

Black Swans and Black Elephants in Plain Sight: An Empirical Review of Central Bank Independence

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Prior to the 2008 financial crisis, it was easy to see the logic of delegating monetary policy to private central bankers. It was widely accepted that politicians could not be trusted with monetary policy because of their short-term time horizons and fixations on their next elections. They would be tempted to spike the punch bowl just when central bankers, with their longer time horizons, would be taking the punch bowl away from the party.¹ The credibility of the Federal Reserve in helping maintain low inflation seemed to confirm the conventional wisdom of keeping central banks insulated from politics. Legal scholars have largely deferred to this orthodox economics consensus on central bank structure by avoiding the constitutional critique of broad delegations to privately-directed central banks.² But the

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¹ William McChesney Martin, Federal Reserve chairman in the 1950s and 1960s, is credited with the punch bowl aphorism. See N. Gregory Mankiw, *How to Avoid Recession? Let the Fed Work*, N.Y. TIMES, Dec. 23, 2007, (Sun. Money), at 4. Mankiw, a Republican economist, downplayed the Federal Reserve's failure to prevent the subprime mortgage crisis through regulation. *Id.* Mankiw also defended the Fed's easy monetary policy in 2007 as an attempt to avoid recession by "spiking the punch with grain alcohol when the party starts to flag . . ." *Id.*

² The Federal Reserve is a privately-owned central bank; each of the system's twelve regional Federal Reserve Banks is owned by private commercial member banks. *Lewis v. United States*, 680 F.2d 1239, 1241 (9th Cir. 1982); THE FEDERAL RESERVE SYSTEM: ITS PURPOSES AND FUNCTIONS 48, 50–53 (Bd. of Governors of the Fed. Reserve

financial crisis and its continuing aftermath have shaken this orthodox paradigm of central bank independence. Suddenly, it seemed that central bankers were as prone to short-term herd behavior as any politician, and that the Federal Reserve was not all that independent of the private financial interests that dominate its own governing boards.³ The line between regulator and regulated industry had become blurred as the central bank enabled the housing bubble with low interest rates and ever-lower lending standards, while abandoning any meaningful oversight or supervisory role. Critics charge that the central bank was not simply asleep at the wheel, but that it was an active cheerleader in all that had gone wrong in inflating a huge and unsustainable bubble. Since the collapse, the Federal Reserve has showered trillions of dollars in subsidies on its private constituencies, far exceeding all other subsidies and stimulus packages passed by Congress combined.⁴

Indeed, since the financial crisis hit in 2008, the case for autonomous central banking has been increasingly questioned, even in financial circles.⁵ Others see no such lessons from the financial collapse and subsequent bailouts. An article by Harout Jack Samra warrants attention for combining the typical range of flawed assumptions and problematic methodologies in arguing for central bank independence.⁶

Part I of this essay will consider the economic authorities relied upon by Samra, including David Ricardo and John

Sys. 2d ed. 1947) [hereinafter *THE FEDERAL RESERVE SYSTEM: ITS PURPOSES AND FUNCTIONS* 1947] (reporting that each of the twelve Federal Reserve Banks is a private corporation which serves a regional district and is obligated to “subscribe to the capital of the Federal Reserve Banks”); MURRAY N. ROTHBARD, *A HISTORY OF MONEY AND BANKING IN THE UNITED STATES: THE COLONIAL ERA TO WORLD WAR II* 258 (2002) (quoting a Chase National Bank official, prior to the Act’s passage, that the Federal Reserve Act “will make all incorporated banks together joint owners of a central dominating power”); WILLIAM GREIDER, *SECRETS OF THE TEMPLE: HOW THE FEDERAL RESERVE RUNS THE COUNTRY* 277 (1987) [hereinafter *GREIDER, SECRETS OF THE TEMPLE*] (describing “a privately controlled network of regional reserve banks that would be given governmental powers”); RON PAUL, *END THE FED* 23 (2009) (concluding that the Federal Reserve Act conferred “legal legitimacy on a cartel of the largest bankers”).

³ The Federal Reserve’s policy-making Federal Open Market Committee (FOMC) includes the regional Federal Reserve Bank presidents who are appointed by boards of directors which are in turn selected by private commercial banks in each regional district. *THE FEDERAL RESERVE: PURPOSES & FUNCTIONS* 3–4, 10 (Bd. of Governors of the Fed. Reserve Sys. Publ’n Comm. ed., 9th ed. 2005) [hereinafter *THE FEDERAL RESERVE: PURPOSES & FUNCTIONS* 2005].

⁴ Div. of Supervision and Consumer Protection, *The Fed. Deposit Corp., A Year in Bank Supervision: 2008 and a Few of Its Lessons*, *SUPERVISORY INSIGHTS*, Summer 2009, at 3, 7.

⁵ Clive Crook, *Central Bankers Get with the Politics*, *FIN. TIMES*, May 17, 2010, at 13.

⁶ See generally Harout Jack Samra, *Central Bank Autonomy in Latin America: A Survey and Case Studies*, 13 *CHAP. L. REV.* 63 (2009).

Maynard Keynes, towering figures in the history of economic thought.⁷ Samra overlooks conflicting views of Keynes in particular.⁸ Although Keynes endorsed the autonomy of central bankers he also argued that they should be motivated solely by the public interest.⁹ Keynes also endorsed the nationalization of the Bank of England and provided a theoretical framework for neutralizing monetary policy and reigning in the authority of central bankers and activating the fiscal capabilities of elected branches of government.¹⁰ A fair and balanced discussion of Keynes suggests, at the very least, that central bank governance and monetary policy are far more complex matters than presented by Samra and other proponents of central bank independence.¹¹ Consideration of the Keynesian model in action, particularly during the 1940s, suggests that high economic growth and low inflation need not be inconsistent with a more accountable central bank.¹² Meanwhile, the record of the Federal Reserve's more recent failures suggests that autonomous central banking invites regulatory capture, financial instability, and eventual financial collapse and bailout.¹³

Part II considers the empirical research relied upon by Samra, including studies that purportedly correlate central bank independence with lower inflation rates.¹⁴ The studies were all conducted prior to the 2008 collapse and all mimicked the flaws in the risk management models that contributed to the financial crisis by relying on far too limited time periods of historical data.¹⁵ By so doing, they overlooked the possibilities of so-called "Black Swans"—those outlier events that do not fit neatly within the bell-shaped curves of probabilities, but which do occur and reoccur in history.¹⁶ Instead, the studies all engage in a crude type of comparative analysis, comparing countries and inflation rates while ignoring all potential non-monetary factors, such as differences in regulatory and trade policies affecting consumer price levels.

⁷ See generally GIANNI VAGGI & PETER GROENEWEGEN, A CONCISE HISTORY OF ECONOMIC THOUGHT: FROM MERCANTILISM TO MONETARISM (2003).

⁸ See, e.g., Samra, *supra* note 6, at 69.

⁹ See *infra* Part I.

¹⁰ See *infra* Part I.

¹¹ See *infra* Part I.

¹² See *infra* Part I.

¹³ See *infra* Parts I & II.C.

¹⁴ See *infra* Part II.A.

¹⁵ See *infra* Part II.A; Timothy A. Canova, *Financial Market Failure as a Crisis in the Rule of Law: From Market Fundamentalism to a New Keynesian Regulatory Model*, 3 HARV. L. & POL'Y REV. 369, 381–82 (2009) [hereinafter Canova, *Financial Market Failure*].

¹⁶ NASSIM NICHOLAS TALEB, THE BLACK SWAN: THE IMPACT OF THE HIGHLY IMPROBABLE xxii–xxiii (2010).

Perhaps a more fruitful approach would be longitudinal studies that consider changes in one particular central bank's structure and macroeconomic performance over a longer time period. For instance, by ignoring the data from the 1930s and 1940s for the United States in particular, the empirical literature overlooks perhaps the most significant decade when the central bank lacked de facto independence, inflation was kept low, and economic growth rates were at an all-time high.¹⁷ Likewise, by failing to consider more recent data from the 2000s, these studies fail to appreciate the relationship between central bank independence and agency capture, deregulation of lending standards, growth of financial fragility and inflation of unsustainable financial bubbles, and enormous subsidies to favored financial constituents.¹⁸

Part III responds to Samra's reliance on a book little-known in the United States, *Guide to the Perfect Latin American Idiot*,¹⁹ written by three highly ideological Latin American journalists—a book devoid of sources but long on name-calling.²⁰ The economic philosophy embedded in this book is a crude monetarism, one which was refuted by the weight of empirical evidence in the early 1980s when monetarists, led by Milton Friedman, wrongly predicted a resurgence of inflation, and more recently by the evidence of the past two years, in which inflation has not kept pace with the huge expansion in the money supply precisely because of the collapse in the velocity of money, a Keynesian insight that monetarists conveniently overlook. But Samra and *The Perfect Idiot* co-authors do not discuss such substantive issues; rather, their ad hominem line of argument seems intended to deflect and distract from substantive discussion. Part IV concludes this article with a discussion of various proposals to reform the structure of the Federal Reserve to make it more accountable and transparent. Recent reforms in the Dodd-Frank Wall Street Reform and Consumer Protection Act are placed in the context of various constitutional challenges to the Federal Reserve.²¹ What has often been missing from both sides of the central bank debate is an appreciation for nuance and the wide spectrum of possible central bank structures. All too often the choices are phrased as a false dichotomy between an independent but captured central bank or one that is dominated by the

¹⁷ See, e.g., *infra* Parts I & II.A.

¹⁸ See *infra* Part II.

¹⁹ See generally PLINIO APULEYO MENDOZA, CARLOS ALBERTO MONTANER & ALVARO VARGAS LLOSA, *GUIDE TO THE PERFECT LATIN AMERICAN IDIOT* (Michaela Lajda Ames trans., Madison Books 2000) (1996). Hereinafter *The Perfect Idiot*.

²⁰ See *infra* Part III.

²¹ See *infra* Part IV.

politics of daily shifts in public opinion. In a diverse and pluralistic society, surely there should be other, alternative models that would achieve greater transparency and public accountability without sacrificing the objectives of price stability and economic growth.²²

I. THE MISUSES OF HISTORY

Samra opens his article with a quote by Keynes that there is “no surer means of overturning the existing basis of society than to debauch the currency.”²³ This was from Keynes’ prophetic 1920 critique of the Versailles peace settlement, a critique that recognized the inflationary dangers from imposing huge war reparations on Germany.²⁴ Defenders of central bank independence routinely point to the hyperinflation in Weimar Germany, which did indeed destroy the foundations of middle class prosperity, but they present highly selective evidence, ignore the actual history, and therefore draw the wrong lessons. Contrary to their arguments, the Weimar hyperinflation had little to do with the structure of the central bank.

Rather, the root cause of the German hyperinflation of 1923, like more recent bouts of high inflation in Latin America, was the country’s inability to service its huge foreign debt rather than any purported political control of the central bank. In May 1922, responding to pressure from foreign creditors Britain and France, Germany passed the Law on the Autonomy of the Reichsbank, which made the central bank independent of government.²⁵ As recounted by David Marsh: “The granting of the Reichsbank’s independence had no effect on controlling inflation, which ran at 1,300 percent in 1922.”²⁶ In fact, it was this newly independent central bank that printed paper money around the clock while placing the blame for the continuing inflation squarely on the Allied governments for making repayment of Germany’s debts

²² JOHN R. COMMONS, INSTITUTIONAL ECONOMICS: ITS PLACE IN POLITICAL ECONOMY 900–01 (1934) (proposing reform of the Federal Reserve to include representation of all economic stakeholders to give voice to a wide diversity of economic interests); LEON H. KEYSERLING, MONEY, CREDIT, AND INTEREST RATES: THEIR GROSS MISMANAGEMENT BY THE FEDERAL RESERVE SYSTEM: THE FED’S ASSIST TO INFLATION, RECESSIONS, AND INJUSTICE AND THE READILY AVAILABLE REMEDIES IN THE PERSPECTIVE OF THE WHOLE ECONOMY 111 (Conf. on Econ. Progress, Washington, D.C., 1980) (proposing that Federal Reserve Board of Governors and Federal Open Market Committee include fair representation of “business, labor, farmers, [and] consumers”).

²³ Samra, *supra* note 6, at 63.

²⁴ *Id.* at 63 n.1.

²⁵ DAVID MARSH, THE MOST POWERFUL BANK 81, 252 n.46 (1992).

²⁶ *Id.* at 81.

impossible when French and Belgian armies occupied the Ruhr, the industrial heartland of Germany's economy, in early 1923.²⁷

It is unlikely that any central bank governance structure could have prevented the 1923 German hyperinflation. The Reichsbank was already autonomous, and, in 1924, the hyperinflation was ended by the introduction of a new currency and the so-called Dawes plan, which granted Germany a temporary moratorium on its reparations payments.²⁸ By 1933, nearly a decade after the hyperinflation had ended and with an even more independent central bank, the basis of German society was once again overturned. Three years of Great Depression and mass unemployment led to the rise of Hitler.²⁹ Keynes himself would focus his critique on the monetary orthodoxy that contributed to depression and deflation, though he largely ignored the implications for central bank structure in implementing his alternative model.

The myth of Weimar hyperinflation should give pause to simplistic uses of history that ignore the full context and range of historical facts.³⁰ Likewise, Samra offers a long quote by David Ricardo from 1824 to suggest that Ricardo "advocated for greater independence for monetary authorities."³¹ However, in the quote itself, Ricardo proposes delegating monetary authority to commissioners "not removable from their official situation but by a vote of one or both Houses of Parliament."³² That would have made Ricardo's proposed monetary commissioners more accountable than the regional Federal Reserve Bank presidents sitting on the Federal Open Market Committee (FOMC) that

²⁷ *Id.*

²⁸ Timothy A. Canova, *Financial Liberalization, International Monetary Dis/Order, and the Neoliberal State*, 15 AM. U. INT'L L. REV. 1279, 1298–99, 1299 n.84 (2000) [hereinafter Canova, *Financial Liberalization*].

²⁹ ADAM FERGUSON, WHEN MONEY DIES: THE NIGHTMARE OF THE WEIMAR COLLAPSE 213 (1975); WILLIAM SHIRER, THE RISE AND FALL OF THE THIRD REICH: A HISTORY OF NAZI GERMANY 94–111 (1985); William Krehm, *The Bank of Canada—A Misused Tool*, in WILLIAM F. HIXSON, IT'S YOUR MONEY 121 app., 122 (1997) (discussing Reichsbank's refusal in 1930 "to make loans to the democratic German government unless it fired its Finance Minister, the Socialist economist Rudolf Hilferding . . . [initiating] a tight money policy that drove unemployment to 30% and paved the way for the Nazis to come to power and World War II"). It was deflationist policies in Germany that paved the way for Hitler and National Socialism. CONTRA KEYNES AND CAMBRIDGE: ESSAYS, CORRESPONDENCE 36 (Bruce Caldwell ed., 1995).

³⁰ Eric Foner suggests that historical truth is not fixed and permanent, and that fact and interpretation can be sealed off from each other: "The very selection and ordering of some 'facts' while ignoring others is itself an act of interpretation." ERIC FONER, WHO OWNS HISTORY? xvii (2002).

³¹ Samra, *supra* note 6, at 68.

³² *Id.*

makes U.S. monetary policy.³³ This is not to suggest that Ricardo today would support making the Federal Reserve Bank presidents more accountable, but rather to suggest the uncertainties inherent in trying to find support for present-day policies in the words of early economists.

Samra also asserts that Keynes “later adopted similar views to Ricardo’s as to the benefits of central bank independence.”³⁴ His only support for this assertion is an article by B.W. Fraser, written when Fraser served as Governor of the Reserve Bank of Australia, in which he quotes Keynes’ testimony before the 1913 Royal Commission regarding an Indian central bank.³⁵ Although Keynes endorsed the idea of providing such a central bank’s executive officers with day-to-day independence, he also suggested constraining that authority by “ultimate government responsibility,” which is not exactly a ringing endorsement of central bank goal independence.³⁶ Yet, Samra equates Keynes’ testimony with support for central bank independence, presumably of the variety now predominant in maintaining anti-Keynesian policies in much of the world today.

To conclude that Keynes and Ricardo had similar views on monetary governance and policy paints with too broad a brush. Samra never mentions that the work of Keynes he relies on was written decades before Keynes’ groundbreaking 1936 classic, *The General Theory of Employment, Interest, and Money*.³⁷ It is instructive to consider the evolution of and weaknesses in Keynes’ views on monetary governance and policy as it highlights the differences between autonomy and accountability as well as

³³ Section 341 of the Federal Reserve Act provides for the appointment and dismissal of the presidents of the regional Federal Reserve Banks by the private boards of directors of those regional Federal Reserve Banks. Federal Reserve Act, 12 U.S.C. § 341 (2006). It should also be noted that Ricardo’s plan for independent commissioners was never adopted, the Bank of England continued to issue paper money and conduct monetary policy for the next two centuries, and the United Kingdom was not beset by any hyperinflations.

³⁴ Samra, *supra* note 6, at 69.

³⁵ B.W. Fraser, *Central Bank Independence: What Does it Mean?*, RESERVE BANK OF AUSTRALIA BULLETIN 1, 2 (1994), available at <http://www.rba.gov.au/publications/bulletin/1994/dec/pdf/bu-1294-1.pdf>. Fraser served as Governor from 1989 to 1996. *Past & Present Governors*, RESERVE BANK OF AUSTRALIA, <http://www.rba.gov.au/about-rba/history/governors/index.html> (last visited Jan. 4, 2011).

³⁶ Samra discusses the difference between goal independence and instrument independence. Samra, *supra* note 6, at 79–82.

³⁷ Hereinafter referred to as “The General Theory.” Samra refers to *The Perfect Idiot* as “groundbreaking,”—and perhaps it is in the annals of mean-spirited satire and ad hominem attacks. *The General Theory of Employment, Interest, and Money*, on the other hand, was truly groundbreaking and is still considered by many as “[t]he most influential macroeconomics book of the twentieth century.” LYNN TURGEON, *THE SEARCH FOR ECONOMICS AS A SCIENCE: AN ANNOTATED BIBLIOGRAPHY* 108 (Lynn Turgeon ed., 1996).

the cultural sea change in public ethics between the time of Keynes and the present.

In his 1926 essay, *The End of Laissez-Faire*, Keynes suggested that in many cases the ideal location of authority would be “somewhere between the individual and the modern State.”³⁸ Progress would lie in the recognition and growth of “semi-autonomous bodies within the State—bodies whose criterion of action within their own field is solely the public good as they understand it, and from whose deliberations motives of private advantage are excluded”³⁹ This hardly seems to describe the monetary operations of today’s Federal Reserve and other autonomous central banks. In just the past two years, the Federal Reserve has purchased some \$1.25 trillion of so-called toxic assets from private financial institutions and extended another \$1.5 trillion in low-interest loans to those interests.⁴⁰ There is certainly no reason to assume that motives of private advantage have been excluded from these central bank decisions. Rather, there are enormous conflicts of interest and opportunities for private avarice inherent in today’s culture of independent central banking.

In *The End of Laissez-Faire*, Keynes spoke favorably of the Bank of England as an example of the medieval conception of autonomies—“bodies which in the ordinary course of affairs are mainly autonomous within their prescribed limitations, but are subject in the last resort to the sovereignty of the democracy

³⁸ JOHN MAYNARD KEYNES, *The End of Laissez-Faire* (1926), in ESSAYS IN PERSUASION 312, 313 (1963).

³⁹ *Id.* See also JOHN MAYNARD KEYNES, THE GENERAL THEORY OF EMPLOYMENT, INTEREST, AND MONEY 372, 374 (1936) [hereinafter KEYNES, THE GENERAL THEORY] (decrying the large disparities in income and wealth that existed in his day).

The love of money as a possession—as distinguished from the love of money as a means to the enjoyments and realities of life—will be recognised for what it is, a somewhat disgusting morbidity, one of those semi-criminal, semi-pathological propensities which one hands over with a shudder to the specialists in mental disease.

JOHN MAYNARD KEYNES, *Economic Possibilities of Our Grandchildren* (1930), in ESSAYS IN PERSUASION, *supra* note 38, at 358, 369.

⁴⁰ Federal Reserve Bank of New York, FAQs: MBS Purchase Program, http://www.ny.frb.org/markets/mbs_faq.html (last visited Jan. 11, 2011) (reporting \$1.25 trillion in Federal Reserve purchases of mortgage backed securities). The Federal Reserve’s various emergency lending programs exceeded \$1.6 trillion. Christian A. Johnson, *Exigent and Unusual Circumstances: The Federal Reserve and the U.S. Financial Crisis* 11 (Sept. 7, 2010) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1584731 (reporting \$112 billion in Primary Credit Program; \$493 billion in Term Auction Facility; \$225.4 billion in Section 13(3) lending; \$234 billion in Term Securities Lending Facility; \$147 billion in Primary Dealer Credit; \$145 billion in Asset-Backed Commercial Paper Money Market Mutual Fund Liquidity Facility; \$349 billion in Commercial Paper Funding Facility; and \$48 billion in Term Asset-Backed Securities Loan Facility).

expressed through Parliament.”⁴¹ He was also quite clear that he saw the central bank as motivated and incentivized to act in the public interest by limiting the private avarice of its shareholders to “conventionally adequate dividends.”⁴² Beyond paying such dividends, “the direct interest of the management [of the Bank] often consists in avoiding criticism from the public,” and that was sufficient, according to Keynes, to ensure that Bank directors would be motivated by the public interest.⁴³

Keynes saw the Bank of England as merely an extreme instance of institutions which were “socializing themselves” because of their growing size, impact on others, and their concern with their reputation and stability.⁴⁴ This was a rather optimistic and unrealistic view of the capacity of semi-autonomous institutions and actors to constrain and regulate themselves. According to Robert Skidelsky, Keynes’ view “was driven by a belief in scientific expertise and personal disinterestedness which now seems alarmingly naïve”⁴⁵

[Keynes] accepted uncritically the view that captains of industry were constrained, by the size of their undertakings, to serve the public interest; and he assumed, without further argument, that an interconnected elite of business managers, bankers, civil servants, economists and scientists, all trained at Oxford and Cambridge and imbued with a public service ethic, would come to run these organs of state, whether private or public, and make them hum to the same tune. He wanted to decentralize and devolve only down to the level of Top People.⁴⁶

The nuances and flaws of Keynes’ position on central banking are not reflected in Samra’s portrayal. Keynes believed that central banking could be removed not just from politics but from the self-interest of bankers, and that it should “be regarded as a kind of beneficent technique of scientific control such as electricity or other branches of science are.”⁴⁷ For all his genius in overturning the economic orthodoxy of his day, Keynes’ political philosophy rested on a somewhat flawed view of human nature. He could wax eloquently about the eventual euthanasia

⁴¹ JOHN MAYNARD KEYNES, *The End of Laissez-Faire* (1926), *supra* note 38, at 313–14.

⁴² *Id.* at 315.

⁴³ *Id.*

⁴⁴ ROBERT SKIDELSKY, JOHN MAYNARD KEYNES: THE ECONOMIST AS SAVIOR 1920–1937, at 227 (1992) [hereinafter SKIDELSKY, JOHN MAYNARD KEYNES: THE ECONOMIST AS SAVIOR]; JOHN MAYNARD KEYNES, *The End of Laissez-Faire* (1926), *supra* note 38, at 315.

⁴⁵ SKIDELSKY, JOHN MAYNARD KEYNES: THE ECONOMIST AS SAVIOR, *supra* note 44, at 228.

⁴⁶ *Id.* at 227–28.

⁴⁷ *Id.* at 228 (quoting Keynes).

of politics (as well as the euthanasia of the rentier⁴⁸), but until that bright future arrived, assumptions of political and financial disinterestedness seemed premature. The result was an inherent and recurring inconsistency in Keynes' views on central banking.

For instance, in 1932 Keynes supported the Labour Party plan for nationalization of the Bank of England, and yet he still opposed "democratic interference" in its governance.⁴⁹ Presumably, nationalization would do away with the paying of dividends to Bank shareholders and thereby further undermine the self-interested profit motive of Bank directors. Nonetheless, Keynes wanted to protect the Bank's day-to-day independence.⁵⁰ If "it was the policy and not the structure of the Bank of England which was at fault," then to Keynes the remedy was to better educate the Bank governors in the proper principles of monetary management.⁵¹ His view on autonomous institutions cannot be separated from his faith in an aristocracy of merit motivated solely by the public interest and common good, an aristocracy of obligations and duties and limits.⁵² How different from today's financial aristocracy—which has morphed into an increasingly lawless and predatory oligarchy.⁵³ Indeed, for centuries this has been the very definition of oligarchy: an aristocracy that rules for its own selfish advantage rather than primarily for the common good.⁵⁴

Keynes also articulated, albeit in incomplete form, what wise and scientific economic management should look like during a prolonged downturn or so-called liquidity trap.⁵⁵ He bemoaned

⁴⁸ KEYNES, *THE GENERAL THEORY*, *supra* note 39, at 376. A rentier is a person whose income comes mainly from property rents, bond interest or other investments. *Id.*

⁴⁹ SKIDELSKY, JOHN MAYNARD KEYNES: THE ECONOMIST AS SAVIOR, *supra* note 44, at 437.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² This public-regarding view of aristocracy was articulated by Ortega y Gasset: "Nobility is defined by the demands it makes on us—by obligations, by not rights. *Noblesse oblige.*" JOSE ORTEGA Y GASSET, *THE REVOLT OF THE MASSES* 63 (Anonymous trans., W.W. Norton & Co. 1960) (1930).

⁵³ SIMON JOHNSON & JAMES KWAK, 13 BANKERS: THE WALL STREET TAKEOVER AND THE NEXT FINANCIAL MELTDOWN 120–21 (Pantheon Books 2010).

⁵⁴ Leo Strauss, *Plato*, in *HISTORY OF POLITICAL PHILOSOPHY* 33, 74 (Leo Strauss & Joseph Cropsey eds., Univ. of Chicago Press 3d ed. 1987) (suggesting Plato's view that the difference between aristocracy and oligarchy is the difference "between lawfulness and lawlessness"); James E. Holton, *Marcus Tullius Cicero*, in *HISTORY OF POLITICAL PHILOSOPHY*, *supra*, at 163 (discussing Cicero's view that aristocracy contained "within itself not only certain defects but even the seeds of its own destruction," namely the injustice and greed of oligarchy, its "depraved counterpart"); Muhsin Mahdi, *Alfarabi*, in *HISTORY OF POLITICAL PHILOSOPHY*, *supra*, at 212 (discussing Alfarabi's criticism of oligarchy as a vile regime "in which the ultimate aim of the citizen is wealth and prosperity for their own sakes").

⁵⁵ See JOHN MAYNARD KEYNES, *The End of Laissez-Faire* (1926), *supra* note 38, at 317.

persistently high levels of unemployment and the tremendous and arbitrary inequalities in income and wealth that undermined the production and efficiency of the economic system.⁵⁶ The cure, he suggested, was an active fiscal policy accommodated by a neutralized monetary policy, and implemented by deliberate control of currency and credit by central institutions⁵⁷—a policy-mix that both constrains and directs the goals and instruments of central bankers and is therefore routinely seen as incompatible with central bank independence.⁵⁸

In *The General Theory*, Keynes provided the theoretical framework for what would become the most active period in the history of U.S. public finance.⁵⁹ Keynes recognized that central banks tend to concentrate on short-term interest rates, while leaving the price of long-term debt instruments to the market.⁶⁰ During a severe slump, he argued, the central bank should also set interest rates at low levels for longer-term government securities.⁶¹ This would accommodate much higher levels of government borrowing and spending to stimulate the economy and invest in long-term assets such as infrastructure, while also pushing down long-term interest rates for private borrowers—a framework completely at odds with Samra's hostility to central bank accommodation of large fiscal deficits and his vision of central bank independence.⁶²

This Keynesian model was followed in the United States from 1941 to 1951, a decade of hyperactive fiscal policy and neutralized monetary policy that finally pulled the U.S. economy out of the Great Depression.⁶³ Throughout this period, the Federal Reserve was not independent in any de facto sense. Instead, it took its monetary policy instructions from the White

⁵⁶ *Id.* at 317–18.

⁵⁷ *Id.*

⁵⁸ For instance, Jácome decries a government's direction of capital controls as an imposition on central bank independence. Samra, *supra* note 6, at 79 (quoting Luis Jácome H., *Legal Central Bank Independence and Inflation in Latin America During the 1990s*, at 4 (IMF, Working Paper No. 01/212, 2001), available at <http://www.imf.org/external/pubs/ft/wp/2001/wp01212.pdf> [hereinafter Jácome, *Legal Central Bank Independence*]).

⁵⁹ See generally KEYNES, *THE GENERAL THEORY*, *supra* note 39.

⁶⁰ *Id.* at 206.

⁶¹ *Id.*

⁶² See Samra, *supra* note 6, at 74–77.

⁶³ Robert Higgs, *Wartime Prosperity? A Reassessment of the U.S. Economy in the 1940s*, 52 J. ECO. HISTORY 41, 42 (1992) (“The entire episode of apparent business-cycle expansion during the war years is understood by most writers as an obvious validation of the simple Keynesian model: enormous government spending, with huge budget deficits, spurred the military economy and produced multiplier effects on the civilian economy, the upshot being increased employment, real output, and consumption and decreased unemployment.”).

House and the Treasury.⁶⁴ Although the results were impressive, with the highest economic growth decade in American history coupled with low inflation, this history is strangely left out of every empirical study cited by Samra. Instead, this 1940s decade is apparently to be considered as an outlier, an aberration, to be dismissed as the special circumstance of war even though it also spanned the post-war period of reconstruction, the Marshall Plan, and the G.I. Bill of Rights, massive fiscal programs that altered the world for the better and ensured there would be no return to depression economics.⁶⁵

To appreciate the sea change in economic policy involved in the Keynesian model, consider the metrics. Today, federal spending is about 25% of GDP; in the 1940s, spending peaked at nearly 45% of GDP.⁶⁶ Today's federal deficit is about 9% of GDP; in the 1940s, the deficit peaked at about 31% of GDP.⁶⁷ Today, the federal debt held by the public is about 61% of GDP; in the 1940s, it peaked at over 113% of GDP.⁶⁸ Those higher spending and debt levels were sustainable precisely because the central

⁶⁴ THE FEDERAL RESERVE SYSTEM: ITS PURPOSES AND FUNCTIONS 1947, *supra* note 2, at 105; LESTER V. CHANDLER, THE ECONOMICS OF MONEY AND BANKING 482–83 (5th ed. 1969).

⁶⁵ Friedman and Schwartz dismiss the World War II high growth rates and low inflation rates by attributing the post-war inflation to the war years. MILTON FRIEDMAN & ANNA JACOBSON SCHWARTZ, A MONETARY HISTORY OF THE UNITED STATES, 1867–1960, at 556–58 (1963). Higgs does much the same. Higgs, *supra* note 63, at 50, 52. Meltzer refers to the pegged period as an anomaly and then dismisses the experience. ALLAN H. MELTZER, A HISTORY OF THE FEDERAL RESERVE: VOLUME 1: 1913–1951, at 738–39 (2003) (quoting with approval from Allan Sproul, president of the New York Federal Reserve Bank from 1941 to 1956 that “in war or in any other great emergency, the policy of the central banking system must support the national plan of action. It seems to me equally clear that in less emergent circumstances it is wise for government to set-up barriers or buffers of protection of the central banking system from narrow political influence”). *But see* HAROLD G. VATTER, THE U.S. ECONOMY IN WORLD WAR II 100–01 (1985) (relying on C.R. Whittlesey's 1948 assessment that it may have been a mistake to remove price controls until civilian supply rose to meet pent-up demand).

⁶⁶ National Priorities Project, Charts, *Federal Outlays and Revenues, 1930–2015 as a Percentage of the GDP*, <http://nationalpriorities.org/en/resources/federal-budget-101/charts/general/federal-outlays-and-revenues-1930-2015-perc-gdp/> (last visited Jan. 11, 2011).

⁶⁷ *Trade, Exchange Rates, Budget Balances and Interest Rates*, THE ECONOMIST, July 29, 2010, available at http://www.economist.com/node/16702183?story_id=16702183; ECONOMIC REPORT TO THE PRESIDENT ON THE ACTIVITIES OF THE COUNCIL OF ECONOMIC ADVISERS, app. 438 tbl.B-76 (1993), available at http://fraser.stlouisfed.org/publications/erp/issue/1587/download/6006/ERP1993_Appendixes.pdf; EXECUTIVE OFFICE OF THE PRESIDENT, HISTORICAL TABLES: BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2009, 24, tbl.1.2, available at <http://www.whitehouse.gov/sites/default/files/omb/budget/fy2009/pdf/hist.pdf>.

⁶⁸ CONG. BUDGET OFFICE, THE BUDGET AND ECONOMIC OUTLOOK: AN UPDATE 2 (2009), available at http://www.cbo.gov/ftpdocs/105xx/doc10521/2009BudgetUpdate_Summary.pdf; CONG. BUDGET OFFICE, HISTORICAL DATA ON FEDERAL DEBT HELD BY THE PUBLIC (2010), available at http://www.cbo.gov/ftpdocs/117xx/doc11766/2010_08_05_FederalDebt.pdf; ECON. REPORT TO THE PRESIDENT, *supra* note 67.

bank was not independent. Known as the “pegged period” in public finance, from 1942 to 1951 the Federal Reserve was directed by the White House and Treasury to purchase government securities in any amount and at any price needed to peg interest rates at $\frac{3}{8}$ of 1% on short-term Treasury borrowing and 2.5% on long-term Treasury borrowing.⁶⁹

Contrary to today’s Washington Consensus view, the Federal Reserve’s loss of its independence in the 1940s did not coincide with higher inflation. Meanwhile, the U.S. economy grew at real annual rates of 15% or more for the three peak years and more than doubled in output during the war.⁷⁰ Private investment was crowded in, not out. Industry boomed and businesses returned to profitability. The United States emerged from the war with enormous productive capacity, as the world’s largest creditor and with huge trade surpluses, conditions which allowed it to play a commanding role on the world stage. By the end of the war, with the jobless rate at only 1.2%, full-employment was a reality for perhaps the first and only time in American history, and the distribution of income became much more equitable as a result of the strong economy, low yields on Treasury securities, and progressive taxation.⁷¹

During the 1940s period, the Federal Reserve lacked both goal independence and instrument independence.⁷² The objectives of the interest rate peg were set by the Treasury, and Congress directed a range of policy instruments. In particular, the central bank was deprived of the blunt monetary instrument of raising either short-term or long-term interest rates.⁷³ In

⁶⁹ THE FEDERAL RESERVE SYSTEM: ITS PURPOSES AND FUNCTIONS 1947, *supra* note 2, at 105; CHANDLER, *supra* note 64, at 482–83.

⁷⁰ Christopher J. Tassava, *The American Economy During World War II*, EH.NET ENCYCLOPEDIA, Feb. 2, 2010, <http://eh.net/encyclopedia/article/tassava.WWII> (last visited Jan. 11, 2011); THE NATIONAL HISTORIC LANDMARKS PROGRAM ET AL., WORLD WAR II & THE AMERICAN HOME FRONT: A NATIONAL HISTORIC LANDMARKS THEME STUDY 3 (Oct. 2007), available at <http://www.nps.gov/history/nhl/themes/HomefrontStudy.pdf>.

⁷¹ LYNN TURGEON, BASTARD KEYNESIANISM: THE EVOLUTION OF ECONOMIC THINKING AND POLICYMAKING SINCE WORLD WAR II 5 (1996). “The wealthiest 5 percent of Americans had received 30 percent [of income] in 1929 . . . by 1944 their share was down to 20.7 percent.” JOHN M. BLUM ET AL., THE NATIONAL EXPERIENCE: A HISTORY OF THE UNITED STATES 685 (4th ed. 1977).

⁷² Samra, *supra* note 6, at 79–82 (discussing goal and instrument independence).

⁷³ Since the Federal Reserve could no longer ratchet up interest rates to preempt potential inflation during this pegged period, the federal government had to find new ways to keep prices stable, including price controls. In addition, consumer purchasing power and inflationary pressures were dampened by bond sales to the public and highly progressive taxes. WILLIAM J. BARBER, DESIGNS WITHIN DISORDER: FRANKLIN D. ROOSEVELT, THE ECONOMISTS, AND THE SHAPING OF AMERICAN ECONOMIC POLICY, 1933–1945, at 142–51 (1996). This approach to wartime finance had been urged by Keynes in his plan on “how to pay for the war.” ROBERT SKIDELSKY, JOHN MAYNARD KEYES: FIGHTING FOR FREEDOM 1937–1946, at 53 (2001) [hereinafter SKIDELSKY, JOHN MAYNARD

addition, the Federal Reserve was directed to impose selective credit controls and strict lending standards on its member banks, including interest rate ceilings and prohibitions on checking and savings deposits, and margin requirements on private borrowing for purchases of corporate securities, housing, automobiles, and other consumer durables—policy tools that complemented wage and price control authority.⁷⁴ Likewise, the Federal Reserve and other central banks throughout the 1930s and 1940s were directed to impose a range of foreign exchange controls and engage in foreign currency operations.⁷⁵ Moreover, the Treasury Department assumed responsibility for exchange rate policy with a stabilization fund that rivaled the Federal Reserve's open market portfolio in size, thereby allowing the Treasury to circumvent the Federal Reserve, devalue the dollar, and relax monetary policy.⁷⁶ These controls, along with the neutralization of monetary policy, were part of the model envisioned by Keynes to help an economy reach full employment without inflation.⁷⁷

KEYNES: FIGHTING FOR FREEDOM] (highlighting that the “Keynes Plan” which was formalized by Keynes in an article published in *The Times* in November 1939, was in essence a crystallization of Keynes' ideology from as early as 1937).

⁷⁴ CHANDLER, *supra* note 64, at 247–51, 484–85, 489–90; MELTZER, *supra* note 65, at 602–05 (recounting the Federal Reserve's use of selective credit controls); Arthur Smithies, *Uses of Selective Credit Controls*, in UNITED STATES MONETARY POLICY 94, 94–105 (American Assembly ed., 1964) (indicating that selective credit controls might be wise). For the theoretical underpinnings of Keynesian policy in the U.S., see generally J. E. MEADE, AN INTRODUCTION TO ECONOMIC ANALYSIS AND POLICY (C.J. Hitch ed., 1938).

⁷⁵ FRIEDMAN & SCHWARTZ, *supra* note 65, at 471–72; MELTZER, *supra* note 65, at 461; FRED L. BLOCK, THE ORIGINS OF INTERNATIONAL ECONOMIC DISORDER 109–10 (1977); CHANDLER, *supra* note 64, at 426–27.

⁷⁶ MELTZER, *supra* note 65, at 457–59; CHANDLER, *supra* note 64, at 468–69. In the conduct of its foreign currency operations, the Federal Reserve acts “in close cooperation with the U.S. Treasury, which has overall responsibility for U.S. international financial policy.” THE FEDERAL RESERVE SYSTEM: PURPOSES & FUNCTIONS 63 (Bd. of Governors of the Fed. Reserve Sys. ed., 8th ed. 1994) [hereinafter THE FEDERAL RESERVE SYSTEM: PURPOSES & FUNCTIONS 1994]. Meanwhile, with a favorable balance of trade, there was little need to sell Treasury debt abroad and an enhanced capability of spreading the debt widely in the U.S. among the general public. See *Spending Beyond Our Means: US Trade Balance by Decade*, MINT.COM (Feb. 15, 2010), <http://www.mint.com/blog/trends/spending-beyond-our-means-us-trade-balance-by-decade> (last visited Nov. 3, 2010) (showing a shift in U.S. balance of payments from surplus to deficit); Franklin Noll, *The United States Public Debt, 1861 to 1975*, EH.NET ENCYCLOPEDIA fig.12 (Feb. 1, 2010, 6:21 PM), <http://eh.net/encyclopedia/article/noll.publicdebt> (showing rise in foreign purchases of Treasuries after U.S. payments go into deficit).

⁷⁷ Keynes helped create Britain's foreign exchange control system during World War II. SKIDELSKY, JOHN MAYNARD KEYNES: FIGHTING FOR FREEDOM, *supra* note 73, at 74–77, 194. In the Bretton Woods negotiations that would create the International Monetary Fund, Keynes and the assistant U.S. treasury secretary Harry Dexter White attempted to construct a system of national exchange controls. LINDA MCQUAIG, THE CULT OF IMPOTENCE: SELLING THE MYTH OF POWERLESSNESS IN THE GLOBAL ECONOMY 223–34 (1998); James R. Crotty, *On Keynes and Capital Flight*, 21 J. ECON. LITERATURE 59, 62 (1983).

All these various controls are today considered incompatible with central bank independence.⁷⁸ Yet, this model proved remarkably successful in keeping inflation of both consumer and asset prices at relatively low rates, while delivering impressive economic growth, high levels of employment, a more equitable distribution of wealth and income, and a rising middle class standard of living. Even after price controls ended in 1947, inflation was only a temporary problem, and by 1949 prices were falling across the board.⁷⁹ This may well have reflected the country's expanded supply.⁸⁰ "Federal spending did not simply pump up demand; massive federal investments in infrastructure and factories expanded the nation's industrial capacity, thereby reducing inflationary pressures."⁸¹

In a study relied on by Samra, Luis Jácome argues against the combination of de jure independence and de facto political interference in the context of central banks in Brazil and Venezuela, countries with markedly different political and economic environments from the United States.⁸² Of course, Jácome does not consider the more positive experience of the Federal Reserve, which was legally independent in the 1940s, but as a practical matter lacked de facto independence yet did not lead to high inflation or other negative economic outcomes.⁸³ Rather, the increased policy direction provided by Congress, the Treasury, and the White House reflected a deeper discussion and wider range of interests in the formulation of monetary policy.⁸⁴

⁷⁸ Fraser, *supra* note 35, at 5.

⁷⁹ *Historical Inflation Data from 1914 to the Present*, INFLATIONDATA.COM, http://inflationdata.com/inflation/Inflation_Rate/HistoricalInflation.aspx?dsInflation_curr&entPage=5 (last visited Nov. 3, 2010).

⁸⁰ VATTER, *supra* note 65, at 100–01. For discussion on the end of the pegged period, see Gerald A. Epstein & Juliet B. Schor, *The Federal Reserve-Treasury Accord and the Construction of the Postwar Monetary Regime in the United States*, 7 SOCIAL CONCEPT 7, 7–48 (1995).

⁸¹ Timothy A. Canova, *The Federal Reserve We Need*, THE AM. PROSPECT, Oct. 11, 2010, http://prospect.org/cs/articles?article=the_federal_reserve_we_need [hereinafter Canova, *The Federal Reserve We Need*].

⁸² Agustín Carstens & Luis Jácome H., *Latin American Central Bank Reform: Progress and Challenges* 6 (IMF, Working Paper No. 05/114, 2005), available at <http://www.imf.org/external/pubs/ft/wp/2005/wp05114.pdf>.

⁸³ Inflation was kept low during the boom years of the 1940s. In fact, the annual inflation was below three percent for the final three years of the war, from October 1942 to August 1945. BLUM ET AL., *supra* note 71, at 685 ("From October 1942 to the end of the Pacific war, consumers' prices rose only 8.7 percent.").

⁸⁴ John Commons, a leading Institutionalist economist of the 1930s, advocated for such wider participation in the formulation of monetary policy. COMMONS, *supra* note 22, at 900–01; Charles J. Whalen, *Full Employment with Liberty: John R. Commons' Perspective and Its Continuing Relevance*, 44 J. ECO. ISSUES 559, 565 (2010). This was the position of Leon Keyserling, Chairman of the Council of Economic Advisers in the administration of President Harry S. Truman. KEYSERLING, *supra* note 22, at 111

In more recent years, without such policy direction and input from elected branches, the Federal Reserve has focused almost exclusively on one policy objective (low consumer price inflation), and has used only one policy instrument (changes in short-term interest rates).⁸⁵ All other policy objectives, such as maximizing employment and ensuring financial stability, were secondary at best, and often totally ignored.⁸⁶ What a sharp contrast to the 1940s, when the political direction of policy goals and instruments helped the Federal Reserve resist domination and capture by its big bank constituency, which was crucial in achieving a host of policy objectives, including full employment, low inflation, and stability of the financial system.

If the 1940s was clearly the low point for central bank independence, it was the high point for political accountability. The Federal Reserve chairman during this period was Marriner Eccles, a successful Utah banker whose support for higher federal spending had anticipated the fiscal ideas of Keynes.⁸⁷ In the 1930s, he had pushed for structural reform of the Fed to remove the “banker interest” from its crucial policy-making Federal Open Market Committee.⁸⁸ Although Eccles came up short in that effort, he remained committed to a model of governance that prevented the central bank from undermining the Treasury’s fiscal program.⁸⁹ Eccles and other Federal Reserve governors demonstrated the ideals of self-restraint and concern for the public good that Keynes assumed should motivate the actions of autonomous central bankers.

Throughout the 1940s, the Federal Reserve’s willingness and ability to accommodate huge Treasury deficits while imposing a range of selective credit and capital controls reflected both its relative independence from private financial interests and its accountability to democratically elected institutions. This period provides a model of what a democratically-accountable central bank would look like when working with elected branches to achieve the three primary objectives of Keynesian economics: (1) maintaining genuine full-employment; (2) reducing the

(proposing that Federal Reserve Board of Governors and Federal Open Market Committee include “fair representation of business, labor, farmers, [and] consumers”).

⁸⁵ See Ben S. Bernanke, Chairman, Bd. of Governors of the Fed. Reserve Sys., Monetary Policy Objectives and Tools in a Low-Inflation Environment, Address at the Revisiting Monetary Policy in a Low-Inflation Environment Conference (Oct. 15, 2010) (highlighting that low inflation and short term interest rates have been the modern standard, but noting that some consequences have arisen as a result of such a policy).

⁸⁶ *Id.*

⁸⁷ MELTZER, *supra* note 65, at 464–65.

⁸⁸ *Id.* at 468–69, 476.

⁸⁹ *Id.*

tremendous inequalities in wealth and income that undermine any sustainable recovery; and (3) putting an end to the monopolistic structures and financial practices that harm taxpayers and consumers alike.⁹⁰

Unfortunately, few economists ever learn of this period in Federal Reserve history. Not surprisingly, this most successful decade in U.S. history is ignored by Samra and the empirical studies upon which he relies, and has been all but airbrushed from most mainstream texts, including the economics textbook co-authored by the present Federal Reserve chairman, Ben Bernanke.⁹¹ It is a telling omission that Bernanke, although routinely hailed as an authority on the Great Depression, does not mention the monetary regime—a politically-directed central bank—that accommodated the hyperactive fiscal policy that lifted the U.S. economy out of the Depression once and for all after a decade of drift.

II. EMPIRICAL MYOPIA, BLACK SWANS, AND BLACK ELEPHANTS

Every empirical study relied on by Samra suffers the same flaws of selective presentation of evidence and myopic focus on limited variables and limited time periods. None of the studies consider data from the 1920s to the mid-1950s, thereby avoiding important “black swan” events, including the 1929 stock market crash, the financial panics of the early 1930s, the Great Depression, and the economic boom of the 1940s.⁹² In this way they mimic the risk management models used by big banks and credit rating agencies in the past decade to ignore the possibility of sharp drops in asset prices.⁹³ By dismissing such large

⁹⁰ Canova, *Financial Market Failure*, *supra* note 15, at 373 (restating the primary policy objectives of ABBA P. LERNER, *THE ECONOMICS OF CONTROL: PRINCIPLES OF WELFARE ECONOMICS* 3 (1947)).

⁹¹ See generally ROBERT H. FRANK & BEN S. BERNANKE, *PRINCIPLES OF MACRO-ECONOMICS* (3d ed. 2007) (providing Federal Reserve and monetary history that includes pre-pegged and post-pegged periods, but nothing on the pegged period itself); STEPHEN G. CECCHETTI, *MONEY, BANKING, AND FINANCIAL MARKETS* (2006) (avoiding any discussion of the fiscal and monetary expansion of the pegged period). See also EXEC. OFFICE OF THE PRESIDENT, *ECONOMIC REPORT OF THE PRESIDENT AND ANNUAL REPORT OF THE COUNCIL OF ECONOMIC ADVISERS* 280–81 tbl.B-1 (1996) (providing GDP statistics no earlier than 1959); PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, *MACROECONOMICS* 191–211 (18th ed. 2005) (historical overview of the Federal Reserve and monetary policy omitting any mention of pegged period); HARVEY S. ROSEN, *PUBLIC FINANCE* 424–26 (6th ed. 2002) (discussing federal deficits no earlier than 1970). Meanwhile, the Federal Reserve encourages mis-education and ignorance of the pegged period through its financial education and literacy programs as well as its practice of keeping hundreds of economists on paid retainers while restricting the dissemination and scope of their research. ROBERT D. AUERBACH, *DECEPTION AND ABUSE AT THE FED: HENRY B. GONZALEZ BATTLES ALAN GREENSPAN'S BANK* 141–47 (2008).

⁹² See generally TALEB, *supra* note 16.

⁹³ Canova, *Financial Market Failure*, *supra* note 15, at 381–82.

historical events as outliers and aberrations, these risk models effectively assumed that housing prices would always keep rising. Likewise, Samra also ignored the more recent black swans, the financial collapse of 2008 and its continuing aftermath, as well as the rise of China as an economic power without an independent central bank—events so recent and so significant that to overlook them is more like missing a black elephant than a black swan.⁹⁴

A. Autistic Economics and Inflation Myopia

All of the studies relied on by Samra, and in fact all of the many studies generated by the research departments of central banks and the International Monetary Fund (IMF) confine their analyses mostly to the 1980s and 1990s while overlooking any and all non-monetary explanations for variations in inflation rates. It is worth noting the professional affiliations of the authors of many of the studies cited by Samra, most of whom were associated with the IMF, World Bank, Bank for International Settlements, and the Federal Reserve, institutions with long-standing commitments to the model of central bank independence, and in the case of the Federal Reserve, a direct bureaucratic self-interest and perhaps a financial interest in maintaining the model.⁹⁵

In addition to the truncated period and focus of analysis, these studies share a fixation on one variable: the rate of consumer price inflation, while ignoring all other kinds of price inflation, even hyperinflations of asset prices. This fixation on one variable while ignoring all others is characteristic of the orthodoxy in economics. In recent years, a critical movement has developed within economics that challenges this orthodox approach as “autistic” for pursuing econometric modeling as “an end in itself” and thereby “cutting off economics from reality.”⁹⁶

⁹⁴ A “black elephant” is a combination of “the elephant sitting in the room,” which everyone knows is important but is a taboo that no one will talk about, and “black swan,” which is considered an extreme or unlikely event that undermines prior risk management strategies. The black elephant has been defined as “an event which is extremely likely and widely predicted by experts, but people attempt to pass it off as a black swan when it finally happens.” Vinay Gupta, *On Black Elephants*, THE BUCKY-GANDHI DESIGN INSTITUTION (Apr. 27, 2009, 8:31 AM), <http://vinay.howtolivewiki.com/blog/fluo-on-black-elephants-1450>.

⁹⁵ See, e.g., Jâcome, *Legal Central Bank Independence*, *supra* note 58, at 5–6 (discussing Latin American structural reforms to comply with International Monetary Fund “best practices” for central bank autonomy); JOSEPH E. STIGLITZ, MAKING GLOBALIZATION WORK 28, 57 (2006) [hereinafter STIGLITZ, MAKING GLOBALIZATION WORK].

⁹⁶ POST-AUTISTIC ECONOMICS NEWSLETTER, No. 1, Sept. 2000, <http://www.paecon.net/PAERReview/wholeissues/issue1.htm> (last visited Jan. 11, 2011). Autism is characterized by a narrow range of interests, restricted use of language, lack of

According to this critique, mainstream economics suffers from a variety of symptoms of autism in its uncontrolled use of mathematics, repetitive fixation with abstract econometric modeling, and complete avoidance of social context and empirical evidence, including historical facts, the functioning of institutions, and the study of the behaviors and strategies of agents.⁹⁷ The studies relied on by Samra that attempt to correlate central bank independence with low inflation are within this autistic tradition: they ignore empirical evidence that would correlate central bank independence with asset price inflations, unsustainable financial bubbles, high levels of unemployment, top-heavy distributions of income, agency capture, financial fragility, and central bank subsidies for financial elites.

These studies are also based on flawed assumptions about the nature and causes of consumer price inflation. Luis Jácome's 2001 study assumes that "inflation is essentially a monetary phenomenon"⁹⁸ and focuses on three relatively brief periods: 1980–1989, when Latin American countries were beset by the so-called Third World debt crisis and sharply rising interest rates on their foreign debts; and 1990–1995 and 1996–2000, periods of recovery in much of Latin America thanks in large part to resolution of the debt crisis and a revival in agriculture and commodity exports.

The most recent episodes of high inflation in Latin America have occurred in the context of foreign indebtedness and balance of payments crises.⁹⁹ Dependence on foreign bank loans, inflows

social reciprocity, inability to appreciate social context, repetitive behavior, repetitive use of idiosyncratic language, and inflexible adherence to specific, non-functional routines or rituals. *Diagnosis of Autism*, AUTISM SPEAKS, <http://www.autismspeaks.org/diagnosis/index.php> (last visited Jan. 11, 2011).

⁹⁷ POST-AUTISTIC ECONOMICS NEWSLETTER, *supra* note 96. According to Marc Lavoie, the post-autistic movement has criticized mainstream economics for "the dogmatism of their teaching and the irrelevance of formalized models that seemed to relate to some imaginary world rather than to the real world." MARC LAVOIE, INTRODUCTION TO POST-KEYNESIAN ECONOMICS xiv (2006). *See also* Milton Friedman, in CONVERSATIONS WITH LEADING ECONOMISTS: INTERPRETING MODERN MACROECONOMICS 124, 137 (Brian Snowdon & Howard R. Vane eds., 1999) (quoting Friedman that "economics has become increasingly an arcane branch of mathematics rather than dealing with real economic problems").

⁹⁸ Jácome, *Legal Central Bank Independence*, *supra* note 58, at 29 (asserting that "inflation is essentially a monetary phenomenon"). *See also* Samra, *supra* note 6, at 64 n.9 (citing to Jácome's paper). Jácome finds a strong correlation between central bank independence and low inflation during the 1991–2001 period, although that finding also required that Argentina and Venezuela be excluded from the analysis. Jácome, *Legal Central Bank Independence*, *supra* note 58, at 23–24.

⁹⁹ Mark Weisbrot, Ctr. for Econ. & Pol'y Research, *Latin America's Electoral Leftward Shift: The Importance of Economics*, (Mar. 14, 2006), available at http://www.cepr.net/events/200603_latam/2006_03_lagrowth_transcript.htm [hereinafter Weisbrot, *Latin America's Electoral Leftward Shift*] (providing the graphic charts which accompany Weisbrot's speech). There were serious inflations in the 1970s and 1980s in

of portfolio capital, and the “dollarization” of domestic bank accounts led to overvalued currencies and huge trade imbalances financed by yet more capital inflows contributing to unsustainable debt burdens.¹⁰⁰ When interest rates rose and painful adjustments were imposed by international bond markets and International Monetary Fund loan conditions, everything went in reverse. Collapsing currencies led to ever-rising prices of imported goods, including necessities such as food and fuel, and falling prices for exports, including exports of commodities in particular. As countries found it increasingly difficult to meet their debt service obligations and import bills, some responded by printing money, leading to even higher inflation rates. Market fundamentalists blame the central banks for monetizing debt while ignoring the underlying causes that led to such poor decisions.¹⁰¹ Moreover, monetizing debt in the middle of a balance of payments and foreign debt crisis is very different from monetizing debt to invest in real productive resources and expand the industrial capacity and supply of a country.

Since Jácome begins with monetarist assumptions, it is not surprising that he sees independent central banks and tighter monetary policy as the only explanations for the low inflation period.¹⁰² Foreign debt burdens and sharply higher interest payments imposed from without are never addressed. According to critics of Jácome’s approach, the failure “to control adequately for other factors that might account for cross-country differences in inflation” is a major deficiency in the literature that purports to attribute low inflation to central bank independence.¹⁰³ In fact, Carl Walsh has noted one study that did control for other potential determinants of inflation and “found little additional role for central bank independence.”¹⁰⁴

Significant non-monetary factors contributed to global inflation in the 1970s in particular, including recurring balance of payments crises and International Monetary Fund designed adjustment.¹⁰⁵ The Organization of Petroleum Exporting

Argentina, Bolivia, Brazil, Chile, Peru, and Uruguay. This was also a period of sharply rising oil prices that had nothing to do with central bank structure or monetary policies in Latin America, and which contributed to balance of payments problems, dependence on foreign inflows of portfolio capital, falling currencies, and rising prices. *Id.*

¹⁰⁰ Weisbrot, *Latin America’s Electoral Leftward Shift*, *supra* note 99 (providing the graphic charts which accompany Weisbrot’s speech).

¹⁰¹ See Jácome, *Legal Central Bank Independence*, *supra* note 58, at 29–30.

¹⁰² See *id.* at 30.

¹⁰³ Carl E. Walsh, *Central Bank Independence*, in 1 THE NEW PALGRAVE DICTIONARY OF ECONOMICS 728, 730 (Steven N. Durlauf & Lawrence E. Blume eds., 2d ed. 2008).

¹⁰⁴ *Id.*

¹⁰⁵ See generally CHERYL PAYER, THE DEBT TRAP: THE INTERNATIONAL MONETARY FUND AND THE THIRD WORLD (1974).

Countries (OPEC) quadrupled the price of oil in 1973 and doubled the price of oil in 1979.¹⁰⁶ As a result, Western banks helped “recycle” the so-called petrodollars deposited by OPEC countries into loans to Latin American and other Third World countries, as developing countries were then called, so they could continue paying for oil imports.¹⁰⁷ But this recycling of petrodollars ended badly for most of Latin America when U.S. banks raised interest rates sharply on their loans in the early 1980s.¹⁰⁸

Studies by Jácome and others do not consider the following counter-factual: if Latin American countries had independent central banks at the time of the 1980s debt crisis, would such a model have then been discredited and would the reforms then have gone in the opposite direction leading to greater central bank accountability which should then receive much of the credit for all the good inflation numbers resulting from resolution of the debt crisis and export-led recovery? In fact, Chile provides just such a counter-factual example, although one would not realize this by reading Samra’s ahistorical case study of Chile, as he provides few dates and makes no attempt to correlate central bank reforms with actual economic indicators.¹⁰⁹

Although Chile’s central bank was made independent in the early 1980s, average annual inflation exceeded 20% throughout the 1980s and 17% through the mid-1990s.¹¹⁰ Moreover, Chilean inflation was brought down to 6% a year in the late-1990s, but not because of any change in central bank monetary vigilance.¹¹¹ Rather, lower inflation rates coincided with increased regulation of portfolio capital markets imposed by the elected government, resulting in greater exchange rate and price stability.¹¹² Chile’s

¹⁰⁶ JEFFREY FRIEDEN, *GLOBAL CAPITALISM: ITS FALL AND RISE IN THE TWENTIETH CENTURY* 364, 368 (2006); Jack L. Hervey, *Changing U.S. Trade Patterns*, in *HISTORY OF THE U.S. ECONOMY SINCE WORLD WAR II* 444, 446 (Harold G. Vatter & John F. Walker eds., 1996).

¹⁰⁷ GREIDER, *SECRETS OF THE TEMPLE*, *supra* note 2, at 340.

¹⁰⁸ STEVEN SOLOMON, *THE CONFIDENCE GAME: HOW UNELECTED CENTRAL BANKERS ARE GOVERNING THE CHANGED GLOBAL ECONOMY* 22 (1995) (discussing the Reagan administration’s approach to treating the debt crisis of four particular countries—Mexico, Argentina, Brazil, and Yugoslavia—as financial problems that demanded International Monetary Fund austerity programs); GREIDER, *SECRETS OF THE TEMPLE*, *supra* note 2, at 437. *See generally* DARRELL DELAMAIDE, *DEBT SHOCK* (1984).

¹⁰⁹ *See* Samra, *supra* note 6, at 84–86.

¹¹⁰ Eva Gutiérrez, *Inflation Performance and Constitutional Central Bank Independence: Evidence from Latin America and the Caribbean* 16 tbl.3 (IMF, Working Paper No. 03/53, 2003), available at <http://www.imf.org/external/pubs/ft/wp/2003/wp0353.pdf>.

¹¹¹ *Id.*

¹¹² Timothy A. Canova, *Banking and Financial Reform at the Crossroads of the Neoliberal Contagion*, 14 AM. U. INT’L L. REV. 1571, 1621–22, 1626 (1999) [hereinafter Canova, *Banking and Financial Reform*] (discussing Chile’s *encaje* program which required foreign investors and lenders to deposit 30% of the investment or loan into a

high inflation in the earlier period, and its disinflation in the later period, had far less to do with central bank structure than with foreign debt burdens, exchange rates, and the effectiveness of financial regulation. As discussed above, Chile's high inflation rates of the 1980s occurred under an independent central bank, and the disinflation of the 1990s occurred when the central bank's instrument independence was undermined by capital controls.¹¹³ Yet Jácome does not consider any explanation other than a crude monetarist one.

In another Jácome paper co-authored with Agustín Carstens in 2005, the authors likewise have a relatively short view of economic history, comparing changes in macroeconomic indicators from the 1980s to 2003.¹¹⁴ Samra relies on this paper in particular for his statement that "most scholars agree" that central bank autonomy is "a *sine qua non* of monetary or price stability."¹¹⁵ If this is so, the statement says more about blind orthodoxy than the merits of central bank independence. One is hard pressed to find strong empirical support for such a sweeping conclusion, which perhaps confuses cause and effect.¹¹⁶ According to Adam Posen, reforms leading to central bank independence often reflect the presence of an already strong political constituency for low inflation.¹¹⁷ For instance, as Latin American countries pulled out of the debt crisis and experienced a resurgence in their exports, the resulting economic growth may have strengthened the political forces pushing for central bank independence, as well as a host of other policies—such as trade

non-interest bearing account with the central bank for a full year or pay a 3% tax to recover the deposit); GREG GRANDIN, *EMPIRE'S WORKSHOP: LATIN AMERICA, THE UNITED STATES, AND THE RISE OF THE NEW IMPERIALISM* 204 (2006) (discussing Chile's break with "free-market dogma" in the 1980s and turn to state promotion of exports and use of regulatory laws "including some enacted by the vilified Allende government").

¹¹³ See *supra* Part II.A.

¹¹⁴ Carstens & Jácome, *supra* note 82, at 15 tbl.6; Samra, *supra* note 6, at 65 n.12 (citing to Carstens & Jácome's paper). The paper's conclusion that central bank independence explains the reduction in inflation once again ignores all other possible explanations and empirical evidence from earlier periods. Carstens & Jácome, *supra* note 82, at 17.

¹¹⁵ Samra, *supra* note 6, at 65 & n.12.

¹¹⁶ Even Samra hedges this sweeping conclusion by referring to Federal Reserve Board Chairman Ben Bernanke's caveat that "the evidence for developing countries is more mixed." Samra, *supra* note 6, at 69 (quoting Bernanke as stating that "the evidence for developing countries is more mixed" with regard to the connection between central bank independence and the promotion of low inflation).

¹¹⁷ Walsh, *Central Bank Independence*, *supra* note 103, at 728, 730; Adam Posen, *Why Central Bank Independence Does Not Cause Low Inflation: There is No Institutional Fix for Politics*, in 7 *FINANCE AND THE INTERNATIONAL ECONOMY* 40, 47 (Richard O'Brien ed., 1993)).

liberalization, fiscal austerity, and wage suppression—which would also have contributed to lower inflation rates.¹¹⁸

Samra also relies on a study by Eva Gutiérrez arguing the high inflation in Latin America during the late 1980s and early 1990s was caused by the region's high fiscal deficits, which were monetized by central banks that were pressured by elected governments with short-term objectives.¹¹⁹ Gutiérrez also attributes the decline in inflation in the 1990s to reforms that made central banks more autonomous.¹²⁰ Again, like all the other studies relied on by Samra,¹²¹ Gutiérrez' study does not consider data from earlier key periods such as the 1940s and early 1950s. Moreover, Gutiérrez even ignores the high economic growth rates and low inflation rates across Latin America during the 1960s, prior to central bank independence, and the OPEC oil price hikes and the ensuing debt crisis.¹²² Moreover, like Jácome, she does not consider any other factors that may have led to later declines in inflation and improvements in economic growth such as the resolution of Latin America's debt crisis and higher export earnings.

¹¹⁸ See Michael Parkin, *Inflation*, in 4 THE NEW PALGRAVE DICTIONARY OF ECONOMICS 293, 299 (Steven N. Durlauf & Lawrence E. Blume eds., 2d ed. 2008) (discussing fiscal causes of inflation).

¹¹⁹ See Gutiérrez, *supra* note 110, at 15 (stating that inflation during the 1980s and early 1990s was, at root, due to the high fiscal deficits that were financed by monetization by central banks).

¹²⁰ See *id.* at 16, 23 (linking lower inflation to “entrench[ing] the independence of the central bank in the constitution”).

¹²¹ See, e.g., Luis I. Jácome & Francisco Vásquez, *Any Link Between Legal Central Bank Independence and Inflation? Evidence from Latin America and the Caribbean* 12 tbl.1, 15 fig.2, 16 tbl.3 (Int'l Monetary Fund, Working Paper No. 05/75, 2005), available at <http://www.imf.org/external/pubs/ft/wp/2005/wp0575.pdf> (focusing on data from the 1990s); Samra, *supra* note 6, at 71 n.43 (citing to Jácome & Vásquez' paper); Charles T. Carlstrom & Timothy S. Fuerst, Commentary, *Central Bank Independence: The Key to Price Stability?*, FED. RESERVE BANK OF CLEVELAND, Sept. 1, 2006, at 1, available at <http://www.clevelandfed.org/research/commentary/2006/0901.pdf> (focusing on the 1955–2000 period); Samra, *supra* note 6, at 73 n.58 (citing to the Federal Reserve Bank of Cleveland commentary); Alberto Alesina & Lawrence H. Summers, *Central Bank Independence and Macroeconomic Performance: Some Comparative Evidence*, 25 J. MONEY, CREDIT, & BANKING 151, 160 app. tbl.A1, 161 app. tbl.A2 (1993) (focusing on two periods: 1955–1988 and 1973–1988); Samra, *supra* note 6, at 72 n.56 (citing to Alesina & Summers' article); Jeffrey C. Fuhrer, *Central Bank Independence and Inflation Targeting: Monetary Policy Paradigms for the Next Millennium?*, 1997 NEW ENG. ECON. REV. 19, 25 (1997), available at <http://www.bos.frb.org/economic/neer/neer1997/neer197b.pdf> (focusing on the period of 1970 to the late 1990s); Samra, *supra* note 6, at 72 n.53 (citing to Fuhrer's article).

¹²² See EDWIN WILLIAMSON, THE PENGUIN HISTORY OF LATIN AMERICA 620 tbl.3 (rev. ed. 2009) (reporting high economic growth rates across Latin America in the 1960s and sharp declines in the 1980s); *id.* at 621 tbl.4 (reporting relative price stability across Latin America in the 1960s, followed by huge increases in inflation in the 1970s and 1980s); *id.* at 622 tbl.5, 623 tbl.6 (reporting rising total external debt levels across Latin America from 1978 to 1984); *id.* at 624 tbl.7 (reporting rising external debt and debt service levels across Latin America from 1975 to 1985).

Likewise, Samra relies heavily on a study by Carlstrom and Fuerst on the Reserve Bank of New Zealand, once considered the least independent of central banks, which was made independent in 1989 and now ranks among the more independent.¹²³ The country's inflation rate fell from an average 7.6% in 1955–1988 to 2.7% in 1988–2000.¹²⁴ Of course, the inflation numbers are elevated for the early period simply by including the 1970s, the peak years of inflation due in large part to successive price hikes by OPEC, a global oil cartel.¹²⁵

Carlstrom and Fuerst acknowledge that, with reference to the United States, changes in central bank independence “were not responsible for the large inflation run-up that occurred during the 1970s in the United States and throughout the world.”¹²⁶ Likewise, the decline in U.S. inflation was “not caused by changes in [Federal Reserve] independence but by other forces that have lowered the worldwide inflation rate.”¹²⁷ But, apparently the authors saw no reason to extend those caveats to New Zealand. Instead, Carlstrom and Fuerst must engage in “holding everything else equal” to conclude that if New Zealand had “an independence score” as high between 1955 and 1988 as it does today, then annual inflation would have been 3.4% instead of 7.6% during that period.¹²⁸ Apparently, in this fictitious world, the OPEC price increases and global inflation would simply have ceased having any effect on the New Zealand economy.¹²⁹

Carlstrom and Fuerst then broaden their conclusion beyond New Zealand to the global economy once more: “[H]olding everything else equal, the increase in central banks’ independence would have lowered the average inflation rate

¹²³ Samra, *supra* note 6, at 73.

¹²⁴ Carlstrom & Fuerst, *supra* note 121, at 1.

¹²⁵ Vlad Grinkevich, *OPEC Marks 50th Anniversary*, FINANCIAL (Oct. 9, 2010), http://www.finchannel.com/Main_News/Op-Ed/70381_OPEC_marks_50th_anniversary. See also Andrew C. Udin, *Slaying Goliath: The Extraterritorial Application of U.S. Antitrust Law to OPEC*, 50 AM. U. L. REV. 1321, 1327–28 (2001) (“A ‘cartel’ is an association of producers and/or consumers of a certain product, formed for the purpose of manipulating the product’s price in a given market OPEC is widely known as the most prominent cartel in the international economy[.]”); Tim McMahon, *Inflation Similarities Between the 2000s and the 1970s*, INFLATIONDATA.COM (Apr. 21, 2006), http://inflationdata.com/inflation/Inflation_Articles/2000_vs_1970s.asp (noting that in the 1970s, inflation rates had surpassed 14%); John Keefe, *What Causes Inflation? Lessons from the 1970s*, Vol.3, CBS MONEYWATCH.COM (May 26, 2009), <http://moneywatch.bnet.com/economic-news/blog/macro-view/what-causes-inflation-lessons-from-the-1970s-vol-3/553/> (“Many people who lived through the 1970s associate high inflation with sharply higher oil prices, due to an embargo on Arab oil in 1973.”).

¹²⁶ Carlstrom & Fuerst, *supra* note 121, at 3.

