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CONTENTS

ADDRESSING THE CIVIL-MILITARY GAP: ADOPTING A 21ST CENTURY SOLOMON AMENDMENT TO REQUIRE ON CAMPUS ACCESS TO RESERVE OFFICER TRAINING CORP PROGRAMS AT ELITE INSTITUTIONS

Donald M. Benedetto[1]

I. INTRODUCTION

Since the beginning of the war in Iraq, there have been 4,377 American military deaths as of the time of this article.[2] One overarching commonality amongst many of these men and women is that they most likely did not attend Reserve Officer Training Corps drill at an elite institution of higher education in the United States. During the 2008 presidential election campaign, both candidates called for an end to the exclusion of Reserve Officer Training Corps (ROTC) programs from elite universities.[3] The expulsion of ROTC from elite campuses has its roots in the Vietnam War era; as the hostility towards that era dissipated, it was replaced with a new veil of hostility

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[1] Candidate for Juris Doctor May, 2010. The author is a veteran of the United States Navy.

[2] Press Release, Dep't of Def., Operation Iraqi Freedom (OIF) U.S. Casualty Status (Jan. 12, 2010), *available at* http://www.defense.gov/NEWS/casualty.pdf.

[3] *See* Obama and McCain Remarks at the ServiceNation Summit Forum, CQ POLITICS, Sept. 11, 2008, http://www.cqpolitics.com/wmspage.cfm?parm1=5&docID=news-000002948987. During the forum, President-Elect Obama classified Columbia University's dismissal of on-campus ROTC as a "mistake." *Id.*

premised on disagreement with the Clinton-era policy of "don't ask, don't tell." As set forth in detail below, some of the nation's top universities, such as Brown, Columbia, Harvard, University of Chicago, and Yale, do not allow on-campus access to ROTC programs.[4] Thus, not only are the majority of students at elite institutions not contributing to the common defense, it is unlikely that their schools will facilitate their doing so in the foreseeable future. This creates questions of fairness and creates a cultural rift between members of the military and civilian leadership classes.

So, what can be done about this conundrum driving a stake between the military and higher education, and adding to the unfortunate phenomenon known as the civil-military gap? Congress has intervened in this forum before. In 1994, Representative Gerald Solomon shepherded through Congress what has become known as the Solomon Amendment.[5] The Solomon Amendment is a two-part statute that seeks to address civil-military relations. Part "a" pertains to ROTC programs while part "b" addresses access to college campuses by military recruiters.[6] Largely disregarded and unenforced after its passage, the Solomon Amendment ignited a firestorm of backlash when the Department of Defense sought to force academia to allow recruiters on campus in light of recruiting needs brought about after September 11th. In *Rumsfeld v. Forum for Academic & Institutional Rights*, the United States Supreme Court upheld the Solomon Amendment's constitutionality; however, this litigation was nearly entirely argued in regards to part "b," the campus access for military

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4 Some institutions have allowed their students to participate in non-credit, off-campus programs; for example, Yale Air Force ROTC candidates travel approximately seventy miles to complete their required military training at the University of Connecticut in Storrs. *See* Marc Lindemann, *Storming the Ivory Tower: The Military's Return to College Campuses*, PARAMETERS, Winter 2006-07, at 51. Yale offers financial assistance with travel, but the trainees receive no academic credit and must schedule their primary courses to accommodate the extensive travel. *Id.*

5 10 U.S.C. § 983 (2006).

6 *Id.* § 983(a)-(b).

recruiters subsection, which was an attempt to remove outright bans of the military's access to some college campuses.[7]

There has been little need on the part of colleges and universities, hostile to on-campus military presence, to litigate the Solomon Amendment in regards to ROTC programs on campus. In its current toothless form, subsection "a" of the Solomon Amendment[8] allows institutions to ship their unwanted ROTC candidates off to complete their programs at neighboring institutions. That is to say, a student who wishes to participate in an ROTC program and become a commissioned officer may attend a particular institution, but must then go to some other institution to complete his or her drill and military training. This is a national embarrassment and a serious hardship imposed on a student whose only sin is a desire to serve in the armed forces; such a policy can only add to the growing fissure in civil-military relations.

This Note proposes a change to Section 983(a)[9] of the Solomon Amendment, to provide for the withholding of federal funds from any institution that does not allow an on-campus ROTC program.[10] To set the stage for the proposed amendment, the author will illustrate the history of higher education hostility towards the military, conduct a brief examination of the Solomon litigation under *Rumsfeld v. Forum for Academic & Institutional Rights*, and discuss the impact of the proposed amendment on higher education, the military and society as a

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[7] Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47, 60 (2006). The "Forum for Academic and Institutional Rights" consists of a coalition of thirty-six law schools or faculty groups. See www.SolomonResponse.Org, FAIR Participating Schools, http://www.law.georgetown.edu/solomon/participating_schools.html (last visited March 3, 2010). Of these thirty-six groups, only twenty-four are willing to be named publicly. *Id.*

[8] 10 U.S.C. § 983(a) (2006).

[9] 10 U.S.C. § 983(a) (2006).

[10] ROTC program requirements are codified in 10 U.S.C. § 2102 (2006), and defined by the Department of Defense in Instruction Number 1215.08 (June 26, 2006), *available at* http://www.dtic.mil/whs/directives/corres/pdf/121508p.pdf.

whole. Perhaps most importantly, the existence of a civil-military gap will be explained along with the role the absence of ROTC programs at elite institutions plays in exacerbating the situation. Finally, this paper will analyze the benefits ROTC programs at elite institutions would have in addressing this serious issue.

II. THE ORIGINS OF CAMPUS HOSTILITY

Hostility towards the military was not always the norm in higher education. In fact, it is a complete byproduct of the Vietnam War era. Although images of campus protests and students spitting on G.I.'s may be ingrained in the psyche of many Americans, for most of the first half of the twentieth century, quite the opposite was true; college campuses saw themselves as performing a civic duty in readying the next generation of officer candidates.[11]

Author Michel Neiberg describes ROTC as enjoying a "Favored Position on Campus" during the cold war era.[12] Even before the cold war however, the military enjoyed a peaceful existence on campus, if not a benign neglect. Much of the history of on-campus ROTC can be attributed to the Morrill Act of 1862,[13] which allowed the sale of land to the states in order for the individual states to create public universities.[14] Attached as a condition of the Morrill Act appropriation was the teaching of "military tactics" on campus.[15]

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[11] *See* Lindemann, *supra* note 4, at 46-48 (for an exhaustive discussion of the role of institutions of higher education during times of conflict prior to the Vietnam War era). For example, Yale President Charles Seymour at the time of the German invasion of Poland explained that "the justification of a university is to be found in the service which it gives to the nation" in such times. *Id.* at 48.

[12] MICHAEL NEIBERG, MAKING CITIZEN SOLDIERS 35 (Harvard Univ. Press 2000).

[13] 7 U.S.C. § 301 (2006).

[14] NEIBERG, *supra* note 12, at 21.

[15] *Id.*

The original design of the ROTC program was meant to produce men "who had military knowledge but were not military professionals," and were "citizens first and soldiers second;" in this way, its design was distinct from that of the service academies.[16] In the post-civil war period, it was the states, desiring federally funded universities, who sought out the military's involvement on their campuses as a way to secure Morrill grants.[17] These early Morrill Act programs were not connected to the system of appointing and commissioning officers in the military or National Guard, and thus did not result in direct commissioning like the modern ROTC.[18]

The formal ROTC program as we recognize it today resulted from the buildup to the world's first mechanized war, World War I.[19] By the close of the First World War, one hundred and thirty five institutions had been granted ROTC units; these units resembled their modern counterparts in that students who completed a two-year advanced course of at least five hours per week could receive a reserve or National Guard commission.[20] However, in the inter-war period of isolationism, ROTC faced a challenge, albeit nothing like the hostility it would face in the Vietnam era; instead, ROTC programs became a casualty of the popular policy of isolationism.[21] During this period, the country generally reflected a distaste for standing armies, as it had during much of its non-war history, thus making ROTC highly unnecessary.[22] Furthermore, very few of the participants

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16 *Id.*

17 *Id.*

18 *Id.* at 22.

19 NEIBERG, *supra* note 12, at 22.

20 *Id.* at 26.

21 *Id.* at 26-27.

22 *Id.* at 29. Military training at the land grant schools was not only required but compulsory for graduation. *Id.* No anti-ROTC movement existed at any school where participation was voluntary. *Id.* at 30.

themselves took the ROTC program very seriously.[23] Thus, unlike the Vietnam era and its aftermath, in which willing participants were thwarted from ROTC access, the situation was quite the opposite, with unwilling participants and compulsory, as well as unwanted, ROTC drill.

Some may have a tendency to view World War II patriotism as the default setting in American culture, and Vietnam malaise as atypical. The true American default setting would seem to be somewhere in between, probably more along the lines of the post-World War I era. Of course, World War II would stand as a seminal event in how the military recruited and trained its officer corps; during World War II, ROTC had been dismantled in favor of quicker training programs necessary to satisfy the war effort.[24] However, in the aftermath of World War II, ROTC saw itself elevated to new heights both in terms of participation and importance as the age of the permanent standing military was here to stay due to the Cold War.

Neiberg explains two rationales for the hospitality shown to ROTC in the post World War II era. First, "civilian participation would serve a critical check on the growth of a professional military."[25] Second, and, in Neiberg's view more importantly, the universities took great pride in preparing its students for futures in "all walks of life" including military service.[26] Moreover, university administrators had their own "soft" reasons for supporting ROTC on campus:

> 1. A firm belief, especially among the highest officers of universities (themselves often ardent supporters of the Cold War), that American higher education had an obligation to assist in the prosecution of the Cold War as a service to

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[23] Neiberg recounts a quote from Robert McNamara about his ROTC training at the University of California at Berkley, "What I learned is that nobody took the military seriously. My classmates and I saw [ROTC] as a pointless ritual, irrelevant to our world." *Id.* at 31-32.

[24] *Id.* at 35.

[25] NEIBERG, *supra* note 12, at 37.

[26] *Id.*

> society. 2. A desire to keep the military happy in an era in which, at several large research universities, government contracts were worth many millions of dollars. Total Department of Defense (DOD) outlays to universities for basic research alone equaled $105.7 million in 1958 and they continued to climb into the late 1960's. 3. A fear that any negative statement about the military could be construed as "un-American" and lead to marginalization or dismissal. 4. A belief that ROTC contributed to good order on the campus and good citizenship in the undergraduate population. 5. A belief that training officers via ROTC would "civilianize" the military by infusing it with ideas from the universities. Concurrently, ROTC would prevent the creation of a military caste composed of officers trained at the service academies. 6. A desire to please groups with influence over the university, such as alumni, trustees, and state legislators, most of whom were staunch supporters of ROTC. [27]

All six of these factors are pertinent today in the debate about whether ROTC should return to elite institutions.

Among the first points of tension to develop at elite institutions between the military and academia was the requirement that ROTC instructors be given faculty status.[28] Many university administrators disliked the vocational emphasis of the courses as well.[29] Yet for the most part, universities and the military were generally able to come to a consensus regarding both instructors and the proper balance between military vocational training and other courses.[30]

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[27] NEIBERG, *supra* note 12, at 40.

[28] *Id.* at 49. The military professors normally lacked PhDs or tenure. *Id.*

[29] *Id.* at 61.

[30] *Id.* at 60-61.

ROTC would enter its second post-war era with the 1964 ROTC Revitalization Act.[31] Much of the retooling of ROTC had to do with the fact that it was no longer a supplement to the service academies, but the primary source of the military's officer corps.[32] Furthermore, a large problem of the period was the military's failure to make its national recruitment and enrollment goals as of the early 1960's.[33] The changes to ROTC were accomplished with consultation and approval of the universities generally.[34] The central difference with the modern ROTC program and the previous incarnation was that enrolled students would now receive scholarships to attend the university, a two-year and a four-year program, decreased on-campus drill, and increased stipends.[35] This modern program offered something for everyone: the enrollee benefited via the stipend and scholarship. This, in turn, generated the number of enrollees the military sought. The reduced on-campus drill requirement thus gave the military presence a smaller footprint in a period of growing on-campus unrest about the American role in Indochina.

Early Vietnam era opposition to ROTC had as much to do with course content, militarism and tenure than any opposition to the war itself.[36] As was the case then, one must wonder, if the

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[31] 88 H.R. 9124.

[32] NEIBERG, *supra* note 12, at 87. In 1964, the Air Force expected one of every two officers to be commissioned from ROTC and the Army expected this number to be three of every four. *Id.*

[33] *Id.* at 88.

[34] *Id.* at 90.

[35] *Id.* at 91.

[36] *Id.* at 109. The American Association of Academic Professionals defines tenure as being subject to termination only for "adequate cause" after the completion of a probationary period; the probationary period "should not exceed seven years." AAUP: 1940 Statement of Principles on Academic Freedom and Tenure, http://www.aaup.org/AAUP/pubsres/policydocs/contents/1940statement.htm (last visited March 3, 2010).

conflict over "don't ask don't tell" is resolved, would these traditional oppositional points merely return? While the Vietnam War would take the rhetorical lead role in ROTC opposition, many still argued that the military and academia could never be "reconciled."[37] Given the increase of anti-ROTC incidents during the height of the Vietnam War, and a concomitant reduction in 1970-71, perhaps a corollary can be drawn between involvement in the Vietnam War and perception of the military as a whole.[38]

Beginning with the occupation of a campus building in 1969 to protest the Vietnam War, hostility, which had remained below the surface for the most part, boiled over.[39] Yale's ROTC program was ended after much fanfare in 1969 when course credit was no longer awarded to students, and faculty status was removed from military instructors.[40] Harvard's program suffered a similar fate in 1970.[41] By 1972, only two Ivy League institutions, the University of Pennsylvania and Cornell, still had on-campus, for-credit ROTC programs.[42] Most institutions which sought to expel their ROTC did so in a manner which forced the military to voluntarily leave campus. For example, the Army pulled Harvard's ROTC unit when both academic

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[37] Neiberg cites opposition from Students for a Democratic Society who claim that ROTC "is not only antithetical to the ultimate purpose of higher education, but contrary to basic pedagogical principles as well [because of] the unquestioning submissiveness endemic in the rigidly hierarchical structure of military education." NEIBERG, *supra* note 12, at 119.

[38] *Id.* at 120. From the academic year 1969-1970 to 1970-1971 "major damage/injury" incidents fell from 55 to 16. *Id.* Thus, it would appear that the on-campus ROTC served largely as an outlet for general Vietnam-era unrest at its high point.

[39] *Id.*

[40] Lindemann, *supra* note 4, at 49.

[41] *Id.*

[42] *A Survey of ROTC Status and the Ivies*, THE HARVARD CRIMSON, Sept. 28, 1973, *available at* http://www.thecrimson.com/article.aspx?ref=118807.

credit and faculty status were removed from military professors.[43]

By 1983, much of the Vietnam-driven anti-military sentiment had dried up, and there was a general increase in ROTC programs at rank and file colleges and universities throughout the United States.[44] Yet, among elite institutions, the hostility remains, now driven by a vehement opposition to the military's "don't ask, don't tell" policy. [45] However, even if the "don't ask, don't tell" policy was to be repealed by the Obama administration, the question would still remain whether these institutions would welcome the military with open arms. Because the "on-campus ROTC program is an important symbol of legitimacy for the military" and an essential element for fostering good military-civilian relations, it may be necessary to push these institutions in the proper direction.[46]

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[43] Greg Killday, *Army Plans to Terminate Harvard ROTC in 1970; Air Force Stays Until '71*, THE HARVARD CRIMSON, Aug. 12, 1969, *available at* http://www.thecrimson.com/article.aspx?ref=271221.

[44] Lindemann, *supra* note 4, at 49. In 1983 there were 416 ROTC units on college campuses, an increase from 297 in 1978. *Id.* This increase was not only due to a change in attitudes toward the military, but also to increased scholarships and course offerings. *Id.*

[45] In a message to the Columbia University community, President Lee Bollinger described the rationale for barring ROTC on campus as:

> [A]dhering to a core principle of the University: that we will not have programs on the campus that discriminate against students on the basis of such categories as race, gender, military veteran status, or sexual orientation. Under the current "Don't Ask, Don't Tell" policy of the Defense Department, openly gay and lesbian students could or would be excluded from participating in ROTC activities. That is inconsistent with the fundamental values of the University.

Lee Bollinger, President, Columbia Univ., Statement Regarding ROTC and the Campus (Sept. 25, 2008), *available at* http://www.columbia.edu/cu/president/docs/communications/2008-2009/080925-ROTCstatement.html.

[46] Lindemann, *supra* note 4, at 54.

There are of course logistical issues to any proposed change. Two important issues must be resolved by the military itself: first, whether the military would want to be present on the campuses of elite universities and, second, whether it is economically viable to have an ROTC presence on every college campus. However, it is clear that in the special circumstances of elite institutions, the symbolism and good faith between the military and civil sector alone would justify on campus establishments, even if only symbolic in size and nature.[47] Furthermore, the often politically liberal view that dominates elite universities needs a voice from within the military elite in order to effectively debate important policy questions such as "don't ask, don't tell" on their merits and not based on emotion.

III. DON'T ASK, DON'T TELL

As part of the National Defense Authorization Act for the Fiscal Year 1994, Congress enacted what has become known as the "don't ask, don't tell" policy.[48] The enactment of "don't ask, don't tell" was in response to the overwhelming rejection of President Clinton's attempt to repeal the existing ban on homosexual military service.[49] Also placing pressure on "don't

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47 On-campus ROTC serves a greater purpose than merely training future officer corps. As Professor Jean Yarbrough stated while addressing the West Point Bicentennial Conference, "the presence of ROTC programs on college campuses . . . help[s] bridge the gap between the military and civilian worlds." Jean M. Yarbrough, *Duty, Honor, Country,* CLAREMONT REV. OF BOOKS, Vol. II, No. I, (Fall 2001), http://www.claremont.org/publications/crb/id.765/article_detail.asp (last visited March 3, 2010). Professor Yarbrough contends that the "cross-fertilization" between the warrior class produced by the service institutions and the Reserve Officer Corps still occurs at non-Ivy institutions, however, "without the participation of our political and cultural elites." *Id.* Unlike the founders, who were suspicious of a standing military because it was so closely tied to the aristocracy, quite the opposite is true today: "We don't have to force our most privileged classes out of the officer corps; they wouldn't be caught dead in it." *Id.*

48 *See* 10 U.S.C. § 654 (2006), detailing the government's policy toward homosexuals in the armed forces.

ask, don't tell" are the personnel needs for the wars in Iraq and Afghanistan.[50]

What is often neglected by critics of "don't ask, don't tell," especially those espousing it as a rationale to bar ROTC from elite campuses, is that it is a political act, not one put in place by the military. It should be reasonably clear that those least at fault are the young recruits, who must travel obscene distances to participate in drill and may even disagree with the policy themselves. However, the critics of "don't ask, don't tell" also fail to objectively view the military's concerns and attempt to characterize the debate about homosexual military service as being likened to the desegregation of the armed forces, which took place during the administration of Harry Truman.[51] This

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49 President Clinton announced the "don't ask, don't tell" policy in his remarks at the National Defense University at Fort McNair. President William Jefferson Clinton, Remarks Announcing the New Policy on Gays and Lesbian in the Military (July 19, 1993), *available at* 1993 WL 358030.

50 According to Servicemembers Legal Defense Network, a group opposed to "don't ask, don't tell," since its enactment, 13,500 people have been discharged from service under the provisions of § 654. About "Don't Ask, Don't Tell," http://www.sldn.org/pages/about-dadt (last visited March 3, 2010). This ranged from a high of 1,273 in 2001 to a low of 617 in 1994. *Id.*

51 Chairman of the Joint Chiefs of Staff, General Colin Powell, at the Senate debate on "don't ask, don't tell" succinctly explains the difference between the arguments:

> I am well aware of the attempts to draw parallels between this position and positions used years ago to deny opportunities to African-Americans. I know you are a history major, but I can assure you I need no reminders concerning the history of African-Americans in the defense of their Nation and the tribulations they faced. I am a part of that history…Skin color is a benign, non-behavioral characteristic. Sexual orientation is perhaps the most profound of human behavioral characteristics. Comparison of the two is a convenient but invalid argument. I believe the privacy rights of all Americans in uniform have to be considered, especially since those rights are often infringed upon by the conditions of military service.

139 CONG. REC. S7, 603 (daily ed. June 22, 1993) (statement of Sen. Coats).

view obviously serves to polarize much of the constructive debate on the issue. However, the future of "don't ask, don't tell," is uncertain; should the policy be repealed, the punishment of ROTC participants at elite institutions is especially off the mark.

Punishing ROTC candidates seems particularly foolish in light of the changing perceptions of homosexuality in the military, at least among the civilian community.[52] Such shifts in public opinion may lead to the gradual removal of "don't ask, don't tell," but taking a harsh stand against the military seems counterproductive in the public relations war. The open hostility of higher education, especially among elite institutions, has served to solidify military agreement with the "don't ask, don't tell" policy, resulting in an anti-homosexual attitude within much of the military's ranks.[53] Taken together, the foregoing demonstrates that the elites have forsaken any principled debate on how the military can best satisfy its obligations. Consequently, these elites, many of whom have never had any connection to the military nor any contact with its members, are seen as dictating from their ivory towers how the military should perform a dangerous and serious job.

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52 A poll of civilians conducted by the *Washington Post*/ABC News showed that support for the open service of gays in the military has increased from 44 percent in 1993 to 75 percent in 2008. Kyle Dropp & Jon Cohen, *Acceptance of Gay People in Military Grows Dramatically*, WASH. POST, July 19, 2008, at A03. This represents a change from 1993 opposition of 67 percent of Republicans, 56 percent of independents and 45 percent of Democrats. *Id.*

53 Contrary to the civilian public, a *Military Times* survey of active duty service members revealed that 10 percent would not re-enlist if the policy was changed and 14 percent would terminate their service at the end of their existing obligations. Brendan McGarry, *Troops Oppose Repeal of "Don't Ask,"* MILITARY TIMES, Dec. 29, 2008, http://www.militarytimes.com/news/2008/12/122908_military_poll_DADT/ (last visited March 3, 2010).

IV. THE POWER OF THE SOLOMON AMENDMENT

The Solomon Amendment is a simple and unabashedly pro-military piece of legislation. It offers a refreshing directness often lacking in today's legislative process. Quite simply, if you are a higher education institution receiving any number of federal funds, which even the most wealthy Ivy League institutions do, strings are attached that require certain protocols to be observed pertaining to both military recruiters and ROTC programs.

A line by line analysis of Section 983 highlights its power as well as its flaw—a flaw that allows elite institutions to thwart its intent.[54] Section (a) pertains directly to the denial of funds for preventing ROTC access to campus.[55] Enforcement of the act is accomplished via the denial of funds which are listed in section (d)(1), which is an extensive list amounting to billions of dollars in the fiscal year 2008.[56] Sections (a)(1) and (a)(2) explain the conditions upon which funds can be withheld.[57] Section (a)(1) addresses the issue of when an institution specifically attempts to prohibit the Secretary of Defense from opening an ROTC unit.[58] However, in its current version this is not an absolute, and the statute's intent can be thwarted, as is the case at elite institutions.

Section (a)(2) provides an unacceptable loophole to the elite institutions of the Ivy League: as long as students desiring to

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54 *See* 10 U.S.C. § 983 (2006).

55 *Id.* § 983(a).

56 *Id.* § 983(d)(1). This section includes all Department of Defense funds or any funds appropriated through the Department of Labor, Health and Human Services and Education, and Related Agencies Appropriations Act; any funds related to the Department of Homeland Security, the National Nuclear Security Administration of the Department of Energy, the Department of Transportation and funds appropriated to the Central Intelligence Agency. *Id.*

57 *Id.* § 983(a)(1)-(2).

58 *Id.* § 983(a)(1).

participate in ROTC are allowed to attend at another institution, the institution has met its burden and is in compliance with the Solomon Amendment.[59] This is the aforementioned flaw in the statute—it allows elite institutions to ship their ROTC students off to other institutions while not jeopardizing their funding. Neither the schools nor the government bears the burden in this scenario; rather it is borne entirely by the ROTC participant who travels very long distances to complete his or her drill and class work.[60]

The question that remains is, if and when President Obama achieves the repeal of "don't ask, don't tell," whether the status of the ROTC will return to the pre-1969 status quo, or if the hostility will instead be focused on another military/civilian wedge issue.[61] "Don't ask, don't tell" did not exist from the end of the Vietnam War until it was passed into law by a Democratic-controlled Congress and signed into law by Democratic President Bill Clinton.[62] It is possible that opposition to ROTC would shift in focus from homosexuality to conflicts a center-left faculty disagrees with, such as the war in Iraq or possible future conflicts. [63] The argument that senior

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[59] 10 U.S.C. § 983(a)(2) (providing that funds may not be provided to an institution that prevents "a student at that institution – or any sub-element of that institution – from enrolling in a unit of the Senior Reserve Officer Training Corps at another institution of higher education").

[60] *See, e.g.* Lindemann, *supra* note 4, at 51 ("Yale's Air Force cadets commute about 70 miles to the University of Connecticut in Storrs every Thursday, whereas Yale's Army cadets commute about 23 miles to Sacred Heart University in Fairfield, Connecticut three times each week.")

[61] President Obama, while clearly showing support for the repeal of "don't ask, don't tell," moderated his commentary as the election went on, clarifying his position as "want[ing] to make sure that when we revert 'don't ask, don't tell,' it's gone through a process and we've built a consensus or at least a clarity of that, of what my expectations are, so that it works." Larry Eichel, *Obama: Go Slower on 'Don't Ask, Don't Tell'*, PHILA. INQ., Sept. 18, 2008, at A10.

[62] *See* 10 U.S.C. § 654 (2006).

[63] 72 percent of faculty members at American universities and colleges are self-classified as "liberal" and the percentage jumps to 87 percent at more elite institutions. Howard Kurtz, *College Faculties a Mostly Liberal Lot, Study Finds*, WASH. POST, March 29, 2005, at C01.

officers of the military, who often hold advanced degrees and have decades of experience, are somehow unqualified to serve as faculty is elitism and protectionism at its worst. In the event that "don't ask, don't tell" is removed as a bar to ROTC, expect the debate to soon shift its focus to the instructors serving as faculty.

An analysis of the amicus curiae briefs filed on behalf of the respondents in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.* shows that not only was the hot button issue the ability to recruit on law school campuses, but that debate centered nearly exclusively on opposition to "don't ask don't tell." For example, the National Lawyers Guild explained that law schools "have concluded that discrimination on the basis of sexual orientation is an unacceptable form of bigotry, and that the school should not associate with anyone who discriminates on that basis."[64] A collective of gay and lesbian student associations explained the importance of opposing the Solomon Amendment by arguing that the "attempt by law schools to maintain their nondiscrimination policies in the face of coercive measures like the Solomon Amendment is an important part of the national struggle against sexual orientation discrimination."[65]

Interestingly, the amicus curiae for the collective of top law schools, including Columbia, Cornell, Harvard, New York University, the University of Chicago, the University of Pennsylvania and Yale, did not base their opposition overtly on "don't ask, don't tell" and instead proffered a free speech argument.[66] That these schools, with the exception of the University of Pennsylvania, are among the most hostile to ROTC

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[64] Brief for Nat'l Lawyers Guild as Amicus Curiae Supporting Respondents at *1, Rumsfeld v. Forum for Academic and Inst. Rights, Inc., 547 U.S. 47 (2006) (No. 04-1152), 2005 WL 2312117.

[65] Brief for Nat'l Lesbian and Gay Law Ass'n et al. as Amici Curiae Supporting Respondents at *3, Rumsfeld v. Forum for Academic & Inst. Rights, Inc., 547 U.S. 47 (2006) (No. 04-1152), 2005 WL 2347167.

[66] *See* Brief for Colombia Univ. et al. as Amici Curiae Supporting Respondents at *2-4, Rumsfeld v. Forum for Academic & Inst. Rights, Inc., 547 U.S. 47 (2006) (No. 04-1152), 2005 WL 2347168.

may suggest that they are leaving the door open to broader challenges to the Solomon Amendment even in the event that "don't ask, don't tell" is repealed. ROTC, with daily access to students and a visible on-campus presence, may be seen as an even greater threat if "don't ask, don't tell" is repealed.

Rumsfeld v. Forum for Academic & Institutional Rights established that the existing Solomon amendment did not place an unconstitutional condition on the receipt of government funds.[67] The case also stated that Solomon did not force the law schools to take on any government message.[68] Presumably, that message is the furtherance of the allegedly discriminatory message of "don't ask, don't tell."

The most interesting part of the *Rumsfeld v. Forum for Academic & Institutional Rights* holding is that the Solomon Amendment does not violate the schools' expressive association rights.[69] Many of the most radical elements of the Vietnam era's opposition to ROTC had nothing to do overtly with the Vietnam War but rather with a general distrust of the military instead.[70] Whether "don't ask, don't tell" is a mere pretext for the same hostility which has existed among the most radical elements of academia since the 1960s is a pressing question that has yet to be answered.

The Supreme Court expressly said that nothing in the Solomon Amendment requires association by the law schools because it is the military recruiters who in fact must associate with the school, not vice versa:

> The Solomon Amendment, however, does not similarly affect a law school's associational rights. To comply with the statute, law schools must allow military recruiters on campus and assist

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67 *See Forum for Academic & Inst. Rights, Inc.*, 547 U.S. at 59-60.

68 *See id.* at 62.

69 *See id.* at 69-70.

70 *See., e.g.* NEIBERG, *supra* note 12, at 119 ("[The most radical students] sought an expulsion of ROTC, not reform, because in their eyes ROTC was 'an island of indoctrination in a sea of academic freedom.'")

> them in whatever way the school chooses to assist other employers. Law schools therefore "associate" with military recruiters in the sense that they interact with them. But recruiters are not part of the law school. Recruiters are, by definition, outsiders who come onto campus for the limited purpose of trying to hire students-not to become members of the school's expressive association. This distinction is critical.[71]

Similarly, mere association by the target school with a ROTC program cannot be seen as diluting any voices in opposition to the military's policies, and therefore tying federal funding to the presence of an ROTC program would seem to be constitutional.

Continuing under an assumption that elite institutions would not come into line with many of their student body majorities, regardless of whether "don't ask, don't tell" remains military policy, Congress has the demonstrated power to force change. [72] The federal basis for power in the Solomon Amendment was litigated in 2005, largely based on subsection "b," which pertained to on-campus recruiting, in *Rumsfeld v. Forum for Academic & Institutional Rights*.[73] The amendment was found to be a constitutional exercise of federal power under the spending clause[74] and not an impediment to free speech.[75] The power of the Solomon Amendment rests on the notion that since the institution is free to decline the funds, there is no First

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71 *See Forum for Academic & Inst. Rights, Inc.*, 547 U.S. at 69.

72 For example, in 2003, 65 percent of students voting in Columbia University's student elections voted in favor of ROTC's return. Bari Weiss, *Columbia Students May Vote on ROTC*, N.Y. SUN, Sept. 15, 2008, at 2. The proposition was unanimously quashed by the University Senate in 2005. *Id.*

73 *See Forum for Academic & Inst. Rights, Inc.*, 547 U.S. 47.

74 The Spending Clause of the Constitution states that "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States." U.S. CONST. art. 1, §8.

75 *See Forum for Academic & Inst. Rights, Inc.*, 547 U.S. at 70.

Amendment implication.[76] This directly applies in the area of higher education as set down in *Grove City College v. Bell*, which required Title IX compliance in order for the institution to continue receiving federal funds.[77]

The ultimate test for conditioned federal spending is established in *South Dakota v. Dole*.[78] *Dole* laid down a four prong test: 1) the spending must be pursuant to the general welfare; 2) the spending must be sufficiently unambiguous; 3) the spending must relate to a particular federal interest in national projects and; 4) the conditioned spending must not be barred by another constitutional provision.[79] Part "b" of the Solomon Amendment has met the requirements of this test; the Supreme Court, with little fanfare, established that the Solomon Amendment was a legitimate exercise of conditioned spending only subject to First Amendment examination.[80]

It is clear that the spending at issue is pursuant to the general welfare as it is composed entirely of agency appropriations funded by Congress.[81] There is no ambiguity in the Solomon Amendment in terms of its funding clause. The particular national interest is the raising of a competent officer corps. Finally, as *Forum for Academic & Institutional Rights* established, the conditioned funding in the Solomon Amendment is not barred by the First Amendment and therefore is a permissible exercise of Congress' spending power.

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76 *Id.* at 59.

77 *See Grove City Coll. v. Bell*, 465 U.S. 555, 575 (1984); *see also* Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 16 (1981) ("[O]ur cases have long recognized that Congress may fix the terms on which it shall disburse federal money to the States.")

78 483 U.S. 203 (1987).

79 *See* Emily R. Hutchinson, *Solomon's Choice: The Spending Clause and First Amendment Rights in* Forum for Academic & Institutional Rights v. Rumsfeld, 80 WASH. L. REV. 943, 948 (2005).

80 See Forum for Academic & Institutional Rights, Inc., 547 U.S. at 59-60.

81 *See* 10 U.S.C. § 983(d) (2006).

One may argue that the analysis will be different for section (a), dealing with ROTC. However, the importance of ROTC in terms of the national interest would seem to be as compelling, if not more so, than the need to access to law school recruiting especially in consideration of the civil-military gap.

In light of the clout of many of the amici, it would have been thought that at least one justice could have been swayed from the majority.[82] However, *Rumsfeld v. Forum for Academic & Institutional Rights* did not traverse the ROTC side of the issue and thus there is always some chance of a justice defecting. In any event, the basis for any change need not necessarily follow the same path as *Rumsfeld v. Forum for Academic & Institutional Rights*. A challenge to any future change to the Solomon Amendment requiring ROTC participation at the threat of withholding federal funds could be justified under Congress' duty to raise and support a military under Article I and would not need to be decided under contingent spending as applied to the First Amendment.[83]

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[82] One amici brief had the signatures of 42 members of Yale's faculty, and yet, Peter Berkowitz notes that not a single justice was compelled to leave the majority decision or even pen a concurrence. Peter Berkowitz, *U.S. Military: 8 Elite Law Schools: 0; How did so Many Professors Misunderstand the Law?,* THE WEEKLY STANDARD, Vol. II, No. 25, March 20, 2006.

[83] Congress has the power:

> (12) To raise and support the Armies, but no Appropriation of Money to that Use shall be for longer a Term than two Years; (13) To provide and maintain a Navy; (14) To make Rules for the Government and Regulation of the land and naval Forces; (15) To provide for the calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; (16) To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.

U.S. CONST. art. I, § 8; *see also* Hutchinson, *supra* note 79, at 958.

The Court has been relatively willing to defer to Congress in matters pertaining to Article I military powers.[84] As Neiberg points out, there is an inherent importance to the military in having ROTC on university campuses, specifically relating to national security interests for which power is granted under Article I.[85] This importance is further enhanced at elite institutions. In order to achieve the best possible officer corps, wouldn't it logically follow that a diverse group of candidates is necessary to cross-pollinate the military with the views of these institutions and achieve the same result in return?

V. TOUGHENING THE SOLOMON AMENDMENT

Toughening the Solomon Amendment seems highly unlikely and very low on anyone's list of Congressional priorities. Furthermore, other than the symbolic gesture of having ROTC present at these institutions, enrollment is unlikely to be as high as at the state institutions that have traditionally served as the launching point for ROTC. Yet something feels inherently wrong with the notion of ROTC being absent from these institutions. In a sense, it is like the son of an elite politician receiving a deferment from service or assignment to the National Guard during a time of conflict. Many argue for a draft

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[84] *Id.*

[85] NEIBERG, *supra* note 12, at 40. Neiberg gives five reasons for military support of ROTC:

> 1. A belief that the military needed a place on campus if it was to compete successfully with industry for talented men.
> 2. A more subtle desire to maintain good relations with higher education – the locus of critical military research.
> 3. A belief (especially prevalent in the Army) that ROTC instilled civil awareness and patriotism.
> 4. The great cost-effectiveness of ROTC, especially in comparison to the service academies.
> 5. A desire to please members of Congress, most of who were firm supporters of on-campus military instruction program.
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> *Id.*

as a way of spreading the burden of military conflict between the social classes, which could possibly serve to ease the gap between elite institutions and the military.[86]

In the most extreme case, amending the Solomon Amendment to require on-campus ROTC might require only modifying the language and properly stating the intent of 10 U.S.C. § 983(a) accordingly.[87] In reality, it may be as simple as modifying the Department of Defense procedures which define the Solomon Amendment's enforcement.[88] The current Code of Federal Regulations defines "anti-ROTC policy" as including the act of "in effect" preventing a student from attending ROTC.[89] This already occurs when students are forced to travel great distances to complete their ROTC drill.[90]

For example, Yale ROTC participants travel from New Haven to Storrs, a trip of sixty-two miles that takes over an hour each way.[91] While some students have been willing to make this sacrifice, it is quite clear they have "in effect"[92] been prevented from participating in ROTC as they would where an on-campus program exists. While universities may argue by that they do not have an anti-ROTC policy, but merely no on-campus program, their rhetoric does not support this position. For

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86 Universal National Service Act of 1996, H.R. 4752, 109th Cong. (2006) (proposing the reenactment of a military draft).

87 *See* 10 U.S.C. § 983 (2006).

88 32 C.F.R. § 216.3(a) (2006):

> Anti-ROTC policy. A policy or practice whereby a covered school prohibits or in effect prevents the Secretary of Defense from maintaining, establishing, or efficiently operating a unit of the Senior ROTC at the covered school, or prohibits or in effect prevents a student at the covered school from enrolling in a Senior ROTC unit at another institution of higher education.

89 *Id.*

90 *See* Lindemann, *supra* note 4, at 51.

91 *Id.*

92 32 C.F.R. § 216.3(a) (2006)

example, Harvard University's president had the audacity to launch a veiled attack during the 2008 graduation ceremony of its five cadets who make the daily trip to MIT.[93]

Modifying 32 C.F.R. § 216.3(a) to include a definition of the words "in effect" preventing a student from participating in ROTC to include maximum allowable travel distances and times would be permissible under the existing Solomon Amendment without change; as part of the code of federal regulations, such a modification could be accomplished by D.O.D. authority alone. This would serve to thwart the offloading of cadets to other university facilities. However, it would be much more difficult to overcome the academic course and faculty status requirements of 10 U.S.C. § 2102.[94] Yet with the explosion of military professionals with advanced degrees, the argument can no longer be made that training officers no longer measure up academically. Indeed, many of the military's senior leadership hold graduate degrees from the very institutions that shun ROTC participation.[95]

The most extreme option available is the express amendment of 10 U.S.C. § 983 to require on-campus access to ROTC programs.[96] Included in such a change would be the requirement of faculty status for instructors and course credit for military classes. However, included in such a change should also be appropriate changes to 10 U.S.C. § 2102.[97] In its current

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93 *See* Clifford M. Marks and Nathan C. Strauss, *In ROTC Address, Faust Quietly Criticizes Don't Ask Don't Tell*, THE HARVARD CRIMSON, June 4, 2008, *available at* http://www.thecrimson.com/article.aspx?ref=523839. University President Drew G. Faust remarked during the address that she "wish[ed] that there were more" of the cadets, alluding that she believes everyone, regardless of sexual orientation, should be allowed to participate in the military. *Id.*

94 *See* 10 U.S.C. § 2102 (2006).

95 For example, according to his CENTCOM biography, General David Petraeus holds an MPA and Ph.D. from Princeton University's Woodrow Wilson School of Public and International Affairs. United States Central Command - Biography: Gen. David H. Petraeus, http://www.centcom.mil/en/fact-sheets/biography-gen.-david-h.-petraeus.html (last visited March 3, 2010).

96 *See* 10 U.S.C. § 983 (2004).

97 *See* 10 U.S.C. § 2102 (1977).

incarnation, section 2102 offers no specific requirements for the qualification of military instructors to be given faculty status.[98] This may serve to ease some university administrators' concerns over the academic credentials of the instructors assigned to ROTC positions.

An olive branch of sorts could be extended by allowing academia to take part in the drafting of minimum requirements for instructors, as was done during the drafting of the ROTC Revitalization Act of 1964. The military should seek out the universities' participation in determining instructor and class qualifications. Work on this drafting should be done in advance, in order to prevent the dulling of inertia in the event "don't ask, don't tell" is repealed by the Obama administration.

For example, instructor qualifications, class credit and drill requirements for entry into elite institutions can all be drawn up now and made contingent upon the possible change in policy. The creation of a public record on the matter will allow the ROTC programs to be in a position of power in the event that on-campus access is secured via either legislative change to the Solomon Amendment or negotiation between the universities and military as a result of the repeal of "don't ask, don't tell." Ideally, a turnkey solution should be used as part of the repeal of "don't ask, don't tell" in that the overturning of the policy should be part of the same bill that requires on-campus access to ROTC at all elite institutions.

VI. ADDRESSING THE CIVIL-MILITARY GAP: A 21ST CENTURY ROTC

A veteran's advocate once said to me that it was depressing that such a role needed to exist. Indeed, the same is true for the need to argue to be "allowed" on the campuses of elite institutions. However, it seems that since the end of the Vietnam era, largely beginning with the Reagan administration, there has been a sea change in perceptions of the military.[99]

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[98] *Id.*

[99] It could be argued this has largely been due to the elimination of the draft and the return to the all volunteer force; however, much can also be

Many of these elite institutions' restrictions on ROTC programs may not reflect the views of their student bodies, but are rather the opinions of administrators and faculty; these views are further disjunctive to the desire of their alumni.[100] Why those who sacrifice in the service of their country need to be the ones that bear the burden of this political argument is inexplicable.

If those who protest against "don't ask, don't tell" truly want to foster change in the perception among the military of open homosexual service, it would seem that they would be better able to enact that change from within, by sending products of their own elite institutions into the upper echelon of the military, instead of dictating from a position of claiming to know what is best for defense policy. This phenomenon is part of the "civil-military gap," which posits that a framework of four relationships encompass the civilian to military correlation.[101]

The four core relationships are "(1) [b]etween the American society and the military; (2) [b]etween America and our political leaders; (3) [b]etween America's military and its leadership; [and] (4) [b]etween American political leaders and military elites."[102] The civil-military gap manifests itself when the military is "insular in their attitudes, values and makeup" which results in "mistrust, misunderstanding and overt resentment."[103] There is no better illustration of this phenomenon than the

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attributed to the quality and character of the men and women who serve, as well as the evolution of technology, which has served to make junior enlisted personnel often better educated than most college graduates.

[100] For example, the American Council of Trustees and Alumni sent an open letter to the administrators of Yale, Stanford, Brown, Columbia and Harvard. Clifford Marks & Nathan Strauss, *Alumni Org Calls for the Return of ROTC*, THE HARVARD CRIMSON, Oct. 2, 2008, *available at* http://www.thecrimson.com/article.aspx?ref=524371 (last visited March 3, 2010).

[101] Frank Hoffman, *Bridging the Civil-Military Gap*, ARMED FORCES JOURNAL, Dec. 2007, *available at* http://www.armedforcesjournal.com/2007/12/3144666 (last visited March 3, 2010).

[102] *Id.*

[103] *Id.*

disparity between civilian perceptions of "don't ask, don't tell" and those of the military. The resulting argument has only served to narrow the debate, as elite institutions become more disjoined from an understanding of the military, and the military becomes more conservative in its views.

The dangers of the civil-military gap expand well beyond peaceful policy questions such as "don't ask, don't tell." The nonprofit RAND Corporation conducted a study entitled "The Army and the American People" with the purpose of identifying civil-military gaps which may "affect the army's effectiveness" in doing its job.[104] The RAND project examined three core issues that arise as a result of the civil military gap: reduced support for defense budgets, difficulty in recruiting, and dwindling support for the use of force.[105] All are far more serious than the issue of "don't ask, don't tell." Dwindling support for the use of force also includes the growing intolerance for any level of casualties in battle, which has recently served to create unreachable expectations of no American casualties during times of conflict of.

A case in point of the emergence of the civil-military gap is the Clinton administration. This administration, the initial post-cold war presidency, was charged with the first redefinition of the military's role since the end of the Vietnam era, and really the first since the adoption of the Truman Doctrine after the Second World War.[106] The post-cold war demobilization included drastic reductions in defense spending, as well as a new emphasis on peacekeeping.[107] These policy issues alone are enough to challenge any administration, Democratic or Republican. However, the Clinton administration suffered from an enhanced set of difficulties. In addition to the truly difficult policy decisions above, the Clinton team attempted to

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[104] Thomas S. Szayna, Kevin F. McCarthy, Jerry M. Sollinger, Linda J. Demaine, Jefferson P. Marquis & Brett Steele, THE CIVIL MILITARY GAP IN THE UNITED STATES: DOES IT EXIST, WHY AND DOES IT MATTER? (RAND 2007).

[105] *Id.* at xiii.

[106] *Id.* at 3.

[107] *Id.*

immediately interject its civilian individualistic values, embodied in the immediate proposed change of open homosexual military service, without any consultation of the military elite.[108] While this action is within the president's prerogative as commander-in-chief, the impression on military leadership was not positive, especially in light of Mr. Clinton's questionable draft status.[109]

While many civilians are unaware of the societal differences between the civilian community and the military, the military is acutely aware of those differences and, in fact, commissioned the RAND study. After all, the military is completely under civilian control in terms of both policy and the budgetary process.[110] As a result of its civilian control, the military "responds to leaders of the state" in an attempt to influence and implement civilian policies.[111] This responsiveness is not limited to the president as commander in chief, but extends to the legislative level, as well.[112] As a result, the military engages in a process of actively lobbying Congress.[113] RAND identified five "realms of potential civil-military divergence" and assessed their impact.[114] These areas of divergence get to the heart of the true

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[108] *Id.*

[109] SZAYNA ET AL., *supra* note 104, at 3.

[110] *Id.* at 15.

[111] *Id.* at 16.

[112] *Id.* at 30.

[113] *Id.*

[114] *Id.* at 32. The five realms are threat assessment, defense resources, force design and creation, force maintenance and force employment. *Id.* Each has its own distinct area of possible conflict between military and civilian leadership. *Id.* The differences can resonate in the assessment of the "nature and seriousness of threat[s]," the "importance of capabilities … [in dealing] with … threat[s]," the "uses of [the] military," "personnel policies" and "constraints on [the] use of force." *Id.* Such divergence can have massive repercussions when there is a difference between the policy creators—the president and legislature—and the military; for example, "don't ask, don't tell" falls directly within the personnel policy category identified by RAND.

dangers (as opposed to mere distractions such as "don't ask, don't tell") of a military separated from civilian society, with issues such as questions of civilian control and the use of force.

The military is an overwhelmingly conservative institution.[115] However, the fact that there is a civil-military gap is not lost on the liberal intelligentsia. Liberals note that their credibility is low in matters of national security and that many of their policymakers lack a general understanding of military affairs.[116] Melissa Tryon, a self-described "progressive" and veteran of the Iraq War, understands that there is a dangerous "cultural chasm" between the conservative military and other parts of the American public.[117] This chasm is evident in the faculties of elite institutions that bar ROTC, as well of many of their students

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[115] SZAYNA ET AL., *supra* note 104, at 102.

[116] Melissa Tryon, *Progressives and the Military: Bridging the Gap,* TRUMAN NATIONAL SECURITY PROJECT, May 2006, at 1.

[117] *Id.* at 2. While broadly generalizing, Ms. Tryon identifies what she characterizes as military folklore in regards to civilians, which is particularly harsh to Democrats:

- Liberals make America weak and impose dangerous ideas about limited war. Remember how Kennedy set the military up to fail in Vietnam by not letting us go in and kick butt?
- Liberals in the 1960s either shirked responsibility by running to Canada, or stayed and spit on veterans when they returned home scarred. Then Carter had the balls to pardon the shamers while veterans were abandoned to deal with their nightmares.
- Reagan showed the communists who was boss, rebuilt the military, and restored American pride.
- At least George H.W. Bush knew how to fight, win, and go home.
- Clinton was a draft dodger who slashed the military budget, compromised mission effectiveness by focusing on peacekeeping operations instead of the true "war" mission, and flouted moral precepts by conducting liberal social experiments.
- Iraq may or may not be going well, but there's no excuse in voting for a presidential candidate who betrayed his own brothers-in-arms by coming home from Vietnam and telling lies about them.

Id. While many of these pieces of folklore no doubt have been uttered by countless members of the military, they are perhaps more indicative of the fact that there is a civil-military gap, as they do not appear to be the root cause of the elite levels of the military distrusting elite parts of civil society.

who have little understanding of notions of military tradition such as duty and honor. The fact that Tryon and others reduce it to pop culture and miss the truly important aspects such as duty, honor and integrity is disappointing.

However, a glimmer of hope exists when there is acknowledgement that liberals, in large part, do not understand military culture.[118] The lack of military presence at Ivy League and other elite institutions only contributes to this situation. To address the civil-military divide, especially among liberals, Tryon is spot-on in her claim that there is "no substitute for actual military service."[119]

The most serious repercussion of the civil-military gap is the decision on the use of force. Then-Secretary of State Madeleine Albright once famously remarked to General Colin Powell, "What is the point of having this superb military that you're always talking about if we can't use it?"[120] Upon hearing this, Powell reportedly thought he was going to "have an aneurysm."[121] The disagreement between these figures cannot be waved off as a result of ideological differences between the conservative military and the Democratic administration discussed above.[122] Generally, non-military elites are surprisingly more willing to use force in a wider variety of situations than military elites, who think more in terms of a

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[118] *Id.* at 3.

[119] *Id.* at 11.

[120] Peter Feaver & Christopher Gelpi, CHOOSING YOUR BATTLES: AMERICAN CIVIL-MILITARY RELATIONS AND THE USE OF FORCE 2-3 (Princeton University Press 2004) (citing Colin Powell, MY AMERICAN JOURNEY 576-77 (Random House 1995)).

