otic solution, lotrisone cream, Prozac, Intal, Zoloft, Ritalin, Alupent. Nordenberg, *supra* note 16.

[288] *See Hearings on Evaluating the Effectiveness of the FDA Modernization Act, supra* note 83, at 98 (statement of Timothy R. Franson, Vice President, Clinical Research and Regulatory Affairs, Lilly Research Laboratories, Eli Lilly and Company on behalf of the Pharmaceutical Research and Manufacturers of America).

[289] *See, e.g., Hearings on Better Pharmaceuticals for Children, supra* note 100, at 19 (2001) (statement of Sen. DeWine).

[290] *See id.* at 21, 24 (noting that the FDA, pediatrician groups and consumer groups supported the rule's codification); Public Citizen Congress Watch, *Pediatric Exclusivity: Changes Needed to Assure Safety Effectiveness of Medications for Children and More Affordable Drugs for Seniors* [hereinafter *Pediatric Exclusivity*], *available at* http://www.citizen.org/congress/reform/drug_patents/pediatric/articles.cfm?ID=5001 (last visited Oct. 2, 2002); *Exclusivity Periods: Pediatric Exclusivity Provision Battle Begins; Generic Consumer Groups Question FDAMA*, PHARMACEUTICAL L. & PUB. POL'Y, Aug. 2, 2001 [hereinafter *Exclusivity Periods*].

feared that the pharmaceutical industry would kill a bill that codified the rule.[291]

Some consumer groups, on the other hand, suggested a combined requirement and incentive approach.[292] For example, Public Citizen Congress Watch requested that Congress allow the FDA to require exclusivity for new drugs and already marketed, on-patent drugs without the reward of an extra exclusivity term.[293] For on-patent drugs used for off-label purposes, Public Citizen Congress Watch recommended giving the FDA authority to require pediatric studies in exchange for a patent extension, with a limitation on that extension for blockbuster drugs.[294]

A transfer mechanism was another, less radical, alternative offered to reach off-patent and off-exclusivity drugs.[295] A pharmaceutical company could perform a pediatric clinical study on an off-patent drug, thereby earning a six-month credit, which it could attach to one of its on-patent drugs.[296] These options, while not ultimately adopted, demonstrate the creative ways that policymakers attempted to reform the exclusivity provision.

2. The Pharmaceutical Companies' "Windfall" from Extended Patent Terms

A second major concern was that the provision was paying drug manufacturers too much to perform studies they should have done in the first place—pharmaceutical companies received a windfall.[297] Estimates as to the cost of conducting a pediatric test vary. The NICHD estimates that safety and effectiveness studies in children can cost from $1 million to $7 million.[298] Pharmaceutical Research and Manufacturers of America, a pharmaceutical lobbying group, estimates the cost at anywhere from $5 to $35 million.[299] A Tufts-based group, whose numbers are often cited, places the cost at an average of $3.87 million.[300]

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[291] *See, e.g.*, Press Release, American Academy of Pediatricians, Law Providing Safer Medications for Children Must Continue (May 4, 2001). For example, Dr. Philip Walson, a member of the AAP Committee on Drugs, stated: "We cannot lose sight of the law's goal to improve the safety and effectiveness of medications taken by children. If we tinker too much within the existing law or fail to renew the law altogether, the health of children will be compromised." *Id.*

[292] *Pediatric Exclusivity*, *supra* note 290.

[293] *Id.*

[294] *Id.*

[295] *See* 2001 STATUS REPORT TO CONGRESS, *supra* note 6, at 22.

[296] *See User Fees*, *supra* note 198.

[297] *See generally* Rachel Smolkin, *Pros, Cons of Pediatric Drug-Testing are Debated as Congress Debates Extending a Law that Promotes Testing Drugs for Use with Children, the Benefits and Drawbacks are Volleyed*, PITTSBURGH POST-GAZETTE, Aug. 5, 2001 at A3.

[298] *Hearings on Better Pharmaceuticals for Children*, *supra* note 100, at 3–4 (statement of Janet Heinrich, Director, Health Care-Public Health Issues).

[299] *Id.* at 4.

[300] *Id.*

The payout for a six-month extension, on the other hand, often far exceeds these numbers. For example, the *Wall Street Journal* calculated the additional revenue for six drugs granted exclusivity, estimating their gains to be as follows: Claritin $975 million, Prozac $831 million, Glucophage $648 million, Pepcid $290 million, Vasotec $318 million, and Buspar $284 million.[301] In the case of Prilosec, its pediatric clinical study cost between $2 and $4 million, but it earned $1.4 billion during its six-month extension.[302] This 36,000% return on an investment in medical research[303] should be contrasted with the entire 2002 budget for the NICHD of $1.1 billion.[304] The FDA performed a cost study of the pediatric exclusivity provision and found that the six-month patent and exclusivity extension would cost American consumers $13.9 billion over the next twenty years.[305] The present value of that amount using Office of Management and Budget standards is about $7.2 billion over the next twenty years.[306] Many children's advocates, politicians, and consumer advocates argued that this was simply too great a windfall for the pharmaceutical industry, already the wealthiest in the nation.[307]

Critics further argued that these costs disproportionately burdened the generic industry and its primary consumers, the elderly.[308] The total cost of the program on an annual basis was $695 million, which amounted to half a percent of the nation's pharmaceutical bill.[309] The

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[301] Zimmerman, *supra* note 92, at 2. These numbers represent the additional revenue earned on the extended exclusivity term of six months as compared to the revenue from the same amount of time in competition with generic drugs. *Id.*

[302] PUBLIC CITIZEN CONGRESS WATCH, *supra* note 12, at 4.

[303] *Id.*

[304] *User Fees*, *supra* note 198.

[305] 2001 STATUS REPORT TO CONGRESS, *supra* note 6, at 14.

[306] *Id.*

[307] *See Markup of H.R. 2985, H.R. 2887, and H.R. 2983: Hearings Before the House Energy and Commerce Comm.*, 107th Cong. (Oct. 11, 2001) (statement of Rep. John D. Dingell, (D-Mich.)) (stating that "[I]t is now my view that we made a mistake in enacting the pediatric exclusivity law. First, it establishes a voluntary 'incentive' for activity that should instead simply be required. Second, assuming that we choose to provide an incentive, the exclusivity program is more expensive, less equitable, and less efficient than any number of alternatives . . . . The central feature of this bill, exclusivity, is about further increasing the profits of an already bloated industry . . . . What have the parents, patients, and pediatricians received for this government-provided largess? Nothing."); *User Fees*, *supra* note 198 (arguing that "these windfalls come out of Americans' pockets because of this legislation as surely as they would if we had increased taxes and paid billions for pediatric trials directly . . . each time we extend patents of exclusivity, however laudable the purpose, we spend the public's money"); Zimmerman, *supra* note 92, at 2.

[308] *Hearings on Evaluating the Effectiveness of the FDA Modernization Act*, *supra* note 83, at 71–75 (2001) (statement of Carole Ben-Maimon, President and CEO, Proprietary Research and Development, Barr Laboratories) (expressing concern that the program disproportionately burdened the elderly). *See also Pediatric Indication Will Become Subject to User Fees*, WASH. DRUG LETTER, Dec. 24, 2001 [hereinafter *Pediatric Indication*], *available at* 2001 WL8205608. Representative Waxman argued that the "windfall has contributed to soaring out-of-pocket cost for seniors." *House Panel Clears Pediatric Study Bill*, GENERIC LINE, Oct. 19, 2001, *available at* WL 15571315.

[309] 2001 STATUS REPORT TO CONGRESS, *supra* note 6, at 16–17.

FDA predicts that the government will pay for twenty-one percent of this extra burden, while the private sector will pay for seventy-nine percent.[310] According to generic drug manufacturers, the increased costs will affect the elderly more than any other group.[311] As Public Citizen Congress Watch points out, to a senior taking three of the most popular drugs, the increase will seem more costly than half a percent of his budget.[312] As for the generic companies, they will lose $10.7 billion in new sales over twenty years, and they could potentially lose up to $48 million a year in unrealized profits.[313] Furthermore, the biggest critics of the program charged that the provision paid pharmaceutical companies to release pediatric information that they already had or that they should have acquired on their own accord.[314]

To address these concerns, legislators and consumer advocates proffered various proposals as alternatives to the six-month incentive structure. One idea that received broad support and endorsements from Senators Ted Kennedy (D-Mass.) and Hillary Rodham Clinton (D-N.Y.) was the "tiered approach."[315] Under this approach, the term of the extension would be limited by how much money the drug grossed.[316] A simpler version of the reduced-incentive approach would target the blockbuster drugs alone, reducing the provision's extension to drugs that would earn over $800 million in sales during the extension.[317] Senator Christopher Dodd (D-Conn.) argued, however, that this approach would result in litigation, as manufacturers and the FDA would argue over how much a drug would actually earn in a given time period.[318] Another approach, touted by the generic industry and Donna Shalala, the former Secretary of HHS, was to award a tax-credit to manufacturers who conducted pediatric studies.[319] Some thought that only a government guarantee of a 100%

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[310] *Id.* at 17.

[311] *Id.* at 25.

[312] PUBLIC CITIZEN CONGRESS WATCH, *supra* note 12, at 10. *See also Hearings on Evaluating the Effectiveness of the FDA Modernization Act*, *supra* note 83, at 165–66 (letter dated June 11, 2001 from Abbey S. Meyers, President, National Organization for Rare Disorders, Inc.) (expressing concern that for the elderly and uninsured, half a percent is a significant amount).

[313] 2001 STATUS REPORT TO CONGRESS, *supra* note 6, at 17.

[314] *See* Zimmerman, *supra* note 92, at 4–5; *Hearings on Evaluating the Effectiveness of the FDA Modernization Act*, *supra* note 83, at 4–5 (statement of Rep. Frank Pallone, (D-N.J.)) (expressing concern for the amount paid to drug companies for putting forth information that they already have and for paying them to do research on children that they should have done anyway).

[315] *See User Fees*, *supra* note 198; *Pediatric Exclusivity*, *supra* note 290.

[316] *See User Fees*, *supra* note 198.

[317] *See* S. REP. NO. 107-79, at 7 (stating that Senator Clinton proposed and then withdrew such an amendment).

[318] *User Fees*, *supra* note 198.

[319] *See Exclusivity Periods*, *supra note* 290; *Pharmaceuticals: Pediatric Exclusivity Provision Battle Begins, as Generic Consumer Groups Questions Law*, BNA'S HEALTH CARE DAILY REP., July 27, 2001.

return on investment would provide enough incentive.[320] This approach, however, was criticized both for providing too little incentive to conduct tests and for being impractical because the money for such reimbursements would have to come out of taxpayer dollars.[321] Finally, some members of the generic drug industry advocated attaching exclusivity only to the drug studied rather than the active moiety studied, but few beyond the generic industry supported this approach.[322]

3. The Provision's Failure To Ensure Testing in Smaller Markets Such as Neonates

Critics also focused on the lack of attention that the pediatric exclusivity provision gave to smaller market drugs, which tended to include drugs for neonates.[323] Neonates were rarely studied as a result of the provision's limited opportunity for a second exclusivity term.[324] In order to establish a safe study for neonates, information usually must be gathered from older pediatric age groups first.[325] Once a pharmaceutical company performed a study in any pediatric age group and it received its six-month extension, however, it had little incentive to study other age groups since the provision provided no extra incentives.[326]

Many critics of the provision also felt that the incentive structure prompted drug companies to study only blockbuster drugs that would garner the greatest profits in six months, as opposed to lesser selling drugs.[327] Proponents disputed this analysis, arguing that only two of the seventeen drugs that were labeled for children under the exclusivity provision had sales of greater than $1 billion.[328] Public Citizen Congress

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[320] *See* H.R. REP. No. 107-277, at 56 (2001) (referring to the Waxman-Brown Substitute).

[321] *User Fees*, *supra* note 198.

[322] Stolberg, *supra* note 118, at 1.

[323] *See Hearings on Better Pharmaceuticals for Children*, *supra* note 100 (prepared statement of Janet Woodcock, M.D., Director, Center for Drug Evaluation and Research, Food and Drug Administration); *Hearings on Better Pharmaceuticals for Children*, *supra* note 100, at 55 (statement of Robert Ward, M.D., on behalf of the American Academy of Pediatrics) (noting that the degree of caution necessary to neonatal study should not render such studies outside the scope of the incentives of pediatric exclusivity). *See, e.g.*, Regulations Requiring Manufacturers to Assess the Safety and Effectiveness of New Drugs and Biological Products in Pediatric Patients, 63 Fed. Reg. 66,632 (Dec. 2, 1998) (codified at 21 C.F.R. pts. 201, 312, 314, and 601) (noting that the incentives of the FDAMA were insufficient to promote neonatal studies).

[324] 2001 STATUS REPORT TO CONGRESS, *supra* note 6, at 13, 21. *See also New Incentive Proposed for Studies in Youngest Children*, WASH. DRUG LETTER, Sept. 10, 2001 [hereinafter *New Incentive*], *available at* 2001 WL 8205396.

[325] 2001 STATUS REPORT TO CONGRESS, *supra* note 6, at 13. *See also New Incentive.*

[326] *See* 2001 STATUS REPORT TO CONGRESS, *supra* note 6, at iii.

[327] PUBLIC CITIZEN CONGRESS WATCH, *supra* note 12, at 2.

[328] *Hearings on Evaluating the Effectiveness of the FDA Modernization Act*, *supra* note 83, at 68–69 (statement of Gregory L. Kearns, M.D., Professor and Chief, Division of Clinical Pharmacology and Medical Toxicology, Children's Mercy Hospital and Clinics).

Watch, however, claims that blockbuster drugs comprise an increasing number of pediatric exclusivity extensions, estimating that fifteen of nineteen of the drugs with over $1 billion in sales in 2000 were likely to seek and receive extensions.[329]

To address this problem, Public Citizen Congress Watch advocated codification of the 1998 final rule, which would allow the FDA to require testing in smaller markets. On the opposite side of the spectrum, some reformers sought to introduce mechanisms to promote testing of drugs in neonates through secondary periods of exclusivity.[330] For example, Senator Kit Bond (R-Mo.) proposed an additional three month period of exclusivity for those drugs that were tested in neonatal populations.[331]

4. The Provision's Limited Capacity To Ensure Pediatric Labeling and Dissemination of Information

The pediatric exclusivity provision did not require that labels actually be changed.[332] The provision stated that the six-month extension on a drug's patent or exclusivity period begins when the pharmaceutical company satisfies the research requirements of the written request or agreement.[333] The pharmaceutical company did not have to change its labels for the extension to activate.[334] In fact, if the required testing produced no new labeling information, the FDA had the freedom to grant an extension without requiring a change to the pediatric label.[335] The provision left pharmaceutical companies with little incentive to assent to labeling changes in a timely matter.[336] The General Accounting Office ("GAO") found that, on average, it took nine months for the FDA and drug manufacturers to agree on labeling changes.[337] Moreover, the FDA reported great difficulty in convincing drug manufacturers to list "unfavorable pediatric research results" on their drug labels.[338]

This situation disturbed many, as it appeared that drug companies were merely taking advantage of a loophole in the legislation to avoid releasing important information about the hazards of their drugs to parents and their physicians. Representative Bart Stupak (D-Mich.), an ac-

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[329] PUBLIC CITIZEN CONGRESS WATCH, *supra* note 12, at 10.

[330] *See* 2001 STATUS REPORT TO CONGRESS, *supra* note 6, at 20; *New Incentive*, *supra* note 325.

[331] *New Incentive*, *supra* note 325.

[332] 21 U.S.C. § 355a(a)–(b) (2000).

[333] *Id.*

[334] *Id.*

[335] *Id.*

[336] *Hearings on Better Pharmaceuticals for Children*, *supra* note 100, at 7–8 (statement of Janet Heinrich, Director, Health Care-Public Health Issues).

[337] *Id.* at 7. This finding was based on the eighteen drugs granted pediatric exclusivity at the time the GAO conducted its survey. *Id.*

[338] *Id.*

tive advocate for strengthening the provision,[339] was outraged by what he believed to be the pharmaceutical companies' foot-dragging.[340] Indeed, two of the companies that grossed the most in their six-month patent extensions were Astra Zenaca for Prilosec ($1.4 billion) and Eli Lilly for Prozac ($900 million).[341] Neither drug changed its labeling as a result of the pediatric studies.[342]

Thus, Stupak, along with others in the House and Senate, the AAP, the FDA, and consumer groups, called on Congress to tie labeling changes to the grant of exclusivity.[343] They sought to condition the six-month extension on the manufacturer's compliance with the FDA's labeling recommendations.[344] Still, others feared that such a conditional approach would lead to less research since drug companies that predicted that their clinical tests would result in no labeling changes or detrimental changes would decide not to conduct the research.[345]

5. Other Concerns

Other critics noted smaller problems with the pediatric exclusivity provision. For example, the FDA and industry members generally regarded the list of additional drugs needing pediatric testing required by the provision as a waste of the FDA's time, since it produced so few studies.[346] Additionally, the FDA protested that it was underfunded and

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[339] Representative Stupak's son committed suicide while on the prescription drug Accutane. *See* Jennifer Frey, *With Little Warning a Teen's Parents Were Not Aware that Their Son's Acne Medication Could Lead to Thoughts of Suicide, and They Never Suspected He Would Follow Through*, FLA. SUN-SENTINEL, Feb. 4, 2001, at E1. The drug, manufactured by Hoffman la Roche, did not contain a label warning that the drug might produce depression in teens, even though, by the time of Stupak's son's death, there appeared to be a correlation. *Id.* Accutane is prescribed for acne and is known to have a range of side-effects. *See generally* Tara Parker-Pope, *Alternative to Accutane: Parents Search for New, Less-Toxic Acne Treatments*, WALL ST. J., Apr. 30, 2002, at D1.

[340] 147 CONG. REC. E23,890-901 (daily ed. Dec. 20, 2001) (statement of Rep. Stupak) ("What I find horrifying [about the pediatric exclusivity provision] is the grant of exclusivity takes place after the drug company does its study but before anyone knows what is included in the results of the study. Nothing is said to the general public—which includes parents and pediatricians—or prescribing physicians about the safety, effectiveness, or dosage requirements.")

[341] H.R. REP. No. 107-277, at 56 (2001).

[342] *Id.*

[343] 2001 STATUS REPORT TO CONGRESS, *supra* note 6, at 25.

[344] *See, e.g., Hearings on Better Pharmaceuticals for Children*, *supra* note 100, at 43–48 (statement of Janet Heinrich, Director, Health Care-Public Health Issues); Letter from Consumers Union Opposing House Pediatric Exclusivity Bill to Unspecified Representatives in Congress (Oct. 21, 2001), *available at* http://www.citizen.org/congress/reform/drug_patents/pediatric/articles.cfm?ID=6242; H.R. REP. No. 107-277, at 57 (2001).

[345] *See Hearings Evaluating the Effectiveness of the FDA Modernization Act*, *supra* note 83, at 3–4 (statement of Rep. Charlie Norwood (R-Ga.)) (expressing concern that making extensions conditional on labeling would counteract the incentive because pharmaceutical companies would want to avoid labeling drugs with negative information); *id.* at 8–11 (statement of Rep. Sherrod Brown (D-Ohio)).

[346] The provision required the FDA to develop such a list, 21 U.S.C. § 355a(b), but a

understaffed.[347] Also, some drug companies were attempting to exploit loopholes in the provision to obtain a three-year exclusivity extension based upon a combination of the pediatric exclusivity provision and the Waxman-Hatch exclusivity provision.[348] Both supporters and opponents of this position wanted this issue clarified in the reauthorized legislation.[349] The pediatric exclusivity provision's strongest advocates and critics sought ways to improve the provision, hoping to strengthen it without harming its political viability.[350]

As the January 1, 2002, deadline for reauthorization drew near, the BPCA began to crystallize, responding to many of the aforementioned concerns. Significantly, it addresses most of the major concerns without modifying the six-month incentive structure. As the following Partwill show, Congress adopted other financial and regulatory measures to meet some of the concerns about the FDAMA's exclusivity provision.

IV. THE REAUTHORIZATION OF THE PEDIATRIC EXCLUSIVITY PROVISION, AN OVERHAUL WITHIN THE INCENTIVE STRUCTURE

The BPCA is a greatly matured successor to the original pediatric exclusivity provision of the FDAMA.[351] The new legislation, which passed resoundingly in both houses of Congress,[352] will undoubtedly transform the field of pediatric studies, as it both addresses the testing of

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drug did not need to be on the list to be awarded exclusivity, nor did the FDA's selection of a drug for the list mean that the drug's manufacturer was required to complete testing on pediatric populations. 2001 STATUS REPORT TO CONGRESS, *supra* note 6, at 19.

[347] 2001 STATUS REPORT TO CONGRESS, *supra* note 6, at 22.

[348] *See* Jill Wechsler, *Policy Makers Seek to Limit Payments for Medicines*, PHARMACEUTICAL EXEC., Feb. 1, 2002, *available at* 2002 WL 13373489. These companies argued that a new pediatric label could also qualify as a new indication under the terms of the Waxman-Hatch Act, entitling a company that satisfied the requirements of the provision to the six-month extension as well as to the three-year exclusivity term under the Waxman-Hatch Act. *Id.* Bristol-Myers Squibb even delayed the reauthorization of the legislation with its attempts to convince Congress of this interpretation. *Id.* After losing the general battle to have Congress include such an interpretation in the new legislation, it sought to obtain a special three-year extension for its diabetes drug Glucophage, continuing to bog down the entire bill's passage. *See infra* text accompanying notes 424–429. In the end, the legislation made no special provisions for Bristol-Myers Squibb. *Bush Signs Pediatric Incentive Bill Extending Exclusivity Provision until 2007*, BNA HEALTH CARE DAILY REP., Jan. 9, 2002.

[349] *See* Wechsler, *supra* note 348.

[350] *See, e.g., Hearings on the Effectiveness of the FDA Modernization Act*, *supra* note 83, at 166 (letter dated June 11, 2001 from Abbey S. Meyers, President, Nat'l Org. for Rare Disorders, Inc.).

[351] Best Pharmaceuticals for Children Act of 2002, Pub. L. No. 107-109, 115 Stat. 1408 (codified in scattered sections of 21 U.S.C. and 42 U.S.C.).

[352] The House passed House Bill 2887, its version of the bill, by a vote of 338 yeas, 86 nays, and 8 not voting. 147 CONG. REC. H8216 (daily ed. Nov. 15, 2001). The Senate passed its version of the bill, Senate Bill 1789, by voice vote on December 12, 2001. 147 CONG. REC. S13,070, 13,071 (daily ed. Dec. 12, 2001). The House approved the Senate's version by voice vote on December 18, 2001. 147 CONG. REC. H10,200, H20,212 (daily ed. Dec. 18, 2001).

off-patent drugs and on-patent drugs that pharmaceutical companies decline to test, and it expedites labeling changes. Nonetheless, it still retains many of the policy and ethical tensions of the original legislation. As this Partwill demonstrate, while Congress has sought to protect as many groups of children as possible through the BPCA, its insistence on an incentive-based system and its reluctance to require manufacturers to conduct pediatric studies will continue to cost consumers billions of dollars and enormous amounts of administrative time and energy. While the BPCA is not due to sunset until October 1, 2007,[353] policymakers should begin to think about non-incentive based policies that could be enacted to improve pediatric testing and health.

A. The Amendments and Reforms To the Pediatric Exclusivity Provision

1. Off-Patent Drug Research Funding

Perhaps the most significant reform of the BPCA is the "Program for Pediatric Studies of Drugs Lacking Exclusivity" ("Program for Pediatric Studies"), which establishes a program by which off-patent drugs can be tested.[354] The Program for Pediatric Studies requires the National Institutes of Health ("NIH") and the FDA to develop an annual list of drugs that are off-patent and off-exclusivity terms "for which additional studies are needed to assess the safety and effectiveness of the drug in pediatric populations."[355] The list may also include certain on-patent drugs, which are not voluntarily studied by pharmaceutical manufacturers or studied through the Foundation for Pediatric Research.[356] The FDA is then to take action to ensure that those drugs are actually studied through the Program for Pediatric Studies.[357] The BPCA met the FDA's requests to eliminate one section that required the FDA to develop a list of drugs that would benefit from pediatric testing.[358] Under the BPCA, when the FDA[359] decides that a drug requires research, it will issue written requests to all the drug's application holders.[360] These sponsors must respond to the FDA's request within thirty days. If they decline to perform the test or do not respond, then the FDA may publish requests for proposals from

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[353] 21 U.S.C. § 355a(n) (2002).

[354] 42 U.S.C. § 284m (2002). *See generally* S. REP. No. 107-79, at 7 (2001).

[355] H.R. REP. No. 107-277, at 34 (2001); 42 U.S.C. § 284m(a).

[356] 42 U.S.C. § 284m(a)(1)(A)(iv); H.R. REP. No. 107-277, at 34 (2001). The Foundation for Pediatric Research, which the BPCA establishes, is discussed below. *See infra* Part IV.A.2.

[357] 42 U.S.C. § 284m(b)–(c).

[358] S. REP. No. 107-79, at 6 (2001). The section eliminated was U.S.C. § 355a(b).

[359] The BPCA refers to the "Secretary," but for purposes of this Act, the two are interchangeable and will be used so here. *See* Delegations from the Secretary of Health and Human Services to the Commissioner of Foods and Drugs, 21 C.F.R. § 5.10 (2002).

[360] 42 U.S.C. § 284m(c).

third parties to study the drug.[361] The FDA will accept proposals from organizations such as universities, teaching hospitals, laboratories, contract research organizations, and pediatric pharmacology research units.[362]

The BPCA also addresses the information dissemination problems of the pediatric exclusivity provision. The BPCA mandates that all reports completed pursuant to the Act are part of the public domain and will be published in the Federal Register.[363] Indeed, any pediatric report conducted pursuant to the Act must be published in the Federal Register within 180 days after its submission to the FDA.[364]

Additionally, the Program for Pediatric Studies establishes a structure for the FDA to negotiate labeling changes with drug application holders.[365] The BPCA created a clear timeline for labeling negotiations and affirmed the FDA's authority to compel label changes.[366] The FDA and all application holders have 180 days to negotiate the labeling changes.[367] At the point of agreement or at the end of the 180 days, the FDA will publish the requested labeling change, along with a copy of the clinical report, in the Federal Register.[368] In cases where no agreement is reached, the BPCA requires the FDA Commissioner to refer his recommendation to the newly formed Pediatric Advisory Subcommittee of the Anti-Infective Drugs Advisory Committee.[369] The Subcommittee has ninety days to review the Commissioner's recommendation and return its own recommendation to the Commissioner concerning the appropriate labeling changes.[370] The Commissioner must then consider, but need not accept, the Committee's recommendation.[371] Within thirty days, the FDA Commissioner will forward final requests to the application holder,[372] who will then have thirty days to comply.[373]

If the manufacturer still refuses to accept the labeling change, under the BPCA the FDA has the authority to deem the drug misbranded.[374] The BPCA further states that the FDA has full authority to bring an enforcement action against the offending drug manufacturer.[375] The Program for

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[361] *Id.* § 284m(c)(2). Once a drug application holder has declined to conduct a test or misses the thirty day deadline, it is not eligible to respond to a written request for a contract from the FDA. *Id.* § 284m(c)(3).

[362] *Id.* § 284m(b).

[363] *Id.* § 284m(c)(6)(B). *See also* S. REP. NO. 107-79, at 3 (2001).

[364] 21 U.S.C. § 355a(j); 42 U.S.C. § 284m(c)(7)(C).

[365] 42 U.S.C. § 284m 409I(c)(7).

[366] S. REP. NO. 107-79, at 3 (2001).

[367] 42 U.S.C. § 284m(c)(8).

[368] *Id.* § 284m(c)(7)(C).

[369] *Id.* § 284m(c)(8)(A).

[370] *Id.* § 284m(c)(8)(B).

[371] *Id.* § 284m(c)(9).

[372] *Id.*

[373] *Id.* § 284m(c)(10).

[374] *Id.*

[375] *Id.* § 284m(c)(11). The Senate Report explains that the

Pediatric Studies, therefore, is a considerable departure from the FDAMA's approach, which failed to address either off-patent drug testing or the efficiency and effectiveness with which the FDA can negotiate label changes. Still, the cost of this newfound attention does not fall on manufacturers unless they volunteer. Instead, its cost falls on the public, which supports pediatric testing through tax dollars under the Program for Pediatric Studies.[376] To fund the program, the BPCA appropriated $200 million for the fiscal year 2002, and as much as deemed necessary for the following five years.[377]

2. New Requirements for Drug Manufacturers with Patents or Exclusivity Terms

For on-patent drugs, the BPCA modifies 21 U.S.C. § 355a, entitled Pediatric Studies of Drugs, to address areas of timing and labeling in a manner similar to the Program for Pediatric Studies' treatment of off-patent drugs.[378] The BPCA compels manufacturers to make a decision regarding the FDA's written request within 180 days.[379] Manufacturers who agree to conduct pediatric studies pursuant to a written request then receive the same six-month extension as they would under the original provision.[380] The BPCA, however, eliminates a fee waiver for pediatric supplements that the FDAMA had allowed.[381] Now, as with all other supplemental applications, manufacturers will pay a mandatory user fee; the Congressional Budget Office estimates that the fee will generate $6 million in 2002 and $33 million over the 2002 to 2006 period.[382] The funds garnered by the user fees are earmarked to help maintain efficient approval of labels.[383] The BPCA also ensures that pediatric supplements

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> government would make its case that a company's drug is misbranded before the court by showing that FDA made an initial request for relabeling that the company refuse [sic], that FDA referred the issue of [sic] the Pediatric Advisory Subcommittee, which reviewed the matter and made a recommendation about a labeling change to FDA, that FDA made a second request for a labeling change, which the company refused, and that FDA's second requested labeling change was appropriate because without the change the drug would lack adequate direction for use in children.
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> S. REP. NO. 107-79, at 9 (2001).

[376] 42 U.S.C. § 284m(d).

[377] *Id. See also* S. REP. NO. 107-79, at 12 (2001).

[378] 21 U.S.C. § 355a(d)(4)(A).

[379] *Id.*

[380] *Id.* § 355a.

[381] *Id.* § 379h(a)(1).

[382] *See Pediatric Indication*, *supra* note 308.

[383] S. REP. NO. 107-79, at 2 (2001).

proposing labeling changes will be considered priority supplements[384] under the standards established for all priority drugs.[385]

As with off-patent drugs, manufacturers of on-patent and on-exclusivity drugs now face a time limit for the labeling negotiation process. The FDA and the application holder have 180 days to agree on a pediatric label.[386] If no agreement is reached, the Commissioner of the FDA refers his or her labeling request to the Pediatric Advisory Subcommittee of the Anti-Infective Drugs Advisory Committee, which must return a recommendation to the Commissioner within ninety days.[387] The Commissioner then has thirty days to consider the Committee's recommendation and make a labeling request to the drug sponsor.[388] Again, as with off-patent drugs, the drug sponsor has thirty days in which to agree to the labeling request.[389] If the manufacturer continues to decline the labeling request, the FDA may deem the drug misbranded and take action against the manufacturer.[390]

If, on the other hand, a manufacturer declines to perform a pediatric study or has already completed a study of one age group and has no incentive to complete another study, the BPCA sets up a fallback system for testing on that drug.[391] Once a study has been declined, the FDA may refer the drug to the Foundation for the National Institutes of Health ("Foundation for Pediatric Research").[392] The Foundation for Pediatric Research is a private, non-governmental foundation[393] designed to allay concerns that if public funding is not available there would be no independent funding for pediatric studies.[394] The Foundation is commissioned to collect funds (gifts, grants, and donations) and award grants for pharmacologic pediatric research on already-marketed drugs still on patent or exclusivity terms.[395] The Foundation contracts with an outside group under the guidelines described in the program for pediatric studies.[396] The BPCA also directs that the contract and labeling negotiations function like those of the publicly funded studies in the Program for Pediatric

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[384] *See* 21 U.S.C. § 321(kk) (defining a "priority supplement" as "a drug application referred to in section 101(4)" of the FDAMA); H.R. REP. NO. 107-277, at 36 (2001); S. REP. No. 107-79, at 12 (2001).

[385] 21 U.S.C. § 355a(b)(1)(F).

[386] *Id.* § 355a(d)(4)(A).

[387] *Id.* § 355a(d)(3).

[388] *Id.* § 355a(i)(2)(C).

[389] *Id.* § 355a(i)(2)(D).

[390] *Id.*

[391] 42 U.S.C. § 290b.

[392] *Id.*

[393] The Foundation is designed to serve the National Institutes of Health. *Id.* § 290b(a)–(b). Pediatric studies are one of its charges, but not its only responsibility. *See id.* § 290b(c).

[394] *See id.* § 290b(a)–(b); H.R. REP. NO. 107-277, at 39 (2001).

[395] 42 U.S.C. § 290b(c)(1).

[396] *See id.*

Studies.[397] If the Foundation has insufficient funds to conduct the study, the drug can then be included on the list of drugs for the Program for Pediatric Studies.[398] Hence, although different provisions apply to off-patent and on-patent drugs, the format by which the FDA negotiates with the various manufacturers is consistent throughout the BPCA.

3. Structural Administrative Changes

The BPCA increases the capacity of the FDA, enabling it to handle its new role as the initiator and arbitrator of pediatric studies—something that the original bill had failed to do. The BPCA establishes the Office of Pediatric Therapeutics to oversee and coordinate pediatric activities and programs.[399] The Office will include at least one ethics specialist in pediatric clinical research and at least one person with expertise in agency coordination.[400] The BPCA also establishes a Pediatric Pharmacology Advisory Committee to advise the Secretary of HHS on pediatric pharmacology research priorities and ethical issues.[401] This Committee will help connect the BPCA's provisions to the ethical regulations established to ensure that children are not put at undue risk or used exploitatively for the benefit of research.[402] Finally, the BPCA attempts to address the concerns raised by oncologists that research in their field was particularly absent under the pediatric exclusivity provision.[403] The Act creates a Pediatric Subcommittee of the Oncologic Drugs Advisory Committee, which evaluates and prioritizes cancer drugs for children.[404] It also requires the FDA and NIH to complete a report by January 31, 2003 studying whether pediatric patients have received adequate access to new cancer therapies.[405]

While the BPCA specifies the structure of these offices and their interactions quite precisely, it takes no steps to address criticisms from the pharmaceutical industry that the FDA exercises its authority capriciously. It establishes no guidelines to protect drug companies from the strict requirements and lengthy delays that the FDA has imposed on pharmaceutical companies over the past several years.[406] The timeline and review guidelines that the BPCA establishes are concerned with labeling negotiations, not negotiations regarding the satisfaction of the written request.

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[397] H.R. REP. NO. 107-277, at 35 (2001).
[398] 42 U.S.C. § 290b.
[399] 21 U.S.C. § 393a(a).
[400] *Id.* § 393a(c).
[401] 42 U.S.C. § 284m.
[402] *See* Additional Safeguards for Children in Clinical Investigations, 21 C.F.R. §§ 50.50–.56 (2002).
[403] 21 U.S.C. § 355.
[404] *Id.*
[405] *Id.*
[406] *See infra* note 227 and accompanying text.

The Act appears to allocate full discretion to the FDA to determine whether it will request comprehensive tests from drug companies or whether it will request tests of specific age groups.[407] Companies will still need to appeal the FDA's decisions in court, as drug manufacturer Merck did in the case of Lovastatin.[408]

4. Ethics and Equality Issues

The BPCA addresses pediatric ethical issues by directing HHS to contract with the Institute of Medicine to review the guidelines for pediatric research.[409] The BPCA notes that these reviews should look at issues such as consent, expectations of participants, risks, maturity levels in relation to legal status, payments made to children or their parents in return for participation, compliance with regulations, and the role of internal review boards in pediatric studies.[410]

The BPCA also addresses the right of minority children to be equally protected by the pediatric exclusivity program.[411] The BPCA requires that written protocols take into account the representation of children of ethnic and racial minorities.[412] It also requires the General Accounting Office to review whether minorities are included in pediatric research and whether adequate studies are performed on drugs used to treat diseases that disproportionately affect minorities.[413] This study must be completed by the Comptroller General of the United States by January 10, 2003.[414]

The BPCA also explicitly acknowledges that neonates are considered a pediatric population,[415] making clear that the FDA can request neonatal studies from manufacturers or contract for such studies with outside organizations.[416] Thus, the FDA could request studies in an older age group, to be followed by studies in neonates.[417] This step will help to ensure that neonates receive more equitable attention, but it is unlikely that this acknowledgment will encourage manufacturers to conduct testing on neonates of their own accord because of the risks and costs asso-

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[407] *See, e.g.*, 42 U.S.C. § 284m(c)(11); 21 U.S.C. § 355a(a).

[408] Merck v. FDA, 148 F. Supp. 2d 27, 29 (D.D.C. 2001).

[409] 42 U.S.C. § 289.

[410] *Id. See also* Internal Review Board Duties, 21 C.F.R. § 50.50 (2002); Clinical Investigations Not Involving Greater than Minimal Risk, 21 C.F.R. § 50.51 (2002).

[411] 21 U.S.C. § 355a.

[412] *Id.* § 355a(d)(2).

[413] *Id.* § 355a.

[414] *Id.*

[415] *Id.* § 355a(a). *See also* S. REP. NO. 107-79, at 3 (2001) (stating that neonates are newborns to one month old).

[416] S. REP. NO. 107-79, at 10 (2001).