¹²⁷ *Id.*

¹²⁸ *Id.* at 2.

¹²⁹ See *supra* note 125.

worldwide from 5.6% to 3.8%.”¹³⁰ Again, there is no discussion about how central bank independence would have prevented the OPEC countries from forming a cartel and raising global oil prices. They offer caveats that central bank independence was not the only factor in reducing inflation rates and that the impact of independence is more mercurial in developing nations.¹³¹ But it is telling that such caveats are hedged in their conclusion section, which offers the definitive statement that central bank independence is the “most effective way” to ensure low inflation and that “nearly 2 percentage points of developed countries’ average decline in inflation over time is *the direct results* [sic] of their central banks’ increased independence.”¹³² Here we see a pattern of studied ignorance: all non-monetary factors must be ignored to maintain the case for central bank independence.

Likewise, Samra relies on a study by Larry Summers and Alberto Alesina, finding a strong relationship between central bank independence and lower inflation across more than a dozen industrialized countries.¹³³ According to this study, countries with high degrees of central bank independence generally had lower inflation rates than countries with less independent central

¹³⁰ *Id.*

¹³¹ Carlstrom & Fuerst, *supra* note 121, at 1–3.

¹³² *Id.* at 3 (emphasis added).

¹³³ Alesina & Summers, *supra* note 121, at 159, 160–61 tbls.A1 & A2 (analyzing the independence of various countries’ central banks and concluding that “[t]hese results suggest that the monetary discipline associated with central bank independence reduces the level and variability of inflation”). As Deputy Secretary, and then Secretary, of the Treasury from 1999–2001, Summers played an active role in pushing central bank independence around the world and deregulation of banking and derivatives in the United States. See Lawrence H. Summers: Director of the National Economic Council and Assistant to the President for Economic Policy, NATIONAL ECONOMIC COUNCIL, <http://www.whitehouse.gov/administration/eop/nec/director> (last visited Jan. 11, 2011). See also Joshua Zumbrun, *Clinton Calls Advice He Got on Derivatives ‘Wrong’ (Update1)*, BLOOMBERG BUSINESSWEEK (Apr. 19, 2010, 7:07 PM), <http://www.businessweek.com/news/2010-04-19/clinton-calls-advice-he-got-on-derivatives-wrong-update1.html> (“[Summers’] argument was that derivatives didn’t need transparency because they were ‘expensive and sophisticated and only a handful of people will buy them and they don’t need any extra protection’ . . .”). Summers stated in an interview that

we’ve got a very clear sense, as I know the Fed does, of the respective roles of national fiscal authorities and national central banks. And that has got to be premised on a central bank’s independence. It’s got to be premised on a central bank’s making judgments about overall monetary and financial policy, not about specific subsidies.

David Wessel, *Larry Summers on Ben Bernanke–Sort of*, REAL TIME ECONOMICS (Apr. 14, 2009, 8:52 PM), <http://blogs.wsj.com/economics/2009/04/14/larry-summers-on-ben-bernanke-sort-of/>. At the time of this writing, he is director of the White House National Economic Council. See Lawrence H. Summers: Director of the National Economic Council and Assistant to the President for Economic Policy, NATIONAL ECONOMIC COUNCIL, <http://www.whitehouse.gov/administration/eop/nec/director> (last visited Oct. 23, 2010).

banks.¹³⁴ But this conclusion is easily dispelled by expanding the time frame of the longitudinal studies and considering non-monetary factors. For instance, the annual inflation rate in the United States averaged about 6% during the 1941–1951 decade, when the Federal Reserve was politically-directed.¹³⁵ This was roughly the average annual U.S. inflation rate for the 1973–1988 period, when the Federal Reserve enjoyed far more independence.¹³⁶ Perhaps Samra would object to including the inflationary 1970s in such a comparison, but of course that is exactly what all of these self-serving studies have been doing to impugn the record of politically accountable central banks in Latin America.

Although Samra asserts that “most scholars agree” that central bank autonomy is closely correlated with lower inflation, the actual evidence is far less clear.¹³⁷ Eijffinger and de Haan present the findings of more than two dozen studies, not one of which considers the empirical evidence prior to 1950, thereby ignoring the most important decade of the twentieth century, as discussed above, when the Federal Reserve and other central banks lacked independence while supporting the century’s highest economic growth rates and low inflation rates.¹³⁸ Even with such limited time frames, the studies were less than uniform in finding any statistical relation between central-bank independence and inflation, and many found no relation between central-bank independence and economic growth, interest rates, or budget deficits.¹³⁹

In summarizing the empirical studies, including the Alesina/Summers study, Carl Walsh has stated that “[a]mong developed economies, central bank independence was found to be negatively correlated with average inflation.”¹⁴⁰ Walsh noted, however, that data supporting this contention was based on “the high inflation years of the 1970s.”¹⁴¹ In addition, the studies mostly omitted consideration of the 1950s and 1960s, and completely overlooked the 1930s and 1940s. Moreover, these

¹³⁴ Alesina & Summers, *supra* note 121, at 159.

¹³⁵ *Historical Inflation Data from 1914 to the Present*, *supra* note 79. See also *supra* Part I.

¹³⁶ Alesina & Summers, *supra* note 121, at 161 app. tbl.A2.

¹³⁷ Samra, *supra* note 6, at 65.

¹³⁸ Sylvester C. W. Eijffinger & Jakob de Haan, Special Paper, *The Political Economy of Central-Bank Independence*, PRINCETON INT’L FIN. SEC. 64–65 tbls.B1 & B2 (1996), available at http://www.princeton.edu/~ies/IES_Special_Papers/SP19.pdf. See also *supra* Part I (noting the period of 1941–1951).

¹³⁹ Eijffinger & de Haan, *supra* note 138, at 66–69 tbls.B2–B4.

¹⁴⁰ Walsh, *Central Bank Independence*, *supra* note 103, at 728–29.

¹⁴¹ *Id.* at 729.

studies have also been criticized for failing to consider any non-monetary factors that might explain changes in inflation rates.¹⁴²

Walsh further noted that for developing countries, when “causality is difficult to establish; is inflation high because of political interference that leads to rapid turnover of central bank officials? Or are central bank officials tossed out because they can’t keep inflation down?”¹⁴³ Again, implicit in such questions is the recognition that inflation may at times be caused by other non-monetary factors beyond the control of central bankers. Yet Samra indulges, quite uncritically, in monetarist assumptions. He quotes at length from Milton Friedman denigrating such possible causes of inflation as “greedy businessmen, grasping trade unions, . . . Arab sheikhs, . . . or anything else that seems remotely plausible.”¹⁴⁴ According to Friedman, any of these can produce rising prices for individual goods or services, but “they cannot produce rising prices for goods in general [T]hey cannot produce continuing inflation.”¹⁴⁵ There is actually no empirical analysis in Friedman’s argument; rather, this is ideology and belief. There is no recognition that the quadrupling of the price of just one item—petroleum—could have devastating ripple effects throughout the economy, raising prices for goods in general, particularly since that commodity is an input in the production of so many other goods.¹⁴⁶

Samra also quotes Friedman that

‘[t]here is probably no other proposition in economics that is as well established’ as the principle that ‘[i]nflation occurs when the quantity of money rises appreciably more rapidly than output, and the more rapid the rise in quantity of money per unit of output, the greater the rate of inflation.’¹⁴⁷

¹⁴² *Id.* at 730. Although Samra quotes from Walsh’s summary at some length about the definitions of goal independence and instrument independence, he does not discuss the criticisms raised by Walsh about the empirical studies of developing countries related to methodology, causation, scope of analysis, and underlying theory. *See, e.g.*, Samra, *supra* note 6, at 80.

¹⁴³ *See* Walsh, *Central Bank Independence*, *supra* note 103, at 728, 730.

¹⁴⁴ *See* Samra, *supra* note 6, at 76 (quoting Friedman).

¹⁴⁵ *See id.* (quoting Friedman).

¹⁴⁶ James Galbraith disputes the view that the 1970s inflation somehow vindicates Milton Friedman and undermines Keynesian economics. The inflation resulted from the Vietnam War, the collapse of Bretton Woods, the rise of OPEC and major oil shocks in 1973–1974 and 1979; huge events that were much larger than any “monetary mischief.” Therefore, the solution need not have been super-tight money, high interest rates, deep recession, and even less accountability for central bankers. Rather, “[t]he renewed application of less drastic measures might have been enough.” James K. Galbraith, *We Are All Keynesians Again: Why Ben Bernanke Isn’t Listening to Robert Samuelson*, WASH. MONTHLY (Jan./Feb. 2009) (reviewing ROBERT J. SAMUELSON, *THE GREAT INFLATION AND ITS AFTERMATH: THE PAST AND FUTURE OF AMERICAN AFFLUENCE* (2008)).

¹⁴⁷ *See* Samra, *supra* note 6, at 67 (quoting Friedman). This Friedman quote comes from a chapter in which Friedman once again raises the history of the Weimar

Samra fails to analyze the implications of Friedman's monetarist prescription, which would limit the discretion of central bankers by tying them to a fixed rule for money, essentially requiring that the Federal Reserve limit the growth of monetary aggregates to about three percent a year, regardless of the consequences.¹⁴⁸ According to William Greider, Friedman's solution would have Congress "strip the Fed of its privileged independence and enact legislative instructions for U.S. monetary policy."¹⁴⁹ Samra is apparently unaware that this crude monetarism, based as it is on a quantity theory of money, was easily refuted in the early 1980s, when monetarists led by Friedman wrongly predicted double-digit inflation would result from an increase in the money supply and, instead, inflation continued to fall.¹⁵⁰ Various explanations—all non-monetarist—were offered by economists, from falling oil prices to a strong dollar, and the Federal Reserve itself abandoned the monetarist experiment in mid-1982.¹⁵¹

Friedman's monetarism is also refuted by the evidence of the past two years, during which time central banks around the world, and the Federal Reserve in particular, have been trying mightily to expand the money supply to ease credit conditions and foster economic recovery.¹⁵² The result has not been a resurgence of inflation. Quite the contrary, inflation has fallen to near zero and the U.S. economy creeps dangerously close to deflation.¹⁵³

As the Federal Reserve itself recognizes, the velocity of money—the frequency in which money is actually spent—can

hyperinflation without providing the important context that Germany was in the grips of a balance of payments and foreign debt crisis, and that its central bank was already autonomous. See MILTON FRIEDMAN, *MONEY MISCHIEF: EPISODES IN MONETARY HISTORY* 194, 217 (1994).

¹⁴⁸ GREIDER, *SECRETS OF THE TEMPLE*, *supra* note 2, at 91–92.

¹⁴⁹ *Id.* at 91.

¹⁵⁰ TURGEON, *BASTARD KEYNESIANISM*, *supra* note 71, at 78–79; Nicholas Kaldor, *How Monetarism Failed*, in *HISTORY OF THE U.S. ECONOMY SINCE WORLD WAR II*, *supra* note 106, at 423–24; ROBERT LEKACHMAN, *GREED IS NOT ENOUGH: REAGONOMICS* 120–35 (1982); Timothy A. Canova, *Inflation Hinges Not on M-1 Alone*, N.Y. TIMES, Apr. 16, 1984, at A20.

¹⁵¹ Andrew E. Busch, *Ronald Reagan and the Defeat of the Soviet Empire*, 27 *PRESIDENTIAL STUDIES Q.* 451, 460 (1997) (attributing the decline in inflation to falling oil prices engineered by the Saudis as part of a Reagan administration strategy to collapse the Soviet economy); Andrew H. Bartels, *Volcker's Revolution at the Fed*, in *HISTORY OF THE U.S. ECONOMY SINCE WORLD WAR II*, *supra* note 106, at 422.

¹⁵² Johnson, *supra* note 40.

¹⁵³ David Leonhardt, *2010, a Year of No Inflation*, *ECONOMIX BLOG*, N.Y. TIMES, (Sept. 13, 2010 8:45 AM), <http://economix.blogs.nytimes.com/2010/09/13/2010-a-year-of-falling-prices>.

vary quite dramatically.¹⁵⁴ This was an insight of Keynes, developed in his theory of “liquidity-preference,”¹⁵⁵ that monetarists like Friedman seem to overlook at critical times.¹⁵⁶ For instance, as consumer and business confidence has declined along with the economy during the past two years, there has been a marked increase in hoarding by banks, businesses, and consumers.¹⁵⁷ Under such conditions, expansion of the money supply will not necessarily translate into higher inflation or higher economic growth. “The Fed has been pushing reserves into the banking system in exchange for toxic assets while hoping the banks will lend to consumers and businesses in an environment of severe economic insecurity.”¹⁵⁸ Marriner Eccles himself had criticized this approach as “pushing on a string” and largely ineffective.¹⁵⁹

Although the quantity theory of money and other monetarist assumptions have been widely discredited, many of the studies relied on by Samra remain committed to these doctrines. In any given context, changes in inflation rates may or may not have anything to do with central bank structure and monetary policy, and they may or may not be related to a host of non-monetary factors. Unfortunately, for autistic economics, context does not

¹⁵⁴ THE FEDERAL RESERVE SYSTEM: PURPOSES & FUNCTIONS 1994, *supra* note 76, at 27 (reporting that when the velocity of money or credit changes unpredictably, “adherence to the initial objectives for money or credit growth would lead to an undesirable outcome for output or prices”).

¹⁵⁵ KEYNES, THE GENERAL THEORY, *supra* note 39, at 194–209.

¹⁵⁶ In fairness, in Friedman’s academic work he recognizes periodic changes in money velocity, including periods in which velocity has fallen quite significantly even as the supply of money has increased and inflation has remained stable. FRIEDMAN & SCHWARTZ, *supra* note 68, at 302, 307 (discussing a sharp decline in money velocity from 1929–1933); *id.* at 546 (discussing decline in money velocity during World War II). But in Friedman’s less academic and more popular and polemical writings relied on by Samra, there is not a word of mention about the velocity of money. FRIEDMAN, *supra* note 147, at 189–95, 202, 205–09, 219–22, 229–33, 235–37, 258–59, 264 (discussing money supply growth and inflation without any mention of changes in the velocity of money). It could be construed that the omission was motivated by Friedman’s political agenda and may be lacking in intellectual honesty.

¹⁵⁷ Jia Lynn Yang, *Companies Pile Have the Cash But Not the Will to Hire*, WASH. POST, July 15, 2010, at A1 (reporting that “[n]on-financial companies are sitting on \$1.8 trillion in cash, roughly one-quarter more than at the beginning of the recession”); Daniel Fisher, *Excess Reserves Are the \$1 Trillion Reminder of Crisis*, FORBES BLOG (Aug. 5, 2010, 9:21 AM), <http://blogs.forbes.com/danielfisher/2010/08/05/excess-reserves-are-the-1-trillion-reminder-of-crisis/> (reporting excess bank reserves at the Federal Reserve rose from \$1.9 billion in August 2008 to more than \$1 trillion two years later).

¹⁵⁸ Canova, *The Federal Reserve We Need*, *supra* note 81.

¹⁵⁹ MELTZER, *supra* note 65, at 478 (discussing Eccles’ 1935 testimony to the House Committee on Banking and Currency). Eccles recognized that central bank accommodation of large public deficits would prove far more effective than pushing reserves into the banking system as long as the federal government spent wisely in putting people back to work and investing in the long-term infrastructure needs of the nation.

matter, and these studies fail to even consider non-monetary factors in changes in inflation rates over time.¹⁶⁰

B. Economic Growth and Income Distribution

The empirical literature on central bank independence is limited and also quite flawed in its treatment of economic growth and the distribution of income. Once again, the studies generally narrow the time period of inquiry to reach unsound conclusions. Moreover, all the studies relied on by Samra fail to even consider the impact of central bank independence on distributions of wealth and income.

For instance, in the study by Carlstrom and Fuerst on the New Zealand experience, the authors fail to mention that the 1950s and 1960s was the longest period of sustained economic growth in New Zealand history while inflation averaged about four percent.¹⁶¹ Since the Reserve Bank of New Zealand was far less independent during this period, it allowed the Labour government to pursue Keynesian economics, social welfare, employment protection, and the expansion of infrastructure to serve economic, employment, and social development objectives.¹⁶²

This was also the trend in much of the advanced capitalist world during the same period, including in the United States, Canada, Japan, and much of Western Europe, where politically-directed central banks were accommodating massive government spending and social welfare programs, and high economic growth rates.¹⁶³ Yet, a study by Summers and Alesina found no

¹⁶⁰ See, e.g., *Historical U.S. Inflation Rate: 1914 to the Present*, *supra* note 80; VATTER, *supra* note 65, at 100.

¹⁶¹ JANE KELSEY, *THE NEW ZEALAND EXPERIMENT: A WORLD MODEL FOR STRUCTURAL ADJUSTMENT?* 160 (1997).

¹⁶² *Id.* at 23.

¹⁶³ LINDA MCQUAIG, *SHOOTING THE HIPPO: DEATH BY DEFICIT AND OTHER CANADIAN MYTHS* 220–28 (1995) (discussing the role of the Bank of Canada in accommodating public spending and investment levels of “the golden era” of the late 1940s to early 1970s which “represented a kind of historic compromise between powerful financial interests and the working population”); WILLIAM KREHM, *A POWER UNTO ITSELF* 26–27 (1993) (describing the Bank of Canada’s pegging interest rates at 1.5% throughout the 1940s and 1950s, perhaps the most vibrant period in all of Canada’s economic history to accommodate active fiscal policies on education, housing, and infrastructure investment); WILLIAM F. HIXSON, *IT’S YOUR MONEY* 124 (1997) (explaining how the Bank of Canada financed the public’s purchases of Victory Bonds during World War II “to mobilize the idle real resources of the nation—labor, materials, and plant—to win the war”); Jagdish Bhagwati, *The Capital Myth: The Difference Between Trade in Widgets and Dollars*, 77 *FOREIGN AFF.* 7, 10 (1998) (pointing out that Western Europe and Japan returned to prosperity after World War II, and China has enjoyed remarkable economic growth rates in recent years, all without capital account convertibility); BLOCK, *supra* note 75, at 109 (noting that “[a]t the beginning of the 1950s . . . no major European currency was convertible”); MARGARET GARRITSEN DE VRIES, *BALANCE OF PAYMENTS ADJUSTMENT, 1945 TO 1986: THE IMF*

correlation between central bank independence and higher economic growth rates precisely because it did not consider any data prior to 1955, but mostly focused on the period of 1973–1988.¹⁶⁴ How convenient to mostly ignore the three most successful decades for politically directed central banks. For instance, if we compare U.S. economic growth in the 1940s with growth in more recent years, the conclusions are much different. In fact, U.S. gross national product (GNP) grew at an average rate of about 5.2% a year during the 1940s when the Federal Reserve was politically-directed,¹⁶⁵ compared with average annual GNP growth of about 2.4% growth from 1973–1987 when the Federal Reserve was far less accountable.¹⁶⁶ Therefore, real economic growth rates were more than twice as high when the central bank was politically accountable compared with when it had much greater autonomy.

According to Mark Weisbrot, real per capital growth in Latin America rose 82% between 1960 and 1980, the period prior to central bank independence; and only 9% from 1980 to 2000, the period coinciding with reforms to independent central banks.¹⁶⁷ This is an enormous decline in growth rates from about 4% a year to less than 0.5%, not even high enough to keep pace with population increases. In country after country—Argentina, Brazil, Mexico, Bolivia, Costa Rica—there were enormous decelerations in economic activity with the onset of structural reforms, including central bank independence, that were imposed by the International Monetary Fund in the context of severe balance of payments and foreign debt crises.¹⁶⁸

Ha-Joon Chang concludes that the “bad old days” before independent central banks was actually the most successful period for developing countries, with per capita income growing by 3% annually in the 1960s and 1970s, above the 1.7% annual growth rates since the 1980s after central bank independence

EXPERIENCE 30–32 (1987) (chronicling reforms in various countries to make their currencies legally convertible); BEGG ET AL., CTR. FOR ECON. POL’Y RESEARCH, SUSTAINABLE REGIMES OF CAPITAL MOVEMENTS IN ACCESSION COUNTRIES viii (indicating that some larger Western European countries did not fully remove capital controls until the 1990s).

¹⁶⁴ Samra, *supra* note 6, at 72 n.56–57; Alesina & Summers, *supra* note 121, at 160–61 app. tbls.A1 & A2 (focusing on two periods, 1955–1988 and 1973–1988).

¹⁶⁵ *Statistical Tables Relating to Income, Employment, and Production*, in ANNUAL REPORT TO THE PRESIDENT, COUNCIL OF ECONOMIC ADVISORS 197, 204 tbl.B-2 (1980), available at http://fraser.stlouisfed.org/publications/erp/issue/1383/download/5809/ERP1980_Appendixes.pdf (providing the basis for the calculation of the 5.2% figure for the 1941–1951 period by averaging the annual real GNP growth rates).

¹⁶⁶ Alesina & Summers, *supra* note 121, at 161 app. tbl.A2.

¹⁶⁷ Weisbrot, *Latin America’s Electoral Leftward Shift*, *supra* note 99 (providing the graphic charts which accompany Weisbrot’s speech).

¹⁶⁸ *Id.*

and other neoliberal reforms were implemented.¹⁶⁹ Chang also points out that the average growth rate of developing countries since the 1980s “would be even lower if we were to exclude China and India,” two countries that have experienced tremendous economic growth precisely by not embracing central bank independence.¹⁷⁰

China’s central bank is tightly controlled in a one-party state and is perhaps the most politically directed central bank in the world, with the state dictating the central bank’s objectives and policy instruments.¹⁷¹ Yet, China has experienced the fastest economic growth over a sustained period of time than any country since the United States in the 1940s.¹⁷² Meanwhile, inflation has not yet gotten out of hand. For instance, as Chinese growth rates have pulled up real estate prices, the authorities have imposed margin requirements and other selective credit controls to prevent the asset bubble from getting out of hand.¹⁷³ China’s central bank has also been directed to intervene in foreign exchange markets to keep the Chinese currency undervalued to the dollar, thereby helping the country amass large trade and current account deficits by promoting manufacturing and exports.¹⁷⁴ China, India, and Malaysia were among the very few Asian countries to avoid economic collapse during the Asian currency contagion of the late 1990s by

¹⁶⁹ HA-JOON CHANG, *BAD SAMARITANS: THE MYTH OF FREE TRADE AND THE SECRET HISTORY OF CAPITALISM* 27 (2008).

¹⁷⁰ *Id.*

¹⁷¹ C. FRED BERGSTEN ET AL., *CHINA: THE BALANCE SHEET: WHAT THE WORLD NEEDS TO KNOW NOW ABOUT THE EMERGING SUPERPOWER* 29 (2006); WILLIAM GREIDER, *ONE WORLD, READY OR NOT: THE MANIC LOGIC OF GLOBAL CAPITALISM* 160 (1997).

¹⁷² G. John Ikenberry, *The Rise of China and the Future of the West: Can the Liberal System Survive?*, 87 *FOREIGN AFF.* 23, 23–24, 26 (2008), available at <http://www.foreignaffairs.com/articles/63042/g-john-ikenberry/the-rise-of-china-and-the-future-of-the-west>.

¹⁷³ Joy C. Shaw, *Beijing Acts to Limit Speculative Investing*, *WALL ST. J.*, Apr. 19, 2010, at A15 (reporting an increase in margin requirements and lending rates by State Council, China’s cabinet, rather than the People’s Bank of China, the country’s central bank). Hong Kong’s central bank, which is more independent than the People’s Bank of China, has been provided with selective credit control instruments and charged with containing inflation of asset prices. Although these intrusions are often considered by monetarists to be constraints on central bank prerogatives, such delegated authority has provided the central bank with the tools to slow, if not completely prevent, the growth of a housing bubble. Jonathan Cheng, *Hong Kong Acts to Prevent Bubble*, *WALL ST. J.*, Oct. 24–25, 2009, at B2 (reporting that Hong Kong has managed so far “to sidestep the troubles that beset the U.S. subprime mortgage market, thanks to a 30% down-payment requirement that has been in place since 1991,” and was recently raised to 40% for the high-end property market).

¹⁷⁴ BERGSTEN ET AL., *supra* note 171, at 90 (concluding that “undervaluation of the Chinese currency since 2002 has exacerbated the underlying structural imbalance in bilateral trade” and contributed to China’s current account surplus).

imposing restrictions on short-term capital flows.¹⁷⁵ Recall that currency and capital controls are routinely criticized by monetarist scholars as intrusions on central bank independence.¹⁷⁶ Malaysia imposed capital controls over the objections of its central bank governor and deputy governor, both of whom reportedly resigned in protest.¹⁷⁷ As Joseph Stiglitz concluded, and the IMF finally conceded:¹⁷⁸ “In retrospect, it was clear that Malaysia’s capital controls allowed it to recover more quickly, with a shallower downturn, and with a far smaller legacy of national debt burdening future growth.”¹⁷⁹ Meanwhile, throughout the period of currency contagion in Asia, India’s economy continued to grow at a rate in excess of 5% and China’s economy grew at close to 8%.¹⁸⁰

The empirical evidence demonstrates that in both good times and bad, economic growth rates are higher when central banks are subject to some political control. China’s emergence as an economic powerhouse is particularly instructive: a politically directed central bank has accommodated high economic growth rates over a sustained period of time while helping to ensure relative stability in asset prices and financial markets. This compares favorably with the relative instability and slow growth in the United States and other countries with captured central banks.

It is also instructive to consider the relationship between economic growth and income distribution. At times, economic growth may be widely shared and contribute to more equitable distributions of income; at other times, when based on policies that restrict wide distributions, economic growth leads to less income equality.¹⁸¹ Slow growth or negative growth is most often associated with rising inequality.¹⁸² Unfortunately, none of the

¹⁷⁵ STIGLITZ, MAKING GLOBALIZATION WORK, *supra* note 95, at 34; ROBIN HAHNEL, PANIC RULES: EVERYTHING YOU NEED TO KNOW ABOUT THE GLOBAL ECONOMY 88 (1999).

¹⁷⁶ Samra, *supra* note 6, at 79 (quoting J  come, *Legal Central Bank Independence*, *supra* note 58, at 20–22).

¹⁷⁷ JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS 124 (2002) [hereinafter STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS].

¹⁷⁸ Michael M. Phillips, *IMF Concedes that Malaysia’s Controls over Capital Produced Positive Results*, WALL ST. J., Sept. 9, 1999, at A21.

¹⁷⁹ STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS, *supra* note 177, at 125.

¹⁸⁰ *Id.*

¹⁸¹ James Galbraith describes these negative outcomes as “growth with inequality” and “poverty amidst plenty.” Email from James K. Galbraith, Professor, LBJ School of Public Affairs, University of Texas at Austin, to Post-Keynesian list-serve (Aug. 12, 2000, 10:19), available at <http://www.mail-archive.com/pen-l@galaxy.csuchico.edu/msg44810.html> (discussing the CEPR paper *World Bank Research Faulted*).

¹⁸² The Commission on the Measurement of Economic Performance and Social Progress has provided a useful critique of the failures of aggregate measurements of GDP, income, consumption and wealth to reflect actual living standards and distributions of

studies relied on by Samra considered the distributional consequences of central bank structure. In fact, Samra's ad hominem attack was apparently triggered by a quote from my own work pointing out that the Washington Consensus policy agenda, which includes central bank independence, has coincided with a significant redistribution of income and wealth from the many at the bottom to the few at the top.¹⁸³

Samra's omission is unfortunate since empirical, theoretical, and econometric research does exist which considers the relationship between the goal independence of central banks and distributional consequences. For instance, *Beyond Inflation Targeting* provides sophisticated empirical and econometric analyses by nearly two dozen economists, none of whom are associated with the research departments of central banks or other orthodox institutions.¹⁸⁴ In particular, the volume considers the distributional consequences of "inflation targeting," which, according to Gerald Epstein and Erinc Yeldan, is considered "the new orthodoxy" approach, has been adopted by some two dozen central banks, and is usually associated with central bank independence.¹⁸⁵ These and other studies conclude that inflation targeting may have significant costs in terms of lost output and mal-distributions of income and wealth, including differential negative impact on the employment rates of women relative to men and on the welfare of workers relative to owners and managers.¹⁸⁶

income, consumption and wealth. JOSEPH E. STIGLITZ, AMARTYA SEN & JEAN-PAUL FITOUSSI, MISMEASURING OUR LIVES: WHY GDP DOESN'T ADD UP 13–14 (2010).

¹⁸³ Samra, *supra* note 6, at 74–75 (quoting Canova, *Financial Liberalization*, *supra* note 28, at 1294).

¹⁸⁴ BEYOND INFLATION TARGETING: ASSESSING THE IMPACTS AND POLICY ALTERNATIVES vii–xi (Gerald A. Epstein & A. Erinc Yeldan eds., 2009).

¹⁸⁵ Gerald A. Epstein & A. Erinc Yeldan, *Beyond Inflation Targeting: Assessing the Impacts and Policy Alternatives*, in BEYOND INFLATION TARGETING: ASSESSING THE IMPACTS AND POLICY ALTERNATIVES, *supra* note 184, at 3–4 (defining the inflation targeting policy framework as "the public announcement of inflation targets coupled with a credible and accountable commitment on the part of government policy authorities to the achievement of these targets") (quoting Mark Setterfield, *Is Inflation Targeting Compatible with Post Keynesian Economics?*, 28 J. OF POST KEYNESIAN ECON. 653, 653–71 (2006) and citing to studies by Bernanke, Mishkin and Schmidt-Hebbel).

¹⁸⁶ Epstein & Yeldan, *Beyond Inflation Targeting*, *supra* note 185, at 8; Elissa Braunstein & James Heintz, *The Gendered Political Economy of Inflation Targeting: Assessing Its Impacts on Employment*, in BEYOND INFLATION TARGETING, *supra* note 184, at 110–12 (concluding that in middle- and low-income countries dealing with demand-pull inflation, inflation targeting may undermine economic growth); Arjun Jayadev, *Income, Class and Preferences Towards Anti-inflation and Anti-unemployment Policies*, in BEYOND INFLATION TARGETING, *supra* note 184, at 87 (finding systematically differential effects on the welfare of workers compared with owners, and on different segments of the working class). See also Jose Antonio Cordero, *Economic Growth Under Alternative Monetary Regimes: Inflation Targeting vs. Real Exchange Rate Targeting*, 22 INT'L REV. OF APPLIED

In Latin America, the region on which Samra focuses, levels of income inequality are among the highest in the world, and the levels of poverty have skyrocketed in the present period of independent central banks.¹⁸⁷ James Galbraith and the University of Texas Inequality Project have identified a range of policies that undermine growth and equality, namely “policies of tearing down social institutions that provide health care, education, housing, food and direct support for the wages of low-income workers,” as well as the deregulation of capital markets that lead to inevitable financial crises.¹⁸⁸ Unaccountable central bankers are more likely to pursue the range of these policies by catering to elite financial interests and by limiting the ability of elected governments to expand budgets and avoid fiscal austerity.

Unfortunately, questions of growth and distribution are hardly asked by Samra and are entirely missing in his four case studies. Among the research he relies upon, the few who discuss such issues, like Larry Summers, follow the same flawed empirical methodology based on truncated periods of analysis.¹⁸⁹ This outdated orthodox approach, shared by monetarism and debased forms of Keynesianism, has simply ignored the numerous studies that correlate central bank independence with slow growth and rising levels of income inequality.¹⁹⁰ The orthodoxy ignores distributional questions and entrenches itself in abstract ignorance. This is once again a case of autistic economics, oblivious to larger social or historical contexts and apparently mesmerized by the elegance of their mathematical abstractions.

ECON. 145, 145–60 (2008) (using econometric analysis to conclude that inflation targeting undermines growth and employment).

¹⁸⁷ 2009 WORLD DEVELOPMENT INDICATORS 64–65 tbl.2.7 (Data Dev. Grp., The World Bank ed., 2009) (reporting high and generally rising poverty rates); *id.* 72–73 tbl.2.9 (reporting high Gini coefficients throughout Latin America). *See also* James K. Galbraith & Hyunsub Kum, *Inequality and Economic Growth: Data Comparisons and Econometric Tests*, (Univ. of Texas Inequality Project, Working Paper No. 21, 2002), available at http://utip.gov.utexas.edu/papers/utip_21rv.pdf (finding that per capita GDP growth has slowed in most countries since 1981 and there is a worldwide trend toward rising inequality).

¹⁸⁸ Galbraith, *supra* note 181 (discussing the CEPR paper *World Bank Research Faulted*).

¹⁸⁹ *See* Alesina & Summers, *supra* note 121, at 154; Samra, *supra* note 6, at 72 n.56 (referencing the research findings of Alesina and Summers).

¹⁹⁰ The British economist Joan Robinson, part of Keynes’ inner circle, coined the phrase “bastard Keynesianism” to describe the early Keynesian models that departed from Keynes’ original framework and sought to reconcile Keynesians and non-Keynesians by conforming more closely to orthodox theory. SKIDELSKY, JOHN MAYNARD KEYNES: THE ECONOMIST AS SAVIOR, *supra* note 44, at 538, 621.

C. Agency Capture, Financial Fragility, and Rigged Markets

There is a tendency among economists to dismiss empirical data prior to 1950 as not relevant to today's realities. The 1930s was a depression decade, the 1940s was a wartime decade, and both are seen as anomalies and the data from those periods are treated as outliers.¹⁹¹ Perhaps it is understandable that Samra would not recognize the salience of the pre-1952 period in U.S. monetary history since it is no longer taught in most economics departments and business schools.¹⁹² But there is certainly no reason to ignore the post-2000 period, in which independent central banks, led by the Federal Reserve, lowered interest rates while relaxing all kinds of meaningful regulatory oversight, resulting in an enormous hyperinflation of asset prices followed by a bust of historic proportions. Throughout his brief for central bank independence, Samra manages to avoid any mention of the financial collapse of 2008 and the enormous ensuing financial bailouts, which were engineered by privately-directed central banks.

This blind spot fits within the genre of central bank apologists. They missed the possibility of a black swan prior to the financial collapse by ignoring the empirical data of the financial collapse of 1929–1933; they now miss the black elephant in the closet, the 2008 financial crisis itself and the scale of the ongoing bailouts and hidden subsidies. They also overlook how central bank independence has become a cover for regulatory capture by private sector banking constituencies.¹⁹³

As recognized by Samra, the Federal Reserve has come to enjoy complete instrument independence as well as substantial goal independence since its mandate as delegated by Congress is

¹⁹¹ Anti-Keynesians routinely dismiss the high economic growth and low inflation rates of World War II by attributing the post-war inflation to the war years. FRIEDMAN & SCHWARTZ, *supra* note 65, at 556–58. *See generally* Higgs, *supra* note 63. Meltzer himself dismissed the 1940s as an anomaly. MELTZER, *supra* note 65, at 737–39 (quoting with approval Allan Sproul, president of the New York Federal Reserve Bank from 1941 to 1956). Niall Ferguson's myopia suggests that today's anti-Keynesians have learned nothing from the 1940s. Niall Ferguson, *Today's Modern Keynesians Learnt Nothing Since the 1930s*, FIN. TIMES, July 20, 2010, at 9.

¹⁹² This observation is based on numerous discussions the author has had over the past two decades with faculty in economics departments and business schools around the country about the coverage in their basic and advanced courses. The pre-1952 pegged period is missing from mainstream texts used in those courses, and it appears rare for faculty to supplement those deficient texts with readings on the pegged period.

¹⁹³ Theories of agency capture easily explain the capture of central banks by their commercial banking and financial constituencies. *See generally* MANCUR OLSON, JR., THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1965); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECO. & MGMT. SCI. 3 (1971); Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q. J. ECON. 371 (1983).

cast in broad terms with conflicting policy objectives.¹⁹⁴ But such broad delegations of power have only facilitated the Federal Reserve's capture by its big bank constituency. As Epstein and Yeldan acknowledge, "in practice, 'central bank independence' means that central banks have become less accountable to their governments, and, arguably, more accountable to financial elites and international organizations such as the IMF."¹⁹⁵

Central bank independence does not occur in a vacuum; it is adopted because of the presence of a strong political constituency.¹⁹⁶ The Federal Reserve's most important political constituency is comprised of the big banks that own and dominate the regional Federal Reserve Banks and the Federal Open Market Committee.¹⁹⁷ This domination by private bankers helps explain the "revolving door" that funnels bank economists and lawyers into high level positions at the Federal Reserve and routinely rewards Federal Reserve officials with lucrative private sector opportunities.¹⁹⁸ Although Samra relies on Milton Friedman for the quantity theory of money, he ignores Friedman's strident criticism of the Federal Reserve as an agency that has been captured by its big bank constituency.¹⁹⁹

Samra quotes approvingly from the *Guide to the Perfect Latin American Idiot* that "the fox in the henhouse is not the businessman but the state, which is plucking the chickens mercilessly."²⁰⁰ Hardly any serious observer would accuse businesspeople or industrialists, as opposed to bankers and

¹⁹⁴ Samra, *supra* note 6, at 80 (quoting Walsh, *Central Bank Independence*, *supra* note 103, at 729); *id.* at 82 (discussing the Federal Reserve's complete instrument independence and noting that "it has complete discretion over when and to what extent to make open market operations and other decisions").

¹⁹⁵ EPSTEIN & YELDAN, *supra* note 184, at 8. Likewise, Mark Weisbrot notes that the CEO of JP Morgan sits on the board of the powerful New York Federal Reserve Bank. The problem has been turned on its head as central banks are no longer independent from powerful financial interests. Mark Weisbrot, *Answer to the People, Not Greedy Elites*, THE GUARDIAN (Feb. 15, 2010, 23:00 GMT), <http://www.guardian.co.uk/commentisfree/cifamerica/2010/feb/15/argentina-central-bank-independent>.

¹⁹⁶ Walsh, *Central Bank Independence*, *supra* note 103, at 730 (discussing Posen, *supra* note 117).

¹⁹⁷ THE FEDERAL RESERVE SYSTEM: PURPOSES & FUNCTIONS 1994, *supra* note 76, at 6–15.

¹⁹⁸ Milton Friedman, *The Case for Overhauling the Federal Reserve*, CHALLENGE, July–Aug. 1985, at 4, 6 [hereinafter Friedman, *Overhauling the Fed*] (criticizing the Federal Reserve for "churning" its accounts by unnecessary buying and selling of government securities to subsidize the bond-dealing operations of its private constituency). See generally Jordi Blanes i Vidal, Mirko Draca, & Christian Fons-Rosen, *Revolving Door Lobbyists* (Centre for Economic Performance Discussion Paper No 993, Aug. 2010), available at <http://cep.lse.ac.uk/pubs/download/dp0993.pdf>.

¹⁹⁹ According to Friedman, "no major institution in the United States has so poor a record of performance over so long a period of time yet so high a public reputation as the Federal Reserve." Friedman, *Overhauling the Fed*, *supra* note 198, at 5.

²⁰⁰ Samra, *supra* note 6, at 75.

financiers, of controlling central banks. In fact, for many years critics of independent central banking have proposed including representatives of industrial capital on the Federal Reserve's policymaking committees.²⁰¹ Instead, as the structure of the Federal Reserve shows quite clearly, it is private sector commercial bankers and financial interests that dominate through ownership and direction of the regional Federal Reserve Banks.²⁰² The most powerful of the regional Fed banks is the New York Federal Reserve Bank, which over the past two years has provided some \$1.6 trillion in low interest loans, backed by shaky collateral, to its member banks, while purchasing some \$1.25 trillion of their toxic assets and another \$500 billion in Treasury securities.²⁰³ Often referred to as "quantitative easing," the Federal Reserve's large-scale purchase of assets has a direct "qualitative" effect by providing direct financial assistance to the private counterparties on these transactions.²⁰⁴ Along with selective release of insider information by Federal Reserve officials to their favored investors (often former Fed officials), these are among the many quid pro quos in a system of opaque subsidies that are more suggestive of crony capitalism and rigged markets than any free and fair playing field.²⁰⁵ It would appear that the bankers themselves are playing the role of the fox plucking the taxpayer-chickens in the central bank henhouse.²⁰⁶

In May 2008, former Federal Reserve chairman Paul Volcker expressed concern that the Federal Reserve's independence could be undermined by the wide variety of assets it had taken onto its balance sheet to help its banking constituency. He was quoted in

²⁰¹ COMMONS, *supra* note 22, at 900–01; KEYSERLING, *supra* note 22, at 111.

²⁰² THE FEDERAL RESERVE SYSTEM: PURPOSES AND FUNCTIONS 7–15 (Bd. of Governors of the Fed. Reserve Sys. ed., 6th ed. 1974) [hereinafter THE FEDERAL RESERVE SYSTEM: PURPOSES AND FUNCTIONS 1974].

²⁰³ *FAQs: MBS Purchase Program*, FEDERAL RESERVE BANK OF NEW YORK, http://www.ny.frb.org/markets/mbs_FAQ.HTML (last updated Aug. 20, 2010) (reporting \$1.25 trillion in Federal Reserve purchases of mortgage backed securities). The Federal Reserve's various emergency lending programs exceeded \$1.6 trillion. Johnson, *supra* note 40 (reporting \$112 billion in Primary Credit Program; \$493 billion in Term Auction Facility; \$225.4 billion in section 13(3) lending; \$234 billion in Term Securities Lending Facility; \$147 billion in Primary Dealer Credit; \$145 billion in Asset-Backed Commercial Paper Money Market Mutual Fund Liquidity Facility; \$349 billion in Commercial Paper Funding Facility; and \$48 billion in Term Asset-Backed Securities Loan Facility).

²⁰⁴ David Wessel, *For Fed, Goosing Markets Is a Risk Worth Taking*, WALL ST. J., Oct. 14, 2010, at A4.

²⁰⁵ Kristina Cooke et al., *Special Report: The Ties that Bind at the Federal Reserve*, REUTERS (Sept. 30, 2010), <http://www.reuters.com/article/idUSTRE68S01020100930>.

²⁰⁶ In analyzing central bank independence, Samra recognizes that a disproportionate focus on formal legal structures "often fails to truly explain the full extent of political interference in the central bank decision-making processes." Samra, *supra* note 6, at 65. Unfortunately, he does not apply such inquiry to the informal (and for that matter, formal) mechanisms that allow private financial interests to interfere politically in central bank governance.

the *Wall Street Journal* as stating that the central bank might be viewed “as the rescuer or supporter of a particular section of the market [which] is not strictly a monetary function in the way it’s been interpreted in the past.”²⁰⁷ This was nearly six months before the New York Federal Reserve Bank, then headed by Timothy Geithner, adopted many of the liquidity and open market programs that greatly expanded its balance sheet further to prop up its constituency.²⁰⁸ Volcker, long respected in financial circles, suddenly seemed increasingly out of touch with the new normal of hidden subsidies for the financial oligarchy of big banks and hedge funds.

B.W. Fraser, former governor of the Australian central bank, argues that politicians cannot be trusted to direct monetary policy because they are drawn to short-term monetary stimulus that will fuel inflation: “Independent and longsighted central bankers are needed to rescue politicians from this temptation.”²⁰⁹ Likewise, Gauti Eggertsson and Eric Le Borgne conclude that delegating monetary policy to independent central bankers results in “better forecasts and fewer policy mistakes, which increases social welfare.”²¹⁰ Such glorifications of central bankers seem naïve at best in light of their role in the financial collapse and multi-trillion dollar subsidies to their financial constituencies.²¹¹ It should now be clear that central bankers are not independent from the big banks, and they are as short-sighted as any banking executive fixated on the next quarterly report or daily stock price.

The Federal Reserve’s capture is also related to the larger political culture in Washington. The politicians who continue to delegate broad powers to the Federal Reserve are responding to the agenda of the same big banks that exercise decisive influence over the central bank. The lure of large campaign contributions, surely a very short-term motive, is often enough to convince elected officials to continue with such broad delegations and to

²⁰⁷ Greg Ip, *Fed Balance Sheet Worries Volcker*, WALL ST. J., May 15, 2008, at A3.

²⁰⁸ DAVID WESSEL, IN *FED WE TRUST: BEN BERNANKE’S WAR ON THE GREAT PANIC* 256 (2009).

²⁰⁹ Fraser, *supra* note 35, at 2–3; Samra, *supra* note 6, at 71 (quoting Fraser).

²¹⁰ Gauti Eggertsson & Eric Le Borgne, *A Political Agency Theory of Central Bank Independence* 5 (IMF, Working Paper No. 03/144, 2003), available at <http://www.imf.org/external/pubs/ft/wp/2003/wp03144.pdf>; Samra, *supra* note 6, at 81 (quoting Eggerston & Le Borgne).

²¹¹ Samra offers a “pithy quote” from *The Economist* that “the only good central bank is one that can say no to politicians.” Samra, *supra* note 6, at 72 n.52. Since the many failures of the world’s leading central banks over the past decade, not least of all by the Federal Reserve, perhaps this aphorism should be changed to “the only good central bank is one that can say no to its big bank constituencies.”

comply with the Wall Street agenda being pushed by the Federal Reserve itself.²¹²

Agency capture helps explain the Federal Reserve's failure to effectively monitor and supervise the lending practices of banks, its efforts to undermine the Glass-Steagall firewalls between commercial and investment banking, and its lobbying to further deregulate markets for financial derivatives.²¹³ Throughout the Greenspan and Bernanke eras, at the height of its independence, the Federal Reserve has served as the lapdog for Wall Street interests rather than as a watchdog to prevent marketplace abuses.

The deregulatory agenda pursued by the Federal Reserve, and the financial innovations that resulted, were justified by a variety of economic theories, including rational expectations, real business cycle theory, and the efficient financial market theory—all of which were discredited by the present financial crisis, but all of which live on by force of momentum and career-long commitments in the academy.²¹⁴ According to numerous economic theorists and historians, the consequence of such financial innovation is to markedly increase the fragility of the financial system.²¹⁵ A study by Gerald Epstein presents econometric evidence correlating independent central banking with more speculative financial markets and lower rates of capacity utilization.²¹⁶ The past two decades of independent central banking witnessed a proliferation in financial innovations, including the securitized asset-backed instruments and financial derivatives that played an enormous role in the financial panic, economic recession, and ongoing crisis.

D. Case Studies in Historical Context

The relationship between central bank independence and financial fragility is not confined to the United States and other wealthy countries. Samra notes that more than a dozen Latin

²¹² "The financial sector is far and away the largest source of campaign contributions to federal candidates and parties, with insurance companies, securities and investment firms, real estate interests and commercial banks providing the bulk of that money. The sector contributes generous sums to both parties . . ." Aaron Kiersh, *Finance/Insurance/Real Estate: Background*, CTR. FOR RESPONSIVE POLITICS (last updated July 2009), <http://www.opensecrets.org/industries/background.php?cycle=2010&ind=F>.

²¹³ Canova, *Financial Market Failure*, *supra* note 15, at 384–87.

²¹⁴ ROBERT SKIDELSKY, *KEYNES: THE RETURN OF THE MASTER* 32–42 (2009).

²¹⁵ See generally HYMAN P. MINSKY, *STABILIZING AN UNSTABLE ECONOMY* (2008); CHARLES P. KINDLEBERGER & ROBERT Z. ALIBER, *MANIAS, PANICS, AND CRASHES: A HISTORY OF FINANCIAL CRISES* (5th ed. 2005).

²¹⁶ Gerald Epstein, *Political Economy and Comparative Central Banking*, 24 REV. RADICAL POL. ECON., no. 1, Spring 1992, at 1–30.

American countries have implemented reforms strengthening central bank independence in the past three decades.²¹⁷ He selects four of those countries (Argentina, Chile, Mexico, and Venezuela) as case studies, none of which seek to correlate central bank reforms with changes in any economic indicators.²¹⁸ All the case studies show are the legal changes that have occurred to make central banks more or less independent. But a closer look at the empirical evidence in these four countries suggests the dangers of unaccountable and captured central banks.

As discussed above, in Chile inflation rates rose in the 1980s under an independent central bank and fell in the 1990s under a regime of capital controls that restricted the central bank's instrument independence and helped shield the country from successive currency contagions.²¹⁹ Although Chile is seen as more successful than many other Latin American countries, it still suffers from high rates of unemployment and poverty and top-heavy distributions of income.²²⁰

In Mexico, the central bank was reformed in 1993;²²¹ in early 1995 the Mexican peso collapsed.²²² Mexico, unlike Chile, rejected capital controls.²²³ The impact of the peso crash and the ensuing austerity was severe and added to the mass dislocations arising from Mexico liberalizing its agricultural and other markets as part of its implementation of the North American Free Trade Agreement (NAFTA).²²⁴ Today, after two decades with an independent central bank, Mexico is a failing state, fighting a drug war with the burdens of mass unemployment, high poverty rates, and huge inequalities in wealth and

²¹⁷ Samra, *supra* note 6, at 66.

²¹⁸ *Id.* at 66, 82–85, 87, 90.

²¹⁹ See *supra* notes 206–209 and accompanying text. See also Gutiérrez, *supra* note 110, at 16 tbl.3.; Canova, *Banking and Financial Reform*, *supra* note 112, at 1621–23, 1626 (discussing Chile's *encaje* program which required foreign investors and lenders to deposit thirty percent of the investment or loan into a non-interest bearing account with the central bank for a full year or pay a three percent tax to recover the deposit); GRANDIN, *supra* note 112, at 204 (discussing Chile's break with free market dogma in the 1980s, turn to state promotion of exports and use of regulatory laws, "including some enacted by the vilified Allende government").

²²⁰ WORLD BANK, 2009 WORLD DEVELOPMENT INDICATORS 64–65 tbl.2.7 (2009) (detailing poverty rates and reporting that one in five Chileans are below the poverty line); *id.* at 72–73 tbl.2.9 (detailing "[d]istribution of income or consumption," and reporting high Gini coefficients for Chile).

²²¹ Carstens & Jácome, *supra* note 82, at 4 n.3.

²²² Canova, *Banking and Financial Reform*, *supra* note 112, at 1572.

²²³ *Id.* at 1625 n.224.

²²⁴ *Id.* at 1586–96; Timothy A. Canova, *Closing the Border and Opening the Door: Mobility, Adjustment, and the Sequencing of Reform*, 5 GEO. J. L. & PUB. POL'Y 341, 344–46 (2007) [hereinafter Canova, *Closing the Border*].

income.²²⁵ It is difficult to understand how anyone could point to Mexico as a success story for independent central banking, trade liberalization, privatization, or other components of the Washington Consensus policy agenda.

Argentina's experience has been equally checkered; central bank independence has coincided with years of persistently high levels of unemployment, a wave of financial and political corruption, an enormous financial crisis in 2001, and the country's worst economic collapse in a century.²²⁶ This led to the election of a Peronist government that inherited more than 20%, 60% of the population below the poverty line, and 40% in extreme poverty.²²⁷ Not surprisingly, the government turned to populist measures, including open conflict with the central bank on the use of foreign reserves to repay \$10 billion to the International Monetary Fund in 2009.²²⁸ Some months later, when the central bank refused to comply with the government's plan to use \$6.6 billion of foreign reserves to pay off other debt, President Cristina Fernández fired the head of the central bank.²²⁹ How has all this worked out for Argentina? A significant economic recovery took hold as a result of a devalued peso, renewed demand for Argentine agricultural exports, and increased social spending by the government.²³⁰ According to Mark Weisbrot, it is questionable whether Argentina could have begun "the remarkable economic recovery that started in 2002, in which the economy grew more than 60% in six years, if its central bankers had the kind of independence that the U.S. Federal Reserve has."²³¹

Samra ends his article with a discussion of Venezuela's central bank that serves as an extension of his diatribe against Venezuelan President Hugo Chávez. Once again, he fails to place changes in central bank structure within the context of any

²²⁵ WORLD BANK, *supra* note 220, at 64–65 tbl.2.7 (detailing poverty rates and reporting that one in five Mexicans are below the poverty line and rural poverty is at about thirty percent); *id.* at 72–73 tbl.2.9 (detailing "[d]istribution of income or consumption," and reporting high Gini coefficients for Mexico).

²²⁶ WILLIAMSON, *supra* note 122, at 583–84; STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS, *supra* note 177, at 18, 69; Roberto Frenkel & Martín Rapetti, *Five Years of Competitive and Stable Real Exchange Rate in Argentina, 2002–07*, in BEYOND INFLATION TARGETING, *supra* note 184, at 179–81.

²²⁷ WILLIAMSON, *supra* note 122, at 584.

²²⁸ *Id.*

²²⁹ Mark Weisbrot, *Answer to the People, Not Greedy Elites: Argentina's President Came Under Fire for Sacking the Head of the Central Bank—But Why Should Such Institutions be 'Independent'?*, THE GUARDIAN UNLIMITED (Feb. 15, 2010, 11:00 PM), <http://www.guardian.co.uk/commentisfree/cifamerica/2010/feb/15/argentina-central-bank-independent> [hereinafter Weisbrot, *Answer to the People*].

²³⁰ WILLIAMSON, *supra* note 122, at 584.

²³¹ Weisbrot, *Answer to the People*, *supra* note 229.

actual economic or financial developments. As Samra notes, Venezuela's central bank was given administrative autonomy in the 1990s.²³² He fails to mention that inflation in Venezuela was markedly lower in the 1980s than the 1990s, and that inflation rose significantly after reform of the central bank in December 1992.²³³ Annual inflation averaged about 21% in Venezuela throughout the 1980s prior to the central bank reform, 44% from 1990–1995 as the central bank was being granted more autonomy, and 45% from 1996–2000.²³⁴ These figures only undermine Samra's thesis that central bank independence is correlated with low inflation.²³⁵

Others have criticized Venezuela's 1992 reform as being insufficient: the central bank was legally independent, but it was subject to episodes of political interference, including the government instituting capital controls, deposit insurance, and requiring the central bank to turn over its profits.²³⁶ Although the central bank was not as independent as Jácome and others would have preferred, it was more independent than it would become under Hugo Chávez, who is the particular subject of Samra's ire. Chávez, however, was not elected president until December 1998, well after the relatively lower inflation rates of the 1980s, prior to central bank independence, and after the economic and financial upheavals of the 1990s that occurred under an independent central bank.²³⁷

The pre-Chávez history of central bank reform in Venezuela suggests that formal legal changes are often less significant than underlying political and social realities. There was impressive economic growth in Venezuela in the 1950s to the late 1970s, but under the country's oligarchic two-party system, the gains were not widely distributed.²³⁸ According to Edwin Williamson, "oil-wealth became concentrated in the upper echelons, while poverty shot up to 50 percent in the 1980s from about 15 percent in the

²³² Samra, *supra* note 6, at 90.

²³³ Jácome, *Legal Central Bank Independence*, *supra* note 58, at 29; *id.* at 20 (regarding Dec. 1992 central bank reform); *id.* at 22 (providing inflation statistics).

²³⁴ *Id.* at 20. See also Gutiérrez, *supra* note 110, at 16 (reporting annual inflation in Venezuela of 13% in 1980–1984, 33% in 1985–1989, 41% in 1990–1994, and 53% in 1995–1999).

²³⁵ Recall that Jácome excluded Venezuela and Argentina from his analysis that purports to correlate central bank independence with low inflation in the 1990s, perhaps because the empirical evidence would only undermine Jácome's thesis as well. See Jácome, *Legal Central Bank Independence*, *supra* note 58, at 23–24.

²³⁶ *Id.* at 20–22.

²³⁷ WILLIAMSON, *supra* note 122, at 594.

²³⁸ *Id.* at 593 (reporting that Venezuela's economy grew about 6% per year from about 1950 to the late 1970s).

1950s.”²³⁹ A report of the Inter-American Dialogue that was critical of Chávez, conceded that “during the 1980s and 1990s, no South American country deteriorated more than Venezuela; its gross domestic product (GDP) fell some 40 percent.”²⁴⁰ In 1989, after imposing the standard International Monetary Fund austerity program, the capital of Caracas exploded in rioting and looting which spread to other cities, the army was called in, and several hundred civilians were killed in the repression.²⁴¹ In 1994, the country’s banking system collapsed and there were massive strikes against austerity measures.²⁴²

This all occurred during the period of relative central bank independence, but none of this chaos appears in any of the autistic economics literature. It also explains the populism and popularity of Chávez when he was elected with 56% of the vote in 1998.²⁴³ As Williamson concluded, “The programme of reform undertaken by Chávez has to be understood as a reaction to what young army officers like him regarded as a hopelessly corrupt oligarchy which had squandered the nation’s huge oil resources while doing too little for the poor and disadvantaged.”²⁴⁴

At the time Chávez assumed power in 1998, Venezuela’s poverty rate was 52%;²⁴⁵ by 2007, the poverty rate had fallen to 27.5%, and there were declines in measures of income inequality as well.²⁴⁶ According to Mark Weisbrot, this impressive reduction in poverty, which was largely overlooked by the mainstream media in the United States, resulted from higher economic growth rates and significant government spending to increase people’s access to health care, education, and nutrition.²⁴⁷

One need not support Hugo Chávez’s style of politics or his foreign policy agenda to see the wisdom in reforming a central

²³⁹ *Id.* at 594.

²⁴⁰ MICHAEL SHIFTER, HUGO CHÁVEZ: A TEST FOR U.S. POLICY, A SPECIAL REPORT OF THE INTER-AMERICAN DIALOGUE 11 (Mar. 2007), available at <http://www.thedialogue.org/PublicationFiles/Hugo%20Ch%C3%A1vez%20-%20A%20Test%20for%20U.S.%20Policy%20%28pdf%29.pdf>.

²⁴¹ WILLAMSON, *supra* note 122, at 594.

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ WORLD BANK, *supra* note 220, at 65 tbl.2.7.

²⁴⁶ Mark Weisbrot, *Poverty Reduction in Venezuela: A Reality-Based View*, REVISTA: HARV. REV. LATIN AM., Fall 2008, at 36, 39 (reporting decline in income inequality in Venezuela as measured by the Gini coefficient).

²⁴⁷ *Id.* at 36, 38–39 (reporting that publications such as *Foreign Affairs*, *Foreign Policy*, the *Washington Post*, the *New York Times*, the *Financial Times*, and the *Miami Herald* and many others had published articles “falsely asserting that poverty had increased under the Chavez government”).

bank to make it more accountable to a wider range of societal interests than those of a narrow banking fraternity. In December 2007, Chávez proposed a series of reforms that included restricting the central bank's independence by vesting ultimate monetary authority in the Executive,²⁴⁸ quite different from the United States and many other countries where ultimate authority is vested in the legislative branch even if the legislature has delegated that power to an independent central bank for the time being.²⁴⁹ It is also different from the 1940s period of central banking in the United States where policy was directed by the White House and Treasury which were subject to checks and balances by an independent judiciary and legislative branch.²⁵⁰ But such distinctions are apparently lost on Samra who uses Chávez as a straw man to attack any criticism of central bank independence. The false dichotomy is taken to an absurd extreme when Samra raises the specter of Robert Mugabe in Zimbabwe.²⁵¹ Apparently any move toward central bank accountability, according to Samra's logic, is a step toward hyperinflation, ruthless dictatorship, and mob violence.

Perhaps Samra is correct to be concerned about vesting such powers in Hugo Chávez, but his misgivings seem to have less to do with concerns about the political accountability of the Chávez government and much more to do with its social and populist objectives. For instance, Samra criticizes the proposed reform for seeking to turn the central bank into an agent for funding "vast social programs" and domestic development objectives.²⁵² He declares, "A central bank that transforms into a development and relief agency has ceased to be a central bank."²⁵³ This, he considers, would be "fundamental madness."²⁵⁴

Perhaps Samra would dismiss the Federal Reserve's strict accountability during the 1940s as nothing more than "a slush fund" for Franklin Roosevelt's "regional, political, and military ambitions, not to mention his domestic development goals."²⁵⁵

²⁴⁸ Chris Kraul, *Venezuelan Voters Reject Bid by Chavez to Extend Powers*, L.A. TIMES, Dec. 3, 2007, at A1.

²⁴⁹ THE FEDERAL RESERVE SYSTEM: ITS PURPOSES AND FUNCTIONS 1947, *supra* note 2, at 1.

²⁵⁰ *Id.* at 101–04. For instance, Samra criticizes the proposed 2007 reform for attempting to require the Venezuelan central bank to follow the policy direction of the elected government, not unlike in the 1940s when the Federal Reserve followed the lead of the White House and Treasury. Samra, *supra* note 6, at 92–94.

²⁵¹ Samra, *supra* note 6, at 65 (quoting Felipe Larrain's warnings about hyperinflation being awakened by leaders such as Chavez and Mugabe).

²⁵² *Id.* at 94.

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.*

But for the millions of people in the United States and abroad who sought freedom and security, those ambitions and goals were theirs as well. Should we consider it “madness” to have a central bank support programs like the G.I. Bill of Rights, the Marshall Plan, or childhood education and nutrition, but somehow consider it acceptable when a central bank provides trillions of dollars in support for commercial banks and hedge funds? Such a perspective may seem upside-down to all but well-heeled lawyers and economists representing large banks and other financial interests. The reality is that since the 2008 financial crisis, the Federal Reserve has transformed itself into a relief agency for powerful banks and wealthy investors. This should suggest that the central bank has ceased to be a central bank for anyone but an elite financial oligarchy. Therein lies the fundamental madness of our current troubles.

E. Farewell to Legal Autism

All four of the case studies offered by Samra are examples of “legal autism”—descriptions of legal rules without any reference to social settings or historical contexts, and without any correlation to changes in actual economic performance.²⁵⁶ It is a strange ending to an argument that relies elsewhere on empirical evidence of a purported relationship between central bank independence and low inflation. Although Samra makes the bold assertion that the results of these studies are “quite striking” and “clearly argue in favor of greater independence,” they are mainly striking in their flaws.²⁵⁷ In fact, in reading these studies one would have no idea that there had been tremendous economic growth and low inflation from the 1940s through the 1960s in much of the world in the absence of independent central banking;²⁵⁸ that a global oil cartel had quadrupled the price of oil in the early 1970s, and then doubled the price at the end of that decade;²⁵⁹ that there had been debt crises and currency contagions throughout Latin America and much of the developing world over the past three decades;²⁶⁰ that China has risen as an economic power without the help of an independent central

²⁵⁶ *Id.* at 82–93.

²⁵⁷ *Id.* at 73.

²⁵⁸ CHANG, *supra* note 169, at 27–31; HAHNEL, *supra* note 175, at 7; BRETTON WOODS COMM’N, BRETTON WOODS: LOOKING TO THE FUTURE, COMMISSION REPORT (1994); *Average Annual Inflation Rates by Decade*, INFLATIONDATA.COM (2008), <http://www.inflationdata.com/inflation/images/charts/articles/decadeinflation.jpg>.

²⁵⁹ Andrew Brod, *Look Back at 1970s to Understand a Real Energy Crisis*, NEWS-RECORD.COM, http://libres.uncg.edu/ir/uncg/f/A_Brod_LookBackat1970_2001.pdf (last visited Jan. 11, 2011).

²⁶⁰ Kristin J. Forbes & Roberto Rigobon, *Contagion in Latin America: Definitions, Measurement, and Policy Implications*, ECONOMIA, Spring 2001, at 1, 1–2.

bank;²⁶¹ and that 2008 brought a tremendous crisis in global financial markets and the most severe economic downturn in many countries since the Great Depression.²⁶²

These are rather astounding omissions. At a time when mainstream economics has been criticized and discredited for failing to predict or prevent the tremendous hyperinflation of asset prices and the most damaging financial crisis in more than eighty years, apologists of central bank independence continue to overlook any empirical evidence and historical facts that would undermine their normative conclusions. Since the crash, the Federal Reserve has poured trillions of dollars into its private sector banking clientele; a colossal monetary version of pork-barrel spending.²⁶³ None of this is even mentioned by Samra. It is an impressive display of myopia and studied ignorance. There is no justification offered for the limited scope of analysis and no recognition that perhaps the very broad conclusions of these studies should therefore be tempered.

III. THE SEARCH FOR MEANINGFUL DEBATE

The regime of independent central banking has contributed significantly to a financial and economic crisis of historic proportions. Its supporters, however, have shown little to no responsibility for their actions. In fact, the independence of the leading central banks, particularly the Federal Reserve and the European Central Bank, have been instrumental in fashioning the hidden bailouts that continue to subsidize the profits and bonuses of big banks and hedge funds.²⁶⁴ The obvious culpability of central bankers warrants some degree of humility and introspection by supporters of central bank independence.

It is a sign of the weakness of the case for central bank autonomy that some of its proponents would choose to engage in “ad hominem” attacks on those who support increased accountability.²⁶⁵ Samra’s article engages in an unfortunate level

²⁶¹ See generally ZULIU HU & MOHSIN S. KHAN, WHY IS CHINA GROWING SO FAST?, ECONOMIC ISSUES 8 (1997).

²⁶² Heather Stewart, *We Are in the Worst Financial Crisis Since Depression*, Says IMF, THE GUARDIAN, Apr. 10, 2008, at A28.

²⁶³ James Quinn, *Audit of Fed Will Reveal Name of Banks Given \$2 Trillion in Loans*, THE TELEGRAPH (May 12, 2010, 6:00 AM), <http://www.telegraph.co.uk/finance/newsbysector/banksandfinance/7713041/Audit-of-federal-reserve-will-reveal-name-of-banks-given-2-trillion-in-loans.html>.

²⁶⁴ Jack Ewing & Julia Werdigier, *Europe’s Central Bank Extends Cash Lifeline and Gives Regulators a Pep Talk*, N.Y. TIMES, June 11, 2010, at B3 (reporting European Central Bank purchases of 40.5 billion euros (\$49.1 billion) in bonds on the open market while failing to disclose what kinds of bonds).

²⁶⁵ An ad hominem argument seeks to link the validity of a premise to a characteristic of the person advocating the premise by appealing to feelings or prejudices

of ad hominem argumentation directly in response to my critique of central bank autonomy and my view that the Washington Consensus policy agenda was resulting in widening inequalities in income, wealth, and power that were empirically measureable.²⁶⁶ Those inequalities have become too large to ignore, which is why ad hominem arguments, by attacking the messenger, are intended on some level to discredit the messenger and shock the discussion back in another direction, deflecting discussion away from social inequality and structural injustices.

Nowhere does Samra actually refute the empirical evidence that the trend toward central bank independence has coincided with stagnant real wages, higher real interest rates, and increasing inequalities in income, wealth, and power. Instead, Samra engages in a fair amount of breathless name-calling while conflating my argument with the views of Latin American populists and dictators, past and present. He does this through the use of the ad hominem “perfect idiot” which he claims is the insight of a “groundbreaking study of Latin American populism” entitled *Guide to the Perfect Latin American Idiot*, itself one long ad hominem attack of name-calling and guilt-by-association against anyone who has ever offered a critical history of Latin America or U.S. foreign policy or called for redressing the enormous inequalities in income, wealth, and power through the agencies of the state.²⁶⁷

Although the co-authors of *The Perfect Idiot*, like Samra, never define their terms, it is instructive to do so. “Idiot” is considered “usually offensive” and is used to describe “a person affected with extreme mental retardation,” “a foolish or stupid person,” and is derived from the Greek *idiōtēs* to mean a “layman” or “ignorant person.”²⁶⁸ The use of this insult by Samra and *The Perfect Idiot* authors, after having *ignored* all contrary factual evidence (all the black swans and all the black elephants

rather than intellect; it is marked by “an attack on an opponent's character rather than by an answer to the contentions made.” MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 15 (11th ed. 2004). In this case, the premise is that independent central banks undermine social welfare. Samra's ad hominem attacks seek to undermine that premise by name-calling and guilt-by-association tactics.

²⁶⁶ Samra, *supra* note 6, at 74–75 (quoting from Canova, *Financial Liberalization*, *supra* note 28, at 1294, 1301–04). Samra's article is filled with breathless exclamations of “terrifying” and “ominous warnings” of hyperinflation and ruthless dictatorships that are to be associated with making central banks more accountable to elected governments. Samra, *supra* note 6, at 65. Perhaps in the future he will develop the “mental courage” to re-think his mode of arguments, underlying assumptions and world view. David Brooks, *A Case of Mental Courage*, N.Y. TIMES, Aug. 23, 2010, at A23 (decrying the underlying “metacognition deficit” that habitually afflicts this generation and prevents people from stepping back to re-think their positions and weaknesses).

²⁶⁷ *Id.* at 75.

²⁶⁸ MERRIAM-WEBSTER, *supra* note 265 (emphasis added).

in plain sight), is a bit like the pot calling the kettle black. Perhaps “glutton” would be an equally apt term to describe the mind-set of the authors of *The Perfect Idiot*.²⁶⁹ The vast and growing inequalities in wealth and income, along with enormous central bank subsidies to a financial oligarchy, are suggestive of an upper-class elite that is prone to gluttony. Perhaps “the perfect glutton” is one who will swallow any shallow or specious argument, including ignorant empirical studies, all in the interests of amassing more riches beyond that which can ever be consumed in a lifetime. But it is a gluttony that is concealed in high-minded pretensions to cosmopolitanism and economic sophistication.

Guide to the Perfect Latin American Idiot is a book written by three ideological right-wing Latin American journalists, a book with no index, no sources, and a lot of name-calling.²⁷⁰ It is not the work of scholarship and it does not belong in a serious scholarly article on central bank accountability. Its misuse by Samra is worthy of a response, but before discussing the parts of this book misused by Samra, it is instructive to consider the general tenor of the book and its ideological biases. Although *The Perfect Idiot* co-authors seek to place their work within the tradition of satire, it is difficult to imagine Sartre,²⁷¹ Camus,²⁷² or Revel²⁷³ flinging ad hominem insults at their adversaries and then pretending it is to seek “intellectual confrontation in the arena of ideas, not anecdotes, using arguments, not insults or personal attacks.”²⁷⁴ If calling one’s adversaries names like “idiots” is not an insult, then the level of discourse has surely fallen to a new low. If it is genuinely an attempt at satire, then for all three *The Perfect Idiot* co-authors their laugh is truly louder than their humor.²⁷⁵

²⁶⁹ Glutton is defined as “one given habitually to greedy and voracious eating and drinking,” one possessing a voracious appetite that endures and is never satiated. *Id.* Its synonyms include gorging, hog, overeater, pig, and stuffer. The word is derived from the Latin *gluttire*, “to swallow.” *Glutton*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/glutton> (last visited Jan. 5, 2011).

²⁷⁰ Plinio Apuleyo Mendoza is a Columbian novelist; Carlos Alberto Montaner is a Cuban essayist and journalist; Alvaro Vargas Llosa is a Peruvian columnist. MENDOZA, MONTANER, & VARGAS LLOSA, *supra* note 19, at 219.