[121] *Id.*

[122] *Id.* at 3. The authors note that the military was less than enthusiastic about the proposed Iraq mission in 2003 and Senator Trent Lott went as far as to echo Secretary Albright by exclaiming, "If the military people don't want to fight, what is their role? Do they want to be the people that clean up after natural disasters?" *Id.*

balance of power methodology.[123] What is troubling to the military is that while policy makers are more willing to use force, they are also more willing to limit that force in often dangerous ways, such as rules of engagement or insufficient force levels.[124]

ROTC at elite institutions is not the cure-all for the civil-military gap but it certainly can go a long way towards alleviating it in the post-draft United States. However, any measure that operates to give the governing elite some understanding of military life can certainly carry some of the burden. Rationally, it would seem that if those who were destined to become civilian elite members of society, such as those attending Harvard, Yale and Columbia, had at least some contact with military cadets, it would be beneficial in bridging this dangerous divide.

VII. CONCLUSION

Elite institutions are a closed community in the United States. They are largely disjoined from the rest of society in that often legacies, social agenda and wealth dictate who will be able to attend. This allows a minority of elites to determine who will benefit from a privileged education and what policy views will be advanced. It is not in the national interest to have an anti-military policy put forward without the ability to offer a counter-argument in the form of ROTC candidates being able to influence both their academic peers and the military itself.

The greater societal benefit that would occur if ROTC cadets had more involvement at America's elite institutions would be substantial for all parties involved. The history of academia-military cooperation, which existed before the Vietnam War, should be reestablished. Those at elite institutions who have substituted "don't ask, don't tell" for Vietnam must realize that

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[123] *Id.* at 5. Non-military elites may be supportive of "responses to human rights abuses and the internal collapse of governance in other countries, or the desire to alter a state's regime." *Id.* at 6.

[124] *Id.* Three dimensions in which there may be a civil-military divide in regards to the use of force are: "(1) foreign policy priorities, (2) "the appropriateness and effectiveness of military force, and, (3) "the appropriateness of political constraints on the use of force." *Id.* at 22.

they are only serving to further deepen the civil-military divide in a dangerous manner.

Amending the Solomon legislation will allow a more diverse viewpoint to be represented on campuses. It could lead to a change in debate within the military regarding "don't ask, don't tell" and other policies. More importantly, if the debate occurred from the inside rather than under the auspices of a particular administration's political agenda, it would not run into the failures of previous attempts at aligning civilian and military policy, nor would it result in the large-scale resentment that resulted from many of the Clinton era initiatives.

The United States military needs the best and brightest to consider military service as a viable option. More importantly, American society in general—liberals and conservatives—needs to be concerned about the possible repercussions of a civil-military divide which fosters a general lack of respect for the American constitutional system of civilian control of the armed forces. This is not to suggest that civilian control itself would be threatened, but just as troubling is the vision of service members deployed overseas with no faith in the elected leaders who made the decision to send them into combat, as well as feelings of alienation from the civilian population upon their return.

Congress has the power to amend Solomon in a meaningful way via its spending power. Doing so may seem like harsh action. However, elite institutions, whose mottos often include ideals of service, do a disservice to the nation when their anti-ROTC policies prohibit on-site participation of cadets. It is insulting to current service members, veterans and the American populace as a whole.

LOCAL GUN CONTROL LAWS AFTER DISTRICT OF COLUMBIA V. HELLER: SILVER BULLETS OR SHOOTING BLANKS? THE CASE FOR STRONG STATE PREEMPTION OF LOCAL GUN CONTROL LAWS

Robert J. Cahall[1]

I. INTRODUCTION

On June 26, 2008, the Supreme Court handed down its decision in *District of Columbia v. Heller*.[2] This case marked the first time that the Court has squarely confronted the Second Amendment of the United States Constitution as it relates to the right of private citizens to possess firearms in the absence of any connection to militia service.[3] The Court held that the Second

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[1] Candidate for Juris Doctor, May 2010.

[2] *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008).

[3] In 1939, the Court considered the Second Amendment in *United States v. Miller*, 307 U.S. 174 (1939). However, the holding in that case was limited to the type of arms that are within the scope of the Second Amendment, rather than the individuals who are within the scope of the Second Amendment. In his dissent in *Heller*, Justice Stevens advanced a *stare decisis* argument and asserted that *Miller* endorsed the view that bearing arms must be related to militia service. *Heller*, 128 S. Ct. at 2823 (Stevens, J., dissenting). However, this view was unequivocally rejected by Justice Scalia, writing for the majority, who noted that the *Miller* Court stated:

> [i]n the absence of any evidence tending to show that the possession or use of [a short barreled shotgun] at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second

Amendment "protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home."[4] The Court struck down Washington, D.C.'s complete prohibition on private handgun possession, stating that the total ban "amounts to a prohibition on an entire class of 'arms' that Americans overwhelmingly choose for the lawful purpose of self-defense."[5] The Court further stated that "under any of the standards of scrutiny the Court has applied to enumerated constitutional rights, this prohibition . . . would fail constitutional muster."[6]

While this holding was a victory for gun-rights proponents in that it protects the right of private gun ownership, including

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> Amendment guarantees the right to keep and bear such an instrument.

Heller, 128 S. Ct. at 2814 (quoting *Miller*, 302 U.S. at 178). Given that analysis in *Miller* (indeed, even the fact that the Court in *Miller* engaged in any analysis whatsoever of the weapon at issue instead of simply stating that the right was collective instead of individual) the majority in *Heller* concluded that *Miller's* holding is "not only consistent with, but positively suggests, that the Second Amendment confers an individual right to keep and bear arms (though only arms that 'have some reasonable relationship to the preservation or efficiency of a well regulated militia')." *Heller*, 128 S. Ct. at 2814; *but see* Nelson Lund, *Heller and Second Amendment Precedent*, 13 LEWIS & CLARK L. REV. 335 (2009) (arguing that the interpretation of the Second Amendment in *Miller* is irreconcilable with the holding in *Heller*). In his dissent, Justice Stevens further argued that "hundreds of judges" relied on *Miller* to support the assertion that the Second Amendment provides only a collective, and not individual, right. *Heller*, 128 S. Ct. at 2823 (Stevens, J., dissenting). Justice Scalia's response to this was that such judges "overread *Miller*" and he concluded that "their erroneous reliance upon an uncontested and virtually unreasoned case cannot nullify the reliance of millions of Americans . . . upon the true meaning of the right to keep and bear arms." *Id.* at 2815 n.24. *See also* Akhil Reed Amar, *Heller, HLR, and Holistic Legal Reasoning*, 122 HARV. L. REV. 145, 154, 160 (2008) (noting that Justice Stevens's dissent "failed to answer," and in fact "failed to even ask" the question why a wrongly decided Supreme Court decision should nonetheless be followed; instead Justice Stevens alleged "reliance" as "a vague catchall for entrenching erroneous precedents").

4 *Heller*, 128 S. Ct. at 2789.

5 *Id.* at 2787.

6 Id.

handgun ownership, the parameters of this right remain far from clear. If and when the Second Amendment is incorporated to apply against the states via the Fourteenth Amendment, there will undoubtedly be litigation dedicated to determining the extent to which state and local governments may restrict gun ownership. However, the vast majority of federal, state, and local gun control laws will pass constitutional muster, as they are not nearly as restrictive as the District of Columbia's draconian prohibition.

This Note argues that the Second Amendment will undoubtedly be incorporated and, therefore, state and local jurisdictions that wish to impose restrictions significantly beyond the federal government's minimum requirements must accordingly draft legislation that balances public policy goals with Second Amendment rights. Review of selected state and local statutes taken from jurisdictions with relatively strict background investigation requirements reveals that New Jersey's statutory requirements for acquiring firearms have the potential to be an effective model. However, it is nonetheless vulnerable to challenge because of the possibility for inconsistent treatment of similarly situated individuals due to broad police discretion exercised at the local level. With that that one significant exception,[7] clarified at length below, and other minor exceptions, the legislative requirements set forth in section 2C:39 of the New Jersey Code can serve as an effective

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7 Section 2C:58-3(c)(5) of the New Jersey Code provides that a Firearms Purchaser Identification Card or Permit to Purchase a Handgun shall not be issued "[t]o any person where the issuance would not be in the interest of the public health, safety, or welfare." N.J. STAT. ANN. § 2C:58-3(c)(5) (West 2008). This language appears to give the issuing authority broad discretion in the issuance of permits to acquire or possess firearms, as there are no objective guidelines or criteria on which the issuing authority may base its denial of a permit. Section 2C:58-4 goes even further in granting the police discretion, providing that an applicant for a license to carry a concealed firearm must have a "justifiable need." N.J. STAT. ANN. § 2C:58-4 (West 2008). However, determining what constitutes a justifiable need is left almost entirely to the chief law enforcement officer of the applicant's municipality and the superior court judge of the applicant's municipality. Although this Note argues that police discretion may, to a very limited extent, be permissible when balancing Second Amendment rights and public policy, such broad discretion is problematic and will be more fully discussed in Section VI of this Note.

baseline model for striking the appropriate balance between good faith statutory requirements that respect the rights of law abiding citizens to acquire firearms while also requiring reasonable and constitutional background screening. For the purposes of this Note, New Jersey's statutory approach is analyzed only to the extent that it controls the manner in which firearms can be procured, and not with regard to the type of weapons that may be procured or possessed.[8]

On balance, the virtues and deficiencies of New Jersey's approach vis-à-vis other jurisdictions lead to the inevitable conclusion that the optimum state regulatory scheme for a state seeking relatively stringent regulations will contain objectively evaluated, streamlined background investigations (as distinct from the federally mandated background checks) and the minimum amount of police discretion possible. Further, any efforts at local gun control legislation should be tempered by broad, explicit, and unequivocal state-level preemption of local firearms regulations. This approach will strike the ideal balance between serving public safety interests and preserving Second Amendment rights. Conversely, the city ordinance of Chicago, IL[9] provides an example of an existing provision that will no

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8 "Any person who knowingly has in his possession an assault firearm is guilty of a crime of the second degree . . . ." N.J. STAT. ANN. § 2C:39-5(f) (West 2008). This provision sets forth the onerous penalty for violation of New Jersey's Assault Weapons Ban. However, the definition of what constitutes an assault weapon, as set forth in section 2C:39-1(w), is controversial. *See* N.J. STAT. ANN. § 2C:39-1(w) (West 2008). The specifics of this ban, and its constitutionality, are beyond the scope of this Note. Thus, section 2C:39 is endorsed as a model only to the extent that it sets forth the requirements and procedures for obtaining authorization to acquire firearms.

9 Section 8-20-040(a) of the Chicago Municipal Code provides:

> All firearms in the City of Chicago shall be registered in accordance with the provisions of this chapter. . . . No person shall within the City of Chicago, possess, harbor, have under his control . . . or accept any firearm unless such person is the holder of a valid registration certificate for such a firearm. No person shall, within the City of Chicago, possess, harbor, have under his control . . . or accept any firearm which is unregisterable under the provisions of this chapter.

doubt eventually need to be amended in light of the Supreme Court's ruling due to its complete and continuing disregard of the rights protected by the Second Amendment.

II. APPROPRIATE LEVEL OF SCRUTINY IN EVALUATING FIREARMS LEGISLATION

The Court did not articulate the appropriate standard of scrutiny for evaluating firearms laws, although it was strongly implied that rational basis is not the proper standard, leaving intermediate scrutiny and strict scrutiny as the likely alternatives.[10] The only guidance offered by the Court was that "the right secured by the Second Amendment is not unlimited."[11] According to the Court, it is "not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose."[12] The Court further qualified its holding by stating

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CHI, ILL. MUN. CODE § 8-20-040(a) (2009). Section 8-20-050(c) of the Chicago Municipal Code provides that handguns are unregisterable, with exceptions for handguns owned prior to the law's effective date and handguns owned by very limited categories of people, such as police officers. CHI., ILL. MUN. CODE § 8-20-050(c) (2009). The restrictions imposed by Chicago's law are substantially equivalent to those struck down by the Court in *Heller*.

[10] The Court stated that the District of Columbia's handgun ban would fail "under any of the standards of scrutiny the Court has applied to enumerated constitutional rights . . . ." District of Columbia v. Heller, 128 S.Ct. 2783, 2787. Additionally, the Court stated:

> Justice Breyer correctly notes that this law, like almost all laws, would pass rational-basis scrutiny. . . . Obviously, the same [rational basis] test could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right, be it the freedom of speech, the guarantee against double jeopardy, the right to counsel, or the right to keep and bear arms.

Id. at 2818 n.27. For a comprehensive argument in favor of using intermediate scrutiny, *see* Jason T. Anderson, Note, *Second Amendment Standards of Review: What the Supreme Court Left Unanswered in* District of Columbia v. Heller, 82 S. CAL. L. REV. 547 (2009).

[11] *Heller*, 128 S.Ct. at 2816.

[12] *Id.* at 2786.

that the opinion should not "be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms."[13]

Despite the Court's silence on the level of scrutiny, this decision has essentially preempted the polar extreme positions of gun prohibition and complete deregulation, implicitly providing a continuum between these extremes within which governments are free to act. Given that complete governmental prohibition is no longer even arguably an option, as a practical matter, there are now two general, overarching mechanisms by which opponents of firearm ownership may attempt to restrict the private acquisition and possession of firearms: background investigations and police discretion.[14] Indeed, many of the most prominent gun control policy initiatives championed by the gun control lobby involve the use of background checks or investigations and police discretion in some form. For example, there are frequently proposals to require background checks on all firearms sales, including at gun shows and for purchases between private parties, proposals to require a waiting period for extended background review before acquiring a firearm, and proposals to give police officials the authority to use subjective judgment in issuing any or all types of firearms permits.

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[13] *Id.* at 2816-17. One commentator has suggested that the Court's inclusion of this language has effectively precluded strict scrutiny from being the appropriate standard, arguing that these "four Heller exceptions" were endorsed by the Court, but could not survive under strict scrutiny. *See* Carlton F.W. Larson, *Four Exceptions in Search of a Theory:* District of Columbia v. Heller *and Judicial Ipse Dixit*, 60 HASTINGS L.J. 1371, 1386 (2009) ("[T]he standard simply cannot be strict scrutiny, if the exceptions are taken as binding statements of the law. The exceptions can be easily justified, however, under a reasonableness standard, and possibly under an undue-burden or an intermediate-scrutiny test.").

[14] Certainly anti-gun advocates may also seek to impose any number of restrictions on the nature and capabilities of the firearms available for purchase, but to the extent that restrictions can be imposed on private individuals acquiring and possessing any types of firearms generally, these two mechanisms will likely be the most heavily contested.

Obviously, these mechanisms will not, of their own force, result in private firearm ownership being directly proscribed, but rather, if abused, there is the potential that the process of obtaining a firearm will become so onerous as to effectively discourage private gun ownership.

The reasonable use of background investigations, and perhaps even a very moderate amount of police discretion, may be something that most pro-gun and all anti-gun constituencies can agree on as generally acceptable and beneficial as a matter of public policy. However, states and municipalities should be cognizant that there is a limit to how onerous these procedures may be and how much discretion may be exercised. Asserting them as a *de facto* ban on gun ownership is surely as unconstitutional as Washington, D.C.'s *de jure* ban.

III. THE THRESHOLD QUESTION OF INCORPORATION

District of Columbia v. Heller applied only to actions by the federal government, as it dealt with a statute enacted in Washington, D.C., a federal district. Accordingly, the question of incorporation was not before the Court, and thus the Court properly did not rule on that issue. Certain localities, most notably the City of Chicago, have advanced the argument that the ruling will not affect other local handgun bans because the Second Amendment does not apply to state or local laws.[15]

Simply put, the City of Chicago flatly denied that the Second Amendment is incorporated against state and local governments by the Privileges and Immunities Clause[16] or the Due Process

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[15] *See, e.g.* Brief for Respondents, McDonald v. Chicago, No. 08-1521 (December 30, 2009).

[16] Noteworthy, the Privileges and Immunities Clause of the Fourteenth Amendment was rendered almost meaningless by the *Slaughter-house Cases*, 83 U.S. 36 (1873). Thus, unless the current Court was to overrule *Slaughter-house*, the incorporation of the Second Amendment will almost undoubtedly come through only the Due Process Clause. For a thorough argument that the Supreme Court should overrule *Slaughter-house* and that the Second Amendment should also be incorporated against the states via the Privileges and Immunities Clause of the Fourteenth Amendment, see Petitioners' Brief, McDonald v. Chicago, No. 08-1521 (Nov. 16, 2009).

Clause of the Fourteenth Amendment.[17] If that was in fact the case, then *Heller* will have changed nothing outside of the District of Columbia, as the virtually all of the federal government's current firearms regulations should survive under *Heller*.[18] However, Chicago's position that the Second Amendment does not apply to state and local governments is untenable; the Second Amendment should and will be incorporated against state and local governments.

Admittedly, the Supreme Court has previously held in *Presser v. Illinois*[19] and *U.S. v. Cruikshank*[20] that the Second Amendment does not apply to the states. These cases were decided in 1886 and 1875, respectively. In *Presser*, the Court, citing *Cruikshank*, held that the Second Amendment does not constrain state and local governments.[21] However, any reliance

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[17] *See* Defendant City of Chicago's Answer to Plaintiffs' Complaint, Defense, and Jury Demand at 11, *McDonald*, No. 08-CV-03645 (July 16, 2008).

[18] At oral argument, Solicitor General Paul Clement expressed concern that the federal government's ban on fully automatic weapons could be jeopardized if the Court affirmed without qualification the broad, categorical reading of the Second Amendment held by the D.C. Circuit Court that "once it is an arm, then it is not open to the district to ban it." *Parker v. District of Columbia*, 478 F.3d 370, 400 (D.C. Cir. 2007). However, Justice Scalia responded that the circuit court did not mean "once it's an arm in the dictionary definition of arms. Once it's an arm in the specialized sense that the opinion referred to it, which is-which is the type of weapon that was used in militia, and it is . . . nowadays commonly held." Transcript of Record at 47, District of Columbia v. Heller, 128 S. Ct. 2783 (2008) (No. 07-290). Similarly, Chief Justice Roberts allayed the Solicitor General's concerns by stating that "[t]his law didn't involve a restriction on machine guns. It involved an absolute ban. . . . Why would you think that the opinion striking down an absolute ban would also apply to a . . . narrower one directed solely to machine guns?" *Id.* at 46. Thus, at present, it does not appear that any of the federal gun control laws currently in force will be seriously jeopardized by the Court's holding.

[19] *Presser v. Illinois*, 116 U.S. 252 (1886).

[20] *U.S. v. Cruikshank*, 92. U.S. 542, 553 (1875) ("The second amendment declares that it shall not be infringed; but this, as has been seen, means no more than it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the national government. . . .").

on these cases would be misplaced, as the doctrine of incorporation did not even appear until 1897, with *Chicago Burlington and Quincy R.R. v. Chicago*.[22] Further, in *Chicago Burlington*, the Court's incorporation analysis was still very limited, as the holding was restricted only to the Fifth Amendment's requirement of just compensation for the taking of private property.[23]

Eventually, in 1925 with *Gitlow v. New York*, the Court held that First Amendment freedoms of speech and of the press are protected from infringement by the states.[24] Over time, the Court used varying standards to incorporate amendments to apply against the states via the Fourteenth Amendment, first stating that those amendments of the Bill of Rights that were "implicit in the concept of ordered liberty"[25] were to be held against the states, and later holding that those rights whose abridgement would "shock the conscience" were to be incorporated.[26] Although Justice Blackmun championed the idea of "total incorporation" in his famous dissent in *Adamson v. California*,[27] the Court has instead opted to utilize "selective

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[21] *Presser*, 116 U.S. at 265 ("[T]he amendment is a limitation only upon the power of congress and the national government, and not upon that of the state").

[22] *Chi. Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226 (1897).

[23] *Id.*

[24] *Gitlow v. New York*, 268 U.S. 652 (1925) (holding protections extended by the First Amendment are applicable to state governments via the Due Process clause of the Fourteenth Amendment).

[25] *Palko v. State of Connecticut*, 302 U.S. 319, 325 (1937) (holding that a state prosecutor's appeal of an erroneous acquittal did not violate the defendant's Fifth Amendment rights, as the double jeopardy clause was not "of the very essence of a scheme of ordered liberty," and, consequently, did not constrain action by the states).

[26] *Rouchin v. California*, 342 U.S. 165, 175 (1952) (Black, J., concurring) ("What the majority hold is that the Due Process Clause empowers this court to nullify any state law if its application 'shocks the conscience,' offends 'a sense of justice' or runs counter to the 'decencies of civilized conduct.'").

[27] *Adamson v. California*, 332 U.S. 46, 89 (1947) (Black, J., dissenting).

incorporation" by which it proceeds clause-by-clause and fully incorporates every provision deemed to be "fundamental."[28] Over the years, the majority of the Bill of Rights has been held to apply against state and local governments.[29]

It is true that a federal district court upheld Chicago's handgun ban in December of 2008.[30] However, examination by the district court was, as a practical matter, merely a perfunctory step towards getting the issue before a higher court with the authority to incorporate the Second Amendment. Here, the district court was bound by circuit court precedent.[31] Chicago prevailed not at all due to the strength of its argument, but by the existence of incorrect, though not yet overturned, precedent.[32] Indeed, in *McDonald*, the district court's opinion went so far as to explicitly state that its analysis went no further than examining the relevant circuit court precedent, and was in no way indicative of the strength of the argument for incorporation.[33]

The Seventh Circuit then affirmed the district court's holding that the Second Amendment is not incorporated in June of

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[28] PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING 490 (Aspen Publishers, Inc. 5th ed. 2006).

[29] *Id.*

[30] *McDonald v. City of Chicago*, No. 08C3645 (N.D. Ill. filed June 26, 2008); *see also Nat'l Rifle Ass'n of Am. v. Village of Oak Park,* No. 08C3696 (filed June 27, 2008).

[31] *See Quilici v. Village of Morton Grove*, 695 F.2d 261 (7th Cir. 1982) (holding that the Second Amendment does not apply to the states, thus a ban on handguns enacted by Morton Grove, Illinois did not violate the Second Amendment).

[32] *See Nat'l Rifle Ass'n of Am. v. Village of Oak Park*, No. 08C3696 at 2-3 (filed June 27, 2008) (emphasizing the court's "duty to follow established precedent in the Court of Appeals to which he or she is beholden, even though the logic of more recent caselaw may point in a different direction").

[33] "This Court should not be misunderstood as either rejecting or endorsing the logic of the plaintiff's argument-it may well carry the day before a court that is unconstrained by the obligation to follow the unreversed precedent of a court that occupies a higher position in the judicial firmament." *Id.* at 5.

2009.[34] Significantly, the rationale of the Seventh Circuit was very similar to that of the district court; that is, that it was bound by precedent and the decision to incorporate the Second Amendment must come from the Supreme Court.[35] Noteworthy, the Court stated:

> Anyone who doubts that *Cruikshank*, *Presser*, and *Miller* have 'direct application in [this] case' need only read footnote 23 in *Heller*. . . . The Court added that '*Cruikshank's* continuing validity on incorporation' is 'a question not presented by this case." That does not license the inferior courts to go their own ways; it just notes that *Cruikshank* is open to reexamination by the Justices themselves when the time comes. If a court of appeals may strike off on its own, this not only undermines the uniformity of national law but also may compel the justices to grant certiorari before they think the question ripe for decision.[36]

By contrast, the Ninth Circuit has recently held that the Second Amendment is incorporated via the Due Process Clause.[37] Thus, less than a year after the *Heller* decision, a circuit split has emerged regarding this issue. However, the Ninth Circuit recently granted an *en banc* rehearing of *Nordyke*, effectively vacating the decision of the three judge panel and (at least temporarily) eliminating the circuit split.[38]

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34 *Nat'l Rifle Assoc. v. City of Chicago*, 567 F.3d 856 (7th Cir. 2009).

35 *Id.* at 857, 860.

36 *Id.* at 858 (internal citations omitted).

37 *Nordyke v. King*, 563 F.3d 439, 457 (9th Cir. 2009) ("We therefore conclude that the right to keep and bear arms is 'deeply rooted in this Nation's history and tradition.' . . . We are therefore persuaded that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment and applies it against the states and local governments.").

38 *Nordyke v.* King, 575 F.3d 890 (9th Cir. 2009).

Despite the possible elimination of the circuit split, the significance and pervasiveness of this issue made it one that is ripe for Supreme Court review. Accordingly, the Supreme Court granted certiorari in *Nat'l Rifle Assoc.* on September 30, 2009.[39] Given that the Supreme Court has not previously considered the Second Amendment's effect on state and local governments subsequent to the introduction of the doctrine of incorporation, there is no basis for the argument that the Second Amendment will not be incorporated via this case. On the contrary, there is nothing in the language of the amendment that distinguishes the right to keep and bear arms from those constitutional amendments that have been incorporated.[40] In fact, the *Heller* opinion positively suggests that the Second Amendment is analogous to other enumerated constitutional rights which have been incorporated.[41] Further, this is consistent with the political ethos in the majority of the states.[42] Thus, there is nothing of substance to support the proposition that the Second Amendment should not be incorporated by the Supreme Court, with correspondingly overwhelming support for the argument in favor of incorporation.

Moreover, Justice Scalia also explicitly stated that the Second Amendment's applicability to state governments will need to be reconsidered due to the chronology of the prior cases

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39 *McDonald v. City of Chicago*, 2009 U.S. LEXIS 5150 (2009).

40 *See* Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 653 (1989) ("The obvious question, given the modern legal reality of the incorporation of almost all of the rights protected by the First, Fourth, Fifth, Sixth, and Eighth Amendments, is what exactly justifies treating the Second Amendment as the great exception.").

41 *See District of Columbia v. Heller*, 128 S. Ct. 2783, 2818 n.27 (categorizing the right to keep and bear arms as an enumerated constitutional right similar to the freedom of speech and the right to counsel, both constitutional rights which have been incorporated against the states).

42 *See* Brief of State of Texas, et. al. as Amici Curiae Supporting Petitioners, *McDonald v. City of Chicago*, No. 08-1521 (Nov. 23, 2009) (Thirty-eight of the fifty states joined the amicus brief in support of the petitioners, thus arguing that the Second Amendment applies to the states through the Fourteenth Amendment).

on the subject vis-à-vis the introduction of incorporation.[43] Likewise, the precedent holding that the Second Amendment is not incorporated via the Due Process Clause is a "legal derelict" that has been rejected, both by legal academics and "hundreds of cases involving the other parts of the Bill of Rights that have been fully incorporated against the states."[44]

For the reasons set forth above, the inescapable conclusion is that the Court will incorporate the Second Amendment against state and local government action via the Due Process Clause of the Fourteenth Amendment, and perhaps even through the Privileges and Immunities Clause.[45] Thus, it appears the question of how to best balance Second Amendment rights and public policy will become a pressing issue for many states, cities, and municipalities sooner rather than later.

IV. POST-INCORPORATION IMPACT

A. EXISTING LEGISLATION.

At the outset of this discussion, it is important to note that the vast majority of gun control legislation in this country will

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43 District of Columbia v. Heller, 128 S. Ct. 2783, 2183 n.23 (2008) ("With respect to *Cruikshank's* continuing validity on incorporation, a question not presented by this case, we note that *Cruikshank* also said the First Amendment did not apply against the states and did not engage in the sort of Fourteenth Amendment inquiry required by our later cases.")

44 Akhil Reed Amar, *Heller, HLR, and Holistic Legal Reasoning*, 122 Harv. L. Rev. 145, 181 (2008) ("*Cruikshank's* general vision has been repudiated by the Court in hundreds of cases involving other parts of the Bill of Rights that have been fully incorporated against the states. After *Heller*, it is hard to conceive how *Cruikshank* can still stand . . .").

45 For a more thorough argument favoring incorporation of the Second Amendment that pre-dates *Heller*, *see* Janice Baker, *The Next Step in Second Amendment Analysis: Incorporating the Right to Bear Arms into the Fourteenth Amendment*, 28 U. DAYTON L. REV. 35 (2002) (arguing that the Second Amendment is part of the American tradition, fundamental to the scheme of American justice, and that the purposes of the Second Amendment support incorporation, thus the modern test for incorporation set forth in *Duncan v. Louisiana*, 391 U.S. 145 (1968) is satisfied).

not be affected by *Heller*.[46] Of course, there were jurisdictions at the margins when it came to gun control legislation, either having the minimum amount of restrictions[47] or having restrictions so onerous as to make gun ownership largely impossible, such as the District of Columbia's handgun ban, or Chicago's previously mentioned handgun ban. However, most jurisdictions were on the continuum that lies between these extremes and that continuum remains largely untouched by the decision.[48]

Of course, there have been challenges to gun control laws that were far less restrictive than the complete prohibition struck down in *Heller*, but virtually none of the challenged laws were struck down as violative of the Second Amendment. Thus far, federal district courts have upheld challenges to laws

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[46] *See generally* Mark Tushnet, *Permissible Gun Regulations after* Heller: *Speculations About Methods and Outcomes*, 56 UCLA L. Rev. 1425 (2009); Adam Winkler, Heller's *Catch-22*, 56 UCLA L. Rev. 1551 (2009) ("[T]his celebrated landmark decision has had almost no effect on the constitutionality of gun control. . . . While some laws are sure to be invalidated in time, the new Second Amendment's bark is far worse than its right.")

[47] *See, e.g.,* 13 V.S.A. § 4003 (2008) (Vermont's statutory scheme does not require that an individual obtain a permit before carrying a firearm).

[48] The City of San Francisco arguably went beyond the polar extreme of Washington, D.C.'s handgun ban in 2006, when the City attempted to ban all private handgun ownership and did not include a grandfather clause provision for those who already possessed handguns. This law, however, was invalidated by the California courts as violative of the California Constitution**.** *Fiscal v. City and County of San Francisco*, 70 Cal. Rptr. 3d 324 (Cal. Ct. App. 2008). It is likely that this ordinance was known to be invalid at the time of its passage, as the City legislators should have been well aware that the City's home rule power under the California Constitution did not override state preemption of firearms regulation; this was an area of statewide, not local, concern. CAL. CONST. art. XI, § 5. Indeed, the City had enacted an identical handgun ban in 1982 and it was likewise invalidated as violative of the state constitution and preempted by state law. *Doe v. City and County of San Francisco,* 186 Cal. Rptr. 380 (Cal. Ct. App. 1982). Nonetheless, in 2006, the City enacted an identical handgun ban despite no material changes in the Constitution's preemption provision or state handgun possession laws. Thus, for the purposes of this Note, it is assumed that San Francisco's law was illegitimate from the start and it will not be analyzed as an actual measure of gun control legislation.

barring felons from possessing firearms,[49] upheld a law prohibiting those under twenty-one from acquiring handguns from licensed dealers,[50] and upheld a law prohibiting the possession of firearms by individuals convicted of a crime of misdemeanor domestic violence.[51] Therefore, it is not the case that *Heller* will result in a major upheaval of the nation's mainstream federal gun control laws, and it is only those laws at the margins that are at all threatened by this decision.

With that being said, it is equally clear that there will be some state and local governments that will need to reconsider the terms of their gun control laws or accept that they have imposed as many restrictions as are constitutionally permissible and may go no further.

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49 *United States v. Robinson*, 2008 U.S. Dist. LEXIS 60070 (E.D. Wis. 2008); *United States v. Harden*, 2008 U.S. Dist. LEXIS 54717 (Dist. Ore. 2008). The Robinson court stated:

> Even under its broadest possible reading, *Heller* does not sanction a felon carrying a gun in his pocket in public, then pulling that gun on a police officer. The *Second Amendment* interest in self defense and protection of the home discussed in *Heller* cannot reasonably be extended to cover defendant's conduct here.

Robinson, 2008 U.S. Dist. LEXIS 60070.

50 United States v. Bledsoe, 2008 U.S. Dist. LEXIS 60522 (W.D. Tex. 2008) (Interestingly, the district court declined to utilize strict scrutiny when evaluating gun control laws, noting that the Supreme Court had failed to specify the appropriate level of scrutiny. Nevertheless, in spite of the Supreme Court's silence on the issue, the district court decided to use intermediate-scrutiny and found that the statute barring individuals under eighteen from acquiring handguns from licensed dealers satisfied the intermediate scrutiny requirements and was therefore valid).

51 *United States v. Booker*, 2008 U.S. Dist. LEXIS 61464 (D. Maine 2008) (holding that prohibitions on those convicted of misdemeanor crimes of domestic violence must be incorporated as part of the list of "felons and the mentally ill" enumerated by the Court in *Heller* as groups against whom longstanding prohibitions will survive Second Amendment scrutiny. The district court noted that a statutory prohibition against felons and the mentally ill is similar enough to a statutory prohibition against the possession of handguns by persons convicted of misdemeanor domestic violence that its inclusion is justified).

B. EXTENT OF THE RIGHT

Before examining the mechanisms by which Second Amendment rights may be constitutionally limited by state and local governments after incorporation, it is necessary to determine the extent to which the possession of firearms is protected. Specifically, it is useful to determine whether the Second Amendment provides a general right to bear arms for any reason (or no reason) or if it is a right limited to a self-defense context. In an effort to make a ban exclusively on handguns appear reasonable, the District of Columbia's brief[52] in this case placed particular emphasis on the fact that residents may possess rifles and shotguns for defense within the home.[53] This argument presupposes that the Second Amendment, as applied to individuals, only protects the right to possess

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52 "The much-debated and carefully-crafted legislative solution included both a ban on handguns and a trigger-lock requirement for firearms kept at home. It was the reasonable judgment of the District's political representatives that such a comprehensive package best promoted public safety while respecting private gun ownership." Brief for Petitioners at 48-49, District of Columbia v. Heller, No. 07-290). *See also id.* at 50 n.12 (The District of Columbia's brief erroneously argues that "many" cities and states "regulate or ban" handguns in a further effort to make the ban at issue appear reasonable; however, the brief cites only Chicago's handgun ordinance as a relevant analogue. While it is true that the federal government and all states regulate the possession of handguns to some degree, what is at issue in this case was an absolute ban. Thus, contrary to the District of Columbia's assertion that the relevant analogues are "many," they are in fact exceedingly rare; neither the federal government nor any of the fifty states prohibits the private possession of handguns. Likewise, Chicago was the only other major United States city that completely prohibited the private possession of handguns).

53 The District of Columbia's claim that citizens have the right to use a firearm for self-defense within the home under the existing law was rejected based on the statute's requirement that all guns in the home be disassembled or bound by a trigger lock, and the statute contained no exception to this requirement, even if the firearm was being used for self-defense against an imminent threat. The District of Columbia advanced the argument that such an exception would be inferred by the courts in cases of self-defense; however, the Court was not satisfied with the District's completely unsubstantiated promise, thus the holding in *Heller* also struck down the District of Columbia's trigger lock requirement as it had been written. *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008).

firearms for self-defense, and not for any other purpose, such as target shooting, collecting, or hunting.

Even if, *arguendo*, the extent of the right was limited to a self-defense context, the holding in *Heller* made it clear that a handgun ban is nonetheless unconstitutional.[54] Accordingly, it is no answer for a government to assert that rifles and shotguns are available as an alternative for self-defense within the home.[55] However, if the right is exclusive to the self-defense context, then certainly it is conceivable that a legislature could attempt to define what is necessary for self-defense as narrowly as possible. For example, a legislature may assert that any one individual or household is given adequate resources for self-defense with only one pistol or revolver. The District of Columbia initially took this position after the *Heller* decision was announced.[56]

Legislative efforts to enforce unduly narrow readings of the scope of Second Amendment protections in violation of the spirit of the *Heller* decision, such as those in the District of Columbia's emergency legislation, would seem to be unconstitutional. The Court stated that "[t]he Second

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54 "The District's total ban on handgun possession in the home amounts to a prohibition on an entire class of 'arms' that Americans overwhelmingly choose for the lawful purpose of self-defense." *Id.* at 2787.

55 During oral argument, Justice Roberts compared this assertion, as advanced by the District of Columbia, to a law that banned the possession of books but allowed possession of newspapers. Transcript of Record at 18-19, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-290).

56 The District of Columbia's initial unwillingness to conform its firearms laws to mainstream standards following the *Heller* decision also triggered a political effort by Congress to determine the city's gun control laws; H.R. 6842, 110th Cong. (2d Sess. 2008), named the "Second Amendment Enforcement Act," passed United States House of Representatives on September 17, 2008, but was not brought to the floor of the Senate for a vote. This legislation would have made any future constitutional scrutiny of the city's gun control laws a moot point, as it was more permissive than is constitutionally required under any fair reading of *Heller*. The Act was also notable for its provision to allow D.C. residents to purchase handguns in Virginia or Maryland by providing D.C. residents with an exception to the general requirement of 18 U.S.C. § 922(b)(3) that an individual may only acquire a handgun in his state of residence. H.R. 6842, 110th Cong. § 10 (2d Sess. 2008).

Amendment protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home."[57] The implication of this language is that the right extends to possession of a firearm for all "traditionally lawful purposes." Traditionally lawful purposes include, but are not limited to, self-defense. Given that firearms have many additional lawful purposes, including hunting, target shooting, and collecting, and the firearms that are optimally suited to each purpose can vary dramatically, it appears that this holding contemplated the number and nature of firearms an individual may possess and concluded that arbitrary numerical or functional limits would not be constitutional.[58]

V. BACKGROUND INVESTIGATIONS

Federally licensed firearms dealers are obligated by federal law to conduct a background check on firearms purchasers.[59] Upon enactment of the "Brady Handgun Violence Prevention Act,"[60] all federally licensed dealers were required to wait five business days from the time the applicant's information was provided to the chief law enforcement officer to the date of the transfer; the transfer could only take place if the dealer had not received information from the chief law enforcement officer indicating that the transferee was disqualified from possessing a

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57 *Heller*, 128 S. Ct. 2783 (2008).

58 While not explicitly addressed in the majority opinion, a limit on the number of firearms that an individual may possess was discussed during the oral argument of this case. As Mr. Dellinger, on behalf of the District of Columbia, argued that the word "keep" must be read together with "keep and bear" such that an individual would be limited to the number of arms he could bring to a militia, Justice Scalia inquired, "You mean you can't have any more arms than you would need to take with you to the militia? You can't have a . . . turkey gun and a duck gun and a 30.06 and a 270 and . . . different hunting guns . . . ?" Transcript of Record at 88, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-290).

59 18 U.S.C. § 922(t)(1)(A) (2007).

60 18 U.S.C. § 922 (2007).

firearm.[61] This provision of the Act expired after five years[62] when it was superseded by the "instant" background check system.[63]

Noteworthy, this Act only regulates the transfer of firearms by federally licensed dealers, as the purely intrastate transfer of firearms between private individuals is arguably not within the purview of Congress's power under the Commerce Clause.[64] Thus, the "gun show loophole," which allows an individual to sell a firearm from his private collection to another individual who is a resident of the same state without performing a background check, may not be subject to federal legislative action, as it is arguably outside of congressional authority.

These federal laws merely establish a "floor" for regulation of the transfers and possession of firearms. As noted above, some states, such as Vermont, have enacted very little legislation regarding who may possess firearms that supplements the regulations imposed by the federal government. However, this is the exception, rather than the rule, as most states have statutes in place that supplement those firearm restrictions imposed by the federal government and some states substantially exceed those requirements imposed by the federal government.

The State of New Jersey is one of the few states to require a background investigation prior to allowing an individual to acquire a firearm, thus its statutory scheme is a highly useful mechanism to examine the parameters of the *Heller* decision.[65] New Jersey is relatively unique in that it requires a background *investigation*, including fingerprinting by the police and the provision of two character references, to be conducted by the

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61 18 U.S.C. § 922(s)(1)(A)(ii) (2007).

62 18 U.S.C. § 922(s) (2007) ("Beginning on the date that is 90 days after the date of enactment of this subsection and ending on the day before the date that is 60 months after such date of enactment . . . ").

63 18 U.S.C. § 922(t) (2007).

64 U.S. CONST. art. 1, § 8, cl. 3.

65 N.J. STAT. ANN. § 2C:58-3(e) (West 2009).

applicant's local police department, as distinct from the federally mandated instant background check.[66] Thus, New Jersey requires firearms purchasers to be approved by their local police chief after undergoing fingerprinting and vetting; merely satisfying the criteria imposed by the federally mandated background check does not qualify an individual to acquire a firearm in New Jersey.[67]

New Jersey law provides that "[n]o person of good character and good repute in the community in which he lives, and who is not subject to any of the disabilities set forth in this section . . . shall be denied a permit to purchase a handgun or firearms purchaser identification card . . . ."[68] Provided an applicant satisfies the enumerated criteria, the issuing authority shall issue a firearms purchaser identification card or permit to purchase a handgun to the applicant.[69] Significantly, the fact that the police *shall* issue the applicant a permit to purchase a handgun or firearms identification card within a reasonable time period largely protects this particular aspect of the law from constitutional attack.[70]

However, the limits of the background investigation are not entirely clear, as some of the disqualifying criteria can be difficult to define. For example, it is not precisely specified how the applicant's "good character and good repute" are determined, or even how far into the applicant's household or personal life this criteria reaches. Thus, determining the constitutionality of each aspect of New Jersey's statute may be more complicated than it initially appears.

As previously noted, the majority in *Heller* stated that the opinion should not "cast doubt on longstanding prohibitions on

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66 *Id.*

67 *Id.*

68 N.J. STAT. ANN. § 2C:58-3(c) (West 2009).

69 N.J. STAT. ANN. § 2C:58-3(d) (West 2009).

70 N.J. STAT. ANN. § 2C:58-3(f) (West 2009) (providing that a permit to purchase a handgun or firearms identification card shall be issued to an in-state applicant within 30 days from the date the application is received).

the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms."[71] The court provided no indication of what "conditions and qualifications" would pass constitutional muster. In general, New Jersey's law imposing the "condition and qualification" that an applicant have a firearms purchaser identification card or permit to purchase a handgun (and, as a necessary antecedent to receiving the permit, have undergone a background investigation by the local police department) would no doubt be constitutional. However, the fact that New Jersey utilizes a local approach, in that the applicant's municipal police department is charged with issuing the permit, can lead to countless variations on the "conditions and qualifications" that an applicant faces.

If the investigating police department is particularly diligent and chooses to investigate the applicant's personal living arrangements, there will be a line-drawing issue with what may disqualify an applicant. For example, a New Jersey resident was denied a permit to purchase a handgun on the grounds that her husband had a prior felony conviction.[72] In this case the court deferred to the police chief's decision and articulated sound public policy reasons for affirming the police chief's denial of the permit to this applicant, while also indicating that the underlying purpose of the firearms laws was to prevent those who should not have firearms from obtaining them, while imposing as few restrictions on qualified applicants as possible.[73] However, it is entirely conceivable that, had the applicant resided in a municipality where the investigating

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71 *District of Columbia v. Heller*, 128 S. Ct. 2783, 2816-17 (2008).

72 *See* In re Application of Clark, 257 N.J. Super. 152 (N.J. Super. Ct. App. Div. 1992) (holding that an application for a permit to purchase a handgun was rightly denied when the applicant's husband had a prior conviction for burglary; the court noted that the availability of the firearm to the husband, coupled with the applicant's admission that her husband would be attending target practice with her made the issuance of a permit contrary to the public health, safety, and welfare).

73 *Id.* at 154.

police department was less vigilant, or never inquired about her husband's access to the firearm, she might well have been granted the permit to purchase a handgun. The necessary consequence of having a localized system is that there will be some degree of inconsistency, and defining the limits of the rights granted by the Second Amendment is difficult when similarly situated applicants subject to the same statutory requirements can be treated differently. One police department's criteria for "good character and good repute in the community in which he lives . . . ."[74] may be very different from another department's criteria.

This issue essentially becomes one of police discretion in conducting background investigations and issuing permits. While the statute attempts to create uniformity, in practice each department has at least some discretion in the timing and extent of performing the background investigation required for each application. While it may be argued that the virtue of such a system is that it can provide a more effective mechanism for a seemingly unsuitable candidate's application to be forestalled or denied in the absence of a cleanly identifiable disqualifier, this benefit is substantially outweighed when considered on balance against the considerable and undue power wielded by local police departments. Certainly, the local police departments may use this power to make a good faith effort to follow the statute. Therefore, the risk of disparate or inconsistent treatment is due to the nature of the system, and not necessarily attributable to any shortcomings at the local police levels. Discretion at the local level may give rise to otherwise statutorily qualified applicants being delayed or denied in the absence of any clear objective justification, although that is presumably not the intention of the vast majority of local investigating authorities.

The supposed benefit of a locally implemented system – that it provides the ability to delay or deny subjectively unsuitable applicants – is illusory. The investigating authority should certainly be able to determine if an applicant has met the statutory criteria or not during the prescribed time period. A system in which it is possible to forestall or deny an objectively suitable candidate's application based on subjective concerns

74 N.J. STAT. ANN. § 2C:58-3(c) (2009).

does not ultimately serve public policy, as that applicant can seek judicial remedy for his denial, and there is no reason to believe the court would not provide such a remedy. It is true that New Jersey courts have traditionally been hostile towards evaluating an individual's right to possess firearms vis-à-vis the police department's discretion to issue a permit.[75] However, the court precedent is almost entirely based on evaluating an applicant's challenge to the issuing authority's denial of a permit to *carry* a firearm, something that the statute explicitly provides is largely within the authority's discretion. In contrast, the statute provides that the issuing authority *must* issue the applicant a permit to possess firearms if the applicant satisfies the statutory criteria. Thus, there is no reason to doubt that courts would provide a remedy in the context of a challenge to an improper denial of a permit to possess a firearm, which is, per the statute, a matter of right.

When viewed in this light, the limitations of New Jersey's statutory system become apparent. Obviously, the statute serves important public policy concerns; specifically, preventing unsuitable individuals from obtaining firearms. However, the limitation of this approach is the potential unequal treatment of applicants, despite the statute's attempts at even-handedness. If an applicant has been denied a permit by his local police department, while a similarly situated applicant within a different township was granted a permit, the aggrieved applicant may legitimately argue that his Second Amendment rights have been infringed.[76] After all, both applicants were evaluated by the same statutory standards, but one was denied the right to acquire and possess a firearm while the other was granted that right.[77]

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75 *See, e.g.*, Siccardi v. State, 59 N.J. 545 (N.J. 1971).

76 Given that New Jersey's statute requires a permit to acquire and possess any type of firearm, this hypothetical speaks only to acquiring and possessing firearms for self-defense generally, and not to any specific firearm that may or may not be within the protections afforded by the Second Amendment.

77 The prevalence of this hypothetical situation is impossible to know with any certainty; although it is hopefully very rare, this criticism of the statute stems from the *possibility* for disparate treatment and the advantages to

The necessary conclusion from such circumstances is that either the denied applicant should have been approved or the approved applicant should have been denied. Assuming the former, and all else being equal, the Second Amendment right of the denied applicant, as set forth in *Heller*, has been violated. As indicated above, the applicant who was denied the permit does have the ability to appeal the denial to the Superior Court. However, the process then becomes lengthy and burdensome, especially given the fact that the applicant presumably has a valid Second Amendment right to acquire a firearm for self defense within his home, but is unable to do so unless and until the application is approved.[78] Thus, there should be a mechanism for the locally administered system to be effectuated uniformly and consistently throughout all localities.

Significantly, the argument here is not necessarily that the State of New Jersey did not have the right to set forth its particular statutory disqualifiers, as the opinion in *Heller* explicitly provided a list of "presumptively lawful" measures and further stated that the list was "not exhaustive."[79] Rather, in this case the applicant's argument would be that he was not subject to any of New Jersey's enumerated disqualifiers, regardless of whether they were presumptively lawful, because a similarly situated applicant was determined not to be subject to those same disqualifiers and was consequently able to exercise his Second Amendment right. Prior to *Heller*, the applicant's plight was of far less concern to the State, because there was no

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uniformity, not necessarily from any particular instances regarding the actual application of the statute. It is also plausible that disparate treatment will be seen in the time it takes to receive a permit; with such a locally controlled process, it is certainly possible that some jurisdictions will take the statutory time-frame more seriously than others, thereby allowing some individuals to receive their permits within or around thirty days, while others may not.

78 N.J. STAT. ANN. § 2C:58-3(d) (West 2009) ("Any person aggrieved by the denial of a permit or identification card may request a hearing in the Superior Court of the county in which he resides . . . The request for a hearing shall be made in writing within 30 days of the denial of the application for a permit or identification card. . . . The hearing shall be held and a record made thereof within 30 days of the receipt of the application by the judge of the Superior Court.").

79 *District of Columbia v. Heller*, 128 S. Ct. 2783, 2817 n.26 (2008).

unequivocal legal precedent that the disadvantaged applicant was being denied a constitutional right. It was merely *Heller's* acknowledgement of the presence of an individual right to possess firearms in general, rather than any specific aspect of the decision as applied to New Jersey's laws, that would give rise to the claim of a violation of Second Amendment rights. In other words, the applicant's challenge would not be a facial challenge to New Jersey's statute, but would be a challenge to the statute as applied to him via the discretionary acts of his local police department.

VI. DISCRETION IN THE ISSUANCE OF CONCEALED CARRY PERMITS

It is important to note that the *Heller* decision left the constitutionality of concealed carry restrictions unclear. In the holding, the Court stated that its "opinion should not be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings. . . ."[80] This sends mixed signals, as it indicates that concealed weapons prohibitions *have* been upheld under "the Amendment or state analogues" but then indicates that laws prohibiting the carrying of firearms in "sensitive places" are constitutional while saying nothing about laws prohibiting the carrying of firearms generally.[81] The argument can be made that, based upon the Court's specific language setting forth where carry prohibitions are constitutional, it cannot be presumed that other, unnamed prohibitions were approved by the Court, thus a complete prohibition on concealed carry is unconstitutional.[82]

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[80] *Id.* at 2816-17.

[81] *Id.*

[82] A complete prohibition on concealed carry, much like D.C.'s handgun ban, is very rare. Only two states have no provisions allowing for the carrying of concealed weapons by individuals. *See* WIS. STAT. § 941.23 (2009); ILL. COMP. STAT. § 5/24-1(4) (2009).

The question of whether it is constitutional for the carrying of firearms to be completely prohibited for all individuals, in all places, at all times is something that will need to be determined through subsequent litigation. It is entirely possible that future courts will extend the language of Justice Scalia's list of where weapons may be banned to effectively limit the holding in *Heller* to the possession of a firearm within the home, with no applicability to the carrying of firearms.[83] If it is the case that a state may completely abrogate citizens' ability to carry a firearm, then New Jersey's statutory scheme for the issuance of carry permits should face no constitutional challenges; carrying a firearm would essentially be a privilege that may be granted or denied at the discretion of the issuing authorities. In that respect, *Heller* will have changed nothing.