[417] *Id.*

ciated with testing neonates. Instead, such tests will likely be funded by public contracts.[418]

5. Generics

Another main problem with the earlier pediatric exclusivity provision was that its language did not clearly comport with the Waxman-Hatch generic exclusivity provisions.[419] First, the BPCA clarifies that any generic manufacturer that successfully challenged an invalid patent under the exclusivity provision will be awarded 180 days of exclusivity.[420] If the manufacturer also conducts a pediatric study of that drug, it will then receive a six-month extension to run after the initial Waxman-Hatch extension.[421] Some had thought that the pediatric exclusivity provision required the terms to run together, but Congress clarified that a generic manufacturer was to benefit from both in turn.[422]

The BPCA also addresses the three-year exclusivity extensions offered to pharmaceutical companies that labeled for a new indication.[423] As explained earlier, some pharmaceutical companies argued that a new pediatric label warranted not only a six-month extension but a three-year exclusivity period under the Drug Price Competition and Patent Term Restoration Act ("Hatch-Waxman").[424] Under the BPCA, a pharmaceutical manufacturer will earn a three-year extension for indication changes that meet the requirements of the Act in addition to the six-month pediatric exclusivity period.[425] During the three-year exclusivity period, however, generic manufacturers can market the drug for those indications or aspects of the labeling that are not protected.[426] They simply cannot indicate that they have been tested for use in children.[427] If the drug is dangerous to children in any way, however, the generic manufacturer would need to label it as such.[428] This system creates a strange incentive struc-

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[418] This conclusion is based on the difficulty the FDA has had thus far in procuring tests on neonates through voluntary incentives. *See* Regulations Requiring Manufacturers to Assess the Safety and Effectiveness of New Drugs and Biological Products in Pediatric Patients, 63 Fed. Reg. 66,632, 66,633–34 (Dec. 2, 1998) (codified at 21 C.F.R. pts. 201, 312, 314, and 601).

[419] 21 U.S.C. § 355(j)(5)(B)(iv); S. REP. No. 107-79, at 6 (2001) ("When Congress passed the Pediatric Exclusivity Provision in 1997, it had not meant to change the incentives for challenging patents under the Waxman-Hatch Act by reducing periods of [abbreviated new drug application (generic)] exclusivity.").

[420] 21 U.S.C. § 355a(k).

[421] S. REP. No. 107-79, at 5 (2001).

[422] H.R. REP. No. 107-277, at 36–37 (2001).

[423] 21 U.S.C. § 355a(l).

[424] *Id.* at § 355(c).

[425] 21 U.S.C. § 355a(l)(1). A drug company may be awarded three years of exclusivity if it discerns new clinical uses for a drug already approved. 21 U.S.C. § 355(j)(5).

[426] H.R. REP. No. 107-277, at 37 (2001).

[427] *Id.*

[428] 21 U.S.C. § 355a(l)(2)(a)–(b). *See also* H.R. REP. No. 107-277, at 37 (2001).

ture for a drug manufacturer. It has more incentive to complete non-pediatric studies to achieve a supplemental exclusivity term where there will be no generic competition whatsoever. If it achieves such a term with a pediatric medicine, generic drugs will be able to compete with the non-exclusivity drug for pediatric uses through off-label practices. Nonetheless, Congress did not want to award on-patent drugs an extra three years of market exclusivity for pediatric tests, thus it chose this interpretation of the two exclusivity terms.[429]

6. Planning for the Future

Like its predecessor, the BPCA looks toward the future by including a sunset clause of five years, meaning the BPCA will expire on October 1, 2007.[430] Also, the BPCA requires the United States Comptroller General, in consultation with HHS, to complete a comprehensive report on the effectiveness and costs of the program by October 1, 2006.[431] The report must consider several factors, including the effectiveness of the BPCA; the number and importance of the drugs tested as a result of the BPCA; the relationship between the grant of exclusivity and labeling; the cost to taxpayers in the form of higher expenditures by Medicaid and other government programs; the benefits to government, private insurers, and consumers that result from better health care for children; and the costs of privately and publicly funded studies.[432]

An additional reporting device was also instituted in order to catch adverse events more quickly:[433] each pediatric label will include a toll-free telephone number.[434] The BPCA requires the FDA to promulgate a rule ensuring that the toll-free number reaches the broadest consumer audience while minimizing the costs of the rule to pharmaceutical companies.[435] For example, it might require that the phone number be written on an auxiliary label on the drug vial itself.[436] Furthermore, for a one-year period after pediatric exclusivity is granted, drug sponsors must report all adverse events to the Office of Pediatric Therapeutics.[437]

The BPCA addressed many of the concerns that were raised in the years before the reauthorization of the pediatric exclusivity provision, but it did so within the framework of the incentive structure. Manufacturers may still make their own decisions as to whether or not they want to con-

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[429] S. REP. NO. 107-79, at 8 (2001); H.R. REP. NO. 107–277, at 37 (2001).
[430] 21 U.S.C. § 355a(n).
[431] *Id.* § 355a(m).
[432] *Id.* §§ 355a(m)(1)-(4).
[433] *Id.* § 355b(a).
[434] *Id.*
[435] *Id.* §§ 355b(a)(1)-(2).
[436] H.R. REP. NO. 107-277, at 27 (2001) (recommending that "auxiliary labels" be placed on the bottles or vials themselves).
[437] 21 U.S.C. § 355b(b)(1).

duct a study and receive a six-month extension on their patent or exclusivity term of a drug. The BPCA, however, attempts to control for this voluntariness by instituting the Pediatric Studies Program and the Foundation for Pediatric Research to support research in drugs that the pharmaceutical companies do not investigate on their own. While further improving pediatric testing, the Act puts very little pressure—beyond the pressures of time and necessitated labeling changes—on manufacturers to change the way they approach researching and marketing new drugs. Manufacturers bear few costs beyond the user fees, while the public is now asked to support not only the six-month extensions but also the public funding of some pediatric research.

B. Reaction To the BPCA

At the end of the day, the incentive structure won out over proposals to codify the 1998 final rule or to condition exclusivity on new labeling. Some supported renewal of the voluntary incentive structure mainly because, to date, it had been the most effective legislation passed to ensure pediatric testing.[438] Pediatricians expressed hesitation at tampering with a legislative product that actually produced results.[439] Indeed, the idea that the cost of the incentive program should close the program down seemed contrary to the spirit of protecting children's health.[440]

Other groups, however, were committed to the voluntary structure for philosophical and economic reasons.[441] For example, the American Association of Physicians, the Competitive Enterprise Institute, and Consumer Alert believed that the government should not regulate off-label

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[438] *See* 147 CONG. REC. H10,200–01 (daily ed. Dec. 18, 2001) (statement of Rep. Michael Bilirakis (R-Fla.)) ("If it's not broken—don't fix it. By all accounts . . . this program is a resounding success. According to the FDA, 'the pediatric exclusivity provision has been highly effective in generating pediatric studies on many drugs and in providing useful new information in product labeling.' The American Academy of Pediatrics states that they 'can not overstate how important this legislation has been in advancing children's therapeutics.'") *Id.* at H10,202. *See also* 147 CONG. REC. E2073 (daily ed. Nov. 14, 2001) (statement of Rep. Albert Wynn (D-Md.)) (expressing his view that Congress included a sunset provision in the original enactment out of concern that the program would not work, but arguing that since it had been successful it should be renewed.).

[439] *See, e.g.*, Jim Geraghty & Megan Scully, *Child Drug Incentives Challenged Watchdogs Wary of Pharmaceutical Industry "Windfall,"* RECORD (Bergen County, N.J.), (Aug. 8, 2001) (quoting Dr. Steve Berman, then-president of the American Academy of Pediatrics, to say "What this law has given us over the last four years is a windfall of new, quality information about medications children use every day . . . . We can't go back to the days when children's needs are ignored, and that's what could happen if we tinker with this bill at this stage . . . . [W]e should not be willing to sacrifice the tremendous progress we've made."). *Id.*

[440] *Hearings on Better Pharmaceuticals for Children*, *supra* note 100, at 55 (statement of Robert Ward, M.D., on behalf of the American Academy of Pediatrics).

[441] Robert Pear, *Judge Rules on Pharmaceutical Tests*, N.Y. TIMES, Oct. 19, 2002, at A9.

prescriptions, as the 1998 final rule would.[442] They worried that this would lead to other areas of government regulation of physician practices.[443] Additionally, these groups maintained that if pharmaceutical companies were forced to conduct studies in children, the result might be a costlier approval process overall.[444] The incentive process allows pharmaceutical manufacturers to more easily consider undertaking the costs of pediatric research.[445] Ultimately, the arguments of those in favor of the incentive structure overcame those in favor of codification of the 1998 final rule.

Others, however, felt that the BPCA insufficiently addressed the problems latent in the incentive scheme. Several members of the House wrote a strong dissent in the House Report.[446] They argued that pediatric testing should have been required in some cases.[447] The BPCA, they maintained, only further confirmed that children were not a part of the general mandate of the FDCA that required drugs to be safe and effective for intended use.[448] They also criticized the incentive structure for imposing unnecessary costs on consumers, "costing consumers and taxpayers billions of dollars while producing only 19 new labels."[449] The dissenters highlighted the cases of Astra Zeneca's Prilosec and Eli Lilly's Prozac, which earned $1.4 billion and $900 million, respectively, from

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[442] *See* Kaufman, *supra* note 276, at A9; Ass'n of Am. Physicians and Surgeons, Inc. v. FDA, No. CV. 00-02898, 2002 WL 31323411, at *1 (D.D.C. Oct. 17, 2002). The plaintiffs in this case "argue[d] that the FDA has no authority to require manufacturers to (1) conduct studies of drug uses for which they do not intend to seek approval or (2) devise formulations of the drug tailored to those uses." *Id.* at *5.

[443] *See, e.g.*, Kaufman, *supra* note 276, at A9. Competitive Enterprise Institute's general counsel explained: "The FDA essentially claimed it could force new uses, or new patient populations—in this case, children—on a label. While the rule was limited to pediatric uses, it opened the door for testing requirements for other off-label special patient populations and for other off-label uses." *Id.*

[444] Pear, *supra* note 441, at A9. The Competitive Enterprise Institute general counsel also emphasized the economic risks of a mandatory structure, saying that allowing the FDA to require testing "would have made drugs scarcer and more expensive in the long run, by adding to the risk and the expense of drug development." *Id.*

[445] *Hearings on Evaluating the Effectiveness of the FDA Modernization Act*, *supra* note 83, at 97 (May 3, 2001) (prepared statement of Timothy Franson, Vice President, Clinical Research and Regulatory Affairs, Lilly Research Laboratories, Eli Lilly and Company on Behalf of the Pharmaceutical Research and Manufacturers of America) ("Thanks to . . . the FDAMA, a company R&D director today can weigh the substantial cost of pediatric drug development against the incentive . . . provided in FDAMA . . . . The incentive has meant that kids are now standing on equal terms with adults in the stiff competition for research dollars at our companies.").

[446] *See* H.R. REP. NO. 107-277, at 56–58 (2001). These members included Representatives John D. Dingell, Sherrod Brown, Henry A. Waxman, Peter Deutsch (D-Fla.), Frank Pallone, Jr., Tom Barrett (D-Wis.), and Bart Stupak. The House members were actually writing about House Bill 2887, their version of the Best Pharmaceuticals for Children Act. The two versions are slightly different, but not for the purposes of the dissenters' arguments, so the BPCA is used for the sake of clarity.

[447] *Id.* at 56.

[448] *Id.*

[449] *Id.*

pediatric extensions without making label changes.[450] They argued that the House should have considered alternative structures such as the Waxman-Brown substitute, which would have been a more "cost-effective alternative" than the incentive structure.[451] This substitute would have directly reimbursed drug manufacturers for the cost of pediatric studies and guaranteed them 100% profits on the costs of the studies.[452]

The House dissenters also took issue with the BPCA's failure to condition the grant of exclusivity on labeling, and they were dissatisfied by the provisions that required publication of labeling requests and test reports in the Federal Register as a temporary measure.[453] Few pediatricians, parents, or children would look there for advice on dosing or treatment, as most rely solely upon labels.[454] In the end, the dissenters believed that the FDAMA's pediatric exclusivity provision compounded the initial mistake of not requiring pediatric testing. The BPCA, in the dissenters' view,[455] was another flawed piece of legislation that isolated children from the full protections of the FDCA.[456] In general, consumer activists[457] were concerned that the BPCA unjustifiably forced consumers, especially the elderly, to pay more for drugs; that it forced the public to subsidize pharmaceutical research; and that drug makers were gaining hundreds of millions of dollars from studies that cost them only a couple of million dollars—an incentive far out of proportion to the costs of the studies.[458]

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[450] *Id.*

[451] *Id.*

[452] *Id.*

[453] *Id.* at 57.

[454] *Id.*

[455] For a discussion of the dissent in the Senate, see S. REP. No. 107-79, at 6 (2001) (noting that some amendments to BPCA were offered and withdrawn).

[456] *Id.*

[457] These consumer advocacy groups included, among others: Alpha 1 Foundation; Alliance for Retired Americans; American Federation of State, County and Municipal Employees; Center on Disability and Health; Center for Medical Consumers; Consumer Federation of America; Consumers Union; Families USA; Gray Panthers; International Union; National Consumer League; National Organization for Rare Disorders; National Women's Health Network; Public Citizen; Scleroderma Foundation; Service Employees International Union; USAction; and USPIRG. Public Citizen Congress, *Watch List of Groups that Also Oppose Dodd-DeWine in Its Current Form but May Not Subscribe to All the Points of Public Citizen's Analysis of the Bill, available at* http://www.citizen.org/congress/reform/drug_patents/pediatric/articles.cfm?ID=5000 (last visited Sept. 20, 2002).

[458] PUBLIC CITIZEN CONGRESS WATCH, *supra* note 12. Indeed, consumer advocates accused pharmaceutical companies of unduly influencing legislators. *Id.* After the reforms it supported were not included in the BPCA, Public Citizen Congress Watch wrote a letter claiming that more comprehensive legislation was impossible because of industry lobbying. *Id.* The organization reported that those members of the Health Subcommittee of the House Energy and Commerce Committee who voted to retain the six-month patent extension had received on average $64,691 in campaign contributions from drug companies since 1990, while those who voted for amendments that would have reduced the extension accepted an average of $25,493 from drug companies during the same period. *Id.* at ii. Moreover, it found that three of the four sponsors of the BPCA—Senator Christopher Dodd, Senator Mike DeWine, and Representative Anna Eshoo (D-Cal.)—were among the

C. The Impact of the BPCA on the 1998 Final Rule

The BPCA caused further controversy because of its impact on the 1998 final rule. First, in May 2002, the Bush administration decided to suspend the rule in light of the BPCA's comprehensive structure.[459] The FDA maintained that the BPCA sufficiently addressed safety concerns for pediatric pharmaceutical users, likely making the rule unnecessary.[460] The same Democratic leaders who were disappointed with the BPCA expressed immediate outrage at the FDA's decision to forgo the rule.[461] Representatives Waxman, Dingell (D-Mich.), and Brown (D-Ohio) signed a letter dated March 18, 2002 to President Bush that urged him to prevent the FDA from suspending the rule.[462] They argued that it was a necessary component of pediatric clinical testing, asserting that without it pharmaceutical companies would only engage in the most profitable tests and not conduct tests that were the most worthwhile for children's health.[463]

In response to this harsh public criticism, HHS quickly reversed its policy, stating that it would enforce the 1998 final rule.[464] HHS announced that the BPCA and the 1998 final rule could coexist, but also asked for public comment on "what additional steps [the FDA could] take to assure adequate study of drugs in children in light of" the BPCA.[465] Accordingly, the FDA issued an Advanced Notice of Proposed Rulemaking in the Federal Register.[466] The notice acknowledged that the BPCA might not adequately ensure that all drugs, especially human biologics and antibiotics, are tested in pediatric populations.[467] It also acknowledged the BPCA's limitations: that public funding was dependent on yearly congressional outlays and that the legislation had a built-in sunset provi-

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top ten recipients of campaign contributions from the drug industry. *Id.*

[459] *See* Ceci Connolly, *FDA to Suspend a Rule on Child Drug Testing; Agency Says Patent Plan Meets Safety Goal*, WASH. POST, Mar. 19, 2002, at A10.

[460] *See* Associated Press, *FDA Changes Course on Child Tests*, L.A. TIMES, Apr. 20, 2002, at A17; Connolly, *supra* note 459, at A10.

[461] *Democrats Protest FDA Plan to Suspend Pediatric Testing Rule*, WASH. DRUG LETTER, Mar. 25, 2002.

[462] *Id.*

[463] *Id.*

[464] Marc Kaufman & Ceci Connolly, *U.S. Backs Pediatric Tests in Reversal on Drug Safety*, WASH. POST, Apr. 20, 2002, at A3.

[465] Press Release, U.S. Dep't of Health and Human Servs., HHS Launches New Pediatric Drug Safety Initiative (Apr. 19, 2002), *available at* http://www.hhs.gov/news/press/2002pres/20020419b.html.

[466] *Id. See also* Obtaining Timely Pediatric Studies of and Adequate Pediatric Labeling for Human Drugs and Biologics, 67 Fed. Reg. 20,070 (Apr. 24, 2002) (to be codified at 21 C.F.R. pts. 201, 312, 314, and 601).

[467] *Id.* at 20,070.

sion.[468] It then requested comments on how to "integrate the BPCA and the pediatric rule more effectively."[469]

While advocates of the 1998 rule were pleased that the FDA reversed its position, the near-suspension of the rule renewed efforts to codify it. Such a codification would remove discretion from the FDA as to whether pediatric testing could be required.[470] Senator Clinton explained her position on the importance of codification of the 1998 rule: "While I am pleased that the FDA has changed its mind about the pediatric rule, the fact that it can change its mind illustrates how important it is to make this rule the law of the land."[471] Significantly, codification would also moot legal challenges to the legitimacy of the 1998 rule.[472] Accordingly, Senators Dewine and Dodd have proposed a bill to codify the 1998 rule.[473] There is even evidence that pharmaceutical companies would not strongly oppose such a codification as long as the six-month incentives were kept intact.[474]

On the heels of the flip-flop in the executive branch, the fragility of the 1998 rule's foundation was again thrown into question, this time by the United States District Court for the District of Columbia.[475] The court ruled that the 1998 rule exceeded the scope of the FDA's authority under both the FDAMA and the BPCA.[476] The court made this decision based on an examination of the principles of administrative law and the legislative history, noting a concern that acceptance of the 1998 rule might mean that all off-label practices could be regulated by the FDA—a situation contrary to established food and drug law practice, which allows the manufacturer, and not the FDA, to determine how to label its drug.[477] In the end, though, it concluded that the BPCA was incompatible with the 1998 final rule, stating that "Congress adopted an incentive scheme while the FDA adopted a command and control approach .... The two

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[468] *Id.* at 20,071.

[469] *Id.* at 20,072.

[470] Kaufman & Connolly, *supra* note 464, at A3.

[471] *Id.*

[472] *See* Jennifer Silverman, *FDA to Retain, Update Pediatric Drug Rule as Part of New HHS Initiative*, FAM. PRAC. NEWS, May 15, 2002, *available at* 2002 WL 18106374. The General Counsel for the Competitive Enterprise Institute, one of the groups suing the FDA along with the Association of American Physicians and Surgeons to prevent enforcement of the 1998 final rule, conceded that if the rule were codified their "claim ... would be gone." *Id. See also Sanity on Pediatric Drug Safety*, N.Y. TIMES, Apr. 23, 2002 at A28.

[473] S. 2394, 107th Cong. (2002). *See also* Silverman, *supra* note 472.

[474] Kaufman & Connolly, *supra* note 464, at A3 (reporting that a spokesperson for PhRMA stated that the group was willing to accept such a requirement "as long as the incentives were in place.").

[475] Ass'n of Am. Physicians and Surgeons, Inc. v. FDA, No. CV. 00-02898, 2002 WL 31323411, at *1 (D.D.C. Oct. 17, 2002).

[476] *Id.*

[477] *Id.* at *11.

schemes differ in almost every possible regard."[478] Thus, for the FDA to enforce the 1998 final rule, Congress would need to codify it.

This result was not inevitable, though.[479] Upon its passage, the impact of the BPCA on the FDA's 1998 final rule was unclear.[480] The 1997 legislative history had endorsed the FDA's approach to the promotion of pediatric labeling,[481] but the BPCA's legislative history did not include a similar statement of approval. The BPCA did not alter the section of the exclusivity provision that endorsed FDA regulations that were broader than the pediatric exclusivity provision.[482] Rather, it allowed this "regulatory clause" to stand with the knowledge that the FDA had been enforcing the 1998 final rule since its enactment. Neither the Senate Report nor the House Report that accompany the BPCA mentions anything about changing or modifying the "regulatory clause" or the 1998 final rule. Further, many pediatric experts who spoke before Congress also continually referred to the successes of the pediatric exclusivity provision in conjunction with the 1998 final rule,[483] so it would be odd to assume that the BPCA displaced the 1998 final rule without specific direction from Congress.[484]

Children's health advocates expressed immediate disappointment and called on Congress to remedy the situation.[485] Senator Clinton, for one, quickly condemned the Court's decision, calling it a "major step backwards for children's health," and accusing the court of being "ill-informed about how the legislation was intended to work, and how it did

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[478] *Id.* at *13.

[479] *Id.* at *8 (noting that determining whether the FDA overstepped the bounds of the FDCA's labeling provisions was a close question).

[480] *See id.* at *12–*13.

[481] S. REP. NO. 105-43, at 52 (1997).

[482] 21 U.S.C. § 355a(h) (2002).

[483] *See, e.g., Hearings on Evaluating the Effectiveness of the FDA Modernization Act*, *supra* note 83, at 65–109 (statement of Gregory Kearns, M.D.) (claiming that the "FDAMA conjoined with the 1998 Pediatric Final Rule, provides a most effective 'weapon' to bring pediatric therapeutic injustice to an end.").

[484] Generally, when Congress is silent on an issue, an administrative agency, such as the FDA, is presumed to have discretion to interpret the legislation as it sees fit. *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984) (establishing a deferential standard for reviewing administrative agency interpretations of statutory language if (1) Congress is silent or ambiguous as to the challenged matter and (2) the interpretation is reasonable); Whitman v. American Trucking, 531 U.S. 457 (2001) (reaffirming deferential judicial standard to reasonable agency interpretation of statute). *But see* Ass'n of Am. Physicians, 2002 WL 31323411, at *1 (explaining that congressional inaction on an issue is not a basis for statutory interpretation) (citing Brown & Williamson Tobacco Corp. v. FDA, 153 F.3d 155, 170 (4th Cir. 1998)).

[485] Laura Meckler, *U.S. Court Rejects Efforts to Test Drugs On Children: The Decision Means Companies Don't Have to Study Adult Medicines Often Given to Children*, PHIL. INQUIRER, Oct. 20, 2002, at A7. The Director of Public Policy at the Elizabeth Glaser Pediatric AIDS foundation characterized the ruling as "a devastating setback to children's health in this country," promising that "[t]here's going to be a lot of additional enthusiasm and energy behind this [legislation] as a result of the ruling." *Id.*

work."[486] She and others in the Senate, including Senators DeWine and Dodd, continue, as this Article goes to publication, to lobby for codification of the 1998 final rule.[487] The FDA also announced its dissatisfaction with the court's ruling, saying that it was "very disappointed that the court struck down the pediatric rule, which we have vigorously enforced."[488] At the time of this Article's publication, it was reviewing whether to appeal.[489]

D. The Future of the Pediatric Exclusivity Provision and the BPCA

The BPCA's failure to codify the FDA 1998 final rule is a major deficiency in the legislation, which ultimately may have left the rule open to reversal by the court. Codification of the rule would have been a much stronger step toward ensuring that new and already-marked drugs were tested. This kind of power might not appear necessary when there is public funding available for research, but in the event that congressional expenditures are insufficient to properly test drugs for safety and effectiveness in children, the FDA should be allowed to compel manufacturers to complete such studies. Any such codification could be modeled on the 1998 rule as well as the ethical regulations for pediatric research, which establish a set of rules to determine which drugs should be tested for use in children.[490]

The ethical regulations work to prevent the kinds of exploitative situations that historically developed in pediatric testing. If a study poses more than a minimal risk to children, it must meet conditions such as the potential for direct benefit to the child or approval from the FDA that it will serve the larger ends of children's health.[491] Furthermore, the 1998 rule contains waiver provisions. No study will need to be conducted in children when a drug is unlikely to be used in children when it is highly impracticable to complete the study in children (e.g., a study of a drug for Alzheimer's disease), or when there is evidence that the drug would be dangerous to children.[492] The rule also allays concerns about additional costs and delays in releasing useful drugs to the public by granting deferments of the pediatric testing requirement to drug companies that

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[486] *Court Tosses Out Rule on Drugs Tests*, CHARLOTTE OBSERVER, Oct. 19, 2002, *available at* 2002 WL 101038056.

[487] *Id.*; Laura Meckler, *Court Tosses Drug Testing Rules for Kids*, MILWAUKEE J. SENTINEL, Oct.19, 2002, at 2A. Senator DeWine noted that the case for codification was now much stronger, as children will be harmed without the legislation. *Id.*

[488] Chris Adams, *FDA Can't Require Drug Makers to Test on Children*, WALL ST. J., Oct. 21, 2002, at B4.

[489] *Id.*

[490] *See* Additional Safeguards for Children in Clinical Investigations, 21 C.F.R. § 50.50–.56 (2002).

[491] *Id.*

[492] *Id.* § 314.55(c).

satisfy safety and effectiveness standards for adults.[493] Thus, a drug should not be delayed from reaching the public any longer than it currently is.

Another concern about codification of the rule is that it would impose substantial costs on consumers. Such concerns are unconvincing in light of the large costs of the six-month extension and the costs of public funding for pediatric research. Certainly, the costs of pediatric studies will increase the price of medicine, as the drug companies will pass the cost increases on to their consumers. Both the industry and the public, however, have bypassed these very costs of drug development for years.[494] Considering the precautions that the 1998 rule and ethical regulations take to avoid unnecessary testing,[495] these costs seem reasonable in the name of better pediatric health.

In addition to its failure to codify the 1998 rule, the BPCA is unnecessarily expensive to consumers. It seems inherently unfair for the public to have to pay twice in this way: either the public pays directly for publicly funded tests or indirectly through the increased exclusivity terms. Indeed, the irony of the BPCA is that on a cost basis, it would be cheaper for consumers if pharmaceutical companies declined to perform any studies as consumers would pay the cost of the study, which on average costs $3.87 million,[496] instead of the extraordinary costs of the six-month patent extensions.

Another problem with the BPCA is in its administratively complex and dispersed design. It fails to place responsibility for pediatric testing on any one institution—public or private. Tests may be performed under the auspices of pharmaceutical companies, the Program for Pediatric Studies, or the Foundation for Pediatric Research. A number of offices have been established to oversee these studies and their resulting labeling, ranging from the Office of Pediatric Therapeutics to the Oncologic Drugs Advisory Committee.[497] Administrative time and financing will be wasted in the coordination of oversight and replication of skills and knowledge, as these offices attempt to oversee the various testing options which the BPCA provides. Instead, Congress should place the responsibility of testing children where it lies: with the pharmaceutical compa-

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[493] *Id.* § 314.55(b).

[494] *See supra* Section I.

[495] *See* Regulations Requiring Manufacturers to Assess the Safety and Effectiveness of New Drugs and Biological Products in Pediatric Patients, 63 Fed. Reg. 66,632, 66,654–56, (Dec. 2, 1998) (to be codified at 21 C.F.R. pts. 201, 312, 314, and 601) (noting that because pediatric patients are a vulnerable population, special protections are needed to shield them from undue risk). *See generally* 21 C.F.R. §§ 46, 50.51–.56, 56.101–.102, 56.109, 56.111) (2002).

[496] *See* PUBLIC CITIZEN CONGRESS WATCH, *supra* note 12.

[497] Best Pharmaceuticals for Children Act of 2002, Pub. L. No. 107-109, §§ 6, 14, 115 Stat. 1414, 1419 (codified at 21 U.S.C. §§ 284m, 393a). *See also* List of Standing Advisory Committees, 21 C.F.R. § 14.100 (2002).

nies that research and market drugs. This requirement would likely save the public through reduced coordination costs, and reduced costs from the delay of requesting studies on a voluntary basis.

The voluntary incentive structure and the complex administrative system that complements it undercut the BPCA's strides toward improving pediatric research. Congress should contemplate other options for ensuring pediatric research besides market incentives. Policymakers should look at the reasons beyond cost that pharmaceutical companies are so reluctant to perform studies. A mere four million dollar study is not the crux of the problem—liability is. Perhaps the new ethics regulations will help to set up guidelines that can serve as defenses in the courtroom.[498] Congress might also consider creating an arm of the FDA that oversees pediatric studies. Such oversight could then serve as a form of an "FDA defense" to a lawsuit.[499] That is, drug companies could have an affirmative defense to a lawsuit for a failed pediatric test or adverse side effect if they followed the FDA's procedures.

Congress could even consider establishing an administrative hearings procedure, much like that of the National Vaccine Program,[500] which compensates children who are victims of vaccines' adverse side-effects. Such a "clinical pediatric compensation program" could be funded by tax dollars as well as separate fees levied upon pharmaceutical companies. This kind of program would not only greatly reduce the risks of litigation to the pharmaceutical companies but would help to assure that children are fairly compensated for participation in pediatric studies on a timely basis.[501] The compensation program could use the administrative appara-

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[498] 21 C.F.R. §§ 50, 56 (2002).

[499] *See generally* Lars Noah, *Rewarding Regulatory Compliance: The Pursuit of Symmetry in Products Liability,* 88 GEO. L.J. 2147 (2000). The problem with this solution, however, is that product liability actions are incredibly expensive to mount. Without the incentive of punitive damages, lawyers will be less willing to take on liability suits on a contingency basis. This explains the importance of a secondary claims system in combination with any form of an FDA defense.

[500] National Childhood Vaccine Injury Act, Pub. L. No. 99-660, § 311, 100 Stat. 3743, 3755–84 (1986) (codified as amended in scattered sections of 21 U.S.C. and 42 U.S.C. (2000)).

[501] It is worth noting that the vaccine compensation program has become subject to criticism for its failure to compensate children sufficiently for their injuries. *See, e.g.*, Derry Ridgway, *No-Fault Vaccine Insurance: Lessons from the National Vaccine Injury Compensation Program*, 24 J. HEALTH POL. POL'Y & L. 59, 82–83 (1999). Any new program modeled on the vaccine program would need to take the alleged failures of the vaccine program into account and make adjustments accordingly. The current criticisms of the vaccine program are: (1) the process to obtain compensation has become too adversarial and fails to adequately protect and fairly compensate claimants; (2) the industry has lost the incentive to create safer vaccines because it knows that it will not face punitive damages; (3) the special masters who hear claims are not subject to sufficient review; (4) current levels of compensation are insufficient to reflect the costs of caring for an injured child; and (5) costs awarded for attorney's fees fail to reflect the actual cost of hiring a lawyer skilled in children's medicine, which has become increasingly necessary as the process has become more adversarial. *See id.*; Leonard D. Pertnoy, *A Child's View of Recovery Under the National Children's Vaccine Act or "He Who Hesitates is Lost,"* 59

tus of the vaccine program since the administrative judges in that program are already adept at hearing medical issues concerning children. While this alternative[502] would actually be more administratively complex than the BPCA's structure, it would, at least, avoid the costs of the exclusivity incentive, and it would also directly address the liability concerns of the pharmaceutical companies.

Children deserve special treatment, such as larger investments in ethics guidelines, careful oversight, and training of specialists in pediatric research. They are a special-needs group that could benefit from targeted legislation. The history of exploitation and adverse reactions to drugs suggests the importance of creating legislation and regulations devoted to children's needs. Children need to be carefully integrated into mainstream clinical testing in a way that does not put other groups at risk. Nonetheless, Congress has muddled this notion of special treatment with the idea that pharmaceutical companies should not be responsible for pediatric testing. Nothing about children necessitates the placement of pediatric testing outside of the responsibility of the pharmaceutical industry.

CONCLUSION

Before the 1997 FDAMA pediatric exclusivity provision and the 1998 final rule, pharmaceutical manufacturers had almost free rein to market drugs that they knew would be used in children without performing any pediatric tests. By placing a label on their products stating that the drug had not been tested for safety and effectiveness on children, they could avoid venturing into the complicated area of pediatric testing. To the manufacturers' credit, the world of pediatric studies was highly unregulated, ethically complicated, and scientifically challenging.[503] Still, pharmaceutical companies knew that physicians would go off-label to prescribe to their pediatric patients the drugs that were indicated for adult

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MONT. L. REV. 275, 276–77 (1998); Michael E. Horwin, *Ensuring Safe, Effective Vaccines for Children*, 37 CAL. W. L. REV. 321, 328–29 (2001); Breen, *supra* note 63, at 321–26.

[502] *See* National Swine Flu Immunization Program of 1976, 42 U.S.C. § 247b(k)(1)(A) (repealed 1978) for another example of tort liability protection for manufacturers. In March 1976, there was an outbreak of an influenza named swine flu. Congress attempted to establish a vaccine program, but the manufacturers refused to produce the vaccine without insurance against tort claims, and insurance companies refused to stand behind the vaccine. FOOD AND DRUG LAW, *supra* note 106, at 716. Congress solved the problem by creating the National Swine Flu Immunization Program, which directed all liability suits arising from claims of alleged vaccine injury to be brought against the United States government under procedures almost identical to those of the Federal Tort Claims Act. *Id.* at 717.

[503] *See* Children's Health Act of 2000, Pub. L. No. 106-310, 114 Stat. 1101 (codified as amended in scattered sections of 42 U.S.C., 21 U.S.C., 28 U.S.C., 18 U.S.C., and 25 U.S.C.). It was not until this Act that the FDA enacted clear guidelines regarding the ethics of pediatric testing. *See supra* text accompanying note 57.

diseases.[504] It is hard to justify either their decision to avoid testing or the government's decision to ignore this pattern of pediatric research.

With the 1998 final rule, the FDA attempted to include children into general safety and effectiveness standards for drugs. This radical step toward finally integrating pediatric clinical testing into the same regime as that of adults was thrown off course by Congress in 1997 and again in 2002 when Congress offered pharmaceutical companies rewards for such efforts on behalf of children. Thus, Congress set the tone for the pharmaceutical industry and the pediatric health community, suggesting that it was reasonable for pharmaceutical companies to receive inducements to complete basic pediatric tests. This incentive structure framed the entire debate over the BPCA.

The strongest argument in support of this incentive structure is that without it pharmaceutical companies would not be willing to conduct pediatric tests. This argument depends, however, on a voluntary system of pediatric testing. If Congress had codified the FDA's power to require testing in all new and already marketed drugs, the notion of an incentive or reward for testing would appear ludicrous. It is the controlling idea that testing children is a private and sensitive decision for the pharmaceutical company to make, not one to be imposed by the government, that made it possible for the incentive structure to be created and survive.

Congress, the pharmaceutical industry, and children's advocates should dispense with the notion that pediatric testing should be a voluntary decision on the part of a pharmaceutical company. Justifications for a voluntary structure should be met directly by legislation and regulations, and not by an incentive structure. For example, one argument for a voluntary system is that pediatric testing is ethically challenging.[505] Rather than paying companies to undertake "ethical risks," it would be better health policy and more economically efficient to spend time improving ethical guidelines, training pediatric ethicists, and equipping the FDA to actively participate in helping pharmaceutical companies plan studies. Similarly, pharmaceutical companies fear that they will be exposed to litigation both at the testing stage if their tests harm children, and at the marketing stage if their drugs cause adverse affects when used for a labeled indication. Congress could allay industry concerns by creating an arm of the FDA to assist pharmaceutical companies in dealing with the scientific challenges that children pose. It could also create legal protections, such as an FDA defense or an administrative compensation program to minimize the risk of high stakes tort litigation, which is one of the industry's largest concerns.

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[504] *See generally* Henry, *supra* note 104, at 379.

[505] *See* Notice of Publication of the Executive Summary of the Report "Ethical and Policy Issues in Research Involving Research Participants," by the National Bioethics Advisory Commission, 66 Fed. Reg. 45,998, 46,000, (Aug. 31, 2001).

The current voluntary incentive system costs the public billions of dollars, is inequitable, and is poor health policy. It fails to address the underlying concerns about pediatric health by requiring that studies be performed ethically and safely and that marketed drugs be safe and effective. Thus, while the BPCA is an important step toward improved pediatric health, it is simply a modern extension of past neglect of pediatric clinical testing. Congress should reconsider its legislative effort to encourage pediatric testing. It should codify the 1998 final rule and finance the FDA to address the pharmaceutical companies' concerns regarding pediatric testing.

SYMPOSIUM: AFFIRMATIVE ACTION IN HIGHER EDUCATION

THE AFFIRMATIVE ACTION DEBATE

In the spring of 2002, Harvard University was embroiled in racial controversy. At Harvard Law School, a series of alleged racially insensitive incidents involving both students and professors sparked student response and caught the attention of the national press.[1] Cornell West, a prominent professor of Afro-American studies, left Harvard for Princeton after a disagreement with University President Lawrence Summers over, among other things, the depth of the University's commitment to affirmative action.[2] Against this background, the *Harvard Journal on Legislation* held its annual Symposium entitled "Affirmative Action in Higher Education"—a topic of heightened importance at the time given the controversy at the University. The Symposium was divided into two panels: (1) Constitutionality: From *Bakke* to *Hopwood*, *Gratz*, and Beyond; and (2) Policy: The Merits of Race-Based Admissions and its Alternatives.

I. BACKGROUND: THE AFFIRMATIVE ACTION DEBATE

In the context of higher education, the practice of actively seeking to admit racial minorities began as early as 1835.[3] Even with this long practice, however, affirmative action[4] has never had substantial public support.[5] With respect to college admissions, the opposition to affirmative

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[1] *See, e.g.*, Tamar Lewin, *Comments Concerning Race Divide Harvard Law School*, N.Y. TIMES, Apr. 20, 2002, at A14.

[2] Jacques Steinberg & Pam Belluck, *Harvard Loses a Second Black Scholar to Princeton*, N.Y. TIMES, Apr. 13, 2002, at A1.

[3] In 1835, the Oberlin College Board of Trustees declared that "the education of the people of color is a matter of great interest and should be encouraged and sustained at this institution." WILLIAM G. BOWEN & DEREK BOK, SHAPE OF THE RIVER 4 (1998). By 1965, however, only 4.8 % of all United States college students were African American. *Id.*

[4] For the purposes of this Essay, "affirmative action" refers to the use of preferences based on race either for the purposes of university admissions or financial aid and scholarships. During the Symposium, Congressman John Conyers (D-Mich.) made the point that affirmative action also may exist in other forms, such as outreach programs or the use of "soft" goals rather than mandatory preferences. As noted by panelist Curt Levey, however, such programs generally are not contested; therefore, this writing will not consider them. *But see* Peter H. Schuck, *Affirmative Action: Past, Present, and Future*, 20 YALE L. & POL'Y REV. 1, 6–7 (2002) (noting that outreach programs may be problematic because they utilize resources for the benefit of one group at the expense of another).