²⁷¹ See generally JEAN PAUL SARTRE, <http://www.sartre.org> (last visited Jan. 11, 2011).

²⁷² See generally *The Nobel Prize in Literature 1957 Albert Camus*, NOBELPRIZE.ORG, (Jan. 11, 2011), http://nobelprize.org/nobel_prizes/literature/laureates/1957/camus-bio.html.

²⁷³ See generally *Jean-Francois Revel*, ENCYCLOPEDIA.COM (Jan. 11, 2011), <http://www.britannica.com/EBchecked/topic/1221191/Jean-Francois-Revel>.

²⁷⁴ Mario Vargas Llosa, *Introduction* to MENDOZA, MONTANER, & VARGAS LLOSA, *supra* note 19, at xvi.

²⁷⁵ *The Perfect Idiot* book lacks empirical support and rigor; there is no serious index or list of references, and no attempt to discuss ideas without name-calling. There is a

The book begins with an attack on Eduardo Galeano's truly groundbreaking 1970 book, *Open Veins of Latin America* which *The Perfect Idiot* trio crudely denounces as the idiot's Bible.²⁷⁶ They attack Galeano, just as Samra attacks my work, for use of "the old dichotomy" of left versus right, the use of the word "neoliberal" to describe the Washington Consensus agenda, and the use of class to analyze the effects of that policy agenda on Latin American societies.²⁷⁷ According to Michael Davis and Dana Neacsu, "one of the hegemonic and legitimizing features of globalization is the exclusion of parts of the debate as unworthy, in fact foreclosing what might be the most meaningful parts of the debate as meaningless."²⁷⁸ Apparently, *The Perfect Idiot* trio would foreclose any class analysis as meaningless and any discussion of political polarization and a neoliberal agenda as old thinking. Perhaps in 1996, in the "irrational exuberance" of the expanding bubble economy, when *The Perfect Idiot* was first published, it may have seemed that such discussions could be excluded as unworthy and meaningless. In the aftermath of the bubble, as it continues to deflate for millions around the world, class analysis and critiques of the neoliberal agenda and criticism of unaccountable central bankers may well be the most meaningful parts of debate.

The Perfect Idiot trio attack Galeano for his use of the "open veins" metaphor and his view that the underdevelopment of poor countries is historically the result of the enrichment of others.²⁷⁹ They take exception with Galeano's statement that "Everything, from the discovery until our times, has always been transmuted into European—or later United States—capital, and as such has accumulated in distant centers of power."²⁸⁰ Perhaps the trio

compendium of quotations entitled "Index Expurgatorius Latinoamericanus" which denigrates a list of people and organizations that includes Raul Alfonsin (the former president of Argentina who helped defeat a military dictatorship), Amnesty International (for its conclusion that market reforms "have exacerbated social tensions" in Colombia), and Brazilian president Lula Da Silva (for a statement against privatizing state-owned companies and asserting the state has an important and dominant role). *Id.* at 209–18. Just to make sure all of these speakers are discredited by association, this "Index Expurgatorius Latinoamericanus" also includes Fidel Castro and Che Guevara, and it begins with an unattributed quotation: "It isn't having been an idiot that's so bad but persisting to be one." *Id.*

²⁷⁶ *Id.* at 21. See generally EDUARDO GALEANO, *OPEN VEINS OF LATIN AMERICA: FIVE CENTURIES OF THE PILLAGE OF A CONTINENT* (1973).

²⁷⁷ MENDOZA, MONTANER, & VARGAS LLOSA, *supra* note 19, at 66–69; Samra, *supra* note 6, at 74–75.

²⁷⁸ Michael Davis & Dana Neacsu, *Legitimacy, Globally: The Incoherence of Free Trade Practice, Global Economics and Their Governing Principles of Political Economy*, 69 UMKC L. REV. 733, 734 (2001).

²⁷⁹ MENDOZA, MONTANER, & VARGAS LLOSA, *supra* note 19, at 25 (quoting GALEANO, *supra* note 276, at 11).

²⁸⁰ GALEANO, *supra* note 276, at 12.

should consider the views of Adam Smith, the grandfather of free-market economics whom they would likely claim as their ideological ancestor and soul mate. Smith wrote of the consequences of the Old World “discovery” of Latin America: “The pious purpose of [Spain] converting them to Christianity sanctified the injustice of the project. But the hope of finding treasures of gold there was the sole motive which prompted [Spain] to undertake it.”²⁸¹ The vast riches of gold and silver taken by Spain from the New World were “of a nature to excite in human avidity the most extravagant expectation of still greater riches.”²⁸²

The Perfect Idiot trio scorn all non-monetarist views of inflation, which, as discussed above, only serves to show their own ignorance.²⁸³ Likewise, they ridicule the idea of declining terms of trade and structural inequalities in political and market power, and instead hold fast to simplistic assumptions of arms-length bargaining between equals.²⁸⁴ They ignore serious critiques of the global trading system offered by leading Latin American economists and they distort the history of the foreign debt crisis by characterizing bank loans of petrodollars at high interest rates as gifts.²⁸⁵ They denigrate the idea that division of labor and trade results in winners and losers, an axiom of free trade theory and empirical reality itself.²⁸⁶ But for all their ridicule and ignorance, there is not any serious analysis, only conclusory arguments that show serious ideological biases.

For instance, their ideological blinders are apparent in their discussion of Chile, where they claimed the vast majority of citizens support the creation of a private pension and health care system. “Only a perfect idiot,” they claim, “would think of

²⁸¹ ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 72 (Edwin Cannan ed., 1976).

²⁸² *Id.* at 78.

²⁸³ MENDOZA, MONTANER, & VARGAS LLOSA, *supra* note 19, at 24–44.

²⁸⁴ *Id.* at 44 (equating criticisms of declining terms of trade with complaints about natural injustices such as the color of the sky).

²⁸⁵ *Id.* at 54.

²⁸⁶ *Id.* at 23. See also Eli Heckscher, *The Effect of Foreign Trade on the Distribution of Income*, in READINGS IN THE THEORY OF INTERNATIONAL TRADE 272, 272 (Howard S. Ellis & Lloyd A. Metzler eds., 1949) (introducing the Heckscher-Ohlin model); PAUL R. KRUGMAN & MAURICE OBSTFELD, INTERNATIONAL ECONOMICS: THEORY AND POLICY 72 (2006); MICHAEL P. TODARO, ECONOMIC DEVELOPMENT IN THE THIRD WORLD 378–83 (3d ed. 1985) (discussing Ricardian and Heckscher-Ohlin trade theories in context of growth in less developed countries); STEVEN M. SURANOVIC, INTERNATIONAL TRADE THEORY AND POLICY 134 (2010) (discussing distributive effects of trade and the compensation principle by which winners of free trade should compensate losers to benefit of all); JOHN WILLIAMSON, THE OPEN ECONOMY AND THE WORLD ECONOMY 42–43 (1983) (discussing comparative advantage and the Heckscher-Ohlin model); Elizabeth Becker, *U.N. Study Finds Global Trade Benefits Are Uneven*, N.Y. TIMES, Feb. 24, 2004, at C5.

returning to a government-run pension system” that would consume money, expand the bureaucracy, and create a jungle of middlemen to administer such a program.²⁸⁷ Instead, there has been a jungle of private insurance company middle men, a huge private bureaucracy siphoning the savings of millions in the form of hefty commissions and administrative fees, not unlike the private health insurance bureaucracy found in the United States. In a 2004 World Bank study, empirical analysis of two decades of Chile’s pension system showed that “more than half of all workers [are excluded] from even a semblance of a safety net during their old age.”²⁸⁸ Investment accounts of retirees were so low that forty-one percent of those eligible to receive pensions were forced to continue working and the government was forced to provide subsidies for those failing to accumulate enough money in their pension accounts to pay basic old age expenses in retirement.²⁸⁹ When the huge commissions and other administrative costs were taken into consideration, the total average return on worker contributions between 1982 and 1999 was 5.1%, less than half of what had been calculated by the superintendency of pension funds.²⁹⁰ The average worker would have done better by simply placing their pension contributions in a passbook savings account.²⁹¹

Chile’s privatized pension scheme was good business for private investment firms but it failed to provide for many retirees, thereby contributing to Chile’s high poverty rate. Retirees would have received higher annuities “if the system had remained in government hands.”²⁹² Recall *The Perfect Idiot* trio’s conclusion that “only a perfect idiot would think of returning to a government-run pension system.”²⁹³ In fact, Chileans were forced to re-think the country’s privatized pension system and to cough up government subsidies to supplement the program.²⁹⁴

²⁸⁷ MENDOZA, MONTANER, & VARGAS LLOSA, *supra* note 19, at 72.

²⁸⁸ GREG ANRIG, THE CONSERVATIVES HAVE NO CLOTHES: WHY RIGHT-WING IDEAS KEEP FAILING 206 (2004) (quoting a 2004 World Bank report). See INDERMIT S. GILL, TRUMAN G. PACKARD & JUAN YERMO, KEEPING THE PROMISE OF SOCIAL SECURITY IN LATIN AMERICA xvii (2004).

²⁸⁹ Greg Anrig & Bernard Wasow, *Twelve Reasons Why Privatizing Social Security is a Bad Idea*, THE CENTURY FOUNDATION (Dec. 13, 2004), <http://tcf.org/publications/2004/12/pb503>.

²⁹⁰ *Id.*

²⁹¹ *Id.*

²⁹² GRANDIN, *supra* note 112, at 203 (citing to Larry Rohter, *Chile’s Retirees Find Shortfall in Private Plan*, N.Y. TIMES, Jan. 27, 2005, at A1).

²⁹³ MENDOZA, MONTANER, & VARGAS LLOSA, *supra* note 19, at 72.

²⁹⁴ Larry Rohter, *Chile’s Candidates Agree to Agree on Pension Woes*, N.Y. TIMES, Jan. 10, 2006, at A3 (quoting Patricio Navia, a political science professor, that most Chileans “perceive the costs of pensions and the pensions themselves as unfair” and as

In the 2006 presidential election, Sebastián Piñera, the billionaire businessman and conservative candidate, agreed that the privatized pension system was in need of repair.²⁹⁵ He noted that half of Chileans had no pension coverage and of those who did, 40% were not receiving the minimum level.²⁹⁶ This was a rather embarrassing admission since the candidate's brother, José Piñera, was "the former labor minister who imposed the personal account system" during the Pinochet dictatorship and since Sebastián Piñera was "backed by the large business groups that control the pension funds and have benefited from the expansion of investment capital the funds have provided."²⁹⁷

How ironic for the conservative candidate, and brother of the architect of pension privatization, to propose a government "guaranteed pension for housewives," "matching government contributions" for the poor, and "more bargaining power for consumers."²⁹⁸ The only idiocy is that anyone would be surprised that a privatized pension system could possibly result in huge profits for private pension fund managers and inadequate returns for most Chileans. But it is important to recall that the private pension scheme was put in place during a period of military dictatorship when labor unions and civil society lacked basic democratic freedoms, large business interests enjoyed favored access to government, and the polity was essentially shocked, murdered, and tortured into submission.

Throughout their book, *The Perfect Idiot* co-authors are the perfect apologists for violent dictatorships and coup d'états against elected governments and civil society, including any coup sponsored by the Central Intelligence Agency (CIA) or big business interests. For a book that purports to disdain the political divisions between left and right, the trio is silent on the crimes of the right. They attack Augusto Sandino, the Nicaraguan revolutionary who rebelled against U.S. occupation of his country,²⁹⁹ but not a word of condemnation for Anastasio

resenting the huge overhead costs "that have led to record profits for the pension funds that manage the contributions").

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ *Id.* Apparently, proposing government guaranteed pensions and other such public interventions was not bad politics. Although he lost his campaign in 2006, Sebastián Piñera was ultimately elected president of Chile in January 2010. *Times Topics: Sebastián Piñera*, NYTIMES.COM, http://topics.nytimes.com/top/reference/timestopics/people/p/sebastian_pinera/index.html (last updated Oct. 13, 2010) (reporting that in his 2010 campaign, Mr. Piñera "promised to carry on many of the social programs put in place by President Michelle Bachelet, whose approval ratings have hovered around 75 percent").

²⁹⁹ MENDOZA, MONTANER, & VARGAS LLOSA, *supra* note 19, at 152.

Samoza, the brutal Nicaraguan dictator who served U.S. geopolitical and corporate interests.³⁰⁰ They condemn Jacobo Árbenz Guzmán, the reformist and duly-elected president of Guatemala who was overthrown in a CIA-financed coup in 1954 to shield the United Fruit Company from any land reform.³⁰¹ They vilify Salvador Allende, the democratically-elected president of Chile violently overthrown on September 11, 1973, in another CIA-sponsored and corporate-financed coup that installed Augusto Pinochet in a brutal dictatorship.³⁰² They scorn Cuba's Marxist dictator Fidel Castro but go easy on what came before Castro, the corrupt and repressive regime of Fulgencio Batista, who was in bed with organized crime.³⁰³

Such partisanship is shameful for journalists as well as would-be scholars. Camus reminded the writers of his day to aspire to bear witness for those who are enslaved and he rejected apologists for repression who were angered at the murder of a man only when that man shared their ideas.³⁰⁴ Camus understood that the brutal repressions in the East bloc did not excuse the sins of the West.

Not only is the trio's disdain for democracy and human rights morally reprehensible, it is also self-defeating to long-term interests of peace and stability. As Edwin Williamson concluded, "It was the toppling of Árbenz that had alienated young radicals throughout Latin America, persuading them of the need for armed struggle."³⁰⁵ The record of past U.S. support for repression and brutality in Latin America lives on in our present

³⁰⁰ See generally WILLIAM KREHM, DEMOCRACIES AND TYRANNIES OF THE CARIBBEAN (1984) [hereinafter KREHM, DEMOCRACIES AND TYRANNIES].

³⁰¹ WILLIAMSON, *supra* note 122, at 323, 353 (discussing involvement of CIA and United Fruit). See generally DEMOCRACIES AND TYRANNIES, *supra* note 300. *The Perfect Idiot* trio claim that the 1954 CIA coup against President Árbenz in Guatemala was not to help United Fruit but was inspired by Árbenz' purchase of Czech weapons and his purported strong ties to communism. MENDOZA, MONTANER, & VARGAS LLOSA, *supra* note 19, at 139. They offer no real support for such conclusions and their guilt-by-association indictment of Árbenz is reminiscent of the Red Scare of the McCarthy period at the time of the coup.

³⁰² MENDOZA, MONTANER, & VARGAS LLOSA, *supra* note 19, at 209, 352; WILLIAMSON, *supra* note 122, at 67. See also NAOMI KLEIN, THE SHOCK DOCTRINE: THE RISE OF DISASTER CAPITALISM 99–100 (2007); PETER KORNBLUH, THE PINOCHET FILE: A DECLASSIFIED DOSSIER ON ATROCITY AND ACCOUNTABILITY 105 (2003).

³⁰³ MENDOZA, MONTANER, & VARGAS LLOSA, *supra* note 19, at 209, 181; WILLIAMSON, *supra* note 122, at 443–44.

³⁰⁴ ALBERT CAMUS, *Why Spain?*, in RESISTANCE, REBELLION, AND DEATH 75, 83 (Justin O'Brien trans., 1960) (replying to a December 1948 publication by Gabriel Marcel in COMBAT).

³⁰⁵ WILLIAMSON, *supra* note 122, at 588 (reporting that the CIA's overthrow of Árbenz "was the decisive factor in Che Guevara's decision to join Fidel Castro's insurgency in Cuba in 1956").

day, giving credence to conspiracy theories³⁰⁶ and complicating U.S. efforts to build strong alliances in the region.³⁰⁷

But perhaps peace and stability, like democracy and human rights, are not the real objectives of many of those who defend the prerogatives of central bankers. In *The Shock Doctrine*, Naomi Klein exposed the right-wing strategy to consciously exploit crises to push through market reforms—“shock therapy”—that would never happen in less frightening times.³⁰⁸ The crises could be actual or perceived, unexpected or intentional, from a natural disaster to a violent coup d’état.³⁰⁹

The mode of argument deployed in *The Perfect Idiot* also lives on and seems to be gaining strength in our political and popular and academic cultures. Ad hominem attacks have become standard fare in our public debates. Like *The Perfect Idiot* trio who vilify anyone who speaks up for social rights and economic justice, Glenn Beck, the right-wing Fox-TV talk show host, has equated Christian churches working for “social justice” with Nazism and Communism.³¹⁰ Samra and *The Perfect Idiot* trio invoke Hugo Chávez and Fidel Castro time and again to smear scholars and substantive arguments completely unconnected to Chávez or Castro. Likewise, Sarah Palin, the former vice presidential candidate, has used the same McCarthy-era style guilt-by-association tactics to attack the recent U.S. health care reform by invoking Fidel Castro, as if the fact that

³⁰⁶ *Chavez Accuses CIA as Bombings Rock Venezuela*, TAIPEI TIMES, Oct. 8, 2003, at 7, available at <http://www.taipeitimes.com/News/world/archives/2003/10/08/2003070877>.

³⁰⁷ For instance, revelations that General Pinochet amassed a fortune of \$28 million while in power, perhaps in part from manufacturing and smuggling cocaine, undermines U.S. efforts to build alliances in the region. Larry Rohter, *Former Aide Says Pinochet and a Son Dealt in Drugs*, N.Y. TIMES, July 11, 2006, at A3. The person who defeated Sebastián Piñera in Chile’s 2005 presidential election was Michelle Bachelet, “a member of Allende’s Socialist Party who had been exiled for a time in East Germany.” WILLIAMSON, *supra* note 122, at 579.

³⁰⁸ KLEIN, *supra* note 302, at 7–8, 11–13.

³⁰⁹ *Id.* at 174–75, 230–31, 290–91, 320 (showing various examples of how certain crises have elicited the same policy responses as characterized by “shock therapy”). Of course, crisis has also had the effect of moving policy to the left; Roosevelt’s New Deal was made possible by the massive hardships and dislocations of the Great Depression. However, right-wing governments seem more adept at creating and engineering crises, when not through violent coups then by gross mismanagement and looting of the economy. J. Lawrence Broz, *Partisan Financial Cycles* (draft dated April 18, 2010), available at <http://epe.ucsd.edu/assets/006/11488.pdf> (finding “that governments in power prior to major financial crises are more likely than the average OECD country to be right-of-center in political orientation” and “more likely to be associated with policies that predict crises: large fiscal and current account deficits, heavy borrowing from abroad, and lax bank regulation”).

³¹⁰ Hanna Siegel, *Christians Rip Glenn Beck over ‘Social Justice’ Slam: Right-Wing Host Conflates Christian ‘Social Justice’ With Nazism, Communism*, ABC NEWS (Mar. 12, 2010), <http://abcnews.go.com/WN/glenn-beck-social-justice-christians-rage-back-nazism/story?id=10085008>.

Castro once said something positive about the reform has any bearing on its substantive merits or flaws.³¹¹ These kinds of mindless hit-and-run attacks are lamentable in political discourse, and more so in scholarly discussion.

As for Samra's use of *The Perfect Idiot* in his defense of central bank independence, he attacks class-based critiques of the Washington Consensus model as ubiquitous, the "old dichotomy of the left against the right," semantic, emotional, frenzied, repetitive, Marxist Vulgate, and likened them to the Inquisition against Middle Age heresies.³¹² That is an awful lot of name-calling to avoid a response on the substantive merits as to whether or not the Washington Consensus policy agenda is actually correlated to top heavy distributions of wealth and income, increased poverty levels, and diminished security. As discussed above, all of these distributional consequences are empirically verifiable, and it is precisely because these consequences have in fact been empirically verified³¹³ that Samra must engage in this distasteful name-calling.

Samra also apparently considers the use of the word "neoliberalism" to be an appeal to populist prejudices, an anathema that radical leftists attempt to lodge into the public conscience.³¹⁴ As a former legislative aide to the late U.S. Senator Paul Tsongas who was a leader in what was often referred to in the 1980s as a neoliberal movement within the Democratic Party,³¹⁵ I have witnessed the evolution of the term "neoliberal" from Tsongas's moderate liberalism to a more aggressive libertarian economic agenda that seeks a fantasy state in economic relations ("there's no government like no government") where owners of capital enjoy a world of rights without duties.³¹⁶ If repeating the "neoliberalism" word has some mesmerizing effect on the public conscience, perhaps all the more

³¹¹ Michael Muskal, *Ex-running Mates Reunite*, L.A. TIMES, Mar. 27, 2010, at A18 (reporting Sarah Palin's statement that "When it comes to Obamacare[,] . . . I see Fidel Castro likes Obamacare and we don't. Doesn't that tell you something?").

³¹² Samra, *supra* note 6, at 75. Perhaps Samra should also consult with *The Federalist Papers* which recognized the existence of social and class divisions, including along the line of creditor and debtor factions. THE FEDERALIST NO. 10, at 54–55 (James Madison) (E. H. Scott ed., 1898).

³¹³ See *supra* notes 264–267, 312 and accompanying text.

³¹⁴ Samra, *supra* note 6, at 75.

³¹⁵ Even in the hands of Senator Tsongas, who held many traditional liberal values and supported many social welfare programs, the short-lived "Neoliberal" movement showed a disturbing indulgence for economic orthodoxy and financial deregulation. PAUL TSONGAS, *THE ROAD FROM HERE: LIBERALISM AND REALITIES IN THE 1980S*, at xii–xv (1981).

³¹⁶ See DAVID HARVEY, *A BRIEF HISTORY OF NEOLIBERALISM* 66, 69 (2005).

reason to invoke it.³¹⁷ At any rate, in more recent years, “neoliberalism” seems to have been replaced with the terms “Washington Consensus” and “market fundamentalism.” All three of these terms are basically efficient short-hand for the same policy agenda that has been promoted by the International Monetary Fund, the U.S. Treasury, Wall Street interests, and other leading G-8 institutions: deregulation, trade liberalization, financial liberalization, privatization, fiscal austerity, and central bank independence.³¹⁸

Is it politically incorrect to use words and phrases such as “neoliberalism,” “Washington Consensus,” and “market fundamentalism;” and how about the word “autism” to describe the abstract unreality of mainstream economics? Perhaps these too will be dismissed by Samra as the idiot’s attempts to rouse the rabble through frenzied repetition. Samra’s diatribe against terminology seems eerily reminiscent of right-wing thought police and left-wing guardians of political correctness.³¹⁹ The point of such name-calling, however, is to prevent any substantive discussion from moving forward about poverty rates, social insecurity, and distributions of wealth and income.

Samra continues his ad hominem attack by quoting from *The Perfect Idiot* trio that anyone is an idiot who believes that monetary issuance as a way of reactivating demand and making up for the shortage of resources “is also a means not only of development but of what he defines, with grandiloquent pomposity, as social investment.”³²⁰ Apparently, Samra would consider Abraham Lincoln to have been an idiot for signing the Legal Tender Acts that created nearly \$450 million of U.S. Notes (a rather large sum in the 1860s), considered by many a financial necessity to finance the North’s military effort in the Civil

³¹⁷ Perhaps Samra sees “neoliberalism” as having the same kind of mesmerizing effect on populist movements that phrases like “freedom of contract” and “property rights” have on the leaders at the annual World Economic Forum in Davos, Switzerland. The latter terms, however, like “free trade” itself, embody a system of institutional double-standards. Carmen G. Gonzalez, *Deconstructing the Mythology of Free Trade: Critical Reflections on Comparative Advantage*, 17 BERKELEY LA RAZA L.J. 65, 67, 68 n.12 (2006).

³¹⁸ KLEIN, *supra* note 302, at 204.

³¹⁹ Of course, words like “left” and “right” and “center” are short-hand terms that are useful to move the discussion forward, efficient ways of describing relatively coherent political orientations characterized by lesser or greater degrees of support for economic regulation, social policy, military intervention, and a host of other policies. Perhaps Samra knows of some other way of describing such political orientations, but more likely his criticism of these terms is intended to simply prevent any critical discussion from taking place at all.

³²⁰ Samra, *supra* note 6, at 75 (quoting MENDOZA, MONTANER, & VARGAS LLOSA, *supra* note 19, at 69).

War.³²¹ But rather than discuss the many historical periods when currency issuance was used successfully to activate demand, activate supply, and spur economic development,³²² it is so much more convenient for Samra to quickly raise the specter again of Hugo Chávez whom he claims has been “catastrophic” for the region.”³²³ Does Samra offer any empirical evidence of the catastrophe resulting from Chávez’s monetary policies? No. He offers no discussion or acknowledgment of the empirical evidence showing a decline in poverty and more equitable distributions of income under Chávez. Instead, his only support for “the Chávez catastrophe” comes from *The Perfect Idiot* co-authors, the three Latin American journalists who lack any economic training or scholarly pretense.³²⁴

There is a final ad hominem attack that Samra offers against my own work: “[G]iven the collective Latin American experience over the last half-century, what is perhaps *most* striking about the sorts of arguments advanced by Professor Canova is their dogged persistence.”³²⁵ Recall that the reader is never provided with any empirical support to ascertain any collective Latin American experience over the last half century other than the flawed empirical studies that purport to correlate central bank independence with low inflation, and the very non-empirical conclusions of *The Perfect Idiot* co-authors and several other ideologues. Regardless, Samra contrasts my purported stridency (and dogged stridency at that³²⁶) with the “more

³²¹ See Timothy A. Canova, *Lincoln’s Populist Sovereignty: Public Finance Of, By, and For the People*, 12 CHAP. L. REV. 561, 565–66 (2009).

³²² *Id.* at 569–74.

³²³ Samra, *supra* note 6, at 75.

³²⁴ *Id.* at 75 n.75 (citing MENDOZA, MONTANER, & VARGAS LLOSA, *supra* note 19, at 69). *The Perfect Idiot* trio also denounce John Maynard Keynes for providing the intellectual support for a mixed economy, government planning and intervention, and “monetary issuance as a way of reactivating demand and making up for the shortage of resources.” MENDOZA, MONTANER, & VARGAS LLOSA, *supra* note 19, at 69. They also denounce the British welfare state as perfect idiocy that “has in fact generated catastrophic policies” in Latin America. *Id.* Nowhere is there any balanced discussion, nowhere any critical consideration of the empirical evidence. Instead, it is the same name-calling, guilt-by-association, and cartoonish condemnations. What a contrast to a thoughtful conservative like Judge Richard Posner who is not afraid to re-think his views in light of changing circumstances, empirical evidence, and theoretical inquiry. Richard A. Posner, *How I Became a Keynesian*, THE NEW REPUBLIC (Sept. 23, 2009, 12:00 AM), <http://www.tnr.com/article/how-i-became-keynesian> (conceding his conversion to Keynesian economics was prompted by reading Keynes’s *The General Theory of Employment, Interest, and Money* for the first time).

³²⁵ Samra, *supra* note 6, at 76.

³²⁶ *Id.* at 65, 70–76. Apparently, according to Samra, populists are to be considered doggedly persistent, strident, grandiloquent, pompous, single-minded, frenzied, and fixated on immediate short-term results, while libertarian-conservatives are considered principled, consistent, forceful, even-keeled, wise, and concerned about long-term

cautious note” expressed by Ben Bernanke, the Federal Reserve chairman, that political elites and the broader public in Latin America should favor fiscal discipline, free trade, and free markets.³²⁷ This statement by Bernanke was made in 2005, at a time when he was promoting freedom for large financial institutions to do as they pleased in the subprime mortgage market, the market for securitized assets, and the market for derivative financial instruments. Of course, as many predicted, that experiment in deregulation ended badly.

Since then, Gentle Ben has been particularly gentle to his Wall Street clientele while preaching fiscal discipline for the middle class. He has supported extension of the Bush tax cuts for the wealthiest one percent of U.S. households, and he has used the Federal Reserve’s power to create money on a grand scale, opening the monetary spigots to quench the thirst of a rather narrow constituency, a Wall Street cartel that has become increasingly out of touch with Main Street.³²⁸

For all of Samra’s sound and fury and name-calling, he is correct about one thing. Those who advocate for accountability in central banking and for renewed economic democracy are indeed persistent. Aspirations for justice and economic freedom, including freedom from want and freedom from fear, are perennial. The recent efforts in Congress to reform the Federal Reserve suggest that this persistence is making slow but steady progress.

IV. PERSISTENCE OF REFORM: CENTRAL BANK TRANSPARENCY AND ACCOUNTABILITY

Conservative jurists and legal scholars routinely criticize the modern administrative state for overly broad delegations of lawmaking power from Congress to bureaucratic agencies.³²⁹

results—even as he engages in his breathless “ominous warnings” of “terrifying” consequences and impending doom.

³²⁷ *Id.* at 76.

³²⁸ Perhaps Samra and other gatekeepers of discourse will take exception to the use of the term “Main Street” as another false dichotomy between those who have plenty (Wall Street) and those who have less (the middle and lower classes), and as an “old scholastic stratagem” to vilify anyone who disagrees by lodging another anathema “into the public conscience through frenzied repetition.” *Id.* at 75.

³²⁹ Richard E. Levy, *Escaping Lochner’s Shadow: Toward a Coherent Jurisprudence of Economic Rights*, 73 N.C. L. REV. 329, 346 (1995). See generally *The Constitution and the Economy: Accountability and Autonomy in a Time of Financial Market and Regulatory Transformations*, Association of American Law Schools (AALS) 2010 Annual Meeting Hot Topic Programs (Jan. 7, 2010) [hereinafter *The Constitution and the Economy*], available at https://memberaccess.aals.org/eWeb/DynamicPage.aspx?Site=AALS&WebKey=b8e081a5-3c1b-41ca-8c1f-c9d84b62a02f&RegPath=EventRegFees&REg_evt_key=e95fe6b3-00bd-4570-950c-d1bfa09e510c. In this panel discussion, conservative scholar

Liberal scholars and jurists are more likely to defend broad delegations that allow administrative agencies to operate with enormous policy-making discretion.³³⁰ This is unfortunate since such broad delegations often invite “agency capture,” the dynamic in which regulated industries are able to influence and dominate the agencies charged with their regulation. The symbiotic relationships between regulators, legislators, and private industry are often referred to as “iron triangles,” with each group exchanging favors to remain entrenched at the expense of the general public, taxpayers, and consumers.³³¹

In September 2010, *Reuters* published a special investigation report of the Federal Reserve’s selective disclosure of sensitive information about monetary policy to its favored clientele in the private financial sector. These backroom exchanges are among the many quid pro quos in a system of opaque subsidies and part of a bigger problem of private financial influence over economic decision-making.³³² It is the Public Choice school that has perhaps most thoroughly analyzed the market for legislation and political favors: private industry provides significant campaign contributions to Congress and lobbies on behalf of agency prerogatives while also providing lucrative jobs for their allies when they retire from the legislative branch and regulatory agencies—the so-called “revolving door” phenomenon.³³³

The present financial crisis has added to our understanding of agency capture in at least two important ways. First, we see that the “revolving door” swings both ways as private industry

Richard Epstein criticized the Troubled Asset Relief Program (TARP) as an abuse of discretion by the Treasury Department, while liberal scholar Mark Tushnet defended broad delegations as consistent with the requirements of the modern administrative state. This author questioned the constitutionality of the Federal Reserve as a violation of the Appointments Clause and the private non-delegation doctrine. For audio, see <http://www.aalsweb.org/2010podcasts/thursday/hottopicstheconstitutionoftheeconomy.mp3>.

³³⁰ David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L. J. 97, 141 (2000). See generally *The Constitution and the Economy*, *supra* note 329. Today, conservative hostility to the modern administrative state takes the form of privatization and fiscal austerity, major features of the Washington Consensus policy agenda. With the courts no longer vigilant about scrutinizing delegations, the action has shifted to Congress to downsize the administrative state by keeping the agencies underfunded while privatizing more and more of their functions. This agenda has the perverse effect of making administrators more dependent on industry alliances and therefore more susceptible to capture.

³³¹ Timothy A. Canova, *Campaign Finance, Iron Triangles & the Decline of American Political Discourse*, 12 NEXUS 57, 58 (2007).

³³² Cooke et al., *supra* note 205.

³³³ See generally Robert D. Tollison, *Public Choice and Legislation*, 74 VA. L. REV. 339 (1988) (discussing the economic theory of legislation); Stigler, *supra* note 193; Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J. L. & ECON. 211 (1976); Canova, *Financial Market Failure*, *supra* note 15, at 384.

officials take on key roles in government and then move easily back to the private sector. For instance, Robert Rubin moved from Goldman Sachs to the Clinton White House and Treasury Department, and then back to Citigroup.³³⁴ Former President Bill Clinton earned more than \$109 million within seven years of leaving the White House, nearly half as a speaker hired by large financial companies that contributed to Hillary Clinton's 2008 presidential campaign.³³⁵ It should not be forgotten that the Clinton administration did more to deregulate financial institutions than perhaps any administration since the 1920s.³³⁶ Likewise, there are many similar examples involving central bank officials. For instance, Alan Greenspan, before chairing the Fed, was a board member of J.P. Morgan.³³⁷ After leaving the Fed, Greenspan landed on his feet advising the Pacific Investment Management Company (Pimco), the world's largest mutual fund, as well as Deutsche Bank's investment banking team.³³⁸

The second development made apparent in recent years is the way top central bank and government officials revolve not into traditional salaried positions but into investment opportunities with hedge funds and private equity firms. For instance, former Fed vice chairman David Mullins became a partner in Long-Term Capital Management, a hedge fund that became extremely overleveraged in 1998, suffered catastrophic losses on derivative bets, and required a multibillion dollar assistance package brokered by the New York Fed.³³⁹ Larry Summers, after serving as Treasury secretary in the Clinton administration and before chairing the National Economic Council in the Obama White House, became a managing director for D.E. Shaw & Co., one of the nation's largest hedge funds.³⁴⁰ Meanwhile, former President Clinton brought in more than \$15 million from a private equity investment partnership.³⁴¹ Perhaps more troubling, if that is possible, is the path of Alan Greenspan, who after leaving the Fed became an advisor at

³³⁴ Canova, *Financial Market Failure*, supra note 15, at 386–87.

³³⁵ Matthew Mosk, James V. Grimaldi & Joe Stephens, *Clintons Earned \$109 Million in 8 Years*, WASH. POST, April 5, 2008, at A1.

³³⁶ See Canova, *Financial Market Failure*, supra note 15, at 387.

³³⁷ Alan Greenspan Says Risk Was Underpriced, WHARTON NEWS (Oct. 20, 2008), <http://www.wharton.upenn.edu/news/featured-story2966.cfm>.

³³⁸ PIMCO Hires Greenspan as Consultant, REUTERS (May 16, 2007, 7:30 AM), <http://www.reuters.com/article/idUSN1546703720070516>; Alan Greenspan to Consult for Deutsche Bank Corporate and Investment Bank, DEUTSCHE BANK (Aug. 13, 2007), http://www.db.com/presse/en/content/press_releases_2007_3606.htm.

³³⁹ See Canova, *Financial Market Failure*, supra note 15, at 387.

³⁴⁰ *Id.*

³⁴¹ See Mosk, Grimaldi & Stephens, supra note 335.

Paulson & Co, a giant U.S. hedge fund that earned billions of dollars in 2007 “when it [correctly] called the collapse in the sub-prime mortgage market,” a collapse which has been widely blamed on Greenspan for keeping interest rates low while neglecting any meaningful regulation of financial institutions.³⁴²

Each of these revolving door and “revolving hedge fund” examples raises the appearance of impropriety and the possibility of outright quid pro quo corruption, and suggests that the private financial sector has already compromised and largely captured our “independent” central bank as well as elected branches of government.³⁴³ The corruption of the elected branches raises issues beyond the scope of this article, including proposals to reform the political process, campaign finance and election laws that have entrenched a feeble two-party system.³⁴⁴ However, even the presently compromised Congress, responding to pressure from an outraged public, managed to enact provisions in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 that should provide some measure of increased transparency for the Federal Reserve.

The dynamics of agency capture and unaccountable central banking also raises important rule of law and constitutional concerns. The first sentence of the Constitution states that all legislative powers shall be vested in Congress.³⁴⁵ When Congress delegates its legislative powers to an administrative agency without providing any guidance or limitations on the agency’s exercise of discretion, it runs afoul of the so-called nondelegation doctrine.³⁴⁶ Courts therefore require that Congress provide an “intelligible principle” to guide agency action.³⁴⁷ Although courts are often satisfied with rather vague and indeterminate

³⁴² Angela Monaghan, *Greenspan to Join Paulson as Advisor*, DAILY TELEGRAPH, Jan. 16, 2008, at B4.

³⁴³ In 1996, it was revealed that the Federal Reserve had amassed a \$3.7 billion contingency fund (it was unclear what this slush fund was intended to be used for), and was favoring certain sources in its contracting and procurement, thereby raising conflict of interest concerns. Richard W. Stevenson, *Study Criticizes Federal Reserve as Lax Manager*, N.Y. TIMES, Mar. 26, 1996, at A1. These revelations certainly pale by comparison with the trillions of dollars in Federal Reserve spending in more recent years.

³⁴⁴ Kiersh, *supra* note 212 (documenting that the financial sector is “far and away the largest source of contributions to federal candidates”).

³⁴⁵ U.S. CONST. Art. I, § 1.

³⁴⁶ See generally Louis L. Jaffe, *Law Making by Private Groups*, 51 HARV. L. REV. 201 (1937). See also Nadine Strossen, *Delegation as a Danger to Liberty*, 20 CARDOZO L. REV. 861, 863–64 (1999) (outlining four ways in which the delegation of Congress’ constitutionally defined lawmaking power undercuts the protection of liberty).

³⁴⁷ Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 317–18 (2000) (dismissing the nondelegation doctrine without reference to delegations to private groups).

delegation standards,³⁴⁸ agency discretion is also confined by Congress through a tapestry of procedural requirements imposed by legislation, including the Administrative Procedure Act,³⁴⁹ the Freedom of Information Act,³⁵⁰ the Government in the Sunshine Act,³⁵¹ and the Federal Advisory Committee Act.³⁵²

The elected branches also retain some practical ability in confining agency discretion when the delegations are made to *public* administrative agencies, to officials who are appointed by the President and confirmed by the Senate, and when there is ongoing budgetary oversight by Congress. How much more problematic when the delegation is being made to an ostensibly *private* agency, in which top administrators are not appointed by the President or confirmed by the Senate, and there is no budgetary oversight by Congress—the exact kind of *private* delegation granted to the Federal Reserve. Judicial insistence on an intelligible principle is far less meaningful for a private delegation since privately appointed officials can more easily defy intelligible principles and other policy guidance provided by the legislative branch.

During the early- to mid-1930s, when the Supreme Court was striking down New Deal legislation, often in narrow 5 to 4 votes, there was a consensus among liberal and conservative justices that such *private* delegations were illegitimate and unconstitutional, a violation of the so-called private nondelegation doctrine.³⁵³ In 1935, a unanimous Supreme Court in *A.L.A. Schechter Poultry v. United States* (the so-called “Sick Chicken case”) struck down the National Recovery Administration (NRA), the centerpiece of the early New Deal, as an unconstitutional delegation of lawmaking power.³⁵⁴ The NRA, like the Federal Reserve, was concerned with price stability, only this time it was attempting to stop a deflationary spiral by setting minimum prices and wages through private industry

³⁴⁸ *Yakus v. United States*, 321 U.S. 414, 420, 424 (1944) (upholding the Office of Price Administration’s authority to impose price controls because Congress provided an intelligible principle to guide administrators by mandating that prices set be “generally fair and equitable”).

³⁴⁹ See generally Administrative Procedure Act, 5 U.S.C. §§ 551 et seq. (2007). George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 N.W. U. L. REV. 1557, 1558 (1996) (describing the APA as “the bill of rights for the new regulatory state”).

³⁵⁰ See generally Freedom of Information Act, 5 U.S.C. § 552 (2007).

³⁵¹ See generally Government in the Sunshine Act, 5 U.S.C. § 552(b) (2007).

³⁵² See generally Federal Advisory Committee Act, 5 U.S.C. App. § 1 et seq. (2007).

³⁵³ See, e. g., *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936) (“This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business.”).

³⁵⁴ *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 541–42 (1935).

trade councils which were dominated by the largest firms in each industry.³⁵⁵ Justice Cardozo, in his concurring opinion, characterized the delegation to these private industry trade councils as a “delegation running riot.”³⁵⁶

Since the late 1930s, the Court has routinely upheld the authority of administrative agencies through a more expansive interpretation of the Commerce Clause, while largely ignoring delegation challenges as long as Congress provided some intelligible principle in the delegation.³⁵⁷ Many scholars have criticized this lack of judicial scrutiny of democratic processes ever since. For instance, in *Democracy and Distrust*, John Hart Ely lamented the demise of the nondelegation doctrine as a “death by association” with pre-1937 substantive due process decisions and narrow readings of the Commerce Clause: “when those doctrines died the nondelegation doctrine died along with them.”³⁵⁸

Delegations to private entities are particularly troubling for rule of law purposes. According to Mark Bernstein:

Even if one accepts the necessity of broad delegations of legislative power, the sharing of that power with private interests raises questions about the recipients’ conflict of interest and accountability and about agency capture. The risk is not only that power will be concentrated, but that it potentially may be concentrated in those unaccountable for their actions.³⁵⁹

As Bernstein further recognized, since such delegations can shortcut the legislative process, they also create a separation of power issue and threaten “to upset the delicate balance of institutional interests that the framers believed would check the influence of factions.”³⁶⁰

³⁵⁵ *Id.* at 550.

³⁵⁶ *Id.* at 553 (Cardozo, J., concurring).

³⁵⁷ See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 132 (1980).

³⁵⁸ *Id.* at 132, 133. Likewise, such leading political scientists as Theodore Lowi have derided broad delegations to administrative agencies. THEODORE J. LOWI, *THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES* 96–97 (2d ed. 1979). See also Alan Brinkley, *The Challenge to Deliberative*, in *THE NEW FEDERALIST PAPERS: ESSAYS IN DEFENSE OF THE CONSTITUTION* 23, 25 (Alan Brinkley, Nelson W. Polsby & Kathleen M. Sullivan eds., 1997) (arguing that an anti-populist critique of deliberative democracy “is visible in the extraordinary, and largely unchallenged, authority of presumed experts on the Federal Reserve Board to chart the course of our economy”).

³⁵⁹ Mark F. Bernstein, Note, *The Federal Open Market Committee and the Sharing of Governmental Power with Private Citizens*, 75 VA. L. REV. 111, 127 (1989).

³⁶⁰ *Id.* at 127 n.72 (citing David Schoenbrod, *Separation of Powers and the Powers that Be: Constitutional Purposes of Delegation Doctrine*, 36 AM. U. L. REV. 355, 372–73 (1987)).

The Federal Reserve is indeed “the poster child of an unconstitutional private delegation.”³⁶¹ Like the NRA, which was struck down in *Schechter Poultry*, the Federal Open Market Committee (FOMC) is dominated by private actors.³⁶² The presidents of the twelve regional Federal Reserve Banks participate on the FOMC are appointed by privately selected board members.³⁶³ Meanwhile, unlike delegations to public agencies, the Federal Reserve does not rely on Congress for budgetary appropriations since it is effectively able to print money by simply purchasing government securities (and now toxic assets) with Federal Reserve Notes and credits representing Federal Reserve Notes.³⁶⁴ In addition, the Federal Reserve is exempt in whole or in part from much of the tapestry of administrative procedural requirements that apply to most other federal agencies.³⁶⁵

The private nature of the regional Federal Reserve Banks may also skew the dynamics of the publicly appointed Board of Governors (BOG).³⁶⁶ The seven members of the BOG, who serve for fourteen-year terms, are likely to be pre-screened in the appointments process to prevent any nominees who would challenge the private nature of the regional Federal Reserve Banks, the composition of the FOMC, or the prerogatives of the largest private bank members of the system—the so-called “Too Big To Fail” banks.³⁶⁷ For instance, the Federal Reserve is provided with considerable discretion in its open market operations, deciding what assets to purchase from which financial settings, as well as in setting capital standards for individual banks, bringing formal capital enforcement actions, entering written agreements, ordering hearings, imposing cease and desist orders, ordering prompt corrective action directives, appointing a receiver, and conducting “stress tests” to determine

³⁶¹ Once again, I credit the late John Hart Ely, for this description of the Federal Reserve. See Canova, *Closing the Border*, *supra* note 224, at 407 n.326.

³⁶² Bernstein, *supra* note 359, at 111.

³⁶³ THE FEDERAL RESERVE SYSTEM: ITS PURPOSES AND FUNCTIONS 1947, *supra* note 2, at 53–54; Canova, *Closing the Border*, *supra* note 224, at 407.

³⁶⁴ THE FEDERAL RESERVE SYSTEM: ITS PURPOSES AND FUNCTIONS 1947, *supra* note 2, at 2, 62–64.

³⁶⁵ See Freedom of Information Act, 5 U.S.C. § 552(b)(5) (2007) (providing exemption for certain Federal Reserve directives and information that is part of its deliberative process); Federal Advisory Committee Act, 5 U.S.C. App. § 4 (b) (2007) (exempting any advisory committee of two entities, the Federal Reserve System and the Central Intelligence Agency, from provisions of the Federal Advisory Committee Act).

³⁶⁶ THE FEDERAL RESERVE SYSTEM: ITS PURPOSES AND FUNCTIONS 1947, *supra* note 2, at 56.

³⁶⁷ *Id.* See also *Too Big to Fail*, BUSINESSDICTIONARY.COM, <http://www.businessdictionary.com/definition/too-big-to-fail.html> (last visited Jan. 6, 2011).

how much capital is needed by the largest bank holding companies.³⁶⁸ Such discretion presents challenges for fair enforcement and supervision by any federal agency, such as the Federal Deposit Insurance Corporation or the Office of the Comptroller of the Currency. The problem becomes magnified when the discretion is vested in an institution like the Federal Reserve that is largely directed by the financial industry.

Although there have been numerous challenges to the Federal Reserve System in the 1970s and 1980s on Appointments Clause and nondelegation grounds, all have been dismissed by the U.S. Court of Appeals for the D.C. Circuit on narrow procedural grounds (and the Supreme Court has denied certiorari).³⁶⁹ The D.C. Circuit has held that private plaintiffs lack standing because they cannot show any injury caused directly by the Federal Reserve since they lack any privity of contract with the Fed.³⁷⁰ When the plaintiff has been a U.S. Senator, the court has created the doctrine of “equitable discretion” to avoid ruling on the substantive merits.³⁷¹ If standing and justiciability could be found in some future case, perhaps for a private financial institution or state governments challenging the Fed’s denial of assistance, the issue may turn to redressability.

Most recently, in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*,³⁷² the Supreme Court struck down the removal provisions of the Public Company Accounting Oversight Board (PCAOB),³⁷³ a creation of the Sarbanes-Oxley Act of 2002,³⁷⁴ since PCAOB board members could be removed only for good cause by the Securities and Exchange Commission (SEC) and the SEC Commissioners could in turn only be removed by the President for good cause.³⁷⁵ In his dissenting opinion, Justice Breyer warned of a host of other federal agencies that may be put in jeopardy by the majority’s ruling, and he included

³⁶⁸ Julie Andersen Hill, *Ad Hoc Bank Capital Requirements* 3–5, 8, 11, 15, 19, 21–22, 37 (July 7, 2010) (working draft) (on file with author).

³⁶⁹ Canova, *Closing the Border*, *supra* note 224, at 404–05 n.309–11, 313 (citing *Melcher v. Fed. Open Mkt. Comm.*, 836 F.2d 561 (D.C. Cir. 1987) (dismissed on grounds of equitable discretion); *Comm. for Monetary Reform v. Bd. of Governors of the Fed. Reserve Sys.*, 766 F.2d 538 (D.C. Cir. 1985) (dismissed for lack of standing); *Riegle v. Fed. Open Mkt. Comm.*, 656 F.2d 873 (D.C. Cir. 1981) (dismissed on grounds of equitable discretion); *Reuss v. Balles*, 584 F.2d 461 (D.C. Cir. 1978), cert. denied, 439 U.S. 997 (1978) (dismissed for lack of standing)).

³⁷⁰ *Id.* at 404. See also *Reuss*, 584 F.2d at 470–71.

³⁷¹ Canova, *Closing the Border*, *supra* note 224, at 404.

³⁷² *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010).

³⁷³ *Id.* at 3147.

³⁷⁴ *Id.*

³⁷⁵ *Id.*

the Federal Reserve Board although its members are subject to good cause removal by the President.³⁷⁶ Justice Breyer follows a long line of liberal scholars, including most famously Cass Sunstein, who confuse the Federal Reserve Board of Governors, properly appointed by the President of the United States and confirmed by the Senate, with the constitutionally far more problematic presidents of the regional Federal Reserve Banks who sit on the Federal Open Market Committee.³⁷⁷ Of particular importance in light of *Free Enterprise Fund* is the fact that those regional Federal Reserve Bank presidents are removed only by the privately-elected boards of directors of the privately-owned regional Federal Reserve Banks.³⁷⁸ It appears that for any challenge to the Federal Reserve System, the *Free Enterprise Fund* holding would provide redressability in the form of striking down the removal provisions of the regional Federal Reserve Bank presidents.

It is not surprising that unelected judges would be reluctant to rule on the substantive merits and strike down key features of the nation's central bank. Nor that public opinion and populist dissatisfaction with Wall Street bailouts finally pushed Congress to act—even a Congress so compromised and influenced by Wall Street campaign contributions. Significantly, the impetus for action came not from the center, but from the populist libertarian right joining hands with the populist progressive left. Representative Ron Paul, a Republican libertarian from Texas, introduced a bill to subject the Federal Reserve to an audit by the Government Accountability Office (GAO), the non-partisan investigative arm of Congress.³⁷⁹ Ron Paul's bill was cosponsored on the left by such Democratic and progressive Congressmen as Dennis Kucinich from Ohio and Alan Grayson from Florida.³⁸⁰ Until now, the Federal Reserve's exercise of monetary policy has evaded such scrutiny. But the trillions of dollars in opaque Federal Reserve subsidies for Wall Street interests finally fueled

³⁷⁶ *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, No. 08-861, slip op. at 39 (U.S. June 28, 2010) (Breyer, J., dissenting).

³⁷⁷ Canova, *Closing the Border*, *supra* note 224, at 404 n.310.

³⁷⁸ Federal Reserve Act, 12 U.S.C. § 341 *Fifth* (2000). Unlike the PCAOB removal provision that was struck down in *Free Enterprise Fund*, the President of the United States has no role, direct or attenuated, in the removal of Federal Reserve Bank presidents. *Free Enterprise Fund* restricts PCAOB board members to a single level of insulation from the President; Federal Reserve Bank presidents are completely insulated from the President of the United States. See Ira Stoll, *Free Enterprise Fund v. PCAOB*, FUTUREOFCAPITALISM.COM (June 28, 2010, 12:39 PM), <http://www.futureofcapitalism.com/2010/06/free-enterprise-fund-v-pcaob>.

³⁷⁹ Arnold Kling, *The Case for Auditing the Fed is Obvious*, CATO INSTITUTE BRIEFING PAPERS no. 118, Apr. 27, 2010, available at <http://www.cato.org/pubs/bp/bp118.pdf>.

³⁸⁰ Federal Reserve Transparency Act of 2009, H.R. 1207, 111th Cong. (2009), available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:HR01207:@@P>.

reform efforts. Inquiring minds wanted to know who the Federal Reserve has showered with its largesse—which “Too Big To Fail” Wall Street banks and which politically connected hedge funds—and the terms of such support, including the price paid for toxic assets and the collateral required for Fed loans.

In December 2009, the House passed a financial regulatory reform bill by a vote of 223 to 202 which incorporated several provisions on reforming the Federal Reserve, including the GAO audit provision.³⁸¹ The Senate passed a financial reform bill in May 2010 that included a provision that would have required the president of the Federal Reserve Bank of New York to be appointed by the president of the United States and confirmed by the Senate.³⁸² The Senate bill also prohibited bank officers from serving on the boards of the twelve regional Federal Reserve Banks and voting for the regional bank presidents.³⁸³ In addition, the Senate voted 96 to 0 to include a provision requiring a one-time audit of the Federal Reserve by GAO, a measure that was pushed from the left by Senator Bernard Sanders, an independent from Vermont.³⁸⁴

With two differing versions of financial regulatory reform, the legislation moved to a House-Senate Conference Committee, where reform efforts often get watered down or die. The final version of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) did not include any significant change in the appointment of any of the regional Federal Reserve Bank presidents.³⁸⁵ Previously, they were appointed by the boards of directors of the regional Federal Reserve Banks, which consists of three Class A directors representing the commercial bank members of the Federal Reserve district, three Class B directors also elected by the same commercial banks but purporting to represent the public, and three Class C directors appointed by the Board of Governors.³⁸⁶ Under section 1107 of the Act, the regional presidents will now be appointed by the

³⁸¹ *Comparing the House and Senate Financial Reform Bills*, N.Y. TIMES, Mar. 17, 2010, <http://www.nytimes.com/interactive/2010/03/16/business/financialreform-billcompare.html#tab=2>.

³⁸² *Id.*

³⁸³ *Id.*

³⁸⁴ David M. Herszenhorn, *Senate Votes Unanimously for an Audit of Fed's Actions in Financial Crisis*, N.Y. TIMES, May 12, 2010, at B3; Alan Grayson, *We Beat the Fed*, THE HUFFINGTON POST (May 11, 2010, 10:16 PM), http://www.huffingtonpost.com/rep-alan-grayson/we-beat-the-fed_b_572713.html.

³⁸⁵ In the Senate version, section 1157 proposed that the President of the United States appoint the president of the Federal Reserve Bank of New York for a term of five years. H.R. 4173, 111th Cong. (2010) (Senate version). However, this proposal was not in the final version signed by President Obama. *See infra* note 388 and accompanying text.

³⁸⁶ THE FEDERAL RESERVE: PURPOSES & FUNCTIONS 2005, *supra* note 4, at 10.

Class B and Class C directors of the regional Federal Reserve Banks, with the approval of the Board of Governors.³⁸⁷ This is a baby step in the right direction, but with the Federal Reserve System already captured by the big banking interests, limiting the appointment process to Class B and Class C directors will likely have no actual impact on outcomes.

In addition, the prohibition against bank officers serving on the boards of the twelve regional Federal Reserve Banks was dropped by the Conference Committee and did not appear in the final Dodd-Frank Act.³⁸⁸ However, the Comptroller General is now required to complete an audit of the governance of the Federal Reserve Banks, including an examination of whether the current system of appointing Federal Reserve Bank directors effectively represents the public “with due but not exclusive consideration to the interests of agriculture, commerce, industry, services, labor, and consumers.”³⁸⁹ The audit must also “examine whether there are actual or potential conflicts of interest created when directors of the Federal reserve banks” are elected by member banks.³⁹⁰ Finally, the audit is charged with identifying changes to the selection procedures for Federal Reserve Bank directors that would improve how the public is represented, eliminate actual or potential conflicts of interest in bank supervision, and increase the availability of information and Federal Reserve transparency, effectiveness and efficiency.³⁹¹

More controversial were the provisions dealing with the GAO audit of the Federal Reserve’s open market operations and lending facilities over the past two years, as well as Federal Reserve’s transparency provisions. It is worth wading through the maze of statutory provisions to understand the subterfuges attempted by the Federal Reserve and its allies in the Conference Committee. According to section 1109(a), the GAO will conduct a one-time audit of all loans and other financial assistance provided by the Federal Reserve System during the period beginning December 1, 2007 and ending on the date of enactment of the Dodd-Frank Act.³⁹² This, at first glance, seems to be a

³⁸⁷ Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, H.R. 4173, 111th Cong. (2010) § 1107(a). In addition, § 1108 (d) limits the ability of the Board of Governors to delegate certain authority to the presidents of the Federal Reserve Banks.

³⁸⁸ The Senate version of section 1157 proposed that no officer, past or current, may serve on the board of directors. H.R. 1157, 111th Cong. (2010) (Senate version). This prohibition did not appear in the final version signed by President Obama; instead, an audit is required. See *infra* note 389.

³⁸⁹ Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, H.R. 4173, 111th Cong. (2010) § 1109 (b)(1)(B)(i).

³⁹⁰ § 1109 (b)(1)(B)(ii).

³⁹¹ § 1109 (b)(1)(B)(iv).

³⁹² The Mortgage-Backed Securities (MBS) Purchase Program, by which the Federal

success for transparency efforts since the GAO audit should apparently cover the several trillion dollars in loans and outright purchases made by the Federal Reserve since the onset of the financial crisis.

However, section 102(a) prevents the Comptroller General from disclosing “to any person or entity, including Congress, the names or identifying details of specific participants in any . . . covered transaction” including the amounts transferred in any covered transaction.³⁹³ GAO disclosure can only occur if the Board of Governors first decides to publicly disclose the identity or identifying details of the transaction.³⁹⁴ There is concern that these provisions could be used to effectively prevent disclosure by either the Federal Reserve or the GAO of any of the trillions of dollars of Federal Reserve loans and open-market purchases conducted between the beginning of the financial crisis in late 2007 and July 2010.³⁹⁵

However, section 1109(c), the final provision in the Title XI Federal Reserve provisions of the Dodd-Frank Act, required the Board of Governors to publish on its website no later than December 1, 2010 the identities of each business, individual, entity, or foreign central bank that has received specifically listed Federal Reserve loans and financial assistance beginning on

Reserve purchased some \$1.25 trillion in toxic assets, is indeed covered by the GAO’s one-time audit as an expressly listed program (it is specifically listed as “the agency-guaranteed mortgage-backed securities program”). According to the Federal Reserve, the MBS Purchase Program for large-scale asset purchases (LSAP) was conducted pursuant to section 14 of the Federal Reserve Act (and therefore was not within the Fed’s section 13(3) powers). See Board of Governors of the Federal Reserve System, *Federal Reserve System Monthly Report on Credit and Liquidity Programs and the Balance Sheet January 2010*, at 4 (2010), <http://www.federalreserve.gov/monetarypolicy/files/monthlyclbsreport201001.pdf>; Board of Governors of the Federal Reserve System, *Federal Reserve System Monthly Report on Credit and Liquidity Programs and the Balance Sheet March 2010*, at 4, 5 (Mar. 2010), <http://www.federalreserve.gov/monetarypolicy/files/monthlyclbsreport201003.pdf>.

³⁹³ § 1102(a).

³⁹⁴ *Id.* Presumably, the GAO would not be empowered to disclose the details of non-covered transactions. Meanwhile, according to section 1102 the Board of Governors must disclose the names and identifying details of each counterparty in any covered transaction. *Id.* (enacting a new section 11(s) of the Federal Reserve Act). However, section 1102 requires Federal Reserve to disclose identifying details of only certain transactions conducted after the date of enactment of the Dodd-Frank Act. The GAO’s non-disclosure obligation expires with respect to any transaction “on the date on which the Board of Governors, directly or through a Federal reserve bank, publicly discloses the identity” or identifying details of any transaction. *Id.* Therefore, when the Board of Governors discloses details of any post-July 2010 transaction, the GAO may at that time also disclose such details. But the inverse is also true, that as long as the Board of Governors does not disclose details of any post-July 2010 transaction, the GAO may not disclose such details.

³⁹⁵ While the GAO should be able to audit Federal Reserve loans and open-market transactions under section 1109, the GAO would apparently be prevented from disclosing the identities and identifying details of these transactions under section 1102. *Id.*; § 1109.

December 1, 2007.³⁹⁶ Why, one might ask, were these provisions so convoluted? Why prevent the GAO from disclosing identifying information when the Federal Reserve is required to do so on its website, and why tack that latter requirement onto the very final section of the legislation? According to a Capitol Hill staffer who worked on this legislation, “When you are fighting the Fed and the Senate and Treasury and they won’t show you language, this is what happens.”³⁹⁷

On December 1, 2010, the Fed complied with section 1109(c) by disclosing the identities of those receiving some \$3.3 trillion in Federal Reserve loans and financial assistance. The list of wards of the Fed included the largest financial institutions in the United States and abroad, a who’s who of Wall Street and foreign banks.³⁹⁸

Finally, section 1103(b) states expressly that it is not intended to affect any pending litigation or lawsuit previously filed under 5 U.S.C. § 552, the Freedom of Information Act.³⁹⁹ This provision was meant to protect suits that had been filed against the Federal Reserve by Bloomberg News and other media outlets seeking the identity of financial institutions receiving emergency *Federal Reserve* loans from the Federal Reserve’s discount window and the collateral posted for such assistance.⁴⁰⁰ This was the one Fed lending program that Congress ultimately excluded from the transparency and disclosure requirements in the Dodd-Frank Act.⁴⁰¹ Bloomberg News was granted summary judgment in August 2009 by the federal District Court for the Southern District of New York,⁴⁰² which was affirmed by the Court of Appeals for the Second Circuit in March 2010.⁴⁰³ Apparently there was no need for the Federal Reserve to appeal the decision to the Supreme Court. The Clearing House

³⁹⁶ § 1109(c).

³⁹⁷ Email from unnamed Capitol Hill staffer to author, July 28, 2010 (adding, “The process was a clusterfuck done at the last minute”). *Clusterfuck*, URBANDICTIONARY.COM, <http://www.urbandictionary.com/define.php?term=clusterfuck> (last visited Jan. 8, 2011) (Clusterfuck is a “[m]ilitary term for an operation in which multiple things have gone wrong” and is related to SNAFU and FUBAR).

³⁹⁸ Craig Torres and Scott Lanman, *Fed Names Recipients of \$3.3 Trillion in Crisis Aid*, BLOOMBERG (Dec. 1, 2010, 10:52 AM), <http://www.bloomberg.com/news/2010-12-01/fed-names-recipients-of-3-3-trillion-of-aid-during-u-s-financial-crisis.html>.

³⁹⁹ § 1103(b) (enacting a new section 11(s)(8) of the Federal Reserve Act).

⁴⁰⁰ See generally *Bloomberg, L.P. v. Bd. of Governors of the Fed. Reserve Sys.*, 649 F. Supp. 2d 262 (S.D.N.Y. 2009).

⁴⁰¹ Torres & Lanman, *supra* note 398.

⁴⁰² *Id.* at 282.

⁴⁰³ *Bloomberg, L.P. v. Bd. of Governors of the Fed. Reserve Sys.*, 601 F.3d 143, 151 (2d Cir. 2010).

Association LLC, a group of the biggest commercial banks in the country, filed for certiorari in October 2010.⁴⁰⁴

The Fed has never disclosed the identities of borrowers of its discount window lending since the program was created in 1914.⁴⁰⁵ As Senator Bernie Sanders said, the Dodd-Frank Act disclosure and transparency requirements is “a significant step forward in opening the veil of secrecy that exists in one of the most powerful agencies in government.”⁴⁰⁶ Whether or not the Fed is ultimately compelled to disclose details about its discount window lending, the information already disclosed under Dodd-Frank contributes to our understanding of the Fed’s cozy relationship with Wall Street’s biggest banks and financial institutions. Most recently, the Federal Reserve is engaged in its second round of quantitative easing (QE2), purchasing some \$600 billion in long-term Treasury securities in an attempt to push down mortgage interest rates and to prop up housing and consumption.⁴⁰⁷ The Fed’s disclosures under Dodd-Frank show how the first round of quantitative easing helped transfer \$1.25 trillion of toxic assets from the balance sheets of Wall Street’s

⁴⁰⁴ Bob Ivry & Greg Stohr, *Fed Won't Join Supreme Court on Loan Disclosures*, BLOOMBERG (Oct. 26, 2010, 11:15 AM), <http://www.bloomberg.com/news/2010-10-26/fed-won-t-join-banks-appeal-to-high-court-over-emergency-loan-disclosures.html>; *Pending Cases Involving the Board of Governors*, BOARD OF GOVERNORS OF THE FEDERAL RESERVE, <http://www.federalreserve.gov/bankinfo/legaldevelopments/cases.htm> (last updated Jan. 19, 2011) (reporting the Clearing House filing as intervenor in *Board of Governors v. Bloomberg, LP* and *Fox News Network v. Board of Governors*); Bob Ivry, *Fed Given 60 Days for Supreme Court Appeal of Document Disclosure Order*, BLOOMBERG (Aug. 27, 2010), <http://www.bloomberg.com/news/print/2010-08-27/federal-reserve-given-60-days-to-appeal-disclosure-order-to-supreme-court.html>.

⁴⁰⁵ Ivry & Stohr, *supra* note 404.

⁴⁰⁶ Torres & Lanman, *supra* note 398.

⁴⁰⁷ Wessel, *supra* note 204, at A4 (reporting that Quantitative Easing is “when the Fed turns up its electronic printing presses” and creates money to purchase financial assets). Section 1101 of the Dodd-Frank Act continues to grant the Federal Reserve very broad discretion to engage in emergency lending—the Fed’s so-called section 13(3) lending authority—“for the purpose of providing liquidity to the financial system, and not to aid a failing company . . .” Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R. 4173, 111th Cong. § 1101(a)(6)(B)(i) (2010). There is nothing in the Dodd-Frank Act that would prevent the Federal Reserve from create new money to purchase more trillions of dollars in paper assets through open market transactions. Paul Krugman has suggested that the Federal Reserve may need to purchase between \$8 trillion and \$10 trillion in government bonds to produce a full recovery. Paul Krugman, *On Quantitative Easing and the Currency Situation*, CNBC (Oct. 13, 2010, 5:30 PM), available at <http://www.marketobservation.com/blogs/index.php/2010/10/14/paul-krugman-on-quantitative-easing-and-the-currency-situation?blog=10> (providing an audio broadcasting of Paul Krugman’s predictions). This is another way of saying that the federal government needs to find outlets to spend on that scale. The Federal Reserve already has all the authority it needs to purchase government bonds in any amount, while it would take an act of Congress to authorize the federal government to spend such amounts (or any amount) on economic recovery programs.

biggest banks to the Federal Reserve's own balance sheet.⁴⁰⁸ Meanwhile, as home foreclosures have climbed to an all-time high,⁴⁰⁹ economists on both sides of the spectrum have called on the Federal Reserve to lend directly to Main Street, from proposals to finance the write-down and modifications of mortgages to lending directly to local governments and for job creation through infrastructure investment.⁴¹⁰ Unfortunately, these proposals have fallen on deaf ears at the Fed.

The Federal Reserve sits at the center of these double standards. Sanctity of contract and market discipline result in millions of underwater mortgages, foreclosed homes, and a broken American Dream. But for powerful Wall Street insiders, failure is rewarded through the central bank's programs such as quantitative easing. This is essentially free money for the interests that have captured the central bank, while state and local governments around the United States, and sovereign borrowers elsewhere face rising interest rates and negative assessments from the credit rating agencies tied to the big banks. Populist proposals to reverse these trends are routinely dismissed by Washington and Wall Street. One such proposal, for the Federal Reserve or Treasury to provide interest-free loans to state and local governments for capital investment projects, has met orthodox opposition.⁴¹¹ For instance, Don Brash, the former head of New Zealand's central bank, indicated his concern about the opportunity cost of having the government provide easy credit for public sector capital investment.⁴¹² However, as long as central bankers remain unaccountable there is no

⁴⁰⁸ Dick Armev & Matt Kibbe, *Fed Chairman Ben Bernanke's Bailout Redux*, WASH. EXAMINER (Nov. 4, 2010, 10:00 PM), <http://washingtonexaminer.com/op-eds/2010/11/dick-armey-and-matt-kibbe-fed-chairman-ben-bernanke-bailout-redux>; Larry Doyle, *Barack Obama Has Ben Bernanke by the Balls*, SENSE ON CENTS (Mar. 16, 2010, 3:23 PM), <http://www.senseoncents.com/2010/03/barack-obama-has-ben-bernanke-by-the-balls/>.

⁴⁰⁹ See *Foreclosure Activity Hits Record High in Third Quarter*, REALTYTRAC (Oct. 15, 2009), <http://www.realtytrac.com/foreclosure/foreclosure-rates.html> (reporting a new high in quarterly mortgage foreclosure rate).

⁴¹⁰ For instance, on the right, Nobel laureate Vernon Smith has proposed that the Federal Reserve finance lending modification of home mortgages. Vernon L. Smith, *Mired in Disequilibrium: Do for Households What the Fed Sought for Banks*, NEWSWEEK (Jan. 24, 2011), <http://www.newsweek.com/2011/01/23/mired-in-disequilibrium.html>. On the left, William Greider proposes that the Fed use its section 13(3) authority to lend to nonfinancial entities in "unusual and exigent circumstances" to lend directly to local governments and for building infrastructure and creating jobs. William Greider, *Will the Federal Reserve's \$900 Billion Be Enough?*, AGENCE GLOBAL (Nov. 18, 2010), <http://www.agenceglobal.com/Article.asp?Id=2452>.

⁴¹¹ Canova, *supra* note 321, at 586–87 n.167–73 (discussing H.R. 1452, the State and Local Government Empowerment Act of 1999).

⁴¹² Discussion with Don Brash, Chapman University, Argyros Hall, Feb. 22, 2010. "[T]he opportunity cost of using a particular resource is defined as the value of the next best alternative use of that resource '[W]henver you have a choice, there is a cost.'" HENRY N. BUTLER, *ECONOMIC ANALYSIS FOR LAWYERS* 4 (1998).

incentive for them to ask what the opportunity cost is for providing trillions of dollars in support to Wall Street banks and hedge funds.

The movement to reform central banks and make them accountable has been around for as long as there has been both democracy and privatized central banking. Reigning in privilege and financial aristocracy was the basis for Jefferson's opposition to the First Bank of the United States⁴¹³ and Jackson's veto of the recharter of the Second Bank of the United States.⁴¹⁴ Likewise, today many have come to see the independent Federal Reserve as the linchpin of a government-nurtured cartel and emblematic of the ossification of the political process.⁴¹⁵ Without genuine accountability, independent central banking has become a euphemism for plutocracy and financial oligarchy.

Those concerned about our present economic impasse must ask what kind of central bank we need. They may find that the Federal Reserve we want looks a lot like the Federal Reserve we once had during the 1940s—strictly accountable to the elected branches and far more transparent and efficient in regulation than today. Of course, there are other models of civic republicanism, such as a central bank that remains independent from direct executive branch political control, while including a fair representation of “business, labor, farmers, consumers,” debtors, and other constituencies that have been left outside the present system.⁴¹⁶ This would transform the central bank into a marketplace for ideas, internalizing checks and balances, and a forum for what Madison called faction confronting faction.⁴¹⁷

It has been said that war is too important to be left to the generals. Likewise, the economy is too important to be left to the bankers. Yet, we have largely turned over the nation's central bank to a self-interested banking elite. The result has been to corrupt the culture of the central bank, entrench a system of self-regulation for the biggest banks, and constrain fiscal policy at every level of government. Ultimately, what is at stake is the nature of representative democracy itself.

