# PRICES AND INCOMES: THE DILEMMA OF ENERGY POLICY

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*The recent controversy over energy policy highlights the difficulties which Congress and the Administration confront in arriving at a concerted national strategy. Professor Brannon argues that, from an economist's point of view, the energy crisis required a concerted three-point solution: free market price allocation of scarce resources; windfall taxes on energy producers; and income transfers to protect consumers from excessive rises in energy costs. Analyzing the course of energy legislation in 1975, however, he finds that Congress failed to reach this — or any other — comprehensive solution, but rather continued a mixed, often self-contradictory, package of policies. Professor Brannon concludes from the experience of 1975 that, at least in the absence of effective Congressional leadership allied with a cooperative President, Congress cannot produce complex solutions needed for complex problems that implicate not only broad areas of national policy — but different Congressional committees as well.*

## *Introduction*

Two years after the onset of an acute national problem related to oil imports our political process is still groping for a coherent energy policy. Some of the failures of the first twelve months were analyzed in this Journal last year.[1] In the second twelve months a spirit of non cooperation persisted between Congress and the Administration which produced only a collection of uneasy compromises.

The difficulty of enacting complex controversial legislation in the face of a divided Congress and Executive is well known. In the energy case, however, there was a broad nonpartisan consensus on an objective of reducing United States dependence on im-

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1 *See generally* Morrison, *Energy Tax Legislation: The Failure of the 93d Congress,* 12 HARV. J. LEGIS. 369 (1975).

ported oil. The disagreement was solely on the means of achieving the objective. Why should a question of means be so intractable?

The problem is that the energy question involves an issue of prices which greatly affects the real income of voters. If the price of petroleum products or natural gas rises significantly, other things being equal, the real income of consumers is decreased. This change in real incomes is a serious problem for a popularly elected legislature.

This article is concerned principally with the debates over policy on crude oil as an example of how our political processes deal with price-income issues. This topic is worthy of exploration because from the standpoint of the economist such issues are relatively easy to handle but in the political process they are typically mishandled.

The first part of this article discusses the economic character of the energy-price problem and the economic setting in which it arose. The middle part follows the chronology of the political fight during 1975 when the whole panoply of price-income issues was considered. The final section draws some conclusions about the politics of price-income issues.

## I. Some Background

### A. *The Economic Nature of the Problem*

The energy problem was discovered with the embargo engineered by the Organization of Petroleum Exporting Countries (OPEC) in the winter of 1973-1974. It was an element of the politics of the whole affair that only in mid-1974 did the price issue emerge in public understanding out of the shadow of the shortage issue of the winter of 1973-1974.

The handling of price issues is a complex matter in a democratic market society because prices serve two functions: they determine the respective real incomes of buyers and sellers; and they allocate scarce resources among alternative employments.

A higher price for an item in short supply directly transfers real income from buyers to sellers. The transfer should encourage buyers to consume less, and encourage sellers to produce more.

One could decide that, in a particular market and in the short-run, the amount of income transferred would be too high in relation to the consumption discouraged or the new production encouraged. Such a policy appears appropriate with regard to oil prices because increases in domestic production will take a long time and users find it difficult to reduce oil consumption in the short-run while they still own machines designed for oil use.[2]

Much as nature was once thought to abhor a vacuum, a democracy abhors a large reallocation of real income. This is attested by the persistent "farm problem," the history of protective tariffs and the like. Income reallocation has high standing as an issue because it is a pocketbook issue, and it will commonly have an extra symbolic importance when many beneficiaries are already rich and many losers are already poor.

Efficiency in the allocation of resources, on the other hand, is a less appealing issue. It has no obvious constituency until bad pricing generates scandals of waste.

The problems of shortage[3] can be met by strategies which involve controlling price and resorting to other less efficient ways to reduce consumption and stimulate production. To reduce oil consumption without high prices we could ration gasoline, provide allocations among crude oil users, enforce conservation rules, and the like. To encourage production we could provide direct subsidies, low interest loans, tax concessions, or even threats of more severe government control.

Neo-classical economists almost universally agree that the use of the market price mechanism is a more efficient strategy, *ignoring the income transfer costs*, for dealing with shortages than the bureaucratic controls and subsidies implicit in price control alternatives.

To use reduced consumption as the example, the obvious measure of how much one wants oil is the price at which one would

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2 For a simple statement of the basic economies of prices *see* P. SAMUELSON, ECONOMICS ch. 4, 20 (9th ed. 1973). For a comprehensive discussion of the slow adjustment of oil production and consumption, *see* FEDERAL ENERGY ADMINISTRATION, PROJECT INDEPENDENCE REPORT (1974).

3 Of course, there is a limited supply of any particular resource. Shortage, in the popular sense, occurs when there is not enough of a particular resource that it will be made available at an "acceptably low" price.

choose not to use it. If a price rise of $2 a barrel to $10 a barrel would reduce consumption by a given consumer by one barrel, then those uses for which that barrel of oil was given up must have been those which the user valued at less than $10 at the margin. This is efficient in the sense that the least valuable uses of oil are culled out. No rationing scheme could cut demand more efficiently.

However, the income transfer costs must be considered. Is it "inefficient" that the price mechanism denies oil to some people who would use less oil at a $10 price, not because they are indifferent to a colder house temperature, or to less auto use, but because they are poor and "can't afford" a higher bill for petroleum products?

The price system is still operating efficiently here. If we are worried that some people are poor, that is, they have too little income, the appropriate remedy is, a transfer — not a manipulation of the price system. It is not efficient to help poor people by giving them expensive things that they would not have bought if they had received an equivalent amount of money.[4]

In the face of the apparent dilemma of selecting between the goals of income justice and economic efficiency,[5] there is an economic argument that both goals are attainable.[6] The government has obvious tools for changing real incomes that are too high or too low; it can impose windfall taxes and it can transfer money. Thus it is economically feasible to permit prices to reflect market forces and to change the resulting income effects by tax-transfer policies.

This economic analysis has quite general applicability: it argues for abandoning minimum wage laws in favor of wage supplements

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4 For an effective statement of the case for "efficient" alleviation of poverty, *see* M. FRIEDMAN, CAPITALISM AND FREEDOM 190-95 (1962).

5 This proposition about separability of prices and incomes is not an assertion that free market prices are always efficient. There may in fact be externalities or spillover effects that call for corrective price policies. Getting efficient prices, however, can be approached as a separate matter, *e.g.*, by imposing excise taxes or subsidies. If the correction itself involves undesired income effects, one can add further tax-transfer adjustments.

6 The classic statement is contained in R. MUSGRAVE, THEORY OF PUBLIC FINANCE, ch. 1 (1959), which develops the theory of the three separate budget decisions for three separate purposes: to stabilize the economy, to redistibute income, and to reallocate resources.

or negative income tax,[7] it argues for abandoning price support of agricultural commodities in favor of income support;[8] and it favors trade adjustment assistance in lieu of protective tariffs.[9] To list the cases is to identify the political problem. In a democracy, legislatures would rather change prices than change incomes.

This is the issue for energy prices. On the one hand we can maintain price control. This policy has a cost of generating some inefficiency by stimulating consumption of scarce materials and by discouraging production of substitute energy sources (which now must compete with (low-price oil and gas). Despite these costs, price control has the apparent benefit of minimizing the reallocation of real income resulting from higher oil prices. On the other hand, we can have the efficiency of higher energy prices without significant reallocation of real income. Breaking the link between energy prices and real income requires two measures: tax windfall profits of energy producers and redistribute of the tax proceeds back to consumers in a way that makes each family's share of the refund independent of its consumption of scarce energy materials.

Controlled low prices are themselves a tax on producers. Being required to sell $11 oil for $5.25 is not much different to the seller than being allowed to sell for $11 and paying a special tax of $5.75. Under price control the tax on producers is effectively used to finance a consumer subsidy.[10] This subsidy results because low prices provide a benefit to consumers which is greater the more energy products they consume. This is why low prices stimulate consumption. If consumers receive lump-sum grants equivalent to the price increase on an average amount of energy consumption, then consumers on the average are no worse off. However, the consumer will have to pay a higher price for additional energy and will save more for using less energy. In other words, the

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7 *See* FRIEDMAN, *supra* note 4, at 191-92.

8 For a discussion of price-income issues in the "farm problem," *see* SAMUELSON, *supra* note 2, at ch. 21.

9 *See* KREININ, INTERNATIONAL ECONOMICS 319-20 (2d ed. 1975).

10 Logically a tax can be designed to affect producers in the same way a particular system of price control affects them. It is true, of course, that some price control systems are better than others. We are not here interested in exploring particular systems of windfall tax or price control, but in the broad issue of which kind of a policy instrument to use.

marginal decision to consume more or less energy involves a larger reward for conservation.

When a "free market" program with windfall taxes and transfers to consumers is available, why is it not enacted? The remainder of this article will lay out some of the specific issues which appeared to influence legislators in the oil price debates of 1975. The broad picture is a mixture of subtle economic issues and inefficiencies of the political decision processes when there is little leadership power. Our answer probably lies in both areas. When issues are simple, cooperation should be achievable even without leadership power. When issues are complex, we should expect ineffective leadership to produce chaos.

More specifically, the complexities of energy policy development included the need to develop a general energy policy that served both international and domestic goals. Further, the energy issue involved the political power of organized groups of constituents overriding the more unorganized desires of the general public. It involved a significant lack of trust: between Congressional committees when the problem crossed jurisdictional lines; between the Congress and the Executive and independent agencies, such as the Federal Reserve Board; between those committed to protecting consumers and those seeking also to provide efficient utilization. Much of this lack of trust seems to spring from the fact of complexity. When a program is complex, harms are more likely to be overlooked particularly if all involved are not seen as committed to the same goals.

Relatively few spokesmen articulated the alternatives of price controls or free-prices-with-taxes-and-transfers during 1974.[11] The country more or less drifted into a program of price controls, mandatory allocations, controls on oil use, and exhortations for fuel conservation. This occurred in part because the oil problem developed at a time when the government had a system of selective price controls left over from the efforts of 1972-1973 to impose some general price control. Further, the perceived problem in the

11 *See, e.g., Hearings on the Administration Emergency Windfall Profits Tax Before the House Committee on Ways and Means,* 93d Cong., 2d Sess. 634 (1974) (testimony of author).

winter of 1973-1974 was a prospective loss of about 17% of our oil supplies due to the Arab oil embargo.[12]

President Ford's energy proposals in January, 1975, directed the debate toward an alternative to price control and rationing. It is necessary to appreciate that these proposals were received against the background of a year's experience with the control program. Moreover, the country was facing the unusual conjunction of high inflation and high unemployment.[13]

The most important element of consumer conditioning by the end of 1974 was the feeling that the oil shortage problem caused by the Arab embargo was over. In March of 1974 the real cost of gasoline fell sharply.[14] In retrospect, the handling of this shortage by the Federal Energy Office was a series of bungles,[15] but Arab need for markets prevailed and the embargo ended. The voter who did not read much economic news must have perceived that the oil "crisis" was much improved although prices were still high.

Discussion continued in the media about high imports, the prospect of a new embargo, and unrest in the Middle East. The

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12 *See generally* R. MANCKE, PERFORMANCE OF THE FEDERAL ENERGY OFFICE (1975).

13 In my own view there is less mystery in why this conjunction occurred than most experts profess to seeing, but the question of what to do remains difficult. If all other things were equal, we would expect that higher than normal unemployment would go with falling or at least constant prices. *See* SAMUELSON, *supra* note 2, at ch. 41. Since 1965 we have not had all other things equal. From 1966 to 1970 we were in a war and wars have always been inflationary. Since 1970 the economy has been subjected to a number of foreign shocks, devaluation, an oil price increase, and a world food shortage. Another group of circumstances external to the unemployment-inflation tradeoff were things like environment regulation, and worker and product safety regulations. Assuming these regulations were worthwhile, they generate social benefits which are not reflected in the average money wage rate deflated for average prices. In theory these shocks could have been accommodated without inflation by forcing down other prices and money wage rates. Probably our economy doesn't operate well with falling prices, *see id.* at 274, so monetary policy allowed oil, food, and import prices to rise, which resulted in more pressure for wage increases to chase the "cost of living." These scenarios of wartime and imported inflations were played out on top of the usual employment-inflation tradeoff with the result that a high unemployment situation that should have been associated with no inflation was in 1975 associated with about 8% inflation.

14 In January and February it was about $1.20 a gallon which I estimate by adding a payment of $6.00 for ten gallons plus the value of an hour's time to be another $6.00.

15 *See generally* Mancke, *supra* note 12.

Federal Energy Administration pursued its jawbone efforts to promote a conservation ethic. There was a fairly steady line of White House talk about achieving long-run independence, interrupted during the summer while full attention was being given to impeachment. President Ford found it appropriate on several occasions to show his opposition to increases in the gasoline tax.[16]

Not much attention was given in the press to falling United States production, but newspapers continuously published statistics about profits of United States oil companies, invariably in the deceptive form of percentage change from the previous year.[17] The public recognition of the problem of oil company profits was heightened by Democratic spokesmen who continued to talk about the issue of repealing percentage depletion on oil.[18]

Another dimension of the political problem was that the effects of price control on old oil[19] varied between companies in the oil industry depending on the quantity of old oil they possessed. In general, companies involved mostly in refining or in foreign oil would be at a comparative disadvantage if integrated companies with United States oil suddenly found the price of that oil as high as $11 or $12 per barrel. These non-integrated companies had a considerable interest in price control.[20] The decision of the Congress to exempt "stripper wells" (those with production below 10 barrels per day) created another oil industry constituency for price control since uncontrolled operators are at an advantage if others in the industry are under a price limitation.

The recession presented a new policy problem for our political system. As late as October, 1974, President Ford was calling for tax increases to fight inflation.[21] Fortunately, the Congress resisted this recommendation. By January, 1975, the President was recommending a tax reduction to fight unemployment. At

16 *See, e.g.*, 32 CONG. Q. WEEKLY REP. 2827 (1974).

17 This statistic produces a deceptive picture if the previous year's figure is very low or high. A million dollar company whose income rises from $1 to $10 has a 1,000% increase, but this doesn't show that a $10 profit on $1 million is excessive but only that it is better than $1.

18 *See* Morrison, *supra* note 1, at 398-401.

19 Old oil is "oil from properties producing at, or less than, their 1972 production levels." H.R. REP. No. 340, 94th Cong., 1st Sess. 37 (1975).

20 *Cf., e.g.*, 32 CONG. Q. WEEKLY REP. 955 (1975).

21 *See* 32 CONG. Q. WEEKLY REP. 2819 (1974).

the same time, he was recommending the new price-transfer-tax strategy for oil, and he urged the Congress to give priority to the anti-recession tax cut — which Congress did.

The fiscal debate in 1975 was broadly a difference between a Democratic Congress that was inclined to larger fiscal deficits to deal with unemployment and a President favoring smaller fiscal deficits to control inflation.[22] The presence of this fiscal issue provided some mental set for the Congress and the public toward a program which ostensibly countenanced more inflation, *i.e.*, higher oil prices.

## II. Legislative Developments on Oil Prices and Taxes in 1975

### A. *President Ford's Program*

The 1975 version of the Administration's energy program was articulated by Treasury Secretary William Simon before the House Ways and Means Committee on January 22, 1975.[23] The Ford program was part of a complicated set of proposals dealing with both the energy issue and an anti-recession fiscal program. Basically, the program utilized a decontrolled, market approach coupled with permanent tax reductions. Provisions of the plan included:

> (1) An import fee increases ultimately settling at $2/bbl. on crude oil and products and a corresponding excise tax on domestic crude oil;

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22 This fiscal issue proved particularly complex because of the political structure. A Democratic majority in the Congress was not able to assure achievement of its fiscal program. Particular expenditure programs or large tax reductions could be vetoed or, if passed, largely negated by a tough monetary policy of the Federal Reserve.

The Federal Reserve can finance the deficit by increasing the money supply or by selling bonds. The expansionary effect of an increased money supply can be expected to offset the deflationary effects of increasing selling prices. Selling bonds to the public will cut into the spending of competing borrowers, with little expansionary effect.

23 *Hearings on the Energy Crisis and Proposed Solutions Before the Comm. on Ways and Means,* 94th Cong., 1st Sess., pt. 1, at 23 (1975) [hereinafter cited as *1975 Ways and Means Energy Hearings*].

(2) Decontrol of crude oil prices and a Windfall Profits Tax;

(3) Price decontrol of natural gas and the equivalent of the \$2/bbl. oil excise tax (viz. \$0.37/mcf) on all natural gas . . .[24]

This plan would encourage efficiency in petroleum consumption and yet have no net income effect on the taxpayer because the increase in petroleum prices would be offset by the tax savings.[25]

The first problem in implementing the Administration's program was that although the program is only logically and politically justifiable as a unified whole, the plan was destined to be severed along its taxation and regulation aspects. The proposal was dissected because of the greater political urgency in dealing with the recession[26] and because Congressional consideration of the proposal was splintered along committee jurisdictional lines.[27] Once this dissection occurred, the parts were examined and acted upon separately. Thus each part would have to stand on its own merits.

The separation made the Administration more vulnerable to the Democratic charge that the price increase would be magnified by a ripple effect in the economy (as higher oil and gas prices push up other prices) which would not be offset by the proposed refunds. The attacks contended that this would both be unfair and inflationary.[28] One response to the criticism is to provide more refunds by a larger tax reduction. However, this response was in a practical

24 *Id.* at 33. The import tax was noteworthy because it was to be imposed by Executive Order, on imports only, at the rate of \$1.00 on February 15, \$2.00 on March 15, and \$3.00 on April 15, 1975. The Windfall Profits Tax is identical to the proposal Secretary Schultz made a year earlier. *See Hearings on "Windfall" or Excess Profit Tax Before the Comm. on Ways and Means,* 93d Cong., 2d Sess. 135 (1974).

25 These taxes were expected to raise \$30 billion and they were to be matched with a combination of transfers to consumers and tax reductions totalling \$30 billion; \$19 billion to individuals including \$2 billion to non-income taxpayers, \$6 billion to business consumers of oil and gas, and \$5 billion to state and local governments. *See 1975 Ways and Means Energy Hearings* 45-46.

26 Indeed, even Secretary Simon suggested some separation, stating: "The proposal for a temporary tax reduction to stimulate the economy has the very highest priority and we urge that you enact it immediately, even if that means separating it from the other elements of the President's proposals." *Id.* at 24.

27 Aspects of President Ford's energy program would be considered by at least 9 Senate Committees. *See* 33 CONG. Q. WEEKLY REP. 320 (1975).

28 *See 1975 Ways and Means Energy Hearings* 85. See text accompanying notes 49-53 *infra.*

sense precluded because Congressional action was first taken on the anti recession tax cut. The Ford Administration was more concerned than the Democratic majority in Congress about the magnitude of the budget deficit, its impact on the inflation rate, and their impact upon the recession.[29] After signing the temporary tax cut bill[30] which was $6 billion more than his request, the President became greatly concerned about the size of the budget deficit. He said he would resist all efforts to increase the deficit further, declaring "I will make no exceptions."[31]

The second problem in implementing the Administration's approach was its weak bargaining position. Being an unelected President facing an opposition-dominated Congress, President Ford had limited political influence. Also, key Democratic leaders denigrated the efficacy of the market approach.[32] But President Ford did have several bargaining chips. He had the authority to promulgate regulations under the Emergency Petroleum Allocation Act,[33] to veto legislation, and to impose an import fee upon foreign petroleum under the Trade Expansion Act of 1962.[34] However, each of these powers had significant limitations. By promulgating regulations, President Ford hoped to utilize a means of unilateral decontrol of petroleum prices. Although the Administration did not consider decontrol, by itself, an ideal policy, the possibility of energy conservation occurring only through price allocation was an option that the Congress could not ignore. However, either branch of Congress could, via a resolution, veto the regulation within a 5-day limit.[35] Thus the regulation approach

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29 *See* 33 CONG. Q. WEEKLY REP. 697 (1975) (President Ford's statement on signing the Tax Reduction Act of 1975).

30 Tax Reduction Act of 1975, 89 Stat. 26.

31 33 CONG. Q. WEEKLY REP. 697 (1975).

32 Indeed, in the midst of the Administration's presentation, Ways and Means Chairman Ullman expressed his distrust in a market approach. The chairman thought that quotas were a more certain way of cutting imports; that price increases were both inequitable and inflationary; price increases spread over all petroleum products were less effective than a larger increase applied to gasoline; in summary, he stated that the whole program was ineffective in inducing conservation compared to "a wider range of conservation programs with much sharper teeth." *1975 Ways and Means Energy Hearings,* 85-86.

33 15 U.S.C. § 753(g)(1) (Supp. III 1973).

34 19 U.S.C.A. § 1862(b) (Supp. 1976).

35 15 U.S.C. § 753(g)(2) (Supp. III 1973).

would be used periodically to confront Congress with a plan they had to act on rather than a Presidential avenue to act unilaterally.

President Ford's second bargaining tool was the use of his veto. President Ford could employ the veto on both Congressional energy proposals and Congressional attempts to extend the price control authority. The veto power was constrained by the ability of both branches to override it by a two-thirds vote and by the public perception that a veto is an obstruction, not a contribution to a solution to the energy quagmire.[36]

President Ford employed his third tool immediately. Impatient with Congressional inaction and concerned with American energy vulnerability,[37] on January 23 he announced the imposition of a $1 import fee on petroleum. This duty would be increased to $2 on March 1 and $3 on April 1.[38] This fee would discourage importation because of the increased total cost and spur increased domestic production. However, it also spurred great opposition, particularly in the foreign oil dependent Northeast. The import fee imposition was challenged on two fronts. Congress passed H.R. 1976, prohibiting any increase in oil import fees for 90 days. President Ford vetoed the bill, but to avoid a veto override, he promised to delay the next increase 60 days while Congress worked on its own program.[39] Meanwhile the Administration found its ability to impose the import fee challenged in court by eight northeastern governors, ten utility companies and one Congressman.[40] The Administration claimed its authority derived from the Trade Expansion Act of 1962. Under the Act, after advisement by the Secretary of the Treasury, if the President determines that the situation threatens to impair national security, he can act "to adjust imports."[41] The challengers claimed that the phrase "to adjust imports" limits the President to the option of imposing direct import quotas.[42] During the summer, the President mooted

36 President Ford used his veto power extensively, casting 17 in 1975, most of which were upon major legislation. *See* 34 CONG. Q. WEEKLY REP. 35 (1976).

37 *See* 33 CONG. Q. WEEKLY REP. 174, 326 (1975).

38 *Id.* at 171.

39 *See* 40 Fed. Reg. 10437 (1975).

40 *See* Alconquin SNG, Inc. v. Federal Energy Administration, 518 F.2d 1051, 1054 nn.7-9 (D.C. Cir.), *cert. granted,* 96 S. Ct. 265 (1975).

41 15 U.S.C. § 753(g)(2) (Supp. III 1973).

42 *See* 518 F.2d at 1055.

the policy implications of the suit by agreeing to forgoe the import fee as a part of a compromise.[43] Even though all of President Ford's approaches were restricted, they did give him the opportunity to dicker with Congress.

### B. *Congressional Responses*

The Democratic Congress sought to enact its own energy program. It rejected the Ford Administration's approach both because of a distrust of the efficacy of energy conservation through a price mechanism[44] and a feeling that such a key issue should have a Democratic solution.[45] However, Congressional efforts were hindered by the lack of accepted, unifying leadership in this area. This void partially is a result of the transformed, "new" Congress in which Wilbur Mills had been toppled from the chairmanship of the Ways and Means Committee and where 92 new Congressmen were determined to influence events immediately.[46] This lack of a unified front led to a plethora of proposals, an absence of inter-committee coordination, and little party discipline during floor action on these proposals.

After rejecting an uncontrolled price mechanism for energy conservation, the Democrats had to choose among the other methods of limiting petroleum consumption. But the method by which the Democrats were to make that choice gravely undermined their efforts. The Democrats on the Ways and Means Committee under the coordination of freshman Congressman Joseph Fisher[47] had produced seven task force reports. Broadly, the task force program constituted oil import quotas, a phased-in but ultimately high tax on gasoline, a tax on high-gasoline-using automobiles, a windfall profit tax if there was deregulation, and a

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43 However, the significance of the suit was not mooted since the import fee might be imposed in some later situation, although Presidential authority was upheld in the district court. The Court of Appeals for the D.C. Circuit reversed, 518 F.2d 1051 (D.C. Cir. 1975) (district court opinion reprinted as appendix). The U.S. Supreme Court heard arguments on the appeal of the Ford Administration on April 20, 1976. *See* 44 U.S.L.W. 3606 (April 27, 1975).

44 *See 1975 Ways and Means Energy Hearings* 85-86.

45 *See* 33 CONG. Q. WEEKLY REP. 131 (1975).

46 *See* 33 CONG. Q. WEEKLY REP. 63 (1975).

47 Fisher, former chief economist for the Council of Economic Advisors, is considered an expert on energy resource issues.

program for channeling government funds to energy conservation and the development of new energy resources.[48] But the task force proposals were not seen as an integrated program because of both an inability to deal with the critical regulation question and statements of Chairman Ullman that these proposals were merely "a general consensus."[49] The Democratic leadership also developed a program which was based on a quota, tax incentives, and gradual decontrol of petroleum prices.[50] Adding to the confusion, hundreds of other energy bills were proposed during the first few months of 1975.[51]

After extensive hearings, the House Ways and Means Committee reported H.R. 6860. This bill was similar to the task force program, except for a sharp reduction in the gasoline tax and several other softening provisions.[52] However, this beginning of compromise ignored the interrelationships between the various proposals and the problems of combining them into a coherent program. The committee's disregard for this wholistic approach and the subsequent modifications the committee made served as a warning of what was to occur on the House floor.

Attempts to develop a comprehensive plan were also hampered by a lack of inter-committee coordination. As the task force developed its plan, it could only report that the critical issue of regulation was under discussion with the Energy and Power Subcommittee of the House Interstate and Foreign Commerce Committee.[53] This prevented the task force from tailoring the price regulation proposal with windfall profits tax into their overall scheme. However, poor coordination was not a one-way street. During the extended House debate on controls in July, Congressman Krueger offered an amendment to H.R. 4035 extending controls that would provide gradual decontrol of prices if the Ways and Means Committee enacted a windfall tax. Chairman Ullman

48 *See 1975 Ways and Means Energy Hearings* 4-20 (reprinting text of Task Force Proposals).
49 *Id.* at 21.
50 For key provisions, *see* 33 CONG. Q. WEEKLY REP. 426 (1975).
51 *See id.*
52 Softening provisions included relief for farm and taxi use, commercial aviation, and business travel, plus a rebate of the additional tax on 40 gallons of gasoline for each individual over the age of 16.
53 *See* 33 CONG. Q. WEEKLY REP. 958 (1975).

responded furiously to the prospect of tax legislation not inaugurated by his committee, and the proposition was crushed.[54]

When the Ways and Means bill came to the House floor, it was particularly vulnerable. The provisions of the plan were not comprehensive. The plan itself lacked the protection of the closed rule. The new open rule policy adopted by this Congress resulted in the introduction of nearly 200 amendments and two weeks of House debate.[55] The big defeat for the Committee was a House vote to strike the additional (up to 20 cents a gallon) tax on gasoline which carried by a staggering vote of 345-72.[56] Even the three-cents-a-gallon increase was struck out of the bill by a vote of 209-187.[57] The floor action continued as a rout for the Committee: the import quota level was raised, the auto efficiency taxes were converted to civil penalties (effectively removing Ways and Means from jurisdiction), and the tax credit for recycling was eliminated.[58]

### C. *The Non-Tax Legislation*

When it became obvious that there would be no progress on the President's original scheme of shifting from controls to a windfall tax and consumer rebate plan, the real controversy became the length of the period over which controls would be phased out and the content of the regulatory-subsidy programs which would replace price incentives. This controversy quickly heightened because the authority to control oil prices was scheduled to expire on August 31, 1975.[59] The President's strategy in the absence of tax action was to issue proposed regulations, which were subject to a Congressional veto within five days,[60] under the Emergency

54 *See id.* at 1649.
55 For a summary of some of the proceedings and key amendment votes, *see* 33 CONG. Q. WEEKLY REP. 1268-70 (1975).
56 121 CONG. REC. H5306-07 (daily ed. June 11, 1975).
57 *Id.* at H5325.
58 For a summary of the floor action, *see* 33 CONG. Q. WEEKLY REP. 1268-70 (1975).
59 The authority of the original Act was to expire at midnight, February 28, 1975. 15 U.S.C.A. § 75-6. This authority was extended to August 31, 1975 by P.L. 93-511. In September, the Act would be extended one more time, to November 15, 1975 by P.L. 94-99. 15 U.S.C.A. § 753(g)(2) (Supp. 1976).
60 15 U.S.C. § 753(g)(2) (Supp. III 1973).

Petroleum Allocation Act.[61] One proposed regulation providing for gradual (24 month) decontrol of old oil prices was announced on July 16[62] and vetoed by the Senate on July 17.[63] A new Ford gradual decontrol program over 39 months was announced on July 25[64] and rejected by the House.[65]

The Commerce Committees of both House and Senate gave consideration to the issue of extending price controls on oil and the related issue of terminating controls on natural gas prices. If the price of crude oil should rise to the level of the import price, the market situation of most energy users and non-oil energy producers would drastically change in ways that would reduce United States dependence on oil because of the strong incentive to conserve expensive oil. If oil prices are to be kept low, other ways must be found to provide conservation incentives. The committees also had several other pressures upon them. On the one hand, there was a continued pressure for a price rollback. This pressure was particularly felt in the House, where five freshmen Congressmen presented a rollback program.[66] On the other hand, the existing oil price control system (of early 1975) would eventually become practically inoperative because only old oil was controlled and eventually these oil wells would dry up.

In August, the President and the Congress began to maneuver in earnest. The showdown began when both houses of Congress passed H.R. 7014, which provided for a nine month extension of the controls under the Emergency Petroleum Allocation Act, and then went into recess. President Ford vetoed the extension[67] and the veto was upheld.[68] The President accepted an extension until November 15, 1975, while the Congress made another effort.[69] In September, President Ford employed his other bargaining chip in an attempt to obtain the desired compromise of gradual de-

61 15 U.S.C. § 751 *et seq.* (Supp. III 1973).
62 33 CONG. Q. WEEKLY REP. 1648 (1975).
63 *Id.*
64 *Id.* at 1655.
65 121 CONG. REC. 7900 (daily ed. July 30, 1975).
66 *See* 33 CONG. Q. WEEKLY REP. 518 (1975).
67 *See* 33 CONG. Q. WEEKLY REP. 1953-54 (1975).
68 The veto was sustained 39-61. 121 CONG. REC. 15774-75 (daily ed. Sept. 10, 1975).
69 *See* CONG. Q. WEEKLY REP. 1939 (1975).

control. In a major retreat from his January position, he offered to surrender the $2 import tax imposition.[70] This surrender was a shift from the attempt to reduce dependence on foreign oil by a rapid price movement to market price plus a $2 tax. The special significance of this retreat was that it gave the Congress an opportunity to achieve some immediate rollback of prices, even if the rollback was minor. This surrender on the import tax paved the way for a compromise on the extension of price control with gradual phaseout. The development of the compromise details took the entire autumn but the Energy Policy and Conservation Act was finally signed on December 23.[71]

There was some doubt that the President would accept this compromise offer. The majority of his advisors favored a veto.[72] However, the limits of his veto as a bargaining tool became controlling. The veto power is constrained by the possibility of a two-thirds override, and here, even if he had not gotten what he wanted or all that the Congress might have been willing to give up, President Ford probably had all that two-thirds of the Congress felt that they had to give him. The veto power also had political limits to its utilization. If the veto is overridden, the President will appear as an obstructionist on a key national issue rather than a careful contributor to the solution. But a successful veto would have brought instant termination of price controls with no adjustment mechanism — neither taxes nor rebates nor gradual decontrol. President Ford's record through 1975 had been fairly clear that this was not the result that he wanted. Faced with the depletion of his bargaining resources, President Ford decided to sign the bill.

## III. The Substantive Issues in the Price-Income Debates

In this section we deal with the kind of arguments that apparently influenced the Congress in grappling with the oil

70 *See* 33 Cong. Q. Weekly Rep. 2051 (1975). *See also id.* at 1834.

71 Pub. L. No. 94-163 (Dec. 22, 1975). For the legislative history and a summary of the Act, *see* U.S. Code Cong. & Admin. News 3506-3803 (1975).

72 President Ford was urged to veto the bill by Secretaries Simon (Treasury) and Kleppe (Interior) as well as Chairman Greenspan. Although FEA Chairman Zarb philosophically favored a veto, he pragmatically sought the bill's acceptance. *See* Russell, *Energy Measure Signed,* Washington Post, Dec. 23, 1975, § A at 1, col. 4.

price issue. We do not hope to be definitive on each argument. Rather, the purpose is to bring out the substance of a number of arguments and to look for some generalizations about why the Congress is reluctant to let market prices serve their allocation function and deal directly with undesired income effects.

### A. *International Arguments*

The present oil "crisis" began as an international trade problem. The price of an imported good became very high and its supply was subject to foreign political interference. To a significant extent, the political activity in this country can be understood as a reaction to the international aspect of the problem.

#### 1. Oil Isolation

There was a broad political consensus that foreign countries should not dictate our domestic energy prices.[73] This was frequently supplemented with speculation that the international oil companies operated in some mysterious way to abet the OPEC cartel.[74]

The opposition to having foreigners dictate American domestic policy is understandable. However, the rhetoric was not followed by effectual action. In fact, the ultimate solution was one that maximized OPEC's power to affect the domestic economic situation.

The United States could eliminate foreign influence on prices by refusing to buy or sell oil in international markets. No politician proposed this in 1975. The United States needed the oil; the oil embargo had set off this crisis.

Short of a complete embargo, the United States could have made a one-time decision to fix the impact of the OPEC cartel on Americans by setting an import quota. Such a quota would make the level of imports a non-market decision. The limited "isolationist" character of this policy is that there is a one-time decision on how much to import, but the cost of imports is dependent on

73 *See, e.g., 1975 Ways and Means Energy Hearings* 410 (testimony of David Freeman, former Director, Energy Policy Project of the Ford Foundation).

74 *See 1975 Ways and Means Energy Hearings* 312-13 (testimony of Charles Schultze).

OPEC price decisions and by these decisions OPEC impacts on Americans.[75] In fact the oil price controllers were not even willing to go this far. The Democratic majority plan had no quota and the Ways and Means bill as it finally passed the House had only a most loose quota.

The ultimate Congressional response was both to subsidize imports and to leave the quantity of subsidized imports to a market decision. Having rejected both rationing and price constraints on United States energy demand, the Congress was opting for substantially uncontrolled United States demand. This implies that individual consumption decisions are controlled only by cost. United States consumers would face an average oil cost of about $8/bbl., a result of controlled oil at $5.25 and uncontrolled oil and imports at prices near $11. Decisions to consume more would be made when the oil was worth as much as $8/bbl. to the consumer but it would be supplied by importing more at $11/bbl. Also decisions to supplement United States energy supplies from non-oil sources at oil prices between $8 and $11 would be rejected. These sources would compete with $8 oil even though they would be replacing imported oil at $11.

All of this amounts to protecting OPEC from some of the consequences of its price increase decision. Usually a cartel that raises prices loses some customers that won't buy at the higher price, and it loses sales to substitute products that can beat the higher price. The United States policy served to protect OPEC from both of these consequences. A more pro-Arab policy could hardly be imagined.

### 2. An International Front

A coherent way of looking at the international problem was articulated by Undersecretary of State Thomas Enders in the March hearings before the Ways and Means Committee.[76] In his view, the appropriate response to the OPEC price offensive was a concerted import limitation by the oil importing countries.

75 This means that we would continue as we did from 1973 through 1975, requiring by regulation that each industrial purchaser of crude oil buy proportionate amounts of high price (imported) and low price (domestic) crude. Similar rules would have to apply to imported and domestic petroleum products.

76 *See 1975 Ways and Means Energy Hearings* 80-85.

This strategy was based on two propositions. The first was that ultimately the OPEC oil price decision would be critically affected by what could be sold at each price. Reduction of imports by one country would not make much difference, but a concerted effort to reduce imports by all countries would have the effect of disciplining the cartel. The second was that a strong force to limit the OPEC price was the prospect of developing alternative sources: North Sea oil, oil from shale, etc. The efficacy of these alternatives was problematic. They could be "successful" in that they would bring down the world price, but tragically unsuccessful in that at the lower world price the substitutes themselves could encounter enormous losses. The proposal to take advantage of substitute sources as a threat to OPEC price hegemony was some sort of international agreement on a minimum price of oil, a tricky maneuver since countries had different investments on substitutes which had different prospective prices.[77]

We do not here enter into any analysis of the international oil strategy except to note its bearing on United States policymaking. By and large it was nil. On strict economic grounds this was understandable. If the other industrial countries restrain oil imports, this will send a message to OPEC and the message will be only slightly diluted if the United States does not much restrain its own imports. Conspicuously the Ways and Means Committee had little dealing with Undersecretary Enders, and the international agreements aspect got little attention in the debates.[78]

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77 *See* THE ECONOMIST, March 15, 1975, at 75.

78 It is possible the Administration would have been more successful with an alternate international strategy, one based more obviously on U.S. self-interest. If the U.S. limits its oil imports (in any way, by high prices, gasoline taxes, etc.), it would improve its balance of trade position and strengthen the dollar. Since the U.S. was not as heavy an oil importer as the other industrial countries, the dollar was likely to gain at the expense of other currencies. A higher price of the dollar is basically an advantage to Americans because it means that we get foreign goods cheaper. This, of course, is politically an ambiguous gain because cheaper foreign goods would somewhere compete with domestic U.S. goods. The strength of this policy argument would, however, be that it would be based on national interest, not on some "obligation" to do something for treaty partners. Clearly the Congress had no inclination to accept energy consumption restraints out of commitment to a vague organization of importing countries. Arguments for "energy independence" had some appeal, and this alternate strategy would have been clearly based on self-interest arguments.

### 3. Stockpiles

A technique for achieving effective independence would be to accumulate a government-owned stockpile of crude oil that could be drawn upon in a future embargo situation. This recommendation was made by President Ford, and a general provision for stockpiles was included in the general energy bills in both House and Senate.[79]

A striking fact here is that the short-term cost of a stockpile is very great.[80] If one expects the oil price to stay high, this is not a full cost since for this outlay the government acquires a highly valuable asset. The striking fact is, however, that Federal government budget processes are far too crude to distinguish between capital and operating costs.[81] The highly emotional budget debates surrounding the President's veto of the tax bill in December, 1975, were conducted in terms of simplistic numbers representing total budgetary outlays including inventory accumulation, loans, etc. There was no serious debate about the advisability of an immediate stockpile program even though there has been continuous concern about an outbreak of a new Mideast war which could entail a new embargo.

Stockpiling was treated in quite an off-hand manner by both the President and the Congress because budgetary processes were so crude as to distort its cost upwards into a frightening figure when no distinction is made between capital and operating costs.

## B. *General Economic Effects*

We turn from international to domestic questions. A major set of arguments deserving attention relates to the impact of any particular oil policy on the general economy. A major argument against high oil prices (with windfall taxes and consumer transfers) was that it was not an efficient way of reducing the quantity of oil demand, because it would have detrimental effects on the total economy outside of the oil industry.

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79 *See 1975 Ways and Means Energy Hearings* 8.

80 *See generally 1975 Ways and Means Energy Hearings* 1880-90.

81 *See* M. S. COMIEZ, A CAPITAL BUDGET STATEMENT FOR THE U.S. GOVERNMENT 12-15 (1966).

### 1. Ripple Effects

A consistent argument against the strategy of allowing energy price increases has been the assertion of "ripple effects," *i.e.*, the prediction that the price increases on crude oil would snowball into a series of greater-than-planned price increases. This argument was usually elaborated in two ways. One was an assumption that the consumers would not be fully protected by planned rebates in the event of more-than-planned price increases.

It is well known that economists have not been particularly successful in predicting price developments. The Congressional Committees received various forecasts. The Administration made a minimal argument that there would not be ripple effects.[82] At least one economist who testified before the Ways and Means Committee produced a detailed forecast supporting his prediction of ripple effects.[83]

The treatment of ripple effects by the Congressional policymakers was, on the whole, fairly naive in that little attention was given to distinguishing various kinds of ripples and exploring their implications within a free price-windfall tax-transfer strategy.

First it could happen that as crude oil prices rose, petroleum product prices could rise somewhat more due to the application of standard markups. This ripple effect was not given much attention. As long as a framework of oil price control was maintained this could be dealt with directly.

A second and more significant ripple effect is that as oil prices are permitted to rise, one would expect prices which are competitive with oil to rise also. The most conspicuous price in this category is the price of coal.

What is criticized as a ripple effect here is actually a critical part of the United States independence effort. So long as imported oil costs around $11-12/bbl., then it is efficient to use relatively more expensive domestic coal or coal that must be subjected to considerable treatment in order to be usable in liquid or gaseous form. The advocates of price control were recognizing this in the various

82 *See 1975 Ways and Means Energy Hearings* 88 (testimony of Alan Greenspan, Chairman, Council of Economic Advisors).

83 *See 1975 Ways and Means Energy Hearings* 285-90 (testimony of Otto Eckstein).

proposals to set up elaborate systems for subsidizing new energy sources. The costs of obtaining new coal, or oil from shale will be borne by the public either through higher coal prices or higher taxes to finance coal research and development. This "ripple effect" is thus not necessarily related to uncontrolled prices.

Finally, there is a third kind of ripple effect which is that as the prices of petroleum products rise, and the prices of substitute energy materials rise, then labor will seek to achieve wage increases to compensate for the increased cost of living. The wage increases further increase cost for a wide assortment of goods and thus generate more inflation.[84] This type-three ripple effect raises some complex issues which were never thoroughly analyzed in the energy price debate. The major problem is the inconsistency in creating a structure for compensating consumers for energy price increases and then expecting labor to compensate itself again through escalator clauses.[85]

So much for the types of ripples. What happens if there are ripple effects? One consequence would be higher cost of living burdens on consumers. To the extent that this arises from wage increases, there is not much net burden on consumers. To the extent that it arises from higher petroleum product prices or oil substitute prices, it could have been substantially handled if the Administration had been willing to face up to it. The alleged ripple effect would have increased some business profits and thus tax receipts, and some additional consumer refunds could have been provided. This could have been supplemented by repealing

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84 The Data Resources, Inc. model results presented by Eckstein emphasized this kind of ripple. *See id.*

85 The Congress might have dealt with this situation by requiring the Bureau of Labor Statistics to produce two versions of the Consumer Price Index. In addition to the present one, a new one would subtract from the recorded market price increases, those increases for which consumers had been compensated. It could also specify by statute that contract references to the CPI would be interpreted as referring to the new CPI which excluded compensated price increases. *See 1975 Ways and Means Energy Hearings* 560 (testimony of author). Neither the Committee nor the Administration followed up on this. The Ways and Means Committee version of the gasoline tax with a provision for some tax free purchases, amounted to another way of keeping the compensated price increases out of the CPI. The obvious pricing technique in constructing the CPI would be to allow for an average amount of tax free purchases and to this extent the gasoline tax would not work through escalator clauses.

percentage depletion for coal.[86] However, the advocates of a higher oil price strategy did not propose any systematic plan for dealing with price ripples.

The other type of alleged ripple consequence was a "net recession effect."[87] The premise of the argument is that higher oil prices on top of a weak recovery will trigger more recession. The logic supporting this argument is not self evident. If prices rise more than expected, some sellers will have additional income to spend and the net recession effect is minimal. The real substance of the recession argument was an unspoken assumption that the Federal Reserve would respond by not expanding the money supply. This would be the direct inference from Chairman Burns's repeated assertion that high priority had to be given to resisting inflation even at the expense of somewhat higher unemployment. This difference between the Congress and the President on the priority of unemployment reduction and inflation control as social objectives was at the heart of the fiscal policy debates through 1975. As applied to the present problem, it meant that the prospect of price ripple effects would be seen as an excuse for the independent Federal Reserve further to fight inflation at the expense of unemployment. This problem would be relatively manageable with an integrated political leadership. It was intractable with the divisions that prevailed in 1975.

### 2. Timing Issues

Another basic issue that underlay the dispute between the President and Congress over oil price policy in 1975 was the question of the timing of remedial action. President Ford repeatedly emphasized the need for rapid action.[88]

In general, the Democrats on the Ways and Means Committee were more adjusted to a gradual approach. This difference appeared most sharply in differing statements as to the goal of import reduction. The Administration, for example, spoke of reducing

86 As coal prices rise, percentage depletion would provide the greatest benefit for mines with the highest profit rate which is hardly an efficient way to encourage marginal additions to supply.

87 *See, e.g.,* THE REPORT OF THE HOUSE COMMERCE COMMITTEE TO H.R. 4035, H.R. REP. No. 65, 94th Cong., 1st Sess. 7-8 (1975).

88 *See* 33 CONG. Q. WEEKLY REP. 475-79 (1975).

imports by a million barrels a day in 1976 and the Ways and Means Committee Democrats and the Democratic leadership spoke of a half million as the goal.[89]

The slow approach of the two Democratic groups had a solid technical basis. On both the consumer and producer sides most of the advantage of a higher price will be realized if it is known that the price will soon be higher. One needs specialized equipment to consume energy resources such as a boiler or an automobile. The major way in which the consumer modifies oil consumption habits is by buying different machines, *e.g.*, buying a gasoline-efficient automobile when the present car wears out.[90]

Similarly, the development of oil substitutes is a long-run process; a producer will begin that process as readily when he knows that the oil price will be high when the new product comes on the market, as when he knows that the price is high now.

Why was the President initially so anxious for haste? It appears the major reasons were practical ones. One practical argument was that the whole year of 1974 had been wasted so far as developing a long-run United States energy policy. Another practical argument was that the international posture, seeking agreement for concerted action among the consuming countries, called for the United States to appear diligent in cutting imports.[91]

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89 *See* Gulick, *Energy Related Legislation — Highlights of the 93rd Congress and a Comparison of Three Energy Plans before the 94th,* 35 PUB. AD. REV. 346 (1975).

90 Some statistical studies of gasoline demand by Verleger and Sheehan show a much higher long run response to gasoline price changes than short run response. *See* Verleger and Sheehan, *A Study of the Demand for Gasoline,* in ECONOMETRIC STUDIES OF THE U.S. ENERGY POLICY, 1975 (D. Jorgenson ed.) (1975).

91 A more theoretical argument relates to the economics of extraction of natural resources. The generally accepted pure theory of extraction holds that the rate of production of that resource will be controlled by the prospect of price increases. If the price is expected to increase more rapidly than the interest rate then it will be efficient to delay producing the resource since production amounts to converting the resource to cash. For a concise discussion of the theory of resource production, *see* H. BARNETT & C. MORSE, SCARCITY AND GROWTH 101-50 (1963). This is only a basic theory. Some producers will find it harder to delay production because of contract commitments with the landowner, or the prospect that if he does not drill, a neighboring well could drain his field. Nevertheless there will be many situations where an oil well operator will have options about when to produce, for example, in deciding when to introduce secondary recovery methods. The prospect or rising prices will bias all of these decisions toward delay.