[5] Schuck, *supra* note 4, at 55.

action is large even among African Americans and other minorities.[6] Affirmative action has also been a divisive issue in the Supreme Court.[7] Nevertheless, despite public opposition and a recent series of judicial and legislative attacks, affirmative action has survived.[8]

Supporters have put forth several rationales in support of affirmative action in higher education. First, proponents argue that affirmative action is necessary to compensate groups that have been victimized in the past, often by the government.[9] This rationale holds especially true for African Americans, who were brought to the United States under force, sold into slavery, and, after emancipation, legally discriminated against for more than a century under segregation and Jim Crow laws.[10] Corrective justice, it follows, requires that our society do what it can to restore victims' descendants to the position that they would have been in had these wrongs not been committed.[11]

A second argument that supporters make is that American society needs affirmative action to correct systemic biases in university admissions that disadvantage minority applicants. "Color-blind" admissions, they argue, work against minorities by relying heavily on standardized test scores that "[do] a better job predicting the socio-economic status of the test taker's parents than predicting college performance."[12] In addition, "color-blind" admissions processes give bonuses to students who are enrolled in Advanced Placement ("AP") courses.[13] Since many high schools do not offer AP courses, the high schools that students attend can play very large roles in their chances for admission. For example, at the University of California at Berkeley ("Berkeley"), reliance on AP courses shuts out many minority applicants because their high schools do not

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[6] *See id.* Additionally, in the area of hiring and promotions, more than a third of African Americans and seventy percent of Hispanic Americans oppose racial preferences, with the level of opposition rising somewhat over time. *Id.* at 54–55. Researchers have also found that opposition among whites is just as strong on the political left as it is on the right. *See id.* at 57.

[7] After the seminal case of *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), the Court decided twelve affirmative action cases (through the 1986 term). Nine of the twelve were decided by five to four or six to three votes, and the twelve generated forty-six opinions. Lee Epstein & Jack Knight, *Piercing the Veil: William J. Brennan's Account of the* Regents of the University of California v. Bakke, 19 YALE L. & POL'Y REV. 341, 370 (2001).

[8] Scholars have pointed to several explanations for affirmative action's survival, including political and administrative inertia. Schuck, *supra* note 4, at 58–59. Affirmative action may also be an example of what Professor James Q. Wilson has called "clientist politics," where the benefits of a program are concentrated on a relatively small but intense group while its costs are spread among a much larger but more diffuse group for whom the issue is less significant. *Id.* at 60.

[9] *See id.* at 22–23.

[10] *See id.* at 22.

[11] *Id.* at 23.

[12] Charles R. Lawrence, *Two Views Of The River: A Critique Of The Liberal Defense Of Affirmative Action*, 101 COLUM. L. REV. 928, 945 (2001).

[13] *See id.* at 943.

have the resources to offer AP courses.[14] Finally, supporters of affirmative action argue that "color-blind" admissions give bonuses for criteria unrelated to academic merit, such as being the child of an alumnus.[15] Affirmative action is therefore necessary to correct biases in admissions processes that systematically impede minority enrollment.[16]

A third rationale for affirmative action is that it is necessary for the creation of a class of minority professionals who can serve as role models for members of underprivileged groups.[17] Proponents argue that, absent affirmative action, minority admissions would decrease significantly at elite institutions, thereby perpetuating the cycle of disadvantage.[18] In contrast, substantial evidence indicates that affirmative action increases opportunities for minorities; moreover, beneficiaries of affirmative action succeed and go on to serve in their communities.[19] By furthering opportunities for minorities, then, affirmative action helps minority communities develop role models who provide inspiration to their younger members and give them confidence that they can succeed despite disadvantage.[20]

Finally, supporters argue that affirmative action is necessary to maintain intellectual diversity at schools. Justice Powell articulates this "diversity rationale" in *Bakke* in the following manner: "The atmosphere of speculation, experiment and creation—so essential to the quality of higher education—is widely believed to be promoted by a diverse student body."[21] Proponents of this argument point to research showing that surrounding a student with members of different races improves his or her

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[14] *See id.* at 944. Lawrence notes that, according to the plaintiffs in recent litigation in California, as many as twenty-five percent of California's high schools offer no AP courses, while four percent offer twenty-one or more. *Id.* After the adoption of race-neutral admissions in California, 750 Latino, African American, and Filipino American students with 4.0 grade point averages ("GPAs") were denied admission to Berkeley because they could not compete with students from wealthier schools, whose GPAs were boosted to as much as 5.0 as a result of bonuses awarded for AP courses. *Id.* at 944–45.

[15] *See* Schuck, *supra* note 4, at 25.

[16] *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 306 n.43 (1978) (plurality opinion). Justice Powell acknowledges that affirmative action could also correct systemic biases in grading or testing. *See id.* Justice Powell does not address whether this interest is compelling, instead arguing that, to the extent that it is used to correct inaccuracies in predicting student performance, affirmative action is really no preference at all. *See id.*

[17] *See* Schuck, *supra* note 4, at 30–31.

[18] *See* BOWEN & BOK, *supra* note 3, at 32–33 (stating that the probability of admission of African American applicants under a race-neutral admissions process would drop from 41.9 % to 13.0 %).

[19] *See id.* at 155–74 (arguing that African American beneficiaries of affirmative action are "much more likely than their white classmates to have taken on leadership positions in virtually every type of civic endeavor."). *But see* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 275–76 (1986) (finding that hiring or firing teachers based on race in order to provide role models for minority students allows engaging in discriminatory hiring and layoff practices long past the point required by any legitimate remedial purpose).

[20] *See* Schuck, *supra* note 4, at 30–31.

[21] *Bakke*, 438 U.S. at 312 (plurality opinion) (internal quotations and citations omitted).

academic success.[22] There is also evidence indicating that most people think it is important to learn to work effectively and coexist peacefully with people of other races, and that their college experiences helped cultivate these abilities.[23] Thus, supporters argue, affirmative action not only improves opportunities for its beneficiaries but also advances the interests of all students and society in general.

Of course, affirmative action is not without its critics. Most importantly, critics note the inherent unfairness of giving an advantage to one applicant based on race at the expense of other students.[24] Furthermore, they argue that the cost-bearers of affirmative action programs are innocent with respect to transgressions of the past and, therefore, should not have to pay for them.[25] This effect is especially problematic when the cost-bearers are other minorities, such as Asian Americans, who have also faced substantial disadvantages.[26] To argue that the benefits of affirmative action should fall on middle and upper-class minorities of one group[27] at the expense of poor students of other minority groups merely because those groups are well-represented at universities seems especially harsh.[28]

A second problem noted by critics is that affirmative action puts a stigma on its beneficiaries. Justice Powell wrote that "preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth."[29] In addition, critics argue that beneficiaries of affirmative action have lower academic performance and higher drop-out rates.[30] Thus, affirmative action may fur-

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[22] *See* Jeffrey D. Grosset, Note, *Upholding Diversity in the Classroom as a Compelling Interest*, 52 CASE W. RES. L. REV. 339, 358 (2001).

[23] Schuck, *supra* note 4, at 42.

[24] *See, e.g., id.* at 65; Krista L. Cosner, Note, *Affirmative Action in Higher Education Lessons and Directions from the Supreme Court*, 71 IND. L.J. 1003, 1009 (1996).

[25] *See* Schuck, *supra* note 4, at 23.

[26] *See, e.g.*, Gitanjali S. Gutierrez, Note, *Taking Account of Another Race: Reframing Asian-American Challenges to Race-Conscious Admissions in Public Schools*, 86 CORNELL L. REV. 1283, 1287 (2001); Schuck, *supra* note 4, at 68. During the nineteenth century, Asian laborers worked in conditions of servitude comparable to those under slavery. *See id.* Cases such as the Chinese Exclusion Case, Chae Chan Ping v. U.S., 130 U.S. 581 (1889), and the Japanese Internment Cases, *e.g.*, Korematsu v. U.S., 323 U.S. 214 (1944), increased disadvantages faced by Asians. *Id.* Furthermore, unlike African Americans, Asians could not become naturalized citizens until 1952. *Id.*

[27] The beneficiaries of affirmative action in college admissions largely come from middle and upper-class families. Schuck, *supra* note 4, at 64.

[28] *See* Podberesky v. Kirwan, 38 F.3d 147 (4th Cir. 1994) (striking down a University of Maryland scholarship program that only benefited African American students—suit was brought by a Hispanic student—because it was not narrowly tailored to remedy any past discrimination by the University).

[29] Univ. of Cal. v. Bakke, 438 U.S. 265, 298 (1978) (plurality opinion). *See also* Hopwood v. Texas, 78 F.3d 932, 947 (5th Cir. 1996) (citing Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954)) (stating that classification based on race creates feelings of inferiority).

[30] Schuck, *supra* note 4, at 71.

ther the impression that minorities are unable to achieve without preferential treatment; this may only exacerbate racial tensions on college campuses by advancing the very prejudices affirmative action is designed to prevent.[31]

Finally, critics point out that the "diversity rationale" for affirmative action is hollow if universities make no attempts to diversify the student body in other ways beyond race. Race, they argue, is only one aspect of diversity;[32] yet, universities that employ affirmative action programs generally make no attempt to diversify based on other criteria, such as political affiliation or religion.[33] Instead, they rely on race as a proxy for diversity of viewpoints.[34] Affirmative action programs therefore ignore how "diverse" American society really is.[35]

Given the substantial policy concerns involved, it is not surprising that affirmative action in higher education has been the subject of much litigation. The Supreme Court, though, has only addressed the issue once. In *Regents of the University of California v. Bakke*,[36] an applicant to the University of California at Davis ("Davis") Medical School challenged the school's use of race in its admissions decisions.[37] In a plurality opinion written by Justice Powell, the Court held that, while race may be considered in admissions, the Davis affirmative action program was unlawful.[38] In striking down the program, four Justices declined to reach the question of whether the Davis program violated the Equal Protection Clause,[39] holding that the program violated Title VI[40] of the Civil Rights Act of 1964.[41] Another four Justices, led by Justice Brennan, would have

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[31] Cosner, *supra* note 24, at 1011. Professor Christopher Edley argued during the Symposium, however, that even assuming this effect exists, he would gladly bear the cost of people thinking he is only successful because of affirmative action if it means that countless other African Americans would be able to benefit from it.

[32] *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 315 (plurality opinion).

[33] *See* Schuck, *supra* note 4, at 38.

[34] *See, e.g.*, *Hopwood*, 78 F.3d at 946 (arguing that the use of race as a proxy for diversity is exactly the type of harm the Fourteenth Amendment was designed to eliminate).

[35] *See* Schuck, *supra* note 4, at 38.

[36] 438 U.S. 265 (1978).

[37] *Id.* at 269–70 (plurality opinion). The school operated a dual-track admissions program, whereby several seats in each class were set aside for minority applicants. *Id.* at 276 (plurality opinion). The plaintiff was considered under the "general admissions" program and was twice rejected from the school. *Id.* at 276–77 (plurality opinion). In both years in which the plaintiff was rejected, applicants under the special admissions program were admitted with scores "significantly lower" than the plaintiff's. *Id.* at 277 (plurality opinion).

[38] *See id.* at 320 (plurality opinion).

[39] U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

[40] Title VI, 42 U.S.C. § 2000d (1994), provides that "no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." *Id.*

[41] *Bakke*, 438 U.S. at 412 (Stevens, J., concurring in part and dissenting in part). Jus-

upheld Davis's program under the Equal Protection Clause by applying intermediate, rather than strict, scrutiny.[42] To those Justices, the program only involved "benign" discrimination and thus had to pass a lower level of scrutiny.[43]

Only Justice Powell decided to strike down the Davis program on Equal Protection grounds.[44] While joining Justice Brennan in holding that race may be used as a factor in admissions, Justice Powell wrote that any racial classifications would be subject to strict scrutiny: "[w]hen they touch upon an individual's race or ethnic background, he [sic] is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest."[45] The University had put forth four interests that it argued met the compelling state interest test: "(i) reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession; (ii) countering the effects of societal discrimination; (iii) increasing the number of physicians who will practice in communities currently underserved; and (iv) obtaining the educational benefits that flow from an ethnically diverse student body."[46] Justice Powell nevertheless found that Davis's program violated the Equal Protection Clause.

Justice Powell rejected the University's first interest as facially invalid.[47] Next, while arguing that the state may have a substantial interest in countering the effects of societal discrimination, Justice Powell rejected this interest as compelling absent judicial, legislative, or administrative findings of specific statutory or constitutional violations.[48] Justice Powell

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tice Stevens was joined by Chief Justice Burger, and Justices Stewart and Rehnquist.

[42] *Id.* at 359 (Brennan, J., concurring in part and dissenting in part).

[43] *See id.* at 357 (Brennan, J., concurring in part and dissenting in part) (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973), for the proposition that "[n]or do whites as a class have any of the 'traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.'"); *id.* at 359 (stating that "racial classifications designed to further remedial purposes 'must serve important governmental objectives and must be substantially related to achievement of those objectives.'"); Epstein & Knight, *supra* note 7, at 361.

[44] *Bakke*, 438 U.S. at 320 (plurality opinion).

[45] *Id.* at 299 (plurality opinion). It was not until the Court's decision in City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989), however, that a majority of the Court held that "benign" discrimination under affirmative action programs is also subject to strict scrutiny.

[46] *Bakke*, 438 U.S. at 306 (plurality opinion) (internal quotations and citations omitted).

[47] *Id.* at 307 (plurality opinion).

[48] *Id.* at 307 (plurality opinion). Justice Powell argued that such findings would delineate the extent of injury caused by discrimination, and the nature of the necessary remedy, and that they would ensure that remedial action is subject to oversight that would limit the harm to third parties. *Id.* at 307–08 (plurality opinion). Absent such findings, he wrote, the government has no reason to favor helping one individual over hurting another. *Id.* at 308–09 (plurality opinion). *See also* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 276 (1986) ("[S]ocietal discrimination, without more, is too amorphous a basis for imposing a racially

then assumed that the interest in increasing the number of physicians in underserved communities could be compelling, but he found that Davis's program was not narrowly tailored to meet this interest.[49]

Davis's final interest, the "diversity rationale," has been the subject of considerable discussion, both among academics and in recent litigation.[50] Justice Powell wrote that, while diversity in the classroom is a compelling interest, diversity consists of more than racial diversity.[51] Indeed, it includes "a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element."[52] Insofar as the Davis program used a quota which focused solely on racial diversity, it was not narrowly tailored and, therefore, violated the Equal Protection Clause.[53]

In recent years, affirmative action in higher education has been subject to both judicial and legislative challenges. Most significantly, the Fifth,[54] Sixth,[55] and Ninth[56] Circuits have reached different conclusions about whether diversity in the classroom constitutes a compelling interest for the purposes of strict scrutiny. First, in *Hopwood v. Texas*, the Fifth Circuit held that student body diversity is not a compelling governmental interest.[57] The *Hopwood* court pointed out that, although Justice Powell announced the decision of the Supreme Court in *Bakke*, no other Justice joined the portion of his opinion discussing the "diversity rationale."[58] The court further noted that since *Bakke*, the Supreme Court has adopted the "diversity rationale" only once, in *Metro Broadcasting, Inc. v. Fed-*

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classified remedy.").

[49] *See Bakke*, 438 U.S. at 310 (plurality opinion).

[50] *See, e.g.*, Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996); Schuck, *supra* note 4, at 34–46. *See generally* Grosset, *supra* note 22; Lawrence, *supra* note 12.

[51] *See Bakke*, 438 U.S. at 315 (plurality opinion).

[52] *See id.* (plurality opinion).

[53] *See id.* (plurality opinion).

[54] *See Hopwood*, 78 F.3d at 932.

[55] *See* Grutter v. Bollinger, 288 F.3d 732 (6th Cir. 2002) (en banc), *cert. granted*, 71 U.S.L.W. 3154 (U.S. Dec. 2, 2002) (No. 02-241). The Sixth Circuit's decision in *Grutter* was handed down after this Symposium was held.

[56] *See* Smith v. Univ. of Wash., 233 F.3d 1188 (9th Cir. 2000).

[57] *Hopwood*, 78 F.3d at 944. The plaintiffs in *Hopwood* argued that the use of race-based preferences at the University of Texas Law School violated the Equal Protection Clause. *Id.* at 938. The school's admissions policy placed students into "presumptive admit," "presumptive deny," or a middle "discretionary zone" based on the composite of their GPAs and LSAT scores. *Id.* at 935. Under the school's affirmative action program, the threshold composite score for each category was lower for African American and Mexican American applicants. *Id.* at 936. In addition, African American and Mexican American applicants placed into the discretionary zone had their applications reviewed by a separate minority subcommittee. *Id.* at 937. The plaintiffs were rejected from the law school after they were placed into the discretionary zone, *id.* at 938, despite the fact that each of their composite scores would have put them into the presumptive admit category for African American and Mexican American applicants. *See id.* at 936 (noting the threshold score for each admissions category).

[58] *Id.* at 944.

eral Communications Commission.[59] Because *Metro Broadcasting* relied on intermediate scrutiny in its analysis,[60] however, no case since *Bakke* has held that diversity is a compelling state interest.[61] Thus, the *Hopwood* court held that Justice Powell's opinion, insofar as it held that diversity is a compelling state interest, is not binding on lower courts.[62]

In contrast, both the Ninth and Sixth Circuits have held that diversity is a compelling interest for the purposes of the Fourteenth Amendment. First, in *Smith v. University of Washington Law School*,[63] the Ninth Circuit held that Justice Powell's holding on the "diversity rationale" is indeed binding.[64] Although Justice Brennan's opinion never mentioned diversity as a compelling interest, the court explained that his broader acceptance of societal discrimination as a justification for affirmative action would have encompassed the narrower "diversity rationale" as a compelling state interest.[65] Thus, the *Smith* court decided that five Justices in *Bakke* had found the diversity rationale compelling, thereby deciding the issue definitively for lower courts.[66]

The Sixth Circuit, in *Grutter v. Bollinger*,[67] substantially agreed with *Smith*'s analysis and held that Justice Powell's opinion in *Bakke* is binding precedent.[68] The *Grutter* court also noted that, in *Metro Broadcasting*, a majority of the Supreme Court cited *Bakke* for the proposition that "a

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[59] 497 U.S. 547 (1990).

[60] *See id.* at 566.

[61] *Hopwood*, 78 F.3d at 944.

[62] *Id.*

[63] 233 F.3d 1188 (9th Cir. 2000). In *Smith*, three white applicants to the University of Washington Law School were denied admission. *Id.* at 1191–92. The school acknowledged that it used race as a factor in the admissions process in order to "assure" a diverse student body. *Id.* at 1191.

[64] *Id.* at 1200.

[65] *Id.* at 1198–2000. The Ninth Circuit based its analysis on Marks v. U.S., 430 U.S. 188 (1977), where the Supreme Court said that "when a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." Smith, 233 F.3d at 1199 (quoting *Marks*, 430 U.S. at 193) (internal quotations omitted). The Ninth Circuit's opinion in *Smith* directly contradicts the Fifth Circuit's opinion in *Hopwood*. *See id.* at 1200 n.9.

[66] *Id.* at 1200.

[67] 288 F.3d 732 (6th Cir. 2002) (en banc), *cert. granted*, 71 U.S.L.W. 3154 (U.S. Dec. 2, 2002) (No. 02-241). The University of Michigan Law School employed a race-conscious admissions program that had a stated goal of admitting "a mix of students with varying backgrounds and experiences who will respect and learn from each other." *Id.* at 736. As part of its policy, the law school gave:

> [A] commitment to racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against . . . who without this commitment might not be represented in our student body in meaningful numbers. Students from such racial and ethnic groups are particularly likely to have experiences and perspectives of special importance to our mission.

Id. at 737 (internal quotations omitted).

[68] *See id.* at 741.

diverse student body contributing to a robust exchange of ideas is a constitutionally permissible goal on which a race-conscious university admissions program may be predicated."[69] The *Grutter* court therefore concluded that a diverse student body is a compelling state interest under the Fourteenth Amendment.[70]

The extent to which affirmative action programs meet the narrow tailoring requirement under strict scrutiny analysis has also been the subject of several circuit court decisions. The Sixth Circuit noted in *Grutter* that Justice Powell's opinion in *Bakke* laid out two guidelines regarding narrow tailoring analysis for race-based affirmative action: (1) segregated dual-track systems with quotas for minority students are unconstitutional, and (2) affirmative action plans, where race and ethnicity are considered a plus, are constitutional.[71] The *Grutter* court held that the University of Michigan plan at issue was narrowly tailored, finding that it fell under the second category and largely resembled the "Harvard Plan,"[72] which Justice Powell found constitutional.[73]

In contrast, in *Johnson v. Board of Regents of the University of Georgia*, the Eleventh Circuit struck down the University of Georgia's affirmative action plan because it was not narrowly tailored.[74] The University's plan admitted students in three stages.[75] Under the school's affirmative action program, applicants who were not admitted automatically as a result of their grade point averages ("GPAs") and SAT scores were accorded a set number of points on their application if they were members of a minority group.[76] The *Johnson* court identified four factors relevant to determining whether an affirmative action program meets the requirements of narrow tailoring: (1) whether the policy uses race in a rigid or mechanical way that does not take sufficient account of the different contributions to diversity that individual candidates may offer, (2) whether the policy fully and fairly takes account of race-neutral factors that may contribute to a diverse student body, (3) whether the policy gives an arbitrary or disproportionate benefit to members of groups favored under it, and (4) whether the school has genuinely considered race-neutral alternatives for creating student body diversity and rejected them as inadequate.[77] Finding that the University of Georgia arbitrarily and mechanically applied the bonuses given to minority applicants, neither taking into account other diversity factors nor genuinely considering

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[69] *Id.* at 743 (internal quotations omitted).
[70] *Id.* at 742.
[71] *See id.* at 745–46.
[72] *See id.* at 742.
[73] *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 318 (1978) (plurality opinion).
[74] 263 F.3d 1234, 1244–45 (11th Cir. 2001).
[75] *Id.* at 1240–41.
[76] *Id.* at 1241.
[77] *See id.* at 1253.

race-neutral alternatives, the court held that the university's program was not sufficiently narrowly tailored to withstand strict scrutiny.[78]

In addition to being heavily litigated, affirmative action has also been the subject of several legislative and executive measures in recent years.[79] Most notably, in 1996, California voters approved Proposition 209, eliminating affirmative action in various domains, including education.[80] Voters in Washington approved a similar referendum two years later.[81] In addition to these measures, Governor Jeb Bush of Florida signed an executive order in 1999 banning the use of affirmative action in college admissions in Florida.[82]

In the face of these challenges to affirmative action, scholars have suggested several race-neutral alternatives to maintain diversity and create opportunities for minority applicants, without encountering the negative consequences of race-conscious admissions. One such alternative is affirmative action based on class rather than race.[83] Proponents of class-based affirmative action argue that, while it would provide opportunities primarily to disadvantaged minority students, it would do so in a race-neutral fashion.[84] Critics of such programs point out that, although a disproportionate number of minorities are poor, class-based affirmative action would predominantly favor whites since poor whites outnumber poor minorities.[85] Class-based programs also ignore the fact that middle-class minorities still face substantial disadvantages because of the lack of resources in their communities.[86] When properly applied, though, class-based affirmative action may benefit minority applicants. Proponents have noted that class-based affirmative action plans that utilize broad measures of resource availability (such as resources available in applicants' schools), rather than merely using income as a measure of class, can effectively advantage minority applicants in a race-neutral manner.[87]

A second alternative to race-based admissions is to employ a "direct measures" program.[88] Under such a program, universities would give admissions preferences to applicants who demonstrate either: (1) that they

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[78] *See id.* at 1254–61.

[79] Some have argued that, because elected officials fear being labeled racist or insensitive to minority interests, legislative challenges to affirmative action generally have taken the form of ballot referenda. *See, e.g.*, Schuck, *supra* note 4, at 61–62.

[80] *See* CAL. CONST. art. I, § 31. The Regents of the University of California eliminated affirmative action in admissions several months prior to the passage of Proposition 209. *See* David Roithmayr, *Direct Measures: An Alternative Form of Affirmative Action*, 7 MICH. J. RACE & L. 1, 2 (2001).

[81] *See* WASH. REV. CODE ANN. § 49.60.400 (West 2002).

[82] *See* Fla. Governor Exec. Order No. 99-281 (1999).

[83] *See generally* R. Richard Banks, *Meritocratic Values and Racial Outcomes: Defending Class-Based College Admissions*, 79 N.C. L. REV. 1029 (2001).

[84] Schuck, *supra* note 4, at 80.

[85] *See, e.g., id.*; BOWEN & BOK, *supra* note 3, at 47.

[86] Roithmayr, *supra* note 80, at 11.

[87] *See* Banks, *supra* note 83, at 1067–68.

[88] *See generally* Roithmayr, *supra* note 80.

have suffered from the effects of racial discrimination, (2) that they are likely to contribute an important and under-represented viewpoint to the classroom on issues of social or racial justice, or (3) that they are likely to provide resources to underserved communities.[89] A direct measures program would be designed to fulfill several of the goals underlying affirmative action—providing opportunity to those who face disadvantage, achieving diversity in the classroom, and training leaders to serve in disadvantaged communities—without resorting to race as a proxy for these characteristics.[90]

Finally, in recent years several states have adopted so-called "X-percent" programs, which guarantee admission to students if they fall within a certain percentage of students at the top of their high school class.[91] Texas, California, and Florida have adopted such programs, admitting the top ten percent, four percent, and twenty percent, respectively.[92] Like other alternatives, X-percent programs have the advantage of increasing diversity despite race neutrality.[93] Critics of these programs note, though, that they only apply to undergraduate admissions.[94] More importantly, X-percent programs would only achieve diversity in highly segregated states, causing many states to reject them.[95]

The end of affirmative action in several states and the adoption of race-neutral alternatives has had a mixed impact on minority enrollment. For example, after Proposition 209 went into effect, minority enrollment in the freshman class at Berkeley was cut in half.[96] The same year at the Berkeley School of Law, only eighteen African American candidates were admitted, fifty-nine fewer than the year before.[97] In addition, at the University of California at Los Angeles Law School, the number of African American students admitted dropped from 104 to 21 (8 of whom enrolled).[98] Supporters of affirmative action point to these cases as indicating the continued need for race-conscious admissions.

This evidence notwithstanding, many argue that the "nightmare" of the end of affirmative action has not played out.[99] For example, although

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[89] *Id.* at 6.

[90] *Id.*

[91] Schuck, *supra* note 4, at 74.

[92] *See id.*; Roithmayr, *supra* note 80, at 12.

[93] *See* Roithmayr, *supra* note 80, at 12. Roithmayr notes mixed results for the X-percent programs. Significantly, though, Texas's program was successful when combined with outreach programs targeted at minority students. *See id.*

[94] *See id.* at 12.

[95] *See id.* at 13. These programs may also disadvantage students who attend highly competitive high schools and who might fall outside the top X percent of their class despite substantial achievement.

[96] James Traub, *Class of Prop. 209*, N.Y. TIMES, May 2, 1999, § 6 (Magazine), at 44.

[97] Lawrence, *supra* note 12, at 929. None of the eighteen matriculated, although one African American student entered the class after deferring enrollment for a year. *Id.*

[98] Anthony Lewis, *Violin in the Wings*, N.Y. TIMES, Nov. 28, 1997, at A39.

[99] *See, e.g.*, Schuck, *supra* note 4, 73–78.

schools such as Berkeley saw a drop in minority admissions after Proposition 209, students who were not admitted to these schools were admitted to lower ranked schools within the University of California system.[100] In addition, race-neutral alternative plans have been used to counteract the effects of the end of affirmative action. For example, after including a race-neutral device in its admissions program, Berkeley reported a thirty percent increase in minority enrollment a year after the initial drop following Proposition 209.[101] The University of Texas at Austin has also reported a return to pre-*Hopwood* minority enrollment as a result of the success of its Ten Percent Plan.[102] Thus, while the end of affirmative action would probably lead to substantial decreases in minority enrollment at the nation's most prestigious universities, these effects may only be temporary if universities aggressively seek race-neutral alternatives to counter the re-segregation of their campuses.

The following is a summary of key points made by each speaker at the Symposium during their opening remarks.

PANEL ONE—CONSTITUTIONALITY: FROM *BAKKE* TO *HOPWOOD*, *GRATZ*,[103] AND BEYOND

MODERATOR:

Richard Fallon is professor of law at Harvard Law School, where he began teaching in 1982. His research interests include constitutional law and theory and the federal court system. He is the author of *Implementing the Constitution*,[104] and co-author of *Constitutional Law: Cases, Comments, and Questions.*[105] Professor Fallon received his A.B. from Yale, a B.A. from Oxford University as a Rhodes Scholar, and his J.D. from Yale University Law School.

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[100] Traub, *supra* note 96, at 44–46. *Cf.* Schuck, *supra* note 4, at 32 (critiquing a study examining the positive affects of affirmative action on African American enrollment in highly selective institutions by noting that, absent affirmative action, these students would have attended other institutions that graduated more African Americans than those studied).

[101] Traub, *supra* note 96, at 46.

[102] *See* UNIV. OF TEX. AT AUSTIN, IMPLEMENTATION AND RESULTS OF THE TEXAS AUTOMATIC ADMISSIONS LAW (HB 588) AT THE UNIVERSITY OF TEXAS AT AUSTIN, REPORT No. 4, at 3 (2001), *available at* http://www.utexas.edu/student/research/reports/admissions/HB588-Report4.pdf. *But see supra* note 93.

[103] Gratz v. Bollinger, 135 F. Supp. 2d 790 (involving a challenge to the University of Michigan undergraduate admissions program). *Gratz* was combined with *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002) (en banc), on appeal. Although the district court opinion in *Gratz* was reversed in part and remanded in part in *Grutter*, the Sixth Circuit reserved its decision on the University of Michigan affirmative action program for a forthcoming opinion. *Grutter*, 288 F.3d at 735 n.2.

[104] RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION (2001).

[105] JESSE H. CHOPER & RICHARD FALLON, JR. ET AL., CONSTITUTIONAL LAW: CASES, COMMENTS, AND QUESTIONS (9th ed. 2001).

PANELISTS:

Congressman John Conyers (D-Mich.) is serving his nineteenth term as U.S. Representative for the Fourteenth Congressional District of Michigan. Congressman Conyers is the second most senior member of the House and is the ranking Democrat on the House Judiciary Committee. Congressman Conyers is one of the founders and is considered the Dean of the Congressional Black Caucus. Congressman Conyers is a strong proponent of minority rights legislation in Congress, including the Hate Crimes Prevention Act of 1999.[106] Congressman Conyers received his B.A. and J.D. from Wayne State College.

Gail Heriot is professor of law at the University of San Diego School of Law and a frequent critic of racial and gender preferences. Her work on the subject has appeared in law reviews as well as the *Wall Street Journal*, the *National Review*, the *Weekly Standard*, the *Los Angeles Times*, and other newspapers and magazines. In 1996, Professor Heriot was Co-Chair of the Proposition 209 Campaign and served as Civil Rights Counsel to the Senate Judiciary Committee in 1998. Professor Heriot received her B.A. from Northwestern University and J.D. from the University of Chicago.

Curt Levey is Director of Legal and Public Affairs at the Center for Individual Rights ("CIR"). He writes and speaks about a variety of legal issues, including racial and gender preferences, free speech, religious liberty, constitutional limits on federal power, and sexual harassment. Since joining CIR in 1998, Mr. Levey has written about these issues in the *Wall Street Journal*, *USA Today*, the *Legal Times*, and the *National Law Journal*, and spoken about them before the American Bar Association and National Conference of State Legislatures, as well as on television and radio. Mr. Levey received his B.A. and M.S. from Brown University and his J.D. from Harvard Law School.

Richard Parker is professor of law at Harvard Law School. He teaches constitutional law and criminal law as well as seminars entitled "Majority Rule" and "Law and Literature." Professor Parker's recent publications include *"Here the People Rule": A Constitutional Populist Manifesto*,[107] along with essays entitled "Taking Politics Personally,"[108]

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[106] H.R. 1082, 106th Cong. (1999). Congressman Conyers also sponsored the Universal Voter Registration Act of 1993, H.R. 499, 103rd Cong. (1993), and in 1999 he introduced the Traffic Stops Statistics Study Act, H.R. 1443, 106th Cong. (1999), which mandates a Justice Department study of racial bias in traffic enforcement. Congressman Conyers also wrote the Martin Luther King Holiday Act of 1983, H.R. 800, 98th Cong. (1983), the passage of which he worked on for fifteen years after introducing the legislation mere days after Dr. King's assassination.

[107] RICHARD D. PARKER, "HERE THE PEOPLE RULE": A CONSTITUTIONAL POPULIST MANIFESTO (1994).

[108] Richard D. Parker, *Taking Politics Personally*, 12 CARDOZO STUD. L. & LIT. 103

"Power to the Voter,"[109] and "Homeland: An Essay on Patriotism."[110] Professor Parker received his B.A. from Swarthmore College and J.D. from Harvard Law School.

Frank Wu joined the faculty of Howard University School of Law in 1995. Professor Wu teaches courses on civil procedure, the federal courts, and immigration law, in addition to teaching in the school's clinical program. His latest book *Yellow: Race in America Beyond Black and White* was published in early 2002.[111] Professor Wu has a regular column in *A. Magazine*, the largest Asian American interest periodical. Professor Wu received his B.A. from Johns Hopkins University and his J.D. from the University of Michigan, at Ann Arbor.

SUMMARY OF OPENING REMARKS:

Professor Richard Fallon began by noting the timeliness of the Symposium given recent litigation in the area of affirmative action.[112] The Supreme Court has only addressed the issue of affirmative action in higher education once, in *Regents of the University of California v. Bakke*.[113] In *Bakke*, Justice Powell approved the use of racial preferences to achieve permissible diversity in the classroom and to correct for past discrimination by a particular institution. Professor Fallon stated, though, that Justice Powell's opinion left several questions open: he neither explained what constitutes a compelling interest nor the requirements for narrow tailoring. In the past, these ambiguities were the core of the litigation in affirmative action cases. In recent years, however, the extent to which Justice Powell's opinion is binding on lower courts has become widely contested.[114] Consequently, Professor Fallon predicted that the litigation currently pending before the Sixth Circuit (*Grutter*) would probably reach the Supreme Court.[115] He noted that since race-neutral alternatives have been developed in response to *Hopwood* and are now available to schools, the political and legal landscape of the case would be much different than the context surrounding *Bakke*.

Congressman John Conyers, Jr. began by pointing out that the Symposium was taking place because race is still a sensitive and unresolved

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(2000).

[109] Richard D. Parker, *Power to the Voters*, 24 HARV. J. L. & PUB. POL'Y 179 (2000).

[110] Richard D. Parker, *Homeland: An Essay on Patriotism*, 25 HARV. J.L. & PUB. POL'Y 407 (2002).

[111] FRANK H. WU, YELLOW: RACE IN AMERICA BEYOND BLACK AND WHITE (2002).

[112] *See supra* notes 54–78 and accompanying text.

[113] 438 U.S. 265 (1978).

[114] *See, e.g.*, Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996); Smith v. Univ. of Wash., 233 F.3d 1188 (9th Cir. 2000).

[115] The Sixth Circuit has since handed down its decision in this case, and the Supreme Court has taken the decision up on certiorari. *See* Grutter v. Bollinger, 288 F.3d 732 (6th Cir. 2002) (en banc), *cert. granted*, 71 U.S.L.W. 3154 (U.S. Dec. 2, 2002) (No. 02-241).

issue in the United States. The history of African Americans, including the legacies of slavery and segregation, affects the affirmative action debate. Congressman Conyers then shifted his focus to the specific issue of race on admissions in higher education. He argued that decreases in minority admissions after the end of affirmative action in California and Texas underscore the need for affirmative action.[116] There is little incentive, however, for Congress to address affirmative action until the issue of what constitutes a compelling interest is resolved in the courts. Congressman Conyers closed his opening remarks by responding to a question often asked by opponents of affirmative action—why not just end all racial discrimination, whether benign or invidious? In response, he argued that diversity benefits not only minority students, but all students and society in general.

Professor Gail Heriot stated that all Equal Protection issues are difficult to resolve. Instead of banning all consideration of race, the framers of the Fourteenth Amendment chose to adopt the vague "equal protection" language. Professor Heriot argued, however, that when one examines the development of Equal Protection jurisprudence over the last few decades, the argument that affirmative action is unconstitutional is strong. First, the average American does not believe the interest in affirmative action is compelling.[117] Professor Heriot argued that it was particularly wrong to uphold an unpopular case of discrimination when most people do not think the interest is compelling. Second, the drop in minority admissions at schools like Berkeley is logical because the magnitude of preferences under affirmative action was often as much as 300 points on the SATs. Finally, Professor Heriot stated that the academic credentials of admitted students matter. Despite anecdotal evidence to the contrary, most students perform within the range that their SAT scores suggest. For example, prior to the end of affirmative action at the University of California at San Diego ("U.C.S.D."), only a single African American student had a freshman-year G.P.A. above 3.5, as compared to twenty percent of white students. Professor Heriot argued that this is because those students who would have made the honor roll at U.C.S.D. had been admitted to Stanford or Berkeley; thus, the condition at U.C.S.D. erroneously gave the impression that minorities could not compete with whites. After affirmative action, these differences in performance went away. Professor Heriot concluded by arguing that, given all the problems affirmative action seems to create, it is difficult to argue that the state interest in supporting it is compelling.

Curt Levey began by acknowledging that affirmative action consists of more than preferences in admissions; it can also include outreach and de-emphasizing factors that disadvantage minorities, such as standard-

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[116] *See supra* text accompanying notes 99–102.
[117] *See supra* text accompanying notes 5–6.

ized tests. Because most people do not oppose these initiatives, though, Mr. Levey focused on preferences in admissions. He also acknowledged that there is a compelling interest in correcting for past discrimination by specific institutions that discriminated. On the other hand, Mr. Levey argued that the diversity rationale was not compelling because Justice Powell's conclusion that it was compelling in *Bakke* had never attained a majority in the Supreme Court. For example, Powell's "diversity rationale" would allow preferences for any group that would add to the diversity of a school (Indian Americans for example), but eight of nine Justices on the *Bakke* Court would not have allowed preferences for a group unless under-representation was the result of some past discrimination. Mr. Levey also stated that, while diversity is important, race-based preferences are unrelated to the diversity that Justice Powell discussed in his opinion. Most schools that employ affirmative action are not concerned with diversity of viewpoints. Diversity is, therefore, really a euphemism for "quota."