⁴¹³ *Primary Source: Thomas Jefferson's Opinion on the National Bank*, (PBS/KCET 2008), <http://www.pbs.org/kcet/andrewjackson/edu/jeffersononbank.pdf>.

⁴¹⁴ *American President: Jackson Vetoes Bank Bill—July 10, 1832*, Miller Center of Public Affairs, University of Virginia, http://millercenter.org/academic/americanpresident/events/07_10.

⁴¹⁵ Jacob Heilbrunn, Op-Ed., *Bernanke Bashes*, L.A. TIMES, Nov. 19, 2010, at A27.

⁴¹⁶ See, e.g., COMMONS, *supra* note 22, at 900–01; Whalen, *supra* note 84, at 564–65; KEYSERLING, *supra* note 22, at 111.

⁴¹⁷ THE FEDERALIST NO. 10, *supra* note 312, at 54–55.

The Red and Blue Golden State: Why California's Proposition 11 Will Not Produce More Competitive Elections

*Anthony E. Chavez**

INTRODUCTION

In November 2008, Californians approved a redistricting reform measure, Proposition 11, which, despite the promises of its supporters, will have little effect on the competitiveness of the state's elections.¹ The initiative shifted responsibility for the redrawing of state legislative lines from the Legislature to an appointed commission.² Supporters promised that by taking the process from self-interested legislators, the resulting districts would be more competitive. However, an analysis of the state's demographics and the experience of other states suggests that a significant increase in the competitiveness of California's legislative districts remains unlikely and may even be undesirable. Indeed, because of the give-and-take nature of the redistricting process, California would be served best by keeping the initial responsibility for redrawing legislative lines with the Legislature. A redistricting commission would be most helpful if it focused on reviewing and revising plans developed by the Legislature, rather than actually drawing the initial plan itself.

This article first reviews the legal standards applicable to redistricting in California. It then discusses the most recent redistrictings and the five failed attempts that have been made to alter the redistricting process through ballot initiatives. Section II addresses Proposition 11, the campaign, and the 2008 general election. Section III explores the benefits and detriments resulting from more competitive district elections, the much-touted benefit of Proposition 11. Section IV analyzes the decline

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¹ The full text of Proposition 11, as it appeared on the 2008 ballot, is available at <http://www.voterguide.sos.ca.gov/past/2008/general/text-proposed-laws/text-of-proposed-laws.pdf#prop11> (last visited Nov. 2, 2010).

² See *infra* Part II.

in competitive elections in California and the non-redistricting causes of this decline. Section V looks to the experiences of other states that have employed commissions and imposed competitiveness standards on the drawing of their legislative districts. Finally, the last two sections discuss the likelihood that Proposition 11's redistricting commission will be able to draw more competitive districts and present an alternative approach that would provide redistricting roles for both an independent commission and the Legislature.

I. REDISTRICTING, "CALIFORNIA" STYLE

Proposition 11 is the first successful salvo in the ongoing redistricting battle in California.³ To best appreciate the measure's significance, a review of the state's redistricting history is helpful. But, first, this article will look at the legal constraints impacting redistricting prior to the passage of the measure. Then, it will review the decline in competitiveness in California's district elections which has prompted most of the concern over redistricting reform. Moreover, the article will examine the battles over the state's past redistrictings, both in the courts and on the ballot.

A. Legal Constraints on Redistricting in California

Redistricting is the process of revising the geographic boundaries of congressional or state legislative districts to account for population shifts between decennial censuses.⁴ The U.S. Constitution requires the federal government to conduct a census every ten years for the purpose of apportioning congressional seats among the states.⁵ The states typically

³ Two years later, California voters approved Proposition 20, which extends the reach of Proposition 11 to encompass the redrawing of congressional districts. See *Proposition 20: Voter Information Guide*, CALIFORNIA SECRETARY OF STATE, <http://www.voterguide.sos.ca.gov/propositions/20/> (last visited Dec. 28, 2010). In the November 2010 election, California's voters also rejected Proposition 27, which would have repealed Proposition 11. See *Proposition 27: Voter Information Guide*, CALIFORNIA SECRETARY OF STATE, <http://www.voterguide.sos.ca.gov/propositions/27/> (last visited Dec. 28, 2010).

⁴ *What You Should Know About the Apportionment Counts*, U.S. CENSUS BUREAU (2000), <http://www.census.gov/dmd/www/pdf/pio00-ac.pdf>. Redistricting is distinct from apportionment, which is the process of determining the number of seats to which each state is entitled in the U.S. House of Representatives. *Id.*

⁵ U.S. CONST. art. I, § 2, cl. 3. Article I provides that the first census shall occur within three years of the first meeting of congress; it further requires that the federal government conduct future censuses within ten-year terms thereafter. *Id.* Now, "Census Day" is the first day of April in years ending in zero. *Key Dates—2010 Census*, 2010 CENSUS, <http://2010.census.gov/2010census/how/key-dates.php> (last visited Oct. 22, 2010). Within one week of the commencement of the Congress following the census, the President must transmit to Congress a statement of the persons counted in each state and its allocation of Representatives. 2 U.S.C. § 2a(a) (2006).

redistrict their own state legislatures in conjunction with this process. The California State Constitution, for instance, requires that the state redistrict its election lines once every decade in the year following the national census.⁶ Historically, the California Assembly has shouldered responsibility for redrawing state legislative and congressional district lines.⁷

Certain federal and state standards apply to the drawing of election districts. First, the Supreme Court has determined that congressional districts must have approximately equal population. In *Reynolds v. Sims*,⁸ the Court held that political equality under the Constitution “can mean only one thing—one person, one vote.”⁹ This means that district populations should be as nearly equal as possible.¹⁰ Courts have applied this standard rigorously in congressional redistrictings.¹¹ In the context of state legislative plans, the Supreme Court has allowed state legislatures greater latitude.¹² Indeed, the Court has indicated that deviations of at least sixteen percent are acceptable.¹³

The other federal law that controls redistricting is the Voting Rights Act of 1965 (Act), as amended and codified in Title 42 of the United States Code.¹⁴ Depending upon the state involved, two provisions of the Act may have implications for redistricting. Section 2 of the Act applies to all states.¹⁵ Where certain preconditions exist,¹⁶ section 2 prohibits dilution of minority

⁶ CAL. CONST. art. XXI, §§ 1–2.

⁷ § 1 (amended 1980).

⁸ *Reynolds v. Sims*, 377 U.S. 533 (1964).

⁹ *Id.* at 558 (quoting *Gray v. Sanders*, 372 U.S. 368, 381 (1962)).

¹⁰ To calculate the ideal district population, divide the state’s total population by the number of districts in the legislative body. THOMAS L. BRUNELL, REDISTRICTING AND REPRESENTATION: WHY COMPETITIVE ELECTIONS ARE BAD FOR AMERICA 54 (2008). The variance of a given district is the total population of a district divided by the ideal district size. The overall or total deviation of a plan is the population difference between the largest and smallest districts divided by the ideal district population. *Chapter 3—Equal Protection*, MINN. SENATE, <http://www.senate.leg.state.mn.us/departments/scr/redist/Red2000/Ch2Equal.htm> (last visited Oct. 22, 2010).

¹¹ See *Kirkpatrick v. Preisler*, 394 U.S. 526, 530–31 (1969) (“[T]he ‘as nearly as practicable’ standard requires that the State make a good-faith effort to achieve precise mathematical equality.”).

¹² See *Mahan v. Howell*, 410 U.S. 315, 326 (1973).

¹³ *Voinovich v. Quilter*, 507 U.S. 146, 161–62 (1993) (stating that *Mahan* upheld a sixteen percent deviation because it was justified by a rational objective).

¹⁴ 42 U.S.C. §§ 1971–1974 (2006).

¹⁵ 42 U.S.C. § 1973 (2006).

¹⁶ The Supreme Court has identified three preconditions that must be present to establish a violation of section 2. First, the minority group must be sufficiently large and geographically compact so as to constitute a majority in a district. Second, it must be politically cohesive. Third, the white majority must vote sufficiently as a bloc to enable it to defeat the minority’s preferred candidate. *Thornburg v. Gingles*, 478 U.S. 30, 50–51 (1986).

voting strength.¹⁷ Line drawers typically use one or more of the following techniques to dilute minority voting strength through redistricting: “packing,” “cracking,” or “stacking.” “Packing” involves concentrating as many minorities as possible into as few districts as possible, thereby creating larger minority populations than necessary to elect their candidates of choice and minimizing the impact of minority votes.¹⁸ “Cracking” consists of splitting concentrations of a minority population and dispersing them among other districts to increase the number of districts containing white-voting majorities.¹⁹ Finally, “stacking” refers to combining concentrations of a minority population with larger concentrations of a white population to ensure that the districts contain white voting majorities.²⁰

Section 5 of the Voting Rights Act requires that changes involving voting (such as the passage of a redistricting plan) must be approved (“precleared”) by either the U.S. Attorney General or the U.S. District Court for the District of Columbia.²¹ Section 5 prohibits “retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.”²² Section 5 extends only to nine states in their entirety, and to portions of seven others.²³ Four counties in California fall under section 5.²⁴ Section 5 applies when a covered jurisdiction adopts a redistricting plan.²⁵ Because four counties in California are covered, the effects of any statewide redistricting plan (congressional or legislative) on those four counties fall within the preclearance requirement of section 5.²⁶

¹⁷ Upon satisfaction of the three *Gingles* preconditions, courts must examine other factors in the totality of circumstances. *Johnson v. De Grandy*, 512 U.S. 997, 1011–12 (1994). Those factors include: a history of official discrimination touching the right to vote; racially polarized voting; the use of election procedures that may enhance the opportunity for discrimination; the use of a candidate slating process; the extent to which members of the minority group bear the effects of nonvoting discrimination which hinder their ability to participate in the political process; the use of racial appeals in political campaigns; the election of minority group members to public office; a lack of responsiveness by elected officials to the needs of the minority group; the tenuousness of policies underlying voting procedures; and proportionality, defined as the relationship between the number of majority-minority voting districts and minority members’ share of the relevant population. *Johnson v. Hamrick*, 196 F.3d 1216, 1220 (11th Cir. 1999).

¹⁸ Frank R. Parker, *Racial Gerrymandering and Legislative Reapportionment*, in MINORITY VOTE DILUTION 85, 96 (Chandler Davidson ed., 1989).

¹⁹ *Id.* at 89.

²⁰ *Id.* at 92.

²¹ 42 U.S.C. § 1973(c) (2006).

²² *Beer v. United States*, 425 U.S. 130, 141 (1976).

²³ 28 C.F.R. § 51 app. (2009).

²⁴ The counties are Kings, Merced, Monterey, and Yuba. *Id.*

²⁵ 28 CFR § 51.13(e) (2009); *Beer*, 425 U.S. at 133.

²⁶ *Wilson v. Eu*, 823 P.2d 545, 550 (Cal. 1992).

California law also imposes certain requirements upon the redistricting process. The California Constitution sets forth several basic constraints. It reiterates the federal requirement that the districts shall have reasonably equal population²⁷ and also requires that they be contiguous.²⁸ In addition, the California Constitution provides that the geographical integrity of cities and counties be respected to the extent possible, without violating other requirements.²⁹

In addition, California recently passed its own state voting rights act.³⁰ While the California act is similar to the federal statute, the state law explicitly removes geographic concentration of the minority group as a requirement for finding a violation.³¹ Of course, some level of geographic compactness is necessary to establish an interest in redistricting. For these reasons, California's voting rights act does not appear to create any new constraints on its redistricting process.

B. Recent Trends in California District Elections

Despite the tradition in California (and elsewhere) of legislative control of the redistricting process, the placement of this responsibility in the hands of the Legislature has long been a target of criticism.³² In general, critics have charged that legislators are inherently self-interested in the outcome of redistricting.³³ Legislators have a number of incentives to exploit the process for political gain, including protection of individual incumbents, expanding partisan statewide majorities, and punishing those with differences from the line drawers, regardless of their party affiliation.³⁴ Critics complain that "politicians get to choose their voters, rather than the

²⁷ CAL. CONST. art. XXI, § 1(b).

²⁸ CAL. CONST. art. XXI, § 2(d)(3).

²⁹ CAL. CONST. art. XXI, § 2(d)(4).

³⁰ CAL. ELEC. CODE §§ 14025–32 (West 2009).

³¹ CAL. ELEC. CODE § 14028(c) (West 2009).

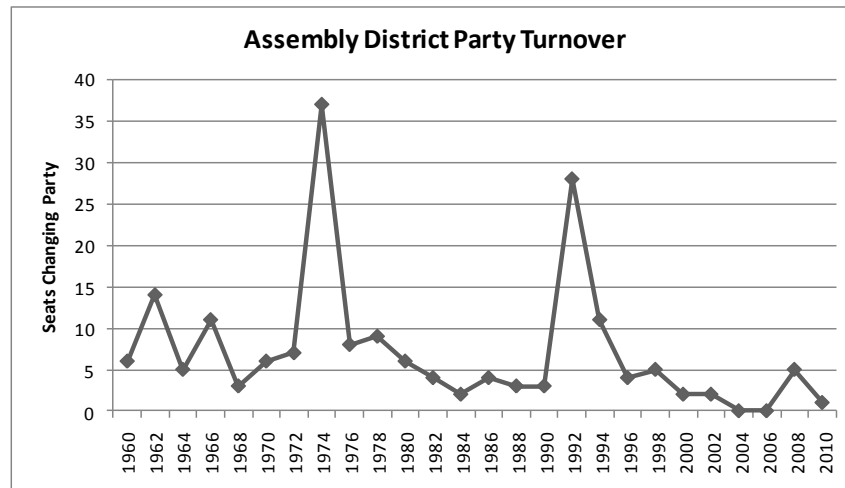
³² See Nicholas Stephanopoulos, *A Fighting Chance for Redistricting*, L.A. TIMES, Sep. 27, 2008, at A21 [hereinafter Stephanopoulos, *A Fighting Chance for Redistricting*], available at <http://articles.latimes.com/2008/sep/27/opinion/oe-stephanopoulos27>.

³³ *Id.*

³⁴ George Passantino, *Redistricting in California: Competitive Elections and the Effects of Proposition 11*, REASON FOUNDATION 13 (Oct. 2008), <http://reason.org/files/79d00eb443669b026c8c37c483f0bdb0.pdf>. While these are recognized incentives for political gain through redistricting, they do not all lead to the same ultimate configuration. For instance, the incentive of protecting individual incumbents encourages increasing a party's concentration in a particular district. Expanding a party's statewide share of districts, however, often requires drawing slimmer margins in each individual district, as the plan spreads that party's voters around to more districts. David Lublin & Michael P. McDonald, *Is It Time to Draw the Line? The Impact of Redistricting on Competition in State House Elections*, 5 ELECTION L.J. 144, 145 (2006).

reverse”³⁵ Or, as North Carolina State Senator Mark McDaniel rather candidly admitted about the redistricting process, “We are in the business of rigging elections.”³⁶

While these arguments have tremendous emotional appeal, of greater interest is whether proof of such practices can be found in California. Critics of legislative redistricting identify several indicia of these practices. First, one trend pointed out by proponents of Proposition 11 during the 2008 campaign was the decline in changes of party control of California’s Assembly districts.³⁷ Figure 1 tracks the number of seats in the Assembly that have changed parties between 1960 and 2010:

FIGURE 1³⁸

³⁵ Editorial, *Redistricting Defeats*, WASH. POST, Nov. 14, 2005, at A20.

³⁶ John Hoeffel, *Six Incumbents Are a Week Away from Easy Election*, WINSTON-SALEM J., Jan. 27, 1998, at B1.

³⁷ See Passantino, *supra* note 34, at 13.

³⁸ See *Elected Offices*, JOINCALIFORNIA, <http://www.joincalifornia.com/page/9> (last visited Jan. 4, 2011). Although data was available only through 2006 when Proposition 11 appeared on the ballot, this Article will include data through the November 2010 general election.

The first striking fact about this chart is the two spikes in the trendline. These spikes represent a high exchange of seats between the parties in 1974 and 1992. Both of these occurred in the first elections after the implementation of new redistricting plans.³⁹ Of course, these are not the only elections held after the passage of new plans. California conducted elections pursuant to new plans in 1962, 1982, and 2002. Why were 1974 and 1992 the only years to have such extraordinarily high changes of seats between the major parties? Possibly because the authors of those plans were judges and not the Legislature.⁴⁰

The other trend that Figure 1 highlights is the overall decline of party turnover during the period analyzed. In the 1960s, the yearly exchange of seats averaged eight per election. By the 2000s, the average turnover was down to less than two per election. As was frequently noted during the Proposition 11 campaign,⁴¹ in the two elections prior to the 2008 election, no Assembly seats changed party hands.⁴²

Another possible indicator of legislative misuse of the redistricting process is the decline in competitive elections. Scholars have noted the decline of marginal districts over the past thirty years.⁴³ California's elections have followed this pattern; the number of competitive assembly seats has steadily decreased. For instance, Passantino tracked the number of

³⁹ In the 1970s, because of an impasse between the legislature and Governor Reagan over the proposed redistricting plan, the California Supreme Court ordered that the state use a temporary plan for the 1972 elections. The first election conducted under the permanent plan was in 1974. *Legislature v. Reinecke*, 492 P.2d 385, 390–91 (Cal. 1972); *Legislature v. Reinecke*, 516 P.2d 6, 9 (Cal. 1973).

⁴⁰ See *infra* notes 51–53, 64–67 and accompanying text.

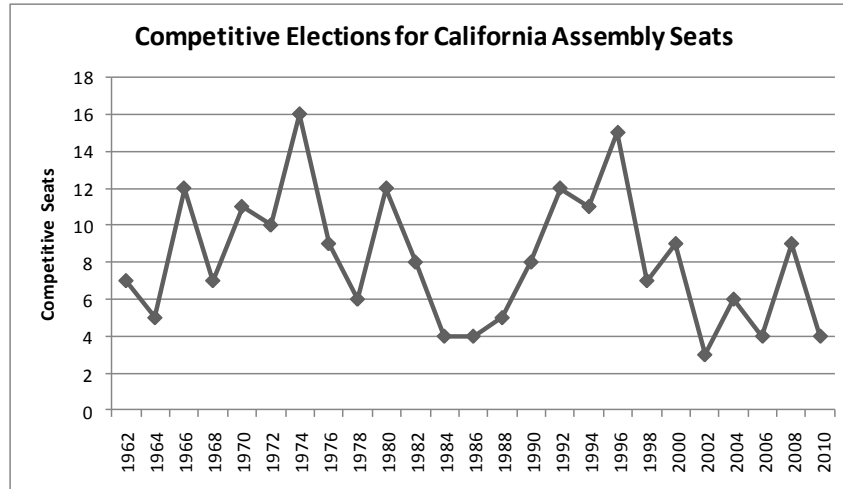
⁴¹ Stephanopoulos, *A Fighting Chance for Redistricting*, *supra* note 32.

⁴² See *supra* Figure 1. Ironically, this trend took a brief respite in the same election in which the voters approved Proposition 11. Five assembly seats changed party hands in November 2008. By 2010, however, the pattern returned, as the parties swapped only one seat. See Figure 1.

⁴³ Samuel Issacharoff & Jonathan Nagler, *Protected from Politics: Diminishing Margins of Electoral Competition in U.S. Congressional Elections*, 68 OHIO ST. L.J. 1121, 1124–25 (2007) (showing a decline over the past sixty years in congressional elections decided by ten percent and five percent margins between the top two candidates).

assembly seats where the winner won no more than fifty-three percent of the vote.⁴⁴ Figure 2 presents the results:

FIGURE 2⁴⁵



In many respects, Figure 2 presents a picture quite similar to that of Figure 1. In both Figures 1 and 2, the highest peak occurs in 1974, which is immediately subsequent to the adoption of that year's plans. However, the second peak in Figure 1 occurs in 1992, but in Figure 2 it does not arise until 1996. In other words, in the 1990s, the highest number of districts changed party hands in the year immediately after the redistricting, while the number of competitive contests continued to increase. This discrepancy may suggest that factors other than redistricting affect competitiveness. Although Figure 2 also suggests that the number of competitive districts had been in decline since the 1992 redistricting, as with Figure 1, it illustrates a significant, though short-lived, rebound in the 2008 general election.⁴⁶

⁴⁴ Passantino, *supra* note 34 at 11–12.

⁴⁵ See *Elections by Decade*, JOINCALIFORNIA, <http://www.joincalifornia.com/page/10> (last visited Jan. 4, 2011).

⁴⁶ The fact that eight of the nine competitive districts in 2008 had Republican incumbents suggests that the rise in close contests may not reflect a general increase in competitiveness, but rather the national trend supporting Democratic candidates in that election. See generally Gary C. Jacobson, *The 2008 Presidential and Congressional Elections: Anti-Bush Referendum and Prospects for the Democratic Majority*, 124 POL. SCI. Q., no.1 (2009).

This decline in competitive districts during the past two decades coincided, not surprisingly, with the rise in sophisticated tools for the line drawers. Indeed, the most significant change occurred between the 1981 and 1991 redistricting cycles. For instance, the architect of California's 1981 redistricting, Congressman Philip Burton, "used teams of individuals to analyze massive hard-copy reports of voter registration data, election results, census data, and precinct maps using simple calculators and colored markers."⁴⁷ One decade later, the available technology had changed dramatically. The Supreme Court described the capabilities of the software REDAPPL, which the Texas redistricters used in 1991:

REDAPPL permitted redistricters to manipulate district lines on computer maps, on which racial and other socioeconomic data were superimposed. At each change in configuration of the district lines being drafted, REDAPPL displayed updated racial composition statistics for the district as drawn. REDAPPL contained racial data at the block-by-block level, whereas other data, such as party registration and past voting statistics, were only available at the level of voter tabulation districts (which approximate election precincts). The availability and use of block-by-block racial data was unprecedented; before the 1990 census, data were not broken down beyond the census tract level.⁴⁸

Thus, redistricters who sought to minimize competitiveness suddenly found themselves armed with new, high-tech tools with which to accomplish this objective.

C. California's Redistrictings and Redistricting Ballot Initiatives

In the past forty years, redistricting has been especially contentious in California. Both the process and the resulting plans have been the targets of litigation and of ballot measures. These experiences helped to shape Proposition 11 and its successful campaign.

⁴⁷ Micah Altman, Karin Mac Donald, & Michael McDonald, *From Crayons to Computers: The Evolution of Computer Use in Redistricting*, 23 SOC. SCI. COMPUTER REV. 334, 336 (2005). Because of the difficulty in using this data, Burton often relied upon his own knowledge of the state's demography and voting patterns to assess proposed districts. Nevertheless, Burton was so knowledgeable that he was able to create a district plan that swung five congressional seats to the Democrats. *Id.*

⁴⁸ *Bush v. Vera*, 517 U.S. 952, 961 (1996).

Three of California's past four redistrictings were the subjects of litigation. In 1971, the Democratic-controlled Legislature and Republican Governor Ronald Reagan failed to agree to a redistricting plan.⁴⁹ Accordingly, the California Supreme Court adopted temporary redistricting plans for the 1972 election.⁵⁰ When the Legislature did not enact redistricting plans in 1972, the California Supreme Court appointed special masters to develop the plans,⁵¹ which it eventually adopted.⁵²

In 1981, the Democrat-controlled Legislature passed redistricting plans that Democratic Governor Jerry Brown signed.⁵³ Republicans, outraged over what they thought was blatant partisan gerrymandering, commenced two separate attacks to overturn these plans.⁵⁴ First, they placed three referenda on the June 1982 ballot; each proposition sought to replace one of the redistricting plans (assembly, senate, and congressional).⁵⁵ Republicans hoped that new plans could take effect immediately, but the California Supreme Court ordered the state to use the 1981 plans for the 1982 congressional and legislative elections.⁵⁶ The three plans used for the 1982 elections each lost the referenda vote by an average margin of sixty-three percent to thirty-seven percent.⁵⁷ Moreover, in

49 Passantino, *supra* note 34, at 3.

50 Legislature v. Reinecke, 492 P.2d 385, 390–91 (Cal. 1972).

51 Legislature v. Reinecke, 507 P.2d 626, 627–28 (Cal. 1973).

52 Legislature v. Reinecke, 516 P.2d 6, 9 (Cal. 1973).

53 Assembly v. Deukmejian, 639 P.2d 939, 942 (Cal. 1982).

54 Nicholas Stephanopoulos, *Reforming Redistricting: Why Popular Initiatives to Establish Redistricting Commissions Succeed or Fail*, 23 J. L. & POL. 331, 360 (2007) [hereinafter Stephanopoulos, *Reforming Redistricting*]. Critics of the plans used colorful language to voice their objections: "One Republican denounced the Burton plan as an 'outrageous, blatant, partisan carving up of the people,' another likened it to the Jewish Holocaust, while a third, adding one more insensitive religious metaphor, compared Speaker Brown to the contemporary Iranian theocrat, the Ayatollah Khomeini." J. Morgan Kousser, *Reapportionment Wars: Party, Race, and Redistricting in California, 1971–1992*, in RACE AND REDISTRICTING IN THE 1990S, at 134, 153 (Bernard Grofman ed., 1998). For his part, Representative Burton, the architect of the plan, described a district that spanned the San Francisco Bay and four counties as "my contribution to modern art." Daniel Borenstein, *The California Experience: Why Most of the Media Ignored Redistricting*, 1 ELECTION L.J. 141, 142 (2002).

55 Kousser, *supra* note 54. Proposition 10 challenged the congressional plan; Proposition 11 sought to replace the state senate redistricting; and Proposition 12 challenged the assembly remap. *California 1982 Ballot Propositions*, BALLOTPEDIA, http://ballotpedia.org/wiki/index.php/California_1982_ballot_propositions (last visited Oct. 23, 2010).

56 Assembly v. Deukmejian, 639 P.2d 939, 963.

57 Specifically, Proposition 10 lost 35.4% to 64.6%; Proposition 11 lost 37.8% to 62.2%; and Proposition 12 lost 37.9% to 62.1%. See CALIFORNIA SECRETARY OF STATE, STATEMENT OF VOTE: JUNE 8, 1982, GENERAL ELECTION (1982). The wording of the propositions provided that a "yes" vote approves, a "no" vote rejects" the redistricting statutes involved. Thus, a majority of "no" votes for a measure overturned the particular redistricting statute in question. *Id.*

November 1982, a Republican was elected to replace Governor Brown.⁵⁸ Accordingly, the lame duck Democratic governor called a special session of the Legislature to commence in December 1982, one month before Governor Brown was to step down, to develop new plans.⁵⁹ The Democrats drew plans that offered sufficient protections to Republicans and garnered the necessary two-thirds vote to receive “urgency” status,⁶⁰ which caused the plans to be sent to Governor Brown before the end of his term.⁶¹ The new plans remained in effect through 1990.⁶² As a second means to overturn the Democrat’s plans, the Republicans placed onto the November 1982 ballot Proposition 14.⁶³

In 1991, Governor Pete Wilson vetoed the redistricting plans approved by the Legislature.⁶⁴ Since the Legislature did not have sufficient votes to override the veto,⁶⁵ the governor initiated mandate proceedings in the California Supreme Court.⁶⁶ The court exercised its original jurisdiction and appointed three special masters, whom they instructed to develop the redistricting plans after conducting public hearings.⁶⁷ The California court accepted and adopted the Special Masters’ recommendations with minor modifications.⁶⁸

Finally, in 2001, the Golden State avoided major litigation over its redistricting plan when Democratic and Republican leaders found common ground: preservation of incumbents.⁶⁹ As

⁵⁸ *Badham v. Eu*, 694 F. Supp. 664, 666 (N.D. Cal. 1988).

⁵⁹ *Id.*

⁶⁰ Pursuant to the California Constitution, “urgency statutes” must be “necessary for immediate preservation of the public peace, health, or safety,” and passed by two thirds of each house. CAL. CONST. art. IV, § 8(d). Moreover, as an urgency statute, the statute redistricting the state legislature was not subject to a referendum. *Legislature v. Deukmejian*, 669 P.2d 17, 22 (Cal. 1983). The statute establishing the state’s new congressional lines would have been subject to a referendum, but no one challenged it. *Id.*

⁶¹ *Kousser*, *supra* note 54, at 156.

⁶² *Passantino*, *supra* note 34, at 6.

⁶³ *See infra* notes 76–84 and accompanying text.

⁶⁴ *Wilson v. Eu*, 816 P.2d 1306, 1306 (Cal. 1991).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 1307.

⁶⁸ *Wilson v. Eu*, 823 P.2d 545, 559 (Cal. 1992).

⁶⁹ Later, the state’s Republicans revealed that they reached this accommodation after playing a “bluff” in 2001. Because of the strong Democratic majorities in the legislature (twenty-six to fourteen in the Senate and fifty to thirty in the Assembly) and a Democrat, Gray Davis, occupying the governor’s mansion, Democrats could pass redistricting legislation without a single Republican vote. Republicans threatened to submit the redistricting to a statewide referendum. Actually, however, the state party had “absolutely no money for a referendum,” admitted then-Assembly Republican Jim Brulte. Jim Sanders, *Precursor to Prop. 77 ‘Orchestrated Well’: Both Parties Got What They Wanted in 2001, at Least in the Short Term*, SACRAMENTO BEE, Oct. 19, 2005, at A3. Despite their ability to pass redistricting legislation and the likelihood that a referendum would not overturn the redistricting plans, Democrats accepted the deal. Considerations for the Democrats included the ability to shore up several congressional seats won in

the *Los Angeles Times* characterized the plan: “Most legislative districts are so safe that the real battles are in the primary elections.”⁷⁰ The Legislature drew both congressional and legislative lines “in a transparent effort to create ‘safe seats’ for virtually all state and federal legislators”⁷¹ Accordingly, the Democratic-controlled Legislature passed redistricting plans—with no significant Republican opposition—that Democratic Governor Gray Davis signed.⁷² Critics have described those plans as “bipartisan gerrymanders”⁷³ and “incumbent protection gerrymanders.”⁷⁴

2000, certainty over future district lines, and the concern that the Bush Administration might use the Voting Rights Act to challenge the plan. *Id.*

⁷⁰ Editorial, *Serving the Pols, Not the People*, L.A. TIMES, Nov. 10, 2004, at B10. An analysis of the plans demonstrates the successfulness of their agreement. The following table presents the number of assembly and state senate districts before and after the redistricting that had registered voter differentials between Republicans and Democrats of five percentage points or less:

TABLE 1
DISTRICTS WITH 5% REGISTRATION DIFFERENCES
BETWEEN REPUBLICANS AND DEMOCRATS
1992 AND 2002 REDISTRICTING PLANS

	Pre-Redistricting	Post-Redistricting
Assembly	14	3
State Senate	7	1

Sanders, *supra* note 69. Table 1 shows the significant drop in the number of competitive districts in both the Assembly and Senate after the redistricting.

⁷¹ Daniel P. Tokaji, *First Amendment Equal Protection: On Discretion, Inequality, and Participation*, 101 MICH. L. REV. 2409, 2515 (2003).

⁷² Carl Ingram, *Davis OKs Redistricting that Keeps Status Quo*, L.A. TIMES, Sep. 28, 2001, at B12.

⁷³ Michael S. Kang, *The Bright Side of Partisan Gerrymandering*, 14 CORNELL J. L. & PUB. POL’Y 443, 464 (2005).

⁷⁴ Lublin & McDonald, *supra* note 34, at 146. Ironically, the ultimate consequence of the Democrats agreeing to the “bipartisan gerrymander” is that it prevented the heavily-Democratic state from sharing in the Democratic electoral wave in 2006 and 2008. See Dan Morain, *Donors Give Millions, Hide Their Motives*, SACRAMENTO BEE, Apr. 18, 2010, at E1.

Just as California's redistricting plans have been hotly contested, so has its redistricting process; redistricting has been the subject of five California propositions since the 1980s.⁷⁵ The first four failed by significant margins. The fifth finally succeeded, but by less than two percentage points.

Proposition 14 appeared on the November 1982 ballot.⁷⁶ It sought to create a redistricting commission whose members would be selected by judges, the major parties, and by any other party representing at least ten percent of the Legislature.⁷⁷ California Republicans were the primary financial supporters of the proposition, and several interest groups also backed it.⁷⁸ The Democratic Party and its leaders, especially Governor Jerry Brown and Assembly Speaker Willie Brown, were its primary opponents.⁷⁹ The proposition lost by a vote of 44.5% to 54.5%.⁸⁰

After the defeat of Proposition 14 and the subsequent blocking of the Sebastiani Plan, the Republicans, under the stewardship of Governor Deukmejian, developed a new proposal which became Proposition 39 on the November 1984 ballot.⁸¹ This measure proposed to establish a redistricting commission with eight of its ten members consisting of retired state court judges.⁸² Both parties spent approximately \$4 million on the

⁷⁵ The California Supreme Court blocked two additional proposals from being submitted to the voters. Assemblyman Don Sebastiani (heir to the wine fortune) and several Republican campaign consultants (still angry from the loss of potential fees that would have resulted from another round of competitive elections under new redistricting plans) prepared another referendum for a December 1983 special election. The proposed statutes would redraw the congressional and state legislative districts. Kousser, *supra* note 54, at 156. Collectively, they were dubbed the "Sebastiani Plan." Alan Heslop, REDISTRICTING REFORM IN CALIFORNIA 2 (2004), http://www.claremontmckenna.edu/rose/publications/pdf/conf_redistricting_paper.pdf. The state legislature and several Democratic officeholders petitioned the California Supreme Court to prevent the holding of the special election. *Legislature v. Deukmejian*, 669 P.2d 17, 18 (1982). The court ruled that the state could only be redistricted once per decade. *Id.* at 22. The court also said that the holding of the special election was prevented. *Id.* at 31. Two decades later, Proposition 24, a proposal intended for the March 2000 ballot, would have transferred responsibility for drafting redistricting plans from the state legislature to the California Supreme Court, which would then appoint a panel of special masters to conduct hearings and prepare the actual plans. *Senate v. Jones*, 988 P.2d 1089, 1092–93 (Cal. 1999). Because the measure violated a requirement that propositions must involve only a single subject (it also included provisions relating to the compensation of state legislators and other officers), the state's highest court blocked the proposal from appearing on the ballot. *Id.* at 1105.

⁷⁶ See *supra* note 63 and accompanying text.

⁷⁷ Heslop, *supra* note 75, at 1.

⁷⁸ Stephanopoulos, *Reforming Redistricting*, *supra* note 54, at 361.

⁷⁹ *Id.* at 361–62.

⁸⁰ Passantino, *supra* note 34, at 6.

⁸¹ Kousser, *supra* note 54, at 157–58.

⁸² Heslop, *supra* note 75, at 2.

campaign.⁸³ Nevertheless, Proposition 39 lost by a similar margin to that of Proposition 14, 44.8% in favor versus 55.2% against.⁸⁴

Having failed in the court of public opinion, the Republicans shifted their efforts to actual courts. However, they had no greater success.⁸⁵ Thus, in anticipation of the post-1990 Census redistricting, Republicans placed two propositions onto the June 1990 ballot.⁸⁶ The first, Proposition 118, would have retained initial authority over redistricting in the Legislature, but for such plans to become law it would have required that the redistricting plans receive two-thirds of the votes in each chamber, the signature of the governor, and approval by the voters in a referendum.⁸⁷ Proposition 119, submitted by a second group of Republicans, would have replaced the Legislature with a bipartisan commission whose members were nominated by non-profit, non-partisan organizations and selected by a panel of retired judges.⁸⁸ Supporters again contributed millions to the campaigns.⁸⁹ Proposition 118 failed by approximately 33% to 67%, while Proposition 119 lost by a vote of approximately 36% to 64%.⁹⁰

Finally, in 2005, after becoming frustrated by working with the Democratic-controlled state Legislature, Republican Governor Arnold Schwarzenegger made redistricting reform one of his primary goals.⁹¹ He ordered a special election in 2005.⁹² Included on the ballot was Proposition 77, which would have created a three-member commission to conduct the redistricting.⁹³ Proposition 77, along with the eight other

⁸³ Stephanopoulos, *Reforming Redistricting*, *supra* note 54, at 363–64.

⁸⁴ Heslop, *supra* note 75, at 3.

⁸⁵ See *Badham v. Eu*, 694 F. Supp. 664, 666 (N.D. Cal. 1988). In *Badham*, Republican Congressional representatives and voters challenged the redistricting bill signed by Governor Brown in 1983 as an “intentional, invidious and effective gerrymander” in violation of the Fourteenth Amendment. *Id.* at 667. The three judge panel granted defendants’ motion to dismiss, holding that plaintiffs could not amend their complaint to state a claim under *Davis v. Bandemer*. *Id.* at 673 (referring to *Davis v. Bandemer*, 478 U.S. 109 (1986)).

⁸⁶ Kousser, *supra* note 54, at 165.

⁸⁷ Heslop, *supra* note 75, at 3.

⁸⁸ Kousser, *supra* note 54, at 166; Heslop, *supra* note 75, at 4. If both propositions passed, the measure that received the largest majority would prevail. Kousser, *supra* note 54, at 166.

⁸⁹ One estimate calculated that the campaigns for and against the measure received a combined total of \$6 million. Kousser, *supra* note 54, at 166.

⁹⁰ Heslop, *supra* note 75, at 5.

⁹¹ Stephanopoulos, *Reforming Redistricting*, *supra* note 54, at 372.

⁹² Proclamation, *Governor Schwarzenegger Proclaims Special Election for November 8, 2005*, OFF. OF THE GOVERNOR (June 13, 2005), <http://gov.ca.gov/proclamation/2064/>.

⁹³ Stephanopoulos, *Reforming Redistricting*, *supra* note 54, at 372. Proposition 77 was just one part of a reform agenda for which the governor sought approval from the

propositions on the ballot, lost; Proposition 77 failing by a vote of 40.5% in favor to 59.5% against.⁹⁴

Thus, the five propositions after *Baker v. Carr* that were submitted to California voters lost. Table 2 summarizes these results:

TABLE 2
REDISTRICTING PROPOSITIONS
1982–2005

Year	Measure	For	Against	Difference
1982	Proposition 14	44.5	54.5	-10.0
1984	Proposition 39	44.8	55.2	-10.4
1990	Proposition 118	33.0	67.0	-34.0
1990	Proposition 119	36.2	63.8	-27.6
2005	Proposition 77	40.5	59.5	-19.0

Support for these propositions never reached 45%. Consequently, each proposition lost by a double-digit margin, with an average differential of 20.2%.

With this as the background leading up to the 2008 election, Proposition 11 qualified for the November 2008 ballot.

II. PROPOSITION 11: IF AT FIRST YOU DON'T SUCCEED . . .

In many ways, the passage of Proposition 11 in 2008 was aberrational. Most things about the contest were unusual, including its inception, fundraising, and support. Nevertheless, despite the benefit of all of these factors, it still nearly did not pass.⁹⁵

voters. He also included on the ballot propositions that would delay teachers from gaining tenure (Proposition 74), require employee consent to use union dues for political contributions (Proposition 75), and limit increases in state spending (Proposition 76). Jordan Rau, *Governor Puts Agenda on Ballot*, L.A. TIMES, June 14, 2005, at A1; *California Special Election, 2005*, WIKIPEDIA, http://en.wikipedia.org/wiki/California_special_election_2005 (last visited Oct. 5, 2010).

⁹⁴ Peter Nicholas & Jordan Rau, *Results Unsettle Gov.'s Supporters*, L.A. TIMES, Nov. 10, 2005, at A1. All of Governor Schwarzenegger's measures lost despite his raising and spending \$56 million on them. The total spent for all of the propositions in that election reached \$300 million. Richard L. Hasen, *Assessing California's Hybrid Democracy*, 97 CAL. L. REV. 1501, 1502 (2009).

⁹⁵ CALIFORNIA SECRETARY OF STATE, STATEMENT OF VOTE: NOVEMBER 4, 2008, GENERAL ELECTION 7 (2008) [hereinafter STATEMENT OF VOTE 2008], available at http://www.sos.ca.gov/elections/sov/2008_general/sov_complete.pdf.

During the post mortem of the 2005 special election, one critique found that Governor Schwarzenegger “took on too much. He took on everybody in sight.”⁹⁶ Accordingly, in 2008 he narrowed his focus to one target: redistricting.

Perhaps more importantly, as in any good sequel, several new actors joined Schwarzenegger. One factor that set Proposition 11 apart from its predecessors was the breadth of its conception and subsequent support. The proposal arose not from one of the political parties or the governor, but from the efforts of “good government” non-profit organizations—the drafters of the measure included the California branches of AARP, Common Cause, and the League of Women Voters.⁹⁷ The authors of the ballot arguments were the presidents of the California Taxpayers Association and the California offices of the League of Women Voters and AARP.⁹⁸ In addition to these organizations, proponents of the measure included the Los Angeles Chamber of Commerce, the California Chamber of Commerce, the California NAACP, the California Police Chiefs Association, and the ACLU of Southern California.⁹⁹ The proposition also received endorsements from a broad range of editorial boards.¹⁰⁰

Politically, the supporters of Proposition 11 were similarly diverse. Despite its non-profit roots, the measure became identified with Republican Governor Schwarzenegger.¹⁰¹ This occurred for good reason since he was an active campaigner and

⁹⁶ Nicholas & Rau, *supra* note 94.

⁹⁷ Kathay Feng, Executive Director, Common Cause, Gov. Schwarzenegger Touts Redistricting Reform, Highlights Continued Fight for Reform in California (Dec. 17, 2008), <http://gov38.ca.gov/index.php?/speech/11278/>.

⁹⁸ *California Online Voter Guide—2008 General Election*, CAL. VOTER FOUND., <http://www.calvoter.org/voter/elections/2008/general/props/prop11.html> (last visited Oct. 23, 2010).

⁹⁹ *California Passes Proposition 11 on Redistricting Reform*, AMERICANS FOR REDISTRICTING REFORM, <http://www.americansforredistrictingreform.org/documents/Proposition11.pdf> (last visited Oct. 23, 2010). Organizations with a particular focus on the interests of California’s minority populations, however, largely opposed Proposition 11. Opponents included the National Association of Latino Elected and Appointed Officials, the Mexican American Legal Defense and Education Fund, the NAACP Legal Defense Fund, and the Asian Pacific American Legal Center. *Id.*

¹⁰⁰ Included among the papers to endorse the measure were the *Los Angeles Times*, *San Francisco Chronicle*, *San Jose Mercury News*, *Fresno Bee*, *Torrance Daily Breeze*, *San Diego Union Tribune*, *Pasadena Now*, *L.A. Daily News*, *North County Times*, *Stockton Record*, *San Gabriel Valley Tribune*, *Santa Cruz Sentinel*, *Lompoc Record*, and *Redding Searchlight*. *California Proposition 11 (2008)*, BALLOTPEdia, [http://www.ballotpedia.org/wiki/index.php/California_Proposition_11_\(2008\)](http://www.ballotpedia.org/wiki/index.php/California_Proposition_11_(2008)) (last visited Jan. 5, 2011). The same source does not identify any editorial boards opposed to Proposition 11.

¹⁰¹ See, e.g., Nancy Vogel, *Prop. 11 Aims to Redo Remap*, L.A. TIMES, Oct. 14, 2008, at B1 [hereinafter Vogel, *Prop 11 Aims*].

fundraiser for the proposal.¹⁰² Despite its close connection to the Republican governor, the proposition nevertheless received significant support from high-profile Democrats. For instance, Gray Davis, the chief executive who Schwarzenegger replaced through the 2003 recall election, supported Proposition 11.¹⁰³ Other prominent Democratic supporters included Treasurer Bill Lockyer, former Assembly Speaker Robert Hertzberg, and former Controller Steve Westly.¹⁰⁴ California Forward, a recently-created reform group, also supported the measure.¹⁰⁵ The organization's co-chair was Leon Panetta, former eight-term Democratic congressman and chief of staff for President Clinton.¹⁰⁶

While Proposition 11's support was broad-based, its funding was anything but. Of the \$14 million contributed to the campaign, traditional Democratic supporters gave less than \$1 million.¹⁰⁷ Governor Schwarzenegger, in addition to campaigning for the measure, also supported it financially. His campaign contributions approached \$3 million.¹⁰⁸ Not only did contributions skew Republican, significant amounts came from Republicans outside of California. Non-California Republican contributors included New York City Mayor Michael Bloomberg, T. Boone Pickens,¹⁰⁹ and a group of Florida Republicans who donated large sums of money after a personal visit from Schwarzenegger.¹¹⁰

¹⁰² Michael Rothfeld, *Governor Talks, and Funds Flow*, L.A. TIMES, Dec. 14, 2008, at B1.

¹⁰³ Vogel, *Prop 11 Aims*, *supra* note 101.

¹⁰⁴ *Id.*; George Skelton, *Prop. 11 Beats the Alternative*, L.A. TIMES, Oct. 30, 2008, at B1.

¹⁰⁵ George Skelton, *Obama Takes the State's Best Bet*, L.A. TIMES, Jan. 8, 2009, at B1.

¹⁰⁶ *Id.*

¹⁰⁷ John Howard, *Redistricting: Ultimate Political Battle Looms in California*, CAPITOL WKLY., June 18, 2009, at A7; Nancy Vogel, *California Elections: Key Prop. 11 Donors Have GOP Ties*, L.A. TIMES, Oct. 24, 2008, at B1 [hereinafter Vogel, *California Elections*].

¹⁰⁸ George Skelton, *Prop. 11 Lead Signals Voters' Reform Mood*, L.A. TIMES, Nov. 13, 2008, at B1.

¹⁰⁹ Vogel, *Prop 11 Aims*, *supra* note 101.

¹¹⁰ Vogel, *California Elections*, *supra* note 107. This may overstate their contribution, since bankruptcy attorneys are seeking the return of \$250,000 contributed from Florida attorney Scott Rothstein, who pleaded guilty in January 2010 to running a billion-dollar Ponzi scheme. Anthony York, *Refund Sought for Disgraced Florida Lawyer's Donation to California's Prop. 11 Campaign*, L.A. TIMES POLITICAL BLOG (May 5, 2010, 3:50 PM), <http://latimesblogs.latimes.com/california-politics/2010/05/florida-lawyers-want-refund-for-california-political-contribution.html>.

Not only did Democrats not contribute to the campaign for Proposition 11, they did not contribute much to the opposition campaign either. In contrast to the \$14 million contributed in support of Proposition 11, the “No on 11” campaign received only \$1 million.¹¹¹

Also, in contrast to previous redistricting measures, Proposition 11 took a different approach to reform. Earlier propositions provided significant roles for either the major parties or for retired state court judges. For instance, Proposition 14 (1982) and Proposition 39 (1984) would have allowed the major parties to nominate the redistricting commission members.¹¹² Two of the propositions, 39 (1984) and 77 (2002), would have required that retired judges serve as commission members.¹¹³ Finally, two measures would have had judges either nominate (Proposition 14) or appoint (Proposition 119) the commissioners.¹¹⁴

Proposition 11, on the other hand, minimized the role of the parties and eliminated any role for retired judges.¹¹⁵ Instead, it proposed to establish a “Citizens Redistricting Committee” (CRC).¹¹⁶ The CRC would draw new district lines for the State Senate, Assembly, and Board of Equalization; under the proposition, the Legislature retained the authority to redraw congressional districts.¹¹⁷

¹¹¹ Howard, *supra* note 107.

¹¹² Heslop, *supra* note 75, at 1–2.

¹¹³ *Id.* at 2; Stephanopoulos, *Reforming Redistricting*, *supra* note 54, at 372.

¹¹⁴ Heslop, *supra* note 75, at 1, 4.

¹¹⁵ Retired judges were lightning rods for opponents’ attacks in earlier campaigns. Steven F. Huefner, *Don’t Just Make Redistricters More Accountable to the People, Make Them the People*, 5 DUKE J. CONST. L. & PUB. POL’Y 37, 41 (2010). Presumably for this reason, the drafters of Proposition 11 eliminated any role for them.

¹¹⁶ CAL. CONST. art. XXI, § 1(d), *amended by* Prop. 11, § 3.2.

¹¹⁷ CAL. CONST. art. XXI, § 2(a), *amended by* Prop. 11, § 3.3; CAL. CONST. art. XXI, § 1(b), *amended by* Prop. 11, § 3.2. The drafters decided to exclude congressional districts from the reach of Proposition 11 to reduce the likelihood that Speaker of the House Nancy Pelosi would aggressively oppose the measure. Vogel, *Prop 11 Aims*, *supra* note 101. Pelosi had vowed to finance the opposition effort heavily if Congress was included. John Howard, *New Redistricting Initiative Targets Congressional Seats*, CAPITOL WKLY. (Sept. 3, 2009, 12:00 AM), www.capitolweekly.net/article.php?xid=y859w0qbbs932v. Although Pelosi and Senator Barbara Boxer did support the opposition, the \$1 million raised by opponents fell far short of the \$14 million contributed in favor of the proposition. Howard, *supra* note 107. By contrast, when congressional lines were implicated in 2005’s Proposition 77, Pelosi spearheaded the effort to defeat the motion. In fact, after the 2005 election, the opposition campaign had more money in the bank (\$4 million) than the “No on 11” campaign raised during the entire campaign (\$1 million). Anthony York, *Redistricting Fight—from Riches to Rags*, CAPITOL WKLY., Oct. 9, 2008, at A1.

The CRC would consist of fourteen members: five Democrats, five Republicans, and four persons not registered with either party.¹¹⁸ Unlike prior proposals, neither the parties, retired judges, nor organizations would nominate prospective members; instead, they would submit applications.¹¹⁹ The State Auditor would establish a panel of three State Auditors to screen the applicants.¹²⁰ This panel would strike applications of persons who did not meet a series of requirements identified in the proposition.¹²¹ Then, this pool of qualified applicants would be reduced as follows:

- (1) The state auditors would narrow each of the three groups to twenty members;¹²²
- (2) The majority and minority leaders of the Assembly and Senate could each strike up to two applicants;¹²³ and
- (3) The State Auditor would randomly draw three Democrats, three Republicans, and two persons not registered with either party, and these persons would serve on the Citizens Redistricting Committee.¹²⁴

¹¹⁸ CAL. CONST. art. XXI, § 2(c)(2), *amended by* Prop. 11, § 3.3.

¹¹⁹ CAL. GOV'T CODE § 8252(a)(1) (West Supp. 2010), *added by* Prop. 11, § 4.1.

¹²⁰ CAL. GOV'T CODE § 8252(b) (West Supp. 2010), *added by* Prop. 11, § 4.1.

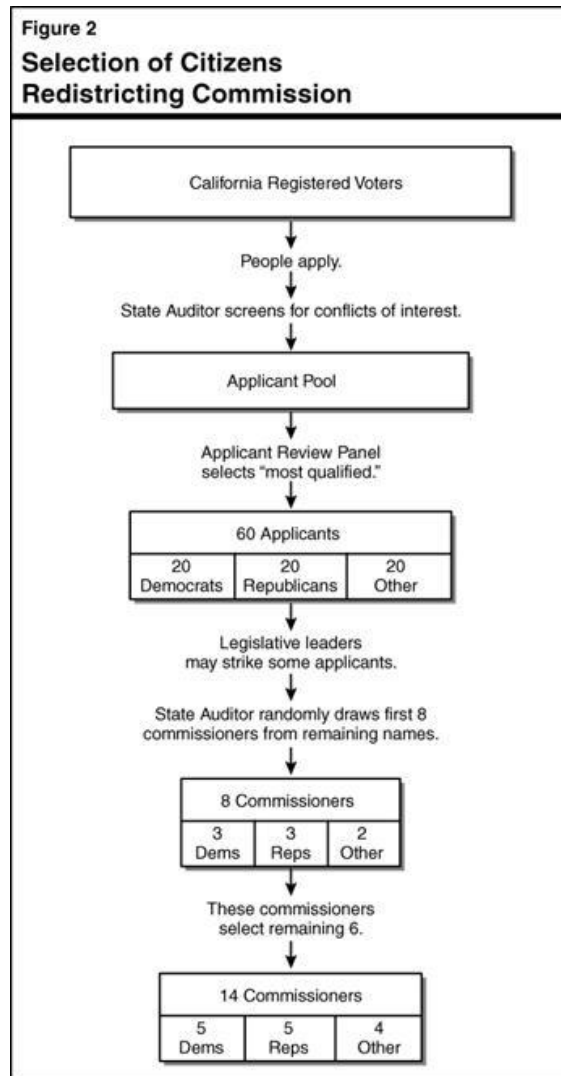
¹²¹ Proposition 11 contains the following minimum criteria for CRC members: (1) Be continuously registered in California and have not changed parties for at least five years, see CAL. CONST. art. XXI, § 2(c)(3), *added by* Prop. 11, § 3.3; (2) Have voted in two of the last three statewide general elections, see CAL. CONST. art. XXI, § 2(c)(3), *added by* Prop. 11, § 3.3; (3) Within ten years of application, neither the applicant nor an immediate family member had: served as a candidate for federal or state office, served as an officer, employee, or consultant of a political party, served as a member of a political party central committee, been a registered lobbyist, served as paid congressional, legislative or Board of Equalization staff, contributed \$2,000 or more to any candidate for elective office in any year, see CAL. GOV'T CODE § 8252(a)(2)(A) (West Supp. 2010), *added by* Prop. 11, § 4.1. While presumably well intended, these limitations would have the effect of filtering out many of the most qualified applicants. Consequently, as Arturo Vargas, the Executive Director of the National Association of Latino Elected and Appointed Officials noted, "We have to identify those folks who are not engaged . . . and convince them to serve." Shane Goldmacher, *Drawing Lines, Erasing Biases*, L.A. TIMES, Feb. 3, 2010, at AA1.

¹²² CAL. GOV'T CODE § 8252(d) (West Supp. 2010), *added by* Prop. 11, § 4.1.

¹²³ CAL. GOV'T CODE § 8252(e) (West Supp. 2010), *added by* Prop. 11, § 4.1.

¹²⁴ CAL. GOV'T CODE § 8252(f) (West Supp. 2010), *added by* Prop. 11, § 4.1.

Finally, these eight members would then select two additional members from each of the three sub-pools.¹²⁵ Figure 3, prepared by the California Legislative Analyst's Office, presents this selection process graphically:

FIGURE 3¹²⁶

¹²⁵ CAL. GOV'T CODE § 8252(g) (West Supp. 2010), *added by* Prop. 11, § 4.1.

¹²⁶ *Proposition 11*, CAL. LEGIS. ANALYST'S OFF. (July 17, 2008), http://www.lao.ca.gov/ballot/2008/11_11_2008.aspx (internal figure number omitted).

Proponents and opponents alike recognized the unusual nature of these procedures. Bob Stern, the president of the Center for Governmental Studies, helped draft Proposition 11.¹²⁷ Stern acknowledged that the measure is “complicated It does take a lot of understanding to vote yes on this.”¹²⁸ George Skelton, a political commentator with the *Los Angeles Times* and Proposition 11 advocate, described its process as “convoluted.”¹²⁹ Other words used to characterize these procedures included “complex,” “confusing and unfair,” and “byzantine.”¹³⁰ Probably the most colorful description, however, was the following: “The mechanisms for selecting the panel seem about as convoluted as the weaning out process of a reality TV series.”¹³¹

Proposition 11 provides criteria that the CRC must follow in drawing new districts. First, it must comply with the federal requirements of equal population and the Voting Rights Act. Second, districts shall be contiguous. Third, districts must respect the geographic integrity of sub-jurisdictions to the extent possible. Fourth, to the extent possible, districts should be geographically compact. Finally, Assembly districts should be nested within Senate districts—two Assembly districts wholly within each Senate district.¹³²

¹²⁷ CENTER FOR GOVERNMENTAL STUDIES, REDISTRICTING REFORM IN CALIFORNIA: PROPOSITION 11 ON THE NOVEMBER 2008 CALIFORNIA BALLOT 5 n.2 (2008), http://www.cgs.org/images/publications/redist_memo_rpt_102408_fin.pdf.

¹²⁸ Debra J. Saunders, *Return to Redistricting Sanity*, RASMUSSEN REPORTS (Oct. 5, 2008), http://www.rasmussenreports.com/public_content/political_commentary/commentary_by_debra_j_saunders/return_to_redistricting_sanity.

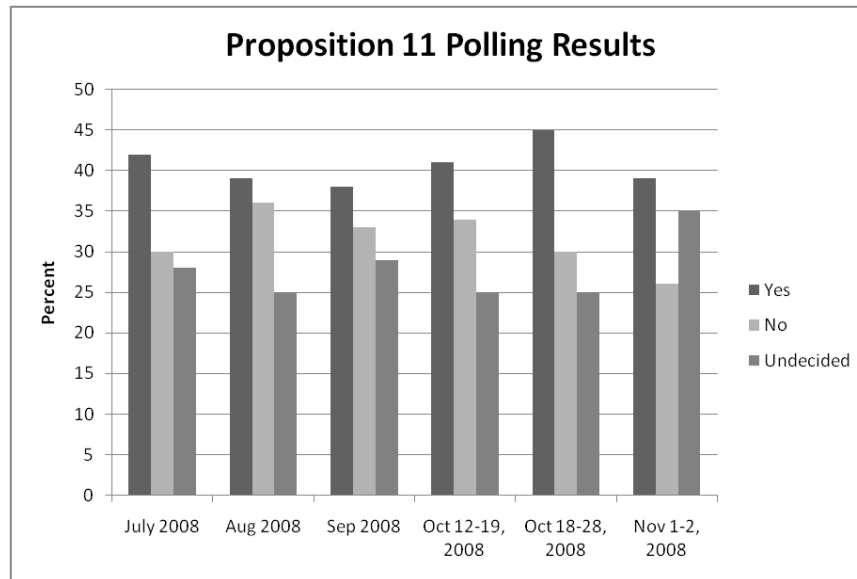
¹²⁹ George Skelton, *Reform Takes a Tough Road*, L.A. TIMES, Jan. 18, 2010, at A2.

¹³⁰ Howard, *supra* note 107; Matthew Yi, *Prop. 11 Leading in Early Returns*, S.F. CHRON. (Nov. 5, 2008), http://articles.sfgate.com/2008-11-05/news/17127045_1_redrawing-district-district-lines-independent-citizen. Recently, Professor John N. Friedman of Harvard's Kennedy School of Government called the selection process “a foray into uncharted territory” that could produce a highly positive outcome or “it could really be a disaster.” John Mecklin, *Redrawn and Quartered: Will the Extraordinary California Experiment in Redistricting Spread to Other States?*, MILLER-MCCUNE, Mar./Apr. 2010, at 8, 10.

¹³¹ Saunders, *supra* note 128.

¹³² CAL. CONST. art. XXI, § 2(d), *amended by* Prop. 11, § 3.3.

Despite its vast fundraising and endorsement advantages, Proposition 11 had a difficult time attracting the attention of voters.¹³³ As Figure 4 indicates, in every poll taken in the five months preceding the election, support for the measure never exceeded forty-five percent:

FIGURE 4¹³⁴

For most propositions, political consultants expect support to fall during the campaign. Thus, experts anticipated a difficult road ahead for Proposition 11.¹³⁵ Furthermore, at least twenty-five percent of voters remained undecided about the proposition, though this number rose to thirty-five percent on the eve of the election.¹³⁶

Thus, prior to the election, the factors relating to Proposition 11 were mixed. It had overwhelming advantages in fundraising and endorsements. On the other hand, four previous redistricting initiatives in California had lost by an average

¹³³ Nationally, this election involved the historic candidacy of Barack Obama. In California, the ballot also included Proposition 8, which would have restricted the definition of marriage to opposite-sex couples, thereby overturning the California Supreme Court's ruling of the *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), that same-sex couples have a constitutional right to marry.

¹³⁴ *California Proposition 11 (2008)*, *supra* note 100.

¹³⁵ A low percentage of "Yes" voters "is always kind of ominous. Usually initiatives have to start out with a big lead to withstand the No campaign against it," said Mark DiCamillo, Field Poll director. York, *supra* note 117.

¹³⁶ *California Proposition 11 (2008)*, *supra* note 134.

margin of twenty percentage points.¹³⁷ Furthermore, voter support for Proposition 11 appeared at best to be tepid.¹³⁸

In fact, Proposition 11 did succeed, but barely. In the closest proposition contest on the ballot, the measure prevailed by a margin of 50.9% to 49.1%.¹³⁹

Although it passed, this result may not reflect enthusiastic support, but instead that its supporters were less likely to ignore the proposition than were its opponents. Table 3 provides a recap of the initiatives that were on the November 4, 2008 ballot:

TABLE 3¹⁴⁰
**COMPARING SUPPORT FOR PROPOSITIONS
NOVEMBER 2008**

Proposition Number and Description		Total "Yes" and "No" Votes	% of Votes Cast for Prop 11
1A	High-Speed Train Bond	12,696,429	105.9
2	Farm Animals Confinement	12,935,507	107.9
3	Children's Hospital Bond	12,638,905	105.4
4	Parental Notification	12,948,951	108.0
5	Nonviolent Drug Offenses Sentencing	12,721,989	106.1
6	Police and Law Enforcement Funding	12,384,019	103.3
7	Renewable Energy Generation	12,657,416	105.5
8	Eliminates Same-Sex Couples Marriage	13,402,566	111.8
9	Criminal Justice System Victims' Rights	12,411,433	103.5
10	Alternative Fuel and Renewable Energy Bonds	12,562,820	104.8
11	Redistricting	11,992,688	100.0
12	Veterans' Bond Act	12,288,826	102.5

Table 3 presents the twelve propositions on the November 2008 ballot and the total votes in the contest. The last column represents the ratio of votes cast for each proposition compared to the total votes cast for Proposition 11. It shows that fewer voters cast a vote—either “Yes” or “No”—for Proposition 11 than for any other proposition. Between 2.5% more votes (290,000)

¹³⁷ See *supra* Table 2.

¹³⁸ See *supra* Figure 4.

¹³⁹ CALIFORNIA SECRETARY OF STATE, STATEMENT OF VOTE: NOVEMBER 4, 2008, GENERAL ELECTION 7 (2008) [hereinafter STATEMENT OF VOTE 2008], available at http://www.sos.ca.gov/elections/sov/2008_general/sov_complete.pdf.

¹⁴⁰ *Id.* at 7.

and 11.8% more votes (1.4 million) were cast for propositions other than for Proposition 11. One consideration is voter roll-off, which tends to be greater the lower an issue physically appears on the ballot.¹⁴¹ Since Proposition 11 was the second to last measure in the election, roll-off could explain this disparity. Studies, however, have found that voter roll-off in lower visibility contests can be double that of higher visibility contests.¹⁴² The reverse seems to have occurred in California in 2008, where a higher visibility contest, Proposition 11, had a higher roll-off than did lower visibility measures.¹⁴³

Despite the effort expended in support of the measure, both the opposition and the electorate in general displayed ambivalence toward Proposition 11. Certainly, most Democratic leaders opposed the motion. The “No on 11” campaign listed both Speaker Pelosi and Senator Boxer as members.¹⁴⁴ Furthermore, with significant majorities in both state houses, Democrats seemed to be the party with the most to lose.¹⁴⁵ Nevertheless, the measure’s drafters specifically excluded congressional re-districting from its reach to avoid a major fundraising effort by Pelosi.¹⁴⁶ This strategy worked. In 2005, Pelosi spearheaded the fundraising effort, but she also received significant assistance from California Senate President Pro Tem Don Perata and then-Assembly Speaker Fabian Nunez.¹⁴⁷ Furthermore, two powerful unions in California, the California Teachers Association and the Service Employees International Union, staunchly opposed the governor’s special election slate in 2005.¹⁴⁸ In 2008, both unions were neutral on Proposition 11.¹⁴⁹ As a result of these differences, in 2005 the opposition to Proposition 77 spent \$13

¹⁴¹ Roll-off is “[t]he difference between how many people go to the polls and how many people actually vote on a specific [contest].” David C. Brody, *The Use of Judicial Performance Evaluation to Enhance Judicial Accountability, Judicial Independence, and Public Trust*, 86 DENV. U. L. REV. 115, 127–28 (2008). In legal and academic literature, “roll-off,” “falloff,” “dropoff,” and “ballot fatigue” refer to the same concept. *Id.* at 128. In the November general election, the total votes cast were 13.74 million. STATEMENT OF VOTE 2008, *supra* note 139, at 3. Thus, even Proposition 8, the measure with the highest votes cast, experienced some roll-off (340,000 votes). *Id.* at 62.

¹⁴² James Sample, Caperton: *Correct Today, Compelling Tomorrow*, 60 SYRACUSE L. REV. 293, 301 n.34 (2010).

¹⁴³ For instance, despite Governor Schwarzenegger’s campaigning and national fundraising efforts, Proposition 11 received fewer votes than did two bond initiatives, Propositions 10 and 12. *See supra* Table 3.

¹⁴⁴ Howard, *supra* note 107.

¹⁴⁵ Vogel, *California Elections*, *supra* note 107.

¹⁴⁶ Vogel, *Prop 11 Aims*, *supra* note 101.

¹⁴⁷ York, *supra* note 117.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

million¹⁵⁰ (which does not include \$4 million in unexpended funds);¹⁵¹ in 2008, the opposition to Proposition 11 spent only \$1 million.¹⁵²

Apparently, the Democrats' reserved approach to the measure stemmed from more than just Proposition 11's failure to apply to congressional redistricting. Possibly because of the weak performance of previous redistricting initiatives, the Democrats did not expect Proposition 11 to succeed.¹⁵³

Voters also lacked enthusiasm for the redistricting measure. As Figure 4 demonstrates, throughout the campaign, polling indicated that at least twenty-five percent of voters were undecided regarding Proposition 11, peaking at thirty-five percent on the eve of the election.¹⁵⁴ For their part, prospective voters indicated that the measure was low on their list of priorities for the election.¹⁵⁵ Besides the presidential election, among the eleven other initiatives on the ballot was Proposition 8, regarding same-sex marriage.¹⁵⁶ In contrast to the combined \$15 million raised in support and opposition of Proposition 11, Proposition 8 raised a combined total of \$83.2 million from both sides.¹⁵⁷ The high roll-off for Proposition 11 likely resulted from the mixture of many factors: confusion, uncertainty, placement on the ballot, ballot fatigue,¹⁵⁸ and attention focused on other choices on the ballot.

¹⁵⁰ LEAGUE OF WOMEN VOTERS ET AL., BUILDING A NATIONAL REDISTRICTING REFORM MOVEMENT: REDISTRICTING CONFERENCE REPORT 11, *available at* http://www.americansforredistrictingreform.org/html/documents/SLCRedistrictingReport_FINAL.pdf.

¹⁵¹ York, *supra* note 117.

¹⁵² Howard, *supra* note 107.

¹⁵³ Editorial, *A Political Triple Whammy*, L.A. TIMES, Feb. 16, 2010, at A12.

¹⁵⁴ Likely some of this uncertainty resulted from the complexity of the proposition itself. *See supra* text accompanying notes 127–131.

¹⁵⁵ As one voter who admitted that she abstained from voting on the proposition stated: "Redistricting. We need to do more immediate things." Tamara Audi et al., *California Votes for Prop 8*, WALL ST. J. (Nov. 5, 2008, 10:59 PM), http://online.wsj.com/article/NA_WSJ_PUB:SB122586056759900673.html.

¹⁵⁶ *See supra* Table 3.

¹⁵⁷ Lisa Leff, *Donors Pumped \$83M into Prop. 8 Race*, KSL.COM (Feb. 2, 2009, 8:05 PM), <http://www.ksl.com/?nid=148&sid=5490691>. The measure's sponsors raised \$39.9 million and spent all but \$983,000; the opposition received \$43.3 million and had \$730,000 left after the election. *Id.* As another indicator of the interest in this measure, it received the highest vote total of any of the measures in the election. *See supra* Table 3. Another initiative, Proposition 2, which sought to impose standards for confinement of certain farm animals, also attracted significant contributions; supporters contributed \$10.6 million, and opponents donated \$8.9 million. *California Proposition 2 (2008)*, WIKIPEDIA, [http://en.wikipedia.org/wiki/California_Proposition_2_\(2008\)](http://en.wikipedia.org/wiki/California_Proposition_2_(2008)) (last visited Oct. 23, 2010).

¹⁵⁸ While more ballot initiatives lead to higher turnout, too many policy questions may have a negative effect of decreasing turnout. *See* Caroline J. Tolbert, John A. Grummel & Daniel A. Smith, *The Effects of Ballot Initiatives on Voter Turnout in the American States*, 29 AM. POL. RES. 625, 635 (2001). *See also* Kirk J. Stark, *The Right to*

Was the passage of Proposition 11 foreseeable despite the abysmal track record of California redistricting initiatives? Under the circumstances, yes. After reviewing redistricting initiatives nationwide, Nicholas Stephanopoulos developed a set of factors leading to the passage of such measures. He analyzed the campaigns of every redistricting initiative since 1936,¹⁵⁹ including the California predecessors of Proposition 11, and initiatives from Arkansas (1936), Oklahoma (1960 and 1962), North Dakota (1973), Colorado (1974), Ohio (1981 and 2005), and Arizona (2000).¹⁶⁰ Stephanopoulos concluded that the most important variable in determining a proposition's success was the legislative-majority party's opposition to the measure.¹⁶¹ He identified several characteristics of successful opposition campaigns run by the majority party including "raising large sums of money, campaigning furiously against the measure, and striving to frame the debate in the most advantageous possible terms."¹⁶²

A comparison between the campaigns of the two most recent California redistricting initiatives supports Stephanopoulos' conclusion. In 2005, the opposition to Proposition 77 raised \$14 million; in 2008, the "No on 11" campaign raised only \$1 million.¹⁶³ In 2005, Speaker Pelosi pledged: "I am very committed to defeating Proposition 77, and I am raising money to defeat it."¹⁶⁴ In 2008, she basically sat on the sidelines since the measure did not involve congressional districts. In 2005, the opposition successfully characterized the proposition as "a Republican power grab."¹⁶⁵ In 2008, the "Yes on 11" campaign succeeded by focusing on anti-incumbent sentiments.¹⁶⁶

Vote on Taxes, 96 NW. U. L. REV. 191, 248 (2001) (noting that voters feel a "ballot fatigue" when "faced with ever longer lists of issues to decide on election day").