Alternatively, assuming that at least one future court interprets the *Heller* decision to have some impact on the issuance of concealed carry permits, the question will again become one of line-drawing. It is important to note that this question will likely be decided predominantly by federal district and circuit courts; there is no guarantee that the Supreme Court will again take up this issue and offer a standard applicable to all states.

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[83] Some scholars have made the argument that the Second Amendment only protects firearms ownership within the home, much as the First Amendment only protects the right to own and view obscenity within the home. *See* Darrell A.H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278 (2009). For example:

> This Article offers a provocative proposal for tackling the issue of Second Amendment scope, one tucked in many dresser drawers across the nation: Treat the Second Amendment right to keep and bear arms for self-defense the same as the right to own and view adult obscenity under the First Amendment - a robust right in the home, subject to near-plenary restriction by elected government everywhere else.

Id. *But see* Eugene Volokh, *The First and Second Amendments*, 109 COLUM. L. REV. SIDEBAR 97 (2009) ("*Guns as Smut* does something peculiar: It analogizes a core category of private arms to one of the *least* protected and marginal categories of speech (obscenity). It's hard to see any justification for such an analogy, other than a purely instrumental one.").

Currently, the majority of the states[84] have a "shall issue" system. "Shall issue" is the colloquial term for an issuance system in which the issuing authority does not have discretion over whether or not to issue a permit to carry a concealed weapon. Provided the applicant meets the objective statutory criteria, it is not within the issuing authority's discretion to deny the applicant a permit. A minority of states[85] have a "may issue" system in which the issuing authority may exercise discretion in approving or denying an application, notwithstanding the fact that the applicant may meet all of the objective statutory criteria.[86] As noted above, only two states, Wisconsin and Illinois, are "no issue" states, in that their statutes contain no provision for the issuance of concealed carry permits to civilians.[87]

If *Heller* is ultimately extended to apply to a citizen's right to carry a handgun and effectively eliminates "no issue" as a choice, the next logical question is whether "may issue" systems can survive. After all, if the decision is read to mean that prohibitions on carrying firearms in "sensitive places" are constitutional, but that general prohibitions on concealed carry are not, then it is presumably within the scope of the Second Amendment's protections that an individual has the right to carry a firearm in "non-sensitive" places. Giving the issuing authority any measure of discretion over whether or not to issue the permit would violate that right and could give rise to issues of inconsistent treatment.

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84 *See, e.g.,* 18 PA.CONS.STAT. § 6109 (2008); TEX. GOV'T CODE ANN. § 411.172 (2007); 21 OKLA. STAT. tit. 21 § 1290.25 (2008); TENN. CODE ANN. § 39-17-1351(b) (2008).

85 *See*, e.g. N.J. STAT. ANN. § 2C:58-4 (West 2009); MD. CODE ANN. PUB. SAFETY § 5-306(a)(5)(ii) (2008).

86 For a more comprehensive explanation of concealed carry statutes throughout the fifty states, *see* Ryan S. Andrus, *The Concealed Handgun Debate and the Need for State-to-State Concealed Handgun Permit Reciprocity*, 42 ARIZ. L. REV. 129 (2000).

87 WIS. STAT. § 941.23 (2009), ILL. COMP. STAT. § 5/24-1(4) (2009).

New Jersey's issue of disparate treatment becomes particularly acute when examining New Jersey's statutory provisions for obtaining a permit to carry a concealed weapon.[88] The key provision of this statute is that "[n]o application shall be approved by the chief police officer or the superintendent unless the applicant demonstrates . . . that he has a justifiable need to carry a handgun."[89] The statute does not offer any definition of what qualifies as a "justifiable need," but rather, it appears to be left entirely to the discretion of the chief police officer. Even if the chief police officer approves the application, it is then within the discretion of the superior court judge of the county in which the applicant lives, as the statute provides that the application must be presented to the court for approval.[90] The courts have traditionally been relatively hostile towards the idea of authorizing a permit to carry a handgun, ever since the New Jersey Supreme Court first articulated the standards in *Siccardi v. State*.[91]

Notwithstanding the obvious potential for disparate treatment under the evaluation criteria set forth in *Siccardi*, the *Siccardi* court nonetheless paid lip-service to the need for uniformity when it stated:

> In prescribing a single application form for the entire State the Legislature pointed toward the proper goal of uniformity in the various counties and municipalities. But since the applications were ultimately being passed on by many

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88 N.J. STAT. ANN. § 2C:58-4 (West 2008).

89 N.J. STAT. ANN. § 2C:58-4(c) (West 2008).

90 N.J. STAT. ANN. § 2C:58-4(d) (West 2008).

91 59 N.J. 545 (N.J. 1971) (holding that a theater owner who was required to carry large sums of money between the theater and the bank depository did not show sufficient need to carry a handgun. The court stated the issuance of concealed carry permits was limited to "personnel who can establish an urgent necessity for carrying guns for self protection, and that "serious threats or earlier attacks" may qualify as an urgent necessity. Noteworthy, the court offered no guidance on what qualifies as a "serious" threat, and this seems to be entirely within the discretion of the evaluating judge.); *see also* In re Preis, 118 N.J. 564 (N.J. 1990).

> individual County Judges there was still great danger of disparate treatment. To reduce this danger the Assignment Judges undertook to designate for each County a single judge as the issuing authority under N.J.S.A. 2A:151-44.[92]

However, the very next paragraph of this decision states "the Legislature made provision for other persons who could make a sufficient showing of 'need,' leaving to Judges the required policy formulation of what constitutes 'need.'"[93] It seems that the courts are merely adhering to the commands of the legislature in exercising discretion when approving or denying concealed carry permits. Nonetheless, these contradictory passages demonstrate the insurmountable obstacles in achieving uniformity under this system.

Consequently, if the *Heller* decision is expanded to protect some form of concealed carry, the police and the judiciary cannot have such unfettered discretion in issuing concealed carry permits. Instead, New Jersey and all other "may issue" states would be wise to enact a statutory scheme in which the applicant may satisfy objective criteria that preempts discretion on the part of local officials. Simply put, if the Second Amendment is read to protect the carrying of a firearm, then "may issue" jurisdictions would be well advised to adopt a "shall issue" approach. Even if it remains permissible for the issuing authority to have discretion in how thoroughly to investigate each applicant to ensure that the criteria are satisfied, it would no longer be acceptable to give the issuing authority unfettered and arbitrary discretion over the actual criteria; there must be a uniform, objective set of criteria. These criteria may be investigated on the local level, but the content of the criteria and the investigation itself cannot be determined arbitrarily at the local level.

Certainly, states moving from "may issue" to "shall issue" would have every right to continue to proscribe the carrying of arms in "sensitive places," provided that the state did not purposefully define "sensitive" so broadly as to include virtually

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92 *Siccardi*, 59 N.J. at 557.

93 *Id.*

everywhere. Likewise, the two states which statutorily make no provision for the issuance of any concealed carry licenses under either a "may issue" or "shall issue" system will be required to amend their laws accordingly; if "may issue" is constitutionally impermissible, then it is beyond doubt that "no issue" would also be unconstitutional.

VII. PREEMPTION AS A BROAD-BASED SOLUTION

After reviewing all of the above Second Amendment issues, it becomes patently clear that the overwhelming majority of all constitutionally problematic regulations originate at the local, rather than state, level. Indeed, the only jurisdictions with statutes currently in force that squarely violate the Second Amendment, as defined in *Heller*, are Chicago and Oak Park, Illinois.[94] No state has ever enacted an absolute ban on handgun possession within one's own home for self-defense, although this is not for lack of political lobbying by anti-handgun advocates.[95]

The recognition of an individual right to possess firearms in the vast majority of state constitutions[96] further reinforces the

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94 The localities of Evanston, IL, Wilmette, IL, Morton Grove, IL, and Winnetka, IL also had bans on the possession of handguns within an individual's own home, but these prohibitions were repealed in the aftermath of the *Heller* decision. *See* EVANSTON, ILL., ORDINANCE tit. 9, ch. 8, § 2(b) (2008), WILMETTE, ILL., CODE § 12-24(b) (2008), MORTON GROVE, ILL., CODE § 6-2-3(C) (2008), WINNETKA ILL., ORDINANCE ch. 9, § 9.12.020(B) (2008).

95 This general agreement between state laws and the *Heller* decision is likely due to political reasons rather than judicial limitations, as drastic legislation comparable to District of Columbia's handgun ban failed to receive significant political support in the very few states where it was ever even seriously considered. Proposition 15, a statewide referendum to ban private ownership of handguns was introduced in California in 1982, and was overwhelmingly defeated by a margin of 63% to 37%. Likewise, six years prior, the similar Massachusetts Handgun Ban Referendum was defeated.

96 *See, e.g.* DEL. CONST. art. I, § 20 ("A person has the right to keep and bear arms for the defense of self, family, home and State, and for hunting and recreational use."); ME. CONST. art. I, § 16 ("Every citizen has a right to keep and bear arms and this right shall never be questioned."); PA. CONST. art. 1, § 21

general agreement between the *Heller* decision and the law of virtually all states.[97] Thus, as a general matter, no state's laws are in direct conflict with the explicit holding in *Heller*, notwithstanding any violations which may later be found to exist after the nuances and contours of *Heller* are clarified. Accordingly, a strong and comprehensive statutory system of

("The right of the citizens to bear arms in defence of themselves and the State shall not be questioned."). For further reading on state constitutional rights to keep and bear arms, *see* Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. REV. L. & POL. 191 (2006) (providing a comprehensive list of each state's constitutional provisions regarding the right to keep and bear arms, and arguing that an analysis of the meaning of the Second Amendment should consider the meaning of framing-era state provisions).

97 *See* Adam Winkler, *The Reasonable Right to Bear Arms,* 17 STAN. L. & POL'Y REV. 597 (2006) (noting that, of the forty-four states that have state constitutional provisions recognizing a right to arms, state courts in forty-two of those states have recognized an individual right to bear arms; significantly, a consistent theme among the court interpretations in those forty-two states is that reasonable gun control regulations do not infringe on the state constitutional right).

state preemption[98] of local legislation should be enacted in all fifty states.[99]

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[98] For the purposes of this Note, comprehensive statutory preemption is endorsed only to the extent that it preempts localities from imposing restrictions on who can obtain firearms, or what firearms can be obtained, that differ from the state's regulations. With regard to a locality enacting other types of firearms legislation that differ from the state's requirements, such as a requirement that a gun owner report a lost or stolen firearm within a certain period of time, preemption is less useful and certainly not necessary. The rationale for preemption is to prevent a locality from violating the Second Amendment by broadly precluding all law abiding citizens from acquiring and possessing firearms, and it is unlikely that laws directed at preventing the criminal or negligent misuse of firearms, such as reporting requirements, would implicate the Second Amendment. Thus, in the example above, in which a locality enacts a reporting requirement, it is certainly foreseeable that similarly situated individuals within a state could be subjected to different treatment and/or penalties. However, the utility of preemption lies in its ability to minimize and avoid violations of the rights protected by the Second Amendment, and not necessarily to preclude any and all possible variations in the law that could result in disparate treatment. Accordingly, explicit preemption statutes are endorsed only to the extent that they preempt legislation that would implicate the Second Amendment by disparately affecting who may possess a firearm, or what type of firearm an individual may possess.

[99] Currently, some form of preemption of local firearms legislation by state firearms legislation is in force in the majority of states, but the mechanism by which and the extent to which local jurisdictions are preempted varies dramatically by state. Some states have an extremely comprehensive statute that explicitly preempts local jurisdictions from promulgating firearms legislation. *See, e.g.* N.H. REV. STAT. ANN. § 159:26 (2008):

> To the extent consistent with federal law, the state of New Hampshire shall have authority and jurisdiction over the sale, purchase, ownership, use, possession, transportation, licensing, permitting, taxation, or other matters pertaining to firearms . . . Except as otherwise specifically provided by statute, *no ordinance or regulation of a political subdivision may regulate the sale, purchase, ownership, use, possession, transportation, licensing, permitting, taxation, or other matter pertaining to firearms . . .*

Id. (emphasis added). Conversely, other states, such as New Jersey, feature implicit preemption that requires courts to take a case-by-case approach in determining whether a local firearms regulation is preempted by state law; it must be noted that, although New Jersey's implicit preemption has recently withstood challenge at the Superior Court and appellate level, the extent to which local gun control laws are preempted by state law is currently being

Review of the various preemption measures in various states indicates that New Mexico's approach to preemption is effective for illustrative purposes.[100] New Mexico's approach provides for preemption of local firearms legislation via the state constitution.[101] The New Mexico constitution states that

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decided by the New Jersey Supreme Court. *See* Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. City of Jersey City, 402 N.J. Super. 650 (N.J. Super. Ct. App. Div. 2008), *cert. granted*, 198 N.J. 312 (N.J. 2009). *Rifle & Pistol Clubs* held that the city's law prohibiting an individual from purchasing more than one handgun in a 30-day period was preempted by Section 2C:58-1 of the New Jersey Code. Significantly, New Jersey state law does not expressly preempt local legislation; however, the appellate court felt that preemption was implied with regard to laws governing possession and acquisition of firearms, stating:

> The Legislature clearly intended to create a complete system with respect to firearm regulation. The statute directs all aspects of the application, purchase, and sale of firearms. It also requires applicants to undergo intensive 13-point individual investigations, including criminal background checks, in order to obtain firearm permits. Thus, *it can be and is inferred by me that the Legislature intended to preempt municipal gun control legislation*.

Id. at 654 (emphasis added). Although this decision was appealed, the Supreme Court of New Jersey unfortunately did not reach the merits of this issue; former Governor Jon Corzine, as part of his flailing (and unsuccessful) re-election campaign, forced a vote on a statewide law that was virtually identical to the Jersey City ordinance. *See, e.g.*, Peggy Ackermann, *Bill to Limit N.J. Gun Purchases gets Legislative Approval*, STAR LEDGER, June 26, 2009, http://www.nj.com/news/index.ssf/2009/06/bill_to_limit_nj_gun_purchases.html Noteworthy, Corzine directed the Senate to schedule the vote with very little public notice, and it won approval in the early morning hours of the very last day of the Senate's term; indeed, it passed by one vote after State Sen. Fred Madden provided the "key" vote that he had previously withheld. *Id.* Consequently, the Supreme Court of New Jersey issued an order dismissing the appeal as moot. *See* Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. City of Jersey City, A-75/76 (January 4, 2010).

[100] As noted above, some form of state preemption of local firearms legislation is in force in the vast majority of states, and by no means is New Mexico the only effective example. Indeed, the statutes of other states may be equally useful in avoiding Second Amendment challenges. However, New Mexico's explicit, comprehensive and unequivocal approach to preempting local jurisdictions from contradicting state firearms law makes it about as useful a model for ensuring uniformity and avoiding Second Amendment challenges based on the *Heller* decision as can be found.

[101] N.M. CONST. art. II, § 6 (2008):

"nothing herein shall be held to permit the carrying of concealed weapons,"[102] yet judicial decisions have nonetheless barred local jurisdictions from legislating in this arena. The Supreme Court of New Mexico has held that a state statute purporting to allow municipalities to prohibit the carrying of concealed weapons violated the state constitution because the statute would allow local jurisdictions to regulate an "incident" of the right to bear arms.[103] Significantly, the *Baca* decision did not hold that the ability to carry concealed firearms could not be abrogated by the state, as the constitution explicitly declined to create such a right.[104] Rather, the decision instead indicates that the carrying of concealed firearms in any location must be decided at the state, not local, level.

The virtue of New Mexico's approach lies in the combination of the language in the constitutional provision and the judicial interpretation of the provision. As previously discussed, the Second Amendment's protection of the right to carry concealed firearms is an uncertain issue. However, it is beyond debate that there is a constitutional right to possess firearms for certain private purposes unconnected to militia service. Thus, New Mexico's approach embodies a perfect balance.[105] The constitution explicitly provides that no municipality may abridge the right to keep and bear arms, but also explicitly provides that the carrying of concealed firearms is not constitutionally protected. Instead, the decision as to whether

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> No law shall abridge the right of the citizen to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes, but nothing herein shall be held to permit the carrying of concealed weapons. No municipality or county shall regulate, in any way, an incident of the right to keep and bear arms.

[102] *Id.*

[103] *See Baca v. N.M. Dep't. of Pub. Safety*, 132 N.M. 282 (N.M. 2002).

[104] *Id.*

[105] Admittedly, the fact that New Mexico's approach optimally complies with the *Heller* decision is purely coincidental, as its preemption scheme was adopted long before *Heller* was decided.

or not to permit the concealed carrying of firearms is left to the state legislature, which decided to permit such carrying. Thus, in the face of the state legislature's decision to allow private citizens to obtain a permit to carry a concealed firearm, municipalities are barred from proscribing the concealed carry of firearms.

This state constitutional approach is eminently respectable; it explicitly protects the right of all state citizens to *possess* firearms, and leaves the decision about carrying firearms exclusively to the state legislature. In this sense, all of New Mexico's citizens either have the ability to carry a firearm or they all do not, solely within the prerogative of the state legislature. A statute purporting to give local jurisdictions discretion in the issuance of carry permits thus violated the state constitution. Further, should the state legislature later reconsider and make a different judgment about concealed carry, such restrictions would be presumably be permissible under the state constitution, provided that any such regulations emanated directly from the legislature and did not vest municipalities with the ability to regulate firearms. Such an approach respects the political process, but also recognizes the inherent unfairness in a locally applied, potentially arbitrary standard and therefore requires that all restrictions on the acquisition and possession of firearms be promulgated at the state, rather than local, level.

The counter-argument to this approach is that it would essentially abrogate local control of firearms legislation from localities, and that local legislatures should be able to enact legislation according to local needs in order to effectively control gun violence. While on its face this may sound like a compelling and reasonable argument, as a practical matter, it has no merit.

The argument that depriving localities of the ability to enact their own gun control laws will adversely affect their ability to reduce gun violence is premised on the erroneous belief that gun control laws promulgated at the local level are, or could ever hope to be, effective. It is true that there are competing beliefs regarding the efficacy of various gun control measures, including local gun control legislation, and this Note does not purport to address the immense variations in empirical conclusions regarding gun control and crime. However, while this Note is not a complete statistical analysis of crime rates,

even a cursory examination of official crime statistics demonstrates that Chicago's handgun ban has not made the City a paragon of violent crime control.

Chicago, a city of just over 2.8 million people, recorded 443 homicides in 2007, while by comparison, Los Angeles, a city of nearly 3.9 million people, had 395 homicides in the same year; similarly, New York, a city of just over 8.2 million people, had 496 homicides in 2007 (thus, despite having nearly triple the population of Chicago, New York had only fifty-three (53) more homicides than Chicago, reflecting a significantly lower homicide rate per capita).[106] New York and Los Angeles do have relatively strict gun control laws, but neither city imposes an outright ban prohibiting law abiding citizens from possessing handguns within their homes. No doubt, there are various social and economic factors that contribute to a city's murder rate, but Chicago's exorbitantly high number of murders relative to its population when compared to other cities without a handgun ban is indicative of the ineffectiveness of this law. Admittedly, the city of Philadelphia, Pennsylvania,[107] with a population of just over 1.4 million, recorded 392 homicides in 2007, and Baltimore, Maryland, a city of just over 600,000, recorded 282 homicides; neither of these cities imposes a handgun ban on its residents, and these are very high numbers relative to the cities' populations.[108] However, this Note does not argue that that Chicago's handgun ban has necessarily

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[106] U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES, OFFENSES KNOWN TO LAW ENFORCEMENT, BY STATE BY CITY, 2007 (2008) [hereinafter table], http://www.fbi.gov/ucr/cius2007/data/table_08.html (last accessed Mar. 1, 2010).

[107] Interestingly, the City of Philadelphia was also at the center of a controversy over Pennsylvania's strong state constitutional preemption of local gun control legislation. In 2008, Philadelphia's newly enacted Straw Purchaser and Assault Weapons Ordinances were struck down as violative of the state constitution's preemption of local firearms laws codified in PA. CONST. art I, § 21. *See NRA v. City of Philadelphia*, 2008 Phila. Ct. Com. Pl. LEXIS 159 (Phila. Ct. Com. Pl. 2008).

[108] TABLE, supra note 106.

increased its homicide rate,[109] but rather, merely that the ban has made no material difference in controlling or reducing murder and violent crime, the purported justifications for the law. Thus, when viewed on balance with the fact that the ban deprives the entirety of the city's residents of the ability to possess handguns, while doing virtually nothing to reduce the criminal use of handguns, it is evident that there is no logical reason for allowing a city to impose such exceedingly onerous firearms restrictions.

Further, separate and apart from the empirical arguments regarding gun control laws, there are also practical considerations that must carry the day. Specifically, very strict local gun control legislation cannot possibly be effective when a neighboring locality has no such restrictions. For example, as noted above, the City of Chicago has barred the private ownership of handguns, but city residents can easily travel to neighboring localities within Illinois to obtain handguns.[110] This may explain the failure of the City's handgun ban to reduce the violent use of handguns, and the reality is that the vast majority of nearby jurisdictions has not and will not enact similar handgun bans. The prohibition of handguns at the local level essentially disadvantages only the law abiding citizens of Chicago who wish to own a handgun, as all non-law abiding individuals can easily obtain and possess a handgun.

Accordingly, preemption will only change matters for the disadvantaged law abiding citizens. As noted above, individuals who are not predisposed to abide by the law are already capable of procuring handguns through various methods, so preempting

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[109] It is significant to note that the application of the foregoing murder statistics is limited by the fact that the data reflect the raw number of murders and is not limited to only those murders in which the perpetrator used a handgun. As previously indicated, this Note does not purport to be an exhaustive study of the empirical data regarding the use and misuse of handguns, thus a more rigorous analysis of this data is beyond the scope of this Note.

[110] The possibility for both legal and illegal purchases exists, as individuals may have the option to purchase the gun legally from a federally licensed dealer and then illegally possess it within Chicago's city limits, or to illegally purchase the gun through various channels, both within and without Chicago's city limits.

a local handgun ban will not materially alter their position. The same holds true of a local firearms restriction in any other city in the country.

The inevitable conclusion is that local gun bans, such as Chicago's, cannot hope to be effective if the locality is within or near a state that does not have the same gun ban applicable to all citizens, and none of the fifty states have such a draconian restriction. As long as there is a nearby source of the commodity, the principles of supply and demand, rather than the existence or absence of a local prohibition, will control whether such weapons are possessed within the locality.[111]

Preemption works at both the intrastate and the federal level. With regard to intrastate benefits, it prevents unequal treatment of similarly situated state residents. At the federal level, it prevents constitutional challenges to a given city's laws since that city's laws will be in conformity with the state law. Thus, the city's laws would likely be less vulnerable to constitutional attack. As previously noted, it is far more likely that the laws enacted by a municipality or city will run afoul of the Second Amendment. Indeed, given the wide latitude the *Heller* decision affords in enacting gun control laws, it is improbable that any significant state-level gun control laws will be invalidated.

VIII. CONCLUSION

The *Heller* decision marked the beginning, not the end, of Second Amendment analysis. While most challenged laws will ultimately be upheld, it is wise to be mindful of the existence of an individual's right to possess firearms when contemplating gun control legislation. Given the recognition of a private right to arms, uniform and objectively administered background investigations, tempered by comprehensive state-level preemption, will be the most efficient means to balance public policy concerns with the Second Amendment. States should use

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[111] *See also* Nicholas J. Johnson, *Imagining Gun Control in America: Understanding the Remainder Problem*, 43 WAKE FOREST L. REV. 837 (2008) (discussing the historical ineffectiveness of supply-side gun restrictions in the United States).

this opportunity to enact preemption statutes, if they have not already, or to clarify and strengthen existing preemption statutes. States using implicit preemption that requires judicial interpretation should adopt an explicit preemption statute.

Preemption serves both fundamental fairness and judicial economy. With regard to judicial economy, preemption will eliminate the need for repetitive court challenges to the gun control laws of various intrastate localities—laws that may have only very slight variations. Instead, each questionable aspect of a state law will likely be challenged only once, as that is the law for the entire state, and a singular judicial determination will control for the state. There will be no need for the Second Amendment litigation that would undoubtedly result if each locality was able to even subtly vary its gun control laws.

Opponents of preemption will argue that it stifles the political process at the local level and that local laws are made in response to local needs. As noted above, local laws regulating firearms do not truly advance the local need that they purport to serve. Also, it is not the case that preemption completely eliminates the political process with regard to gun control laws. Admittedly, preemption does reduce the options available to localities when enacting gun control legislation. However, the localities remain free to use the political process and petition the state legislature to enact particular gun control measures. Indeed, in the long run, preemption may better serve the localities' needs, because it will motivate the locality to direct its resources towards legislation at the state level, which would be far more effective than a locally implemented restriction. At the same time, the more diverse and restrained qualities inherent in a legislative body that represents an entire state, rather than just a locality, will prevent excessively draconian laws from being enacted.

FEDERAL REGULATION OF THE INSURANCE INDUSTRY: ONE FOR ALL AND ALL FOR WHO? HOW FEDERAL REGULATION WOULD HELP THE INDUSTRY INTO THE NEW MILLENNIA

Leo Donatucci[1]

INTRODUCTION

There is perhaps no modern commercial industry that touches the home, the family, and the workplace as does the business of insurance.[2] It affects all aspects of life.[3] From the early days of insurance regulation in the United States, the business of insurance has been regulated by the states, each acting as its own sovereign regulator. As technology has advanced and the insurance market has grown into an international business, insurers have spread their business around the world seeking to compete in the fast-paced market. However, the insurers have been hampered by excessive costs and burdensome regulations from the fifty individual state regulators. Congress has always kept the state insurers safe from federal regulation. In this new millennium, the federal government has proposed a radical change to the regulation of the insurance industry—a change destined to help consumers, agents, and insurers alike prosper more abundantly in the

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[2] Scott A. Sinder, *The Gramm-Leach-Bliley Act and State Regulation of the Business of Insurance – Past, Present and . . . Future?,* 5 N.C. BANKING INST. 49, 51 (2001).

[3] *Id.*

domestic market, and speak as one strong voice in the international market.

In Part I of this article, I will review the history of the insurance industry and the current trends that are leading it toward some form of federal regulation. Next, in Part II, I will describe the federal government's biggest proposal, the "Optional Federal Charter," and the arguments for and against its implementation. In Part III, I present and discuss other approaches suggested in revising the insurance regulatory structure. Finally in Part IV, I submit my proposal for complete federal regulation. I will describe and meticulously examine the proposed scheme for the many benefits it could bring to the industry by reforming the various divisions of insurance regulation: licensing procedures, rate regulation, form standards, solvency requirements, and market conduct regulation. My proposal is not meant to disparage states' rights or be a beacon for "big government" enthusiasts. My goal is only to advocate the need to change a flawed system that is costing all participants billions of dollars in excess costs. Subsequently, I will analyze the future of insurance regulation given the current financial crisis and what impact it may have on the choices that the government makes toward regulating insurance.

PART I: HISTORY OF INSURANCE REGULATION

The history of insurance regulation dates back to the mid-nineteenth century when the individual states first began establishing their own regulatory agencies "to register insurers conducting business within their respective borders."[4] Eventually, insurance companies grew in size and sought some sort of federal regulation as their business extended across state lines.[5] A struggle ensued between the states' needs to exert control over their commerce and the insurance companies' desire for federal oversight. It came to a climax in 1869 with the

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[4] Danielle F. Waterfield, *Insurers Jump on Train for Federal Insurance Regulation: Is It Really What They Want or Need?* 9 CONN. INS. L.J. 283, 286 (2002).

[5] *Id.* at 287.

Supreme Court's decision in *Paul v. Virginia*,[6] where the Court held that "[i]ssuing a policy of insurance is not a transaction of commerce" but is instead intended to be "governed by the local law."[7] Subsequent cases after 1869 held that the entire business of insurance was not interstate commerce subject to federal regulation.[8] With their victory in hand, the existing state insurance regulators, in an effort to coordinate regulation of multi-state insurers formed the National Association of Insurance Commissioners (NAIC) in 1871.[9] The concept of state insurance regulation then quickly expanded to all of the states, each with its own chief insurance commissioner.[10]

These state commissioners ran the insurance industry until Franklin Roosevelt's New Deal program came into effect in the 1930s and 1940s.[11] With the idea of increasing its size and power in the regulation of insurance, the federal government appealed an important insurance dispute directly to the Supreme Court.[12] In 1944, the federal government won its case for exclusive regulatory power when the Supreme Court overturned the *Paul* decision in *United States v. South-Eastern Underwriters Association*.[13] The Court ruled that the federal government can regulate the business of insurance because it

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6 Paul v. Virginia, 75 U.S. 168 (1869).

7 *Id.* at 183.

8 *See, e.g.*, Hooper v. California, 155 U.S. 648, 652 (1895); Noble v. Mitchell, 164 U.S. 367, 368-69 (1896); Nutting v. Massachusetts, 183 U.S. 553, 556 (1902); Nw. Mut. Life Ins. Co. v. Wisconsin, 247 U.S. 132, 138 (1918); Bothwell v. Buckbee, Mears Co., 275 U.S. 274, 276-77 (1927).

9 THE U.S. DEPARTMENT OF THE TREASURY, BLUEPRINT FOR A MODERNIZED FINANCIAL REGULATORY STRUCTURE 62 (2008) [hereinafter Blueprint].

10 *Id.*

11 Waterfield, *supra* note 3, at 288.

12 *Id.* at 288-89.

13 United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944).

falls within the scope of the Commerce Clause as interstate commerce.[14] The state governments perceived the decision as "a threat to state power to tax and regulate the insurance industry."[15] The states were now also subject to federal antitrust laws.[16] Faced with increasing political pressure from the states and the NAIC, Congress disregarded the decision of the Supreme Court and passed the McCarran-Ferguson Act in 1945.[17] In what is often called "reverse preemption,"[18] the Act provides that states have primary authority for insurance regulation, although the federal government can enact legislation if the states' regulations are deficient.[19] It also asserts that no state shall be subject to federal antitrust law, provided the states' laws do not involve boycott, coercion, or intimidation.[20] Justifying its actions, Congress makes it clear in the Act that "the continued regulation and taxation by the several States . . . is in the *public interest*."[21] (emphasis added).

MODERN TRENDS IN THE INSURANCE INDUSTRY

Over the past sixty years, the insurance marketplace has experienced radical changes.[22] Industry consolidation, globalization, e-commerce, private healthcare, and the

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14 *Id.* at 553.

15 U.S. Dep't of Treasury v. Fabe, 508 U.S. 491, 499-500 (1993).

16 *Id.* at 499.

17 15 U.S.C. §§ 1011-14 (2009).

18 Blueprint, *supra* note 8, at 63.

19 Scott E. Harrington, *The History of Federal Involvement in Insurance Regulation*, *in* OPTIONAL FEDERAL CHARTERING AND REGULATION OF INSURANCE COMPANIES 21, 25 (Peter J. Wallison ed., 2000).

20 *Id.*

21 15 U.S.C. § 1011 (2009).

22 Blueprint, *supra* note 8, at 62-63.

integration of financial services have affected the U.S. marketplace.[23] When needed, Congress has stepped in and implemented federal laws regulating specific pockets of insurance.[24] In 1974, Congress enacted the Employee Retirement Income Security Act (ERISA), which granted the Department of Labor the power to regulate employer-sponsored retirement plans and preempted any applicable state insurance regulations.[25] After the terrorist attacks of September 11, 2001, Congress approved the Terrorism Risk Insurance Act (TRIA), which provided property and casualty insurers with a federal "backstop" program for catastrophic losses resulting from a terrorist act.[26] No Congressional act tested the nerve of the insurance industry more than the passage of the Gramm-Leach-Bliley Act (GLBA) in 1999.[27] The GLBA repealed the anti-affiliation provisions of the 1933 Glass-Steagall Act,[28] and the 1982 amendments to the Bank Holding Company Act of 1956,[29] which erected barriers between the banking and insurance industries.[30] By removing these barriers, the GLBA allowed financial companies to offer banking, insurance, and securities products all under one roof.[31] Now, in addition to a convergence

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[23] *Id.* at 63.

[24] *Id.*

[25] 29 U.S.C. § 1001 (2009).

[26] Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, 116 Stat. 2322 (2002), *amended by* Terrorism Risk Insurance Extension Act of 2005, Pub. L. No. 109-144, 119 Stat. 2660 (2005).

[27] Gramm-Leach-Bliley Financial Modernization Act, Pub. L. No. 106-102, 113 Stat. 1338 (1999) [hereinafter GLBA].

[28] 12 U.S.C. § 377 (2009).

[29] 12 U.S.C. § 1843 (2009). Congress amended the Act in 1982 to prohibit banks with limited exceptions from conducting general insurance activities. 12 U.S.C. §§ 78, 377 (2009).

[30] GLBA, *supra* note 26, at §§ 101-03.

[31] Sinder, *supra* note 1, at 49.

in products, there is also a convergence in customers.[32] Banks and insurers "are each vying to become the principal link between an individual . . . and the financial markets."[33] This competition has caused many insurers to look closely at the banking regulatory scheme under which their competitors function.[34] Banks operate under a dual banking system, in which they can choose either a federal or state charter.[35] Insurance companies found themselves at a disadvantage because they still had to rely on the state-based regulatory scheme while their banking competitors can enjoy the benefits of a single regulatory body.[36]

DEFICIENCIES IN THE STATE-REGULATED INSURANCE MARKET

Even before the GLBA passed, the insurance industry was suffering from many deficiencies.[37] The lack of uniformity of state regulation led to undue regulatory burdens and "limited insurers' ability to compete across state boundaries."[38] This diminished the quality of services for consumers and shifted more of the costs onto those consumers.[39] "Under the state regulatory scheme, new product launches are consistently delayed for up to two years while they await approval" by all

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[32] Peter J. Wallison, *Optional Federal Chartering for Life Insurance Companies*, *in* OPTIONAL FEDERAL CHARTERING AND REGULATION OF INSURANCE COMPANIES 51, 53 (Peter J. Wallison ed., 2000).

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *See* Waterfield, *supra* note 3, at 296.

[37] Blueprint, *supra* note 8, at 126.

[38] *Id.*

[39] *Id.*

fifty-one state regulators (including Washington, D.C.).[40] Insurers and their sales personnel "must receive a license from each state in which they plan to do business."[41] These licensing requirements vary significantly from state to state.[42] Also, insurers must have their policy forms reviewed and approved by each state regulator.[43] There are at least seven different categories of state policy form approval systems.[44] States can impose externalities on other states by regulating differently.[45] It is estimated that "the cost of excess regulation at the state level is $13.7 billion annually" – paid for by customers through higher premiums.[46] The insurance industry is also hindered when it comes to international representation.[47] The U.S. Treasury Department is concerned that under the current state-based system, "there is no regulatory official at the federal level [who] can speak for the interests" of all U.S. insurers.[48] It becomes more and more difficult for the U.S. insurance industry "to speak consistently and effectively with one voice" to the

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[40] 153 CONG. REC. S6849 (2007) (statement of Sen. Sununu) [hereinafter Testimony of Sen. Sununu].

[41] Blueprint, *supra* note 8, at 67.

[42] *Id.* at 67-68.

[43] *Id.* at 68.

[44] *Id.*

[45] Martin F. Grace & Hal S. Scott, Optional Federal Chartering of Insurance: Rationale and Design of a Regulatory Structure (June 13, 2008) (working paper at 12) *available at* http://ssrn.com/abstract=1175104.

[46] Ed Royce, *The Forgotten Financial Sector*, WALL ST. J., Apr. 16, 2008. Mr. Royce (R – Cal.) is a member of the House Financial Services Committee and co-author of the National Insurance Act.

[47] Blueprint, *supra* note 8, at 71.

[48] *Id.*

world.[49] This problem may become magnified in the near future when Europe adopts its Solvency II Framework Directive.[50] "It is unlikely that the EU [(European Union)]would find the current U.S. state-based regulatory structure 'equivalent' for purposes of allowing U.S. insurers to operate" in Europe.[51] An EU regulator may be reluctant to let a U.S. company access its market when the U.S. company is already overseen by a non-sovereign state regulator.[52] These difficulties have led Congress to push for an "optional" federal chartering system for all insurers.[53] Some insurance companies have been outspoken in their preference for some kind of "optional" federal charter.[54]

PART II: OPTIONAL FEDERAL CHARTER

In May 2007, Senators John Sununu and Tim Johnson introduced the National Insurance Act of 2007 (NIA),[55] which sets forth a plan to create an "optional" federal charter for the insurance industry. In July 2007, Representatives Melissa Bean

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[49] *Insurance Information Act of 2008: Hearing on H.R. 5840 Before the H. Subcomm. on Capital Markets, Insurance, and Government Sponsored Enterprises of the H. Comm. on Financial Services*, 110th Cong. (2008) (testimony of Deputy Assistant Secretary Jeremiah O. Norton) [hereinafter Testimony of Jeremiah Norton].

[50] *Id.*; see generally Elizabeth F. Brown, *The Development of International Norms for Insurance Regulation*, 34 BROOK. J. INT'L L. 953 (2009).

[51] *See* Testimony of Jeremiah Norton, *supra* note 48; *See generally* Brown, *supra* note 49.

[52] Royce, *supra* note 45.

[53] Testimony of Sen. Sununu, *supra* note 39.

[54] Jessica Holzer, *Insurance Industry Divided Over Federal Regulation*, June 5, 2007, http://thehill.com/business-a-lobbying/3127-insurance-industry-divided-over-federal-regulation (last visited Nov. 11, 2009).

[55] National Insurance Act of 2007, S. 40, 110th Cong. (1st Sess. 2007) [hereinafter NIA].

and Ed Royce introduced a companion bill that mirrored the NIA.[56] The purpose of the NIA is to establish a "comprehensive system of Federal chartering, licensing, regulation, and supervision for insurers and insurance producers that is independent of the State system of insurance licensing, regulation, and supervision."[57] The states would not have jurisdiction over insurers electing to be federally regulated under the OFC.[58] However, insurers that are federally regulated would still be obligated to comply with some aspects of state law, such as state taxes, compulsory coverage for workers' compensation and individual auto insurance, and requirements to participate in mandatory residual risk mechanisms and state guaranty funds.[59] The NIA would permit national life insurers to classify their own policies and set their rates freely.[60] Moreover, national property and casualty insurers would be free to use any particular rate, rating element, price, or form.[61] The NIA would establish an Office of National Insurance (ONI) within the Department of the Treasury to provide federal chartering to insurance companies.[62] Such a dual federal-state regulatory structure would provide the ONI with an opportunity

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[56] H.R. 3200, 110th Cong. (1st Sess. 2007). Representative Royce introduced similar legislation in 2006 (H.R. 6225, 109th Congress), but the bill was passed over. In comparison with the 2006 bill, the 2007 bill adds surplus lines as a type of insurance that a person with a federal producer's license would be authorized to sell under the federal charter program. H.R. 6225, 109th Cong. (2d Sess. 2006).

[57] NIA, *supra* note 54, § 2(1).

[58] *Id.*

[59] *Id.* §§ 2(1), 1125(b)(3) & (4), 1601(a); *see also* Blueprint, *supra* note 8 at 128-29.

[60] NIA, *supra* note 54, § 1214.

[61] *Id.* § 1215(d).

[62] *Id.* § 2(2). In March 2008, the U.S. Treasury issued its Blueprint for a Modernized Financial Regulatory Structure in which it set forth general guidelines for an OFC and appraised many provisions of the proposed NIA. *See* Blueprint, *supra* note 8.

to integrate different portions of state regulatory law with the new national system without disrupting the marketplace.[63] The ONI would be funded by the examination fees paid by federally licensed insurers or by any other costs a national commissioner determines to be appropriate.[64]

The NIA would designate a Commissioner of National Insurance to head the ONI.[65] This person would have the sole authority to issue federal charters and licenses to insurers and would exclusively regulate and supervise the federally chartered insurers.[66] The Treasury Department believes that the Commissioner "should be empowered to address international issues with other national regulators . . . a role currently beyond the scope of the state-based system."[67] The Commissioner's goal would be to focus "on regulatory matters that are not presently addressed at the federal level."[68] He would work closely with the Commerce Department and other executive branch agencies to bring to the table a well-developed uniform U.S. position on insurance regulatory policy.[69] In addition, the Commissioner must affirm that each state guaranty fund does not discriminate against national insurers and is "fairly representative of insurers of different sizes and lines of insurance written."[70] If a national or state insurer offers a line of insurance in a state that does not have a qualified state guaranty fund, then that insurer would be

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63 Blueprint, *supra* note 8, at 128.

64 NIA, *supra* note 54, § 1122(a)(1).

65 *Id.* § (2)(3).

66 *Id.* § (2)(3)(a) & (b).

67 Blueprint, *supra* note 8, at 131.

68 Testimony of Jeremiah Norton, *supra* note 48.

69 *Id.*

70 NIA, *supra* note 54, § 1602(a) & (b).

able to participate in the National Insurance Guaranty Corporation, to be established through the NIA.[71]

Most importantly for consumers, the Commissioner would "have the power to revoke or restrict a national insurer's federal charter for conduct that is hazardous and represents an undue risk to policyholders, [or] violates any law, regulation, or written agreement."[72] The NIA would create internally within the ONI a Division of Insurance Fraud to investigate fraudulent insurance practices.[73] The NIA would also create a Division of Consumer Affairs to implement and enforce market conduct regulations.[74] This division would enforce rules governing the advertising, sale, issuance, distribution, and administration of insurance policies and would review any other claims pertaining to products of national insurers.[75] To further ensure that the ONI does not turn a deaf ear toward blatant mishaps, the NIA created the Office of the Ombudsman.[76] The Ombudsman will "act as a liaison between the Office and any regulated person adversely affected by the supervisory or regulatory activities of the ONI, including the failure of the ONI to take a requested action."[77] "The Ombudsman shall assure that safeguards exist to encourage complainants to come forward and preserve confidentiality."[78]

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71 *Id.* § 1601(b).

72 Blueprint, *supra* note 8, at 132.

73 NIA, *supra* note 54, §§ 1104, 1161-63.

74 *Id.* §§ 1105, 1216.

75 *Id.*

76 NIA, *supra* note 54, § 1107.

77 *Id.* § 1107(b)(1).

78 *Id.*

BENEFITS OF AN "OPTIONAL" FEDERAL CHARTER

Proponents of the OFC agree that the anticipated reduction of approval delays and compliance costs are but two of the main reasons favoring implementation of the OFC.[79] They argue that "an inefficient regulatory system spread across [fifty-one] different jurisdictions imposes direct and indirect costs on insurers."[80] A study conducted at the request of the American Council of Life Insurers (ACLI) found that the "life insurance costs [alone] could be reduced by an estimated $5.7 billion annually if insurance companies functioned under a single regulator."[81] A further study estimates that the savings in producer licensing associated with moving to an OFC from the current system of exclusive rate regulation could range from $268 million to $377 million annually.[82] The bipartisan Bloomberg-Schumer report entitled *Sustaining New York's and the U.S.' Global Financial Services Leadership* states, "[o]ne priority, in the context of enhancing competitiveness for the entire financial services sector and improving responsiveness and customer service, should be an optional federal charter for insurance, based on market principles of serving customers."[83] The OFC would allow the best regulations to "rise to the top" and become the national standards.[84] This scheme would

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[79] Testimony of Sen. Sununu, *supra* note 39.

[80] *Id.*

[81] Steven W. Pottier, State Regulation of Life Insurers: Implications for Economic Efficiency and Financial Strength 2, 6 (May 30, 2007), http://www.acli.com/NR/rdonlyres/3A7453E3-FDF9-44DC-9A5B-66A41C949F97/9195/PottierPackage3.pdf.

[82] Laureen Regan, The Optional Federal Charter: Implications for Life Insurance Producers 2 (Sept. 10, 2007), http://www.acli.com/NR/rdonlyres/EF95BEF6-506D-4D2B-B867-EADC09B42565/10737/OFC_ReganStudyFinal090409.pdf.

[83] Michael R. Bloomberg & Charles E. Schumer, SUSTAINING NEW YORK'S AND THE U.S.' GLOBAL FINANCIAL SERVICES LEADERSHIP 25 (2007), *available at* http://www.nyc.gov/html/om/pdf/ny_report_final.pdf.

[84] *Id.* at 118.

strongly resemble the successful dual banking system, and would improve the ways that insurers and agents buy, sell, and underwrite insurance.[85] Furthermore, the Treasury Department stresses that competition will be spurred by insurance companies not having to comply with various state rate controls.[86] When states set varying degrees of price controls, companies are unable to set "actuarially sound rates, and [this] reduces the number of products to their customers."[87] A federally regulated industry would eliminate state price controls by permitting insurance companies to set their own rates,[88] thereby driving competition in the market and regulating the market through the pressures of supply and demand.[89] The banking industry is also behind the push for an OFC for the insurance industry.[90]

OPPONENTS OF AN "OPTIONAL" FEDERAL CHARTER

Opponents of the OFC argue that not only is federal regulation "unnecessary, but it also would be harmful to everyone concerned – consumers, insurers and the federal

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[85] Testimony of Sen. Sununu, *supra* note 39.

[86] Blueprint, *supra* note 8, at 129. Price controls are considered a problem for the property and casualty sector, as life insurance products are not subject to price controls. *Id.* at 69. Nevertheless, most of the life insurance industry supports the OFC because it "competes with the federally regulated securities industry for baby boomers' retirement assets." *See* Holzer, *supra* note 53.

[87] Royce, *supra* note 45.

[88] Blueprint, *supra* note 8, at 129.

[89] *Smart Insurance Reform: Hearing Before the H. Comm. on Financial Services, Subcomm. on Capital Markets, Insurance, and Government Sponsored Enterprises*, 109th Cong. (2005) (testimony of Nathaniel Shapo, Director, Illinois Department of Insurance).

[90] *See* Holzer, *supra* note 53. The legislation is supported by lobbying heavyweights such as the Financial Services Roundtable and the American Bankers Insurance Association—the insurance arm of the American Bankers Association.

government" itself.[91] Insurers cite for support the Hurricane Katrina chaos and the mortgage crisis, raising significant doubts about whether a new federal regulatory scheme is the answer.[92] Professional Insurance Agents (PIA), a national trade association, believes that the OFC would not be truly "optional."[93] It argues that large financial insurance entities will be able "to move in and out of markets – anything from several territories to entire regions of the country – solely at their whim, thereby disrupting markets and diminishing, not enhancing, options for consumers."[94] An OFC would ultimately impose the costs of an additional and, as OFC opponents argue, perhaps needless federal bureaucracy upon businesses and the public.[95]

There is a growing concern that consumers will become more confused and thus less protected by the state versus federal option.[96] Opponents believe that "consumer access to regulatory

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[91] Jim Hodges, *Federal Regulation of Insurance Would be Harmful*, Aug. 12, 2008, http://www.politico.com/news/stories/0808/12441.html. Mr. Hodges, a Democrat, served as governor of South Carolina from 1999 to 2003 and is currently the executive director of the National Alliance of Life Companies.

[92] *Id.*; *see also* Press Release, NAIC, NAIC Response to Treasury Report (March 31, 2008) *available at* http://www.naic.org/Releases/2008_docs/praeger_response_treasury_report.htm.

[93] Press Release, PIA, Professional Insurance Agents Say National Insurance Act Would Make Consumer Protection Optional (July 27, 2007) *available at* http://www.pianet.com/NewsCenter/PressReleases/7-27-07.htm [hereinafter PIA Press Release]. The PIA is joined in its dissent over an OFC by the National Conference of Insurance Legislators (NCOIL), the National Governors Association (NGA), the National Conference of State Legislators (NCSL), the Council of State Governments (CSG), and the NAIC. *Id.*

[94] *Id.*

[95] Letter from Members of the NCOIL Executive Committee to Senators John Sununu and Tim Johnson (July 21, 2007) (on file with author).

[96] Robert B. Morgan, *The Optional Federal Insurance Charter Is No Option At All*, *in* OPTIONAL FEDERAL CHARTERING AND REGULATION OF INSURANCE COMPANIES 59, 61-62 (Peter J. Wallison ed., 2000).

protection would become needlessly complicated by the mere existence of dual regulatory systems and the resulting confusion as to which system has jurisdiction over a particular consumer complaint."[97] Many parties opposed to an OFC point to past instances where the federal government failed in its attempt to regulate various industries.[98] In the 1980s, the Savings and Loan Thrift Institution's fiasco resulted from the government allowing banks to opt for either a state or federal charter.[99] A competition ensued between state-chartered thrift entities and the federal government over investment capital.[100] This led to a "dismantling of regulatory standards as a regulatory 'race to the bottom' developed that left consumers without the protections they needed."[101] Another grievance voiced by opponents surrounds the Sarbanes-Oxley Act, which federalized large portions of previously state-dominated corporation law.[102] They contend this Act "has caused huge costs and problems for publicly-traded firms."[103] These critics look no further than the current economic crisis to justify requesting that the federal government not interfere with the state-run insurance business.[104] By keeping the states in charge of regulation, the

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[97] *Id.*

[98] *See* PIA Press Release, *supra* note 92.

[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] Henry N. Butler & Larry E. Ribstein, *A Single-License Approach to Regulating Insurance* 9 (Univ. of Illinois, Law & Econ. Research Paper No. LE08-015, Northwestern Univ. Sch. of Law, Law & Econ. Research Paper No. 08-10, 2008), *available at* http://ssrn.com/abstract=1134792.