Professor Frank Wu made three points. First, he noted that the terms "color-blind" and "strict scrutiny" have suspect origins. The concept of color-blindness in the law originated in Justice Harlan's concurrence in *Plessy v. Ferguson*.[118] What Justice Harlan was actually saying was that he believed that the white race was superior and that it would maintain its superiority if the law remained color-blind. Strict scrutiny originated in *Korematsu v. United States*,[119] where the Supreme Court upheld the internment of Japanese Americans during the Second World War. Second, Professor Wu stated that people who argue for color-blindness generally are only talking about government action. This narrow focus exists because they believe that the market will take care of private action. Contrary to popular perception, then, color-blindness is not about morality, but rather about limiting government. Third, Professor Wu claimed that those who argue for color-blindness in the context of affirmative action are perfectly willing to adopt invidious color-conscious arguments in other areas, such as in the debates over immigration policies and racial profiling. Professor Wu concluded that arguments in favor of color-blind admissions in higher education should be carefully scrutinized.

Professor Richard Parker stated that, if the Supreme Court were to address the issue of affirmative action in higher education in the near future, Justice O'Connor would be the swing vote on the Court. When addressing the "diversity rationale" in higher education, he noted that the Court likely will ask the following three questions. First, did the university actually study the value of diversity? Second, is the university actually promoting diversity in other ways? This would include whether it promoted racial diversity (i.e., does it allow race-based "theme" housing)

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[118] 163 U.S. 537 (1896).
[119] 323 U.S. 214 (1944).

and whether the university seeks viewpoint diversity in other areas, such as in its faculty. Finally, is the university truly committed to diversity? If so, is it open about its use of racial preferences in admissions? Professor Parker stated that the fact that most universities hide that they employ racial preferences cuts against the diversity argument. Regardless, Professor Parker believed that the "diversity rationale" is on "thin ice" if the Supreme Court grants certiorari to the *Grutter* case.

PANEL TWO—POLICY: THE MERITS OF RACE-BASED ADMISSIONS AND ITS ALTERNATIVES

MODERATOR:

Elena Kagan is professor of law at Harvard Law School, where she began teaching in 1999. Her research interests include constitutional law and administrative law. Professor Kagan received her A.B. from Princeton University, her M.Phil in Politics from Worcester College at Oxford University (which she attended as a Daniel M. Sachs Scholar) and her J.D. from Harvard Law School.

PANELISTS:

Carl Cohen is professor of philosophy at the University of Michigan in Ann Arbor, where he has taught in the Department of Philosophy and the Residential College since 1955. He has served as a member of the admissions committee at both the University of Michigan medical school and undergraduate college. Professor Cohen is the author of *Naked Racial Preference*,[120] *Introduction to Logic*,[121] and other books in political philosophy.

Christopher Edley, Jr. has been professor of law at Harvard Law School since 1981. Professor Edley is founding co-director of The Civil Rights Project, a think tank based at Harvard University. In May 1999, he was appointed to a six-year term on the United States Commission on Civil Rights. Professor Edley served in the Clinton Administration as Special Counsel to the President. In that position, he led the White House review of affirmative action programs and participated in developing the President's July 1995 "Mend it, don't end it" policy on affirmative action. Professor Edley is also the author of a recent book on affirmative action, *Not All Black and White: Affirmative Action, Race and American Values*.[122] Professor Edley received his B.A., M.P.P., and J.D. from Harvard University.

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[120] CARL COHEN, NAKED RACIAL PREFERENCE (1995).

[121] IRVING M. COPI & CARL COHEN, INTRODUCTION TO LOGIC (1998).

[122] CHRISTOPHER F. EDLEY, JR., NOT ALL BLACK AND WHITE: AFFIRMATIVE ACTION, RACE, AND AMERICAN VALUES (1996).

Richard D. Kahlenberg is a senior fellow at the Century Foundation, where he writes about education, equal opportunity, and civil rights. He is the author of *Remedy: Class, Race, and Affirmative Action*,[123] which was named one of the best books of the year by the *Washington Post*. Mr. Kahlenberg's articles on affirmative action and education have been published in the *New York Times*, *Washington Post*, *Wall Street Journal*, and *New Republic*, among other newspapers and magazines. Mr. Kahlenberg received his B.A. and J.D. from Harvard University.

David Montejano is a professor in the Department of Ethnic Studies at the University of California at Berkeley. He joined the Berkeley faculty in September 2002 after teaching at the University of Texas at Austin in the Department of History from 1996 to 2002, and serving as director of the Center for Mexican American Studies from 1996 to 2000. Professor Montejano is one of the chief authors of the Texas "Top Ten Percent" Law. He is also the author of *Anglos and Mexicans in the Making of Texas, 1836–1986*[124] and the editor of *Chicano Politics and Society in the Late Twentieth Century*.[125]

Gary Orfield is professor of education and social policy at Harvard University. He is interested in the study of civil rights, education policy, urban policy, and minority opportunity. Professor Orfield is the director of the Harvard Project on School Desegregation and co-director of the Harvard Civil Rights Project. His recent works include *Diversity Challenged: Evidence on the Impact of Affirmative Action and Raising Standards or Raising Barriers*[126] and *Diversity Challenged: Evidence on the Impact of Affirmative Action*.[127] Professor Orfield received his B.A. from the University of Minnesota, and his M.A. and Ph.D. in political science from the University of Chicago.

SUMMARY OF OPENING REMARKS

Professor Carl Cohen stated that he believed that racial preferences, no matter what their constitutional or statutory implications, have negative consequences at the schools in which they are used and for the groups that allegedly benefit from them. First, race-based preferences force universities, which are supposedly committed to academic standards, to lower their standards to admit some students. Professor Cohen

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[123] RICHARD D. KAHLENBERG, THE REMEDY: CLASS, RACE, AND AFFIRMATIVE ACTION (1996).

[124] DAVID MONTEJANO, ANGLOS AND MEXICANS IN THE MAKING OF TEXAS, 1836–1986 (1987).

[125] CHICANO POLITICS AND SOCIETY IN THE LATE TWENTIETH CENTURY (David Montejano ed., 1999).

[126] GARY ORFIELD & MINDY L. KORNHABER, RAISING STANDARDS OR RAISING BARRIERS?: INEQUALITY AND HIGH-STAKES TESTING IN PUBLIC EDUCATION (2001).

[127] GARY ORFIELD & MICHAEL KURLEANDER, DIVERSITY CHALLENGED: EVIDENCE OF THE IMPACT OF AFFIRMATIVE ACTION (2001).

argued that the hypocrisy of schools that lie about their use of racial preferences compounds this problem. Second, he claimed that racial preferences undermine racial harmony. Race relations are deteriorating at campuses around the country and affirmative action only exacerbates these tensions. Finally, Professor Cohen argued that racial preferences hurt the minorities they purport to help. If a preferred minority is admitted with lower standards, that student will inevitably underperform, thereby creating a self-impression of inferiority. Professor Cohen therefore contended that affirmative action creates and serves to legitimize racist attitudes.

Professor Christopher Edley, Jr. stated that he believed affirmative action programs had costs and that race-neutral alternatives should be considered. He argued, though, that if these race-neutral programs do not achieve necessary levels of diversity, they should be rejected. Society should not compromise the goals of affirmative action out of a desire to promote color-blindness. Professor Edley argued that, given demographic trends and the growth of minority populations, institutions cannot achieve excellence without diversity. He also argued that affirmative action is necessary to correct for the continuing racism in society. While the Supreme Court has rejected societal discrimination as a compelling interest, that rejection does not eliminate the need to address this problem. Finally, Professor Edley asserted that the costs borne by minorities[128] are small prices to pay for the benefits derived by minorities from affirmative action programs.

Mr. Richard Kahlenberg argued that, while affirmative action has merits, the modern trend of focusing on perpetual challenges faced by minorities rather than on remedying past discrimination is problematic. He contended that society should create class-based rather than race-based affirmative action programs. Mr. Kahlenberg stated that the poor are far less represented in higher education than minorities and that the purpose of affirmative action should be to remedy disadvantage rather than discrimination. When used, such class-based programs have been successful. Mr. Kahlenberg also stated that minorities would disproportionately benefit from class-based affirmative action. In addition to these fairness arguments, Mr. Kahlenberg cited popular support, for example, noting that fifty-two percent of people are in favor of class preferences if racial preferences are eliminated. Policies such as progressive taxation represent further proof of the fact that Americans are in favor of providing opportunities to the disadvantaged. Mr. Kahlenberg summarized his remarks by suggesting that class-based affirmative action programs may be a viable compromise between advocates and opponents of affirmative action.

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[128] *See, e.g.*, *supra* note 31.

Professor David Montejano pointed out that, despite its race-neutrality, there are many who still challenge the Texas Ten Percent Plan because it is designed to achieve racial diversity. He explained that the Ten Percent Plan has been successful at the University of Texas at Austin, in part because, in guaranteeing admission to students, it deemphasizes factors that systematically disadvantage minorities, such as standardized tests. Because the Plan has been in effect for four admissions cycles, there is substantial data on which to establish its success. The Plan has restored diversity at the University of Texas at Austin to pre-*Hopwood* levels.[129] Students admitted through the Ten Percent Plan have not underperformed while in college; in fact, when one controls for SAT scores, students admitted through the Ten Percent Plan have outperformed other students. This statistic demonstrates that, contrary to the contention of the Plan's critics, these students have the motivation and work ethic needed to succeed in college. Moreover, students admitted under the Ten Percent Plan have retention and graduation rates that are higher than those of other students at the University of Texas at Austin (ninety-four percent retention after first-year compared to ninety percent for other students). Professor Montejano also noted that the Ten Percent Plan, combined with active recruiting, has resulted in more minority students choosing to apply to the University of Texas at Austin (prior to the Ten Percent Plan, only fourteen percent of the top ten percent of African American students chose to apply). This increase in minority student applications has played a substantial role in increasing minority enrollment at the University of Texas at Austin.

Professor Gary Orfield argued that the idea that society has rid itself of racism was absurd. He stated that there has not been one day of equal treatment for minorities in the United States and that equal opportunity simply does not exist. Furthermore, Professor Orfield explained that opponents of affirmative action often wrongly assume that a neutral measure of merit exists. He contended that standardized tests, for example, measure family background and school resources more than merit. It is incorrect, therefore, to argue that affirmative action subverts measures of true merit. Moreover, affirmative action is not zero-sum; both whites and minorities derive benefits from it. Building on this point, Professor Orfield contended that interaction with minorities is crucial in an increasingly diverse world. To the extent that it allows white students to interact with minorities, then, affirmative action benefits all races. Professor Orfield argued that class-based affirmative action, on the other hand, ignores the fact that the experiences of middle-class African Americans are different from those of middle-class whites. For example, middle-class African Americans tend to live in poorer communities and have fewer resources available to them. While it is important to take so-

[129] *See supra* note 102.

cioeconomic status into account, Professor Orfield stated that race should not be ignored in college admissions. Finally, he argued that the key to achieving renewed diversity at the University of Texas at Austin was not the Ten Percent Plan itself but rather targeted minority outreach combined with the Ten Percent Plan. Thus, race must still factor into the equation. As evidence, Professor Orfield pointed to Florida's twenty percent plan, which has not been successful in achieving diversity in part because it has not been combined with the same minority outreach as the Texas program. According to Professor Orfield, then, race-neutral programs may not be a viable alternative to affirmative action.

CONCLUSION

The Symposium on Affirmative Action in Higher Education provided an opportunity for practitioners, scholars, students, and community members to debate an important issue of public policy. The debate over affirmative action, along with related issues such as reparations for slavery, reflects a larger debate about the role of race in our society and the legacy of more than 300 years of minority oppression. As Richard Kahlenberg noted, however, even proponents of affirmative action must be open to race-neutral alternatives, given that the Supreme Court may strike down race-conscious programs. Thus, while the debate over race and opportunity will continue, the ability of racial preferences to address these problems may be short-lived.

—Arunabha Bhoumik

ESSAY

STRICT SCRUTINY, PUBLIC OPINION, AND AFFIRMATIVE ACTION ON CAMPUS: SHOULD THE COURTS FIND A NARROWLY TAILORED SOLUTION TO A COMPELLING NEED IN A POLICY MOST AMERICANS OPPOSE?

GAIL L. HERIOT*

The Supreme Court will soon revisit the constitutionality of affirmative action in state university admissions. In this Essay, Professor Gail Heriot argues that when it does, the Court should factor widespread public opposition to affirmative action into its strict scrutiny analysis. She suggests that, even though the Court was right to ignore public sentiment when it dismantled segregation and other discriminatory policies, it would be wrong to do so today.

No legal doctrine is more familiar to the student of constitutional law than the strict scrutiny test.[1] Its twin requirements of "compelling purpose" and "narrow tailoring" for racially discriminatory laws are the stuff of which multiple-choice questions on bar examinations are made.

When the Supreme Court applies this abstract doctrine to specific cases, however, it becomes a more intricate matter—one the Court will face in the context of racial preferences in university admissions in *Grutter v. Bollinger*.[2] *Grutter* presents the Court with the opportunity to decide the fate of what the Sixth Circuit has delicately called the "race-conscious" admissions policies of the University of Michigan Law School.[3] The district court was less delicate. In granting relief to the plaintiff, a white woman who had been denied admission to the law school, it found "mathematically irrefutable proof that race is indeed an enormously important factor" in admissions decisions.[4] By deciding to

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[1] *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 639 (6th ed. 2000).

[2] 288 F.3d 732, 735 (6th Cir. 2002) (en banc) (holding that the University of Michigan Law School's consideration of race and ethnicity in admissions is constitutional), *cert. granted*, 71 U.S.L.W. 3154 (U.S. Dec. 2, 2002) (No. 02-241). The Supreme Court will also consider *Gratz v. Bollinger*, 122 F. Supp. 2d 811, 831 (E.D. Mich. 2000) (holding that the University of Michigan College of Literature, Science, and the Arts's admissions program, "under which certain minority applicants receive a 'plus' on account of their race but are not insulated from all competition with other applicants," is constitutional).

[3] *Grutter*, 288 F.3d at 743.

[4] Grutter v. Bollinger, 137 F. Supp. 2d 821, 841 (E.D. Mich. 2001), *rev'd*, 288 F.3d 732.

review this policy, the Court is ensuring that it will command significant public attention and raise many intriguing issues, legal and otherwise.[5]

One intriguing aspect of the case is the general public's lack of support for racially preferential admissions policies like those at the University of Michigan.[6] Whether to their credit or not, most Americans oppose these policies. To what extent, if any, should public opinion bear on their constitutionality?

This Essay will argue that, where public opinion is aligned with the basic constitutional principle of equality among the races, the Court should not bend that principle to uphold affirmative action policies that most people oppose. It should be especially reluctant to do so where public opinion is based on sound policy judgments, as it is in this case.

In general, this Essay will suggest that the Court should view itself as a counterweight to the kinds of errors Americans have committed and regretted in the past. When the majority clamors for discriminatory laws, the argument for the Court to ignore public sentiment is strong; indeed, race discrimination is among the best examples of regrettable error in American history. In such cases, the Court acts as a "counter-majoritarian"[7] force but in fact plays a democracy-reinforcing role by ensuring minority access to political processes.[8] This Essay will suggest

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[5] The Court's last major decision on affirmative action in admissions, *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), led to a flurry of commentary that has not yet completely subsided. *See, e.g.*, HOWARD BALL, THE *BAKKE* CASE: RACE, EDUCATION AND AFFIRMATIVE ACTION (2000); JOEL DREYFUSS, THE *BAKKE* CASE: THE POLITICS OF INEQUALITY (1979); TERRY EASTLAND, COUNTING BY RACE: EQUALITY FROM THE FOUNDING FATHERS TO *BAKKE* AND *WEBER* (1979); BERNARD SCHWARTZ, BEHIND *BAKKE*: AFFIRMATIVE ACTION AND THE SUPREME COURT (1988); ALLAN P. SINDLER, *BAKKE, DEFUNIS* AND MINORITY ADMISSIONS: THE QUEST FOR EQUAL OPPORTUNITY (1978); J. HARVIE WILKINSON, FROM *BROWN* TO *BAKKE*: THE SUPREME COURT AND SCHOOL INTEGRATION, 1954–1978 (1979).

[6] *See infra* Part III (describing public opposition to affirmative action).

[7] ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (1962). It is worth noting that Professor Bickel was one the most eloquent early opponents of racial preferences in university admissions. *See* ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 131–33 (1975). Whatever he thought of the Court's role as a counter-majoritarian force, it did not cause him to embrace legislatively enacted racial preferences:

> The lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society. Now this is to be unlearned and we are told that this is not a matter of fundamental principle but only a matter of whose ox is gored. Those for whom racial equality was demanded are to be more equal than others. Having found support in the Constitution for equality, they now claim support for inequality under the same Constitution.

Id. at 133.

[8] *See* Pamela S. Karlan, *Exit Strategies in Constitutional Law: Lessons for Getting the Least Dangerous Branch Out of the Political Thicket*, 82 B.U. L. Rev. 667, 668–69 (2002).

that this argument evaporates when the Court would override a public that favors equal treatment.

I. STRICT SCRUTINY'S STRONG PRESUMPTION AGAINST RACIAL DISCRIMINATION

More than thirty years ago, Professor Gerald Gunther examined cases applying the strict scrutiny test[9] and pronounced it "'strict' in theory and fatal in fact."[10] While on its face the test suggested the possibility that discriminatory practices might be upheld at least in rare cases, in practice, as far as Gunther had noticed, no such case had come along. Years later, in *Adarand Constructors, Inc. v. Pena*, Justice O'Connor announced that the Court "wish[ed] to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'"[11] She explained that "[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it," apparently implying that some forms of "reverse discrimination" would be permissible.[12] Many scholars have observed that the Court has not relied on this assertion to weaken the strict scrutiny test.[13] Examination of

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[9] The presumption against racial discrimination by state and local governments finds its origins in the Equal Protection Clause of the Fourteenth Amendment: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. The Court has interpreted this clause to mean that any statute that classifies people by race is unconstitutional unless it is (1) "narrowly tailored" (2) to further a "compelling governmental interest." Shaw v. Reno, 509 U.S. 630, 643 (1993).

[10] Gerald Gunther, Foreword, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). Though the combination of the specific terms "narrowly tailored" and "compelling interest" has become standard more recently, the Court has described its careful evaluation of racial classifications as "strict scrutiny" since at least 1942. Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942).

[11] 515 U.S. 200, 237 (1995) (citation omitted) (holding that a federal program encouraging contractors to hire minority subcontractors is subject to strict scrutiny). Most of Justice O'Connor's opinion was for a 5-4 majority of the Court. *See id.* at 204. The portion of it denouncing Gunther's assessment, however, was for the Court "except insofar as it might be inconsistent with the views expressed in Justice Scalia's concurrence . . . ." *Id.* at 204.

[12] *Id.* at 237. At least part of this reasoning appears to be inconsistent with Scalia's concurrence and, therefore, merely a plurality opinion rather than the opinion of the Court. Scalia wrote that no compelling interest can exist for discriminating on the basis of race "to 'make up' for past racial discrimination in the opposite direction." *Id.* at 239 (Scalia, J., concurring in part and concurring in the judgment). That assertion seems to contradict Justice O'Connor's position that government may use racial classifications to respond to "the lingering effects of racial discrimination." *Id.* at 237. It does not, however, contradict O'Connor's view that the government may use racial classifications to respond to "the practice . . . of racial discrimination." *Id.* In any case, the following term the Court, in dicta, repeated the assertion that strict scrutiny "is not inevitably fatal in fact." U.S. v. Virginia, 518 U.S. 515, 532 n.6 (1996) (internal quotation marks and citation omitted) (holding that the Virginia Military Institute must admit women).

[13] *See, e.g.*, R. Richard Banks, *Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse*, 48 UCLA L. REV. 1075, 1117 (2001) ("Notwithstand-

the case O'Connor uses to support her claim demonstrates, moreover, that even at the time of *Adarand*, only a short distance separated her view from Gunther's.

O'Connor cites only *United States v. Paradise*[14] as an example of the Court's upholding a race-conscious government action in the face of strict scrutiny.[15] That case grew out of underlying facts that Professor Charles Fried, President Reagan's solicitor general when the case reached the Court, characterized as "horrible."[16] The undisputed evidence showed that in the thirty-seven-year history of the Alabama Department of Public Safety ("DPS"), "'there ha[d] never been a black trooper and the only Negroes ever employed by the department ha[d] been nonmerit system laborers.'"[17] The district court found that the DPS had "'engaged in a blatant and continuous pattern and practice of discrimination.'"[18]

Over the fifteen-year course of the litigation, which included numerous consent orders, the district court gave the DPS considerable opportunity to comply with the law.[19] The district court found, however, that rather than cooperate, the DPS had, time after time, chosen a strategy of resistance and delay.[20] Increasingly exasperated, the district court resorted to ordering the Department to promote one African American state trooper for every white it promoted until such time as it developed an acceptable promotion procedure that did not discriminate against African American applicants.[21] At all times, the DPS had the power to remove the racial quota by developing such a procedure.[22] The district court's authority to order this extraordinary remedy was the issue addressed on certiorari.[23]

Most of the Supreme Court Justices appeared to agree that there could be cases in which states (or federal courts) could engage in race-based conduct despite strict scrutiny's strong presumption against it.[24]

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ing recent pronouncements that strict scrutiny is no longer 'fatal in fact,' the Supreme Court has yet to uphold a law to which it applied strict scrutiny.").

[14] 480 U.S. 149 (1987) (plurality opinion).

[15] *See Adarand*, 515 U.S. at 237.

[16] CHARLES FRIED, ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT 117 (1991).

[17] *Paradise*, 480 U.S. at 154 (plurality opinion) (quoting NAACP v. Allen, 340 F. Supp. 703, 705 (M.D. Ala. 1972)).

[18] *Id.* (plurality opinion).

[19] *See id.* at 153–65 (plurality opinion).

[20] *See id.* at 164–65 (plurality opinion).

[21] *See id* at 163–64 (plurality opinion).

[22] *See id.* at 164 (plurality opinion).

[23] *See id.* at 153 (plurality opinion).

[24] *See id.* at 185–86 (plurality opinion) (Brennan, J., joined by Marshall, Blackmun, and Powell, JJ.) ("The race-conscious relief imposed here was amply justified and narrowly tailored to serve the legitimate and laudable purposes of the District Court."); *id.* at 196, 199 (O'Connor, J., dissenting, joined by Rehnquist, C.J., and Scalia, J.) (finding the compelling purpose prong satisfied but contending, "If strict scrutiny is to have any meaning, . . . a promotion goal must have a closer relationship to the percentage of blacks eligible for promotions," thereby implying that a more narrowly tailored promotion goal would

Significantly, however, they did not all agree that *Paradise* was itself such a case: the Court upheld the district court's race-conscious order with only a five-to-four vote. Justice O'Connor herself dissented, writing that the race-based order at issue "cannot survive strict scrutiny" because its purpose could be achieved in other ways.[25] *Paradise* was a closely decided case in which a government policy addressed extreme racial discrimination. If it was the best case that Justice O'Connor, writing in *Adarand* eight years later, could find to prove that strict scrutiny is sometimes less than fatal in the context of racial discrimination, the case demonstrates just how strict a standard O'Connor—and, most likely, the Court—envisions.

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survive the test). The only possible exceptions are Justice Stevens, who agreed that the district court's order should be upheld but disputed the application of the strict scrutiny test to federal legislatures (and hence the case), *see id.* at 189–90 (Stevens, J., concurring in the judgment), and Justice White, who dissented without discussing the strict scrutiny test. *See id.* at 196 (White, J., dissenting).

This result, in fact, is not so surprising. Scholars have long agreed that in at least some hypothetical situations, race-based government conduct should survive strict scrutiny—the oft-cited prison race riot, in which guards are permitted to regain control by dividing prisoners by race, comes to mind. *See* Lee v. Washington, 390 U.S. 333, 334 (1968) (Black, J., concurring) (joining affirmation of judgment compelling integration of prisons and jails, but asserting that "prison authorities have the right, acting in good faith and in particularized circumstances, to take into account racial tensions in maintaining security, discipline, and good order in prisons and jails"), *cited in, e.g.*, Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CAL. L. REV. 297, 350–51 (1997); Michael J. Mannheimer, *Equal Protection Principles and the Establishment Clause: Equal Participation in the Community as the Central Link*, 69 TEMP. L. REV. 95, 129–30 (1996); David A. Strauss, *Discriminatory Intent and the Taming of* Brown, 56 U. CHI. L. REV. 937, 940 n.11 (1989); Eugene Volokh, *Freedom of Speech, Shielding Children, and Transcending Balancing*, 1997 SUP. CT. REV. 141, 173 n.109 (1997).

[25] *Paradise*, 480 U.S. at 196 (O'Connor, J., dissenting). Justice O'Connor wrote:

> Given the singular in terrorem purpose of the District Court order, it cannot survive strict scrutiny. There is simply no justification for the use of racial preferences if the purpose of the order could be achieved without their use because racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification. Thus, to survive strict scrutiny, the District Court order must fit with greater precision than any alternative remedy. The District Court had available several alternatives that would have achieved full compliance with the consent decrees without trammeling on the rights of nonminority troopers. The court, for example, could have appointed a trustee to develop a promotion procedure that would satisfy the terms of the consent decrees. By imposing the trustee's promotion procedure on the Department until the Department developed an alternative promotion procedure that complied with the consent decrees, the District Court could have enforced the decrees without the use of racial preferences. Alternatively, the District Court could have found the recalcitrant Department in contempt of court, and imposed stiff fines or other penalties for the contempt. Surely, some combination of penalties could have been designed that would have compelled compliance with the consent decrees.

Id. at 199–200 (internal quotation marks, alterations, and citations omitted).

II. No Deference to Politically Popular Calls for Racial Discrimination

The Equal Protection Clause was made part of the Constitution precisely because of the issue of race, and over the many decades of its existence, race has continued to be its focus.[26] Among other things, the clause confers upon the judiciary responsibility for reining in the political branches and the majorities they represent when they move toward racial division. It is established that the Supreme Court owes no deference to legislatures or other lawmaking authorities when it reviews racially discriminatory laws.[27] It owes even less deference to public support for such laws. Deference would be inconsistent with the strong presumption against racially discriminatory laws.

No one would claim that the Court has always done an excellent job of rejecting discriminatory laws. As time has passed, however, perhaps it has gotten better at it,[28] and, fortunately, so have white Americans. In 1942, only forty-four percent of American whites opposed racial segregation on streetcars and buses; by 1963, the figure was seventy-nine percent. Similarly, in 1944, just forty-two percent of whites believed African Americans "should have as good a chance as white people to get any kind of job;" by 1964 that figure nearly doubled to eighty-three percent.[29]

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[26] *See, e.g.*, Hunter v. Erickson, 393 U.S. 385, 391 (1969) ("[T]he core of the Fourteenth Amendment is the prevention of meaningful and unjustified official distinctions based on race."); Loving v. Virginia, 388 U.S. 1, 10 (1967); *Ex Parte* Virginia, 100 U.S. 339, 344–45 (1879); Strauder v. West Virginia, 100 U.S. 303, 307–08 (1879); Slaughter-House Cases, 83 U.S. 36, 71 (1872). *See generally* Andrew Kull, The Color-Blind Constitution (1992). The Supreme Court has repeatedly asserted that the "central purpose" of the Equal Protection Clause is "the prevention of official conduct discriminating on the basis of race." Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 484 (1982) (quoting Washington v. Davis, 466 U.S. 229, 239 (1976)).

[27] *See* Nowak & Rotunda, *supra* note 1, at 639 ("[The strict scrutiny] test means that the Justices will not defer to the decision of the other branches of government but will instead independently determine the degree of relationship which the classification bears to a constitutionally compelling end.").

[28] *Compare* Plessy v. Ferguson, 163 U.S. 537, 544 (1896) (the Fourteenth Amendment does not require "a commingling of the two races upon terms unsatisfactory to either"), *with* Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) ("in the field of public education the doctrine of 'separate but equal' has no place"), *supplemented by* Brown v. Bd. of Educ., 349 U.S. 294, 301 (1955) (schools must be integrated "with all deliberate speed"). *Compare* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 320 (1978) (plurality opinion) ("a properly devised admissions program involving the competitive consideration of race and ethnic origin" would be constitutional), *with* City of Richmond v. J. A. Croson Co., 488 U.S. 469, 508 (1989) (plurality opinion) (holding that Richmond's affirmative action program in public contracting failed strict scrutiny).

[29] Stephan Thernstrom & Abigail Thernstrom, America in Black and White: One Nation, Indivisible 141 (1997) (citing William G. Mayer, The Changing American Mind: How and Why American Public Opinion Changed Between 1960 and 1988, at 366, 370 (1992)); Paul B. Sheatsley, *White Attitudes Toward the Negro*, 95 Daedalus 217, 222 (1966). It might be suggested that the Supreme Court led the fight against discrimination in cases like *Brown* and thereby contributed to the improvement in these statistics. This is certainly possible—the data cited by the Thernstroms neither prove

Slowly and sometimes haltingly, both the Court and the public have arrived at the conclusion that racial discrimination is poisonous; it must be avoided except under the most extraordinary circumstances. The modern strict scrutiny standard appropriately reflects this view.[30]

Doctrinally, all of this makes *Grutter* and other cases involving admissions policies that establish preferences for minority applicants at state universities perfectly ordinary. The State of Michigan, through the law school at its flagship state university, is engaging in old-fashioned racial discrimination. The only twist is in the identity of the beneficiary races—a distinction the Court has deemed irrelevant. As early as *Wygant v. Jackson Board of Education*, a plurality of the Court believed that the "the level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination."[31] Later, a majority of the Justices reached the same conclusion in *City of Richmond v. J.A. Croson Co.*[32] By 1993, in *Shaw v. Reno*, the Court called the position "clear."[33]

Several results follow. First, strict scrutiny still applies.[34] Second, the Court will not thoughtlessly defer to the university regents' view that the

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nor disprove this theory. The Court was correct to overrule the majority's view when that majority favored discrimination. That does not mean, however, that it would be correct today to overrule a majority that opposes discrimination.

[30] *See J.A. Croson Co.*, 488 U.S. at 509 (plurality opinion) ("*In the extreme case*, some form of *narrowly tailored* racial preference might be necessary . . . .") (emphasis supplied).

[31] 476 U.S. 267, 273 (1986) (plurality opinion).

[32] *See* 488 U.S. at 494 (plurality opinion) (O'Connor, J., joined by Rehnquist, C.J., and White and Kennedy, JJ.) ("the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification"). Justice Scalia wrote that he agreed "in particular, with Justice O'Connor's conclusion that strict scrutiny must be applied to all governmental classification by race, whether or not its asserted purpose is 'remedial' or 'benign.'" *Id.* at 520 (Scalia, J., concurring in the judgment).

[33] 509 U.S. 630, 650 (1993).

[34] *See* Miller v. Johnson, 515 U.S. 900, 907–08, 992–27 (1995) (applying strict scrutiny to a Georgia redistricting plan intended to increase the number of "majority-minority" voting districts and holding the plan unconstitutional). Two arguments might be used to suggest that strict scrutiny should not apply to affirmative action in university admissions. The first is that the programs burden whites, who historically have not been subject to unequal treatment and therefore do not require the doctrine's protection. See Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 357 (1978) (Brennan, J., concurring in the judgment in part and dissenting in part). In fact, however, affirmative action also burdens Asian Americans, *see infra* Part IV, who have been the subjects of both social and legal discrimination. *See* David E. Bernstein, *Lochner, Parity, and the Chinese Laundry Cases*, 41 WM. & MARY L. REV. 211, 217–69 (1999).

A second argument against the application of strict scrutiny to affirmative action programs is that these programs burden the majority, which is capable of defending itself at the ballot box if it so chooses. *See* John Hart Ely, *Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 727 (1974). It is far from clear, however, that these racially discriminatory admissions programs ought to be viewed as for the benefit of a minority or a majority. Affirmative action in undergraduate admissions most typically benefits African Americans, Latinos, and Native Americans (and most typically works against Asian Americans, Americans of Middle Eastern descent, and whites). *See, e.g.*, MICHAEL LYNCH, ETHNICITY AS DESTINY: AN EXAMINATION OF RACE-BASED ADMISSIONS

test's requirements have been met; it must reach that conclusion on its own, if at all. Finally, if the public also believed the test had been met, its opinion would not be entitled to deference. The Court's job is to bring the other branches of government back from the brink when they move in the direction of racial discrimination.

In this case, however, the Court's task is not that difficult: the majority of Americans apparently do not believe that racially preferential admissions policies are narrowly tailored to fit a compelling interest—if they did, they would probably support such policies, which they do not. Their views thus work with, rather than against, the strong presumption against laws that discriminate on the basis of race. It would be difficult to take the presumption seriously if it could be overcome without regard to that kind of public sentiment. Admittedly, this case is somewhat unusual. Ordinarily, when public opinion is firmly in the camp of non-discrimination, so too will be the public's representatives in state government, and there will be no discriminatory laws for courts to consider. The failures of representational democracy, however, are well known.[35] Now and then a case

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AT UNIVERSITY OF CALIFORNIA AT BERKELEY (1996) (reproducing the UC-Berkeley admissions matrix for 1993, which grants preferences to American Indians, African Americans, Chicanos, and Latinos), *at* http://www.pacificresearch.org/pub/sab/social/ocr2.html. Women can be beneficiaries as well, however, especially in faculty and staff hiring and promotion. *See* Lynn S. Muster, *A Proposal for the Hire and Tenure of Faculty of Color in Higher Education*, 20 T. MARSHALL L. REV. 45, 64 (1994) (contending that affirmative action "programs in academia have not been effective at increasing the number of professors of color because white women have largely constituted the 'beneficiaries' of affirmative action hiring measures."). If one looks at affirmative action practices as a whole in university settings, therefore, one will see preferential treatment of a majority at the expense of a minority, rather than the reverse. The majority simply happens to be made up of a coalition of certain groups that have been discriminated against historically.

Interestingly, affirmative action is often defended against political challenge on exactly that ground—that it is not simply for the benefit of racial minorities but rather for the benefit of women and minorities. Willie Brown, at the time the speaker of the California Assembly and later the mayor of San Francisco, once said that "90 percent of the benefits [of affirmative action] go to white women" and that defenders of preferential policies must cultivate their support. Judy Keen & Andrea Stone, *Calif.'s Brown: Watch out for Wilson*, USA TODAY, Mar. 14, 1995, at 4A. *See also* Bettina Boxall, *Opponents of Prop. 209 Target Women Voters*, L.A. TIMES, Aug. 20, 1996, at A1; Heath Foster & Lise Olsen, *Only King County Rejected I-200 as All 7 Seattle Districts Said No*, SEATTLE POST-INTELLIGENCER, Nov. 5, 1998, at A4 ("The opposition campaign [to Washington State's Initiative 200] was focused heavily on women, targeting them with a stream of campaign ads that emphasized how as the primary beneficiaries of affirmative action, they had the most to lose"); Bob Herbert, *The Wrong Target*, N.Y. TIMES, Apr. 5, 1995, at A25 (arguing in favor of affirmative action preferences and stating that "the primary beneficiaries of affirmative action are women"); Ellis Cose, *After Affirmative Action*, NEWSWEEK, Nov. 11, 1996, at 43 (quoting Reverend Jesse Jackson as stating "If the anti-209 forces could 'de-racialize' the issue, and get the public to see that white women—not blacks—were affirmative action's primary beneficiaries, support for the measure might collapse.") (internal quotation marks omitted).

[35] *Cf.* Hilary Sigman, *The Pace of Progress at Superfund Sites: Policy Goals and Interest Group Influence*, 44 J.L. & ECON. 315, 315 (2001) (concluding that a study of Superfund cleanups "provide[s] little evidence that the Environmental Protection Agency (EPA) prioritizes sites according to their harms. By contrast, concentrated private interests, such

comes along in which, for whatever reason, the state bureaucracy favors racial discrimination while the people do not.[36] *Grutter* and other cases concerning racial preferences on campus are such cases.[37]

III. THE PUBLIC DESIRE FOR EQUAL TREATMENT

It is difficult to deny that racial preferences in higher education are unpopular. In California and Washington, the two states that have had voter initiatives on the ballot prohibiting such policies, the initiatives passed by substantial margins. California's Proposition 209[38] was passed by a margin of 54.6% to 45.4% in 1996;[39] Washington State's nearly identical Initiative 200[40] brought in 58.22% of the vote.[41]

Moreover, judging by surveys described a few years before these votes by Paul Sniderman and Thomas Piazza, the results in California and Washington may have significantly understated white opposition to such policies:

> [The affirmative action agenda] is politically controversial precisely because most Americans do *not* disagree about it. The distribution of public opinion on . . . affirmative action . . . is

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as liable parties and local communities, play an important role in the EPA's priorities"); John R. Lott, *Empirical Evidence in the Debate on Campaign Finance Reform*, 24 HARV. J.L. & PUB. POL'Y 9, 9 (2000) (arguing that campaign finance reform has "entrenched incumbent candidates, given wealthy candidates an advantage, increased many types of corruption, and led to more negative campaigns"); Lisa O. Monaco, Comment, *Give the People What They Want: The Failure of "Responsive" Lawmaking*, 3 U. CHI. L. SCH. ROUNDTABLE 735, 737 (1996) ("This Comment discusses two aspects of the phenomenon of phone call democracy: first, that it distorts the Framers' conception of representative government; second, that it produces ill-conceived solutions.").

[36] For a general discussion of why the government might promote affirmative action despite public opposition, see Peter H. Schuck, *Affirmative Action: Past, Present, and Future*, 20 YALE L. & POL'Y REV. 1, 57–62 (2002). For a detailed narrative of the government's shift toward affirmative action in the specific area of employment, see HUGH DAVIS GRAHAM, THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY 1960–1972 ch. IX (1991).