¹⁵⁹ Stephanopoulos, *Reforming Redistricting*, *supra* note 54, at 346.

¹⁶⁰ *See id.*

¹⁶¹ *Id.* at 380. In reaching this conclusion, Stephanopoulos also identified several factors that were not dispositive. These included the governor's position on the proposition, the legislative minority's support, the actual proposal, interest group positions, and the extent of any recent gerrymanders. *Id.* at 379–80.

¹⁶² *Id.* at 381.

¹⁶³ *See supra* note 111 and accompanying text.

¹⁶⁴ Christian Berthelsen, *Group Backing Remap Initiative Caught up in Donations Dispute*, S.F. CHRON., Oct. 7, 2005, at B3. As part of this commitment, she asked all thirty-three California Democrats in Congress to contribute against the proposition. *Id.*

¹⁶⁵ Hubert Huang, *The Strange Journey of Proposition 77*, CARDINAL INQUIRER (Nov. 3, 2005), <http://www.stanford.edu/class/comm273/2005/hhboy77/strangejourney.html> ("In an attempt to dispel the notion that the proposition is a disguise for a Republican power grab, Schwarzenegger went to Ohio and show [sic] his support for its redistricting initiative, the Democrat-backed Issue 4.").

¹⁶⁶ John Wildermuth, *Prop. 11 Won By Not Talking About Redistricting*, S.F. GATE POLITICS BLOG (Dec. 1, 2008, 6:06 AM), http://www.sfgate.com/cgi-bin/blogs/nov05election/detail?blogid=14&entry_id=33086#ixzz0swyfQTzL.

Nicholas Mosich, on the other hand, argues that 2005's Proposition 77 actually lost because of three different factors. Specifically, he identified: "(1) California's history of resistance to redistricting reform initiatives, (2) fierce bipartisan opposition to Proposition 77, and (3) voters' perception of the special election as a referendum on Governor Schwarzenegger's leadership."¹⁶⁷

Looking solely at the 2005 election, Mosich's conclusions are appealing; they do not, however, explain the subsequent success of Proposition 11. First, Californians certainly have demonstrated a reluctance to adopt a new redistricting procedure.¹⁶⁸ Indeed, this reluctance may have manifested itself in the narrowness of Proposition 11's victory. Nevertheless, the measure did taste victory. Furthermore, even if this history were a factor, one would expect it to have a greater effect in 2008, only three years after the defeat of Proposition 77, rather than in 2005, fifteen years after the last failed proposition.¹⁶⁹ Second, Schwarzenegger's approval and disapproval ratings were almost identical shortly before each election. According to the Field Poll, his approval ratings rose from thirty-seven percent in October 2005 to thirty-eight percent in September 2008; and during the same period, his disapproval ratings fell from fifty-six percent to fifty-two percent.¹⁷⁰ Thus, two of the factors identified by Mosich do not help to explain Proposition 11's success. The second factor he identifies, fierce bipartisan opposition, may help to explain Proposition 77's failure. It does not, however, explain the failure of earlier propositions, which only one party opposed.

Thus, Stephanopoulos' theory—that the legislative-majority party's vigorous opposition to the measure is the most significant factor in the failure of a proposition—seems to explain best the failure of Proposition 11's predecessors. The lack of such opposition also best explains Proposition 11's subsequent success. This was the first redistricting proposition not to face concerted opposition from the majority party, and it was the first such proposition to succeed.

¹⁶⁷ Nicholas D. Mosich, Note, *Judging the Three-Judge Panel: An Evaluation of California's Proposed Redistricting Commission*, 79 S. CAL. L. REV. 165, 198–99 (2005).

¹⁶⁸ *Id.* at 198.

¹⁶⁹ See *supra* Table 2.

¹⁷⁰ Mark DiCamillo & Mervin Field, *New Record Low Job Ratings for Both Schwarzenegger and the State Legislature*, FIELD POLL, Oct. 13, 2009, at 2, <http://www.field.com/fieldpollonline/subscribers/R1s2315.pdf>.

III. COMPETITIVENESS: IS IT DESIRABLE?

Supporters of Proposition 11 promised one result: competitive elections. But, are competitive elections desirable? Even if they are, are they attainable in California? These are the questions that the next two sections explore.

To sell Proposition 11 to the voters, its proponents maintained that it would increase electoral competitiveness.¹⁷¹ Governor Schwarzenegger, the proposition's top contributor and fundraiser and highest-profile proponent, charged that "the current redistricting system . . . insulates lawmakers from competitive general elections."¹⁷² Similarly, Democrat and former-Controller Steve Westly assured the public that the proposition would create more competitive election districts.¹⁷³ But the "competitiveness" drumbeat did not stop there. Others who touted the proposition's ability to increase competitiveness included redistricting experts,¹⁷⁴ a non-profit organization,¹⁷⁵ and several newspaper editorial boards.¹⁷⁶

Despite this focus on competitiveness in the 2008 campaign, no discussion arose concerning the merits of competitiveness. Several commentators have pushed for redistricting reform to enhance competition in general elections. They have raised three main benefits of greater competitiveness: increased electoral participation, election of moderate legislators, and greater responsiveness of those legislators to the needs of their constituents.

¹⁷¹ Interestingly, the initiative does not actually require that the redistricting commission draw competitive districts. Proposition 11 delineates multiple standards for redrawing maps, see *supra* text accompanying note 132, but it does not include competitiveness among these requirements.

¹⁷² Steven Harmon, *Governor Pivots to Campaign Mode*, STATEWIDE DATABASE (Sept. 24, 2008), http://swdb.berkeley.edu/resources/Redistricting_News/california/2008/September/Governor_pivots_to_09_24-08.htm.

¹⁷³ Bay City News Service, *Schwarzenegger Stumps for Prop. 11*, PALO ALTO ONLINE (Oct. 24, 2008, 8:41 AM), http://www.paloaltoonline.com/news/show_story.php?id=9783.

¹⁷⁴ Patrick McGreevy, *Democrats Fall Short in Bid for a Super Majority*, L.A. TIMES, Nov. 6, 2008, at B4 (quoting professor John J. Pitney of Claremont McKenna College as saying, "[Proposition 11] will make more seats competitive"); Stephanopoulos, *A Fighting Chance for Redistricting*, *supra* note 32 ("What's good about Proposition 11 is that it would make California's elections more competitive.").

¹⁷⁵ ACLU/SC Supports the California Voters FIRST Initiative on the November Ballot, ACLU OF S. CAL. (June 18, 2008), <http://www.aclu-sc.org/releases/view/102890>.

¹⁷⁶ See *supra* note 100 (citing references). See also Editorial, *Let Citizens Redraw the Map*, DAILY BREEZE, Mar. 17, 2008, at 10A ("New plan to create competitive legislative districts in California merits support."); Editorial, *California Voters Should Support Redistricting Ballot Measure*, FRESNO BEE, Mar. 25, 2008, at C4 ("More competitive races will make lawmakers more accountable."); Editorial, *An Essential Reform*, SAN DIEGO UNION-TRIBUNE, Mar. 10, 2008, at B6 ("This is why it's absolutely crucial to have as many competitive legislative districts as possible.").

First, supporters maintain that greater competitiveness can benefit the entire electoral process. Competitiveness increases voter turnout rates.¹⁷⁷ The political parties are sensitive to competition and focus their limited resources where elections are competitive.¹⁷⁸ They target television advertising and other mobilizing efforts mainly in competitive races,¹⁷⁹ and studies have found that persons contacted through mobilization efforts are more likely to vote.¹⁸⁰ Presumably, greater interest also leads to more media attention, higher campaign contributions, and a sense that one's vote matters.¹⁸¹ Accordingly, the closer the anticipated outcome of an election, the more voters become involved¹⁸² and the better informed they are likely to be.¹⁸³ Furthermore, competitive elections can affect participation even after the election. For instance, after the 2000 presidential election, voter registration drives surged.¹⁸⁴ In addition to their effect on voters, competitive elections are essential to other aspects of the democratic process. For instance, they encourage the appearance of strong challengers to majority-party candidates, which also stimulates party mobilization and campaign contributions.¹⁸⁵

Proponents also maintain that more competitive districts can yield more centrist candidates. Studies suggest that at the individual district level "more competitive seats lead to more moderate members and . . . 'cross-pressured' members are more likely to have more centrist voting scores."¹⁸⁶ When districts are not competitive, candidates know that voters in their districts are

¹⁷⁷ Shelley de Alth, *ID at the Polls: Assessing the Impact of Recent State Voter ID Laws on Voter Turnout*, 3 HARV. L. & POL'Y REV 185, 192 (2009).

¹⁷⁸ Michael P. McDonald, *The Competitive Problem of Voter Turnout*, WASH. POST (Oct. 31, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/10/30/AR2006103000712.html>.

¹⁷⁹ *Id.*

¹⁸⁰ ROBERT HUCKFELDT ET AL., INFORMATION, ACTIVATION, AND ELECTORAL COMPETITION IN THE 2002 CONGRESSIONAL ELECTIONS 22, available at http://psfaculty.ucdavis.edu/huckfeldt/website_revise060106.pdf.

¹⁸¹ See generally *id.* (exploring the correlation between voter engagement with an issue and political competitiveness).

¹⁸² STEVEN J. ROSENSTONE & JOHN MARK HANSEN, MOBILIZATION, PARTICIPATION, AND DEMOCRACY IN AMERICA 180–81 (Bruce Nichols & Robert Miller eds., 1993).

¹⁸³ Peter J. Jenkins, Comment, *The Supreme Court's Confused Election Law Jurisprudence: Should Competitiveness Matter?*, 2007 BYU L. REV. 167, 171.

¹⁸⁴ LORRAINE C. MINNITE, THE POLITICS OF VOTER FRAUD 18 (Mar. 5, 2007), available at <http://www.projectvote.org/component/content/article/254-Voter%20Fraud/561-the-politics-of-voter-fraud.html>.

¹⁸⁵ Richard H. Pildes, *The Constitution and Political Competition*, 30 NOVA L. REV. 253, 260 (2006).

¹⁸⁶ Walter M. Frank, *Making Our Congressional Elections More Competitive: A Proposal for a Limited Number of Statewide At-Large Elections in Our More Populous States*, 39 J. MARSHALL L. REV. 1425, 1427 (2006).

unlikely to support challengers from the other party.¹⁸⁷ This enables candidates to be more attentive to those voters who cast ballots in primary elections, who tend to be more partisan and less moderate than voters in general elections. When they are focused on this sort of voter, candidates are more likely to take extreme positions instead of representing the political center.¹⁸⁸ Thus, noncompetitive districts undermine centrists, who can win competitive general elections but not primaries in heavily-partisan districts. Noncompetitive districts thus impact the partisanship, and possibly the effectiveness, of legislatures.¹⁸⁹ Of course, the hope of many supporters of competitive districts is that an increase in centrist legislators will reduce both partisanship and gridlock in legislatures.¹⁹⁰

Competitive districts may also increase the accountability of legislators to the voters.¹⁹¹ Districts that are competitive compel legislators to respect the interests of their constituents or face a realistic chance of defeat.¹⁹² Furthermore, districts with competitive elections prevent parties from becoming overwhelmingly dominant in geographic areas and lacking incentives to compete for voters.¹⁹³ Some commentators consider accountability to be the central purpose of elections.¹⁹⁴ Others consider it to have a constitutional basis or to function as part of the checks and balances fundamental to the Constitution.¹⁹⁵ Another aspect of accountability regards corruption of elected officials. One study found that in the 1980s, among candidates

¹⁸⁷ Jenkins, *supra* note 183, at 170–71.

¹⁸⁸ *Id.* at 171.

¹⁸⁹ Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2380 (2006). See Larry Alexander & Saikrishna B. Prakash, *Tempest in an Empty Teapot: Why the Constitution Does Not Regulate Gerrymandering*, 50 WM. & MARY L. REV. 1, 13 (2008) (asserting that the replacement of centrist legislators with extremists produces polarized, factious, and inefficient legislatures).

¹⁹⁰ See Alexander & Prakash, *supra* note 189, at 2381.

¹⁹¹ Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 629 (2002). However, some results suggest that a lack of electoral competition actually increases the responsiveness of legislators. BENJAMIN G. BISHIN, COMPETITION AND THE CONGRESSIONAL REPRESENTATION: ARE THE BENEFITS OF COMPETITIVE ELECTIONS OVERSTATED? 27, available at <http://moya.bus.miami.edu/~bbishin/ccr.pdf>.

¹⁹² Timothy P. Brennan, Note, *Cleaning Out the Augean Stables: Pennsylvania's Most Recent Redistricting and a Call to Clean Up This Messy Process*, 13 WIDENER L.J. 235, 338 (2003).

¹⁹³ Pildes, *supra* note 185, at 260.

¹⁹⁴ Richard Briffault, *Defining the Constitutional Question in Partisan Gerrymandering*, 14 CORNELL J. L. & PUB. POL'Y 397, 411 (2005).

¹⁹⁵ See Pildes, *supra* note 185, at 265–66 (arguing that the Elections Clause prohibits the self-interested manipulation in the creation of overwhelmingly safe and noncompetitive districts that destroy electoral accountability); Brennan, *supra* note 192, at 337 (asserting that the Founders believed that legislators should be accountable to the people, which was the most essential Constitutional check on the government).

charged with corruption, only 3.8% percent lost in primaries, while their loss rate in the general election was 25%.¹⁹⁶

Defenders of noncompetitive districts, however, point to several valuable functions they provide. They argue that noncompetitive districts provide better representation for their voters and promote stability of the Legislature. They also maintain that competitive elections, rather than inspiring crossover appeals, actually lead to “getting out the base” efforts.

Critics point out that, by definition, competitive districts leave more voters unrepresented. A major drawback of single-member districts is that the votes for the losing candidate are “wasted.”¹⁹⁷ Closely-balanced districts therefore maximize the number of wasted votes.¹⁹⁸ A district that is less competitive in general elections forces candidates to take positions more akin to those of the typical voter of the district; thus legislators elected from homogenous districts will be more representative of more of the district’s voters.¹⁹⁹ Furthermore, from the perspective of voter satisfaction, competitive elections are less desirable. Unlike with sporting events, when it comes to elections voters prefer blowouts (large victory margins) to exciting finishes (competitive contests).²⁰⁰ Voters also prefer to have representatives with similar ideologies over having closely-contested general elections.²⁰¹ As an additional psychological benefit, voters give Congress higher approval ratings when like-minded persons represent their districts.²⁰² Thus, non-competitive districts may maximize voter satisfaction.²⁰³

Another advantage pointed to by commentators is that noncompetitive districts increase the stability of the Legislature as a whole. With more competitive districts, partisan control of the Legislature would change more frequently.²⁰⁴ Thus, slight

¹⁹⁶ Matthew G. Jarvis, Competition is Good: Side-Benefits of Competitive Districts 14–15 (Aug. 28–31, 2008) (unpublished manuscript, prepared for presentation at the 2008 Annual Meeting of the Midwest Political Science Association), *available at* http://www.allacademic.com/meta/p_mla_apa_research_citation/2/7/9/2/7/pages279276/p279276-1.php.

¹⁹⁷ Brunell, *supra* note 10, at 46.

¹⁹⁸ *Id.*

¹⁹⁹ Thomas I. Brunell & Justin Buchler, *Ideological Representation and Competitive Congressional Elections*, 28 ELECTORAL STUD. 448, 449 (2009).

²⁰⁰ *Id.* at 455. On the other hand, the satisfaction of voters who supported losing candidates is not related to the margin of defeat. *Id.* at 456.

²⁰¹ *Id.*

²⁰² *Id.* at 454.

²⁰³ This may explain the finding that turnout rates are curvilinear—while the most competitive counties have the highest turnout rates, so too do the least competitive counties. DAVID E. CAMPBELL, WHY WE VOTE: HOW SCHOOLS AND COMMUNITIES SHAPE OUR CIVIC LIFE 34 (2006).

²⁰⁴ HUCKFELDT ET AL., *supra* note 180, at 22.

changes in voter preferences would shift control of the Legislature.²⁰⁵ At the extremes of competitiveness, a statewide vote of only fifty-one or fifty-two percent in favor of a party might shift control in the Legislature.²⁰⁶ Because of legal²⁰⁷ and geographic constraints,²⁰⁸ no districting plan for California will have all hyper-competitive districts. Nevertheless, the risk of shifts in partisan control remains.²⁰⁹

Opponents of competitiveness also argue that high levels of competition can adversely affect individual officeholders and candidates. Candidates would likely be less interested in running for office if they knew that slight changes in political sentiment would remove them from office. Thus, less competitive districts can be more appealing to prospective candidates because greater stability makes the possibility of a career in the Legislature more likely.²¹⁰ Conversely, competitive elections deter candidates because of the foreseeable burden of campaigning in future close elections.²¹¹ Incumbents who are concerned about upcoming competitive elections have greater incentives to steer pork barrel projects to their districts in attempts to “buy off” their constituents.²¹² Similarly, they are more likely to focus on parochial issues rather than on those of benefit to the larger whole, be it a region, state, or nation.²¹³

²⁰⁵ Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649, 668 (2002). See also *Vieth v. Jubelirer*, 541 U.S. 267, 359 (2004) (Breyer, J., dissenting) (describing the fact that in a large state with mere random redistricting, a shift from fifty-one percent Republican to forty-nine percent Republican could yield a “seismic shift” in the composition of the legislature from one hundred percent Republican to one hundred percent Democrat).

²⁰⁶ Daniel H. Lowenstein & Jonathan Steinberg, *The Quest for Legislative Districting in the Public Interest: Elusive or Illusory?*, 33 UCLA L. REV. 1, 39–40 (1985).

²⁰⁷ See *infra* text accompanying notes 219–232.

²⁰⁸ See *infra* text accompanying notes 233–256.

²⁰⁹ Possibly a more likely concern in California is that a large number of competitive districts could result in significantly disproportional representation. Non-proportional legislatures are likely where excessive numbers of districts are competitive. Brunell, *supra* note 10, at 75.

²¹⁰ See Sally Dworak-Fisher, Note, *Drawing the Line on Incumbency Protection*, 2 MICH. J. RACE & L. 131, 137 (1996). See also Thomas Brunell, *When Competition Is Bad for Voters and Democracy*, DALLAS MORNING NEWS (June 3, 2008, 9:07 AM), http://www.dallasnews.com/sharedcontent/dws/dn/opinion/viewpoints/stories/DN-brunell_03edi.ART.State.Edition1.45fe223.html (asserting that a district that is less competitive in general elections is more attractive to strong candidates of the majority party to run in the primary).

²¹¹ Daniel R. Ortiz, *Federalism, Reapportionment, and Incumbency: Leading the Legislature to Police Itself*, 4 J. L. & POL. 653, 683 (1988).

²¹² Recent Developments, *Independent Redistricting Commissions*, 43 HARV. J. ON LEGIS. 535, 543 (2006).

²¹³ Justin Buchler, *Competition, Representation and Redistricting: The Case Against Competitive Congressional Districts*, 17 J. THEORETICAL POL. 431, 461 (2005).

Critics also charge that competitive districts may rely upon a premise that is not always applicable. Proponents argue that competitive districts will force candidates to take less extreme positions.²¹⁴ Candidates, however, do not always follow this strategy. For instance, after the 2000 presidential election, in which George W. Bush lost the popular vote but won the electoral college vote by 271 to 266,²¹⁵ President Bush did not focus on winning swing voters. Instead of targeting moderate voters, his reelection campaign focused on mobilizing his own party's voters.²¹⁶ Since the majority of "independent" voters are not truly swing voters but actually favor one party,²¹⁷ the drawing of competitive districts may not force candidates to broaden their appeal. Instead, such districts may actually heighten partisan appeals.²¹⁸

While the virtues of competitiveness are more intuitive, a lack of competitiveness may be beneficial. This is reassuring, since Proposition 11 is unlikely to accomplish its goal of increasing competition.

²¹⁴ See *supra* notes 186–190 and accompanying text.

²¹⁵ David Leip, *2000 Presidential General Election Results*, ATLAS OF U.S. PRESIDENTIAL ELECTIONS, <http://www.uselectionatlas.org/RESULTS/national.php?year=2000&off=0&elect=0&f=0> (last visited Oct. 24, 2010).

²¹⁶ Ronald Brownstein, *The Race to the White House: Bush Aims to Solidify His Base*, L.A. TIMES, Aug. 22, 2004, at A1. This strategy did not begin with President Bush; parties have utilized it since the earliest days of the union. Samuel Issacharoff, *Collateral Damage: The Endangered Center in American Politics*, 46 WM. & MARY L. REV. 415, 426 (2004).

²¹⁷ Tom Jacobs, *'Independent' Voters Are Generally Not*, MILLER-MCCUNE (July 28, 2009), <http://www.miller-mccune.com/politics/independent-voters-are-generally-not-3560/>. According to Tom Jensen, communications director of Public Policy Polling, "two-thirds of independent voters are not swing voters." *Id.* Conventional political science wisdom holds that "independents" who acknowledge that they "lean" toward one party actually behave like closet partisans. They are politically active and interested and loyal to the party to which they lean. Eric McGhee & Daniel Krimm, *Party Registration and the Geography of Party Polarization*, 41 POLITY 345, 359 (2009).

²¹⁸ Furthermore, a study of Congressional polarization concluded that gerrymandering explains little if any of the polarization apparent in Congress. Nolan McCarty et al., *Does Gerrymandering Cause Polarization?* 5 (Oct. 23, 2006), *available at* <http://www.princeton.edu/~nmccarty/gerrymander11.pdf>. Indeed, the authors found that legislative polarization is consistent with the general geographic polarization of voters along ideological and partisan lines. *Id.* at 4. Masket, Winburn, and Wright found that representatives elected from legislatively-drawn districts are actually less polarized than members of Congress whose districts were drawn by a non-legislative body. Seth Masket et al., *The Limits of the Gerrymander: Examining the Impact of Redistricting on Electoral Competition and Legislative Polarization* 20 (Aug. 31–Sept. 3, 2006) (unpublished paper presented at annual meeting of American Political Science Association), *available at* <http://www.votelaw.com/blog/blogdocs/Limits%20of%20the%20gerrymander.pdf>. Another study found that, while redistricting was a factor in polarization, the U.S. Senate, which does not undergo redistricting, and the House had become polarized concurrently. Sean M. Theriault, *The Case of the Vanishing Moderates: Party Polarization in the Modern Congress* 19 (2004), *available at* http://www.allacademic.com/meta/p_mla_apa_research_citation/0/8/3/2/6/pages83269/p83269-19.php.

IV. NON-COMPETITIVE ELECTIONS: MIGHT SOMETHING BESIDES REDISTRICTING CAUSE THEM?

Whether or not competitiveness is desirable, legislative elections in California have experienced a marked competitive decline,²¹⁹ and supporters of Proposition 11 have insisted that legislative redistricting is the cause. A more careful study of applicable legal requirements and geographic considerations, however, indicates that Proposition 11 is unlikely to increase competitiveness significantly.

As previously discussed, federal and state laws constrain the drawing of legislative districts. Line drawers must populate the districts equally,²²⁰ and they must not dilute minority voting strength.²²¹ California law also imposes additional mandatory (contiguity)²²² and nonmandatory (respect for jurisdictional boundaries)²²³ requirements. The combination of these constraints, however, limits the ability of redistricters to draw more competitive districts.

Bruce Cain, Karin Mac Donald, and Iris Hui examined the impact of legal criteria on the drawing of competitive districts.²²⁴ They noted a truism of redistricting: the imposition of multiple criteria will “highly constrain” the accomplishment of any single goal. In other words, mandating more than one criteria necessarily will require trade-offs among criteria.²²⁵ Compliance with the Voting Rights Act, for instance, necessitates avoiding both minority vote dilution and retrogression of minority voting

²¹⁹ See *supra* Figure 2. Although the competitiveness of California’s districts has declined, this is not solely a California phenomenon. Analysis of congressional elections reveals that victory margins for incumbents have been rising nationwide since the early 1990s (for open seats, election margins during the period have fluctuated). Legislative control of redistricting has not correlated to higher victory margins. Masket et al., *supra* note 218, at 14.

²²⁰ See *supra* notes 8–13, 27 and accompanying text.

²²¹ See *supra* notes 14–26 and accompanying text.

²²² See *supra* note 28.

²²³ See *supra* note 29.

²²⁴ See generally BRUCE E. CAIN, KARIN MAC DONALD & IRIS HUI, INSTITUTE FOR GOVERNMENTAL STUDIES, COMPETITION AND REDISTRICTING IN CALIFORNIA: LESSONS FOR REFORM (2006). Specifically, they instructed a team of mappers to draw demonstrative assembly district plans for California. As part of this experiment, they “switched on or off” particular redistricting constraints to determine their effects on the drawing of districts for California. These particular requirements were: (1) compliance with the Voting Rights Act; (2) minimizing the splitting of subjurisdictions; and (3) enhancing competitiveness. They began by drawing “random-box” plans (using only Census population data) to establish benchmarks from which the effect of adding a particular constraint could be measured. Then, they instructed the mappers to add one of the constraints in separate plans. Finally, they instructed them to draw maps incorporating all three criteria. *Id.* at 22.

²²⁵ *Id.* at 5.

strength.²²⁶ Since African Americans and Latinos are predominantly Democratic, the legally-mandated majority-minority districts are usually heavily-Democratic and intentionally noncompetitive in general elections (so the minority population can elect its candidate of choice).²²⁷ Conversely, since these districts require the inclusion of large concentrations of Democratic voters, they deplete the pool of Democratic voters for surrounding districts, thereby facilitating—or even necessitating—the drawing of safe Republican districts.²²⁸

Thus, the Voting Rights Act requirements have significant redistricting consequences. The Voting Rights Act reduces competitiveness not only by altering the configuration of districts, but also by reducing the pool of districts available for competition. In California, Cain et al. found that minority populations have been dispersing geographically.²²⁹ As a result, to satisfy the Voting Rights Act standards, map drawers need to extend districts to encompass pockets of ethnic communities.²³⁰ This constrains their options when populating surrounding districts. Moreover, states that must satisfy the section 5 non-retrogression requirement typically have fewer marginal districts and fewer districts with two major-party candidates.²³¹ Consequently, preserving minority voting strength often occurs at the direct expense of electoral competitiveness.²³²

Another factor that explains the decline in competitiveness is population redistribution. During the past two decades, our population has realigned itself geographically along political lines. Bill Bishop labels this phenomenon as “The Big Sort.”²³³ As a result, regions, states, and counties now are much more politically homogenous than they were just three decades ago.²³⁴

²²⁶ See *supra* notes 14–26 and accompanying text.

²²⁷ Lublin & McDonald, *supra* note 34, at 147.

²²⁸ Bruce I. Oppenheimer, *Deep Red and Blue Congressional Districts: The Causes and Consequences of Declining Party Competitiveness*, in CONGRESS RECONSIDERED 135, 152 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 8th ed. 2005).

²²⁹ See Lublin & McDonald, *supra* note 34, at 147.

²³⁰ CAIN ET AL., *supra* note 224, at 24.

²³¹ Lublin & McDonald, *supra* note 34, at 155.

²³² CAIN ET AL., *supra* note 224, at 24. Similarly, because of the unusual configurations of many city and county boundaries, respecting those lines also significantly constrains competitiveness. *Id.* at 26. While this is not a mandatory standard that redistricters must follow, the California Constitution nonetheless does require that the geographic integrity of cities and counties be respected to the greatest extent possible without violating other requirements. CAL. CONST. art. XXI, § 2(d)(3).

²³³ BILL BISHOP, THE BIG SORT 42 (2008).

²³⁴ *Id.*

This sorting is possible because we have a highly mobile population. For instance, in 2008, 11 million Americans moved to a different county.²³⁵ While the population of the United States has always exhibited a high rate of mobility, the nature of this movement has changed in recent decades.²³⁶ Beginning in the 1970s and 1980s, when people moved, they tended to relocate to areas where most residents held similar political perspectives.²³⁷ In general, when people select a locale in which to live, they choose where to live within that locale based upon factors that correlate with partisan preferences.²³⁸ These factors include immigration, education, income, and religion.²³⁹ Thus, Democrats began moving to Democrat-majority counties and Republicans to Republican counties. Similarly, as Democrats left Republican areas, Republicans were more likely to replace them, and vice versa.²⁴⁰ This trend differed markedly from the racial consequences of these movements. From 1980 to 2000, American counties became slightly less segregated, whereas during the same period, the segregation of Republicans and Democrats increased by almost twenty-six percent.²⁴¹

Within California, these shifts are readily apparent. The 1976 and 2004 presidential elections provide good points for comparison. Both races were very closely contested at the national level. In 1976, Jimmy Carter prevailed over Gerald Ford by a popular vote margin nationwide of 2.1% (50.1% to 48.0%); in 2004, George W. Bush defeated John Kerry by a similar margin of 2.4% (50.7% to 48.3%).²⁴² During the twenty-eight years between these elections, forty-seven of California's

²³⁵ U.S. CENSUS BUREAU, TABLE 1: GENERAL MOBILITY, BY RACE AND HISPANIC ORIGIN, REGION, SEX, AGE, RELATIONSHIP TO HOUSEHOLDER, EDUCATIONAL ATTAINMENT, MARITAL STATUS, NATIVITY, TENURE, AND POVERTY STATUS: 2008 TO 2009, <http://www.census.gov/population/www/socdemo/migrate/cps2009.html> (follow excel for United States Table 1). At the same time, another twenty-five million persons moved within the same county. *Id.* In addition to population mobility, population growth has been the other major cause of California's political redistribution. JAMES G. GIMPEL & JASON E. SCHUKNECHT, PATCHWORK NATION: SECTIONALISM AND POLITICAL CHANGE IN AMERICAN POLITICS 76 (2004).

²³⁶ Oppenheimer, *supra* note 228, at 152–53.

²³⁷ *Id.*

²³⁸ Oppenheimer, *supra* note 228, at 153.

²³⁹ Alan I. Abramowitz et al., *Don't Blame Redistricting for Uncompetitive Elections*, 39 PS: POL. SCI. & POL. 87, 88 (2006).

²⁴⁰ BISHOP, *supra* note 233, at 44.

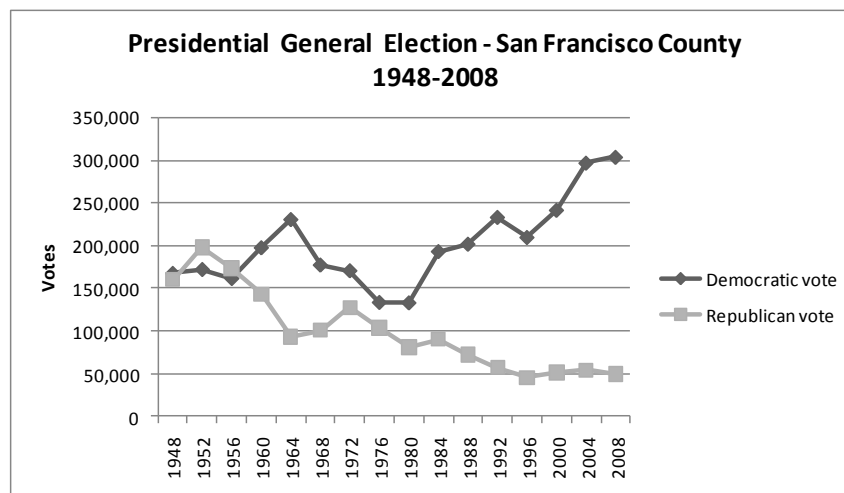
²⁴¹ *Id.* at 10.

²⁴² David Leip, ATLAS OF U.S. PRESIDENTIAL ELECTIONS, <http://www.uselectionatlas.org/RESULTS/national.php?year=2000&off=0&elect=0&f=0> (last visited Oct. 24, 2010).

fifty-eight counties (81%) became more partisan. Specifically, seventeen counties (29.3%) became more Democratic while thirty (51.7%) became more Republican.²⁴³ Only eleven (20.0%) became more closely contested.²⁴⁴

Three counties provide especially illuminating illustrations of this shift: San Francisco,²⁴⁵ Los Angeles, and Kern. San Francisco is an example of an area that became increasingly partisan during this period despite a stable overall population size. Figure 5 charts the Democratic and Republican votes in presidential general elections in San Francisco:

FIGURE 5²⁴⁶



For the first three elections, San Francisco leaned slightly toward the Republicans. However, starting in 1960, the Democratic candidate won the county, and Democrats have won every presidential general election since then. Starting in 1976, the Democratic margin of victory has increased from the previous elections, with the sole exception being in 1996. By 2008, the Republican candidate (McCain) garnered only 13.6% of San

²⁴³ BISHOP, *supra* note 233, at 44.

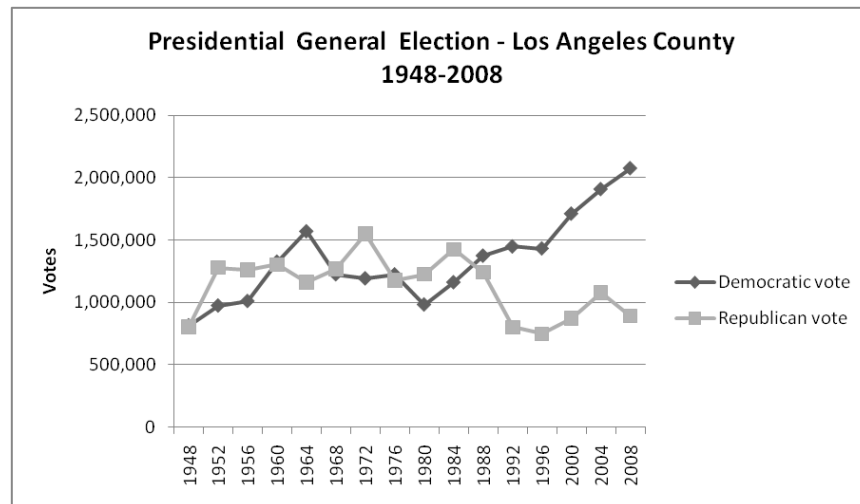
²⁴⁴ *Id.*

²⁴⁵ The California legislature consolidated the city and county of San Francisco in 1856. Percy v. Long, *Consolidated City and County Government of San Francisco*, 8 PROC. OF THE AM. POL. SCI. ASS'N 109, 109 (1912). It is the only consolidated city and county in California. *Id.* at 110.

²⁴⁶ CALIFORNIA SECRETARY OF STATE, *Statewide Election Results*, http://www.sos.ca.gov/elections/elections_elections.htm; Leip, *supra* note 242.

Francisco's vote.²⁴⁷ Those familiar with San Francisco's geography will know that this shift in partisanship did not result from population growth (there is nowhere to add population). In fact, between 1960 and 2000, the total population in San Francisco County increased by just 4.9%; during this period, the statewide population increased by 115.5%.²⁴⁸ Thus, this change must have resulted from geographic sorting; specifically, an influx of Democrats and outflow of Republicans.

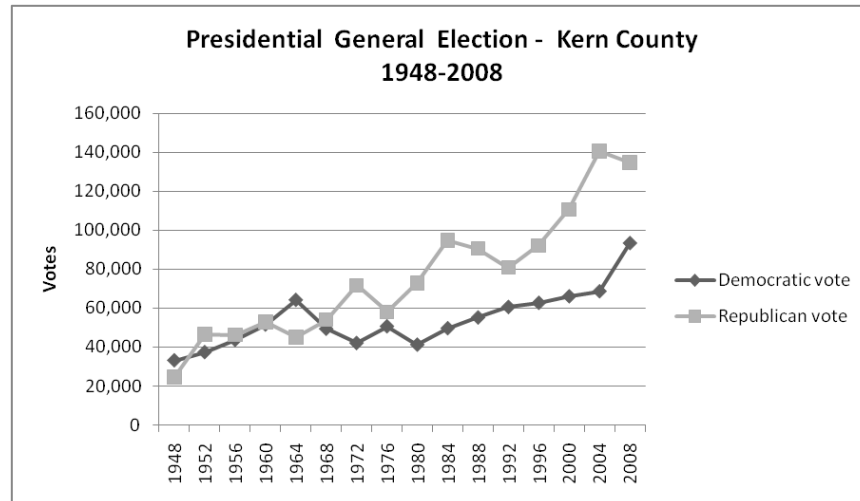
Neighboring counties Los Angeles and Kern provide striking examples of the divergence of growing populations, as one neighbor broke Democratic while the other Republican. Figures 6 and 7 chart these results:

FIGURE 6²⁴⁹

²⁴⁷ See Leip, *supra* note 242.

²⁴⁸ See *California Historic & Projected Growth 1790 to 2030*, NEGATIVE POPULATION GROWTH, <http://www.npg.org/states/ca.htm>; *San Francisco Population*, SFGENEALOGY.COM, <http://www.sfgenealogy.com/sf/history/hgpop.htm>.

²⁴⁹ CALIFORNIA SECRETARY OF STATE, *Statewide Election Results*, http://www.sos.ca.gov/elections/elections_elections.htm; Leip, *supra* note 242.

FIGURE 7²⁵⁰

From 1948 until 1984, Los Angeles County oscillated between supporting Republican and Democratic presidential candidates. Then, in 1988 it supported the Democratic nominee, and it has continued to do so since then by increasing margins. In Kern County, support for Democratic and Republican nominees stayed fairly close through 1976. Then, as in Los Angeles, the margin of support started to diverge, but in this instance in favor of Republicans. Moreover, unlike San Francisco, which had a relatively stable population from 1960 through 2000, both Los Angeles and Kern experienced significant growth. During this period, Los Angeles grew by 57.6%, while Kern grew by 126.6%.²⁵¹

This analysis focused on the trends evident in particular counties. The effects of this sorting are apparent, however, throughout the state. Beginning in 1948, sixteen general election contests (excluding propositions) had extremely close votes statewide; the final margins between the top two candidates were less than two percentage points.²⁵² These close statewide results, however, mask the sorting occurring at the local level. Figure 8

²⁵⁰ CALIFORNIA SECRETARY OF STATE, *Statewide Election Results*, http://www.sos.ca.gov/elections/elections_elections.htm; Leip, *supra* note 242.

²⁵¹ *Los Angeles County Population Growth*, CENSUSSCOPE, http://www.censusscope.org/us/s6/c37/chart_popl.html; *Kern County Population Growth*, CENSUSSCOPE, http://www.censusscope.org/us/s6/c29/chart_popl.html.

²⁵² The Appendix lists these specific elections and the distribution of votes by county by margin of victory.

presents the average percentage of votes cast by decade in landslide and “toss-up” counties in these narrowly-decided statewide elections:²⁵³

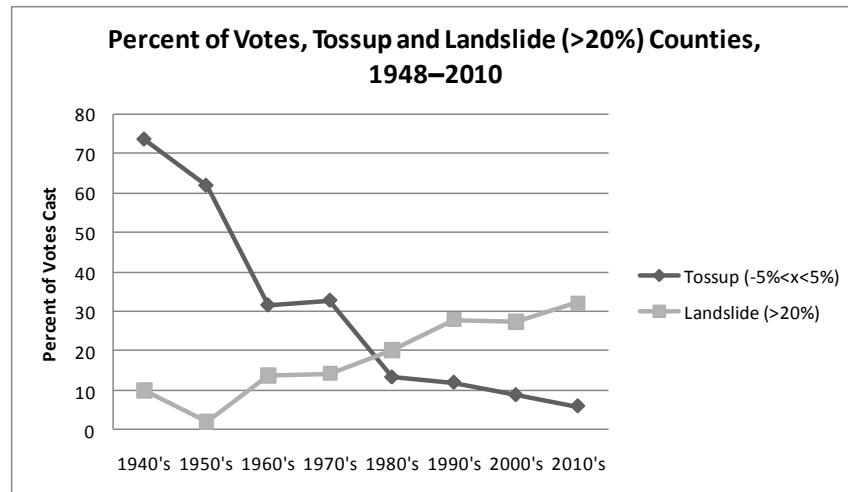
FIGURE 8²⁵⁴

Figure 8 illustrates the diverging trends in California. In the 1940s, 73.5% of California’s votes were cast in counties in which the statewide vote differential between the top two candidates was less than two percentage points. Only 9.9% of the vote came from counties decided by landslide margins—at least twenty percentage points. Thus, three-quarters of Californians lived in counties with nearly equal populations of Democrats and Republicans. Starting in the 1980s, however, in these narrow statewide elections more Californians cast their votes in landslide counties than in toss-up counties. This trend has continued, so that in the 2000s less than ten percent of the votes came from toss-up counties, while more than one-quarter were cast in landslide counties.

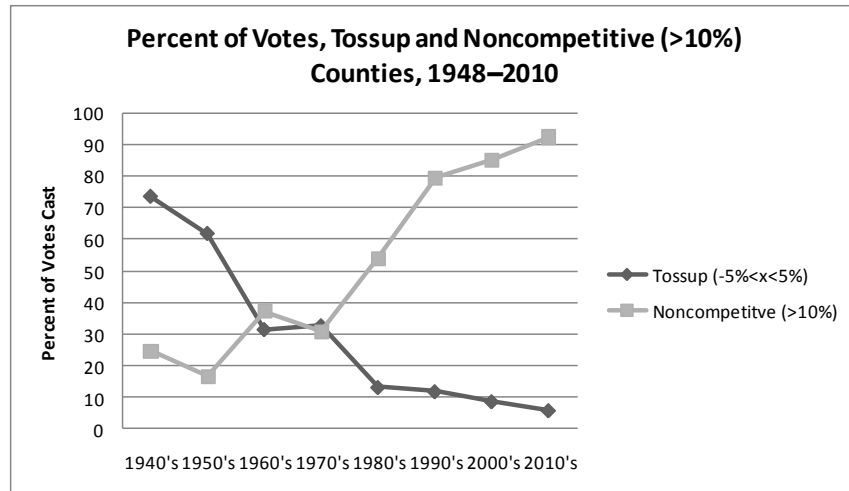
Although the analysis of twenty percent landslide counties demonstrates the growth of politically extreme counties, political scientists recognize that a differential of ten percent or less defines marginal contests.²⁵⁵ Thus, we could use ten percent as

²⁵³ A “landslide” election refers to a contest in which the winner receives at least sixty percent of the vote. ALLAN J. LICHTMAN, *THE KEYS TO THE WHITE HOUSE: A SUREFIRE GUIDE TO PREDICTING THE NEXT PRESIDENT* 26 (2000). A “toss-up” election is an election in which the winning candidate prevails by less than five percent of the total vote.

²⁵⁴ See *infra* Appendix & note 353.

²⁵⁵ James E. Campbell, *The Stagnation of Congressional Elections, in* LIFE AFTER REFORM: WHEN THE BIPARTISAN CAMPAIGN REFORM ACT MEETS POLITICS 141, 142 (Michael J. Malbin ed., 2003).

the cutoff to examine noncompetitive counties. When we do so, we see some interesting changes:

FIGURE 9²⁵⁶

Not surprisingly, more voters live in ten percent noncompetitive counties than live in twenty percent landslide counties. Accordingly, the votes in noncompetitive counties basically draw even with the votes in toss-up counties by the 1960s and 1970s. The main difference, though, between Figures 8 and 9 is the magnitude in jump after the 1970s in the population in noncompetitive counties. By the 2000s, nearly ninety percent of votes in a statewide toss-up election were cast by voters who lived in counties decided by at least ten percent, or noncompetitive margins. Conversely, less than ten percent of the state's voters lived in marginally competitive counties, even when the election was a toss-up.

These changes probably did not result solely from population movement. It is more likely that group dynamics pushed group members to greater extremes as one group or another became dominant in a county.²⁵⁷ Sociologists have studied group dynamics and the effects of group homogeneity on behavior. They have found that heterogeneous groups tend to be more moderate; the differences within the group restrain group excesses.²⁵⁸ Groups of homogenous persons, conversely, tend to

²⁵⁶ See *infra* Appendix & note 353.

²⁵⁷ BISHOP, *supra* note 233, at 68.

²⁵⁸ *Id.*

move toward polarization.²⁵⁹ Group polarization occurs as homogenous groups discuss issues. Over time group members predictably move and coalesce, not toward a middle position, but toward a more extreme position than that held by the members initially.²⁶⁰ Continued dialog actually decreases variance among members and produces convergence on a relatively more extreme position.²⁶¹ This result occurs for two reasons. First, individuals seek acceptance, and so they adjust their position to conform to the dominant perspective of the group.²⁶² Second, with a relatively homogenous group, contrary positions are rarely considered, so the dominant perspective naturally becomes more convincing.²⁶³

Pervasive evidence demonstrates that group polarization theory extends to issues that bear directly on politics and political behavior.²⁶⁴ When applied to political dynamics, homogeneous groups similarly become self-reinforcing. For instance, in landslide counties, political minorities participate less throughout the political process, from volunteering to voting.²⁶⁵ As minorities retreat, the majority gains confidence in its positions and becomes more extreme.²⁶⁶

What are the implications of this population sorting for California's redistricting reform? Critics of legislative redistricting charge that the Legislature draws noncompetitive districts that favor one party over the other.²⁶⁷ This is a comforting hypothesis since it provides a readily-curable cause: legislators redrawing their own lines and thus choosing their voters, for an effect: the rise in noncompetitive districts. Even better, not only does it have a cause, it identifies the "bad guys" who perpetrated it, and what better bad guys could one suggest

²⁵⁹ "Polarization," in this context, occurs when the tendency of individual members of a group to lean toward a given position is enhanced after discussion or other exchanges. As a result, groups often make more extreme decisions than would the typical average individual in the group. Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 85 (2000) [hereinafter Sunstein, *Deliberative Trouble?*].

²⁶⁰ Cass R. Sunstein, *The Law of Group Polarization* 9 (John M. Olin Law & Econ., Working Paper No. 91, 1999) [hereinafter Sunstein, *The Law*].

²⁶¹ Sunstein, *Deliberative Trouble?*, *supra* note 259, at 85–86.

²⁶² *Id.*

²⁶³ Sunstein, *The Law*, *supra* note 260, at 10.

²⁶⁴ Edward L. Glaeser & Cass R. Sunstein, *Extremism and Social Learning*, 1 J. LEGAL ANALYSIS 263, 269 (2009).

²⁶⁵ BISHOP, *supra* note 233, at 73.

²⁶⁶ *Id.* at 77. Not only do group dynamics relate to the decline in competitiveness in districts, they also help explain the rise in partisanship and the decline in moderation in legislatures. Studies at the national level have found that members of Congress from all regions have moved away from the center, and since the 1980s voters have become vastly more partisan. *Id.* at 246, 253.

²⁶⁷ *Id.* at 28–29.

than politicians?²⁶⁸ The hypothesis also has victims—besides the electorate generally, the centrists who otherwise would send moderate candidates to the Legislature.²⁶⁹ During the past two decades, however, county lines—which have not changed—have come to define highly-partisan enclaves. Although the line drawers decide the final district configurations, geographies underlying the districts have become more partisan anyway. Blaming legislators for the lack of competition may be appealing, but it ignores underlying realities.²⁷⁰

Other analyses confirm that the ability of line drawers to create competitive districts in California is limited. Cain et al. found that California's geography constrains the ability to draw competitive districts. When they instructed their map drawers to develop their random box plans (applying only equal population and compactness as constraints), fifty-three of the eighty assembly seats (66.3%) were unlikely to be even potentially competitive.²⁷¹ In other words, before taking into account any other criteria, which will necessarily reduce competition further, two-thirds of California's assembly districts will be noncompetitive.²⁷²

The Center for Governmental Studies (Center), which helped to draft Proposition 11 and which supported the measure, acknowledged that increasing competition in California would be difficult.²⁷³ In addition to the concentrations of urban Democrats, Republicans predominate in large regions of the state, notably the Central Valley and much of Orange and Riverside Counties.²⁷⁴ The Center noted that imposing competitiveness as a redistricting criterion would require stretching districts from areas dominated by one party to those controlled by the other party.²⁷⁵ Even if this were possible, such practices likely would violate other considerations, such as the compactness of districts

²⁶⁸ *Id.* at 29.

²⁶⁹ Levinson & Pildes, *supra* note 189, at 2380.

²⁷⁰ BISHOP, *supra* note 233, at 29.

²⁷¹ CAIN ET AL., *supra* note 224, at 16–17. For these plans, they instructed their map drawers to ignore all other federal and state criteria. The map drawers constructed four plans, and Cain et al. averaged the results of these plans. *Id.*

²⁷² The “random box” plans also illustrate another consequence of California's geography. Because of the large urban concentrations of Democrats in the San Francisco and Los Angeles metropolitan areas, anything other than a heavily-biased Republican gerrymander will result in a Democratic majority. *Id.* at 4. For instance, of the fifty-three safe assembly districts in the “random box” plans, forty (75.5%) were safe Democratic seats. *Id.* at 13. These safe-Democratic districts constitute half of the Assembly's eighty districts.

²⁷³ CENTER FOR GOVERNMENTAL STUDIES, *supra* note 127, at 27.

²⁷⁴ *Id.*

²⁷⁵ *Id.*

Figure 10 illustrates that one continuous bloc of counties supported the Democratic candidate, while another bloc supported the Republican candidate. Of California's fifty-eight counties, only three (Alpine, Imperial, and Los Angeles) were not part of one of these two blocs. In the thirty-nine contiguous counties that supported Cooley, he won by a combined margin of 18.6% of the vote. In the sixteen contiguous counties that supported Harris, the Democrat won by a combined differential of 26.4%; in the three noncontiguous counties, her combined margin was 14.1%.²⁷⁸ Furthermore, only seven of the state's counties were marginally competitive (differential between the top two candidates of less than ten percent). These seven counties accounted for only 7.7% of the state's total votes.²⁷⁹

This analysis illustrates the difficulty that line drawers will have in crafting competitive districts. Because of the geographic sorting that has occurred, most areas in California are highly partisan. Redistricters can draw competitive districts only by crossing city and county lines to combine different types of communities.²⁸⁰ In areas of political segregation, no commission can draw competitive districts.²⁸¹ Furthermore, the requirements of the Voting Rights Act will further constrain the commission's ability to draw competitive districts. Thus, the commission can fulfill the promises of Proposition 11's supporters only by violating the only standards that the measure actually articulates.

V. NONCOMPETITIVENESS: CAN REDISTRICTERS PROVIDE THE CURE?

The competitiveness of districts has declined, but geographic patterns appear to play a major role in this development. Can a change in the persons redrawing the lines alter this outcome?

To determine whether commission-controlled redistricting enhances competitiveness, Jamie Carson and Michael H. Crespin analyzed the results from the four Congressional redistricting cycles occurring between 1972 and 2002.²⁸² Carson and Crespin concluded that legislative redistricting is more likely to lead to

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ Recent Developments, *supra* note 212, at 542.

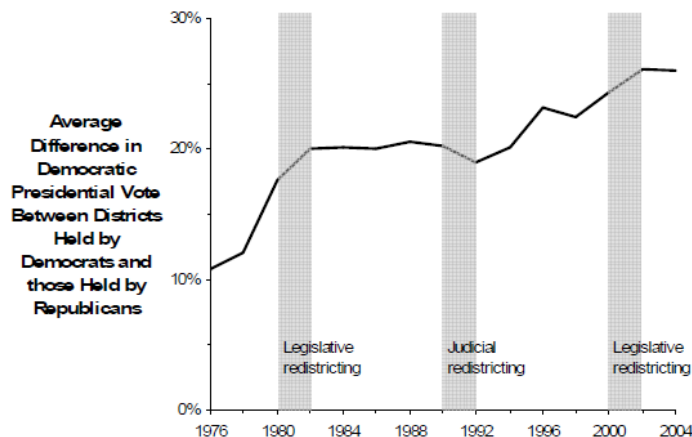
²⁸¹ Levinson & Pildes, *supra* note 189, at 2381.

²⁸² See generally Jamie Carson & Michael H. Crespin, Comparing the Effects of Legislative, Commission, and Judicial Redistricting Plans on U.S. House Elections, 1972–2002 (Mar. 11–13, 2004) (unpublished manuscript prepared for presentation at the Western Political Science Association Annual Meeting), available at <http://www.commoncause.org/atf/cf/%7BFB3C17E2-CDD1-4DF6-92BE-BD4429893665%7D/PaperRedistrictingPoliticalCompetition.pdf>.

the creation of noncompetitive districts than other procedures. Specifically, plans drawn by commissions, or the courts, tend to produce a greater level of competition than legislative-drawn plans.²⁸³ Seth Masket, Jonathan Winburn, and Gerald C. Wright looked at the competitiveness of state legislative districts. They found some evidence that legislative redistricting resulted in less competitive elections when compared to elections in districts drawn by neutral commissions, especially in contests involving incumbents.²⁸⁴

Although Masket et al. found that legislative redistricting created less competitive districts, another of their findings reinforces the geographic sorting hypothesis. They examined the difference in votes by assembly districts in presidential elections. Figure 11 presents the average difference in vote by districts from 1976 through 2004:

FIGURE 11²⁸⁵
**AVERAGE DIFFERENCE IN PRESIDENTIAL VOTE
 BY CALIFORNIA ASSEMBLY DISTRICT
 1976–2004**



²⁸³ *Id.* at 22. Carson and Crespín further found, however, that partisan redistricting strategies for Congressional seats depend upon the party's standing in Congress. A party not in control of Congress will tend to use more aggressive strategies in state redistrictings in an attempt to take away seats from the other party. Parties in control of Congress, however, are more likely to adopt conservative redistricting strategies to retain control. *Id.* at 22–23. But, sometimes if a party cuts its margins too thin, these strategies can backfire. For instance, in the 1980s, Indiana Republicans drew a plan that enabled their party to convert a 6-5 Democratic delegation to a 6-4 Republican advantage in 1982; by the end of the decade, the Democrats then reversed this to an 8-2 Democratic majority. More recently, a plan by Georgia Democrats intended to capture 7 of 13 seats resulted in securing only 5 seats. Lublin & McDonald, *supra* note 34, at 145.

²⁸⁴ Masket et al., *supra* note 218, at 17.

²⁸⁵ *Id.* at 38.

Figure 11 confirms that the vote differential increased after the legislative redistrictings of the 1980 and 2000 redistricting cycles. On average, the increase was by slightly less than three percent after the redistrictings. On the other hand, after the judicial redistricting in 1992, the differential declined by approximately one percent. The greatest change in differentials occurred, however, not after redistricting, but during the middle of the decades. In the 1970s, the differential increased by seven percent; in the 1990s, it rose by five percent (and was essentially flat during the 1980s).²⁸⁶ Alan I. Abramowitz, Brad Alexander, and Matthew Gunning similarly found that “[t]he most significant changes in competitiveness of [congressional contests] occurred between redistricting cycles.”²⁸⁷ Since the greatest decline in competitiveness occurred not after redistrictings, but between them, this suggests that the geographic sorting hypothesis better explains the decline.

Fortunately, two states, Arizona and Washington, already require that their redistricting commissions consider competitiveness in developing plans.²⁸⁸ If self-interested redistricting, rather than geographic sorting, better explains the decline in competitiveness, we should expect the districts in these states to exhibit significantly greater competitiveness than those in California—they do not.

²⁸⁶ *Id.*

²⁸⁷ Alan I. Abramowitz et al., *Incumbency, Redistricting, and the Decline of Competition in U.S. House Elections*, 68 J. OF POL. 75, 79 (2006). Concerning the type of line drawer, they found “no evidence that redistricting by nonpartisan redistricting commissions or courts resulted in more competitive districts than redistricting by partisan state legislatures.” The primary exception was California, in which marginal congressional districts declined from fourteen to four. *Id.*

²⁸⁸ Two other states contemplated proposals to require competitive election districts. In Colorado, State Senator Ken Gordon introduced a bill to add competitiveness to the criteria that the legislature must use when it draws political boundaries. Eventually, however, these provisions were removed from the bill. *Redistricting*, COMMONCAUSE, <http://www.commoncause.org/site/pp.asp?c=dkLNK1MQIwG&b=196481> (last visited Oct. 25, 2010). In November 2005, voters placed onto the Ohio ballot a proposition to reform its redistricting process. *State Issue 4: Amended Certified Ballot Language*, OHIO SECRETARY OF STATE, <http://www.sos.state.oh.us/SOS/elections/electResultsMain/2005ElectionsResults/05-1108Issue4/State%20Issue%204%20Amended%20Certified%20Ballot%20Language.aspx> (last visited Oct. 25, 2010). This measure, Ballot Issue 4, would have substituted judicial appointment of members in place of appointment by elected officials. *Id.* More importantly, it would have required the commission to adopt the legislative and congressional plans—including any submitted by the public—that scored highest for competitiveness. *Id.* The measure lost, however, 30.3% to 69.7%. *State Issue 4: November 8, 2005*, OHIO SECRETARY OF STATE, <http://www.sos.state.oh.us/SOS/elections/electResultsMain/2005ElectionsResults/05-1108Issue4.aspx> (last visited Oct. 25, 2010).

Washington State had originally required its Legislature to redraw the state's districts.²⁸⁹ Of the first ten redistrictings after statehood in 1889, however, the Legislature successfully redistricted only four times; the remaining times, the lines were redrawn by either the courts or voter initiatives.²⁹⁰ Therefore, in 1983, after the governor vetoed that decade's redistricting bill, the Washington Legislature proposed and the voters approved Constitutional Amendment 74 to shift responsibility for redrawing the lines to a bipartisan commission.²⁹¹ Pursuant to this amendment, the majority and minority leaders of the state Legislature each appoint one commissioner, and those four commissioners then appoint the remaining member.²⁹² The commission then submits its plans to the Legislature, which may alter the lines, but only after approval from two-thirds of the Legislature.²⁹³

As amended, Washington law delineates particular standards for the commission to follow in redrawing the lines. Washington law divides the state into forty-nine legislative districts. Each district elects one state senator and two members of the state house of representatives, who run for numbered posts.²⁹⁴ Legislative districts must have equal population.²⁹⁵ In addition, to the extent possible, districts should minimize splits of subjurisdictions and be compact and contiguous.²⁹⁶ Finally, the commission must "encourage electoral competition."²⁹⁷

Much was made of the apparent success of the commission in bringing change to the state's congressional delegation. Indeed, prior to the 1992 redistricting, the delegation's members had

²⁸⁹ *Redistricting Facts*, WASH. STATE REDISTRICTING COMM'N, <http://www.redistricting.wa.gov/pages/facts.html> (last visited Oct. 25, 2010).

²⁹⁰ Herb Robinson, *Still Political, But Better Than Before*, SEATTLE TIMES, Nov. 19, 1990, at A8. The state had many colorful incidents in its history. Among labels applied to parts of plans were the "Kiskaddon Pimple," which described the addition of a single Snohomish County precinct—which included an incumbent's residence—into an otherwise all-King County district defined by a straight boundary with the exception of the precinct, and the "Rasmussen Stovepipe," a narrow corridor connecting Democratic incumbent senator Rasmussen's home to the Republican Lakewood area. Neil Modie, *Compromise Is the Key in Political Redistricting*, SEATTLE POST INTELLIGENCER, Mar. 19, 2001, at A7. Another plan submitted by activists, which would have placed eight incumbents into a single district was described as the "legislative equivalent of the Texas Chainsaw Massacre." Shelby Scates, *Trying to Slay the Gerrymander*, SEATTLE POST INTELLIGENCER, Dec. 22, 1991, at F2.

²⁹¹ David Ammons, *Citizen Panel Will Redraw State's Political Boundaries*, SEATTLE TIMES, Aug. 27, 1990, at D4.

²⁹² WASH. CONST. art. II, § 43, cl. 2.

²⁹³ WASH. REV. CODE ANN. § 44.05.100(1)–(2) (West 2007).

²⁹⁴ WASH. REV. CODE ANN. § 44.05.090(4) (West 2007).

²⁹⁵ WASH. REV. CODE ANN. § 44.05.090(1) (West 2007).

²⁹⁶ WASH. REV. CODE ANN. § 44.05.090(2) (West 2007).

²⁹⁷ WASH. REV. CODE ANN. § 44.05.090(5) (West 2007).

served an average of six terms in office. By 1994, the members averaged two terms.²⁹⁸ Table 4 tracks the changes in the party control of seats from the election, before the implementation of the commission's first plan to the present:

TABLE 4²⁹⁹
WASHINGTON CONGRESSIONAL DELEGATION
1990–2010

	Democrats	Republicans
1990	5	3
1992	8	1
1994	2	7
1996	3	6
1998	5	4
2000	6	3
2002	6	3
2004	6	3
2006	6	3
2008	6	3
2010	5	4

As Table 4 shows, in the first election under the 1992 plan, Democrats won three new seats, two from Republicans and one as a result of the state receiving an additional seat through reapportionment. Two years later, the Republicans took six seats from the Democrats. Over the next three elections, the Democrats won back four of those seats. Thus, during the five elections under this plan, incumbents lost seven elections and seats changed party hands twelve times.³⁰⁰ Elections under the

²⁹⁸ Louis Jacobson & Chris Cillizza, *Taking Redistricting out of Lawmakers' Hands*, NAT'L J., Mar. 10, 2001, at 728.

²⁹⁹ *United States Congressional Delegations from Washington*, WIKIPEDIA, http://en.wikipedia.org/wiki/United_States_congressional_delegations_from_Washington (last visited Oct. 29, 2010).

³⁰⁰ A closer analysis suggests that the turnover occurring in the 1992 plan may have resulted from national trends rather than any inherent competitiveness of the districts in the plan. Eight of the twelve seats that changed party hands under the 1992 plan did so in either the 1992 or 1994 elections. 1992 saw the defeat of Republican George H. W. Bush by Democrat Bill Clinton; the following election involved "the Republican tidal wave of 1994," in which Republicans won more than fifty congressional seats, including that of then-House Speaker Tom Foley of Washington. Rhodes Cook, *Hamstrung by Health Care? Two Ways to Lose a House Majority*, U. VA. CENTER FOR POL. (Mar. 25, 2010), <http://www.centerforpolitics.org/crystalball/articles/frc2010032501/>.

2002 redistricting plan, however, were a different matter. Only one seat changed parties under this plan.

Despite the use of a bipartisan commission that needed to comply with a specific competitiveness requirement, Washington's 2002 redistricting mirrored that of California. Much like the "incumbent protection gerrymander" passed by the California Legislature, the Washington bipartisan commission developed its own "status-quo plan."³⁰¹ As one of the members of the Redistricting Commission conceded, state legislative districts "tended to become slightly more Democratic if two or all three of their incumbent lawmakers were Democrats, and slightly more Republican if two or three incumbents were Republican."³⁰² In other words, the districts became less competitive.

An analysis of the Washington congressional and legislative districts reveals the dearth of competition under its 2002 status quo plan. Table 5 graphically presents the average margin of victory in the districts that the commission drew:

TABLE 5³⁰³
**AVERAGE MARGIN OF VICTORY, WASHINGTON
 CONGRESSIONAL, STATE SENATE, AND STATE
 REPRESENTATIVE DISTRICTS
 1992-2010**

	U.S. Representative	State senator	State representative
1992	19.8	23.0	29.2
1994	16.8	34.7	34.8
1996	17.4	31.6	31.1
1998	28.1	47.2	43.0
2000	23.8	40.8	35.8
2002	26.0	54.6	42.2
2004	28.7	30.3	36.8
2006	29.1	44.3	48.2
2008	31.4	43.0	37.7
2010	20.2	40.8	35.7
Average	24.6	40.8	38.4

³⁰¹ David Ammons, *Citizen Commission Approves a New Map of Congressional Districts*, SEATTLE TIMES, Jan. 2, 2002, B1.

³⁰² Neil Modie, *Tale of 2 Legislators—and One District*, SEATTLE POST INTELLIGENCER, Jan. 22, 2002, at B6, available at http://www.seattlepi.com/local/55337_redistrict22.shtml.

³⁰³ See WASHINGTON SECRETARY OF STATE, *Previous Elections*, <http://wei.secstate.wa.gov/osos/en/PreviousElections/Pages/default.aspx> (last visited Jan. 7, 2011).

As Table 5 illustrates, from 1992 to 2008, the lowest average margin of victory in an election in districts drawn by the commission was almost 17%. In six of ten election cycles, the average margin of victory in general elections for state senate seats exceeded 40%. Overall, the average margins of victory under the commission's plans were 24.6% in congressional contests, 40.8% in state senate races, and 38.4% in state representative elections.

Because a large number of state senate and legislative districts were so uncompetitive that candidates ran uncontested, these contests skew the average victory margin upward. Therefore, the next three charts present the distribution of contests by range of margin of victory: less than five percent, between five and ten percent, greater than ten percent, and uncontested (no congressional races were uncontested):

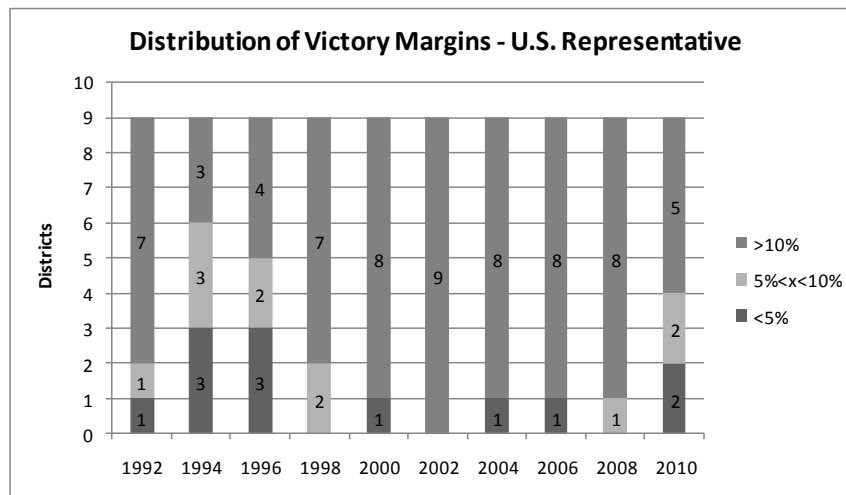
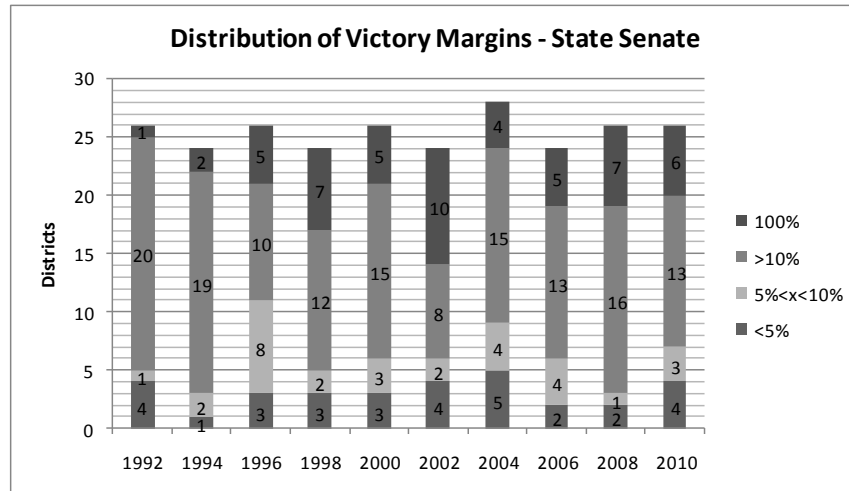
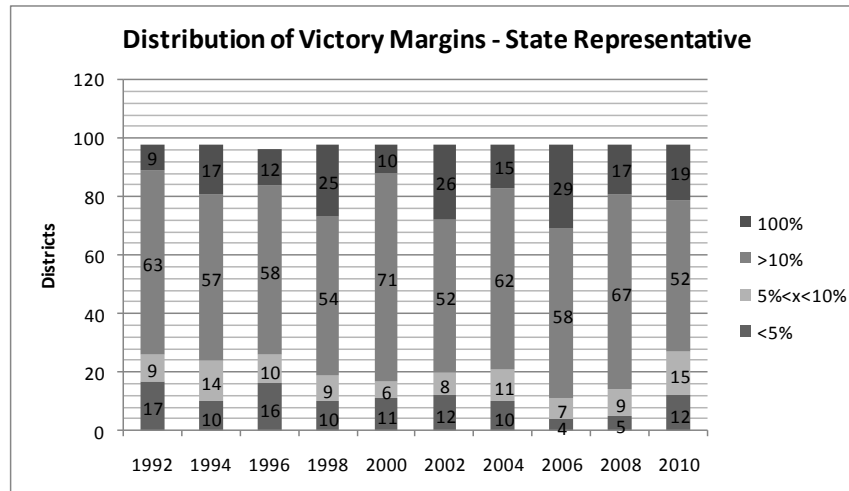
FIGURE 12³⁰⁴304 *Id.*

FIGURE 13³⁰⁵FIGURE 14³⁰⁶

These distributions also make apparent the increase in uncontested (presumably extremely safe) seats after the January 2002 “status quo” plan. Furthermore, despite the imposition of a competitiveness requirement, in seven of nine years for state senator and six of nine years for state representative, the number

³⁰⁵ *Id.*

³⁰⁶ *Id.*

of uncontested elections actually exceeded the number of toss-up elections.

Arizona provides a second example of a state that includes a competitiveness requirement. In 2000, Arizona voters approved an initiative that mandated consideration of competitiveness as a criterion for redistricting.³⁰⁷ The measure, Proposition 106, mandates creation of a five-member Independent Redistricting Commission (IRC) to perform the redistricting. Arizona's Commission on Appellate Court Appointments nominates candidates.³⁰⁸ The majority and minority leaders of the state senate and house each then appoint one commissioner.³⁰⁹ Next, the four commissioners appoint the fifth member, who serves as the chair.³¹⁰ No more than two members may be from the same political party.³¹¹ The Arizona Constitution requires this commission to redistrict the state's congressional and legislative districts.³¹²

As amended, the Arizona Constitution requires the commission to develop initial districts of equal population in a grid-like pattern. In the next phase, the commission makes adjustments as necessary to accommodate the six goals identified by Proposition 106 (equal population, Voting Rights Act compliance, compactness and contiguity, respect for communities of interest, geographic features and jurisdiction boundaries, and competitiveness).³¹³ In the remaining two constitutionally-mandated phases, the commission receives comments on its plan and makes final adjustments.³¹⁴

The commission's approval of a final plan in 2002 sparked litigation that did not conclude until a ruling by the Arizona Supreme Court seven years later. Concerning competitiveness, the Arizona Supreme Court concluded that the Arizona

³⁰⁷ Ronald J. Hansen, *2000 Redistricting Goal of Closer Elections Unmet*, ARIZ. REPUBLIC, Jul. 8, 2010, at A1.