[103] *Id.*

[104] *Turmoil in the Financial Markets: Hearing on the Causes and Effects of the AIG Bailout Before the H. Comm. on Oversight and Government Reform*, 108th Cong. (2008) (testimony of Eric Dinallo, Superintendent, New York State Insurance Department) [hereinafter AIG Bailout]. *See also* Press Release, PIA, PIA National Applauds NCOIL CSG for Renewed Commitment to

regulators remain closer to their consumers.[105] Having fifty-one regulators means that power is diversified.[106] Looking from a different angle, it is possible that "state regulators may be more responsive to local complaints due to the political consequences of not doing so."[107]

In addition, there is the fear that once an OFC is in place, the federal government could substantially expand its authority over the industry.[108] Some state insurance departments feel that an OFC "would be the largest expansion of federal power since the New Deal in the 1930s."[109] They firmly believe that the current system should be fixed in a methodical way that would result in a better tried-and-tested scenario than going the untested federal route.[110]

Oppose Federal Insurance Regulation (Dec. 22, 2008) *available at* http://pianet.com/NewsCenter/PressReleases/12-22-08.htm. In the Press Release, PIA Nat'l Executive Vice President & CEO Leonard C. Brevik states "[t]he sectors of our economy which were imprudent will now attempt to shift the responsibility for their irresponsible behavior to the one sector of our economy that behaved responsibly, the insurance sector, which was prudently regulated by the states." Id.

[105] *See* Michael Kerley, *Insurance Agents and Advisors*, *in* OPTIONAL FEDERAL CHARTERING AND REGULATION OF INSURANCE 174, 175 (Peter J. Wallison ed., 2000).

[106] *Id.*

[107] Grace & Scott, *supra* note 44, at 27; *see, e.g.*, Press Release, NAIC, State Regulators Protect Consumers From Insurance Fraud (Sept. 24, 2008) *available at* http://www.naic.org/Releases/2008_docs/fraud_protect.htm (showing that because of unscrupulous and abusive sales practices toward seniors, the NAIC implemented model rules to protect seniors).

[108] Grace & Scott, *supra* note 44, at 26.

[109] Press Release, Casualty Actuarial Society, Proposed Federal Regulation of Insurance Hotly Debated at CAS Annual Meeting (Dec. 19, 2007) (quoting Michael McRaith, Director of the Illinois Dept. of Insurance) *available at* http://casact.org/media/index.cfm?fa=viewArticle&articleID=490.

[110] *Id.*

PART III: ALTERNATE THEORIES OF REGULATION

THE NATIONAL STANDARD

The concept of creating national standards for the insurance industry is an attempt to improve, rather than replace entirely, the current state regulatory system by promoting a more efficient and effective state regulatory framework.[111] Legislators can address problems on an issue-by-issue basis, such as producer licensing, speed-to-market problems, and market conduct examinations.[112] These standards can "directly impact a company's bottom-line and its ability to remain competitive."[113] A major problem with this approach is the problematic and herculean task of orchestrating the states to agree on which uniform standards to apply.[114] Individual state insurance departments may be reluctant to accept licensing and rate determinations made by sister states.[115] As former NAIC President Glenn Pomeroy rightly stated, "[i]t's one thing to get fifty different commissioners to agree to one thing in one point in time and another to get fifty different state legislators to agree with fifty different commissioners."[116] Each state agency has a slightly different legislatively mandated mission at the state level.[117] The NAIC has striven, sometimes against overwhelming odds, to bring together the states' interests and those of

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[111] Waterfield, *supra* note 3, at 317.

[112] *Id.* at 320.

[113] *Id.* at 325.

[114] *Id.*

[115] *Id.*

[116] Lynda Gach, *Staying the Course: As Insurers Navigate the Changing Regulatory Environment, They Have Set Their Sights on Speed-To-Market Rules, Which Are in the Early Stages of Use And Are Facing Growing Pains in 2002*, BEST'S REVIEW, Feb. 1, 2002, at 43 (quoting Glenn Pomeroy, former NAIC President).

[117] Grace & Scott, *supra* note 44, at 12.

legislators for the good of implementing effective policy for all consumers.[118] However, a major problem arises because the NAIC-developed programs are voluntary and may not be appropriate for all lines of insurance.[119] For example, there is no mandatory language directing use in the NAIC's Review Standards Checklist for form filing.[120] In addition, it could take years after an agreement is signed for the parties to start to implement its "voluntary" policies.[121] The NAIC lacks the necessary enforcement authority to achieve the kinds of reform depicted by this theory.[122]

The states could ask the federal government for enforcement help, but that would defeat the whole purpose of state-only regulations. Moreover, the federal government may run into Tenth Amendment issues regarding the enforcement of standards upon the states.[123] The federal government cannot force or coerce the states to enforce the regulations.[124] To

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[118] *See* Press Release, NAIC, Regulators, Legislators Underscore Commitment to Working Together, Feb. 25, 2008 *available at* http://www.naic.org/Releases/2008_docs/naic_ncoil_ncsl.htm. Organizations that the NAIC has been influential in developing include: the Interstate Insurance Compact Regulation Commission, the National Insurance Producer Registry, State Based Systems and the System for Electronic Rate and Form Filing. *Id.*

[119] Waterfield, *supra* note 3, at 324.

[120] *See* NAIC's Rates & Forms Filing: Uniform Review Standards Checklist *available at* http://www.naic.org/industry_rates_forms_ursc.htm. The NAIC hopes these standards will mature over time and perform most effectively for the benefit of all stakeholders.

[121] *See* Press Release, NAIC, Interstate Insurance Product Regulation Commission Begins Work, June 13, 2006 *available at* http://www.naic.org/Releases/2006_docs/compact_commission_meeting.htm. The Interstate Insurance Product Regulation Compact was signed in March 2004 but was not fully operational until early 2007.

[122] Waterfield, *supra* note 3, at 318.

[123] *See, e.g.*, Printz v. United States, 521 U.S. 898 (1997).

[124] *See* New York v. United States, 505 U.S. 144, 166-67 (1992) (Through its commerce power, Congress can use its spending power to condition states'

bypass this potential Constitutional problem, Congress should follow the Supreme Court's guidance from 65 years ago[125] and regulate insurance as an interstate business.[126]

LIMITED FEDERAL INTERVENTION

The limited federal intervention approach seeks to address and fix the main flaw of the National Standard approach, namely, lack of enforcement.[127] The federal government would enact "minimum" federal standards through limited federal preemption, creating a floor of standards with which each state regulator would be required to minimally comply.[128] Scholars believe this approach would avoid both the "unnecessary creation of a new federal bureaucracy and the continual delay and uncertainty surrounding . . . state enactment of such standards."[129] As the federal government addresses the most pressing issues, the states would ideally seize "the opportunity to step up to the plate and reform the remaining issues of concern."[130] Ultimately, this approach puts too much faith in the possibility that state regulators will come together to rectify the remaining issues. As stated earlier, state regulators rarely agree on policy, and if they eventually do, they usually take years to implement it.[131] The NAIC has recently opened up to some federal involvement in support of the Insurance Information Act

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receipt of federal funds on meeting certain federal goals, or it may regulate private activity).

[125] *See* United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944).

[126] *See infra* Part IV.

[127] *See supra* note 119.

[128] *See* Jonathan R. Macey & Geoffrey P. Miller, *The McCarran-Ferguson Act of 1945: Reconceiving the Federal Role of Insurance Regulation*, 68 N.Y.U. L. REV. 13, 46 (1993).

[129] Waterfield, *supra* note 3, at 333.

[130] *Id.*

[131] *Id.* at 324-25.

of 2008, but has vehemently objected to any preemption on the main issues.[132]

Unlike complete federal regulation, limited federal preemption does not completely remove all of the additional costs and externalities associated with multi-state regulation.[133] Even with the bare minimum imposed by the federal government, states can regulate differently above that floor, imposing negative externalities on other states.[134] This lack of uniformity increases costs for insurers and consumers.[135] There is also a cost arising from the operations of whatever federal agency will examine, define, and enforce the preempted regulations.[136] To the dismay of its supporters, the limited preemption approach cannot operate cost-free as just another duty to be assumed by the Secretary of Treasury.[137] The Secretary is onerously burdened with the current financial crisis. He will need a committee to oversee and determine the approach to take with the regulations and issues in need of preemption. This will present a dual cost problem since the state regulators will be conducting the same determinations,[138]

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[132] *See* Letter from Sandy Praeger, President of the NAIC, to Paul Kanjorski, Chairman, House Subcommittee on Capital Markets, Insurance, and Government Sponsored Enterprises (Sept. 11, 2008), *available at* http://www.naic.org/documents/testimony_0809_officers.pdf.

[133] *See infra* Part IV.

[134] Grace & Scott, *supra* note 44, at 12.

[135] *Id.* at 24.

[136] *Id.*

[137] *See* Waterfield, *supra* note 3, at 335.

[138] *See* Grace & Scott, *supra* note 44, at 26. "[A] reduction in state expenditures exactly offset by the increase in federal expenditures . . . is not likely to occur as bureaucracies are difficult to eliminate even if the mission changes dramatically."

and so this idea will suffer from the same problem of duplicity of costs that the banking sector currently encounters.[139]

SINGLE LICENSE APPROACH

The Single License approach would allow an insurer to be chartered in a primary state of its choice, and the insurer would then be licensed to operate nationwide under the laws of its home state.[140] This plan would involve no overall federal regulation of insurance or massive federal regulatory body.[141] There would be some federal legislation involved mandating jurisdictional choice.[142] This approach would allow "consumers in every state to shop for insurance from companies regardless of where they are chartered based on price, quality, and type of product."[143] To spur this jurisdictional competition, scholars have suggested providing incentives to state insurance regulators in the form of allocated tax revenue from insurance sales.[144]

Detractors of this theory argue that the states "will not accept the possibility of their consumers being exposed to lax regulation by another state."[145] Moreover, uncertainty may be prevalent in the minds of many consumers who may lack easy access to the insurer's primary state consumer laws.[146] This

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[139] *See generally* Henry N. Butler & Jonathan R. Macey, *The Myth of Competition in the Dual Banking System*, 73 CORNELL L. REV. 677 (1988).

[140] Butler & Ribstein, *supra* note 101, at 14-15.

[141] *Id.* at 15.

[142] *Id.* at 16.

[143] *Id.*

[144] *Id.*

[145] Grace and Scott, *supra* note 44, at 28.

[146] *Id.*

asymmetric information on the part of consumers is a key reason for calls for new insurance regulation in the first place.[147]

SELF-REGULATORY ORGANIZATION

Various scholars have brought up the issue of creating a self-regulatory organization (SRO) for the insurance industry, based on the perception that the federal government has no experience in licensing people to engage in insurance activities.[148] These commentators claim that "SROs can be quite flexible regulatory tools, as different SROs could be created to respond to the needs of different segments of the insurance agent and broker community."[149] If federally created, an SRO "could apply to both the federal insurance regulator and to the SEC for approval" to issue licenses to insurers.[150]

PART IV: COMPLETE FEDERAL REGULATION

Complete federal regulation would involve creating an agency within the Treasury Department called the National Insurance Office (NIO). Its status as an entity within the Treasury Department would give the NIO more political power, instead of merely being chartered as an independent agency. This office would totally displace the NAIC and remove its somewhat hypocritical stance over the industry.[151] Unlike the NAIC, the NIO would be entirely subject to government oversight. The public would have access to annual reporting requirements, audits, public meetings, hearings on important

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147 *Id.*

148 *See, e.g.*, Sinder, *supra* note 1, at 85-86.

149 *Id.* at 86.

150 *Id.*

151 The NAIC presents a contradictory mission statement when it consistently pushes for uniformity of regulations among the states but, in the same breath, emphatically calls for the preservation of state sovereignty.

issues, vetoes, or legislative approval requirements.[152] A National Insurance Chairman would head the NIO. The Chairman would be appointed by the President and confirmed by the Senate for a proposed five-year term.[153] The NIO could set up an office in each state headed by experienced people in the industry or by previous state regulators. These state offices would make it easier for the NIO to collect information and respond to consumer needs. Initial start-up funding for the NIO could come from a government loan and taxes paid by the industry participants.[154] This would enable the NIO to escape industry captivity, unlike the NAIC, which receives its funding directly from the entities it regulates. Besides Congressional oversight, the government could also use the President's Working Group on Financial Markets as another assessor of the NIO's performance.[155] The President's Working Group could also resolve disputes between the NIO and the other heads of the financial services industry.[156]

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[152] *See* Susan Randall, *Insurance Regulation in the United States: Regulatory Federalism and the National Association of Insurance Commissioners*, 26 FLA. ST. U. L. REV. 625, 695 (1999).

[153] *See* Larry LaRocco, *The Banking Industry*, *in* OPTIONAL FEDERAL CHARTERING AND REGULATION OF INSURANCE COMPANIES 188, 190 (Peter J. Wallison ed., 2000). A five-year term would give the Chairman some independence from political pressures.

[154] *See* Elizabeth F. Brown, *The Fatal Flaw of Proposals to Federalize Insurance* 35 (Univ. of St. Thomas Sch. of Law, Legal Studies Research Paper No. 07-25), *available at* http://ssrn.com/abstract=1008993.

[155] The executive branch created the President's Working Group on Financial Markets in 1988 in order to analyze the 1987 stock market crash. Its membership includes the heads of the Federal Reserve, the SEC, the CFTC, and Treasury Department. *See* Elizabeth F. Brown, *E Pluribus Unum--Out of Many, One: Why the United States Needs a Single Financial Services Agency*, 14 U. MIAMI BUS. L. REV. 1, 29 (2005).

[156] *See* Brown, *supra* note 153, at 74.

REPEALING THE MCCARRAN-FERGUSON ACT

Under a federally regulated insurance regime, the states' antitrust exemptions under the McCarran-Ferguson Act would have to be removed.[157] Insurance is the largest U.S. industry to have escaped federal regulation.[158] For years, each state regulatory body has held a monopoly over the regulation of insurance sold in that state, giving the states little incentive to provide the most efficient, competitive regulation.[159] When under certain circumstances this "regulation restricts consumer choice and distorts market decisions . . . social welfare is reduced."[160] In particular, critics of the Act believe that "insurance rates, like any other prices, should be set by market forces under conditions of free competition."[161] This free competition requires that antitrust laws be applied to the insurance industry as they are to other U.S. industries .[162] When Congress enacted the McCarran-Ferguson Act 1945, the business of insurance was conducted mostly within state and/or

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[157] *See* 153 CONG. REC. S2025-01 (1997) (testimony of Sen. Lott, which was included as part of bipartisan support from several senators, including Senators Leahy, Reid, Specter, and Lott, regarding S. 618, the Insurance Industry Competition Act of 2007). Senator Lott's own house was damaged by Hurricane Katrina.

[158] *See* TOM BAKER, INSURANCE LAW AND POLICY 24 (Aspen Pub. 2d. 2008) (By 2000, the insurance industry collected $677 billion in premiums, accounting for 7.4% of the gross domestic product (excluding health care)). Insurance companies collect more than $1 trillion in premiums each year and have more than $6 trillion in assets. *See* Eric Dinallo, *Marriage, Not Dating, is the Key to Healthy Regulation*, FIN. TIMES, Apr. 27, 2009, at 7.

[159] Butler & Ribstein, *supra* note 101, at 11.

[160] *See* Martin F. Grace & Robert W. Klein, *Efficiency Implications of Alternative Regulatory Structures for Insurance*, *in* OPTIONAL FEDERAL CHARTERING AND REGULATION OF INSURANCE COMPANIES 79, 112 (Peter J. Wallison ed., 2000).

[161] *See* Macey & Miller, *supra* note 127, at 84.

[162] J. Robert Hunter, *A Consumer Perspective*, *in* OPTIONAL FEDERAL CHARTERING AND REGULATION OF INSURANCE COMPANIES 177, 181 (Peter J. Wallison ed., 2000).

regional borders, [163] thus "[t]he insurable risks of most businesses were localized."[164] In modern times, the policy objectives embodied in the Act are in question given the "increasingly internationalized insurance world."[165] Thus, the Act does not serve any functional purpose in today's international landscape except for imposing millions of dollars in unnecessary administrative costs upon insurers and consumers.[166] Since many insurance companies now offer banking and investment services intertwined with their insurance packages, the courts have the arduous task of trying to apply the McCarran Act only to the sale of insurance products.[167] In recent years, the states have actually attempted to crack down on insurers' behavior with their own state antitrust laws.[168] Nevertheless, many states still have a limited exception for the insurance industry.[169] It is doubtful that the states, on their own, will ever remove McCarran against the insurers' wishes, considering that half of the state insurance commissioners over

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[163] Joel Wood, *Broker Organizations*, *in* OPTIONAL FEDERAL CHARTERING AND REGULATION OF INSURANCE COMPANIES 167, 172 (Peter J. Wallison ed., 2000).

[164] *Id.*

[165] *Id.* at 171.

[166] *Id.* at 171-72.

[167] *See* AMERICAN BAR ASSOCIATION, AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW, INSURANCE ANTITRUST HANDBOOK 23 (2d ed., 2006). If "a life insurance policy or annuity contains both insurance and investment features, the McCarran Act may apply to the former but not the latter." *Id.*

[168] *Id.* at 35. The states have also enacted their own legislation dealing with unfair trade practices by insurers to deter possible action by the Federal Trade Commission. *See, e.g.*, FTC v. Nat'l Cas. Co., 357 U.S. 560 (1958); FTC v. Ticor Title Ins. Co., 112 S. Ct. 2169 (1992).

[169] American Bar Association, *supra* note 166, at 35.

the past twenty years have mostly emanated from and, following their public tenure, gone back to the insurance industry.[170]

The federal government will still have to grant the insurance industry a safe harbor when it comes to sharing loss data information. Unlike other financial industries, the insurance industry requires firms to share loss information in order to facilitate the accurate pricing of its products.[171] Accurate information cannot be developed unless insurers can share and analyze historical loss cost information.[172] This cooperation will not only provide a high degree of statistical reliability in the analysis, but also achieve greater economies of scale because the sampling and analysis only needs to be done once by a new federal rating bureau, instead of many times within individual insurance firms.[173] Congress has already recognized the public policy value of protecting cooperative research and analysis from antitrust scrutiny in its passage of the National Cooperative Research Act.[174]

Cooperative sharing of information between insurers should also be permitted in developing standardized insurance forms.[175] Policy "form regulation standardizes the insurance coverage available in the market and prevents a 'race to the bottom' driven by adverse selection."[176] Without the standardized forms, consumers would have the time-consuming task of looking "through the fine print of each policy to assess the effective costs of the various deductibles, exclusions, and

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[170] *See* Hunter, *supra* note 161, at 182. Further research by the Consumer Federation of America shows that about one-fifth of the time, state insurance legislators on committees dealing with insurance are employed by the industry.

[171] *See* Macey & Miller, *supra* note 127, at 18.

[172] *Id.*

[173] *Id.* at 48-49.

[174] *See* 15 U.S.C. §§ 4301-06 (2009).

[175] *See* NIA, *supra* note 54, § 1702.

[176] Baker, *supra* note 157, at 641.

exemptions."[177] In the absence of standardized forms, "it would be difficult to compile a sufficient statistical database on which to base risk assessments."[178] The insurance industry currently uses different types of standardized policy forms.[179] Under the eye of the new NIO, insurers would continue to collate information together to develop standardized forms.

However, the approval process for any new insurance form must come through the new Insurance Chairman. Unfortunately, the current state approval process is inconsistent and duplicative. The regulatory requirements to file an application for a new product differ significantly from state to state.[180] Most states "require that all insurance policies sold in the state be on forms approved by the state insurance department."[181] "Forms are deemed 'approved' if they are filed with the state insurance department and not explicitly disapproved within a certain time period."[182] Such variations in the approval process impose additional costs on insurance companies and hinder the speed-to-market time for new products.[183] Some critics of the current system believe that useful products might never be introduced into the market because "[t]he first company to introduce this product would bear substantial upfront costs resulting from the necessity of

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[177] See Macey & Miller, *supra* note 127, at 53.

[178] *Id.*

[179] An example of a standardized policy form is an "ISO" form – created by the Insurance Service Office (an organization of insurance firms that promulgates standard insurance contracts for the property/casualty industry).

[180] *See* Brown, *supra* note 153, at 16.

[181] Baker, *supra* note 157, at 639.

[182] *Id.*

[183] *See* Brown, *supra* note 154, at 58. In her article, Professor Brown suggests that after federalizing insurance, the insurance sector should be combined with other financial agencies to form one U.S. financial services agency. While this author agrees with federalizing insurance, the idea of one "super" financial agency is beyond the scope of this paper.

educating [fifty] insurance regulators about the product's attributes."[184] A second company wanting to sell the same product can enter the market and pay considerably fewer upfront costs because it will not have to educate the same regulators about the product's features.[185] Moreover, some of these approval variations between the states have little or no rational basis.[186] The NAIC has tried to set up a centralized system for filing and approving insurance products, but its efforts have found limited success.[187] Unlike the NAIC, the Insurance Chairman will have the power to draft uniform application review rules across all the states.[188] This will cut down on costs and improve speed-to-market times for new insurance products.[189] The first company seeking to offer a new product would have to submit only one application to the NIO instead of submitting it for approval to fifty-one regulators.[190]

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[184] *Id.*

[185] *Id.* The first company to introduce the product will not recoup enough profit to offset the higher upfront costs because the second company will enter the market and drive the price (and profit) down. *Id.*

[186] *See* Brown, *supra* note 153, at 23. "Insurance companies in Nevada must use pink paper when filing the documentation page for a filing fee. Some states, such as Kentucky, Iowa and Ohio, will return filings if they have not been stapled in the prescribed manner or assembled in the prescribed order." *Id.*

[187] *See* Elizabeth F. Brown, *The Tyranny of the Multitude Is a Multiplied Tyranny: Is the United States Financial Regulatory Structure Undermining U.S. Competitiveness?*, 2 BROOK. J. CORP. FIN. & COM. L. 369, 379 (2008); see also Interstate Insurance Product Regulation Compact (2003), available at http://www.insurancecompact.org/documents/compact_statute.pdf.

[188] For example, the Office of the Comptroller of the Currency, the Office of Thrift Supervision, and the Federal Deposit Insurance Commission adopted a uniform application form for obtaining a charter and federal deposit insurance. *See* Brown, *supra* note 186, at 379. Perhaps the proposed new federal regulator can incorporate an insurance charter (license) into that form.

[189] *See* Brown, *supra* note 154, at 83.

[190] *Id.*

Insurance companies can benefit from the idea of one versus fifty-one when it comes to licensing. Being licensed by the federal government is substantially easier and cheaper than seeking fifty-one licenses from fifty-one jurisdictions. Insurers have dealt with the licensing process since the earliest days of insurance regulation.[191] Before a new product application can be sent to a state regulator, an insurance company must be licensed to do business in that jurisdiction by demonstrating the experience and abilities of its management as well as its financial soundness to the state regulator.[192] The NAIC has admitted that "[s]ome states issue a general producer license while others will issue licenses for each different type of producer, such as individual licenses for agents, brokers, solicitors, consultants, and reinsurance intermediaries."[193] With the federal government regulating insurance, each of these producers would be licensed once solely from the federal regulator. This will cut costs and create a smoother administrative process across the industry.

Insurance intermediaries, namely agents and brokers, will also be required to abide by more uniform practices if regulated by the federal government. "Insurance is an industry without an established, written set of rules governing business practices."[194] New employees of brokers and agents generally receive their training in an informal way, often from senior employees.[195] This practice is shocking because these intermediaries are supposed to act as the gatekeepers for new opportunities

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[191] *See* Baker, *supra* note 157, at 637.

[192] *Id.* at 637-38.

[193] *See* Brown, *supra* note 153, at 18.

[194] Sean M. Fitzpatrick, *The Small Laws: Eliot Spitzer and the Way to Insurance Market Reform*, 74 FORDHAM L. REV. 3041, 3048 (2006). Former New York Attorney General Eliot Spitzer set off a nationwide wave of investigations and legislative initiatives to reform brokerage practices when he investigated the occurrences of "contingent commissions" being paid by insurers to brokers, which breached the brokers' fiduciary duty to represent the best interests of their clients. *Id.* at 3043.

[195] *Id.* at 3048.

between insurers and consumers.[196] The coexistence of large financial incentives and blurry fiduciary laws breeds collusion between intermediaries and opportunistic insurance companies. Traditionally, the term "insurance agent" was reserved for an entity that had actual authority to act on behalf of an insurance company and the term "insurance broker" was reserved for an entity with actual authority to act on behalf of the person seeking insurance.[197] However, the legal distinction between the two terms has grown so imprecise that "some courts and commentators have simply given up."[198] Some states do not even recognize multiple levels of insurance intermediaries, while other states continue to recognize two separate types of intermediaries.[199] The federal government needs to take the reins from the states and create and enforce its own uniform laws for these insurance intermediaries to follow.[200] Federal rules concerning conflicts of interest and disclosure requirements are proposed to be more stringent than many state laws.[201] This will create greater transparency between insurance companies, intermediaries and consumers.

Uniform federal regulation would alleviate the concerns voiced by the insurance industry about the way that market conduct surveillance has been performed. Insurance companies are particularly upset about the cost and inefficiency of market

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[196] *Id.*

[197] Baker, *supra* note 157, at 75.

[198] *See* Fitzpatrick, *supra* note 193, at 3054.

[199] *Id.*; *see, e.g.*, Krumme v. Mercury Ins. Co., 20 Cal. Rptr. 3d 485, 488-90 (Cal. Ct. App. 2004).

[200] This paper only focuses on the notion that the federal government needs to enact uniform laws for insurance intermediaries. The concept of what that law should look like is beyond the scope of this paper. In the past, Congress has tried to create uniform laws for agents and brokers through the GLBA and the National Association of Registered Agents and Brokers Reform Act of 2008, but those efforts never became law. *See* H.R. 5611, 110th Cong. (2008).

[201] *See* Randall, *supra* note 151, at 676 n.287 (citing to 5 U.S.C. § 552 (2008) and 44 U.S.C. §§ 3501-20 (2008)).

conduct examinations.[202] State insurance departments regularly perform market conduct examinations by going onsite to insurance company offices to review files.[203] Insurers believe there is "a significant amount of duplication of effort and overlap by the various state insurance departments performing market conduct examinations."[204] These extra examination costs incurred by the insurers are ultimately passed down to taxpayers and insurance consumers.[205] "There is a public interest in avoiding costs that exceed the benefits of surveillance and compliance."[206] Nevertheless, the concept of a single market examination "has been rejected by state regulators on the basis that state laws and regulations governing market conduct vary significantly among the states."[207] The NAIC has tried to ease the burden of these costs with its Exam Tracking System (ETS).[208] ETS "enables states to share examination information and reduce duplication of effort."[209] However, duplication still exists because some states only use the ETS for particular types of exams.[210] The NAIC has even tried to standardize the practice of market conduct examination in the

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[202] *See* Robert W. Klein & James W. Schacht, *An Assessment of Insurance Market Conduct Surveillance*, 20 J. INS. REG. 51, 52 (2001). The concerns expressed about the issue prompted the National Conference of State Legislators (NCOIL) to sponsor a public policy study on market conduct surveillance. *Id.*

[203] *See* Baker, *supra* note 157, at 640.

[204] *See* Klein & Schacht, *supra* note 201, at 79.

[205] *Id.* at 86.

[206] *Id.*

[207] Grace & Klein, *supra* note 159, at 110-11.

[208] NAIC, Exam Tracking System (ETS): Map of Participating States, http://www.naic.org/urtt_ets.htm (last visited Nov. 12, 2009).

[209] *Id.*

[210] *Id.* States that use the ETS for limited purposes include Hawaii, Montana, Oregon, South Carolina, and South Dakota.

various editions of its Market Conduct Examiners Handbook.[211] Despite this effort, approximately half of the state examiners do not use the examination classifications outlined by the NAIC.[212] The federal government needs to step in and create uniform rules for examining insurance companies. Insurance companies would then be examined under these new rules by only one regulator: the federal government. This will lower costs for insurers and decrease the amount of costs passed down to the consumers.

The benefits of federal regulation of the insurance industry would impact consumers significantly. Insurance is a business intertwined with the public interest.[213] It is the job of insurance regulators to discourage and prevent any company practice or transaction that would result in significant and pervasive harm to consumers.[214] It is not impractical to think that fifty-one regulators would provide better services to consumers than one regulator. Yet, this is not the case when those fifty-one regulators all move in opposite directions. As states compete with one another through various regulations, consumer protections are diminished by this "race-to-the-bottom" situation.[215] Consumer protections can be enhanced if regulatory power is transferred to the federal level.[216] The federal government possesses the necessary resources to protect consumers, unlike the state insurance departments who are

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[211] *See* Market Regulation Handbook (D) Working Group, Oct. 15, 2008, *available at* http://www.naic.org/meetings0812/summary_d_mrh.htm.

[212] *See* Klein & Schacht, *supra* note 201, at 78.

[213] *See, e.g.*, German Alliance Ins. Co. v. Lewis, 233 U.S. 389, 413 (1914).

[214] *See* Klein & Schacht, *supra* note 201, at 57. Insurance consumers are vulnerable to faulty transactions with insurers because of a lack of information and bargaining power on their part.

[215] *See* Brown, *supra* note 154, at 52. Some states even lack the authority to run criminal background checks on prospective applicants, unlike the regulators in the banking and securities industries. *Id.*

[216] *Id.* at 53.

often significantly underfunded and likely to succumb to political pressures for less regulation.[217] Elizur Wright, known as the "Father of Insurance Regulation," stated that "insurance, being of widespread interest, should be secure against the adverse operation of local causes . . . and that a state could probably not protect itself as well with reference to insurance of other states as it could be protected by the federal government."[218] Under the proposal for federal government regulation, each state would have its own deputy federal regulator that would be answerable to the Insurance Chairman. This would eliminate a lot of the political pressure on the states to compete with each other for valuable customers, since the "[s]tates would continue to be able to protect their citizens through the enforcement of federal laws and regulations, but would no longer be able to disrupt the [insurance] markets by enacting conflicting laws."[219] The federal government should also create a single database to track and collect consumer complaints in order to make the new National Insurance Office more effective in deterring fraud and ensuring consumer protections.[220] The NAIC has tried to unify the states' consumer regulations through its Interstate Compact, but as stated before, the NAIC "lacks the necessary enforcement authority."[221]

Through federal regulation, consumers would also enjoy a greater voice in the lobbying sector.[222] Lobbying expenses would be reduced since lobbyists would only need to petition the

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[217] *See* Randall, *supra* note 151, at 629.

[218] *Id.* at 631.

[219] *See* Brown, *supra* note 154, at 82. Federal law in the form of the Sarbanes-Oxley Act has drastically improved financial reporting issues and reduced cases of fraud in the banking and securities industries.

[220] *Id.* at 84-85.

[221] Waterfield, *supra* note 3, at 318. *See generally*, Jill E. Hasday, *Interstate Commerce in a Democratic Society: The Problem of Permanency*, 49 FLA. L. REV. 1 (1997) (detailing the failures and successes of interstate compacts throughout history).

[222] *See* Randall, *supra* note 151, at 672.

federal government, rather than fifty separate state governments and the District of Columbia.[223] "Effective participation at the federal level benefits all insurance consumers, not just those in a particular state."[224] Likewise, industry groups representing insurance companies will also cut their lobbying costs and be able to pool their resources together to petition the federal government. In the end, consumers and insurance companies alike would benefit from federal regulation.

Insurance regulation by the federal government would also alter the flow of benefits from the states to the consumers through the implementation of a new budgetary framework. In the current state structure, state insurance departments draw their funding, directly or indirectly, from fees, taxes, assessments, fines and penalties paid by domestic and foreign state insurance companies.[225] Most of that state funding comes from costs paid to the states from foreign (out-of-state) insurers,[226] since the number of foreign insurers is larger than the number of domestic insurers in every state.[227] If that money went to the federal government instead of to the states, the states might be forced to cut their budgets or raise taxes.[228] It is understandable that the states would be concerned about this potential loss of income. However, the states' losses would be balanced by the positive externalities placed on consumers and the industry. With federal regulation, barriers to entry and excess regulation would be reduced, causing fewer costs to be

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[223] *Id.*

[224] *Id.* at 677.

[225] Grace & Klein, *supra* note 159, at 99. State insurance departments are not funded by direct premium taxes on the industry. The premium taxes raised from the industry go to the general state fund, to be allocated to all state services. *Id.* at 127 n.19.

[226] *See* Brown, *supra* note 154, at 66.

[227] *See* Brown, *supra* note 153, at 29.

[228] *Id.* at 40.

passed along by insurance companies to consumers.[229] All insurance companies, agents, and brokers would continue to pay taxes to the federal government and whatever state they conduct business in, just like any other company or individual. This will help the states to at least account for the amount of business being conducted within their borders. Furthermore, federal regulation will make the funding source for the NAIC moot. The greater part of the NAIC's budget comes from industry financing assessments.[230] This control of funding has enabled the industry to exert "budgetary power over the NAIC in public and direct ways and presumably in subtle, less public ways as well."[231] With federal regulation, insurance companies will not be required to fund the NIO. This will eliminate any undue influence on the watchdog of the industry and help assure consumers and insurers that they are being regulated and governed by a nonpartisan governmental agency.

Before the federal government takes control of insurance regulation, it must first decide how it is going to guarantee protection for consumers in the event of insolvency by an insurance company. Currently, each state runs its own guaranty fund that essentially acts like a product warranty, protecting innocent consumers from regulatory negligence on the part of state-employed regulators.[232] If any government wants to be involved in regulating the insurance business, "then it has no choice but to provide a warranty for the service that business supposedly provides to the general public."[233] In an emergency, this warranty or guaranty fund requires surviving insurers to provide funds to cover an insolvent insurer's claims.[234]

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[229] *See* Brown, *supra* note 154, at 66-67.

[230] *See* Randall, *supra* note 151, at 675, 682.

[231] *Id.* at 675.

[232] *See* Bert Ely, *The Fate of the State Guaranty Funds After the Advent of Federal Insurance Chartering*, *in* OPTIONAL FEDERAL CHARTERING AND REGULATION OF INSURANCE COMPANIES 135, 137 (Peter J. Wallison ed., 2000).

[233] *Id.*

[234] *See* Baker, *supra* note 157, at 683.

Consumer confidence in the entire insurance field relies on the insurance companies' ability to honor their commitments.[235]

The problem with the existence of fifty-one guaranty funds is that they vary from state to state and set different warranty limits for instances, such as refunds on unearned premiums or limits on loss claims.[236] Also, conflicts of interest may arise because "the board of directors of each guaranty fund is composed of representatives from member companies and from the state insurance commissioner's office."[237] All of these problems and discrepancies can be diminished by the allowing the federal government to replace the fifty-one funds with a Federal Insurance Guaranty Fund.[238] The Federal Fund would set the applicable rate that would be assessed to all insurance companies.[239] Unlike the post-assessment scheme currently run by the state funds, the Federal Fund would collect funds from insurers before the loss occurs.[240] Moreover, this would help protect policyholders in a time of economic crisis.[241]

If catastrophic losses, such as Hurricane Katrina, should occur and deplete the Federal Guaranty Fund, then the Federal Reserve could be established as the lender of last resort for the

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[235] *Id.* at 639.

[236] *See* Ely, *supra* note 231, at 140.

[237] *Id.* at 141.

[238] *See* LaRocco, *supra* note 152, at 188, 193. In 1993, Representative John Dingell (D) attempted to create a national guaranty fund through a bill entitled the Federal Insurance Solvency Act, but he was unsuccessful in his efforts. *See* H.R. 1290, 103rd Congress (1993). The NAIC has tried to manage loss payments of failed multistate insurers through the National Conference of Insurance Guaranty Funds and the National Organization of Life & Health Insurance Guaranty Associations. *See* Ely, *supra* note 231, at 139.

[239] *See* LaRocco, *supra* note 152, at 193.

[240] *Id.* This is very similar to deposit insurance issued to bank depositors by the Federal Deposit Insurance Corporation (FDIC).

[241] *Id.*

insurance industry.[242] The Federal Reserve already performs a similar function for the banking industry.[243] The government will have to liberalize insurers' access to the Federal Reserve's discount window.[244] Because insurance companies are nonbank firms, they would need approval from five members of the Federal Reserve's Board of Governors.[245] As these warranties come more and more under federal oversight, the federal government should be wary of any moral hazard that may occur from such an expansion of protection.[246]

State regulation of insurance rates is the Achilles heel of the insurance industry. It adds needless costs and headaches to all insurance parties. For years, state regulators have favored rate regulation because this control helps them "expand their powers, their budgets, and their political standing in the industry."[247] In some instances, they set "rates at unrealistically low levels in order to benefit their own citizens at the expense of the national interest."[248] Most states agree that insurance rates must be "adequate, not excessive or nondiscriminatory," but variation occurs among states in the implementation of those standards.[249] "Any system of administered rates carries with it serious dangers of marketplace distortions."[250] The federal government needs to assume control of rate regulation and fix the industry by letting rates set themselves through market

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[242] *See* Macey & Miller, *supra* note 127, at 79.

[243] *Id.* at 80.

[244] *See* Ely, *supra* note 231, at 146.

[245] 12 U.S.C. § 343 (2009).

[246] *See* Harrington, *supra* note 18, at 39; *see also* AIG Bailout, *supra* note 103.

[247] *See* Macey & Miller, *supra* note 127, at 86.

[248] *Id.* at 19.

[249] *See* Baker, *supra* note 157, at 639.

[250] *See* Macey & Miller, *supra* note 127, at 84.

conditions under free competition. "Marketplace forces will function effectively to set rates at optimal levels" in such a competitive industry.[251] The federal government would essentially be regulating the industry through deregulation.

A single insurance regulator can help eliminate the jurisdictional nightmare that states face when trying to implement their rules and laws. "Because the insurance business is effectively nationwide in scope, one state's efforts to regulate that business often generate ripple effects in other states."[252] Who has jurisdiction over a certain claim or who can dispute certain damages are questions that have been continuously litigated throughout the states.[253] Over the years, states have used unwritten rules to determine which state should take the lead in enforcing a particular transaction.[254] The federal government should take over and assert uniform, formal laws so that insurance companies cannot behave opportunistically by forum shopping among the fifty-one jurisdictions for favorable laws and contract interpretation standards.

Federal regulation will also assist in eliminating the ambiguity present in defining what is "insurance."[255] In today's

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[251] *Id.* at 19.

[252] *Id.* at 33.

[253] *See, e.g.*, Pac. Employers Ins. Co. v. Indus. Accident Comm'n, 306 U.S. 493, 503-04 (1939); John Hancock Mut. Life Ins. Co. v. Yates, 299 U.S. 178, 183 (1936); St. Louis Cotton Compress Co. v. Arkansas, 260 U.S. 346, 349 (1922); Hartford Life Ins. Co. v. Ibs, 237 U.S. 662, 671 (1915); Allgeyer v. Louisiana, 165 U.S. 578, 579 (1897).

[254] *See* Macey & Miller, *supra* note 127, at 39.

[255] *See, e.g.*, United States Dep't of the Treasury v. Fabe, 508 U.S. 491, 493 (1993); SEC v. Nat'l Sec., Inc., 393 U.S. 453, 460 (1969); SEC v. Variable Annuity Life Ins. Co., 359 U.S. 65, 71 (1959). A prime example of ambiguity in defining "the business of insurance" occurs in the ERISA context. ERISA has set remedy provisions that are enforced only if an entity falls within its authority. It preempts state regulation of health and disability insurance, but leaves nothing to regulate those same circumstances if ERISA does not apply. If insurance is defined narrowly under ERISA, then employees will be exposed to

ever-expanding world, this clarity is needed since consumers find it extremely difficult to discern meaningful differences among insurance, banking, and securities products.[256] This confusion was enlarged when the GLBA dismantled barriers in the financial industry and allowed banks to package insurance contracts with their other products.[257] These packaged products, called "hybrid products," could contain insurance functions but would not be classified as an insurance product or be regulated by the insurance industry.[258] The GLBA did allow the states to retain regulatory control of clear, overt insurance products.[259] Currently, there are fifty-one jurisdictions, each with its own statute defining "insurance" and "the business of insurance."[260] This means that only the banking and securities sectors can profit from this new market. For all intents and purposes, when the dust settled, the insurance industry was not given a voice in the new modernized economy, but instead was relegated back to its usual ways of in-house fighting among fifty-one voices.

The insurance industry needs to unite under one federal regulator in order to be taken seriously in the domestic as well as international markets. The Insurance Chairman would be able to end the turf war between the states and instead channel that energy toward building stronger relationships with the SEC and OCC. Insurance is not separate and apart from the rest of the financial services industry, but an integral part of it.[261] The

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a health benefit market regulated by neither the federal government nor the states. *See* Baker, *supra* note 157, at 666-67.

[256] *See* Brown, *supra* note 153, at 4. Annuities, derivatives, and credit cards are examples of products that have the characteristics of insurance but are classified as banking or securities services. *Id.* at 56-60.

[257] *Id.* at 15.

[258] GLBA, *supra* note 26, § 205. An example of a hybrid product would be a variable annuity.

[259] *Id.* § 104.

[260] *See* Macey & Miller, *supra* note 127, at 23-24.

[261] *See* Brown, *supra* note 153, at 42.

contemporary trend in the financial world is toward functional regulation, which dictates that a "given financial function is regulated by the same regulator regardless of who conducts the activity."[262] The General Accounting Office has recommended to Congress that the insurance, banking, and securities sectors should each have their own federal regulator.[263] If the insurance industry had its own federal regulator before the 2007-08 subprime mortgage crisis, it may have been able to close the many regulatory gaps that existed and proactively limit its losses, instead of debating who should regulate the various players that gave rise to the crisis.[264]

International associations have made an effort to notify the United States that they would prefer to deal with a single insurance regulator at the federal level instead of continuing to deal with the NAIC.[265] The NAIC does not have the power to make binding commitments on behalf of the state governments.[266] The U.S. market could suffer if foreign companies retaliate and refuse to deal in a market with no uniform set of rules. Globalization has made more Americans aware of foreign options.[267] Using the NAIC as the country's representative erects significant barriers to entry and harms consumers by limiting their choices of products and providers.[268]

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[262] *See* Howell E. Jackson, *Regulation in a Multisectored Financial Services Industry: An Exploratory Essay*, 77 WASH. U. L. Q. 319, 387 (1999).

[263] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-61 FINANCIAL REGULATION: INDUSTRY CHANGES PROMPT NEED TO RECONSIDER U.S. REGULATORY STRUCTURE 129 (2004) [hereinafter GAO Report].

[264] *See* Brown, *supra* note 186, at 385-87; *see also* AIG Bailout, *supra* note 103.

[265] GAO Report, *supra* note 262, at 122-23.

[266] *See* Brown, *supra* note 186, at 409.

[267] *Id.* at 400.

[268] *Id.* at 409.

PROPOSED IMMEDIATE ATTENTION

Recognizing the disputes above and the difficult process and ongoing debate in Congress, the Treasury Department has implied that certain aspects of the insurance market require immediate attention.[269] Treasury proposes "that Congress create a national Office of Insurance Oversight ('OIO') within the Treasury, which can be rolled into the ONI . . . once Congress passes significant insurance regulatory reform."[270] The OIO would be able to deal with international regulatory issues and advise the Treasury Secretary on major domestic and international policy issues.[271] The OIO would take the lead in working with the NAIC and state insurance regulators to develop uniform policy goals.[272] If the state regulators are unable to achieve uniformity in implementing the U.S. international policy goals, then "the OIO should have authority to preempt inconsistent laws or regulatory actions of any state."[273] A month after the Treasury released its Blueprint, Congress further supported this immediate governmental need for uniformity in international insurance matters with the proposed Insurance Information Act of 2008.[274] The Act seeks to establish the Office of Insurance Information within the

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[269] Blueprint, *supra* note 8, at 132. The Secretary of the Treasury would appoint a director to lead the OIO. *Id.*

[270] *Id.*

[271] *Id.*; *see also* Testimony of Jeremiah Norton, *supra* note 48.

[272] Blueprint, *supra* note 8, at 133; *see also* Testimony of Jeremiah Norton, *supra* note 48.

[273] Blueprint, *supra* note 8, at 133.

[274] Insurance Information Act of 2008, H.R. 5840, 110th Cong., (2d sess. 2008). The Treasury Department welcomes and supports the bill's introduction, but has some concerns that it would like to address with Congress as the legislation moves forward. *See* Testimony of Jeremiah Norton, *supra* note 48.

Treasury, headed by a Deputy Assistant Secretary.[275] The Deputy Secretary would have the authority to preempt any state law that is inconsistent, establish federal policy on international insurance matters, and advise the Treasury Secretary on major domestic and international insurance policy issues.[276] The Act also would create an Advisory Group to the Office of Insurance Information, made up of representatives including the NAIC, the Department of Commerce, and other insurance industry and consumer groups.[277] Some insurers understand the need for some kind of immediate federal regulation, especially given the recent state of the U.S. financial services industry.[278] The NAIC actually supports the Act on the basis that it will enable the states to send and receive confidential data with the federal government and that the Act will protect the states' prudential regulations in international insurance agreements.[279] At the same time, the NAIC states that its support for modernization in no way should be construed as implicit acceptance of further federal intervention.[280] To the NAIC, "modern" does not mean "federal."[281] Detractors of federal regulation acknowledge that there is a need for quick action, but assert that the frustration is better addressed at the state level – particularly from the larger

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[275] Insurance Information Act of 2008, H.R. 5840, 110th Cong. § 2 (2d Sess. 2008).

[276] *Id.*

[277] *Id.*

[278] *See* Letter from Frank Keating, President & CEO of the American Council of Life Insurers, to Henry Paulson, Secretary, Dep't of the Treasury (Sept. 17, 2008) *available at* http://www.acli.com/NR/rdonlyres/E86E9FBC-72AB-4FE3-B28E-01E3DBB8C630/15717/OIIFKtoPaulsonTHELETTER.pdf.

[279] *See* Letter from Sandy Praeger, *supra* note 131.

[280] *Id.*

[281] *See* Press Release, NAIC, NAIC Response to Treasury Report (Mar. 31, 2008) *available at* http://www.naic.org/Releases/2008_docs/praeger_response_treasury_report.htm.

states.[282] As one opponent stated, "[o]ne bad federal regulator can do far greater damage to insurers and consumers than one misguided state regulator."[283]

FUTURE PATH OF INSURANCE REGULATION

Uncertainty continues to be prevalent in the insurance industry. The Treasury Blueprint and the Insurance Information Act have effectively been put in limbo as the government tries to cope with the aftereffects of the subprime mortgage crisis. Additionally, the new president and his cabinet have entered Washington, D.C. with their own prioritized agenda. The proposals from 2008 are likely to undergo meticulous review and possibly be scratched altogether. However, scholars acknowledge that "history shows that Congress frequently waits for a financial crisis to erupt before choosing to act."[284] After the financial meltdown worsened in 2008, a bill was proposed on April 2, 2009 by Representatives Melissa Bean (D-Ill.) and Ed Royce (R. Calif.), entitled the National Insurance Consumer Protection Act.[285] Not surprisingly, this proposal had already been attacked for its threatening preemption language, even before it was introduced to Congress.[286] The likelihood of any insurance regulatory bill being enacted in 2010 seems remote given the workload Congress has on its hands, from health care reform to the financial crisis. Nevertheless, Congress must take action and realize that regulatory structures that are not modernized will

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[282] Hodges, *supra* note 90.

[283] *Id.*

[284] *See* Brown, *supra* note 154, at 100.

[285] National Insurance Consumer Protection Act, H.R. 1880, 111th Cong. (1st Sess. 2009).

[286] *See* Letter from Douglas Heller, Executive Director, Consumer Watchdog, to Timothy F. Geithner, Secretary, Dep't of the Treasury (Feb. 11, 2009) *available at* http://www.consumerwatchdog.org/resources/geithner2-11-09.pdf.

suffer deeply, as evidenced by the current economic recession. Putting the current regulation of the insurance industry and the entire financial industry into perspective, former U.S. Secretary of the Treasury Henry Paulson commented correctly that "[a] new regulatory architecture . . . with flexibility to adapt to changing markets and clarity of responsibility to interact with international counterparts to forge a seamless global market infrastructure, would inspire the confidence for the financial system to create prosperity in all sectors once again."[287]

CONCLUSION

The insurance industry needs a dramatic overhaul. The federal government is in the best position to make the correct changes. The states, through the NAIC, have operated themselves in an inefficient way by duplicating many of the regulatory actions they commit. Insurers and consumers pay additional and unnecessary costs because they must answer to fifty-one regulators. Evidence has shown that the NAIC is ineffective to solve the problem. The federal government, through the creation of a National Insurance Office, can alleviate all these problems and bring uniformity to the industry. The NIO would serve as the voice of the American insurance industry in the international, 21st century marketplace.

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[287] Henry Paulson, *Reform the Architecture of Regulation*, FIN. TIMES, Mar. 17, 2009, at 11.

DEALING DOGS: CAN WE STRENGTHEN WEAK LAWS IN THE DOG INDUSTRY?

Sandra K. Jones[1]

> "Dogs are the most amazing creatures; they give unconditional love. For me, they are the role models for being alive." *-Gilda Radner*

I. INTRODUCTION: DOGS AND THE LAW

We call them "man's best friend." "The bond between humans and dogs can be traced to [dog skeletons] found in human graves dated 12,000 to 14,000 years ago."[2] Dogs are featured in paintings of great Americans, and nearly everyone has a story of that "greatest dog that ever lived."[3] Dogs are welcomed into our homes and our families; we give them love and attention and they faithfully and eagerly return the favor. Many people who love dogs and embrace them as family members do so because the dogs' traits echo some of the best human characteristics, and it is said that they lack the worst. They can give love, sincerity, patience, and devotion. This cannot be said of most other things that we consider property. When many of us think of our dogs, we do not think of them in the same way we would think of a shoe, a book, a computer, or a

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[1] Candidate for Juris Doctor May, 2010

[2] Rebecca J. Huss, *Issues Relating to Companion Animals and Housing*, *in* Taimie L. Bryant, et al., ANIMAL LAW AND THE COURTS: A READER 180 (Thompson-West ed., 2008).