[37] *See* Johnson v. Bd. of Regents of the Univ. of Ga., 263 F.3d 1234 (11th Cir. 2001); Smith v. Univ. of Wash. L. Sch., 233 F.3d 1188 (9th Cir. 2000), *cert. denied*, 532 U.S. 1051 (2001); Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996).

[38] Enacted as CAL. CONST. art. 1, § 31.

[39] According to the official count of the California Secretary of State, Proposition 209 passed by a vote of 5,268,462 to 4,388,733. *See* Cal. Sec. of State, *1996 General Election Returns for Ballot Propositions*, *at* http://Vote96.ss.ca.gov/Vote96/html/vote/prop/page.96 1218083528.html.

[40] WASH. REV. CODE § 49.60.4000 (2002).

[41] According to the official count of the Washington Secretary of State, 1,099,410 votes (58.22 percent) were cast in favor of Initiative 200 and 788,930 (41.78 percent) were cast against. *See* Wash. Sec. of State, *Official Results of the 1998 General Election—Summary Report*, *at* http://www.secstate.wa.gov/elections/election_1998summary.aspx.

> unmistakable .... [T]here is scarcely any support ... among whites.[42]

Sniderman and Piazza cite public opinion polls in which ninety percent of whites oppose "[p]reference in hiring and promotion in jobs" and seventy-six percent oppose "[r]acial quotas for college admissions."[43] Despite their reputation for left-of-center politics, California's Bay Area residents were similarly skeptical of racially preferential policies. A poll cited by Sniderman and Piazza found that seventy-three percent of white residents voiced opposition to "[r]acial quotas for college admissions," and that African Americans were "split right down the middle on affirmative action."[44]

One could argue that the public at large is not particularly knowledgeable about the need for racial preferences on college and university campuses. Even among those who are among the most knowledgeable—faculty members at colleges and universities that have employed such preferences—support for racial and ethnic preferences remains scant. In a 1996 nationwide study of full-time faculty members at public and private colleges and universities, the Roper Center for Public Opinion Research found that racial, ethnic, and gender admissions preferences are quite unpopular. Among those who knew their own institution's policy on admissions, sixty percent reported that their institution had either formal or informal policies giving preferences to applicants based on race, sex, or ethnicity.[45] When asked whether their institutions *should* grant preference to one applicant over another for admission on the basis of race, sex, or ethnicity, fifty-seven percent responded "no," thirty-two percent responded "yes," and eleven percent did not know or declined to state.[46]

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[42] PAUL M. SNIDERMAN & THOMAS PIAZZA, THE SCAR OF RACE 130 (1993).

[43] *Id.* at 131

[44] *Id.* at 130–31. The final vote on Proposition 209 may have understated the opposition to affirmative action. Two arguments may have artificially cost it votes: first, that the measure would legalize sex discrimination, *see* Stuart Taylor, Jr., *Affirmative Action and Doublespeak*, LEGAL TIMES, May 13, 1996, at 21, and second, that it was a partisan issue designed to drive a wedge between Democratic candidates and Democratic voters. *See* Greg Lucas & Edward W. Lempinen, *State GOP Pulls King Ad But Not Blitz*, S.F. CHRON., Oct. 25, 1996, at A21.

[45] ROPER CENTER FOR PUBLIC OPINION RESEARCH, NATIONAL FACULTY SURVEY REGARDING THE USE OF SEXUAL AND RACIAL PREFERENCES IN HIGHER EDUCATION (1996), *available at* http://www.nas.org/reports/roper/exsum.htm.

[46] *Id.* Even at the University of California, where every campus faculty senate voted to protest the Board of Regents' adoption of race- and gender-blind policies by lopsided majorities, a Roper poll found that—depending on how the question was worded—only one-third to half of faculty members supported preferences. *See* Pamela Burdman, *UC Chief Talks about the Ban*, S.F. CHRON., Feb. 5, 1996, at A11. The reasons for the difference between the polling results and the faculty senate votes may be complex. One likely explanation for this discrepancy is that faculty senates are seldom representative of the faculties they purport to represent. *See, e.g.*, Carl A. Auerbach, *The Silent Opposition of Professors and Graduate Students to Preferential Affirmative Action Programs: 1969 and 1975*, 72 MINN. L. REV. 1233, 1269–70 (1988) (describing studies indicating faculty dissatisfaction

Indeed, opposition to racial preferences on campus comes from some of the most unlikely places. Berkeley's student newspaper, the *Daily Californian*, gave Proposition 209 one of its most simple and passionate endorsements. "Race-based affirmative action is wrong," the Board of Editors wrote, "because it discriminates on the basis of race."[47] The student newspaper at Berkeley was not alone among University of California ("UC") campuses. Farther south, UC-San Diego's *Guardian* had reached a similar conclusion and endorsed the Proposition. "Our Constitution guarantees equality of opportunity," the editors wrote, "not equality of results."[48]

One could argue that whites' views on affirmative action might soften if more people understood that the failure to give rather substantial preferences to African Americans and Latinos would result in substantially fewer members of those groups in the most competitive colleges and universities. Again, the evidence is to the contrary. Sniderman and Piazza's data suggest that whites' opinions on racial quotas and preferential treatment are more difficult to "dislodge" than their opinions on other issues of social welfare.[49] Poll respondents who opposed racial quotas in higher education were asked if their views would change "if it mean[t] that hardly any blacks would be able to go to the best colleges and universities."[50] Sniderman and Piazza found that "[t]he positions white Americans take on affirmative action are markedly firmer and less malleable than the positions they take on more traditional forms of government assistance for the disadvantaged."[51]

Moreover, recent polls suggest that, if anything, the public's views have hardened against racial preferences in higher education. In one poll, ninety-four percent of whites and eighty-six percent of African Americans said hiring, promotions, and college admissions should be based "strictly on merit and qualifications other than race/ethnicity."[52]

Public opinion on this matter does not appear to be merely the product of ill will or fear of competition. One study has shown that the correlation between opposition to racial preferences and racial intolerance is actually quite low.[53] Among whites found to be in the top one percent in prejudice against African Americans, the opposition to racial preferences

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with internal governing bodies).

[47] Editorial, DAILY CALIFORNIAN, Nov. 4, 1996, at 7.

[48] Editorial, UCSD GUARDIAN, Nov. 4, 1996, at 6.

[49] SNIDERMAN & PIAZZA, *supra* note 42, at 145.

[50] *Id.*

[51] *Id.* Supporters of racial preferences in college admissions were asked, "Would you still feel that way, even if it means fewer opportunities for qualified whites, or would you change your mind?" *Id.* According to the authors, "[t]he proportion of whites changing their position . . . is 20 percent, a pronounced contrast with the pliability of preferences on social welfare issues, which ran double that." *Id.*

[52] *See* WASH. POST ET AL., RACE AND ETHNICITY IN 2001: ATTITUDES, PERCEPTIONS, AND EXPERIENCES 22 (2001), http://www.kff.org/content/2001/3143/RacialBiracialToplines.pdf.

[53] PAUL M. SNIDERMAN & EDWARD G. CARMINES, REACHING BEYOND RACE (1997).

in hiring (more than ninety percent) and to racial quotas in college admissions (almost ninety percent) was overwhelming. Among the group found to be in the top one percent in racial *tolerance*, however, opposition was still very high. Approximately eighty percent opposed preferential treatment in hiring, and more than sixty percent opposed quotas in college admissions.[54] The authors wrote that "the fundamental fact is that race prejudice, far from dominating and orchestrating the opposition to affirmative action, makes only a slight contribution to it."[55]

Another point sometimes made is that white opposition to racial preferences is driven by the fear of shrinking opportunities available for whites—a fear that, if it were significant, would likely become particularly pronounced during periods of economic contraction. In fact, however, opposition to racial preferences, both in hiring and in college admissions, has been stable over a long course of time.[56] According to the study, between 1986 and 1994, "white attitudes have not changed a whit," despite dramatic changes in the economy.[57]

IV. COLOR-BLIND ADMISSIONS ARE GOOD POLICY

The policy of equal treatment is more than simply popular. It is also grounded in good sense: many are persuaded by the argument that the gap in college performance that racial preferences in admissions create is in no one's interest.[58] At the most selective colleges and universities at which racial preferences have been outlawed, the number of African Americans, Latinos, and Native Americans initially dropped.[59] For exam-

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[54] *See id.* at 20–21.

[55] *Id.* at 20–22.

[56] *See id.* at 27–30.

[57] *Id.* at 28–30.

[58] For other arguments in favor of equal treatment in admissions, see, for example, BICKEL, THE MORALITY OF CONSENT, *supra* note 7, at 132–34 (arguing that, through the admission of unqualified students, affirmative action dilutes academic standards and, ultimately, the quality of the workforce by causing a "loss of efficiency and productivity"); DINESH D'SOUZA, ILLIBERAL EDUCATION: THE POLITICS OF RACE AND SEX ON CAMPUS 35 (1991) (arguing that affirmative action programs stigmatize members of minority groups by encouraging "suspicion [that they have been] unfairly advanced"); TERRY EASTLAND, ENDING AFFIRMATIVE ACTION: THE CASE FOR COLORBLIND JUSTICE 80–82 (1996) (arguing that affirmative action inappropriately "regard[s] individuals as fungible members of their racial group"); SHELBY STEELE, THE CONTENT OF OUR CHARACTER: A NEW VISION OF RACE IN AMERICA 115–16 (1991) (arguing that affirmative action "leaps over the hard business of developing a formerly oppressed people to the point where they can achieve proportionate representation on their own"); THERNSTROM & THERNSTROM, *supra* note 29, at 421 (noting that affirmative action is "class-blind," benefiting members of racial minority groups "whatever the occupation and income of their parents").

[59] *See* Gail Heriot, *Equal Opportunity Works: The End of Racial Preferences in California Has Been an Unheralded Success*, WKLY. STANDARD, Apr. 17, 2000, at 19. When Proposition 209 went into effect, one *Los Angeles Times* headline announced, "Acceptance of Blacks, Latinos to UC Plunges." Kenneth R. Weiss & Mary Curtius, *Acceptance of Blacks, Latinos to UC Plunges*, L.A. TIMES, Apr. 1, 1998, at A1. The headline was misleading in that the story considered only the Berkeley and UCLA campuses. *See id.*

ple, in 1997, the last year in which racially preferential policies were still openly practiced at the University of California, 58.6% of Berkeley's admitted freshmen were members of racial minority groups—primarily African Americans, Native Americans, Asian Americans, and Latinos. In 1998, the figure declined to 48.7%, no longer a majority, but still a very large proportion of the class.[60]

Most of the decrease was attributable to African Americans, Native Americans, and Latinos, who went from 23.1% of the total admitted class to 10.4%.[61] This result was hardly surprising given that those groups were the primary beneficiaries of racial preferences. At some UC schools, 300 admissions points—worth 300 points on the SAT—had been awarded to applicants simply for being members of these preferred groups.[62] On the other hand, Asian Americans, who had been among the victims of the racial preference system, increased their admissions numbers from 35.5% to 38.3%, and whites jumped from 41.4% to 51.3% of admitted students.[63]

Proponents of affirmative action acted as if the minority students who would have attended Berkeley if Proposition 209 had not been passed had simply vanished.[64] That, of course, was not so. They had been accepted to somewhat less highly ranked campuses—often UCLA, UC-San Diego, or UC-Irvine—based on their academic record rather than their race or ethnicity.[65] In turn, students who previously would have been admitted to UCLA or UC-San Diego had often been admitted to such University of California schools as Davis, Santa Cruz, or Riverside. These schools were somewhat less prestigious, but nevertheless part of the world-renowned UC system, which is intended primarily for the top eighth of the state's high school graduates.[66] At Riverside, for example, the number of African Americans and Latinos admitted shot up by 41.9% and 47%, respectively.[67] Santa Cruz also gained a notable increase in admitted Latino students, though the number of admitted African Ameri-

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[60] *See* Heriot, *supra* note 59.

[61] *See id.*

[62] *See id.*

[63] *See* Weiss & Curtius, *supra* note 59.

[64] *See id.*

[65] *See* Adam Cohen, *When the Field Is Level: In California, Minority Students Are "Cascading" Out of Top Schools and Into the Second Tier. Is This Good For Them?*, TIME, July 5, 1999, at 30.

[66] J. COMM. TO DEVELOP A MASTER PLAN FOR EDUC., CALIFORNIA MASTER PLAN FOR EDUCATION 39 (2002) ("The California State University and University of California systems should continue to adhere to the policy of guaranteeing that all students who apply for freshman admission and who are eligible to attend (students within the top one-third, in the case of California State University applicants, and the top one-eighth, in the case of University of California applicants) are offered admission to the system(s) for which they are eligible and have applied.").

[67] Kenneth R. Weiss, *Fewer Blacks and Latinos Admitted to 3 UC Schools*, L.A. TIMES, Mar. 17, 1998, at A1.

cans dropped slightly.[68] The term "cascading" was coined to describe the phenomenon.[69]

Some have argued that cascading is a disaster for minority students.[70] The truth is quite the opposite; few changes in educational policy have brought greater benefits. Some supporters of affirmative action argue that entering academic credentials—that is, high school grades and scores on standardized tests—are purely arbitrary and have no more to do with academic performance in college than one's choice of breakfast cereal. In *Standardized Minds*, for example, Peter Sacks calls standardized tests "a highly effective means of social control . . . serving the interests of the nation's elite," and tools with which elites "perpetuate their class privilege with rules of their own making."[71]

In reality, however, entering academic credentials matter. Although some students will outperform their entering credentials, just as other students will underperform theirs, most students will perform in the range suggested by their entering credentials.[72] One of the most serious problems with affirmative action preferences is that they encourage many minority students to enter schools where they are unlikely to do well, and thus begin their college careers with two strikes against them. At UC-San Diego, for example, in the year before Proposition 209's implementation, twenty percent of white students on campus had a freshman-year grade point average ("GPA") of 3.5 or better.[73] In contrast, only two percent of African American students had such a GPA.[74] This was not because no African American students were capable of doing honors work at UC-San Diego. The problem was that such students were often at Stanford or Berkeley, where they were not receiving honors. Nationwide, misguided affirmative action was creating the illusion that few African American students could excel.

Even William G. Bowen and Derek Bok—former presidents of Princeton and Harvard Universities, respectively, who have written fre-

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[68] *See id.* ("UC Santa Cruz reported an increase in Latinos, 7.4 percent, but a slight decrease in black students admitted, down 1.8 percent.").

[69] *See, e.g.*, Pamela Burdman, *Number of Non-Asian Minorities Expected to Plunge at Cal, UCLA*, S.F. CHRON., Oct. 2, 1996, at A1.

[70] *See, e.g.*, Mary Frances Berry, *How Percentage Plans Keep Minority Students Out of College*, CHRON. OF HIGHER EDUC., Aug. 4, 2000, at A48 (arguing that under Proposition 209, Hispanic and African American "students are prevented from obtaining the educational and social benefits of attending a flagship campus, and are steered, or 'cascaded,' to lower-ranked state institutions.").

[71] PETER SACKS, STANDARDIZED MINDS: THE HIGH PRICE OF AMERICA'S TESTING CULTURE AND WHAT WE CAN DO TO CHANGE IT 15 (1999). *See generally* NICHOLAS LEMANN, THE BIG TEST: THE SECRET HISTORY OF THE AMERICAN MERITOCRACY (1999).

[72] *See* Robert J. Barro, *Why Colleges Shouldn't Dump the SAT*, BUS. WK., Apr. 9, 2001, at 20 (examining data on 33,000 students and concluding that "admissions-test scores strongly predict college grades").

[73] *See* UNIV. OF CAL.-SAN DIEGO, ACADEMIC PERFORMANCE REPORT 4 tbl.1 (1999).

[74] *See id.*

quently in support of affirmative action in university admissions[75]—acknowledge the poor performance of many minority college students: "college grades [for affirmative action students] present a . . . sobering picture. The grades earned by African American students at the [schools we studied] often reflect their struggles to succeed academically in highly competitive academic settings."[76] Bowen and Bok report that the average GPA for African American students matriculating in 1989 at the twenty-eight academically selective colleges and universities they studied was 2.61 on a 4.0 scale, compared to an average GPA of 3.15 among their white counterparts.[77] They found that "[t]he average rank of black students was at the 23rd percentile of the class, the average Hispanic student ranked in the 36th percentile, and the average white student ranked in the 53rd percentile."[78]

Proposition 209 led to very different results at UC-San Diego, where the performance of African American students improved dramatically immediately after the initiative's implementation. No longer were African Americans a rarity among top students. Instead, a full twenty percent of African American freshmen earned a GPA of 3.5 or higher.[79] That was higher than the rate for Asians (sixteen percent) and extremely close to the rate for whites in the same year (twenty-two percent).[80]

UC-San Diego's academic performance experts were obviously delighted by the turn of events. Their internal academic performance report

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[75] *See, e.g.*, William G. Bowen et al., *A Report Card on Diversity: Lessons for Business from Higher Education*, HARV. BUS. REV., Feb. 1, 1999, at 2; Derek Bok & William G. Bowen, *Get In, Get Ahead: Here's Why*, WASH. POST, Sept. 20, 1998, at C1.

[76] WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS 72 (1998).

[77] *See id.* According to Bowen and Bok, this difference "may seem negligible" to some, but they regard it as "in fact very large when seen in the context of the overall distribution of grades." *Id.*

[78] *See id.* Bowen and Bok looked at African Americans as a group and Latinos as a group. They did not separate those students who needed a preference to be admitted from those who would have been admitted anyway.

Some affirmative action supporters deny that a problem exists. But even they do not disagree that members of minority groups tend to receive significantly lower grades than whites. Instead, they argue that grades and other standards of academic performance are meaningless. *See, e.g.*, CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 35–36 (1987). Professor Richard Delgado argues, "Any society's elite class will deem what they do well as constitutive of merit, thus assuring that their own positions become even more secure." Richard Delgado, *Rodrigo's Tenth Chronicle: Merit and Affirmative Action*, 83 GEO. L.J. 1711, 1718 (1995). Columbia University's Patricia Williams has argued that words like "qualified" are mere "con words, shiny mirrors that work to dazzle the eye" and are not indicative of anything substantive or real. PATRICIA WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR 103 (1991) (quoted in DANIEL A. FARBER & SUZANNA SHERRY, BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW 32 (1997)) (internal quotation marks omitted). That minority students who need a preference to be admitted will tend to do poorly does not trouble Professors MacKinnon, Delgado, and Williams.

[79] *See* UNIV. OF CAL.-SAN DIEGO, *supra* note 73, at 4 tbl.1.

[80] *See id.*

on the 1998-1999 school year announced that, while overall performance remained static, "underrepresented students admitted to UC-San Diego in 1998 substantially outperformed their 1997 counterparts" and "the majority/minority performance gap observed in past studies was narrowed considerably."[81] "Narrowed" was, in fact, an understatement. The report found "no substantial GPA differences based on race/ethnicity."[82] A discreet footnote made it clear that the report's authors understood exactly how this had happened: 1998 was the first year of color-blind admissions.[83]

The bottom of the class also changed. Prior to Proposition 209, fifteen percent of African American freshmen and seventeen percent of Native American freshmen were in academic jeopardy (defined as having a GPA of less than 2.0), while only four percent of white freshmen were.[84] Because UC-San Diego does not keep separate statistics for those minority students who needed a preference to be admitted and those who would have been admitted regardless, it is impossible to say exactly how high the failure rate was for preference beneficiaries in particular. But it certainly appears to have been high: when racial preferences were eliminated, the differences among racial groups in percentage of freshmen in academic jeopardy all but evaporated, with the African American and Native American rates dropping to six percent, compared to three percent of white students.[85]

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[81] *Id.* at 1.

[82] *Id.*

[83] *See id.* at 1 n.1.

[84] *See id.* at 4 tbl.1.

[85] *See id.* Proponents of affirmative action argue that students are better off attending more prestigious institutions, even if their grades suffer. *See* BOWEN & BOK, *supra* note 76, at 118–54. If a central purpose of attending college is to increase earning potential, however, the proponents' claims may be false: at least one study found that, for African Americans whose SAT scores were significantly lower than their schools' medians, lower grades and increased odds of dropping out offset the earnings gains otherwise conferred by attending a more selective institution. *See* Linda Datcher Loury & David Garman, *College Selectivity and Earnings*, 13 J. LAB. ECON. 289, 306–08 (1995). *See also* STACY BERG DALE & ALAN B. KRUEGER, ESTIMATING THE PAYOFF TO ATTENDING A MORE SELECTIVE COLLEGE: AN APPLICATION OF SELECTION ON OBSERVABLES AND UNOBSERVABLES 30 (Nat'l Bureau of Econ. Research, Working Paper No. 7322, 1999) ("[O]ur findings cast doubt on the view that school selectivity, as measured by the average SAT score of the freshmen who attend a college, is an important determinant of students' subsequent incomes."). In any event, Bowen and Bok neglect the likelihood that creating a ghetto for preference beneficiaries at the bottom of the class is in part responsible for the racial and ethnic separatism that currently affects many elite campuses. *See* BEVERLY DANIEL TATUM, "WHY ARE ALL THE BLACK KIDS SITTING TOGETHER IN THE CAFETERIA?" AND OTHER CONVERSATIONS ABOUT RACE 77 (1997) (arguing that African American students "should not be discouraged" from participating in African American student unions or sitting primarily with other African Americans in dining halls).

CONCLUSION

The argument that the Supreme Court should take account of public opinion in applying strict scrutiny when, and only when, public opinion opposes racial discrimination will seem counter-intuitive to some. Scholars are accustomed to thinking about the opposite situation, in which the Court rightly declines to defer to public sentiment *in favor* of racial discrimination. As a result, they have come to think of the Court's role as a freely counter-majoritarian force that should be as unaffected by popular sentiment as possible.

But this is error. Equal Protection doctrine is built upon the recognition that history has looked kindly upon those who oppose racial discrimination. The strict scrutiny standard thus creates a strong, if not overwhelming, presumption against laws that discriminate on the basis of race. That presumption should include a reluctance to approve racially discriminatory admissions policies in the face of strong public sentiment against them.

RECENT DEVELOPMENTS

SARBANES-OXLEY ACT

Since December 2001, when Enron filed the largest bankruptcy in United States history, the accuracy of corporate financial reports and the conduct of high-ranking executives have been subject to intense public scrutiny.[1] The scrutiny seemed well-placed, as thereafter a series of corporate scandals unfolded, involving several prominent companies such as WorldCom, Global Crossing, Adelphia Communications, and Tyco.[2] The disclosures shook the public's confidence and contributed to a sharp decline in the stock market.[3]

In the aftermath of the disclosures of corporate wrongdoing,[4] Congress passed the Sarbanes-Oxley Act,[5] signing it into law on July 30,

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[1] *See* Patrick McGeehan, *Goldman Chief Urges Reforms in Corporations*, N.Y. TIMES, June 6, 2002, at A1 (quoting Henry M. Paulson, Jr., Chairman and CEO of Goldman, Sachs & Co., in a speech at the National Press Club) ("I cannot think of a time when business over all has been held in less repute . . . . The business community has been given a black eye by the activities and behavior of some C.E.O.'s and other notable insiders who sold large numbers of shares just before dramatic declines in their companies' share prices." (internal quotations omitted)); Mark Gimein, *The Enforcer*, FORTUNE, Sept. 16, 2002, at 76, 78 (citing a Pew Research Center for the People & the Press poll conducted in February 2002 showing that sixty-six percent of Americans thought business executives had low ethical standards, below those of journalists and Washington politicians).

[2] *See* Simon Romero, *WorldCom Facing Charges of Fraud*, N.Y. TIMES, June 27, 2002, at A1 [hereinafter Romero, *WorldCom Facing Charges*]; Simon Romero & Alex Berenson, *WorldCom Says It Hid Expenses, Inflating Cash Flow $3.8 Billion*, N.Y. TIMES, June 26, 2002, at A1 (describing the corporate scandals that unfolded at WorldCom, Global Crossing and Adelphia); Andrew Ross Sorkin, *Sweeping Charges Expected for Tyco's Ex-Chief and 2 Others*, N.Y. TIMES, Sept. 12, 2002, at C1.

[3] *See, e.g.*, 148 CONG. REC. H5462 (daily ed. July 25, 2002) (statement of Rep. Oxley) (stating that "our capital markets . . . have unquestionably suffered a series of blows . . . which have truly damaged the public's faith in the integrity of corporate America"). The Dow Jones Industrial Average ("Dow") was at 11252.84 on August 28, 2000. *See Markets Diary*, WALL ST. J., Aug. 29, 2000, at C1. The Dow had dropped to 7702.34 by July 23, 2002, during the height of the corporate scandals and a week before passage of the Sarbanes-Oxley Act. *See Markets Diary*, WALL ST. J., July 24, 2002, at C1. The Dow is a price-weighted average of thirty component companies, representing over twenty-nine percent of the publicly investable American stock market, that serves as a model portfolio used by financial professionals as a barometer of market activity. *See* Dow Jones & Co., Inc., *Dow Jones Averages: Key Benefits*, *at* http://www.djindexes.com/jsp/avgKeyBene.jsp. The corporate scandals, combined with an economy already in the process of slowing, had a substantial impact on the stock market. *See Federal Reserve's Second Monetary Policy Report to Congress for 2002: Oversight Hearing Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 107th Cong. (2002) (statement of Alan Greenspan, Chairman, Board of Governors, Federal Reserve System) ("[I]nvestor skepticism about earnings reports has . . . depressed the valuation of equity shares . . . ."), *available at* http://www.federalreserve.gov/boarddocs/hh/2002/july/testimony.htm.

[4] The need for any reform legislation as extensive as the Sarbanes-Oxley Act was unimaginable even through the first half of 2002, despite a dropping stock market that hurt the retirement savings of millions of Americans. *See, e.g.*, Kate Zernike, *Stocks' Slide is Playing Havoc with Older Americans' Dreams*, N.Y. TIMES, July 14, 2002, at A1.

[5] Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745.

2002.[6] Among other far-reaching changes, the Sarbanes-Oxley Act creates the Public Company Accounting Oversight Board ("Oversight Board") that will supervise the accounting process,[7] and sets out new requirements for the independence of both corporate auditing committees[8] and outside auditors.[9] The Act also prohibits auditors from providing certain consulting services to their clients,[10] orders chief executive officers ("CEOs") and chief financial officers ("CFOs") to certify the accuracy of corporate financial statements,[11] and mandates that corporations establish internal controls to guarantee the accuracy of internal financial data.[12] Finally, the Act restricts corporate executives from selling stock during "blackout periods,"[13] requires corporations to disclose certain off-balance-sheet transactions,[14] and restrains corporations from giving personal loans to executives.[15]

The fundamental principles behind the Sarbanes-Oxley Act are not new. The Act builds on a regulatory system originally established by Congress in response to an almost total lack of corporate accountability in the first three decades of the twentieth century.[16] In the midst of the Great Depression, Congress passed a law mandating that corporations selling securities to the public disclose to investors any important material facts about the company.[17] The following year, Congress established the Securities and Exchange Commission ("SEC")[18] on the fundamental principle that securities markets should operate fairly and honestly.[19] The Sarbanes-Oxley Act is based on a similar belief that corporations should be monitored by law to ensure they act in a fair, transparent and accountable manner. The Act is a measured law that will help restore and maintain confidence in the market by curbing corporate abuses and increasing transparency. President Bush's signing of the law does not mean that the work of reform is over. The Sarbanes-Oxley Act, however expansively its

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[6] *See* Press Release, White House Office of the Press Secretary, President Bush Signs Corporate Corruption Bill (July 30, 2002), *available at* http://www.whitehouse.gov/news/releases/2002/07/20020730.html.

[7] *See infra* text accompanying notes 50–68.

[8] *See infra* text accompanying notes 69–72.

[9] *See infra* text accompanying notes 73–75.

[10] *See infra* text accompanying notes 76–88.

[11] *See infra* text accompanying notes 89–100.

[12] *See infra* text accompanying notes 101–108.

[13] *See infra* text accompanying notes 109–110.

[14] *See infra* text accompanying notes 111–114.

[15] *See infra* text accompanying notes 115–123.

[16] *See* DAN A. BAVLY, CORPORATE GOVERNANCE AND ACCOUNTABILITY: WHAT ROLE FOR THE REGULATOR, DIRECTOR, AND AUDITOR? 67 (1999).

[17] *See* Securities Act of 1933, ch. 38, 48 Stat. 74 (codified as amended at 15 U.S.C. § 77a–77aa (2000)).

[18] *See* Securities Exchange Act of 1934, ch. 404, 48 Stat. 881 (codified as amended at 15 U.S.C. § 78 (2000)).

[19] *See* JOHN W. GRAHAM, U.S. SECURITIES AND EXCHANGE COMMISSION: A RESEARCH AND INFORMATION GUIDE 3 (1993).

provisions are interpreted, does not by itself lead to effective corporate governance reforms. The effectiveness of the Act depends substantially on the resources available to the SEC for enforcement, the leadership of the Oversight Board and other regulatory bodies that will enforce the new audit rules, the commitment of both political parties to true and lasting reforms, and, perhaps most importantly, the public's continued support for vigilant corporate oversight. Steady public support is essential to counter the political uncertainties that surround the implementation of any major legislation. Effective implementation of the Sarbanes-Oxley Act will happen only if Congress knows that the public will hold it responsible for failing to produce the reforms promised in the Act.

Although the recent scandals brought much attention to corporate accounting practices, concern over and unhappiness with the accounting profession is not a uniquely post-Enron phenomenon. Disenchantment with the profession has been building steadily over the years, with a large increase in suits against accountants since at least the 1980s.[20] An experienced audit executive[21] made the following prescient remarks in 1999:

> Especially discomforting . . . are instances where certain companies receive clean audit reports just a short time before collapsing. These fiascoes have led to calls for closer financial accounting and auditing regulations, some of which could involve radical change. They include . . . a ban on accountants performing consultancy work for audit clients . . . [and] limits on auditor tenure.[22]

The author further predicted that such reform proposals would meet strong opposition that may make their adoption unlikely.[23] Indeed, it took the Enron scandal and other multi-billion-dollar debacles to provide the driving force behind the passage of reforms.[24]

Enron's fall had far-reaching economic, political, and legislative consequences. While 20,000 Enron employees lost $1.2 billion from their 401(k) plans as Enron's stock price fell from almost ninety dollars to

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[20] *See* BAVLY, *supra* note 16, at 163.

[21] *Id.* at 216. Dan Bavly, the author, is a retired partner of the Israeli accounting firm Bavly Millner. *See* Press Release, Harvard University John F. Kennedy School of Government, Center for Business and Government Announces Global Gathering of Fellows (Dec. 13, 2000), *available at* http://www.ksg.harvard.edu/cbg/news/fellows_rls.htm. He was also a Fellow at the Center for Business and Government at Harvard University's John F. Kennedy School of Government. *See id.*

[22] BAVLY, *supra* note 16, at 164. Section 203 of the Sarbanes-Oxley Act requires that any audit partner with either primary responsibility for conducting the audit, or responsibility for reviewing the audit, must rotate off of the audit every five years. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 203, 116 Stat. 745, 773.

[23] BAVLY, *supra* note 16, at 164.

[24] *See* Lee Walczak et al., *Let the Reforms Begin*, BUS. WK., July 22, 2002, at 26, 26–31.

pennies,[25] Enron executives sold $994 million in company stock between January 1999 and May 2002.[26] The public's call for reform[27] was further fueled by the fact that Enron had been deceiving the public for years about the strength of its balance sheet.[28] Investors and regulators blamed, among others: Enron's auditor Arthur Andersen, who not only failed to detect Enron's shaky accounting practices, but also destroyed thousands of Enron-related documents;[29] investment bank analysts, who continued to make "buy" recommendations to investors even as Enron stock was plummeting;[30] and Enron executives, who deceived the public regarding the true condition of Enron's financial health.[31] For example, Enron hid billions of dollars in liabilities in off-balance-sheet subsidiaries using loopholes in accounting rules.[32]

The magnitude of Enron's collapse and the acuteness of the public reaction made corporate governance reforms seemingly inevitable.[33] By the early summer of 2002, however, post-Enron reform efforts had stalled in Congress.[34] Moreover, few Americans thought the reforms were a top priority. A Harris poll taken in that period showed that only one percent of Americans thought Enron and related issues were among the most important issues facing government.[35] Strong lobbying efforts by businesses to dampen reforms and the lack of public pressure to push reforms

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[25] *See* Wendy Zellner et al., *The Fall of Enron*, BUS. WK., Dec. 17, 2001, at 30, 30–31 (noting that Enron's stock traded at $90 per share on August 17, 2000 and at $1.01 per share on December 5, 2001).

[26] Mark Gimein, *You Bought, They Sold*, FORTUNE, Sept. 2, 2002, at 64, 68.

[27] *See, e.g.*, John A. Byrne, *Restoring Trust in Corporate America*, BUS. WK., June 24, 2002, at 30, 31; Joseph Nocera et al., *System Failure*, FORTUNE, June 24, 2002, at 62, 62.

[28] *See* David Henry et al., *Who Else is Hiding Debt*, BUS. WK., Jan. 28, 2002, at 36, 36.

[29] *See* Indictment, U.S. v. Arthur Andersen, L.L.P., No. CRH-02-121 (S.D. Tex. filed Mar. 7, 2002), *available at* http://news.findlaw.com/hdocs/docs/enron/usandersen030702ind.pdf; Consolidated Complaint for Violations of the Federal Securities Laws, In re Enron Corp. Sec. Litig., No. H-01-3624, at 95–96 (S.D. Tex. filed Apr. 8, 2002), *available at* http://www.enronfraud.com/pdf/consolidated_complaint.pdf. *See also* Kurt Eichenwald, *Arthur Andersen Guilty In Effort to Block Inquiry on Enron*, N.Y. TIMES, June 16, 2002, at A1.

[30] *See* Consolidated Complaint for Violations of the Federal Securities Laws, In re Enron Corp. Sec. Litig., No. H-01-3624, at 101–05 (S.D. Tex. filed Apr. 8, 2002), *available at* http://www.enronfraud.com/pdf/consolidated_complaint.pdf.

[31] *See id.* at 55–95.

[32] *See* Henry et al., *supra* note 28, at 36.

[33] *Under the Board Talk: American Companies Need Stronger Independent Auditors*, ECONOMIST, June 15, 2002, at 13, 13 [hereinafter *Under the Board Talk*] ("Earlier in the year, Congress was breathing fire about audit reform, including tougher regulation of accountants and banning firms from doing consulting work for their audit clients.").

[34] *Id.* ("The shameful prospect now is that Congress may not enact any auditor reforms at all.").

[35] *See* Jeffrey H. Birnbaum, *D.C. Declares Enron's 15 Minutes of Fame Over*, FORTUNE, June 10, 2002, at 38, 38. *But see* Lydia Saad, *National Issues May Play Bigger-Than-Usual Role in Congressional Elections*, GALLUP NEWS SERV., Oct. 31, 2002, *available at* http://www.gallup.com/poll/releases/pr021031.asp (analyzing data from October 21–22 poll showing that thirty-three percent of registered voters consider corporate corruption "extremely important" to their 2002 election decision).

through caused both accounting and pension reforms to stall in Congress.[36] Meanwhile, Democrats raised questions over whether SEC Chairman Harvey Pitt, who as a private sector lawyer had represented the largest accounting firms, was serious about implementing far-reaching reforms.[37]

In addition to doubts about the SEC's true intentions and the public's apparent apathy, many Republicans and others whose faith in the self-correcting ability of the market was greater than that of the reformers warned that overreacting to Enron's collapse would further harm the economy.[38] These opponents of reform argued that the cumulative effect of restatements of corporate financial reports would further erode investor confidence.[39] Another argument against reform was that risk is part of the free market, and Enron employees who lost their life savings assumed that risk in pooling all of their savings in only Enron stock.[40] While such an investment strategy may have been lucrative when Enron's stock price was very high,[41] it was a risky strategy nonetheless and, according to opponents of reform, the government should not interfere with the freely made choices of investors.[42] Those who wanted the market to correct it-

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[36] *Under the Board Talk*, *supra* note 33, at 13 ("[T]he fire [of reform] has been deftly extinguished by deep-pocketed corporate lobbyists.").

[37] *See* Stephen Labaton, *Democrats Want Change at SEC*, N.Y. TIMES, Oct. 10, 2002, at C1 (stating that Democrats have called for the replacement of Pitt because his "pattern of behavior . . . is steadily eroding the credibility of the SEC"). Pitt was ultimately driven to resign on Election Day 2002 over criticism surrounding his conduct in championing former Director of the Central Intelligence Agency and the Federal Bureau of Investigations, William Webster, as a candidate for Chairman of the Oversight Board. *See* Stephen Labaton, *SEC's Embattled Chief Resigns in Wake of Latest Political Storm*, N.Y. TIMES, Nov. 6, 2002, at A1. *See also infra* text accompanying notes 64–68.

[38] *See* 148 CONG. REC. H1541 (daily ed. Apr. 24, 2002) (statement of Rep. Jeff Sessions (R-Tex.)) ("When something such as Enron happens, we as Members of Congress must fight the temptation to react by overlegislating, thus doing more harm than good."); Gabor Garai, *History as a Guide to the Accounting Mess: Let's Cure the Disease Without Killing the Patient*, 13 No. 1 ANDREWS MERGERS & ACQUISITIONS LITIG. REP. 27 (2002), *available at* WL 13 No. 1 ANMALR 27.

[39] *See, e.g.*, Garai, *supra* note 38 ("The cascading effect of this second wave of financial 'corrections' would further erode investor confidence and destroy the value of our portfolios . . . .").

[40] *See* 148 CONG. REC. H1543 (daily ed. Apr. 24, 2002) (statement of Rep. Sessions) ("[W]e have heard a lot of political rhetoric about how the Federal Government should be engaged in the oversight of companies, the oversight of CEOs . . . . But the fact of the matter is that we live in an environment where the free market has an opportunity to have success and have failure."). The efficient capital markets theory says that market share prices are an accurate measure of a stock's levels of risk and value. *See* ROBERT C. CLARK, CORPORATE LAW 281 n.2 (1986).

[41] *See supra* note 25.