There is not much evidence that the Administration took the technical argument against slowly increasing oil prices very seriously. This argument applies to price control and to windfall taxes as well. Under the price control rules applicable to

### C. *Specific Economic Effects*

It is well known that most legislators respond to the immediate concerns of their constituents over their own general evaluations of national effects. This was certainly true in the energy impasse. The issue involved the special problems of consumers who saw themselves trapped into a pattern of high oil consumption and the public conception of the efficiency of market prices.

#### 1. The Unique Consumer

The argument offered at the beginning of this article was that the effects of price control could be achieved more elegantly with free prices, a program of windfall taxes and consumer refunds. An important part of this argument is that refunds equivalent in size to the price increase on the average consumption patterns would exactly offset the price increase for the average consumer (or, as under the Administration proposal, the average consumer at each income level). Unlike refunds, price control benefits each consumer in relation to the consumption of petroleum products. The economic argument against price control is that this constitutes a blatant encouragement to high energy consumption and waste.

A serious difficulty for a legislator accepting this argument was that some of the constituents were high oil consumers and for the foreseeable future could do nothing about it. Living in Maine

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old oil, the producer could expect to improve his economic position by slowing down production from existing wells until the demise of price control. This worked strongly against introduction of secondary recovery processes for old wells. See E. Renshaw, *The Pricing of Domestic Crude Oil,* paper presented at meeting of Eastern Economic Association, Albany, New York, 1974.

A windfall tax of the type originally proposed by the Administration, one that phased out gradually, has the same problem of encouraging delay.

Curiously, the Administration made little effort to correct this feature of its own price control rules. Proposals were made in the Ways and Means hearings and were later reflected in actions of both the Senate and House Interior Committees to introduce a more imaginative price control system.

For example, instead of defining old oil as 1972 production, it could have been defined as this production reduced 19% per year to approximate a normal decline rate. In this way any production from old properties which resulted from efforts to offset normal decline such as secondary recovery would have been rewarded with higher prices. *See 1975 Ways and Means Energy Hearings* 311-12 (testimony of Charles Schultze); 562-63 (testimony of author). In the confrontation atmosphere of 1975 there was less incentive to work at technical improvement of a price control system.

or New Hampshire commits one to a very high heating bill; living a long distance from one's job commits one to a very high gasoline bill; being employed in an industry that depends on petroleum products makes one very concerned about the petroleum price. This "unique consumer" problem is a variation of the political problem of protective tariffs. A small group severely disadvantaged makes more political noise than a large group of slightly disadvantaged, and "the noisy wheel gets the grease." A rationing system can take account of many of the unique features of each consumer, though not without severe administrative problems. Gasoline rationing in World War II did so, even down to the miles from home to work. In principle, one could design a variation of the Administration's original system of rebates to offset higher oil prices that was as complex as a rationing system, but it is not our tradition to make tax systems so specific.

The action of the Ways and Means Committee can be easily interpreted as a response to the "unique consumer" problem. The effort to load the price increases on gasoline was a device to avoid increasing the heating bills of voters in the northern states.[92] Within the gasoline tax technique, the Ways and Means Committee exploited the opportunity to exempt farmers and other favored groups and did not extend an equivalent penalty tax rate to diesel fuel for heavy trucks.

In retrospect, one must wonder at the naiveté of the Committee in expecting the rest of the Congress to go along with the technique of loading the burden on automobile drivers. The ranking Republican on Ways and Means commented, "Al [Ullman] apparently didn't understand why Ford came out with a Rube Goldberg program in the first place; it was to avoid a gasoline tax, which couldn't get passed."[93] When the Committee's package that took care of the Committee favorites was exposed to the broader constituency of the whole House, it was slaughtered. It appears doubtful that plans which shuffle burdens between groups of constituents on the basis of "unique consumer" arguments can ever be successful. Ultimately the Congress succumbed to the issue-

92 *See* Reese, *The Energy Bill: Lessons for Tax Reformers*, TAX NOTES, June 30, 1975, at 3, 5.

93 *See* Drew, *The Energy Bazaar*, NEW YORKER, July 21, 1975, at 59.

dodging tactic of simply minimizing the burden to be placed on anyone and then shifting that burden into the future. There was no real dialogue on the Administration plan to let prices rise and through rebates penalize any consumer who consumed more than average oil for his income level.

### 2. Market Confidence

The decision to rely on market prices as a policy, with or without taxes and transfers, requires confidence that both businesses and consumers will respond to price changes. Much of the opposition to the Administration's energy program reflected serious doubts that there would be adequate market responses to higher oil prices.[94]

This sort of argument for energy users is self-serving. If it is proposed that I pay more for something I want, it is to my advantage to argue that producers will not increase output even if I pay a higher price, nor will my fellow consumers reduce consumption. Thus output/consumption changes would require direct government intervention, and a price control law would limit useless income reallocations caused by higher prices.

There is impressive evidence of long-run responsiveness of both consumers and producers to higher price. The Administration compiled an impressive amount of this evidence in its massive report, *Project Independence*.[95] Any demonstration of expected responses to price increases is a complicated affair, but the situation with oil was especially complex. On the consumer side, modifying consumption depends largely on buying new equipment that uses less oil, and this generally occurs only when existing equipment begins to wear out. On the production side, output increases in response to a higher price but is likely to fall when there is an expectation that the future price will exceed the present price.[96]

94 THE SENATE INTERIOR COMM. REPORT ON S. 621, S. REP. No. 32, 94th Cong., 1st Sess. 22 (1975) asserted that the economic response to higher prices expected by the Administration was not "clearly and convincingly demonstrated." *See also 1975 Ways and Means Energy Hearings* 85-86 (remarks of Chairman Ullman).

95 *See generally* FEDERAL ENERGY ADMINISTRATION, PROJECT INDEPENDENCE REPORT, (1974).

96 *See generally* H. BARNETT & C. MORSE, *supra* note 57.

The practical implication of this situation was that there was much opportunity to make debating points against a free price strategy by noting that United States oil production had in fact fallen (which could be expected when price control gave rise to expectations that future prices would be higher) or that consumption, corrected for recession, had fallen very little.[97] This confusion about price effects served to emphasize other problems of the free price strategy, such as unique consumers and ripple effects.

A different argument about the efficiency of the price solution has to do with the assertion that the oil industry is highly oligopolistic. In fact, the oil industry is not more oligopolistic than most United States industry, although the concentration has been increasing.[98] If one is not satisfied with this market structure, then the debate is not about oil policy but rather about general social policy toward business. More sophisticated arguments have been offered which involve the peculiar relation of the major oil companies to the OPEC producers, and their ownership of non-oil energy sources.[99]

An oil company with United States production gains in the long run if the OPEC price is high, even without a conspiracy to raise prices. United States-based international companies may, however, work in various ways to help to maintain the cartel, *e.g.*, by restricting United States production of new oil in order to maintain higher production levels abroad.[100] The solution for this type of problem is a single United States purchasing agent, or some other explicit anti-monopoly policy. The notion of creating a single United States purchasing agent was considered by the Ways and Means Committee but rejected.[101]

By and large these issues are distinguishable from the price control issue that we are discussing. They could be enacted whether oil prices are controlled or not. Yet they contributed to a skepticism about the effectiveness of a market price strategy.

97 *See, e.g.*, Marlow, *Energy Policy*, TAX NOTES, October 13, 1975, at 3.

98 *See* T. DUCHESNEAU, COMPETITION IN THE U.S. ENERGY INDUSTRY 37-47 (1975).

99 *See id.* at 177-82.

100 *Compare 1975 Ways and Means Energy Hearings* 318 (testimony of Charles Schultze) *with id.* at 570-72 (testimony of Paul Davidson).

101 *See* Gulick, *supra* note 89, at 349.

### D. *Political Problems*

A full analysis of the history of energy legislation in 1975 would deal with very specific issues of politics, *i.e.,* the detailed relationships between constituencies and policymakers. We do not attempt this since our argument is concerned with a narrow question of why the legislation was structured for price control rather than a compensated free price. We have given most attention to the kinds of arguments used in the debates.

There are, however, some political matters that are directly relevant to the structure of the legislation. They include the Committee organization and the lack of unified leadership. Both of these circumstances work against enactment of a complex "packaged" program.

There was a considerable opportunity for exchange of information between the commerce and tax committees. The operations of both were extensively reported in the press. Yet there was little interchange. The core of the operating problem appears to have been a lack of mutual trust.

If a member of one of the commerce committees preferred a compensated free price strategy it should cause great concern to realize that the oil producers may avoid any windfall tax. There is a common belief that the way tax laws are written, a "smart operator" can always figure a way to beat a loophole-closing provision. The critical trust relationship must involve trusting the tax committees since a law taxing windfall oil profits could succeed whether or not prices were decontrolled. Apart from a general belief that the tax committees tolerate loopholes, there had been a specific demonstration of oil lobbying pressure in the Senate in the enactment of a generous retention of percentage depletion for producers with sales of up to $10 million a year.[102]

The critical loss of trust in 1975 was related to the plowback provision. "Plowback" was the term applied to relief from a windfall tax for qualified reinvestment. Before recapitulating some of the incarnations of this device, it is crucial to establish the point that the plowback has no real effect on the policy choice between price control or compensated free price.

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102 *See* CONG. Q. WEEKLY REP. 1320 (1974).

The assumption of both price control and the windfall tax strategy is that there is more than enough incentive for producers of oil, particularly new oil.[103] Even if one assumed that the market incentive for investment in the oil business was inadequate, a credit for reinvestment, structured as was the Ways and Means plowback in 1974, would work to reduce not only the cost of marginal investment, but also of investment that would be made anyway. This is the result of specifying that any investment, of a qualifying character, could be counted as generating a credit up to some amount of the windfall tax.[104]

Finally, if we assume that there would be an inadequate incentive for energy-related investment, the device of providing an incentive for such investment through a credit against a windfall tax amounts to an investment subsidy which is restricted to companies that enjoy windfall profits from oil production. That the Congress would have deliberately structured a subsidy restricted to very profitable oil companies is incredible. Since the investment which qualified for plowback credit covered all sorts of energy related projects, it was an incentive to integrated companies.[105]

For one who had an intellectual conviction that a plowback provision was right, it would have been consistent to favor repeal of oil price control with no windfall tax at all. Very clearly the function of the plowback proposal was in principle to gull the public into thinking that a windfall tax of some severity had been enacted when in fact a much milder or even nominal windfall tax had been enacted.

A plowback was mentioned as a possible provision in the Nixon message of December, 1973. It was not included in the Administration's 1974 proposal but Secretary Schultz indicated a willing-

103 Under price control, new oil was uncontrolled and under the standard windfall proposal the windfall tax was phased out. Under both regimes new investment is about as attractive as if there was no profit constraint.

104 This would be avoided by specifying that some amount of investment "didn't count" before one got to the qualifying investment. This kind of a test, however, works much to the advantage of the integrated company that has a large amount of investment relative to its windfall profits.

105 An independent refiner would not have crude oil production profits with which to finance new refineries. An integrated oil company could build more refineries with its windfall profits from producing crude. For a fuller critique of the plowback, *see* Brannon, *Oil Industry Taxes: Plowback or Kickback?*, TAX NOTES, March 25, 1974, at 15-18.

ness to explore this with the Ways and Means Committee. It was again omitted from the President's energy message in 1974 but included by President Ford in a television address in the spring of 1975. The idea was sanctioned by the Ways and Means Committee in 1974 and by the Finance Committee in 1975.[106]

From the standpoint of those in Congress considering a vote to terminate price control who were opposed to oil company windfall profits and in favor of compensation to consumers for the cost of oil prices, these machinations with a plowback credit could only be read as bad faith on the part of the entire tax law making apparatus. Effectively President Ford's endorsement of the plowback principle suggested that he only wanted to appear tough on oil companies while working to improve their position and curry their favor. The public disclosures in 1975 of illegal campaign contributions by oil companies reduced confidence that the tax committees would stand firm against the blandishments of the oil companies.[107]

## *Conclusion*

Congress will frequently be faced with situations where it will see the opportunity to achieve a more satisfactory distribution of income by changing prices. On those occasions economists will point out that the society would be better off if the Congress would forego changing prices and instead change incomes. Based on past experience it would seem that economists will generally lose arguments of this character.

From our examination of the oil experience in 1975 we can observe that these arguments become extremely complex. They involve subtle forecasts of the consequences of particular prices in their own markets and in the way that they ripple through the entire economy. Complex technical issues are difficult to handle within the political process.[108]

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106 *See* CONG. Q. WEEKLY REP. 1123 (1975).

107 It was pointed out to me by Henry Briefs that the significance of trust as an element in the success of economic planning is quite general. He pointed out that E. C. Banfield, for example, has argued that the absence of trust is a cause of underdevelopment. *See* E. C. BANFIELD, THE MORAL BASIS OF A BACKWARD SOCIETY 85-127 (1958).

108 *See generally* C. SNOW, THE TWO CULTURES (1964).

Even if agreement on policy can be reached, these technical complexities call for delicate orchestration in their planning and administration. If it is agreed that a significant price increase for crude oil has important advantages within the energy economy, it still needs to be established to the interested legislator that this will be managed so as not to have unfavorable effects on income distribution and employment. When a government of divided responsibility has a President whose party is a minority in the legislature, a central bank authority beholden to no one, and a legislative majority with disorganized leadership, there is little reason for a legislator to rely upon the system.

In the price issues that we are talking about, the legislator will see simultaneously questions of market efficiency, income distribution, and employment stabilization. The economists' argument amounts to telling the legislator that on the price issue he should vote for market efficiency and leave to tax-subsidy and monetary policy the solution of the income distribution and employment stabilization effects. The legislator will see a trivial constituency for market efficiency and large constituencies on the income and employment questions. In effect, major guarantees of satisfactory performance on the income-employment fronts are necessary to make a vote for market efficiency acceptable. In the best organized government adequate quantities are hard to obtain; in the chaotic government of 1975 they were impossible.

# THE NATIONAL LABOR RELATIONS ACT AND THE REGULATION OF PUBLIC EMPLOYEE COLLECTIVE BARGAINING

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*Messrs. McCann and Smiley analyze the arguments for and against Federal assumption of the responsibility for regulating the relationship between public employers and public employees. They conclude that, on balance, the Federal government should extend the National Labor Relations Act to public employers and employees, thereby imposing upon them a duty to bargain collectively with respect to wages, hours, and other conditions of employment. They conclude also, however, that public employment differs from private employment in significant aspects which justify special provisions for public employees within the general context of the National Labor Relations Act.*

*Introduction*

Unions, lawmakers, and the public have all recently discovered public employees.[1] While public sector strikes and the fiscal woes of many cities and States have contributed to growing public awareness, at least three long-term factors justify a special focus on public sector labor relations: the rapid growth of public employee unions since the beginning of the 1960's;[2] the passage

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1 For a comprehensive discussion of the emerging law of public sector collective bargaining, *see* SMITH, EDWARDS, & CLARK, LABOR RELATIONS LAW IN THE PUBLIC SECTOR (1974) [hereinafter cited as LABOR RELATIONS LAW IN THE PUBLIC SECTOR].

2 Since 1964, unions representing government employees have registered by far the greatest percentage gains in membership among all unions. In the decade

of public employee collective bargaining statutes in some 37 States and the District of Columbia over the last 15 years;[3] and the institution of collective bargaining in the Federal government.[4] Increased interest in public sector collective bargaining has led to proposals for federal regulation of public sector labor relations.[5]

This article analyzes the arguments supporting Federal regulation of public sector collective bargaining and weighs them against the arguments which support continued State authority in this area. It seeks to answer two related questions: first, should the Federal government take over the regulation of all public sector labor relations from State and local governments?; and second, if Federal regulation is desirable, what form should it take? The major conclusion is that the Federal government should assert jurisdiction over the labor relations of public employees through the mechanisms of the National Labor Relations Act (NLRA)[6] and the National Labor Relations Board (NLRB).[7]

The analysis does not directly address the question of whether collective bargaining for public employees is inherently desirable. Rather, it assumes that public sector collective bargaining is already a reality, and limits itself to the narrower question of how best to regulate the process of collective bargaining. This assumption is reasonable in view of the large number of Federal, State and local employees who are currently covered by some bargaining statute, and of the evidence that in many places public employees not covered by statutes are nevertheless bargaining collectively.[8] There are, however, 13 States without public sector

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between 1964 and 1974, the American Federation of Teachers increased its membership by 344 percent, the American Federation of State, County, and Municipal Employees increased by 176 percent, and the American Federation of Government Employees by 116.4 percent. Total union membership increased by less than 20 percent in the same period. 619 GOVT. EMPL. REL. REP. D-5 (Aug. 18, 1975) [hereinafter cited as GERR].

3 *See* text accompanying notes 100-124 *infra.*

4 *See* text accompanying notes 66-90 *infra.*

5 *See, e.g.,* H.R. 8677 & H.R. 9730, 93d Cong., 1st Sess. (1973). The two approaches suggested by these bills are: (1) to extend the coverage of the National Labor Relations Act to public employees; or (2) to adopt a special Federal Public Employee Relations Act administered by a special Federal agency.

6 29 U.S.C.A. § 151 *et seq.* (1973).

7 *See* 29 U.S.C.A. § 154 (1973).

8 *See* text accompanying notes 125-153 *infra.*

collective bargaining legislation.[9] At least six of these States have taken the position that public employee bargaining is undesirable and that collective bargaining agreements between government employers and their employees must not be enforced.[10] For these States, the passage of a Federal public employee collective bargainning statute would represent a major reversal of policy.

## I. EXISTING RIGHTS OF PUBLIC EMPLOYEES

In the landmark case of *McAuliffe v. New Bedford*,[11] Justice Holmes stated in dicta that public employees have no constitutional right to their jobs, and that governmental employers can therefore impose reasonable restrictions on their employees without violating the First and Fourteenth Amendment guarantees of freedom of speech.[12] Since *McAuliffe* was decided in 1892, however, it has become clear that public employees do not entirely surrender their rights when they accept public employment.[13] Moreover, the intervening years have witnessed major changes in the national policy toward labor-management relations which have had an effect on the rights of public employees at both the Federal and the State levels.[14]

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9 *See* note 101 *infra*.

10 Alabama, Georgia, North Carolina, South Carolina, Tennessee, and Texas. See text accompanying notes 129-135 *infra*.

11 155 Mass. 216, 29 N.E. 517 (1892).

12 *Id.* at 220, 29 N.E. at 517-18.

13 *See* Comment, *Constitutional Rights of Public Employees: Progress toward Protection*, 49 N.C.L. REV. 302 (1971); Eisner, *First Amendment Right of Association for Public Employee Union Members*, 20 LAB. L.J. 438 (1969); Leahy, *From McAuliffe to McLaughlin; A Revolution in the Law of Constitutional Rights of Public Employees*, 57 ILL. B.J. 910 (1969).

14 While the Constitution may assure public employees certain rights to union membership and representation, it can be argued that the Due Process Clause of the Fourteenth Amendment also restricts the use of collective bargaining in the public sector. In Perry v. Sindermann, 408 U.S. 593 (1972), the United States Supreme Court held that certain public employees may not be discharged without being accorded fair hearings and other procedural safeguards. *See also* Arnett v. Kennedy, 416 U.S. 134 (1974). *But see* Board of Regents v. Roth, 408 U.S. 564 (1972). Many collective bargaining agreements, however, provide their own mechanisms for handling employee discharges, and these mechanisms may differ from those provided by Civil Service laws and agency procedures. A recent Note published by the HARVARD LAW REVIEW suggests, however, that discharge and grievance procedures embodied in collective bargaining contracts provide the equivalent of more

### A. *The Developing Constitutional Doctrine*

The First and Fourteenth Amendments to the United States Constitution guarantee the right to freedom of association. In *McLaughlin v. Tilendis,*[15] the Seventh Circuit held that the right of association includes the right to form or join a labor union, and that a public employee cannot be dismissed because of union membership:

> It is settled that teachers have the right of free association, and unjustifiable interference with teachers' associational freedom violates the Due Process clause of the fourteenth Amendment .... Unless there is some illegal intent, an individual's right to form and join a union is protected by the First Amendment.[16]

The constitutional right to join labor unions has been recognized by the Fifth,[17] Eighth,[18] and Tenth Circuits.[19]

Although the right to join labor unions appears to be established, its exact contours remain unclear. Some States have attempted to bar unionization of certain public employees, such as police or firemen, on the grounds of compelling State interests. In *Melton v. City of Atlanta,*[20] however, Atlanta's attempt to bar unionization of police was struck down on the grounds that it was overbroad and unnecessary to protect the city's legitimate interest in impartial law enforcement. Other states have sought to prevent certain public employees from joining unions which included both public and private employees, or which included different categories of public employees. In *Atkins v. City of Charlotte,*[21] the District Court struck down a North Carolina statute barring firemen from joining national unions, again on

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traditional due process procedures, at least where the union is subjected to a sufficiently stringent duty of fair representation. Note, *Public Sector Grievance Procedures, Due Process, and the Duty of Fair Representation,* 89 HARV. L. REV. 752 (1976).

15 398 F.2d 287 (7th Cir. 1968).

16 *Id.* at 288-89.

17. Orr v. Thorpe, 427 F.2d 1129 (5th Cir. 1970).

18 AFSCME v. Woodward, 406 F.2d 137 (8th Cir. 1969).

19 Lontine v. VanCleave, 483 F.2d 966 (10th Cir. 1973).

20 324 F. Supp. 315 (N.D. Ga. 1971).

21 296 F. Supp. 1068 (W.D.N.C. 1969).

grounds of overbreadth. Not all courts, however, have found such limitations objectionable.[22]

While there is general agreement that public employees enjoy the constitutional right to join labor unions, there seems to be almost equal agreement that public employees cannot claim constitutional protection for other rights traditionally associated with private sector labor relations. In *Richmond Education Association v. Crockford*,[23] the District Court for the Eastern District of Virginia held that the right to form unions encompassed the right to meet and confer with the public employer since refusal to meet and confer would have an unconstitutionally chilling effect on the public employees' organizational rights. In *Indianapolis Education Association v. Lewallen*,[24] however, the Seventh Circuit held that public employees and their unions had no right to insist upon collective bargaining with their public employers:

> The gravamen of the complaint goes to the failure on the part of the [school board] to bargain collectively in good faith. But there is no constitutional duty to bargain collectively with an exclusive bargaining agent. Such duty, when imposed, is imposed by statute. The refusal of the [board] to bargain in good faith does not equal a constitutional violation of the [union's] positive rights of association, free speech, petition, equal protection, or due process. Nor does the fact that the agreement to collectively bargain may be enforceable against a state elevate a contractual right to a constitutional right.[25]

The *Lewallen* rule has been followed by every court that has faced the issue, and has been extended to deny unions the right to particular grievance procedures[26] and the right to the use of school facilities.[27] Furthermore, there is unanimous agreement that public

22 *See* Annot., 40 A.L.R.3d 728, 734-38 (1971).

24 72 L.R.R.M. 2071 (7th Cir. 1969).

25 *Id.* at 2072.

26 Teachers Local 1954 v. Hanover Community School Corp., 457 F.2d 456 (7th Cir. 1972); Beauboeuf v. Delgado College, 428 F.2d 470 (5th Cir. 1970); Confederation of Police v. Chicago, 382 F. Supp. 624 (N.D. Ill. 1974); Winston-Salem/Forsyth County Unit, N.C. Ass'n of Educ. v. Phillips, 381 F. Supp. 644 (M.D.N.C. 1974); Fire Fighters Local 794 v. Newport News, 339 F. Supp. 13 (E.D. Va. 1972); Atkins v. City of Charlotte, 296 F. Supp. 1068 (W.D.N.C. 1969).

27 Teachers Local 858 v. School Dist. No. 1, 314 F. Supp. 1069 (D. Colo. 1970) (the grant of school facilities only to the union selected by the teachers in a representation election did not impair the losing union's rights to organize).

employees have no constitutional right to strike.[28] Finally, it has been held that public employees are not denied equal protection because private employees, or other groups of public employees, are granted statutory collective bargaining rights.[29]

### B. *The National Labor Relations Act*

The passage of the National Labor Relations Act (NLRA) in 1935[30] marked a major change in the national policy toward labor-management relations. The NLRA committed the United States to a system of collective bargaining as the primary means of insuring industrial peace and the maintenance of economic production.[31] The NLRA system was not, however, extended to public employee labor relations. Section 2(2) of the Act defines "employer" to include:

> any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof . . . .[32]

Section 2(3) of the NLRA, similarly, excludes from the definition of "employee" the employees of any person not within the definition of "employer."[33] Since the protections and prohibitions of the NLRA are, with few exceptions, applicable only to "employers" and "employees,"[34] the effect of § 2(2) is to exclude governments and public employees from the coverage of the Act.

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28 *See, e.g.*, United Fed'n of Postal Clerks v. Blount, 325 F. Supp. 879 (D.D.C. 1971), *aff'd* 404 U.S. 802 (1971); Local 519 v. School City of Anderson, 251 N.E.2d 15 (Ind. 1969), *cert. denied*, 399 U.S. 928 (1970); Annot., 37 A.L.R.3d 1147 (1971). Public employees may not, however, be penalized for belonging to unions which merely advocate the right to strike. National Ass'n of Letter Carriers v. Blount, 305 F. Supp. 546 (D.D.C. 1969), *appeal dismissed by stipulation*, 400 U.S. 801 (1970). *See* Aurora Educ. Ass'n v. Board of Educ., 490 F.2d 431 (7th Cir. 1973), *cert. denied*, 416 U.S. 985 (1974); Police Officers' Guild v. Washington, 369 F. Supp. 543 (D.D.C. 1973); Annot., 23 A.L.R. Fed. 691 (1975).

29 Beauboeuf v. Delgado College, 303 F. Supp. 861, *aff'd in part* 428 F.2d 471 (5th Cir. 1970); Confederation of Police v. Chicago, 382 F. Supp. 624 (N.D. Ill. 1974).

30 49 Stat. 449 (1935), U.S.C. §§ 151-68 (as amended).

31 NLRB v. Jones & McLaughlin Steel Corp., 301 U.S. 1 (1937).

32 29 U.S.C.A. § 152(2) (1976 Supp.).

33 29 U.S.C. § 152(3) (1971).

34 The major exceptions are the prohibitions of secondary activity contained in §§ 8(b)(4) and 8(e), 29 U.S.C.A. §§ 158(b)(4), 158(e) (1973).

At the time of the passage of the original NLRA in 1935, there does not seem to have been any serious consideration of the question of whether public employees should be included under the Act. Authoritative opinion in the Federal government adhered to the belief that public employment was a gratuitous benefit bestowed by government, and therefore subject to the terms and conditions set by government.[35] The United States Supreme Court, in reviewing the legislative history of § 2(2),[36] remarked that Congress did not explicitly consider the meaning of the term "political subdivision" but simply "enacted the § 2(2) exemption to except from [NLRB] cognizance the labor relations of federal, state, and municipal governments, since governmental employees did not usually enjoy the right to strike."[37]

The history of § 2(2) reveals, however, that it has not always been easy to separate public employers from private employers. The United States Supreme Court has twice confronted the issue of whether a particular employer and its employees fell within the political subdivision exemption. In *NLRB v. E.C. Atkins & Co.*,[38] the employer operated a manufacturing plant which was converted to the production of war materiel. In connection with the conversion, certain of the plant guards were militarized, and the employer refused to bargain with these guards on the grounds that they were now government employees. The Supreme Court, however, held that militarization did not necessarily change the status of the guards, and upheld the NLRB's determination that the guards remained private employees.[39]

In *NLRB v. Natural Gas Utility District of Hawkins County*,[40] the Supreme Court was confronted with a more common situation. The employer was a county utility district administered by a board

35 *See, e.g.*, letter of President Franklin D. Roosevelt to the president of the National Federation of Federal Employees, August 16, 1937, quoted in LABOR RELATIONS LAW IN THE PUBLIC SECTOR, *supra* note 1 at 19.

36 NLRB v. Natural Gas Utility District, 402 U.S. 600 (1971).

37 *Id.* at 604. The Court cites as authority for this statement: 78 CONG. REC. 10351 *et seq.*; *Hearings on Labor Disputes Act before the House Committee on Labor*, 74th Cong., 1st Sess., at 179; 93 CONG. REC. 6441 (Remarks of Senator Taft); C. RHYNE, LABOR UNIONS AND MUNICIPAL EMPLOYEE LAW 436-37 (1946); Vogel, *What About the Rights of the Public Employee?*, 1 LAB. L.J. 604, 612-15 (1950).

38 331 U.S. 398 (1947).

39 *Id.* at 405.

40 402 U.S. 600 (1971).

of commissioners appointed by an elected judge and subject to removal under statutory procedures. After holding that Federal law governed the definition of "political subdivision" under § 2(2), the Supreme Court went on to hold that the utility district was an exempt political subdivision. It first approved the test enunciated by the NLRB: the political subdivision exemption is limited to entities that are "either (1) created directly by the state, so as to constitute departments or administrative arms of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate."[41] It then found, contrary to the NLRB, that the county utility district met the second half of the test.[42] The Court also mentioned the fact that the district enjoyed the power of eminent domain, and was treated as an exempt governmental entity under the Federal tax and social security laws.[43]

The lower courts and the NLRB have been confronted with a number of recurring situations. Semi-autonomous utility districts of various sorts have proven problematic both before and after *Hawkins*.[44] Port authorities have also given rise to litigation, although State courts have usually concluded that the authorities were "clearly" governmental bodies exempt from the NLRA.[45] There is also the possibility that some entities may escape regulation by either the NLRB or State authorities. There are numerous interstate and international agencies which meet the requirement for exemption.[46] In some cases, one or more States may success-

41 *Id.* at 604-05.

42 *Id.* at 605.

43 *Id.* at 608-09.

44 *Compare* NLRB v. Randolph Electric Membership Corp., 343 F.2d 60 (4th Cir. 1965) *with* NLRB v. Natchez Trace Electric Power Ass'n, 476 F.2d 1042 (5th Cir. 1973). *See also* NLRB v. Lewiston Orchards Irrigation District, 469 F.2d 698 (9th Cir. 1972). The per curiam opinion held that the district was a political subdivision within the meaning of NLRA § 2(2) under the *Hawkins* test.

45 Virgin Islands Port Authority v. S.I.U. de Puerto Rico, 494 F.2d 452 (3d Cir. 1974); Longshoremen Local 1256 v. Broward County Port Authority, 183 So. 2d 257 (Dist. Ct. App. Fla. 1966); Longshoremen's Union v. Georgia Ports Authority, 217 Ga. 712, 124 S.E.2d 733, *cert. denied,* 370 U.S. 922 (1962); Longshoremen's Union v. Harris County-Houston Ship Channel Navigation District, 358 S.W.2d 658 (Ct. Civ. App. Tex. 1962), *cert. denied,* 372 U.S. 975 (1963). *Cf.* Bateman v. South Carolina State Ports Authority, 298 F. Supp. 999 (D.S.C. 1969); Stearns v. Commission of Public Docks, 423 P.2d 748 (Ore. 1967); Baltimore Building and Construction Trades Council v. Maryland Port Authority, 238 Md. 232, 208 A.2d 564 (1965).

46 *See* LABOR RELATIONS LAW IN THE PUBLIC SECTOR, *supra* note 1, at 162-67.

fully assert jurisdiction under their own public employee statutes over some or all of the interstate agency's employees.[47] In other cases, however, it is possible that no State could successfully regulate employee relations of these employers, which nonetheless are exempt from regulation by the Federal government under the NLRA.[48] Another possibility is that a governmental entity may escape regulation because both the NLRB and the State agency decline jurisdiction.[49]

Subcontracting by government agencies also produces problems under the political subdivision exemption. While the agency itself may fall within the definition of political subdivision, the subcontractor may fall equally clearly within the definition of employer subject to the NLRA. In *NLRB v. Howard Johnson Co.*,[50] the Third Circuit held that a Howard Johnson concession located on the New Jersey Turnpike did not qualify for exemption as a political subdivision on the grounds that the State exercised control over many aspects of its operations. Rather, the Court held that the concessionaire was an independent contractor and, as such, remained a private employer under § 2(2). The Court stressed the fact that the Company retained control over its employment relations policy:

> We agree with respondent [Company] that the element of control of the enterprise is important in deciding the issue before us, but we think control of the employment relationship is of paramount significance.[51]

The Third Circuit's control test is similar to tests applied earlier by the First and Fifth Circuits.[52] In recent years the NLRB has applied a similar test to deny exemption to a company cutting trees for the New York City Parks Department,[53] a company pro-

47 *See, e.g.*, Buffalo & Port Erie Public Bridge Authority, 1 PERB ¶ 399.03 (New York Public Employment Relations Board 1968).

48 *See, e.g.*, Delaware River & Bay Authority v. New Jersey PERC, 112 N.J. Super. 160, 270 A.2d 704 (Super. Ct. App. Div. 1970), *aff'd* 58 N.J. 388, 277 A.2d 880 (1971).

49 *See* Labor Relations Law in the Public Sector, *supra* note 1, at 157-58.

50 317 F.2d 1 (3d Cir.), *cert. denied*, 375 U.S. 920 (1963).

51 *Id.* at 2.

52 NLRB v. Carroll, 120 F.2d 457 (1st Cir. 1941); NLRB v. Reynolds Corp., 155 F.2d 679 (5th Cir. 1946).

53 Current Construction Corp., 85 L.R.R.M. 1417 (NLRB 1974).

viding cafeteria services for the State University of New York,[54] a company providing flying services to the National and California State Forestry Services,[55] and the contractor operating the Bangor, Maine International Airport.[56]

The difficulty of distinguishing between public and private employers is compounded by the fact that activities may be converted from private to public operations (or vice versa). Public transportation facilities appear to provide a particularly troublesome example.[57] Where transportation facilities are provided by private companies, the transit employees have the right to be represented by unions in collective bargaining with their employers, and many have exercised that right through such unions as the Amalgamated Association of Street Electric Railway and Motor Coach Employees.[58] But when cities or other governments take over private transit systems operating within their limits,

> formerly private transit employees lose their rights under the NLRA. In the case of transit employees, Congress has attempted to deal with this problem by requiring Federal grant recipients under the Urban Mass Transportation act to preserve employees' bargaining rights when Federal money is used to purchase private transportation facilities.[59]

States have occasionally sought to take advantage of their exemption under the NLRA to shield private employers from strikes by their employees. In *Division 1287 of the Amalgamated Association of Street, Electric Railway & Motor Coach Employees v. Missouri*,[60] the Governor of Missouri ordered the takeover of a private transit company during a strike, and then obtained an injunction against the strike under the Missouri statute banning strikes by public employees. The Supreme Court held the injunction unconstitutional under the Supremacy Clause:

> [T]he record shows that the State's involvement fell far short of creating a state-owned and operated utility whose

54 Servomation Mathias PA, 82 L.R.R.M. 1030 (NLRB 1973).
55 Sis-Q Flying Service, Inc., 80 L.R.R.M. 1315 (NLRB 1972).
56 Trans-East Air, Inc., 76 L.R.R.M. 1546 (NLRB 1971).
57 *See, e.g.*, Bilik, *Close the Gap: NLRB and Public Employees*, 31 OHIO ST. L.J. 456 (1970).
58 *Cf.* Division 1287, Electric Railway Union v. Missouri, 374 U.S. 74 (1963).
59 Urban Mass Transportation Act § 13(c), 49 U.S.C. § 1609(c) (1972). *See* text at notes 96-98 *infra*.
60 374 U.S. 74 (1963).

> labor relations are by definition excluded from the coverage of the National Labor Relations Act. The employees of the company did not become employees of Missouri. Missouri did not pay their wages, and did not direct or supervise their duties. No property of the company was actually conveyed, transferred, or otherwise turned over to the State. Missouri did not participate in any way in the actual management of the company, and there was no change of any kind in the conduct of the company's business. . . . The short of the matter is that Missouri, through the fiction of 'seizure' by the State, has made a peaceful strike against a public utility unlawful, in direct conflict with federal legislation [NLRA Sec. 7]. . . .[61]

However, if the takeover had been permanent, the Governor would presumably have succeeded.

A final problem arises from the fact that public employers cannot always be isolated from disputes in the private sector. Section 8b(4) of the NLRA makes it an unfair labor practice for labor organizations to engage in various secondary activities.[62] Prior to 1959, the section proscribed only activities directed at "employers" and therefore did not protect governmental employers from secondary activities by private sector unions.[63] The Congress found it necessary to amend § 8b(4) in 1959, however, because certain government employers had been the targets of such secondary pressures.[64] The section now protects all "persons" from union secondary activities.[65]

### C. *Federal Grants of Collective Bargaining Rights for Public Employees*

In January, 1962, President Kennedy promulgated an executive order which, for the first time, granted collective bargaining rights to employees of the Federal government.[66] Since then, both the Executive Branch and the Congress have taken steps to accord

61 *Id.* at 81-82.

62 29 U.S.C.A. § 158(b)(4) (1973).

63 NLRA § 8(b)(4), as added by the Labor-Management Relations Act of 1947, Pub. L. No. 101, 80th Cong., 1st Sess. (1947), 61 Stat. 141.

64 Labor-Management Reporting & Disclosure Act of 1959, §§ 201(e), 704(a)-(e), 705(a), Pub. L. No. 257, 86th Cong., 1st Sess. (1959), 73 Stat. 525, 542, 545.

65 NLRA § 8b(4), 29 U.S.C. § 158b(4) (1971).

66 Exec. Order No. 10,988, 3 C.F.R. 521 (1962).

collective bargaining rights to certain Federal, State and local employees.

### 1. Executive Order No. 11,491

Executive Order No. 11,491 was promulgated in October, 1969 by President Nixon to replace the Kennedy Order as the basic framework for Federal government employee collective bargaining;[67] it has been amended twice, most recently by Exec. Order No. 11,838, promulgated by President Ford on February 6, 1975.[68] The Order grants all Federal government employees, with limited exceptions, the right to participate in, or refuse to join, a labor union.[69] As of October, 1974, more than one-third of the Federal civilian employees, or 1,142,419 employees, were represented by unions holding exclusive recognition rights under Exec. Order No. 11,491.[70]

The Order places Federal government agencies and the exclusive representatives of their employees under a duty to meet, confer and bargain in good faith with respect to the terms and conditions of employment, subject to certain restrictions.[71] Unfair labor practices are defined and proscribed for both employers and employee unions in terms closely resembling those of the NLRA.[72] While Exec. Order No. 11,491 closely resembles the NLRA with respect to the grant of exclusive representation rights and the

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67 Exec. Order No. 11,491, 3 C.F.R. 254 (1974), 5 U.S.C.A. § 7301 (1976 Supp.). The text of the Order, as amended, may be found at GERR 21:1. For general descriptions of the Order, see Rosenblum & Steinbach, *Federal Employee Labor Relations: From the 'Gag Rule' to Executive Order 11491*, 59 KY. L.J. 833 (1971); Wray, *Crisis in Labor Relations in the Federal Service: An Analysis of Labor-Management Relations in the Federal Service under Executive Order 11491*, 37 BROOKLYN L. REV. 79 (1970).

68 Exec. Order No. 11,616, 36 Fed. Reg. 17319 (1971), (promulgated by President Nixon on Aug. 26, 1971); Exec. Order No. 11,838, 40 Fed. Reg. 5743 (1975), (promulgated by President Ford on Feb. 6, 1975).

69 Exec. Order No. 11,491 § 1(a), GERR 21:1.

70 GERR 71:212. Exclusive recognition rights are accorded by §§ 7-10 of Exec. Order No. 11,491. *See* GERR 21:3. For a discussion of representation problems under Exec. Order No. 11,491, *see* Naumoff, *Ground Rules for Recognition under Executive Order 11,491*, 22 LAB. L.J. 100 (1971); Levine, *National Exclusive Recognition under Executive Order 11,491: The PATCO Case*, 22 LAB. L.J. 106 (1971).

71 Exec. Order No. 11,491 §§ 11-15, GERR 21:4-21:5.

72 Exec. Order No. 11,491 § 19, GERR 21:6-21:7. *Cf.* NLRA § 8, 29 U.S.C.A., § 158 (1973).

imposition of a duty to bargain in good faith and to refrain from unfair labor practices, it nonetheless differs from the NLRA in several important respects.

*a. Administrative Structure*

The Order sets up its own administrative structure for the supervision of Federal employee collective bargaining.[73] General authority to administer the Order is vested in the Federal Labor Relations Council, which is comprised of the Chairman of the Civil Service Commission, the Secretary of Labor, the Director of the Office of Management and Budget, and other executive branch officials appointed by the President.[74] In addition to setting basic policy, the Council hears appeals from decisions of the Assistant Secretary of Labor for Labor-Management Relations, who has the primary responsibility for administering the act and deciding questions arising with respect to representation, bargaining, and unfair labor practices.[75] Although the Assistant Secretary has the ultimate authority to resolve such questions, the Order contemplates that preliminary resolutions will be reached within each agency by the agency head.[76]

*b. Duty to Bargain*

Section 11 of the Order imposes on both agencies and exclusive representatives of agency employees the duty to:

> meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions, so far as may be appropriate under applicable laws and regulations . . . . They may negotiate an agreement, or any question arising thereunder; . . . and execute a written agreement or memorandum of understanding.[77]

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73 For a discussion of the administrative structure and functioning under Exec. Order No. 11,491, *see* Seidenberg, *Federal Eector Overview: Collective Bargaining—an Address before the 1975 Seminar on 'Employee Relations in the Federal Government'*, 34 FED. B.J. 229 (1975).

74 Exec. Order No. 11,491 § 4, GERR 21:2.

75 Exec. Order No. 11,491 § 6, GERR 21:2-21:3.

76 Exec. Order No. 11,491 § 11(c), GERR 21:4.

77 Exec. Order No. 11,491 § 11(a), GERR 21:4.

Although the basic duty to bargain resembles the duty imposed by Section 8 of the NLRA, the Order does not use the exact language of the NLRA;[78] it has been suggested that the language "with respect to personnel policies and practices and matters affecting working conditions" has been construed more narrowly than the NLRA's "wages, hours and conditions of employment" and that the scope of bargaining is correspondingly smaller.[79] More importantly, the Order goes on to impose specific limitations on the scope of bargaining. Section 11(b) excludes from bargaining the mission of the agency and various subjects related to agency organization and staffing,[80] while Section 12(b) requires that any collective bargaining agreement retain for agency management the right to direct employees, hire, promote and assign employees, and "maintain the efficiency of the Government operations . . . ."[81]

In addition to placing restrictions on the general scope of bargaining, the Order requires that bargaining be conducted in accordance with the Federal Personnel Manual published by the Civil Service Commission, thereby giving the Commission power to structure the collective bargaining process.[82] Furthermore, the Council has ruled that the Commission has final authority to construe its own rules and to ascertain whether collective bargaining agreements comply with Civil Service rules.[83] Finally, the Order requires that bargaining be conducted in accordance with published agency regulations.[84] The power of the agency to structure its own bargaining relationship was substantially restricted by the 1975 amendment to the Order, however, which required that agency regulations, in order to govern collective bargaining, had to be promulgated by the agency headquarters or a primary na-

78 *Compare* Exec. Order No. 11,491 § 11(a), GERR 21:4, *with* NLRA § 8(d), 29 U.S.C.A. § 158(d) (1976 Supp.).

79 *Collective Bargaining in the Federal Service: The Permissible Scope of Negotiations under Executive Order 11,491*, 25 CASE W. RES. L. REV. 193, 199-200 (1974) [hereinafter cited as *Scope of Negotiations under E.O. 11,491*].

80 Exec. Order No. 11,491 § 11(b), GERR 21:4.

81 Exec. Order No. 11,491 § 12(b), GERR 21:5. *See Scope of Negotiations under E.O. 11,491*, *supra* note 79, at 214.

82 Exec. Order No. 11,491 § 11(a), GERR 21:4. *See Scope of Negotiations under E.O. 11,491*, *supra* note 79, at 200.

83 Exec. Order No. 11,491 § 11(a), GERR 21:4.

84 *Id.*

tional subdivision of the agency, and be responsive to a "compelling need [existing] under criteria established by the [Council]."[85]

While Federal employee unions have gained substantial bargaining rights under Exec. Order No. 11,491, a recent study of the scope of bargaining under the Order concludes that employees' bargaining rights remain significantly narrower than those accorded private employees by the NLRA.[86] This is true with respect to matters affecting working conditions, work assignments and scheduling, and contracting out of work. In light of the Civil Service commitment to the merit system, promotional policies remain an important area of distinction between Federal employees and their private counterparts: while the Council has granted Federal employee unions rights with respect to promotional procedures, it has refused to allow them any control over the substantive decisions of agency management in this area.

*c. Union Security*

Section 12(c) of the Order prohibits any collective bargaining agreement from requiring any employee to become or remain a member of a labor organization, or to pay dues or any other assessment to the union other than voluntary membership dues.[87] The Order therefore differs from the NLRA, which permits union shop arrangements whereby unit members can be compelled to become members of the union which represents them.[88]

*d. Impasse Resolution and the Right to Strike*

Federal employees have no right to strike: Section 19b(4) makes it an unfair labor practice for any labor organization to "call or engage in a strike, work stoppage, or slowdown; picket an agency in a labor-management dispute; or condone any such activity by failing to take affirmative action to prevent or stop it."[89] In order to assure the resolution of bargaining impasses, the Order makes available to Federal agencies and employees the services of the

85 *Id.*
86 *Scope of Negotiations under E.O. 11,491, supra* note 79.
87 Exec. Order No. 11,491 § 12(c), GERR 21:5.
88 *See* NLRA § 8(a)(3), 29 U.S.C. § 158(a)(3) (1971).
89 Exec. Order No. 11,491, § 19(b)(4), GERR 21:6.

Federal Mediation and Conciliation Service.[90] In cases where the Service or other voluntary impasse resolution mechanisms fail to resolve the dispute, the Order grants authority to the Federal Services Impasses Panel to take "any action it considers necessary to settle an impasse."

### 2. The Postal Reorganization Act

The Postal Reorganization Act was enacted by Congress in August, 1970,[91] at least partly in response to the nationwide strike of postal workers in March, 1970.[92] Chapter 12 of the Act governs labor-management relations in the Postal Service[93] and in general makes the Postal Service subject to the NLRA and the jurisdiction of the NLRB with respect both to representation and to bargaining matters.[94] In the case of bargaining impasses, the Act prescribes a resolution procedure administered by the Federal Mediation and Conciliation Service and culminating in binding arbitration.[95]

### 3. The Urban Mass Transportation Act

The Urban Mass Transportation Act of 1964[96] provides the authority for Federal grants to local transportation authorities to acquire, improve, and operate regional public transportation facilities. As a condition of assistance under the Act, recipients must assure the Secretary of Labor that arrangements have been made to protect the rights of employees affected by Federal assistance.[97] Among the rights thus protected is the right to continue to engage in collective bargaining with the employer authority through an employee representative. At least where private transit companies have been taken over by governmental authorities with Federal assistance, then, public transportation employees are guaranteed

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90 Exec. Order No. 11,491 §§ 4, 17, GERR 21:2, 21:6.
91 The Postal Reorganization Act of 1970, Pub. L. No. 91-375 (1970), 84 Stat. 719.
92 *See* Rosenblum & Steinbach, *supra* note 67; Wray, *supra* note 67.
93 39 U.S.C.A. §§ 1201-09 (1976 Supp.).
94 *See* 39 U.S.C.A. §§ 1202, 1209(a) (1976 Supp.).
95 *See* 39 U.S.C.A. § 1207 (1976 Supp.).
96 49 U.S.C.A. §§ 1601 *et seq.* (1976 Supp.).
97 Urban Mass Transportation Act, § 13c, 49 U.S.C.A. § 1609(c) (1976 Supp.).

collective bargaining rights regardless of the applicable State law concerning public employee bargaining.[98]

### D. *State Grants of Collective Bargaining Rights to Public Employees*

While the Federal government has not acted to extend collective bargaining rights to most State and local employees, State legislatures have been active in this area during the last twenty years. Since a comprehensive comparison of the treatment of public employee labor relations in the 50 States and the District of Columbia is beyond the scope of the article, the following analysis will focus on the most important real differences in the treatment of public employees in the various States, and the differences between the States' treatment of public employees and the treatment of private employees under the NLRA.