[3] Megan McMorris, WOMAN'S BEST FRIEND, WOMEN WRITERS ON THE DOGS IN THEIR LIVES 7 (Seal Press 2006).

car. Legally however, dogs are our property, and we have rights to their lives as such.[4] Human interests are protected by constitutional and common law rights, one of which is the fundamental right to own property. Animals, on the other hand, have no true legal rights.[5] When we attempt to challenge animal interests as compared to the interest of humans, the animal interest almost never prevails because of the system ingrained in all of us that requires us to juxtapose the interests of the human with those of the animal—the non-right holder. [6]

Gary L. Francione has compared institutionalized animal exploitation to American slavery.[7] Francione writes that there were laws enacted to protect slaves from excessive beatings or unnecessary punishment, but the common law usually assumed that the owner was the best judge of how his property ought to be used and would act in a "self-interested way" with regard to his property.[8] The same has become an institutionalized view of human ownership of animals. This institutionalized idea that property cannot have its own rights follows from the definitions of property. By one definition, property is "that which cannot have relations with other property or with persons."[9] "To the extent that the law recognizes animals as having an interest, those interests are recognized only to the extent that they facilitate the use of the animal as property" – a thing that possesses no interests of its own, and the interests it may have can be sacrificed for the best interests of the property owner, which are typically to make sure his right in the property is not disrupted.[10]

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4 Thomas G. Kelch, *Toward a Non-Property Status for Animals*, 6 N.Y.U. ENVTL. L.J. 531, 532 (1998).

5 *See* Gary L. Francione, *Animal Rights and Animal Welfare*, 48 RUTGERS L. REV. 397, 434-35 (1996).

6 *Id.* at 435-36.

7 *Id.* at 444.

8 *Id.*

9 *Id.* at 445.

10 *See id.*

The world of animal advocacy itself is somewhat murky on the subject of animal "rights" as compared to animal "welfare."[11] On one side of the alleged spectrum, there is the sentiment that animals should be treated as humans and should no longer retain "property status."[12] On the other hand, there are those who feel that respect for animals is as good as it is going to get, and the utopian ideals of a non-property status for animals should be abandoned. While many organizations such as the American Anti-Vivisection Society (AAVS) maintain that the differences between animal rights and animal welfare are irrelevant and only compassion and respect for animals is important, other groups focus on a loose definition of animal rights.[13] Groups such as People for the Ethical Treatment of Animals (PETA), which are considered to be on the "radical" end of the spectrum of animal activist organizations, have even stepped back from an animal rights view.[14] Ingrid Newkirk, the current director of PETA, has maintained that an all-or-nothing position towards animal rights activism is not realistic, and that a stronger focus on animal welfare should be pursued.[15]

While animals themselves do not have rights, there are federal laws that concern animals. The Laboratory Animal Welfare Act, now known as the Animal Welfare Act (AWA), was created in 1966 in an attempt to regulate the use of certain animals in research in the United States.[16] Today, it remains the only federal law designed to cover animals that are used by

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[11] Francione, *supra* note 4, at 405.

[12] *See generally* Kelch, *supra* note 3.

[13] Zoe Weil, THE AV MAGAZINE, Sept.–Oct. 1995, at 20 (reviewing LAWRENCE FINSEN & SUSAN FINSEN, THE ANIMAL RIGHTS MOVEMENT IN AMERICA: FROM COMPASSION TO RESPECT (Twayne Publishers 1994)).

[14] *See* Francione, *supra* note 4, at 407.

[15] *Id.*

[16] Animal and Plant Health Inspection Service (APHIS), The Animal Welfare Act, http://www.aphis.usda.gov/publications/animal_welfare/content/printable_version/fs_awawact.pdf (last visited Mar. 6, 2010).

breeders, dealers, exhibitors, and researchers.[17] Dogs are covered under this act in the definition of "animal" which states: "[t]he term 'animal' means any live or dead dog, cat, monkey, guinea pig . . . or such other warm-blooded animal, as the secretary may determine is being used, or is intended for use, for research, testing, experimentation, or exhibition purposes."[18] "Legal standards that concern the 'humane'" treatment of animals … [also] assume that the human hegemony over animals is legitimate."[19] The law has always assumed that animals are "things", and that these "things" exist in our lives mainly to satisfy our needs and desires.[20]

The AWA has the potential to vastly improve conditions for animals, and responsibility for enforcing the Act lies with a division of the United States Department of Agriculture (USDA) known as the Animal and Plant Health Inspection Service (APHIS).[21] Unfortunately, "budgetary constraints and strong opposition from animal breeders, pharmaceutical companies, exhibitors, and experimenters themselves—as well as an inadequate number of inspectors—have resulted in poor enforcement of the AWA."[22] Looking at the numbers alone, it is evident that facilities governed by the Act are under-regulated. There are more than 4500 dealers of animals (apart from exhibitors, laboratories, and other animal facilities) in the United States that should be inspected each year.[23] However, here are only three APHIS Sector Offices nationwide with a total of approximately 70 veterinary inspectors who are entrusted

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17 7 U.S.C. § 2131 (2006).

18 *Id.* at § 2132(g).

19 Francione, *supra* note 4, at 436.

20 *Id.*

21 PETA Media Center Factsheets, The Animal Welfare Act, http://www.peta.org/mc/factsheet_display.asp?ID=80 (last visited Mar. 6, 2010).

22 *Id.*

23 *Id.*

with inspecting, unannounced, the various types of facilities covered by the Act.[24]

It is the very lack of legal regulation and recognition that leads to the exploitation of "man's best friend" as nothing more than human property. In July of 2008, in Berks County, Pennsylvania, eighty dogs were shot to death because the kennel owners feared that the deplorable conditions of their property would result in the closure of their kennel business.[25] While dog lovers and animal rights and welfare activists throughout the country condemned this horrid act, under current Pennsylvania dog laws, it was entirely legal.[26] The dogs, for the most part healthy, were killed because their owners saw them as nothing more than property – and in the eyes of the law, that is all that they are. Perhaps more appalling is a 1997 incident which resulted in charges against notorious animal dealer Chester C. Baird.[27]

Baird was a dog dealer who obtained and sold dogs to laboratories for use as research subjects.[28] It was long suspected by animal-protection organizations that Baird was "stealing pet dogs and cats to supply his kennels."[29] Ultimately, the United States Department of Agriculture filed a complaint against Baird's kennel.[30] The complaint included multiple allegations regarding failure to provide proper veterinary care to the animals and over 100 violations of minimum humane care standards, including "temperature and humidity extremes,

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[24] *Id.*

[25] Amy Worden, *Berks Kennel Owners Kill Their 80 Dogs*, PHILADELPHIA INQUIRER, August 13, 2008, at 15.

[26] *Id.*

[27] The Humane Society, Notorious Animal Dealer Loses License and Pays Record Fine, http://www.hsus.org/animals_in_research/animals_in_research_news/animal_dealer_loses_license_and_pays_record_fine.html (last visited Mar. 6, 2010).

[28] *Id.*

[29] *Id.*

[30] *Id.*

enclosures too small for the animals (inspectors found 30-inch tall dogs housed in 25-inch tall enclosures), dog food infested with insect larvae, and rat and mouse infestation in all pen areas."[31] Interestingly, over 72 hours of this activity was filmed by investigators from Last Chance for Animals, including video footage of dogs being shot to death.[32]

"Class B Dealers" like Baird, discussed later on in this note, often slip through the Animal Welfare Act regulations and remain in operation. [33] It was not until Last Chance For Animals, an animal rights organization, put one of their own men inside one of Baird's kennels and documented the atrocities, theft, and overwhelming abuse that was subsequently presented to the government.[34] Baird's kennel was raided at daybreak on August 27, 2003, nearly fifteen years after he began his business.[35] As a result, Baird, the largest and most notorious USDA licensed Class B Dealer, was officially charged with hundreds of violations of the AWA including mistreatment of animals, inadequate veterinary care, and improper housing of animals.[36] However, the federal charges against Baird were not for the animal abuse; because an animal abuse charge in the state of Arkansas is only a misdemeanor, the United States Attorney deliberately "went after Baird on federal charges to attempt a felony conviction" for money laundering and criminal

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[31] *Id.*

[32] *Id.*

[33] *See, e.g.* Animal Welfare Institute, Dog Dealer's Day of Reckoning, http://www.awionline.org/ht/d/ContentDetails/i/1719/pid/2511 (last visited Mar. 6, 2010).

[34] The Humane Society, Notorious Animal Dealer Loses License and Pays Record Fine, http://www.hsus.org/animals_in_research/animals_in_research_news/animal_dealer_loses_license_and_pays_record_fine.html (last visited Mar. 6, 2010).

[35] Last Chance for Animals, C.C. Baird Final Sentencing, http://www.lcanimal.org/cmpgn/cmpgn_dog_baird_sentenced.htm (last visited Mar. 6, 2010).

[36] *Id.*

forfeiture of property.[37] Baird's AWA violations were handled separately in a civil case in which Baird was found liable for over $260,000 in civil penalties, and all of his licenses were permanently revoked.[38]

Possibly the most well known examples of canine exploitation based on their property status, and the focus of this note, are puppy mills. There is no legal definition of a puppy mill, meaning most dogs purchased from pet stores who may come from a "puppy mill" are allowed to be sold as if "from a reputable breeder" without raising issues of fraud. [39] The American Society for the Prevention of Cruelty to Animals, better known by its acronym ASPCA, defines a "puppy mill" as a large-scale commercial dog breeding operation where profits are given a higher priority than the well-being of the dogs kept there. [40] The dogs' health is often disregarded in order to maintain low overhead costs and maximize the profits of the kennel owner.[41] There is a very large number of Amish-owned puppy mills, and many of them are concentrated in Missouri in the midwestern United States, and in Pennsylvania in the east. [42] Stories of puppy mill horrors are gruesome and numerous; breeding stock dogs are often kept in tiny wire-floored cages that are stacked on top of one another and typically live out their short lives in those cages, given minimal care and no

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[37] *Id.*

[38] *Id.*

[39] American Society for the Prevention of Cruelty to Animals, Laws that Protect Dogs in Puppy Mills, http://www.aspca.org/fight-animal-cruelty/puppy-mills/laws-that-protect-dogs.html (last visited Mar. 6, 2010).

[40] American Society for the Prevention of Cruelty to Animals, Puppy Mills, http://www.aspca.org/fight-animal-cruelty/puppy-mills (last visited Mar. 6, 2010).

[41] American Society for the Prevention of Cruelty to Animals, What is a Puppy Mill, http://www.aspca.org/fight-animal-cruelty/puppy-mills/what-is-a-puppy-mill.html (last visited Mar. 6, 2010).

[42] *Id.*

opportunity to exercise.[43] Puppy mill owners often fail to comply with temperature regulations that result in dogs being housed outdoors and exposed to the elements year-round. [44] Some of these breeding dogs are rescued when puppy mills are raided by rescuers, but usually these poor creatures will live their entire lives in a two-foot by two-foot wire cage.

So how is it possible that every day in America, the very same country where we sleep in the same bed with our faithful golden retriever, yellow lab, or cocker spaniel, dogs are being abused, stolen, sold, and killed? How is it that for fifteen years someone like C.C. Baird could run a business where animal abuse was a daily practice?[45]

II. CURRENT LEGAL STANDING FOR DOGS; THE ANIMAL WELFARE ACT

There are many federal laws that mention animals and address animal issues. Of these laws, the Animal Welfare Act[46] is perhaps the most well-known and oft-cited statute. Congress enacted the AWA to regulate animals in interstate or foreign commerce.[47] In doing so, Congress indicated that it is necessary to prevent and eliminate burdens upon commerce in order:

> (1) to insure that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment;
> (2) to assure the humane treatment of animals during transportation in commerce; and

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43 Press Release, Pennsylvania Dog Law Action, AG Secretary: Pennsylvania Could Shed Puppy Mill Label with Passage of House Bill 2525 (Sept. 15, 2008) *available at* http://www.doglawaction.com/PressReleases.aspx?PRID=197.

44 What is a Puppy Mill, *supra* note 40.

45 Last Chance for Animals, *supra* note 34.

46 7 U.S.C § 2131 (2006).

47 *Id.*

> (3) to protect the owners of animals from the theft of their animals by preventing the sale or use of animals which have been stolen.[48]

The AWA also regulates, among other entities, dealers. A "dealer" is defined under the legislation as

> [A]ny person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of, (1) any dog or other animal whether alive or dead for research, teaching, exhibition, or use as a pet, or (2) any dog for hunting, security, or breeding purposes . . . .[49]

The term "dealer" does not include retail pet stores unless they sell animals to researchers, other dealers, or exhibitors; nor does it include people who do not sell animals or make less than five hundred dollars per year from the sale of animals.[50]

Within the category of dealer, the Animal Welfare Act classifies dealers into various subcategories. There are three types of dealers that are relevant to the AWA: Class A dealers, Class B dealers, and Class C dealers.[51] This Note will focus primarily on the Class A and Class B dealers. Class A dealers are breeders; under the Act, they must turn a gross profit of more than five-hundred dollars per calendar year in the sale of dogs to be classified as such.[52] Class A encompasses the typical puppy mill kennel owners, but also includes more reputable breeders who sell pure-breed dogs. Class B dealers are people who broker dogs, meaning that they purchase them from Class A dealers or,

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48 *Id.*

49 *Id.* at § 2132(f).

50 *Id.* at §§ 2132(f)(i)-(ii).

51 9 C.F.R. § 1.1 (2010).

52 *Id.*

in the case of C.C. Baird, from dog bunchers and hoarders.[53] These Class B dealers then sell these dogs as goods to other dealers (either Class A or B), to pet stores, or to research laboratories and facilities. Many Class B dealers may breed their own dogs as well, and then sell these dogs for profit directly to the pet stores or laboratories, thus eliminating the Class A middle-man and turning a greater profit.[54] Dog bunchers, as mentioned previously, are not regulated specifically under the Act. Bunchers or "collectors" obtain dogs from shelters or watch newspaper ads for "Free to Good Home" animals.[55] Finally, there are Class C dealers, who are the exhibitors.[56] Exhibitors can be anyone from zoos and aquariums to pet collectors.

At the state level, dealers may be regulated by state laws and state departments of agriculture. However, problems such as the disgusting and deplorable conditions maintained by C.C. Baird and Class B dealers like him are facilitated by a general paucity of enforcement by the USDA and the state departments of agriculture.[57] "There is a lack of funding for the inspectors, and according to PETA, budgetary constraints and strong opposition from animal breeders, pharmaceutical companies, exhibitors, and experimenters themselves—as well as an inadequate number of inspectors—have resulted in poor enforcement of the AWA."[58]

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53 *Id.* ("[Class B Licensee] includes brokers, and operators of an auction sale, as such individuals negotiate or arrange for the purchase, sale, or transport of animals in commerce.").

54 Telephone Interview with Cori A. Menkin, Esq., ASPCA Director of Legislative Initiatives, in New York, NY (September 2, 2008).

55 Michelle Crean, Dogs Only, Free to Good Home, http://www.dogsonly.org/bunchers.html (last visited Mar. 6, 2010).

56 9 C.F.R. § 1.1 (2010).

57 PETA Media Center Factsheets, *supra* note 20.

58 *Id.*

III. A LACK OF REGULATION

1. THERE IS A GAPING LOOPHOLE IN THE AWA.

The federal AWA provides the primary basis for regulation of animal use in experiments and breeding, but does very little beyond that. The Act provides absolutely no limitations on what can be done to animals, or even how it can be done.[59] As mentioned previously, the AWA does not impose licensure regulations on dog breeders who sell directly to the public. Facilities that breed dogs for commercial resale through pet stores are required to be licensed and inspected under the AWA, but thanks to the Act's loophole, puppy mills that sell directly to the public are exempt from any federal oversight whatsoever. Unregulated Internet sellers and other direct sales facilities can sell thousands of puppies and dogs each year to "unsuspecting customers" without having to answer to federal inspection.[60] The 2003 case *Doris Day Animal League v. Veneman* confirmed this lack of licensure regulations for these breeders, or "retail pet stores."[61] Doris Day Animal League, an animal rights group that was concerned about the mistreatment of dogs, brought an action challenging the Act's exemption of breeders who sell dogs directly to the public from federal oversight.[62]

The main question presented by the Animal League was about the legislative meaning of the term "retail pet store" in § 2132(f)(i) of the Animal Welfare Act and what Congress intended it to mean.[63] In response, the Secretary of Agriculture

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[59] *See* Francione, *supra* note 4, at 429.

[60] Press Release, The Humane Society of the United States, Federal Lawmakers Introduce Bill to Crack Down on Abusive Puppy Mills (Sept. 19, 2008), *available at* http://www.humanesociety.org/news/press_releases/2008/09/federal_lawmakers_introduce_puppy_mill_legislation_091908.html [hereinafter *Humane Society Press Release*].

[61] 315 F.3d 297 (D.C. Cir. 2003).

[62] *Id.* at 297-98.

[63] *Id.* at 298.

defined a "retail pet store" as "any outlet where only the following animals are sold or offered for sale, at retail for use as pets: Dogs, cats, rabbits, guinea pigs, hamsters, gerbils, rats, mice, gophers, chinchilla, domestic ferrets, domestic farm animals, birds, and cold-blooded species."[64] The Animal League, unsatisfied with this definition, asked the court to consider classifying home breeders and those who sold animals from their residences (including most puppy millers) as "retail pet stores."[65] In deciding the issue, the court determined that Congress had not spoken clearly on this matter during the Act's enactment. However, as Congress had already amended the AWA three separate times as of the date of the case, it did not alter the regulatory definition of "retail pet store" for a reason justified as legislative intent.[66] The court deferred to the government's reasonable statutory interpretation and applied the Secretary of Agriculture's definition, relying on his expertise and judgment about the degree of need for federal regulation of the larger, already defined Class A and Class B dealers.[67] The Secretary declined to amend the definition to meet the Animal League's desired meaning on the ground that the "best interest of animal welfare is supported by allowing the Department [of Agriculture] to concentrate [its] resources on those facilities that present the greatest risk of noncompliance with the regulations."[68] The Department of Agriculture chose to "focus on wholesale dealers where its resources are likely to yield the greatest benefit," and the court here deferred to the Department's chosen strategy of implementing the AWA.[69]

As a result of its decision, the court effectively exempted breeders who sell dogs from their residences from licensure

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64 *Id.* at 297 (quoting 9 C.F.R. § 1.1 (2010)).

65 *Id.* at 297-98.

66 *Id.* at 300.

67 *Doris Day*, 315 F.3d at 301.

68 *Id.* (quoting Licensing Requirements for Dogs and Cats, 64 Fed. Reg. 38,546, 38,547 (July 19, 1999)).

69 *Id.*

requirements and other regulations under the Animal Welfare Act. In doing this, the court and the Department of Agriculture created a gaping loophole in the law. The repercussions of this decision and the creation of this loophole are horrifying for animals and those who care about them. Puppy mills and puppy millers, as detailed previously, are the number one beneficiary of this loophole. Every time purchasers "go out to the country" to pick up a puppy, they are potentially purchasing from these puppy mill owners.[70] If the puppy millers are selling directly to the public, they are considered retail sellers, and do not become full Class A dealers requiring licensure under the Act. Puppy millers often maintain roadside stands or sell their puppies at the entryways to their larger kennels so that purchasers do not see the horrors of stacked cages and mistreated animals in the background as they purchase the adorable puppies born to dog parents who are kept in shockingly unsanitary conditions.

In a troubling development, more puppy millers are selling puppies directly to the public through Internet websites.[71] Most purchasers who believe they are getting their dogs from a small reputable breeder are paying large sums of money for dogs that actually come from puppy mills. The dogs are shipped through the airlines, so no consumers see the kennel facilities. Increasing use of the internet to easily obtain cheap puppies has correspondingly spurred a jump in the number of puppy mills. These puppy mill kennels remain unchecked because under the Act, they are exempt from the regulations imposed on other dealers. When the Act was first imposed in 1966, the legislators could not have foreseen the internet becoming a literal breeding ground for fraud, scams, and the exploitation of animals.[72]

In addition to puppy mills, their customers—the actual "retail pet stores,"—benefit greatly from this loophole. As the demand for cute, young puppies continues to grow at a steady rate, there is no shortage of eager and willing customers for the

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[70] American Society for the Prevention of Cruelty to Animals, Puppy Scams & Cons, http://www.aspca.org/fight-animal-cruelty/puppy-mills/puppy-scams-cons.html (last visited Mar. 6, 2010).

[71] *Id.*

[72] *Id.*

pet stores.[73] Most of the pet stores purchase their dogs from puppy mills, "facilities" that they pass off as breeders to their naive consumers. Customers who do not know any better purchase dogs from the retail pet stores, and in doing so, contribute to the steady stream of profits for the puppy millers and pet stores. For every dog purchased from a pet store, there needs to be another dog sent to the pet store by a puppy mill to take its place in the inventory. In turn, for every dog sent to the pet store, another breeding dog must give birth to yet another litter. The disturbing cycle of forced breeding, cheap sales, and easy profits continues to revolve because the retail pet stores, like internet sellers, are not regulated under the AWA.

To recap, it may be best to redefine this proposed cycle of profit. The AWA exhibits a loophole in which "retail pet stores," or people who sell dogs directly to the public, like Internet sellers, are not subjected to licensure or regulations under the Act.[74] This in turn leads to puppy millers producing more dogs in order to meet the demand of consumers looking for cute, "purebred," yet reasonably priced puppies. Consumers can also purchase either directly from the millers through roadside stands or on internet websites. If consumers choose to visit a retail pet store, they may be purchasing puppies that they believe came from a reputable breeder, but actually came from a puppy mill. At the end of the cycle, the puppy millers have turned large profits and the breeding stock dogs continue to suffer in inhumane conditions.

As a result of this lack of licensure, other laws that set standards for veterinary care, food provisions, sufficient clean water, ventilation, heating/cooling, and sanitation are often disregarded by the breeders and unenforced by the USDA. Veterinary care, proper nutrition, socialization, integrity of the breed and breed standards, and most importantly sanitation at puppy mills are substandard in comparison to other responsible breeders. "Illness, diseases, fearful behavior[s], and lack of socialization with humans and other animals are not uncommon

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[73] Humane Society of the United States, Inside a Puppy Mill, http://www.stoppuppymills.org/inside_a_puppy_mill.html (last visited Mar. 6, 2010).

[74] 7 U.S.C. § 2132(f)(i) (2006).

characteristics of dogs from puppy mills."[75] "Breeding is performed without consideration for [the] maintenance of genetic quality/breed standards, resulting in the passage of hereditary conditions and diseases from generation to generation" of puppy mill dogs.[76] While it can be argued that "purebred" dogs are dogs that are bred with certain genetic abnormalities on purpose, puppy mill dogs are bred and cross-bred to the extent that some dogs do not even remain similar to the American Kennel Club's definition of the breed.[77] Indeed, puppy millers often deceive consumers who purchase their dogs by declaring them "pedigreed,"[78] when in truth, so long as the ancestry of a dog is documented, the dog can be called pedigreed.[79] Therefore, a miller may sell a dog to consumers as pedigreed simply because he owns the parents and grandparents of that puppy.[80] Becoming even more popular are "designer dogs," or puppies that are mixtures of other breeds to create cute hybrids such as puggles, jugs, and labradoodles.[81] Unlike other mutts or mixed breed dogs, "designer dogs" have documented purebred ancestries, thus making them desirable to the public.[82] Accordingly, many puppy mills are beginning to mass-produce these dogs to deal with the increasing demand.[83]

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75 Cori Menkin, Learning to Give, Puppy Mills, http://learningtogive.org/papers/paper351.html (last visited Mar. 6, 2010).

76 *Id.*

77 American Society for the Prevention of Cruelty to Animals, *Puppy Mill Glossary*, http://www.aspca.org/fight-animal-cruelty/puppy-mills/puppy-mill-glossary.html (last visited Mar. 6, 2010).

78 What is a Puppy Mill, *supra* note 40 (stating that the "lineage records of puppy mill dogs are often falsified").

79 Puppy Mill Glossary, *supra* note 76.

80 *Id.*

81 *Id.*

82 *Id.*

83 *Id.*

Female breeding stock dogs are bred at every possible opportunity with little or no recovery time between litters.[84] When the females are no longer able to reproduce, they are usually killed.[85] Puppies also suffer, as they are typically removed from their mothers at a younger age than they should be, and are typically sold to pet shops and marketed as young as six weeks of age. Because they have been removed from their mothers and littermates at such a young age, these dogs can sometimes lack crucial social skills acquired in the first two months of being a puppy, such as bite inhibition and proper dog-to-dog socialization. This can lead to under-socialized, shy, and aggressive dogs that wind up in shelters and are eventually euthanized for lack of other option. While this practice can be harmful and misleading to consumers, the ultimate harm is suffered by the dogs that will suffer from illness, under-socialization and genetic defects due to inbreeding and disregard for breeding standards.

2. THERE IS A PROFOUND LACK OF ENFORCEMENT BY THE GOVERNMENT.

The USDA is responsible for enforcing the AWA.[86] A subdivision of the USDA known as Animal and Plant Health Inspection Service (APHIS) has been delegated the reponsibility of inspecting facilities covered under the Act.[87] The ASPCA, along with the Humane Society of the United States (HSUS) and PETA, has determined through years of research that the AWA is not being enforced in many areas.[88] Most of these areas involve Class A and Class B dealers, who have worked out ways

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84 Society for the Prevention of Cruelty to Animals, Puppy Mills – Frequently Asked Questions, http://www.spcai.org/learn/animal-cruelty/item/106-puppy-mills-%E2%80%93-frequently-asked-questions.html (last visited Mar. 6, 2010).

85 *Id.*

86 7 U.S.C. § 2146 (2006).

87 PETA Media Center Factsheets, *supra* note 20.

88 Menkin, *supra* note 53.

around inspections and continue to remain in operation despite obvious conditions that violate the regulations imposed by the Act.[89] However, an enforcement problem arises because the USDA and APHIS cannot be compelled to enforce the AWA; if the ASPCA were to sue the USDA for not enforcing the law with respect to particular dealers, its claim would not be likely prevail.[90] The power and discretion to take action against licensees rests with the USDA, not private citizens.[91] Courts have consistently chosen not to interfere in the USDA's decisions unless they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[92]

An alternative enforcement theory is for organizations like the ASPCA to sue the USDA for its apparent adoption of a policy of non-enforcement against breeders generally. In order for this theory to be effective, the "policy" that the USDA has adopted must be considered a final agency action that violates the Administrative Procedure Act by being arbitrary, capricious, an abuse of discretion, or not in accordance with the law. This is of course much easier said than done.

Three cases demonstrate the difficulty of employing this theory as a possible avenue of enhanced AWA enforcement. The first is the 1985 Supreme Court decision in *Heckler v. Chaney*, a case that did not involve the USDA, but nonetheless considered the extent of judicial discretion granted to government agencies. Here, the Court considered the extent to which a decision of an administrative agency to exercise its "discretion" not to undertake certain enforcement actions is subject to judicial review under the Administrative Procedure Act, 5 U.S.C. § 501 et seq. (APA).[93] The Supreme Court upheld the appellate court's

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89 *Id.*

90 *Id.*

91 7 U.S.C. 2149(a) ("If the Secretary has reason to believe that any person licensed as a dealer. . . has violated or is violating any provision of this Act []. . . he may suspend such person's license temporarily. . . or revoke such license, if such violation is determined to have occurred.").

92 Clark v. United States Dep't of Agric., 537 F.3d 934, 939 (8th Cir. 2008) (quoting 5 U.S.C. § 706(2)(A)(2006)).

93 Heckler v. Chaney, 470 U.S. 821, 823 (1985).

decision that an agency's choice not to take enforcement action should be presumed immune from judicial review under the APA.[94] The Court stated that "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion."[95] The Court went on to say that "[t]he danger that agencies may not carry out their delegated powers with sufficient vigor does not necessarily lead to the conclusion that courts are the most appropriate body to police this aspect of their performance."[96] Therefore, with its decision, the Supreme Court declared that an agency's decision-making cannot be questioned by the citizens through the court system.

A second case that set precedent in this matter was *Animal Legal Defense Fund, Inc. v. Glickman*. In this 1996 decision, the Animal Legal Defense Fund (ALDF) sued the USDA in federal court for its failure to enforce the AWA with respect to the treatment of primates in research facilities.[97] In *Glickman*, the United States District Court for the District of Columbia came to several conclusions. The first was that the AWA delegates the discretion for enforcement to the Secretary of Agriculture to make investigations and inspections as he/she deems necessary, basing its decision in part on the ruling in *Heckler v. Chaney*.[98] Second, the court found that the AWA does not impose a duty on the Secretary of Agriculture to "make a finding of a violation or to initiate enforcement action."[99] Third, the court found that under the Act, the USDA is not required to penalize a regulated entity that is found to be in violation of the law.[100] Essentially, the court in *Glickman* confirmed prior court decisions holding

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94 *Id.* at 837-38.

95 *Id.* at 831.

96 *Id.* at 834.

97 Animal Legal Def. Fund v. Glickman, 943 F. Supp. 44, 48 (D.D.C. 1996), *rev'd on other grounds*, 204 F.3d 229 (D.C. Cir. 2000).

98 *Id.* at 62.

99 *Id.* at 63.

100 *Id.*

that government agencies such as the USDA should have the ultimate discretion to act as they deem fit. The *Glickman* court ultimately found that this was not an issue suitable for judicial review as intended by Congress, and the case against the USDA was dismissed.

The third case pertaining to an agency's discretion not to enforce certain legislation is *Adams v. Richardson*. This was an action brought against the Secretary of Health, Education, and Welfare by certain African American students, citizens, and taxpayers.[101] The citizens and students claimed that the agency had not fulfilled its duty to enforce Title VI of the Civil Rights Act of 1964 because it did not take action to end segregation in public schools receiving federal funding.[102] In contrast to *Animal Legal Defense Fund v. Glickman*, the court in *Adams* found that the agency's adoption of a policy of non-enforcement was actually reviewable by the court.[103] The situations are similar in that here the Department of Health was found to have "consciously and expressly adopted a general policy [of non-enforcement]" that was so extreme as to amount to "an abdication of its statutory responsibilities."[104] In contrast to the AWA however, the Civil Rights Act of 1964 contains a clear and direct statutory mandate for enforcement. The Secretary of Health, unlike the Secretary of Agriculture, does not have discretion as to whether to enforce the laws or not. In contrast, the Secretary of Agriculture has complete statutory discretion regarding whether or not to enforce the AWA. The AWA's statutory language states that the Secretary "may" enforce the law, not that he "must" or "shall" enforce it. The *Adams* case is not as on point on this issue, and therefore because of the major difference in statutory language, *Adams* cannot be used as precedent-setting case law to sue the USDA for its delinquency in enforcing the AWA.

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101 Adams v. Richardson, 480 F.2d 1159, 1160-61 (D.C. Cir. 1973).

102 *Id.* at 1161.

103 *Id.* at 1164.

104 *Id.* at 1162.

Amending the statute to include stronger, mandatory language such as "must enforce" may not solve the problem. While statutory language may give private organizations legal standing on which to pursue action against blatant agency disregard for the absolute mandate, the USDA and APHIS still lack the manpower and financial resources required to inspect and enforce regulations in all of the facilities that they are charged with overseeing. The most obvious proposal for enforcing a strong mandatory statute would be to increase funding and manpower for inspections. However, this proposal currently represents at best a utopian ideal. The present legal standing for animals does not provide the government with enough incentive to increase funding for APHIS or to create more jobs for inspectors.[105] Furthermore, because of longstanding notions of judicial deference to government agencies such as the USDA, it will be difficult to enforce non-compliance with new mandatory language unless their actions are arbitrary or capricious.[106] Additionally, even if the statutory language is changed to create mandatory enforcement provisions, the loophole in the Act that exempts puppy mills will not close simply by this linguistic modification.

In sum, according to the three cases discussed here, *Heckler*, *Glickman*, and *Adams*, the current loose statutory language of the AWA gives the USDA virtually absolute discretion regarding enforcement of the Act, its provisions, and the entities that it is supposed to be regulating. Aside from the agency's discretion in enforcing the Act, there is another problem with suing an agency under the APA for adopting a policy of non-enforcement. In order for an agency's action to be reviewable by the courts, it must be a "final" agency action, meaning that it "must mark the consummation of the agency's decision making process [and] must be one by which rights or obligations will be determined, or from which legal consequences will flow."[107] If an

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[105] *See generally* Kelch, *supra* note 3.

[106] *See* Heckler v. Chaney, 470 U.S. 821, 854-55 (1985) (Marshall, J., concurring).

[107] Pa. Mun. Auths. Ass'n v. Johnson, 2005 WL 2491482, at *1 (D.C. Cir., June 3, 2005) (quoting Appalachian Power Co. v. EPA, 208 F.3d 1015, 1022 (D.C. Cir. 2000)).

administrative action is not deemed to be final, it will not be subject to judicial review.

IV. CAN THE LAWS BE CHANGED?

1. BACKGROUND.

Over the past few years, as public awareness about cruelty and neglect towards animals has increased, legislation designed towards protecting animals has correspondingly increased. The most prominent one is the federal Puppy Uniform Protection Statute, better known as the PUPS Bill—a proposal that will make a major amendment to the AWA and potentially work to close the loophole that has allowed dealers who sell to the public directly to go unregulated. Following closely behind the PUPS Bill are Federal 2008 Farm Bill amendments and many state laws that have been amended and bolstered to include provisions protecting animals from cruelty and abuse in more recent times.

2. FEDERAL ACTION: THE PUPS BILL AND 2008 FARM BILL

Despite being over forty years old, the AWA has been the primary federal law regulating animals and those who handle them. According to ASPCA attorney Cori A. Menkin, there has been a call to action for many years from national groups like the ASPCA and the HSUS, but nothing has been done until recently.[108] In September of 2008, federal lawmakers introduced a bill that has been a long time in the works – a bill that will start to crack down on abusive puppy mills and dog dealers in the United States.[109] The proposed legislation will actually help to close the loophole in the AWA that currently allows the large, commercial breeders who sell their dogs on the internet and directly to the public to avoid the licensing and

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[108] Menkin, *supra* note 53.

[109] Humane Society Press Release, *supra* note 59, at 2.

regulations required by the Act.[110] This proposed legislation is known as the "Puppy Uniform Protection Statute" (PUPS), and is often affectionately referred to as "Baby's Bill" in honor of a rescued puppy mill dog named Baby is who now the subject of a new book about the plight of puppy mill survivors.[111]

The bill will require that dogs used for breeding be removed from their cages for exercise every day rather than live their entire lives in small cages with no opportunity to get out and run.[112] It will also add an amendment to Section 2 of the AWA to define a 'retail pet store' as a person that "(1) sells an animal directly to the public for use as a pet; and (2) does not breed or raise more than 50 dogs for use as pets during any one-year period."[113] Furthermore, Section 3 of the AWA that governs licenses under the Act will be amended "by striking 'retail pet store or other person who' and inserting 'retail pet store, or other person who (1) does not breed or raise more than 50 dogs for use as pets during any one-year period.'"[114] The Humane Standards section of the AWA, Section 13, will also be amended by adding new subsection (j) stating that:

> (1) Subject to paragraph (2), a dealer shall provide each dog held by such dealer that is of the age of 12 weeks or older with a minimum of two exercise periods during each day for a total of not less than one hour of exercise during such day. Such exercise shall include re[-]moving the dog from the dog's primary enclosure and al[-]lowing the dog to walk for the entire exercise period, but shall not include the use of a treadmill, catmill, jenny mill, slat mill, or similar device, unless prescribed by a doctor of veterinary medicine.
>
> (2) Paragraph (1) shall not apply to a dog certified by a doctor of veterinary medicine, on a

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110 *Id.* at 1.

111 *Id.*

112 *Id.* at 2.

113 H.R. 6949, 110th Cong. § 2 (2008).

114 *Id.*

> form designated by and submitted to the Secretary, as being medically pre[-]cluded from exercise.[115]

Another section addressing the impact of the amendments on state animal laws provides that the amendments made by the Act "shall not be construed to preempt any law or regulation of a State or a political subdivision of a State containing requirements that are greater than the requirements of the amendments made by this Act."[116]

While the bill might seem effective in closing the loophole in the AWA, it simply requires breeders to obtain a license from the USDA if they raise more than fifty dogs in a one-year time period and sell directly to the public.[117] Legislators are confident that the bill is not going to "hinder the operation of reputable and responsible breeders . . . [and is instead] . . . aimed at protecting dogs and making individuals who are motivated by profit over the fair and humane treatment of dogs accountable for their actions."[118] It has been said that the amendment to the AWA is long overdue, as public national television coverage and several large-scale cruelty investigations and raids of puppy mills that were headed up by the HSUS, ASPCA, and other animal shelters.[119]

Because the bill was introduced in September 2008, just a few short months before the 2008 election, the Act was almost certain to take a backburner to the election and Congress' scheduled adjournment.[120] As of the time of publication of this

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[115] *Id.*

[116] *Id.*

[117] Humane Society Press Release, *supra* note 59, at 2.

[118] *Id.*

[119] *Id.*

[120] Pet Alert, "Puppy Uniform Protection & Safety Act" Introduced in Congress, http://www.kennelspotlight.com/US_H_6949_S_3519_PUPS.pdf (last visited Mar. 6, 2010).

Note, the bill has not become law, but may still be reintroduced during the next legislative session.[121]

In addition to the possibility of the PUPS Bill changing the language in the AWA, the 2008 Farm Bill, as amended in May 2008, represented a major victory for the ASPCA and other animal welfare groups.[122] As previously noted, when the AWA was first passed, the internet has not yet become a major source for animal commerce and a literal breeding throughout world were able to ship dogs to paying customers in the United States.[123] Because of this new puppy mill market and the increasing demand for designer and rare breeds of dogs, the United States was flooded with imported puppies that were in poor health and possibly carried diseases that were potentially harmful to people and other animals.[124] As the standards of foreign puppy mills are certainly not subject to any United States laws or regulations (especially the AWA), many of these dogs were also raised and bred in shockingly inhumane conditions.[125]

The 2008 Amended Farm Bill has implemented some major changes to the animal industry as a whole.[126] Specifically targeting foreign puppy mills, the bill prohibits the importation of puppies that are under six months of age for the purpose of

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[121] Govtrack.us, S.3519 [110th]: Puppy Uniform Protection and Safety Act, http://www.govtrack.us/congress/bill.xpd?bill=s110-3519 (last visited Mar. 31, 2010).

[122] Laws That Protect Dogs in Puppy Mills, *supra* note 38.

[123] *Id.*

[124] *Id.*

[125] *Id.*

[126] *See* Food, Conservation, and Energy Act of 2008, H.R. 6124, 110th Cong. § 2 (2008), *available at* http://www.usda.gov/documents/Bill_6124.pdf (last visited Mar. 6, 2010). The 2008 Farm Bill also implements farm programs, conservation programs, environmental conservation and incentives programs, rural development in the United States, nutrition programs, increased budget for research and marketing, bio-energy plans, crop insurance, and other improvements for the conditions of livestock. *Id.*

resale in the United States.[127] However, if the dog is in good health and has received all of its vaccinations upon inspection, it will be allowed into the United States so long as it is over six months old.[128]

The Farm Bill was amended to strengthen penalties for animal fighting, and to increase the protection of pets, the Secretary of Agriculture was obligated to review a report required of the National Institute of Health and to make recommendations on the disposition of Class B Dealers accordingly.[129] While these amendments to the Farm Bill may not seem drastic enough to combat the plague of domestic puppy mills, they are a step in the right direction by the federal government.

3. STATE ACTION

As awareness of the seriousness of crimes toward animals and its connection to other unwanted human behaviors has increased, individual states have improved their own animal cruelty laws. Every state in the United States including the District of Columbia has laws regarding cruelty to animals.[130] While these laws certainly do not give animals rights, they do deter violence by humans and protect some animals from mistreatment and cruelty by imposing punishments for inhumane acts against them.[131] Most of these state laws fall under the "purpose of human morality," meaning that their purpose is not actually to protect the animals, but rather to keep people from acting immorally.[132] More states have recently

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[127] *Id.* at § 14210.

[128] *Id.*

[129] *Id.* at § 14216.

[130] Stray Pet Advocacy, Animal Cruelty Laws by State, http://www.straypetadvocacy.org/html/cruelty_laws.html (last visited Mar. 31, 2010).

[131] *Id.*

[132] *Id.*

begun to recognize that animal cruelty and abuse are serious issues and accordingly, there are now forty-one states with felony provisions for animal cruelty. Animal cruelty is still not a felony in Alaska, Arkansas (former state home of C.C. Baird's kennel), Hawaii, Idaho, Kansas, Mississippi, North Dakota, South Dakota, and Utah.[133]

In fact, there are states that have no laws at all addressing the "commercial use of dogs" – an umbrella term that includes pet stores, breeders, kennels, and dealers.[134] Sometimes state laws decrease the impact made by the AWA loophole, but states more often than not categorize puppy mill operations and dealers as "breeders" and not retailers.[135] The ultimate result is that there is no oversight of these facilities.

On the other hand, some states have made major efforts to improve the animal cruelty laws in their jurisdictions. A recent and significant improvement was the 2008 amendment to Pennsylvania's Dog Law. Prior to the passage of House Bill 2525, Pennsylvania was known to some as "Puppy Mill Capital of the East" and was home to countless puppy mill breeding factories.[136] Known for its Lancaster farm-country puppy roadside stands, Pennsylvania is considered one of the largest puppy mill states in the country.[137] After Pennsylvania's local Main Line Animal Rescue's (MLAR) Bill Smith made efforts to contact Oprah Winfrey in early 2008, the Pennsylvania puppy mill industry was exposed to many unknowledgeable viewers for the dreadful and inhumane breeding factories that they were.[138] Winfrey continued to advocate against the horrors of puppy

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[133] *Id.*

[134] Laws That Protect Dogs in Puppy Mills, *supra* note 38.

[135] *Id.*

[136] Last Chance for Animals, Campaigns, http://www.lcanimal.org/cmpgn/cmpgn_012_puppy_aware.htm#axzz0eK7ADpNB (last visited Mar. 6, 2010).

[137] *Id.*

[138] The Oprah Winfrey Show, Investigating Puppy Mills, www.oprah.com/slideshow/oprahshow/slideshow1_ss_global_20080404 (last visited Mar. 6, 2010).

mills and publicized the sad stories of the rescued dogs, many by Bill Smith of MLAR, throughout the year.[139] As a large part of her successful exposé, Winfrey documented the tiny cage sizes, the wire-grate flooring, the lack of veterinary care, and the unsanitary conditions where the breeding stock dogs lived their entire lives.[140]

Winfrey's television shows were just the beginning for anti-puppy mill spokespeople such as ASPCA attorney Cori Menkin, Bill Smith of MLAR, and attorney Buzz Miller, who began speaking at state-wide seminars and alerting the public to problem of puppy mills. Shortly thereafter, House Bill 2525 was introduced, and for those who despised the puppy mills, it seemed like a small step to attack the greater problem of animal cruelty and abuse. After the bill's passage in late 2008, the new Pennsylvania Dog Law created a novel class of kennels known as "commercial breeding kennels," and sought "to provide essential minimum standards for the dogs that spend their lives in such kennel settings."[141] The mandatory improvements to commercial breeding kennels include "increasing the cage size to ensure that the dogs are reasonably comfortable, providing access to an outdoor exercise area, annual veterinary examinations, [and] limiting the stacking of cages . . . ." [142] Establishing daily cleaning standards, creating a reasonable temperature for the kennel areas, mandating appropriate lighting, imposing higher ventilation standards, and requiring strategically placed fire extinguishers all add to the list of mandatory measures kennel operators must take.[143]

In addition, the new law provides clear authority for the Pennsylvania Bureau of Dog Law Enforcement to enforce laws against unlicensed kennels in the same manner that it had

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[139] *Id.*

[140] *Id.*

[141] Pennsylvania Department of Agriculture, Comprehensive Amendment to the Pennsylvania Dog Law *available at* http://www.doglawaction.com/files/2525summary.pdf.

[142] *Id.*

[143] *Id.*

previously regulated licensed kennels.[144] Additionally, the new Pennsylvania Dog Law "set forth a judicial appeals process, allow[ed] for inspections of [dog breeding] facilit[ies], provide[d] for issuance of citations and civil penalties, and provide[d]for removal of the dogs in the same limited circumstances as those that apply to licensed kennels to insure the welfare of the dogs."[145] "As with licensed kennels, the unlicensed kennels [are] afforded the opportunity to appeal any action of the department." [146] In short, viewing this new Pennsylvania State Law in comparison and conjunction with the proposed PUPS Act, all kennels that are targeted by the new state laws of Pennsylvania would also be required under federal law to obtain a license, and the Pennsylvania law would probably be altered to comply with new federal regulations.

Pennsylvania is one of the first of several states to take legislative action against the atrocious living conditions of puppy mill dogs. HSUS and ASPCA attorneys hope that more states will follow suit in the near future and that ultimately these dog laws will discourage puppy millers from operating altogether.[147]

In addition to Pennsylvania, in 2008 Virginia became the first state to pass a law limiting the number of adult dogs that a commercial breeder is entitled to possess, capping the number at 50 dogs.[148] Virginia's new stricter animal laws also include provisions that impose on a dealer or pet shop a duty to provide animals in its possession or custody with adequate housing, food, water, exercise, and care.[149] Furthermore, Virginia has enacted provisions in its statute that require pet dealers who intend to sell dogs that are capable of being registered pedigreed

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144 *Id.*

145 *Id.*

146 *Id.*

147 Menkin, *supra* note 53.

148 Laws That Protect Dogs in Puppy Mills, *supra* note 38.

149 VA. CODE ANN. § 3.2-6503 (2009).

to have a dealer's animal history certificate.[150] This certificate contains information regarding the animals' veterinary history and detailed vaccination records.[151] The Virginia bill went remarkably from its introduction in the Virginia Legislature to the Governor's desk in just four short months, demonstrating that animal-friendly laws need not drag through legislatures over the course of many months or years.[152]

4. THE THREE PRONGED APPROACH TAKEN BY EXISTING ANIMAL ADVOCATES

Advocates who see themselves as a voice for animals are taking what they call a three-pronged approach toward eliminating the cruelty and mistreatment toward companion animals such as dogs.[153] First, the ASPCA and HSUS work together toward better enforcement of the laws that already do exist, such as the AWA and various state laws, through cooperation with the respective departments of enforcement.[154] The ASPCA and HSUS use their power as well-known and established animal advocates to threaten exposure of departments that do not adhere to and enforce the current laws.[155] Grassroots organizations such as "Last Chance for Animals" and "Best Friends" also use their access to the media and the inherent shock value that accompanies horrific stories of animal abuse to combat the animal abusers and alert the government. By placing a man on the inside of a puppy mill, the

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[150] *Id.* at § 3.2-6512.

[151] *Id.*

[152] Laws That Protect Dogs in Puppy Mills, *supra* note 38.

[153] Sheila Walsh, Phyllis Wright: The Woman Who Gave Shelters and Their Animals More Dignity, http://www.hsus.org/about_us/accomplishments/the_people_who_have_shaped_the_hsus/phyllis_wright_the_woman_who_gave_shelters_and_their_animals_more_dignity.html (last visited Mar. 6, 2010).

[154] *See* http://www.aspca.org and http://www.hsus.org (last visited Mar. 6, 2010).

[155] *See id.*

people at "Last Chance for Animals" single-handedly alerted the federal government to the cruelty being inflicted by C.C. Baird and increased public awareness of such facilities throughout the country.[156]

Organizations like the Animal Legal Defense Fund (and their law school subsidiary, the Student Animal Legal Defense Fund) continue to use their legal education background and their power in the courtroom to pursue cases against animal abusers and educate the public while doing so. These legal-based organizations have the power to push the legal system to end the suffering of abused animals are supported by hundreds of dedicated attorneys and more than 100,000 members.[157]

The second prong of the ASPCA and HSUS approach is to strengthen the laws that already exist in both the state and federal levels. Pennsylvania House Bill 2525, now Pennsylvania law, is a prime example of reforming old and outdated laws by advocating for new and stronger anti-abuse provisions in the statutes. The PUPS Proposed Bill is another way that interested organizations can lobby to strengthen pre-existing laws such as the AWA in order to create better living conditions for dogs. The ASPCA also organizes its own movements, known as ASPCA Mission Orange, to support local governments in enhancing laws regarding companion animals.[158] Mission Orange "…is a focused effort [by the ASPCA], in partnership with select communities to create a country of humane communities where animals receive the compassion and respect that is due to them as sentient creatures and furthermore where there is no more unnecessary euthanasia of healthy and adoptable animals

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[156] *See* The Humane Society, Notorious Animal Dealer Loses License and Pays Record Fine, http://www.hsus.org/animals_in_research/animals_in_research_news/animal_ dealer_loses_license_and_pays_record_fine.html (last visited Mar. 6, 2010).

[157] Animal Legal Defense Fund, About Us, http://www.aldf.org/section.php?id=3 (last visited Mar. 6, 2010).

[158] American Society for the Prevention of Cruelty to Animals, ASPCA Mission: Orange, http://www.aspca.org/adoption/aspca-partnership/amo-faqs-final-1-4-07.pdf (last visited Mar. 6, 2010).

simply because there is a lack of resources and awareness".[159] The ASPCA has already implemented this program in New York City when they joined the Mayor's Alliance for New York City Animals in 2005, ensuring that no healthy animals were put to sleep.[160] Similar programs were initiated in Richmond, Virginia in 2006, and the ASPCA has started partnerships in Austin, Texas, Gulfport-Biloxi, Mississippi, Philadelphia, Pennsylvania, Spokane, Washington, and Tampa, Florida.[161]

The third prong, and the prong which the author believes to be the most important, is an increase in general public outreach and educational programs.[162] The ASPCA's Mission Orange is a vital step toward efficient public outreach and education; however, these efforts must be taken further. The more Americans who become educated about the problems of puppy mills, animal abuse, and the plight of the homeless animals in this country, the greater the chance will be that cruelty can end altogether. While a lofty goal, increasing the number of people who are educated will increase possibility that those people will educate their family, friends, and neighbors until an entire nation follows suit. The ASPCA specifically is working to find out how people are getting their dogs and from where they are getting them.[163] The average person does not recognize that purchasing a puppy from a pet shop effectively supports puppy mills and factory breeders.[164] The dots need to be connected for the general public to show them that for every pet store puppy that is purchased, a homeless one lives in an animal shelter and will likely be euthanized.[165]

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[159] *Id.*

[160] *Id.*

[161] ASPCA Overview of ASPCA Partnership, http://www.aspca.org/adoption/aspca-partnership/overview.html (last visited Mar. 10, 2010).

[162] Laws That Protect Dogs in Puppy Mills*, supra* note 38.