[42] *See, e.g.*, *Enron, Bankruptcy, and Easy Credit*, RON PAUL'S TEXAS STRAIGHT TALK (Office of U.S. Rep. Ron Paul, Washington, D.C.), Dec. 17, 2001, *available at* http://www.house.gov/paul/tst/tst2001/tst121701.htm. Representative Ron Paul (R-Tex.) argued that "investing carries risk, and it is not the role of the federal government to bail out every investor who loses money. In a true free market, investors are responsible for their own decisions, good or bad." *Id.* An investor who embraces risk should have no complaints when he loses his investment to inferior execution of a business strategy or superior

self argued that the market is already ahead of government reform efforts; for example, Arthur Andersen lost hundreds of clients following revelations of its role in the Enron scandal.[43] Even Federal Reserve Board Chairman Alan Greenspan sounded a note of caution against increased regulation, saying that market forces were inciting higher ethical standards.[44]

Prospects of passing a reform bill closely mirrored the shifting political strengths of those championing reform and those opposed to it. The accounting industry's powerful lobbying against sweeping reform efforts influenced Congress, especially attempts to ban auditors from providing non-audit services.[45] Still, the weight of corporate scandals that were increasingly hurting the stock holdings and pension funds of tens of millions of Americans[46] pushed corporate reform legislation through Congress on a bipartisan basis.[47] Politicians who were reluctant to support reforms must have realized the public backlash that would have resulted from government inaction.[48] The political climate changed dra-

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competition. *Cf. id.* Nevertheless, even this risk-taking investor has a legitimate grievance when his losses stem from outright fraud or corporate theft. *See* 148 CONG. REC. S6496 (daily ed. July 9, 2002) (statement of Sen. Jon Corzine (D-N.J.)) (arguing that reform is "about making sure corporate fraud is properly dealt with in the legal system, [by putting] everyone on notice that they [sic] have serious responsibilities to certify that what is reported is real, and if it is not real, then people are held accountable").

[43] *See* Stephen Labaton & Richard A. Oppel, Jr., *Enthusiasm Waning in Congress for Tougher Post-Enron Controls*, N.Y. TIMES, June 10, 2002, at A1. Senator Phil Gramm (R-Tex.), a leading opponent of reform, has argued that regulators and the market are already correcting the kind of abuses found in Enron and Arthur Andersen. *See id.*

[44] *See* Elizabeth Baird et al., *Criminalizing Business Judgment Could Stagnate U.S. Economy*, LEGAL BACKGROUNDER (Wash. Legal Found., Washington, D.C.), June 7, 2002, at 1, *available at* http://www.omm.com/webdata/content/newsevents/criminalizing_business_judgment.pdf.

[45] *See* Labaton & Oppel, *supra* note 43 (arguing that "the drift in Congress largely reflects the power of the accounting profession"); Jackie Spinner, *Sullied Accounting Firms Regaining Political Clout*, WASH. POST, May 12, 2002, at A1; Jeremy Kahn, *Deloitte Restates Its Case*, FORTUNE, Apr. 29, 2002, at 64, 68 (quoting a Deloitte auditor accusing former SEC Chairman Arthur Levitt of "deliberately misleading the public into thinking that there is a conflict between auditing and consulting"). For a discussion of the prohibition on accounting firms from performing consulting services for the same client, see *infra* text accompanying notes 76–88.

[46] *See, e.g.*, Zernike, *supra* note 4, at A1. The drop in stock prices that resulted in part from corporate scandals had a particularly severe impact on older Americans who were close to retirement age. *See id.* Many older Americans were forced to return to work from retirement or delay their retirement. *See id.*

[47] *See* David E. Sanger & Richard A. Oppel, Jr., *Senate Approves a Broad Overhaul of Business Laws*, N.Y. TIMES, July 16, 2002, at A1 (stating that during the peak of corporate scandal revelations, volatile markets prompted unanimous support for reform of some kind from both parties).

[48] *See* Walczak et al., *supra* note 24, at 27 (describing how "WorldCom's $4 billion stunner," coming after a wave of accounting scandals that weakened the economy, motivated both parties to join the reform drive). The financial collapse of WorldCom, the nation's second-largest long distance carrier, scared investors in other companies and led to an immediate market drop. *See* Romero & Berenson, *supra* note 2. The SEC said that the WorldCom announcement "confirmed 'accounting improprieties of unprecedented magnitude.'" *Id.*

matically when the succession of scandals burst into the media coverage.[49] Even if some lawmakers believed that the scandals did not reflect the overall health of American corporations, it became politically risky to oppose reform measures. The Sarbanes-Oxley Act is substantially the product of this swift change in the political landscape.

The Sarbanes-Oxley Act's first major provision is the creation of the Oversight Board, which will "oversee the audit of public companies,"[50] establish standards for auditors,[51] and conduct inspections of public accounting firms.[52] The Oversight Board will conduct annual quality inspections of firms that audit more than one hundred companies and triennial inspections of all other auditing firms.[53] Additionally, under the Act either the SEC or the Oversight Board can order a special inspection of any firm at any time.[54] The Oversight Board can impose sanctions such as censure, additional professional education, or a temporary or permanent suspension from accounting activities on an accountant or accounting firm if the Board finds an unreasonable failure to supervise any person associated with auditing or quality control standards.[55]

The composition of the Oversight Board reflects the Sarbanes-Oxley Act's emphasis on the need for those charged with assuring the validity and fairness of corporate accounting to be independent. Only two of the five members of the Oversight Board, all of whom must have "demonstrated commitment to the interests of investors and the public,"[56] can be current or former certified public accountants ("CPAs").[57] This provision reflects lawmakers' desire to end or at least curtail the system of self-regulation of accountants.[58]

The SEC will have comprehensive authority over the Oversight Board.[59] It must approve all Oversight Board-proposed rules for them to become effective.[60] The Commission can "censure or impose limitations upon the . . . operations of the [Oversight] Board" if it finds that the Oversight Board has violated the Sarbanes-Oxley Act or the securities

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[49] *See id.*

[50] Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 101(a), 116 Stat. 745, 750.

[51] *Id.* § 103(a).

[52] *Id.* § 104(a).

[53] *Id.* § 104.

[54] *Id.*

[55] *Id.* §§ 105(c)(4), 105(c)(6)(A)(i).

[56] *Id.* § 101(e)(1).

[57] *Id.* § 101(e)(2).

[58] *See* 148 CONG. REC. S7351 (daily ed. July 25, 2002) (statement of Sen. Sarbanes) (stating that the Sarbanes-Oxley legislation "establishes a strong independent accounting oversight board, thereby bringing to an end the system of self-regulation in the accounting profession which, regrettably, has not only failed to protect investors . . . but which has in effect abused the [public's] confidence in the markets"); 148 CONG. REC. H5463 (daily ed. July 25, 2002) (statement of Rep. John LaFalce (D-N.Y.)) ("No longer will the accounting industry be able to set the rules for itself without regard for the interests of shareholders.").

[59] Sarbanes-Oxley Act of 2002 § 107.

[60] *Id.* § 107(b)(2).

laws, or if the Oversight Board has failed to ensure the compliance of accounting firms without reasonable justification or excuse.[61] Any member of the Oversight Board can be removed from office or censured by the SEC for failing to enforce the laws.[62] The SEC can also enhance or reduce the Oversight Board's sanctions if the Commission finds them inadequate or excessive.[63]

The effectiveness of the Oversight Board in performing the functions assigned to it by the Sarbanes-Oxley Act largely depends on the character of its leadership. It is not surprising, then, that not long after the Act's passage, a political fight ensued over who would be nominated to chair the Oversight Board.[64] SEC Chairman Pitt and other members of the SEC had favored John H. Biggs, the Chairman and CEO of the pension investment plan Teachers Insurance and Annuity Association College Retirement Equities Fund ("TIAA-CREF").[65] Pitt subsequently withdrew his support from Biggs, and proponents of reform claimed the reason was pressure from accounting executives and some Republican lawmakers who felt Biggs was too antagonistic to the accounting industry.[66] Biggs has been a strong proponent of stricter regulation of the accounting profession, supporting reforms such as requiring companies to rotate their auditors every few years and prohibiting accounting firms from performing consulting services for a client.[67] When further controversy erupted around the Republicans' replacement candidate for Chairman of the Oversight Board, mounting criticism ultimately forced Pitt to resign on Election Day 2002.[68] Whatever the merits of this criticism, the fight over nominations to the Oversight Board is indicative of how large a role it has in determining how vigorously the Sarbanes-Oxley Act is implemented.

The Sarbanes-Oxley Act also seeks to increase the quality and independence of an audit by giving more authority to the audit committee of

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[61] *Id.* § 107(d)(2).

[62] *Id.* § 107(d)(3).

[63] *Id.* § 107(c)(3).

[64] *See* Stephen Labaton, *S.E.C. Chief Hedges on Accounting Regulator*, N.Y. TIMES, Oct. 4, 2002, at C1.

[65] *See id.* TIAA-CREF provides investment services for faculty and staff of schools and research institutions. *See* TIAA-CREF, *About TIAA-CREF*, *at* http://www.tiaa-cref.org/a_company/index.html.

[66] *See* Labaton, *supra* note 64, at C1. Lynn E. Turner, a former chief accountant at the SEC, said at the time that Republicans, accounting firms, and Pitt were "trying to circumvent the [Sarbanes-Oxley Act] by making certain that the [Oversight Board] does not include any reform-minded persons." *Id.* She continued, "If we lose Biggs, we lose a reform-minded board." *Id.*

[67] *See id.*

[68] *See* Labaton, *supra* note 37, at C1. The Republicans' favored candidate was William Webster. *See id.* Webster's candidacy became controversial upon revelations that he had ties to the ailing corporation U.S. Technologies and that Pitt had withheld information concerning those ties from both the White House and the SEC. *See id.*

a company's board of directors.[69] Under the Act, the audit committee will hire and receive reports from the company's outside accounting firm, and it will be responsible for the work and payment of the firm.[70] Perhaps most importantly, the Act further provides that each member of the audit committee must be "independent": a member of the committee may not accept consulting fees or be affiliated with the company other than in his or her capacity as a member of the board of directors.[71] In contrast, prior to the Act's passage, no state or federal legal provisions addressed the duties of the audit committee (or even mandated its existence). These decisions concerning internal corporate organization were instead left to the discretion of the corporation's board of directors.[72]

In a similar vein, the Sarbanes-Oxley Act declares that if a company's CEO, Controller, CFO, or Chief Accounting Officer was employed by the company's outside accounting firm during a one-year period preceding the audit, that auditing firm has a conflict and is not independent.[73] An accounting firm found to lack independence cannot serve as the auditor of the company to which it has ties.[74] These rules will help prevent situations where the highest-ranking executives of companies have ties to their accounting firms that can lead to biased audits overlooking ethically questionable or outright illegal activities.[75]

The Sarbanes-Oxley Act's prohibition on auditing firms performing non-audit functions[76] is also part of the effort to strengthen accountants' independence. Auditors voiced strong opposition to this provision, making two main arguments against the ban.[77] First, they argued that per-

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[69] The audit committee will most likely be one of many committees of a company's board of directors; the board may create any committees it deems proper to manage the "business and affairs of [the] corporation." *E.g.*, DEL. GEN. CORP. L. § 141(a) (1991). This right is a sweeping one, as the board of directors can create committees, including an audit committee, that can exercise "all the powers and authority of the board of directors in the management of the business and affairs of the corporation." *E.g.*, DEL. GEN. CORP. L. § 141(c)(1) (1991 & Supp. 2000).

[70] Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 301(2), 116 Stat. 745, 776.

[71] *Id.* § 301(3).

[72] *See supra* note 69.

[73] Sarbanes-Oxley Act of 2002 § 206. The Act also requires accounting firms to rotate their lead auditors every five years. *Id.* § 203.

[74] *Id.* § 203.

[75] BAVLY, *supra note* 16, at 207.

[76] Sarbanes-Oxley Act of 2002 § 201(a). The Act prohibits provision of the following services: bookkeeping; financial information systems design; appraisal, actuarial, and internal audit services; management functions or human resources; investment banking or brokerage services; legal or expert services unrelated to the audit; and any other services the Oversight Board deems impermissible. *Id.* On a case-by-case basis, the Act does allow companies to seek an exemption from the Oversight Board to hire their auditors for non-audit services. *Id.* § 201(b). The Oversight Board may grant an exemption to the extent that it is "necessary or appropriate in the public interest and is consistent with the protection of investors . . . ." *Id.* Like other decisions of the Oversight Board, these exemptions are subject to SEC review. *Id.*

[77] *See, e.g.*, Kahn, *supra* note 45, at 72 (noting that Deloitte's CEO believes restricting non-audit services will "make audits worse").

forming non-audit services gives accounting firms the comprehensive expertise necessary to understand their clients' businesses, and such understanding is necessary to perform an effective audit.[78] Second, the added income generated through non-audit services can lead to greater financial stability for the accounting profession, which in turn arguably leads to greater independence.[79] Nevertheless, the argument for greater financial stability does not address the seemingly inevitable conflict of interest that would arise if the auditing and consulting fees paid by a client to an accounting firm are significant.[80] Perhaps the most important advantage of eliminating accountants' conflicts of interest is preventing a situation where a company functionally "buys off" its accountant through "bribes" in the form of lucrative consulting fees to prevent an accurate financial picture from emerging.[81] Thus a tension exists between, on the one hand, "the real insights, synergies, and efficiencies obtained by audit firms"[82] from non-auditing services, and, on the other hand, the costs of providing those services in terms of potential conflicts of interest that could lead to inaccurate, or even fradulent, accounting.[83] In weighing whether a ban on non-auditing services is likely to be beneficial overall, "it is hard to predict which effect will be bigger."[84]

Even if the cost of an audit increases because accounting firms cannot use knowledge gained from consulting, this price may still be worth paying for effectively addressing the conflict of interest issues that played such a central role in recent corporate scandals. For example, Arthur Andersen earned $27 million in consulting fees and $25 million in accounting fees from Enron in 2000.[85] In this situation, Andersen likely felt pressure to produce favorable audits in exchange for retaining Enron as a lucrative consulting client. The effects of the loss of revenues from discontinuation of non-audit services may also worsen the negative ef-

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[78] *See* Dan L. Goldwasser, *The Accounting Profession's Regulatory Dilemma*, CPA J., May 2002, at 8. Additional knowledge gained by an auditor about a client's business through consulting work, which involves financial analysis of the client's business, is thought to improve the auditor's accounting work. *See id.*

[79] *See id.* at 8, 10.

[80] *See id.* at 8; Bernard Wolfman, *Auditors: Stick to Your Auditing*, 96 TAX NOTES 298 (2002), *available at* http://www.tax.org/Communications/Wolfman (supporting the prohibition on accounting firms from providing non-audit services).

[81] *See* 148 CONG. REC. S6563 (daily ed. July 10, 2002) (statement of Sen. Carl Levin (D-Mich.)). By 1999, fifty percent of revenues at the Big Five accounting firms came from consulting, while only thirty-four percent came from auditing. *Id.* By 2002, almost seventy-five percent of the fees earned came from non-audit services. *Id.* Evidence indicates that accounting firms were using their market position in accounting to gain additional consulting business by lowering audit fees for companies that agreed to a consulting contract. *See id.*

[82] Robert Bricker, *The Accounting Profession After Sarbanes-Oxley: For Better or For Worse*, 13 No. 1 ANDREWS MERGERS & ACQUISITIONS LITIG. REP. 25 (2002), WL 13 No. 1 ANMALR 25.

[83] *See id.*

[84] *Id.*

[85] John A. Byrne, *Fall From Grace*, BUS. WK., Aug. 12, 2002, at 50, 52.

fects of intense competition among auditing firms.[86] Price competition and underbidding to maintain and attract clients have led auditors to devote very little time to the actual audit.[87] Quite simply, CPAs currently do not serve their important if informal function as watchdogs of the public trust.[88]

The Sarbanes-Oxley Act seeks to increase the effectiveness of its accounting provisions by placing new obligations on corporate executives in the form of certifications. One of the most publicized provisions of the Sarbanes-Oxley Act requires the principal executive and financial officers to "certify in each annual or quarterly report filed" that "based on the officer's *knowledge*, the report does not contain any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made . . . not misleading."[89] If an audit firm has to prepare a restatement because of material noncompliance with any financial reporting requirement, the CEO and CFO must forfeit any bonus received in the twelve months following the first public issuance of the financial statement.[90] Moreover, willfully certifying an inadequate report is punishable by a fine of up to $5 million, or imprisonment of not more than twenty years, or both.[91]

Critics of the Sarbanes-Oxley Act's certification provision express concern that it will weaken the Business Judgment Rule ("BJR"), which is the rule used by courts to review the decisions of corporate directors and officers.[92] The BJR recognizes the need for risk-taking by directors and officers to produce economic innovation and growth.[93] Under this rule, a court will not substitute its judgment for that of a company's board of directors if the board's decision can be "attributed to any rational business purpose."[94] When senior executives and the board of di-

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[86] *See* Goldwasser, *supra* note 78, at 8, 10.

[87] *See* BAVLY, *supra* note 16, at 162.

[88] *See id.* CPAs have played this role in America's free market system for years: "Auditors are capitalism's handmaidens. Unless they provide, and are seen to provide, accurate, honest, and impartial information on companies, the whole structure of market economies will be threatened. There is therefore a strong public interest in ensuring that accountancy firms themselves are in good health." *Who Will Audit the Auditors?*, ECONOMIST, July 15, 1989, at 18.

[89] Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 302(a)(2), 116 Stat. 745, 777 (emphasis added). For a discussion of the significance of a knowledge standard for officer liability, see *infra* text accompanying notes 97–100, 107.

[90] Sarbanes-Oxley Act of 2002 § 304(a)(1).

[91] *Id.* § 906(a).

[92] *See, e.g.*, Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954 (Del. 1985) (quoting Sinclair Oil Corp. v. Levien, 230 A.2d 717, 720 (Del. 1971)).

[93] *See, e.g.*, Joy v. North, 692 F.2d 880, 886 (2d. Cir. 1982) ("[B]ecause potential profit often corresponds to potential risk, it is very much in the interest of shareholders that the law not create incentives for overly cautious corporate decisions.").

[94] *See Unocal*, 493 A.2d at 954; Int'l Ins. Co. v. Johns, 874 F.2d 1447, 1458 n.20 (11th Cir. 1989) (stating that directors are "[m]ore qualified to make business decisions than judges"); Kumpf v. Steinhaus, 779 F.2d 1323, 1325 (7th Cir. 1985) ("The press of market forces . . . will more effectively serve interests of all participants than will an error-prone judicial process.").

rectors have acted in good faith, their "decisions will be regarded as 'business judgments' and [they] will not be personally liable for damages even if a decision proves to be detrimental to the corporation. This holds true even if, in hindsight, these decisions proved to be unwise or inexpedient."[95] Thus, courts have consistently held that a CEO, protected by the BJR, is allowed to rely on the representations of those who report to him, including outside auditors, and is allowed to assume that they are carrying out their professional duties honestly.[96]

Some of those opposed to reforms have argued that the certification provisions have the potential to cause the most harm out of all the Act's provisions because they amount to a *de facto* strict liability standard for corporate officers that would effectively abrogate the BJR in this context.[97] Without the BJR, corporate executives would more often than not turn away from business opportunities that are likely to be profitable but present some risk of failure because executives will be held responsible for bets that fail.[98] When business opportunities with higher chances of success than failure are turned down, the aggregate wealth of society decreases.[99] Whatever the merits of this argument, opponents of the certification requirements are wrong to argue that the BJR is in danger; while the requirements place substantial responsibilities on corporate officers, they are not equivalent to a strict liability standard. The Sarbanes-Oxley Act does not seek to punish good faith corporate decisions; it punishes only fraudulent corporate actions such as knowingly falsifying financial statements.[100]

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[95] Baird et al., *supra* note 44, at 2. *See also* Grobow v. Perot, 526 A.2d 914, 928 (Del. Ch. 1987), *aff'd*, 539 A.2d 180 (Del. 1988), *aff'd on other grounds sub nom.* Levine v. Smith, 591 A.2d 194 (Del. 1991) (holding that under the BJR, directors will not be held liable for conduct that turns out to be "controversial, unpopular, or even wrong").

[96] *See, e.g.*, Graham v. Allis-Chalmers Mfg. Co., 188 A.2d 125, 130 (Del. 1963) ("[D]irectors are entitled to rely on the honesty and integrity of their subordinates until something occurs to put them on suspicion that something is wrong."). Under Delaware law, the board of directors shall

> be fully protected in relying in good faith upon the records of the corporation and upon such information, opinions, reports or statements presented . . . by any of the corporation's officers or employees . . . or by any other person as to matters the member reasonably believes are within such other person's professional or expert competence . . . .

DEL. GEN. CORP. L. § 141(e) (1991 & Supp. 2000).

[97] *See* Baird et al., *supra* note 44, at 2 (arguing that reform proposals such as those contained in the Sarbanes-Oxley Act "effectively sound the death knell for the [BJR]").

[98] *See, e.g.*, In re Consumers Power Co. Derivative Litig., 132 F.R.D. 455, 464 (E.D. Mich. 1990) (stating that the BJR "protects directors from undue fear of personal liability and encourages the innovation, quick decision, and occasional risk-taking that are important to a corporation's success" (citing CLARK, *supra* note 40, at 641)).

[99] *See* Gagliardi v. TriFoods Int'l, Inc. 683 A.2d 1049, 1052–53 (Del. Ch. 1996) (stating that the BJR protects against "sub-optimal risk acceptance" that results from second-guessing managers' risk-taking).

[100] *See* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 302(a)(2), 116 Stat. 745,

The Sarbanes-Oxley Act also contains internal controls requirements that complement its certification provisions. These provisions operate in tandem to force CEOs not only to certify that they know of no wrongdoing, but also to take steps to guarantee that if there were any wrongdoing, they would be likely to know about it. Those who sign financial reports must establish internal controls[101] to ensure the flow of financial information to them and evaluate the effectiveness of the internal controls within ninety days prior to the publication of the report.[102] Before the Sarbanes-Oxley Act, corporate law statutes did not mandate the creation of internal controls, much less create standards for their effectiveness.[103] Without accurate internal controls to gather and sort a corporation's financial data, no amount of vigilance by outside accountants can completely correct numbers tainted at the source.[104] Those officers who must comply with the Act's certification requirements must also certify that they have disclosed both to the company's outside auditor and to the auditing committee of the board of directors any "significant deficiencies" or "material weaknesses" in the company's internal controls.[105] This new responsibility on corporate officers puts them on notice that they carry heavy responsibilities for ensuring the accuracy of their company's financial statements.

If the Sarbanes-Oxley Act certification provisions are to be effective, the Oversight Board and the SEC must put real teeth behind the requirement of effective internal controls.[106] It is unclear how much force the

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777 (stating that penalties are based "on the officer's *knowledge*" and thus are not based on strict liability) (emphasis added).

[101] Internal controls are mechanisms that help ensure the accurate flow of a company's financial information for collection and publication for investors and the regulatory agencies. *See* Roger W. Mills, *Internal Control Practices within Large UK Companies*, *in* CORPORATE GOVERNANCE: RESPONSIBILITIES, RISKS AND RENUMERATION 124 (Kevin Keasey & Mike Wright eds., 1997).

[102] Sarbanes-Oxley Act of 2002 § 302(a)(4).

[103] *But see* In re Caremark Int'l Inc. Derivative Litig., 698 A.2d 959 (Del. Ch. 1996). *Caremark* represents an earlier, judicial attempt to create internal controls obligations. *See generally id.* The Chancery Court of Delaware said that a board must meet its obligation to be "reasonably informed" about the corporation's affairs by assuring . . . that information and reporting systems exist in the organization that are reasonably designed to provide to senior management and to the board itself timely, accurate information sufficient to allow management and the board, each within its scope, to reach informed judgments concerning both the corporation's compliance with the law and its business performance. *Id.* at 970.

[104] *See, e.g.*, BAVLY, *supra* note 16, at 200 (arguing that when outside accountants work alone without the benefit of internal controls, the effectiveness of their audit is reduced); 148 CONG. REC. S6748 (daily ed. July 15, 2002) (statement of Sen. Chuck Grassley (R-Iowa)) (arguing that recent scandals "further demonstrated that the problem does not rest entirely with a company's external auditors[,] whose best efforts may not detect financial misrepresentations if fraud is repeatedly covered up by corporate insiders or contrived to defeat established internal controls").

[105] Sarbanes-Oxley Act of 2002 § 302 (a)(5).

[106] *See* 148 CONG. REC. S6748 (daily ed. July 15, 2002) (statement of Sen. Grassley) (arguing that "addressing [the accounting scandals] requires additional oversight[,] and not just of a company's external accountants but of the internal accounting function itself").

penal provisions for false financial statements can have under a knowledge standard, and it may be relatively easy for a corrupt corporate officer to claim lack of knowledge when he in fact falsified financial statements.[107] With the requirement of reasonably effective internal controls, however, these officers may not so easily escape punishment.[108] It remains to be seen whether the combination of certification and internal controls provisions will be adequate to ensure the efficient flow of accurate financial data to investors and regulatory bodies.

Several other Sarbanes-Oxley Act reforms are responses to problems in corporate law that were revealed in the Enron scandal and other recent corporate scandals. Many Enron employees could not sell their Enron stock during "blackout" periods, while no rule prohibited executives, who were not subject to the blackout, from selling their own Enron stock.[109] The Sarbanes-Oxley Act prohibits any director or executive officer from trading in company stock acquired "in connection with his or her service or employment" during any pension fund blackout period.[110]

Off-balance sheet accounts were also revealed as a major problem for investors who had invested in Enron. Enron hid millions of dollars in losses in off-balance-sheet accounts and thereby painted a false picture of profitability that led investors to buy Enron stock.[111] The Sarbanes-Oxley Act requires the disclosure of all "off-balance sheet transactions . . . that may have a material current or future effect on financial condition . . . ."[112] This new disclosure requirement seeks to prevent companies from contriving their accounting practices to keep investment losses off their balance sheets.[113] The Act also mandates that the SEC determine the extent of off-balance sheet transactions and whether generally accepted accounting rules result in financial statements that accurately reflect the financial conditions of such transactions to investors.[114]

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[107] *See, e.g.*, Terrydale Liquidating Trust v. Barness, 611 F. Supp. 1006, 1027 (S.D.N.Y. 1984) (stating that, for a knowledge standard, "[a]ctual knowledge of a breach of duty is required; mere suspicion or even recklessness as to the existence of a breach is insufficient").

[108] *Cf. supra* note 104 and accompanying text.

[109] *See* Press Release, U.S. Dep't of Labor, President Bush Calls for Action to Protect American Workers' Retirement (Feb. 1, 2002), *available at* http://www.dol.gov/pwba/newsroom/fs020102.html. A blackout period is the time when employers change pension plan rules or administrators, during which employees cannot access or sell their retirement accounts. *See id.*

[110] Sarbanes-Oxley Act of 2002 § 306(a)(1).

[111] *See* Henry et al., *supra* note 28, at 36.

[112] Sarbanes-Oxley Act of 2002 § 401(a).

[113] *See* 148 CONG. REC. S6690 (daily ed. July 12, 2002) (statement of Sen. Charles Schumer (D-N.Y.)) (stating that off-balance sheet entities "have been used to take losses off the books, and then shareholders, and everybody else, don't know much about them").

[114] Sarbanes-Oxley Act of 2002 § 401(c).

Another reform that is tied to a specific recent scandal is the Sarbanes-Oxley Act's prohibition on personal loans to executives.[115] According to media reports, former Tyco chief executive L. Dennis Kozlowski received a $19 million no-interest loan from the company that was later forgiven.[116] This kind of loan was permissible under Delaware corporate law, for example, which allowed corporations to make loans to officers and directors if the board of directors decides that such assistance will benefit the corporation.[117] The Sarbanes-Oxley Act, as a federal law, will supercede Delaware's approval of personal loans to executives.[118] The Act's prohibition on personal loans will help prevent the abuse of corporate funds for personal purposes.[119]

Nevertheless, there are some good reasons to allow firms to lend money to executives. First, firms may want to lend money to a new CEO relocating from across the country.[120] The CEO may want to have some loan money from the company to cover legitimate expenses, such as buying a new home while waiting to sell his old one and paying relocation costs.[121] Second, companies may want to lend money to corporate officers so that managers can buy the company's stock.[122] The interests of executives who hold company stock may be more closely aligned with shareholders than those executives who do not own company shares.[123]

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[115] *Id.* § 402(a).

[116] *See* Sorkin, *supra* note 2, at C1. Kozlowski received an additional $13 million from Tyco to pay the income taxes on that loan. *See id.* Loans to high-ranking executives also figured prominently in several other recent corporate scandals. *See, e.g.*, 148 CONG. REC. S6690 (daily ed. July 12, 2002) (statement of Sen. Schumer). Senator Schumer cited the following examples of abuse of this practice:

> Bernard Ebbers, CEO of WorldCom, borrowed a mind-boggling $408 million from the corporation over several years, while receiving a compensation package valued at over $10 million annually, all the while the company was facing massive losses. In the case of Adelphia, the Rigas Family received loans and other financial benefits totaling a staggering $3.1 billion, while that company has also reported huge financial losses.

Id.

[117] DEL. GEN. CORP. L. § 143 (1991).

[118] *See* U.S. CONST. art. VI. Under the Supremacy Clause, a federal law will override the state law occupying the field. *See, e.g.*, Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 210–11 (1824) (Marshall, C.J.).

[119] *See* 148 CONG. REC. S7361 (daily ed. July 25, 2002) (statement of Sen. Schumer) (stating that under the prohibition "CEOs will have to go to the bank, just like everyone else, to acquire a loan; which, [sic] will reduce the risk of CEOs ability to use company funds for personal purposes").

[120] *See* Mark J. Roe, Delaware's Competition 37 (Oct. 20, 2002) (unpublished manuscript, on file with author).

[121] *See id.*

[122] *See id.*

[123] *See* WILLIAM T. ALLEN & REINIER KRAAKMAN, COMMENTARY AND CASES ON CORPORATE LAW, ch. 9, 36 (2002) (unpublished manuscript, on file with author). Nevertheless, equity-based compensation may also create new possibilities for executive abuse. *See id.* Executives may use their influence over corporate decision making to engage in actions

Allowing loans only for these purposes may have preserved the advantages of executive loans while limiting their abuse.

Although the Sarbanes-Oxley Act addresses the role of auditors, executives, and members of the audit committee, one weakness of the Act is that it does not address the role of the board of directors generally, nor does it specify any minimum qualifications board members need to have in order to serve. As Enron, Tyco, and other scandals have shown, "too often directors are [not] really independent. Even so-called outsiders end up having some ties to the CEO."[124] CEO Ken Lay selected everyone on Enron's board of directors; thus, they were each likely to be too "cowed to question his leadership."[125] Better board performance may be based on requiring board members to have a fairly comprehensive knowledge of the company's business and on setting aside a certain number of board seats for those with expertise in finance, accounting, and management.[126] Board membership qualifications deserve continued scrutiny and should be a high priority in the next phase of corporate governance reforms.

Vigorous enforcement of the provisions of the Sarbanes-Oxley Act is crucial to their effectiveness. To this end, the Act calls for an increase in the SEC's funding from $438 million in fiscal year 2002[127] to $776 million for fiscal year 2003.[128] The Act also calls for the addition of no fewer than 200 qualified professionals to the SEC staff to facilitate greater oversight of auditors.[129] While the SEC is in charge of reviewing the financial statements of 17,000 public companies, only one in fifteen annual reports was reviewed in 2000.[130] Moreover, SEC workers are relatively underpaid, earning twenty-five to forty percent less than peers at other federal agencies.[131] To address this earnings gap, the Sarbanes-Oxley Act sets aside over $100 million for additional employee compensation.[132] The extent to which the SEC can enforce the Sarbanes-Oxley

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that raise the company's stock price in the short-term but add little real value to the company in the long-term, and then sell their shares before prices fall. *See id.*

[124] Nocera et al., *supra* note 27, at 72.

[125] *Id.*

[126] *See id.*

[127] *See Appropriations for 2002: Hearings Before the Subcomm. on Commerce, Justice, State and Judiciary of the Senate Comm. on Appropriations*, 107th Cong. 346 (2001) (statement of Laura S. Unger, Acting Chairman, SEC), *available at* http://www.sec.gov/news/testimony/062801tslu.htm.

[128] Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 601, 116 Stat. 745, 793.

[129] *Id.*

[130] Nocera, *supra* note 27, at 68.

[131] *Id.*

[132] Sarbanes-Oxley Act of 2002 § 601. *See also* 148 CONG. REC. S7351 (daily ed. July 25, 2002) (statement of Sen. Sarbanes). According to Senator Sarbanes,

> the SEC cannot offer its attorneys and accountants the same level of salary and benefits that their counterparts receive at the five Federal bank regulatory agencies. Talented and dedicated staff attorneys and accountants can increase their compensation by as much as one-third simply by moving to another agency. This is an intolerable situation. Pay parity has been authorized and now must be

Act also depends on the resources that it is appropriated.[133] The SEC's capacity for oversight is particularly important to the fate of the Oversight Board.[134]

The public, corporations, and government agencies should not rest with the signing of the Sarbanes-Oxley Act into law. Legislators and the public must be willing to revise and improve the Sarbanes-Oxley Act in response to changing regulatory needs. Congress should not be afraid to modify or strike aspects of the law that turn out to hinder its goals of corporate accountability and transparency. The ultimate challenge is to anticipate corporate governance problems in order to prevent devastating collapses such as that of Enron, which destroyed the savings of thousands of workers. In that sense, some may say that the Sarbanes-Oxley Act is merely a rear-guard action that addresses yesterday's problems. Even though it took a sequence of corporate scandals to pass comprehensive reform legislation, however, that does not detract from the real substance of the reforms.

Nevertheless, the Sarbanes-Oxley Act by itself accomplishes very little in the absence of vigorous enforcement of its provisions and effective leadership by the SEC and the Oversight Board. Political debate and maneuvering over these issues will never cease. The SEC will always depend on Congress for its funding to fill its expanded role under the Sarbanes-Oxley Act. The constant variables of politics will shape the implementation of the Act. However strong the public's support for the passage of the Sarbanes-Oxley Act may have been, public interest in corporate governance may recede if economic performance improves and recent scandals become distant memories. Therefore, arguably the most important determinant in the success of the Sarbanes-Oxley Act is the public's vigilance. If the public does not want the effectiveness of the Sarbanes-Oxley Act to rise and fall with the political climate, it should continually be willing to reward or punish candidates running for office based on their degree of support for corporate governance reforms.

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funded; this legislation specifically provide[s] the necessary funding.

Id.

[133] The political debate over the funding of the SEC did not cease with the passage of the Sarbanes-Oxley Act. *See* Stephen Labaton, *Bush Seeks to Cut Back on Raise for S.E.C.'s Corporate Cleanup*, N.Y. TIMES, Oct. 19, 2002, at A1 (describing a White House proposal to give the SEC a thirty percent increase in funding for Fiscal Year 2003, as opposed to the seventy-seven percent increase called for in the Sarbanes-Oxley Act). Democrats charge that the White House has decided that corporate scandals have receded in importance among political issues and seeks to take advantage of this situation. *See id.* Proponents of reform argue that a smaller increase would not provide enough money for the SEC's expanded role, for raising SEC salaries up to the level of other government agencies, for increasing the SEC's overwhelmed staff, and for financing the start-up of the Oversight Board. *See id.*

[134] *See supra* text accompanying notes 59–63.

No amount of rules and enforcement mechanisms can prevent all corporate abuses. In any free society, there will always be a large role for voluntary compliance. This freedom can mean greater ability to commit fraud, but it is also necessary for the entrepreneurialism and innovation that make the free-market system an incredible producer of wealth. The goal is to create a vigorous corporate governance structure that fights fraud without shutting out creativity. The Sarbanes-Oxley Act substantially achieves this balance through a combination of stronger rules for, among other things, financial disclosure and independence of auditors and greater oversight and enforcement resources.

—Brian Kim

BIPARTISAN CAMPAIGN REFORM ACT

On March 27, 2002, President George W. Bush signed into law[1] the most sweeping reform of the federal campaign finance system in twenty-five years. The Bipartisan Campaign Reform Act of 2002 ("BCRA"),[2] sponsored by Representatives Martin Meehan (D-Mass.) and Christopher Shays (R-Conn.),[3] has at its core two prohibitions. First, the BCRA bans the solicitation, receipt, transfer, donation and spending of soft money by political parties for federal elections.[4] Second, the BCRA prohibits corporations and unions from using treasury money to pay for "electioneering communications," which are candidate advertisements within sixty days of a general election and thirty days of a primary election.[5]

The BCRA also includes several other provisions that modify the structure of the campaign finance system. The Act increases hard money limits on permissible contributions by individual donors from $1,000 to $2,000 per candidate per election,[6] from $20,000 to $25,000 per national

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[1] *See* Press Release, White House Office of the Press Secretary, President Signs Campaign Finance Reform Act (Mar. 27, 2002), *available at* http://www.whitehouse.gov/news/releases/2002/03/20020327.html.

[2] Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (to be codified in scattered sections of 2 U.S.C.).

[3] Representatives Meehan and Shays introduced the bill as H.R. 2356, 107th Cong. (2001). The Senate version of the bill was introduced by Senators John McCain (R-Ariz.), Russell Feingold (D-Wis.), and seventeen other Senators as S. 27, 107th Cong. (2001). *See* 147 CONG. REC. S298 (daily ed. Jan. 22, 2001) (statement of Sen. McCain). Senators McCain and Feingold had introduced a bipartisan campaign reform bill in every congressional session since 1995. *See* 148 CONG. REC. S2104 (daily ed. Mar. 22, 2002) (statement of Sen. Feingold). Not until 1997, however, did soft money and issue advertisements become the focus of the legislation. *See* 144 CONG. REC. S10,067 (daily ed. Sept. 9, 1998) (statement of Sen. Feingold) (stating that in 1996, parties stopped using soft money exclusively to get out the vote, and began running issue ads designed to support particular candidates, leading to changes in the legislation's focus).

[4] Bipartisan Campaign Reform Act of 2002 § 101. Soft money is defined as "funds raised and/or spent outside the limitations and prohibitions" of the Federal Election Campaign Act, 2 U.S.C. §§ 431–455 (2000). *See* FED. ELECTION COMM'N, TWENTY YEAR REPORT, ch. 3 (1995), *available at* http://fecweb1.fec.gov/pages/20year.htm. Hard money is contributions received in accordance with FECA guidelines. *See generally id.* For a more thorough explanation of soft money, see *infra* text accompanying notes 56–65.