³⁰⁸ ARIZ. CONST. art. 4, pt. 2, § 1(4)–(9).

³⁰⁹ *Id.*

³¹⁰ *Id.*

³¹¹ ARIZ. CONST. art. 4, pt. 2, § 1(3).

³¹² ARIZ. CONST. art. 4, pt. 2, § 1(14). Although Arizona also uses districts to elect the members of its state house, each district elects two representatives, the top two vote getters. ARIZ. CONST. art. 4, pt. 2, § 1(1). Accordingly, elections for the state house are not included in this analysis.

³¹³ ARIZ. CONST. art. 4, pt. 2, § 1(14).

³¹⁴ ARIZ. CONST. art. 4, pt. 2, § 1(14)–(16). Since Proposition 106 passed in 2000, the commission has been formed and drawn districts only in conjunction with the post-2000 Census round of redistricting. Despite the terms of the constitutional mandate, the commission did not actually adjust for competitiveness until after receiving comments. *Arizona Minority Coalition for Fair Redistricting v. Arizona Independent Redistricting Comm'n*, 208 P.3d 676, 681 (Ariz. 2009).

Constitution, as amended by Proposition 106, required that the IRC create “more competitive districts to the extent practicable when doing so does not cause significant detriment to the other goals.”³¹⁵

Despite this goal of creating more competitive districts, the chair of the IRC conceded that most Arizonans would consider the commission’s work in this regard to be “an abject failure.”³¹⁶ He elaborated, “If your goal is competitive districts, I don’t think this helps you get down that road very far.”³¹⁷ In an analysis of the commission system, *The Arizona Republic* concluded that the commission “failed to meet a primary goal of making legislative elections more competitive.”³¹⁸

Analyses of the elections in the IRC’s districts support these conclusions and suggest again that geographic sorting cannot be overcome, even when governing law specifically instructs map drawers to do so. Despite the IRC’s charge to craft competitive districts, the resulting districts were anything but. Table 6 illustrates the average margin of victory in the districts that the commission drew:

TABLE 6³¹⁹
**AVERAGE MARGIN OF VICTORY,
 ARIZONA CONGRESSIONAL AND STATE SENATE
 DISTRICTS
 2002–2010**

	U.S. representative	State senator
2002	26.8	64.8
2004	40.1	62.3
2006	26.8	40.1
2008	22.7	44.2
2010	18.0	46.6
Average	26.9	51.6

Table 6 shows that the average margin of victory in districts drawn by the IRC approached thirty percent. Specifically, the average victory margin in general elections in congressional districts was 26.9%. For state senate contests, Table 6 shows

³¹⁵ *Arizona Minority Coalition*, 208 P.3d at 687.

³¹⁶ Hansen, *supra* note 307.

³¹⁷ Eli Rosenbaum, *Redistrict Reform’s Dead End*, WASH. POST, Oct. 29, 2005, at A23.

³¹⁸ Hansen, *supra* note 307.

³¹⁹ See *Previous Arizona Elections*, ARIZONA SECRETARY OF STATE, <http://www.azsos.gov/election/PreviousYears.htm> (last visited Jan. 8, 2011).

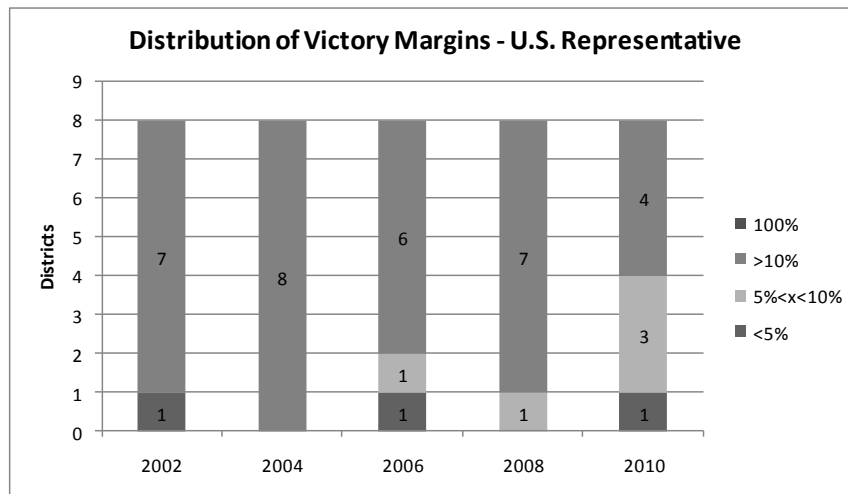
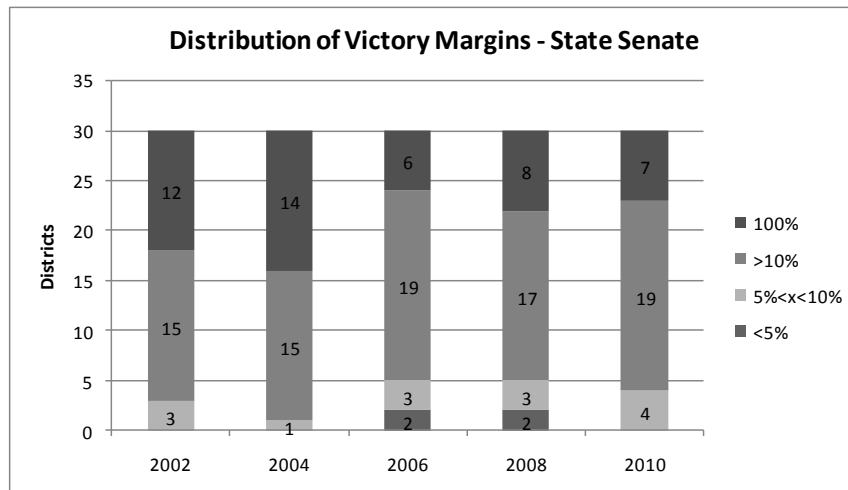
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that the average margin of victory was 51.6%.

As with the Washington legislative elections, the large number of uncontested seats distorts these numbers. Therefore, Figures 15 and 16 reflect the ranges in which these contests fall:

FIGURE 15³²⁰FIGURE 16³²¹

As with Washington's elections, the vast majority of

³²⁰ *Id.*

³²¹ *Id.*

Arizona's districts were decided by margins that exceeded ten percent. Of the 150 state senate contests over eight years in the "competitive" districts crafted by the IRC, only eighteen had margins below ten percent, and only four of those fell within five percent. Furthermore, in nearly one-third (forty-seven) of these contests, the winner did not face an opponent in the general election.

Why was the commission incapable of drawing competitive districts? Professor Michael McDonald, who worked as a consultant with the commission, noted that the state's redistricting requirements (similar to those of California except for the *addition* of competitiveness) prevented the creation of many competitive districts.³²² The commission's chair pointed to the Voting Rights Act's protection of minorities and their tendency to vote Democratic, and, echoing the findings of Cain et al., the IRC chair noted that the resulting concentration of Democrats in a small number of districts left few Democrats with which to make the remaining districts competitive.³²³

What do the experiences of Washington and Arizona suggest for California? Because of Arizona's sizeable minority population, redistricters' hands were tied when trying to draw competitive districts.³²⁴ California, however, has a much larger minority population than does the Grand Canyon State.³²⁵ To the extent demographics limited the competitiveness of Arizona's districts, California's redistricters will surely find their hands even more tightly bound by their own state's demographics.

Washington, however, had a proportionately smaller minority population than either Arizona or California had.³²⁶ Nevertheless, its commission did not craft significantly competitive districts. Instead, it chose to develop a "status quo" plan. More than anything else, this experience confirms that commissions, be they purportedly bipartisan or nonpartisan, are no more insulated from political considerations than is the Legislature.³²⁷ Washington's Redistricting Commission's five

³²² Hansen, *supra* note 307.

³²³ *Id.*

³²⁴ *Profile of General Demographic Characteristics*, U.S. CENSUS BUREAU, http://factfinder.census.gov/servlet/QTSubjectShowTablesServlet?_lang=en&_ts=313332516005 (select table "DP-1"; then click "Show Result") (last visited Jan. 16, 2011).

³²⁵ According to the 2000 Census, 63.8% of Arizona's population was non-Latino white, whereas only 46.7% of California's population was non-Latino white. *Id.*

³²⁶ The 2000 Census found that 78.9% of the Washington's population was non-Latino white. *Id.*

³²⁷ Christopher C. Confer, *To Be About the People's Business: An Examination of the Utility of Nonpolitical/Bipartisan Legislative Redistricting Commissions*, 13 KAN. J. L. & PUB. POL'Y 115, 125 (2004).

members could not agree on redistricting plans. After missing the statutory deadline,³²⁸ the members eventually agreed to make only minimal changes to the previous plan to adjust for population shifts during the past decade. In the end, the only conclusion to which they could all agree was to sacrifice competitiveness.³²⁹

VI. IS PROPOSITION 11'S REDISTRICTING COMMISSION THE BEST MEANS TO REDRAW CALIFORNIA'S LINES?

Will Proposition 11's Citizens Redistricting Commission be able to draw more competitive districts? Arizona and Washington, states which have imposed competitiveness goals on their redistricting commissions, have had little success in achieving competitiveness. Since California has not statutorily included competitiveness among its requirements,³³⁰ the likelihood of California's commission achieving significant competitiveness in the state's districts is minimal. Demographics³³¹ and federal law³³² will work against the commission. Arizona and Washington, states with predominantly white populations, needed to concentrate few of their minority (and typically Democratic) voters into districts to comply with the Voting Rights Act. Nevertheless, few of those state's districts are competitive.³³³ California's majority-minority population, however, necessitates the drawing of numerous majority-minority, heavily-Democratic districts.³³⁴ This concentration of Democratic voters, along with the population's geographic sorting, will render the drawing of a significant number of competitive districts quite difficult.

If the commission will not be effective, might it actually be a step back? Some of the differences between independent commissions and the Legislature may make the CRC the less desirable body to redistrict the state.

³²⁸ The Washington legislature needed to pass a law retroactively changing the statutory deadline after the commission could not approve a congressional plan until more than two weeks after the required date. David Ammons, *Lawmakers to Rescue New Districts*, SEATTLE TIMES, Jan. 10, 2002, at B5.

³²⁹ This is an example of the problem of the "bipartisan gerrymander." A "bipartisan commission," with equal representation for both major parties, tends not to result in a nonpartisan result, but rather a bipartisan one. Desiring to avoid gridlock, commissioners draw a map that is acceptable to both sides. As with the 2002 California legislative redistricting and the 2002 commission redistrictings in Arizona and Washington, rather than draw competitive districts, such plans primarily strengthen the partisan district majorities already in place. Rosenbaum, *supra* note 317.

³³⁰ See *supra* note 171.

³³¹ See *supra* text accompanying notes 233–275.

³³² See *supra* text accompanying notes 220–232.

³³³ See *supra* text accompanying notes 302–305, 319–321.

³³⁴ See *supra* text accompanying notes 226–230.

One of the primary arguments for adopting a commission was to take redistricting away from the self-interested Legislature.³³⁵ The Legislature may have a vested interest in the outcome, but it also has more relevant knowledge and experience. Legislators are extremely familiar with their districts, their constituents, and their needs, and they usually have a better understanding of these concerns than do outsiders.³³⁶ Legislators are thus best able to tailor districts to represent constituent communities and their interests.³³⁷ Nathaniel Persily experienced this firsthand when he assisted courts in drawing redistricting plans for New York and Maryland. In one instance, he moved an uninhabited swamp from one district to another. Since this was uninhabited swampland, a person unfamiliar with the district, such as Persily, would justifiably have thought that such a move would have no redistricting consequences (since it had no population) and no political consequences (since the land had little value). A legislator informed Persily, however, that this shift would disrupt environmental projects that the legislator initiated and hoped to complete. Thus, a move that would have no apparent political effect had tangible policy consequences: persons unfamiliar with the district would not be able to incorporate this concern.³³⁸

Furthermore, the elected nature of legislators, rather than rendering them less qualified, actually makes legislators better suited to make the choices required by redistricting. The remap process inherently involves tradeoffs among numerous communities, constituent interests, and policies.³³⁹ Redistricting “involves give and take in resolving conflicts among the various standards and in considering the concerns, desires, and objections of numerous interested persons and groups.”³⁴⁰ Line drawers also make decisions about service relationships between representatives and constituents and their placement within larger policy programs or decisions.³⁴¹ Legislators routinely balance complicated policy choices and, as elected

³³⁵ See *supra* text accompanying notes 33–36.

³³⁶ Interview of Dr. Shauna Reilly, (Jan. 27, 2010), at 1:1-10 (on file with author).

³³⁷ Justin Levitt & Bethany Foster, *A Citizen's Guide to Redistricting*, BRENNAN CENTER FOR JUSTICE 23 (2008), http://brennan.3cdn.net/58180b7e66ce3d66bb_5sm6bvr97.pdf.

³³⁸ Persily, *supra* note 205, at 678 nn.94–95. Persily also found that line drawers who are unfamiliar with local communities are more likely to draw district boundaries coterminous to subjurisdiction boundaries even when the actual communities of interest extend beyond those lines. *Id.* at 678.

³³⁹ Brunell & Buchler, *supra* note 199, at 448–49.

³⁴⁰ *Nadler v. Schwarzenegger*, 41 Cal. Rptr. 3d 92, 100 (2006).

³⁴¹ Persily, *supra* note 205, at 679.

representatives, are particularly qualified to do so.³⁴² The Supreme Court has recognized that legislatures exercise political judgment in balancing competing interests,³⁴³ and that legislatures are the institutions “best situated to identify and then reconcile traditional state policies” within the redistricting framework.³⁴⁴ In contrast to legislatively-controlled redistricting, an appointed commission not only empowers less experienced persons to make these tradeoffs, but the commissioners also lack the accountability for their actions that legislators must confront with each election.³⁴⁵

Legislative redistricting does have significant advantages. Moreover, legal and demographic hurdles will prevent the CRC from achieving its objective of significantly increasing the competitiveness of California’s districts.

VII. KEEPING THE COMMISSION AND RETURNING REDISTRICTING TO THE LEGISLATURE—BUT WITH A TWIST

Because of the Legislature’s knowledge regarding factors that are relevant to the formulation of districts, as well as its experience in balancing interests, it is the appropriate body to draw the redistricting plan. An independent commission, however, could still serve a useful function in the redistricting process.

The commission could review the plan developed by the Legislature and propose changes. To add teeth to its recommendations, California law should give deference to the commission’s proposals.

An independent commission is better suited to review a redistricting plan, rather than to create it. Because of commission members’ lack of familiarity with the communities and the government’s relationship to them, they will benefit by having additional time to get up to speed and by observing the Legislature’s redistricting hearings and decisions. Once the

³⁴² Michael S. Kang, *De-Rigging Elections: Direct Democracy and the Future of Redistricting Reform*, 84 WASH. U. L. REV. 667, 697 (2006).

³⁴³ *Miller v. Johnson*, 515 U.S. 900, 915 (1995).

³⁴⁴ *Connor v. Finch*, 431 U.S. 407, 414–15 (1977).

³⁴⁵ Kang, *supra* note 342, at 690. Critics also question whether an appointed body can be representative of as diverse a population as that of California. This argument was particularly powerful in helping defeat Proposition 77 and its redistricting commission of three retired judges. Huefner, *supra* note 115, at 40–41. Although opponents of Proposition 11 raised this point, it obviously did not carry the day. Nevertheless, as of this writing, the application period for the Citizens Redistricting Commission has closed, and only 11,000 of the 30,000 applicants are from minority candidates. Malcolm MacLachlan, *Group Effort Pushed Minority Outreach for Redistricting Commission*, CAPITOL WKLY., Feb. 25, 2010, at A1.

Legislature has completed its plans, the commission could then review those lines. Their review could proceed at three levels:

(1) Overall architecture—this would look at the overall demographics of the plan. The commission would compare the share of registered voters in each major party and the racial and ethnic percentages of the statewide and regional population and compare them to the anticipated totals for the proposed plans. The objective of this review is to ensure that no groups are especially over- or under-represented at the statewide level. An example of a plan that would cause the commission concern would be the 2002 Ohio redistricting plans, in which Republicans controlled 61.6% of the seats even though they represented only 49.0% of the state's registered voters.³⁴⁶

(2) Review of specific districts—the commission would review the configuration of specific districts for irregularities. Concerns here would include unnecessary splitting of communities of interests and sub-jurisdictions, lack of compactness, irregular district shapes, combination of dissimilar communities, and other anomalies.

(3) A consideration of specific lines—this would focus on specific streets and geographic features that the plan uses to form districts. Practices that the commission addresses here might include the “Kiskaddon Pimple” and the “Rasmussen Stovepipe” from the Washington plans—situations where the overall district configuration is acceptable but a particular district's exclusion or inclusion of a few blocks lacks justification.³⁴⁷

To assist its review, the commission would consider public testimony provided to the Legislature and the complete record of its deliberations. It could also convene its own hearings to receive public comment about the Legislature's plans, which would help to direct the commission's attention. After concluding its review, the commission would submit to the Legislature written comments concerning the acceptability of its plan.

To encourage the Legislature to adopt the commission's recommendations, the deference that courts normally apply to the Legislature's plans should instead shift to the commission's

³⁴⁶ Joe Hallett, *Redistricting Comes Under Scrutiny*, COLUMBUS DISPATCH, Oct. 27, 2005, at A1. Not only did Ohio's plans create a disparity between party registration and electoral success, but its plans caused excessive noncompetitiveness in its districts. In the election immediately preceding Issue 4, the state's redistricting measure, the mean margin of victory in Ohio's 133 congressional and state legislative districts was forty-two percent. *Id.*

³⁴⁷ Modie, *supra* note 290.

work. As discussed previously, prior to the adoption of Proposition 11, California law mandated that the Legislature redistrict the state.³⁴⁸ Under that process, the courts held that California law entitled the Legislature's determinations to great deference as long as they constituted reasonable applications of controlling state and federal law. Courts extended such deference even when equally reasonable alternatives might be available.³⁴⁹ Courts deferred to the Legislature in the absence of a showing that it unmistakably violated a particular provision of the law.³⁵⁰ When considering a legislative redistricting, the court not only applied deference, but judicial restraint.³⁵¹ For constitutional challenges to legislative redistrictings, courts have presumed that the plans were constitutional and placed the burden of proving a violation upon the challenger.³⁵²

If the courts instead extend this deference to the conclusions of the reviewing commission, the Legislature would confront a choice. It could modify its plan to be consistent with the comments of the commission, or it could decline to alter its plan. However, in any subsequent challenge on grounds raised by the commission, courts would defer to the commission's recommendations as long as they were reasonable. Thus, to defend its unaltered plan, the Legislature would need to overcome the deference extended to the commission's recommendations.

Two examples show the effectiveness of this change. First, assume a commission had reviewed the Washington redistricting plan that contained the "Rasmussen Stovepipe." A reviewing commission might recommend that the narrow "Stovepipe" extension sliced through a community, combined dissimilar populations, and should be eliminated. In future litigation, the Legislature would need to argue that such a recommendation was not reasonable. In a second example, assume a commission had reviewed the Ohio redistricting plan and suggested that the Legislature modify it to balance more evenly the number of majority-Democratic and majority-Republican districts under the plan. Remember that Republicans controlled sixty percent of the districts even though they held only a forty-nine percent to forty-eight percent registration lead statewide. Again, in any future

³⁴⁸ See *supra* Part I.A.

³⁴⁹ *Nadler v. Schwarzenegger*, 41 Cal. Rptr. 3d 92, 100–01 (2006).

³⁵⁰ *Id.* at 98.

³⁵¹ *Assembly v. Deukmejian*, 639 P.2d 939, 958 (1982). See also *Easley v. Cromartie*, 532 U.S. 234, 242 (2001) (observing that caution is particularly appropriate where the legislature has "articulated a legitimate political explanation for its districting decision").

³⁵² *Nadler*, 41 Cal. Rptr. 3d at 98.

litigation, the Legislature would need to explain why drawing a more balanced plan was not reasonable. Conversely, if the commission recommends that a politically-balanced plan be tilted to favor one of the parties, the Legislature might be willing to contest in court the reasonableness of such a recommendation in a legal challenge to its plan.

The establishment of a reviewing commission thus has several advantages. First, it places upon the Legislature a tremendous burden to overcome if it decides not to adopt the commission's recommendations. Even if the Legislature believes its initial plan is justified, it must be able to establish that the commission's alternative is not even reasonable. Because of the high burden it must satisfy, counsel often will urge the Legislature to adopt the recommendations so as to retain control over the remap process. A second advantage is that the Legislature retains responsibility for the initial architecture of the plan in the Legislature, the body that is most familiar with the pertinent representational considerations, the best able to begin the process quickly, and most accountable to the voters. This system, however, would provide a significant check on the Legislature. Third, this system better utilizes the commission, allowing it more time to prepare and not demanding that it learn the minutiae of district representation, while providing a fuller record for its consideration. Fourth, it allows the Legislature to retain its plan if it believes the recommendations of the commission are not reasonable. Finally, it allows for public comment after the Legislature has developed its plan.

CONCLUSION

Proposition 11's redistricting commission is unlikely to provide a significant change in the competitiveness of the state's districts. A better approach would leave redistricting in the hands of the body most experienced in performing the policy trade-offs required by the redistricting process. A commission could be most helpful not in drawing lines, but in reviewing the maps developed by the Legislature.

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APPENDIX³⁵³

		Statewide Differential	Counties Decided by:		
			<5%	>10%	>20%
1948	President	0.5	73.5	24.5	9.9
1958	Lieutenant Governor	1.8	63.7	20.2	2.0
1958	Secretary of State	0.9	61.0	14.6	2.8
1958	Controller	0.6	60.7	14.8	1.2
1960	President	0.5	51.4	30.3	5.1
1966	Controller	1.0	6.5	41.1	10.4
1970	Attorney General	1.4	7.4	45.4	18.8
1976	President	1.8	55.5	28.8	8.7
1982	Governor	1.2	9.8	32.4	19.6
1986	Senator	1.4	16.5	75.2	20.7
1990	Attorney General	0.4	32.7	57.6	23.1
1994	Senator	1.9	7.5	90.7	40.4
1994	Secretary of State	0.5	6.3	87.3	21.4
1998	Secretary of State	1.1	0.7	81.9	26.3
2002	Controller	0.3	8.7	85.1	27.4
2010	Attorney General	0.6	5.8	92.3	32.4

³⁵³ See DAVID LEIP'S ATLAS OF U.S. PRESIDENTIAL ELECTIONS, <http://uselectionatlas.org/RESULTS/index.html> (last visited Jan. 9, 2011); *Statewide Election Results*, CALIFORNIA SECRETARY OF STATE, http://www.sos.ca.gov/elections/elections_elections.htm (last visited Jan. 9, 2011); *United States Presidential Election in California, 1948*, WIKIPEDIA, http://en.wikipedia.org/wiki/United_States_presidential_election_in_California,_1948 (last visited Jan. 9, 2011). The author's calculations, based on data obtained from the above sources, are on file with the author.

Reforming Adult Felony Probation to Ease Prison Overcrowding: An Overview of California S.B. 678

*Jessica Feinstein**

INTRODUCTION

In 2009, California's prison overcrowding crisis made national headlines.¹ A panel of three federal judges ordered the state to reduce its prison population to 137.5% of design capacity within two years in order to conform with constitutional requirements.² Faced with the threat of releasing as many as fifty thousand offenders into the community, lawmakers and state officials rushed to devise plans that would satisfy the federal mandate, while also preserving public safety.³

Yet, the specter of tens of thousands of offenders living in the community is not a future scenario, but a present-day fact. As of December 31, 2008, approximately 445,822 adults in California were under "community supervision," serving the remainder of a state prison term on parole or having been directly sentenced to probation.⁴ Roughly three-quarters of adults serving sentences in the community⁵—or about three times the number of offenders in California prisons at any one time⁶—are probationers. The large number of individuals on probation is directly tied to the state prison population: felony offenders who failed probation supervision account for about forty percent of all new felony

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¹ Solomon Moore, *Court Panel Orders California to Reduce Prison Population by 55,000 in 3 Years*, N.Y. TIMES, Feb. 10, 2009, at A12.

² Opinion and Order, at 130, *Coleman v. Schwarzenegger* No. CIV S-90-0520 LKK JFM P (E.D. Cal. Aug. 4, 2009).

³ Solomon Moore, *Federal Judges Order California Prisons to Reduce Inmate Population by a Quarter*, N.Y. TIMES, Aug. 5, 2009, at A10.

⁴ U.S. DEPT OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULLETIN, PROBATION AND PAROLE IN THE UNITED STATES, 2008, at 17 (2009) [hereinafter BUREAU OF JUSTICE STATISTICS], available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/ppus08.pdf>.

⁵ *Id.* at 19.

⁶ As of December 31, 2008, the California Department of Corrections and Rehabilitation (CDCR) reported a total prison population of 164,919. CAL. DEPT OF CORR. & REHAB., MONTHLY REPORT OF POPULATION AS OF MIDNIGHT DECEMBER 31, 2008 (2009), available at http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Monthly/TPOP1A/TPOP1Ad0812.pdf.

prison admissions each year,⁷ or roughly ten percent of yearly total prison admissions.⁸

The prison crisis, accompanied by a crippling prison budget,⁹ an economic downturn, and an estimated \$20 billion deficit,¹⁰ forced the California Legislature, after years of neglect, to turn its attention to California's adult probation population.¹¹ This extraordinary political moment opened the door for the 2009 passage of S.B. 678, the Community Corrections Performance Incentives Act (CCPIA),¹² which provides stable funding for county probation departments to implement evidence-based community corrections programs.¹³

This article provides a holistic examination of the CCPIA, including an overview of the current state of California's dysfunctional adult probation system, the political maneuvering which led to the passage of S.B. 678, and the challenges facing its successful implementation. In particular, California's own failed reform efforts, comprehensive analyses of probation in California, and other states' probation legislation provide insight into the inadequacies of California's adult probation system and how the CCPIA seeks to address these inadequacies.

Part I of this article discusses adult probation as it currently exists in California, including the demographics, governance structure, and funding apparatus. Part II details California's prior attempts to fix adult probation, best practices as they are currently recognized, as well as new legislation conforming to those best practices in Arizona and Kansas. Part III explores the legislative history of California's S.B. 678 and explicates the

7 MAC TAYLOR, CAL. LEGISLATIVE ANALYST'S OFFICE, ACHIEVING BETTER OUTCOMES FOR ADULT PROBATION 20 (2009) [hereinafter LEGISLATIVE ANALYST'S OFFICE], available at http://www.lao.ca.gov/2009/crim/Probation/probation_052909.pdf.

8 CAL. DEP'T OF CORR. & REHAB., EXPERT PANEL ON ADULT OFFENDER AND RECIDIVISM REDUCTION PROGRAMMING 24 tbl.3 (2007) [hereinafter EXPERT PANEL], available at http://www.cdcr.ca.gov/News/2007_Press_Releases/docs/ExpertPanelRpt.pdf. Total annual prison admissions include parole violators as well as new felony convictions from the courts.

9 The 2009–2010 CDCR Budget is approximately \$8.2 billion, and has replaced California's university system as the largest state expenditure. Joan Petersilia, *A Retrospective View of Corrections Reform in the Schwarzenegger Administration*, 22 FED. SENT'G REP. 148, 149 (2010).

10 Shane Goldmacher, *State Lawmakers Pass Proposal to Cut Budget Deficit by \$1.1 Billion*, L.A. TIMES (Mar. 4, 2010, 11:36 AM), <http://latimesblogs.latimes.com/lanow/2010/03/state-senators-budget-deficit.html>.

11 See Roger K. Warren, *Probation Reform in California: Senate Bill 678*, 22 FED. SENT'G REP. 186, 186 (2010).

12 CAL. PENAL CODE §§ 1228–1233.8 (2010).

13 See § 1230; ROGER K. WARREN, AM. LEGISLATIVE EXCH. COUNCIL, PERFORMANCE INCENTIVE FUNDING: CALIFORNIA SB 678 (2010), available at <http://www.alec.org/AM/PDF/publicsafety&elections/warren.pdf>.

provisions included in the new CCPIA. Finally, Part IV looks at the next steps for the CCPIA, including a discussion of the logistics of how various counties are implementing the act, and potential challenges that the CCPIA faces going forward. While the CCPIA could successfully realign the formerly adverse incentives that the decentralized probation system has created, implementation poses significant challenges for the translation of theory into practice. Should implementation prove successful, the CCPIA will mark a significant shift in how California uses adult probation—from an under-resourced catch-all for repeat offenders, to a front-end partner in the justice system.

I. PROBATION IN CALIFORNIA

In its current state, adult probation in California is a broken system. The dismal condition of probation is not a new phenomenon. For years, county probation departments have struggled with piecemeal funding and decentralized standards and resources.¹⁴ Reports cataloguing the shortcomings of the probation system—if in fact it can be called a “system” at all, since that implies unified structure and central management—and calling for reform have appeared with some regularity since 1990.¹⁵ These reports and a failed legislative attempt at reform in 1994 will be discussed in greater detail in Part III. However, for a brief summary of the current quality of California’s probation services, it is enough to quote the 2003 Final Report of the Probation Services Task Force: “[T]he status quo in the probation system is not acceptable. . . . [T]he probation structure as it exists today functions poorly on many levels.”¹⁶

The rate of adult felony probationers in California who fail to successfully complete their probation terms is high.¹⁷ Most of these felony “probation failures” are then sent to state prison as a result of new felony convictions or violations of the terms of their probation.¹⁸ The Legislative Analyst’s Office reported in 2009 that adult felony probationers are revoked to state prison at a statewide average rate of about 7.5%; revocation to prison is as high as 12–16% in some counties,¹⁹ and the overall level of

¹⁴ Warren, *supra* note 11, at 186–87.

¹⁵ Joan Petersilia, *Influencing Public Policy: An Embedded Criminologist Reflects on California Prison Reform*, 4 J. EXPERIMENTAL CRIMINOLOGY 335, 341 (2008).

¹⁶ PROB. SERV. TASK FORCE, FINAL REPORT 70 (2003), available at <http://www2.courtinfo.ca.gov/probation/documents/new/fullreport.pdf> [hereinafter PROB. SERV. TASK FORCE].

¹⁷ LEGISLATIVE ANALYST’S OFFICE, *supra* note 7, at 19.

¹⁸ *Id.* at 20.

¹⁹ *Id.* at 30–31. The Legislative Analyst’s Office revocation statistics are likely lower than the real statistics because they include only new admissions to state prison with a

revocation of adult probationers (to jail and prison) is likely even higher. These probation failures are thus incredibly costly for the state. California's state prison system, the California Department of Corrections and Rehabilitation (CDCR), estimates that each failed probationer sentenced to state prison will serve 8.6 months there.²⁰ With the estimated average annual cost of incarcerating a state prisoner at \$49,000,²¹ each failed probationer revoked to prison costs California an average of \$35,116.

California's high rate of probation failure and generally dysfunctional adult probation system may be traced to two primary problems. First, and most significantly, a lack of stable and adequate funding for county probation departments creates overburdened caseloads for probation officers.²² This in turn contributes to a low level of supervision for many serious offenders as well as a lack of programming, such as treatment and job training, which can help offenders successfully complete their probation terms.²³ Inadequate funding also creates adverse incentives for probation departments and courts to keep probationers in the community rather than send them to state prison.²⁴ Second, California's decentralized probation system leads to a dearth of unified standards and goals for probation departments to follow.²⁵ As a result, some probation departments in California have fallen behind the curve in regard to best practices.²⁶

A. California's Adult Probation Population

The challenges facing California's probation departments are rooted in the population and composition of probationers themselves. Probation is the most frequently imposed form of criminal sentence in California, and is not limited to the least serious offenders.²⁷ Estimates of the state's adult probation

probation revocation flag on their record, and may not include probationers who had their probation terminated prior to being sent to state prison. *Id.* Probation revocation statistics from the California Department of Justice's Criminal Justice Statistics Center indicate higher levels of felony probation revocation, although many of these revocations may be to county jail rather than prison. CAL. DEPT OF JUSTICE, CRIMINAL JUSTICE STATISTICS CENTER, ADULT PROBATION AND LOCAL ADULT SUPERVISION (2008), available at http://stats.doj.ca.gov/cjsc_stats?prof08/00/7.htm. Until there are better data reporting systems in place, the true rates of revocation will remain unknown.

²⁰ EXPERT PANEL, *supra* note 8.

²¹ LEGISLATIVE ANALYST'S OFFICE, *supra* note 7, at 19.

²² *Id.* at 17.

²³ *Id.* at 19.

²⁴ *Id.*

²⁵ See generally PROB. SERV. TASK FORCE, *supra* note 16.

²⁶ *Id.*

²⁷ BUREAU OF JUSTICE STATISTICS, *supra* note 4, at 1.

population range from roughly 325,000²⁸ to 350,000.²⁹ This places California as third, after Texas and Georgia, for the highest number of adult probationers in the United States.³⁰ The majority of these probationers are felony offenders. Roughly three-quarters of adult probationers in California,³¹ or 270,000 adults,³² are felony convicts. Mirroring national data, probationers are overwhelmingly sentenced for drug and property offenses. In 2007, forty-one percent of adult probationers in California were serving sentences for drug crimes, and twenty-three percent for property crimes.³³ Although data regarding the criminogenic makeup of this population is scant, national studies indicate that probationers have high rates of substance abuse, mental illness, and unemployment—all factors which correlate to criminal activity.³⁴

In addition to a large and needy population, California's probation departments have struggled to keep pace with the changing demographics of probationers. Over the past fifteen years, the United States has experienced a rapid growth in the population of adults on probation,³⁵ and California is no exception.³⁶ From 1991 to 1999, the state's total adult probation population increased seven percent;³⁷ from 1997 to 2007 it increased fifteen percent.³⁸ The number of new probation sentences entered each year *more than doubled* over the last decade, from 15,788 in 1999 to 35,684 in 2008.³⁹ Significantly,

²⁸ *Id.* at 19 (noting statistics compiled for Dec. 31, 2008).

²⁹ LEGISLATIVE ANALYST'S OFFICE, *supra* note 7, at 3 (detailing 2007 data).

³⁰ BUREAU OF JUSTICE STATISTICS, *supra* note 4, at 18–19.

³¹ LEGISLATIVE ANALYST'S OFFICE, *supra* note 7, at 8–9.

³² See CAL. PENAL CODE § 1228(a) (2010) (finding that “in 2007, nearly 270,000 felony offenders were subject to probation supervision in California’s communities”).

³³ LEGISLATIVE ANALYST'S OFFICE, *supra* note 7, at 9.

³⁴ See, e.g., PAULA M. DITTON, BUREAU OF JUSTICE STATISTICS, MENTAL HEALTH AND TREATMENT OF INMATES AND PROBATIONERS (1999), <http://bjs.ojp.usdoj.gov/content/pub/pdf/mhtip.pdf>; LEGISLATIVE ANALYST'S OFFICE, *supra* note 7, at 9.

³⁵ By the end of 1995, the Bureau of Justice Statistics reported a probation population of a little over three million. Joan Petersilia, *Probation in the United States*, 22 CRIME & JUST. 149, 149–50 (1997). By the end of 2008, that number had increased by over a million to 4,270,917. BUREAU OF JUSTICE STATISTICS, *supra* note 4, at 1.

³⁶ LEGISLATIVE ANALYST'S OFFICE, *supra* note 7, at 8. The Bureau of Justice Statistics reports substantial decline in California's overall probation population in 2008. However, this one-time decrease does not undermine the massive growth of the state's probation population over a fifteen year period. Nor is it clear what caused the decrease. Unsatisfactory probation exits—failure to complete probation and subsequent revocation to prison—might account for a portion of the decline; a decrease in misdemeanor probation is another possibility. See *infra* note 41 and accompanying text.

³⁷ PROB. SERV. TASK FORCE, *supra* note 16, at 3.

³⁸ LEGISLATIVE ANALYST'S OFFICE, *supra* note 7, at 8.

³⁹ CAL. DEP'T OF JUSTICE, CRIMINAL JUSTICE STATISTICS CTR, FINAL LAW ENFORCEMENT, PROSECUTION, AND COURT DISPOSITION OF ADULT FELONY ARRESTS BY TYPE OF DISPOSITION STATEWIDE (2008), available at http://stats.doj.ca.gov/cjsc_stats/prof08/00/6.htm. The annual number of new split sentences including probation

this increase in the number of adult probationers includes a shift in the underlying offenses from less serious to more serious.⁴⁰ In fact, the number of misdemeanor probationers *decreased* by fifteen percent over the last decade.⁴¹ The rise in the total probation population is thus due to a two-decade-long increase in the number of felony probationers. In 1996, the California Research Bureau reported an increasing backlog of sentenced felons resulting in an increase in probation referrals.⁴² This phenomenon is born out in the data: from 1990 to 1999, the number of felony probationers nearly doubled, from 130,000 to 245,000,⁴³ and then grew by approximately 50,000 more over the next ten years.⁴⁴ Thus, not only are probation departments dealing with a significantly larger population than they were ten or twenty years ago, but also a more risky population requiring more supervision. This “clearly has placed different and more intensive service demands on probation departments.”⁴⁵

Unfortunately, probation departments have not been able to keep pace. The California Legislative Analyst’s Office reports that the rate at which California’s probationers successfully complete their probation terms is lower than the national average by ten percent.⁴⁶ According to the U.S. Department of Justice, in 2008, of the 199,528 “exit” from probation in California, only 87,246 were “completions.”⁴⁷ This means that less than half of adults removed from probation successfully completed their terms, while the rest lost probation status due to failure. A probationer “fails” probation when he has his probation status revoked due to a technical violation, like failing a drug test, or he is convicted for a new crime.⁴⁸ Of those who fail

fluctuated from year to year between 1999 and 2008, but maintained a rough average of about 128,000. Combining split sentences and pure probation sentences, the annual number of new probation sentences was 140,705 in 1999 and 164,416 in 2008. *Id.*

⁴⁰ LEGISLATIVE ANALYST’S OFFICE, *supra* note 7, at 8.

⁴¹ *Id.*

⁴² MARCUS NIETO, CAL. RESEARCH BUREAU, THE CHANGING ROLE OF PROBATION IN CALIFORNIA’S CRIMINAL JUSTICE SYSTEM 1 (1996), <http://www.library.ca.gov/crb/96/06/96006.pdf> [hereinafter NIETO, THE CHANGING ROLE OF PROBATION].

⁴³ PROB. SERV. TASK FORCE, *supra* note 16, at 3.

⁴⁴ LEGISLATIVE ANALYST’S OFFICE, *supra* note 7, at 8.

⁴⁵ PROB. SERV. TASK FORCE, *supra* note 16, at 3.

⁴⁶ LEGISLATIVE ANALYST’S OFFICE, *supra* note 7, at 20. Indeed, as early as 1994, California’s failure rate diverged from the national average. The California Research Bureau reported that one-in-seven adult probationers in California had his or her probation revoked, in comparison with a national average of one-in-ten. NIETO, THE CHANGING ROLE OF PROBATION, *supra* note 42, at 8.

⁴⁷ BUREAU OF JUSTICE STATISTICS, *supra* note 4, at 23.

⁴⁸ See, e.g., CAL. PENAL CODE § 1203.2(a) (2010).

each year, a significant portion—somewhere from 14,532⁴⁹ to an upward estimate of 20,000⁵⁰—winds up in state prison.

B. Structure, Governance, and Practices

Despite the size and complexity of California's probation population, there is little centralized state oversight. The general statute governing probation in California is Penal Code section 1203, which defines probation as "the suspension of the imposition or execution of a sentence and the order of conditional and revocable release in the community under supervision of a probation officer."⁵¹ Other than this provision, there exists relatively scant statutory language detailing the structure or governance of probation departments, leaving counties to adopt most of their own practices, unhindered by state oversight.⁵²

California's placement of primary responsibility for probation in the hands of counties, rather than the state, is unique. California is the "only state in the nation to follow a strictly local operational model" for probation.⁵³ The state has fifty-eight independent probation departments, one for each of the fifty-eight counties.⁵⁴ In each county, one Chief Probation Officer oversees and supervises the department, and appoints deputy probation officers and other staff.⁵⁵ In most counties, the Chief Probation Officer is in turn appointed by the superior court,⁵⁶ and the local executive branch controls the management and finances of probation.⁵⁷

Probation departments perform a diverse array of roles for the community. Probation not only "supervises" probationers—a task which itself includes varying responsibilities, from support to drug testing to enforcement—but also refers probationers to

⁴⁹ EXPERT PANEL, *supra* note 8, at 143 (reporting 2006 data).

⁵⁰ CAL. PENAL CODE § 1228(b) (2010) (reporting 2007 data).

⁵¹ § 1203(a).

⁵² The appointment process for chief probation officers is governed by CAL. PENAL CODE § 1203.5 and § 1203.6, and CAL. WELF. & INST. CODE § 225, § 270 and § 271 (West 2008); however, even this process varies widely among counties. PROB. SERV. TASK FORCE, *supra* note 16, at 40–41. PENAL CODE § 1203.71 grants probation officers the powers of a peace officer with regard to probationers under their supervision, and § 1203.73 grants probation officers necessary expense allowances from the county's funds. PENAL CODE § 1203 *et seq.* sets the basic requirements of probation, including pre-sentence reports and reporting of probation violations.

⁵³ PROB. SERV. TASK FORCE, *supra* note 16, at 61.

⁵⁴ See *State Juvenile Justice Profiles: California*, NCJJ, <http://70.89.227.250:8080/stateprofiles/profiles/CA06.asp?state=%2Fstateprofiles%2Fprofiles%2FCA06.asp&topic=> (last updated Feb. 4, 2008).

⁵⁵ PROB. SERV. TASK FORCE, *supra* note 16, at 40.

⁵⁶ In several major population centers, including Los Angeles and San Diego, the CPO is appointed by the local board of supervisors rather than the court. *Id.*

⁵⁷ *Id.* at 61.

programs, investigates crimes, oversees payment of court fines, and manages custody facilities and electronic monitoring systems.⁵⁸ Probation thus assumes the difficult but important task of “link[ing] the system’s many diverse stakeholders, including law enforcement; the courts; prosecutors; defense attorneys; community-based organizations; mental health, drug and alcohol, and other services providers; the community; the victim; and the probationer.”⁵⁹ The multitude of probation’s roles and partnerships, combined with the decentralization of probation in California and the diverse populations in counties, multiplies inconsistencies among probation departments as to procedures used and programs available.

As a result, while some probation departments proceed largely in keeping with current best practices, others are far behind.⁶⁰ The California Legislative Analyst’s Office (LAO), after conducting a study of thirty-one counties, noted that “many probation departments do not follow all of the best probation practices identified in research.”⁶¹ For example, the LAO found that only eighty percent of surveyed counties use an evidence-based risk and needs assessment to evaluate at least some segments of probationers.⁶² In addition, risk/needs assessments are not widely used among the counties to make sentencing recommendations in pre-sentence reports or in the process of prioritizing which probationers ought to receive intensive rehabilitation.⁶³ Even assuming departments identify the probationers best positioned to benefit from rehabilitation, some counties lack rehabilitation programs that are open to probationers, while other counties’ rehabilitation programs “suffer from having limited capacity, few available locations, and questionable quality.”⁶⁴ Finally, evaluating the efficacy of probation departments’ programs becomes challenging or impossible due to varied data tracking systems. While several counties, such as San Francisco, have begun to use electronic systems to track data such as probation revocation rates,⁶⁵ other

⁵⁸ LEGISLATIVE ANALYST’S OFFICE, *supra* note 7, at 7–8; PROB. SERV. TASK FORCE, *supra* note 16, at 49–54.

⁵⁹ PROB. SERV. TASK FORCE, *supra* note 16, at 1.

⁶⁰ See LEGISLATIVE ANALYST’S OFFICE, *supra* note 7, at 16 (finding that “the absence of a stable funding source for adult probation, and the lack of fiscal incentives to promote the best outcomes for public safety or efficiency, constitute major barriers to the promotion of successful probation practices” in California).

⁶¹ *Id.* at 5, 16.

⁶² *Id.* at 17.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Interview with Wendy Still, Chief Adult Probation Officer, City and County of San Francisco (April 28, 2010).

counties still rely on paper,⁶⁶ making compilations of data impossible to create or evaluate.⁶⁷ Many probation departments surveyed could not inform the LAO of how many probationers were participating in rehabilitation programs; and less than half of the responding counties were able to report the number of probation violations in a year.⁶⁸

The only factor most counties have in common is the excessive caseloads adult-probation officers juggle.⁶⁹ The rising numbers of probationers⁷⁰ and lack of funding⁷¹ directly contribute to this phenomenon. For California's estimated 270,000 adult probationers, there are only about 3,000 sworn adult probation officers supervising them.⁷² The American Probation and Parole Association recommends fifty cases per officer and twenty cases for specialized caseloads.⁷³ While these targets are idealistic, they are not realistic because caseloads in California far exceed that—each officer oversees an average of one hundred to two hundred cases, with specialized caseloads averaging around seventy.⁷⁴

High caseloads translate to less supervision for adult probationers, particularly those not assigned to special oversight. Most departments have “banked” caseloads, which receive little or virtually no supervision.⁷⁵ According to the Chief Probation Officers of California (CPOC), approximately fifty-two percent of all probationers in California are on banked caseloads.⁷⁶ The low

⁶⁶ Telephone interview with Karen Pank, Executive Director, Chief Probation Officers of California (May 5, 2010). *See also* LEGISLATIVE ANALYST'S OFFICE, *supra* note 7, at 18–19 (“Although many departments indicated that they would like to be able to track the above data, they currently lack the information technology systems that would be needed to do so.”).

⁶⁷ LEGISLATIVE ANALYST'S OFFICE, *supra* note 7, at 18 (“[O]ur survey found that a majority of probation departments do not track the type of performance or outcome data that is necessary to evaluate the effectiveness of probation activities and programs.”).

⁶⁸ *Id.*

⁶⁹ PROB. SERV. TASK FORCE, *supra* note 16, at 47.

⁷⁰ *See supra* Part I.A.

⁷¹ *See infra* Part I.C.

⁷² LEGISLATIVE ANALYST'S OFFICE, *supra* note 7, at 9.

⁷³ *Id.* at 15, 17–18.

⁷⁴ *Id.* at 18. The trend of large caseloads and “banking” probationers had already begun in 1996:

[C]ounty probation officials are managing larger adult offender caseloads with fewer resources, often resulting in little or no supervision Probation departments are increasingly placing sentenced offenders into large ‘banked’ caseloads (a new form of unsupervised probation) with a statewide average ratio of 629 offenders per probation officer.

NIETO, THE CHANGING ROLE OF PROBATION, *supra* note 42.

⁷⁵ PROB. SERV. TASK FORCE, *supra* note 16, at 47.

⁷⁶ CHIEF PROB. OFFICERS OF CALIFORNIA, ADULT PROBATION SERVICES AND THE NEED TO INCREASE PUBLIC SAFETY, ACCOUNTABILITY, COMPETENCY DEVELOPMENT AND

level of supervision for banked cases results in a problematic pattern: a probationer will build up repeated violations without sanctions, and will escalate his criminal behavior until he reaches a tipping point where a violation will result in a jail or prison term.⁷⁷ CPOC explains that banked caseloads mean “there is little opportunity to intervene in the offenders['] course of current criminal behavior.”⁷⁸ Given that experts acknowledge that recidivism rates are high for felony probationers with minimal supervision,⁷⁹ it is unsurprising that California’s failure rate is so high.

C. Funding and Adverse Incentives

Lack of adequate funds for adult probation is the primary cause of California’s probation woes. Probation departments “do not enjoy a stable, reliable funding base,”⁸⁰ and instead subsist on a “patchwork” financial structure that leaves adult probation services badly under-resourced.⁸¹ Compared with the money spent on prison, and even parole—both of which are state-run—funds devoted to probation are meager at best. It costs the state about \$1,250 per year to maintain an offender on probation, three times that amount—\$4,500 per year—to maintain an offender on parole, and forty times that amount to incarcerate a prisoner.⁸²

As with management, the funding model for probation is local, and therein lies a portion of the problem. Prior to the implementation of S.B. 678 in 2009, counties supplied two-thirds of probation funding; one-quarter of funding came from the state; and departments obtained the rest of their budget from federal grants and various court fees.⁸³ California is once more an outlier in this respect—only one other state in the nation relies on local government as its primary source of funding for probation.⁸⁴

Although in 2009 California supplied one-quarter of its probation funds, it is important to emphasize that prior to the

COST EFFECTIVENESS (2008) [hereinafter CHIEF PROB. OFFICERS OF CALIFORNIA], available at <http://67.199.72.34/php/Information/Papers/papers.php>.

⁷⁷ LEGISLATIVE ANALYST’S OFFICE, *supra* note 7, at 18.

⁷⁸ CHIEF PROB. OFFICERS OF CALIFORNIA, *supra* note 76.

⁷⁹ Petersilia, *Probation in the United States*, *supra* note 35, at 181.

⁸⁰ PROB. SERV. TASK FORCE, *supra* note 16, at 43.

⁸¹ *Id.* at 6.

⁸² LEGISLATIVE ANALYST’S OFFICE, *supra* note 7, at 19.

⁸³ *Id.* at 12.

⁸⁴ LITTLE HOOVER COMM’N, SOLVING CALIFORNIA’S CORRECTIONS CRISIS 29 (2007) [hereinafter LITTLE HOOVER COMM’N], available at www.lhc.ca.gov/studies/185/Report185.pdf.

passage of S.B. 678, the state provided no stable, ongoing funding for adult probation services.⁸⁵ Proposition 172, a half-cent statewide sales tax for local public safety departments, contributes some funds for probation; and in 2007 and 2008, the state also gave \$10 million in one-time grants to improve probation supervision and services for adults ages eighteen to twenty-five.⁸⁶ But other than these one-time grants, most state money goes to juvenile probation programs. In the mid-1990s, the Juvenile Crime Enforcement and Accountability Challenge Grant Program and the Juvenile Justice Crime Prevention Act began funneling state resources to those under age eighteen.⁸⁷ This resulted in a “somewhat overbalanced emphasis on juvenile services,” meaning that “the limited number of remaining staff and resources is often sorely insufficient to properly supervise the adult probation population.”⁸⁸ Insufficient numbers of probation officers overseeing adults, lack of programs and resources availability, large banked caseloads, and low supervision directly follow from lack of funds.⁸⁹

This dearth of funds for adult probation, in conjunction with inadequate supervision and resources, creates an incentive structure adverse to keeping probationers in the community. Probation officers are incentivized to recommend incarceration rather than probation since the state must then bear the financial burden of that offender; moreover, sending a probationer to prison is one less case for their already overburdened loads.⁹⁰ In addition, judges know there is a lack of supervision of and resources available to the felony offenders they might otherwise sentence to probation.⁹¹ Why keep a felony offender in the community with little oversight or opportunity when sending the offender to prison at least incapacitates him from criminal activity on someone else’s dime? Former Sacramento Superior Court Judge Roger K. Warren explained that “the principal reason . . . judges are sentencing too many non-violent offenders to prison is the absence of effective community corrections programs providing intermediate

⁸⁵ LEGISLATIVE ANALYST’S OFFICE, *supra* note 7, at 12.

⁸⁶ *Id.*

⁸⁷ PROB. SERV. TASK FORCE, *supra* note 16, at 44; LEGISLATIVE ANALYST’S OFFICE, *supra* note 7, at 12. *See also* Telephone interview with Jerry Powers, Legislative Chair, Chief Probation Officers of California and Stanislaus County Chief Probation Officer (Apr. 29, 2010) (stating that, for the past fifteen years, there has been a fear that juvenile crime was going to have a huge spike, and the state provided counties with funding so they “could work from a preventative perspective”).

⁸⁸ PROB. SERV. TASK FORCE, *supra* note 16, at 44.

⁸⁹ *Id.* at 6.

⁹⁰ *See* LEGISLATIVE ANALYST’S OFFICE, *supra* note 7, at 3.

⁹¹ LITTLE HOOVER COMM’N, *supra* note 84, at 26.

punishments and necessary and appropriate treatment and rehabilitation services”⁹² Probation departments, law enforcement, and courts worry about the headlines that could result from an unsupervised criminal on the streets.⁹³ And, where resources are scarce and passing the buck is easy to do, many county actors will choose to shift the burden to the state. The Little Hoover Commission concluded that, as a result of these adverse incentives, “the State squanders its most expensive resource on low-level offenders who could be more effectively supervised by local authorities.”⁹⁴

II. ATTEMPTS TO FIX PROBATION IN CALIFORNIA AND ELSEWHERE

The problems with adult probation in California have been apparent to those familiar with the situation for at least two decades. S.B. 678 is only the latest attempt to fix adult probation. To properly understand the origins of the new law and the potential challenges facing its implementation, it is necessary to survey the various reform efforts and failed projects that preceded it. S.B. 678 builds upon experience gleaned over the years from California’s own failed laws, the accumulation of knowledge regarding criminogenic factors and best practices, several expert reports, and legislative experiments in other states.

A. California’s Failed Probation Legislation

The California Legislature enacted the first probation laws in 1903.⁹⁵ However, the first major legislative attempt to substantively impact county probation practices was the California Probation Subsidy Act of 1965.⁹⁶ The Probation Subsidy Act was an incentive-based funding provision, the basic structure of which has much in common with S.B. 678.⁹⁷ The Probation Subsidy Act provided counties up to \$4,000 for each adult or juvenile offender supervised in the community, rather than sent to prison.⁹⁸ The state provided counties with the subsidies based on probation departments’ improvement over

⁹² *Id.*

⁹³ See, e.g., Adam Foxman, *Proposed Prison Budget Cuts Worry Local Law Enforcers*, VENTURA COUNTY STAR (Feb. 1, 2008, 12:00 AM), <http://www.vcstar.com/news/2008/feb/01/proposed-prison-budget-cuts-worry-local-law/>.

⁹⁴ LITTLE HOOVER COMM’N, *supra* note 84, at 27.

⁹⁵ See CAL. PENAL CODE § 1203 *et seq.* (West 2004).

⁹⁶ LEGISLATIVE ANALYST’S OFFICE, *supra* note 7, at 14.

⁹⁷ MARCUS NIETO, CAL. RESEARCH BUREAU, COMMUNITY CORRECTION PUNISHMENTS: AN ALTERNATIVE TO INCARCERATION FOR NONVIOLENT OFFENDERS (1996) [hereinafter NIETO, COMMUNITY CORRECTION PUNISHMENTS], available at <http://www.library.ca.gov/crb/96/08/index.html>.

⁹⁸ *Id.*

historical commitment levels,⁹⁹ thus incentivizing counties to maintain probationers in the community and lower their revocation rates. Proponents of the Subsidy Act optimistically argued that: “[T]he state payment is sufficient to provide excellent supervisory and ancillary programs for three or four times as many persons as were not committed. . . . In fact, the program should increase public protection through prevention of delinquency and reduction of repeated criminality.”¹⁰⁰

Especially in its early years, the Subsidy Act lived up to these expectations, diverting more than 45,000 offenders from state institutions to local probation programs.¹⁰¹ However, various factors contributed to the Legislature’s eventual decision to cease the subsidies. First, although the Subsidy Act provided counties with more funding, most counties did not implement new services for offenders, such as halfway houses and day service centers.¹⁰² Second, the Act’s subsidies did not keep pace with the rate of inflation, undermining its efficacy at enticing counties to supervise offenders.¹⁰³ And third, the Legislature came to consider the program too costly.¹⁰⁴ As nationwide sensibilities shifted from rehabilitation to incapacitation, California’s move to a determinate sentencing scheme as well as the passage of tough on crime laws multiplied the number of offenders and the cost of prisons.¹⁰⁵ Ending the subsidies immediately saved money for the state, although in the long term it might have proven more cost effective to fix the Subsidy Act rather than to scrap it.¹⁰⁶ As a result, in 1978 the Legislature replaced the Probation Subsidy Act with the County Justice System Subvention Program, which provided counties with grants to support local justice programs.¹⁰⁷ Later, the Subvention Program became a block grant with few requirements for grantees, and thus had little impact on prison commitments.¹⁰⁸ By 1992, the Subvention Program represented only 7.5% of county probation expenditures statewide.¹⁰⁹

⁹⁹ *Id.*

¹⁰⁰ STANFORD CRIMINAL JUSTICE CTR., STATE/COUNTY CRIMINAL JUSTICE PARTNERSHIPS IN CALIFORNIA: AN ABBREVIATED HISTORY 2 (2007) [hereinafter STANFORD CRIMINAL JUSTICE CTR.], available at http://www.pewcenteronthestates.org/report_detail.aspx?id=32980.

¹⁰¹ NIETO, COMMUNITY CORRECTION PUNISHMENTS, *supra* note 97.

¹⁰² *Id.*

¹⁰³ STANFORD CRIMINAL JUSTICE CTR., *supra* note 100.

¹⁰⁴ *Id.*

¹⁰⁵ NIETO, COMMUNITY CORRECTION PUNISHMENTS, *supra* note 97.

¹⁰⁶ STANFORD CRIMINAL JUSTICE CTR., *supra* note 100.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 2–3. “The County Justice Subvention Program still exists, see Cal. Welf. & Inst. Code § 1805 *et seq.*, but deals only with probation services for juveniles.” *Id.* at 3.

Legislators enacted the second major attempt to impact probation in the mid-1990s as part of a trend of states enacting “community corrections acts.”¹¹⁰ These diverse acts all created “mechanisms by which state funds [were] granted to local governments and community agencies to encourage local sanctions in lieu of prison or jail.”¹¹¹ Already in the late 1980s, a population crunch threatened California state prisons.¹¹² In 1990, the California Blue Ribbon Commission on Inmate Population Management recommended adopting a community corrections act to expand community-based intermediate sanctions.¹¹³ As a result, the Legislature passed the Community-Based Punishment Act of 1994.¹¹⁴ The Community Based Punishment Act would establish a “partnership between the state and local government” to expand probation in an effort to ease prison overcrowding.¹¹⁵ As recommended, the Community Based Punishment Act encouraged counties to develop “intermediate sanctions” such as short-term jail stays, boot camp, home detention and electronic monitoring, community service, drug testing, rehabilitation, and job training.¹¹⁶ The Legislature recognized that probation programs required a “consistent, reliable, and separate funding source;” and it designated the California Board of Corrections to oversee the approval of county corrections plans and the annual doling out of funds.¹¹⁷

Those funds never materialized. The Achilles heel of the Community Based Punishment Act was not its goals or even its basic structure, but the total lack of long-term guaranteed funding or startup moneys. Implementation was “contingent upon the availability of funding” from the state budget, federal funds, private grants, and “[o]ther sources as may be identified as suitable”¹¹⁸ The Community Based Punishment Act comically instructed the Board of Corrections to “seek startup funding . . . from public and private sources commencing as soon as practicable.”¹¹⁹ In 1995, the State Legislature allocated \$2 million to the Board of Corrections to fund county planning grants.¹²⁰ This paltry sum was never replicated. Needless to say,

¹¹⁰ See NIETO, COMMUNITY CORRECTION PUNISHMENTS, *supra* note 97.

¹¹¹ *Id.*

¹¹² LITTLE HOOVER COMM’N, *supra* note 84, at 17.

¹¹³ *Id.* at 28.

¹¹⁴ CAL. PENAL CODE § 8050 *et seq.* (West 2000).

¹¹⁵ § 8051 (providing the “Legislative Findings”).

¹¹⁶ § 8052(e).

¹¹⁷ §§ 8051(f), 8061.

¹¹⁸ § 8090.

¹¹⁹ § 8092.

¹²⁰ NIETO, THE CHANGING ROLE OF PROBATION, *supra* note 42, at 12.

the Community Based Punishment Act was a total failure as a result of these vague financial directives.¹²¹

Following the 1994 act, there were no further legislative initiatives to fix adult probation until the state prison crisis came to a head in the late 2000s.¹²² But, the 1965 Probation Subsidy Act and the 1994 Community Based Punishment Act are still significant in that they communicate important lessons regarding implementation of reforms. First, the Probation Subsidy Act's initial success proves that state funds for county probation, if properly structured, can incentivize counties to supervise offenders in the community. Second, successful implementation of a probation reform act requires a guaranteed and steady source of funding—both start-up and long-term. Third, once programs are implemented, the Legislature ought to make periodic evaluations of the programs and formulate adjustments as necessary.¹²³ If the Legislature had adjusted the Probation Subsidy Act to account for inflation, the Subsidy Act might have proven to be more successful in the long-term. And fourth, in a partnership between state and local authorities, each party must try to require accountability of the other. For example, California ought to have required probation departments to implement new programs with subsidies from the 1965 Act. Relations between state and locals are notoriously difficult in California, and public safety collaborations tend to be strained.¹²⁴ Mutual accountability is necessary for such collaborations to work.¹²⁵

B. Best Practices and Recommendations

In the thirty or so years since California abandoned the Probation Subsidy Act, criminologists have made major advances in understanding what factors tend to impact offenders' rates of recidivism, and what programs and sentencing structures are best able to reduce the risk of re-offense. A body of "best practices" for community punishment and other forms of corrections has gradually emerged and is only now gaining

¹²¹ See LITTLE HOOVER COMM'N, *supra* note 84, at 28.

¹²² Community Corrections Performance Incentives Act of 2009, CAL. PENAL CODE §§ 1228–1233.8 (2010).

¹²³ In fact, the CBPA did provide for an annual progress report to the Legislature, but only on request. See § 8061(j).

¹²⁴ STANFORD CRIMINAL JUSTICE CTR., *supra* note 100, at 1.

¹²⁵ See, e.g., Kristina Smock, *Building Effective Partnerships: The Process and Structure of Collaboration*, SHELTERFORCE ONLINE, May–June 1999, <http://www.nhi.org/online/issues/105/smock.html> (arguing that, "[w]ithout enforceable rules of interaction [including mutual accountability], organizational partnerships often take the form of loose networks than functional collaborations[.]" and can sometimes cause "organizations [to be] unwilling to fully commit to potentially productive partnerships . . .").

headway in policy. Significantly, this research shows that behavior change and rehabilitation can be successful when implemented properly for the right subsection of offenders.¹²⁶

Briefly, best practices include: (1) a combination of surveillance and treatment for probationers, rather than one or the other alone;¹²⁷ (2) the use of evidence-based practices risk and needs assessment tools;¹²⁸ (3) swift, certain, and proportionate punishment for all probation violations, with a concomitant range of graduated sanctions¹²⁹ and positive incentives for offenders;¹³⁰ and (4) community coordination and cooperation.¹³¹ Over the last decade, various statewide studies and reports have recommended reforms for California's probation system, including some of these practices.

In 2000, California's Administrative Office of the Courts appointed a Probation Services Task Force to perform a

¹²⁶ See, e.g., MATTHEW T. DEMICHELE, AM. PROB. & PAROLE ASS'N, PROBATION AND PAROLE'S GROWING CASELOADS AND WORKLOAD ALLOCATION: STRATEGIES FOR MANAGERIAL DECISION MAKING 12 (2007), available at <http://www.appa-net.org/eweb/docs/appa/pubs/SMDM.pdf> ("The research evidence in favor of offender behavior change as the most effective strategy to enhance public safety is impressive and voluminous.") (citing various studies).

¹²⁷ Criminologists have found that in programs where offenders receive a combination of surveillance and relevant treatment or "prosocial activities" such as education and employment programs, recidivism was reduced by twenty to thirty percent. See, e.g., Joan Petersilia, *A Decade of Experimenting with Intermediate Sanctions: What Have We Learned?* CORRECTIONS MGMT. Q., Summer 1999, at 19, 23; Petersilia, *Probation in the United States*, *supra* note 35, at 186. See also DEMICHELE, *supra* note 126, at 8, 11–14 (recommending an "integrated approach of surveillance, treatment, and enforcement," and arguing that "the justice system goals of punishment and rehabilitation can effectively co-exist if carefully managed and thoroughly understood").

¹²⁸ CRIME & JUSTICE INST. & NAT'L INST. OF CORR., IMPLEMENTING EVIDENCE-BASED POLICY AND PRACTICE IN COMMUNITY CORRECTIONS ix (2d ed. 2009) ("Evidence-based practice (EBP) is the objective, balanced, and responsible use of current research and the best available data to guide policy and practice decisions, such that outcomes for consumers are improved.... [E]vidence-based practice focuses on approaches demonstrated to be effective through empirical research rather than through anecdote or professional experience alone."). See also PROB. SERV. TASK FORCE, *supra* note 16, at 81; LEGISLATIVE ANALYST'S OFFICE, *supra* note 7, at 13; DEMICHELE, *supra* note 126, at 8, 10, 21, 30 (recommending risk/needs actuarial tools).

¹²⁹ See, e.g., Michael Tonry, *Purposes and Functions of Sentencing*, 34 CRIME & JUST. 1, 8 (2006); PROB. SERV. TASK FORCE, *supra* note 16, at 8.

¹³⁰ See, e.g., COLORADO DIV. OF CRIMINAL JUSTICE, EVIDENCE BASED CORRECTIONAL PRACTICES 5 (2007), available at www.nga.org/Files/pdf/0805SENTENCERES10.pdf ("Researchers have found that optimal behavior change results when the ratio of reinforcements is four positive to every negative reinforcement.").

¹³¹ Given probation's position as the "link" between justice system actors, successful collaboration with key stakeholders, such as police and service providers, is crucial to the success of community corrections programs. See, e.g., Petersilia, *A Decade of Experimenting with Intermediate Sanctions: What Have We Learned?*, *supra* note 127, at 27 ("Workable, long-term solutions must come from the community and be embraced and actively supported by the community."); PROB. SERV. TASK FORCE, *supra* note 16, at 76, 96; DEMICHELE, *supra* note 126, at 28.

comprehensive review of probation in California.¹³² When it issued its Final Report in 2003, the Task Force set out seventeen recommendations to improve the unacceptable “status quo.”¹³³ These recommendations included the provision of stable and adequate funding; more centralized governance of probation; the development of measurable goals and objectives; the adoption of risk/needs assessments and meaningful program evaluations; creating a graduated continuum of services and sanctions, especially for adults; and greater collaboration among courts, counties, and other community agencies.¹³⁴

Nothing immediately resulted from the Task Force report. In 2007, as the prison overcrowding crisis came to a head, the Little Hoover Commission published a report titled “Solving California’s Corrections Crisis,” subtitled “*Time is Running Out*.”¹³⁵ Although the Little Hoover Commission evaluated the whole corrections structure, it in particular recommended “reallocating resources [from state prison] to community based alternatives,”¹³⁶ and “assist[ing] counties in expanding intensive probation,”¹³⁷ as well as implementing evidence-based practices and a “continuum of alternatives to prison.”¹³⁸ Various witnesses told the Commission that California should re-establish something like the original Probation Subsidy Act.¹³⁹

Finally, in 2009, as the Legislature was drafting S.B. 678, the Legislative Analyst’s Office published a report on probation, “Achieving Better Outcomes for Adult Probation.”¹⁴⁰ The LAO identified a set of best practices for probation, including the use of risk and needs assessments, program reviews and evaluations based on data collection, referral to treatment and assistance services, a reduction in probation officers’ caseloads, and a system of graduated sanctions to combat the cycle of criminal activity buildup followed by revocation.¹⁴¹ Ultimately, the LAO settled on recommending an incentive-based funding program for probation,¹⁴² not unlike the one recently implemented in Arizona.

¹³² See generally PROB. SERV. TASK FORCE, *supra* note 16.

¹³³ *Id.* at 61–98.

¹³⁴ *Id.*

¹³⁵ See generally LITTLE HOOVER COMM’N, *supra* note 84.

¹³⁶ *Id.* at iii.

¹³⁷ *Id.* at vi.

¹³⁸ *Id.* at 31.

¹³⁹ *Id.* at 28.

¹⁴⁰ LEGISLATIVE ANALYST’S OFFICE, *supra* note 7, at 6–29.

¹⁴¹ *Id.*

¹⁴² *Id.* at 29.

C. Legislative Initiatives in Other States

California is not the only state to experience a problematic rise in its prison population and a concomitant rise in probationers. A small number of other states—Kansas and Arizona, in particular—have implemented experimental legislation in an attempt to reduce probationers' recidivism.¹⁴³ S.B. 678 is not identical to any of these initiatives, but it does adopt certain aspects of their provisions.¹⁴⁴ Although these states have different probation systems than California, it is worthwhile to examine their initiatives to better understand the policy choices California has made.

Kansas and Arizona have each passed formal legislation addressing probation reform, Kansas in 2007 and Arizona in 2008.¹⁴⁵ Both states articulated similar overall goals for the legislation, including increasing public safety, increasing services for probationers, and, ultimately, reducing the rate of probation revocation.¹⁴⁶ Also, both states were concerned with their rising prison populations and crime rates.¹⁴⁷ Although their goals were the same, the states' approaches did differ in significant respects.

Kansas' S.B. 14, also known as the Community Corrections Statewide Risk Reduction Initiative (RRI), set up a competitive grant application system for counties and established a statewide goal of reducing each probation agency's revocation rate by

¹⁴³ Other states, such as Hawaii, have reformed probation through innovative programming rather than legislation. *See infra* Part IV.A (briefly discussing Hawaii's Opportunity Probation with Enforcement (HOPE) program).

¹⁴⁴ *See infra* Part IV.A.

¹⁴⁵ Kansas S.B. 14, codified as KAN. STAT. ANN. § 75-52,112 (West 2007 & Supp. 2009); Arizona S.B. 1476, codified as ARIZ. REV. STAT. ANN. §§ 12-267, 12-270, 13-924 (West 2003 & Supp. 2009).

¹⁴⁶ KAN. STAT. ANN. §§ 75-112(a), (b); ARIZ. REV. STAT. ANN. §§ 12-267(A)(2)(e), 12-270(A) (Supp. 2009). *See generally* S.B. 1476, 2008 48th Leg., 2nd Sess., § 7 (Ariz. 2008) (House Engrossed Senate Bill), available at <http://www.azleg.gov/legtext/48leg/2r/bills/sb1476p.pdf>.