#### 1. Statutory Coverage of Public Employees

The most obvious difference in the treatment of public employees lies in coverage: some States have enacted statutes governing the relationship between public employees and their governmental employers, while other States have not. At last count, 37 states and the District of Columbia[99] had enacted at least one statute covering the labor relations of at least one category of public employees,[100] while thirteen States had enacted no legislation in

98 This is true even where State law prohibits public employee collective bargaining. In some southern States with such statutory prohibitions, special arrangements have been made whereby a public agency is set up to receive Federal grants, but contracts with a private company for the construction and operation of the transportation facilities. The private companies can, and indeed must, bargain with the representatives of their employees.

99 *See, e.g.*, Brown, *Federal Legislation for Public Sector Collective Bargaining: A Minimum Standards Approach*, 5 U. Tol. L. Rev. 681, 688 (1974) [hereinafter cited as Brown II]. Throughout this Article, the District of Columbia will be considered a State, and the total number of States will therefore appear as 51.

100 GERR 51:1011-6115. The 37 States are: Alabama, Alaska, California, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Utah, Vermont, Washington, Wisconsin and Wyoming.

this field.[101] Four of the 38 States with some legislation have enacted statutes covering firemen only[102] and two, Kentucky and Texas, have statutes for police and firemen only.[103] Maryland has a statute covering school personnel only,[104] while Idaho has statutes covering teachers and firefighters.[105] Five States have statutes covering all but a limited category of public employees.[106] Twenty-five States have statutes applicable to all public employees: 12 of these States have comprehensive statutes[107] while 13 achieve full coverage with two or more separate statutes.[108]

TABLE 1[109]
Statutory Coverage of Public Employees

| Type of Coverage | Number of States |
|---|---|
| Comprehensive statute | 12 |
| Full coverage with multiple statutes | 13 |
| Coverage with limited exceptions | 5 |
| School personnel (& firemen) only | 2 |
| Firemen (& police) only | 6 |
| No statutory coverage | 13 |

As of October, 1974, the full-time-equivalent (FTE) employment of all State and local governments equalled 9,880,872.[110]

101 *Id.* The thirteen States are: Arizona, Arkansas, Colorado, Illinois, Louisiana, Mississippi, New Mexico, North Carolina, Ohio, South Carolina, Tennessee, Virginia, and West Virginia.

A North Carolina statute prohibits membership in unions by public employees. South Carolina law provides grievance procedures for public employees. For the sake of clarity these two States are listed as having no statute.

102 *Id.* The four States with statutes covering firemen only are Alabama, Georgia, Utah and Wyoming.

103 *Id.* at 51:2611, 5211. The Kentucky statutes apply, in effect, only to Louisville and to other cities petitioning for inclusion. The Texas statute is in the form of an enabling act which becomes effective only upon adoption by a local government.

104 *Id.* at 51:2911.

105 *Id.* at 51:2111.

106 *Id.* at 51:1011-6115. The five States were: D.C., Indiana, Missouri, Nevada and Oklahoma.

107 *Id.* The 12 States were: Florida, Hawaii, Iowa, Massachusetts, Michigan, Minnesota, Montana, New Hampshire, New Jersey, New York, Oregon and South Dakota.

108 *Id.* The 13 States were: Alaska, California, Connecticut, Delaware, Kansas, Maine, Nebraska, North Dakota, Pennsylvania, Rhode Island, Vermont, Washington, and Wisconsin.

109 *See* notes 100 to 108 *supra.*

110 *Full-time Equivalent Employment, State and Local Governments,* Oct. 1974, GERR 71:2116 [hereinafter *FTE Employment Statistics*].

Fifty-five percent of this FTE employment was accounted for by States with comprehensive or full coverage, while 25 percent was attributable to States with no statutory coverage at all. States with selective coverage accounted for 21 percent of the FTE employment, roughly one-third of which was covered by labor relations statutes.

TABLE 2[111]
Statutory Coverage of Public Employees

| Type of Coverage | No. of Employees | Percent |
|---|---|---|
| Covered by comprehensive statute | 2,993,176 | 30.3 |
| Covered by special statute in full-coverage state | 2,388,818 | 24.2 |
| Covered by special statute in selected-coverage state | 601,038 | 6.1 |
| Not covered: | | |
| in selective coverage state | 1,441,051 | 14.6 |
| in no-statute state | 2,456,789 | 24.9 |
| Total | 9,880,872 | 100.1 |

The geographic distribution of the States according to kinds of coverage shows a marked skew. Eleven of the thirteen States with no statutory coverage,[112] and five of the six with firefighter/police coverage only,[113] were located in the South and Southwest. Illinois and Ohio are the only other States with no collective bargaining legislation, while Wyoming is the only other State with just a firefighters' statute.[114] By contrast, the only Southern or Southwestern State with comprehensive or full coverage is Florida;[115] Oklahoma and Nevada have statutes covering all public employees except State employees.[116]

Between the extremes of comprehensive, single-statute coverage and no coverage lie a wide variety of statutory patterns. Rhode

111 *Id.; see* notes 100-108 *supra.*

112 *See* note 101 *supra.* The eleven States were: Arizona, Arkansas, Colorado, Louisiana, Mississippi, New Mexico, North Carolina, South Carolina, Tennessee, Virginia and West Virginia.

113 *See* text accompanying note 102 *supra.* The five States were: Alabama, Georgia, Kentucky, Texas and Utah.

114 *See* notes 101-102 *supra.*

115 *See* notes 107-108 *supra.*

116 *See* note 106 *supra.*

TABLE 3[117]
Statutory Coverage of Public Employees

| Type of Coverage | Region Northeast | Midwest | Far West | South | Southwest |
|---|---|---|---|---|---|
| Comprehensive statute | 4 | 4 | 3 | 1 | — |
| Full coverage with multiple statutes | 6 | 4 | 3 | — | — |
| Coverage with limited exceptions | 1 | 2 | — | — | 2 |
| School personnel (& fire) only | 1 | — | 1 | — | — |
| Fire (& police) only | — | — | 1 | 3 | 2 |
| No statute | — | 2 | — | 8 | 3 |
| Total | 12 | 12 | 8 | 12 | 7 |

Island, for example, has five separate statutes which collectively apply to all public employees,[118] while Wyoming and Utah have only firefighters' laws reaching one percent of all public employees.[119] The many variations appear to have limited significance, however. The existence of multiple statutes in the full coverage States appears to result more from historical accident than from substantive differences in treatment of the different categories of public employees. Furthermore, the exceptions provided in five States to otherwise full coverage have limited practical significance. School personnel in the District of Columbia have a history of collective bargaining with the D.C. School Board,[120] while the Missouri Supreme Court has accorded Missouri teachers those rights provided by statute to other public employees.[121] The percentage of non-covered public employees runs from 39 percent in D.C. to only 11 percent in Indiana.[122] On the other hand, the existence of firefighters' statutes in six States was of limited significance because less than two percent of all public employees in those States were firemen.[123] The Texas statute potentially reached 6.5 percent of the State's public em-

117 *See* notes 100-108 *supra.*
118 GERR 51:4811.
119 GERR 51:5311, 5911; *FTE Employment Statistics.*
120 GERR 51:504.
121 Peters v. Board of Educ. 506 S.W.2d 429 (Mo., 1974).
122 *FTE Employment Statistics; see* note 106 *supra.*
123 *FTE Employment Statistics; see* note 106 *supra.*

ployees, but actually reached fewer because it applied only in municipalities which voted for coverage in a referendum.[124] In sum, then, the States can be divided into three classes:

TABLE 4
Statutory Coverage of Public Employees

| Type of Coverage | Number of States |
|---|---|
| General coverage | 30 |
| School personnel only | 2 |
| Limited or no coverage | 19 |

The distinction between States with general coverage, and States with little or no coverage, is both basic and highly significant.

### 2. Status of Public Employees in States with Limited or No Statutory Coverage

In the States classified as having limited or no statutory coverage, the rights of public employees have for the most part been developed by the State and Federal courts. In the absence of statutory authorization, courts have not been willing to accord public employees specific rights such as the right to union dues checkoff or the right to various types of union security, although some courts have permitted employee unions to contract for such rights with their employers. Rather, the common law of public employee relations is limited to public employees' rights to belong to unions, to engage in collective bargaining with their governmental employers, and to enter into enforceable collective bargaining contracts with their employers.

Three of the southern States (Alabama, Georgia, and North Carolina) have enacted legislation barring public employees from belonging to labor unions,[125] while the Supreme Court of Tennessee has held that a public employee may be dismissed for membership in a union.[126] However, all three statutes have been declared unconstitutional by either Federal or State courts, and it

124 *Id.;* GERR 51:5211.

125 ALA. CODE tit. 55, § 317(2) (1960); GA. CODE ANN. §§ 54-909, 54-9923 (1974); N.C. GEN. STAT. § 95-97 (1975). *See* Jedel & Rutherford, *Public Labor Relations in the Southeast: Review, Synthesis and Prognosis,* 25 LAB. L.J. 483, 484 (1974) [hereinafter cited as *Public Labor Relations in the Southeast*].

126 Keeble v. City of Alcoa, 204 Tenn. 286, 319 S.W.2d 249 (1958).

is now clear that public employees in these States have a constitutional right to belong to labor unions.[127] In the other States the right of public employees to join labor unions appears unchallenged and is, in some cases, protected by statute.

Beyond the right to join unions, the law in the no-statute States varies substantially. Three categories of States emerge:[128] those prohibiting all public employee labor contracts; those permitting limited collective bargaining; and those permitting both collective bargaining and the enforcement of resulting labor contracts.

*a. States prohibiting all public employee labor contracts*

Six southern States have adopted the position that collective bargaining contracts between public employee unions and their employers are void and possibly illegal.[129] North Carolina and Texas have statutes declaring any contract entered into by a public employer and a labor organization void and against public policy,[130] and the North Carolina statute has been found constitutional by the Federal District Court for the Western District of North Carolina.[131] In Alabama, Georgia, and Tennessee, the same result has been achieved by the State courts, which have voided collective bargaining contracts between public employers and unions on the grounds that they represented illegal delegations of authority by the governmental employer.[132] In South Carolina, a

127 Alabama Labor Council v. Franzier, 69 L.C. 52, 896 (Ala. Cir. Ct. 1972); Melton v. City of Atlanta, 324 F. Supp. 315 (N.D. Ga. 1971); Atkins v. City of Charlotte, 296 F. Supp. 1068 (W.D.N.C. 1969). *See Public Labor Relations in the Southeast, supra* note 125, at 484.

128 Three States, Mississippi, Utah, and Wyoming, have not been classified because they appear to have no law on the subject of public employee collective bargaining.

129 Alabama, Georgia, North Carolina, South Carolina, Tennessee and Texas. *See* notes 130-33 *infra.* Alabama has a special statute governing firefighters, *see* GERR 51:1011, and Texas has a special statute governing firefighters and police, *see* GERR 51:5211. The Alabama firefighters' statute was construed in Nichols v. Bolding, 291 Ala. 50, 277 So. 2d 868 (1973).

130 N.C. GEN. STAT. § 95-98 (1975); TEX. REV. CIV. STAT. ANN., art. 5154c (Vernon 1971). *See* Haemmel, *Impasse in North Carolina: the Need for a Viable Public Employees' Labor Relations Act,* 5 N.C. CENTRAL L.J. 190 (1974).

131 Atkins v. City of Charlotte, 296 F. Supp. 1068 (W.D.N.C. 1969).

132 Operating Engineers Local 321 v. Water Works Bd., 276 Ala. 462, 163 So. 2d 619 (1964); Chatham Ass'n of Educators v. Board of Educ., 231 Ga. 806, 204 S.E.2d 138 (1974); Weakly County Municipal Elec. Sys. v. Vick, 43 Tenn. App. 524, 309 S.W.2d 792 (1957); City of Alcoa v. Electrical Workers, Local 760, 203 Tenn. 12,

special committee of the legislature has expressed the view that South Carolina's public policy prohibits any kind of agreement between government employers and their employees' unions.[133]

Some of these States have gone further in restricting the rights of public employees, and have declared collective bargaining itself to be against public policy. The Texas statute states that it is against public policy for a government employer to recognize a labor organization as the collective bargaining agent of its employees,[134] while the Alabama Supreme Court has stated that "matters of wages, hours, and conditions of employment never have been, and cannot become, a matter of collective bargaining and contract in the absence of constitutional or statutory authority. . . ."[135]

### *b. States permitting limited public employee collective bargaining*

Several States permit voluntary collective bargaining subject to certain limitations. First, public employee unions cannot compel an unwilling government employer to bargain. Second, any agreement resulting from collective bargaining may be denied enforcement, or enforced only if it reserves ultimate discretionary authority to the public employer. In essence, these States permit voluntary collective bargaining but treat any resulting agreement as a statement of the parties' intentions, subject to unilateral change by the public employer. Arizona,[136] Colorado,[137] Virginia[138]

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308 S.W.2d 476 (1957). *See* Moberly, *Public Sector Labor Relations Law in Tennesssee: The Current Inadequacies and the Available Alternatives,* 42 TENN. L. REV. 235, 238 (1975).

133 Report of the Committee created pursuant to § 592 (1971), GERR 51:519. *See also* Medical College of South Carolina v. Drug & Hospital Union, Local 1199, Charlestown, S.C. Ct. Com. Pl., cited in *Public Labor Relations in the Southeast, supra* note 125, at 485 n.6.

134 TEX. REV. CIV. STAT. ANN. art. 5154c (1971).

135 Operating Engineers Local 321 v. Water Works Bd., 276 Ala. 462, 465, 163 So. 2d 619, 622 (1964).

136 Communications Workers v. Arizona Board of Regents, 17 Ariz. App. 398, 498 P.2d 472 (1972). *But see* Local 266, IBEW v. Salt River Agricultural Improvement and Power Dist., 78 Ariz. 30, 275 P.2d 393 (1954).

137 Rockey v. School Dist. No. 11, 32 Colo. App. 203, 508 P.2d 796 (1973); Fellows v. LaTronica, 151 Colo. 300, 377 P.2d 547 (1962).

138 OP. ATT'Y GEN. VA. (July 30, 1962). *See* GERR 51:521.

and West Virginia[139] fall into this intermediate category on the basis of their courts' decisions or the opinions of their Attorneys General.[140]

*c. States permitting public employee collective bargaining and the enforcement of resulting labor contracts*

In Illinois,[141] Kentucky,[142] Louisiana,[143] New Mexico[144] and Ohio[145] the courts not only permit collective bargaining between government employers and unions representing their public employees, but will enforce any contracts resulting from such bargaining. Again, collective bargaining is permitted only when the governmental employer is willing to bargain. Furthermore, agreements appear to be void to the extent they conflict with State or local legislation; the Louisiana Court of Appeals has even suggested that a collective bargaining contract could be overturned by subsequent legislation.[146]

The courts of Illinois have gone the farthest in developing a common law of public employee collective bargaining. In the landmark case of *Chicago Div. Ill. Educ. Ass'n v. Board of Educ.*,[147] an Illinois Appeals Court held that "the Board of Education of the City of Chicago does not require legislative authority to enter into a collective bargaining agreement with a sole collective bargaining agency selected by its teachers, and we hold that such an

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139 OP. ATT'Y GEN. W. VA. (June 26, 1974, February 23, 1966, June 29, 1962). *See* GERR 51:522. *Cf.* Kirker v. Moore, 308 F. Supp. 615 (S.D.W. Va. 1970).

140 Arkansas may also fall into this category. In City of Fort Smith v. Council 38, AFSCME, 245 Ark 409, 433 S.W.2d 153 (1968), the Supreme Court of Arkansas held that a public employer was under no duty to bargain collectively with its employees, absent a statute, but remarked in dicta that some courts have permitted willing public employers to bargain collectively.

141 *See* text accompanying notes 147-153 *infra.*

142 Jefferson City Teachers Ass'n v. Board of Educ., 463 S.W.2d 627 (Ct. Apps. Ky., 1970), *cert. denied,* 404 U.S. 865 (1971).

143 Firefighters Local 632 v. New Orleans, 204 So. 2d 690 (Ct. Apps. La. 1967). *See* Comment, *Public Employee Collective Bargaining in Louisiana,* 34 LA. L. REV. 56 (1973).

144 IBEW Local 611 v. Town of Farmington, 75 N.M. 393, 405 P.2d 233 (1965).

145 *See* Green, *Concerted Public Employee Activity in the Absence of State Statutory Authorization,* 2 J. LAW & EDUC. 419 (1973); Note, *Ohio Public Sector Labor Relations Law: A Time for Reevaluation and Reform,* 42 U. CIN. L. REV. 679 (1973).

146 *Cf.* Firefighters' Local 632 v. City of New Orleans, 204 So. 2d 690 (Ct. Apps. La. 1967).

147 76 Ill. App. 2d 456, 472, 222 N.E.2d 243, 251 (1966).

agreement is not against public policy."[148] A bargaining representative may be designated the exclusive representative of a unit of employees without unanimous approval by included employees.[149] Collective bargaining agreements may contain arbitration clauses, and agreements to arbitrate will be enforced in some cases.[150] After a decade of widespread collective bargaining in Illinois, however, the Illinois courts seem to be moving away from a regime of unfettered collective bargaining. In 1972, an Illinois Appeals Court held that the power to appoint teachers and fix the amount of their salaries was not among the powers and duties of a board which could be delegated or limited by contract.[151] Two 1974 cases reiterate the suggestion that not all areas of Board policy are subject to negotiation and contract in the absence of statutory authority.[152] In 1975, an Illinois Appeals Court voided parts of the Chicago Teachers' Union two-year contract with the Chicago Board of Education on the grounds that State law prohibited any contract involving the expenditure of funds not already appropriated by the legislative body.[153]

### 3. Status of Public Employees in States with General Statutory Coverage[154]

The States in this category fall into three groups: the States with a single comprehensive statute, the States with two or more

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148 An Illinois public employer cannot be forced to bargain collectively with the representative of its employees, however. Cook County Police Ass'n v. City of Harvey, 8 Ill. App. 3d 147, 289 N.E.2d 226 (1972).

149 Chicago High School Assistant Principals' Ass'n v. Board of Educ. 5 Ill. App. 3d 672, 284 N.E.2d 14 (1972).

150 *Compare* Board of Educ. v. Johnson, 21 Ill. App. 3d 482, 315 N.E.2d 634 (1974), *with* Board of Educ. v. Champaign Educ. Ass'n, 15 Ill. App. 3d 335, 304 N.E.2d 138 (1973).

151 Board of Educ. v. Rockford Educ. Ass'n, 3 Ill. App. 3d 1090, 280 N.E.2d 286 (1972).

152 Illinois Educ. Ass'n Local 218 v. Board of Educ., 23 Ill. App. 3d 649, 320 N.E.2d 240 (1974) (contract limiting Board's right to dismiss teachers is not ultra vires where the Board retains the final authority); Board of Educ. v. Johnson, *supra* note 142 (right to determine qualifications of job applicants is not a minor matter and may not be made a subject of arbitration under a collective bargaining contract).

153 Board of Educ. v. Teachers Local 1, 26 Ill. App. 3d 806, 326 N.E.2d 158 (1975).

154 Idaho and Maryland, which have statutes covering school employees only, do not fall into either the category of States with limited or no statutory coverage. The Idaho Supreme Court has ruled that public employees cannot obtain collec-

statutes collectively covering all public employees, and the five States with nearly full coverage.[155] Altogether, these 30 States have some 55 separate public employee labor relations statutes on their books.[156] Despite this proliferation of statutes, however, it appears that the treatment accorded public employees is similar under all or most of the statutes, and resembles in many instances the treatment of private employees under the National Labor Relations Act.

Under most statutes, public employees select their bargaining representative by secret election or other means of designation in a manner similar to that prescribed by the NLRA.[157] The unit of representation is determined by the employees or an administrative board in much the same manner as under the NLRA.[158] The unit includes all employees except certain managerial, professional, and confidential employees; supervisory employees are in some cases excluded but, especially in the case of teachers, police, and firemen, traditional patterns of representation have led to the inclusion of supervisory personnel in bargaining units to a greater extent than normal under the NLRA.[159] With the notable

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tive bargaining rights under the Idaho labor statutes applicable to private employees. IBEW Local 283 v. Robison, 91 Ida. 445, 423 P.2d 999 (1967). The most recent opinion of the Maryland Court of Appeals holds void a collective bargaining agreement between the City of Baltimore and a union representing city employees. Mugford v. Mayor and City Council of Baltimore, 185 Md. 266, 44 A.2d 745 (1945). However, this opinion is now 30 years old and it is not clear that the Maryland courts would still follow it. Furthermore, public employees in Baltimore City, Prince George's County, and other Maryland counties now enjoy collective bargaining rights by virtue of local ordinances or special State statutes. GERR 51:2911. Maryland's policy with regard to public employee strikes is examined in Note, *Reexamination of Maryland Policy Concerning Public Employee Strikes*, 3 U. BALT. L. REV. 235-50 (1974).

155 *See* notes 106-108 *supra*.

156 GERR 51:1011-6115. Rhode Island has the largest number of separate statutes, its five statutes cover States employees, municipal employees, teachers, firemen, and policemen. GERR 51:4811.

157 *See* Brown, *Public Sector Collective Bargaining: Perspective and Legislative Opportunities*, 15 WM. & MARY L. REV. 57, 64 (1973) [hereinafter cited as Brown I]; Brown II, *supra* note 99, at 698; Moberly, *Public Sector Labor Relations in Tennessee: The Current Inadequacies and the Available Alternatives*, 42 TENN. L. REV. 235, 251-52 (1975) [hereinafter cited as Moberly].

158 *See* OGAWA & NAJITA, GUIDE TO STATUTORY PROVISIONS IN PUBLIC SECTOR COLLECTIVE BARGAINING: UNIT DETERMINATION (1973); Brown I, *supra* note 157, at 64-65; Brown II, *supra* note 99, at 698; Moberly, *supra* note 157, at 252. *See also* NLRA § 9, 29 U.S.C. § 159 (1971).

159 *See* Brown I, *supra* note 149, at 66; Brown II, *supra* note 99, at 699; Moberly, *supra* note 157, at 255-56.

exception of California, public employee statutes have adopted the NLRA principle of exclusive representation, with the exclusive representative chosen by the majority of employees voting in the representation election (or, in some cases, the majority of employees in the unit).[160]

Most of the States adopting public employee labor legislation have established an independent board to administer the Act.[161] In some cases, a special public employee relations board has been created;[162] in others, jurisdiction over public employees has been granted to a board already exercising jurisdiction over private labor relations.[163] Most of the statutes have followed the example of the NLRA and defined certain unfair labor practices (ULP's) on the part of public employers and public employees.[164] All twelve comprehensive statutes contain ULP sections;[165] 13 of the remaining 18 States proscribe ULP's for at least certain employers or unions.[166]

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160 *See* Brown I, *supra* note 157, at 67; Moberly, *supra* note 157, at 252. *See also* CAL. GOV'T CODE §§ 3502-03, 3507 (West 1966), GERR 51:1412-13; CAL. GOV'T CODE §§ 3527-28, 3530 (West 1976), GERR 51:1413-14. California's Winton Act formerly provided proportional representation for school employees, but organizations representing a majority of unit employees may now obtain exclusive representation rights. CAL. LEGIS. SERV. Ch. 961 (West 1975), effective July 1, 1976, GERR 51:1418.

161 *See* Brown I, *supra* note 157, at 64; Brown II, *supra* note 99, at 697; Moberly, *supra* note 157, at 267. A notable exception is Nebraska, which has a Court of Industrial Relations. *See* GERR 51:3611. *See also* Good, *Public Employee Impasse Resolution by Judicial Order: the Nebraska court of Industrial Relations*, 2 J. LAW & EDUC. 253 (1973).

162 As of 1972 eight States and the District of Columbia had created new agencies charged with the administration of the public employee bargaining statute. *See* Brown I, *supra* note 157, at 64; *Hearings on H.R. 12532, H.R. 7684, and H.R. 9324 Before the Special Subcomm. on Labor of the House Comm. on Education and Labor*, 92d Cong., 2d Sess., at 132-34 (1972) [hereinafter cited as 1972 *Hearings*].

163 As of 1972, 15 States had assigned jurisdiction over public employees to existing labor relations boards already exercising jurisdiction over nonpublic employees. Brown I, *supra* note 157, at 64.

164 *See* Brown II, *supra* note 99, at 702. As of 1974, Brown lists 24 States which proscribe, in the manner of § 8 of the NLRA, both employer and union unfair labor practices: Alaska, Connecticut, D.C., Hawaii, Indiana, Iowa, Kansas, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, South Dakota, Vermont, Washington and Wisconsin. The Kentucky statute covers only firefighters; New Mexico has no statute, but has regulations covering State employees.

165 GERR 51:1011-6115. Florida and New Jersey now have ULP sections, although they do not appear on Brown's list. GERR 51:1816, 3914.

166 California has recently added provisions concerning ULP's to its teachers' bargaining statute, GERR 51:1418, but does not prescribe ULP's in its other

While the evidence suggests that public employee statutes in most states are similar with respect to the above issues, there do appear to be important variations among the States with respect to the nature and scope of the duty to bargain, the types of union security arrangements permitted, and the methods prescribed for resolving bargaining impasses.

*a. The duty to bargain*

Professor Harry Edwards, in a recent article entitled *The Emerging Duty to Bargain in the Public Sector*,[167] has attempted to synthesize the statutory provisions and the practices in the various States in the area of the collective bargaining obligation.[168] Edwards distinguishes two basic approaches.[169] The first type of statute imposes upon employer and employee representative the duty to bargain collectively in good faith; this approach parallels the obligation imposed upon employers and employee representatives in the private sector by §§ 8a(5), 8b(3), and 8(d) of the NLRA,[170] and often uses the same statutory language as the NLRA. The second type of statute imposes upon the employer the obligation to "meet and confer" with the employee representatives. In its pure form, the "meet and confer" approach differs from the collective negotiations approach in that the employer is not obliged to bargain until impasse and retains the right to accept or reject employee proposals. Furthermore, in a pure "meet and confer" jurisdiction the outcome of the consultations may be limited to a unilateral declaration of intent by the employees subject to unilateral alteration by the employer, rather than the enforceable labor contract which usually results from true collective negotiations. On the basis of practice in the States, however, Edwards concludes that the supposed differences are of limited

bargaining statutes. Delaware, Missouri, Nebraska, North Dakota and Rhode Island do not prescribe ULP's. GERR 51:1011-6115.

167 71 MICH. L. REV. 885 (1973) [hereinafter cited as Edwards].

168 *See also* Brown I, *supra* note 157, at 67; Brown II, *supra* note 99, at 700; Moberly, *supra* note 149, at 256; Shipley, *Determining the Scope of Bargaining under the Indiana Employment Relations Act*, 49 IND. L.J. 460 (1974); WEITZMAN, THE SCOPE OF BARGAINING IN PUBLIC EMPLOYMENT (1975).

169 Edwards, *supra* note 167, at 894.

170 29 U.S.C.A. § 158(d) (Supp. 1976).

significance.[171] Only three States, Alabama (in its firefighters' statute), California and Missouri, impose true "meet and confer."[172] Moreover, "the recent history of collective bargaining in the public sector suggests that there is relatively little difference in bargaining tactics or techniques under these two models."[173] In addition, it appears that both California and Missouri will enforce collective bargaining agreements resulting from meeting and conferring.[174]

Edwards goes on to discuss the scope of bargaining in the public sector,[175] a subject which has received substantial comment.[176] In the private sector, the scope of bargaining is determined by the NLRA's requirement of bargaining about "wages, hours, and other terms and conditions of employment."[177] Many State public employee bargaining statutes incorporate the language of the NLRA;[178] a substantial number, however, add language specifically delineating subjects about which employers and employee representatives must or must not bargain.[179] Edwards concludes that the public employee statutes containing such restrictions do not differ in substance from the practice under the NLRA, but merely in the fact that the statute, rather than an administrative board, has articulated the boundaries of the phrase "wages, hours, and conditions of employment."[180] Nonetheless, Edwards details

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171 Edwards, *supra* note 167, at 896.

172 ALA. CODE tit. 37, § 450(3) (Supp. 1973), GERR 51:1011; CAL. GOV'T CODE §§ 3525-36 (West Supp. 1976) (state employees); CAL. GOV'T CODE §§ 3500-10 (West 1966) as amended (West Supp. 1976) (public employees other than State employees and school employees), GERR 51:1411; MO. ANN. STAT. §§ 105.500-40 (Vernon Cum. Supp. 1973), GERR 51:3411. California's new school employees act provides for "meeting and negotiation", CAL. EDUC. CODE § 3543, (as amended by CALIF. LEGIS. SERV. Ch. 961, effective July 1, 1976), GERR 51:1417. *See* Edwards, *supra* note 167, at 896.

173 Edwards, *supra* note 167, at 896.

174 City & County of San Francisco v. Cooper, 13 Cal. 3d 898, 120 Cal. Rptr. 707, 534 P.2d 403 (1975); Peters v. Board of Educ., 506 S.W.2d 429 (Mo. 1974); *cf.* State *ex rel.* Missey v. Cabool, 441 S.W.2d 35 (Mo. 1969).

175 Edwards, *supra* note 167, at 908.

176 *See* Brown II, *supra* note 99, at 701; Moberly, *supra* note 157, at 259.

177 NLRA § 8(d), 29 U.S.C.A. § 158(d) (Supp. 1976).

178 Edwards, *supra* note 167, at 909.

179 *Id.* at 909-10. For examples of such provisions, see HAWAII REV. STAT. § 89-9(d) (1975), GERR 51:2015; PA. STAT. ANN. tit. 43, § 1101.402 (1975), GERR 51:4713; WIS. STAT. ANN. §§ 111.20, 90, 91(2)(a)-(b), GERR 51:5815.

180 Edwards, *supra* note 167, at 909.

three substantial differences in practice under the State public employee statutes and the NLRA. First, state courts have shown some tendencies to be restrictive in their interpretation of the scope of bargaining under public employee statutes, partly to avoid potentially illegal delegations of authority, and partly in response to statutory deviations from the language of the NLRA.[181] Second, public employee bargaining is restricted by civil service and other legislation which may take precedence over the collective bargaining law.[182] Finally, many State public employee statutes contain "management rights" clauses which specifically exclude certain subjects from the collective bargaining process.[183] These clauses often reserve to management such ambiguous rights as the right to "maintain the efficiency of government operations" and have presented difficult interpretative problems for courts and administrative agencies.

Edwards concludes, that, despite differences in statutory language and in practice, the "leading" States are moving closer to the NLRA-type unfettered bargaining:

> Current developments in public sector labor laws indicate that we may expect to see a widening of the scope of bargaining in all states. The experience in Michigan furnishes ample evidence that public sector bargaining can be satisfactorily regulated under the private sector concept of the duty to bargain. A state public employment relations board is usually quite capable of deciding, on the basis of private sector precedents and public sector bargaining experiences, which subjects should be deemed "mandatory" for bargaining purposes. The case-by-case decision-making approach on mandatory subjects is vastly superior to a rigid legislative limitation on the scope of bargaining, because if experience proves the initial judgment to be erroneous, it is easier for a state board to reverse itself than it is to get a modification of a state statute in the legislature.[184]

Nonetheless, the fact that the "leading" States are moving toward the NLRA pattern does not prove that other States will follow; Edwards' focus on states such as Michigan and New York may

181 *Id.* at 912-14.
182 *Id.* at 910-12.
183 *Id.* at 914-15.
184 *Id.* at 916.

not provide conclusions equally applicable in states with different traditions of labor relations.

*b. Union security*

Another area in which States have significantly different approaches in their public employee bargaining statutes is union security. The NLRA permits unions to bargain for a union shop but not for a closed shop.[185] According to a study published by Patricia Blair in January 1975, however, most states are more restrictive for public employees than the NLRA.[186] The most liberal States, Alaska and Washington, have laws which could be construed to permit unions to bargain for any kind of union security except the closed shop, including both the union and the agency shop.[187] Michigan and Montana permit agency shop agreements, as does Rhode Island for State employees. Pennsylvania permits maintenance of membership agreements whereby union members are not allowed to resign during the term of a union contract. Hawaii, Massachusetts, Minnesota, Oregon and Wisconsin permit "fair share" agreements by which non-members are required to pay the union an amount considered to represent their share of the union's expenses in representing all unit employees. Vermont permits the assessment of one year's dues to any State employee seeking representation by the union in grievance proceedings. Delaware law simply prohibits the union shop.[188] On the other hand, some States have "right to work" laws severely limiting the availability of union security devices.[189] Six States, including Iowa and Nebraska, prohibit all union security devices.[190] Eight States, including Florida, Kansas, Nevada, North Dakota, and South Dakota, prohibit any device requiring membership in a union.[191] The remaining States have not specified

185 *See* NLRA § 8(a)(3), 29 U.S.C. § 158(a)(3) (1971).

186 Blair, *Union Security Agreements in Public Employment*, 60 CORNELL L. REV. 183, 208-09 (1975) [hereinafter cited as Blair, Union Security Agreements].

187 Blair, *Union Security Agreements, supra* note 186, at 208. Kentucky's statute grants firemen the right to bargain over union shop.

188 *Id.* at 209 n.124.

189 *Id.* at 209.

190 Blair, *Union Security Agreements, supra* note 186, at 209 n.126. The other four States are Alabama, Arkansas, Mississippi, and Virginia.

191 *Id.* at 209-10 & n.127. The other three States are Arizona, North Carolina and South Carolina.

allowable union security devices, leaving the articulation of the State's policy to the courts.[192]

### *c. Impasse procedures and the right to strike*

By far the most important difference among the State public employee statutes, and between public employee statutes and the NLRA, lies in their approach to the resolution of bargaining impasses. The policy of the NLRA is set out in section 13:[193]

> Nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

While structuring the bargaining process and requiring private employers and their employee representatives to bargain until impasse, the NLRA makes no requirements upon the parties to engage in specific conciliatory proceedings once impasse has been reached.

Until 1971, the States and the Federal Government imposed an almost absolute ban on strikes by public employees.[194] On the other hand, virtually every State public employee statute prescribes some procedures for the resolution of bargaining impasses.[195] Missouri appears to be the only State with a public employee statute which makes no provision for the resolution of bargaining impasses.[196] California, Minnesota, New Hampshire, South Dakota and Washington provide for mediation of im-

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192 *But see Hearings on H.R. 8677 and H.R. 9730 Before the Special Subcomm. on Labor of the House Comm. on Education and Labor*, 93d Cong., 1st Sess., *at 251* (1973), [hereinafter cited as 1973 *Hearings*], which states that as of 1973 only Colorado, Georgia, Idaho, Indiana, Louisiana, Maine and West Virginia were without any statutory, regulatory or judicial authority on the subject of union security agreements.

193 NLRA § 13, 29 U.S.C. § 163 (1976).

194 For a review of State public employee strike bans, *see Annot.*, 37 A.L.R.3d 1131 (1971).

195 *See* Coughlin & Rader, *Right to Strike and Compulsory Arbitration: Panacea or Placebo?*, 58 MARQ. L. REV. 205 (1975) [hereinafter cited as Coughlin & Rader]. *See also* Brown I, *supra* note 157, at 71; Brown II, *supra* note 99, at 703; Moberly, *supra* note 157, at 262.

196 *See* Coughlin & Rader, *supra* note 195, at 210-17; Missouri Public Sector Law, GERR 51:3411.

passes, but make no further requirements.[197] The prevailing pattern appears to be mediation followed by fact-finding, with the fact-finder's report in some cases required to be made public, or submitted to the appropriate legislature. This approach is taken by all the comprehensive statutes except those of Minnesota, New Hampshire and South Dakota, and by selective-coverage statutes in 16 other States.[198]

Several States have begun to experiment with additional steps in the impasse resolution procedure. Seven States and the District of Columbia provide for the use of voluntary, but binding, interest arbitration.[199] Eight States have imposed compulsory interest arbitration for firefighters and police.[200] Recently, Maine and Rhode Island have imposed compulsory arbitration of non-financial disputes for other State and local employees,[201] and Nevada has provided for compulsory arbitration of impasse disputes upon order of the governor.[202]

The various impasse resolution procedures are designed to compensate public employees for the lack of the right to strike, and to provide a means to assure the continuation of public services without strikes. The basic tenet of public employee bargaining legislation remains the prohibition on the right to strike. In some States, the prohibition is merely a declaration of policy,

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197 California, Minnesota, New Hampshire, South Dakota and Washington public sector bargaining statutes, GERR 51:1411, 3211, 3811, 5011, 5611.

198 *See* Coughlin & Rader, *supra* note 195, at 210-17; GERR 51:1011-6115. The sixteen States include all of the full coverage States except California and Washington, all the nearly full coverage States except Missouri, and Idaho.

199 The nine States are: Alaska, Delaware, Indiana, Iowa, Maine, New Jersey, Oregon, Pennsylvania and Rhode Island. Coughlin & Rader, *supra* note 195, at 213, n.28; GERR 51:2321, 2416.

200 *Id.* Coughlin & Rader, *supra* note 195, at 213. The eight States are: Massachusetts, Michigan, Pennsylvania, Rhode Island, South Dakota, Vermont, Wisconsin and Wyoming.

201 *Id.;* GERR 51:2811, 4811. The Maine compulsory arbitration provision applies to municipal employees, and excludes salaries, pensions and insurance from compulsory arbitration. The Rhode Island compulsory arbitration provision applies to State employees and excludes wages from compulsory arbitration. The Rhode Island statutes applicable to municipal employees and to teachers provide compulsory arbitration of all non-monetary issues upon demand of either party.

202 NEV. REV. STAT. § 288.200(7) (1975), GERR 51:3715. The Nevada statute grants the Governor authority to order that all or any specified findings of a fact-finder in a particular dispute shall be final and binding upon the parties to the dispute.

to be enforced by the State courts on a case-by-case approach.[203] In other States, the prohibition is supported by statutory penalties against striking employees, including fines, dismissal, and disqualification from further governmental employment.[204] Despite these restrictions, however, public employee strikes continue to occur.[205]

Recently, certain States have reversed long-standing strike bans and have moved to permit limited strikes by public employees. In some cases, the movement has occurred in the courts and has taken the form of refusal to grant injunctions against striking public employees and their unions. In *School District v. Holland Educ. Ass'n.*,[206] the Supreme Court of Michigan held that it was contrary to the public policy of Michigan to issue injunctions in labor disputes "absent a showing of violence, irreparable injury, or breach of the peace,"[207] and that therefore the issuance or denial of an injunction against a public teachers' strike lay in the discretion of the trial court. The *Holland* approach has been endorsed by the Supreme Courts of Rhode Island[208] and New

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203 Delaware, Michigan, Rhode Island and Washington take this approach. *See* Brown II, *supra* note 99, at 704-05.

204 There is a further distinction between States which impose self-executing penalties and those whose statutory penalties are only imposed upon action by the government employer, the State courts, or both. New York's Taylor Law specifies mandatory penalties automatically incurred by strikers, but imposition of the penalties nonetheless depends upon action by the government employer involved. *See* N.Y. CIV. SERV. LAW, §§ 210-211 (McKinney 1973), GERR 51:4117-20. Florida's public employee bargaining law provides penalties for strikers which are imposed by State courts upon application of the government employer. FLA. STAT. §§ 447.505-.507 (1973).

*See also* Brown II, *supra* note 99, at 704-05. Brown further distinguishes between States in which the strike prohibition is merely declaratory, as in Delaware, Michigan, Rhode Island and Washington, and States in which the prohibition is self-executing, such that penalties are automatically imposed upon the occurrence of a strike.

205 In 1973 there were 387 recorded strikes by public employees, involving a total of 196,400 workers. One strike occurred in the Federal government, 29 in State governments, and 357 in local governments. Teachers' strikes in Philadelphia, Chicago and Detroit accounted for more than one half of the work-days lost. The number of strikes in 1973 was the largest in any year except 1969 and 1970, when 411 and 412 strikes were recorded, respectively. BUREAU OF LABOR STATISTICS, U.S. DEP'T. OF LABOR, WORK STOPPAGES IN GOVERNMENT, 1973, GERR 71:1011.

206 380 Mich. 314, 157 N.W.2d 206 (1968).

207 *Id.* at 326, 157 N.W.2d at 210.

208 School Committee v. Teachers' Ass'n, 111 R.I. 96, 299 A.2d 441 (1973).

Hampshire,[209] but has been specifically rejected by the Court of Chancery of Delaware.[210] The denial of an injunction under the *Holland* rule does not make the strike legal, nor does it relieve striking public employees of the penalties imposed upon strikers by statute; however, as a practical matter, the refusal of the courts to grant anti-strike injunctions may effectively legitimize public employee strikes.

A more fundamental change in the approach to public employee strikes has occurred in seven States. Alaska, Hawaii, Minnesota, Montana, Oregon, Pennsylvania and Vermont have all accorded a statutory right to strike to some public employees under some conditions,[211] and the Supreme Court of Montana has recently held that the term "concerted activities" protected by the Montana Public Employee Collective Bargaining Act includes the right to strike.[212] All these States, except Montana, require public employees to exhaust the statutory impasse resolution procedures before engaging in a strike. All (except possibly Montana) permit the enjoining of any public employee strike found to be harmful to the public health, safety or welfare; decisions under the laws of Pennsylvania and Hawaii indicate that this restriction may be substantial, but legal public employer strikes have occurred in both States.[213] Several of these States limit the right to strike to certain employees: Pennsylvania prohibits strikes by police and firemen;[214] Alaska divides public employees into three categories[215] (vital employees such as police and firemen, who may not strike, important employees, including school personnel, who may

209 Timberlane Regional School Dist. v. Timberlane Regional Educ. Ass'n, 114 N.H. 245, 317 A.2d 555 (1974).

210 State v. Delaware State Educ. Ass'n, 326 A.2d 868 (Ct. Chanc., Del. 1974).

211 GERR 51:1111, 2011, 3211, 4611, 4711, 5411. *See* Coughlin & Rader, *supra* note 195, at 214.

212 Dep't of Highways v. Public Employees Craft Council of Mont., 529 P.2d 785 (Mont. 1974).

213 *Compare* Armstrong Educ. Ass'n v. Armstrong School Dist., 5 Pa. Cmwlth. Ct. Rptr. 378, 291 A.2d 120 (1972), *with* Bristol Township Education Ass'n v. School Dist., 14 Pa. Cmwlth. Ct. Rptr. 463, 322 A.2d 767 (1974) *and* Philadelphia Federation of Teachers v. Ross, 8 Pa. Cmwlth. Ct. Rptr. 203, 301 A.2d 405 (1973). *Cf.* Hawaii Pub. Employment Relations Bd. v. Hawaii State Teachers' Ass'n, 54 Haw. 531, 511 P.2d 1080 (1973).

214 GERR 51:4711.

215 GERR 51:1111.

be allowed to strike for limited periods of time only, and other public employees, who enjoy an unlimited right to strike after exhausting impasse resolution procedures); Minnesota restricts the right to strike to "nonessential employees" whose strike will not endanger the public health, safety or welfare.[216] Nonetheless, despite these restrictions, the right to strike laws of these seven States represent a major change in public policy toward public employees. In a study of the right to strike laws and other impasse resolution mechanisms, Coughlin and Rader conclude that limited right to strike laws, coupled with voluntary binding arbitration, provide a reasonable solution to the public employee strike question. They caution, however, that limited right to strike laws may not serve as a means of reducing the incidence of public employee strikes. They found that experience in the seven States remained the same after the enactment of right to strike laws as before: in six States, few public employee strikes occurred either before or after the enactment of the laws; in Pennsylvania, by contrast, numerous public employee strikes occurred before and after enactment of the law.[217] Most of these strikes have involved teachers, but Pennsylvania recently experienced the nation's first statewide strike of State employees.[218]

## II. The Need for a Federal Act

### A. *Implementing the policies of the NLRA*

The National Labor Relations Act was passed to provide a stable system of industrial relations and to assure labor peace and economic productivity. When it was passed, public employees were assumed to be different from private employees, and forty years later there remains a substantial body of opinion that public

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216 GERR 51:3211.

217 Coughlin & Rader, *supra* note 195, at 217.

218 For an analysis of Pennsylvania's strike experience under its limited right to strike law, *see Findings of Special Joint Legislative Committee on Effect of Pennsylvania Public Sector Bargaining Law*, 587 GERR E-1 (Jan. 6, 1975). In December 1975 and January 1976, Pittsburgh was the scene of a six-week teachers' strike which continued despite court injunctions ordering the teachers back to work.

employees should be exempt from the NLRA because of inherent differences between public and private employment, including the fact that most public employees are not legally permitted to strike.[219] During those forty years, however, attitudes toward public employment have shifted, and it is now widely recognized that governments cannot prescribe the terms and conditions of public employment at will.[220] Moreover, despite the strike bans which prevail in most States, illegal public employee strikes have been occurring with increasing frequency.[221] Furthermore, the experience under the NLRA suggests that public employees cannot easily be separated from the rest of the economy: on the one hand, the existence of numerous quasi-governmental agencies, the practice of contracting out governmental services to private operators, and the trend toward governmental takeover of other services, notably transportation systems, all argue that the line between government and the private sector is not distinct;[222] on the other hand, the experience with the secondary activity proscription of NLRA § 8b(4) suggests that public employers are not immune from disputes in the private sector.[223]

Most of the analysis of the differences between public and private employment focuses on the special nature of the government as employer. This focus, however, overlooks the substantial similarities in the nature of work performed and the employees who perform it. In the first place, many of the functions performed by governmental agencies are not uniquely governmental. Almost one-half the full-time equivalent employment of State and local governments is devoted to education;[224] although public education is by far the most prevalent mode in the United States, 11 percent of the elementary and secondary school enrollments

219 *See* note 37 *supra.*

220 For a discussion of the traditional attitudes toward public employee strikes and consideration of other, less drastic, impasse procedures, *see* the landmark case of Norwalk Teachers' Assoc. v. Board of Education, 138 Conn. 269, 83 A.2d 482 (1951) (teachers' union recognized for purposes of collective bargaining and arbitration, but denied right to strike). *See also* BOK & DUNLOP, LABOR AND THE AMERICAN COMMUNITY 331-40 (1970).