[163] What is a Puppy Mill, *supra* note 40.

[164] Menkin, *supra* note 53.

[165] Adopt A Pet, http://adoptapet.com/ (last visited Mar. 6, 2010).

The author of this note firmly believes that education is the key to a world of empty animal shelters and the abolition of puppy mills. Education needs to begin at an early age—children must be taught the proper way to care for their animals, and that their animals are not disposable, but rather are important beings who some consider to have their own fundamental rights. Community shelters also have the duty to inform the public that pets abandoned at shelters do not have a great chance of making it out alive. People need to be made aware that there is no shortage of homeless animals in this country, and that thousands upon thousands of animals lose their lives each year because of human ignorance and lack of understanding. In Philadelphia alone, approximately 30,000 homeless and unwanted animals are taken in to animal control each year.[166] Of those 30,000 homeless animals, only a small fraction will make it out of the shelter system alive.[167] Through federal and locally funded education programs, as well as existing programs such as the ASPCA and the HSUS, the public can learn the truth about the problems regarding lack of funds for animal programs and lack of legislation regarding animal treatment and protection. Furthermore, newly educated citizens can contact their government representatives in both the state and federal legislatures to express their opinions on the lack of effective legislation, as well as to voice their support for pending amendments to existing laws such as the PUPS Bill.

In the past few years, Americans have become increasingly aware of the plight of homeless animals, puppy mill dogs, and animals that suffer from abuse and neglect. Accordingly, we have seen an increase in legislation that strengthens anti-cruelty laws and provides protection for animals. Whether considering laws that have already passed, like PA House Bill 2525, or legislation currently pending, such as the PUPS Bill, it seems as though things are gradually shaping up for companion animals. Yet, questions remain about the current future safety of animals. Are these small steps really enough to improve the lives of these

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166 Philadelphia PAWS website, http:// www.phillypaws.org/About-PAWS/default.asp (last visited Mar. 10, 2010).

167 *Id.*

creatures? Is increased cage room and one hour per day of exercise sufficient?[168] Will closing the loophole to the AWA guarantee that the Department of Agriculture maintains inspections for puppy millers who sell directly to the public? Will making it more difficult for puppy millers and dealers to house their animals put them out of business altogether? Will improving living conditions for imprisoned animals truly establish the goals of organizations like the ASPCA, or will it only bring society one step closer toward a utopian dream of freeing animals from their property status? Perhaps the abolition of the property status of animals is indeed a utopian dream that will not come to fruition. If this is true, are movements toward less horrid living conditions for the animals that exist now necessary?

V. A NON-PROPERTY STATUS FOR DOGS?

Despite the recent rise in amendments of pre-existing laws and pending new legislation, it can be argued that such laws are not enough to protect the rights of animals. As Thomas G. Kelch writes ". . . the common law is a ripe mechanism for changing the view of animals as property."[169] However, the only way an animal welfare issue can come before a court is if some person can assert a personal interest at stake relating to the animal that is sufficient to gain standing to bring suit.[170] Animal advocates have argued that both animals and the environment itself should have standing to assert injuries; specifically, that they should have rights that can be asserted through human representatives.[171] While changes to this extent have not yet occurred, the law in the area of animals has not yet seen a plateau, and this perhaps has set the stage for a movement away from most humans' view that animals are property.

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[168] Comprehensive Amendment to the Pennsylvania Dog Law, *supra* note 140.

[169] *See* Kelch, *supra* note 3, at 534.

[170] Fund for Animals, Inc. v. Lujan, 962 F. 2d 1391, 1395-96 (9th Cir. 1992).

[171] *See* Christopher D. Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450, 456, 464 (1972).

In the case *Corso v. Crawford Dog and Cat Hospital, Inc.*, the court pondered the proper measure of damages for mishandling the body of a dog that had been euthanized, before declaring that companion animals should be seen as occupying a status above that of ordinary property.[172] The result of this noteworthy case was that plaintiff was found to be entitled to more than market value damages for the conduct of the defendant veterinary hospital in losing the body of his deceased dog and replacing it with the body of a dead cat.[173] A similar view was also expressed in a concurring opinion in *Bueckner v. Hamel*, where the issue concerned the amount of damages to be awarded against a defendant who shot two of the plaintiff's pet dogs.[174] In his concurrence, Judge Andell stated that animals are more than property despite their current treatment in the eyes of the law.[175]

The spectrum of those who advocate for animals is wide. On one hand, there are those who feel as though "the property status of animals presents conceptual and practical difficulties that militate against treating animals as having inherent value and ignores the fundamental issue that our [human] use of animals – however well we treat them – cannot be justified morally."[176] Animal activists who follow this belief preach that those who advocate for animals should pursue "the abolition of

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[172] 415 N.Y.S.2d 182, 183 (N.Y. Civ. Ct. 1979) ("This court now overrules prior precedent and holds that a pet is not just a thing but occupies a special place somewhere in between a person and a piece of personal property . . . [a] pet is not an inanimate thing that just receives affection, it also returns it.").

[173] *Id.*

[174] 886 S.W.2d 368, 376-77 (Tex. App. 1994) (Andell, J., concurring) ("[F]or the proposition that animals are treated as property in the eyes of the law. I agree that this is an established principle of the law. But animals are not *merely* property.").

[175] *Id.*

[176] Gary L. Francione & Anna E. Charlton, *Animal Advocacy in the 21st Century: The Abolition of the Property Status of Non-humans*, in ANIMAL LAW AND THE COURTS: A READER 7 (Thompson-West ed., 2008) [hereinafter Francione & Charlton].

animal exploitation rather than its regulation."[177] On the other hand, there are those who argue that ". . . the benefits of changing the legal status of animals from their current position as items of property have been exaggerated."[178] That argument is based around the notion that even if animals are no longer considered property, there is no guarantee that animals will no longer be exploited and that, while ending animals' status as property may represent just one step toward the fulfillment of "an animal rights agenda," it is a fallacy that significant improvements to their well-being cannot be made in the present.[179]

Francione and Charlton "maintain that it is the use of animals and not the treatment of animals that ought to be the primary focus of animal advocates and that this involves the abolition rather than just the regulation of animal exploitation."[180] "Just as the abolition of human slavery required that humans no longer be treated as the chattel property of others, the abolition of non-human slavery requires that animals no longer be treated as the economic commodities of humans."[181] Francione and Charlton argue however, that this is only possible once animals are given a right not to be treated as property, and this can only exist when "a critical mass of society rejects as a moral matter the notion that non-humans are economic commodities for human use."[182] Furthermore, this argument hinges on the idea that as a practical matter, humans must stop bringing "domestic non-humans into existence for human use, including [dogs] brought into existence

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[177] *Id.*

[178] Robert Garner, *Political Ideology & The Legal Status of Animals*, 8 ANIMAL L. 77 (2002) [hereinafter Garner, Legal Status of Animals].

[179] *Id.* at 78.

[180] Francione & Charlton, *supra* note 175, at 22.

[181] *Id.*

[182] *Id.*

to serve as human companions, as well as those [animals that are] produced for … human consumption purposes."[183]

While some may see this argument as extreme, the author sees it as idealistic and utopian at best. Robert Garner has written to oppose the sentiments of Francione and Charlton. Garner has said that the abolition of a property status of all non-humans will not guarantee that these non-humans are no longer exploited.[184] As supportive evidence, Garner has said that wild animals, which are technically and legally not the property of anyone (with exceptions), are still used by humans for a variety of purposes – "hunting for food, tourism, aesthetic pleasure, and so on."[185] Garner's view is that in order to truly improve status for animals, there must be a change in social attitudes toward both humans and animals to ensure that these individuals are treated with respect and compassion.[186]

It is unrealistic to believe that humans will cease to bring non-humans such as dogs into existence, especially in a society that created the dog as a companion to humans in the first place. Even those who consider themselves animal lovers and activists continue to keep dogs at their homes, and those who consider themselves "dog enthusiasts" continue to breed exceptional dogs that they care for greatly. However, it is still possible and necessary to educate humans about the importance of animal welfare. There has been a marked evolution in human awareness toward compassion for animals, and it cannot be said that this has reached a definitive plateau that will level out. The Animal Legal Defense Fund has shown that there are currently 116 Animal Law classes offered in law schools throughout the United States – this demonstrates that people are willing to alter their attitudes and behavior once they learn that animals need human compassion in order for things to change.[187]

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[183] *Id.*

[184] Garner, *supra* note 177, at 91.

[185] *Id.* at 79.

[186] *Id.* at 80.

[187] Animal Legal Defense Fund, Animal Law Courses, http://www.aldf.org/article.php?id=445 (last visited Mar. 6, 2010).

The United States embraces a moral pluralism, where we are free to choose whether or not to eat free-range meat (or not to eat meat at all), free to avoid hunting, to visit zoos, and to resist the use of drugs and cosmetics that are developed by using animals.[188] But personal freedom is a highly valued privilege of living in the United States, and to say that all humans must abstain from eating meat or keeping non-humans for their personal pleasure—while perhaps a solution to animal exploitation—is not consistent with the country's constitutional or political ethos. Francione and Charlton claim that the abolitionist movement is the only possible way, and that other advocates who claim that it is utopian do not have any guidance to support their refutation of the abolitionist ideals.[189] This author believes it is not the most viable alternative. To force Americans, even over a long period of time, to give up on keeping dogs as pets is certainly not something that is likely to come to fruition in the foreseeable future. On the other hand, a measure that offers potentially immediate effects is the education of Americans (and other nations, independently) with regard to the treatment and overpopulation of, specific to this note, dogs.

This author believes that the current efforts of the ASPCA and the HSUS are commendable, and that these groups should be acknowledged rather than chastised for not doing "enough." Considering the state legislative action that has recently been taken by Pennsylvania, Virginia, and others that will soon follow suit, as well as potential federal legislation such as the PUPS Act that will help close the long-standing puppy mill loophole in the AWA, it can be seen that slowly but surely, positive steps are being taken to improve the lives of animals. The common idiom "Rome was not built in one day" applies to the animal welfare movement, especially where companion animals are involved. Great promise has been shown in the increased awareness of humans toward non-human compassion and respect, and the author anticipates that things in the "animal respect" movement will continue to blossom. As already discussed, the key to

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188 Garner, *supra* note 177, at 89.

189 Francione & Charlton, *supra* note 175, at 24.

animal respect and compassion stems from education. Education is an immediate remedial measure that can be taken to increase awareness for animal welfare.

Specifically in the dog dealing industry, education of dog purchasers and citizens will increase awareness of the harms that are being done to dogs in puppy mills and pet stores across the country. This education, in turn, will lead to citizens taking action by communicating with their legislators in such a mass that the problems may no longer be ignored, and laws will eventually be changed, one at a time. Society, as a whole, needs to recognize the problem at issue here. For example, the author has come across fellow law students, all of whom can certainly be considered "educated," who are unaware that the puppies they purchased in pet stores likely came from a mill where their mothers and fathers live in misery. Once these students become aware and become passionate, they can increase the awareness of their families and friends, who in turn can educate those they encounter in the future.

Furthermore, the government, at both state and federal levels, should implement educational programs that help to inform society about the use and abuse of animals. If people become aware, they will in turn learn to respect, and this will potentially lead to a change in societal morals. In the meantime, as laws continue to change and society's awareness increases, those who are already knowledgeable should exercise their right to choose by remaining vegan, avoiding animal exploitation, and avoiding connections to those who abuse animals; perhaps their strength and moral resolve will rub off on more and more humans as attitudes continue to evolve. There is certainly hope for respect and compassion for all non-humans, but only humans can effectively change the status quo, for the better, permanently.

VI. CONCLUSION

The aim of this note has been to make a contribution to the awareness of the legal status of companion animals, specifically dogs. Currently, federal laws that govern man's best friend are archaic and lack fundamental protections for dogs. The relevant law has not evolved with the rest of society and fails to recognize that dogs need greater federal protection. The lack of protection

is exemplified by the gaping loophole in the Animal Welfare Act, which leads to the exploitation of dogs by puppy mills and pet shops that only consider human profit at the expense of animal welfare. Because of this loophole, puppy millers are able to maintain kennels that are unregulated by federal laws, and in turn can keep their breeding stock dogs in deplorable conditions to pump out adorable puppies that they sell at high profit margins. Internet sellers are the greatest beneficiaries, as they can sell their dogs to unsuspecting consumers without any sort of regulation at all. Even more disturbing is that there is also a profound lack of enforcement by the USDA, and the controlling case law has given great deference to the agency to it in its regulatory decisions.

Fortunately, through societal and legislative change, improvements for the welfare of dogs are possible in the future. Support for this position comes from an analysis of current legislation, both at the federal and state levels. At the federal level, the PUPS Bill has become the most promising piece of legislation the AWA has seen in several years. The outlook is optimistic that it will be passed in the near future. Furthermore, amendments to the 2008 Farm Bill have shown promise in improving conditions for animals that are sold over the internet. At the state level, Pennsylvania House Bill 2525 proved to be a great victory for animal welfare organizations, and other states have already followed suit with similar legislation.

While the property status of animals, specifically dogs, was only touched upon briefly, it has been argued that the abolitionist movement of ending all animal use by humans is overly idealistic and may not be possible. While the abolitionist movement may potentially achieve its goals, an approach of educating society such that moral standing of animals is changed is a more realistic and time-appropriate solution. If society is educated such that it begins understand the implications of its actions, perhaps humans can see the error of their ways and change their present attitudes about animals for feelings of compassion, and ultimately, for respect. As a result, the treatment of animals is subject predominantly to moral action, rather than a legal compulsion for abolition of non-human use altogether.

AN ANTITRUST AND PUBLIC POLICY ANALYSIS OF THE NBA'S AGE/EDUCATION POLICY: AT LEAST ONE ROAD LEADS TO ROME

Nitin Sharma[1]

I. INTRODUCTION

On July 16, 2008, recent high school graduate Brandon Jennings made history by becoming the first American high school basketball player to bypass the college-to-pro route in favor of signing a contract to play professionally in Europe in preparation for the 2009 National Basketball Association (NBA) Draft.[2] Jennings was a five-star high school recruit, and most basketball talent scouts regarded him as the number one American high school player.[3] In any year before 2006, the 6-foot 2-inch point guard from Compton, CA likely would have skipped college to enter the NBA Draft as a potential lottery pick, guaranteeing him a multi-million dollar contract regardless of his performance at the professional level.[4] Instead,

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[1] J.D. Candidate, Rutgers School of Law-Camden (2010). The author would like to thank Professor Marc Edelman for his invaluable guidance and insight, as well as his fiancée and family for their unwavering support.

[2] Lance Pugmire, *Prep Star Commits to Italian Team*, L. A. TIMES, July 17, 2008, *available at* http://articles.latimes.com/2008/jul/17/sports/sp-jennings17.

[3] *See* Ronnie Flores, *Brandon Jennings Tops Consensus Player Rankings*, Rivals.com, June 13, 2008, http://basketballrecruiting.rivals.com/content.asp?SID=910&CID=817279.

[4] The NBA Draft is a system whereby NBA teams select eligible players in two rounds, with the teams picking in reverse order of finish from the previous season. The so-called "lottery" teams are those that did not make the playoffs in

the current NBA rules dictate that a player must be at least one year removed from his high school graduating class and at least nineteen years of age to be eligible to enter the NBA Draft.[5] As a result, Jennings was precluded from entering the draft and had to consider college instead.

Most blue-chip high school prospects dealt with the 2006 revision to NBA eligibility guidelines by attending universities with prestigious basketball programs for the minimum requirement of one year before entering the NBA Draft.[6] Jennings initially had the same idea, and he signed a letter of intent to attend the University of Arizona on a basketball scholarship.[7] Unfortunately, Jennings was reportedly unable to qualify academically to join the Arizona team, and therefore had with no viable option but to explore the possibility of playing in a foreign professional league for a year.[8]

Jennings decided to sign a three year, multi-million dollar contract with the Italian professional league's Rome-based Pallacanestro Virtus Roma team, "with buyout considerations that [allowed] Jennings to leave the team and enter the NBA draft when eligible [in 2009]."[9] Why was a young man with copious NBA talent forced to move to another country in order

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the previous season, and are therefore most in need of an immediate talent infusion. A player selected in the first round is guaranteed a three-year contract, with players selected in the lottery slotted to make well over two million dollars over those initial three years.

5 *See* Pete Thamel, *Brandon Jennings Paves Path from High School to European Pro Leagues*, N. Y. TIMES, Oct. 4, 2008, *available at* http://www.nytimes.com/2008/10/05/sports/basketball/05jennings.html.

6 Pugmire, *supra* note 2.

7 *Id.*

8 Zach Berman and Steve Yanda, *Teen Chooses Overseas Path to NBA Goal*, WASHINGTON POST, July 9, 2009, available at http://www.washingtonpost.com/wpdyn/content/article/2008/07/08/AR2008070802714.html. Observers have noted that Jennings' socioeconomic background growing up in an impoverished black family in Compton, CA further influenced his decision to choose a professional salary over a year in college. Mike DeStefano, *Brandon Jennings: Trailblazer or Guinea Pig?*, NBADRAFT.NET, July 19, 2008, http://www.nbadraft.net/node/1527.

9 Pugmire, *supra* note 2.

to make a living utilizing his skills? What would have been the outcome if Jennings had challenged the NBA eligibility rule in court? How could the NBA achieve the goals of the age/education policy in ways less restrictive of an athlete's ability to make a living in his home country?

This Note discusses the NBA's age/education policy, as well as its impact on high school players and their ability to use their talents to earn a living. It also compares the NBA system to the European "academy" approach to developing young talent. Part One of this note discusses the development and current status of the NBA's age/education eligibility policy, and its effects on high school athletes with NBA potential. Part Two explains the legal issues that would emerge from an antitrust challenge to the NBA's policy under Section 1 of the Sherman Antitrust Act. Part Three examines the policy arguments for and against the NBA rule, in part through a comparison between the NBA policy and the approach adopted by many European professional sports teams in respect to the development of their young talent, and further argues for a reversal of the NBA's policy in favor of the European approach.

II. DEVELOPMENT AND IMPACT OF THE NBA POLICY

The latest incarnation of the NBA's Collective Bargaining Agreement (CBA) was implemented in July of 2005.[10] The previous version, implemented in 1999, contained minimal restrictions on the eligibility of high school athletes for the NBA Draft. In the 1999 version, the only restraint on eligibility was contained within Article X(5)(a), which granted eligibility "to those amateur players who have either graduated from high school or who have received the equivalence of a high school diploma."[11] If eligible, an amateur player could "declare" for the

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[10] Michael McCann, *The Reckless Pursuit of Dominion: A Situational Analysis of the NBA and Diminishing Player Autonomy*, 8 U. PA. J. LAB. & EMP. L. 819, 832 (2006).

[11] NBPA.org, Collective Bargaining Agreement, Jan. 6, 1999, NBA-NBPA, Art. X(5)(a), *available at* http://www.nbpa.com/cba/articleX.html#section5.

NBA Draft by renouncing his remaining collegiate eligibility at least 45 days prior to the NBA Draft.[12] Under this previous system, only two players between 1949 and 1994 took the opportunity to jump directly from high school to the NBA, bypassing collegiate athletics.[13]

The NBA Draft landscape experienced a seismic shift in 1995 when Kevin Garnett, a high school basketball prodigy from Chicago's Farragut Academy, entered the NBA Draft and was selected as the fifth overall pick by the Minnesota Timberwolves.[14] Garnett was an instant success as a pro, averaging 10.4 points per game and shooting 49.1% from the field during his rookie season.[15] The immediate success and high profile attained by Garnett were extremely alluring and opened up a floodgate of high school players eager to bypass college for the more immediate riches and fame of the NBA. "Specifically, thirty-six amateur players straight out of high school were eligible to be selected from 1995 to 2004."[16] Only a few of these players were able to approach Garnett's level of success, while the remainder either played at an average level or failed to produce at all, and were subsequently labeled as "draft busts."[17]

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[12] *Id.*

[13] McCann, *supra* note 10, at 832. The two aforementioned players were Daryl Dawkins and Bill Willoughy. While Moses Malone also jumped from high school to pro basketball in that time period, he did not participate in the NBA Draft, but instead was drafted by a rival basketball league—the American Basketball Association (ABA). *See* Michael McCann, *Illegal Defense: The Irrational Economics of Banning High School Players from the NBA Draft*, 3 VA. SPORTS & ENT. L.J. 113, 143-45 (2004).

[14] McCann, *supra* note 10, at 832.

[15] Kevin Garnett: NBA Draft, 1995, http://sports.jrank.org/pages/1604/Garnett-Kevin-NBA-Draft-1995.html (last visited Feb. 25, 2009).

[16] McCann, *supra* note 10, at 832.

[17] Michael McCann, *Illegal Defense: The Irrational Economics of Banning High School Players from the NBA Draft*, 3 VA. SPORTS & ENT. L.J. 113, 143-45 (2004). Many sportswriters of the day successfully implanted in the minds of the NBA and its fans the largely unsubstantiated idea that for every Kevin Garnett or Kobe Bryant (spectacular high school-to-pro successes), there

Partly due to concerns that the influx of fundamentally unsound and immature players was diluting the NBA product, in 1994 NBA Commissioner David Stern proposed the idea of implementing an age floor to bar young high school players from entering the NBA Draft.[18] His wish was granted after the league's CBA expired after the 2005 season and bargaining began during the summer of 2005 for a new CBA between the NBA and the NBA Players' Association (NBAPA). Under the 2005 CBA, "the two negotiating units raised the age floor for draft entry from 18 to at least 19 years of age, effective in the 2006 NBA Draft."[19] As a result, amateur players would no longer be able to jump directly from high school to the NBA, and instead would have to wait at least one year from the date of their high school graduation, with the expectation that this year would be spent playing collegiate basketball.[20]

Among the rationales that Commissioner Stern and NBAPA Executive Director Billy Hunter advanced for the adoption of the new age/education policy were that (1) "amateur players require the 'life experience' bestowed in college in order to handle the pressures of NBA life;" and (2) "NBA teams can better evaluate amateur talent after it has been vetted in the college game."[21] It is worth noting, however, that the NBA's age/education policy also benefits universities with prominent college basketball

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were many more Korleone Youngs, Tony Keys, and Taj McDavids (equally spectacular prep-to-pro disaster stories). *Id.*

[18] Nicholas E. Wurth, *The Legality of an Age Requirement in the National Basketball League After the Second Circuit's Decision in Clarett v. NFL*, 3 DEPAUL J. SPORTS L. & CONT. PROBLEMS 103 (2005).

[19] McCann, *supra* note 10, at 832.

[20] NBPA.com, Collective Bargaining Agreement, July 2005, NBA-NBPA, Art. X(1)(a), *available at* http://www.nbpa.com/cba_articles/article-X.php.

[21] McCann, *supra* note 10, at 832-33. Specifically Commissioner Stern, in a 2003 interview, revealed his opinion that "it's an intelligent business discussion that leads you to conclude that from a societal perspective and from a business perspective, it would be better if the kids came to us older, better rounded, more mature and more marketable." *See* STREET & SMITH'S SPORTS BUSINESS DAILY, *NBA Commish Discusses Possible Age Limit, CBA Negotiations*, *available at* http://www.sportsbusinessdaily.com/article/74769 (last visited Feb. 25, 2009).

programs (such as North Carolina, Kentucky, Kansas, and Duke), which no longer have to worry about recruits bypassing them for the NBA and can earn ticketing, merchandising, and broadcasting revenue while the promising players are with them for at least a year.[22]

Also benefitting from the new rule are veteran NBA players; the very same veteran players who make up the NBAPA, which bargained collectively with the NBA to adopt the new rules. These veteran players have an interest in preventing "superior amateur talent from usurping their employment opportunities."[23] For every drafted rookie that joins the NBA, there is one less roster space available for a veteran player. Therefore, despite the union's public statements to the contrary,[24] these veterans had every reason to support the new age/education policy.

III. ANTITRUST ISSUES

A. ANTITRUST LAW PRINCIPLES

As with many professional sports, players who were prevented from joining the NBA have sued in the past for the right to work in the profession of their choice. However, as of the date of publication, the NBA's current version of the age/education policy has not been challenged in court. Some intriguing legal issues may arise if a potential player brought an

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[22] McCann, *supra* note 17, at 189. McCann points to collegiate coaches' unhappiness "that superstar high school players are bypassing college for the NBA, thereby weakening college basketball's talent pool and diminishing the quality of play." *Id.* In terms of declining broadcasting revenue, McCann notes that "interest in watching the NCAA's championship game--the climax of March Madness--has waned, as the game attracted only 43.5 million viewers in 2002, compared with 46 million in 1997." *Id.*

[23] McCann, *supra* note 10, at 833.

[24] Wurth, *supra* note 18, at 104 (quoting NBAPA Executive Billy King as saying, "What they are trying to do with an age requirement is reduce the number of bites at the apple that a player can take .... [t]he owner's negotiating committee is about money. Their stance that an age requirement helps [players get an education] is a charade.").

antitrust suit against the league, challenging the policy as an illegal group boycott under the Sherman Antitrust Act.

Section 1 of the Sherman Antitrust Act states that "[e]very contract, combination . . . or conspiracy, in the restraint of trade of commerce . . . is declared to be illegal."[25] Section 1 of the Act deals with collusive behavior, including price fixing, wage fixing, and concerted refusals to deal (group boycotts).[26] Included within the category of group boycotts are boycotts in labor markets, "such as the market for professional athletic services."[27] The Supreme Court of the United States has long held that group boycotts are prohibited by law as a matter of public policy.[28] The Court has characterized the danger of concerted action as arising when many entities act together in a way that reduces consumers' freedom of choice, depriving consumers of the opportunity to use their purchasing power to indicate a preference for boycotted products, materials, or labor sources.[29] The Court articulated this public policy argument most clearly in the 1914 case *Eastern State Retail Lumber Dealers' Association v. United States*.[30]

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[25] 15 U.S.C. § 1 (2000).

[26] PAUL WEILER & GARY ROBERTS, SPORTS AND THE LAW 145 (3d ed. 2004).

[27] Marc Edelman & C. Keith Harrison, *Analyzing the WNBA's Mandatory Age/Education Policy from a Legal, Cultural, and Ethical Perspective: Women, Men, and the Professional Sports Landscape*, 3 NW J. L. & SOC. POL'Y 1, 35 (2008).

[28] *See, e.g.*, Klor's Inc. v. Broadway-Hale Stores Inc., 359 U.S. 207, 212 (1959) ("Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category. They have not been saved by allegations that they were reasonable in the specific circumstances . . . .").

[29] Edelman & Harrison, *supra* note 27, at 13.

[30] 234 U.S. 600, 614 (1914) (quoting Grenada Lumber Co. v. Mississippi, 217 U.S. 433 (1910)) ("An act harmless when done by one may become a public wrong when done by many acting in concert, for it then takes on the form of a conspiracy, and may be prohibited or punished, if the result be hurtful to the public or to the individual against whom the concerted action is directed.").

However, it has long been understood that the Sherman Act is only concerned with unreasonable restraints of trade.[31] As explained in one scholarly commentary:

> Because the rules of [most professional sports leagues] are clearly the product of concerted action among their member teams, the principal antitrust issue in bringing a challenge to those rules would be whether they unreasonably restrain trade. Given that, collaborations, such as the NFL and the NBA, are necessary for the production of their product, many of the Leagues' restrictions generally do not violate antitrust laws.[32]

Many courts have held professional sports clubs within a league to be part of a "joint venture," where cooperation is essential to the success of their product.[33]

To prove a violation of the Sherman Act, courts initially conduct a prima facie review of the defendant's conduct by applying one of the Supreme Court's three sanctioned tests.[34] First, the Court uses a *per se* test where the defendant's acts are found to be so pernicious that they have no redeeming virtue.[35] In these circumstances, the court will presume a prima facie case of an antitrust violation without further investigation of the defendant's alleged justifications for those business practices.[36] The *per se* rule is "a bright line rule that facilitates legal certainty and promotes judicial economy."[37] The purpose of the

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31 *See* Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918).

32 Jack N.E. Pitts, *Why Wait?: An Antitrust Analysis of The National Football League and National Basketball Association's Draft Eligibility Rules*, 51 HOW. L.J. 433, 453 (2008).

33 Smith v. Pro Football, Inc., 593 F.2d 1173, 1179 (D.C. Cir. 1978).

34 Edelman & Harrison, *supra* note 27, at 13.

35 *Id.* at 13 (citing N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 (1940)).

36 *Id.*

37 *Id.*

per se rule is to avoid "difficult factual inquiries and subjective policy judgments" which most courts have recognized are "more appropriate for legislative, rather than judicial, determination."[38] Interestingly, many

> courts have consistently refused to invoke the [group] boycott Per se rule where, given the peculiar characteristics of an industry, the need for cooperation among participants necessitated some type of concerted refusal to deal, or where the concerted activity manifested no purpose to exclude and in fact worked no exclusion of competitors.[39]

This trend militates against the use of the *per se* test in industries such as sports leagues, where cooperation among clubs is necessary for survival of the league. Courts fear that use of the *per se* rule "risks sweeping reasonable, pro-competitive activity within a general condemnation, and a court will run this risk only when it can say, on the strength of unambiguous experience, that the challenged action is a 'naked restraint[ ] of trade with no purpose except stifling of competition.'"[40]

The *per se* rule is contrasted by Rule of Reason analysis, under which a court conducts a full economic investigation to determine whether the accused business practice is legal; this standard is applied when the acts in question are not as clearly

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[38] Linseman v. World Hockey Ass'n., 439 F. Supp. 1315, 1320 (D. Conn. 1977).

[39] Smith v. Pro Football, Inc., 593 F.2d 1173, 1180 (D.C. Cir. 1978); Hatley v. Am. Quarter Horse Ass'n, 552 F.2d 646, 652-53 (5th Cir. 1977) (finding no *per se* illegal group boycott in association's refusal, in accordance with its regulation, to register plaintiff's horse: "[i]n an industry which necessarily requires some interdependence and cooperation, the *per se* rule should not be applied indiscriminately"); Worthen Bank & Trust Co. v. Nat'l BankAmericard, Inc., 485 F.2d 119, 126-28 (8th Cir. 1973), *cert. denied*, 415 U.S. 918 (1974) (refusing to invoke boycott per se rule where "product" represented by bank credit card "requires cooperative relationships among the member banks" and it would be impossible for any bank to issue such card on its own).

[40] *Smith*, 593 F.2d at 1181 (citing White Motor Co. v. United States, 372 U.S. 253, 263 (1963)).

harmful to consumers.[41] Rule of Reason analysis is conducted by searching the defendant's conduct for the following factors, all of which are necessary to find a prima facie violation: (1) market power, (2) anticompetitive effects that exceed any pro-competitive justifications, and (3) harm.[42] Under the Rule of Reason analysis, courts look to "the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed."[43] If the restraint seems to have justifiable business purposes which tend to promote competition, then the "anticompetitive evils" of the challenged practice must be carefully balanced against its "pro-competitive virtues" to ascertain whether the former outweigh the latter.[44]

In between the *per se* test and the Rule of Reason lies a "quick look" or "truncated" Rule of Reason test, which is applied when a court presumes that the business practices at issue are neither completely pernicious nor completely ambiguous.[45] Under this test, the court considers economic effects based on merely "a rudimentary understanding of economics."[46] The test is properly used when "the great likelihood of anticompetitive effects can easily be ascertained."[47] It has become regarded as particularly useful in the sports context, because "courts may avoid automatically rejecting a league regulation of player activities, but nevertheless examine its anticompetitive effects with heightened scrutiny."[48]

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41 Edelman & Harrison, *supra* note 27, at 13.

42 *Id.* (citing Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 689 (1978)).

43 *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 692.

44 *Smith*, 593 F.2d at 1183; Milton Handler, *Changing Trends in Antitrust Doctrines: An Unprecedented Supreme Court Term-1977*, 77 COLUM. L. REV. 979, 983 (1977).

45 Edelman & Harrison, *supra* note 27, at 13.

46 *Id.* (citing Cal. Dental Ass'n. v. FTC, 526 U.S. 756, 763-64, 770 (1999)).

47 *Cal. Dental Ass'n*, 526 U.S. at 770.

48 Michael A. McCann & Joseph S. Rosen, *Legality of Age Restrictions in the NBA and the NFL*, 56 CASE W. RES. L. REV. 731, 736 (2006).

The current trend in courts is to move away from the *per se* test and its instant presumption of antitrust violations, towards either the quick-look test or Rule of Reason analysis.[49] "The shift has emerged as a result of a changing understanding of industrial economics, which has cast doubt on traditional notions about anticompetitive effects."[50]

If a prima facie violation can be made out by any of the three tests to produce a preliminary finding of an antitrust violation, a defendant may still be able to rebut this finding by employing one of antitrust law's affirmative defenses or exemptions.[51] The most common defense utilized in sports leagues is the non-statutory labor exemption, which shields from antitrust scrutiny any conduct that is arrived at via the collective bargaining process.[52] The exemption is based on the principle that employees are better off negotiating collectively, rather than individually, especially with regard to wages, hours, and working conditions.[53] For this reason, courts have chosen to apply labor law, rather than antitrust law, to circumstances where the allegedly anti-competitive conduct in question arises from collective bargaining.[54]

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49 Daniel A. Crane, *Rules Versus Standards in Antitrust Adjudication,* 64 WASH & LEE L. REV. 49, 57 (2007); *see also* Marc Edelman, *Clarett's Run to Court No Sure Score*, STREET & SMITH'S SPORTS BUS. J., Sept. 22-28, 2003, at 32 ("since the middle 1980s, courts have moved away from per se rulings where concerted refusals to deal involve professional industries. Instead, modern courts prefer full-blown 'rule of reason' analysis. . . .").

50 Edelman & Harrison, *supra* note 27, at 14.

51 *Id.* at 42 (citing PHILIP AREEDA & LOUIS KAPLOW, ANTITRUST ANALYSIS: PROBLEMS, TEXT, AND CASES 106-22 (Aspen Publishers 1997).

52 McCann & Rosen, *supra* note 48, at 737.

53 *Id.* at 738.

54 Edelman & Harrison, *supra* note 27, at 14. *See also* NLRB v. Am. Nat'l Ins. Co., 343 U.S. 395 (1952). Edelman notes that the Supreme Court first applied the non-statutory labor exemption in *United Mine Workers of America v. Pennington*, where it stated that "in order to effectuate congressional intent, collective bargaining activity concerning mandatory subjects of bargaining under the Labor Act is not subject to the antitrust laws." 381 U.S. 676, 710 (1965).

B. THE NON-STATUTORY LABOR EXEMPTION

As indicated by its name, the non-statutory labor exemption arises not from Congressional legislation but from judicial inferences.[55] "The interaction of [antitrust laws] and federal labor legislation is an area of law marked more by controversy than clarity,"[56] but courts have deciphered the scope of the exemption "from federal labor statutes, which set forth a national labor policy of favoring free and private collective bargaining, which require good faith bargaining [with respect to mandatory terms and conditions of employment], and which delegate related rulemaking and interpretive authority to the National Labor Relations Board."[57] The exemption thus exists both to bolster the authority of the National Labor Relations Board (NLRB)[58] and to allow "meaningful collective bargaining to take place. . . ."[59] It further serves to limit "an antitrust court's authority to determine, in the area of industrial conflict, what is or is not a 'reasonable' practice. It thereby substitutes legislative and administrative labor-related determinations for judicial antitrust-related determinations as to the appropriate legal limits of industrial conflict."[60] The result is to avoid a situation in which groups of employers and employees are required to bargain together, while at the same time they are forbidden from acting in concert in ways that might restrict competition in order to make their bargaining successful.[61]

The issue of the exemption's scope has resulted in a split among the circuit courts of appeals as to how broadly the exemption applies. In *Mackey v. National Football League*, the

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55 Edelman & Harrison, *supra* note 27, at 14.

56 Wood v. Nat'l Basketball Ass'n., 809 F.2d 954, 959 (2d Cir. 1987).

57 Edelman & Harrison, *supra* note 27, at 14 (citing Brown v. Pro Football, Inc., 518 U.S. 231, 236 (1996)).

58 *Id.*

59 *Brown*, 518 U.S. at 237.

60 *Id.*

61 *Id.*

Eighth Circuit held that the non-statutory labor exemption applies only where an alleged restraint of trade: (1) involves mandatory subjects of bargaining, (2) primarily affects the parties involved, and (3) is reached through bona-fide, arm's-length bargaining (the Mackey Test).[62] On the other hand, the Second Circuit gave the non-statutory labor exemption a broader reach in *Clarett v. National Football League*, where it held that the exemption applies most broadly where the alleged antitrust injuries affect employees rather than competitors (the Clarett Test).[63] Because the Mackey Test is much narrower than the Clarett Test, the NBA's age/education policy is slightly more likely to be subjected to antitrust scrutiny if the Mackey Test is applied.[64] "Indeed, given the remarkable success of NBA players who have bypassed college, the absence of equivalent employers to NBA teams, and the inflexible nature of an arbitrary age floor, the NBA would likely lose any challenge if antitrust scrutiny were applied."[65]

C. NOTABLE ANTITRUST CASES IN SPORTS

The early history of cases involving players challenging a sports league's age/education policy shows that many of the policies were found to be illegal based on the *per se* rule and a lack of applicable affirmative defenses or exemptions.[66] The first such case, *Denver Rockets v. All-Pro Management Inc.*, [67] involved an NBA rule mandating that all players seeking to join the league wait at least four years after completing their high

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[62] Mackey v. Nat'l Football League, 543 F.2d 606, 614 (8th Cir. 1976). The "mandatory subjects of bargaining" mentioned primarily include wages, hours, and working conditions. *Id.* at 615.

[63] Clarett v. Nat'l Football League, 369 F.3d 124, 131, 134 (2d Cir. 2004), *cert. denied*, 544 U.S. 961 (2005).

[64] Edelman & Harrison, *supra* note 27, at 15.

[65] McCann & Rosen, *supra* note 48, at 738.

[66] Edelman & Harrison, *supra* note 27, at 15.

[67] 325 F. Supp. 1049 (C.D. Cal. 1971).

school education before applying for the NBA draft.[68] After the rule was struck down, the NBA moved for a stay of the ruling, which the Ninth Circuit Court of Appeals granted,[69] but which was ultimately overturned by the Supreme Court.

The plaintiff in *Denver Rockets* was nineteen-year-old Spencer Haywood, an athletically gifted but impoverished young African-American male.[70] Haywood challenged the NBA eligibility rule as an unreasonable restraint of trade, arguing that he was entitled to a hardship exemption from the policy due to the dire economic straits of his family, and that the policy prevented him from earning a living by practicing his chosen profession.[71]

The District Court for the Central District of California applied the *per se* rule, granting Haywood summary judgment while finding multiple harms emerging from the NBA's restriction.[72] The NBA offered (and the court rejected) three defenses: financial necessity, cost effectiveness, and a desire to promote advanced education.[73] While the education policy was

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[68] *Denver Rockets*, 325 F. Supp. at 1051-57.

[69] Edelman & Harrison, *supra* note 27, at 15 (citing Denver Rockets v. All-Pro Mgmt., Inc., No. 71-1089, 1971 WL 3015 (9th Cir. Feb. 16, 1971), *rev'd sub nom.* Haywood v. Nat'l Basketball Ass'n, 401 U.S. 1204, 1206-07 (1971)).

[70] *See* Edelman & Harrison, *supra* note 27, at 15.

[71] *Id.*

[72] *See Denver Rockets*, 325 F. Supp. at 1058-61. Specifically, the Court found that

> The harm resulting from a "primary" boycott such as this is threefold. First, the victim of the boycott is injured by being excluded from the market he seeks to enter. Second, competition in the market in which the victim attempts to sell his services is injured. Third, by pooling their economic power, the individual members of the NBA have, in effect, established their own private government. Of course, this is true only where the members of the combination possess market power in a degree approaching a shared monopoly. This is uncontested in the present case.

Id.

[73] *Id.* at 1066.

found to be "commendable," the court nonetheless determined that "the goals of promoting education may not 'override the objective of fostering economic competition which is embodied in the antitrust laws.'"[74] Further, the court looked unfavorably upon the "inflexible nature and arbitrariness of the rule, for it failed to provide an exception for unique talent or financial circumstance. In other words, a blanket age floor to draft entry comprised illegal per se activity."[75] Ironically, today Spencer Haywood "is remorseful that this decision paved the way for high school athletes to jump straight to the NBA," and has voiced support for the NBA's current version of the age/education policy.[76]

The next major challenge to a professional sports league's age/education policy came in *Linseman v. World Hockey Ass'n*,[77] where the District Court for the District of Connecticut found the facts of the case to be "indistinguishable from the Spencer Haywood case."[78] Kenneth Linseman was a nineteen-year-old amateur Canadian hockey player who sued the World Hockey Association (WHA), alleging that the league's ban on players under the age of twenty violated Section 1 of the Sherman Act.[79] The court found that the WHA rule had no valid purpose and constituted a *per se* illegal refusal to deal.[80] In line with the *Haywood* court's reasoning, the *Linseman* court found that antitrust law did not allow a sports league's purported

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74 Edelman & Harrison, *supra* note 27, at 16 (citing *Denver Rockets*, 325 F. Supp. at 1066).

75 McCann & Rosen, *supra* note 48, at 739.

76 Wurth, *supra* note 18, at 111; s*ee also* KRT, *Spencer Haywood on Clarett: 'Stick it out' at Ohio State*, THE EAST CAROLINIAN, Sept. 23, 2003, http://media.www.theeastcarolinian.com/media/storage/paper915/news/2003/09/23/UndefinedSection/Spencer.Haywood.On.Clarett.stick.It.Out.At.Ohio.State-2207722.shtml

77 439 F. Supp. 1315 (D. Conn. 1977).

78 *Id*. at 1326.

79 Edelman & Harrison, *supra* note 27, at 16.

80 *Linseman*, 439 F. Supp at 1321-23, 1325-26.

economic necessity to be used to circumvent the Sherman Act.[81] Further, the court in *Linseman* ruled that the "arbitrary basis of basing a restriction completely on age without regard to talent was a factor in determining its illegality as a group boycott."[82]

Interestingly, while the *Linseman* court did invalidate the WHL's age restriction, it also recognized a narrow exception that could be granted to group boycotts that demonstrated three requirements.[83] Under this "Silver" exception, a boycott that would otherwise be declared *per se* unlawful could be saved by showing that the following three requirements were present:

> (1) a legislative mandate for self-regulation 'or otherwise,' (2) the collective action is intended to (a) accomplish an end consistent with the policy justifying self-regulation, (b) is reasonably related to that goal, and (c) is no more extensive than necessary; (3) the association provides procedural safeguards which assure that the restraint is not arbitrary and which furnishes a basis for review.[84]

Another age/education policy was struck down in *Boris v. United States Football League*, where Robert Boris challenged the eligibility policy of the United States Football League (USFL).[85] This policy required that prospective USFL players

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[81] Edelman & Harrison, *supra* note 27, at 16. The court also noted that the "[e]xclusion of traders from the market by means of combination or conspiracy is so inconsistent with the free-market principles embodied in the Sherman Act that it is not to be saved by reference to the need for preserving the collaborators' profit margins." *Linseman*, 439 F. Supp. at 1322 (quoting United States v. Gen. Motors Corp., 384 U.S. 127, 146 (1966)).

[82] Nicholas E. Wurth, *The Legality of an Age-Requirement in the National Basketball League After the Second Circuit's Decision in Clarett v. NFL*, 3 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 103, 108 (2005).

[83] *Linseman*, 439 F. Supp. at 1321 (citing Silver v. N.Y. Stock Exch., 373 U.S. 341 (1963)).

[84] Wurth, *supra* note 18, at 108.

[85] Edelman & Harrison, *supra* note 27, at 17 (citing Boris v. U.S. Football League, 1984-1 Trade Cas. (CCH) ¶ 66,012, at 68,461 (C.D. Cal. Feb. 28, 1984)).

exhaust all of their college eligibility before entering the draft.[86] While the parties ultimately reached a settlement and dismissed the case with prejudice, the court (in its opinion approving the terms of the settlement) overturned the USFL age/education policy, which it found to be *per se* illegal.[87]

In the most recent (and most significant) challenge to a professional sports league's age/education policy, *Clarett v. National Football League*,[88] the Second Circuit Court of Appeals upheld the NFL's age/education policy because it found the policy to be shielded from antitrust scrutiny by the non-statutory labor exemption.[89] At the time he brought his case, Maurice Clarett was a twenty-year-old college sophomore running back from Ohio State University who sought to enter the NFL draft.[90] The NFL had in place a policy that required any prospective NFL player to wait at least three years from his high school graduation date before entering the NFL draft.[91] Clarett had grown up in a "financially hard-pressed family" in nearby Youngstown, Ohio,[92] and over the course of his freshman year was named the Big Ten Freshman of the Year, was voted the best running back in college by *The Sporting News*, and led Ohio State to a national championship over the University of Miami.[93] Clarett's presence and play at Ohio State were so impressive that his team jersey "rapidly sold-out of stores-a great benefit to his school, which received the revenue from these sales, though Clarett, as an NCAA student-athlete, received nothing."[94]

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86 Edelman & Harrison, *supra* note 27, at 17.

87 Boris, 1984-1 Trade Cas. (CCH) ¶ 66,012, at 68,461.

88 369 F.3d 124 (2d Cir. 2004), *cert. denied*, 544 U.S. 961 (2005).

89 Edelman & Harrison, *supra* note 27, at 17.

90 *Id.*

91 *Id.*

92 McCann & Rosen, *supra* note 48, at 740.

93 Edelman & Harrison, *supra* note 27, at 17.

94 McCann & Rosen, *supra* note 48, at 740.

Seeking to enter the league after only two years of college, Clarett challenged the NFL's age/education policy as an antitrust violation—specifically claiming that the rule was an unreasonable restraint of trade under Section 1 of the Sherman Antitrust Act. [95] Clarett anticipated that he would be drafted in either the first or second round of the NFL draft, entitling him to a bonus of at least one million dollars,[96] and he "found it profoundly unfair that others could profit so considerably from his talents, while he and his family remained impoverished."[97]

At the district court level, Clarett argued that the NFL age eligibility rule "failed the Mackey Test on each of its three prongs, and thus warranted antitrust scrutiny."[98] Clarett first claimed that the rule affected primarily him and other similarly situated athletes who were excluded from the bargaining unit, thus failing the Mackey Test requirement that the restraint primarily affect only the parties to the collective bargaining unit. In fact, Clarett argued, the rule did not "concern the rights of any NFL players or draftees; rather, it concerns only those individuals who, because of it, cannot become NFL players or draftees. For that reason, Clarett asserted, the rule should be distinguished from rules designed to promote competition, such as a salary cap or drug testing policies since they, unlike the age eligibility rule, obviously concern parties to the collective bargaining agreement."[99]

Clarett next argued that the NFL policy did not concern a mandatory subject of collective bargaining—another prong of the Mackey Test.[100] Clarett's reasoning was that "unlike the NFL draft itself, which governs the method by which players

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95 *Id.* at 741.

96 See Dave Anderson, *Sports of the Times: For Clarett, How Early Equals How Much*, N.Y. TIMES, Sept. 26, 2003, at 3 (discussing the signing bonuses of players picked during the 2003 draft).

97 McCann & Rosen, *supra* note 48, at 741.

98 *Id.*

99 *Id.*

100 McCann & Rosen, *supra* note 48, at 742.

enter the bargaining unit, the NFL age eligibility rule precludes certain nonemployees from applying for employment."[101] He claimed that neither the jobs nor wages of veteran players were at issue under the NFL rule; "Clarett would have simply took [sic] the place of another draft eligible player, and, like that player, Clarett would have ultimately competed against a veteran player for a roster spot."[102] Therefore, Clarett was not challenging the legality of the draft itself as a group boycott, but rather he was simply asserting that "a rule that precludes nonemployees from applying for employment does not concern a mandatory subject of collective bargaining."[103]

Clarett's final claim was that the NFL rule was neither the result of collective bargaining nor bona fide arm's-length bargaining.[104] The rule was not contained within the Collective Bargaining Agreement between the NFL Players Association (NFLPA) and the NFL Management Council (NFLMC).[105] Rather, the rule seems to have arisen from a "non-collectively bargained memorandum unilaterally issued by the NFL commissioner to teams in 1990-three years before the CBA-but, tellingly, not issued to the NFLPA and only of concern to the 1990 NFL draft."[106]

In opposition, the NFL offered three defenses that it claimed protected the age/education policy: (1) that the non-statutory labor exemption protected the rule from antitrust scrutiny because it was the product of collective bargaining between the NFL and the players' union, (2) that Clarett had no standing to sue under antitrust laws, and (3) that the policy withstood Rule

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[101] *Id.*

[102] *Id.*

[103] *Id.*

[104] *Id.* at 743.

[105] *See* NFL MGMT. COUNCIL & NFL PLAYERS ASS'N, COLLECTIVE BARGAINING AGREEMENT 2006-2012 (1998), *available at* http://nflplayers.com/images/fck/NFL%20COLLECTIVE%20BARGAINING%20AGREEMENT%202006%20-%202012.pdf

[106] McCann & Rosen, *supra* note 48, at 743.

of Reason analysis based on its alleged pro-competitive effects.[107]

The court ruled in favor of Clarett at the district court level, granting him summary judgment and striking down the NFL's age/education policy. Using the quick look test, the court analyzed the effects of the rule and determined that no further inquiry was required, as "Clarett [had] alleged the very type of injury . . . that the antitrust laws are designed to prevent."[108] In response to the NFL's argument that Clarett lacked standing to sue the NFL, the district court noted that "his injury flow[ed] from a policy that excludes all players in his position from selling their services to the only viable buyer—the NFL."[109] The district court further held that the non-statutory labor exemption did not protect the NFL policy from antitrust scrutiny because it met none of the three prongs of the Mackey Test—the policy was not a mandatory term or condition of collective bargaining; it did not primarily affect either the NFL teams or the NFLPA members; and it was not reached between the NFL teams and the NFLPA through bona-fide arm's length bargaining.[110]

The NFL promptly appealed the district court's decision to the Second Circuit Court of Appeals, where the lower court's ruling was reversed. The Second Circuit first disagreed with the district court's contention that none of the prongs of the Mackey Test had been met, then further asserted that the Mackey Test was not even necessarily controlling in the Second Circuit when assessing the applicability of the non-statutory labor exemption

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[107] Edelman & Harrison, *supra* note 27, at 17-18.