¹⁴⁷ Ariz. S.B. 1476, at § 7 ("1. Arizona's prison population is unacceptably high and among the highest in the nation. 2. Arizona's prison population is expected to increase by fifty per cent from 2007 to 2017..."); PEW CTR. ON THE STATES, WORK IN THE STATES: SENTENCING AND CORRECTIONS IN KANSAS 1 (2008), [http://www.pewcenteronthestates.org/uploadedFiles/Kansas\(1\).pdf](http://www.pewcenteronthestates.org/uploadedFiles/Kansas(1).pdf) (noting that the Kansas "Sentencing Commission projected in 2006 that the prison population would grow 26 percent over the next 10 years, costing taxpayers an additional \$500 million"). In fact, Kan. S.B. 14 introduced sweeping reform of the entire correctional system, including an increase in good-time credit awarded to state prison inmates for completion of programs, and a comprehensive review of Kansas' sentencing policies. LEGISLATIVE RESEARCH DEPT., THIRD CONFERENCE COMMITTEE REPORT BRIEF HOUSE SUBSTITUTE FOR SENATE BILL NO. 14, at 1-14 (2007), available at <http://www.kslegislature.org/supplemental/2008/CCRB14.pdf>.

twenty percent using a FY 2006 baseline.¹⁴⁸ Under the RRI, probation agencies (called “community corrections” in Kansas) submit grant proposals to the Department of Corrections which then distributes funds to community corrections agencies based on plans that accord with the RRI’s stated requirements.¹⁴⁹ In particular, the RRI requires the adoption of risk assessment instruments, provision of evidence-based treatment and services, and ongoing data tracking and evaluation of set goals.¹⁵⁰ Significantly, the grants are tied to outcomes: the Department of Corrections continues to fund programs only if they are meeting their established goals.¹⁵¹

Rather than set a statewide revocation reduction goal, Arizona’s S.B. 1476, the Safe Communities Act, creates an incentive-based funding initiative for county probation departments whereby probation receives a portion of the money saved by the state prison system when probationers remain in the community.¹⁵² Annually, the Joint Legislative Budget Committee calculates for each county the costs avoided by the Department of Corrections that may be attributed to reducing the county’s rate of revocation.¹⁵³ This is accomplished by comparing the number of revocations to state prison in each county with a county-specific baseline revocation rate established in 2007–2008; the Budget Committee does the same for the number of probationers with new felony convictions.¹⁵⁴ As long as the number of revocations and new convictions are decreasing compared with its baseline rates, each county will receive forty percent of the cost savings, to be spent on substance abuse treatment, risk reduction programs, and victim services.¹⁵⁵ This provides a source of funding for probation departments that is directly tied to their ability to reduce revocations and improve services; at the same time, it insures a cost-savings for the state since sixty percent of total cost savings remain unallocated.

¹⁴⁸ KAN. STAT. ANN. § 75-52,112(a); *The Senate Bill 14 Risk Reduction Initiative*, KAN. DEPT OF CORR., <http://www.doc.ks.gov/publications/the-senate-bill-14-risk-reduction-initiative> (last visited Oct. 18, 2010).

¹⁴⁹ KAN. STAT. ANN. §§ 75-52,112(a), (b).

¹⁵⁰ § 75-52,112(b).

¹⁵¹ § 75-52,112(d) (“The department of corrections shall evaluate the programs which received a grant using a research-based process evaluation targeting the critical components of effective programs to ensure that the program is being delivered as such program was designed. Continued funding shall be contingent on the program meeting the established goals.”).

¹⁵² ARIZ. REV. STAT. ANN. § 12-270(A)(1) (West 2003 & Supp. 2009).

¹⁵³ § 12-270(A)(1).

¹⁵⁴ §§ 12-270(A)(1) and (2).

¹⁵⁵ §§ 12-270(B), 12-267(A)(2)(e).

In addition to providing a steady stream of funding for outcomes-improving probation departments, the Arizona Safe Communities Act also provides “earned time credit” for probationers for their good behavior.¹⁵⁶ On the recommendation of an adult probation officer, a judge may reduce a probationer’s term of supervision by twenty days for every month in which the probationer “1) [e]xhibits positive progression toward the goals and treatment of the probationer’s case plan, 2) [i]s current on payments for court ordered restitution . . . , or 3) [i]s current in completing community restitution.”¹⁵⁷ The earned-time credit provision creates a positive incentive for probationers to engage with services such as treatment and education, to interact with their probation officers, and to fulfill their other obligations. The goal, of course, is both to improve offenders’ chances of success on probation and to successfully graduate more probationers from their sentences.

Although Arizona’s statute is arguably more innovative than Kansas’, particularly with regard to its sharing of cost-savings, Kansas’ RRI does place more emphasis on developing the kinds of meticulously planned programs that are shown to work well at reducing recidivism, including evidence-based practices, probation staff training, treatment services, education and employment training, data collection, and careful evaluation.¹⁵⁸ Regardless of the differences, both initiatives have shown early promise, although the real funds for Arizona’s program will not be distributed until 2010–2011.¹⁵⁹ According to the Kansas Department of Corrections (KDOC), programs which received the RRI grants achieved the twenty percent revocation reduction goal within one year and exceeded it within two years.¹⁶⁰ Between 2006 and 2008, Kansas reported a statewide decrease in revocations to prison of 21.9%.¹⁶¹ It simultaneously experienced a 26.2% increase in probationers successfully completing their probation terms.¹⁶² Each community corrections agency

¹⁵⁶ § 13-924(A).

¹⁵⁷ § 13-924(B). Certain offenders are not eligible for earned time credit, including those on probation for more serious felony offenses or misdemeanor offenses, those on lifetime probation, and sex offenders. § 13-924(C). In other words, earned time credit is not available for probationers with the highest and the lowest risk of re-offenses.

¹⁵⁸ KAN. STAT. ANN. § 75-52,112 (West 2007 & Supp. 2009).

¹⁵⁹ ARIZ. REV. STAT. ANN. § 12-270(B).

¹⁶⁰ *Statement at Justice Reinvestment: Hearing Before the Subcomm. on Commerce, Justice, Science, and Related Agencies Appropriations*, 110th Cong. 4 (2009), available at www.justicereinvestment.org/files/Kansas.Werholtz.pdf (statement of Roger Werholtz, Secretary of the Kansas Department of Corrections).

¹⁶¹ KAN. DEP’T OF CORR., STATEWIDE COMMUNITY CORRECTIONS RISK INITIATIVE ANNUAL REPORT 1 (2009), available at http://www.doc.ks.gov/publications/the-senate-bill-14-risk-reduction-initiative/SB_14_Risk_Reduction_Initiative_Report_2009.pdf/.

¹⁶² *Id.*

submitted a detailed RRI plan to the KDOC, which included a succinct goal and program data.¹⁶³ In the first two years, the KDOC engaged in extensive risk reduction education and skills development for community corrections staff and helped agencies develop evidence-based practices individualized to their targeted populations.¹⁶⁴ Arizona, meanwhile, also exhibits positive trends, including a one-year thirteen percent decrease in revocation to jails or prison,¹⁶⁵ and a 1.9% decrease in probationers' new felony convictions.¹⁶⁶ If these positive trends can be attributed to the Safe Communities Act—and in fact the report does not chart any definite linkage—then results must flow from the earned-time credit, since the incentive-based funding does not begin until 2010–2011.¹⁶⁷

Although Arizona and Kansas each have very different probation systems than California, the early success of these legislative attempts to reform probation provides an optimistic outlook for California's new initiative.

III. CALIFORNIA S.B. 678, THE COMMUNITY CORRECTIONS PERFORMANCE INCENTIVES ACT

For more than a decade, those familiar with California's probation system grew increasingly critical of the system's inability to handle the rising numbers of adult felony probationers sentenced to the community. Finally, in 2009, the Legislature heeded their warnings and drafted a bill which declared that "[a]dult probation is a ticking time bomb waiting to go off."¹⁶⁸ The Senate Committee on Public Safety acknowledged that "[t]he state has been overlooking probation as an essential partner in community corrections,"¹⁶⁹ and noted that "because probation is so sorely under-resourced very little can be done to stop [felony probationers'] cycle of offending."¹⁷⁰ However, this official recognition of the need to reform adult probation arrived only as the result of an extraordinary moment of crisis in California's justice system, and after careful political

¹⁶³ *Id.* at 15–96.

¹⁶⁴ *Id.* at 2–11.

¹⁶⁵ ARIZ. ADULT PROB., PROBATION REVOCATION & CRIME REDUCTION REPORT FY 2009, at 7 (2009), available at http://www.azcourts.gov/Portals/25/SafeCommunitiesAct/FINAL_SB_1476_RPT_FY09.pdf.

¹⁶⁶ *Id.* at 10.

¹⁶⁷ ARIZ. REV. STAT. ANN. § 12-270(B) (West 2009).

¹⁶⁸ *Bill Analysis, Hearing on S.B. 678 Before the Assem. Comm. on Public Safety*, 2009–2010 Sess. 13 (Cal. June 16, 2009) [hereinafter *Bill Analysis, June*].

¹⁶⁹ *Id.* at 14.

¹⁷⁰ *Id.* at 13.

maneuvering on the part of probation supporters. The resulting statute, the Community Corrections Performance Incentives Act, is a hybrid of the Arizona and Kansas acts and includes many of the expert recommendations described in Part II of this article.

A. The Perfect Political Storm

The Chief Probation Officers of California (CPOC), the statewide association of California probation officers which became the primary sponsor of S.B. 678, worked for several years prior to the bill's passage to educate members of the government regarding the need for funds for adult probation.¹⁷¹ Beginning in the mid-1990s, the Legislature began to approve various grants and funding sources for juvenile probation which successfully reduced the number of juveniles in state institutions.¹⁷² One initiative was the Juvenile Justice Crime Prevention Act, passed in 2001, which provided a steady source of funding to counties for programs targeting at-risk youth and young offenders.¹⁷³ The rate of juvenile incarceration dropped by seventy percent between 1994 and 2004.¹⁷⁴ According to Jerry Powers, CPOC Legislative Chair, this preventative partnership between the state and counties demonstrated that "if you put money in on the front end, you save money on the back end, so everyone saves money."¹⁷⁵ Given the success of the juvenile initiatives, those in probation began to work toward something similar for adult services.¹⁷⁶

CPOC Executive Director Karen Pank, who had recently left Governor Schwarzenegger's office, helped the association put together a strategic plan to bring attention to the issue and suggested that they make a pitch appealing to the governor's public safety platform: "We knew we had this looming prison crisis, so what better way than to be proactive . . ."¹⁷⁷ Governor Schwarzenegger, who had vowed to reform California's

¹⁷¹ Telephone interview with Karen Pank, *supra* note 66; telephone interview with Jerry Powers, *supra* note 87.

¹⁷² For a summary of these grants and initiatives, see generally SUSAN TURNER & TERRY FAIN, RAND, ACCOMPLISHMENTS IN JUVENILE PROBATION IN CALIFORNIA OVER THE LAST DECADE (2005), available at http://www.rand.org/pubs/technical_reports/2005/RAND_TR297.pdf.

¹⁷³ See *id.* at xiii.

¹⁷⁴ *Id.* In 2007, Governor Schwarzenegger signed the Juvenile Justice Realignment Act, which furthered the transition from state incarceration to local supervision of juvenile offenders. Petersilia, *A Retrospective View of Corrections Reform in the Schwarzenegger Administration*, *supra* note 9, at 151.

¹⁷⁵ Telephone interview with Jerry Powers, *supra* note 87.

¹⁷⁶ Telephone interview with Karen Pank, *supra* note 66; telephone interview with Jerry Powers, *supra* note 87.

¹⁷⁷ Telephone interview with Karen Pank, *supra* note 66.

correctional system early in his tenure,¹⁷⁸ liked the idea so much he proposed \$100 million in funds for adult probation as part of the 2007–2008 budget.¹⁷⁹ But the budget line did not get past the Legislature where prison overcrowding had not yet reached the boiling point.

The prison and budget crises did, however, help coalesce CPOC's attempts to educate legislators regarding the need to fund adult probation. In 2007, CPOC became an intervener in *Plata v. Schwarzenegger*, one of the federal lawsuits addressing overcrowding in California's prisons.¹⁸⁰ The association joined the lawsuit to argue that California ought to invest in probation in order to prevent offenders from being sent to prison in the first place.¹⁸¹ Mr. Powers, the Chief Probation Officer for Stanislaus County, offered testimony before the federal three-judge panel, and later at a joint-legislative hearing, regarding the potential release of inmates ordered by the suit. "I told them I was opposed to the release," Mr. Powers said.¹⁸² "You could do the same thing [i.e., decrease the prison population] in a much safer manner by slowing down the flow to prison in the first place."¹⁸³ CPOC's arguments interested staff members of the Senate Committee on Public Safety, who in late 2008 had learned about the new Arizona Safe Communities Act as well as a recent Pew Center report encouraging states to draft similar performance-incentive acts for community corrections.¹⁸⁴ Senator Mark Leno, the Chair of the Senate Committee on Public Safety, reached out to CPOC regarding the possibility of addressing the prison crisis through probation.¹⁸⁵

Two factors in particular influenced the drafting of the legislation: California's fiscal crisis and Sacramento's notoriously unforgiving politics. The fiscal crisis combined with the prison overcrowding crisis to create an extraordinary moment in California politics—what Senator Leno termed "the perfect

¹⁷⁸ Petersilia, *A Retrospective View of Corrections Reform in the Schwarzenegger Administration*, *supra* note 9, at 148.

¹⁷⁹ Telephone interview with Jerry Powers, *supra* note 87.

¹⁸⁰ Telephone interview with Karen Pank, *supra* note 66; telephone interview with Jerry Powers, *supra* note 87.

¹⁸¹ Telephone interview with Jerry Powers, *supra* note 87.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ Telephone interview with Alison Anderson, Chief Counsel, California Senate Committee on Public Safety (May 10, 2010); PEW CTR. ON THE STATES, PUBLIC SAFETY PERFORMANCE PROJECT: POLICY FRAMEWORK TO STRENGTHEN COMMUNITY CORRECTIONS 1 (2008), *available at* <http://www.pewcenteronthestates.org/uploadedFiles/Policy%20Framework.pdf>.

¹⁸⁵ Telephone interview with Karen Pank, *supra* note 66.

storm”¹⁸⁶—in which criminal justice reformers were able to break through the state’s otherwise “nearly impassable political barriers”¹⁸⁷ The three-judge panel had ordered the release of inmates;¹⁸⁸ the Legislature needed to cut spending. Reducing the prison population was therefore an immediate goal, and improving probation a way to do it. But, the lack of funds meant that money for adult probation could not be provided in the way that the Legislature had previously funded juvenile probation—with state grants and budget items.¹⁸⁹ Alison Anderson, the Chief Counsel for the Senate Committee on Public Safety, had worked on public safety since 1994 and saw potential in Arizona’s funding incentives model.¹⁹⁰ “We’re upside-down in how we invest some of our public safety dollars,” Ms. Anderson said.¹⁹¹ She began to think that “maybe there’s a way we can share state savings with locals.”¹⁹² Arizona’s funding incentives model is better suited to hard economic times than Kansas’ grant-based approach because it requires no state funding without concomitant savings. However, while the double-crisis did create a window of opportunity, Sacramento politics remained a formidable barrier to the passage of any reform effort. Senator Leno is a high-profile Democrat,¹⁹³ and Ms. Pank felt that a bipartisan approach would be necessary to give the bill any chance of success.¹⁹⁴ Before drafting began, the idea was pitched to former Senator John Benoit, a Republican, as a way to increase public safety while decreasing the prison population.¹⁹⁵ Senator Benoit agreed to become the co-author of the bill with Senator Leno.¹⁹⁶ With a bipartisan pact in place, Ms. Anderson began drafting a bill that would provide funding for adult probation.¹⁹⁷

The resulting legislation, The Community Corrections Performance Incentives Act (CCPIA), introduced as S.B. 678, is

¹⁸⁶ Mark Leno, *Reforming Corrections: We’ve Only Just Begun*, CAP. WKLY., Nov. 30, 2009, at A11, available at <http://dist03.casen.govoffice.com/>.

¹⁸⁷ *Id.*

¹⁸⁸ See Opinion and Order, at 183, *Coleman v. Schwarzenegger*, No. CIV S-90-0520 LKK JFM P (E.D. Cal. Aug. 4, 2009).

¹⁸⁹ Telephone interview with Alison Anderson, *supra* note 184.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ Telephone interview with Karen Pank, *supra* note 66.

¹⁹⁴ *Id.*

¹⁹⁵ Telephone interview with Alison Anderson, *supra* note 184.

¹⁹⁶ Telephone interview with Karen Pank, *supra* note 66; Telephone interview with Jerry Powers, *supra* note 87; Telephone interview with Alison Anderson, *supra* note 184.

¹⁹⁷ Telephone interview with Alison Anderson, *supra* note 184.

“specifically designed to pay for itself”¹⁹⁸ while simultaneously providing stable funding for adult felony probation, and thus promising economic viability.¹⁹⁹ The CCPIA incorporates recommendations made by the Pew Center report, the LAO report, the Probation Services Task Force, and the findings in 2007 of the Little Hoover Commission.²⁰⁰ As a result, the CCPIA is an amalgamation of Arizona’s incentive-based model and the evidence-based emphasis of Kansas’ results-driven act.

B. The Three-Step Funding Formula

The CCPIA specifically targets adult felony probationers. As in Arizona, the CCPIA sets up a formula by which county probation departments receive annual funds from the state commensurate with each county’s success in preventing probationers from being sent to state prison.²⁰¹ The formula involves three steps. In the first step, a cooperative of several statewide agencies and organizations²⁰² calculates for each county its annual probation revocation rate as well as the annual statewide probation revocation rate.²⁰³ The counties are then placed into two tiers: those with failure rates that are no more than twenty-five percent higher than the statewide failure rate (Tier 1), and those with failure rates that are more than twenty-five percent above the statewide rate (Tier 2).²⁰⁴

In the second step, the annual county revocation rate is compared to a baseline revocation rate, and calculated for each county using 2006–2008 data,²⁰⁵ in order to arrive at a yearly estimate of the *number* of probationers each county successfully prevented from revocation to prison.²⁰⁶ Tier 1 counties will receive funds equal to forty-five percent of the costs that the

¹⁹⁸ Press Release, Mark Leno, Leno-Benoit Plan to Reduce Prison Population Clears Major Hurdle (June 16, 2009) [hereinafter Press Release, Mark Leno], *available at* http://dist03.casen.govoffice.com/index.asp?Type=B_PR&SEC={F0DFD1A5-1C7B-4F09-9F09-C48A423D1072}&DE={946E1572-5079-4AEE-BF04-9DEBF1A4FDED}.

¹⁹⁹ See *Bill Analysis: Hearing on S.B. 678 Before the S. Comm. on Public Safety*, 2009–2010 Sess. H (Cal. Apr. 28, 2009) [hereinafter *Bill Analysis, April*], *available at* http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb_0651-0700/sb_678_cfa_20090427_164719_sen_comm.html.

²⁰⁰ See generally *Bill Analysis, April*, *supra* note 199; *Bill Analysis, June*, *supra* note 168.

²⁰¹ *Bill Analysis, April*, *supra* note 199, at 13.

²⁰² These include the California Director of Finance, CDCR, CPOC, the Administrative Office of the Courts, and the Joint Legislative Budget Committee. CAL. PENAL CODE § 1233.1 (2010).

²⁰³ §§ 1233.1(b), (c).

²⁰⁴ § 1233.2.

²⁰⁵ § 1233(a).

²⁰⁶ § 1233.1(d). The number of felony probationers revoked to prison is inclusive of those sent for conviction of a new felony offense as well as those revoked for other violations. §§ 1233.1(d), (e).

CDCR avoided for that county as a result of not having to incarcerate those probationers.²⁰⁷ This is calculated by multiplying the number of probationers successfully prevented from revocation by forty-five percent of the annual cost to incarcerate in prison and supervise on parole a failed probationer.²⁰⁸ The Tier 2 counties will receive forty percent of costs avoided.²⁰⁹

Tier1: Higher Performing Counties

Probationers Prevented from Revocation to Prison x .45(annual incarceration cost for 1 revoked probationer)

Tier 2: Lower Performing Counties

Probationers Prevented from Revocation to Prison x .4(annual incarceration cost for 1 revoked probationer)

Thus, counties with higher success rates (Tier 1) will receive a larger portion of costs avoided attributed to their success, although the exact dollar amount will be dependent upon the number of probationers prevented from revocation. This means that larger counties with smaller success rates might still receive more funding than small but highly successful counties.

The third step is meant to reward the state's highest performing counties, all of which will be in Tier 1. Counties with revocation rates more than fifty percent below the statewide revocation rate can choose between receiving the Tier 1 calculation and a "high performance grant."²¹⁰ Annually, the state will calculate five percent of total savings to the state attributed to all counties' successful reduction of revocations that year.²¹¹ Each county opting for a high performance grant will receive a share of the five percent calculation based on the county's total population (not just probationers) of eighteen to twenty-five year-olds.²¹²

Ms. Anderson explained that the high performance grants, which do not appear in the Arizona bill, are intended to ensure adequate recognition of counties that are already high-performing.²¹³ To understand how the high performance grant

²⁰⁷ § 1233.3(a).

²⁰⁸ § 1233.3(a).

²⁰⁹ § 1233.3(b).

²¹⁰ § 1233.4(e).

²¹¹ § 1233.4(b).

²¹² § 1233.4.

²¹³ Telephone interview with Alison Anderson, *supra* note 184.

might benefit a county, contrast Contra Costa County and Los Angeles County. From 2005–2007, Contra Costa County had an average revocation rate of one percent, placing it well below the statewide average of 7.5%.²¹⁴ Los Angeles County, in contrast, had a 10.7% average revocation rate, placing it in Tier 2.²¹⁵ However, Los Angeles County has a total population of adult felony probationers more than eighteen times the size of Contra Costa's.²¹⁶ So, even though Contra Costa will be Tier 1, the number of Contra Costa probationers prevented from revocation might be much smaller than Los Angeles County's, and the funds it receives from the Tier 1 calculation smaller than Los Angeles County's Tier 2 calculation. But, Contra Costa's total eighteen to twenty-five year-old population is large—about 124,000.²¹⁷ Contra Costa would therefore receive a fairly large amount of the high performance grant if it opted to do so, and this would potentially amount to more money than the Tier 1 calculation would otherwise provide.

This three-step formula aims to realign the fiscal relationship between the state and county probation departments, and, in the process, realign the adverse incentives formerly in place. The CCPIA encourages counties to supervise offenders in the community, rather than pass the buck to the state—the lower a county's failure rate, the more state funds it will receive. The formula is good for the state as well since it saves a portion of the money that it would otherwise spend on incarcerating probationers. The Assembly Appropriations Committee projects annual General Fund savings of tens of millions of dollars, with savings of \$30 million projected for 2009–2010.²¹⁸ The Department of Finance projected that if half of the roughly twenty thousand felony probationers revoked to prison instead remained in the community—an ambitious estimate—annual savings for the state would be as high as \$255 million, while counties could receive up to \$127.3 million.²¹⁹

²¹⁴ LEGISLATIVE ANALYST'S OFFICE, *supra* note 7, at 30–31. See *supra* note 19 for an evaluation of the accuracy of these revocation rates.

²¹⁵ LEGISLATIVE ANALYST'S OFFICE, *supra* note 7, at 30–31.

²¹⁶ *Id.* Los Angeles County has 54,285 adult felony probationers, while Contra Costa has 3,039. *Id.*

²¹⁷ CAL. EMERGENCY MGMT. AGENCY, REQUEST FOR APPLICATION FOR THE EVIDENCE-BASED PROBATION SUPERVISION PROGRAM 2 (2009), available at [http://www.calema.ca.gov/WebPage/oeswebsite.nsf/OESLevsPDF/2009%20Evidence-Based%20Probation%20Supervision%20Program/\\$file/EBPSP09%20RFA.pdf](http://www.calema.ca.gov/WebPage/oeswebsite.nsf/OESLevsPDF/2009%20Evidence-Based%20Probation%20Supervision%20Program/$file/EBPSP09%20RFA.pdf).

²¹⁸ *Bill Analysis: Hearing on S.B. 678 Before the S. Rules Comm.*, 2009–2010 Sess. Fiscal Effect (Cal. Sept. 11, 2009) [hereinafter *Bill Analysis, September*].

²¹⁹ *Bill Analysis: Hearing on S.B. 678 Before the Cal. Dep't of Finance*, 2009–2010 Sess. (Cal. Aug. 24, 2009) [hereinafter *Bill Analysis, August*], available at http://www.dof.ca.gov/legislative_analyses/search.php.

C. Evidence-Based Programs and Practices

In addition to creating a complex but strategic funding formula, the CCPIA stipulates that county probation departments must spend these funds on “evidence-based community corrections practices and programs”²²⁰ for adult felony probationers. In particular, the CCPIA recommends implementing and expanding the use of risk and needs assessments to evaluate what level of supervision and which programs each offender requires.²²¹ It also suggests the use of intermediate sanctions such as electronic monitoring, mandatory community service, “restorative justice programs,” and incarceration in county jail; “providing more intense probation supervision;” and expanding the availability of evidence-based programs and rehabilitation for substance abuse, mental health, cognitive behavior, and employment training.²²²

While the California Department of Finance and the Administrative Office of the Courts calculate and disburse the annual funds, county probation departments retain control of designing and implementing the evidence-based programs as they see fit. Pursuant to the CCPIA, probation must set up an advisory committee, called the Community Corrections Partnership, to advise in development and implementation of evidence-based practices.²²³ The Community Corrections Partnership is mandated to include a range of public safety stakeholders, such as the presiding judge of the superior court, the district attorney and public defender, the sheriff and chief of police, representatives of county social services, mental health, education, and employment, and a representative of victims.²²⁴ Thus, the CCPIA encourages the kind of community participation and cooperation demonstrated to be an essential part of the successful implementation of community corrections programs.

Finally, and critically both for the proper functioning of the funding formula as well as for the successful implementation of evidence-based practices, the CCPIA requires probation departments to identify and track data and “outcome-based measures.”²²⁵ This includes basic data such as the number of adults on felony probation, the number of revocations to state prison, the number of probationers successfully completing their terms, the percentage of state moneys expended on evidence-

²²⁰ CAL. PENAL CODE § 1230(b)(3) (2010).

²²¹ § 1230(b)(3)(A).

²²² §§ 1230(b)(3)(B)–(D).

²²³ § 1230(b)(1).

²²⁴ §§ 1230(b)(1), 1230(b)(2)(A)–(M).

²²⁵ § 1231(a).

based programs, and the percentage of offenders supervised in accordance with evidence-based practices.²²⁶ In order to facilitate the accurate collection of data for the bill,²²⁷ the Legislature passed a companion bill, S.B. 431, which requires an adult probationer's county of residence to facilitate the offender's supervision.²²⁸ This remedies the former practice whereby probationers could be placed on probation in a county other than where they resided, which created situations of duplicate supervision or no supervision at all.²²⁹

Significantly, the CCPIA requires that counties reserve five percent of funds to evaluate the effectiveness of their programs and practices,²³⁰ thereby encouraging reliance on evidence and outcome-based measures not only to implement programs, but also to determine whether such programs are delivering the desired outcomes. The bill also builds in some degree of state oversight. Annually, probation departments must submit a written report to the Administrative Office of the Courts and CDCR evaluating the effectiveness of their programs.²³¹ In turn, the state agencies disbursing the funds must annually report to the Governor and Legislature regarding statewide performance-based outcomes stemming from the CCPIA and "[t]he impact of the moneys . . . to enhance public safety"²³²

In theory, therefore, the CCPIA incorporates many of the best practices and recommendations of the various reports which have addressed probation in California. In particular, it encourages a combination of surveillance and treatment for probationers, the use of evidence-based risk and needs assessment tools and practices, with critical evaluation of program efficacy, and coordination and cooperation with the community. It also seeks to address two of the problems inherent in California's decentralized probation model: lack of state oversight and failure to collect data. Although the CCPIA retains California's county-based probation system, it does require greater cooperation between state agencies and local entities as far as data collection and funds disbursement. Ideally, this would enable the state to monitor the overall effectiveness of the programs and require some level of accountability from counties without meddling too much in local affairs. Ultimately, the

²²⁶ §§ 1231(b)(1)–(4), 1231(d)(1)–(4).

²²⁷ Telephone interview with Alison Anderson, *supra* note 184.

²²⁸ § 1203.9.

²²⁹ Press Release, Mark Leno, *supra* note 198.

²³⁰ § 1230(b)(4).

²³¹ *Bill Analysis, April*, *supra* note 199, at F–G.

²³² § 1232.

CCPIA represents a shift in perspective on adult probation: “For a long time, adult probation was not seen as something that has outcomes,” said Natalie Pearl, Research Director for San Diego County Probation.²³³ “This bill is one of the first opportunities we’ve had to get funding for adult services.”²³⁴

D. Focus on Public Safety and Startup Funds

While the CCPIA creates a new financial structure, it is worthwhile to consider what the Act does *not* implement.²³⁵ First, the CCPIA does not alter the existing sentencing structure. No crimes are re-categorized as requiring probation rather than incarceration. Second, the CCPIA does not adopt Arizona’s approach and thus does not provide probationers with the possibility of shortening their sentences with earned-time credit. Third, the CCPIA does not shift responsibility for probation to the state: probation remains a local public safety program receiving some state funds. And fourth, the CCPIA does not itself provide startup funding for evidence-based programs.

Although the CCPIA does align with many policy-based arguments, politics influenced what drafters ultimately decided to include in the bill. Ms. Pank said that creating an earned-time-credit provision or including any sentencing reform were politically infeasible options.²³⁶ Sentencing reform, in particular, is a dead issue in Sacramento. Since 1984, seven attempts to create a statewide sentencing commission to evaluate and reform California’s penal code have failed due to political opposition.²³⁷ In addition, CPOC and county probation departments did not wish to cede control over probation to the state; and the CDCR certainly did not have the political desire or capacity to assume responsibility for even more offenders.²³⁸ According to Ms. Pank:

We were very clear that this was a delicate balance. We needed to juxtapose this solution [to the prison crisis] with all the other proposed solutions. We needed to show that this is not changing sentencing; this is not a realignment of county programs to the state If we had done anything that looked like a sentencing

²³³ Telephone interview with Natalie Pearl, Research Director, San Diego County Probation (May 12, 2010).

²³⁴ *Id.*

²³⁵ See generally *Bill Analysis*, April, *supra* note 199.

²³⁶ Telephone interview with Karen Pank, *supra* note 66.

²³⁷ Lauren E. Geissler, *Creating and Passing a Successful Prison Reform Commission in California* 14 (Stanford Criminal Justice Ctr., Working Paper, 2006), available at www.law.stanford.edu/program/centers/scjc/workingpapers/LGeissler_06.pdf.

²³⁸ Telephone interview with Karen Pank, *supra* note 66.

change, that would have upset the political balance of this big piece of legislation.²³⁹

Aware of the politics at play, those supporting S.B. 678 strategically emphasized public safety and fiscal outcomes, rather than altering sentencing or diverting offenders who would normally go to prison. Ms. Anderson explained that a focus on diversion would have undermined efforts to pass the bill: “In California, in order to get broad bipartisan support, that as a goal was not going to get us where we wanted to go.”²⁴⁰ In the Senate, the Committee on Public Safety told legislators that S.B. 678 would accomplish three goals: (1) reduce crime through increased supervision of felony offenders; (2) reduce prison overcrowding, “not by early release but by decreasing the criminal activity of those already on felony probation;” and (3) establish sustainable funding and save money for the state.²⁴¹ Notably, rehabilitation, treatment, restorative justice, and diversion are not listed among those three reasons.²⁴²

The strategic bipartisan focus on outcomes, combined with a crisis situation, worked. S.B. 678 unanimously passed in the Senate and the Assembly in September 2009.²⁴³ But, the passage of the bill alone, without startup funds, would be problematic. The failure of the 1994 Community Based Punishment Act communicated an important lesson to the CCPIA’s sponsors.²⁴⁴ “S.B. 678 is really a great piece of legislation. It really sets up a place to pivot the criminal justice system. But it wouldn’t work if there wasn’t any startup money,” Ms. Pank said.²⁴⁵ Federal funding offered a solution: the American Recovery and Reinvestment Act of 2009 made stimulus funding available to states for public safety projects.²⁴⁶ Through the Edward Byrne Memorial Justice Assistance Grant (JAG) program, probation departments are eligible for a portion of \$44.5 million to jump-start the implementation of evidence-based programs and

²³⁹ *Id.*

²⁴⁰ Telephone interview with Alison Anderson, *supra* note 184.

²⁴¹ *Bill Analysis, April*, *supra* note 199, at R.

²⁴² *See id.*

²⁴³ S.B. 678, Legis. Counsel’s Digest (Cal. Sept. 12, 2009), *available at* http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb_0651-0700/sb_678_bill_20090915_enrolled.pdf.

²⁴⁴ *See Hearing on S.B. 1069 Before the Assem. Comm. on Public Safety*, 1995–1996 Sess. Current Bill Status (Cal. July 11, 1995) [hereinafter *Hearing on S. B. 1069*], *available at* http://info.sen.ca.gov/pub/07-08/bill/sen/sb_1051-1100/sb_1069_bill_20081204_status.html.

²⁴⁵ Telephone interview with Karen Pank, *supra* note 66.

²⁴⁶ For information on the act, see *Current Legislation: American Recovery and Reinvestment Act*, SPEAKER NANCY PELOSI, <http://www.speaker.gov/newsroom/legislation?id=0273> (last visited Oct. 19, 2010).

practices.²⁴⁷ The Legislature approved the one-time federal grant funding as part of the 2009–2010 Budget Act, which also reserved \$424,000 for the Administrative Office of the Courts to begin administering the CCPIA.²⁴⁸ With all the pieces thus in place, the CCPIA is set to begin reforming the state of adult felony probation in California.

IV. IMPLEMENTING S.B. 678

The passage of S.B. 678, while groundbreaking, is just the beginning of the efforts to reform adult probation in California. California's own legislative history demonstrates that good legislative work comprises only a small fraction of the battle. The movement from planning to implementation can, and undoubtedly will, pose unforeseen challenges. Data collection, funding administration, the daily actions of probation officers—all these areas and others open a myriad of potential pitfalls. Moreover, probation has limited time to demonstrate the act's efficacy to legislators since the CCPIA sunsets in 2015.²⁴⁹ It is therefore useful to take note of those areas which may pose particular challenges to implementation. If implementers exercise caution and flexibility, the CCPIA could prove to be a long-term success.

A. A Survey of County Plans

Beginning in 2010, probation departments will receive the one-time JAG stimulus grants distributed over a period of three years; the size of the grants, which total \$44.5 million, are proportionate to each county's population of adults ages eighteen to twenty-five years.²⁵⁰ Counties submitted applications for JAG stimulus funds to the California Emergency Management Agency (Cal EMA) in late 2009.²⁵¹ These grant applications, accompanying submissions to county supervisor boards, and interviews with chief probation officers, provide details of probation department plans for the implementation of the CCPIA.²⁵² A survey of the grant applications of seven diverse

²⁴⁷ See CAL. EMERGENCY MGMT. AGENCY, *supra* note 217.

²⁴⁸ *Bill Analysis, September*, *supra* note 218, at 14.

²⁴⁹ CAL. PENAL CODE § 1233.8 (2010).

²⁵⁰ CAL. EMERGENCY MGMT. AGENCY, *supra* note 217, at 2.

²⁵¹ *Id.* at 1.

²⁵² *Id.* at 21. According to Cal EMA, the purpose of the grant program “is to provide evidence-based supervision, programs, or services to adult felon probationers in an effort to reduce the likelihood that they will commit new crimes or other violations and be sent to prison.” *Id.* at cover letter. Although the Request for Application does not explicitly mention the CCPIA, its goals, including collection of relevant data, are consistent with the CCPIA; the legislative intent was to provide this grant to counties as startup funding

counties, some Tier 1 (Stanislaus, San Diego, San Francisco, Tulare), some Tier 2 (Riverside, Shasta, Fresno), some with very large adult felony probation populations (San Diego: 21,940; Riverside: 13,052) and other smaller (San Francisco: 4,733; Shasta: 1,822) gives some indication of the immediate actions probation departments are taking to implement evidence-based practices.²⁵³ The grant applications and other sources show that counties are beginning the process of hiring probation officers, implementing risk/need assessments, and exploring options for increasing evidence-based services and sanctions.

The Recovery Act requires grant recipients to demonstrate that the funding helped retain or create jobs.²⁵⁴ As a result, all counties applying for grants plan to hire new probation officers or retain others that, due to budget cuts, might have otherwise been let go.²⁵⁵ Given the high caseloads across counties,²⁵⁶ the retention or addition of probation officers is indeed critical to the success of any probation reform; moreover, implementing evidence-based practices will likely require more time per probationer than previously provided. For example, Tulare County, which will receive a total of \$635,044 over three years, plans to use ninety-nine percent of grant funds to pay the salary and benefits of four new probation officers.²⁵⁷ Tulare, currently the sixth most poverty-stricken county in the United States with a 14.9% unemployment rate, would not otherwise be able to implement evidence-based practices: “Adult offenders in Tulare County receive very few specialized services that assist them in maintaining a crime-free lifestyle. Current adult supervision probation caseloads average over 100 probationers per officer and do not allow for intensive supervision services nor adequate assessment of offender needs.”²⁵⁸

until the CCPIA’s incentive-based funding begins to be distributed. *See Bill Analysis, September, supra* note 218, at 16.

²⁵³ LEGISLATIVE ANALYST’S OFFICE, *supra* note 7, at 30–31. Calculations of counties’ assignments to Tier 1 or Tier 2 are based on the Legislative Analyst’s Office provision of revocation rates for 2005–2007, with an average statewide rate of 7.5%. Counties with revocation rates under 9.375 (25% above 7.5) are Tier 1, while those with rates higher than 9.375 are Tier 2. *See* CAL. PENAL CODE § 1233.2 (2010). *See supra* note 19 for an evaluation of the accuracy of this data and rate calculations.

²⁵⁴ CAL. EMERGENCY MGMT. AGENCY, *supra* note 217, at 13.

²⁵⁵ *Id.*

²⁵⁶ *See, e.g.,* LEGISLATIVE ANALYST’S OFFICE, *supra* note 7, at 30–31.

²⁵⁷ CAL. EMERGENCY MGMT. AGENCY, PROJECT SUMMARY FOR TULARE COUNTY, EVIDENCE-BASED PROBATION SUPERVISION PROGRAM BUDGET NARRATIVE 1 (2009), available at http://bosagendas.co.tulare.ca.us/MG307139/AS307142/AS307157/AI307312/DO307414/DO_307414.pdf.

²⁵⁸ *Id.* at Project Summary § 8.

Lowering caseloads is a goal even for the highest performing counties, like San Francisco.²⁵⁹ Wendy Still, the San Francisco Chief Adult Probation Officer, said that San Francisco will also be adding a probation officer in an ongoing effort to lower caseloads to eighty offenders per officer.²⁶⁰

In addition to adding staff, probation departments which formerly did not use risk/needs assessment tools are spending JAG funds to purchase and implement these. For example, Tier 2 counties Fresno, Riverside, and Shasta each lacked an assessment tool prior to 2010.²⁶¹ Fresno County will use part of its \$1.3 million grant funding to implement the use of an assessment tool to help determine “what interventions would best address the offender’s risk of reoffending and thus returning to prison.”²⁶² Sparsely populated Shasta County will use a portion of its \$37,353 grant to participate along with fifteen other counties in the development of an assessment tool.²⁶³

Many counties are also planning to expand evidence-based services for probationers; a task that is possible only through increases in staffing and the use of risk/needs assessment tools. San Francisco intends to implement a pilot program targeted at felony probationers ages eighteen to twenty-five; and, in addition to higher levels of supervision, probationers who fall into this category will have increased access to services in four target areas: substance abuse, housing, education, and employment.²⁶⁴ Wendy Still explained that the idea is to show that the program works for this target group, and thereafter it will expand outward to the rest of the probation population using CCPIA funds.²⁶⁵ Since San Francisco will likely fall within the small pool of counties eligible for the high performance grants, Ms. Still said she will select whichever calculation—Tier 1 or high

²⁵⁹ Telephone interview with Wendy Still, *supra* note 65.

²⁶⁰ *Id.*

²⁶¹ See CNTY. OF RIVERSIDE PROB. DEPT., SUBMITTAL TO THE BOARD OF SUPERVISORS COUNTY OF RIVERSIDE 2 (2009), *available at* www.clerkoftheboard.co.riverside.ca.us/agendas/2009/12_22_2009/03.39.pdf; FRESNO CNTY. BD. OF SUPERVISORS, AGENDA ITEM 38: EVIDENCE BASED PROBATION SUPERVISION PROGRAM WITH THE CALIFORNIA EMERGENCY MANAGEMENT AGENCY (2010) [hereinafter FRESNO CNTY. BD. OF SUPERVISORS], *available at* http://www2.co.fresno.ca.us/0110a/Questys_Agenda/MG173545/AS173576/AS173593/Al173734/DO173735/DO_173735.pdf; SIERRA CNTY. BD. OF SUPERVISORS, AGENDA ITEM 4: AUTHORIZATION TO APPLY FOR A RECOVERY JUSTICE ASSISTANCE GRANT (JAG) THROUGH CALIFORNIA EMERGENCY MANAGEMENT AGENCY (CAL EMA) (2009) [hereinafter SIERRA CNTY. BD. OF SUPERVISORS], *available at* http://www.sierracounty.ws/county_docs/bos/BOS%20DECEMBER%2015%202009/12152009%20BOS%20PKT.pdf.

²⁶² FRESNO CNTY. BD. OF SUPERVISORS, *supra* note 261, at 2.

²⁶³ SIERRA CNTY. BD. OF SUPERVISORS, *supra* note 261.

²⁶⁴ Interview with Wendy Still, *supra* note 65.

²⁶⁵ *Id.*

performance—will provide more money.²⁶⁶ In San Diego, roughly \$2 million of the county's \$3.4 million in stimulus funding will go toward accepting contract bids from community providers of direct services.²⁶⁷ Although San Diego is a Tier 1 county with a large adult felony probation population, Natalie Pearl said the right types of services are not currently available to probationers.²⁶⁸ In particular, she said, San Diego will be looking for carefully tailored contract proposals for cognitive behavioral services, substance abuse treatment, and vocational and educational training.²⁶⁹

Several counties, including Stanislaus, Fresno, and Tulare, are intending to combine access to services with increased supervision through the creation of targeted day reporting centers.²⁷⁰ All three counties will assign probationers to high supervision caseloads based on the outcome of assessment tools. Stanislaus, for example, is specifying intensive supervision for approximately fifty medium-to-high risk eighteen to twenty-five year-old felony probationers.²⁷¹ Day reporting centers place probation officers under the same roof as services, allowing a one-stop shop for daily interactions with probation officers, drug testing, job training, housing assistance, peer support groups, and other services.²⁷²

Finally, both San Diego and Stanislaus intend to increase probationer accountability through implementing sanction models in which offenders receive immediate hearings and escalating sanctions for any violations.²⁷³ Stanislaus, in addition to increasing services through a day reporting center, will emulate an evidence-based program in Hawaii called HOPE (Hawaii's Opportunity Probation with Enforcement).²⁷⁴ Through the use of unscheduled drug testing and the threat of immediate, short-term jail sentences ("flash incarceration"), HOPE has demonstrated success in significantly decreasing positive drug

²⁶⁶ *Id.*

²⁶⁷ Telephone interview with Natalie Pearl, *supra* note 233.

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ BD. OF SUPERVISORS OF THE CNTY. OF STANISLAUS, ACTION AGENDA SUMMARY, APPROVAL TO ACCEPT AN EDWARD BYRNE MEMORIAL JUSTICE ASSISTANCE GRANT FROM THE CALIFORNIA EMERGENCY MANAGEMENT AGENCY (2010); CAL. EMERGENCY MGMT. AGENCY, PROJECT SUMMARY FOR TULARE COUNTY, *supra* note 257; FRESNO CNTY. BD. OF SUPERVISORS, *supra* note 261.

²⁷¹ BD. OF SUPERVISORS OF THE CNTY. OF STANISLAUS, *supra* note 270, at 3.

²⁷² *Id.*

²⁷³ Telephone interview with Natalie Pearl, *supra* note 233; BD. OF SUPERVISORS OF THE CNTY. OF STANISLAUS, *supra* note 271, at 3.

²⁷⁴ BD. OF SUPERVISORS OF THE CNTY. OF STANISLAUS, *supra* note 270, at 3.

tests and lowering arrest rates among probationers.²⁷⁵ Ms. Pearl said that San Diego is looking at a similar model used in Houston and hopes to create a program tailored to San Diego's resources and needs.²⁷⁶

B. Potential Challenges for Implementation

The statewide implementation of the CCPIA is underway and so far appears to be conforming to the intent of legislators. However, there are already several areas of concern for implementation which probation departments and state administrations should carefully consider: county budget shortfalls; the need for extensive training; and the omission of concrete incentives for probationers.

First, while the CCPIA guarantees some funding from the state once the initiative is up and running—that is, once counties can show results—but before those results develop, counties must depend on the stimulus grants and county funds. While the JAG grants are a positive development, federal funds may not be enough to provide the needed startup money.²⁷⁷ Unfortunately, the CCPIA asks probation departments to develop greater supervision and resources at a time when many counties face severe budget cuts.²⁷⁸ For example, Tulare County cut its Probation Department's budget by 6.03% in FY 2009–2010, freezing some salaries and instituting a mandatory furlough.²⁷⁹ Stanislaus intends to implement a "flash incarceration" system, but the Sheriff's Department is closing two hundred fifty beds due to budget cuts.²⁸⁰ And, San Francisco Mayor Gavin Newsome told agencies, including probation, to submit reports anticipating worst-case scenario budget cuts of ten to twenty percent.²⁸¹ Karen Pank said that with all of the budget cuts, "I'm concerned that \$45 million of start-up funding won't go as far as we had hoped."²⁸² That would leave probation departments without the funds necessary to implement the programs and

²⁷⁵ ANGELA HAWKEN & MARK KLEIMAN, RESEARCH BRIEF: EVALUATION OF HOPE PROBATION (2008) *available at* http://www.pewcenteronthestates.org/uploadedFiles/HOPE_Research_Brief.pdf. See also Mark Schoofs, *Scared Straight . . . by Probation*, WALL ST. J. (July 24, 2008), <http://online.wsj.com/article/SB121685255149978873.html>.

²⁷⁶ Telephone interview with Natalie Pearl, *supra* note 233.

²⁷⁷ See Telephone interview with Karen Pank, *supra* note 66.

²⁷⁸ *Id.*

²⁷⁹ CAL. EMERGENCY MGMT. AGENCY, PROJECT SUMMARY FOR TULARE COUNTY, *supra* note 257, at Project Summary § 8.

²⁸⁰ Telephone interview with Jerry Powers, *supra* note 85.

²⁸¹ Matt Smith, *DA: Further Newsom Budget Cuts Would Lead to 'Surrender the Safety of Our Streets'*, S.F. WKLY. BLOG (Mar. 8, 2010, 5:10 PM), http://blogs.sfweekly.com/thesnitch/2010/03/before_ag_endorsement_kamala_h.php.

²⁸² Telephone interview with Karen Pank, *supra* note 66.

practices needed to begin fulfilling the CCPIA's revocation-reduction objective.²⁸³ Moreover, for less populous counties, the stimulus grants may not be enough to cover the costs of assessment tools and data management systems.²⁸⁴ As a result, Ms. Pank said she would not be surprised if some smaller counties decide that it is not cost effective for them to partake in the CCPIA program at all.²⁸⁵

Funding issues aside, the mere implementation of evidence-based practices and programs alone, without ongoing training and monitoring of probation officers and staff, will accomplish little. As the National Institute for Corrections admonishes, "[i]mplementing evidence-based policy and practice is not a simple task; it requires a fundamental change in the way community corrections does business, and a shift in the philosophies of those doing this work."²⁸⁶ Turning theory into practice can backfire if program components are altered or ignored due to political pressure or shoddy training: "Those interested in translating the 'what works' literature into operational programs must make certain that the programs are implemented fully and coherently, not dismantled or watered down through the political process in ways that undermine their effectiveness."²⁸⁷

Wendy Still agrees that, even in high-performing San Francisco, instituting best practices is slow work which requires training.²⁸⁸ "We have a long way to go," she said.²⁸⁹ "There are cultures that have to change within institutions."²⁹⁰ However, the text of the CCPIA does not mention probation staff training.²⁹¹ And while the act requires departments to reserve some funds for the evaluation of programs,²⁹² this back-end focus misses critical work that must be done at the front end. The California Public Defenders Association, which opposed S.B. 678, criticized the bill for "presuppos[ing] that each Probation Department is a clinically trained treatment provider."²⁹³

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ CRIME & JUSTICE INST. & NAT'L INST. OF CORR., *supra* note 128, at xv.

²⁸⁷ Robert Weisberg & Joan Petersilia, *The Dangers of Pyrrhic Victories Against Mass Incarceration*, DAEDALUS, Summer 2010, at 124, 132.

²⁸⁸ Interview with Wendy Still, *supra* note 65.

²⁸⁹ *Id.*

²⁹⁰ *Id.*

²⁹¹ S.B. 678, Legis. Counsel's Digest 92 (Cal. Sept. 12, 2009), *available at* http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb_0651-0700/sb_678_bill_20090915_enrolled.pdf.

²⁹² *Id.*

²⁹³ *Bill Analysis, June, supra* note 168, at 19.

Indeed, in San Diego, Natalie Pearl predicts that the largest challenge for implementation of the CCPIA will be insuring that all probation officers and staff are properly using the evidence-based methods: "I see the major challenge as fidelity to the evidence based practice knowledge. I don't think most of us really understand what [constant and careful following of EBP] means Unless you maintain integrity to that model, it won't reduce recidivism."²⁹⁴

As a result, San Diego is taking the training of its officers seriously. As part of the its grant funding, the county will be collaborating with the University of California, San Diego to provide two days of training per month for its line officers.²⁹⁵ Although San Diego already uses a risk/needs assessment, Ms. Pearl said training will focus on the "needs" half of the equation.²⁹⁶ Officers will learn how to better manage cases and motivate offenders to change.²⁹⁷ Proper implementation will call for a shift in officer attitude from an all-enforcement mentality to a mixture of supervision and social work.²⁹⁸ Unless other counties likewise devote resources to training, the theory behind evidence-based practices will likely fail to produce real outcomes when implemented.²⁹⁹

In addition to failing to mention or build in resources for training, the Legislature opted to refrain from including earned-time credits for probationers who follow court orders and participate in programming. The possibility of shortened probation terms for good behavior would provide probationers with positive incentives to alter their criminal conduct. The California Public Defenders Association criticized S.B. 678 for this omission and suggested that it include incentives for probationers "including, but not limited to, reduction in the length of probation supervision."³⁰⁰ Although conceivably the CCPIA could reduce revocations without such incentives, this situation has not been tested. Arizona's early success appears to be largely the result of the earned-time credit provision.³⁰¹ Moreover, the experience of drug courts and other evidence-based

²⁹⁴ Telephone interview with Natalie Pearl, *supra* note 233.

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ The implementation of Kansas' RRI is a good example of the amount of training and leadership needed to help evidence-based practices work in reality. The Department of Corrections has engaged in extensive and ongoing training of probation agency staff. See KAN. DEP'T OF CORR., ANNUAL REPORT, *supra* note 161, at 4-5.

³⁰⁰ *Bill Analysis, June, supra* note 168, at 21.

³⁰¹ ARIZ. ADULT PROB., PROBATION REVOCATION & CRIME REDUCTION REPORT FY 2009, *supra* note 165, at 4, 7.

programs indicates that “positive reinforcement for good behavior is often critical for producing long-term behavioral improvement,” especially for individuals with long histories of coercive interactions with the law.³⁰² Of course, judges are already enabled by law to reduce probation terms,³⁰³ so probation departments do not need an act to recommend a term reduction to judges. Wendy Still said San Francisco intends to do just that if a probationer is doing well on probation and participating in programs.³⁰⁴ In fact, positive incentives need not be limited to a reduction in probation time, but could be as simple as positive feedback from a figure of authority, such as a judge, or recognition at a graduation ceremony, as occurs in drug court. That said, positive incentives of this ilk only work if the probationer is aware of them *ex ante*, and they are dependent on the involvement of a judge in the oversight of a probationer’s case.

The success of the CCPIA might very well depend on probation’s proactive outreach to county judges. Judges have the power not only to decide whether to sentence offenders to probation in the first place, but also to determine the conditions of probation.³⁰⁵ Judges can set goals for the offender, shorten probation terms, and show lenience if an offender violates the terms of his probation.³⁰⁶ Judges also have the influence to draw together justice system actors such as prosecutors and defenders, thus proving an important ally in the creation of community cooperation and motivation. In fact, Little Hoover Commission recommended that judges should be empowered to “oversee the progress of the offenders in the assigned community sanctions.”³⁰⁷ The Public Defender Association likewise agreed that “intensive judicial supervision will enhance public safety and increase positive outcomes for a great number of [probation program] participants.”³⁰⁸ While the CCPIA does include the chief judge of the county superior court on the Community

³⁰² NAT’L ASS’N OF DRUG COURT PROF’LS, PRINCIPLES OF EVIDENCE-BASED SENTENCING & OTHER COURT DISPOSITIONS FOR SUBSTANCE ABUSING INDIVIDUALS 4 (2009), *available at* <http://www.nadcp.org/sites/default/files/nadcp/NADCP%20Principles%20of%20Evidence-Based%20Sentencing.pdf>.

³⁰³ CAL. PENAL CODE § 1203.3(a) (2010) (“The court shall have authority at any time during the term of probation to revoke, modify, or change its order of suspension of imposition or execution of sentence. The court may at any time when the ends of justice will be subserved thereby, and when the good conduct and reform of the person so held on probation shall warrant it, terminate the period of probation, and discharge the person so held.”).

³⁰⁴ Interview with Wendy Still, *supra* note 65.

³⁰⁵ *See* § 1203.

³⁰⁶ *Id.*

³⁰⁷ LITTLE HOOVER COMM’N, *supra* note 84, at 32.

³⁰⁸ *Bill Analysis, June, supra* note 168, at 21.

Corrections Partnership committee,³⁰⁹ probation departments ought to make a concerted effort to obtain buy-in and active support for local judges whether or not they decide to provide offenders with positive incentives.

CONCLUSION

After twenty years of neglect, California's adult probationers are finally receiving the legislative attention this high-risk, high-needs population desperately needs. If implemented properly, California's S.B. 678, the Community Corrections Performance Incentives Act, could represent a sea-change in how the California justice system engages with low-level offenders. In large part, the CCPIA is a well-crafted piece of legislation which incorporates expert recommendations and lessons learned from failed projects. By providing sustainable funding tied to probation departments' implementation of evidence-based practices, the CCPIA seeks to realign the fiscal relationship between counties and the state and to reverse the adverse incentive structure which leads counties to incarcerate rather than rehabilitate. So far, counties that have begun to implement the CCPIA appear to be adhering to legislative intent; but implementation will likely prove difficult. In order to ensure the success of the CCPIA, probation departments should devote adequate resources to staff training, provide positive incentives for probationers, and reach out to judges and other justice system actors. Furthermore, the state and the counties should demand accountability of one another and annual reports evaluating outcomes should be read and then acted upon. Like any long-term project, the CCPIA will require some short-term investment in order to produce benefits down the road.

³⁰⁹ *Bill Analysis, September, supra* note 218, at 3.

The Case for Domestic Box Office Receipt Derivatives

*Jeremy A. Gogel**

INTRODUCTION

Derivatives have been given a bad rap over the last two years. Following the sub-prime mortgage crisis and the ensuing economic collapse of 2008, many commentators and political figures targeted derivatives as one of the main causes of the financial crisis.¹ Derivatives were immediately branded as “risky,” “complex,” and “impossible to understand,” and were even analogized to gambling.² Indeed, derivatives are risky instruments if used carelessly, but if used properly, they provide a useful hedging device. These instruments have been traded on-exchange and over-the-counter in the United States for nearly as long as the country has existed, and have traded in other countries for millennia.³

While the basic principles of these contracts have largely remained the same over time, the types of underlying assets, indices, or rates from which derivatives derive their value have expanded. Derivatives were originally used by farmers, processors, and end users of agricultural products to hedge against the risk of abrupt swings in the price of crops, but eventually began to be used to hedge against interest rate swings, credit risk, currency prices, weather changes, and even

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¹ See Dorit Samuel, *The Subprime Mortgage Crisis: Will New Regulations Help Avoid Future Financial Debacles?*, 2 ALB. GOV'T L. REV. 217, 220 (2009).

² See, e.g., *id.* at 232–37.

³ *Id.* at 233.

death.⁴ Despite their wide ranging use, Congress, in response to the 2008 financial crisis, sought to strengthen the existing derivative regulations, and in doing so banned trading of derivatives tied to box office receipt numbers.⁵

At the time Congress passed this legislation, there had never been any exchange trading of box office derivatives, and little to no over-the-counter trading of box office derivatives.⁶ Despite the lack of contribution by these instruments to the financial crisis, Congress nonetheless took the request by two recently created box office derivatives exchanges to begin listing and trading contracts as further evidence of the excesses and reckless behavior of the financial sector.⁷ By banning box office derivatives, Congress halted an opportunity to bring additional financing to the movie industry and potentially stifled future creativity in the derivative markets.⁸ Additionally, the ban on box office receipt derivatives marks the first time in nearly thirty years that Congress has prohibited trading of a derivative instrument for a specific underlying asset, and only the third time in U.S. history that it banned trading of derivatives for a specific commodity.⁹ After passage of the new regulations, the only two commodities on which derivatives cannot be traded in the United States are onions and box office receipts.¹⁰

This Article will discuss the origin and regulation of derivatives, the purpose behind the creation of box office derivative exchanges, and why Congress banned the trading of box office derivatives. The Article will conclude with a discussion of why Congress' decision to ban box office derivatives has the potential to hurt the movie industry, as well as future financial innovation in general.

⁴ Don M. Chance, *A Brief History of Derivatives*, in *ESSAYS IN DERIVATIVES* 16, 17–19 (1998).

⁵ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 721(a)(4), 124 Stat. 1376, 1659 (2010).

⁶ See Todd Shields & Michael White, *Box-Office Futures Market Wins U.S. Approval*, BLOOMBERG (Apr. 21, 2010), <http://www.bloomberg.com/news/2010-04-20/cantor-wins-cftc-s-approval-for-movie-futures-market-opposed-by-hollywood.html>.

⁷ Letter from Tom Ashton, CEO, Vantage Advisor Group, LLC, to Andrew Wing, Pres. & CEO, Cantor Entertainment (Apr. 26, 2010), *available at* <http://www.cantorexchange.com/getdoc/6bc630b2-33e0-4eb0-9ee2-4e20c1d5bc79/Vantage-Advisors-Letter-on-Box-Office-Futures.aspx>.

⁸ Letter from Michael Burns, CEO, Lionsgate, to H.R. Comm. on Agriculture (Apr. 16, 2010), *available at* <http://www.cantorexchange.com/getdoc/bb0c85fe-0cf1-434c-8444-b3e2c02866ea/Lionsgate-Burns-Letter-to-House-Committee-on-Agric.aspx>.

⁹ See Alan Greenspan, Chairman, U.S. Fed. Reserve, Address at the Financial Markets Conference of the Federal Reserve Bank of Atlanta, Georgia: Government Regulation and Derivative Contracts (Feb. 21, 1997) [hereinafter Greenspan, Government Regulation and Derivative Contracts], *available at* <http://www.federalreserve.gov/BoardDocs/Speeches/1997/19970221.htm>.

¹⁰ Dodd-Frank Wall Street Reform and Consumer Protection Act, § 721(a)(4).

I. INTRODUCTION TO DERIVATIVES

A. What are Derivatives?

A derivative is a “financial instrument whose value depends on or is derived from the performance of a secondary source such as an underlying bond, currency, or commodity.”¹¹ There is no singular type of derivative instrument, but rather, a family of instruments who derive their values from reference points.¹² These reference points can be currency exchange rates, interest rates set by financial institutions, prices of securities such as stocks or bonds, prices of physical commodities such as precious metals or harvested farm products, weather patterns,¹³ and even mortality dates.¹⁴

The most common derivative instruments are forward and futures contracts, swaps, and options, with each having distinct payment and/or delivery terms.¹⁵ Futures and options are used for hedging (i.e., shifting the risk of price changes to those who are more willing or able to assume this risk), or for speculation (i.e., investing with the intent of profiting from price changes).¹⁶ Swaps and forwards are “typically used to hedge or to obtain more desirable financing.”¹⁷ Swaps can be used to speculate, but are generally not used as frequently for this purpose because of the relatively high transaction costs compared to those of other derivatives.¹⁸ Thus, only participants willing to operate on a

¹¹ BLACK'S LAW DICTIONARY 374 (9th ed. 2005).

¹² See Samuel, *supra* note 1, at 233.

¹³ Various weather derivative products are traded on the Chicago Mercantile Exchange. These products typically derive their values from fluctuations in temperatures. For an overview, see J. SCOTT MATHEWS, CME GROUP, WEATHER PRODUCTS: DOG DAYS AND DEGREE DAYS (2009), available at http://www.cmegroup.com/trading/weather/files/WT133_Weather_White_Paper_Final.pdf; Bob Dischel, *Weather Risk Management at the 'Frozen Falls Fuel Company'*, CME GROUP, http://www.cmegroup.com/trading/weather/files/WEA_weather_risk.pdf (last visited Nov. 3, 2010).

¹⁴ Cris Sholto Heaton, *Have Financial Wizards Found a Way to Outwit Death?*, MONEYWEEK (Nov. 24, 2006), <http://www.moneyweek.com/investments/have-financial-wizards-found-a-way-to-outwit-death.aspx>.

¹⁵ See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/GGD-94-133, FINANCIAL DERIVATIVES: ACTIONS NEEDED TO PROTECT THE FINANCIAL SYSTEMS 26 (1994) [hereinafter GAO REPORT ON FINANCIAL DERIVATIVES], available at <http://archive.gao.gov/t2pbat3/151647.pdf>. More complex derivatives can be created by combining the elements of basic derivatives. For example, a swaption gives the holder the option, but not the obligation, to enter into a swap on or before a specified future date. An interest rate cap (or floor) agreement is a derivative in which the buyer receives payments at the end of each period in which the interest rate exceeds (or is below) the specified reference rate. See *id.* at 172.

¹⁶ *Id.* at 25.

¹⁷ *Id.* at 26.

¹⁸ *Id.*

large scale have the potential to make swap speculation worthwhile.

Forward and futures contracts are similar, except that a forward contract is negotiated, settled, and cleared privately between two parties, while a futures contract is entered into on an exchange, settled, and cleared by a central clearing party (CCP).¹⁹ An individual who buys a forward or futures contract assumes what is known as a “long” position.²⁰ The seller of a forward or futures contract assumes what is known as a “short” position.²¹ The two parties, by taking these positions, assume the respective obligation to buy and sell the underlying asset at a specific price sometime in the future.²² The holder of a long position benefits when the price of the underlying asset increases, while the holder of a short position benefits when the price of the underlying asset decreases.²³ A party to a futures contract has two choices on how to liquidate its position. The first option is to liquidate the position prior to the settlement date.²⁴ This option requires the party to take an offsetting position in the same contract.²⁵ For the buyer of a futures contract, “this means selling the same number of identical futures contracts; for the seller of a futures contract, this means buying the same number of identical futures contracts.”²⁶ Alternatively, a party can wait until the contract settlement date.²⁷ Then, “the party purchasing a futures contract accepts delivery” of the underlying asset, or settlement is made in cash.²⁸

¹⁹ Clearance is the process of acquiring trade data, comparing buyer and seller versions of the data, and guaranteeing that the trade will settle once the data is matched. Settlement is the process of determining the daily closing price for each contract and collecting losses from clearing members carrying losing positions and making payments to clearing members carrying gaining positions. See EUGENE F. BRIGHAM & MICHAEL C. EHRHARDT, *FINANCIAL MANAGEMENT: THEORY AND PRACTICE* 827–28 (12th ed. 2008).

²⁰ *Frequently Asked Questions About Futures Trading*, GOWEBTRADE, <http://www.gowebtrade.com/ztrading-products/futures> (last visited Oct. 10, 2010).

²¹ *Id.*

²² BRIGHAM & EHRHARDT, *supra* note 19, at 827.

²³ For instance, imagine that Party A bought a futures contract from Party B, whereby Party A would purchase 100 barrels of crude oil from Party B for \$100 per barrel in one year. If, in one year, the price of crude oil is selling for \$125 per barrel, Party A would be the “winner” because he is saving \$25 per barrel. Party B, on the other hand, would be the “loser” because he is selling his oil at a \$25 per barrel discount. Of course, the opposite would be true if the price of oil were selling for \$75 per barrel in one year. See GARY SHOUP, *CURRENCY RISK MANAGEMENT: A HANDBOOK FOR FINANCIAL MANAGERS, BROKERS, AND THEIR CONSULTANTS* 75 (1998).

²⁴ PETER K NEVITT & FRANK J. FABOZZI, *PROJECT FINANCING* 230 (7th ed. 2000).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

Because forward contracts are privately negotiated, it is up to the parties to determine how the positions can be liquidated.²⁹

Option contracts give the purchaser the right to buy (call option) or sell (put option) a specified asset at a particular price (exercise price) on or before a certain future date.³⁰ In exchange for the right to buy or sell the particular asset, the purchaser pays the seller (writer) a certain amount (option premium).³¹ Options are different from forwards and futures in that they do not create an obligation on the part of the purchaser to buy or sell the underlying asset.³² Options that expire without being exercised do so with no value. Thus, a purchaser of an option would only lose his option premium if he decides not to exercise the option.³³ Options, like futures, may be exchange-traded, or, like forwards, may be privately negotiated.³⁴ Additionally, the buyer of an option assumes a long position, while the writer of an option assumes a short position.³⁵

A swap transaction is similar to a forward or futures contract, except that it has a multiple period structure with corresponding multiple payments.³⁶ For instance, in a fixed-for-floating interest rate swap:

[O]ne party agrees to pay an amount equal to a stated fixed interest rate applied to a notional amount, and the other party agrees to pay an amount determined by reference to the value of a specified floating interest rate (e.g., LIBOR) for the applicable period as applied to the same notional amount.³⁷

The number of periods for which the swap applies to is predetermined by the parties.³⁸ In addition to fixed-for-floating

²⁹ *Id.*

³⁰ See GAO REPORT ON FINANCIAL DERIVATIVES, *supra* note 15, at 27.

³¹ *Id.*

³² *Id.*

³³ For instance, imagine that Party A owns one share of stock in XYZ, Corp. Party A decides to sell Party B the right to buy this share for \$45 within the next six months. The premium on this call option is \$5. As soon as the price of XYZ's stock exceeds \$50, Party A would exercise his option, and purchase the stock, because at that point, the sum of the exercise price and option premium is less than the price of the stock. Depending on the terms of the option contract, there may be a transfer of ownership of the stock from the option writer to the option buyer, or the option writer may merely pay the option purchaser the difference between the sum of the exercise price and option premium, and the market price of the stock at the time the option is exercised. If the price of XYZ's stock drops, however, Party A would simply let the option expire, and simply pay (if he had not done so already) Party B the option premium. See *id.*

³⁴ *Id.* at 26–27.

³⁵ See NEVITT & FABOZZI, *supra* note 24, at 245.

³⁶ Mark A. Guinn & William L. Harvey, *Taking OTC Derivative Contracts as Collateral*, 57 BUS. LAW. 1127, 1131 (2002).

³⁷ *Id.*

³⁸ For instance, imagine that Party A owns a bond with a \$1,000 par value paying a fixed interest rate of 5% compounded annually. If Party B owns a similar bond paying a

swaps, parties can enter into fixed-for-fixed swaps, floating-for-floating swaps, or any combination they desire.³⁹ Parties can also enter into swap transactions where the occurrence of a particular event (e.g., default on mortgage payments) would require clearance and settlement between the parties.⁴⁰ Other similar transactions include currency and commodity swaps. Historically, swaps have been entered into privately between the parties because of their unique nature; however, recent legislation has created a presumption that these types of contracts will be cleared through a CCP going forward.⁴¹ Swaps enjoy higher transactions costs than exchange-traded derivatives due to their unique nature, which sometimes require extensive negotiations between the parties.⁴²

B. How Are Derivatives Regulated?

As noted above, derivatives fall into two main categories. One category consists of standardized, exchange-traded instruments, while the other category consists of customized, privately negotiated instruments known as over-the-counter (OTC) derivatives.⁴³ Although many derivative contracts have historically been exchange-traded, the number of OTC derivatives far outnumbers the size of the exchange-traded contracts market.⁴⁴ These contracts differ in the ways they are regulated.

floating interest rate tied to the LIBOR, Party B may want to hedge against the risk of the interest rate plummeting, and simultaneously guarantee a known, steady stream of income. Party A, on the other hand, may want to trade the guaranteed interest payments for the possibility of larger interest payments. Thus, if the two parties enter into an interest rate swap transaction, when the interest is paid on the two bonds, any interest payments above \$50 would have to be paid from Party B to Party A. Conversely, if Party B received less than \$50 in interest at the end of the year, Party A would have to pay Party B the difference between what he was actually paid, and the \$50. Note that Party B will never receive more or less than \$50 in this transaction, but that Party A has the potential to earn more than \$50, as well as the potential to earn less than \$50. It should also be clear that ownership of the underlying instruments—in this case, the bonds—never switches hands. See Samuel, *supra* note 1, at 237.

³⁹ *Id.*

⁴⁰ Kathryn M. Trkla, *Implications of the Financial Reform Legislation for Derivatives Activities*, LEGAL NEWS ALERT, July 2010, at 2, available at <http://www.foley.com/abc.aspx?Publication=7351>.

⁴¹ See *infra* Part I.B.1.ii.

⁴² Patrick Casabona, *Derivatives*, in 1 ENCYCLOPEDIA OF BUSINESS AND FINANCE 235, 237 (Burton S. Kaliski ed., 2001).

⁴³ *Product Descriptions and Frequently Asked Questions*, INT'L SWAPS & DERIVATIVES ASS'N, INC., <http://www.isda.org/index.html> (last visited Oct. 10, 2010).