221 *See* note 205 *supra.*

222 *See* text accompanying notes 32-61 *supra.*

223 *See* text accompanying notes 62-65 *supra.*

224 GERR RF-105, 71:2112 (July 14, 1975).

are in private schools,[225] and the proportion of private higher education enrollments is even greater.[226] Another 18 percent of full-time equivalent employment of state and local governments is devoted to hospitals, utilities, sewer systems, parks, and other recreational and environmental facilities — all of which have significant private counterparts.[227] The only major state and local services without significant private competition are police and fire protection, which account for only 8 percent of state and local employment.[228] The similarities between the public and private sectors are increased by the fact that many public employees, particularly blue-collar and clerical workers, perform jobs indistinguishable from jobs available in the private sector.[229] There is no reason to believe that individuals do not move between the public and private sectors (and among the States) in response to job availability and relative wage and benefit levels.[230]

Furthermore, public employees are often represented by the same unions who represent private-sector employees. As of 1972, 86 unions and associations represented government employees.[231] Twenty-eight of these were unions affiliated with the AFL-CIO, including the American Federation of State, County and Municipal Employees (AFSCME), the American Federation of Government Employees (AFGE), and the American Federation of Teachers (AFT).[232] The remainder were independent unions and pro-

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225 M. Frankel & K. Simon, U.S. Dep't of Health, Education and Welfare, National Center for Education Statistics, Projections of Education Statistics to 1981-82 (1972) at 9.

226 In 1971, private institutions of higher education enrolled 35 percent of degree credit higher education students. *Id.*

227 GERR RF-105, 71:2112.

228 GERR RF-105, 71:2112. Even police and fire services have their private sector counterparts. Guard services, for example, are available from outside contractors or may be provided in-house.

229 *Cf.* Tax Foundation, Inc., Unions and Government Employment 40 (1972), which compares salaries for equivalent occupations in the public and private sectors in 11 cities.

230 *See* Ehrenberg, *The Demand for State and Local Government Employees,* 63 Am. Econ. Rev. 366 (1973).

231 585 GERR D-14 (Dec. 16, 1974). *See* B. Werne, Public Employment Labor Relations §§ 2.1-2.6 (1974); Gitlow, *Public Employee Unionism in the U.S.; Growth and Outlook,* 21 Lab. L.J. 766 (1970).

232 Unions affiliated with the AFL-CIO had a total of 2,006,000 public-service members. AFSCME has 529,000 members, AFGE 293,000, and the AFT 249,000. 585 GERR D-9, 14 (Dec. 16, 1974).

fessional associations,[233] including the National Education Association, which represents 1,166,000 members[234] concentrated at the local school district level. A substantial number of public employees are represented by unions which include both public and private employees. In 1972, 243,000 public employees were members of 20 unions having less than 20 percent public employees among their members, and another 167,000 public employees belonged to 5 unions with 20-40 percent public employees.[235] (By contrast, public employees constituted more than 90 percent of the membership of virtually all of the associations.[236]) Some States and localities have attempted to prohibit certain public employees from joining unions which include private or other public employees among their membership, but most courts have struck down such attempts as unjustifiable incursions upon employees' organizational rights.[237]

The identification of public employee representatives with the national union movement has meant an increasing identity of outlook and goals, a trend which appears likely to continue in the future.[238] It may also mean that agreements in one sector will increasingly set examples during negotiations in the other sector,[239] and that public employees will find it increasingly possible to enlist private-sector union members in their disputes with their public employers.[240]

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233 Twenty-three independent unions had a total membership of 454,000. Thirty-five professional associations had a total membership of 2,060,000. *Id.* at D-14.

234 *Id.* at D-9.

235 *Id.* at D-16.

236 *Id.*

237 *See* notes 11-12 *supra.*

238 *See, e.g.,* statement of Jerry Wurf, 1973 *Hearings, supra* note 192, at 46-74; Bilik, *Close the Gap: NLRB and Public Employees,* 31 OHIO ST. L.J. 456 (1970).

239 *See, e.g.,* Statements of Harold C. Lumb, Michael Markowitz, Reed Larson, James S. Metcalf, 1973 *Hearings, supra* note 238, at 85-111. It has also been suggested that public employee unions may try to use existing statutes as examples in their attempts to get favorable statutes passed in other States or in Congress. *See* Baird, *National Legislation for Public Employees: "End Run" on the Wagner Act?,* 61 ILL. B.J. 410 (1973).

240 In November, 1975, the Greater New Haven Central Labor Council called a general strike of 30,000 workers in 92 affiliated unions in the New Haven, Connecticut area to support the striking members of the New Haven Federation of Teachers. During the course of the bitter, two-week strike by the teachers, 12 union leaders and 78 striking teachers had been jailed. The Federation and the New Haven school board reached agreement the day before the general strike was to begin. *See* 633 GERR B-13 (Dec. 1, 1975), 634 GERR B-11 (Nov. 24, 1975).

Although the political subdivision exemption has not created massive problems for the implementation of the NLRA in the private sector, it nonetheless appears that the justification for excluding public employees, never made explicit by the Congress,[241] has been substantially eroded in the forty years since the Act was passed. To the degree that the NLRA embodies sound national policy, removal of the exclusion of public employees is appropriate. In addition to recognizing the interrelationship of the private and public sectors of the economy, such a change would solve a number of technical problems under the current NLRA which, if not of giant proportions, nonetheless continue to produce uncertainty and litigation.[242] Extension of the coverage of the NLRA would also forestall piecemeal efforts to deal with public employee unionization which, in the absence of comprehensive Federal legislation, have surfaced at both the Federal and State levels.

### B. *Administrative Simplicity*

The existing division of authority between the NLRA and State and Federal public employee collective bargaining provisions produces an administrative division as well. Most private employees are governed by the National Labor Relations Board (NLRB) under the provisions of the NLRA.[243] The NLRB deals with questions of representation and the prevention of unfair labor practices. It is composed of five members and has a large staff. Although the Board and its General Counsel are located in Washington, it has roughly forty regional offices which are served by their own staff members. Most cases are disposed of at the regional level and on the basis of informal proceedings.[244] Thus,

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241 *See* note 37 *supra.*

242 *See* text accompanying notes 36-56, 62-65 *supra.*

243 Many States have their own private sector labor relations Boards. Such Boards can exercise jurisdiction over employers who are not covered by the NLRA because they are too small to "affect" interstate commerce within the meaning of NLRA § 2(6) and 2(7) or because the NLRB has declined jurisdiction. State Boards can also administer State laws which add to the provisions of the NLRA and are not preempted by the NLRA. *See, e.g.,* NEW YORK LABOR LAW § 700-717 (McKinney 1965).

244 This brief description of the Board leaves out many details of its complex administrative structure. For a somewhat more detailed description, *see* SMITH, MERRIFIELD, & ST. ANTOINE, LABOR RELATIONS LAW, 63-68 (5th ed. 1974).

the Board already has an administrative and enforcement structure that reaches into every part of the country and presumably is able to respond to local needs as well as national mandate.

Jurisdiction over public employees, by contrast, is fragmented among a number of different agencies. Labor relations in the Federal executive branch are governed by the Federal Labor Relations Council and the Assistant Secretary of Labor for Labor-Management Relations pursuant to Exec. Order No. 11491.[245] Postal workers come, in part, under the jurisdiction of the NLRB.[246] State and local employees in States with public sector labor relations statutes come within the jurisdiction of a State labor relations board.[247] As of 1972, eight States and the District of Columbia had vested authority in a new public employee labor board, 15 States had placed jurisdiction over public employees in an existing private-sector labor board, and 10 States had used specialized agencies like State boards of education and health.[248] Local employees in the remaining States may be covered by local labor relations boards established by local ordinances.[249] Finally, State and local employees, especially in the southern States, may be covered by no statute, ordinance, or administrative board.[250]

The current patchwork of agencies, without a unifying central authority, inevitably yields differences in administrative policy which are based more on local political pressures than on irresistible administrative logic, or even on differences in statutory provisions.[251] Lodging authority for administrative decisions in a single board would not inevitably lead to consistency, as critics of the NLRB would no doubt be quick to point out, but the likelihood of consistency would increase. Furthermore, duplicative costs could be avoided.

Administrative centralization has advantages and disadvantages

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245 *See* text accompanying notes 73-76 *supra*.

246 *See* text accompanying notes 93-95 *supra*.

247 *See* text accompanying notes 161-166 *supra*.

248 *See* Brown II, *supra* note 157, at 697-98; text accompanying notes 162, 163 *supra*.

249 *See, e.g.*, Ch. 13A-4 PRINCE GEORGE'S COUNTY MARYLAND CODE OF ORDINANCES & RESOLUTIONS (1973) § 13A-4; GERR 51:2924.

250 *See* text accompanying notes 112-117 *supra*.

251 Brown II, *supra* note 157, at 697-98; WELLINGTON & WINTER JR., THE UNIONS AND THE CITIES 24-29 (1971).

for both labor and management. From the perspective of the national unions, their representational and administrative task would be simplified were they able to deal with a Washington-based agency and a number of regional offices, rather than with each State's administrative and judicial system. Ease of access and logistical planning would be facilitated and procedural variations among forums would be minimized. Major public sector unions are already familiar with the administrative and legislative process in Washington and are probably more advanced in their knowledge and practice of Washington lobbying than are most State officials. Centralization and uniformity carry with them the attendant danger of national application of an undesired judicial or administrative decision. An adverse opinion in a national system is correctable, at least in theory, but it is not avoidable through concentration of effort in States which have a more favorable rule. Yet there is no assurance that the impact of adverse decisions in a State-by-State decisional process would fall more heavily on labor than on management (or vice-versa), nor is there any assurance that nationally determined doctrine would necessarily favor labor over management (or vice-versa). Thus, the advantage of centralization seems more related to administrative, logistical and procedural factors than to doctrine, and to suggest some edge to large, national unions.[252]

The management perspective is more or less the converse of the union view. Advantage to one is largely gained at the expense of the other, and management is likely to perceive centralization as favoring the unions over State and local governments. Nevertheless, even from an employer's perspective there may well be independent advantages to a more uniform national system. Experience in one State would be relevant to experience in another. Unlike the current system, in which the incentive for sharing views and expertise may be reduced by the differences in approach and structure among the various States, a Federal approach would arguably increase the chances for sharing informa-

252 The advantages of centralization might work to favor large unions over smaller, local unions more than over management. Small unions might be less capable of competing with national organizations in the struggle to organize and represent employees.

tion and developing common approaches to labor among the managers of the respective States. Increased cooperation among government employers could well outweigh the asserted advantages of continued experimentation by States with significantly different laws.[253]

Centralization of the administrative and quasi-judicial functions could also serve to eliminate the jurisdictional conflicts which can now arise under the NLRA. The NLRB has exclusive jurisdiction to determine whether an employer is entitled to the exemption for political subdivisions contained in § 2(2) of the NLRA.[254] Nonetheless, State courts are often called upon to determine the status of particular employers;[255] since the State proceedings in many cases involve applications for anti-strike injunctions, delay in determining coverage may be crucial.[256] Furthermore, there is always a possibility that both the NLRB and the State authorities will decline to exercise jurisdiction, leaving the employees with nowhere to turn.[257]

If one concludes that administration of public sector labor relations should be placed in a single, Federal agency, one must still decide whether it should be the NLRB or a separate public employee board. The practice in some States of lodging the administration of public and private labor relations in the same administrative agency argues that public and private sector affairs are not incompatible and suggests that the NLRB could administer

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253 It is said that experimentation by States with differing laws will yield better substantive policies through a process of testing, accommodation and improvement. The possibility of improvement through experimentation must be viewed, however, in light of the evidence that there is already considerable similarity in legal powers and constraints among the States which have enacted public sector bargaining legislation. *See* text accompanying notes 154-218 *supra*.

254 *See* San Diego Bldg. Trades v. Garmon, 359 U.S. 236 (1959); NLRB v. Hawkins Gas Utility District, 402 U.S. 600 (1971).

255 Motor Coach Employees v. Missouri, 374 U.S. 74 (1963); Plumbers Union v. County of Door, 359 U.S. 354 (1959); Longshoremen Local 1256 v. Broward County Port Authority, 183 So. 2d 257 (Dist. Ct. Apps. Fla. 1966); Longshoremen Union v. Georgia Ports Authority, 217 Ga. 712, 124 S.E. 733, *cert. denied* 372 U.S. 922 (1962).

256 *Cf.* Dade County v. Motor Coach Union, 157 So. 2d 176 (Dist. Ct. App. Fla. 1963), *cert. denied* 379 U.S. 971 (1964).

257 For an example, *see* LABOR RELATIONS LAW IN THE PUBLIC SECTOR, *supra* note 1, at 157-58. Both the NLRB and the New York Public Employment Relations Board declined jurisdiction over the employees of the Nassau County Library System, Nassau Library System, 1 P.E.R.B. § 399.47 (N.Y. Public Employee Board 1968), Nassau Library System, 196 N.L.R.B. No. 125, 80 L.R.R.M. 1112 (1972).

both sectors. Furthermore, while there are differences between the two sectors which probably justify some degree of specialization, their importance is a matter of speculation, and creation of a separate agency would seem to prejudge the issue. Specialization within the NLRB, perhaps at both the board and the staff levels, would allow greater flexibility in coordinating the public and private sectors on the basis of growing experience, while at the same time avoiding the possibility that the regular staff of the Board might transpose concepts from one sector to the other without adequate examination of the appropriateness of the transfer. However, the case burden of the NLRB is already substantial, and new cases would increase the delay in processing already experienced. Adding a specialized staff to the NLRB's existing staff would cushion the effect of the new Federal public employee program on the NLRB's private sector activities, but it would represent a real cost of the new program.

The transfer of public employee collective bargaining regulation to the NLRB would also present transitional problems with respect to the existing State public employment labor relations agencies.[258] Some States might choose to phase out their own agencies as their functions were transferred to the Federal government. Others might choose to retain their agencies in the same way that some States continue to operate private sector labor relations boards supplemental to the NLRB. In either case, the problems of transition and coordination would represent an additional cost of the Federal program.

In the final analysis, administrative questions are inextricably linked to matters of judgment, at least some of which are beyond the scope of this review. What impact, for example, would presidential, rather than gubernatorial or legislative, appointment of board members have upon the balance of interests in labor-management relations in the public sector? Would the quality of staff performance increase or decrease when the impact of generally higher Federal pay scales is weighed against the closer contact that State PERBs have with local conditions? How does the

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258 Similar transitional and coordination problems would of course exist with respect to the administrative bodies which currently administer labor management relations in the Federal sector. *See* text accompanying notes 73-76, *supra*.

overall performance of the NLRB compare to PERBs, the best and the worst, in wisdom and efficacy? The answers to such questions are highly speculative and judgmental, but they are bound, even if unarticulated, to influence the outcome of the legislative debates. Our judgment, however, is that the most promising administrative arrangement would be to place jurisdiction over public employees in the NLRB and its regional offices, with a specialized staff to handle the increased caseload associated with the public sector.

### C. *Fairness and Balance of Bargaining Power*

Unlike private sector bargaining, collective bargaining for governmental employees forces the government to play conflicting roles. On the one hand, the government must bargain collectively as employer; on the other, it must establish the basic ground rules for the bargaining process and the employer-employee relationship. The government as rule-maker may seek to bias the outcome of collective bargaining by setting the rules in its own favor.

Historically, States have chosen to regulate the employment relationship unilaterally through civil service systems. Civil service imposes a merit system for hiring and promoting public employees intended to foster a politically neutral cadre of government employees who are selected on merit and rewarded equitably.[259] It is designed to insure that placement and advancement in governmental service are determined by quality of training and performance instead of by patronage and other political considerations. In principle, therefore, the civil service unit is an ally of the employee, and perhaps by extension his representative. In practice, however, employees and employee unions may view civil service agencies simply as another arm of government, and may place little faith in their capacity for independent judgment.[260] Since employees do not participate in civil service rule-

259 The Federal government adopted the merit approach to government employment with the passage of the Pendleton Act in 1883, two years after the assassination of President Garfield by a disappointed office-seeker dramatized the failures of the spoils system which had been used since the Jackson Presidency. For a full discussion of the merit system, *see* LABOR RELATIONS LAW IN THE PUBLIC SECTOR, *supra* note 1, at 464.

260 *See* 1967 EXECUTIVE COMMITTEE, NATIONAL GOVERNORS' CONFERENCE, REPORT

making as equal parties, they may view the operation of the civil service commission as simply a typical management personnel function.[261]

The collective bargaining process, on the other hand, places the employee and his representative in a significantly different relationship to the employing agency and to the executive branch of the government in toto.[262] The employee becomes a more-or-less equal party to the process with the right to bargain about wages and other working conditions, while the employer and the civil service agency are no longer able to establish unilaterally the rules by which people obtain employment, work, and receive payment. In collective bargaining, the employee is pitted against the employer in an attempt to reach a mutually acceptable result, and the result is likely to be different from that reached under a civil service system.[263]

Under collective bargaining, however, State governments inevitably must assume conflicting roles.[264] The State cannot only

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OF TASK FORCE ON STATE AND LOCAL GOVERNMENT LABOR RELATIONS 18-19 (1967), reprinted in LABOR RELATIONS IN THE PUBLIC SECTOR, *supra* note 1, at 465-67.

261 There may not be substantial differences between private and public personnel functions even though the public sector has the special problem of avoiding patronage abuses. In both sectors employees are screened, classified, hired, rated and paid. In most large organizations this process is bureaucratic in its reliance upon rules and their application. To a degree this process is intended to create equity and efficiency in both public agencies and private organizations.

262 Although employee and union interests are not always the same in a given situation, we will assume for the purposes of this analysis that they are. Regulation of conflicts between employee and union interests is of considerable importance but beyond the scope of this article. Consequently, we use the terms employee, representative and union interchangeably.

263 A recent study of the policy implications of public sector collective bargaining has concluded: "Prior to the advent of public sector collective bargaining, wages, hours and conditions of work were decided unilaterally by management. As unilateral decision-making is replaced by bilateral or multilateral decision-making, collective bargaining has had a major impact on the final results of negotiation." R. JONES, PUBLIC SECTOR LABOR RELATIONS: AN EVALUATION OF POLICY-RELATED RESEARCH, at xxvi (1975).

264 The position of local governments in States with collective bargaining statutes differs on this score. Application of the State collective bargaining law is merely another of the myriad instances where the State regulates local affairs. Nonetheless, the collective bargaining process may be of particular concern in light of State-local fiscal relations. The recent fiscal crises of New York City have demonstrated the interrelationship between State and city finances, taxes, and politics. Few States can afford to allow their major cities to spend themselves into bankruptcy, so they may assert controls over local collective bargaining on the grounds that excessive settlements contribute to local insolvency. One way to do so is to

serve as a partisan bargainer. Its legislature is also called upon to establish the procedural rules for the collective bargaining, and the mechanisms by which bargaining impasses are to be resolved. If a third party is called in to help resolve disputes, that third party is itself likely to be a State agency.[265] At the same time, the State must draw up and administer the State budget, and balance the many interests which go into the making of governmental policy. How well State governments can fulfill all of these roles is, at best, an open question, and the potential conflict among the various roles raises serious questions of fairness, credibility, and acceptability of results to the participants.

States cannot escape the roles of employer, budget balancer, and legislator, but the function of setting collective bargaining rules may not be as critical to the basic governing process at the State level. Transferring the rule-making function to another level of government would reduce the conflict among the State's various roles and improve the bargaining process, both by allowing the State to pursue its other interests more directly and by placing the adjudicatory function in the hands of a disinterested party. Separation of the bargaining and rule-making function would also enhance the integrity (or at least the appearance of integrity) of the overall process. By placing the rule-making function at the Federal level, Congress could foster this desirable result. However, increased distance from local conflict and interests could also breed lack of knowledge of local conditions, or fear of that result. Some regionalization of a national agency would protect against this result, as would the development of experience and expertise over a period of time. This, of course, is the NLRB pattern.

Lodging the rule-making function at the Federal level does not entirely solve the problem of duality of roles. The Federal govern-

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skew the procedural rules governing bargaining. For a review of some studies of the complex relationship among local finances, local collective bargaining settlements, and State collective bargaining laws, *see* JONES, *supra* note 263, at 201-26.

265 In practice, the "third party" may actually be a number of parties with overlapping, complimentary or conflicting roles. The "third party" at the Federal level, for example, may include: the Federal Labor Relations Council; the Assistant Secretary of Labor for Labor-Management Relations; the Federal Mediation and Conciliation Service; the Civil Service Commission, and the Federal Services Impasse Panel.

ment would continue to serve as rule-maker and bargaining agent for its own employees. The number of employees affected by this situation, however, would be significantly reduced.[266] Moreover, general rules would apply to local, State, and Federal situations. Since Federal employees are fewer in number, pressures to develop rules responsive solely to Federal interests (management or employee) would be reduced accordingly.

While the argument thus far has focused on the legislative and administrative aspects of government regulation of collective bargaining, similar reasoning holds for court review of decisions by an administrative agency or for direct court intervention to enforce contracts or enjoin allegedly illegal actions such as strikes. Recourse to Federal courts would seem to have some advantages over reliance upon State courts in labor disputes. To begin, they are likely to have more general experience with labor problems due to their long history of some involvement in the private sector under the NLRA. Of at least equal importance, Federal courts should be less responsive to local and State pressures than State courts. State and local judges are elected in some States and are subject to the obvious pressures of the electoral process. Even where appointed, they are likely to be seen as bearing the stamp of a political party or subject to special pressures from elected officials.

### D. *Uniformity and Diversity*

No aspect of the public employee collective bargaining debate has received so much, or so inconclusive, debate as the question of uniformity of treatment of public employees in the various States.[267] Opponents of Federalization see the differences as a healthy aspect of Federalism, reflecting different States' approaches to their different problems.[268] They stress the value of local experience in solving local problems, and also the value of allowing experimentation among the various States to produce, ultimately,

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266 Only 20 percent of all public employees are Federal employees. GERR 71:2111.

267 *See, e.g.,* 1973 *Hearings, supra* note 192.

268 *See, e.g.,* Statement of Frank Le Sueur, 1973 *Hearings, supra* note 192 at 238-243.

better solutions. Other observers see the widespread differences as unfair discrimination among a class of employees solely on the basis of their geographic residence.[269] Furthermore, some question whether diversity and experimentation have, in fact, been achieved.[270]

While it may be impossible to resolve the diversity-uniformity question from a theoretical perspective, it would appear that the Congress has already provided the practical answer. For 40 years, it has been the national policy under the NLRA that employees should have the same chance to determine their conditions of employment regardless of where they live.[271] Outcomes may differ, but the rules for reaching the outcome are uniform throughout the United States. As both the Federal government, and the majority of the States, have recognized a need to extend collective bargaining rights to public employees, there seems to be no convincing justification for depriving them of the long-standing policy of uniform bargaining rights.

Whatever the theoretical desirability of diversity and experimentation, moreover, the substantive law and administrative practice of the States appears to be rather consistent.[272] From the administrative point of view, such consistency is not surprising. For one thing, there are not an infinite number of solutions to

269 *See, e.g.*, Statement of W. H. McClennan, 1973 *Hearings*, *supra* note 192, at 42-45. Related to the issue of discrimination is the issue of economic competition. One effect of the NLRA is to eliminate the potential competitive advantage which could accrue to businesses located in States without collective bargaining schemes as other States imposed a duty to bargain upon employers. Although governments as employers are not subject to the same competitive forces as private employers, States may still fear that public employee bargaining could force tax rises that would place local business at a disadvantage compared to other States.

270 *See, e.g.*, Brown II, *supra* note 157, at 687-89.

271 There is also, of course, a strong Federal policy that States and local governments should not violate the constitutional rights of their citizens, presumably including their employees. This policy would argue in favor of Federal legislation that guaranteed public employees their minimum constitutional rights in the area of union membership and representation. It does not appear, however, that such minimum standards legislation is really necessary. In the first place, the limited constitutional protection of the right to union membership and activity has been clearly set out by the courts in several circuits. *See* cases cited at notes 4, 6-8, 14, *supra*. In addition, States and local governments have largely complied with the constitutional mandate, either by legislation or by judicial ruling. *Cf.* text accompanying notes 125-128, *supra*.

272 *See* text accompanying notes 139-218 *supra*. *See also* Brown II, *supra* note 157, at 695-711.

most labor relations questions. Moreover, nationally prominent unions, such as the National Education Association, have considerable impact in establishing the agenda of issues at the state level throughout the country and, given the nature of the adversary process, tend to narrow the options for State decision-makers. Furthermore, much of the argument in public sector questions, rightly or wrongly, has been based on private sector precedents. Both courts and State agencies have followed private sector decisions emanating from the NLRB and the judiciary in a variety of matters.[273] The tendency to seek private sector precedent is enhanced by the parallels between the language of public sector legislation in many States and the language of the NLRA. The most common language governing scope of bargaining in public sector statutes, for example, requires bargaining over "wages, hours, and other terms and conditions of employment" — the exact words of the NLRA.[274] Agencies and State courts naturally look to NLRA precedents as guidelines for decision in the interpretation of such language.[275] Although interpretations can nonetheless differ, these realities have encouraged a significant degree of uniformity.

Judged by substantive, statutory provisions for collective bargaining by public employees, the most important difference among the States is, of course, that 13 States do not have such legislation at all.[276] Bargaining nonetheless occurs in those States, even in the southern States which have adopted positions most opposed to public employee bargaining.[277] Passage of a Federal act would, however, broaden the rights of most public employees in these States, and create an entirely new system of labor-management relations for others.

Among the States with public employee bargaining laws, the

273 *See Brown* II, *supra* note 157, at 695-707.

274 *See Edwards, supra* note 167, at 908.

275 *See, e.g.,* West Hartford Education Association v. DeCourcy, 162 Conn. 566, 295 A.2d 526 (1972).

276 *See* text accompanying notes 100-124 *supra.*

277 Some bargaining occurs pursuant to local ordinances such as that adopted by Prince George's County, Maryland, GERR 51:2924. Bargaining also occurs pursuant to favorable court rulings in States such as Illinois and Ohio. *See* text accompanying notes 141-153 *supra.* With respect to bargaining in the southern States, *see Labor Relations Law in the Southeast, supra* note 125.

statutory differences appear to be limited to the areas of coverage, scope of bargaining, and impasse resolution and the right to strike.[278] These are the same areas in which State practice, and Federal practice under Exec. Order No. 11491, differ from practice under the NLRA.

With respect to coverage of public employees, the major issue is whether to extend bargaining rights to police and firefighters.[279] This in turn seems to revolve around the question of how disruption of such essential governmental services can be avoided. The most common answer has been to grant police and firemen collective bargaining rights, but to impose upon them an impasse resolution scheme culminating in final, binding arbitration.[280] This same pattern appears in States like Pennsylvania and Vermont, which grant other public employees a limited right to strike, and in States like Wyoming, which grant no other public employees collective bargaining rights.[281]

Except for the case of police and firefighters, the States seem to have adopted similar procedures for the peaceful resolution of bargaining impasses. The standard provisions call for mediation, followed by factfinding, followed in some States by voluntary, binding arbitration.[282] If these procedures do not result in a settlement, however, unions and government employers confront the major difference in practice among the Federal government and the various States: while the Federal government and the majority of the States impose an absolute ban on strikes by public employees, a significant and growing number of States have adopted a more tolerant attitude. Seven States have granted public employees the right to strike under certain circumstances, and several more have limited the availability of anti-strike injunc-

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278 *See* text accompanying notes 154-218 *supra*. State laws also differ with respect to union security, but in this area the same differences occur in the private sector. NLRA § 14(b), 29 U.S.C. § 164(b) (1970), permits States to enact their own union security or right-to-work laws governing private sector employees.

279 There is also a question concerning the coverage of teachers, but this appears to result from the fact that teachers have obtained collective bargaining rights in some States earlier than other groups of employees, not because of special problems with respect to teacher bargaining.

280 At least eight States have adopted this pattern. *See* note 200 *supra*.

281 *Id.*

282 *See* text accompanying notes 194-202 *supra*.

tions.[283] A Federal decision to prohibit or permit strikes must either overturn long-standing policies in many States, or foreclose experimentation in a minority of States. Neither solution appears desirable.

Although it is difficult in principle to refute some of the arguments in favor of allowing variations among the States in the area of public employee collective bargaining, the authors conclude that the strong Federal policy favoring uniform treatment of employees, coupled with the evidence of substantial similarity of practice among the 38 States which have enacted bargaining statutes, on balance support a Federal approach to public labor relations regulation. The evidence on State policy regarding coverage, impasse resolution, and strikes, however, argues that the Federal approach should not impose the NLRA on public employees in its entirety. First, it would appear desirable to add special impasse resolution provisions to the NLRA which would be applicable only to public employees. These would probably include mediation, factfinding, and at least voluntary binding arbitration. Although the Federal program should encompass police and firefighters, it should, in light of the essential nature of their services, impose upon them an obligation to accept binding arbitration of bargaining impasses, or at least it should allow States to impose such an obligation.

With respect to strike policy, the Federal government should adopt the approach which the NLRA takes toward union security in the private sector:[284] that is, it should permit State law to prevail.[285] States desiring to maintain strike bans would be able to do so, and to impose such reasonable penalties as they desire, either by statutory enactment or by case law developed in the State courts.[286] States desiring to experiment with limited strike

283 *See* text accompanying notes 206-218 *supra.*

284 *See* note 278 *supra.*

285 This could be accomplished by adding to the NLRA a new § 13(b), providing that nothing in the NLRA shall be construed as limiting the right of States to impose limitations upon the right of public employees to strike. Congress would, of course, have to take a position on the right of Federal employees to strike.

286 It would seem desirable to lodge jurisdiction over enforcement of State no-strike laws in State courts, even though other elements of the public employment relationship would be handled by Federal agencies and courts. State court jurisdiction would not disrupt current allocations of authority among State legislatures,

rights, however, would be able to continue to do so. In order to maximize the flexibility accorded States in the area of impasse resolution, States should also be permitted to impose binding arbitration on public employers and employees as an alternative to the right to strike.

There remains the question of the scope of bargaining for public employees. The States differ on this question, and the practice in the public sector differs from that under the NLRA. Since this question is closely related to the problem of Federal preemption of existing State law, however, it will be treated in the following section.

### E. *Scope of Bargaining and Preemption*

Much of the discussion of public employee collective bargaining has focused on the issue of the appropriate scope of bargaining in the public sector.[287] State and Federal collective bargaining legislation differs in the treatment of this issue: while some States use language close to that of the NLRA, others include language intended to restrict the scope of bargaining and insure management prerogatives in such areas as setting pay scales and deploying staff.[288] Federal Exec. Order No. 11,491 uses relatively restrictive language which removes from bargaining any matter dictated by the Civil Service Commission, or by an agency rule adopted by the agency head in response to a compelling need, as well as matters affecting the mission of the agency and its staffing.[289]

Despite the differences in statutory language, however, leading commentators have concluded that actual differences in practice have not been great. At least at the State level, experimentation with scope language has not produced differing results.[290] Furthermore, the actual scope of bargaining has not differed greatly from

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administrative agencies, and courts. State court jurisdiction would also be consistent with the limited authority of State courts to enforce allowable State restrictions on non-peaceful picketing in the private sector.

287 *See* text accompanying notes 175-184 *supra*. *See especially Edwards, supra* note 167; WEITZMAN, *supra* note 168.

288 For examples of scope language in State statutes, *see* WEITZMAN, *supra* note 168, at 40-52.

289 Exec. Order No. 11,491 § 11, GERR 21:4. *See* text accompanying notes 77-86 *supra*.

290 *See* WEITZMAN, *supra* note 168.

that under the NLRA.[291] Apparently, the realities of the work place and the bargaining table have proven more effective than abstract concerns about sovereignty, delegation of authority or misallocation of power over governmental resource allocation decisions.[292] As a result, there seems little reason to suggest that adoption of the NLRA scope language will unduly hamper the ability of public authorities to fulfill their obligations in the conduct of public business.[293] On the other hand, adoption of the NLRA language would eliminate some of the confusion that arises from differences in State statutes and would help to sharpen the focus on areas where public sector bargaining should be treated differently from its private sector counterpart.

Adoption of the NLRA scope language would not eliminate the problem of inconsistent State legislation. Even in States with comprehensive public employee collective bargaining legislation, there exist complex statutory controls on the terms and conditions of public employment independent of the collective bargaining legislation. These include civil service laws, tenure and other job security laws, retirement benefits laws, and the like.[294] Similar substantive legislation exists at the Federal level.[295] The relationship of such substantive State law to the State's collective bargaining law has proven difficult to define.[296] At one extreme, the

291 *Id.*

292 For contrasting views on the significance of scope of bargaining limits, *see* WELLINGTON & WINTER, THE UNIONS AND THE CITIES 21-32 (1971); Wollett, *The Bargaining Process in the Public Sector,* 51 ORE. L. REV. 177 (1971).

293 An early investigation of the impact of negotiations in schools suggested that negotiations had relatively little effect on the power of school boards to set policy and of administrators to exercise management discretion. *See* C. PERRY & W. WILDMAN, THE IMPACT OF NEGOTIATIONS IN PUBLIC EDUCATION: THE EVIDENCE FROM THE SCHOOLS 165-189 (1970).

294 Lieberman compiled a partial list of areas where State substantive legislation impinges upon subjects which would be mandatory subjects of bargaining under the NLRA: job security (tenure, notice and procedures, layoff and reemployment, and duration of probationary status); retirement benefits; promotion; veterans benefits; contract performance; sick leave and personal leave; military leave; maternity leave; lunch periods; wages; union security; personnel evaluation and personnel records; residency requirements; legal defense of employees. Lieberman, *Impact of Proposed Federal Public Employee Bargaining on State Legislation: The Potential Legislation of Mandatory Subjects of Bargaining,* 4 J. COLLECTIVE NEGOTIATIONS IN THE PUBLIC SECTOR 133, 140 (1975).

295 *See, e.g.,* 5 U.S.C. Chs. 51-59 (1970), for the Federal job classifications and pay rate system.

296 For a discussion of this relationship, *see* Blair, *State Legislative Control*

Michigan Supreme Court has ruled that the collective bargaining legislation, being more recent than the substantive legislation, implicitly overrides the substantive laws.[297] At the other extreme, the Federal Executive Order requires collective bargaining to be confined within the terms of relevant statutory and Civil Service authority,[298] while Oregon requires every public sector collective bargaining pact to be submitted to the legislature for ratification.[299] New York appears to have taken a middle position by treating State legislation as a minimum protection for public employees: unions and employers may agree to more benefits, but not less.[300] Even here, however, the actual practice in the States may not be so different as the law would suggest: at least one observer has concluded that the practice in Michigan and New York is similar, despite the different approaches of the courts in those two States.[301]

The intervention of Federal public employee collective bargaining legislation would further complicate the problem of relating substantive regulation of the terms and conditions of public employment to collective bargaining laws. On the one hand, the mandates of Federal substantive legislation, such as the Fair Labor Standards Act[302] and the Federal Civil Service Laws,[303] would have to be squared with a Federally-imposed collective bargaining law.[304] On the other hand, the sweep of the Federal collective bargaining law would have to be measured against substantive State legislation covering State and local employees. This second aspect is traditionally considered as a problem of Federal preemption.

Federal preemption actually encompasses three related problems: first, Congress' constitutional power to preempt the regulation of public employee collective bargaining; second, Congress'

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*over the Conditions of Public Employment: Defining the Scope of Bargaining for State and Municipal Employees,* 26 VAND. L. REV. 1 (1973). *See also* Note: *Public Sector Grievance Procedures, Due Process, and the Duty of Fair Representation,* 89 HARV. L. REV. 752, 752-769 (1976); WEITZMAN, *supra* note 168, at 190-194.

297 Civil Serv. Comm's v. Wayne County Bd. of Supervisors, 384 Mich. 363, 184 N.W.2d 201 (1971).

298 Exec Order No. 11,491, § 11, GERR 21:4.

299 *See* Blair, *supra* note 296, at 11-15.

300 *See* WEITZMAN, *supra* note 168, at 187-90.

301 *Id.* at 194.

302 29 U.S.C. §§ 201-219 (1970).

303 5 U.S.C. Chs. 21-89 (1970).

304 *See* text accompanying notes 316-322 *infra.*

constitutional power to preempt the States' rights to regulate the terms and conditions of public employment by law; and finally, the desirability of the Congress' exercising some or all of its constitutional authority. The constitutional questions will be discussed below.[305] Assuming constitutionality, one must still determine advisability.[306]

Preemption has presented difficult problems in the area of private sector labor relations under the NLRA, even though States have not attempted to regulate private employment nearly as extensively as public employment. In *San Diego Building Trades Council v. Garmon*,[307] the United States Supreme Court articulated a standard which appears to make the scope of preemption very broad. The Court stated:

> When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by Sec. 7 of the National Labor Relations Act, or constitute an unfair labor practice under Sec. 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law.[308]

If the *Garmon* rule were adopted, it would bring within the duty to bargain a wide range of items now governed by State legislation, including pay scales, tenure laws, and retirement benefits.

The effect of imposing the *Garmon* rule on State and local

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305 In the next section, the constitutionality of a Federal public employee collective bargaining act is considered in light of the Supreme Court's holding in Maryland v. Wirtz, 392 U.S. 183 (1968), and the proceedings in the Supreme Court in National League of Cities v. Dunlop, 95 S. Ct. 532, 770, 823 (1975), 44 L.W. 3500 (1976). Both of these cases involved the Fair Labor Standards Act, and their results are of interest only by way of analogy. In assessing the constitutionality of a public employee bargaining statute it is important to note that the exact terms of the statute might affect its constitutionality, especially those terms dealing with preemption of State legislation. Such a detailed analysis of constitutionality is, however, beyond the scope of this article.

306 For discussions of the policy issues involved in the preemption problem, *see* Chanin & Snyder, *The Bugaboo of Federal Preemption: An Analysis of the Relationship between a Federal Collective Bargaining Statute for Employees of State and Local Governments and State Statutes affecting such Employees*, 3 FLA. ST. U.L. REV. 236 (1975); *Lieberman, supra* note 294.

307 359 U.S. 236 (1959).

308 *Id.* at 244.

governments' existing relationships with their employees would be devastating; it would wipe out a broad range of existing laws and remove the statutory basis for long-standing employer-employee arrangements. One solution would be to exempt State laws governing public employees from the *Garmon* rule and, in addition, accept the principle that the scope of bargaining must be confined to areas not governed by statute. This, however, would impose a large cost in terms of uniformity and fairness. Another solution would be to phase in the bargaining obligation over a period of time, but that approach would probably produce difficulties of both drafting and implementation.

A more sensible approach appears available under existing NLRA doctrine. Essentially, this approach would treat existing State law as "past practices"; the effect of such treatment would be to bar unilateral change in existing terms and conditions by either employers or unions, but to open up areas formerly controlled by statute for bargaining in the future.[309] Thus, both Federal and State law inconsistent with the duty to bargain under the NLRA would gradually be replaced by bargained agreements. At the same time, however, State legislation valid under the *Garmon* doctrine would continue to control;[310] moreover, States would continue to have the authority to regulate by legislation the terms and conditions of employment of unrepresented employees.

Although the adoption of a "past practices" approach seems desirable on policy grounds, it might be subject to constitutional objections. It is now clearly established that government employees are entitled to the protection of due process in appropriate cases.[311] While the collective bargaining process may satisfy the constitutional requirements with respect to future employees, it appears likely that employees who already enjoy vested employment rights could not be deprived of them in the transition to a collective

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309 *Cf.* Jacobs Manufacturing Company, 94 N.L.R.B. 1214, 28 L.R.R.M. 1162 (1951).

310 In order to prevent confusion, the law should specify that bargaining units and bargaining representatives should be carried over as a past practice, and that the NLRB should extend certification to public employee unions on the basis of their existing State or Federal certifications. However, for reasons discussed in the text at notes 316-322, *infra,* special rules might apply in the Federal and certain State governments.

311 *See* cases cited at note 14 *supra.*

bargaining system.[312] The problem would seem to be greatest in the area of teacher tenure laws, which prevail in virtually every State and school district, and other similar employment security laws.[313] With or without explicit statutory language, however, it seems likely that courts would resolve this problem by construing the Federal collective bargaining statute in such a way as not to override vested employee rights.

The "past practices" approach to the preemption problem would also leave unresolved the problem of the relationship between the Federal bargaining act and other Federal legislation. This problem already exists with respect to private sector employees. In the case of the Fair Labor Standards Act, there seems to be no question that the minimum wage provisions and maximum hour provisions provide a statutory floor below which no collective bargaining agreement can go.[314] Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination, has proven more troublesome in this respect, but the Supreme Court ruled in 1974 that employees retain their rights and remedies under Title VII regardless of the terms of applicable collective bargaining agreements.[315] It would seem that, with respect to Federal legislation applicable generally to both private and public employees, there is adequate doctrine available to the courts to work out an accommodation between the NLRA and other Federal legislation.

There remains, however, the problem of whether the NLRA can be reconciled with current employment practices in the Federal government without excessive disruption of operations or

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312 *Cf.* Note: *Public Sector Grievance Procedures, Due Process, and the Duty of Fair Representation,* 89 HARV. L. REV. 752, 769-792 (1976). The classification of past employees with vested rights, and future employees, leaves out a third possible class — employees who are working for the government but have not yet achieved tenure or other vested rights. This class of employees would not be entitled to realize their expectations to tenure as a matter of Due Process.

313 *See* EDWARDS, THE COURTS AND THE PUBLIC SCHOOLS 467 (1955); REUTTER & HAMILTON, THE LAW OF PUBLIC EDUCATION 447 (1970). Whether tenure and other such benefits are vested rights apparently turns on the particularities of State law. *See* State *ex rel.* Anderson v. Brand, 303 U.S. 95 (1938), Faircloth v. Folmar, 252 Ala. 223, 40 So. 2d 697 (1949); *cf.* Board of Regents v. Roth, 408 U.S. 564 (1972). The absence of continuing litigation over this issue suggests that educators have been mindful of this legal nicety and that state tenure statutes have been drafted accordingly.

314 *Cf.* Walling v. A.H. Belo Corp., 316 U.S. 624, 630 (1942).

315 Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).

employee rights. This issue can be illustrated most clearly by the current Federal Civil Service system of job classifications and pay scales. At present, job grades and pay rates are determined by the Civil Service Commission and the President for the Federal government as a whole.[316] Union representation, on the other hand, is determined by the Department of Labor's Assistant Secretary for Labor-Management Affairs.[317] As a result, issues bargainable under Exec. Order No. 11,491 are resolved between agencies and nearly 3,500 exclusive employee representatives,[318] while job classification and pay rate issues are resolved unilaterally by the government on a nationwide basis. Imposition of the NLRA would therefore require one of two things: either existing bargaining units would have to give way to a small number of government-wide units representing such broad classifications as GS workers,[319] wage board workers,[320] and postal workers, or the government would have to give up nationwide pay scales and job classification schemes as individual unions bargained for changes in existing arrangements in their own agencies.[321]

In light of the bargaining history in the Federal government, a two-tiered system of bargaining might be acceptable to both the Federal government and the unions representing Federal employees.[322] Under such a system, intra-agency bargaining units would continue to exist, and exclusive representatives of the

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316 *See* Exec. Order No. 11,883, GERR 71:1 (1975).

317 *See* text accompanying note 75 *supra*.

318 *See* GERR 71:201.

319 That is, workers currently paid according to the General Schedule or GS scale. These include most secretarial and professional workers whose positions are not classified as confidential or political.

320 That is, workers currently paid according to scales set by the Wage Board. This includes most blue-collar employees of the Federal government.

321 In this respect, it is assumed that the past practices rule would thus be maintained until some unions sought changes. Uniformity would be very difficult to maintain in bargaining with numerous exclusive representatives of intra-agency bargaining units.

322 The conflict between government-wide pay systems and intra-agency bargaining units has been presented as a Federal problem because the national scope of the Federal government, and its employment of more than 2 million employees, present the conflict in its most severe form. It is possible that some of the larger States, such as New York and California, might face similar situations. Therefore, it might be desirable to give State governments the same option to engage in two-tiered bargaining. On the other hand, it should be noted that even some large States, including Pennsylvania, now have a single statewide bargaining unit for employees of the State government. PENN. STAT. ANN., tit. 43, §§ 1101.101-1101.2301 (1975 Supp.).

employees in such units would continue to bargain with the employer agencies over certain items bargainable under the NLRA. Simultaneously, however, a national bargaining unit or units would be established for bargaining over certain matters traditionally determined on a government-wide basis — notably job classifications and pay scales.

The establishment of a two-tiered system of collective bargaining in the Federal government would present a number of technical problems. First, there is the necessity to determine how bargaining would be conducted in the national unit. Although multiparty bargaining might be adopted, with the participation of all unions representing included employees, such bargaining would be extremely complex; as a result, establishment of bilateral bargaining between the government and a single union chosen to represent the employees of the national unit seems more realistic. On the government side, bargaining could be conducted by the Civil Service Commission, by the Assistant Secretary of Labor for Labor-Management Relations, or by some other official designated by statute or executive order. On the union side, there would presumably be a nationwide election of the bargaining representative.

Second, the law must determine how the two-tiered system would come into being. The statute could simply state that there should be such a system, or it could grant the NLRB authority to establish such a system. In the latter case, the statute would need to specify the procedure by which the NLRA would make such a determination, unless the unit determination procedures of NLRA § 9 were to apply. The authors conclude that it would be preferable to give the NLRB authority to establish a two-tiered system upon application of the Assistant Secretary of Labor for Labor-Management Affairs or, in the case of a State government, of the Chief Executive Officer of the State. This would permit States without a history of single-unit bargaining, as well as the Federal government, to use a two-tiered system and would provide rapid establishment of the system in those governments which desired it. It would also permit establishment of a national bargaining unit (or Statewide unit) even though no single union could successfully petition to represent the employees of such a unit; in that case, the government would be able to continue to establish certain terms and conditions of employment unilaterally, subject to the political processes of its executive branch and legislature.

Finally, allocation of bargainable items between the government-wide and intra-agency bargaining units would be necessary. The simplest method would give the NLRB authority to decide which unit should bargain on which items, in light of historical practice and the convenience of the parties, through the normal process of reviewing charges of unfair labor practices under NLRA §§ 8a(5) and 8b(3).[323]

### F. *Constitutionality*

A final element to be considered is the constitutionality of a Federal public employee collective bargaining act. Presumably, the act would be based on the Congress' power to regulate interstate commerce.[324] Challenges might be raised, however, under the tenth and eleventh amendments to the United States Constitution.

#### 1. The Tenth Amendment Challenge

The tenth amendment provides that all powers not granted to the Federal government, nor specifically denied to the States, are reserved to the States or to the people.[325] Opponents of a Federal public labor relations act might therefore argue that the power to regulate the terms and condition of State and local governmental employment is reserved to the States by the tenth amendment.

The United States Supreme Court has considered the power of Congress to legislate with regard to State and local government

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323 Permitting the NLRB to allocate bargainable items through unfair labor practice proceedings presents some possibility that parties would bilaterally agree to exceed their bargaining authority. Such a possibiilty could be checked either by granting other interested persons standing to challenge the course of bargaining in a particular unit before the NLRB, or by giving the NLRB authority to determine the allocation of bargaining items by a rule-making procedure.