[108] Clarett v. Nat'l Football League, 306 F. Supp. 2d 379, 382 (S.D.N.Y. 2004). In its application of the quick look test, the district court held: (1) the rule created obvious anticompetitive effects by limiting access to all players who failed to satisfy the age/education policy; (2) the rule failed to promote economic competition in the labor market; and (3) even if the NFL had legitimate pro-competitive arguments, there existed less restrictive alternatives to the age/education policy. *See id.* at 406-410.

[109] *Id.* at 382.

[110] Edelman & Harrison, *supra* note 27, at 18.

to a restraint imposed by a professional sports league.[111] The court distinguished *Clarett* from the post-*Mackey* cases on the basis that the Mackey Test was inapplicable in cases where "the plaintiff complains of a restraint upon a unionized labor market characterized by a collective bargaining relationship with a multi-employer bargaining unit."[112]

In laying out its own line of reasoning, the Second Circuit emphasized that the paramount task in determining whether to subject a restraint to antitrust scrutiny was to assess "whether subjecting the NFL's eligibility rules to antitrust scrutiny would 'subvert fundamental principles of . . . federal labor policy.'"[113] Making this assessment would in turn depend on identifying the relevant labor policies at issue. The court found the presence of a collective bargaining relationship to be particularly important, ruling that such a relationship allowed the NFL teams to "engage in joint conduct with respect to the terms and conditions of players' employment as a multi-employer bargaining unit without risking antitrust liability."[114] The court felt that imposing antitrust liability in this case would undermine the labor law policies that had been implemented to help players and teams come to fruitful agreements concerning wages, hours, and working conditions.[115]

In addition to determining that blocking Clarett's claim was necessary to uphold the fundamental principles of labor policy, the Second Circuit also addressed and refuted Clarett's arguments for striking down the NFL rule. In response to Clarett's first claim that the rule did not concern a mandatory subject of collective bargaining, the court found that "the

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[111] Wurth, *supra* note 18, at 118. Interestingly, the Second Circuit rejected the Mackey Test even though it had been regularly applied in the Second Circuit before, and only cursorily applied it to the facts in *Clarett*. *See* McCann & Rosen, *supra* note 48, at 744.

[112] Wurth, *supra* note 18, at 118-19 (quoting Clarett v. NFL, 369 F.3d 124 (2d Cir. 2004)).

[113] *Clarett*, 369 F.3d at 138 (quoting *Wood v. NBA*, 809 F.2d at 959).

[114] Wurth, *supra* note 18, at 120 (quoting *Clarett*, 369 F.3d at 134).

[115] *Id.*

eligibility rules for the draft represent a quite literal condition for initial employment and for that reason alone might constitute a mandatory bargaining subject."[116] The court also discussed the "unusual economic imperatives" of professional sports, which make rules that ordinarily would not appear to address wages, hours, or working conditions, but in the context of sport would actually pertain to those mandatory subjects of collective bargaining.[117] Because of the complex nature of the scheme by which individual salaries are set (which is based around the restraint on entry into the market imposed by the eligibility rules of the league), those rules cannot be viewed in isolation, but instead must be viewed in conjunction with other aspects of the collective bargaining agreement. The Second Circuit thus found that the rule did (at least indirectly) concern a mandatory subject of collective bargaining.

The court also refuted Clarett's next claim—that because he was not a party to the collective bargaining agreement and yet the rule affected him, then the rule failed the Mackey Test prong in that it did not primarily affect only the parties to the collective bargaining agreement. The court declared that merely because rules "work a hardship on prospective rather than current employees does not render them impermissible."[118] The court analogized Clarett to other prospective employees "who [are] confident that [they have] the skills to fill a job vacancy but [do] not . . . meet the requisite criteria that have been set," and rejected Clarett's argument.[119]

As to Clarett's final claim that the NFL's age/education requirement was not collectively bargained for, the Second

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[116] *Clarett*, 369 F.3d at 139 (citing Caldwell v. Am. Basketball Ass'n., 66 F.3d 523 (2d Cir. 1995)).

[117] Wurth, *supra* note 18, at 120.

[118] *Clarett*, 369 F.3d at 140 (citing *Wood*, 809 F.2d at 960).

[119] *Id.* The court also asserted that "the NFL and its players union can agree that an employee will not be hired or considered for employment for nearly any reason whatsoever so long as they do not violate federal laws such as those prohibiting unfair labor practices or discrimination." *Id.* Furthermore, even if a violation was present, it must be brought under a labor law claim, and not under antitrust law. *See* Wurth, *supra* note 18, at 121.

Circuit was able to refute it on two grounds. First, the court found that the rule was included in both the NFL Constitution and its bylaws, and was well known to the union. Therefore, "because the rule was a mandatory subject of bargaining the union could have forced the NFL to bargain over the eligibility rule if it wanted to change the rule."[120] Secondly, during the collective bargaining process, the union agreed to waive any challenges to the Constitution or bylaws, so they were bound by those rules for the duration of the collective bargaining agreement.[121]

In sum, the *Clarett* decision resulted from the Second Circuit's belief that federal labor policy outweighed antitrust concerns.[122] The outcome was an alternative to the Mackey Test, wherein the non-statutory labor exemption may save an anticompetitive restraint so long as: (1) the alleged restraint involves a mandatory subject of collective bargaining, and (2) the exemption's application would "ensure the successful operation of the collective bargaining process" (The Clarett Test).[123]

In examining the potential outcomes of an antitrust challenge to the current NBA policy, a thorough analysis requires examination of the policy under both the Mackey and Clarett tests. Unfortunately for high school players, the NBA is likely to prevail under both tests. Under *Mackey*, to be saved by the non-statutory labor exemption, the proposed rule must concern a mandatory subject of collective bargaining, must primarily affect only the parties of the collective bargaining relationship, and must be the subject of bona fide arm's-length bargaining.[124] Rules governing drafts have been held to be to mandatory subjects of collective bargaining because they dictate

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120 Wurth, *supra* note 18, at 122.

121 *Id.*

122 *Id.*

123 Edelman & Harrison, *supra* note 27, at 18 (citing *Clarett*, 369 F.3d at 143).

124 *Mackey*, 543 F.2d at 614.

conditions of employment,[125] such as location; likewise, rules restricting the eligibility of players wishing to enter the draft have also been held to be mandatory subjects.[126] For these reasons, a court is likely to find that the first prong of the Mackey Test is met by the NBA's rule.

Under the second prong (the restraint must primarily affect parties to the collective bargaining agreement), a plaintiff would likely argue that he is not yet a member of the union, and thus is not a party to the collective bargaining agreement and that "because he, and others in his position, are negatively affected by the rule, the age restriction affects more than those primarily in the bargaining relationship."[127] However, this argument has been refuted in several cases,[128] and it is understood that all prospective players in a professional sports league are considered part of the collective bargaining relationship. Therefore, the NBA rule would likely pass the second prong of Mackey as well.

The final prong of the Mackey Test (where the NFL failed in *Mackey*) is that the restraint must be the product of bona-fide arm's length collective bargaining. It is clear in the case of the NBA rule that this age/education policy was collectively bargained for. It appears in the NBA Collective Bargaining Agreement[129] and was the product of arms-length negotiations between the NBAPA and the NBA.[130] It is therefore likely that the NBA's age/education policy would pass muster under all

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[125] *See Wood*, 809 F.2d at 962.

[126] *See Clarett*, 369 F.3d at 142.

[127] Wurth, *supra* note 18, at 126.

[128] *See Clarett*, 369 F.3d 124 (discussed *supra*); *Mackey*, 543 F.2d 606 (discussed *supra*); and Zimmerman v. Nat'l Football League, 632 F. Supp. 398, 405 (D.D.C. 1986) (finding that not only present but also future players for a professional sports league are parties to the bargaining relationship).

[129] *See* NBAPA, Collective Bargaining Agreement, art. X, § 1 (2005), *available at* http://www.nbpa.com/cba_articles/article-X.php#section1.

[130] *See* Press Release, National Basketball Association, *NBA, NBAPA Reach Agreement in Principle on New Collective Bargaining Agreement*, (June 22, 2005), *available at* http://www.nba.com/news/cba_050621.html.

three prongs of the Mackey Test and would therefore avoid antitrust scrutiny.

The Clarett Test is even friendlier to leagues seeking use of the non-statutory labor exemption. Under the first prong, the restraint must concern a mandatory subject of collective bargaining. For the reasons discussed above, the NBA's age/education policy would most likely meet this requirement. Secondly, the restraint must "ensure the successful operation of the collective bargaining process."[131] This requirement reflects the Second Circuit's concern that permitting antitrust scrutiny of a collectively bargained for rule might subvert federal labor policy.[132] Because a court following *Clarett* would want to defer to the collective bargaining process (and ultimately to federal labor policy), it would most likely find that subjecting the age/education policy to antitrust scrutiny would undermine the bargaining process through which the rule arose in the first place. Therefore, the NBA's age/education policy is likely to enjoy the protection of the non-statutory labor exemption under both the Mackey and Clarett Tests.

IV. WEIGHING OF INTERESTS AND COMPARISON TO EUROPEAN SYSTEMS

A. WHOM DOES THE CURRENT SYSTEM REALLY BENEFIT?

To truly understand the debate over the current NBA age/education policy, one must consider the competing interests at play when each of the interested parties makes a case for or against the policy. One major argument against the policy is that everyone seems to derive some benefit except for the player: (1) individual NBA teams get at least an extra year to scout potential draft selections in college & make better investments on the high salaries they will pay; (2) the NBA gets the benefit of players who may have already made a big splash in the college game, and consequently reaps the benefit of the

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131 *Clarett*, 369 F.3d at 143.

132 Wurth, *supra* note 18, at 119, 122.

players' prior public exposure; and (3) universities enjoy highly talented players who are forced to play college basketball for a minimum of one year, raking in millions from ticket sales and tournament, broadcasting and merchandising revenue, while using the players' success as a recruiting tool to attract future talent; while (4) the individual players themselves have to risk catastrophic injury during the year before they can play in the NBA, which could ultimately cost them the multi-million dollar contracts that they might have otherwise secured had they gone straight to the professional level.

Of course, there are beneficial aspects to the policy as well: players get the chance to test their talent against better competition while in college and can therefore make a wiser decision about whether or not to go pro; also, the players gain exposure to an environment of higher learning, and are perhaps encouraged to pursue academics as a fallback or alternative to athletics in the event of a career-ending injury or retirement.

One commonly invoked advantage to the NBA rule is that it affords professional teams another year to evaluate and scout young players.[133] Because teams are making multi-million dollar investments in players and professional athletes are routinely under intense media scrutiny, NBA scouts must analyze every facet of a potential draftee, including on-the-court skills, demeanor, and IQ, as well as how a player deals with his fame off the court.[134] A team must look not only at whether the player can physically compete on the floor, but how he will interact within society, and whether he will be an off-the-court distraction.[135]

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[133] *See* John Paulsen, *Brandon Jennings and the NBA's Age-Limit Rule*, THE SCORES REPORT, July 17, 2008, http://www.scoresreport.com/2008/07/17/brandon-jennings-and-the-nbas-age-limit-rule/.

[134] *See* Jim Eichenhofer, *Eight Things to Know About NBA Scouting*, Hornets.com, May 30, 2008, http://www.nba.com/hornets/news/Hornets_Insider_Eight_Things_-272894-2057.html.

[135] *Id.* For an account of high school-to-pro draftee DeShawn Stevenson's legal troubles, *see* Brian Melley, *NBA Player Surrenders on Rape Charges*, THE ST. PETERSBURG TIMES, June 22, 2001, *available at* http://www.sptimes.ru/index.php?action_id=2&story_id=4486. Twenty year-

By forcing high school players to play at least one year in college or another setting, NBA scouts can assess both the player's skill level at a higher level of competition and the player's maturity level. In particular, if the player signs on to play at a high-profile college program, scouts will get a chance to see how the young man deals with an amplified level of media and fan scrutiny. A player who is unable to play competitively or deal with the pressures of stardom at the collegiate level is unlikely to blossom at the professional level.[136]

However, there is some evidence to dispute the notion that players who go pro directly out of high school are more likely to have difficulties adjusting to adulthood. A study undertaken by Professor Michael McCann in 2005 showed that going to college did "not appear to diminish the probability of a player getting in trouble with the law."[137] The study also showed that "players appear more likely to get in trouble with the law towards the middle and end of their careers than at the start."[138] Both of these findings seem to contradict the claim that those players

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old DeShawn Stevenson was arrested approximately one year after being drafted out of high school and charged with the statutory rape of a fourteen year old girl whom he had served alcohol to in a motel. *Id.* Additionally, on the night he was drafted in 2000, Stevenson was involved in a brawl at a high school all-star game near Fresno, CA. *Id.*

[136] McCann, *supra* note 10, at 832-33, 838 (quoting former Chicago Bulls general manager Jerry Krause's complaint that players skipping college impedes scouting: "It's much, much tougher because you're projecting. Mostly we were looking at full-grown kids (in the past). Now you're looking at a lot of immature bodies and having to project what they're going to look like down the road."). *Id.* at 838.

[137] Posting of Michael McCann to Sports Law Blog, http://sports-law.blogspot.com/2005/07/nba-players-that-get-in-trouble-with_20.html (July 20, 2005, 7:10:00 EST). In fact, McCann's findings show that "some of the most notorious NBA players are those with college degrees, while many others have three years of a college education." *Id.*

[138] *Id.* In support of this finding, McCann suggested three possible interpretations: (1) that the "pressures of being an NBA player" are more manageable at the start of one's career, perhaps because the player is less autonomous and more reliant on the team; (2) that new NBA players are often surrounded by veterans in their late 20s and 30s who can monitor them and serve as de facto "big brothers;" and (3) that as the player accumulates wealth and notoriety, he is more likely to succumb to these "pressures." *Id.*

coming straight out of high school are more likely to get into trouble and are less equipped to handle the stress of playing professional basketball for millions of dollars.

Another entity that benefits greatly from the extra year that players must spend out of professional basketball is the NBA itself. The NBA's major output is superstars, and the league makes its millions by featuring and marketing stellar players like Michael Jordan, Earvin "Magic" Johnson, Larry Bird, LeBron James, Kobe Bryant, and Shaquille O'Neal, to name but a few. "The NBA is a star-driven league," according to StubHub Senior VP Mike Janes. "While team rivalries do exist, many of today's NBA fans are most motivated to see the league's most exciting individual players. Fans will pay substantial amounts to see these true 'money players' in their town, and our data quantifies the ones they are paying the most to see."[139]

For many years, the method by which many players gained "hype" before entering the league was through having an outstanding college career. NBA fans were able to see familiar, established collegiate stars—many of whom were coming off college All-America caliber years—joining the ranks of current NBA players, which helped the league's popularity. By contrast, in the years after Garnett's plunge into the NBA draft, the first round was populated by seldom heard-of high school players who were virtual unknowns to the majority of NBA fans. Wanting to see known commodities, the NBA's policy forces these players into college for a season where they have a chance to shine on an intermediate stage before hitting the professional level. "By forcing the overwhelming majority of the nation's top high school players into college for one season, the league benefits immensely from the media exposure those players generate during that one season."[140] A good example is Carmelo Anthony. Rather than jumping directly into the NBA from high

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[139] Press Release, StubHub FanStats, StubHub's 2007 NBA Top Dollar Ballers, (Feb. 14, 2007) *available at* http://www.stubhub.com/sites/corpsite/?gsec=news&gact=press&article_id=4045.

[140] Caulton Tudor, *NBA Should Change Policy*, THE NEWS AND OBSERVER, Feb. 11, 2009, *available at* http://www.newsobserver.com/sports/high_school/story/40564.html.

school, Anthony elected to spend the 2002-03 season at Syracuse University, where he led the Orangemen to the 2003 NCAA championship and was named the consensus National Freshman of the Year.[141] As a result, when he entered the NBA, he was selected in the first round with the third overall pick, and instantly became a highly recognizable and marketable star.[142]

The next group that benefits from the NBA's current age/eligibility rules is composed of universities with elite basketball programs. Players who are now prohibited from entering the draft directly out of high school are mostly opting to attend college for a year at a university with a big-name basketball program, such as North Carolina, UCLA, Kentucky, or Duke. With the players unable to play professionally, these colleges benefit directly from having these highly talented athletes made available to their teams.[143] The benefit to these schools is not limited to success on the court, however. With highly talented players come more wins, more fans, more tickets

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[141] NBA.com: Carmelo Anthony Bio Page, http://www.nba.com/playerfile/carmelo_anthony/bio.html (last visited Nov. 19, 2009).

[142] McCann, *supra* note 10, at 838-39. McCann cites NBA officials contending

> that more polished and recognizable NBA rookies would advance league interests. Philadelphia 76ers President Billy King notes, 'There will be more of a chance the fans will know a guy's name. You would have seen him in the (NCAA) tournament, maybe. You'd see a guy who went to Syracuse or a guy who went to Duke and you'd have seen him in the tournament.' Such a sentiment appears bolstered by a very simple application of economics: college basketball serves the NBA as a de facto and free minor-league system that develops and promotes the same players who will one day determine the NBA's financial fate.

Id.

[143] *See* Eric Prisbell, *The NBA's Age Minimum Has Given the College Game Possibly One of the Best Freshman Classes Ever*, WASH. POST, Jan. 14, 2007, at E11 *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/01/13/AR2007011301266.html.

sold, and more lucrative broadcast licensing fees.[144] Schools also earn money through "[m]erchandise sales such as replica uniforms with player numbers, and licensing agreements such as those with videogame companies."[145] By keeping these future NBA stars in school for a year, colleges also get the chance to raise their profile to potential recruits, increasing the possibility of landing the next big player, which in turn leads to more profit for the school. There is a downside to this situation, however. Having blue-chip recruits at a school for only one year creates the problem of high turnover, and coaches must constantly find a way to replenish their talent stockpiles.[146]

In contrast to the benefits afforded to the NBA and Division I colleges, it seems that almost all of the risk created by the current policy is borne exclusively by the players--specifically, the risk of catastrophic injury. An NBA player is only as successful as his physical health permits, and the average NBA career in 1999 only lasted 4.82 seasons.[147] Therefore, a player has a huge incentive to get into the league as soon as possible and start making money immediately as a lottery pick. Unfortunately, due to the current NBA policy, some players have been denied that chance. Bill Walker is an example of this

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[144] McCann, *supra* note 10, at 836 ("Division I colleges, as well as the conferences in which they play, receive enormous revenue from the television broadcasting of their men's basketball games.").

[145] *Id.* McCann also points out that high profile "coaches may also profit through secure, considerable coaching and endorsement contracts." *Id.* at 837.

[146] *See* Paulsen, *supra* note 132 (noting that the so called "one and done" policy where elite players spend a single season in college before going pro has caused the recruiting process to be "tipped on its head; as soon as a coaching staff lands a player of this caliber, they have to turn around and start recruiting the next guy. Due to this revolving door, there is little continuity at the bigger college programs.").

[147] Harriet Barovick, et al., *Notebook: Jan. 18, 1999*, TIME, Jan. 18, 1999, *available at* http://www.time.com/time/magazine/article/0,9171,990035,00.html. The article also notes that a player in 1999 would have to play five seasons to become an unrestricted free agent and reap the rewards of a high-dollar free agent contract. Therefore, the "average" NBA player would not even play long enough to get out of his rookie-scale contract and be eligible for the multi-million dollar payday that most aspiring basketball players dream of.

threat realized. Walker was a high school phenomenon in Cincinnati, Ohio who was slated as future NBA first round pick by coaches and scouts alike.[148] When the NBA introduced its new age policy in 2005, Walker's NBA dream was deferred for a year and he opted to enroll at Kansas State University for the 2006-07 season.[149] Walker lived up to his hype as a college freshman, and "made an instant impact with Kansas State, leading the team to important NCAA tournament victories over the University of Southern California and the University of New Mexico."[150] Walker was the third leading scorer on the team with 11.3 points per game, and was second at rebounding with 4.5 per game.[151]

During his second semester in college, Walker's season came to an abrupt end. On January 6, 2007, Walker ruptured the anterior cruciate ligament (ACL) in his left knee, forcing him to undergo surgery and then a difficult eight month rehabilitation process.[152] While approximately 90% of people who undergo ACL reconstruction surgery are able to return to their previous level of activity,[153] NBA teams are understandably wary of investing great sums of money into a potentially injury-prone player. As he was still rehabilitating at the time of the 2007

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[148] Brian Shaffer, *The NBA's Age Requirement Shoots and Misses: How the Non-Statutory Exemption Produces Inequitable Results for High School Basketball Stars*, 48 SANTA CLARA L. REV. 681, 681-82 (2008).

[149] *See* Andy Katz, *Walker's Season Comes to an End with Ruptured ACL*, ESPN.com, Jan. 9, 2007, http://sports.espn.go.com/ncb/news/story?id=2724691.

[150] Shaffer, *supra* note 148, at 682-83.

[151] *Id.* at 683.

[152] *Id.*

[153] *See* Jonathan Cluett, M.D., *Information About Interior Cruciate Ligament Injuries*, Jan. 17, 2005, http://orthopedics.about.com/cs/aclrepain/a/acl.htm.

draft, Walker was forced to play another year at Kansas State in order to rebuild his fading NBA Draft stock.[154]

Unfortunately, Walker re-injured his knee before the 2008 Draft while working out for the Golden State Warriors.[155] While not as severe as the previous ACL rupture, the re-injury was a red flag to many risk-averse NBA teams, who began to see him as damaged goods.[156] The Washington Wizards eventually drafted Walker in the second round of the 2008 Draft with the forty-seventh overall pick, and subsequently traded his rights to the Boston Celtics, who assigned him to their Developmental League team.[157] Walker made $542,114 for the 2009-2010 season, while the salaries for players selected as 2008 lottery picks ranged from $1,424,400 to $4,019,000.[158] Had Walker been able to go directly to the NBA out of high school, he most likely would have been selected in the lottery and earned a million-plus dollar contract. At that point, a knee injury may have been career altering but he nevertheless would have been more financially secure. While more than $500,000 per year is still a substantial sum of money, Walker was denied the chance at earning three to four times that amount, and will probably struggle for some time to make a name (and some money) for himself in the NBA.

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154 Austin Meek, *Martin's Opinion Stays Same: Walker's a Pro*, TOPEKA CAPITAL-JOURNAL, Apr. 15, 2008, *available at* http://cjonline.com/stories/041508/cat_268506945.shtml

155 Andy Katz, *Sources: MRI Needed After Another Knee Injury Strikes Draft Prospect Walker*, ESPN.com, June 16, 2008, http://sports.espn.go.com/nba/draft2008/news/story?id=3445779.

156 Austin Meek, *Walker Stays in NBA Draft*, TOPEKA CAPITAL-JOURNAL, June 17, 2008, *available at* http://cjonline.com/stories/061708/cat_291742509.shtml.

157 DraftExpressProfile: Bill Walker, Stats, Comparisons, and Outlook, DRAFT EXPRESS, http://www.draftexpress.com/profile/Bill-Walker-552/ (last visited Nov. 19, 2009).

158 MyNBADraft: NBA Rookie Salary Scale 2008, http://www.mynbadraft.com/nba-rookie-salary-scale-2008/101 (last visited Nov. 19, 2009).

Some commentators have noted that "paternalism and predictability comprise the principal rationales for the elevated age floor."[159] The NBA allegedly has the players' best interests at heart and cites the further development of the players' maturity and physical development as reasons for its age policy, but it can be argued that these reasons are a cover for the league's paternalistic and arguably racist sensibilities.

Many in the media and coaching profession have offered their reasons for the need of players to go to college. When Kevin Garnett announced his intent to enter the 1995 Draft, University of Utah head coach Rick Majerus declared, "[e]motionally, socially, physically, [Kevin Garnett] will be immature relative to the guys he will be around. In terms of how he relates to fans, how he relates to girls, how he relates to having all that money. There's nothing good about this."[160] Another proponent of the idea that high school players have no business going pro was former Penn State men's head basketball coach Jerry Dunn, who said that such players "completely skip a part of their lives they can never get back. . . . They're skipping the basic foundation they need to take care of themselves and their families for the rest of their lives."[161]

As stated before, the general proposition that high school players are too immature to handle the NBA lifestyle can be easily refuted if one examines the available data. "Unbeknownst

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[159] McCann, *supra* note 10, at 832.

[160] Barry Temkin, *Garnett to Gain Riches, Lose Youth*, CHI. TRIB., June 27, 1995, at N1. Temkin was not alone, as other columnists berated Garnett for his decision to enter. Consider the words of Washington Post sportswriter Michael Wilbon:

> First of all, Kevin Garnett is not ready to play in the NBA. He just isn't close. We're going to assume his coach simply hasn't seen enough NBA games, live, up-close. The kid isn't physically ready to play under the basket in the Big Ten, much less against Hakeem Olajuwon and David Robinson. His skill level isn't high enough; he isn't savvy enough.

Michael Wilbon, *For Prep Star Garnett, NBA is Fool's Gold*, WASH. POST, May 28, 1995, at D14.

[161] Phil Axelrod, *What's the Rush? Coaches Concerned Agents Are Swaying Too Many Youths*, PITT. POST-GAZETTE, June 26, 1996, at D-6.

to most NBA fans and league observers, prep-to-players appear to be the best behaved group of American players in the NBA."[162] Further, as a study of recently arrested NBA players shows, "NBA players who attended college for four years represent a disproportionately high percentage of arrested NBA players, while those who did not attend college represent a disproportionately low percentage."[163] These numbers are enough to make one question the degree to which spending a nominal amount of time in college can give a young player the "life experience" to which the aforementioned coaches alluded. In fact, NCAA players reportedly spend "40-50 hours a week practicing, lifting weights, attending team meetings, traveling, and playing games."[164] This would seem to indicate that these so-called "student athletes" are in fact more like unpaid laborers, who train and toil for the benefit of the universities they represent while reaping none of the monetary rewards.

The most controversial criticism of the NBA draft policy centers on its racially paternalistic sentiments. Many critics are quick to point out that high school-aged athletes in other sports such as golf or tennis (or even talented non-athletes, such as actors) are rarely barred from—and are often lauded or encouraged for—entering the professional ranks.[165] Media commentators are quick to congratulate Anna Kournikova or Michelle Wie on having the talent necessary to make it to the professional level (describing "sixteen year-old golf prodigy Michelle Wie as 'precocious' and 'mature' after signing a $10-million endorsement contract"[166]), and yet express "grave

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[162] McCann, *supra* note 10, at 834.

[163] *Id.*

[164] *Id.* at 835.

[165] *Id.* at 844.

[166] *Id.* at 844. *See, e.g.*, Doug Haller, *Million Dollar Baby*, ARIZ. REPUBLIC, Oct. 6, 2005, at 1A ("It's interesting. People don't want to talk about Michelle Wie's golf game. They want to discuss her presence. Graceful and confident, poised and mature."); Fred Lewis, *Lessons Never Stop, Even as a Pro*, HONOLULU ADVERTISER, Oct. 17, 2005, at 1D ("When it comes to the precocious Wie, very little that surrounds her is routine.").

concerns about the welfare of a 'naïve' seventeen year old Lebron James attracting mere interest from endorsers."[167]

Further, it seems hypocritical that "society finds it imperative to protect eighteen year-old African American men—'kids'—from playing in the NBA or the NFL, but not from fighting in wars or working at McDonald's."[168] Even outside the realm of athletics, society seems to "celebrate actors like Anna Paquin and Leonardo DiCaprio when they earn millions starring in films at an early age, while it casts dispersions on African-American men for doing the same in professional sports."[169] Perhaps the reason is that society—and professional sports leagues in particular—doesn't think that young African-American men (of whom the NBA is primarily composed) are capable of handling the sudden fame and riches that accompany an NBA contract, while young people of other races (athletes and non-athletes alike) are better poised to deal with the money and success.

B. BETTER WAY? THE "EUROPEAN SYSTEM" OF PLAYER DEVELOPMENT.

In contrast to the American model of player development, there is no intermediate collegiate level of competition for players to develop within in Europe. "Economics and profit fuel systems and the United States provides a free development system for the NCAA and NBA. Unlike in other countries, where money filters down from the professional level to the youth clubs, the NBA and NCAA retain their profits."[170] So while professional teams in the United States have the luxury of simply drafting pre-developed players from the collegiate ranks, teams in Europe must find another way.

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[167] McCann, *supra* note 10, at 844.

[168] *Id.*

[169] *Id.* at 844-45.

[170] The Cross Over Movement, Worldwide Development Systems, http://thecrossovermovement.wordpress.com/the-manifesto/player-development-worldwide/ (last visited Nov. 19, 2009).

In Europe, basketball teams "such as [Italy's] Bennetton Treviso, [Israel's] Maccabi Tel Aviv and [Russia's] CSKA Moscow sign players as young as [fourteen] and place them within their club system or academy."[171] In these academies, players are encouraged to learn the fundamentals of the game, but also "complete secondary school during the day, attending class three days a week."[172] These clubs emphasize development of the player, as they "start in a youth academy and move to a junior team affiliated with a professional club. The youth division's primary purpose is to develop professional and international players, not win at the youth level. The club guides development to ensure a constant talent influx to the professional team."[173]

Some clubs take a comprehensive approach to player development, monitoring players' physical, mental, and emotional progress. For example, at Basketball Academy Rhein Main in Germany, all players attend either school or mandatory military service while at the academy. The individual players' schedules "are personalized and organized around their education and respective Club and National Team basketball seasons."[174] The players have weight-lifting and athletic development schedules, and the academy employs "a professional nutritionist who assists the players in organizing and maintaining a balanced diet."[175] In addition, the governing body of European soccer (FIFA) "recently passed a series of rules that ensure minors receive appropriate academic support

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[171] *Id.*

[172] *Id.*

[173] *Id.*

[174] Posting of Brian McCormick, *One European Basketball Academy*, to Basketball Coaching & Youth Basketball: The Cross Over Movement, http://thecrossovermovement.wordpress.com/2008/08/18/one-european-basketball-academy/ (Aug. 18, 2008).

[175] *Id.*

while playing professionally, and that minors are not transferred away from their families' homes."[176]

A strong example of the benefits that the academy system can offer is the story of Ricky Rubio. Rubio joined the Spanish professional team DKV Joventut at the age of 12, signing a five-year contract that allowed him to live at home and take high school classes.[177] He developed quickly, leading the Spanish junior national team to the FIBA Europe under-16 championship.[178] The young point guard even held his own against the NBA's best in the gold medal game of the Beijing Olympics in 2008, keeping Spain close up until the very end of the contest and turning himself into one of the hottest NBA draft commodities in recent memory.[179] In June of 2009, the Minnesota Timberwolves selected Rubio ahead of Brandon Jennings with the fifth overall pick in the NBA Draft.[180]

The NBA would be well advised to adopt a system of player development akin to that of the European sports academies. The current NBA rule is paternalistic and deprives young adults of the right to make a living in the profession of their choice. The pursuit of higher education should not be mandatory for everyone; those who attend college only to get through the required year after high school are often not interested in sticking around for a degree. Professional teams in the Unites Stated should develop academies across the country to identify young talent, then train and develop that talent by emphasizing the fundamentals of the game—something that even NBA Commissioner David Stern recognizes is missing from the

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176 Marc Edelman & Brian Doyle, *Antitrust and "Free Movement" Risks of Expanding U.S. Professional Sports Leagues into Europe*, 29 NW. J. INT'L L. & BUS. 403, 409 (2009).

177 Dennis Brackin, *Timberwolves' Draft Pick Rubio Might Be a Diamond in the Rough, a Crown Jewel or Perhaps Both*, MINNEAPOLIS STAR TRIBUNE, July 3, 2009, at 1A, *available at* http://www.standard.net/topics/sports/2009/07/03/timberwolves-draft-pick-ricky-rubio-might-be-diamond-rough-crown-jewel-or-p.

178 *Id.*

179 *Id.*

180 *Id.*

training of many young players today.[181] These academies should also follow the European example of mandating education within the academies to develop the players not just athletically, but also from a maturity standpoint. By implementing these measures, the NBA could avoid some of the risks that it cites in justifying its current NBA age/education policy—namely, the lack of "life experience," maturity, and physical development.

V. CONCLUSION

As previously stated, it is still too soon to fully assess the impact of the current version of the NBA age-exclusion policy. If challenged by a player under the Sherman Antitrust Act, the success of the claim would depend upon which test the court would adopt. Under the Clarett Test, the challenge would likely fail because this formulation gives a broader scope to the non-statutory labor exemption, effectively insulating the NBA from such a challenge. Under the Mackey Test, the plaintiff would be more likely to succeed, but would not be guaranteed a victory. *Mackey* requires a three-pronged analysis, which could still go either way under the NBA's current version of the age limit.

As an alternative to the current age/education policy, the NBA should adopt a European-style system of player development. Such a system is especially desirable from a social policy perspective, as it balances the professional teams' need for polished and mature players with the need to preserve the young players' autonomy and their right to pursue their financial interests.

The NBA Players Association should fight to remove the age/education requirement from the CBA during the next collective bargaining session following the expiration of the

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[181] Chris Sheridan, *Stern Dismayed by NBA Player Development System*, ESPN.com, June 9, 2006, http://sports.espn.go.com/nba/playoffs2006/news/story?id=2477110 (noting that teams nowadays typically have a "choice on draft night between picking an American player who has been coddled by sneaker companies throughout his teenage years and a foreign player who has spent six or more years playing for his country's national program.").

current CBA after the 2010-11 season, which would eliminate the non-statutory labor exemption loophole that currently protects the NBA from an antitrust challenge.[182] The Players' Association should further push for implementation of the academy system of player development in future collective bargaining agreements.

Brandon Jennings failed to impress during his time playing professional basketball in Europe,[183] but he was nevertheless a lottery pick as the tenth overall selection in the 2009 NBA Draft by the Milwaukee Bucks.[184] However, he never should have been denied the chance to play in the NBA when he graduated from high school. Had he been given the chance to play professionally sooner, he might have developed a mature game more quickly like Ricky Rubio of Spain, who was drafted five spots ahead of Jennings in the 2009 NBA Draft. Jennings represents a small and exceptional minority of high school players, but there are still hundreds of other talented young players who deserve the right to play when they come of age. The successful implementation of the academy system would benefit them greatly, allowing them the right to join professional teams' systems at a younger age like Rubio, preventing them from being boycotted from professional teams (as they currently are), and maintaining an emphasis on building themselves both as professional athletes and as responsible, mature adults.

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[182] If the policy was removed from the CBA, it would no longer be associated with collective bargaining, which would ensure its failure under both the Mackey and Clarett tests.

[183] Ray Glier, *Brandon Jennings Sends Home a Warning From Europe*, N.Y. TIMES, Jan. 23, 2009, at D3, *available at* http://www.nytimes.com/2009/01/24/sports/basketball/24recruit.html ("Jennings does not resemble the pioneer some envisioned when he left for Europe as a dynamic player who could create his own shots and score 20 points or more a game. In Italy, he said, he has been stifled offensively. He is averaging 8 points a game.").

[184] John Smallwood, *Brandon Jennings Won't Set Euro Trend in NBA*, PHILADELPHIA DAILY NEWS, Jun. 30, 2009, *available at* http://www.philly.com/dailynews/columnists/john_smallwood/20090630_John_Smallwood__Brandon_Jennings_won_t_set_Euro_trend_in_NBA.html.

RECONCILING THE AMERICANS WITH DISABILITIES ACT AND COMMERCIAL WEBSITES: A FEASIBLE SOLUTION?

Ryan Campbell Richards[1]

INTRODUCTION

The Internet is recognized as one of mankind's greatest technological achievements, being compared alongside the written word as a giant leap forward for human communication.[2] With modest origins in government research into information technology, the Internet has grown into a massive global phenomenon. Its most popular and widely recognized attribute, the World Wide Web, facilitates a variety of functions, which include communication via electronic mail, social and business networking, the dissemination of information, popular gaming, streaming films and television programs, scholarly research, file storage, and commercial transactions. This list is by no means exhaustive, and the possible future developments and applications of the Internet are potentially limitless.

As it continues to develop, users have revolutionized the ways in which the Internet is used. One commentator has described this development as a "business revolution in the computer industry caused by the move to the internet as

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[1] Candidate for J.D., Rutgers School of Law – Camden (2010). Special thanks to Associate Professor Greg Lastowka and Hedwig Murphy for their comments and suggestions.

[2] Robert Darnton, *The Library in the New Age*, THE NEW YORK REVIEW OF BOOKS, June 12, 2008, at 72, *available at* http://www.nybooks.com/articles/21514 (last visited Nov. 23, 2009).

platform. . . ."[3] In commercial transactions, the Internet can circumvent certain business overhead by eliminating the need for costly personnel and physical facilities from which purchases can be made. Some commentators have predicted the Internet becoming the absolute standard for businesses selling products for which tangible media are unnecessary, such as music and home video.[4] Even today, consumers can access the Internet through their televisions and gaming systems, such as the Playstation 3 and Xbox 360, to browse websites or purchase games and movies, stored on the systems' hard drives for viewing anytime. Given these relatively new advancements in technology, it is unsurprising that the United States Supreme Court has described the Internet as "both a vast library including millions of readily available and indexed publications and a sprawling mall offering goods and services."[5] Clearly, the Internet's business applications are widely recognized. Given the seemingly endless potential the Internet holds, it was inevitable that it would become a part of our everyday lives, both for business and personal use.

However, as with many technological developments,[6] not everyone can enjoy this "revolution" in the manner in which it is intended. Disabled persons, particularly the blind, often miss out on the Internet's largely visual output.[7] This note identifies

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3 Tim O'Reilly, *Web 2.0 Compact Definition: Trying Again*, (Dec. 12, 2006), http://radar.oreilly.com/archives/2006/12/web-20-compact.html (last visited Nov. 23, 2009).

4 Erica Ogg, *Digital Downloads Will Be Blu-ray's Downfall*, CNET NEWS, Feb. 23, 2008, http://news.cnet.com/8301-10784_3-9877031-7.html (last visited Nov. 23, 2009).

5 Reno v. Am. Civil Liberties Union, 521 U.S. 844, 853 (1997).

6 For an interesting discussion of how other technologies, particularly touch-screen phones and devices, have affected the blind, see Sinead Carew, *Touch- Screen Gadgets Alienate Blind*, REUTERS, Jan. 8, 2009, http://www.reuters.com/articlePrint?articleId=USTRE5080T320090109 (last visited Nov. 23, 2009).

7 Letter from Deval L. Patrick, Assistant Att'y Gen., Civil Rights Div., U.S. Dep't of Justice, to Hon. Tom Harkin, U.S. Senate (Sept. 9, 1996), 10 NAT'L DISABILITY L. REP. 6, para. 240 (Sept. 11, 1997), *available at* http://www.cybertelecom.org/ada/adaletters.htm (last visited Nov. 23, 2009).

the issues surrounding ADA compliance, evaluates the existing solutions being advocated by various groups, and attempts, to the extent possible, to offer a solution of compromise which should result in reasonable accessibility, eliminate much of the prediction and guesswork which cast doubt on the existing solutions, and foster future technological development, all while promoting the expansion of e-commerce.

With the rise of e-commerce, the Internet's inaccessibility to the blind raises serious legal implications. The Americans with Disabilities Act requires universal access to places of public accommodation and their respective services.[8] Two essential issues must be considered when determining the necessity for ADA-compliance in commercial websites. One central issue is how to categorize and define websites. A website may qualify as a public accommodation, a service thereof, or neither; the courts have yet to arrive at a mutually acceptable definition. If it is determined that a commercial website does fall under the purview of the Americans with Disabilities Act, the next issue, of even greater importance than the first, is the feasibility of required changes websites must make to become compliant. The Americans with Disabilities Act requires that measures taken by public accommodations falling under its scope be "readily achievable." The phrase "readily achievable" and the criteria used to determine such achievability are defined in the ADA as follows:

(9) Readily achievable

> The term "readily achievable" means easily accomplishable and able to be carried out without much difficulty or expense. In determining whether an action is readily achievable, factors to be considered include –
>
> > (A) the nature and cost of the action needed under this chapter;

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8 42 U.S.C. § 12182 (2006).

> (B) the overall financial resources of the facility or facilities involved in the action; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such action upon the operation of the facility;
>
> (C) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
>
> (D) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative or fiscal relationship of the facility or facilities in question to the covered entity.[9]

Thus, even in situations in which a place of public accommodation would ordinarily be required by law to become handicap-accessible, the ready achievability requirement retains the possibility that such accommodation would be exempt under the law. For example, the Disability Rights Section of the United States Department of Justice's Civil Rights Division, in a statement providing technical assistance to those falling under the Act's purview, has noted that certain modifications to physical locations can at times be quite difficult and therefore exempt under the existing rule:

> Many building features that are common in older facilities such as narrow doors, a step or a round door knob at an entrance door, or a crowded check-out or store aisle are barriers to access by people with disabilities. Removing barriers by ramping a curb, widening an entrance door, installing visual alarms, or designating an

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9 42 U.S.C. § 12181(9) (2006).

> accessible parking space is often essential to ensure equal opportunity for people with disabilities. Because removing these and other common barriers can be simple and inexpensive in some cases and difficult and costly in others, the regulations for the ADA provide a flexible approach to compliance. This practical approach requires that barriers be removed in existing facilities only when it is readily achievable to do so. The ADA does not require existing buildings to meet the ADA's standards for newly constructed facilities.[10]

In the context of the Internet, a similar problem arises, whereby the same barrier-removal can be easily achieved in some cases, yet exceedingly difficult or impossible in others. Literally thousands of businesses maintain websites through which their goods or services are made available, possibly subjecting them to ADA compliance. For the vast majority of such websites, compliance can likely be achieved with relative ease as a single undertaking with periodic maintenance. However, businesses offering a static inventory of products can more easily ensure compliance than businesses offering thousands of new products daily or facilitating third-party sales, such as eBay and Amazon Marketplace. These businesses would have to monitor their websites with constant and exhaustive scrutiny in order to make accessible the thousands of new pages and products they host daily. Alternatively, the burden could fall on individuals when utilizing such websites' services. At best, only a temporary solution currently presents itself. This is to require websites to become ADA compliant to the best of their ability and to merely exempt from its requirements those parts of websites for which compliance is impracticable.

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[10] U.S. DEP'T OF JUSTICE, COMMON QUESTIONS: READILY ACHIEVABLE BARRIER REMOVAL 3, (ADA Technical Assistance 2006), *available at* http://www.ada.gov/adata1.pdf (last accessed Nov. 23, 2009).

HISTORICAL CONTEXT

The Internet evolved over a period of decades, yet widespread access is a relatively new development. It is new enough, in fact, that when drafting the Americans with Disabilities Act, legislators never considered the implications the Internet raises for the blind. Thus, it is useful to examine both the history of the Internet and the Americans with Disabilities Act to gain not only the perspective required to understand why the Internet was not contemplated during the ADA's enactment, but also to understand why and how rapid leaps in computer and web technology preclude a satisfactory solution to noncompliance for commercial websites.

A. A BRIEF HISTORY OF THE INTERNET

In the past, one might have argued that, on paper, the Internet seems more like science fiction than a feasible, factual concept. Ironically, this is not far from the truth. The idea of a massive computer network like the Internet can be traced back to a short science fiction story written by Murray Leinster in 1946, titled "A Logic Named Joe."[11] Leinster's tale tells the story of a "logic" (personal computer) repairman who successfully networks his own logic, which had acquired the ability to think for itself, to all other logics in the world, giving each logic access to complete, unfiltered knowledge databases.[12] This first documented instance of the concept of networked computers and information sharing appeared a mere five years after the advent of the modern digital computer.[13]

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[11] H. Bruce Franklin, *Computers in Fiction*, in ENCYCLOPEDIA OF COMPUTER SCIENCE (Nature Publishing Group, 2000), *available at* http://andromeda.rutgers.edu/~hbf/compulit.htm (last visited Nov. 23, 2009).

[12] *Id.*

[13] The computer, in a more expansive context, can be traced as far back as the early Greeks, who created a series of interoperable dials designed to determine astronomical positions. This device is known as the Antikythera Mechanism and is dated to roughly 150 – 100 B.C.E. Many consider this device to be the first analog computer. *See, e.g.* John Noble Wilford, *Discovering How*

The Internet's development was the result of Cold War politics and the competition for superior technological development.[14] Like many of the great developments of the twentieth century, the Internet found its origins in military research.[15] In response to the USSR launching the Sputnik 1 satellite in 1957, the United States created a military technological development team known as the Advanced Research Projects Agency (ARPA).[16] Expanding on earlier projects that established the first networked radar system, ARPA developed the first networked computer system, which resulted in the first message sent between two computers on October 29, 1969.[17]

While the technology employed by ARPA would continue to develop, it was not until 1990s that the World Wide Web project would launch.[18] The World Wide Web was the brainchild of Tim Berners-Lee, an English scientist working at the European Organization for Nuclear Research, CERN.[19] Today, the World

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Greeks Computed in 100 B.C., N.Y. TIMES, July 31, 2008, at A12, *available at* http://www.nytimes.com/2008/07/31/science/31computer.html?_r=1&hp (last visited Nov. 23, 2009). However, the first digital computer, the Zuse Z3, was invented in 1941 by Konrad Zuse. DENISE BONILLA, *Konrad Zuse*, in LEADERS OF THE INFORMATION AGE 600, 603 (David Weil ed., H.W. Wilson 2003).

14 Defense Advanced Research Project Agency (DARPA) Web Site, *DARPA History*, http://www.darpa.mil/history.html (last visited Nov. 23, 2009).

15 *Id.*

16 *Id.*

17 Chris Sutton, *Internet Began 35 Years Ago at UCLA with First Message Ever Sent Between Two Computers*, Sept. 2, 2004, http://www.engineer.ucla.edu/stories/2004/Internet35.htm (last visited Nov. 23, 2009).

18 Tim Berners-Lee, *The World Wide Web and the "Web of Life"*, 1998, http://www.w3.org/People/Berners-Lee/UU.html (last visited Nov. 23, 2009).

19 CERN: European Organization for Nuclear Research, *History Highlights 1990: Tim Berners-Lee Invents the Web*, http://public.web.cern.ch/public/en/About/History90-en.html (last visited Nov. 23, 2009).

Wide Web is the most recognized use of the Internet. However, global awareness of the Internet and World Wide Web would not come until 1995, a full five years after the Americans with Disabilities Act was passed.[20] Being such a young concept, it is unlikely that legislators contemplated problems arising for disabled persons using the Internet, particularly because it would be years until the World Wide Web would realize widespread commercial potential.[21] Thus, the Web was free to grow unfettered. In a recent investigation, Google software engineers Jesse Alpert and Nissan Hajaj located over one trillion unique URLs.[22]

B. THE AMERICANS WITH DISABILITIES ACT

As of the 2000 census, almost 50 million Americans over age four identify themselves as having some disability.[23] Over 11.5 million of them identified their disability as sensory in nature.[24]

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[20] ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, WEBSITE ACCESSIBILITY FOR PEOPLE WITH DISABILITIES 2 (2006), *available at* http://www.nycbar.org/pdf/report/Website_Accessibility.pdf (last visited Nov. 23, 2009) [hereinafter "Accessibility Website"].

[21] Access Now, Inc. v. Sw. Airlines, Co., 227 F. Supp. 2d 1312, 1319, n.7 (S.D. Fla. 2002); Michelle Kessler, *More Shoppers Proceed to Checkout Online*, USA TODAY, Dec. 27, 2003 at B3, *available at* http://www.usatoday.com/tech/news/2003-12-22-shoppers_x.htm (last visited Nov. 23, 2009).

[22] Posting of Jesse Alpert & Nissan Hajaj to The Official Google Blog, *We knew the web was big. . .*, http://googleblog.blogspot.com/2008/07/we-knew-web-was-big.html (July 25, 2008, 10:12 EST) (last visited Nov. 23, 2009).

[23] JUDITH WALDROP AND SHARON M. STERN, DISABILITY STATUS: 2000—CENSUS 2000 BRIEF 1 (U.S. Census Bureau 2003), *available at* http://www.census.gov/prod/2003pubs/c2kbr-17.pdf (last visited Nov. 23, 2009).

[24] U.S. Census Bureau, *2006 American Community Survey S1801. Disability Characteristics* (200), *available at* http://factfinder.census.gov/servlet/STTable?_bm=y&-qr_name=ACS_2006_EST_G00_S1801&-geo_id=01000US&-geo_%20id=01000US&-ds_name=ACS_2006_EST_G00_&-_lang=en&-redoLog=false (last visited Nov. 23, 2009).

The Americans with Disabilities Act, passed in 1990, recognized the need to act on behalf of disabled Americans. Congress found that "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem."[25] Title III of the Act specifically requires that all places of public accommodation take reasonable measures to ensure uniform accessibility.[26] 42 U.S.C. § 12182(a) provides:

> No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.[27]

The Act further defines the affected facilities and place of public accommodation as follows:

> Facility means all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located.
>
> . . . .
>
> Place of public accommodation means a facility, operated by a private entity, whose operations affect commerce and fall within at least one of the following categories--

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25 42 U.S.C. § 12101(a)(2) (2006).

26 42 U.S.C. §§ 12181-12189 (2006).

27 *Id.* at § 12182(a).

(1) An inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of the establishment as the residence of the proprietor;

(2) A restaurant, bar, or other establishment serving food or drink;

(3) A motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;

(4) An auditorium, convention center, lecture hall, or other place of public gathering;

(5) A bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;

(6) A laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;

(7) A terminal, depot, or other station used for specified public transportation;

(8) A museum, library, gallery, or other place of public display or collection;

(9) A park, zoo, amusement park, or other place of recreation;

(10) A nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;

> (11) A day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and
>
> (12) A gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.[28]

As courts and scholars have repeatedly noted, "public accommodation" has been defined solely in terms of physical location, and does not expressly contemplate intangibles as falling within the definition provided by the statute's plain language.[29] However, courts have nevertheless grappled with the issue of whether intangibles are or should be public accommodations, paving the way for the instant issue.[30] These court decisions, while not dictating how a website should be treated under the Americans with Disabilities Act, nevertheless have offered guidance and formed the foundation for the plaintiffs' argument in *Access Now, Inc. v. Southwest Airlines Co*., the first major federal case dealing with the issue of Internet ADA compliance.