[5] Bipartisan Campaign Reform Act of 2002 § 203. See *infra* notes 76–90 for a more detailed analysis of this provision.

[6] Bipartisan Campaign Reform Act of 2002 § 307(a)(1). Senator Dianne Feinstein (D-Cal.) argued that this increase "will reinvigorate individual giving . . . reduce the incessant need for fund-raising . . . give candidates and parties the resources they need to respond to independent campaigns . . . [and] reduce the relative influence of PACs." 148 CONG. REC. S2154 (daily ed. Mar. 20, 2002) (statement of Sen. Feinstein). While $1,000 per donor may seem insignificant, when added up over thousands of donors, the effect becomes more dramatic. *See generally id.* Some proponents of campaign finance reform have criticized this provision for that very reason, claiming that the increase in hard money will only increase the disparity between the donations of the rich and the poor. *See* Press Release, National Association of State Public Interest Research Groups, Lawsuit Challenges McCain-Feingold's Hard Money Increases (May 7, 2002), *available at* http://www.pirg.org/democracy/democracy.asp?id2=6885.

party committee per year,[7] and from $5,000 to $10,000 per state or local party committee per year.[8] In addition, the Act increases aggregate limits on hard money contributions by individuals from $25,000 per year to $95,000 per every two years, of which only $37,500 may be contributed to candidates or candidates' committees.[9] The BCRA also clarifies and amends federal election law by prohibiting any government employee or official from fundraising on federal property,[10] fraudulently soliciting funds,[11] or receiving contributions from minors.[12] Finally, the Act contains further provisions that strengthen the ban on foreign contributions,[13]

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[7] Bipartisan Campaign Reform Act of 2002 § 307(a)(2). Senator Mitch McConnell (R-Ky.) noted that, without soft money in 2001, "the total cash on hand for the six national party committees would have dropped from $66 million down to $6 million: For the three national Republican committees it would drop from $56 million down to $19 million; and for the three national Democratic Party committees, from $10 million down to a debt of $13 million." 148 CONG. REC. S2121 (daily ed. Mar. 20, 2002) (statement of Sen. McConnell). The increase in limits on hard money contributions to national party committees provides a small pathway through which the committees can regain funds. *See* 148 CONG. REC. S2153–54 (daily ed. Mar. 20, 2002) (statement of Sen. Feinstein).

[8] Bipartisan Campaign Reform Act of 2002 § 102. Since national party committees will lose a significant portion of their funds, they will be less able to contribute to state and local party operations. *See* 148 CONG. REC. S2121 (daily ed. Mar. 20, 2002) (statement of Sen. McConnell). This provision will increase the sum of direct, hard money contributions to state and local parties. *See* 148 CONG. REC. S2153–54 (daily ed. Mar. 20, 2002) (statement of Sen. Feinstein).

[9] Bipartisan Campaign Reform Act of 2002 § 307. Senator Fred Thompson (R-Tenn.) introduced a version of this provision as an amendment to the Senate's bill. *See* 147 CONG. REC. S3005–06 (daily ed. Mar. 28, 2001). Senator Feinstein argued, as she did with the increased individual contribution limit, *see supra* note 6, that this change will reduce the influence of political action committees ("PACs") by permitting individuals and national party committees to contribute more money to individual candidates. *See* 148 CONG. REC. S2154 (daily ed. Mar. 20, 2002) (statement of Sen. Feinstein).

[10] Bipartisan Campaign Reform Act of 2002 § 302. While current law prohibits solicitation and receipt of contributions in one's federal office or on a navy yard, fort, or arsenal, 18 U.S.C. § 607 (2000), the BCRA amends federal law to clarify that the President and Vice President are subject to this ban as well. Bipartisan Campaign Reform Act of 2002 § 302.

[11] Bipartisan Campaign Reform Act of 2002 § 309. Senator Bill Nelson (D-Fla.) proposed this amendment in order to give the Federal Election Commission the power to prosecute individuals who misrepresent themselves as agents of a candidate. *See* 147 CONG. REC. S3122 (daily ed. Mar. 29, 2001) (statement of Sen. Nelson).

[12] Bipartisan Campaign Reform Act of 2002 § 318. Senator McCain argued for inclusion of this provision, citing studies that indicated

> individuals are evading contribution limits by directing their children to make contributions. [For example,] [a]ccording to a Los Angeles Times study, individuals who listed their occupation as student contributed $7.5 million to candidates and parties between 1991 and 1998. Upon further investigation, some of these contributions were made by infants and toddlers. In another instance, the paper found that two high school sisters contributed $40,000 to the Democratic Party in 1998. When asked about the contribution, the high school sophomore answered that it was a "family decision."

148 CONG. REC. S2145 (daily ed. Mar. 20, 2002) (statement of Sen. McCain).

[13] Bipartisan Campaign Reform Act of 2002 § 303. According to Senator Christopher Bond (R-Mo.), this provision is a reaction against attempts to circumvent the old ban

augment disclosure requirements,[14] mandate studies of state "Clean Elections" policies,[15] and increase contribution limits for those donating to candidates whose opponents spend large sums of their own money.[16]

While all of the BCRA's provisions are important, this Recent Development will focus on the two most influential and controversial sections of the BCRA: the soft money ban and the limits on electioneering communications. It is no coincidence that these two sections are the primary focus of pending litigation challenging the constitutionality of the BCRA.[17] Over the past seven years, the use of the campaign practices that these two provisions address has grown dramatically, and the primary purpose of the BCRA is to eliminate these practices.[18]

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against foreign contributions by channeling them through United States citizens, including religious figures such as nuns. *See* 147 CONG. REC. S3187 (daily ed. Mar. 30, 2001) (statement of Sen. Bond).

[14] Bipartisan Campaign Reform Act of 2002 §§ 306, 501–504. This portion of the legislation calls for the Federal Election Commission to promulgate standards for software to post receipts and disbursements on the Internet, and to maintain a particular Internet site for this purpose. *Id.*

[15] *Id.* § 310. The U.S. Comptroller General must study and report within one year on the Clean Elections policies of Arizona and Maine. *Id.* More specifically, he must study the number of individuals who accepted Clean Elections funds, the number of incumbents compared to the number of challengers who took the funds, the rate of success of those who took funds, and the total number of races that included a Clean Elections candidate. *Id.*

[16] *Id.* §§ 304, 316, 319. Since the Supreme Court has found unconstitutional congressional limits on a candidate's spending from his own personal funds, *see* Buckley v. Valeo, 424 U.S. 1, 143 (1976), this "millionaire provision" permits increased contribution limits for candidates facing wealthy opponents. *See* Bipartisan Campaign Reform Act of 2002 §§ 304, 316, 319. Senator Richard Lugar (R–Ind.) justified this provision by arguing that

> parties now spend a great deal of energy recruiting millionaires to run for office, because it is the simplest way to apply millions of dollars—sometimes tens of millions—to a political race virtually free of regulation. As more restraints on fundraising are added, the incentive to recruit millionaire candidates increases. . . . The millionaires amendment in this bill will not eliminate the advantage of wealthy candidates, but it will substantially reduce the current incentives that place personal wealth near the top of qualifications for candidacy.

148 CONG. REC. S2148 (daily ed. Mar. 20, 2002) (statement of Sen. Lugar).

[17] Senator McConnell, the National Rifle Association, and the American Federation of Labor, among others, have filed complaints alleging that the BCRA is unconstitutional. *See* McConnell v. Fed. Election Comm'n, No. 02-582 (D.D.C. filed Mar. 27, 2002). Senator McConnell's complaint charges, *inter alia*, that the BCRA's restrictions on soft money and electioneering communications violate First Amendment rights to free speech and free association and the Equal Protection component of the Due Process Clause of the Fifth Amendment. *See generally* Second Amended Complaint for Declaratory and Injunctive Relief, McConnell v. Fed. Election Comm'n, No. 02-0582 (D.D.C. filed May 7, 2002), *available at* http://www.law.stanford.edu/library/campaignfinance/mcconnell-v-feccomplaint50702.pdf. The complaint seeks injunctive relief to prevent the enforcement of the BCRA's major provisions. *See id.* at 50. For a discussion of whether the Supreme Court will hold that the BCRA violates the First Amendment, see *infra* text accompanying notes 103–195.

[18] *See* 148 CONG. REC. S2104 (daily ed. Mar. 20, 2002) (statement of Sen. Feingold).

The Supreme Court has recognized the reduction of corruption and the appearance of corruption as compelling governmental interests.[19] Congress is charged with legislating in the best interests of the American public, but when the interests of the public conflict with the interests of a large donor, legislators face a conflict of interest.[20] Campaign finance legislation has tried to eliminate the possibility of campaign contributions leading to a *quid pro quo* for more than a century.[21] Despite these attempts, new means for money to influence campaigns like soft money and sham issue advocacy[22] have continued to arise.[23] Without any limits on these activities, corruption or the appearance of corruption could taint congressional action.[24] The BCRA's bans on soft money and corporate and union electioneering communications are designed to reduce these potentially corrupting influences.[25] Since donations of soft money both express support for a party and express an interest in associating with other members of that party, the First Amendment rights to free speech and association are triggered. The provisions limiting corporate and union electioneering communications also trigger First Amendment concerns. The BCRA, however, successfully walks the fine line between effective regulation and protected expression because the Act allows for expressions of loyalty to a party through other means, and because, in the electioneering context, the Act focuses on reducing corporate and union influence on federal elections. For these reasons, the BCRA's core provisions banning soft money and electioneering communications are both constitutional and strong policy.

The legal framework for regulating campaign finance has long been a divisive issue in the United States.[26] The first major pieces of campaign

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[19] *See* Buckley v. Valeo, 424 U.S. 1, 26 (1976) (holding that corruption and the appearance of corruption are "constitutionally sufficient justification[s]" for FECA's contribution limits).

[20] *See* 148 CONG. REC. H352 (daily ed. Feb. 13, 2002) (statement of Rep. Shays) ("The candidates know who makes these huge contributions and what these contributors expect. Candidates not only solicit these funds themselves, they meet with big donors who have important issues pending before the government; and sometimes, the candidates' or the party's position appear to change after such meetings.").

[21] *See infra* text accompanying notes 27–63.

[22] The term "sham issue advocacy" is commonly used to refer to advertisements that purport solely to advocate a particular issue, but in the process endorse a candidate for office. *See, e.g.*, 148 CONG. REC. S2141 (daily ed. Mar. 20, 2002) (statement of Sen. McCain).

[23] *See* 148 CONG. REC. H349 (daily ed. Feb. 13, 2002) (statement of Rep. Robert Borski (D-Pa.)).

[24] *See* 148 CONG. REC. H351–53 (daily ed. Feb. 13, 2002) (statement of Rep. Shays) (citing several examples where large soft money contributions posed potential conflicts of interest for members of Congress).

[25] *See* 148 CONG. REC. H349 (daily ed. Feb. 13, 2002) (statement of Rep. Borski).

[26] *See generally* Anthony Corrado, *History of Federal Campaign Finance Regulation*, *in* NEW CAMPAIGN FINANCE SOURCEBOOK 1, 1–25 (forthcoming 2002), (explaining in detail the statutory history of campaign finance regulation), *available at* http://www.brook.edu/dybdocroot/gs/cf/sourcebk01/HistoryChap.pdf.

finance legislation responded to the "spoils system," in which workers received jobs from political parties and in return paid a percentage of their salary to the party.[27] Without employees to fund them, political parties looked to corporations to increase their contributions.[28] The Tillman Act of 1907 subsequently prohibited national banks or federal corporations from donating to political candidates and also prohibited any state bank or corporation from donating to federal candidates.[29] In 1943, Congress expanded the Tillman Act to prohibit contributions from labor unions.[30] Unions responded by creating political action committees ("PACs"), groups that collected money apart from union dues and used those funds to finance political activity, raising over $1.4 million for use in federal elections in their first year.[31] After that point, Congress passed little legislation relevant to campaign finance until 1971.

In 1971, Congress passed the Federal Election Campaign Act ("FECA"),[32] primarily to account for the rising costs of campaign advertisements by limiting the amount of money federal candidates could spend on advertising as a whole, and on radio and television advertising specifically.[33] FECA also designated officials to collect quarterly reports from candidates of their contributions and expenditures.[34] While these reforms were substantial, in the wake of Watergat, Congress further expanded the regulations.[35] The 1974 amendments to FECA[36] set specific

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[27] *See id.* at 1–2. The first major piece of campaign finance legislation prohibited government employees from requesting these payments, called assessments, from naval employees. *See* Naval Appropriations Act of 1867, ch. 172, 14 Stat. 489, 492. The Pendleton Act of 1883 further limited the spoils system by requiring government employees to pass a competitive exam and prohibiting solicitation of donations from these employees. *See* Pendleton Act of 1883, ch. 27, 22 Stat. 403. In 1939, the Hatch Act expanded the scope of the Pendleton Act to prohibit solicitation of funds from government workers in New Deal created programs. *See* Hatch Political Activities Act, ch. 410, 53 Stat. 1147 (1939). *See also* Corrado, *supra* note 26, at 6–7.

[28] *See* Corrado, *supra* note 26, at 2 (stating that corporations increased their contributions to $50,000 or more after the Naval Appropriations Act).

[29] *See* Tillman Act of 1907, ch. 420, 34 Stat. 864.

[30] *See* War Labor Disputes Act, ch. 144, §§ 9–10, 57 Stat. 163, 167–68 (1943) (prohibiting union contributions until six months after World War II ended); Labor Management Relations Act of 1947, ch. 120, § 304, 61 Stat. 136, 159–60 (codified at 2 U.S.C. § 441(b)) (establishing ban without sunset provision).

[31] *See* Corrado, *supra* note 26, at 8.

[32] Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (codified as amended at 2 U.S.C. §§ 431–455).

[33] *See* Corrado, *supra* note 26, at 10. FECA limited a candidate's overall media spending to the greater sum of $50,000 or $.10 times the voting-age population. Federal Election Campaign Act of 1971 § 104(a)(1)(A). The law also limited a candidate's radio and television advertising to no more than sixty percent of his overall media spending. *Id.* at § 104(a)(1)(B).

[34] *See* Federal Election Campaign Act of 1971 § 304.

[35] *See* Corrado, supra note 26, at 11 (listing some of the campaign finance abuses by the Nixon campaign). Nixon's abuses included maintaining at least three undisclosed slush funds that contained millions of dollars and receiving corporate contributions. *See id.* (citing HERBERT E. ALEXANDER, FINANCING THE 1972 ELECTION 39–76 (1976)).

[36] Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat.

limits on contributions: the legislation limited contributions by individual donors to $1,000 per candidate and $25,000 total; contributions by PACs to $5,000 per candidate; and expenditures by individuals or groups on behalf of a candidate to $1,000 per year per candidate.[37] The amendments also replaced limits on advertising in specific media with a general limitation on a campaign's total expenditures.[38] Finally, the amendments required disclosure statements from both candidates and individuals detailing contributions and expenditures.[39] To enforce this new regulatory framework, the FECA amendments created the Federal Election Commission ("FEC"), a six-person panel charged with reviewing disclosure documents, promulgating rules and regulations concerning campaign practices, and seeking civil injunctions to ensure compliance with the limits.[40] Finally, the amendments provided funding for presidential candidates through an optional tax distribution that had been established in the Internal Revenue Code.[41]

In 1976, the Supreme Court considered the constitutionality of FECA and its amendments in *Buckley v. Valeo*.[42] After a thorough analysis of FECA's provisions, the Court upheld most of the law, but ruled that its limits on candidates' expenditures and on "independent" expenditures by individuals or groups impermissibly infringed First Amendment rights.[43] To arrive at this holding, the Court distinguished between "contributions," "coordinated expenditures," and "independent expenditures."[44] Under the *Buckley* holding, Congress (or states) may limit the amount of contributions and coordinated expenditures, since such limits further a compelling governmental interest in reducing corruption.[45] Congress may

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1263 (codified as amended in scattered sections of 2 U.S.C.).

[37] *See id.* § 101. These limits were much more comprehensive than those of the original FECA, which merely prohibited corporate and union contributions and limited the amount a candidate or his family could spend on his own campaign. *See* Federal Election Campaign Act of 1971 § 608. The 1974 Amendments preserved both of these provisions. *See* Federal Election Campaign Act Amendments of 1974 §§ 101(b)(1)(a), 103.

[38] *Compare* Federal Election Campaign Act of 1971 § 104(a) (limiting the amount a candidate may spend on communications media), *with* Federal Election Campaign Act Amendments of 1974 § 101(c)(1) (limiting a candidate's expenditures).

[39] *See* Federal Election Campaign Act Amendments of 1974 § 201.

[40] *See id.* § 208.

[41] *See id.* § 403 (appropriating to the Presidential Election Campaign Fund an amount equal to that designated for the fund by individual taxpayers both before and after the Amendments took effect).

[42] 424 U.S. 1 (1976).

[43] *Id.* at 143.

[44] *Id.* at 47. The Court defines a contribution as a "general expression of [financial] support of a candidate and his views . . . ." *Id.* at 21. Independent expenditures are expenditures made by individuals or groups that were not "authorized or requested" by the candidate or an authorized agent. *Id.* at 37. Coordinated expenditures are "expenditures controlled by or coordinated with the candidate and his campaign . . . [that] are treated as contributions rather than expenditures under the Act." *Id.* at 46.

[45] *Id.* at 58–59.

not, however, limit the amount of independent expenditures without unduly treading on First Amendment rights.[46]

In the process of striking down FECA's restrictions on independent expenditures, the Supreme Court in *Buckley* also announced a general principle that election laws that restrict speech must be construed narrowly to avoid unconstitutional vagueness.[47] The Court found that unless it were "to clearly mark the boundary between permissible and impermissible speech,"[48] vaguely worded statutes could result in the regulation of "'public discussion of public issues that are also campaign issues . . . .'"[49] According to the Court, the only way to prevent all political speech from potential restriction by FECA was to read FECA's scope "as limited to communications that include explicit words of advocacy of election or defeat of a candidate."[50] If FECA were not so construed, it could be read to cover all forms of issue advocacy, making it facially invalid on vagueness grounds.[51] Applying this construction to FECA's disclosure requirements, the Court found the requirements constitutional, but only for those contributions and expenditures involving express advocacy.[52]

Congress amended FECA in 1976 to accommodate the framework established in *Buckley*, reinstating spending limits only for those presidential candidates who opted to take public funds for their campaigns,[53] and limiting the amount an individual could contribute to a PAC to $5,000 per year and to a national party committee to $20,000 per year.[54]

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[46] *Buckley*, 424 U.S. at 58–59.

[47] *See id.* at 40–44.

[48] *Id.* at 41.

[49] *Id.* at 43 (quoting Buckley v. Valeo, 519 F.2d 821, 875 (D.C. Cir. 1975)).

[50] *Id.* at 43.

[51] *Id.* at 44. While the Court does not use the term "issue advocacy," it gives a rough definition of the kind of speech that is not express advocacy, and thus is beyond congressional regulation: "[f]unds spent to propagate one's views on issues without expressly calling for a candidate's election or defeat are thus not covered." *Id.*

[52] *See id.* at 60–84. The *Buckley* Court found that FECA's disclosure requirements furthered compelling governmental interests in informing the electorate and preventing corruption in the political process. *See id.*

[53] *See* Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, sec. 112, § 320, 90 Stat. 475, 488 (1976) (codified at 2 U.S.C. 441a(b)) (establishing presidential campaign expenditure limits for publicly funded candidates). The Supreme Court had indicated in *Buckley* that it would treat such an opt-in program as a voluntary limitation on a candidate's speech. *See Buckley*, 424 U.S. at 57. The *Buckley* Court reasoned that

> Congress may engage in public financing of election campaigns and may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations. Just as a candidate may voluntarily limit the size of the contributions he chooses to accept, he may decide to forgo private fundraising and accept public funding.

Id.

[54] Federal Election Campaign Act Amendments of 1976, sec. 112.

The amendments also increased disclosure requirements to ensure greater accuracy in the reporting of independent expenditures.[55]

In 1979, Congress further amended FECA[56] to permit political parties to spend unlimited amounts on grass-roots activities, expanding the role of unregulated "soft money" contributions, which are contributions made by individuals to political parties that are outside the scope of FECA.[57] The 1979 Amendments changed the legal definition of "contribution" so that it would not include amounts that parties could spend on certain grass-roots political activities.[58] This change in definition responded to financial concerns expressed by state and local party leaders by greatly expanding a party's ability to make use of unregulated contributions.[59]

While this provision largely lay dormant for more than a decade, relegated to its initial purpose of facilitating local get-out-the-vote activities, both parties began large soft money drives in the mid-1990s.[60] Soft money spent by parties grew from $86 million in 1992, to $262 million in 1996, to $495 million in 2000.[61] This unlimited party spending permitted corporations, unions, individuals, and other interested entities to evade contribution limits by channeling money through political parties, potentially leading to a *quid pro quo*.[62] Concern over this growth in campaign spending outside the limits established by FECA was a major impetus for the passage of the BCRA.[63]

The BCRA bans the use of soft money by political parties in federal elections, providing that "[a] national committee of a political party (including a national congressional campaign committee of a political party) may not solicit, receive, or direct to another person a contribution,

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[55] *Id.* sec. 104.

[56] *See* Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, sec. 101, § 301, 93 Stat. 1339, 1342–44 (codified at 2 U.S.C. § 431 (2000)).

[57] *See generally* FED. ELECTION COMM'N, *supra* note 4, at ch. 3.

[58] Federal Election Campaign Act Amendments of 1979 § 101(8)(B). Following the 1979 FECA Amendments, state and local parties were permitted to use soft money to engage in a variety of grass-roots activities, including mailing out sample ballots to supporters, printing campaign materials (such as signs and buttons) for use "in connection with volunteer activities" on behalf of party candidates, and sponsoring get-out-the-vote and voter registration efforts on behalf of presidential candidates. Federal Election Campaign Act of 1971, 2 U.S.C. 441a(b)(8)(B) (2000). *See also* FED. ELECTION COMM'N, *supra* note 4, at ch. 3.

[59] *See* Corrado, *supra* note 26, at 17. Soft money may be used for get-out-the-vote drives, voter registration, bumper stickers, buttons, stickers, brochures, and practically every mechanism for increasing name recognition except for print or broadcast advertising. *See id.*

[60] *See* 148 CONG. REC. S2104 (daily ed. Mar. 20, 2002) (statement of Sen. Feingold).

[61] *Id.*

[62] *See id.*

[63] *See id.* (stating that in 1997, after the explosion of soft money use in the 1996 elections, banning soft money became the primary focus of congressional efforts to reform the campaign finance system); 148 CONG. REC. H351–52 (daily ed. Feb. 13, 2002) (statement of Rep. Shays).

donation, or transfer" of funds outside of the hard money limits set by FECA.[64] The BCRA also prohibits state and local party committees from using soft money for supporting get-out-the-vote campaigns, for purchasing voter identification lists, and for conducting other local activities for federal candidates.[65] Sponsors of the Act argued that this extra limitation is necessary because federal candidates could otherwise avoid the effects of federal contribution limits by benefiting from large soft money expenditures by state and local parties.[66] The BCRA's soft money provisions are thus designed to ensure that federal candidates are unable to use unregulated soft money contributions in their campaigns.

Another area of campaign finance law that became more frequently exploited in the 1990s was the unregulated broadcasting of issue advertisements that were designed to favor but not explicitly endorse a particular candidate.[67] These advertisements may be sponsored by political parties using soft money, or by private individuals or groups making independent expenditures.[68] In *Buckley*, the Supreme Court held that issue advertisements made as independent expenditures constitute highly expressive messages, triggering First Amendment strict scrutiny.[69] In distinguishing between issue advocacy and express advocacy,[70] the Court suggested that express advocacy can be identified by the language it contains: express advocacy includes "explicit words of advocacy of election or defeat of a candidate" such as "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," or "reject."[71] Some pundits consider even the following advertisement issue advocacy under the *Buckley* test because it lacks any "magic words": "Senate candidate Winston Bryant's budget as attorney general increased 71 percent. Bryant has taken taxpayer-funded junkets to the Virgin Islands, Alaska and Arizona. And spent about $100,000 on new furniture .... Winston Bryant: government waste, political junkets, soft on crime."[72] The Court, by interpreting FECA to require disclosure of only express advocacy and not issue advocacy,[73] has permitted corporations to

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[64] Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 101, 116 Stat. 81, 82 (to be codified at 2 U.S.C. § 323).

[65] *Id.* § 101(b).

[66] *See* 148 CONG. REC. S2138 (daily ed. Mar. 20, 2002) (statement of Sen. McCain) ("We have authority to extend the soft money reforms to the State and local level where it is necessary, as it is here, to protect the integrity of Federal elections.").

[67] See 148 CONG. REC. S2101 (daily ed. Mar. 20, 2002) (statement of Sen. Barbara Boxer (D-Cal.)).

[68] *See generally* 148 CONG. REC. S2098 (daily ed. Mar. 20, 2002) (statement of Sen. Paul Wellstone (D-Minn.)).

[69] Buckley v. Valeo, 424 U.S. 1, 43–44 (1976).

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

[71] *Buckley*, 424 U.S. at 44 n.52.

[72] Seth P. Waxman, Editorial, *Free Speech and Campaign Reform Don't Conflict*, N.Y. TIMES, July 10, 2002, at A21.

[73] *See supra* text accompanying note 52.

use money to fund commercials that undermine legal restrictions on corporate campaign expenditures.[74] Corporations, along with unions, political parties, and other groups, have been able to take advantage of this ambiguity in the law to spend unlimited amounts of money on advertisements in support of a candidate as long as they avoided the magic words of express advocacy.[75]

The BCRA responds to the problem of unregulated issue advocacy by prohibiting corporations and unions from sponsoring "electioneering communications" and placing disclosure requirements on individuals who sponsor "electioneering communications."[76] The BCRA prohibits the funding of "electioneering communications" by corporations, trade associations, and labor organizations from the group's treasury money within sixty days of a general election and thirty days of a primary.[77] Meanwhile, nonprofit corporations that organize under Internal Revenue Code Section 527 to promote a particular issue are exempt from the electioneering communications provisions.[78]

The effect of these provisions hinges on the Act's definition of "electioneering communication" as

> any broadcast, cable, or satellite communication which refers to a clearly identified candidate for Federal office; is made within 60 days before a general, special, or runoff election for the office sought by the candidate; or 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and . . . is targeted to the relevant electorate.[79]

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[74] *See* 148 CONG. REC. S2098 (daily ed. Mar. 20, 2002) (statement of Sen. Wellstone). *See also supra* text accompanying notes 29–30.

[75] *See* 148 CONG. REC. S2141 (daily ed. Mar. 20, 2002) (statement of Sen. McCain) (arguing that "the sham issue ad subterfuge . . . will continue unless Congress draws a more accurate line between campaign ads and issue ads"). While these specific examples indicate that "magic words" usually must be present for an advertisement to constitute express advocacy, one subsequent Supreme Court decision found a pamphlet with pictures of pro-life candidates to be express advocacy despite the pamphlet's lack of magic words. *See* Fed. Election Comm'n v. Mass. Citizens for Life, 479 U.S. 238, 249–50 (1986) (holding that a pamphlet with pictures of pro-life candidates and statements urging citizens to vote for pro-life candidates was functionally express advocacy).

[76] Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 201, 116 Stat. 81, 88 (to be codified at 2 U.S.C. § 434).

[77] *See id.* § 203.

[78] *See id. But see id.* § 101 (prohibiting national, state, district, or local political parties from soliciting money or from sending donations to Section 527 organizations). Combined, these provisions suggest that parties cannot use Section 527 organizations as a front for collecting unlimited funds, but such organizations are still free to make independent expenditures advocating their positions.

[79] *Id.* § 201(3)(A)(i).

This definition potentially strays into areas of speech that the *Buckley* Court was concerned with protecting when it held issue advocacy to be off-limits from congressional regulation.[80] Addressing some of these concerns, the BCRA also makes exceptions from this definition for news stories, editorials, and candidate debates or forums, and it leaves the FEC some discretion to determine other exceptions consistent with the bill.[81] Nevertheless, if a contested primary election is sixty days or less before the general election, as is common in some states for congressional races,[82] the scope of this provision could comprise the entire time the two major party's candidates know their opponents.

If the Supreme Court finds the BCRA's original language defining "electioneering communications" to be "constitutionally insufficient," the Act also contains an alternate definition that would then take effect.[83] This alternate definition regulates advertisements that promote or attack a candidate: an "electioneering communication" is defined as

> any broadcast, cable, or satellite communication which promotes or supports a candidate for [federal] office, or attacks or opposes a candidate for [federal] office (regardless of whether the communication expressly advocates a vote for or against a candidate) and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate.[84]

The main difference between the two definitions is that the primary definition encompasses ads that only *refer* to a particular candidate, while the alternate definition requires that ads *promote* or *support* a particular candidate.[85] Though narrower in scope than the primary definition, the alternate definition still likely goes beyond the *Buckley* "magic words" test for express advocacy.[86]

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[80] *See* Buckley v. Valeo, 424 U.S. 1, 41–43 (1976) (stating that overbroad regulation of campaign speech could chill discussion of public issues).

[81] Bipartisan Campaign Reform Act of 2002 § 201(3)(B)(i), (iii), (iv).

[82] General elections for 2002 were held on November 5. The primaries for several states, including New York (September 10), Wisconsin (September 10), Massachusetts (September 17), and Washington (September 17), fell within the sixty-day period.

[83] Bipartisan Campaign Reform Act of 2002 § 201(3)(A)(ii).

[84] *Id.*

[85] *Compare id.* § 201(3)(A)(i), *with id.* § 201(3)(A)(ii). For an analysis of the constitutionality of these provisions, see *infra* text accompanying notes 151–189.

[86] *See* Buckley v. Valeo, 424 U.S. 1, 42–44 (1976). The *Buckley* Court rejected lower court reasoning that defining express advocacy as "advocating the election or defeat of a candidate" was sufficient to avoid unconstitutional vagueness problems. *Id.* at 42 (internal quotation marks omitted). Rather, the Court found that "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application." *Id.*

The BCRA regulates electioneering communications in two ways. First, the Act requires disclosure by "every person who makes a disbursement for the direct costs of producing and airing electioneering communications in an aggregate amount in excess of $10,000 during any calendar year."[87] This disclosure must identify the person making the disbursement, anyone directing or controlling that person, the custodian of the books and accounts of that person, and the principal place of business of that person making the disbursement, if not an individual.[88] The disclosure also must include the amount of any disbursement over two hundred dollars, along with the relevant elections and the names of the identified candidates.[89] The disclosure requirement permits individuals to create unlimited issue advertisements but requires publication of a list of the contributors to that advertisement on the Federal Communication Commission's Web site.[90]

Many policy arguments in support of the BCRA are motivated by an underlying egalitarian concern that a small set of interests will exert disproportionate influence on legislators at the expense of the nation as a whole. Some supporters of campaign finance reform, such as Ronald Dworkin, argue that constitutional norms of equality require not only a system of one-person, one-vote, but also a system that provides equal ability to command the attention of others to one's own views; to make this possible, strong restrictions should limit spending on candidates.[91] Some liberal members of Congress share this position, and advocate "get[ting] money out of politics" entirely.[92]

Critics of the BCRA and campaign finance reform legislation generally tend to oppose this egalitarian perspective on ideological grounds. Libertarianism is one strand of political thinking that is particularly at odds with the egalitarian view.[93] Opponents of the BCRA who take a lib-

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[87] Bipartisan Campaign Reform Act of 2002 § 201.

[88] *Id.*

[89] *Id.*

[90] *Id.* § 201(b).

[91] *See* Ronald Dworkin, *Curse of American Politics*, N.Y. REV. BOOKS, Oct. 17, 1996, at 19–24.

[92] *See, e.g.*, 148 CONG. REC. S2098 (daily ed. Mar. 20, 2002) (statement of Sen. Wellstone). Senator Wellstone argued that

> no one in the United States of America should believe we have now created a level playing field, where you do not have to be a millionaire to run, where you do not have to depend upon big money to win, where you get a lot of the big money out of politics and you get more ordinary citizens back into politics.

Id. Despite his belief that the BCRA does not do enough to regulate campaign finance, Senator Wellstone described it as "a step forward" and "a victory for the citizens [of this] country." *Id.*

[93] Indeed, the Libertarian National Committee is one of the plaintiffs in litigation challenging the constitutionality of the BCRA. *See* Second Amended Complaint for Declaratory and Injunctive Relief, McConnell v. Fed. Election Comm'n, No. 02-0582 (D.D.C. filed May 7, 2002), at 1, *available at* http://www.law.stanford.edu/library/campaignfinance/

ertarian line tend to object to the Act's limit on the amount that individuals can spend on the causes and candidates they support.[94] As one author described it, the "First Amendment is not a loophole": the political speech that campaign finance legislation often hinders has a constitutionally protected status in the United States, putting it outside of Congress's authority to regulate.[95] The BCRA's limitations on corporate and union electioneering communications directly proscribe certain kinds of political speech.[96] The Act's ban on soft money limits the free speech of political parties.[97] The soft money ban also restricts the ability of individuals who may not know how to arrange their campaign contributions in a way that would maximize their political effect from associating with those who do.[98] Moreover, requiring individuals to publicize their names with their ideas under the BCRA's electioneering communication requirements would chill the expression of unpopular ideas.[99]

Opponents of the BCRA also argue that the best way to increase competition in races for Congress is to strengthen political parties, not to weaken their financial base.[100] Political scientists have suggested that strengthening political parties provides better funding for lesser-known candidates who have party support.[101] In response, supporters of the Act

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mcconnell-v-feccomplaint50702.pdf. Of course, members of the Libertarian Party are not the only political group in America who share this view; libertarianism is an offshoot of the philosophical tradition of liberalism that dates back to Enlightenment thinkers such as John Locke. *See generally* JOHN LOCKE, SECOND TREATISE ON GOVERNMENT (C. B. Macpherson ed., Hackett Publ'g Co. 1980) (1690) (arguing that a limited, minimal state is the best form of government, because it safeguards individual liberty).

[94] *See* James Bopp, Jr. & Richard E. Coleson, *Fatal Flaws in the Bipartisan Campaign Reform Act of 2002*, BNA'S DAILY REP. FOR EXEC., Apr. 22, 2002, at 2–4, *available at* http://www.brook.edu/dybdocroot/gs/cf/debate/Bopp.pdf.

[95] *See* James Bopp, Jr. & Richard E. Coleson, *First Amendment is Not a Loophole: Protecting Free Expression in the Election Campaign Context*, 28 UWLA L. REV. 1, 1 (1997).

[96] 148 CONG. REC. S2124 (daily ed. Mar. 20, 2002) (statement of Sen. McConnell). Senator McConnell also points out that left-wing political organizations such as the American Civil Liberties Union also oppose the BCRA because of the Act's restrictions on political speech. *See id.*

[97] *See* 148 CONG. REC. S2106 (daily ed. Mar. 20, 2002) (statement of Sen. Ted Stevens (R-Alaska)) (arguing that the BCRA "tilts the balance of power away from accountable political parties towards non-profit interest groups whose donors are often shielded from disclosure").

[98] *See generally* Second Amended Complaint for Declaratory and Injunctive Relief, McConnell v. Fed. Election Comm'n, No. 02-0582 (D.D.C. filed May 7, 2002), at 44–45 (arguing that the ban on soft money results in the inability of individuals to pool resources, thereby violating the First Amendment right to free association), *available at* http://www.law.stanford.edu/library/campaignfinance/mcconnell-v-feccomplaint50702.pdf.

[99] *See* Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 201, 116 Stat. 81, 88 (to be codified at 2 U.S.C. § 434). This possibility has been a traditional concern of Anglo-American political philosophy. *See, e.g.*, JOHN STUART MILL, ON LIBERTY 8 (Stefan Collini ed., Cambridge Univ. Press 1998) (1859).

[100] *See, e.g.*, Bopp & Coleson, *supra* note 94, at 14.

[101] *See, e.g., id.* (citing Anthony Gierzynski & David A. Breaux, *Role of Parties in Legislative Campaign Financing*, 15 AM. REV. OF POL. 171–89 (1994)) (arguing that increasing the strength of political parties would increase competition in races for Congress).

argue that the BCRA reduces cynicism about parties, and encourages citizens to become more active because of the cleaner process.[102] This potential for a revitalization of democracy, when combined with the importance of having a political system that is free from corruption, is a strong policy argument outweighing the concerns of BCRA opponents that the Act will produce weaker parties and restrictions on core political speech.

If the Supreme Court chooses to consider a case challenging the BCRA on First Amendment grounds, these policy concerns will play an important role in the Court's decision. The Court will also be forced to revisit its reasoning in *Buckley*, in which it considered the constitutionality of FECA.[103] Fundamental to the *Buckley* Court's reasoning was a finding that FECA's "contribution and expenditure limitations impose direct quantity restrictions on political communication and association . . . ."[104] By limiting the amount of money a person can spend on a candidate, Congress directly limits the amount of speech he can make, since in the modern world of mass media, effective political speech costs money.[105]

The *Buckley* Court's rough equation of speech and money in this context has severe consequences for the constitutionality of campaign finance legislation. Because FECA limits on contributions and expenditures were treated as direct restrictions on political speech, they were required to withstand strict scrutiny[106] by demonstrating "a sufficiently important interest and employ[ing] means closely drawn to avoid unnecessary abridgment of associational freedoms."[107] The Court found that the government's stated interests in preventing corruption and the appearance of corruption in election campaigns were compelling.[108] In light of these compelling state interests, FECA's contribution limits were no more restrictive than necessary to effect the government's purpose.[109] In contrast,

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[102] *See* 148 CONG. REC. S2159 (daily ed. Mar. 20, 2002) (statement of Sen. McCain). Senator McCain argues that the BCRA might lead Americans "to see that their elected representatives value their reputations more than their incumbency." *Id.* With this renewed trust in the political system, citizens would be able "to exercise their franchise more faithfully, to identify more closely with political parties, [and] to raise their expectations for the work [elected officials] do." *Id.*

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

[104] *Buckley*, 424 U.S. at 18.