324 U.S. CONST., art. I, § 8(3).

325 U.S. CONST., amend. X. The amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

employment on several occasions. In *Maryland v. Wirtz,*[326] the Court examined the 1966 Amendments to the Fair Labor Standards Act (FLSA), which extended the coverage of the FLSA to certain State and local government agencies, including schools and hospitals.[327] The Court found that labor conditions in schools and hospitals can affect interstate commerce, and upheld the FLSA Amendments as a valid exercise of the commerce power in the face of a challenge based on the States' tenth amendment rights to exercise "sovereign state functions."[328] More recently, in *Fry v. United States,*[329] the Court upheld the constitutionality of the Economic Stabilization Act of 1970, which imposed emergency wage controls on all employers, including State and local governments.

The Supreme Court is currently considering another case involving the FLSA. In 1974, the Congress again amended the FLSA, extending its coverage to all State and local government employers.[330] In *National League of Cities v. Dunlop,* a three-judge court of the District of Columbia District dismissed a challenge to the constitutionality of the amendments on the basis of *Maryland v. Wirtz,* but the Supreme Court granted a temporary injunction against implementation of the amendments pending a full hearing.[331] The Supreme Court heard argument on April 16, 1975, and the argument focused on the conflict between the Federal government's commerce clause powers and the States' rights under the tenth amendment.[332] The case was reargued on March 2, 1976.[333] Although the issues involved in a collective bargaining statute are not identical with those presented by the FLSA, the Supreme Court's holding in *National League of Cities* should provide an important indication of its attitude toward a Federal public

326 392 U.S. 183 (1968).

327 Act of Sept. 23, 1966, Pub. L. No. 89-601, § 102(b), 80 Stat. 830, *amending* FLSA § 3(d), 29 U.S.C.A. § 203(d).

328 392 U.S. at 193-99.

329 421 U.S. 542 (1975).

330 Fair Labor Standards Amendment of 1974, Pub. L. No. 93-259, § 6(a), 88 Stat. 58, 64, *amending* FLSA §§ 203(d), 203(e).

331 95 S. Ct. 532, 770, 823 (1975). The suit was originally captioned National League of Cities v. Brennan.

332 *See* 602 GERR B-13 (April 21, 1975).

333 44 U.S.L.W. 3500.

employee labor relations act. *Wirtz* and *Fry* provide strong precedent for upholding both the 1974 FLSA Amendments and a Federal public employee bargaining statute. However, the fact that the Supreme Court agreed to hear *National League of Cities* suggests that the outcome is not certain. Pending the decision in *National League of Cities,* therefore, the constitutionality of Federal regulation of public employee labor relations at the State and local level remains uncertain.

2. The Eleventh Amendment Challenge

The eleventh amendment to the U.S. Constitution provides that the Federal courts shall not have jurisdiction to entertain suits against States by citizens of other States or by aliens.[334] It has been held also to bar suits by a State's own citizens.[335] It can be argued that a Federal public employee bargaining law would violate the eleventh amendment if it provided Federal court jurisdiction for suits against the State governments as employers.

Under the National Labor Relations Act, suits against employers can be brought in Federal court in two circumstances. First, the NLRB can bring suit in a Federal court of appeals to enforce an order which it has issued against the employer in the course of its own administrative proceedings.[336] Second, a union representing employees, and possibly individual employees, can bring suit in Federal District Court to enforce a collective bargaining contract with their employer.[337] If the NLRA pattern were adopted for public employee collective bargaining, a State could be the defendant in either situation.

A suit by the NLRB to enforce an order issued against a State would not be barred by the eleventh amendment because that amendment does not apply to suits by the United States,[338] and

334 U.S. CONST., amend. XI. The amendment states: "The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

335 Edelman v. Jordan, 415 U.S. 651 (1974), Hans v. Louisiana, 134 U.S. 1 (1890).

336 NLRA § 10(e), 29 U.S.C. § 160(e) (1971).

337 Labor Management Relations Act § 301, 29 U.S.C. § 185 (1971).

338 Department of Employment v. United States, 385 U.S. 355, 358 (1966), Monaco v. Mississippi, 292 U.S. 313 (1934); Dunlop v. New Jersey, 522 F.2d 504 (3d Cir. 1975),

because a suit by an officer or agency of the United States is considered to be a suit by the United States.[339] However, a suit by a union or an individual employee to enforce a collective bargaining contract against a State would seem to present eleventh amendment problems.

Although the eleventh amendment appears on its face to bar all Federal court actions against States by individual plaintiffs, the Supreme Court has substantially limited its scope. First, the Court has held that the amendment does not bar an action for injunctive relief which will operate prospectively only, even though such injunctive relief may have direct and substantial effects on the State treasury.[340] Therefore, the amendment operates as a bar only to suits for retrospective, money damages.[341] Second, the Court has held that the Congress has power to override the eleventh amendment and force a State to defend in Federal court if Congress has the substantive power to regulate the State conduct involved, although the Court may insist upon explicit Congressional authorization of Federal actions against States.[342] Finally, the Court has held that States may waive their immunity from suit in Federal court under certain circumstances.[343]

In *Employees of the Department of Public Health & Welfare v. Missouri,*[344] the Supreme Court considered whether a State could assert an eleventh amendment defense to a suit by an individual under the FLSA for back pay and other damages. The Court stated that the Congress had power to override the eleventh amendment because it had substantive power to impose the FLSA on State governments under *Maryland v. Wirtz,* but granted the

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*petition for cert. filed,* 44 U.S.L.W. 3285 (Oct. 6, 1975) (No. 532); Brennan v. Iowa, 494 F.2d 100 (8th Cir. 1974), *cert. denied* 95 S. Ct. 2422 (1975).

339 Dunlop v. New Jersey, 522 F.2d 504 (3d Cir. 1975), Brennan v. Iowa, 494 F.2d 100 (8th Cir. 1974). In both cases a suit by the Secretary of Labor was held to be a suit by the United States.

340 Edelman v. Jordan, 415 U.S. 651 (1974), *Ex parte* Young, 209 U.S. 123 (1908).

341 The Court has held however, that the eleventh amendment bars a suit against individual defendants where the judgment, in fact, will be paid from the state treasury. Edelman v. Jordan, 415 U.S. 651 (1974); Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1945).

342 Parden v. Terminal Ry. of Ala. State Docks Dep't, 377 U.S. 184 (1964). *See* Employees of Dep't of Pub. Health & Welfare v. Missouri, 411 U.S. 279 (1973).

343 Parden v. Terminal Ry. of Ala. State Docks Dep't, 377 U.S. 184 (1964); Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275 (1959).

344 411 U.S. 279 (1973).

State's motion to dismiss under the eleventh amendment on the grounds that Congress had not clearly indicated its intention to remove State immunity. The 1974 Amendments to the FLSA amended section 16(b) of the Act to give explicit authorization for suits by individuals against States in Federal court;[345] this amendment is now being considered by the courts.[345a] Meanwhile, however, the Supreme Court was again faced with the eleventh amendment in *Edelman v. Jordan*.[346] Plaintiff, a welfare recipient, brought suit under 42 U.S.C. § 1983 seeking, among other things, retroactive welfare payments. Although the Supreme Court upheld a finding that the State had illegally withheld payments from the plaintiff, it denied retrospective money damages on the grounds of the State's eleventh amendment immunity. In an opinion by Mr. Justice Rehnquist the Court noted, however, that the case differed from other eleventh amendment cases because there was no threshold finding that the Congress intended to authorize suits against a class of defendants which included States.[347]

Although the question is not clearly resolved, *Employees* and *Edelman* argue that the Supreme Court will eventually uphold section 16(b) of the FLSA as an explicit congressional overriding of the eleventh amendment with respect to substantive matters constitutionally within its control, at least with respect to employees of hospitals and schools covered by the 1966 FLSA Amendments and *Maryland v. Wirtz*. If so, and if the Court upholds the constitutionality of a Federal public employee bargaining statute under the tenth amendment, unions and individuals would be able to maintain suits against States in Federal court, at least if Congress amended the Labor Management Reporting Act § 301[347a] to make that right explicit. Even if the Court allowed States to assert eleventh amendment defenses to suits under such an act, however, the effect would be limited. Unions and individuals could still obtain prospective injunctive relief under *Edelman*.

345 FLSA § 16(b), 29 U.S.C.A. § 216(b) (1976 Supp.), *as amended by* Fair Labor Standards Amendment of 1974, Pub. L. No. 93-259, § 6(d), 88 Stat. 58, 61, 64.

345a The issue is before the Supreme Court in National League of Cities v. Dunlop, 95 S. Ct. 532, 770, 823 (1975).

346 415 U.S. 651 (1974).

347 415 U.S. at 672.

347a 29 U.S.C.A. § 185 (1973).

And they could normally obtain retrospective money damages by suing in State court.[348] However, States might be able to protect themselves from money judgments by denying their own courts jurisdiction over such cases.

### *Conclusion*

Given the labor relations policies embedded in the National Labor Relations Act, and the evidence that the practice under various State public employee collective bargaining acts has not differed greatly in most important respects, the authors conclude that extension of coverage of the NLRA to public employees at complished simply by amending Section 2(2) of the NLRA to the Federal, State and local levels is desirable. This could be ac- eliminate the exemption for the United States and its agencies, the States, and political subdivisions. Such an amendment would place all public employees under the NLRA, subject to the jurisdiction of the NLRB.

The preceding sections of this article suggest, however, that there are significant aspects in the nature and historical treatment of public employment which justify special provisions within the NLRA. The most important provisions are summarized below:

(1) Given the special nature and the historical treatment of police and firemen, there should be a special mechanism for the binding resolution of negotiation impasses involving police and firemen; this could be accomplished by providing binding arbitration in such cases, or by permitting States to impose such arbitration;[349]

(2) Given the administrative burden on the NLRB and the special statutory treatment suggested for public employees, the NLRB should be provided with specialized resources (at the Board level and the staff level) for the resolution of public sector disputes;

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348 Under LMRA § 301, 29 U.S.C.A. § 185 (1973), state and federal courts have concurrent jurisdiction over the enforcement of labor contracts. Both are obliged, however, to apply federal law. Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957).

349 This conclusion presupposes that the coverage of the NLRA will be extended to all public employees. For historical reasons and because of the special nature of military and security personnel, the Congress might desire to exempt these limited groups from NLRA coverage.

(3) Given the practice of the Federal government and the States, and the desirability of maintaining uninterrupted government operations, there should be a special impasse resolution mechanism for public employees; following the common State pattern, this would probably involve required mediation, followed by fact finding (with or without public release of the factfinder's report), followed by voluntary but binding arbitration;

(4) Given the long-standing Federal and State prohibition of strikes by public employees, coupled with experimentation in some States with limited grants of the right to strike, a new subsection should be added to NLRA Section 13 providing that State law shall govern the right to strike of public employees, and that State courts shall retain jurisdiction to enforce such State law; to increase the range of options, States should also be allowed to impose binding arbitration as an alternative to the right to strike;

(5) Given the existence of complex statutory controls on the terms and conditions of public employment at the Federal, State and local levels, the NLRA should be amended to provide explicitly that:

(a) Existing terms and conditions of employment shall be considered "past practices" which, if they fall within the mandatory subjects of bargaining under the NLRA, cannot be unilaterally changed;

(b) Except as provided below, bargaining units and bargaining representatives certified under existing law should be certified automatically under the NLRA;

(c) The duty to bargain under the NLRA shall preempt the right of States and local governments to pass legislation inconsistent with their duty to bargain;

(d) The duty to bargain under the NLRA shall preempt other Federal legislation governing the terms and conditions of public employment unless the Congress intends to override the duty to bargain and set independent standards;

(e) The duty to bargain under the NLRA shall not defeat the vested rights of persons employed by government agencies on the effective date of these amendments;

(6) Given the fact that the Federal government employs over two million civilians and that the Federal government, and some

States, do not have a history of government-wide units, the NLRB should be given authority to provide two-tiered bargaining in the Federal and State governments, and to determine which items shall be bargainable at which tier.

These proposals seek to shift the responsibility for administering a system of public employee collective bargaining from a myriad of Federal, State and local authorities to a single Federal agency with a minimum of disruption of existing employment practices. In seeking to prevent disruption, these proposals leave unbalanced an inequality inherent in the law of most States: if the parties are unable to reach agreement after proceeding through all the steps for impasse resolution provided by statute or otherwise, the government employer ultimately has the right to set the terms and conditions of employment, and the employees are barred from challenging that unilateral determination through the ultimate employee weapon, the strike. The very process of bargaining has a therapeutic value, and most disputes will be resolved before total impasse; yet, the evidence strongly suggests that where impasse does occur the result is likely to be a strike.

A first approach to resolution of this dilemma is to look carefully at the effect of a duty to bargain on the government employer. To the extent that the duty to bargain covers major items such as pay scales and staffing patterns, it directly impinges on the government's, and particularly the legislature's, right to control the operation of public affairs and the expenditure of public funds. States have approached this conflict between the duty to bargain and the duty of the legislature to control the government in a variety of ways.[350] Some have bound the legislature to the bargain struck by its authorized bargaining agent[351] or to the contract imposed by an arbitrator appointed according to the State's mandatory arbitration procedure.[352] Others have restricted the area of bargaining to prevent conflict with inconsistent State law, or have required collective bargaining agreements to be ratified by the legislature before becoming effective.[353] The intervention

350 *See* text accompanying notes 294-301 *supra*.
351 *See* note 297 *supra*.
352 MASS. GEN. LAWS ANN. ch. 150E § 9 (1975 Supp.).
353 *See* notes 298 and 299 *supra*.

of Federal law pose an additional dilemma, since the Federal law, by imposing a duty to bargain, forces the State legislature to cede some of its governmental authority.

Both as a matter of policy, and to avoid constitutional infirmities, the authors conclude that the Federal legislation should adopt the position that no collective bargaining agreement could become effective until ratified by the responsible legislature.[354] This need not mean, however, that every collective bargaining agreement would have to be submitted, in toto, to the legislature. As a matter of State law, negotiators might be considered to have delegated authority to bind the legislature with respect to particular matters. Furthermore, adoption of a budget consistent with a collective bargaining agreement might be considered sufficient ratification of the agreement. Nonetheless, the States would have final authority to prescribe the ratification procedure.

Adoption of a ratification requirement would exacerbate the conflict between the government's right unilaterally to terminate a negotiating impasse and the employees' inability to apply pressure by economic reprisals. This is exactly the situation which exists in many States; the cost of ignoring the conflict appears to be an increasing number of illegal strikes. One way to relieve this tension is to permit at least a limited right to strike, and several States have moved in this direction. Another is to impose a binding dispute resolution system such as mandatory, binding arbitration, and several States have moved in this direction, at least with respect to police, firemen, and other special categories of public employees. In deference to existing practice, this article concludes that the Federal government should not impose one or the other alternative upon the States, but should allow the States to continue to experiment with limited strike rights and binding arbitration. In the long run, however, Federal law may have to come to grips with the problem, if only because of the two million Federal employees.

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354 By "responsible legislature" we refer to the State legislature, city council, school board or other governmental body with the power to appropriate the funds needed to implement the collective bargaining agreement.

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# NOTES

## THE RECENT REVISION OF THE FEDERAL MUNICIPAL BANKRUPTCY STATUTE: A POTENTIAL REPRIEVE FOR INSOLVENT CITIES?

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*With the financial plight of New York City overshadowing the deliberations, Congress recently passed a revision of the Municipal Bankruptcy legislation. The new Act seeks to make the bankruptcy machinery available to even the largest cities. After setting out a description of the old Chapter IX, Mr. Ellison provides a detailed summary of the new procedures, and then proceeds to analyze them with regard to old Chapter IX and the financial plight of many of our largest cities.*

### *Introduction*

The recent financial crisis in New York City aroused widespread interest in and concern over the potential insolvency of many local units of government. With New York near default and other cities experiencing budget deficits and payment problems, a comprehensive national response to the problem of local governments unable to meet their financial obligations was needed.

Two particular aspects of the municipal bankruptcy problem make it unique. First, where municipal insolvency is involved, the nature of the judicial process itself is inherently limited. Normal bankruptcy proceedings consist of collecting all of the debtor's assets and arranging for their distribution among its creditors. Where the debtor is a governmental entity, however, priority

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must be given to the continued operation of that entity and maintenance of the public services it is charged with performing.[1]

A municipality's first responsibility is to provide for and maintain its necessary governmental functions, making "its duty of payment of other indebtedness . . . subordinate to its duty first to apply its income to the payment of governmental expenses . . . ."[2] Some state courts have gone so far as to declare that municipal assets constitute a trust fund for the accomplishment of municipal functions and may not be subject to execution or garnishment because of the disruptive effect this would have on governmental operations.[3] In practical terms, this prevents the collection and

1 The Committee that reported the second Municipal Bankruptcy Act explained further:

> This bill is intended to remove an apparent impasse, and the committee believes that it will be welcomed by debtors and creditors. When a municipality or a taxing district is insolvent, the creditors cannot foreclose their mortgage, or cause public property to be sold and the proceeds distributed. They must look to the exercise of the taxing power over a period of years, or, in cooperation with the debtor district, must grant extensions. This often involves reorganization of part or all, of the debt structure, and hinges upon agreement by debtor and creditor, or on the existence of a Federal statute which may force recalcitrant minority creditors into agreement. Otherwise the creditors of a municipality or a taxing district must resort to mandamus proceedings, which have not been adequate remedies. In fact, the trend of recent decisions has been to deny the writ of mandamus wherever sound judicial discretion justifies denial. Hence, creditors have been unable to obtain unjust advantage, but the problem of the municipality or taxing district has remained unsolved. *Christmas* v. *City of Asbury Park* (78 Fed. (2d) 1003). For an embarrassed debtor without the remedy afforded by this bill, the only effective recourse is the repeal of its charter by the State legislature, in which event creditors are generally left without any remedy. *Meriwether v. Garrett* (102 U.S. 472, 501).
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> There is no hope for relief through statutes enacted by the States, because the Constitution forbids the passing of State laws impairing the obligations of existing contracts. Therefore, relief must come from Congress, if at all. . . .
>
> . . . [B]ankruptcy statutes were . . . intended to provide methods whereby insolvent and failing debtors could be relieved of overwhelming burdens and thus be enabled to make a new start under favorable conditions. . . .

H.R. REP. No. 517, 75th Cong., 1st Sess. 3-4 (1937), as quoted in H.R. REP. No. 94-686, 94th Cong., 1st Sess. 4 (1975).

2 64 C.J.S. *Municipal Corporations* § 1890 (1950). *See* Borough of Fort Lee v. United States *ex rel.* Barker, 104 F.2d 275 (3rd Cir. 1939), *petition for cert. dismissed,* 308 U.S. 629 (1939); Town of Mt. Vernon v. General Electric Supply Corp., 289 Ky. 355, 158 S.W.2d 649 (1942); White v. City of Decatur, 119 Ala. 476, 23 So. 999 (1898).

3 *See* City of Roosevelt Park v. Township of Norton, 330 Mich. 270, 47 N.W.2d 605 (1951); Frederick Starr Contracting Co. v. Gandia, 247 App. Div. 906, 287

sale of the local government's assets, and limits creditors to obtaining forced payment solely from the debtor's income flow.

A second set of problems arises from federal involvement in municipal bankruptcy. Although Congress has the express power to make "uniform laws on the subject of bankruptcy throughout the United States,"[4] the Supreme Court has held that where such laws apply to state or local governments, they cannot infringe on state sovereignty.[5] While the concept of state sovereignty has been somewhat eroded in recent years,[6] it is unlikely that the federal government could subject state subdivisions to involuntary bankruptcy proceedings, and, on both constitutional and policy grounds, the federal power to exercise active control over an insolvent city is suspect.[7]

The federal government's previous attempt to deal with the problem was codified in Chapter IX of the Bankruptcy Act.[8] Originally adopted as a temporary stop-gap measure, it has been used sparingly, mainly by small special-district governmental bodies.[9] The provisions of Chapter IX have proven to be inadequate where major governmental bodies or large amounts of obligations were involved, prompting a recent flood of proposals

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N.Y.S. 149, *aff'd per curiam* 271 N.Y. 647, 3 N.E.2d 465 (1936) (creditor can not get mandamus to pay in absence of showing that the treasurer had sufficient money to pay the judgment that was not otherwise specifically appropriated); Daley v. City of Melvindale, 271 Mich. 431, 260 N.W. 898 (1935) (bank cannot set-off deposited funds of municipality against bonds). *See also* Comment, *Administration of Municipal Credit,* 43 YALE L.J. 924, 962 (1934); Stason, *State Administrative Supervision of Municipal Indebtedness,* 30 MICH. L. REV. 833 (1932).

4 U.S. CONST., art. I, § 8.

5 Ashton v. Cameron County Water Improvement Dist. No. One, 298 U.S. 513 (1936).

6 *See* note 129 *infra.*

7 *See* United States v. Bekins, 304 U.S. 27 (1938); Ashton v. Cameron County Water Improvement Dist. No. One, 298 U.S. 513 (1936); *In re* South Beardstown Drainage & Levee Dist., 125 F.2d 13 (7th Cir. 1941); Mission Independent School Dist. v. Texas, 116 F.2d 175 (5th Cir. 1940), *cert. denied,* 313 U.S. 562 (1941). *See also* Patterson, *Municipal Debt Adjustment Under the Bankruptcy Act,* 90 U. PA. L. REV. 520 (1942).

8 Act of Aug. 16, 1937, ch. 657, §§ 81-84, 50 Stat. 653, *as amended* Act of June 22, 1938, ch. 575, § 3, 52 Stat. 939 [hereinafter cited as Act of Aug. 16].

9 Chapter IX has been resorted to 271 times since 1940, with 192 petitions being filed during the period 1940-1943 and only 12 since 1960. *Hearings on H.R. 31 and H.R. 32 before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary,* Part I, 94th Cong., 1st Sess. 36 (material submitted by Mr. Berkeley Wright, Chief of the Bankruptcy Division of the Administrative Office of the U.S. Courts, on May 6, 1975).

from various sources to supplement or replace Chapter IX.[10] The momentum behind these efforts resulted in the recent enactment of a total revision of Chapter IX.[11]

After setting forth the basic structure of the old Chapter IX, this article presents a detailed description of the major elements of the new law and analyzes them in terms of both the procedures they replace and the problems they seek to deal with.

## I. Description of the Previous Chapter IX

The previous Chapter IX was added to the Bankruptcy Act in 1937.[12] It replaced the original provisions relating to municipal bankruptcy[13] that were declared unconstitutional by the Supreme Court in *Ashton v. Cameron County Water Improvement Dist. No. One*[14] which held them to be an infringement on state sovereignty beyond the allowable limits of the bankruptcy provision of the Constitution.[15] The constitutionality of the new provisions was upheld in *United States v. Bekins*.[16] Although the legislation

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10 These include proposals from the Commission on Bankruptcy Laws of the United States, H.R. 31 and S. 235, 94th Cong., 1st Sess. (1975), the National Conference of Judges, H.R. 32 and S. 236, 94th Cong., 1st Sess. (1975), a Ford Administration bill, H.R. Doc. No. 94-289, 94th Cong., 1st Sess. (1975), and the two Congressional proposals that formed the basis for the ultimate legislation — H.R. Rep. No. 94-686, 94th Cong., 1st Sess. (1975) to accompany H.R. 10624 and S. Rep. No. 94-458, 94th Cong., 1st Sess. (1975) to accompany S.2597.

11 Pub. L. No. 94-260, §§ 81-98, (Apr. 8, 1976).

12 Chapter IX was adopted as part of the Act of August 16, 1937, ch. 657, 50 Stat. 653. It was originally numbered Chapter X, but was renumbered by Additional Provisions of the Act of June 22, 1938, ch. 575, § 3(a), 52 Stat. 939.

13 Act of May 24, 1934, ch. 345, 48 Stat. 798, *as amended* Acts of Apr. 10, 1936, ch. 186, 49 Stat. 1198, and Apr. 11, 1936, ch. 210, 49 Stat. 1203.

14 298 U.S. 513 (1936).

15 U.S. Const., art. I, § 8, cl. 4.

16 304 U.S. 27 (1938). The *Bekins* Court, quoting from the report of the Committee on the Judiciary of the House of Representatives (H.R. Rep. No. 517, 75th Cong., 1st Sess. (1937)), noted and endorsed the express efforts of Congress to avoid the constitutional problems of *Ashton*:

> The bill here recommended for passage expressly avoids any restriction on the powers of the States or their arms of government in the exercise of their sovereign rights and duties. No interference with the fiscal or governmental affairs of a political subdivision is permitted. The taxing agency itself is the only instrumentality which can seek the benefits of the proposed legislation. No involuntary proceedings are allowed, and no control or jurisdiction over that property and those revenues of the petitioning agency necessary for essential governmental purposes is conferred by the bill . . . .

304 U.S. at 51.

was originally adopted as an emergency measure for the relief of financially troubled state subdivisions, with a proposed life span of only two years, the Chapter was subsequently extended twice,[17] and in 1946 was made a permanent part of the Bankruptcy Act.[18]

Chapter IX sets out in relatively brief form a system by which a municipality, agency, or instrumentality can voluntarily submit itself to a bankruptcy proceeding.[19] The proceeding is initiated by the municipality through the filing of a petition with the court,[20] asking for judicial intervention and confirmation of a proposed plan of composition.[21] The petition must state that:[22]

(1) The body bringing the petition is a municipality or agency as defined in § 81 of the Act;
(2) The petitioner or the major portion thereof is in the territorial jurisdiction of the presiding court;
(3) The governing body is insolvent or unable to meet its current debts and financial obligations;
(4) The petitioner desires to implement the proposed plan of composition ;
(5) The plan has already been accepted by creditors owning at least 51% of the securities and interests affected by the plan, excluding securities owned or controlled by the petitioner;[23] and

17 Act of June 28, 1940, ch. 438, 54 Stat. 667, and Act of June 22, 1942, ch. 434, 56 Stat. 377.

18 Act of July 1, 1946, ch. 532, 60 Stat. 409 [hereinafter cited as Act of July 1].

19 For a thorough treatment of the content and history *see Hearings on H.R. 31 and H.R. 32 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary,* Part II, 94th Cong., 1st Sess. (hereinafter referred to as *Hearings on H.R. 31 and H.R. 32,* Part II) (statement of Professor George H. Hemple on October 6, 1975).

20 Act of Aug. 16, § 83(a), *as amended* Act of July 1, § 83(a).

21 *Id.* A composition in bankruptcy is an arrangement between an insolvent and his creditors, whereby the creditors accept an amount equal to or less than the whole of their claims, for the sake of some payment at a future time, and the debtor is allowed to retain his assets, upon condition of his making the payments agreed upon.

22 *Id.*

23 Subsection (j) of § 83 was added by the Act of June 22, 1938, ch. 575, § 3(b), 52 Stat. 940. It provided that if a plan had already been accepted and applied to some creditors prior to the filing of the petition, those creditors would be considered as acceptors of the petitioner's plan in calculating the percentage approval for the plan. This was a legislative reversal of *In re* City of West Palm Beach, 96 F.2d 85 (5th Cir. 1938), which held that such creditors could not be considered in the percentage calculation.

(6) The petitioner has authority under state and local law to take actions necessary to implement the plan.[24]

The petition must also include a list of creditors, with addresses if available.[25]

After filing, the judge must either approve the petition as properly filed or dismiss it.[26] This decision is to be based solely on a finding as to whether the statutory requirements of the Chapter have been met, with no consideration given to the merits of the proposal or its effects upon creditors. If the petition is approved, the resources of the debtor are placed within the exclusive jurisdiction of the bankruptcy court, which may enjoin or stay actions against the petitioner based on the debts involved in the plan until the Chapter IX proceeding is terminated.[27] The judge also has the option of putting the plan into temporary operation during the course of the litigation.[28]

Upon approval, an order is entered setting a time and place for a hearing. Creditors named in the petition are sent notice of such and are given an opportunity to file answers to the petition challenging any of the allegations made within it.[29] A hearing on the points at issue is then held, with a special master assisting the judge if he so desires.[30] Before the plan is confirmed it may be altered or modified, subject to the judge's approval, although creditors who had previously supported the plan may withdraw their support after modification.[31]

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24 Although there was no requirement for state approval of its subdivision's participation in this scheme, the phrase "authorized by law" in § 83(c) has been interpreted to refer to state law, thus satisfying the requirement of state approval by assuming implicit approval through the State's grants of power. United States v. Bekins, 304 U.S. 27, 49 (1938). Even if there is no express grant of the necessary powers by a state or express state consent, the scheme is probably still constitutional. *See In re* South Beardstown Drainage & Levee Dist., 125 F.2d 13 (7th Cir. 1941); *In re* Summer Lake Irr. Dist., 33 F. Supp. 504 (D. Ore. 1940); Clark, *Procedure Under Act for Composition of Indebtedness of Local Taxing Agencies,* 20 ORE L. REV. 316 (1941). *But cf.* West Coast Life Ins. Co. v. Merced Irr. Dist., 114 F.2d 654 (9th Cir. 1940), *cert. denied,* 311 U.S. 718 (1941); Peoples State Bank v. Imperial Irr. Dist., 15 Cal. 2d 397, 101 P.2d 466 (1940).

25 Act of July 1, § 83(a).

26 *Id.*

27 Act of July 1, § 83(c).

28 *Id.*

29 Act of July 1, § 83(b).

30 *Id.*

31 Act of July 1, § 83(c). The legislation does not deal with the question of whether the plan can be altered after confirmation. By specifically allowing

When the plan is accepted by creditors holding at least two-thirds of the aggregate amount of claims of all classes affected, it may be confirmed by the court.[32] The judge shall confirm the plan if he is satisfied that it meets certain standards.[33] If the judge is not satisfied that all of these conditions are met, he is required to dismiss the proceedings.[34] To aid the court in its determination, it has been suggested that each plan contain such standard information as amount and kind of outstanding obligations, provisions modifying the rights of creditors, provisions for issuance of new securities to replace outstanding obligations, and provisions for carrying the plan into effect.[35]

Once an interlocutory decree confirming the plan is entered, it is binding on all creditors affected by it if within a specified time all the petitioner's money and securities to be distributed under the plan are deposited with the court or the appointed disbursing agent.[36] After the interlocutory decree has become binding, the court enters a final decree.[37]

Although the House Report stated that "each proceeding is

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changes before confirmation, § 83(c) can be read as implicitly prohibiting post-confirmation changes. The Court of Appeals in American United Life Ins. Co. v. Haines City, 117 F.2d 574 (5th Cir. 1941), however, refused to draw such a rigid implication:

> We are unwilling to put a plan into such a strait jacket. It may be that some matter has been overlooked or has subsequently arisen, which makes the plan unworkable and complicated, but which could easily and justly be remedied. Surprise or mistake may affect it. There ought to be some leeway for such adjustments.

117 F.2d at 576. This is the better view.

32 Act of July 1, § 83(d).

33 Act of July 1, § 83(e) provides:

> At the conclusion of the hearing the judge shall make written findings of fact and his conclusions of law thereon, and shall enter an interlocutory decree confirming the plan if satisfied that (1) it is fair, equitable, and for the best interests of the creditors and does not discriminate unfairly in favor of any creditor or class of creditors; (2) complies with the provisions of this chapter; (3) has been accepted and approved as required by the provisions of subdivision (d) of this section; (4) all amounts to be paid by the petitioner for services or expenses incident to the composition have been fully disclosed and are reasonable; (5) the offer of the plan and its acceptance are in good faith; and (6) the petitioner is authorized by law to take all action necessary to be taken by it to carry out the plan. If not so satisfied, the judge shall enter an order dismissing the proceeding.

*Id.*

34 *Id.*

35 5 W. COLLIER, BANKRUPTCY ¶ 81.11, at 1574 (14th ed. 1976).

36 Act of July 1, § 83(f).

37 *Id.*

subject to . . . appeals from interlocutory and final decrees,"[38] the Chapter contains only two express appeal provisions. It allows appeals concerning the determination of attorneys' fees or expenses assessed against the petitioner[39] to be taken to a U.S. Circuit Court of Appeals, independent of other appeals, and provides for appeals by either party of the interlocutory decree confirming the plan "as in equity cases."[40] Though other judicial determinations are not governed by express appeal provisions, the courts have applied the provisions of the Bankruptcy Act that deal with appeals in general.[41]

## II. Description of the New Chapter IX

While the old Chapter IX had its moments of utility, it proved to be an inadequate vehicle for the financial reorganization of troubled municipalities, especially where large and diversely-held debts were outstanding. Many of the provisions of the Chapter, including the requirement that the plan be approved by 51 percent of the creditors prior to court intervention, together with the lack of provisions for securing financing during the reorganization period, made it essential that Congress revise the legislation governing municipal bankruptcy to more effectively meet the present-day needs and problems of local governments.

The legislation recently adopted by Congress represents a substantial alteration of Chapter IX. Although it retains the basic tenets of voluntary municipal participation and limited federal court control over the governmental entity and its relationship with the state, the bill greatly reduces the practical and administrative problems associated with the former statute and significantly expands the powers of both the court and the petitioner.

The new Chapter IX begins with a preamble stating the basic purposes and constitutional bases for the Act.[42] It cites the impracticability of existing federal bankruptcy remedies, and points to

38 H.R. Rep. No. 517, 75th Cong., 1st Sess., 1 (1937), quoted in United States v. Bekins, 304 U.S. 27, 50 (1938).

39 Act of July 1, § 83(b).

40 Act of July 1, § 83(e).

41 11 U.S.C.A. §§ 46, 47 (1953). *See* Du Pont v. Okeechobee County, 135 F.2d 577 (5th Cir. 1943).

42 Pub. L. No. 94-260, Preamble (Apr. 8, 1976).

the bankruptcy and commerce clauses of the Constitution as the sources of federal power to legislate, and be preemptive, in the area of municipal bankruptcy.

The body of the Act provides that any state's political subdivision, public agency, or instrumentality which is insolvent or unable to meet its debts as they mature may petition for judicial intervention in an attempt to effect a plan of debt adjustment if it "is generally authorized to file a petition under this Chapter by the legislature, or by a governmental officer or organization empowered by State law to authorize filing of a petition . . . ."[43] Such an entity is not entitled to relief, however, unless:

(1) It has successfully negotiated a plan of adjustment with creditors holding a majority in amount of the claims of each class of claims affected by the plan;
(2) It has negotiated in good faith with its creditors and failed to get such an agreement;
(3) Such negotiation is impractical; or
(4) It has a reasonable fear that a creditor may attempt to obtain a preference.[44]

The court in which the petition is filed is given certain new and important powers concurrent with its exclusive jurisdiction over the petitioner and its property.[45] It may permit the petitioner to reject executory contracts[46] or unexpired leases, and to issue secured certificates of indebtedness that have payment priority over existing obligations.[47] The court may also exercise any other powers that are not inconsistent with the Act.[48]

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43 There are a number of court cases declaring that the power of a municipality to reach a compromise over claims against it is inherent in the character of the municipality. *See* Edelstein v. City of Asbury Park, 51 N.J. Super. 368, 143 A.2d 860 (1958); People *ex rel.* Ammann v. Dipper, 392 Ill. 38, 63 N.E.2d 870 (1945); George A. Fuller Co. v. Commonwealth, 303 Mass. 216, 21 N.E.2d 529 (1939); City of Mt. Vernon v. Mt. Vernon Trust Co., 270 N.Y. 400, 1 N.E.2d 825 (1936); Citizen's Nat. Bank's Trustee v. Loyall, 262 Ky. 39, 88 S.W.2d 952 (1935).

Several states have expressly authorized their political subdivisions to participate in composition procedures and plans. *See, e.g.*, 8 MICH. COMPILED LAWS ANNOTATED § 141.192 (West 1967); ANNOTATED CALIF. GOVERNMENT CODE §§ 53760-61 (West 1966).

44 Pub. L. No. 94-260, § 84 (Apr. 8, 1976).

45 *Id.* § 82(a).

46 *Id.* § 82(b)(1).

47 *Id.* § 82(b)(2).

48 *Id.* § 82(b)(3).

The Act does contain some definite limits on the powers of the court. The court cannot, without the petitioner's consent, interfere with any of the political or governmental powers of the petitioner, any of its property or revenue, or the petitioner's "use or enjoyment of any income-producing property."[49] The Act also expressly states that none of its provisions shall be construed to limit or impair the power of a state to control its political subdivisions in the exercise of their governmental functions.[50]

The petition must, "insofar as practical," be accompanied by a list containing the name, address, and claim description of each known creditor.[51] The petitioner, or such other person as the court may designate, must provide each creditor on the list, the relevant state, and the Securities and Exchange Commission with notice of the filing of the petition.[52] The court can dismiss the petition if it determines that the petition is not filed in good faith or does not meet the requirements of the Act.[53] The court may not delay a proceeding because of an appeal over jurisdiction, nor will the reversal of a finding of jurisdiction affect the validity of certificates of indebtedness issued under the Act.[54]

Once a petition is filed, it operates as an automatic stay of the commencement or continuance of any other proceedings against the petitioner,[55] its property, or its officers which seek to enforce a claim against the petitioner. The petition also acts as a stay of any set-off or counter-claim relating to a contract, debt, or obligation of the petitioner.[56] Unless lifted by the court, the stay remains in effect until the case is closed or dismissed.[57] Other proceedings may be stayed if the court finds it appropriate, but only after notice is given to the persons affected by the order.[58]

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49 *Id.* § 82(c).

50 *Id.* § 83.

51 *Id.* § 85(b). This subsection provides that if the identification of any creditor is impractical, the petitioner must state the reason and the character of the claim involved.

52 *Id.* § 85(d). All expenses for such notice are to be paid by the petitioner unless the court determines otherwise.

53 *Id.* § 85(a). Any party in interest can file a complaint objecting to the filing of a petition not later than 15 days after the publication of notice.

54 *Id.* § 85(a).

55 *Id.* § 85(e)(1).

56 *Id.*

57 *Id.* § 85(e)(2).

58 *Id.* § 85(e)(4).

The Act makes unenforceable any contractual provisions that terminate a contract because of the petitioner's insolvency or commencement of proceedings under the Act if previous defaults by the petitioner are cured and adequate future performance is assured.[59] Any set-offs effected within four months prior to the filing of the petition are voidable and recoverable by the petitioner.[60]

The Act allows full choice in representation before the court; creditors may act in their own behalf, by attorney, or by an authorized agent or committee.[61] Persons other than governmental entities representing more than one creditor must file with the court a list of the creditors and claims they represent, a copy of the contracts between themselves and the creditors, and a disclosure of the compensation they are to receive; this compensation is subject to modification and approval by the court.[62] If the court finds that any person is receiving compensation from both the petitioner and a creditor, it must dismiss the petition and charge all costs to that person or to the petitioner unless the plan is modified to eliminate the possibility of such multiple compensation.[63]

The court may refer any special issue of fact to a bankruptcy referee if it does not have the time to take testimony directly and resolution of the issue is necessary for the adjudication of the case.[64] The court cannot dispose of the full case by reference, and the Act specifically states that a "reference to a referee in bankruptcy shall be the exception and not the rule."[65] The court also has the power to order a joint administration of cases where petitions by related entities are pending before it.[66]

All claims on the lists filed by the petitioner are deemed allowed if not disputed, contingent, or unliquidated, and no party in

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59 *Id.* § 85(f).
60 *Id.* § 85(g).
61 *Id.* § 86(a).
62 *Id.*
63 *Id.* § 86(b). The court is to allow reasonable compensation for expenses incurred in connection with the case, but an appeal of any order providing for compensation may be taken to the U.S. Court of Appeals for summary determination independent of any other appeal.
64 *Id.* § 87(a).
65 *Id.*
66 *Id.* § 87(c).

interest objects or files proof of a contrary claim.[67] Proof of other claims must be filed on the date set by the court, or if no such date is set, prior to the entry of the order confirming the plan.[68] Those whose claims are listed as disputed will be so informed, and asked to file proof of their claim. If there is no objection by petitioner to the claim it is deemed allowed; if there is objection, the court shall hear and determine such.[69] Except for the creation of a special class for unsecured claims under $250, the court must designate classes of creditors "whose claims are of substantially similar character and the members of which enjoy substantially similar rights . . . ."[70]

The Act establishes three categories that have priority over any distributions to creditors under a plan:

(1) Administrative expenses incurred subsequent to the filing of the petition;
(2) Debts for services or material actually provided within three months prior to the filing of the petition; and
(3) Debts owed to any other person entitled to priority under any other federal law.[71]

A plan for the adjustment of the petitioner's debts must be filed with the petition or at such later time as the court prescribes.[72] The plan may include provisions modifying the rights of creditors and any other provisions not inconsistent with the Act that the parties desire.[73] At any time prior to confirmation, a modification of the plan may be filed by the petitioner or a creditor who has secured in writing the petitioner's consent to propose a specified modification.[74] Unless the court finds it necessary to select a different time, creditors have 90 days after the plan or modification is filed to accept or reject it.[75] The petitioner, or another person designated by the court, must send a copy or sum-

67 *Id.* § 88(a).
68 *Id.*
69 *Id.*
70 *Id.* § 88(b). Any controversy over classification is to be summarily determined by the court after a hearing.
71 *Id.* § 89.
72 *Id.* § 90(a).
73 *Id.* § 91.
74 *Id.* § 90(a).
75 *Id.* § 90(b).

mary analysis of the plan to each creditor and special taxpayer[76] affected by it, and any other parties in interest that the court designates.[77] Any controversy as to whether a creditor or special taxpayer is affected by the plan is to be resolved by the court.[78]

Except as otherwise provided, "the plan may be confirmed only if it has been accepted in writing by or on behalf of creditors[79] holding at least two-thirds in amount of the claims of each class and 50 percent in number of the claims of each class allowed under § 88."[80] These requirements are applied only to the pool of creditors who file an acceptance or rejection within the time fixed by the court;[81] also excluded from the pool are the claims held by the petitioner[82] and those creditors whose claims are not affected by the plan or who are to be paid in full with cash.[83] Any modification of the plan is deemed accepted if the creditor has previously accepted the plan and either the change does not materially and adversely affect his interest or he does not file a written rejection within the time stated in the notice of modification.[84]

The court must hold a hearing on confirmation of the plan reasonably soon after the time established for acceptance or rejection.[85] All creditors and special taxpayers affected by the plan, along with the SEC, are to receive notice of the hearing, and may

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76 Section 81(10) defines 'special tax payer' as "... record holder or holder of title, legal or equitable, to real estate against which has been levied a special assessment or special tax the proceeds of which are the sole source of payment of obligations issued by the petitioner to defray the costs of local improvements"; and defines 'special tax payer affected by the plan' as a ". . . special tax payer with respect to whose real estate the plan proposes to increase the proportion of special assessments or special taxes referred to in paragraph (10) of this section assessed against that real estate."

77 Pub. L. No. 94-260, § 80(b) (Apr. 8, 1976). Any person receiving a summary must be sent a full copy of the plan or modification upon request.

78 *Id.* § 90(b).

79 Sec. 92(a) provides that all creditors and security holders who are on the list filed under § 85(b), who have filed a proof of claim where such claim is not then disputed, contingent or unliquidated, or who are security holders of record as of the date of the transmittal of information under § 90(b) may accept or reject the plan or modification within the specified time unless the claim has been disallowed or the creditor is not affected by the plan.

80 Pub. L. No. 94-260, § 92(b) (Apr. 8, 1976).

81 *Id.* § 92(c).

82 *Id.*

83 *Id.* § 92(d).

84 *Id.* § 92(e).

85 *Id.* § 94(a).

file an objection to confirmation any time prior to 10 days before the hearing, or within such other time as the court prescribes.[86] The SEC, however, cannot appeal a decision confirming the plan.[87] Labor unions representing affected employees also have the right to appear before the court.[88] The court must confirm the plan if it finds that it is fair, equitable, and feasible, and meets the other requirements set out in the Act.[89] The Act provides for permissive court dismissal,[90] and for mandatory dismissal if confirmation is refused by the creditors.[91]

Once confirmed, the provisions of the plan are binding on the petitioner and all creditors who had timely notice or actual knowledge of the petition or plan.[92] After confirmation the petitioner is freed of all claims against it which are provided for in the plan (except as noted below), once the money, securities, and other consideration to be distributed have been deposited with the disbursing agent appointed by the court. The court must also determine that the security deposited will constitute, upon distribution, a valid legal obligation of the petitioner, and that any provision made to pay or secure payment of such obligation is valid.[93] The petitioner is not discharged from any claims not covered by the plan or the order confirming it, nor does the plan affect the

86 *Id.* § 93.
87 *Id.*
88 *Id.* § 94(a).
89 *Id.* § 94(b). This section states:

(b) CONDITIONS FOR CONFIRMATION. —
The court shall confirm the plan if —

(1) the plan is fair and equitable and feasible and does not discriminate unfairly in favor of any creditor or class of creditors;

(2) the plan complies with the provisions of this chapter;

(3) the plan has been accepted as required by section 92;

(4) all amounts to be paid by the petitioner or by any person, not including other governmental entities, for services and expenses in the case or incident to the plan have been fully disclosed and are reasonable;

(5) the offer of the plan and its acceptance are in good faith; and

(6) the petitioner is not prohibited by law from taking any action necessary to be taken by it to carry out the plan.

90 *Id.*, § 98(a). The court may dismiss the case for want of prosecution, if no plan is proposed within the time fixed by the court, if no plan is accepted within the time fixed by the court, or, where the court retains jurisdiction after confirmation, the debtor defaults on any terms of the plan.
91 *Id.* § 98(b).
92 *Id.* § 95(a).
93 *Id.* § 95(b)(1).

claims of those creditors who, prior to confirmation, had neither timely notice nor actual knowledge of the petition or plan.[94]

With regard to post-confirmation matters, the Act provides that the time allowed for deposit of securities by the petitioner under the plan shall be fixed by the court prior to or promptly after confirmation.[95] It is the petitioner's duty to take all actions necessary to carry out the plan;[96] distribution is made in accordance with the plan and may be made when the order confirming the plan becomes final.[97] To participate in the distribution, all persons must surrender securities or perform activities as directed by the plan within five years after the order of confirmation.[98] Finally, the court may retain jurisdiction over the case for as long as it determines to be necessary to the successful execution of the plan.[99]

The Act concludes with a two-prong separability provision. First, it states that if any provision is held invalid, the remainder of the Chapter shall not be affected.[100] Second, it provides that if the Act is judicially determined to be unconstitutional, the previous Chapter IX provisions will be automatically revived and given full force and effect with respect to cases filed thereafter.[101]

## III. Critique of the New Chapter IX

The new Chapter IX represents a substantial and positive refinement of the debt-restructuring and composition procedures available to insolvent municipalities and state subdivisions. It attempts to make the process more practical and accessible to all such entities, while simultaneously safeguarding the rights of creditors and protecting the credit position of the insolvent. It is against this relatively limited set of objectives that the legislation must be analyzed.

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94 *Id.* § 95(b)(2).
95 *Id.* § 96(a).
96 *Id.* § 96(b).
97 *Id.* § 96(c).
98 *Id.* § 96(d).
99 *Id.* § 96(e).
100 *Id.* § 2.
101 *Id.* § 3.