Under the standards articulated by the ADA, there are two ways in which an establishment can be subjected to the rule: as a public accommodation in and of itself, or as one of the goods,

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[28] 28 C.F.R. § 36.104 (2009).

[29] Access Now, Inc. v. Sw. Airlines, Co., 227 F. Supp. 2d. 1312, 1321 (S.D. Fla. 2002); Isabel Arana Dupree, Websites as "Places of Public Accommodation": Amending the Americans with Disabilities Act in the Wake of National Federation of the Blind v. Target Corporation, 8 N.C. J.L. & TECH. 273 (2007).

[30] *See*, *e.g*. Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Assoc. of New Eng., 37 F.3d 12, 19 (1st Cir. 1994) (holding that "public accommodation" is not limited to actual physical structures, including within its scope health-benefit plans); *compare* Rendon v. Valleycrest Prod., Ltd., 294 F.3d 1279 (11th Cir. 2002) (reversing an appellate decision declaring as a public accommodation a contestant hotline for the television game show "Who Wants to be a Millionaire?").

services, privileges, advantages, and accommodations of a place of public accommodation.[31]

Central to Title III of the ADA is the qualification that measures taken to ensure uniform accommodation are reasonable.[32] Thus, a place of public accommodation need not enact measures that create an undue burden, defined by the Justice Department as "a significant difficulty or expense."[33] A number of factors have been articulated to guide in the determination of whether a measure is to be deemed "reasonable," including:

> (1) The nature and cost of the action needed under this part;
>
> (2) The overall financial resources of the site or sites involved in the action; the number of persons employed at the site; the effect on expenses and resources; legitimate safety requirements that are necessary for safe operation, including crime prevention measures; or the impact otherwise of the action upon the operation of the site;
>
> (3) The geographic separateness, and the administrative or fiscal relationship of the site or sites in question to any parent corporation or entity;
>
> (4) If applicable, the overall financial resources of any parent corporation or entity; the overall size of the parent corporation or entity with respect to the number of its employees; the number, type, and location of its facilities; and
>
> (5) If applicable, the type of operation or

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31 *See* Accessibility Website, *supra* note 20, at 8-9.

32 *See* Nat'l Fed. of the Blind v. Target, 452 F. Supp. 2d 946, 951 (N.D. Cal. 2006).

33 28 C.F.R. § 36.104 (2009).

> operations of any parent corporation or entity, including the composition, structure, and functions of the workforce of the parent corporation or entity.[34]

The reasonability requirement applies to all measures and policies, and is therefore an element that affects the outcome of every case. It is particularly important when considering if and how a website should be subject to the Act, as making websites ADA compliant differs drastically from making accommodations to physical structures. For example, installing a wheelchair access ramp typically entails the one-time cost of installation and perhaps occasional minor maintenance. However, businesses constantly update their websites to add new products, overhaul their sites to implement new technologies, and seek to maintain a user-friendly, stylish interface. According to Monster.com, the estimated annual median salary in the United States for a webmaster, without taking locality into account, is $65,320.[35] However, with thousands of new products being added every minute to sites such as Amazon and eBay, these organizations would have to hire entire teams of experienced programmers to keep their websites compliant.

Therefore, determining if and how to apply the ADA to commercial websites requires a twofold inquiry. First, it must be determined whether websites are places of public accommodation or goods or services thereof. There are essentially three arguments advanced by commentators. Websites might all be subject to Title III, they might not be subject to Title III at all, or there might be qualified application depending on whether there is a sufficient nexus between the website and a physical location. Whichever way the first inquiry is decided, courts must then determine whether a specific

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34 Id.

35 Monster.com Salary Center, Webmaster, http://monster.salary.com/salarywizard/layoutscripts/swzl_compresult.asp?Zipcode=&Metrocode=&Statecode=&Metro=&Geo=U.S.%20National%20Averages&Search=&geocode=&jobtitle=Webmaster&jobcode=IT10000153&narrowdesc=Internet%20and%20New%20Media&narrowcode=IT02&r=mnstr_swzttsbtn_psr&p=MNSTR42X (last visited Nov. 23, 2009).

website's circumstances make such compliance feasible. It is this inquiry that is the most questionable, yet it has not been thoroughly addressed because the first question has yet to be satisfactorily resolved. Nevertheless, it is useful to probe the issue prospectively, as websites will, in all likelihood, continue to fall under scrutiny in the future.

WEBSITES AS "PLACES OF PUBLIC ACCOMMODATION" UNDER TITLE III

Prior to addressing this technological issue, however, it must be decided whether websites are inherently public accommodations, services of public accommodations, or neither. This is no easy task, as commercial websites vary greatly in nature. Some operate solely through their website, such as Amazon.com, whereas others, such as Target.com, also operate from bricks-and-mortar buildings accessible to the public. What impact this difference might have on whether a website should be ADA compliant has yet to be conclusively determined, but recent case law and publications suggest that the distinction could make a world of difference.[36] However, the distinction is essentially illusory. The *Southwest* case dealt with a flight-booking website which also offered a telephone service.[37] It would be a counterintuitive position indeed to hold that no nexus exists because airplane tickets are not sold in physical stores. Furthermore, a strong argument can be made that ADA compliance is even more critical where goods and services are available through a company's website when no physical location exists, thereby making the World Wide Web the only place such goods and services can be acquired from that company.

The issue of what constitutes a public accommodation is not unique to the World Wide Web, but rather is an issue that has plagued courts since the statute's passage in 1990.

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[36] *See Target*, 452 F. Supp. 2d at 955.

[37] *See generally* Access Now, Inc v. Sw. Airlines, Co., 227 F. Supp. 2d 1312 (S.D. Fla. 2002).

Commentator Isabel Arana DuPree has articulated four contexts in which a public accommodation can discriminate:[38]

> First, discrimination will occur when an accommodation imposes eligibility criteria which either "screen out or tend to screen out" disabled people from equal enjoyment of the accommodation.
>
> . . . .
>
> Second, discrimination. . . occurs if a public accommodation fails to make reasonable modifications to its policies or procedures in order to make its services or goods available to the disabled.
>
> . . . .
>
> Third, discrimination includes failure of a public accommodation to take necessary steps to ensure disabled persons are not denied services or segregated because there are no auxiliary aids or services available at the accommodation.
>
> . . . .
>
> Finally, discrimination includes a public accommodation's failure to remove structural barriers when removal is possible.[39]

Arguably, any of these could apply to websites. Prior cases that involve both websites and other intangible accommodations have classified various alleged discriminations according to these categories. However, no definitive standard has emerged,

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[38] DuPree, *supra* note 29, at 276-78. DuPree also highlights the statute's unique nature in that, unlike other anti-discrimination statutes, the ADA requires affirmative measures, whereas other statutes do not.

[39] *Id.*

even prior to the issue of website applicability, and therefore cases before *Access Now, Inc.* offer only cursory guidance.

A. PUBLIC ACCOMMODATIONS HISTORICALLY

Since the Americans with Disabilities Act was passed in 1990, the question of what constitutes a public accommodation has burdened the courts independent of the question of commercial websites. Strict textualist courts interpreted the statute under the rubric of what Title III does and does not say. Specifically, they would point to the fact that Title III, unlike the first two titles of the Act, specifically enumerates places that fall under its purview.[40] Courts have held that because Title III articulates only physical spaces, Congress thus intended that limitation. Other courts, however, have extended places of public accommodation to certain intangibles. These historical cases serve as guideposts for how courts are likely to deal with the question in the future.

i. CASES LIMITING PUBLIC ACCOMMODATION TO PHYSICAL LOCATIONS

Several courts have adopted the position that public accommodations are limited to physical structures only. These courts usually rely on a strict interpretation of the language contained in Title III. The Sixth Circuit Court of Appeals in *Stoutenborough v. National Football League* dealt with the issue of whether television broadcasts are public accommodations.[41] In that case, the National Football League ("NFL") was sued for its blackout policy, which disallows live local broadcasts of NFL games.[42] The blackout rule prohibits the local broadcast of live NFL games where a stadium has not

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[40] Michael O. Finnigan, Jr. et al., *Accommodating Cyberspace: Application of the Americans with Disabilities Act to the Internet*, 75 U. CIN. L. REV. 1795, 1807 (2007).

[41] Stoutenborough v. Nat'l Football League, 59 F.3d 580, 583 (6th Cir. 1995).

[42] *Id.*

been sold-out seventy-two hours before the game begins.[43] The Sixth Circuit, relying on Title III's plain text, held that it applies only to physical locations, emphasizing its "places" language.[44] The court construed the statute strictly, relying heavily on the twelve enumerated "public accommodations" provided within its text.[45] The court reasoned that the legislature purposefully enumerated the various possible types of public accommodations in order to limit the statute's applicability.[46] Additionally, however, the court held that because the blackout applied equally to both hearing and hearing-impaired persons, the plaintiffs failed to state a claim.[47] The court was not persuaded by the plaintiffs' argument that the blackout rule disproportionately affected them because they had no alternative means of accessing the game.[48] This formed a substantial portion of the court's reasoning. This focus on the blackout rule's equal applicability detracted from the weight behind the statutory argument. Although this meant that the case did not specifically limit public accommodations to physical structures, the *Stoutenborough* court paved the way for such interpretation in future cases.[49]

The Sixth Circuit was not alone in its interpretation. Both the Third and Ninth Circuits joined in strictly construing the statute. In *Ford v. Schering-Plough Corp.*, the Third Circuit held that an employee's disability benefit plan was not a public accommodation.[50] The court stated that "[t]he plain meaning of

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43 *Id.* at 582.

44 *Id.* at 583.

45 *Id.*

46 *Id.*

47 *Stoutenborough*, 59 F.3d at 582.

48 *Id.*

49 In *Parker v. Metropolitan Life Insurance Co.*, 121 F.3d 1006 (6th. Cir. 1997), the Sixth Circuit stated that "[t]he clear connotation of the words in § 12181(7) is that a public accommodation is a physical place. Every term listed in § 12181(7) and subsection (F) is a physical place open to public access."

50 Ford v. Schering-Plough Corp., 145 F.3d 601, 612 (3d Cir. 1998).

[the statute] is that a public accommodation is a place. . . ."[51] This interpretation was significantly clearer than the Sixth Circuit's treatment. The Ninth Circuit similarly held in *Weyer v. Twentieth Century Fox Film Corp.* that an insurance company administering an employer-provided disability policy was not a place of public accommodation based on the statute's plain meaning.[52] Thus, ample precedent exists to suggest that courts might treat websites as falling outside the scope of Title III.

Nancy J. King, assistant professor of business law at Oregon State University, suggests that these decisions are inherently unreliable, as they only reach the issue of whether Title III applies to intangibles after first coming to the conclusion that the claims driving each suit failed for other reasons.[53] For example, the *Stoutenborough* case truly hinged upon the fact that football games did not qualify as services offered by football stadiums, while the Third and Ninth Circuit cases dealt with insurance policies privately offered to employees as opposed to being available to the public at large.[54] Essentially, she suggests that precedent for the strict interpretation of Title III might not actually exist in these cases, and therefore such cases are improperly relied upon to arrive at an interpretation that the ADA would be unreasonably applied to websites. King also notes that these cases formed the foundation for the "nexus" test applied in future cases dealing with website compliance, which would require a website to have a sufficient connection to a bricks-and-mortar establishment to be subject to Title III scrutiny.[55] However, in adopting a strict constructionist view of Title III, these older cases narrowly focus their attention and illustrate the primary issue with the Americans with Disability

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[51] *Id.*

[52] Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104, 1114–15 (9th. Cir. 2000).

[53] Nancy J. King, *Website Access for Customers with Disabilities: Can We Get There from Here?* 2003 UCLA J.L. & TECH. 6 (2003).

[54] *Id.*

[55] *Id.*

Act as it applies to the Internet. This issue is that technology changes faster than the law. Technology, which is widespread today, was so young when the ADA was adopted that Congress simply did not consider it.

While proponents of the ADA's application to websites can point to this argument as an indication that the statute should be extended to the Internet, the cases actually indicate otherwise. *Stoutenborough, Parker, Ford,* and *Weyer* all dealt with intangibles in existence at the time of the statute's enactment that did not fall within the enumerated public accommodations of Title III. Thus, while advocates would argue that the primary reason the statute does not cover the Internet is that it was not widespread at the time, Congress certainly had the opportunity to consider non-physical places as public accommodations. The existence of these intangibles at the time of the statute's enactment bolsters the argument that Congress had intent instead to purposefully exclude intangibles. This leaves two distinct possibilities: either Congress failed to contemplate intangible public accommodations, or they did so and chose not to include them in the statute. Both interpretations are equally plausible. Tying Title III to such intangibles as an insurance administrator is a rather attenuated connection, and thus it is entirely possible that Congress simply did not contemplate such a scenario.

Regardless of the circumstances by which Congress did not include non-physical places in Title III, the Internet is distinguishable from those intangibles considered in the aforementioned cases. Websites and the Internet generally can and often do mirror the physical locations of which consumers take advantage. Few would argue that disability benefit plans resemble any physical location, but the World Wide Web offers a marketplace not unlike the shopping malls and superstores produced in the twentieth century.[56] Gary Wunder, a

[56] This fact is becoming increasingly true as the years pass. On June 23, 2003, developer Linden Research, Inc. launched the first version of Second Life, perhaps the most famous of several "virtual worlds" peppering the Internet today. Other examples vary, but often these "virtual worlds" strongly mirror the traditional video game ("World of Warcraft," "Everquest II"). In these online "games," players create "avatars," or simulated three-dimensional representations of themselves, and operate just as they would as if in the physical world. Users can accumulate actual wealth (the approximate value of

programmer analyst from the University of Missouri and a volunteer with the National Federation of the Blind, testified before Congress during their 2000 inquiry into ADA-compliance for websites that "[t]he Internet is not just a window on the world but more and more the Internet is the world. It is where we talk, it is where we shop, and it is where we make our living."[57] What matters to proponents of the statute's extension is not that the Internet is intangible, and thus analogous to the intangibles considered in the preceding cases, but that it increasingly supplants rather than supplements the physical locations in existence at the time of the statute's passage. Many believe that, with respect to various media relating to film, television, and music, the Internet will replace tangible items entirely, much like the computer itself revolutionized business practices such as record-keeping in the 1990s.[58] Thus, advocates of extending the definition of "public accommodation" to websites specifically look to a different line of cases to strengthen their argument.

$1 American is $266 of Second Life's "Linden Dollars"), purchase land, and attend events, such as concerts and plays. Among other real-world implications, events occurring in these games have formed the bases for divorce proceedings. *See* "Discovery of Second Life sex leads to divorce," *available at* http://www.techradar.com/news/internet/discovery-of-second-life-sex-leads-to-divorce-484673 (last visited Nov. 23, 2009). It has also been the basis for at least one murder. *See* Amalie Finlayson & Reuters, "Online Gamer Killed for Selling Virtual Weapon," Sydney Morning Herald, Mar. 30, 2005 *available at* http://www.smh.com.au/news/World/Online-gamer-killed-for-selling-virtual-weapon/2005/03/30/1111862440188.html (last visited Nov. 23, 2009). While arguably impractical as a standard for web-surfing generally, these virtual worlds further illustrate the parallels between what are traditionally thought of as public accommodations and the World Wide Web, bolstering the argument for Title III's extension to the Internet. For an in-depth analysis of the virtual world phenomenon, *see* Greg Lastowka, *User-Generated Content and Virtual Worlds*, 10 VAND. J. ENT. & TECH. L. 893 (2008).

[57] *Applicability of the Americans with Disabilities Act to Private Internet Sites Before the Subcommittee on the Constitution of the H. Comm. on the Judiciary*, 106th Cong. (2000) (statement of Gary Wunder, Programmer Analyst Expert, University of Missouri), available at http://commdocs.house.gov/committees/judiciary/hju65010.000/hju65010_0f.htm (last accessed Nov. 23, 2009).

[58] *See* Erica Ogg, *supra* note 4.

ii. CASES EXTENDING THE DEFINITION OF PUBLIC ACCOMMODATION TO NON-PHYSICAL PLACES

While at least three circuits adopted a strict constructionist position on the definition of "public accommodation" under Title III, the First, Second, and Seventh Circuits established contrary precedent extending the definition to non-physical places as well as physical ones. These courts focused less on the content of the statute's text than on what they interpreted as the legislature's intent, but nevertheless some found textual support for their contentions.

For example, the First Circuit arrived at its decision in *Carparts Distribution Center. v. Automotive Wholesaler's Association* by expansively interpreting Congress' use of the term "travel service."[59] In that case, the Court of Appeals reversed a trial court's decision that public accommodations were limited to physical structures, stating that:

> [b]y including "travel service" among the list of services considered "public accommodations," Congress clearly contemplated that "service establishments" include providers of services which do not require a person to physically enter an actual physical structure. Many travel services conduct business by telephone or correspondence without requiring their customers to enter an office in order to obtain their services. Likewise, one can easily imagine the existence of other service establishments conducting business by mail and phone without providing facilities for their customers to enter in order to utilize their services. It would be irrational to conclude that persons who enter an office to purchase services are protected by the ADA, but persons who purchase the same services over the telephone or

59 Carparts Distrib. Ctr. v. Auto. Wholesaler's Ass'n, 37 F.3d 12 (1st Cir. 1994).

> by mail are not. Congress could not have intended such an absurd result.[60]

Although professing to rely on the plain language of the statute, the court noted that even if the language was ambiguous, "[t]his ambiguity, considered together with agency regulations and public policy concerns, persuades us that the phrase is not limited to actual physical structures."[61] Thus, the First Circuit carefully blended a unique textual interpretation argument with a close examination of what the legislature would have intended, or perhaps did intend, had they contemplated the applicable accommodation when enacting the statute.

In *Pallozzi v. Allstate Life Insurance Co.*, the Second Circuit agreed with the First Circuit's position.[62] In *Pallozzi*, the court reasoned that by guaranteeing equal access to a public accommodation's goods and services, Congress could not have intended to limit the statute to access to physical structures, stating: "[w]e believe an entity covered by Title III is not only obligated by the statute to provide disabled persons with physical access, but is also prohibited from refusing to sell them its merchandise by reason of discrimination against their disability."[63] This legislative intent approach abandons the distinction of "place" in the statute's public accommodation language, opting instead to focus on what approach would produce the most equitable result.

Judge Posner, writing for the Seventh Circuit, reached a similar conclusion in *Doe v. Mutual of Omaha Insurance Co.*[64] Posner's opinion provides the strongest historical evidence in favor of websites as public accommodations in that he specifically notes, albeit in dicta, that they should be included within the statute's purview.[65] Posner said:

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[60] *Id.* at 19.

[61] *Id.*

[62] Pallozzi v. Allstate Life Ins. Co., 198 F.3d 28 (2d Cir. 2000).

[63] *Id.* at 32–33.

[64] *See* Doe v. Mut. of Omaha Ins. Co., 179 F.3d 557 (7th Cir. 1999).

[65] *Id.* at 558–59.

> Title III of the Act, in section 302(a), provides that "no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation" by the owner, lessee, or operator of such a place. The core meaning of this provision, plainly enough, is that the owner or operator of a store, hotel, restaurant, dentist's office, travel agency, theater, Web site, or other facility (whether in physical space or in electronic space) that is open to the public cannot exclude disabled persons from entering the facility and, once in, from using the facility in the same way that the nondisabled do.[66]

Thus, the *Carparts* opinion promulgated by the First Circuit provided the backbone and ammunition for proponents of the statute's extension to not only intangibles generally, but also paved a clear path for the argument in favor of its application to websites specifically, contributing to the split that currently divides courts on the issue. This line of cases focuses not on text but equity, determining that it simply would not be fair to leave the disabled without access to goods and services as the country moved increasingly away from what were considered "traditional" avenues of commerce. This closely mirrors the arguments in favor of accessibility requirements for commercial websites. Regardless of whether the judiciary or Congress assumes the responsibility to make the ultimate decision of applicability of the ADA to websites, it is extremely likely that such equitable considerations will heavily influence the result.

B. ARE WEBSITES PLACES OF PUBLIC ACCOMMODATION?

While various tests have been proposed to remedy the inaccessibility of commercial websites to the blind, they all share the same problem in that they, like the ADA itself, fail to address

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66 *Id.* (citations omitted)

the rapid growth in technology. As the Internet and the World Wide Web continue to grow and develop, the various proposed tests will not lead to uniform application and will impose an unfeasible requirement on many organizations, particularly small businesses and those hosting third-party business transactions. Essentially, the problem is that the remedies treat the issue as it existed in the past, and cannot remedy it as it exists now and will continue to exist for the immediate future.

The first viewpoint is that a commercial website does not qualify as a public accommodation and therefore the ADA does not apply. This test was advocated in the first of two major cases addressing the problem, *Access Now v. Southwest Airlines Co*.[67] The court in that case mirrored the strict constructionists of the cases from the 1990s, in that they looked at the plain language of the statute, which defines public accommodations in terms of physical facilities.[68] Furthermore, the court noted that the ADA enumerates various physical structures and locations as public accommodations.[69] Since the statute is silent on whether the Internet is a public accommodation, the court granted Southwest's motion to dismiss.[70] This keeps in perfect alignment with the Third, Sixth, and Ninth Circuits' historical interpretations of the statute.

The second and most recent case addressing the issue offered a different standard. In *National Federation of the Blind v. Target*, the court noted that the ADA is not limited to allegations of denial to a physical location.[71] The court reasoned that the disabled should be able to fully enjoy goods and services offered by a place of public accommodation.[72] Consequently, although commercial websites are not inherently public

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[67] 227 F. Supp. 2d 1312, 1317–18 (S.D. Fla. 2002).

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] 452 F. Supp. 2d 946, 953 (N.D. Cal. 2006).

[72] *Id.*

accommodations, the court suggested that they could be considered services of a public accommodation provided that a bricks-and-mortar facility exists.[73] This "nexus" approach has become the predominant viewpoint advocated by scholars and is a source of great controversy.[74] While it requires some connection between the physical location and its accompanying website, it is not yet clear to what degree this connection must exist. However, as the court in *Carparts* suggested, it is likely that the scope would include not only the physical structures consumers access to purchase goods or services, but also physical structures inaccessible to the general public and those of companies providing goods and services solely through the Internet.[75]

The third approach adopts the exact opposite position of the *Access Now* case and is endorsed by the National Federation of the Blind as well as government agencies. The United States Department of Justice has adopted an unqualified position[76] that the ADA applies to the Internet.[77] This remains true even

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[73] *Id* at 956.

[74] See, e.g. Richard E. Moberly, *The Americans with Disabilities Act in Cyberspace: Applying the "Nexus" Approach to Private Internet Websites*, 55 MERCER L. REV. 963 (2004); Shani Else, *The Courts Must Welcome the Reality of the Modern World: Cyberspace is a Place Under Title III of the Americans with Disabilities Act*, 65 WASH. & LEE L. REV. 1121 (2008); Nikki D. Kessling, Why the Target "Nexus Test" Leaves Disabled Americans Disconnected, 45 HOUS. L. REV. 991 (2008); Jeffrey Bashaw, Applying the Americans with Disabilities Act to Private Websites after National Federation of the Blind v. Target, 4 SHIDLER J. L. COM. & TECH. 10 (2008).

[75] *See* Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler Assoc. of New Eng., 37 F.3d 12, 19 (1st Cir. 1994).

[76] *See generally* Brief of United States as Amicus Curiae in Support of Appellant, Hooks v. OKBridge, Inc., 1999 WL 33806215 (5th Cir. June 30, 2000) (No. 99-50891).

[77] The American Bar Association has adopted a similar viewpoint. While limiting the resolution to websites "provided by lawyers, judges, law students, and other individuals or entities associated with the legal profession," the ABA has taken the position that no qualifications are required, and thus all such websites ought to be uniformly accessible. *See* 31 MENTAL & PHYSICAL DISABILITY L. REP. 504, 504 (2007). Regardless of its narrow scope, the resolution was passed partly in response to, and does in fact cite, the *Target* and

when no brick-and-mortar facility exists.[78] In furtherance of this position, the Department of Justice has required sponsors of public events to create accessible websites by employing screen-reading and other compliance technologies.[79] To date, the Justice Department's bright line rule is the broadest standard that has been advocated, and one which no court or commentator has wholly adopted. However, some support has been shown for the proposition that the Act is not limited solely to physical locations, providing ammunition for those advocacy groups who argue in the Department's favor.[80]

Despite the Justice Department's position, Congress chose not to add an amendment including websites as public accommodations when it held its first and only inquiry into the matter in 2000.[81] In November, 2007, commentator Kenneth Kronstadt discussed a test to apply based on *Carparts* to determine whether a website should be required to be ADA compliant. According to Kronstadt,

> [a]s long as a facility running an Internet business: (1) is "operated by a private entity;" (2) has operations, including the operation of a website, that affect commerce; and (3) provides

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Southwest cases, adopting some of their reasoning and therefore implying that such application should extend to all commercial websites. *See id.*

[78] *See supra* note 76, at 9.

[79] *See, e.g.* U.S. DEP'T. OF JUSTICE, SETTLEMENT AGREEMENT BETWEEN THE UNITED STATES AND THE NEW ORLEANS JAZZ AND HERITAGE FOUNDATION, INC., DOJ File No. 202-32-24 (Nov 1, 2001), *available at* http://www.usdoj.gov/crt/ada/nojazz.htm (last visited Nov. 23, 2009) (requiring "home page and ADA page on the Foundation's website" to be as accessible "as possible").

[80] *See Carparts*, 37 F.3d at 19 (holding that an AIDS victim's healthcare plan was a public accommodation); Doe v. Mut. of Ohio Ins. Co., 179 F.3d 557, 559 (7th Cir. 1999) ("[T]he owner or operator of. . . a facility (whether in physical space or in electronic space) that is open to the public cannot exclude disabled persons. . . .") (citations omitted).

[81] *See Applicability of the Americans with Disabilities Act to Private Internet Sites: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 106th Cong. (2000), available at http://commdocs.house.gov/committees/judiciary/hju65010.000/hju65010_0f.htm (last visited Nov. 23, 2009).

> goods and services to the public that fit one of the twelve categories of public accommodation, that business fits the definition of a place of public accommodation provided in the federal regulations. Under such an interpretation, it is irrelevant whether the facility literally opens its doors to the public, or whether it serves the public by phone, facsimile or website. That the facility serves the public via a website does not change the fact that it is "a facility, operated by a private entity, whose operations affect commerce and fall within at least one of the [twelve enumerated] categories."[82]

Like the Justice Department's position, this three-pronged test offers little guidance concerning what constitutes a place of public accommodation. In fact, the test is little more than a rehashing of Congress's definition of a public accommodation.[83]

The *Target* case, the Justice Department's position, and the *Carparts* test fail to address the direction in which the World Wide Web is headed. Specifically, there is a growing trend on the Internet of facilitating third-party transactions. For example, Amazon sells others' products in addition to its own goods. eBay does not sell products at all. Instead, it solely facilitates other peoples' sales and auctions, collecting a fee for each listing. If these types of websites are required to be ADA compliant, it is uncertain upon whom responsibility for compliance would fall.[84] Whomever the burden falls on, the

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[82] Kenneth Kronstadt, *Looking Behind the Curtain: Applying Title III of the Americans with Disabilities Act to the Businesses Behind Commercial Websites*, 81 S. CAL. L. REV. 111, 132 (2007).

[83] Applicable federal regulations define a place of public accommodation as "a facility, operated by a private entity, whose operations affect commerce and fall within at least one of the [twelve enumerated] categories." 28 C.F.R. § 36.104 (2009).

[84] Some commentators suggest that websites hosting third-party transactions, such as Amazon or eBay, would not be subject to Title III at all. Unlike websites selling their own products, these websites facilitate the sale of others' goods. Therefore, because these websites are not "offering [their] own goods and services in connection with [their] own public accommodation, the

result would be to stifle e-commerce and force a great number of businesses to cease offering products on the Internet. Should each individual seller be required to make their listing ADA compliant, many people would simply be forced to cease using these and other websites to conduct business. If the burden falls on the business facilitating the sale, problems are even worse. eBay, for example, sells approximately $2,000 of goods per second.[85] This translates to thousands of new postings every minute. Thus, eBay would be required to update its ADA compliance measures around the clock, every single day.

One commentator has suggested that Congress amend the language of the ADA to specifically address websites.[86] The article acknowledges the great uncertainty as to what is or should be the law.[87] In the interest of clarity, the author suggests Congress adopt one of three rules: either the ADA should apply to all commercial websites; a qualified application to only certain websites meeting the *Target* decision's nexus approach; or application of the Act to no websites at all.[88] By

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connection with a public accommodation for purposes of Title III liability does not exist." Isabel Anna DuPree, *Websites as "Places of Public Accommodation:" Amending the Americans with Disabilities Act in the Wake of National Federation of the Blind v. Target Corporation*, 8 N.C.J.L. & TECH. 273, 298 n.143 (2007). This position oversimplifies a decidedly more complicated issue and produces a disparate result. Although websites like eBay do not offer their own products, they do offer a service. In fact, the service of hosting third-party sales effectively is their primary service in connection with their bricks-and-mortar offices. Therefore, eBay offers a service in connection with a place of public accommodation, while the third-party business might be selling a good tied to its own bricks-and-mortar location. A useful way to frame the issue would be to imagine eBay as a consignment shop. Surely, the responsibility for making such a shop handicap accessible would not fall upon the consignor. However, these commentators would argue that, on the Internet, the consignee has no duty to provide access either. Furthermore, the sheer volume of business provided by these websites (*see infra* note 105) militates in favor of liability, whether placed on the host website or the third-party seller. A rule to the contrary would frustrate the purpose of Title III, excluding the blind from some of the largest marketplaces on the World Wide Web.

85 *See infra* note 105.

86 *See* Dupree, *supra* note 84, at 300.

87 *Id.*

88 *Id.*

completely including or excluding websites, Congress would settle the question of whether a website is a public accommodation, but both choices are too radical to be genuinely feasible options. If all commercial websites have to be ADA compliant, the growth and expansion of technology would be frustrated. Many businesses, particularly small, technologically dependent businesses which rely on these "marketplace" websites for the bulk of their transactions, would be forced off of the Internet. Exempting all websites from ADA compliance, on the other hand, would exclude the blind from access to e-commerce altogether. This would be inconsistent with current case law and the spirit of the ADA generally. A proposal to statutorily require only those websites with a sufficient nexus to be compliant defeats itself; while eBay offers one-hundred percent of its services through their website, she argues that such a website would escape Title III scrutiny.[89] While a nationwide standard still eludes the courts, most nonetheless recognize the strong possibility that websites are public accommodations, or at least services thereof.[90] Congressional action would help clear the air as to which websites would be subject to Title III, but cannot aid in the uncertainty of how to remove barriers to access.

A PHANTOM SOLUTION: BARRIER-REMOVAL IS NOT UNIVERSALLY FEASIBLE

As noted earlier, the problem is twofold. First, we must determine whether websites are, in fact, public accommodations or services thereof, and second, we must identify a feasible means of implementing compliance where it is required, presuming such means exist. In the vast majority of cases, websites will have no problem ensuring their barriers are removed. However, there are a growing number of websites in which both the feasibility of compliance and upon whom the burden would fall are uncertain. Ultimately, the best policy is

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[89] *Id.* at 298, n.143.

[90] Evgenia Fkiaras, Liability Under the Americans with Disabilities Act for Private Website Operators, 2 SHIDLER J. L. COM. & TECH. 6 (2008).

one which balances the rights and needs of the disabled with policies favoring technological advancement and economic growth.

Although most case law, position papers, and scholarly articles have focused on the issue of public accommodation, most fail to address the possible issues regarding the latter, less scrutinized technological issue. That noncompliance would leave the blind at a severe disadvantage in this increasingly digital age is undeniable. However, as prolific and sophisticated as technology has become, its inherent human element serves as an impediment to website compliance which cannot easily be rectified.

A. WHAT IS NECESSARY TO MAKE WEBSITES ADA COMPLIANT?

Most portions of websites are comprised of text and therefore are relatively simple to make accessible to the blind. The majority of Internet use by the blind depends on screen readers that tell the user what text is on the screen. However, the development of the Internet has caused a number of problems. In particular, the reliance of most websites on images terminates a screen reader's ability to interact with the user. This is particularly problematic with commercial websites, which often sell products and depend on an image or series of images to accurately describe products to users. Because screen readers cannot interpret pictures, the burden for accessibility cannot lie with the user. Instead, a website's programmer must include "alt-text" within a picture's encoding.[91] Alt-text is a textual equivalent to pictures displayed on screen so that blind users will hear a description of the photo when they tab to that

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[91] A recent study has shown that alt-text is poorly applied in practice. The study found that "[a] large fraction of images lack alternative text [alt-text]. For example, of the significant images found on the homepages of the 500 most high-traffic websites, only 39.6% were assigned alternative text." Jeffrey P. Bigham, et al., *WebInSight: Making Web Images Accessible*, 2006 PROC. OF THE 8TH INT'L, ACM SIGACCESS CONF. ON COMPUTERS AND ACCESSIBILITY 181 (citation omitted).

portion of the page.[92] One expert, in his statement to Congress during the 2000 inquiry, noted:

> Most of you make extensive use of a mouse when you navigate the Internet, but blind people cannot do this. Instead of a mouse used to point and click, we use the tab and arrow keys to move from item to item on a screen.
>
> . . . .
>
> One of our biggest difficulties comes when we try to shop on-line using pages where the creator of the web site has failed to label the pictures he shows with a brief textual description. Computer technology is not yet sufficiently advanced to recognize a picture and tell us that what appears on the screen. For this information we must rely on the creator of the page we're viewing to add a line of text . . . .[93]

Thus, businesses maintaining commercial websites are the only party able to bear the burden of ensuring that their websites are sufficiently accessible to all users. Since the overwhelming majority of products sold on the Internet rely heavily on imagery to provide users with a proper description of what they are purchasing, the blind are detrimentally affected; at best trying to discern the content of a picture through the surrounding text, and at worst not knowing the content at all. Herein lies the true problem. While the disabled can purchase

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[92] Some experts argue that the lack of alt-text is often not the impediment that it may seem to be. *See* Jeffrey P. Bigham, et al., *WebInSitu: A Comparative Analysis of Blind and Sighted Browsing Behavior*, 2007 PROC. OF THE 9TH ANN. INT'L. ACM SIGACCESS CONF. ON COMPUTERS AND ACCESSIBILITY 51. This study notes that "[b]lind web users have proven adept at overcoming accessibility problems, and one of the goals of this study was to better understand the coping strategies employed by blind users as they browse the web. For instance, the lack of alternative text is an often-cited accessibility concern, but blind users can often obtain the same information contained within an image from surrounding context." *Id.* at 51-52.

[93] *See supra* note 57, at 18-19.

goods in stores, where sales associates can describe an item to a blind shopper, they cannot get adequate descriptions of these products to confidently purchase over the Internet. Thus, alt-text is not only beneficial for the blind to have equal access, it is entirely necessary.

B. THE PROBLEM OF FEASIBILITY

Perhaps the key requirement of Title III is that any modifications made by businesses to ensure handicap accessibility must be reasonable. This prong of the test was a clear acknowledgment by the legislature that, due to the retroactive nature of the Act, certain businesses would not be able to comply without placing an undue burden on their business operations. In particular, physical structures created in the past and used as business offices or stores were not necessarily built to standards which easily lend themselves to alteration accommodating disabled persons. While it has been left unaddressed regarding the Internet, a handful of cases from the past nineteen years since the statute's enactment can help steer us toward an idea of how courts might treat the issue in cases involving commercial Internet use.

This provision ultimately arose due to the retroactive nature of the ADA. The legislature acknowledged that modifications to physical locations would not necessarily be practicable and therefore refused to require businesses to make changes that would place an undue burden on their operations.[94] The relevant prohibitions provide, in pertinent part:

> For purposes of subsection (a) of this section, discrimination includes--
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> **(i)** the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any goods, services,

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[94] Each specific prohibition contained within the statute contains an exception for unfeasible changes or those that substantially alter the purpose of the business by fundamentally frustrating the good or service. 42 U.S.C. § 12182(b)(2)(A) (2006).

facilities, privileges, advantages, or accommodations, *unless such criteria can be shown to be necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations being offered*;

(ii) a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, *unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations*;

(iii) a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, *unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden*;

(iv) a failure to remove architectural barriers, and communication barriers that are structural in nature, in existing facilities, and transportation barriers in existing vehicles and rail passenger cars used by an establishment for transporting individuals (not including barriers that can only be removed through the retrofitting of vehicles or rail passenger cars by the installation of a hydraulic or other lift), *where such removal is readily achievable*; and

> **(v)** where an entity can demonstrate that the removal of a barrier under clause (iv) is not readily achievable, a failure to make such goods, services, facilities, privileges, advantages, or accommodations available through alternative methods *if such methods are readily achievable*.[95]

Thus, Congress made it clear that under no circumstances should a modification be imposed when it would be fundamentally detrimental to the business to which it professes to apply. While this serves as a barrier to uniform compliance, it recognizes the fundamental tension between the rights of the blind, who face new hardships every day, and existing businesses, who have succeeded in the past but, for various reasons, would not survive compliance.

Widespread public use of the Internet did not occur until 1995, five years after the ADA was passed.[96] Thus, the ADA's applicability to commercial websites had not been contemplated at the time of its passage. Instead, the issue arose contemporaneously with the rise of what is commonly referred to as "Web 2.0," which signified a new perception of the World Wide Web as no longer being distinct from, but rather a part of, the physical world.[97] Web 2.0 has been described as a rejuvenation of business on the Internet after the "dotcom bubble" burst near the turn of the century.[98] Tim O'Reilly, founder and CEO of O'Reilly Media, has articulated five general rules that guide our definition of the Web 2.0 revolution, which emphasize its primary feature of interaction between websites and their users:

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95 *Id.* (emphasis added).

96 *See supra* note 20, at 2.

97 *Id.* at 3.

98 Tim O'Reilly, *Web 2.0 Compact Definition: Trying Again*, O'REILLY RADAR, Dec. 10, 2006, http://radar.oreilly.com/archives/2006/12/web-20-compact.html (last visited Nov. 23, 2009).

1. Don't treat software as an artifact, but as a process of engagement with your users. ("The perpetual beta")
2. Open your data and services for re-use by others, and re-use the data and services of others whenever possible. ("Small pieces loosely joined")
3. Don't think of applications that reside on either client or server, but build applications that reside in the space between devices. ("Software above the level of a single device")
4. Remember that in a network environment, open APIs and standard protocols win, but this doesn't mean that the idea of competitive advantage goes away. (Clayton Christensen: "The law of conservation of attractive profits")
5. Chief among the future sources of lock in and competitive advantage will be data, whether through increasing returns from user-generated data (eBay, Amazon reviews, audioscrobbler info in last.fm, email/IM/phone traffic data as soon as someone who owns a lot of that data figures out that's how to use it to enable social networking apps, GPS and other location data), through owning a namespace (Gracenote/CDDB, Network Solutions), or through proprietary file formats (Microsoft Office, iTunes). ("Data is the Intel Inside")[99]

Thus, the "readily achievable" problem described above does not merely affect the postings on sites such as eBay and Amazon, but also user-generated content integrated into each individual webpage. For example, pages describing products offered for sale by Amazon would have to moderate each individual user-review, ensuring each new entry is accessible to blind users. Similarly, some websites provide the ability for individual users to upload pictures of a product for sale through the website. Each new image would have to be given an alt-text description before posting to the site.

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[99] *Id.*

This current impediment to uniform applicability of the ADA to websites leaves us with a choice of several possible actions, none of which would satisfy both the businesses offering goods and services through the Internet and their visually-impaired customers: uniform compliance, uniform exemption, selective exemption, and a "best of one's ability" approach. No solution is without its problems, and therefore we must currently choose the least offensive solution.

First, requiring uniform compliance would prejudice some of the largest businesses on the Internet or the third parties who make use of their services by either requiring individual third parties posting items for sale, who are arguably less tech-savvy than those programmers maintaining the websites, to make their own pages ADA compliant in order to sell their goods, or by requiring the service-providing websites themselves to ensure compliance on each new page. This would put an undue burden on e-commerce and effectively stifle what has become the world's largest marketplace.

At the other end of the spectrum, the second possibility would be uniform inapplicability of the ADA to the Internet. This ill-advised approach would prejudice the visually impaired and run contrary to the spirit of the Act, as discretion would lie solely in the hands of businesses themselves. While a strong argument could be made that most businesses would rather take the initiative to make their websites compliant in order to retain more customers, it would provide little incentive to websites adding thousands of new pages – and therefore thousands of new products – every minute.

A third approach that would reconcile the letter of the law with the technological inability of certain websites to comply is a series of exemptions for those websites that, by their very nature, would not be able to meet the "readily achievable" requirement built into the statute. Again, the difficulty here lies in the belief that the exempt websites are the very ones representing the future of e-commerce, and therefore selective exemption would inadequately protect the rights of the blind from a prospective viewpoint. This would also run contrary to a number of existing cases suggesting that places of public accommodation that cannot readily achieve barrier-removal in certain instances still must remove any barriers to the fullest extent possible.

This leads to the final, and most advisable, approach, which is compliance to the "best of one's ability." By this standard, businesses would have to use their best efforts to make as much of their websites as accessible as possible. While this is currently the best option, there remain several problems with this approach. It still fails to satisfy the spirit of the ADA's equal access intent, as not all parts of all websites would be compliant. Furthermore, a determination of a business's ability to ensure compliance would almost certainly be an *ad hoc* determination which could potentially greatly tax judicial resources. However, until a time arises in which screen-reading technology can meet the demands of an extremely fluid market, the "best of one's ability" approach remains the most attractive option to combat noncompliance.

"Readily achievable" has been interpreted by the courts several times over the last several years. Most significant of these is the treatment of the issue by the 11th Circuit in the 2006 case *Gathright-Dietrich v. Atlanta Landmarks, Inc.*[100] That case involved an action by patrons using wheelchairs against a historic theater for insufficient access. The court focused its inquiry on the building's historic significance.[101] Citing a case from the District of Maryland, the Court determined that, in light of the factors articulated by the Act, a historic building could not "readily achieve" the removal of access barriers when it would fundamentally frustrate the historic significance of the building.[102] Instead, the theater would only have to comply as much as possible without frustrating the building's central characteristic.[103]

It is likely such a rule would not be limited to the context of historical buildings, but would instead apply whenever a commercial entity's central characteristic or purpose would be

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[100] 452 F.3d 1269 (11th Cir. 2006)

[101] *Id.* at 1273.

[102] *Id.* (citing Speciner v. NationsBank, N.A., 215 F. Supp. 2d 622, 628–29 (D. Md. 2002)) ("barrier removal would not be considered 'readily achievable' if it would threaten or destroy the historic significance of [the] building.").

[103] Id.

frustrated by unqualified compliance. Considering the factors to be contemplated when determining ready availability articulated by 42 U.S.C. § 12181(9),[104] courts should most likely exclude any barrier-removal that would fundamentally alter the nature or purpose of a business. In the context of the Internet, this means that if a third-party sales facilitator such as eBay would no longer be able to provide its services efficiently, or if the third party itself would no longer be able to send its goods into the stream of commerce, such a business would find exemptions under the rule, becoming compliant only to the extent to which it is able.

This requirement holds the potential to exclude a number of websites' central features from the requirement of ADA compliance, including some of the most widely used websites representing the future of Internet technology. Problems arise when considering Internet businesses that can be considered public accommodations, or services thereof, yet retain little control over the products and services offered by the site. For example, eBay, while often considered an offeror of goods, in fact offers a service by which individual eBay users can advertise, or "post," their own goods for sale. The site can best be compared to a shopping mall. EBay offers webpages as "stores" where its customers – the sellers themselves – can offer products to shoppers who surf the website. In fact, the site allows users to consolidate the items they are offering for sale into a single page to which buyers can navigate, mirroring a physical store to a very high degree. EBay moves two thousand dollars worth of merchandise every second.[105] Amazon, while offering products of its own, also operates a service called the "Amazon Marketplace," where users, often independent businesses (but available to anyone), can sell their own items on Amazon. Placing the responsibility of making each new post on these sites ADA-compliant on the individual seller raises serious implications under the rubric of feasibility articulated by 42

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[104] 42 U.S.C. § 12181(9) (2006).

[105] In 2008, $2000 worth of merchandise was sold on eBay every second. eBay Inc., *Who We Are*, http://www.ebayinc.com/who (last visited Nov. 23, 2009).

U.S.C. § 12181(9),[106] as the average eBay user or Amazon Marketplace poster might not be technologically savvy, relying on the simplified posting formats provided by the host site to successfully offer its products.

It is also important to note that the average eBay user varies greatly. Many are small businesses taking advantage of eBay's services to move their own products. Others, however, are simply individuals selling collectors' items or things for which they no longer have any personal use. Although small businesses would not be in the best position to make their postings compliant, they certainly have more resources at their disposal than the individual seller. However, placing the burden on the third-party seller to ensure compliance would produce one of two results. First, the courts might treat individuals as distinct from businesses as they lack bricks-and-mortar business offices necessary to find the requisite "nexus" under the *Target* test. This would create a large inconsistency in compliance, as small businesses might need to make their items compliant while individuals would not. To the average blind user, it is likely they would not know the difference between these respective sellers, so it would merely appear to them as though accessibility were inconsistent. The other possibility is that courts would be forced to treat individuals the same as small businesses in the e-commerce setting, placing a strain on sales through these popular websites. Individuals particularly would not be in a position to make their posts ADA-compliant, nor would they be likely to realize such measures are necessary. Thus, the only logical party on which to place the burden would be the service-providing host website.

Similarly, issues could arise by requiring the host website to bring into compliance each of the thousands of new posts per minute. Constraining these websites by requiring unfeasible ADA compliance could not only inhibit the growth of individual businesses, but could result in a deterioration or failure of e-commerce in the United States altogether. These types of websites account for a substantial amount of daily Internet traffic and have been at the forefront of the development of the

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[106] 42 U.S.C. § 12181(9) (2006).

World Wide Web's commercial applications in the twenty-first century.

Courts must strike a balance among competing public interests. The first and most central of these is the interest in equality implicated by the Americans with Disabilities Act. The Act reflected a judgment call, implicated by Constitutional equality, that all Americans should, to the extent possible, be on a level playing field regardless of any mental or physical handicap. This reaches back to the beliefs of America's forefathers that "all men are created equal."[107]

At tension with this interest is the promotion of the free market. The Internet represents the future of commerce, both in the United States and abroad, and therefore we must take great care to ensure it remains free to grow. Placing certain burdens on the fledgling e-commerce markets could have the practical effect of slowing the growth of the Internet's commercial uses, as well as the technology required for its expansion and development generally. This would create a vicious cycle by which the very rule which was designed to make websites equally accessible would also stifle the technology necessary to make equal access feasible.

Also at tension with the interest in equality is the promotion of technological advancement. Promoting e-commerce in the United States incentivizes initiatives whereby programmers and developers will create newer, more efficient ways to offer goods and services online. This would not necessarily be limited to visual output, and programs which attempt to automatically interpret images for blind Internet users are already in development.[108] Thus, allowing for exceptions to ADA compliance when such compliance is not entirely feasible might ultimately aid in shortening the length of time during which this problem will exist. While this might affect the disabled detrimentally in the short-term, it would ultimately benefit them by helping pave the way for a satisfactory solution for all parties involved.

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[107] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

[108] *See* Bigham, *supra* note 92, at 51–52.

Some might argue that requiring full compliance would better promote technological advancement by forcing websites to shut down until such time as they can become fully compliant. This approach would be misguided. First, it does nothing to promote access in the immediate future, as not only would the blind be shut out of many websites, but all users. Thus, it would be a severe blow to both the free market and individual businesses. Second, it ignores the very real possibility that the technology required for full compliance might not be on the immediate horizon. While the technological divide continues to exist, it will, in all likelihood, be remedied at some point. It would be punitive to cause such extensive harm to businesses while preventing buyers from making use of the sites' services.

CONCLUSION

The Americans with Disabilities Act was a huge step forward for the rights of disabled Americans. The advent of the Internet is likewise a huge step forward for mankind generally. Unfortunately, the two are currently at odds with one another, as the technology involved in e-commerce is simultaneously over- and underdeveloped. It is overdeveloped in that it permits the introduction of thousands of new commercial products into the stream of e-commerce every second, giving rise to the very issues being analyzed by the legal community. It is underdeveloped in that the alt-text technology necessary for full equal access to web pages currently cannot keep up with the speed at which new pages are created.

Courts grappling with ADA compliance for websites have focused on the first of two levels of inquiry. The threshold question that has garnered the attention of both courts and commentators is whether the ADA should apply to commercial websites and to what extent. While this critical problem continues to plague courts, the second issue has yet to be reached. Since this first issue will, however, eventually be resolved, courts should be prepared to address the second issue, which is whether the required barrier-removals are readily achievable by businesses participating in e-commerce. This would currently require an *ad hoc* decision by the courts in each individual case. For the vast majority of these businesses,

compliance will not be an issue, as they offer a static or slowly evolving line of products and thus do not need to update their websites with great frequency. However, issues arise with commercial websites offering hosting services for transactions between third-party sellers and consumers, such as eBay and Amazon Marketplace. These websites generate so many new products every second that the service providers cannot possibly be expected to bring every new page into compliance. Problems similarly arise if the third-party goods providers are required to make their pages compliant, as many small businesses lack the technical staff to ensure such compliance. Furthermore, it would require courts to place individual sellers, often families clearing items from their attics or garages, in the same situation as small businesses. Although small businesses might lack the technologically savvy support staff necessary to ensure compliance, they are certainly in a better position than the individual seller.

This problem implicates a number of policy issues, but they tend to militate in favor of qualified compliance. Although such compliance will seriously frustrate access to websites such as eBay and Amazon in the short-term, the technological advancement and promotion of e-commerce it would foster suggest exceptions to compliance would be the best temporary solution. Until the time comes when accessibility technology can keep up with the growth of e-commerce, these websites should be subjected to qualified compliance standards, allowing them to become compliant to the best of their ability.