[105] *Id.* at 19 ("[V]irtually every means of communicating ideas in today's society requires the expenditure of money.").

[106] *Id.* at 25 (quoting N.A.A.C.P. v. Ala., 357 U.S. 449, 460–61 (1958)) (finding that "governmental 'action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny'").

[107] *Id.* (citing Cousins v. Wigoda, 419 U.S. 477, 488 (1975)).

[108] *Id.* at 27. *See also* Fed. Election Comm'n v. Nat'l Conservative Pol. Action Comm., 470 U.S. 480, 496–97 (1985) (holding that a statute limiting independent expenditures by PACs violated the First Amendment, in part because the statute did little to further the compelling governmental interest in preventing corruption).

[109] *Id.* at 28–29.

the Court found less of a governmental interest in regulating independent expenditures, since the possibility of a *quid pro quo* is reduced when coordination between candidates and donors is lacking.[110] Because there was a clear possibility of corruption if contributions went unregulated, *Buckley* concluded that, as long as individuals could make independent expenditures, FECA was narrowly tailored.[111] Moreover, a donor's First Amendment right was found to be stronger in making independent expenditures because donors choose the use to which their money is put, increasing its expressive quality.[112] Thus, the Court struck down the limits on expenditures but upheld the limits on contributions and coordinated expenditures.[113]

The Supreme Court has never ruled directly on the constitutionality of banning soft money donations. Nonetheless, the Court has consistently upheld the *Buckley* framework, finding limits on independent expenditures unconstitutional and limits on contributions constitutional.[114] In *Colorado Republican Federal Campaign Committee v. Federal Election Commission*, the Colorado Republican Federal Campaign Committee purchased advertisements attacking the Democratic candidate before the Republican Party had selected its nominee.[115] Interpreting a provision of FECA regulating political party committee expenditures on federal campaigns,[116] the FEC argued that the purchase was a coordinated expenditure that violated statutory limits.[117] Because there was no evidence in the record that the Republican Campaign Committee coordinated the purchase of the advertisement with any candidate, the Court found the purchase to be an independent expenditure that was beyond congressional authority to regulate.[118]

In a subsequent opinion in the same litigation,[119] the Supreme Court considered the Colorado Republican Party's claim that even limits on

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[110] *Id.* at 45.

[111] *Buckley*, 424 U.S. at 28–29. The Court also noted that individuals were still permitted to engage in political expression by volunteering for campaigns. *See id.* at 28.

[112] *Id.* at 47–48.

[113] *Id.* at 143.

[114] *See, e.g.*, Colo. Repub. Fed. Campaign Comm. v. Fed. Election Comm'n, 518 U.S. 604, 610 (1996) [hereinafter *Colorado I*] (stating that "the provisions that the Court found constitutional mostly imposed *contribution* limits").

[115] *Colorado I*, 518 U.S. at 608.

[116] *See* Federal Election Campaign Act of 1971, 2 U.S.C. § 441a(d)(1) (2000) (imposing special limits on expenditures of national and state party committees made "in connection with the general election campaign of candidates for Federal office").

[117] *Colorado I*, 518 U.S. at 619. FEC regulations interpreted this FECA provision to cover all party expenditures "in connection with a general election campaign." *See id.* (quoting 11 C.F.R. § 110.7(b)(4) (1995) (internal quotation marks omitted)). The Supreme Court had previously expressed support for this position in dicta, stating that "party committees are considered incapable of making 'independent' expenditures . . . ." Fed. Election Comm'n v. Dem. Sen. Campaign Comm., 454 U.S. 27, 28–29 n.1 (1981).

[118] *Colorado I*, 518 U.S. at 613–16.

[119] Fed. Election Comm'n v. Colo. Repub. Fed. Campaign Comm., 533 U.S. 431 (2001) [hereinafter *Colorado II*].

coordinated expenditures by party committees in connection with congressional campaigns were facially unconstitutional.[120] The Republican Party argued that the expressive quality of its activities towards electing a particular candidate who represented its set of views was so strong that any limit on the party's coordinated expenditures in this context imposed a unique First Amendment burden.[121] Because financial support of candidates is essential to the nature of a political party, the Republican Party claimed that any regulation of its expenditures in connection with an election campaign was akin to regulation of an individual's independent expenditures.[122] The Court rejected that argument, holding that the limits on coordinated expenditures met strict scrutiny because they prevented the corruption that might result from donors circumventing statutory hard money limits by contributing soft money to the party.[123]

Nixon v. Shrink Missouri Government PAC also upheld the Buckley framework.[124] In *Nixon*, the Court considered whether a Missouri statute that imposed contribution limits as low as $275 violated the Fourteenth Amendment rights of PACs and candidates.[125] The Court held that testimony concerning the potential for corruption satisfied the state's evidentiary burden, and that the contribution limits approved in *Buckley* did not set a constitutionally mandated minimum.[126]

In the one case where the Supreme Court upheld statutory limits on independent expenditures, the scope of the statute was limited to regulating expenditures from corporate treasury funds. In *Austin v. Michigan State Chamber of Commerce*,[127] the Supreme Court upheld the Michigan Campaign Finance Act,[128] which prohibited corporations from using treasury funds to make independent expenditures.[129] The Court held that "the compelling governmental interest in preventing corruption support[s] the restriction of the influence of political war chests funneled through the corporate form."[130] The State of Michigan persuaded the Court that unique economic and legal advantages that the state grants to corporations[131] created a compelling state interest in addition to the prevention of "financial *quid pro quo*" corruption: namely, the possibility that the corporation will use the aggregated wealth of its shareholders to

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[120] *Id.* at 437.
[121] *Id.* at 445.
[122] *Id.* at 445–46.
[123] *Id.* at 460.
[124] 528 U.S. 377 (2000).
[125] *Id.* at 382–83.
[126] *Id.* at 393–97.
[127] 494 U.S. 652 (1990).
[128] MICH. COMP. LAWS § 169.254(1) (1979).
[129] *Austin*, 494 U.S. at 654.
[130] *Id.* at 659 (quoting Fed. Election Comm'n v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 500–01 (1985) (internal quotation marks omitted)).
[131] *See id.* at 658–59. These advantages include "limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets." *Id.*

pursue a political agenda that has "little or no correlation to the public's support for the corporation's political ideas."[132] The Court found that the Michigan statute was narrowly tailored to prevent this kind of corruption, since it permitted corporations to make unlimited independent expenditures from a separate, segregated fund established with shareholder contributions specifically earmarked for political purposes.[133]

Opponents of the BCRA argue that a complete ban on soft money does not withstand strict scrutiny, but rather that the Act bans an entire form of federal fundraising to eliminate a practice that creates only a minimal appearance of corruption.[134] *Buckley* recognized that the less a donation involves coordination between the candidate and the donor, the less danger there is of corruption.[135] In the context of soft money, the presence of the party as an intermediary through which the donation passes reduces the amount of coordination, thereby reducing the potential for corruption.[136] The Supreme Court has recognized that interests of candidates are not identical to those of party committees.[137] No party by itself votes for any piece of legislation—individual members of Congress do—so contributors to parties have no guarantee that their money will translate into their desired policies. Furthermore, a party, through its whip, would continue to exert pressure on its members to vote in accordance with the party position even if the party did not receive contributions.[138] According to this argument, the BCRA does not further the government's interest in reducing corruption.

Opponents of the BCRA also argue that its soft money ban does not satisfy the other prong of the strict scrutiny test because the Act is not narrowly tailored to impede only minimally the constitutional rights of contributors. *Buckley* noted that the First Amendment protects the freedom to associate with a political party of one's choice.[139] This right to associate provides a mechanism for a group to express its political views: as the Supreme Court has stated, "[i]t is the accepted understanding that a party combines its members' power to speak by aggregating contributions and broadcasting messages more widely than individual contribu-

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[132] *Id.* at 659–60.

[133] *Id.* at 660–61.

[134] *See* Second Amended Complaint for Declaratory and Injunctive Relief, McConnell v. Fed. Election Comm'n, No. 02-0582 (D.D.C. filed May 7, 2002), at 44–45, *available at* http://www.law.stanford.edu/library/campaignfinance/mcconnell-v-feccomplaint50702.pdf.

[135] *See* Buckley v. Valeo, 424 U.S. 1, 46–47 (1976) (finding that independent expenditures have less potential for corruption than coordinated expenditures).

[136] *See id.*

[137] *See Colorado I*, 518 U.S. 604, 622–23 (1996) (stating that parties are "coalitions of differing interests").

[138] *See generally* ROGER H. DAVIDSON & WALTER J. OLESZEK, CONGRESS AND ITS MEMBERS 176 (7th ed. 2000) (explaining that the party whip's role is "to encourage party discipline, count votes, and in general, mobilize winning coalitions on behalf of partisan priorities").

[139] *Buckley*, 424 U.S. at 15 (quoting Kusper v. Pontikes, 414 U.S. 51, 56–57 (1973)).

tors generally could afford to do, and the party marshals this power with greater sophistication than individuals generally could."[140] The BCRA prevents individuals from pooling their money together in a political party that advocates a slate of candidates that support their causes; this restriction, opponents argue, is unnecessarily heavy, and effectively undermines the First Amendment freedom of association.[141]

Assuming the Court preserves the *Buckley* framework,[142] the constitutionality of the BCRA's soft money ban will hinge on whether the Court views it as more like a regulation of contributions, which is permissible under *Buckley*, or more like a regulation of independent expenditures, which is not. Some analysts argue that the BCRA's soft money provisions further the compelling governmental interest in reducing the potential for corruption and only minimally impede free speech and association.[143] The soft money provisions could stem corruption resulting from "*quid pro quo* relationships between large-dollar soft money contributors and federal office candidates who benefit from political party soft money expenditures."[144] For example, donors who gave $250,000 to the Republican National Committee in 1996 received access to expensive parties and photo-ops with high-level politicians.[145] In the 1999-2000 election cycle, Enron donated more than $2 million in soft money to candidates from both parties, and when congressional hearings on Enron began, the contributions had cast "a pall of doubt" over federal activity on the matter.[146] These examples, and many more cited by Representative Shays,[147] indicate that soft money's potential to create corruption, or at least its appearance, is high.

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[140] *Colorado II*, 533 U.S. 431, 453 (2001).

[141] *See* Second Amended Complaint for Declaratory and Injunctive Relief, McConnell v. Fed. Election Comm'n, No. 02-0582 (D.D.C. filed May 7, 2002), at 44–45, *available at* http://www.law.stanford.edu/library/campaignfinance/mcconnell-v-feccomplaint50702.pdf.

[142] While the above paragraphs suggest that the Supreme Court would uphold the *Buckley* framework, Justice Thomas has argued that the Court should break with *Buckley* by abolishing the distinction between contributions and expenditures. *See Colorado I*, 518 U.S. at 636 (Thomas, J., dissenting) (arguing that "[c]ontributions and expenditures both involve core First Amendment expression because they further the 'discussion of public issues and debate on the qualifications of candidates.'"). Thomas's position would make any campaign finance legislation that regulates contributions and expenditures unconstitutional. *See id.*

[143] *See, e.g.*, L. PAIGE WHITAKER, CAMPAIGN FINANCE: CONSTITUTIONAL AND LEGAL ISSUES OF SOFT MONEY (Cong. Res. Serv., Report No. 98-025, 2001), *available at* http://www.cnie.org/nle/crsreports/risk/rsk-35.cfm.

[144] *Id.*

[145] *See* Peter H. Stone, *Green Wave*, 28 NAT'L J. 2410, 2411 (1996).

[146] 148 CONG. REC. H352 (daily ed. Feb. 13, 2002) (statement of Rep. Shays). Enron contributed $1.4 million to the Republican Party and $600,000 to the Democratic Party. *Id.*

[147] *See id.* For example, Shays also cites the case of three Wisconsin tribes who wanted to open a casino in Wisconsin. *Id.* Their application was ultimately rejected by the Clinton Administration Department of the Interior after Minnesota tribes fearing competition contributed "large sums of soft money" to the Democratic Party. *Id.* The incident triggered "an independent counsel investigation and two debilitating congressional investigations into whether the government was for sale." *Id.*

Supporters of the BCRA argue that it also satisfies the second prong of the strict scrutiny test because it is narrowly tailored to reduce corruption and impedes minimally on free speech and association. Even under the Act's soft money ban, there are many alternatives available to those who want to express their political views: they may

> contribute directly to a candidate, to a PAC that would support a certain candidate, to the political party of such a candidate in accordance with FECA-regulated contribution limits (also known as "hard money" contributions), to state parties for state activities, or make independent expenditures on behalf of the candidate.[148]

Since the BCRA does nothing to restrict unlimited independent expenditures, the Act does not severely impair the total quantity of speech available to individuals.

For these reasons, the Supreme Court will likely find the BCRA's soft money provisions constitutional. The potential conflicts of interest cited by Representative Shays[149] justify the Act, and the concurrent opportunity to make individual expenditures and pool money through state parties or national parties, subject to FECA limits, adequately addresses First Amendment concerns. Furthermore, viewing *Buckley* and its progeny as a whole, the Supreme Court generally gives deference to the FEC and Congress on campaign finance issues.[150] Given this trend and the strength of constitutional arguments in favor of the BCRA, the Court will likely uphold the soft money ban.

The constitutionality of the BCRA's electioneering communications clause is also contested in pending litigation.[151] Under the Supreme Court's holding in *Buckley*, Congress may only regulate communications that expressly advocate the election of a candidate; any statute that strays beyond these limits into the regulation of issue advocacy is unconstitutionally vague.[152] The BCRA, however, regulates advertisements beyond those that contain the magic words that *Buckley* suggests are necessary to

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[148] *See* WHITAKER, *supra* note 143.

[149] *See supra* notes 146–147.

[150] *See* Trevor Potter & Kirk L. Jowers, *The Frequently Mischaracterized Impact of the Courts on the FEC and Campaign Finance Law*, 51 CATH. U. L. REV. 839, 840–44 (2002) (arguing that "in the six most relevant Supreme Court battles since [FECA] . . . was passed, the Court has upheld most, if not all, of the challenged law"). The six cases examined were *Buckley*, *Massachusetts Citizens for Life*, *Austin*, *Colorado I*, *Colorado II*, and *Nixon*. *See id.*

[151] *See* Second Amended Complaint for Declaratory and Injunctive Relief, McConnell v. Fed. Election Comm'n, No. 02-0582 (D.D.C. filed May 7, 2002), at 34–36, *available at* http://www.law.stanford.edu/library/campaignfinance/mcconnell-v-feccomplaint50702.pdf.

[152] *See* Buckley v. Valeo, 424 U.S. 1, 43–44. *See also supra* text accompanying notes 50–51.

trigger express advocacy,[153] both in the Act's primary definition of electioneering communication[154] and in its alternate definition.[155] This legislation forces the Court to decide whether Congress may prohibit corporations and unions from engaging in what, under *Buckley*, might be considered issue advocacy during the most important ninety days of an election cycle.

The supporters of the BCRA argue that its ban on electioneering communications passes the strict scrutiny test since it only impedes corporations and unions from using their treasury funds to engage in speech.[156] This ban on the use of money by corporations and labor unions to influence elections is consistent with the historical bans on contributions from corporations and unions in the Tillman Act of 1907 and Labor Management Relations Act of 1947.[157] The ban is also consistent with the Supreme Court's holding in *Austin*.[158]

The BCRA's provisions concerning electioneering communications promote the reduction of corruption in a narrowly tailored manner that focuses on the treasury funds of corporations and unions.[159] The BCRA furthers the interest in reducing corruption for the same reasons as the statute in *Austin* did: corporate agents who control corporate treasuries (and, along parallel lines, union agents who control union dues) are not generally thought to be authorized to express the political views of the corporation's shareholders (or the union's workers) through the business decisions they make on how to spend those funds; meanwhile, the ability of those agents to use this large mass of funds to influence campaigns to advance corporate (or union) interests may lead to corruption.[160] The *Austin* Court found that the aggregation of wealth of a large number of shareholders in the corporate form made corporate political advocacy inherently suspect, because the political acts of the corporation were un-

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[153] *See Buckley*, 424 U.S. at 44 n.52. *See also supra* text accompanying notes 71–72.

[154] *See* Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 201(3)(A)(i), 116 Stat. 81, 89 (to be codified at 2 U.S.C. § 434(f)(3)) (regulating advertisements that "refer to a federal candidate"). *See also supra* text accompanying note 79.

[155] *See* Bipartisan Campaign Reform Act of 2002 § 201(a)(3)(A)(ii) (regulating advertisements that oppose or attack a candidate "regardless of whether the communication expressly advocates a vote for or against a candidate"). *See also supra* text accompanying notes 83–84.

[156] *See* Trevor Potter, *New Law Follows Supreme Court Rulings*, BNA'S DAILY REP. FOR EXEC., Apr. 22, 2002, at 2, *available at* http://www.brook.edu/dybdocroot/gs/cf/debate/Potter.pdf.

[157] Tillman Act of 1907, ch. 420, 34 Stat. 864 (repealed); Labor Management Relations Act of 1947, ch. 120, § 304, 61 Stat. 136, 159–60. *See also* Federal Election Campaign Act of 1971, 2 U.S.C. § 441(b) (2000) (re-codifying the ban on corporate and union contributions); *supra* text accompanying notes 28–31.

[158] Austin v. Mich. St. Chamber of Commerce, 494 U.S. 652 (1990). *See also supra* text accompanying notes 127–133.

[159] *See* Bipartisan Campaign Reform Act of 2002 § 203(a).

[160] *See Austin*, 494 U.S. at 660–61.

likely to be correlated with the views of individual shareholders.[161] Similarly, in *Federal Election Commission v. Massachusetts Citizens for Life*,[162] the Supreme Court stated that "direct corporate spending on political activity" could result in corruption, as corporations used their vast resources in the economic market to gain an "unfair advantage" in the political marketplace.[163] The BCRA's electioneering communications provisions are designed to reduce this potential for undue influence from corporate entities.

In adding a provision to FECA that regulates electioneering communications, the BCRA is no less narrowly tailored to effect its purpose than the Michigan statute that the Supreme Court upheld in *Austin*. Like the statute at issue in *Austin*, FECA includes an exemption from the longstanding ban on corporate and union contributions[164] for a "segregated funds" account.[165] Corporations and unions may create an account solely for political spending, as long as they do not transfer money from their dues into this account, and as long as they only accept money from shareholders, executive and administrative personnel, and their families.[166] Since the BCRA's electioneering communications provision will be inserted into the same section of FECA as this exemption,[167] it will thus become a part of the same kind of regulatory framework that the Court approved in *Austin*.[168] Seen in this light, the BCRA is not an outright ban on corporate or union free speech because corporations and unions may still use the segregated funds allowed to them by FECA to make independent expenditures.[169]

Individuals may also continue to express themselves by forming nonprofit groups for purposes of political expression, entities that the BCRA has exempted from its ban on electioneering communications.[170] In *Massachusetts Citizens for Life*, the Supreme Court held that congressional restrictions on independent corporate expenditures are unconstitutional as applied to a nonprofit corporation formed for "the express pur-

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[161] *See, e.g.*, 148 CONG. REC. S2114 (daily ed. Mar. 20, 2002) (statement of Sen. Carl Levin (D-Mich.)).

[162] 479 U.S. 238 (1986).

[163] *See id.* at 257–58 ("The availability of these resources may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas.").

[164] *See supra* note 157.

[165] Federal Election Campaign Act of 1971, 2 U.S.C. § 441b(b)(C) (2000) (stating that the ban "shall not include . . . the establishment, administration, and solicitation of contributions to a segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock").

[166] *Id.* § 441b(b)(C)(3).

[167] *See* Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155 § 203, 116 Stat. 81, 91 (to be codified at 2 U.S.C. § 441b).

[168] *See* Potter, *supra* note 156, at 2.

[169] *See id.* at 7–8.

[170] *See supra* note 78 and accompanying text.

pose of promoting political ideas" that "has no shareholders or other persons with a claim on its assets or earnings," and that was not established or funded by a business corporation or union.[171] Under this holding, nonprofit corporations are independent political funds that are outside the scope of the BCRA's ban on the use of corporate or union treasury funds for electioneering communications.

The BCRA's supporters suggest that the BCRA may not even regulate issue advocacy at all, arguing that the magic words test in *Buckley* is not exhaustive in determining what constitutes express advocacy.[172] The magic words given as examples in *Buckley* originally appear in a footnote, preceded by the words "such as."[173] Subsequently, in *Massachusetts Citizens for Life*, the Court held that "the fact that [a] message is marginally less direct than 'Vote for Smith' does not change its essential nature" as express advocacy.[174] Nonetheless, regulating any reference to a political candidate during the designated period[175] will, by definition, include advertisements focused solely on an issue and the stances of different candidates on that issue.

The BCRA's opponents build on this point, charging that the BCRA is overbroad, and not narrowly tailored to further a compelling interest.[176] *Buckley* reasons that discussion of issues affecting the public inevitably leads to discussion of political candidates and officeholders, and it would be unconstitutional to regulate all such discussions.[177] Regulations that encroach upon public discussion of issues limit the quantity of core political speech in which an individual is able to engage.[178] The BCRA is the exact type of regulation that the *Buckley* Court denounced: if interpreted according to the plain meaning of its terms, the Act would regulate over ninety-seven percent of political television ads.[179]

Furthermore, critics of the BCRA charge that it fails to promote either of its primary governmental interests because there is no evidence of corruption, and it would not reduce the appearance of corruption.[180] One

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[171] *See* Fed. Election Comm'n v. Mass. Citizens for Life, 479 U.S. 238, 264 (1986) (finding that defendant pro-life advocacy group was such a group).

[172] *See* Potter, *supra* note 156, at 9.

[173] Buckley v. Valeo, 424 U.S. 1, 44 (1976).

[174] *Mass. Citizens for Life*, 479 U.S. at 249.

[175] *See* Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 201, 116 Stat. 81, 89 (to be codified at 2 U.S.C. 434).

[176] *See* Second Amended Complaint for Declaratory and Injunctive Relief, McConnell v. Fed. Election Comm'n, No. 02-0582 (D.D.C. filed May 7, 2002), at 35, *available at* http://www.law.stanford.edu/library/campaignfinance/mcconnell-v-feccomplaint50702.pdf.

[177] *See Buckley*, 424 U.S. at 42.

[178] *See id.* at 18.

[179] Expert Report of Kenneth M. Goldstein on Behalf of Intervenor Defendents, McConnell v. Fed. Election Comm'n, No. 02-0582 (D.D.C. filed Mar. 27, 2002), at 3, *available at* http://www.camlc.org/attachment.html/Goldsteinpart1.pdf?id=258. Eighty-five percent of interest group advertisements mentioning a candidate were broadcast within sixty days of a general election. *Id.* at 17.

[180] *See supra* text accompanying notes 159–163.

opponent of the BCRA cited a 1997 Princeton study in which less than one percent of respondents correctly answered five questions on federal campaign finance regulation to claim that "public opinion about campaign finance regulations is shallow and poorly informed."[181] If Americans know little about campaign finance regulations, changing those regulations will not influence public opinion regarding corruption.[182] *Buckley* also already rejected potential corruption and its appearance as sufficient justification for regulating issue advocacy.[183] The lack of coordination between candidate and contributor reduces the possibility of corruption.[184] While the statute that the Supreme Court upheld in *Austin* did limit independent expenditures, it did not involve direct regulation of issue advocacy.[185] Because the BCRA fails to further a compelling governmental interest and is not narrowly tailored, the BCRA's ban on electioneering communications, according to this argument, is unconstitutional.

If the Supreme Court finds that the BCRA's primary definition of electioneering communications is unconstitutional under *Buckley*, it may do the same with the alternate definition.[186] The alternate definition changes the scope of the regulation from an advertisement that "refers to a clearly identified candidate" to one that "promotes or supports," or "attacks or opposes" a candidate for federal office.[187] This definition is more limited than the original definition since some ads that refer to a candidate but do not support or attack him would not be regulated.[188] The alternate definition, however, is also broader than the original definition because it regulates corporate and union advertisements year-round instead of the thirty days before the primary election and sixty days before the general election.[189] Critics have suggested that this year-round definition could include any broadcasting advertisement by a corporation referring to a candidate's record.[190] If so, a corporation may be prohibited from making any political communications within a year of an election, significantly impairing its First Amendment right to free expression.[191]

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[181] Declaration of Q. Whitfield Ayres, McConnell v. Fed. Election Comm'n, No. 02-0582 (D.D.C. filed Mar. 27, 2002), at 3–4, *available at* http://www.camlc.org/attachment.html/Ayres,+Whitfield+-+Declaration.pdf?id=101. Only four percent of respondents knew that corporations were prohibited from directly contributing to federal candidates. *Id.*

[182] *Id.* at 4.

[183] *Buckley*, 424 U.S. at 45.

[184] *See id.*

[185] *See* Austin v. Mich. St. Chamber of Commerce, 494 U.S. 652, 656 (1990) (finding that the advertisement at issue was "an advertisement supporting a specific candidate").

[186] *See supra* text accompanying notes 83–86.

[187] *Compare* Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 201(3)(A)(i), 116 Stat. 81, 89 (to be codified at 2 U.S.C. 434), *with id.* § 201(3)(A)(ii).

[188] *See id.* § 201(3)(A)(ii).

[189] *Compare id.* § 201 (3)(A)(ii), *with id.* § 201(3)(A)(i).

[190] *See* Bopp & Coleson, *supra* note 94, at 9.

[191] *See id.*

Supporters of the BCRA, however, can stress the narrow scope of regulating direct advocacy to suggest that the alternate definition is narrowly tailored. In *Massachusetts Citizens for Life*, the Supreme Court suggested that advertisements that clearly promote or support a candidate are functionally express advocacy, even though they do not contain explicit words endorsing a candidate.[192] Moreover, while the alternate definition would apply year-round to advertisements purchased by corporations and unions out of their treasury funds, these entities still have the opportunity to engage in political expenditures out of a segregated fund.[193] The BCRA's alternate definition would thus likely withstand strict scrutiny even if the primary definition does not.

The Supreme Court will likely uphold the BCRA's electioneering communication provisions because of the strong arguments in favor of their constitutionality. History and precedent reveal that reducing corporate and union influence on elections furthers the compelling governmental interest in reducing corruption and its appearance.[194] The toughest issue before the Court is whether the statute is narrowly tailored to further its goal since it would regulate almost all political messages sponsored by corporations and unions.[195] The Court, however, will likely rule that the provisions are narrowly tailored because the BCRA limits its ban on electioneering communications to corporations and unions, while continuing to allow the use of segregated funds and nonprofit advocacy to further a group's political interests.

Regardless of how the Supreme Court rules on the BCRA's constitutionality, the current FEC interpretation of the Act's soft money provisions will have a significant impact on their effectiveness. The FEC is the federal agency responsible for developing regulations governing how the Act will be enforced, and for monitoring its enforcement.[196] Supporters of the BCRA have strongly criticized the regulations that the FEC has promulgated to interpret the Act as failing to uphold both the letter and the spirit of its ban on soft money.[197]

Supporters of the BCRA have challenged the FEC's interpretations of the Act's soft money ban in four respects. First, the FEC interprets the ban on political parties' soliciting, receiving, or directing another party to

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[192] *See supra* text accompanying note 174.

[193] *See supra* text accompanying notes 164–169.

[194] *See supra* text accompanying notes 156–163.

[195] *See supra* text accompanying notes 176–179.

[196] *See* Federal Election Campaign Act of 1971, 2 U.S.C. § 437c (2000) (establishing the FEC).

[197] *See* Press Release, Senator John McCain, FEC Undermines the New Campaign Finance Law in Direct Contravention of the Statute's Language, Purpose, and Legislative History (June 26, 2002) [hereinafter FEC Undermines New Law], *available at* http://www.camlc.org/attachment.html/MCAIN-FEINGOLD+REGS+RESPONSE+6+26+02+latest+version.pdf?id=54.

contribute soft money[198] to require one to explicitly "ask" another to donate or transfer something of value, rather than the definition recommended by the BCRA's sponsors that included "request[ing], suggest[ing] or recommend[ing]" that one contribute soft money.[199] This permissive interpretation opens the possibility for political parties to gain soft money funds through suggestion, allowing potential donors to read between the lines what is asked of them.[200] The Commission justified its interpretation on the grounds that the recommended phrase was too vague, giving rise to a concern that such an interpretation would lead to convictions of innocent people whose actions unintentionally suggested a contribution.[201] This would result in meritless suits that would only waste judicial resources.[202]

Second, the FEC regulations permit federal candidates and officeholders to engage in solicitation of large donations as featured guests at state, district, or local fundraising events, as long as they do not serve on the event's host committee.[203] While the FEC recognized that at least one of the BCRA's sponsors, Senator McCain, wanted to ban this solicitation entirely and only permit federal candidates or officeholders to speak if they do not solicit money,[204] the FEC did not want to be a "speech police," monitoring federal candidates' statements at events to determine if they constituted solicitations.[205] Whatever the merits of the FEC's concern, this interpretation has little support in the text of the BCRA itself.[206] If wealthy donors may attend local fundraisers in which they can gain the good graces of a federal officeholder who is a featured guest, the same potential *quid pro quo* could occur as that which the BCRA seeks to prevent.[207]

Third, the Commission allows national parties to set up affiliated organizations[208] before the law takes effect, which would later be deemed

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[198] Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 101, 116 Stat. 81, 82 (to be codified at 2 U.S.C. § 441).

[199] Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. 49,064, 49,086–87 (July 29, 2002) (to be codified at 11 C.F.R. pt. 300).

[200] *See* FEC Undermines New Law, *supra* note 197 (arguing that the FEC's interpretation of "soliciting or directing" undermines the BCRA's prohibition against federal candidates and national parties soliciting, directing, receiving or spending soft money).

[201] *See* Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. 49,064, 49,086–87 (July 29, 2002) (to be codified at 11 C.F.R. pt. 300).

[202] *See id.*

[203] *See id.* at 49,107–08. This rule interprets Section 101 of the BCRA, which permits federal candidates and officeholders to be featured guests at state and local party fundraisers "notwithstanding" the ban on solicitation of non-federal funds. *See id.*

[204] *See* 148 CONG. REC. S2139 (daily ed. Mar. 20, 2002) (statement of Sen. McCain).

[205] *See* Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. 49,064, 49,107–08 (July 29, 2002) (to be codified at 11 C.F.R. pt. 300).

[206] *See* FEC Undermines New Law, *supra* note 197.

[207] *See id.*

[208] The Commission defines an "affiliated committee" vaguely, as a committee that is authorized or controlled by a common entity. 11 C.F.R. § 100.5(g) (2001).

independent and available to solicit unlimited donations.[209] This interpretation opens a gaping hole in the BCRA's soft money ban. As long as the political parties have gone through the appropriate formalities in setting up affiliated organizations, the FEC will allow them to continue accepting soft money donations through these organizations, as if the Act had never been passed at all.[210]

Fourth, the FEC allows local parties to use soft money for get-out-the-vote activities and acquiring voter lists,[211] despite indications in the BCRA that such activities constituted federal election activity.[212] As with all of the controversial FEC interpretations, this regulation undermines the intended purpose of the BCRA.[213] Each of these FEC regulations expands the ability of political parties to solicit contributions, and ultimately fails to uphold the letter and spirit of the Act.[214]

While the FEC justified its interpretations with constitutional and policy arguments, unless some change occurs, the BCRA, as interpreted, does not close the soft money loophole. To challenge these FEC regulations, BCRA sponsors Representatives Shays and Meehan have taken legal action by filing suit against the FEC, arguing under the Administrative Procedure Act[215] that the FEC regulations are arbitrary and capricious, contrary to the plain meaning and text of the BCRA, and lacking a rational basis.[216]

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[209] *See* Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. 49,064, 49,083–84 (July 29, 2002) (to be codified at 11 C.F.R. pt. 300). The FEC argued that since the BCRA does not take effect until November 6, 2002, organizations created prior to that date are beyond the scope of the statute, and are presumptively not subject to regulation. *See id.*

[210] *See* FEC Undermines New Law, *supra* note 197.

[211] *See* Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. 49,064, 49,083–84 (July 29, 2002) (to be codified at 11 C.F.R. pt. 300).

[212] *See* Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 101(b), 116 Stat. 81, 85–86 (to be codified at 2 U.S.C. § 431). (defining "federal election activity" to include get-out-the-vote activities associated with federal campaigns).

[213] *See* FEC Undermines New Law, *supra* note 197. Senator McCain argued that "the FEC, without any basis in law, defined get-out-the-vote activities as not including encouraging voters to vote, and voter identification activities as not including the acquisition of voter lists." *Id.*

[214] *See id.* FEC Commissioner Scott Thomas charged that a block of four other Commissioners "have so tortured this law, it's beyond silly." Thomas B. Edsall, *FEC Reopens Soft Money Spigot*, PITT. POST-GAZETTE, June 23, 2002, at A18. As a result, at least two critics have called for a change in the process for nominating FEC Commissioners. *See* Bruce Ackerman & Ian Ayres, *Campaign Reform's Worst Enemy*, N.Y. TIMES, July 6, 2002, at A13 (arguing that a panel of five retired federal judges over the age of sixty-five could be the most impartial group to decide important questions of election law, since partisan Commissioners can impede enforcement of reform). Currently, the six-person Commission may not have four members of the same party serving at the same time. *See* Federal Election Campaign Act of 1971, 2 U.S.C. § 437(c) (2000) (establishing the FEC).

[215] Administrative Procedure Act, 5 U.S.C. § 706 (1946) (establishing standards for judicial review of an agency's rulemaking and adjudication).

[216] *See* Complaint for Declaratory and Injunctive Relief, Shays v. Fed. Election Comm'n (D.D.C. filed Oct. 8, 2002), *available at* http://www.camlc.org/attachment.html/SHAYS+V.+MEEHAN+COMPLAINT+FINAL+10+8+0211.pdf?id=88.

The BCRA may also produce new and unintended effects that run counter to the goals of its drafters. A common critique of the BCRA charges that it will unduly protect incumbents.[217] According to this argument, parties currently help unknown candidates gain exposure through soft money.[218] Perhaps without soft money and without issue advertisements from corporations or unions, people will only vote for the name they recognize, the incumbent. New candidates may not be able to garner recognition through increased hard money contributions under the BCRA alone.[219] A tradeoff generally exists between eliminating potential corruption and protecting incumbents.

Even with the passage of the BCRA, individuals and interest groups will still be able to find ways to use money to increase their level of influence on the political system. For example, donations to Section 527 nonprofit corporations, and spending by these corporations, will likely increase as a result of the BCRA.[220] These corporations already play a significant role in financing campaigns: Planned Parenthood, for example, spent $12 million on politically relevant activity in the 2000 presidential election campaign.[221] Groups seeking influence could also exploit the exclusion of news coverage and editorials from the definition of electioneering communications.[222] This exemption may lead corporations to publish advertisements in corporate-owned newspapers.[223]

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[217] *See* Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 COL. L. REV. 1390, 1390–414 (1994) (suggesting that reforming the campaign finance system could entrench incumbents); Bopp & Coleson, *supra* note 190, at 2.

[218] *See* Bopp & Coleson, *supra* note 190, at 14 (citing MICHAEL J. MALBIN & THOMAS L. GAIS, DAY AFTER REFORM: SOBERING CAMPAIGN FINANCE LESSONS FROM THE AMERICAN STATES 145–58 (1998) (arguing that in close elections, parties fund challengers and candidates in open-seat elections, thereby making the parties an important vehicle in electoral competition)). Senator McConnell entered into the Congressional Record several articles that argued that the increasingly complex rules of campaign finance favor incumbents who know the rules. *See* 148 CONG. REC. S2121–29 (daily ed. Mar. 20, 2002) (statement of Sen. McConnell). Moreover, the BCRA's electioneering communications provisions benefit incumbents because voters will hear fewer commercials supporting opponents, and the BCRA's millionaire provision benefits incumbents facing wealthy challengers. *See id.* at S2125.

[219] *See* Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 307, 116 Stat. 81, 102–03 (to be codified at 2 U.S.C. § 441a) (increasing individual contribution limits from $1,000 to $2,000 per candidate).

[220] *See* Frances R. Hill, *Softer Money: Exempt Organizations and Campaign Finance*, 91 TAX NOTES 477, 478 (2001). These kinds of donations to nonprofit corporations are sometimes referred to as "softer money." *See, e.g., id.* According to some commentators, placing a ban on soft money without also addressing softer money donations will only shift more donations to nonprofit organizations, preventing the reform from realizing its desired effect. *See id.*

[221] MICHAEL J. MALBIN ET AL., CAMPAIGN FINANCE INSTITUTE INTEREST GROUP PROJECT, NEW INTEREST GROUP STRATEGIES—A PREVIEW OF POST MCCAIN-FEINGOLD POLITICS? 24 (2002), *available at* http://www.cfinst.org/int_groups_CFIpaper.pdf.

[222] *See* Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 201, 116 Stat. 81, 89–90 (to be codified at 2 U.S.C. 434(f)(3)). *See also supra* text accompanying note 81.

[223] 148 CONG. REC. S2097 (daily ed. Mar. 20, 2002) (statement of Sen. McConnell)

The BCRA produces a substantial change in the legal structure that governs campaign financing. By banning soft money and curbing sham issue ads, the legislation eliminates some means by which corporations, unions, and individual donors used money to gain disproportionate access to the political system. This disproportionate level of influence by campaign contributors and sponsors of sham issue ads produced corruption, or at least the appearance of corruption. Even after the BCRA, monetary interests may still exert a disproportionate level of influence through uncoordinated independent expenditures and advocacy by nonprofit organizations. Because regulating these forms of political speech may be unconstitutional under the Supreme Court's First Amendment jurisprudence, the BCRA regulates as much as it can without infringing on protected speech. The Act should be found constitutional by the Supreme Court because it is narrowly tailored to further a compelling governmental interest in reducing the corruption created by soft money and sham issue ads. For the BCRA's potential to institute these meaningful reforms of the campaign finance system to be realized, however, the Act's FEC interpretations must be changed, and the Supreme Court must find the Act constitutional. If both of these conditions are satisfied, the BCRA will change the way campaigns are run, and 2004 will provide a glimpse at how effectively the new regime can help secure cleaner elections in the twenty-first century.

—Gregory Comeau

(suggesting that corporations that own newspapers are exempt from all regulation under the BCRA).