### A. *Administrative Responsibilities of the Petitioner*

The revision incorporates several measures aimed directly at easing the practical and administrative burdens facing the petitioner in a bankruptcy procedure. By far the most important of these is the removal of the requirement that the plan be approved by 51 percent of the creditors prior to the initial petitioning.[102] This provision made the old Chapter IX procedure virtually inaccessible to most cities. The change is consistent with the experience under private bankruptcy actions, which seems to demonstrate that no viable plan can be formulated until well after the filing of the petition. As a prerequisite for filing, the new Act does require the petitioner to attempt good faith negotiation with its creditors if practical; this requirement may be waived if the petitioner has a reasonable fear that a creditor may attempt to obtain a preference.[103] Even this reduced requirement is unwise, and was inserted in the final legislation to pacify bond counsel lobbyists who sought to restrict eligibility under the new procedure. At the least, Congress should have given the courts discretion to allow a petition to be presented where it finds that the circumstances warrant overlooking these eligibility restrictions.

It is during the initial phase of plan development and negotiation that the petitioner is most in need of the umbrella protection and supervision of the judiciary. As Professor Vernon Countryman has commented, "Only after the debtor has committed itself to a bankruptcy adjustment and creditor actions have been stayed is it possible for the debtor to bargain meaningfully with its creditors about the content of a feasible plan."[104] The statement of needs contained in the Report accompanying the interim Senate proposal stated: "The provisions of the Chapter should provide ready access to the bankruptcy courts. It is during the first steps of reorganization that delay could cause the most permanent harm."[105]

The practical effect is likely to be minimal, however; courts

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102 Act of August 16, § 83(a)(5), *as amended* Act of July 1, § 83(a)(5).

103 Pub. L. No. 94-260, § 84 (Apr. 8, 1976).

104 *Hearings on H.R. 31 and H.R. 32,* Part II, — (statement of Professor Vernon Countryman on Nov. 12, 1975).

105 S. REP. No. 94-458, 94th Cong., 1st Sess. 13 (1975).

seeking to provide easy access may do so by finding that negotiations are not feasible and waiving the requirement.

Certain clerical tasks are greatly simplified by the Act. For example, the petitioner must submit a list of creditors only "insofar as practical,"[106] and need not substantiate claims that are liquidated or undisputed.[107] While this is an improvement over the previous law, it does not go as far as possible; the Senate version of the bill would have required a listing of only those creditors affected by the plan.[108] Such a provision is preferable, since only those creditors affected by the plan are allowed to vote on it, and only their claims will be governed by it upon confirmation. Given that the Act does not contemplate immediate notice to creditors at the commencement of the proceedings, section 85(b) merely serves to increase the time it will take to file a petition. The full list requirement was probably aimed at facilitating identification of creditors; since the plan does not have to be filed with the petition, it would otherwise be impossible to determine at the outset which creditors are affected. However, any omissions because of such uncertainty could be remedied by including a supplemental list when the plan is filed.

The new Act does remove the unnecessary requirement that the list of creditors be submitted with the petition. Following the format of Bankruptcy Rule 10-108, which authorizes the court to fix the time for filing the list after it has ascertained the magnitude of the task and determined when the list would be needed, § 85(b) of the Act allows the court, either sua sponte or upon application of the petitioner, to set a later time for filing the list if it does not accompany the petition.[109] This section would have been readily adaptable to limiting the list to affected creditors. The Act also gives the court the option of making a person other than the petitioner responsible for notifying the listed creditors.[110] While it is not expected that the court will utilize this flexibility very often, it is a feature which may prove appropriate in some cases,

106 Pub. L. No. 94-260, § 85(6) (Apr. 8, 1976).
107 *Id.* § 88(a).
108 S. REP. No. 94-458, 94th Cong., 1st Sess. 6 (1975).
109 Pub. L. No. 94-260, § 85(b) (Apr. 8, 1976).
110 *Id.* § 85(d).

particularly where the petitioner's capabilities and resources are severely limited.

### B. *Protection of Creditor and Outside Interests*

For the protection of minority interests and non-consenting creditors, approval from creditors holding two-thirds in amount of each class of claims is maintained as a prerequisite for confirmation.[111] The base for the calculation of the required voting percentages, however, is altered from all creditors affected to just those actually voting,[112] making approval of the plan both more equitable and more attainable. Under the old system, a creditor not voting due to a lack of concern about the effects of the plan on his claim would be counted as voting against the plan. The new law treats non-action neutrally, preventing relatively disinterested parties from stymieing the wishes of the affected interests. The new provision also reduces the pressure on petitioner to "campaign" for votes.

To provide further protection for non-consenting interests, the Act includes the new requirement that the plan also be approved by more than 50 percent in number of each class of creditors.[113] The effect of this provision is to give small creditors unjustified power over confirmation of the plan. It is easy to imagine a situation where a mass of small creditors, with claims representing as little as 10-20 percent of the value of the outstanding obligations, would be able to permanently block a plan for wholly arbitrary reasons. This impasse could be broken by either eliminating their claims from the plan's coverage or providing in the plan that their interests will be paid off in full, thus removing their voting powers; this has the disadvantage of giving small creditors an unfairly advantageous position and does not promote equal and equitable treatment of all creditors. The two-thirds of amount requirement, coupled with the need for court approval, is sufficient protection for non-consenting creditors, including those with only relatively small interests.

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111 *Id.* § 92(b).
112 *Id.* § 92(c).
113 *Id.* § 92(b).

The Act adds two new devices for the protection of outside interests. The first is the requirement that the Securities and Exchange Commission be given notice of the petition and be allowed to state its objections to the plan,[114] though it is not allowed to appeal the lower court's opinion.[115] This is an interesting mechanism for protecting the public interest, particularly where the market for a municipality's securities is widespread and active, and is likely to introduce an effective and knowledgeable voice in the proceedings. The restraint on the right to appeal should not diminish the utility of the provision; the required agreement of the court, the petitioner, and the affected creditor interests provides sufficient protection for the general public.

A second feature of the new law gives labor unions and associations that represent employees of the petitioner the right to be heard before the court.[116] These groups certainly have a valid interest in the outcome of the proceedings, even if their contracts are not expressly rejected or violated by the petitioner. They have a long-range relationship to the petitioner and are a major influence on its day-to-day operations; their cooperation may be a crucial factor in making the plan "feasible." It is both sensible and necessary to have their information and views before the court.

### C. *Powers of the Court*

The new Act consistently provides for more complete and effective judicial control over the bankruptcy proceedings. The court is given exclusive jurisdiction over the petitioner and its property;[117] its dominance is further insured by a variety of automatic and discretionary stays of other actions.[118] It is responsible for the equitable and efficient classification of creditors,[119] and holds firm rein over representing agents and their compensation.[120] It may provide for joint administration of related peti-

114 *Id.* §§ 85(d), 93.
115 *Id.* § 93.
116 *Id.* § 94(a).
117 *Id.* § 82(a).
118 *Id.* § 85(c). These stays also serve to give the petitioner a "breathing spell" during which it can attempt to gain acceptance of a plan and get its affairs in order.
119 *Id.* § 88(b).
120 *Id.* § 86(a).

tions,[121] and may refer special issues of fact to a bankruptcy referee.[122] The court retains ultimate authority and responsibility for determining whether the plan meets the requirements for confirmation.[123] It may retain jurisdiction as long as it deems necessary to insure the successful execution of the plan,[124] and is granted extended flexibility as to when to order dismissal.[125]

While these provisions provide the court with more control and input than previously, its role is still primarily a passive one. Direct court intervention (for example, to settle claims or impose obligations as to taxation or disposition of assets) is allowed only if the petitioner consents or the plan allows. In deference to the assumed constitutional restriction imposed by the concept of state sovereignty, the authority of the court "is strictly limited to disapproving or to approving and carrying out a proposed composition."[126] To further emphasize this point, the Act expressly reserves to the states the power to control their political subdivisions.[127]

On a constitutional level, these provisions unnecessarily defer to state authority. The *Ashton*[128]-*Bekins*[129] line of reasoning as to federal invasion of state sovereignty has given way over the years to a recognition of the joint federal-state participation required to attack problems, like municipal bankruptcy, that are important to both levels of government.[130] As Gerald Dunne, editor of the Bank Law Journal, has commented:

> Given the manifest erosion of the *Bekins* keystones . . . it is surely a pity that the recent report of the Commission on the

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121 *Id.* § 87(c).
122 *Id.* § 87(a).
123 *Id.* § 94(b).
124 *Id.* § 96(e).
125 *Id.* § 98.
126 Leco Properties, Inc. v. R.E. Crummer & Co., 128 F.2d 110, 113 (5th Cir. 1942).
127 Pub. L. No. 94-260, § 83 (Apr. 8, 1976).
128 298 U.S. 513 (1936).
129 304 U.S. 27 (1938).
130 *See* Maryland v. Wirtz, 392 U.S. 183 (1968); South Carolina v. Katzenbach, 383 U.S. 301 (1966); Oklahoma v. United States Civil Service Comm'n, 330 U.S. 127 (1947); United States v. Darby, 312 U.S. 100 (1941); Helvering v. Davis, 301 U.S. 619 (1937); Steward Machine Co. v. Davis, 301 U.S. 548 (1937); Note, *Is Federalism Dead? A Constitutional Analysis of the Federal No-Fault Insurance Bill: S. 354*, 12 HARV. J. LEGIS. 668 (1975).

> Bankruptcy Laws of the United States did not adopt Justice Cardozo's dissenting vision of the "expanding concept" of bankruptcy and lay the ax to the root by proposing a new Chapter IX fitted to the needs of the modern American metropolis.[131]

The same can be said of Congress' approach here. A requirement that the petitioner subject itself to some measure of federal control after choosing to utilize the federal bankruptcy procedure would almost certainly have withstood constitutional attack.

On a practical level, however, such a departure from previous norms might have proven to be counter-productive. Municipalities and subdivisions need state authorization, either general or specific, to participate in such federal proceedings; states might be reluctant to allow municipal participation in a proceeding where the federal government, through the court, would infringe on state power and control. But even barring a change in the voluntary nature of the system (a change that would come under stiff and justifiable constitutional attack), Congress could have given the courts a more active role that would have been acceptable to the states.

In addition to its administrative and procedural powers, the court is given control over the exercise of the petitioner's two new and important substantive powers — the rejection of executory contracts[132] and the issuance of certificates of indebtedness.[133] Both of these provisions are a part of the existing private bankruptcy structure, and the exercise of judicial control in these areas is well documented.[134] To authorize rejection of executory contracts the court must generally find that the agreement "is onerous and burdensome, and its rejection will aid the petitioner in its reorganization and rehabilitation attempt."[135] As to certif-

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131 Dunne, *Bankruptcy Reform: A New Chapter IX?*, 92 BANKING L.J. 671, 672 (1975). *But see Hearings on H.R. 31 and H.R. 32* Part I, 189 (statement of Professor Frank Kennedy on Sept. 8, 1975).

132 Pub. L. No. 94-260, § 82(b)(1) (Apr. 8, 1976).

133 *Id.* § 82(b)(2).

134 *See* Countryman, *Executory Contracts in Bankruptcy: Part I*, 57 MINN. L. REV. 439 (1973); Countryman, *Executory Contracts in Bankruptcy: Part II*, 58 MINN. L. REV. 479 (1974); 8 W. COLLIER, BANKRUPTCY ¶ 6.40(4), at 970 (14th rev. ed. 1975).

135 H.R. REP. No. 94-686, 94th Cong., 1st Sess. 17 (1975).

icates of indebtedness, the Act outlines the court's role in assuring that such issues, and their terms and conditions, are equitable given the particular circumstances of the case.[136]

### D. *Substantive Powers and Duties of the Petitioner*

Realizing the precarious and tenuous situation of any entity that resorts to Chapter IX relief, much of the new legislation is directed toward improving the petitioner's situation in the proceedings. As noted above,[137] the Act gives the petitioner the power, with court approval, to reject executory contracts. This can be an important escape valve for a city, especially where past mismanagement and short-sighted political pressures have left the present administration "holding the bag."

By far the most important and controversial potential application of this power relates to existing collective bargaining agreements.[138] It is clear that under Chapter XI the insolvent has the right to unilaterally terminate such contracts if it can meet the "onerous and burdensome" test,[139] which is strictly applied where labor contracts are involved.[140] The courts have reasoned that since the debtor in possession under Chapter XI is not the same entity as the prebankruptcy company and thus is not a party to the labor agreement, it is not subject to external termination restrictions,[141] until it assumes the old collective bargaining agreement or creates a new one.[142] The courts could apply this same

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136 *See* Baker, *Certificates of Indebtedness in Reorganization Proceedings: Analysis and Legislative Proposals*, 50 AM. BANKR. L.J. 1 (1976).

137 *See* text accompanying note 31 *supra*.

138 *See* Wall Street Journal, April 2, 1976, at 12.

139 *See* Brotherhood of Railway Employees v. REA Express, Inc., 523 F.2d 164 (2d Cir. 1975); Shopmen's Local 455 v. Kevin Steel Products, Inc., 519 F.2d 698 (2d Cir. 1975); Note, *Agreement May Be Rejected in Chapter XI Proceedings if Debtor-In-Possession Can Show Agreement To Be Onerous and Burdensome*, 28 VAND. L. REV. 1374 (1975).

140 *See In re* Overseas National Airways, Inc., 238 F. Supp. 359 (E.D.N.Y. 1965); *In re* Mamie Conti Gowns, Inc., 12 F. Supp. 478 (S.D.N.Y. 1935).

141 *E.g.*, National Labor Relations Act, § 8(d), *as amended* 29 U.S.C.A. § 158(d) (1976); Railway Labor Act, 45 U.S.C. § 151 *et seq.* (1971).

142 Brotherhood of Railway Employees v. REA Express, Inc., 523 F.2d 164 (2d Cir. 1975); Shopmen's Local 455 v. Kevin Steel Products, Inc., 519 F.2d 698 (2d Cir. 1975).

policy rationale, though perhaps not the same terminology, to the municipal bankruptcy situation.[143]

However, the new law contains an apparent paradox. If the qualification of section 83 that no provision of the Chapter shall limit a state in the exercise of its political or governmental powers is taken literally, the power to reject executory contracts could be severely limited. Ordinarily, under state law a city is prohibited from unilaterally revoking or modifying a labor contract once the legislative body has appropriated the money.[144] In addition, some states provide that upon expiration or termination of an existing contract its terms will remain in effect until a new contract is negotiated.

The ambiguity as to which provision of the Act should prevail may reflect a deliberate attempt, in the face of the strong union lobby, to leave the ultimate decision to the courts. There is a brief reference to the problem in the Senate floor discussions of the bill which strongly supports the position that the power to reject executory contracts was intended to include labor agreements and should be read to override any contradictory state laws.[146] Yet the House Report accompanying its version of the bill specifically states, in discussing the rejection of executory contracts, that section 83 "does not permit Chapter IX to interfere with or derogate from any State law that regulates the way in which municipalities may execute this governmental function."[147] If and when the judiciary does have to resolve this contradiction, they should not allow state law to frustrate the purposes of the federal statute. Section 83 should be read in light of, and qualified by, the express power to reject all executory contracts. To be effective this rejection must occur immediately; any delay would

143 *See* 122 CONG. REC. S4377 (daily ed. March 25, 1976) (remarks of Senator Burdick).

144 *E.g.,* Glendale City Employees' Assoc. v. City of Glendale, 15 Cal. 3d 328, 540 P.2d 609 (1975) (N.Y. Taylor Law (Civil Service Law, Ar. 14) forbids a public employer from unilaterally altering the terms or conditions of employment in an expired contract during the negotiation period for a new contract).

146 *See* 122 CONG. REC. S4377 (daily ed. March 25, 1976) (remarks of Senators Burdick and Hruska).

147 H.R. REP. No. 94-686, 94th Cong., 1st Sess. 9 (1975).

remove all pressure from the unions to promptly begin good faith renegotiation and would make the rejection an empty and futile act. Such a holding would be in direct contradiction to statements in the House Report,[148] but would find support in comments made on the Senate floor.[149] The court could still find that such renegotiation must conform to applicable state law, such as a duty to bargain or meet and confer, where such laws are not a substantial hindrance to the bankruptcy proceedings.

Reaching such a result inevitably raises a constitutional controversy. Under this approach, the federal government would essentially be giving the city a power to act in a way that its own state expressly forbids or may not permit. This would appear to be a direct federal-state clash. But given that the city must have at least the general consent of its state to petition under this Act,[150] the courts could easily find that such authorization impliedly gave the petitioner the power to utilize all the provisions of the Chapter, including the power to reject all executory contracts. The restrictions on rejection of collective bargaining agreements would thus be superseded by the authorization to reject.

The other major feature of the new Chapter mentioned above[151] is the provision allowing the petitioner to issue certificates of indebtedness that have priority over existing obligations. The availability of such certificates will give a financially strapped municipality a practical way to obtain the short-term financing necessary for the continued day-to-day provision of public services. This continuation of services is provided for in the prepetition period by the guarantee that goods and services actually provided within the three months immediately prior to the petition filing will be given priority over all claims except the costs of administration incurred after the filing.[152] It is hoped that these mechanisms for continuing general services will prevent a mass exodus from the city by businesses and residents, and thereby avoid erosion of the tax base.

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148 *Id.* at 8. *See also* King, *Municipal Insolvency: Chapter IX, Old and New: Chapter IX Rules,* 50 AM. BANKR. L.J. 55 (1976).
149 *See* 122 CONG. REC. S4377 (daily ed. March 25, 1976).
150 Pub. L. No. 94-260, § 84 (Apr. 8, 1976).
151 *See* text accompanying note 132 *supra.*
152 Pub. L. No. 94-260, § 89 (Apr. 8, 1976).

Such borrowing with priority over existing claims is justified against due process attack as a means for the court, by maintaining the "business" as an ongoing entity, to preserve the collateral of the old creditors.[153] To insure the marketability of the certificates, they are protected from subsequent attacks on the jurisdiction of the court.[154] While the interest rates may be abnormally high, the petitioner will potentially[155] be able to obtain operating funds pending resolution of the judicial proceedings. Interest rates could undoubtedly have been reduced and marketability assured if Congress had provided for some form of federal backing or guarantee, but this would have been a controversial element of federal involvement that would have threatened the Act's passage. This option should be considered if the certificates do prove unmarketable. States may, of course, provide such backing themselves.

Congress wisely deleted from the final legislation the additional confirmation requrement, proposed by the Senate[156] and the Ford Administration,[157] that the plan contain a provision for a balanced budget within a reasonable time after adoption. The protection sought from such a requirement is already contained in the mandate that the court find the plan "fair and equitable and feasible."[158] As noted by Professor Countryman, Chapter X only requires feasibility, not budget-balancing, for a corporate reorganization.[159] According to the House Report, feasibility means:

> . . . there is a reasonable prospect that the petitioner will be able to perform under the plan. That is, it must appear to the court, based on the Petitioner's past and projected future tax revenues and expenses, that it will have enough to make the payments required by the plan.[160]

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153 *See* Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974).

154 Pub. L. No. 94-260, § 85(a) (Apr. 8, 1976).

155 There are some who have questioned whether the certificates will be marketable at all. *See* King, *Municipal Insolvency,* 50 AM. BANKR. L.J. 55, 62 (1976); H.R. REP. No. 94-686, 94th Cong., 1st Sess. 55 (1975) (separate views of Rep. Holtzman).

156 S. REP. No. 94-458, 94th Cong., 1st Sess. 9 (1975).

157 H.R. Doc. No. 94-289, 94th Cong., 1st Sess. 9 (1975).

158 Pub. L. No. 94-260, § 94(b)(1) (Apr. 8, 1976).

159 *Hearings on H.R. 31 and H.R. 32,* Part II, — (statement of Professor Vernon Countryman on Nov. 12, 1975).

160 H.R. REP. No. 94-686, 94th Cong., 1st Sess. 32 (1975).

In addition, for the plan to be deemed fair and equitable, the petitioner must exercise its taxing power to the fullest extent possible for the benefit of its creditors.[161] A strict requirement of a balanced budget would have limited the flexibility of the parties to the plan without providing any real additional protection for creditors. Such a requirement could have resulted in extended disputes and hearings as to what constitutes a "balanced budget" and the acceptability of the accounting methods proffered by the city. Such a dispute could have taken several years winding its way through the judicial system before it was finally determined.

### E. *Restraints on the States*

In terms of regulating state involvement in and control over municipal insolvency, the Act retains the prohibition against state involuntary composition plans.[162] Such a plan had been upheld as constitutional by the Supreme Court in *Faitoute Iron & Steel Co. v. City of Asbury Park.*[163] Congress gave the following rationale when it originally included the provision counteracting this ruling in the bankruptcy statute:

> State adjustment acts have been held to be valid, but a bankruptcy law under which the bondholders of a municipality are required to surrender or cancel their obligations should be uniform throughout the [United] States, as the bonds of almost every municipality are widely held. Only under a Federal law should a creditor be forced to accept such an adjustment without his consent.[164]

Some, including Professor Countryman, have questioned the continuation of this prohibition, arguing that it is inconsistent with

161 Fano v. Newport Heights Irr. Dist., 114 F.2d 563 (9th Cir. 1940).

162 Pub. L. No. 94-260, § 83 (Apr. 8, 1976).

163 316 U.S. 502 (1942). In that case, the court upheld a New Jersey statute that permitted a binding composition of a municipality's debts upon acceptance of a plan by 85% of the municipality's creditors. The composition dealt only with unsecured obligations, and the state statute prohibited reduction in the principal amount of the outstanding obligations. The Court refused to go beyond the facts of the case, holding only that the contracts clause of the Constitution did not prohibit that particular composition.

164 H.R. REP. No. 2246, 79th Cong., 2d Sess. 4 (1946), as quoted in H.R. REP. No. 94-686, 94th Cong., 1st Sess. 19 (1975).

the view held by many in Congress that "the City and the State should work out their own problems without federal assistance."[165] But by retaining the voluntary nature of the proceedings the Act does leave the ultimate decision-making to the locality, with only those restrictions that Congress found necessary for the protection of creditors' rights included. Unless Congress is willing to give the states free run in developing composition plans, with no federal guidelines, it would seem that the advantages of uniformity outweigh the real and psychological advantages of allowing state plans.

A provision that was proposed by the Senate would have invalidated all state laws that served to deprive the petitioner of the effects of confirmation of the plan.[166] This was aimed directly at those state statutes which prevent financial institutions from purchasing the obligations of a municipality that has petitioned for relief in bankruptcy. The final bill deleted this provision and instead relied on *Perez v. United States*,[167] in which the Supreme Court held that Congress, under the commerce power, could control the local activity of loan sharking as directed in the Consumer Credit Protection Act.[168] While the case does state the general principle of federal preemption where interstate commerce is involved, the vagueness of the link between municipal default and such commerce, together with the heightened tenth amendment state sovereignty questions, should have led Congress to explicitly invalidate such state legislation. It is extremely important that cities not be deterred from seeking Chapter IX relief because of a fear that the market for their obligations might be severely restricted by state regulation. Though the courts may indeed find that where state laws directly frustrate congressional intent, the commerce and bankruptcy powers prevail over the state sovereignty concept, it would have been preferable from the municipalities' standpoint to have this intent and exercise of federal authority as an express provision of the Chapter.

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165 *Hearings on H.R. 31 and H.R. 32*, Part II, — (statement of Professor Vernon Countryman on November 12, 1975).

166 H.R. Rep. No. 94-938, 94th Cong., 1st Sess. 23 (1976).

167 402 U.S. 146 (1970).

168 18 U.S.C. § 891 *et seq.* (Supp. V., 1964).

*Conclusion*

As the Senate Committee stated:

> Municipal debt reorganization is not impractical. The debt structure of a municipality, while complex in many respects, is no more complicated than the debt structure of a major corporation. The ability of a city to propose a workable plan in good faith, which is fair, equitable and feasible has not seriously been questioned.[169]

It is essential that adequate legal machinery be available to those municipalities that find themselves wholly unable to meet their debts.

Yet the passage of the legislation inherently raises questions as to its own applicability and utility in dealing with the situation of municipal insolvency. Will the larger municipalities find the act accessible from a practical standpoint? Will they be inclined to use it, and if so, at what stage of financial hardship or creditor negotiations? What effect, if any, will the legislation have on municipal bond rates? On negotiations between creditors and a city before a petition is filed? Will a large city be able to gain the required creditor approval? What will be the response of labor unions if their contracts are unilaterally rejected? These are only some of the questions that a city must consider before it voluntarily submits itself to a Chapter IX proceeding.

The first test for the new Act may come very shortly. At the end of the city's fiscal year, the one-year federal loans to New York City will become due and payable.[170] It was stipulated in the loan legislation that each year's loan must be paid in full before any credit is extended for the following year. If, as expected, New York is unable to meet this federal payment, it may find itself at the point of financial collapse and be forced to turn to Chapter IX in an attempt to avoid total financial chaos. If this does prove to be the case, it will be the ultimate test for the new provisions and a perfect occasion to judge the efficacy of the changes.

At this point two observations regarding Congress' future involvement with municipal bankruptcy seem appropriate. First, a

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169 S. REP. No. 94-458, 94th Cong., 1st Sess. 15 (1975).

170 New York City Season Financing Act of 1975, Pub. L. No. 94-143, § 4(b), 89 Stat. 797 (Dec. 9, 1975), 31 U.S.C. 1503(b) (1970).

total revision of the Bankruptcy Act is still pending in the Senate and House Committees[171] and will be ready for Congressional action in the near future. This comprehensive version should include further changes in Chapter IX, so as to better integrate the municipal parties into the total Bankruptcy Act. These ultimate changes should also draw on any experiences with and comments on what should in fact be considered the "interim" Chapter IX. The New York City crisis may have dictated that Congress act immediately to revise Chapter IX, but the recent modifications should not be viewed as the ultimate product.

Second, and more importantly, Congress must realize that a municipal bankruptcy chapter, no matter how accessible or effective, does little or nothing to alleviate the causes of municipal insolvency. Representative Holtzman was at least partially correct in proclaiming, "Bankruptcy does not represent a sensible national policy for dealings with the fiscal problems of municipalities."[172] Having dealt with the symptoms and provided a temporary remedy, it is imperative that Congress at some point turn to dealing with the diseases that have left far too many of our urban centers on the verge of financial ruin. It is towards this lasting cure that Congress should now focus its attention.

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171 H.R. 31 and H.R. 32, 94th Cong., 1st Sess. (1975), now pending before the House Judiciary Committee.

172 H.R. REP. No. 94-686, 94th Cong., 1st Sess. 56 (1975) (separate views of Rep. Holtzman).

# CURRENT CONGRESSIONAL PROPOSALS TO REDUCE THE INCOME TAX AVOIDANCE USE OF REAL ESTATE TAX SHELTERS

JOHN R. POWER*

*A real estate tax shelter is an investment from which the investor realizes tax savings on other income as well as a tax-free cash flow from the investment itself. During 1975 Congress has shown interest in reducing the real estate tax shelter.*

*Mr. Power examines and compares the three major proposals which limit the amount of the tax shelter available as well as the scope of the income to which the shelter is applicable: Limitations on Artificial Losses, Minimum Taxable Income and Limitation of a Limited Partner's Losses. He concludes that none of these proposals eliminate the roots of the shelter — i.e., accelerated depreciation, deduction for construction period expenses, and limited recapture. He suggests, however, that the Limitations on Artificial Losses proposal would be a desirable reform of the tax system.*

## *Introduction*

The income tax avoidance use of real estate tax shelters[1] by high bracket investors continues to be the subject of Congressional concern.[2] Despite the enactment of the Tax Reform Act

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1 A real estate tax shelter may be defined as an investment in which a significant portion of the investor's return is derived from the realization of tax savings on other income as well as the receipt of tax-free cash flow from the investment itself. STAFF OF THE JOINT COMM. ON INTERNAL REVENUE TAXATION, 94TH CONG., 1ST SESS., TAX SHELTERS: REAL ESTATE 1 (Comm. Print 1975).

2 Congressional criticism of tax shelters has at times been very severe. Representative Edward Koch, for example stated:

> Let us face it: the rich are ripping off the tax system, and the average American is then made to pay for this ripoff. . . . Legal tax avoidance by the rich has become an art in this country. Through various devices the wealthy shield vast amounts of income from taxation. How can the average American maintain faith in our economic and political situation under such circumstances? . . . The ways in which rich individuals abuse tax shelters in order to avoid taxes are really very clever.

121 Cong. Rec. 11851 (daily ed. Dec. 4, 1974). For specific examples of tax avoidance through the use of shelter arrangements, *see* STAFF OF THE JOINT COMM. ON INTERNAL REVENUE TAXATION, 94TH CONG., 1ST SESS., TAX SHELTER INVESTMENTS· ANALYSIS OF 37 INDIVIDUAL INCOME TAX RETURNS, 24 PARTNERSHIPS AND 3 SMALL BUSINESS CORPORATIONS RETURNS (Comm. Print. 1975).

of 1969,[3] real estate tax shelters are still widely used in the housing industry.[4] Critics of shelter arrangements have responded in the current session of Congress with several reform proposals — Limitation on Artificial Losses, Minimum Taxable Income, and Limitation of a Limited Partner's Losses — which would reduce the favorable tax treatment now enjoyed by real estate investors. Although they would not eliminate the real estate tax shelter in its entirety, these reform proposals would considerably change the calculus of real estate investment.

## I. TAX SHELTER LIMITED PARTNERSHIPS

A real estate tax shelter will typically take the business form of a limited partnership with the builder-developer as the general partner and the investors as limited partners.[5] A limited partner-

3 Pub. L. No. 91-172, 83 Stat. 649. The real estate provisions of the Tax Reform Act of 1969 were designed to reduce the substantial dealing in tax losses produced by depreciable real property through the sale of real estate tax shelters. S. REP. No. 552, 91st Cong., 1st Sess. 212 (1969). The Act tightened the rules governing both accelerated real estate depreciation and its recapture. New depreciation rates for post-1969 nonresidential (150 percent declining balance method) and used residential rental property (straight line or 125 percent declining balance method) and new recapture rules for low-income housing (decreasing limited recapture after 20 months), residential rental property (decreasing limited recapture after 100 months) and non-residential real property (full recapture) were established by the 1969 Act. INT. REV. CODE OF 1954, §§ 167(j)(1), (5), 1250(a)(1)(C)(ii), (iii), (v). The Act also established the minimum tax on accelerated real estate depreciation deductions exceeding straight line. *Id.* §§ 56, 57(a)(2). See Ritter & Sunley, *Real Estate and Tax Reform: an Analysis and Evaluation of the Real Estate Provisions of the Tax Reform Act of 1969,* 30 MD. L. REV. 5 (1970).

4 Registered offerings of limited partnerships exemplify this trend. Public syndications registered with the National Association of Securities Dealers, which make up only a very small number of the actual tax shelter investments, continued at high levels following the Tax Reform Act of 1969 (54 registered syndications offering $256,485,390 in 1970; 139 offering $523,534,085 in 1971; 207 offering $787,735,062 in 1972; 172 offering $849,436,164 in 1973; 94 offering $521,457,932 in 1974; 35 offering $192,101,249 in the first half of 1975; nontax factors such as a shortage of investor funds because of the recession contributed to the post-1972 decline). STAFF OF THE JOINT COMM. ON INTERNAL REVENUE TAXATION, 94TH CONG., 1ST SESS., OVERVIEW OF TAX SHELTERS 12-16, 18 (Comm. Print 1975).

In Massachusetts, developers commonly finance mixed-income apartments with a group of limited partners via the Massachusetts Housing Finance Agency, which has made more than half a billion dollars in mortgage loans involving tax shelter investments. Yudis, *Tax Shelter Got Shelter Built, Developers Point Out,* Boston Globe, March 14, 1976, § F (Real Estate), at 1, cols. 1-6.

5 TAX SHELTERS: REAL ESTATE, *supra* note 1, at 2. A partnership, joint venture,

ship is the preferred investment vehicle[6] because it combines the nontax advantages of a corporation with noncorporate tax attributes. Unlike a partnership or a corporation, a limited partnership not only insulates its limited partners from its general liabilities, providing they take no part in the control of the business,[7] but also acts as a tax conduit for its partners.

Because it is not a taxable entity, a tax shelter limited partnership can "pass-through" substantial tax losses to each partner.[8] In a project geared for the development of real estate, a partner

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corporation, subchapter S corporation, common law trust and a Real Estate Investment Trust (REIT) are some of the possible alternative business forms. For a comparison of the merits of various business forms in tax shelter arrangements, *see* Gabinet and Coffey, *Housing Partnerships: Shelters from Taxes and Shelters for People,* 20 CASE W. RES. L. REV. 723, 730-747 (1969).

6 A limited partnership provides syndicators with an adequate vehicle for obtaining credit from financiers and raising capital from investors. If a limited partnership qualifies as a limited distribution entity eligible for federal mortgage insurance under the National Housing Act, as much as 90 percent of a real estate project may be financed with debt. Nonrecourse financing by a limited partnership, furthermore, will not affect the project's tax leverage. The remaining equity can be raised by selling small shares or units in the limited partnership to numerous investors. Equity can also be sold to the National Limited Partnership, created by Title IX of the Housing and Urban Development Act of 1968, which is authorized to take up to 25 percent of the equity investment of local partnerships engaged in the production of low- and moderate-income housing as a partner along with local investors. For a detailed discussion of debt and equity financing of a limited partnership, see Gabinet & Coffey, *supra* note 5, at 742, 747-760.

7 UNIFORM LIMITED PARTNERSHIP ACT §§ 1, 7. (As of 1974, the U.L.P.A. had been enacted in 47 states and the District of Columbia. 6 UNIFORM LAWS ANN. (Pocket Part 1974)). Section 1 of the U.L.P.A. makes a limited partner liable to the extent of his cash and property contributions and any credit obligations. Feld, *The 'Control' Test for Limited Partnership,* 82 HARV. L. REV. 1471, 1473 n.11 (1969).

8 The Code requires each partner to report on his federal tax return his distributive share of his partnership's income, gain, loss, deduction or credit in accordance with his distributive share of taxable income or loss or as allocated by the partnership agreement. As the losses and deductions of his partnership pass-through, a partner may offset them against his income from any other source. INT. REV. CODE OF 1954, §§ 702, 704. A partner, however, can deduct losses only to the extent of his adjusted basis in his partnership interest which, at the time of inception, equals his sum of capital contributions to the partnership plus his share, if any, of partnership liabilities. *Id.,* §§ 704(d), 705. In addition, a limited partner's basis includes his share of partnership liabilities for which no partner is individually liable (i.e., nonrecourse liability). Treas. Reg. § 1.752-1(e) (1960).

A limited partnership may be taxed as a corporation if it fails to meet Treasury standards. *Id.,* § 301.7701-2(a) (1965). See Fraser, *Taxing the Limited Partnership as a Corporation,* 50 TAXES 333 (1972). In Rev. Proc. 74-17, 1974-1 CUM. BULL. 438, the Service set forth guidelines which it will apply in determining whether the formation of a limited partnership is for the principal purpose of avoiding federal taxes.

may use his distributive share of construction period expenses such as interest on the construction loan,[9] real estate taxes,[10] financing fees[11] and mortgage insurance premiums[12] as current deductions against his total taxable income. When the project is placed in service, a partner may claim his distributive share of depreciation deductions as tax-saving loses, albeit possibly taxed as an item of tax preference.[13] A limited partnership can provide each partner with sizable depreciation deductions by applying a rapid write-off to its debt-inflated basis. According to the *Crane* rule,[14] a limited partnership can include the total cash outlay and mortgage indebtedness of its project in its depreciable basis.[15] A limited partnership can then achieve a rapid write-off of its high tax basis by electing one of the various rates of accelerated depreciation.[16] Thus, even though actual revenues from a successful real estate project exceed out-of-pocket expenses, a partner in a tax shelter limited partnership will receive both a tax-free cash flow and a stream of deductions that will shelter income from other sources for a number of years.[17]

Since annual depreciation deductions under an accelerated rate will decline from year-to-year, a tax shelter limited partnership will soon reach the cross-over point[18] when it will usually be

9 INT. REV. CODE OF 1954, § 163(a). The Service has announced that it will disallow the prepayment of interest for more than 12 months beyond the end of a taxable year by a cash-basis taxpayer. Rev. Rul. 68-643, 1968-2 CUM. BULL. 76.

10 INT. REV. CODE OF 1954, § 164.

11 Financing fees or "points" may be treated as deductible interest. Rev. Rul. 69-188, 1969-1 CUM. BULL. 54.

12 Rev. Rul. 56-264, 1956-1 CUM. BULL. 153. For a discussion of construction period deductions, *see* BNA HOUS. & DEV. REP. (Reference File), 80 Tax, Securities, and Investments 25-27 (1973).

13 INT. REV. CODE OF 1954, § 57(a)(2).

14 Crane v. Commissioner, 331 U.S. 1 (1947).

15 Depreciable basis does not include that part of the purchase price allocable to land. Treas. Reg. § 1.167(a)-5 (1960).

16 A taxpayer generally may use the 200 percent declining balance method of accelerated depreciation for new residential real estate. Commercial and industrial property is limited to the 150 percent declining balance method, and used residential rental property is limited to the 125 percent declining balance method. INT. REV. CODE OF 1954, § 167(b), (j)(1), (j)(5).

17 BNA (Reference File), *supra* note 12, at 11.

18 At some point in time, the portion of each payment under a level-payment mortgage that represents nondeductible amortization of principal will exceed the annual depreciation deductions resulting in taxable income in excess of cash flow.

desirable for a partner to sell his interest in the project.[19] Although a capital gains tax will be levied in any event,[20] the Code's limited recapture rules enable a partner to avoid further taxes on his sale. If he complies with the prescribed holding periods, a partner may pay an ordinary income tax on only a part of his preference gain.[21] It is this combination of high tax basis, accelerated depreciation and limited recapture which create the real estate tax shelter.

These special benefits of real estate tax shelters undermine public confidence in a progressive system of taxation. Shelters are regressive since the tax savings on a tax shelter increase as the individual investor's tax bracket increases.[22] The layman can scarcely be faulted for questioning the fairness of a tax code that sanctions the marketing of tax losses to affluent taxpayers through equity syndication. The sale of tax shelters to high bracket investors has other undesirable effects too. Because they encourage the planning of new construction on the basis of tax savings rather than long-term maintenance and management, shelters promote investments in projects that are economically unsound and cause distortions in real estate values and construction costs.[23] Shelters,

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This event is known as the "cross-over" point. Robinson, *The Syndication of Low- and Moderate-Income Housing — Federal Tax Aspects*, 18 PRAC. LAW. 15, 18 (Feb. 1972).

19 Gabinet & Coffey, *supra* note 5, at 729; Note, *The Tax Shelter Dilemma: Disposition of a Crossover Limited Partnership Interest*, 43 U. CIN. L. REV. 349 (1974). A taxpayer may also engage in a tax-free rollover of a qualifying low-income housing project. INT. REV. CODE OF 1954, § 1039.

20 INT. REV. CODE OF 1954, § 1202.

21 Gain from the sale of property which is attributable to the excess of accelerated depreciation over straight line constitutes the taxpayer's preference gain. In the case of low-income housing held for more than 20 months or residential rental property held for more than 100 months, the taxpayer's preference gain is subject to decreasing (1 percentage point for each month) limited recapture. Thus, there is no recapture if the taxpayer sells his low-income housing after 120 months (10 years) or his residential rental property after 200 months (16 years and 8 months). INT. REV. CODE OF 1954, § 1250(a)(1)(C), (ii), (iii).

22 TAX SHELTERS: REAL ESTATE, *supra* note 1; OVERVIEW OF TAX SHELTERS, *supra* note 4, at 3.

23 TAX SHELTERS: REAL ESTATE, *supra* note 1, at 9. *Public Hearings Before the Comm. on Ways and Means on the Subject of General Tax Reform*, 93rd Cong., 1st Sess., 3170 (1973) (Statement of George Deffet). Section 236 (Housing and Urban Development Act of 1968) low-income housing, a housing program that gives owners little incentive to manage and maintain their projects profitably, illustrates the ineffectiveness of tax shelters as a form of subsidy. OVERVIEW OF TAX SHELTERS, *supra* note 4, at 18. For specific criticisms of § 236 housing, *see* A. DOWNS, FEDERAL HOUSING SUBSIDIES: HOW ARE THEY WORKING? 49-54, 56-57 (1973).

moreover, often waste resources. As tax expenditures which are not systematically authorized and appropriated[24] and as tax incentives which are inefficient indirect subsidies,[25] shelters do not contribute to a rational federal housing program and could be replaced with direct subsidies.[26]

## II. Current Congressional Proposals

### A. *Limitation on Artificial Losses*

Limitation on Artificial Losses (LAL) is the leading current reform proposal. As its name indicates, LAL applies to those artificial tax losses created by construction period deductions and accelerated depreciation in excess of allowable straight line depreciation. LAL generally prevents a taxpayer from offsetting his artificial real estate tax losses against his unrelated taxable income such as salary and dividends. LAL may operate on the aggregation basis by composing a class of properties or on the per-property basis by treating each item of property separately. LAL on the aggregation basis permits a taxpayer to aggregate his artificial tax losses from all his properties and use them against his total real estate revenue. LAL on the per-property basis, a much more stringent version of LAL, permits a taxpayer to use his artificial tax losses attributable to one item of property as an offset only against income from that particular item of property.

H.R. 10612 is the legislative vehicle for LAL in the current

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24 [T]he tax expenditure system as applied to real estate is a highly irrational subsidy program. And that is not surprising considering that it is constructed of bits and pieces put in the tax law at various times and for various purposes, having nothing to do with the current problems of the industry.

*Public Hearings Before the Comm. on Ways and Means on the Subject of tax Reform*, 94th Cong., 1st Sess., 1455 (Statement of Jerome Kurtz)

Shelters combine with FHA mortgage insurance and VA loan guarantees, low rent public housing, home ownership and rental assistance, rent supplements, below market interest rate loans, insured loans of the Farmers Home Administration and special tax benefits for homeowners to form the federal housing program. Weinstein, *Housing Subsidies: An Overview*, 51 J. Urb. L. 723, 725 (1973).

25 *See* Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83 Harv. L. Rev. 705 (1970).

26 Senators Edward Kennedy and Walter Mondale support the use of direct subsidies as a more efficient and equitable way of promoting housing than the current tax incentives. 3 BNA Hous. & Dev. Rep. No. 23, 1052 (April 5, 1976).

session of Congress.[27] In its original draft of H.R. 10612, the House Ways and Means Committee prescribed LAL on the per-property basis with an exception for small scale builder-developers.[28] This exception permitted a taxpayer with an interest in not more than thirty-six residential dwelling units to elect LAL on the aggregation basis. When the Committee reported H.R. 10612, however, it mandated LAL on the aggregation basis.[29] Subsequently, the full House narrowly defeated an amendment which proposed to revise H.R. 10612 with LAL on the per-property basis.[30]

Now pending in the Senate Finance Committee,[31] H.R. 10612 incorporates LAL on the aggregation basis. The bill disallows accelerated deductions attributable to a class of LAL property to the extent that they exceed net related income.[32] Accelerated deductions under the bill include those artificial tax losses arising from LAL property.[33] H.R. 10612 sweeps low-income housing, residential property and commercial real estate into one class of LAL property.[34] The House-backed bill, furthermore, defines net

27 H.R. 10612, 94th Cong., 1st Sess. (1975) [hereinafter cited as H.R. 10612]. LAL was first proposed by the Administration to the House Ways and Means Committee on April 30, 1973. *Public Hearings Before the Comm. on Ways and Means on the Subject of General Tax Reform*, 93rd Cong., 1st Sess., 6916-6921 (Statement of George Schultz, Secretary of the Treasury). LAL was adopted by the Ways and Means Committee in its 1974 bill. TAX SHELTERS: REAL ESTATE, *supra* note 1. The Committee's 1974 tax reform bill, however, was never reported. 30 CONG. Q. ALMANAC 181 (1974).

28 3 BNA HOUS. & DEV. REP. No. 9, 423 (Sept. 22, 1975) (House Ways and Means Committee Tentative Actions on Real Estate Tax Shelters). This exception was continued in the per-property amendment to H.R. 10612 proposed by Representative Abner Mikva. 121 CONG. REC. 11,831 (daily ed. Dec. 4, 1975). The per-property amendment would have increased the expected revenues from H.R. 10612 by $167 million in 1976 and $571 million in 1981. 121 CONG. REC. 11,689 (Statement of Representative Al Ullman).

29 The Committee reported H.R. 10612 by a slim 21-16 margin. 3 BNA HOUS. & DEV. REP. No. 13, 591 (Nov. 17, 1975).

30 121 CONG. REC. 11,833 (daily ed. Dec. 4, 1975) (The amendment, offered by Rep. Mikva, was defeated 226-192).

31 The Senate Finance Committee finished its hearings on H.R. 10612 on April 13, 1976. 34 CONG. Q. 16, 881 (April 17, 1976).

32 H.R. 10612, 94th Cong., 1st Sess. (1975), § 101(a), *proposing* § 466(a)(1) of the Internal Revenue Code.

33 Construction period interest, real property taxes, and accelerated depreciation in excess of allowable straight line depreciation constitute the bill's accelerated deductions. H.R. 10612, § 101(a), *proposing* § 468(a).

34 H.R. 10612, § 101(a), *proposing* § 467(b). Residential property or commercial real estate exclude § 1245 property, essentially personal property and property used

related income as the gross income derived from a class of LAL property less its related ordinary deductions.[35] H.R. 10612, however, does not put a taxpayer who lacks sufficient net related income in the unfortunate position of forfeiting his disallowed accelerated deductions. By maintaining a deferred deduction account,[36] a taxpayer may use his disallowed deductions in later years when he has excess net related income. Even though a depreciation deduction is deferred, H.R. 10612 requires the taxpayer to make an annual adjustment in the basis of his property.[37] But if the taxpayer disposes of LAL real property, H.R. 10612 allows him a deduction for any allocable amount remaining in his deferred deduction account, thereby offsetting the preference gain otherwise created by the basis adjustment.[38] If the taxpayer makes a nontaxable transfer of LAL real property, on the other hand, the bill requires the transferee to assume the deferred deduction account.[39]

### B. *Minimum Taxable Income*

Minimum Taxable Income (MTI) has also been advocated as a reform proposal.[40] In effect MTI levies an alternative tax on preference income. MTI reduces some of the tax avoidance use of shelter arrangements by exacting a greater minimum tax from very high bracket investors.

MTI has fared poorly in the House of Representatives. The Ways and Means Committee defeated adoption of MTI by a decisive vote.[41] An amendment to H.R. 10612 that sought to

as an integral part of manufacturing, production or extraction or in furnishing transportation, communications or utility service. INT. REV. CODE OF 1954, § 1245 (a)(3). H.R. 10612 also creates separate classes for LAL lease property, LAL film property, LAL farm property, LAL oil and gas property, and LAL sports franchise property. H.R. 10612, § 101(a), *proposing* § 467(c)-(g).

35 H.R. 10612, § 101(a), *proposing* § 468(g).

36 H.R. 10612, § 101(a), *proposing* § 466(b).

37 H.R. 10612, § 101(a), *proposing* § 470(d).

38 H.R. 10612, § 101(a), *proposing* § 469(a).

39 H.R. 10612, § 101(a), *proposing* § 469(d)(2).

40 MTI was first proposed by Secretary of the Treasury Joseph Barr of the Johnson Administration. *Hearings on the 1969 Economic Report of the President Before the Joint Economic Committee,* 91st Cong., 1st Sess., 8-44 (1969), *approving* HOUSE COMM. ON WAYS AND MEANS AND SENATE COMM. ON FINANCE, 91ST CONG., 1ST SESS., TAX REFORM STUDIES AND PROPOSALS 132-142 (Comm. Print 1969).

41 3 BNA HOUS. & DEV. REP. No. 9, 382 (Sept. 22, 1975).

replace LAL with MTI was overwhelmingly defeated on the House floor.[42] Sponsored by Representative James Jones, the MTI amendment required a taxpayer to pay the greater of his normal taxes or fifty-five percent of his minimum taxable income as his annual tax.[43] The MTI amendment, which did not affect investors with less than $50,000 in annual income, computed minimum taxable income by adding gross income and items of tax preference and subtracting charitable contributions, investment expenses, medical expenses, casualty losses and $10,000.[44]

House approval of an additional tax[45] on preference income immediately preceded the defeat of the MTI amendment. The House easily passed a minimum tax amendment to H.R. 10612 which increases the minimum tax rate and amends the minimum tax exclusions.[46] Increasing the tax on preference income ap-

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42 121 CONG. REC. 11,842 (daily ed. Dec. 4, 1975) (the MTI amendment was defeated 334-85).

43 *Id.* at 11,837.

44 *Id.* The MTI amendment would have affected 175,000 tax returns as compared to the 30,000 tax returns which are presently affected under the minimum tax provisions. Among those 175,000 tax returns, the MTI amendment would have affected primarily taxpayers in the $50,000 a year and up category. *Id.* at 11,709 (daily ed. Dec. 3, 1975) (Statement of Representative Jones).

45 Section 56 levies a tax on preference income. INT. REV. CODE OF 1954, § 56.

46 121 CONG. REC. 11,836 (daily ed. Dec. 4, 1975) (The amendment, offered by Representative James Corman, passed 314-107). Before the Finance Committee markup, the minimum tax provisions of H.R. 10612 eliminate the deduction for regular taxes paid when computing the minimum tax, raise the minimum tax rate to 14 percent, reduce the exemption for preference income to $20,000, eliminate the exemption when preference income exceeds $40,000, levies a minimum tax on corporations, and includes construction period interest and real estate taxes as preference items. H.R. 10612, § 301(a), (b), (c)(1), *proposing* §§ 55(a), (c)(1), (c)(2), 56(2), 57(14). The minimum tax amendment promises to add $376 million of additional revenue in 1976 and $565 million in 1981. *Id.* at 11,689 (daily ed. Dec. 3, 1975) (Statement of Representative Ullman). LAL and the minimum tax provisions of H.R. 10612 in total will increase tax revenues by $1.5 billion in 1976 alone. 3 BNA HOUS. & DEV. REP. No. 21, 939 (March 8, 1976). For a detailed look at the revenue impacts of H.R. 10612 as reported by the House Ways and Means Committee on Nov. 12, 1975, *see* H.R. REP. No. 658, 94th Cong., 1st Sess. 17-24 (1975).

The strongest opposition to LAL comes from the housing industry. Builders, already facing a bleak capital market and what some consider to be a depression in their industry, fear that LAL will cripple any possibility of a housing recovery. See *94th Cong. Hearings on Tax Reform, supra* note 24, at 1409 (Statement of John Williamson), 1412 (Statement of John Hart). Industry economists estimate that LAL and the minimum tax provisions of LAL will cause a $6.3 billion drop in real estate investment, a $11.2 billion loss in real estate GNP, a $2.8 billion net annual loss in federal tax revenues from the real estate industry, and an increase in real estate unemployment of 280,000. 3 BNA HOUS. & DEV. REP. No. 23, 1053 parently has strong support in the Senate too.[47] Senators Edward Kennedy and Joseph Biden have submitted similar bills which broadly expand the minimum tax base.[48]

### C. *Limitation of a Limited Partner's Losses*

Limitation of a Limited Partner's Losses (LLP) has been submitted as another reform proposal.[49] Reversing the application of the *Crane* rule to limited partnerships, LLP limits the tax losses a limited partner can take from his limited partnership by restricting his basis to the amount of his equity in the project.[50] Under LLP, tax shelter limited partnerships cannot "pass-through" to their limited partners artificial tax losses in excess of

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(April 5, 1976). Some members of Congress, however, challenge the industry's predictions. 121 CONG. REC. 11,842 (daily ed. Dec. 4, 1975) (Statement of Representative William Green).

47 3 BNA HOUS. & DEV. REP. No. 13, 591 (Nov. 17, 1975).

48 Senator Kennedy's bill would apply the minimum tax of 10 percent on the sum of tax preference items which exceed $10,000, decreasing the current $30,000, and eliminate the deduction for regular taxes paid. S. 2400, 94th Cong., 1st Sess. (1975), *proposing* § 752(e). Senator Biden's bill would levy a minimum tax on 10 percent of the amount by which the items of tax preference exceeds the excludable amount of $10,000. S. 294, 94th Cong., 1st Sess. (1974).

49 Representative Corman in 1974 proposed to overrule the nonrecourse loan Treasury Regulation (§ 1.752-1(e)) by providing that a limited partner's share of partnership liabilities cannot exceed the difference between his actual contribution credited to him by the partnership and the total contributions he is obligated to make under the partnership agreement. STAFF OF THE JOINT COMM. ON INTERNAL REVENUE TAXATION, 94TH CONG., 1ST SESS., TAX SHELTERS: USE OF LIMITED PARTNERSHIPS, ETC. 12 (Comm. Print 1975). H.R. 1040, 93rd Cong., 1st Sess. § 502 (1973) would have limited depreciation to an investor's actual investment by disallowing depreciation to the extent it would reduce the adjusted basis of property below an amount equal to any mortgage indebtedness on such property less the adjusted basis of the land allocable to such property.

50 Present law permits a limited partner to achieve a high tax basis for his interest in the limited partnership, the statutory ceiling for the tax losses that he can take from the limited partnership, by including not only the amount of money he contributes to the limited partnership but also his pro rata share of partnership and nonrecourse liabilities. Note 8 *supra*. For a brief consideration of the LLP approach, *see* S. SURREY, W. WARREN, P. MCDANIEL & H. AULT, 2 FEDERAL INCOME TAXATION 134-35 (1973). For a strong defense of the *Crane* rule and its application to the limited partnership, see *Statement of Public Witnesses in Panel Form Testifying on the Subjects of Tax Shelters and Minimum Tax (Capital Formation and Housing in General) and Deductions for Conventions Outside the United States Before the Committee on Ways and Means*, 94th Cong., 1st Sess. 77-85 (1975) (Statement of Alan Aronsohn). A complete discussion can be found in Perry, *Limited Partnerships and Tax Shelters; The Crane Rule Goes Public,* 27 TAX L. REV. 525 (1972).

their actual investment, a major tax advantage of a shelter arrangement.

Senator Kennedy and Representative Don Bonker have advanced LLP bills in the current session of Congress. Senator Kennedy's bill prevents a limited partner from increasing his basis by his share of any partnership liability for which he was not individually liable.[51] Since a limited partner is only individually liable to the extent of his cash and property contributions and contractual obligations,[52] Senator Kennedy's bill limits a limited partner's deductible losses to his actual commitment. Representative Bonker's bill reaches the same result by excluding nonrecourse partnership liabilities from a limited partner's basis.[53]

## III. A COMPARISON OF THE THREE APPROACHES

Of these three reform proposals, LLP takes the narrowest approach to the problem of real estate shelters. LLP does not affect shelter arrangements using business forms other than the limited partnership. LLP does not, for example, prevent individual proprietors or general partners from using accelerated deductions derived from heavily financed real estate projects against their unrelated taxable income.[54] LLP is also over-inclusive. By extending to all limited partnerships, LLP has implications beyond real estate tax shelters.[55]

MTI takes the most indirect approach to the problem of real estate tax shelters. MTI simply imposes an alternative tax on preference income without making any substantive changes in

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51 S. 1765, 94th Cong., 1st Sess. (1975), *proposing* § 752(e).

52 Note 7 *supra*.

53 Representative Bonker's bill, adding § 752(e) to the Code, prevents a limited partner from including partnership liabilities which exceed the difference between his actual contribution and his total contractual obligations to the limited partnership in his basis. H.R. 6988, 94th Cong., 1st Sess. § 212 (1975).

54 LLP would also permit corporations, notably banks, to continue to utilize tax shelter arrangements. SURREY ET AL. *supra* note 50, at 135.

55 LLP, moreover, is criticized for discriminating against small investors who must invest through some form of group ownership and consequently favoring the wealthy who can invest directly, and making illogical distinctions between business forms. *93rd Cong. Hearings on Tax Reform, supra* note 23 at 3122 (Statement of Howard Benedict), 3203 (Statement of Albert Walsh).

the Code. MTI also accords all investments the same treatment.[56] In the opinion of its sponsors, furthermore, MTI promises to raise additional revenues at a minimal cost to the growth of the housing industry.[57]

LAL makes the most significant change in the law of real estate tax shelters. By removing the tax leverage in real estate investment, LAL on the per-property basis proposes to end the practice of selling real estate deductions to high bracket investors.[58] LAL on the aggregation basis, however, confines this practice to those investors who have unrelated real estate income from their LAL real property. LAL on the aggregation basis in fact permits the packaging of ordinary income and tax shelter real estate for syndication purposes.[59] According to its advocates,[60] LAL on the aggregation basis also protects the bona fide builder-developer who must cushion the impact of tax losses suffered in a new project with tax-savings from established real estate developments.[61] Neither version of LAL precludes an investor from achieving a tax-free cash flow from a particular real estate project.

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56 121 CONG REC. 11,709 (daily ed. Dec. 3, 1975) (Statement of Representative Jones). Although it is potentially neutral, LAL as devised by H.R. 10612 grants other investments some tax advantages that it does not grant real estate. Exploratory oil wells are not included in LAL property. H.R. 10612, § 101(a), *proposing* § 467(a)(5). For individual taxpayers, the bill exempts the preproductive expenses of certain farm crops — wheat, alfalfa, barley, oats, rye, sorghum and cotton — from inclusion in accelerated deductions. Similar treatment is given to the preproductive expenses of non-poultry livestock. H.R. 10612, § 101(a), *proposing* § 468(c)(1)(b)(iii), (iv).

57 Note 46 *supra*. MTI would have raised $866 million in revenue in 1976 and $1,335 million in 1981 when fully effective. 121 CONG. REC. 11,709 (daily ed. Dec. 3, 1975) (Statement of Representative Jones).

58 H.R. 10612 does not apply LAL to corporations. H.R. 10612, § 101(a), *proposing* § 466(a)(2).

59 *94th Cong. Hearings on Tax Reform, supra* note 24, at 1457 (Statement of Jerome Kurtz); 121 CONG. REC. 11,831 (daily ed. Dec. 4, 1975) (Statement of Rep. Mikva).

60 See 121 CONG. REC. 11,701 (daily ed. Dec. 3, 1975) (Statement of Representative Barber Conable); 121 CONG. REC. 11,183 (daily ed. Dec. 4, 1975) (Statements of Representatives William Ketchum, Joe D. Waggoner, Jr., and Barber Conable).

61 This rationale has appeal but it seems unlikely that a bona fide builder-developer could not finance a new commercial or residential development that promises to be profitable merely because his non-economic tax losses are deferred for several years. Even if this rationale has a solid basis in fact, it does not require that all investors be given similar treatment. LAL on the per-property basis could be enacted with an exception for bona fide builder-developers who could elect LAL on the aggregation basis.

LAL is particularly defective as a legislative solution because it is not tailored to meet the needs of real estate development. By uniformly diminishing real estate tax incentives and consequently decreasing housing subsidies across-the-board, LAL ignores the different investment needs of low-income housing, residential property and commercial real estate. The investment needs of low-income housing are considerable. Because low-income families cannot afford high rentals, low-income housing cannot provide the high yields that are necessary to attract investors who can realize a greater net profit from other investments.[62] Additionally, investors demand a higher return on low-income housing because of industry-wide high construction costs and the increased inner-city risks of tenant turnover, rent "skips" and vandalism that are frequently associated with low-income housing.[63] Without some program of government assistance, the stock of low-income housing resulting from the trickle-down process will be generally substandard and concentrated in older central cities and close-in suburbs.[64] Tax incentives which reduce the yield which investors demand increase the supply of minimally-acceptable low-income housing. Tax incentives which assist financially viable residential property and commercial real estate such as apartments, office buildings and shopping centers, however, give windfalls to investors who would have invested irrespective of the tax incentives.[65] LAL fails to distinguish between low-income housing, residential property and commercial real estate[66] and, unless Congress legislates an alternative housing pro-

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62 Note, *Government Programs to Encourage Private Investment in Low-Income Housing*, 81 HARV. L. REV. 1295, 1296 (1968).

63 *Id.*

64 Downs, *Are Subsidies the Best Answer for Housing Low- and Moderate-Income Households?*, 4 URB. LAW. 405, 409 (1972).

65 [A]s a former builder and real estate developer, my extensive experience with real estate tax shelters convinces me that such are not essential to a healthy building industry. . . . An investor does not lower his rents or originate a project because of his tax advantage. He only realizes a windfall of untaxed income because of accelerated depreciation).

121 CONG. REC. 11,716 (daily ed. Dec. 3, 1975) (Statement of Representative James Weaver.

66 Note 34 *supra*. LAL as drafted in H.R. 10612 does make minor concessions to the needs of low-income housing. The bill employs its latest effective date for low-income housing. Commercial property begun after January 1, 1976 is subject to LAL immediately. Residential real property is excepted from the

gram for low-income housing to supplant the present tax expenditures,[67] would produce presumably unintended effects on the stock of low-income housing.

Neither LAL, MTI nor LLP are far-reaching tax reform proposals. A reform proposal designed to foreclose all the tax advantages of shelter arrangements would have to restrict the depreciation deductions on real estate investments to the investor's actual equity in the project, require capitalization of construction period expenses, limit depreciation to the straight line method, and provide full recapture upon sale.[68] Unlike such a reform proposal, MTI preserves all aspects of the real estate tax shelter. LLP dramatically affects tax shelter limited partnerships but, perhaps illogically,[69] encourages the use of other business forms in shelter arrangements. As an add-on provision to the Code[70] which categorizes income and deductions into classes of property,[71] LAL does not directly abrogate or revise any of the existing preferential real estate provisions.

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January 1, 1976, effective date if the taxpayer acquires the site and the necessary financing before January 1, 1977, and the construction period begins before January 1, 1978. The bill exempts low-income housing from LAL if a qualifying federal or state subsidy is secured before January 1, 1979, and the construction period begins before January 1, 1981. H.R. 10612, § 101(a), *proposing* § 470(c)(1), (2), (3). The bill also stipulates a limited recapture rule for the sale of low-income housing. According to the Code, additional depreciation on low-income housing is subject to one hundred percent recapture less one percentage point for every month the property is held after twenty months. INT. REV. CODE OF 1954, § 1250(a)(1)(c)(ii). The bill alters this formula by extending the twenty months to one hundred months. H.R. 10612, § 201(a), *proposing* § 1250(a)(1)(B)(i). The bill requires full recapture for all additional depreciation after December 31, 1975, taken on depreciable real property. H.R. 10612, § 201(a), *proposing* § 1250(a)(1)(B)(iv). The bill, furthermore, extends and liberalizes the tax shelter in low-income housing rehabilitation expenditures for two years. Prior to 1976, the Code permitted such expenditures to be depreciated under the straight line method using a useful life of five years up to an aggregate of $15,000. INT. REV. CODE OF 1954, § 167(k) (expired Dec. 31, 1975). The bill extends this treatment for two years and increases the ceiling of aggregate expenditures to $20,000. H.R. 10612, § 102(a), (b). Such expenditures are not subject to LAL until January 1, 1978. H.R. 10612, § 101(a), *proposing* § 470(c)(4).

67 The purpose of the five-year delay in effecting LAL for low-income housing is to give HUD and Congress time to consider alternative direct subsidies and to allow planning and construction to proceed without interruption. 3 BNA HOUS. & DEV. REP. No. 11, 472 (Oct. 20, 1975).

68 SURREY ET. AL., *supra* note 50, at 134.

69 *Supra* note 55.

70 H.R. 10612, § 101(a), *proposing* §§ 466-470.

71 We have analyzed LAL . . . and find it wanting from the standpoint . . .

Notwithstanding its shortcomings, LAL at this time is the strongest tax reform proposal before Congress. LAL, unlike MTI, or LLP, measurably decreases the tax avoidance use of real estate tax shelters. In a political system where change is deliberate and incremental, the enactment of LAL, whether in H.R. 10612 or a future tax reform bill, would be a creditable victory for critics of shelter arrangements.

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> that the whole concept of categorizing a taxpayer's net income into specific different categories, rather than taxing a taxpayer on his total worldwide net income, is both inequitable and administratively bad policy.

*94th Cong. Hearings on Tax Reform, supra* note 24, at 1423, (Statement of Alan Aronsohn.

# CONSTITUTIONALITY OF THE LEGISLATIVE VETO

GEOFFREY S. STEWART*

*Legislative review mechanisms have assumed increasing importance as Congress seeks to assert control over the mushrooming federal bureaucracy. One such mechanism — the legislative veto — allows Congress to prevent implementation of executive and administrative rules which do not accord with Congress' intent in enacting the authorizing legislation. The legislative veto has been challenged, however, on the grounds that it violates the constitution's scheme of separation of powers and that it interferes with the President's right to veto Congressional legislation. Mr. Stewart analyzes the constitutional arguments against the legislative veto and concludes that, in the form it has thus far been used, the veto does not violate the Constitutional allocation of powers between the legislative and executive branches.*

## *Introduction*

Statutory provisions giving Congress the power to veto certain administrative proposals and regulations have recently attracted considerable attention from legislators and legal commentators.[1] For example, the question of Congress' right to reserve for itself a power to veto agency rules and regulations was

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1 J. HARRIS, CONGRESSIONAL CONTROL OF ADMINISTRATION (1964); Remarks by J. William Rehnquist, Section of Administrative Law of the American Bar Association, in Dallas, Tex., Aug. 12, 1969; *Hearings on Congressional Review of Regulations, H.R. 8231 and H.R. 3658, Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 94th Cong., 1st Sess. (1975) (testimony of A. Scalia); Boisvert, *A Legislative Tool for Supervision of Administrative Agencies: The Laying System*, 25 FORDHAM L. REV. 638 (1956-57); Cooper and Cooper, *The Legislative Veto and the Constitution*, 30 GEO. WASH L. REV. 417 (1962); Ginnane, *The Control of Federal Administration by Congressional Resolutions and Committees*, 66 HARV. L. REV. 569 (1953); Jackson, *A Presidential Legal Opinion*, 66 HARV. L. REV. 1353 (1953); Newman and Keaton, *Congress and the Faithful Execution of the Laws — Should Legislators Supervise Administrators?*, 41 CALIF. L. REV. 565 (1953); Schwartz and Carr, *Legislative Control of Administrative Rules and Regulations*, 30 N.Y.U.L. REV. 1031 (1955) (separate articles); Stone, *The Twentieth Century Administrative Explosion and After*, 52 CALIF. L. REV. 513 (1964); Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 CALIF. L. REV. 983 (1975).

a focus of attention in the recent Congressional debates on the reconstitution of the Federal Election Commission.[2] Two bills introduced in the first session of the 94th Congress — one with 122 cosponsors — would have given the Congress power to nullify substantially all the thousands of rules issued each year by administrative agencies.[3] Congress already has enacted legislative veto provisions in a number of significant statutes, including the Trade Act of 1974,[4] the Foreign Assistance Act of 1971,[5] the Congressional Budget and Impoundment Control Act[6] and the Federal Election Campaign Act Amendments.[7]

Provisions allowing Congress to veto administrative proposals are a recent development in a trend towards giving Congress ways of controlling executive and administrative agencies which can be dated as far back as the Wilson Administration. It began in earnest in 1932, when Congress gave the legislative branch a veto power over executive reorganization plans.[8] Since then, over 125 separate statutes have given the legislative branch direct review powers.[9] The review devices have ranged from simple directives to an agency to "come into agreement" with Congressional committees to grants of absolute veto power to Congress or its Houses or committees.[10] Altogether, these statutes contain almost two hundred specific legislative review provisions,[11] covering subjects as diverse as tax refunds,[12] education[13] and military expenditures.[14] The trend has been accelerating in recent years: half the review provisions ever enacted have been passed since 1970.[15]

2 34 CONG. Q. WEEKLY REP. 675-77 (1976).
3 H.R. 3658 (S. 1678, same bill), H.R. 8231, 94th Cong., 1st Sess. (1975).
4 Trade Act of 1974, 19 U.S.C.A. §§ 2112, 2253, 2412, 2432, 2437 (Supp. 1975).
5 Foreign Assistance Act of 1971, Pub. L. No. 92-226, § 304, 86 Stat. 28 (1972).
6 Congressional Budget and Impoundment Control Act of 1974, 31 U.S.C.A. §§ 1403-07 (Supp. 1976).
7 Federal Elections Campaign Act Amendments of 1974, 2 U.S.C.A. § 438(c) (Supp. 1975).
8 *See* Act of June 30, 1932, ch. 314, § 407, 47 Stat. 414.
9 C. NORTON, CONGRESSIONAL REVIEW, DEFERRAL AND DISAPPROVAL OF EXECUTIVE ACTIONS: A SUMMARY AND AN INVENTORY OF STATUTORY AUTHORITY 8 (Library of Congress Congressional Research Service (1975)).
10 *Id.* at 2.
11 *Id.* at 8.
12 INT. REV. CODE OF 1954, § 6405.
13 Act of August 21, 1974, 20 U.S.C.A. §§ 1221(e) note, 1232, 1853 (Supp. 1976).
14 *See, e.g.,* Act of December 27, 1974, Pub. L. No. 93-552, §§ 501, 613, 88 Stat. 1757, 1766.
15 NORTON, *supra* note 9, at 2.

True veto provisions are the most significant development in the general trend towards direct Congressional review of administrative activities. Eighty-five percent of the review provisions enacted between 1973 and mid-1975 included vetoes.[16] Moreover, veto provisions raise most acutely the constitutional issues implicated by all legislative review devices: (1) the principle of separation of powers; and (2) article I, § 7. Opponents of the legislative veto have argued that it permits Congress to interfere in agencies' actual enforcement of the law and thus intrude upon executive prerogatives.[17] And since the legislative veto allows Congress to act directly, without being subject to the President's veto, on matters that concern more than its internal affairs, its opponents argue that the veto power clearly violates the prescriptions of article I, § 7 of the Constitution.[18]

There has been much comment on the legislative veto by state courts[19] and United States Attorneys General,[20] but the constitutionality of the legislative veto has never been decided by the federal courts. The Supreme Court deliberately avoided the issue when it considered the Federal Election Campaign Act[21] in *Buckley v. Valeo*,[22] although Justice White, writing separately, expressed a belief that the legislative veto was constitutional.[23]

This Note presents an argument in favor of the constitutionality of at least certain types of legislative veto. It begins with a brief description of the legislative veto mechanism and then proceeds to the question whether it is appropriate for Congress to act directly, in any manner, in the substantive context of administrative activity. The Note next analyzes article I, § 7, and discusses whether Congress may act in the manner prescribed in most

16 *Id.* at 9.

17 Remarks of J. Rehnquist, *supra* note 1; *Hearings on H.R. 8231 and H.R. 3658, supra* note 1.

18 Ginnane, *supra* note 1; *Hearings on H.R. 8231 and H.R. 3658, supra* note 1.

19 Opinion of the Justices, 110 N.H., 359, 266 A.2d 823 (1970); Opinion of the Justices, 96 N.H. 517, 83 A.2d 738 (1950). *See also* Sibbach v. Wilson & Co., 312 U.S. 1 (1941); Mullan v. State, 114 Calif. 578, 46 P. 670 (1896); Moran v. LaGuardia, 270 N.Y. 450, 1 N.E.2d 961 (1936); Watrous v. Golden Chamber of Commerce, 121 Colo. 521, 218 P.2d 498 (1950); People v. Tremaine, 252 N.Y. 27, 168 N.E. 817 (1929).

20 6 Op. Att'y Gen. 680 (1854); 9 Op. Att'y Gen. 387 (1859); 19 Op. Att'y Gen. 385 (1889); 37 Op. Att'y Gen. 56 (1933).

21 Federal Elections Campaign Act Amendments of 1974, 2 U.S.C.A. § 438(c) (Supp. 1975).

22 Buckley v. Valeo, 96 S. Ct. 612, 692 n.176 (1976).

23 *Id.* at 757.

legislative veto provisions without subjecting its actions to Presidential approval. The Note concludes with a discussion of the role of Congress in the constitutional system.

## I. THE MECHANISM OF LEGISLATIVE VETO

Simply defined, the legislative veto is a form of congressional action by which Congress participates in certain specified activities of another organ of government pursuant to a statute which the legislative branch has already enacted. Within this definition there is room for wide variations in veto provisions, so far as the subject matter of the veto, the manner in which it must be exercised, and the voting requirements of a veto are concerned. And veto provisions have almost exhausted the possibilities for their form, varying greatly in structure, scope, and effect,[24] although their effect has always been limited to actions taken pursuant to a particular statute, unlike the two "blanket" legislative review statutes introduced in the first session of this Congress.[25]

For purposes of illustration, H.R. 3658,[26] one of those "blanket" veto provisions, may serve to describe the mechanism by which many legislative vetoes operate. H.R. 3658 requires proposed agency[27] regulations to be published in the *Federal Register* at least thirty days before they take effect. During the thirty days after publication of the rules, either House of Congress may by simple resolution declare that it does not favor the proposed rule, in which event the rule never becomes effective. If neither

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24 NORTON, *supra* note 9, at 3-4.

25 H.R. 3658 (S. 1678, same bill), H.R. 8231, 94th Cong., 1st Sess. (1975). See text accompanying note 3 *supra*.

26 94th Cong., 1st Sess. (1975). This bill applies only to regulations issued by the executive and by administrative agencies, and only to those regulations which provide criminal sanctions in the event of their violation.

27 For the purposes of this Note, the term "agency" will be given the meaning it has in the context of the Administrative Procedure Act, 5 U.S.C. § 551 (1970):

> (1) "agency" means each authority of the Government of the United states, whether or not it is within or subject to review by another agency, but does not include—
>
> (A) the Congress;
>
> (B) the courts of the United States;
>
> (C) the governments of the territories or possessions of the United States; . . .

House votes to disapprove the rule in the thirty day period, the rule takes effect according to its own terms. H.R. 3658 follows the example of the Executive Reorganization Acts,[28] permitting a veto resolution to be referred to appropriate committees for closer study.

The approach taken by H.R. 3658 is not the exclusive one available to Congress. The bill limits the veto power to agency rule-making activity,[29] while other veto provisions enacted by Congress have extended review to activities such as acquisition of properties,[30] reorganization plans,[31] and expenditures on new programs.[32] Other acts have used notification procedures ranging from publication in the *Federal Register* to direct notification of individual Congressional committees.[33] Periods in which Congress may exercise its veto power have also varied widely, although they have usually been sixty days or less.[34] The manner in which Congress exercises the veto has differed. Some veto provisions have required Congress to affirmatively approve the proposed agency action; others, including H.R. 3658, have used a "negative"[35] procedure whereby a proposal is vetoed only if Congress actually votes a veto resolution.

## II. The Constitutionality of the Legislative Veto

### A. *The Separation of Powers*

The legislative veto has frequently been attacked on the grounds that it permits Congress to intervene in the executive functions of various agencies and departments.[36] "If they envision Congress' setting regulations aside on the basis of its own notions as to what constitutes desirable enforcement policy," one critic has declared,

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28 5 U.S.C. §§ 908-13 (1970).

29 Such a limitation is not uncommon. *See, e.g.*, Federal Election Campaign Act Amendments of 1974, 2 U.S.C.A. § 438(c) (Supp. 1975).

30 Public Building Purchase Contract Act, 68 Stat. 560 (1954).

31 5 U.S.C. § 908-13 (1970).

32 Act of Aug. 21, 1974, 20 U.S.C.A. §§ 1221(e) note, 1232, 1853 (Supp. 1976).

33 *Id.*

34 Norton, *supra* note 9, at 10.

35 Schwartz and Carr, *supra* note 1, at 1045-47.

36 *See* note 17 *supra*.

"they intrude upon the Executive's functions."[37] Closer analysis of the meaning of the principle of the separation of powers shows that these criticisms are founded upon misconceptions of both the nature of the separation of powers and the operation of most legislative vetoes.

### 1. The Doctrine of the Separation of Powers

The framers divided the government into distinct branches in order to preserve basic freedoms from the authority of a strong central government.[38] Without an institutional separation of powers, they believed, one of the three branches could displace the others, upsetting the representative system of government and the liberties it was meant to protect.[39] "The accumulation of all powers," James Madison wrote, "legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."[40] The framers accomplished the division of powers in two ways: through a formal allocation of powers to each of the three branches of government[41] and through a constitutional system of structural checks and balances that buttressed the formal division of powers.

The Constitution's formal allocation of powers among the three branches is the primary means by which the separation of powers is implemented. The powers of the government are allocated to the three branches in the first sections of the first three articles of the Constitution. Essentially, these sections provide that the legislative power of the United States shall be vested in one Congress, consisting of the Senate and the House of Representatives,[42] that the executive authority is granted to the President,[43] and that the judicial powers shall be vested "in one supreme Court."[44] This

37 *Hearings on H.R. 8231 and H.R. 3658*, *supra* note 1, at 11.
38 *See* THE FEDERALIST No. 47, at 301 (New American Library ed. 1961) (J. Madison).
39 *Id.*
40 *Id.*
41 *See* Springer v. Philippine Islands, 277 U.S. 189, 201-02 (1928).
42 U.S. CONST. art. I, § 1.
43 *Id.* art. II, § 1.
44 *Id.* art. III, § 1.

division of authority was in accordance with the three principal functions — judicial, executive, and legislative — that the government discharged. The separation of the government into distinct branches was not an accident or afterthought. "[T]his separation and the consequent exclusive character of the powers conferred upon each of the three departments is basic and vital — not merely a matter of governmental mechanism."[45]

Yet the framers realized that "a mere demarcation on parchment of the constitutional limits of the several departments [was] not a sufficient guard against those encroachments that lead to a tyrannical concentration of all the powers of government in the same hands."[46] The framers buttressed the Constitution's formal allocation of powers with a second set of constitutional provisions that established structural checks among the branches and provided each branch with a means by which it could protect itself from the other two.[47] The checks themselves operate both within and among the branches, and are found throughout the first three articles of the Constitution. The majority of the checks are imposed on Congress. Examples include the requirement that the two Houses of Congress act concurrently in enacting laws[48] and the requirement that all bills passed by Congress be submitted to the President for his approval or veto.[49] Other provisions, such as the "Ineligibility" or "Incompatability" clause[50] and the Appointments clause[51] are also meant to limit congressional authority.

These checks are in the nature of extraordinary powers. They were placed in the Constitution in order to give each branch a means of protecting its prerogatives. They grant each branch a special — but a strictly defined — power that extends beyond its ordinary authority under the Constitution's formal allocation of power. Failing an express constitutional grant of these powers, a branch would not be able to exercise them without violating

45 Springer v. PPhillipine Islands, 277 U.S. 189, 201 (1928).
46 THE FEDERALIST No. 48, *supra* note 38, at 313 (J. Madison).
47 *See id.*, No. 73, at 443 (A. Hamilton).
48 U.S. CONST. art. I, § 7.
49 *Id.*
50 *Id.*, § 6.
51 *Id.* art. II, § 2.

the principle of the separation of powers.[52] In those situations to which the extraordinary power is inapplicable, the latitude of action of each branch must be determined with reference to the general powers that the Constitution confers on each branch.

The device of extraordinary powers serving as constitutional checks may be illustrated by the cases involving the appointment power of the President. Article II, Section 2 of the Constitution provides that the President "shall nominate, and by and with the consent of the Senate, shall appoint . . . Judges of the supreme Court, and all other Officers of the United States, whose appointments are not otherwise provided for. . . ."[53] Significantly, the provision gives Congress no power of appointment, and Congress had not subsequently been thought to have such a power, except in the case of its own inferior officials.[54] The President's appointment power activates whenever the office to be filled involves the exercise of *any* significant authority that is not purely legislative;[55] but the scope of the President's power to appoint is not, therefore, indicative of the reach of executive power generally and is not instructive as to the scope of executive power for the purposes of the separation of powers. For example, article II, § 2 also gives the President the power to appoint Justices of the Supreme Court, but few would argue that the writing of judicial decisions is an executive function.

The special nature of the appointment power is underlined by the cases involving the power of the executive to remove government officials. Unlike the power to appoint, the power of the President to remove officers is not mentioned in the Constitution. Although courts have held that the President's power to appoint implies the power to remove officials whose functions are pri-

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52 Discussing the principle of the separation of powers, the Court in *Springer v. Philippine Islands*, 277 U.S. 189, 202 (1928), observed that,

> The existence in the various [state and federal] constitutions of occasional provisions expressly giving to one of the departments powers which by their nature otherwise would fall within the general scope of the authority of another department emphasizes, rather than casts doubt upon, the generally inviolate character of this basic rule.

53 U.S. CONST. art. II, § 2.

54 *See* Buckley v. Valeo, 96 S. Ct. 612, 686 (1976); Springer v. Philippine Islands, 277 U.S. 189, 202 (1928). *But see Ex parte* Siebold, 100 U.S. 371, 397-98 (1879).

55 Buckley v. Valeo, 96 S. Ct. 612, 685 (1976).

marily executive,[56] they have also held that the power of the President to remove officers who are not in the executive branch is limited by the nature of the office in question.[57] The President has no plenary power where the power to remove is involved: the reach of his powers is only co-extensive with the reach of executive powers generally, and the reach of executive powers has not been declared to extend to situations where various governmental powers are blended in an administrative agency.

Because the leading cases involving the appointment power have denied Congress the power to appoint administrative officers, they are often cited for the proposition that Congress may not act at all in situations requiring exercise of any measure of executive authority.[58] Closer examination of these decisions, however, shows that this view is based upon a confusion of the powers the executive enjoys where a specific constitutional check is involved with those which the executive enjoys generally by the authority of article II, § 1. Aside from the President's veto power, which will be discussed below,[59] the legislative veto provisions now in operation do not impinge on areas of government, such as appointment, where the ordinary allocation of power among the branches of government is altered by the existence of an extraordinary check.[60] The standards by which the constitutionality of these legislative veto powers ought to be judged for the purposes of the separation of powers, then, is whether they intrude upon the powers allocated to the Congress' coordinate branches by the Constitution.

### 2. The Scope of Legislative Authority

The clarity of the boundaries of the three branches of government has often been overemphasized. "The difference between

56 Myers v. United States, 270 U.S. 52, 125 (1926).

57 Humphrey's Executor v. United States, 295 U.S. 602, 626-30 (1935); Wiener v. United States, 357 U.S. 349, 355-56 (1958).

58 *See* Springer v. Philippine Islands, 277 U.S. 189, 202 (1928); Buckley v. Valeo, 96 S. Ct. 612, 690 (1976).

59 See text accompanying notes 103-126 *infra*.

60 A possible exception might be that the majority of existing veto provisions permit the veto power to be exercised by less than the whole Congress, a mode of legislative action which has been thought to violate the art. I, § 7 requirement of bicameral action in the legislative process. *See* Watson, *supra* note 1, at 1053-57.

[Congress and the executive]," courts have declared, "undoubtedly is, that the legislature makes, and the executive executes."[61] In practice, however, it is often nearly impossible to draw lines between the proper functions of the different branches. Analysis of the meaning of the principle of the separation of powers must ultimately focus, therefore, on the fundamental authority of each branch.

Preliminarily, it should be noted that the division of the government into separate branches does not contemplate an absolute compartmentalization of powers or a prohibition of the sharing of powers among the branches. This fact has been recognized repeatedly from the time the Constitution was framed. Writing in *The Federalist*, James Madison emphasized that the principle of separation of powers is violated only "where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department."[62] And later, Justice Holmes, in a classic formulation of the principle of the separation of powers, observed that

> The great ordinances of the Constitution do not establish and divide fields of black and white. Even the more specific of them are found to terminate in a penumbra shading gradually from one extreme to the other. . . . It does not seem to need argument to show that however we may disguise it by veiling words we do not and cannot carry out the distinction between legislative and executive action with mathematical precision. . . . When we come to the fundamental distinctions it is still more obvious that they must be received with a certain latitude or our government could not go on.[63]

The fact that the boundaries between the powers of the different branches are vague and uncertain implies that the authority of each branch should be absolute only within the core of the powers the Constitution assigns it. Beyond the core of its powers, a branch certainly may act, but its activities begin to operate in an area where authority is shared with other branches. "[T]here is a twi-

61 Wayman v. Southard, 23 Wheat. 1, 46 (1825).

62 THE FEDERALIST No. 47, *supra* note 38, at 302-03 (J. Madison) (emphasis in original).

63 Springer v. Philippine Islands, 277 U.S. 189, 209-11 (1928) (Holmes, J., dissenting).

light in which [the President] and Congress may have concurrent authority, or in which its distribution is uncertain."[64] Within this "gray area" Congress may act to the extent that it has legislative authority and does not encounter an express constitutional limitation or intrude upon the core of powers held by another branch.

Several attributes of legislative authority may be deduced by reference to what is perhaps the core of Congress' powers — the authority to enact laws. The essence of law-making is the issuance of rules that have the substantive authority to regulate conduct[65] or direct the operation of government.[66] These rules take effect prospectively[67] through standards of general application.[68] They impose legal sanctions[69] or constitute legal authorization to take certain actions.[70] If not unconstitutional, laws bind courts[71] as well as other branches of government.[72] Congress may act by law to regulate almost every subject which the Constitution commits

64 Youngstown Sheet and Tube Co. v. Sawyer [The Steel Seizure Case], 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

65 A law, Alexander Hamilton observed, "is a rule which those to whom it is prescribed are bound to observe." THE FEDERALIST No. 33, *supra* note 38, at 204. "If individuals enter into a state of society, the laws of that society must be the supreme regulator of their conduct." *Id.* Distinguishing laws or rules that have substantive effect from those which concern the operations of the other branches is difficult, but may become important in the context of the legislative veto. See note 93 *infra*. Courts have wrestled with this problem repeatedly, however, in the context of the issues raised by the judicial doctrine of *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), and in interpreting language of the Federal Rules Enabling Act, 28 U.S.C. § 2072 (1970), limiting the scope of the Federal Rules of Civil Procedure to rules that do "not abridge, enlarge or modify any substantive right." While the term "substantive" admits of no simple definition, courts and commentators have characterized it as implicating "primary decisions respecting human conduct," Hanna v. Plumer, 380 U.S. 460, 475 (1965) (Harlan, J., concurring).

66 U.S. CONST. art. I, § 8: "The Congress shall have Power . . . To make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

67 U.S. CONST. art. I, § 9: "No Bill of Attainder or ex post facto Law shall be passed."

68 U.S. CONST. art. I, § 9.

69 "It is essential to the idea of a law that it be attended with a sanction; or in other words, a penalty or punishment for disobedience." THE FEDERALIST NO. 15, *supra* note 38, at 110 (A. Hamilton).

70 *See, e.g.*, Youngstown Sheet and Tube Co. v. Sawyer: "The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself." 343 U.S. 579, 585 (1952).

71 U.S. CONST. art. III, § 2.

72 *Id.* art. II, § 3: "[The President] shall take care that the Laws be faithfully executed."

to the federal government.[73] Within its substantive jurisdiction, Congress' powers are plenary.[74] If characterized by any single feature, legislative power involves the formulation of policy, as opposed to the actual implementation of law. It is expected to be general, leaving latitude to Congress' co-ordinate branches in the application of policy to facts.[75]

The reach of legislative authority is limited by the constitutional prerogatives of Congress' co-ordinate branches — particularly the executive. The general power the Constitution vests in the President is the duty to see that the laws "be faithfully executed."[76] The meaning of this function is obscure. The few judicial decisions attempting to give specific content to this phrase indicate that the executive's powers are narrowly drawn in the absence of an express constitutional grant of extraordinary powers.[77] Courts have held that the executive function extends to the proprietary management of government property,[78] and the decision whether to bring suit for a breach of the law.[79] More significant in this respect, perhaps, is what the courts have held that executive powers do not extend to. The President has no inherent authority to seize private property,[80] and despite his special powers of appointment,[81] does not have the power to remove officers who are not part of the executive establishment.[82] Nor does the President have any inherent power to act in a legislative capacity: "In the framework of our Constitution, the President's power to see that

73 U.S. CONST. art. 1, § 8.

74 *See* Buckley v. Valeo, 96 S. Ct. 612, 684 (1976).

75 *See generally* United States v. Brown, 381 U.S. 437, 455 (1965).

76 U.S. CONST. art. II, § 3.

77 *See* Fed'n of Civic Ass'ns v. Volpe, 459 F.2d 1231, 1247-48 (D.C. Cir., 1972), *cert. denied,* 405 U.S. 1030 (1972); *cf.* Pillsbury v. FTC, 354 F.2d, 952, 963-65 (5th Cir. 1966).

78 Springer v. Philippine Islands, 277 U.S., 189 (1928). *But see* United States v. Midwest Oil Co., 236 U.S. 459, 474-75 (1915).

79 "A law suit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to 'take care that the laws be faithfully executed.'" Buckley v. Valeo, 96 S. Ct. 612, 691 (1976).

80 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

81 See text accompanying note 53 *supra.*

82 Wiener v. United States, 357 U.S. 349, 355-56 (1958). *Compare* Myers v. United States, 272 U.S. 52 (1926), *with* Humphrey's Executor v. United States, 295 U.S. 602 (1936).

the laws are faithfully executed refutes the idea he is to be a law-maker."[83] Execution of the law is distinguished by a specificity of action, and takes the form of carrying out certain legislative commands as to the expenditure of government monies, the administration of federal programs and projects, and the conduct of private persons.

Applying these principles to the legislative vetoes now in force or proposed, it appears that all or most fall squarely within Congress' legislative authority. H.R. 3658,[84] already discussed,[85] would apply only to proposed agency rules that provide criminal penalties in the event of their violation. Because of the legislature's unquestioned power to define crimes — a power once thought to be exclusive[86] — these rules are perhaps the most clearly legislative of all agency regulations, and the most clearly subject to control by Congress through the legislative veto.

As a general rule, there should be little question but that rule-making is an activity that is legislative in nature, and therefore also subject to a Congressional veto power. Agency rule-making possesses the fundamental attributes of law-making; administrative rules are in fact defined by the Administrative Procedure Act in a manner closely resembling the definition of a law.[87] Administrative and executive rules are subject to requirements of notice and hearing that allow their promulgation to be made in a manner paralleling the legislative process. Rules and regulations also have the force of law, and bind courts and other branches of the government.[88]

Moreover, the power to promulgate rules and regulations is one which no other branch may exercise in the absence of a delegation

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83 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952).

84 (S. 1678, same bill), H.R. 8231, 94th Cong., 1st Sess. (1975).

85 See text accompanying notes 27-28 *supra*.

86 On the basis of several judicial opinions, chiefly *United States v. Grimaud*, 220 U.S. 506 (1911), it was thought at one time that the power to define criminal acts was not delegable by Congress.

87 5 U.S.C. § 551(4) provides in relevant part:

> "rule" means the whole of part of an agency statement of general or particular applicabiilty and future effect designed to implement, interpret, or prescribe law or policy . . . .

88 United States v. Grimaud, 220 U.S. 506 (1911); Nader v. Bork, 366 F. Supp. 104 (D.D.C. 1973).

of rule-making authority by Congress.[89] Congress does often vest rule-making authority in the executive, but this is nonetheless known as a delegation of "legislative" authority.[90] And rule-making power may be conferred on organs of the government that are in no respect executive. Congress has granted the power to promulgate rules to a large number of agencies such as the Securities Exchange Commission and the Federal Trade Commission which are independent in nature and have been described as "quasi-judicial" or "quasi-legislative" organs.[91] The power of the Federal Trade Commission to issue rules is unquestioned, even though, as the Supreme Court observed in *Humphrey's Executor v. United States*, it could not "in any proper sense be characterized as an arm or eye of the executive. Its duties are performed without executive leave and, in the contemplation of the statute,. must be free from executive control."[92] Although agencies may use their rule-making powers to promulgate rules that are not "legislative," it would be rarely that an agency rule would fall completely beyond the scope of the legislature's interest.[93] In any event, rules of an

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89 *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 588 (1952).

90 *See* Humphrey's Executor v. United States, 295 U.S. 602 (1935).

91 Humphrey's Executor v. United States, 295 U.S. 602, 628 (1935).

92 295 U.S. at 628.

93 The fact that rule-making may be considered a legislative prerogative in the abstract does not mean that agencies do not use their rule-making powers to issue rules and regulations that could be considered "executive" in nature. Rule-making has become a means by which the executive discharges a number of functions, some of which appear executive in nature. *See Hearings on H.R. 8231 and H.R. 3658, supra* note 1, at 11. The Administrative Procedure Act, for example, envisions agency rule-making powers as encompassing rules that provide for "the organization, procedure, or practice requirements of an agency." 5 U.S.C. § 551(4) (1970). The principle of the separation of powers requires that rules in which the Congress does not have a legitimate legislative interest be excluded from the scope of the legislative veto power.

Two categories of rules that could be called "executive" come to mind as falling within this classification. First, those rules which concern an agency's internal affairs: rules pertaining to its methods of decision-making and internal organization, personnel requirements and procedures. Rules of this nature concern matters of interest only to the agency itself, as is indicated by the Administrative Procedure Act, which exempts rules relating to "agency management or personnel" from its requirements of public hearing, publication and judicial review. 5 U.S.C. § 553(a)(2) (1970).

A second category of "executive" rules would be those which are directly concerned with the actual enforcement of an agency's charge. Factors indicating that a rule is executive in nature for these purposes would be that it served to guide or direct executive officials in the enforcement of the law, applied in a limited "executive" character may be exempted from the scope of the veto power by appropriate statutory language. A legislative veto power limited to agency rule-making would supervise an area of agency action that involves the exercise of legislative powers, and would not appear to violate the separation of powers.

Other veto provisions already in effect permit Congress to supervise agency activities that are less clearly legislative and more closely identifiable with agencies' executive functions. Possible limits imposed on the veto power by the separation of powers may be indicated by examination of an existing veto statute, the Rural Development Act of 1972.[94] The Act empowers the Secretary of Agriculture to allocate development funds for rural areas to state governments, provided the states comply with certain regulations. If the Secretary determines that a state is ineligible to receive development funds because of its failure to satisfy regulations, he must inform the President, who in turn directs the Treasury to keep separate the funds which the state would otherwise receive until the end of the next session of the state's legislature. During that period, the state legislature can "appeal to Congress from the determination of the Secretary;"[95] Congress may then overrule the Secretary's finding and direct that the funds be paid to the state in question. If Congress does not vote to have the monies released to the state, the funds remain in the Treasury.

The effect of the Rural Development Act is to give Congress a power to overrule an executive official's determination of facts. The function of making findings of facts in this context has been declared to fall between the two conceptual extremes of judicial and legislative action.[96] Actually, it partakes to some degree of the powers of all three branches. In part, Congress' action is legislative in nature, since Congress has substantive jurisdiction over

context to a small number of persons, or was issued pursuant to an agency's expertise or investigation to focus legal responsibility upon a specific area of human conduct. Conversely, such rules would not be expected to display the features that characterize legislative action: they would not have the purpose or effect of setting forth standards of personal conduct or government policy, would not apply generally, and would not have a binding effect on the other branches of government.

94 86 Stat. 657-77 (1972).

95 86 Stat. 674, tit. V, § 506 (1972).

96 Fed'n of Civic Ass'ns v. Volpe (D.C. Cir., 1972), 459 F.2d 1231, 1246, *cert. denied*, 405 U.S. 1030 (1972).

the expenditure of public monies and is called upon by the Act to exercise its legislative judgment as to the need for expenditure of development funds. At the same time, Congress is required by the Act to make a determination of whether a state's actions satisfy legal requirements, a function that is judicial in character. Finally, the Act permits Congress to participate in the ongoing administration of a statutory program, a task which may be seen as executive.

The conclusion that the constitutionality of a particular legislative veto law depends upon the substantive authority of Congress to act with respect to that particular phase of agency activity necessarily means that the legislative veto is not per se constitutional. Most of the vetoes currently in force or suggested, including vetoes directed at agency rule-making, seem clearly within the scope of legislative authority. In the case of the Rural Development Act, however, Congress imposed a legislative veto in an administrative context that involves the exercise of significant authority over the other branches, and may indeed have approached the limits of the constitutionality of the legislative veto. At some point in the domain of shared powers, the interests of the executive and judicial branches limit the exercise of congressional authority through the veto mechanism.

### 3. Informal Congressional Action

On the basis of the foregoing analysis, it appears that the ultimate validity of the legislative veto for the purposes of the separation of powers depends on whether the subject over which Congress holds a veto power falls within the sphere of legislative authority. Because of the overwhelming predominance of lawmaking as a means of discharging Congress' legislative function, modes of legislative action such as direct legislative review of agency rule-making are often regarded with suspicion. The courts have never directly resolved the question of whether Congressional oversight of agency action by methods less formal than law-making violates the constitutional separation of powers.

The validity of informal modes of congressional activity was considered by the United States Supreme Court in the case of *Sibbach v. Wilson and Co.*,[97] which involved *inter alia* an attack on the constitutionality of a "laying before" provision of the Federal Rules Enabling Act.[98] The Court upheld the validity of the provision, noting that

> The value of the reservation of the power to examine proposed rules, laws and regulations before they become effective is well understood by Congress. It is frequently, as here, employed to make sure that the action under the delegation squares with the Congressional purpose.[99]

Courts appear to accept the proposition that Congress has the authority to declare what the administrative policies of agencies should be, even where the agency is characterized as an "independent agency."[100] Apparently, Congress also may attempt to influence agency decisions that are legislative in nature without violating constitutional commands, and may, by statute, instruct administrators to take informal congressional pressure into account in making their decisions.[101] Direct action by Congress outside of the sphere of the actual making of law has likewise been held permissible. Judicial decisions have confirmed that the legislature may employ congressional resolutions as a means of activating or acting under previously enacted legislation.[102]

### B. *Article I, Section 7: The Requirement that Certain Congressional Actions be Submitted to the President for His Approval or Veto*

A second ground on which the legislative veto is often attacked is that it frees Congress from the restraint of the President's veto. The Constitution grants the President a veto over some congressional resolutions as well as bills, and it is argued by the critics

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97 312 U.S. 1, *amended* 312 U.S. 655 (1941).

98 28 U.S.C. § 2072 (1970).

99 312 U.S. at 15.

100 *See* Pillsbury v. FTC, 354 F.2d 952 (5th Cir., 1966); Humphrey's Executor v. United States, 295 U.S. 602, 626-30 (1935).

101 Fed'n of Civic Ass'ns v. Volpe, 459 F.2d 1231, 1247-48 (D.C. Cir., 1972), *cert. denied,* 405 U.S. 1030 (1972).

102 Concurring in *Buckley v. Valeo,* J. White went so far as to accept the validity of the legislative veto itself. 96 S. Ct. 612, 757 (1976). *See also* Watrous v. Golden Chamber of Commerce 121 Colo. 521, 218 P.2d 498, 507-10 (1950) (comparing state and federal constitutions); Opinion of the Justices, 110 N.H. 359, 266 A.2d 823, 826 (1970).

of the legislative veto that legislative veto resolutions fall within this category.

The President's veto power is granted to him by two separate clauses of § 7 of article I. Clause two grants the President the power to veto bills. Clause three provides:

> Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives according to the Rules and Limitations prescribed in the Case of a Bill.[103]

As one of the explicit checks that alters the general constitutional allocation of power between the three branches of government, Clause three must be construed narrowly.[104] Most forms of the legislative veto fall within the definition of "Order, Resolution, or Vote" of Congress. Even assuming that a particular form of the legislative veto constitutes an "Order, Resolution, or Vote," however, the question arises whether Clause three extends the President's veto to congressional activity in the form of a legislative veto over executive or administrative agency activity.

Despite the broad language of Clause three, its true reach is unclear. It states that it applies to those acts of Congress "to which the Concurrence of the Senate and House of Representatives may be necessary," but gives no guidance as to which acts of Congress require such concurrence.[105] The rest of the Constitution is of little help on this point. That document prescribes three instances in which the concurrence of both Houses is necessary: the enacting of law, the adjournment of Congress and the proposing of constitutional amendments.[106] While the meaning of two of these is reasonably clear, the meaning of "the enacting of law" can only be ascertained by considering the history and purpose of the clause.

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103 U.S. CONST. art. I, § 7.

104 See text accompanying notes 52-60 *supra*.

105 The meaning of the word "necessary" in the Constitution has long been a subject of debate. The word can mean one of several things and the interpretations it has been given in other contexts are of little present use.

106 U.S. CONST. art. I, §§ 5, 7; art. V.

The history of Clause three suggests that it was intended to apply only to Congress' actions in the formal lawmaking process. The vesting of a veto power in the President was the consequence of a protracted series of debates at the constitutional convention. The veto power contained in Clauses two and three was originally proposed for the judiciary as well as the executive, and would have had the effect of absolutely nullifying a bill.[107] The President's veto power was steadily narrowed over the course of the convention, however, and, as finally adopted, Clauses two and three vested the veto power in the President alone and made the presidential veto subject to override.

The records of the constitutional convention show that Clause three was conceived as an afterthought to Clause two. During the final debate on Clause two on August 15, 1787, James Madison voiced the concern that Congress could easily circumvent its requirements by enacting measures that had the force of law, but which were labelled "resolutions" or "votes."[108] Madison proposed that the language be changed to read "bill or resolve" to forestall this possibility, but after "a short and rather confused conversation" the question was rejected.[109] Nevertheless, the motion was renewed the following day by Edmund Randolph of Virginia, who proposed Clause three in substantially the same form as was ultimately adopted.[110] The motion passed easily, 9 to 1.[111]

The only congressional actions to which Clause three has been declared applicable have been joint resolutions, which resemble laws and which have the authority of law when approved by the President.[112] In *United States ex rel Levey v. Stockslager*, the Court was called upon to interpret a joint resolution, signed by the President, which purported to suspend the effect of a specified law "until the further order of the Congress."[113] The resolution stayed the effect of the act indefinitely, and was thus in the nature

107 *See* Watson, *supra* note 1, at 1044-48.
108 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 301 (1911).
109 *Id.* at 302.
110 *Id.* at 304-05.
111 *Id.* at 303, 305.
112 *See* United States *ex rel.* Levey v. Stockslager, 129 U.S. 470, 475 (1889); Watts v. United States, 161 F.2d 511, 513 (5th Cir., 1947), *cert. denied*, 332 U.S. 769 (1947).
113 129 U.S. at 475.

of a statutory repeal of the act in question. In finding that the resolution fell within the bounds of Clause three, the Court stated:

> The joint resolution was one of the character mentioned in Section 7, of Article I, of the Constitution, to which the concurrence of the Senate and House of Representatives was necessary. . . . It had all the characteristics and effects of the act of March 2, 1867, which became a law by the approval of the President. Until Congress should further order, the operation of the act of March 2, 1867, was by the joint resolution effectually suspended.[114]

The joint resolution had the effect of law, and therefore had to be submitted to the President for his approval or veto.

The interpretation that Clause three applies only to acts of Congress which are substantially similar to the enacting of law is supported by an analysis of the purposes behind the Clause. When the President considers a bill submitted to him, he acts as a legislative officer.[115] Yet the Constitution's primary purpose in giving the President the power to veto bills was not to make him an arbiter of the wisdom of legislation. Debates of the constitutional convention and the framers' subsequent writings show that the presidential veto was meant to give the President a means by which he could protect his office from encroachments by the legislative branch.[116] Hamilton believed, for example, that "[t]he primary inducement to conferring the power in question upon the executive is to enable him to defend himself; the secondary one is to increase the chances in favor of the community against the passing of bad laws, through haste, inadvertence, or design."[117]

Giving the President the means to defend his office meant according him a power to veto Congressional enactments that posed a genuine threat to executive prerogatives. Laws pose the greatest threat because they are an extremely powerful means of asserting Congressional power. As Hamilton wrote, "Government implies the power of making laws."[118] Laws form the basis of all affirma-

114 129 U.S. at 475.

115 *See* Edwards v. United States, 286 U.S. 482, 490-491 (1931). "The President acts legislatively under the Constitution [in approving or vetoing bills] but he is not a part of the Congress." 286 U.S. at 490.

116 2 M. FARRAND, *supra* note 108, 74-75.

117 THE FEDERALIST No. 73, *supra* note 38, at 443 (A. Hamilton).

118 *Id.* No. 15 at 110.

tive governmental action and mark the course of national policy. Furthermore, the executive depends upon laws for its very existence: it may not act in the absence of laws, and may at any time be reorganized or restricted — perhaps even eliminated to a large degree — by law.[119] In sum, the authority to make law is the authority to structure and run the government.

The many possible forms of congressional law-making make it difficult to determine with exactness which actions of Congress do in fact approximate law. However, formal lawmaking by Congress can be characterized as having five basic attributes: (1) It is a substantive regulation of primary conduct; (2) it applies to all those within the boundaries of the United States; (3) it is of prospective application; (4) it binds the other branches of government (insofar as it is within Congress' enumerated constitutional powers); and (5) it takes effect of its own authority.[120] Tested by these standards, the legislative veto does not have the earmarks of law-making.

First, the legislative veto does not enable Congress directly to set forth standards regulating private conduct or government activity. The standards of conduct involved are those set forth in the administrative rule under scrutiny. Congress may for a limited period disapprove the proposed regulation, but if Congress does not exercise its veto power the rule becomes effective as proposed. If Congress exercises its veto, the law in effect prior to the proposed regulation remains unchanged. Obviously, the fact Congress holds a power to veto a proposed rule may cause an agency to alter the content of the rules it issues. But this action is no different from the effects of congressional pressure on administrators generally, which is undoubtedly permissible so long as it does not violate other constitutional requirements.[121]

Second, exercise of the legislative veto does not require the executive branch to execute, nor the judiciary to interpret, a particular Congressional pronouncement. It merely requires an

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119 There may be some limited areas where the Constitution itself creates a power to act in the executive, but such constitutional grants are rare. *Cf.* Youngstown Sheet & Tube Co., v. Sawyer, 343 U.S. 579 (1952).

120 See text accompanying notes 65-75, *supra*.

121 *See* Fed'n of Civic Ass'ns v. Volpe, 459 F.2d 1231 (D.C. Cir., 1972), *cert. denied,* 405 U.S. 1030 (1972); Pillsbury v. FTC, 354 F.2d 952, 963-65 (5th Cir. 1966).

administrative agency to draft another rule. Congressional resolutions by themselves authorize no collateral action by the government, and have no legal authority as a basis for government action where none existed before. Standing alone, the resolution cannot instruct other branches of the government[122] or the courts[123] as to Congress' intention or sentiment.

One final consideration which reduces the threat to the executive branch from the legislative veto is the fact that the President is afforded an opportunity to exercise a veto over the legislative veto power at the outset, when the statute containing the legislative veto provision is submitted to him. The fact that the legislative veto provision must at some point be signed by the President serves the policies of article I, § 7. All Presidents share a common concern that the executive branch as an institution remain strong. The choice of whether to veto or approve a statute containing a legislative veto provision requires, as with any other statute, weighing the immediate concern along with the broader interest in protecting the office of the President. The choice of a single President whether to approve or veto a legislative veto provision should therefore reflect his broader concern with protecting the office of the President. Of course, the President's approval of a bill containing a veto provision may not mean that he has voluntarily acceded to it. Political circumstances, for example, often force the President to approve a bill of which he does not entirely approve.[124] And in any event, the President's acquiescence to an unconstitutional measure does not make it any more constitutional.[125]

The foregoing analysis suggests that legislative veto mechanisms, at least as they are currently proposed, do not violate the provision of article I, § 7 granting the President the power to veto the bills, orders, resolutions and votes of the Congress. The analysis also suggests that some veto mechanisms might impinge on the President's veto power. In particular, a provision which

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122 *Cf.* 19 Op. Att'y Gen. 385 (1889).

123 *Cf.* Bigelow v. Forrest, 9 Wall. 339 (1869).

124 Jackson, *supra* note 1.

125 *Cf.* Myers v. United States, 270 U.S. 52, 170 (1926); United States v. Midwest Oil Co., 236 U.S. 459 474 (1914) (executive's acquiescence raises presumption of constitutionality).

reserved to Congress the power to veto particular portions of agency action, or the power to require the insertion of particular new language, might come within the strictures against establishing substantive regulation of conduct without the approval of the President. Although the Supreme Court has not yet addressed the issue, at least one Justice appears to believe that the currently-proposed legislative veto mechanisms do not conflict with the Constitution. Mr. Justice White wrote recently, concurring and dissenting in *Buckley v. Valeo,*

> . . . in the light of history and modern reality, the provision for congressional disapproval of agency regulations does not appear to transgress the constitutional design, at least where the President has agreed to legislation establishing the disapproval procedure or the legislation has been passed over his veto. It would be considerably different if Congress itself purported to adopt and propound regulations by the action of both Houses. But here no action of either House is required for the agency rule to go into effect and the veto power of the President does not appear to be implicated.[126]

## III. Constitutional Policy: The Role of Congress

Article I, § 1 of the Constitution expressly grants "All legislative Powers" of the United States to the Congress, which "shall consist of a Senate and House of Representatives." As already discussed, however, the term "legislative" is more conclusory than analytical in nature,[127] and the text of article I is not instructive as to the practical scope of congressional powers.

Analysis of the meaning of "legislative powers" suggests that Congress' authority extends beyond the core of its law-making powers[128] and into the domain of shared powers.[129] Certain of the framers, however, at the time of the drafting of the Constitution, held the view that the powers of Congress ought to be narrowly defined.[130] Writing in *The Federalist,* James Madison declared

126 Buckley v. Valeo, 96 S. Ct. 612, 758 (1976) (issue not reached by majority opinion).

127 See text accompanying notes 64-75, *supra.*

128 See text accompanying note 62, *supra.*

129 See text accompanying note 64, *supra.*

130 *See, e.g.,* Watson, *supra* note 1, at 1030-32.

that "the tendency of republican governments is to an aggrandizement of the legislative at the expense of the other departments."[131] The framers' fear that Congress would abuse its authority largely arose from their experience with the British Parliament, the tyranny of which had been a significant factor in the colonies' decision to declare their independence in the first place. The framers saw in the British Parliament an example of the power the legislative branch held over the other branches because of its authority over revenues and expenditures;[132] they saw, by contrast, that the various colonial executive establishments were weak and disorganized political entities.[133] Accordingly, the framers vested the executive with numerous checks against Congress, as well as other extraordinary powers. The executive branch received these powers because it was thought it would have little opportunity to abuse them.[134] But the framers certainly did not mean to exempt the President from the system of checks and balances. The power to appoint was regarded as the only instance in which the President was perceived as having the potential to abuse his authority, and here he was subject to a check by the requirement of Senate confirmation of his nominees.[135]

The framers could hardly have foreseen the mushrooming of the role of government in this century and the reversal of the roles of the branches which followed when Congress began to delegate its legislative authority. Yet the delegation of legislative authority was an inevitable development, given the Constitution's structuring of the federal government. As new problems confronted the government, expansion and proliferation of the political system

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131 THE FEDERALIST No. 49, *supra* note 38, at 315-16.

132 THE FEDERALIST No. 71, *supra* note 38 (A. Hamilton).

133 *Id.*, No. 48 (J. Madison). *See also Id.*, No. 70 (A. Hamilton).

134 Another factor was the presence of George Washington. As Pierce Butler, a delegate from South Carolina, wrote in 1788:

> I do [not] believe [the executive powers] would have been so great had not many of the members cast their eyes toward General Washington as President; and shaped their ideas of the Powers to be given a President by their opinions of his virtue.

Cited in Harris, *supra* note 1, at 17.

135 THE FEDERALIST No. 77, *supra* note 38, at 464, (A. Hamilton). "In the only instances in which the abuse of executive authority was materially to be feared, the Chief Magistrate of the United States, would, by that plan, be subjected to the control of a branch of the legislative body." *Id.*

became a necessity. Expansion of the government, however, did not have a uniform effect on the three branches. Because their size and structure were not mandated by the Constitution apart from an express vesting of authority in the President and the Supreme Court, the executive and judicial branches were free to meet their increased responsibilities merely by growing: no constraint but practicality limited the number of officials or judges that could be appointed, or the number of executive departments and courts that could be established. The structure of the legislative branch, however, admitted of no parallel expansion. Congress was expressly limited in size by the Constitution, and its structure was also explicitly set forth. Moreover, its primary function had to be discharged in the time-consuming process of lawmaking.[136] Unable to respond to the strains that modern problems imposed on its limited resources merely by expanding, Congress was required to delegate some of its legislative authority to other government organs in order to fulfill its function.

For better or for worse, these tasks became vested in the executive or in bodies that came to be perceived as part of the executive establishment or were subject to executive influence or control.[137] "Functionally, the executive was not a particularly apt repository for such new powers; but on the assumption that there were only

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136 U.S. CONST. art. I, § 7, cl. 2. Justice Douglas summarized this well:

> Legislative power, by contrast, is slower to exercise. There must be delay while the ponderous machinery of committees, hearings, and debates is put into motion. That takes time; and while the Congress slowly moves into action, the emergency may take its toll in wages, consumer goods, war production, the standard of living of the people, and perhaps even lives.

Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579, 629 (1952) (concurring).

137 The President's power to appoint is the primary means by which he is able to control the federal bureaucracy and set the tone and policies of his administration. *See* Buckley v. Valeo, 96 S. Ct. 612 (1975). Control of bureaucracy through the power to appoint is effective because the structure of administrative and executive organs concentrates authority in the hands of the chief officer, who is a Presidential appointee. Although some administrative officers are given extended terms of office and protections from removal, natural attrition alone will usually cause numerous vacancies to occur in the administrative branch during a President's tenure in office, enabling him to staff the agencies substantially with his own appointees. Even in the case of the Supreme Court, where Justices hold office for life and as a practical matter cannot be removed, only three Presidents have never made appointments to the Court. G. GUNTHER & N. DOWLING, CONSTITUTIONAL LAW 1455 (8th ed. 1970).

three powers of government, legislative, judicial and executive, overflow from the first two could go only to the third."[138] The mere sharing of powers among the branches presented constitutional problems that on their face were resolved fairly soon,[139] even when the grant of legislative power to another branch was broad and the standards which Congress provided to guide the body receiving the delegation were exceedingly vague.[140]

The breadth and vagueness of many delegations, however, gave agencies a latitude of action that permitted them to act in a manner unacceptable to Congress. Administrators were able to extend their jurisdiction beyond that which Congress intended and to make declarations of policy contrary to the will of Congress. Some agency actions may strike Congress as being so unreasonable that they prompt a legislative response. More often, Congress simply acceded to administrative action or attempted to remedy the abuse through informal means of control such as watchdog committees and congressional hearings.

The growth of the "administrative branch" resulted in an erosion of congressional powers that the framers could hardly have foreseen or countenanced. Nevertheless, the framers' original distrust of the legislative branch had led them to confer on Congress few direct checks over the executive, and no effective means of supervising other branches' exercise of delegated legislative powers short of wholesale withdrawal of the delegation or frequent and repeated amendment of the original enabling statute.

Withdrawal or amendment, however, were seldom practical due to the fact that the formal law-making process was cumbersome and time-consuming and that congressional law-making was not a mode of legislative action that lent itself to continuous supervision of delegated authority. Furthermore, the law-making process pro-

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138 Stone, *supra* note 1, at 517.

139 *See* United States v. Rock Royal Cooperative, 307 U.S. 533 (1939); Hirabayashi v. United States, 320 U.S. 81 (1943).

140 Breadth and vagueness have in fact become common features of congressional delegation of authority, often for good reason. At times, Congress is unsure at the outset of a decision to regulate a given area what course the regulation should take and accordingly writes its charge to administrators broadly in order not to tie their hands and to permit the development of standards to be left to experience. Delegations are also left broad and vague when the political process leading to the delegation results only in a consensus that an area must be regulated, but not in any agreement as to the substance of the charge. Stone, *supra* note 1, at 520.

duces another law which may have the same problems of vagueness and generality as the original statute. Conversely, efforts to draft remedial legislation narrowly may undershoot the mark, and can require frequent amending legislation as new problems arise that are beyond the scope of the remedial statute. Were Congress seriously to attempt supervising administrators through the lawmaking process, it would find time for little else.

With the phenomenal growth of administrative agencies and of executive departments which have administrative duties, Congress has been left in the anomalous position of having no voice in the exercise of legislative powers — despite a constitutional principle that no branch should be able to exercise its power unchecked. Legislative review provisions serve the function of a statutory check upon the exercise of delegated authority and protect Congress' legitimate legislative interests in the administrative context. They correct an imbalance among the branches of government that has threatened to upset the traditional balance which the Constitution mandated among the branches.

## *Conclusion*

"New institutions of government have developed as new times produced new problems," Professor Archibald Cox has written, "subject only to the fundamental necessity of maintaining the essential balance of the three departments and preventing one from taking over functions falling exclusively in the core of power belonging to another."[141] The legislative veto power is a mode of congressional action that permits Congress to rectify an imbalance that has arisen between the branches due to Congress' delegation of legislative authority to other government organs. If limited in scope to those activities of executive and administrative agencies that involve legislative interests, the legislative veto does not impinge upon the prerogatives of Congress' co-ordinate branches. Similarly, if the power which the legislative veto grants Congress is limited to a power only to negative agency actions, the legislative veto does not violate the requirement that certain congressional actions be submitted to the President for his approval or veto.

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141 Brief of Senators Hugh Scott and Edward M. Kennedy as Amici Curiae at 108, Buckley v. Valeo, 96 S. Ct. 612 (1976).

# BOOK REVIEW

A PRESIDENTIAL NATION. By *Joseph A. Califano, Jr.*, New York: W.W. Norton and Company, Inc., 1975. Pp. 327, index. $9.95.

*Reviewed by Kay Lehman Schlozman**

Public enterprises sometimes leave unexpected bequests. Among the legacies of the space program is Teflon; of the war in Vietnam and Watergate books about the American presidency. Alarmed at the ability of Presidents Johnson and Nixon to pursue with determination policies considered by most to be failures, and by some to be immoral, academic students of presidents, media observers of presidents, servants of presidents, and intimates of presidents have written about the basic dilemma of how to restrain and control expanding presidential power without reducing governmental effectiveness.[1] To the growing shelf of volumes on the scope of presidential power, Joseph A. Califano has recently added *A Presidential Nation.*

A Washington lawyer, Califano brings impressive credentials to an analysis of presidential power. Educated at Holy Cross and Harvard Law School, Califano began his government service in 1961 as one of McNamara's whiz kids at the Department of Defense. He rose quickly in the DOD, serving, during the final years of the Kennedy presidency, as Special Assistant to the Secretary of Defense. In 1965 he moved to the White House where, as Special Assistant for domestic affairs, he acted as one of the architects of the Great Society programs. This broad experience in government gives Califano first-hand knowledge of the relationships between the White House, the executive departments, and

*Assistant Professor of Political Science, Boston College. B.A., 1968, Wellesley College; M.A., 1971, Ph.D., 1973, University of Chicago.

1 *See, e.g.*, T. CRONIN, THE STATE OF THE PRESIDENCY (1975); *C. Hardin*, PRESIDENTIAL POWER AND ACCOUNTABILITY (1974); E. HARGROVE, THE POWER OF THE MODERN PRESIDENCY (1974); E. HUGHES, THE LIVING PRESIDENCY (1973); G. REEDY, THE TWILIGHT OF THE PRESIDENCY (1970); A. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY (1973); Neustadt, *The Constraining of the Presidency*, N.Y. Times, Oct. 14, 1973, § 6 (Magazine) at 38-39; Wildavsky, *The Past and Future Presidency*, 1975 THE PUBLIC INTEREST 56-76.

Congress. Furthermore, unlike many White House aides whose chores are confined to marketing the president or to orchestrating the movements of his entourage, Califano was directly involved in shaping one of the most significant initiatives in domestic policy making since the New Deal.

Quite admirably, Califano has undertaken to write an analysis of the general condition of the American presidency rather than a gossipy, fond memoir of the Great Society White House. Unfortunately, however, the comprehensiveness of his project prevents him from making maximum use of his best resource, his personal experience at the eye of the political hurricane. His analysis of presidential power, while clear-headed and thoughtful, is not substantially different from that offered by other recent authors concerned about rendering the president simultaneously effective and accountable. He is able, of course, to illustrate his argument with examples gleaned from his days with LBJ. Those examples are, however, merely illustrative; they are not the central focus of attention. Thus, the very nature of Califano's project precludes him both from mining deeply his personal experiences and from probing systematically the character of his fascinating, flamboyant boss. By defining his task in this way Califano seems, in a sense, to have undertaken both more and less than one might have wished: less, in the sense that in the context of a general analysis, he cannot tell all he learned while in the government service; more, in the sense that his general analysis is basically an elaboration of themes which have been struck by others before him.

## I. The Incredible Expanding Presidency

The first half of *A Presidential Nation* is devoted to analysis of the changing dimensions of presidential power (chs. I-VII). Quite appropriately, Califano states at the outset that "the presidency cannot be considered in isolation from the other institutions in American society" (p. ix). Guided by this central thesis, he surveys the American system of checks and balances demonstrating the decline in relative power of each of the institutions which might be considered an effective counterpoise to expanded presidential power: the executive branch (ch. II), the Congress (ch. III), state and local governments (ch. IV), political parties (ch. VII), the media (ch. V), and the twin giants of the private sector — business and organized labor (ch. VI).

Like other analysts of the contemporary presidency, Califano devotes considerable attention to the diminution of congressional power relative to that of the presidency. To account for the shift in presidential-congressional relations which has taken place in this century, Califano cites a variety of institutional factors familiar to readers of other works of the imperial presidency school. Among these factors he includes the attention given to the president by the media; the substitution of executive agreements for congressionally ratified treaties in the conduct of foreign relations; the presidential responsibility for the preparation of the budget; congressional dependence upon the executive branch for information and the ability of the executive to withhold requested information or to frame that information in politically advantageous terms; the fragmentation of power in Congress; the failure of congressional committee structure to reflect functional policy areas and the power interests — both inside and outside Congress — which resist attempts at congressional reform; and the multiple pressures on the overworked, understaffed legislator. He concludes his analysis by pointing out that the contemporary state of affairs is as much a function of congressional abdication as of presidential usurpation and by noting that Congress has, in recent years, made tentative steps to overcome its present status of "second-class constitutional citizenship."

Califano places presidential power in the context not only of separation of powers, the changing relations between the branches of the government in Washington, but also of federalism, the changing relationships between the national government on the one hand and state and local governments on the other. In the process he discusses the factors — familiar to students of the federal system — which are responsible for the unidirectional flow of power to Washington. Among these factors are the role of the national government in regulating and managing the private sector in the twentieth century; the need to disregard existing local and state boundaries in dealing with problems like pollution, transportation and even school desegregation; and, most important, the financial woes of the cities and states and their increasing dependence upon federal money. He supplements his analysis with some cogent remarks about the ways in which these relationships were altered by two recent programs — one more or less defunct, the community action programs associated with the war on poverty, and the other of uncertain fate, revenue sharing.[2]

These arguments about presidential power — as well as those contained in Califano's chapters on the political parties, the bureaucracy and the media—display extraordinary sensitivity to the ways in which power relationships are a function of the resources available to major institutions and the loyalties which those institutions engender. But, while Califano's arguments are both systematic and clear, they are not altogether novel. In his analysis of the expansion of the power of the presidency relative to that of other institutions, Califano has a great deal in common with other authors who responded to the issues raised by Watergate and the war in Vietnam by taking a fresh look at the presidency.[3]

## II. The President and the Private Sector

In one respect, however, Califano covers terrain uncharted by other students of presidential power. That departure, which is sufficiently interesting to merit further consideration, is his discussion of the weakening of private interests, especially business, as a potential counterforce to growing presidential power (ch. VI). In certain respects, however, Califano's description of the power relationship between business and the presidency is not altogether convincing. For example, he cites the emergence of joint ventures between government and private industry in fields like space technology and weapons development as *prima facie*

2 *See generally* Etzioni, *What Went Wrong With Revenue Sharing?*, Boston Sunday Globe, April 18, 1976, at A3, col. 1.

3 Although the works listed in footnote 1 *supra* are in many ways quite different from one another, Califano's concerns overlap substantially with those of the authors of these works.

evidence of the decline of the power of business (pp. 133-35). In this context he discusses the risk partnerships which emerge when the government finances projects like the supersonic transport which are seen to be in the public interest but which are beyond the capacity of the private sector. Califano's implicit assumption seems to be that the government retains control in such ventures, thus undermining the power of the private sector. However, one need not be a conspiracy theorist to question whether the partnership between government and large contractors has not indeed enhanced rather than reduced corporate power, or, at the very least, not seriously eroded the power of what is sometimes called the military-industrial complex.

According to Califano, consumer legislation — proposed during the Kennedy Administration and enacted as part of the Great Society[4] — has added another weapon to the president's arsenal, thus augmenting presidential power at the expense of the private sector (pp. 127-33). In terms of the ways in which consumer legislation of the sixties differs in concept and implementation from the regulatory efforts of the preceding century, his analysis is fascinating. However, without the benefit of more extended discussion, it is not obvious that significant diminution of the power of regulated industries is the inescapable result of this unprecedented attempt at government regulation. As a matter of fact, some analysts of American politics hold that regulatory agencies are often quite responsive to the needs of the industries they regulate.[5] According to Grant McConnell, for example, cozy relations often develop between regulator and regulated, yielding a situation in which public power is parceled out to private interests. Resistance by the airlines to current attempts to deregulate air fares is relevant here.[6] The airlines' opposition to deregulation would indicate that Califano's conclusion about who inevi-

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4 *E.g.*, Consumer Credit Protection Act, 15 U.S.C. § 1601 (1970); Fair Packaging & Labelling Programe, 15 U.S.C. § 1451 (1970).

5 Among the authors who present such arguments are the following: M. BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION (1955); L. KOHLMEIER, THE REGULATORS (1969); T. LOWI, THE END OF LIBERALISM (1969); G. MCCONNELL, PRIVATE POWER AND THE PUBLIC INTEREST (1966).

6 See N.Y. Times, Oct. 9, 1975 at 1, col. 7 (speech by President Ford concerning the overhauling of the airline regulatory structure).

tably suffers when the government regulates industry is at best problematic.

Even assuming that recent legislation giving the government broad powers to regulate consumer products does imply a substantial reduction of the power of private enterprise, there is no reason to assume that such measures automatically imply an enhancement of *presidential* power. Califano takes pains to point out that one way in which the Great Society consumer legislation differs from prior regulatory schemes, is that the locus of regulation is within the executive departments themselves rather than in independent regulatory agencies, as has traditionally been the case.[7] Yet, increasing the responsibilities of executive departments, although they are nominally accountable to the president, may not necessarily increase presidential power. On the contrary, according to most analysts of presidential power — including Califano (pp. 23-25) — the bureaucracy is actually an obstacle to presidential power. Califano's analysis (pp. 37-39) of the inevitable tensions between White House staff and executive department personnel, sometimes called "palace guard politics," indicates that there is no necessary harmony of interests between the president and his branch. Thus, Califano's own arguments contradict his conclusion that increased responsibility for consumer regulation augments presidential power.

This discussion may be somewhat beside the point. Califano's main conclusion, that autonomous private power has declined and that the president wields substantial powers over the private sector, seems quite secure. What is perhaps more germane to his analysis of the relationship between the president and big business is Califano's emphasis in the final chapter on "the importance of curtailing the role of private wealth in national politics" (p. 293). In light of this statement, the reader is left to wonder whether he is in fact anxious to increase the power of private interests. One

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7 *Compare* Fair Packaging and Labelling Program, *supra* note 6 (administered through the Department of Commerce); Hazardous Substances Act, 15 U.S.C. § 1261 (1970) (administered through the Department of Health, Education and Welfare); Traffic and Motor Vehicle Safety Acts, 15 U.S.C. § 1381 (1970) (giving special powers to the Department of Transportation) *with* Interstate Commerce Commission 49 U.S.C. § 31 (1970); Federal Communications Commission, 47 U.S.C. § 3151 (1970); Civil Aeronautics Board, 49 U.S.C. §§ 1301, 1321 (1970) (all independent regulatory bodies).

of Califano's consistent concerns is to suggest ways in which institutions such as Congress or the judiciary can be fortified in order to check presidential power. To boost congressional power vis-à-vis the president is to oppose one variety of publicly accountable power with another. Because the political parties, and even the media, are forced to some extent to answer to public constituencies, to augment their power in the face of presidential power would not be to upset the balance between public and private power. However, to buttress the power of business would be to alter that balance in ways which, in view of his evident concern about the influence of big money on politics, might be troubling to Califano.

## III. On the Couch: The Presidential Personality

Califano's three chapters on the presidential personality (chs. IX-XI) constitute both the most and the least interesting section of the book. They are great fun to read, studded with presidential glimpses: LBJ having an aide get in touch with a senator's mistress to ask her to persuade her lover to break a filibuster; Kennedy afloat on the Potomac, annoyed when passing boats would fail to recognize the presidential yacht and salute accordingly; Johnson backing the nomination of Abe Fortas to be Chief Justice long after it was politically prudent to do so. Once again, however, Califano defines his task too abstractly. He attempts to isolate those personality characteristics common to all presidents and, thus, deprives himself of the opportunity to use his best resource — his direct understanding of an enormously complex political personality. Because he lacks expertise in psychology and command of the relevant conceptual tools, his discussion of the presidential personality is, finally, not terribly illuminating. Because he defines his project in this way, he is precluded from probing deeply into the presidential psyche he knew best. These chapters should have given Califano an opportunity to shed real light. They end up, although fascinating, the least satisfying in the book.

Califano's attempt to delineate the personality traits shared by all presidents is marred by the weakness of his conceptual apparatus and his methodology. It is clear, even to one totally untutored in psychological theory, that Califano has no real concept of what personality is, where it comes from, how it develops or how it relates to other aspects of the presidential psyche — beliefs, style and character. The traits Califano lists as essential to the common presidential personality are not clearly differentiated from one another. For example, among those traits which he includes in the presidential personality are pragmatic detachment (pp. 204-211), skepticism (pp. 216-220), and shrewd calculation (pp. 220-223). From the text it is not always clear what the differences among these three traits are or why, for example, Lyndon Johnson's willingness to exploit the outpouring of sentiment following the assassination of Martin Luther King to expedite the passage of his Fair Housing Act is an example of "pragmatic detachment" as opposed to "shrewd calculation" (p. 205).

Not only are the concepts insufficiently well defined, but the methodology upon which his analysis of the presidential personality rests is suspect. By his own description Califano's *modus operandi* is "to illustrate general propositions with specific incidents" (p. 242). However, when examples are used in this eclectic fashion there is no guarantee that the patterns identified are indeed the only patterns or even the predominant patterns of behavior. For example, one of the personality characteristics which presidents are said to share is the tendency to reciprocate the intense loyalty expected of subordinates long after the point at which such reciprocation becomes politically costly. Califano illustrates the point with a variety of examples including Truman's loyalty to Harry Vaughn, Eisenhower's to Sherman Adams and Johnson's to Abe Fortas. It would seem that one could find sufficient examples — starting with Nixon's willingness, in John Erlichman's words, to let Pat Gray "twist slowly in the wind" — to argue that a common presidential characteristic is the unwillingness to repay the loyalty expected from subordinates. Similarly, one could catalogue enough instances when various presidents have pursued disastrous policies based upon the advice of their subordinates to demonstrate that credulousness, rather than skepticism, is a trait shared by all presidents. To put the problem somewhat pretentiously, because Califano — and others who study the presidential personality — cannot specify the universe of behaviors from which they are sampling their illustrative material, their conclusions are somewhat suspect.

However, it may well be that criticism of the methodology and concepts upon which Califano's conclusions are based is unnecessary because those conclusions are so insubstantial. We learn from his analysis that the personality traits shared by all presidents include the willingness to place their pursuit of presidential power ahead of health, wealth, family, and friends; the insistence upon loyalty from subordinates; the willingness to return that loyalty; pragmatic detachment; persistence; unrelenting skepticism; shrewd calculation and secretiveness; and egocentricity.[8] It seems then that he is simply saying that all presidents are successful politicians who seek power and are skillful in its use. Such a conclusion seems almost trivial.

We are left, finally, with a number of questions about the common presidential personality and its implications for the exercise of presidential power. We might be led to query where their common traits come from: Are these traits shared by all politicians? By all successful politicians? By all those with the self-esteem to consider themselves presidential timber? Or are these traits nurtured by the increasingly grueling process of seeking the presidency? Or is the Oval Office the incubator of such traits? Presumably, we might wish to answer such questions in order to ascertain whether the structure of presidential campaigning, the symbolic role thrust upon the president as Chief of State, and/or the intoxicating atmosphere of the White House do not perhaps aggravate the problem of presidential power. We might be led to ask of Califano the question which underlies James David Barber's seminal attempt to understand the presidential personality — Are there not systematic differences between presidential personalities?[9] Furthermore, we might wish to inquire what those

8 It should be noted that there is a certain ambiguity in Califano's discussion of the traits common to the presidential personality. Although he seems to be describing quite straightforwardly those personality characteristics which are shared by all presidents, he slips without warning into a Machiavellian posture from time to time. That is, he alternates between observing that "All presidents are calculating (persistent, etc.)" to advising that "In order to be effective and successful, a president must be calculating (persistent, etc.)."

9 J. BARBER THE PRESIDENTIAL CHARACTER (1972).

differences imply for the exercise of presidential power. Most importantly, we might wish to ask of Califano — and, indeed, of all those who probe the presidential psyche — what we are to do with their conclusions. Califano is ultimately interested in using his understanding of the presidential office and personality in order to make the exercise of presidential power "accountable, responsive and credible." Although he is able to apply his conclusions about the institutional power resources of the presidency from the first section of the book to suggest reforms designed to tame presidential power, he never really confronts the issue of whether the presidential personality as he describes it has implications for the way in which presidential power is exercised.

## IV. The Dilemma of Presidential Power

In the late fifties and early sixties, president watchers — responding both to Eisenhower's failure to assert presidential leadership and to congressional ability to bottleneck New Frontier legislation — celebrated the office of the presidency, championing the vigorous use of presidential power and rueing the institutional limitations on that power.[10] As we have seen, those who have observed the White House more recently have revised their concerns. President watchers are currently concerned both about restraining the presidency and preventing abuses of presidential power and about fortifying institutions like Congress which could offer a counterpoise to presidential power. Of course, as many have noted, it is mostly a matter of whose ox is being gored. When presidential power was insufficient to guarantee the passage of civil rights legislation, the cry was "More Power to the President!"[11] When the issues at stake changed to presidential prosecution of an increasingly unpopular war and presidential conceal-

10 Among the most important of such analyses of the Presidency are: R. Neustadt, Presidential Power (1960) and C. Rossiter, The American Presidency (rev. ed. 1960). William G. Andrews summarizes the views of such analysts and contrasts them with those of recent presidential observers in Andrews, *The Presidency, Congress, and Constitutional Theory* in Perspectives on the Presidency, 24 (A. Wildavsky ed. 1975).

11 Koenig, *More Power to the President*, N.Y. Times, Jan. 3, 1965, § 6 (Magazine) at 7.

ment of criminal activities, the cry changed.[12] Thus the dilemma is obvious: we want to give the president plenty of power to do good things but to deny him the power to do bad things.

Although there seems to be general agreement upon the diagnosis of the presidential condition among contemporary observers, there seems to be very little consensus upon the cure. A quick survey of the concluding chapters of a half dozen books on the presidency, written in as many years, produced nearly thirty different proposals for institutional reforms — from subjecting executive agreements with foreign nations to congressional approval,[13] to requiring the president to hold periodic press conferences,[14] to reorganizing congressional committees to reflect the division of labor among executive branch agencies.[15] The only set of reforms which seems to be missing is that which would carry George Reedy's diagnosis[16] — that is, that the problem of the contemporary White House is the increasing isolation of the president from the problems and concerns of ordinary citizens — to its logical conclusion: that the president should be required to brave rush hour traffic at least weekly, call the repair man himself when the White House washing machine overflows, and argue with the computer at Master Charge about an error in a monthly statement.

To this lengthy list, Califano adds his own reform suggestions (pp. 283-84). One of his suggestions, that every new public policy initiative should be accompanied by a "Presidential Powers Impact Statement," is indeed creative. Such a statement would be similar to an environmental impact statement and would detail the consequences of the new policy for the scope of presidential power. Although such statements would not in themselves change the dimensions of presidential power and would, inevitably, generate paper, policy makers would in the process be forced to consider the unintended consequences of proposed policies. Thus, consideration of the scope of presidential power would be incorporated into the policy process.

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12 See sources cited in note 1/1 *supra*.
13 E. Hughes, The Living Presidency, 287 (1973).
14 T. Cronin, The State of the Presidency 320 (1975).
15 E. Hargrove, The Power of the Modern Presidency 292 (1974).
16 *See generally*, G. Reedy, The Twilight of the Presidency (1970).

*Conclusion*

It is impossible to consider each of Califano's proposed reforms in detail. What seems more relevant is to inquire just what kind of presidency his reforms are designed to create. On the face of it, Califano is fairly clear on this point: he seeks an institution which is "accountable, responsive and credible." But are these the *only* qualities one might wish to build into the office of the presidency? One might, for example, wish to add that, if possible, the presidency should be structured to ensure respect for law and democratic process, for there is nothing about accountability, responsiveness, and credibility which would preclude the wiretapping of Martin Luther King, the manipulation of the IRS for political purposes, the playing of dirty campaign tricks, or the listing of White House enemies.

Califano's final chapter indicates that he too wants more from the presidency. Implicit in his concluding discussion is his belief that to his trio of democratic virtues — accountability, responsiveness and credibility — should be added a fourth, *effectiveness*. That commitment to presidential strength and effectiveness is made clear in the caveat with which he opens the final chapter of *A Presidential Nation:* "This is no time to gather, like political Lilliputians, to tie the presidential Gulliver in miles of string" (p. 280). The problem is, of course, that there are conflicts built into these multiple goals: that which augments presidential effectiveness may compromise presidential credibility; that which enhances presidential responsiveness may diminish presidential effectiveness. Califano's emphasis upon twin needs — the need "to appreciate the importance of presidential power and the need to put it in healthy democratic perspective by rendering its exercise accountable, responsive and credible" (p. 280) — indicates his awareness of the problem. Unfortunately, however, neither Califano nor any of the other commentators on the presidential condition is truly successful in reconciling these two needs. Thus, we are back where we started with the dilemma of presidential power.

# RECENT PUBLICATIONS

GENETICS AND THE LAW. Ed. by *Aubrey Milunsky* and *George J. Annas,* New York: Plenum Press, 1976. Pp. xii, 495, bibliography, index. $22.50.

The second half of the twentieth century has witnessed numerous advances in medical technology. Unfortunately, the law, both legislative and judicial, has failed to keep step. The result has been a number of recent sharp and highly publicized confrontations between the medical profession and the law. *Genetics and the Law* is an attempt to educate and re-synchronize legislators and judges with genetics related developments.

The distinguished faculty of philosophers, lawyers, scientists, and physicians present a thorough and compelling discussion of the ethical, moral, medical, and legal considerations of genetics related medicine. Among the topics covered are: (1) the legal status of the fetus; (2) the legal and legislative implications of artificial insemination; (3) the malpractice risks of genetic screening; and (4) governmental and social restriction of experimentations involving gene manipulation, cloning, and *in vitro* fertilization. Because of this breadth, *Genetics and the Law* should be of particular interest to legislators at both the state and federal levels.

BLACK POLITICAL DEVELOPMENT: AN ADVOCACY ANALYSIS. By *Reginald E. Gilliam, Jr.,* Cambridge: Dunellen Publishing Co., 1975. Pp. xvii, 295, appendices, bibliography, index. $18.50.

Professor Gilliam brings impressive credentials to his interdisciplinary study of Black Americans living within the prevailing political structure. The study examines many of the well known institutional indices of discriminatory treatment within the political, social, and economic systems in an attempt, ultimately, to convince the reader that Blacks cannot obtain political equilibrium by following the established ways and means. Rather, unification within Black communities and unified manipulation of the existing political forces will facilitate parity. However, the importance of the book lies primarily in the rich documentation which adds credibility to Professor Gilliam's pragmatic solutions.

LEGAL PROBLEMS OF THE POOR: CASES AND MATERIALS. Ed. by *Arthur L. Berney, Joseph Goldberg, John A. Dooley, III,* and *David W. Carroll.* Boston: Little, Brown and Co., 1975. Pp. iv, 1149, table of cases, table of statutes, index. $22.00.

*Legal Problems of the Poor* is a very successful attempt to introduce students to the problems confronting poverty lawyers and the persons they represent. The editors depend greatly on the traditional sources of legal commentators — judicial opinions, administrative actions, legislation, and scholarly commentary — as they lead the student to an understanding of the underlying relationship between process and substantive claims seen in the emerging patterns of poverty law.

The import of the work is further enhanced by the method chosen to present the material. Each chapter is organized around a typical factual situation of the kind confronting legal service attorneys. The student is lead through the problem to a series of decision points which require that (s)he think through the issues and come to a conclusion. The factual categories selected reflect the basic needs of the poor — housing, welfare, and consumer concerns.

In total, the editors have attempted to give the student a healthy appreciation of the realities of practicing poverty law by highlighting the incapacity of the legal system to respond adequately to the demands of the poor.