⁴⁴ *Regular OTC Derivatives Market Statistics*, BANK FOR INT'L SETTLEMENTS (Nov. 12, 2009), http://www.bis.org/publ/otc_hy0911.htm. The Bank of International Settlements estimates that the total notional amount of outstanding OTC contracts at the end of June 2009 was \$605 trillion. *Id.* This amount is contrasted with the GAO's estimate of the notional amount of *all* outstanding derivatives contracts (including exchange traded contracts) at the end of the 1992 fiscal year which was \$12.1 trillion. See

1. Exchange-Traded Derivatives Regulation

Exchange-traded derivatives are primarily regulated by two federal government agencies—the Commodity Futures Trading Commission (CFTC), and the Securities and Exchange Commission (SEC).⁴⁵

i. CFTC Regulation

U.S. derivatives regulation began during the Civil War when Congress passed the Anti-Gold Futures Act.⁴⁶ The Act was passed in response to the significant discount at which the Union's "fiat currency"—known as the greenbacks—was trading in comparison to gold.⁴⁷ The Act made it unlawful to enter into any contract for the purchase of gold coin, gold bullion, or foreign exchange to be delivered on any day after the making of such a contract.⁴⁸ Unfortunately, instead of stabilizing the price of the greenbacks, Congress' attempt at regulating gold and foreign currency futures led to the further decline in the value of the greenbacks.⁴⁹ As a result, Congress repealed the Act only two weeks after it was enacted.⁵⁰

Between the years of 1880 and 1920, Congress introduced approximately two hundred bills that would regulate futures exchanges, but none of this proposed legislation passed.⁵¹ Congress' next attempt to regulate futures came in 1921 when it passed the Future Trading Act.⁵² The Future Trading Act imposed a twenty cent tax per bushel on every grain futures contract, but exempted sales on boards of trade designated as contract markets by the Secretary of Agriculture from this

GAO REPORT ON FINANCIAL DERIVATIVES, *supra* note 15, at 34. *See also* Committee Report on the Restoring American Financial Stability Act of 2010, S. REP. NO. 111-176, at 29 (2010), *available at* http://banking.senate.gov/public/_files/S3217ReportASFILED.pdf ("By 2008, 59 percent of derivatives were traded over-the-counter, or away from regulated exchanges, compared to 41 percent in 1998.").

⁴⁵ *OTC Derivatives Oversight: Statement of the Securities and Exchange Commission*, U.S. COMMODITY FUTURES TRADING COMM'N, http://www.cftc.gov/International/InternationalInitiatives/oia_otcderovst.html (last visited October 10, 2010).

⁴⁶ Anti-Gold Futures Act, ch. 127, 13 Stat. 132 (1864).

⁴⁷ Greenspan, *Government Regulation and Derivative Contracts*, *supra* note 9.

⁴⁸ Anti-Gold Futures Act, 13 Stat. at 132.

⁴⁹ Greenspan, *Government Regulation and Derivative Contracts*, *supra* note 9.

⁵⁰ *Id.*

⁵¹ Jerry W. Markham, *Merging the SEC and CFTC—A Clash of Cultures*, 78 U. CIN. L. REV. 537, 564 (2009). It should be noted, however, that in 1914, Congress passed the Cotton Futures Act, which established a system for grading cotton and prohibiting all cotton futures contracts other than those specified in the Act. The Act was eventually declared unconstitutional because it was passed under Congress's taxing power, but did not originate in the House, and was then replaced by the Cotton Futures Act of 1916. *See Cotton Futures Act Called Void*, N.Y. TIMES, Oct. 14, 1915.

⁵² Future Trading Act, ch. 86, 42 Stat. 187 (1921).

requirement.⁵³ The purpose of this regulation was to prevent market manipulation by requiring exchanges seeking a contract market designation to introduce anti-manipulation rules.⁵⁴ The twenty cent tax on non-contract market trades made it nearly impossible to make a profit, and therefore, the Act essentially coerced trades to be executed on designated contract boards.⁵⁵ Soon after the Act was passed, however, eight members of the Chicago Board of Trade sued, and the U.S. Supreme Court eventually declared the Act unconstitutional.⁵⁶

In response to the Supreme Court's decision, Congress passed the Grain Futures Act of 1922.⁵⁷ The purpose of the Grain Futures Act was to regulate interstate transactions on grain futures exchanges.⁵⁸ Once again, the constitutionality of the Act was called into question, requiring another Supreme Court decision.⁵⁹ In distinguishing the two acts, the Court stated that:

The Grain Futures Act which is now before us differs from the Future Trading Act in having the very features the absence of which we held . . . prevented our sustaining the Future Trading Act. As we have seen in the statement of the case, the [Grain Futures Act] only purports to regulate interstate commerce and sales of grain for future delivery on boards of trade because . . . manipulation . . . [of these markets] . . . [has] become a constantly recurring burden and obstruction to [interstate] commerce. Instead, therefore, of being an authority against the validity of the Grain Futures Act, it is an authority in its favor.⁶⁰

In the end, the Court held that the Act's emphasis on limiting price manipulation in the futures markets—an event which had the potential to adversely affect interstate commerce—was enough to make the Act constitutional under the commerce clause.⁶¹

The Grain Futures Act remained in effect until June 15, 1936, when Congress passed the Commodity Exchange Act

⁵³ *Hill v. Wallace*, 259 U.S. 44, 45 (1921).

⁵⁴ *Id.* at 51.

⁵⁵ *Id.* at 71.

⁵⁶ *Id.* at 70. Ultimately, the Court determined that the grain futures contracts at issue were wholly intrastate transactions, and that the assessment of a twenty cent tax was an unconstitutional exercise of Congress' taxing power. *See id.* at 70–72.

⁵⁷ Grain Futures Act, ch. 369, 42 Stat. 998 (1922).

⁵⁸ In response to the Supreme Court's decision in *Hill v. Wallace*, Congress expressly limited the provisions of the Grain Futures Act to boards of trade and individuals conducting interstate transactions. *See id.* at § 3.

⁵⁹ *See Board of Trade of Chicago v. Olsen*, 262 U.S. 1 (1923).

⁶⁰ *Id.* at 32–33 (1923).

⁶¹ *Id.* at 41–42.

(CEA).⁶² The CEA, which has been amended numerous times over the past seventy-five years, created the Commodity Exchange Authority, a precursor agency to the CFTC.⁶³ The CFTC—an independent regulatory agency—was created in 1974 when Congress passed the Commodity Futures Trading Commission Act of 1974 (CFTCA).⁶⁴ With some minor exceptions, the CEA grants the CFTC exclusive jurisdiction over all commodity futures and commodity options contracts.⁶⁵

At the beginning of the new millennium, Congress again passed a major piece of legislation amending the CEA. The Commodity Futures Modernization Act of 2000 (CFMA) divided the universe of commodities into three general categories; (1) agricultural commodities; (2) exempt commodities; and (3) excluded commodities.⁶⁶ This categorization was based on the apparent susceptibility of certain commodities to manipulation, with agricultural commodities seen as most vulnerable, exempt commodities as less vulnerable, and excluded commodities as the least vulnerable.⁶⁷

With respect to agricultural commodities, the CEA specifically enumerates certain articles or goods as commodities.⁶⁸ In addition to these specified commodities, the

⁶² Commodity Exchange Act, ch. 545, 49 Stat. 1491 (1936) (current version at 7 U.S.C. §§ 1–17 (2006)).

⁶³ See *Records of the Commodity Futures Trading Commission*, NAT'L ARCHIVES, <http://www.archives.gov/research/guide-fed-records/groups/180.html> (last visited Oct. 7, 2010). See also Jerry W. Markham, *The Commodity Exchange Monopoly—Reform Is Needed*, 48 WASH. & LEE L. REV. 977, 982 (1991) (“Rather than being an independent federal agency, such as the SEC, the Commodity Exchange Commission was composed of the Secretaries of the Departments of Agriculture and Commerce and the Attorney General of the United States. Day-to-day regulation of the statute was given to the Secretary of Agriculture who assigned this duty to an agency within the department, the Commodity Exchange Authority.”).

⁶⁴ Commodity Futures Trading Commission Act, Pub. L. No. 93-463, 88 Stat 1389 (1974) (current version at 7 U.S.C. § 1 *et seq.* (2006)).

⁶⁵ 7 U.S.C. § 6c(b) (2006) provides that: “No person shall . . . enter into . . . any transaction involving any commodity regulated under this chapter which is of the character of, or is commonly known to the trade as, an ‘option’ . . . contrary to any rule, regulation, or order of the Commission . . .” § 2(a)(1)(A) provides that: “The Commission shall have exclusive jurisdiction . . . with respect to accounts, agreements . . . and transactions [including options] involving contracts of sale of a commodity for future delivery . . .”

⁶⁶ Commodity Futures Modernization Act of 2000, H.R. 5660, 106th Cong. (2d sess. 2000).

⁶⁷ See H.R. 5660, 106th Cong. § 5a(b)(2)(B) (“A registered derivatives transaction execution facility may trade any contract of sale of a commodity for future trading . . . only if . . . (B) the underlying commodity has a deliverable supply that is sufficiently large that the contract is highly unlikely to be susceptible to the threat of manipulation . . .”).

⁶⁸ 7 U.S.C. § 1a(4) enumerates the following commodities:

[W]heat, cotton, rice, corn, oats, barley, rye, flaxseed, grain sorghums, mill feeds, butter, eggs, *Solanum tuberosum* (Irish potatoes), wool, wool tops, fats and oils (including lard, tallow, cottonseed oil, peanut oil, soybean oil, and all

term commodity also includes those articles, goods, services, rights, or interests “in which contracts for future delivery are presently or in the future dealt in.”⁶⁹ Therefore, an underlying interest that is not enumerated in the CEA may nonetheless be a statutory commodity under the Act if it can reasonably underlie a futures contract on a forward looking basis.

The CEA defines an exempt commodity to mean “a commodity that is not an excluded commodity or an agricultural commodity.”⁷⁰ The types of commodities that fit within this definition include oil, gas, electric power, and precious and base metals.⁷¹

Finally, the CEA identifies certain interests as excluded commodities, thereby giving further depth to the regulatory purview of the CFTC.⁷² The definition of an excluded commodity is comprised of four subsections, and allows for trading of contracts based on an enumerated list of commercial or economic indices or rates, whether within the control of contracting parties or not, and whether these indices or rates are based on commodities that have no cash market.⁷³ The definition of an excluded commodity, therefore, appears to open the door to commodity futures or options contracts based on a wide variety of events that have an economic consequence.

other fats and oils), cottonseed meal, cottonseed, peanuts, soybeans, soybean meal, livestock, livestock products, and frozen concentrated orange juice . . .

⁶⁹ *Id.*

⁷⁰ § 1a(14).

⁷¹ *Congress Re-Enacts Amendments to the Commodity Exchange Act*, LEGAL NEWS ALERT (Foley & Lardner LLP), June 26, 2008, available at http://www.foley.com/publications/pub_detail.aspx?pubid=5059.

⁷² § 1a(13).

⁷³ The Act defines “excluded commodity” as:

(i) an interest rate, exchange rate, currency, security, security index, credit risk or measure, debt or equity instrument, index or measure of inflation, or other macroeconomic index or measure;

(ii) any other rate, differential, index, or measure of economic or commercial risk, return, or value that is—

(I) not based in substantial part on the value of a narrow group of commodities not described in clause (i); or

(II) based solely on one or more commodities that have no cash market;

(iii) any economic or commercial index based on prices, rates, values, or levels that are not within the control of any party to the relevant contract, agreement, or transaction; or

(iv) an occurrence, extent of an occurrence, or contingency (other than a change in the price, rate, value, or level of a commodity not described in clause (i)) that is—

(I) beyond the control of the parties to the relevant contract, agreement, or transaction; and

(II) associated with a financial, commercial, or economic consequence.

Id.

ii. SEC Regulation

As stated above, in order for the CFTC to retain sole jurisdiction over a particular derivatives contract, the contract must involve the sale or future delivery of a commodity.⁷⁴ In 1972, the Chicago Mercantile Exchange (CME) created the International Monetary Market (IMM) to offer futures contracts in foreign currencies.⁷⁵ The creation of the IMM began an explosion of derivatives for non-agricultural products. Because these products were not easily defined as commodities, it was not entirely clear that the CFTC retained jurisdictional authority over them. Some of these products either partially or entirely contain features of securities, over which the SEC has jurisdiction.

In 1934, Congress granted the SEC jurisdiction over all security options products when it passed the Securities Exchange Act (Exchange Act), and subjected options to the rulemaking authority of the SEC.⁷⁶ The SEC did not adopt any such rule until 1974, however, until after the creation of the Chicago Board of Options Exchange when it adopted Rule 9b-1.⁷⁷ Options trading after the adoption of Rule 9b-1 was on a “pilot basis” only in order for the SEC to learn about any potential problems that could cause harm to investors. Rule 9b-1, until it was repealed in 1975,⁷⁸ prohibited options trading on any exchange except in accordance with a plan regulating options trading approved by the SEC.⁷⁹ The SEC retains jurisdiction over security options trading to this day. Thus, the SEC retains sole or joint jurisdiction over security futures and security options products.⁸⁰

Since the creation of the CFTC, the two agencies have often battled over which agency has jurisdiction over certain financial derivatives. These jurisdictional battles eventually led to the Shad-Johnson Jurisdictional Accord (accord).⁸¹ The accord was

⁷⁴ § 2(i).

⁷⁵ *From Water Street to the World—A Brief History of the Chicago Board of Trade and the Chicago Mercantile Exchange*, CME MAGAZINE, Summer 2007, available at <http://www.cmegroup.com/company/history/magazine/Summer2007/FromWaterStreetToTheWorld.html>.

⁷⁶ See 15 U.S.C. § 78i (2000).

⁷⁷ 17 C.F.R. § 240.9b-1 (1974).

⁷⁸ Jerry W. Markham & David J. Gilberg, *Stock and Commodity Options—Two Regulatory Approaches and Their Conflicts*, 47 ALB. L. REV. 741, 748 & n.34 (1982).

⁷⁹ See § 240.9b-1(a).

⁸⁰ See *Advisory on Dodd-Frank Act: New Rules for Derivatives*, COVINGTON & BURLINGTON LLP (July 21, 2010), <http://www.cov.com/files/Publication/f11bd6db-d8f2-46d1-b91b-da0b30a44157/Presentation/PublicationAttachment/88322576-8e12-48ab-8c61-daca964bb4e0/Dodd-Frank%20Act%20-%20New%20Rules%20for%20Derivatives.pdf>.

⁸¹ The accord was codified in the Securities Act Amendments of 1982, Pub. L. No. 97-303, 96 Stat. 1409 (1982). It was the result of an agreement between the Commodity

an agreement reached between the Chairmen of SEC and CFTC to resolve a dispute concerning jurisdiction over securities-based derivatives.⁸² Under the accord, the CFTC retained exclusive jurisdiction over all futures contracts and options on both futures contracts and physical commodities.⁸³ The CFTC was also given jurisdiction over options on foreign currencies not traded on national securities exchanges, and futures and options on futures on securities indexes and exempted securities.⁸⁴ The accord allowed the CFTC to approve a stock index futures contract for trading if it (1) was settled in cash; (2) not readily susceptible to manipulation; and (3) derived from a substantial segment of a publicly traded group or index of equity or debt securities, called broad-based indexes.⁸⁵ These contracts were also subject to initial SEC review for compliance with these requirements, and the SEC was given the authority to prohibit the trading of these contracts if the SEC determined that these requirements were not met.⁸⁶ Also under the accord, the SEC retained jurisdiction over securities, including options on securities, options on certificates of deposit, options on securities indexes, and options on foreign currency traded on a national securities exchange.⁸⁷ Because the two agencies could not resolve their jurisdictional differences with respect to single security futures contract, these contracts were banned for nearly twenty years until the CFMA

Futures Trading Commission's Chairman, Phil Johnson, and the Securities and Exchange Commission's Chairman, John Shad, to clarify jurisdictional concerns between the two agencies and their respective products. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/GGD-00-89, CFTC AND SEC: ISSUES RELATED TO THE SHAD-JOHNSON JURISDICTIONAL ACCORD 6 (2000) [hereinafter CFTC AND SEC—ISSUES RELATED TO THE SHAD-JOHNSON JURISDICTIONAL ACCORD], available at <http://www.gao.gov/archive/2000/gg00089.pdf> ("First, [the accord] provided SEC with jurisdiction over securities-based options, including stocks and stock indexes. Second, the accord prohibited futures (and options thereon) on single corporate and municipal securities Finally, the accord provided CFTC with jurisdiction over futures (and options thereon) on exempted securities (other than municipal securities) and stock indexes. The accord allowed CFTC to approve a stock index futures contract for trading if CFTC found that the contract was (1) settled in cash; (2) not readily susceptible to manipulation; and (3) based on an index that either was a widely published measure of and reflected the market as a whole or a substantial segment of the market, or else was comparable to such a measure. According to SEC and CFTC, these three standards were intended to ensure that stock index futures would not be readily susceptible to manipulation, be used to manipulate the underlying securities or related options markets, or serve as a surrogate for a single stock futures contract.").

⁸² *See* CFTC AND SEC—ISSUES RELATED TO THE SHAD-JOHNSON JURISDICTIONAL ACCORD, *supra* note 81, at 5.

⁸³ *Id.* at 6.

⁸⁴ *Id.* at 6 & n.13 ("Exempted securities include securities issued or guaranteed by the United States, the District of Columbia, or any U.S. state.").

⁸⁵ *Id.* at 6.

⁸⁶ *Id.*

⁸⁷ *Id.*

once again allowed trading of these instruments.⁸⁸ Today, regulation of security futures—instruments considered to be both securities and futures—is jointly shared by the CFTC and the SEC.

Despite the various amendments to the CEA and Exchange Act over the past thirty-five years, the jurisdictional battles between the CFTC and SEC have continued. At no time was this battle more intense than during the mid- to late-1990s, when the two agencies failed to agree on how to regulate OTC derivatives.⁸⁹ The CFMA failed to clarify jurisdictional authority over OTC derivatives—a decision that would ultimately haunt the U.S. and world financial markets in the years to come.

2. Over-the-Counter Derivatives Regulation

Following the sub-prime mortgage crisis and the ensuing financial collapse of 2008, calls were made by members of Congress, as well as consumer and investor protection groups, to regulate the OTC derivatives market. As stated previously, OTC contracts are entered into privately, off-exchange by parties. Because these are private contracts, the parties retain control over settlement and clearing. Despite the impact these instruments have on the U.S. and international economies, they remained largely unregulated by either the CFTC or the SEC.⁹⁰

⁸⁸ See 7 U.S.C. § 1a(32) (2000) (“The term ‘security futures product’ means a security future or any put, call, straddle, option, or privilege on any security future.”).

⁸⁹ See Ted Bunker, *Power Grab Threatens OTC Derivatives Market*, BOSTON HERALD, June 22, 1998, at 26; Willa E. Gibson, *Are Swap Agreements Securities or Futures? The Inadequacies of Applying the Traditional Regulatory Approach to OTC Derivatives Transactions*, 24 J. CORP. L. 379, 388, 390–91 (1999) (“In December 1997, the SEC proposed a rule to allow broker-dealers selling OTC derivatives . . . to establish designated subsidiaries for their OTC transactions in the U.S. The designated subsidiaries would be allowed to register with the SEC as an alternative to registration as a fully regulated broker-dealer under Section 15(b) of the Exchange Act if they combine their business in securities and non-securities OTC derivatives products. . . . The CFTC responded . . . by stating that the proposed rule infringed upon the CFTC’s jurisdictional authority over OTC derivatives transactions . . . because only a small percentage of OTC derivatives were securities.”). Nonetheless, the rule took effect on January 4, 1999. *Id.*

⁹⁰ In a 1994 report by the U.S. Government Accountability Office (GAO), the director of the GAO (and U.S. Comptroller General) stated:

Given the weaknesses and gaps that impede regulatory preparedness for dealing with a crisis associated with derivatives, GAO recommends that Congress require federal regulation of the safety and soundness of all major U.S. OTC derivatives dealers. Regulators should attempt to prevent financial disruptions from turning into crises and resolve crises to minimize risks to the financial system The immediate need is for Congress to bring the currently unregulated OTC derivatives activities of securities firm and insurance company affiliates under the purview of one or more of the existing federal financial regulators and to ensure that derivatives regulation is consistent and comprehensive across regulatory agencies.

See GAO REPORT ON FINANCIAL DERIVATIVES, *supra* note 15, at 14.

The most infamous OTC derivative contract during the 2008 financial crisis was the credit default swap (CDS).⁹¹ CDSs are bilateral contracts used to transfer risk between protection buyers and protection sellers.⁹² As one recent commentator stated, “CDSs have provided an important tool for risk management. They enable banks and other financial institutions to hedge the credit risk of lending to corporations, in turn facilitating economic activity. Hedging credit risk arguably frees up funds to be lent elsewhere, making more capital available for financings, which can reduce the cost of borrowing.”⁹³ CDSs were invented by Wall Street Banks in the late 1990s, but the size of the market is estimated to have increased from a notional value of \$632 billion in 2001, to over \$54.6 trillion in notional value by mid 2008.⁹⁴

⁹¹ See *Market Survey*, ISDA, <http://www.isda.org/statistics/pdf/ISDA-Market-Survey-annual-data.pdf> (last visited Nov. 8, 2010).

⁹² David Mengle, *Credit Derivatives: An Overview*, FED. RES. BANK OF ATLANTA ECON. REV., Fourth Quarter 2007, at 1, available at http://www.frbatlanta.org/filelegacydocs/erq407_mengle.pdf.

⁹³ Janis Sarra, *Financial Market Destabilization and the Role of Credit Default Swaps: An International Perspective On The SEC's Role Going Forward*, 78 U. CIN. L. REV. 629, 632 (2009). The underlying debate regarding CDSs has existed for centuries. See Gary Gensler, Chairman, U.S. Commodity Futures Trading Comm'n, Keynote Address at Markit's Outlook for OTC Derivatives Markets Conference (Mar. 9, 2010), available at <http://www.cftc.gov/PressRoom/SpeechesTestimony/ChairmanGaryGensler/opagensler-32.html> (“Though credit default swaps have existed for only a relatively short period of time, the debate they evoke has parallels to debates as far back as 18th Century England over insurance and the role of speculators. English insurance underwriters in the 1700s often sold insurance on ships to individuals who did not own the vessels or their cargo. The practice was said to create an incentive to buy protection and then seek to destroy the insured property. It should come as no surprise that seaworthy ships began sinking. In 1746, the English Parliament enacted the Statute of George II, which recognized that ‘a mischievous kind of gaming or wagering’ had caused ‘great numbers of ships, with their cargoes, [to] have . . . been fraudulently lost and destroyed.’ The statute established that protection for shipping risks not supported by an interest in the underlying vessel would be ‘null and void to all intents and purposes.’”).

⁹⁴ See Mengle, *Credit Derivatives*, *supra* note 92, at 7; *News Release: ISDA Mid-Year 2008 Market Survey Shows Credit Derivatives at \$54.6 Trillion*, INT'L SWAPS & DERIVATIVES ASS'N, INC. (Sept. 24, 2008), <http://www.isda.org/press/press092508.html>. For a criticism of the use of notional amount to measure privately negotiated derivatives, see *Enhancing Investor Protection and the Regulation of Securities Markets: Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs*, 111th Cong. (2009) (testimony of Robert Pickel, Chief Executive Officer, International Swaps and Derivatives Association, Testimony Before the Committee on Banking), available at <http://www.isda.org/press/pdf/Testimony-of-Robert-Pickel031009.pdf> (“While using notional amount as a measurement tool for the size of the privately negotiated derivatives business has its benefits, it also has a major drawback. Notional amount greatly overstates the actual exposure represented by the CDS business. One reason for this is because a seller of protection often seeks to hedge its risk by entering into offsetting transactions. Using the example above, if the counterparty that sold \$10 million of protection wished to hedge its risk and buy protection, it too would enter into a \$10 million CDS contract. Thus, there are now two CDS contracts outstanding with a total notional amount of \$20 million. The reality is, however, that only \$10 million is at risk.”).

On July 21, 2010, the President of the United States signed the Dodd-Frank Wall Street Reform and Consumer Protection Act (Financial Reform Act) into law.⁹⁵ Title VII of the Financial Reform Act—known as the Wall Street Transparency and Accountability Act of 2010 (WSTA)—confers jurisdiction of security-based swaps to the SEC, and all other swaps to the CFTC.⁹⁶ Security-based swaps are also added to the definition of a “security” in the Securities Act of 1933 and the Exchange Act.⁹⁷ As such, an offer or sale of a security-based swap by or on behalf of the issuer of the underlying security, its affiliate or underwriter is considered an offer or sale of the underlying security. There is no requirement that the SEC deem an owner of a security-based swap to be the beneficial owner of the underlying security, or that the security-based swap have “incidents of ownership comparable to direct ownership of the equity security.”⁹⁸ Both agencies share joint regulatory jurisdiction over “mixed swaps.”⁹⁹

The WSTA requires that all swaps and security-based swaps be cleared, unless an exemption exists.¹⁰⁰ The CFTC and SEC may exempt a swap or security-based swap from clearing if: (1) the swap or security-based swap is not accepted for clearing by a derivatives clearing organization (DCO) or a clearing agency or (2) one party to the contract is not a dealer or major swap or security-based swap participant and that party does not meet the eligibility requirement of a DCO/clearing agency.¹⁰¹ All derivatives clearing organizations are required to submit to the CFTC for prior approval any swaps the organization seeks to accept for clearing.¹⁰² The CFTC or SEC can stay the clearing requirement of a swap or security-based swap that it has

⁹⁵ *H.R. 4173: Dodd-Frank Wall Street Reform and Consumer Protection Act*, GOVTRACK.US, <http://www.govtrack.us/congress/bill.xpd?bill=h111-4173> (last visited Nov. 8, 2010).

⁹⁶ See H.R. 4173, 111th Cong. §§ 712(b)(1)–(2) (2010).

⁹⁷ §§ 761(a), 768(a) (amending 15 U.S.C. § 78c(a)(10) and 15 U.S.C. § 77b(a)(1), respectively).

⁹⁸ 15 U.S.C.S. § 78m(o) (LEXIS through P.L. 111-237).

⁹⁹ H.R. 4173 § 712(a)(8); 7 U.S.C.S. § 1a(49)(D) (LEXIS through P.L. 111-267) (“The term ‘security-based swap’ includes any agreement, contract, or transaction that is as described in section 3(a)(68)(A) of the Securities Exchange Act of 1934 (15 U.S.C. [§] 78c(a)(68)(A)) and also is based on the value of one or more interest or other rates, currencies, commodities, instruments of indebtedness, indices, quantitative measures, other financial or economic interest or property of any kind (other than a single security or a narrow-based security index), or the occurrence, non-occurrence, or the extent of the occurrence of an event or contingency associated with a potential financial, economic, or commercial consequence.”).

¹⁰⁰ H.R. 4173 §§ 723(a), 763(a) (amending 7 U.S.C. § 2(e)(3) and 15 U.S.C. § 78a(3C)(a), respectively).

¹⁰¹ *Id.*

¹⁰² *Id.*

approved for listing upon request of either party to the contract, or on its own, and must then determine within ninety days whether the product does or does not need to be cleared.¹⁰³ A product that the CFTC or SEC determines does not need to be cleared is still allowed to be cleared.¹⁰⁴

The WSTA, therefore, creates a presumption that OTC swaps will be cleared through a CCP. Additionally, the WSTA requires both the CFTC and SEC to adopt rules requiring maintenance of records of uncleared swap and security-based swap transactions, respectively, to be made available to one another.¹⁰⁵ Thus, the new legislation confers whole or partial jurisdiction over most OTC swap transactions, which, along with the existing jurisdiction over futures and options by the CFTC and SEC, creates various degrees of regulatory regimes for nearly all derivative contracts.

By passing the WSTA, Congress took the opportunity to not only increase regulation of OTC derivatives, but also to address the potential for on-exchange trading of specific information aggregation derivative contracts; namely, contracts based on box office receipt numbers.

II. DOMESTIC BOX OFFICE RECEIPT DERIVATIVE CONTRACTS

In 2008, in response to a substantial number of requests asking for guidance on the offering and trading of “information aggregation” financial contracts, the CFTC issued a concept release on the appropriate regulatory treatment of event based contracts.¹⁰⁶ As the CFTC’s release summarized:

These event contracts generally take the form of financial agreements linked to eventualities or measures that neither derive from, nor correlate with, market prices or broad economic or commercial measures. Event contracts have been based on a wide variety of interests including the results of presidential elections, the accomplishment of certain scientific advances, world population levels, the adoption of particular pieces of legislation, the outcome of corporate product sales, the declaration of war and the length of celebrity marriages.¹⁰⁷

¹⁰³ H.R. 4173 §§ 723(a), 763(a) (amending 7 U.S.C. § 6(c)(1) and 15 U.S.C. § 78a(3C)(i), respectively).

¹⁰⁴ *Id.*

¹⁰⁵ § 712(d)(1)–(3).

¹⁰⁶ Concept Release on the Appropriate Regulatory Treatment of Event Contracts, E8-9981, 73 Fed. Reg. 25669 (May 7, 2008) [hereinafter Concept Release on the Appropriate Regulatory Treatment of Events Contracts], *available at* <http://www.cftc.gov/LawRegulation/FederalRegister/e8-9981.html>.

¹⁰⁷ *Id.*

Among the reasons for issuing the concept release were to help determine: (1) whether event based contracts are within the CFTC's jurisdiction; (2) if the CFTC does, in fact, have jurisdiction over these contracts, whether there should be exemptions or exclusions applied to them; and (3) how to address potential gambling aspect of some of these contracts.¹⁰⁸

A. Benefits of Information Markets

An event based market is generically known as an "information market."¹⁰⁹ An information market is a relatively simple operation. The market maker issues a security or derivative and specifies how these instruments will eventually be redeemed or settled.¹¹⁰ The various instruments' payout will be based on objectively verifiable information at the time of redemption or settlement (e.g., whether the Federal Reserve changes the federal funds target rate).¹¹¹ Individuals who wish to participate in these markets purchase financial instruments from the market and subsequently trade these instruments (or purchase offsetting contracts in the case of derivatives) with one another.¹¹² The prices at which these transactions occur reflect market predictions of the eventual payout, and thus, whether the participants believe a certain event is likely to occur.¹¹³

Proponents of information markets point to the efficient markets hypothesis, which, in essence, states that it is impossible to beat the market because market efficiency causes the prices of financial instruments to immediately incorporate and reflect all relevant information.¹¹⁴ In other words, stocks traded on a public exchange will always trade at their fair value, making it impossible for investors to purchase undervalued stocks or sell inflated stocks. Thus, the hypothesis maintains that it is impossible to outperform the overall market. In an efficient information market, the market price of the financial instrument will theoretically be the best indicator of whether an event will actually occur or not, and no combination of polling or other information gathering techniques can in any way improve upon the market generated forecasts. The advantage of having a price signal market for information is that the market aggregates the publicly and privately known information, as well as the

¹⁰⁸ *Id.*

¹⁰⁹ Matthew Einbinder, *Information Markets: Using Market Predictions to Make Administrative Decisions*, 92 VA. L. REV. 149, 150 (2006).

¹¹⁰ *Id.*

¹¹¹ *Id.* at 151.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ See Eugene F. Fama, *Efficient Capital Markets: II*, 46 J. FIN. 1575, 1575 (1991).

tastes of a large number of participants, which produce judgments that incorporate more data than could be assembled centrally.¹¹⁵

In order for these markets to perform as advertised, though, market participants must trade rationally. Rational trading is certain to occur in these markets by virtue of the fact that market participants have a financial incentive to disclose their beliefs about future events. Unlike marketing research, polling, or other information gathering techniques, information market participants have no incentive to lie or conceal their beliefs. Additionally, individual positions in regulated information markets cannot be revealed. This means that market participants need not fear potential negative consequences of making their beliefs known—a fear that cannot necessarily be allayed in other types of group information gathering methods.

For some market participants, rational trading will also mean manipulation of the markets in an effort to increase the financial stake in their particular market positions.¹¹⁶ For this reason, there is a clear need for market regulation, particularly anti-manipulation provisions. Anti-manipulation techniques take the form of financial disclosures to regulators and the markets themselves, as well as position and capital limits.¹¹⁷ An information market, if regulated by the CFTC or SEC, would be subject to anti-manipulation provisions, which makes regulated markets more desirable than unregulated markets.

It should be equally clear that these types of markets are limited in how much information can be learned. For instance, a certain market may be able to accurately predict who will next be elected President, but does not have the capability to discern whether a particular policy assurance by a candidate is desired by the public.¹¹⁸ This, of course, underpins one of the tenants of economics: that missing markets lead to inefficiency.¹¹⁹

The classic example of this theory was first analyzed fifty years ago by Nobel Prize winning economist Ronald Coase.¹²⁰ Imagine, for example, that a candy maker operates noisy

¹¹⁵ Cass R. Sunstein, *Group Judgments: Statistical Means, Deliberation, and Information Markets*, 80 N.Y.U. L. REV. 962, 1023 (2005).

¹¹⁶ *Id.* at 1036.

¹¹⁷ *Id.* at 1048.

¹¹⁸ One could argue that a candidate's policy assurances are the reason that he or she is likely to be elected, but there is a difference between whether someone is likely to be elected, and whether the public agrees with a particular campaign promise.

¹¹⁹ See, e.g., Tibor Scitovsky, *Two Concepts of External Economies*, 62 J. POL. ECON. 143, 144–50 (1954).

¹²⁰ Ronald H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960).

equipment next door to a doctor's office. The candy maker, by pursuing his own interests, is interfering with the doctor's examination of patients. While the candy maker derives benefits from his operation, the doctor surely suffers. Economists call this type of interference a negative externality, or as Coase put it, a social cost.¹²¹ An unbiased observer may decide that the candy maker should merely shut down his business in order for the doctor to serve the welfare of the public. This overlooks the damage that such a solution would cause to the candy maker. The same is true, of course, were the onlooker to decide that the doctor should shut down his practice. Thus, there appears to be an impasse, or more precisely, an inefficiency given the fact that both individuals cannot operate their businesses side-by-side.

This dilemma can be solved, however, by the creation of a market. In such a market, the candy maker and doctor would determine how much money one would need to compensate the other with in order to close down their respective businesses. The eventual solution depends on the relative size of the gains and losses of the parties. Coase's example demonstrates that inefficiencies are caused by a lack of markets.¹²² The take away, though, is that information markets have the potential to be very valuable resources, but enough markets must exist (or be allowed to exist) in order for significant amounts of information to be learned.¹²³ Although a single information market is inevitably an imperfect information discovery vehicle, there seems to be some consensus that contracts traded on these types of markets provide capable—if not highly accurate—predictive tools.¹²⁴

B. Existing Event Based Markets

The Iowa Electronic Markets (IEM) is an electronic trading facility operated by the University of Iowa Henry B. Tippie College of Business that functions as an experimental and academic program, and is one of the better known real-money information markets currently in operation.¹²⁵ The IEM has been in existence since 1988, and operates in part pursuant to a 1993 no-action letter issued by the CFTC, which allowed the IEM to list various event contracts subject to certain conditions and

¹²¹ *Id.* at 2.

¹²² *Id.* at 3–4.

¹²³ Sunstein, *supra* note 115, at 962.

¹²⁴ See, e.g., Michael Abramowicz, *Information Markets, Administrative Decisionmaking, and Predictive Cost-Benefit Analysis*, 71 U. CHI. L. REV. 933, 950 (2004).

¹²⁵ *About IEM*, UNIV. OF IOWA TIPPIC COLLEGE OF BUSINESS, <http://tippie.uiowa.edu/iem/about/index.html> (last visited Sept. 28, 2010).

limitations.¹²⁶ The IEM continues to be recognized for its presidential and congressional election contracts.¹²⁷ Currently, the IEM offers markets for 2010 Senate and House of Representatives “control,” as well as a Federal Reserve monetary policy market.¹²⁸

In 2008, the IEM offered vote share and winner-take-all contracts for the U.S. presidential election cycle.¹²⁹ The vote share contract was associated with the candidates nominated by each party, with each contract having a maximum value of one dollar, and a contract payout “directly based on the percentage of the popular vote received by each of the two major party candidates.”¹³⁰ For instance, a contract for a candidate who received twenty-five percent of the popular votes cast for both candidates was worth twenty-five cents at settlement.¹³¹ The winner-take-all contract, in contrast, had a value of either one dollar or nothing at settlement.¹³² These contracts were also associated with a specific candidate, but “instead of having a payout tied to a particular percentage of the popular vote received by each candidate,” the contract “distributed a fixed payout of \$1 to its holder only if the referenced candidate receive[d] a greater percentage of the popular vote cast.”¹³³

Another well-known event based market is the Hollywood Stock Exchange (HSX) which markets itself as the “world’s leading entertainment stock market.”¹³⁴ The HSX, which was founded in 1996, is now a subsidiary of Cantor Fitzgerald, L.P.—a financial services provider that offers clients financial products

¹²⁶ Letter from Andrea M. Corcoran, Director, CFTC Division of Trading and Markets, to George R. Neumann, Professor of Economics, University of Iowa (June 18, 1993), available at <http://www.cftc.gov/files/foia/repfoia/foirf0503b004.pdf>. This no-action letter superseded a more limited letter issued to the IEM in 1992, and extends the CFTC’s no-action relief to contracts based on political elections, economic indicators, and certain currency exchange rates. *Id.* The letter requires that the IEM limit access to any one submarket to between 1,000 and 2,000 traders. *Id.* The letter also sets the maximum amount that any single participant can risk in any one submarket at \$500. The letter makes clear that relief is premised on, among other factors, the IEM’s representation that the market is being operated for academic purposes, and the assurance that the IEM will not receive any profit or other form of compensation from its activities. *Id.*

¹²⁷ *Current Markets*, UNIV. OF IOWA TIPPIE COLLEGE OF BUSINESS, <http://tippie.uiowa.edu/iem/markets/> (last visited Sept. 28, 2010).

¹²⁸ *Id.*

¹²⁹ Concept Release on the Appropriate Regulatory Treatment of Event Contracts, *supra* note 106.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *About HSX*, HSX, <http://www.HSX.com/about/?page=index> (last visited Sept. 27, 2010).

and services in the equity and fixed income capital markets.¹³⁵ The HSX allows individuals to buy and sell virtual shares of celebrities and movies with a currency called the Hollywood Dollar.¹³⁶ The HSX is less of an information market than the IEM because participants are not using real money,¹³⁷ but it nonetheless provides a realistic framework for other—more authentic—information markets. Despite the faux nature of the HSX, it has proved to be a relatively accurate predictor of box office success or failure.¹³⁸ As one recent commentator noted, the “HSX offers good predictions of a film’s gross receipts before release and, relatively speaking, even better predictions after opening weekend—when a large number of traders have some information in the form of (or at least the possibility of) observing the finished film on screen, along with audience reactions.”¹³⁹ By not allowing participants to conduct real trading operations, the HSX avoids securities and derivatives regulation, while still allowing individuals to predict the success of films.¹⁴⁰

While many individuals are interested in politics or Federal Reserve monetary policy, there are some who are undoubtedly more engrossed in the success or failure of major motion pictures. This, of course, was the thinking when Cantor Futures Exchange, L.P.—another subsidiary of Cantor Fitzgerald, L.P.—and Media Derivatives, Inc. applied for designation as contract markets in which individuals would be able to trade real domestic box office receipt derivatives.¹⁴¹

C. The Purpose of DBOR Derivative Exchanges

Supporters of domestic box office receipt (DBOR) derivative exchanges claim that such markets will assist the motion picture industry by expanding the number of potential financing sources

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ This statement is based on the assumption that individuals will behave more rationally when their own money is at stake. Thus, an individual is less likely to merely guess or enter into riskier contracts which, while providing the potential for a larger payoff, are also less likely to actually payoff. See Emile Servan-Schreiber et al., *Prediction Markets: Does Money Matter?*, 14 ELECTRONIC MARKETS 243, 250 (2004), available at <http://bpp.wharton.upenn.edu/jwolfers/Papers/DoesMoneyMatter.pdf> (finding no difference in the predictive accuracy between real money and play money exchanges during the 2003 NFL football season).

¹³⁸ Saul Levmore, *Simply Efficient Markets and the Role of Regulation: Lessons from the Iowa Electronic Markets and the Hollywood Stock Exchange*, 28 J. CORP. L. 589, 593 (2003).

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 592–93.

¹⁴¹ See *infra* note 159.

available, as well as allowing film companies and investors to limit their risk.¹⁴²

Historically, film companies raised financing through public or private sources, but the number of equity investors has decreased dramatically over the past thirty years.¹⁴³ One of the reasons for this decrease in capital is the risk involved in making a motion picture. Even though there are anywhere between 600 and 700 films produced each year, only about 200 of these obtain a release that could potentially lead to any sort of return, let alone a profit.¹⁴⁴ When a blockbuster does occur, though, it can make up for the losses on these other films.¹⁴⁵ Unfortunately, significant capital is required to make enough films to ensure that at least one studio film will be a blockbuster.

The most common film financing technique is known as a banking pre-sale.¹⁴⁶ This approach involves the assembly of a package involving a script, director, and key cast members.¹⁴⁷ Once the film package is complete, the producer engages an agent to pre-sell the film throughout the world at various film markets.¹⁴⁸ However, “[m]any films do not make it past the film markets.”¹⁴⁹ Pre-selling films has become more difficult, though, and distributors are now waiting until films are in production before committing to license them.¹⁵⁰ For those films that are financed, very few are done on an individual basis.¹⁵¹ Film financiers generally engage in “slate financing,” whereby an investor finances a portfolio of future films, thus spreading around—and decreasing—the risk that an investor’s capital will be lost.¹⁵² With slate financing, however, the investor does not

¹⁴² See Nikki Finke, *Worst Idea Ever? Wall Street Plans Futures Exchange Tied to Box Office*, DEADLINE N.Y. (Dec. 9, 2008, 11:23 AM), <http://www.deadline.com/2008/12/wall-street-firm-planning-futures-exchange-tied-to-movie-sales/> (quoting a financial source explaining that such exchanges “could lead to another source of revenue for studios who can make their own bets on movies they are releasing to increase total revenue take or hedge losses”).

¹⁴³ Schuyler M. Moore, *Raising Film Financing by Betting the Box*, 24 ENTMT’L L. REP. 4, 4 (2003) [hereinafter Moore, *Raising Film Financing*].

¹⁴⁴ See Schuyler M. Moore, *Financing Drama*, L.A. LAW., May 2008, at 2 [hereinafter Moore, *Financing Drama*] (“Many events may cause films to lose money, such as budget overages, third-party claims, misappropriation and, of course, artistic failure.”).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 4.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ Moore, *Financing Drama*, *supra* note 144, at 4 (“Average worldwide presales have shrunk from about 100 percent of a film’s budget in the heyday of the financing technique to less than 70 percent today.”).

¹⁵¹ *Id.* at 4–6.

¹⁵² See Norbert Morawetz, *Finance, Policy and Industrial Dynamics The Rise of Coproductions in the Film Industry*, at n.xi (June 18–20, 2007), <http://www2.druid.dk/>

always know what films are being financed, and thus, the investor is essentially investing blind.¹⁵³

Anyone who invests in a film project presumably does so with the expectation that the film (or slate of films) will provide a positive net return. Clearly, film financiers have an incentive to reduce their financial risk, which allows these individuals or companies to survive if a film flops. One of the most common ways to reduce risk is for film companies to enter into split-rights transactions, whereby two or more companies co-finance a film with one taking domestic rights, and the other taking foreign rights.¹⁵⁴ The downside to this type of contract is that when companies enter into contracts where profits are shared over two territories, the valuable distribution rights, and about half the profits, are given away to competitors. Nonetheless, this approach has become widespread despite the fact that film companies are in the business of owning and exploiting film rights.¹⁵⁵

Film financing and hedging obviously go hand in hand. An individual or organization is more likely to invest in a film if assurances can be made that there will be a limit to the potential financial losses, while still providing for potential financial gains. The purpose of DBOR derivative markets, therefore, is to allow the parties with financial interests in a film's revenue stream to hedge against the risks associated with producing, distributing, financing, and insuring motion pictures.¹⁵⁶ The individuals and organizations potentially included in this group include: (1) owners of screenplays; (2) debt and equity investors in a particular film or slate of films; (3) film talent who either benefit directly from box office receipts or whose future career prospects depend on appearance in quality films; (4) studios who need a steady revenue stream to continue production if movie investment dries up; (5) insurers of film talent and movies; (6) theaters whose revenue stream depends on people purchasing tickets to see a film; (7) film distributors; and (8) promotional

conferences/viewpaper.php?id=1671&cf=9 (explaining that, "[r]ather than relying on a single top-or-flop project, equity funds and studios use a portfolio approach to film financing where risk is spread across a slate of films") (citation omitted).

¹⁵³ Cyrus Sanati, *Movie Time at the C.F.T.C. Draws Heated Debate*, N.Y. TIMES BLOG (May 19, 2010, 4:04 PM), <http://dealbook.blogs.nytimes.com/2010/05/19/heated-debate-during-movie-time-at-the-c-f-t-c/>.

¹⁵⁴ Moore, *Raising Film Financing*, *supra* note 144, at 4.

¹⁵⁵ *Id.*

¹⁵⁶ See, e.g., Randall Dodd, Derivatives Study Ctr., Derivatives Markets: Sources of Vulnerability in U.S. Financial Markets, at 2 (Nov. 15, 2001), <http://www.financialpolicy.org/fpfspr8.pdf> (explaining that derivatives, in general, are used to "hedge the risks normally associated with commerce and finance").

marketing partners (e.g., fast food chains) who produce or sell products associated with particular films.

It should be noted that these individuals or organizations could *potentially* benefit from an exchange. This is not to say that these markets will actually be used by these individuals or organizations. Nonetheless, as stated earlier, when seeking the source of inefficiencies, one should look for missing markets, and allow potential participants to decide whether these products and markets are right for them.¹⁵⁷

D. History of DBOR Derivative Exchanges

In 2008, Cantor Futures Exchange, L.P. (Cantor) and Media Derivatives, Inc. (MDEX)¹⁵⁸ applied for designation as contract markets in which individuals and organizations would be able to trade DBOR derivative contracts.¹⁵⁹ The process of creating an exchange on which derivatives are traded can be broken down into two main parts: (1) designation of the exchange as a contract (or other type) of market, and (2) approval of the contracts proposed for trading on the exchange.

1. CFTC Approval of DBOR Markets

When the CEA was amended in 2000 by the Commodity Futures Modernization Act (CFMA), a three-tiered market framework was created.¹⁶⁰ Since the enactment of the Grain Futures Act in 1922, the CFTC, or its precursor agencies, have regulated exchanges known as designated contract markets

¹⁵⁷ At a May 19, 2010 hearing before the CFTC, Clark Hallren and Alice Neuhauser stated that they are not aware of any OTC derivative market where the contracts are linked to box office receipts. Opponents of DBOR derivatives would suggest that the lack of an OTC market tends to indicate that no one would use a DBOR exchange. The flip side of this argument is that the lack of an OTC market could mean that a potential party is merely unable to find a counterparty for its desired contract. Additionally, one benefit that an exchange has over an OTC market is that exchanges and regulators are required to keep individual positions confidential. During this same hearing, CFTC Commissioner Gary Gensler acknowledged that about seventy percent of all contracts submitted to the CFTC for trading approval fail due to lack of trading volume. See *Live Blogging! The CFTC Public Meeting on Movie Box Office Futures*, JABCAT ON MOVIES (May 19, 2010), <http://jabcatmovies.com/2010/05/live-blogging-the-cftc-public-meeting-on-movie-box-office-futures>.

¹⁵⁸ In correspondence with the CFTC dated May 20, 2010, MDEX changed its name to Trend Exchange, Inc. This article, however, will continue to refer to this entity as MDEX.

¹⁵⁹ See Application for DCO Registration of Cantor Fitzgerald, L.P. (Nov. 25, 2008), <http://www.cftc.gov/ucm/groups/public/@otherif/documents/ifdocs/cantordcoapplicationletter.pdf>; Media Derivatives, Inc. Background Paper (August 2009), <http://www.cftc.gov/ucm/groups/public/@rulesandproducts/documents/ifdocs/mdex092509b.pdf>.

¹⁶⁰ See *supra* note 66.

(DCMs).¹⁶¹ DCMs “may list for trading futures or option contracts based on any underlying commodity, index or instrument.”¹⁶² However, in addition to DCMs, the CFMA created less regulated organized markets known as derivatives transaction execution facilities (DTEF).¹⁶³ The CFMA also authorized the creation of “exempt boards of trade”¹⁶⁴ (exempt boards) and “excluded electronic trading facilities” (EETF).¹⁶⁵ The exempt board and EETF provisions of the CFMA provided a means for establishing trading facilities for certain derivative transactions (e.g., energy, metal, chemical, and emissions futures) that remain largely outside the scope of the CFTC’s regulatory authority, with the exception that exempt boards remain subject to the anti-fraud and anti-manipulations prohibitions of the CEA.¹⁶⁶ EETFs, however, are not subject to these prohibitions.¹⁶⁷

DCMs remain subject to strict regulatory requirements by the CFTC.¹⁶⁸ Specifically, the CFMA amended the CEA to require entities requesting a contract market designation to demonstrate that it meets eight designation criteria,¹⁶⁹ and

¹⁶¹ *History of the Current Regulatory Framework*, STA UNIV., <http://www.stauniversity.org/content/History%20of%20the%20Current%20Regulatory%20Framework%20-%20Futures%20Regulation.pdf> (last visited Nov. 8, 2010).

¹⁶² *Designated Contract Markets*, U.S. COMMODITY FUTURES TRADING COMM’N, <http://www.cftc.gov/IndustryOversight/TradingOrganizations/DCMs/index.htm> (last visited Sept. 28, 2010).

¹⁶³ Susan C. Ervin Dechert, CFTC Regulation of Energy Derivatives: An Overview (Aug. 13, 2002), <http://www.abanet.org/buslaw/corporateresponsibility/clearinghouse/02annual/37/ervin.pdf>.

¹⁶⁴ 7 U.S.C. § 7a-3(b) (2000). Transactions conducted on an exempt board must be between eligible contract participants. Permissible transactions for an exempt board of trade are limited to transactions “for which the underlying commodity has: (A) a nearly inexhaustible deliverable supply; (B) a deliverable supply that is sufficiently large, and a cash market sufficiently liquid, to render any contract traded on the commodity highly unlikely to be susceptible to the threat of manipulation; or (C) no cash market.” *Id.* Transactions on an exempt board are subject to the anti-fraud and anti-manipulation provisions of the CEA. *See* § 7a-3(c).

¹⁶⁵ § 2(d)(2). The CEA does not apply to contracts (i) entered into only by eligible contract participants trading on a principal-to-principal basis or in certain investment management or fiduciary capacities, and (ii) done so on an electronic trading facility. *See id.*

¹⁶⁶ *Congress Makes Changes to the Regulation of Futures and Derivatives Transactions*, McDERMOTT WILL & EMERY (Jan. 2001), http://www.mwe.com/index.cfm/fuseaction/publications.nldetail/object_id/EAB1D60E-C2CE-47DC-BEB4-2D6B543759878.cfm.

¹⁶⁷ *Id.*

¹⁶⁸ *See* § 7(d).

¹⁶⁹ § 7(b). The eight designation criteria are: (1) general demonstration of adherence to designation criteria; (2) prevention of market manipulation; (3) fair and equitable trading; (4) enforcement of rules on the trade execution facility; (5) financial integrity of transactions; (6) disciplinary procedures; (7) public access to information on the contract market; and (8) ability of the contract market to obtain information. *Id.*

complies with eighteen core principles.¹⁷⁰ The CEA requires that the CFTC approve or deny a designation application within 180 days of the filing of the application.¹⁷¹ If the CFTC denies the application, it must specify the grounds for the denial.¹⁷² Following a refusal to designate an applicant as a contract market, the CFTC must provide the applicant with an opportunity for a hearing on the record before the CFTC.¹⁷³ A DCM applicant thereafter has a right to appeal an adverse decision directly to a federal appeals court.¹⁷⁴ Despite designating over fifty DCMs over the years, as of December 2010, the CFTC oversaw only seventeen DCMs where trading was active or anticipated.¹⁷⁵

In addition to amending the requirements for achieving a contract market designation, the CFMA created less regulated DTEFs. DTEFs are subject to a less comprehensive body of core principles than contract markets,¹⁷⁶ but in exchange for this less stringent regulatory oversight, are limited in the types of contracts it can offer and the types of parties who are allowed to participate in the transactions.¹⁷⁷ There are currently no DTEFs regulated by the CFTC.¹⁷⁸

¹⁷⁰ § 7(d)(1)–(18). The eighteen core principles contract markets are subject to include: (1) general adherence to these core principles; (2) compliance with the rules; (3) listing of products not subject to manipulation; (4) monitoring of trading; (5) position limits; (6) emergency authority; (7) disclosure of information; (8) trading data dissemination; (9) execution of transactions; (10) trade information maintenance; (11) financial integrity; (12) protection of market participants; (13) dispute resolution; (14) fitness standards; (15) conflicts of interest; (16) governance of mutually owned markets; (17) recordkeeping; and (18) antitrust considerations. *Id.*

¹⁷¹ § 8(a). The CEA also contains a provision for staying the running of the 180-day time limit when an exchange is notified that the application for contract market designation is materially incomplete, and provides the Commission with at least sixty days for review once the application has been resubmitted in completed form. *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ 5 U.S.C. § 706(2) (Supp. II 1965).

¹⁷⁵ *Trading Organizations*, U.S. COMMODITY FUTURES TRADING COMM'N, <http://services.cftc.gov/SIRT/SIRT.aspx?Topic=TradingOrganizations&implicit=true&type=DCM&CustomColumnDisplay=TTTTTTTTT> (last visited Dec. 1, 2010) [hereinafter *Trading Organizations*].

¹⁷⁶ § 7a(d)(2)–(9). The eight core principles for DTEFs are subject to include: (1) compliance with rules; (2) monitoring of trading; (3) disclosure of information; (4) daily publication of trading information; (5) fitness standards; (6) conflicts of interest; (7) recordkeeping; and (8) antitrust considerations. *Id.*

¹⁷⁷ See § 7a(b). If access to a DTEF is limited to eligible commercial entities trading for their own accounts, the DTEF may permit trading involving any commodity other than an agricultural commodity, and if access to a DTEF is not so limited, transactions are restricted to contracts where:

(A) the underlying commodity has a nearly inexhaustible deliverable supply; (B) the underlying commodity has a deliverable supply that is sufficiently large that the contract is highly unlikely to be susceptible to the threat of manipulation; (C) the underlying commodity has no cash market; (D)(i) the contract is a security futures product and (ii) the [DTEF] is [also registered as

EETFs and exempt boards, as stated above, were largely exempted from the CFTC's regulatory authority by the CFMA, and therefore these entities need not comply with any designation criteria or core principles.

On April 16, 2010 and April 20, 2010, respectively, the CFTC approved MDEX and Cantor's applications for registration as DCMs.¹⁷⁹ The CFTC noted that MDEX and Cantor's applications did not include any proposed DBOR derivative contracts to be traded on the exchanges, but rather, the approval was based on the proposed general operations of the exchanges.¹⁸⁰ Further, the CFTC observed that the general operations of the exchanges may not be appropriate for all types of DBOR contracts, because certain contracts may require special surveillance or compliance measures.¹⁸¹ For this reason, the CFTC ordered MDEX and Cantor to not only ensure the appropriateness of particular products for trading on the exchanges, but also required the two exchanges to submit to the CFTC any contracts that the two exchanges anticipate listing on the exchanges for prior approval.¹⁸²

By requiring prior approval of DBOR contracts, the CFTC impeded MDEX and Cantor from conducting any business. As stated previously, registration as a DCM is only half of an exchange's battle. Without products to list, a DCM is analogous to a doctor without patients.

a national securities exchange] . . . ; [or] (E) the [CFTC] determines, based on the market characteristics, surveillance history, self-regulatory record and capacity of the facility that trading in the contract (or option) is highly unlikely to be susceptible to the threat of manipulation

Id.

¹⁷⁸ *Trading Organizations*, *supra* note 175.

¹⁷⁹ Order of Designation as a Contract Market by the U.S. Commodity Futures Trading Comm'n at 2, In re Request of Media Derivatives, Inc. (Apr. 16, 2010) [hereinafter MDEX Order of Designation as a Contract Market], *available at* <http://www.cftc.gov/stellent/groups/public/@otherif/documents/ifdocs/mdexorder041510.pdf>; Order of Designation as a Contract Market by the U.S. Commodity Futures Trading Comm'n at 1, In re Request of Cantor Futures Exchange, L.P., (Apr. 20, 2010) [hereinafter Cantor Order of Designation as a Contract Market], *available at* <http://www.cftc.gov/stellent/groups/public/@otherif/documents/ifdocs/cantorfuturesexchangeorder.pdf>.

¹⁸⁰ MDEX Order of Designation as a Contract Market, *supra* note 179, at 2; Cantor Order of Designation as a Contract Market, *supra* note 179, at 3–4.

¹⁸¹ *Application for Contract Market Designation Compliance with Designation Criteria and Core Principles*, U.S. COMMODITY FUTURES TRADING COMM'N, <http://www.cftc.gov/ucm/groups/public/@requestsandactions/documents/ifdocs/cantordcmcompliancechart.pdf>.

¹⁸² MDEX Order of Designation as a Contract Market, *supra* note 179, at 2; Cantor Order of Designation as a Contract Market, *supra* note 179, at 4.

2. CFTC Approval of DBOR Products

Even before the CFTC designated MDEX and Cantor as contract markets, both exchanges submitted proposed contracts for listing on their respective exchanges.¹⁸³ On March 9, 2010, MDEX requested prior CFTC approval to list an opening weekend DBOR futures and binary option¹⁸⁴ contract on the motion picture *Takers*.¹⁸⁵ On March 30, 2010, Cantor requested approval to trade derivatives contracts on its DCM for the motion picture *The Expendables*.¹⁸⁶

In addition to creating a three-tiered framework for derivative markets, the CFMA also amended the CEA's listing requirements by now allowing exchanges to choose between listing contracts pursuant to a self-certification procedure, or pursuant to a prior review procedure by the CFTC.¹⁸⁷ By filing a self-certification, an exchange certifies that the contract complies with the CEA, and is required to submit the certification documents to the CFTC no later than one business day before initial implementation of the product listing.¹⁸⁸ The CFMA made it possible, therefore, for trading to occur on contracts that are subsequently banned by the CFTC, merely by self-certifying the contract in good faith. On the other hand, if prior approval of a contract is sought, the exchange must submit to the CFTC the contract's terms and conditions, and demonstrate compliance with CFTC regulations.¹⁸⁹ Products submitted for prior approval are subject to a forty-five day review period, with the potential for a forty-five day extension if the product raises a "novel or complex" issue.¹⁹⁰

¹⁸³ MDEX Order of Designation as a Contract Market, *supra* note 179, at 1; Cantor Order of Designation as a Contract Market, *supra* note 179, at 1.

¹⁸⁴ A binary option "is a type of options trading where the payoff is either some fixed amount of some asset or nothing at all." *Binary Options Trading*, 1 ANYOPTION, <http://www.lanyoption.com/tag/binary-option-trading/> (last visited Sept. 30, 2010). Thus, options that are binary in nature allow for only two possible outcomes. For example, an individual purchases a binary call option on XYZ, Inc.'s stock with a strike price of \$75 and a binary payoff of \$500. If, on or before the maturity date, the stock trades at \$75 or above, the purchaser of the option receives \$500. If the stock expires before reaching \$75 or more, the purchaser receives nothing and is out the option premium.

¹⁸⁵ See *Statement of the Commission*, U.S. COMMODITY FUTURES TRADING COMM'N, June 14, 2010 [hereinafter *Statement of the Commission*], available at <http://www.cftc.gov/ucm/groups/public/@otherif/documents/ifdocs/mdexcommissionstatement061410.pdf>.

¹⁸⁶ See *Request by Cantor Exchange For Review and Approval of the The Expendables Futures Contract*, U.S. COMMODITY FUTURES TRADING COMM'N, June 28, 2010, available at <http://www.cftc.gov/ucm/groups/public/@otherif/documents/ifdocs/cantorfuturesdbororder062810.pdf>.

¹⁸⁷ 7 U.S.C. § 7a-2(c) (2000).

¹⁸⁸ See 17 C.F.R. § 40.6 (2009).

¹⁸⁹ 17 C.F.R. § 40 app. A.

¹⁹⁰ 17 C.F.R. § 40.3.

Given the relatively novel nature of these contracts, the CFTC required MDEX and Cantor to submit proposed contracts to the CFTC for prior approval before trading.¹⁹¹ On May 19, 2010, the Commission held a public hearing to consider issues related to the trading of DBOR futures and binary options.¹⁹² As the Commission noted during this meeting, the CEA provides that the CFTC must approve a contract submitted for prior approval within ninety days, unless it finds that the contract violates the CEA.¹⁹³ As stated earlier, the CEA grants the CFTC jurisdiction over contracts for the sale of a commodity for future delivery and over commodity option contracts traded on DCMs, and therefore, the CFTC, in reviewing MDEX and Cantor's applications for prior approval of their DBOR contracts, was required to determine whether the underlying subject of these contracts was a commodity.¹⁹⁴

i. CFTC's Finding that DBORs are Commodities

The CFMA separated the universe of commodities into three categories: (1) agricultural commodities; (2) exempt commodities; and (3) excluded commodities.¹⁹⁵ In the order approving MDEX's DBOR contract, the CFTC noted that "[m]ovie revenues fall into the same category as many other commodities for which futures and options contracts have been either approved by or self-certified to the Commission where the underlying commodity is a non-price-based measure of an economic activity, commercial

¹⁹¹ Dan M. Berkovitz, General Counsel, Commodity Futures Trading Comm., Remarks at Public Meeting to Consider the Trading of Contracts Based on Motion Picture Box Office Receipts and Gather Views of Interested Parties (May 19, 2010) [hereinafter Berkovitz Remarks], available at www.cftc.gov/ucm/groups/public/@newsroom/documents/title/transcripts051910.

¹⁹² For an archived webcast of this meeting, see *Consideration of the Trading of Contracts Based on Motion Picture Box Office Receipts*, U.S. COMMODITY FUTURES TRADING COMM'N, <http://capitolconnection.net/capcon/cftc/webcastarchive.htm#> (last visited Sept. 14, 2010).

¹⁹³ 7 U.S.C.A. § 7a-2(c)(3) (West 2009) (requiring the CFTC to "approve any such new contract or instrument . . . unless the Commission finds that the new contract or instrument . . . would violate this chapter"); 17 C.F.R. § 40.3(b)–(c) ("All products submitted for Commission approval . . . shall be deemed approved . . . forty-five days after receipt The Commission may extend the forty-five day review period . . . for: (1) [a]n additional forty-five days, if the product raises novel or complex issues"); 17 C.F.R. § 40.3(d) ("The Commission . . . may notify the submitting entity that it will not, or is unable to, approve the product or instrument.").

¹⁹⁴ *Statement of the Commission*, *supra* note 185, at 2 n.3 ("In the great majority of new product reviews, the answer to this question is obvious and requires no explicit analysis. However, such a determination was made prior to Commission approval of the Chicago Mercantile Exchange's single-name Credit Event contracts.").

¹⁹⁵ Commodity Futures Modernization Act of 2000, H.R. 5660, 106th Cong. (2d sess. 2000); Jayashree B. Gokhale, *Hedge to Arrive Contracts: Futures of Forwards*, 53 DRAKE L. REV. 55, 56 n.3 (2004).

activity or environmental event.”¹⁹⁶ The Commission has found that such a commodity is a right or interest within the meaning of section 1(a)(4) of the CEA.¹⁹⁷ “While the right or interest may be intangible, it can clearly serve as the basis for a futures or options contract.”¹⁹⁸

The Commission’s order did not explicitly say which of the three categories of commodities DBORs fall under, but the language of the order makes it apparent that box office receipts fall under the category of excluded commodities.¹⁹⁹ The CEA defines an excluded commodity as “an occurrence . . . associated with a financial, commercial, or economic consequence.”²⁰⁰ Despite the fact that the CFTC had never previously dealt with DBOR derivative contracts, the Commission’s order acknowledged that more than five hundred similarly excluded commodity contracts were submitted to the CFTC for prior approval or self-certified since the CFMA was enacted.²⁰¹

ii. DBOR Contracts Do Not Appear to be Subject to Manipulation

Having passed the threshold issue of whether DBORs are commodities, the CFTC addressed the issue of whether these DBOR derivative contracts satisfied the core principles established by the CFMA.

Under the third core principle of the CEA, in order to maintain its standing, a DCM is required to list “only contracts that are not readily susceptible to manipulation.”²⁰² Unlike state and federal securities laws, U.S. derivative regulations do not make insider trading unlawful. Nonetheless, prior to approving MDEX’s contracts, the Commission insisted that modifications be made to the contract proposal to ensure that knowledgeable parties cannot intentionally release or misreport data that would have an impact on the trading or settlement of this contract.²⁰³

Because DBOR contracts are cash-settled (as opposed to physically delivered), the Commission must be sure that the settlement price upon which these contracts are based is not subject to manipulation. The vast majority of DBOR numbers

¹⁹⁶ *Statement of the Commission*, *supra* note 185, at 3.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 4.

²⁰⁰ 7 U.S.C. § 1a(13)(iv) (2000).

²⁰¹ *Statement of the Commission*, *supra* note 185, at 3 (“More than 500 of these types of contracts have been approved by or self-certified to the Commission to date.”).

²⁰² 7 U.S.C. § 7(d)(3) (2000).

²⁰³ *Statement of the Commission*, *supra* note 185, at 4–5.

are reported by Rentrak Corporation (Rentrak) and disseminated throughout the film industry.²⁰⁴ Rentrak is a third-party data aggregator and does not have a direct monetary interest in any motion picture.²⁰⁵ Essentially, Rentrak transfers box office revenue numbers from movie theaters to distributors.²⁰⁶ These numbers are used mostly by film studios as marketing tools (e.g., advertising a film as the number one grossing movie at the box office). Since 2008, Rentrak has collected more than ninety-eight percent of all box office revenue numbers, with the remaining box office numbers being delivered directly from theaters to distributors.²⁰⁷ Because the majority of data is automated, there is little opportunity for “misrepresentation or distortion of the numbers reported to Rentrak by the theaters.”²⁰⁸ The Commission found that the price basis for DBOR contracts (i.e., Rentrak’s numbers) are quite similar to other commodity pricing data (e.g., energy contracts that rely on data from commercial index providers and agricultural contracts that rely on data provided by the U.S. Department of Agriculture), and therefore, do not appear susceptible to manipulation.²⁰⁹

iii. DBOR Contracts Provide a Reasonable Hedging Device

Although repealed by the CFMA, the CEA used to require CFTC staff to apply an economic purpose test when evaluating proposed DCM contracts.²¹⁰ Specifically, the economic purpose test only allowed trading of contracts that would “not be contrary to the public interest.”²¹¹ The CFTC, in interpreting this section, found that a contract that was not contrary to the public interest must serve a legitimate hedging purpose.²¹²

²⁰⁴ *Id.* at 5.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 5–6 (known as “call around” data).

²⁰⁸ *Id.* at 6.

²⁰⁹ *Id.* at 6–7.

²¹⁰ *See id.* at 9.

²¹¹ 7 U.S.C. § 7(g) (1974) (“When such board of trade demonstrates that transactions for future delivery in the commodity for which designation as a contract market is sought will not be contrary to the public interest.”).

²¹² Concept Release on the Appropriate Regulatory Treatment of Event Contracts, *supra* note 106, at 25672 (“The public interest test . . . included an ‘economic purpose’ test, subject to a final test of the public interest. The economic purpose test . . . was used to prohibit the trading of certain contracts. Notably, the economic purpose test regarding contracts appropriate for trading on a futures exchange was not necessarily congruent with the scope of the Commission’s jurisdiction. Accordingly, while futures contracts that failed the economic purpose test were prohibited from trading on futures exchanges and thus illegal because of the on-exchange trading requirement, they (and any instrument with identical terms) remained futures contracts, fully subject to the Commission’s jurisdiction.”).

Despite the repeal of the economic purpose test, the findings and purpose section of the CEA, as amended by the CFMA, finds that transactions subject to the CEA have a significant impact on the public interest because they provide a “means for managing and assuming price risks.”²¹³ The CFTC recognized in its order that some commentators have suggested that the findings and purpose section of the CEA reestablishes an economic purpose test.²¹⁴ Nonetheless, because the economic purpose test was repealed by the CFMA, the Commission declined to adopt the test in determining whether to approve DBOR derivative contracts.²¹⁵

Despite declining to apply the pre-CFMA economic purpose test, the CFTC did evaluate whether MDEX’s DBOR contracts would provide some reasonable means for managing risks associated with box office revenues.²¹⁶ In conducting its analysis, the Commission assessed the risks faced by individuals associated with box office revenues.²¹⁷ The Commission noted that “[f]ilm production requires a significant amount of upfront capital with long lead times to completion. In addition, film financing can involve pre-selling in the form of office space leases for construction and transactions with foreign distributors or television providers.”²¹⁸ In order to deal with these risks, film studios have been required to rely on third party financial investors.²¹⁹ In light of public comments and written testimony submitted to the CFTC, the Commission believed that third party investors would potentially utilize DBOR futures to mitigate their commercial exposure.²²⁰ The Commission also agreed with the authors of many public comment letters who stated that DBOR contracts “would provide a risk management

²¹³ 7 U.S.C. § 5(a) (2000) (“The transactions subject to this chapter are entered into regularly in interstate and international commerce and are affected with a national public interest by providing a means for managing and assuming price risks, discovering prices, or disseminating pricing information through trading in liquid, fair and financially secure trading facilities.”).

²¹⁴ *Statement of the Commission*, *supra* note 185, at 9. At the May 19th hearing on DBOR derivatives, CFTC General Counsel, Dan Berkovitz, stated that:

[I]n 2000 . . . [Congress] . . . took out the public interest test, but . . . we believe that within the findings and purposes [section of the CEA] together with the requirement that the Commission find that and not be violative of the Act that there still is authority within the statute for the Commission . . . [to reject a contract] . . . in a circumstance where the Commission would believe that the contract would violate the finding and the purpose of the Act

Berkovitz Remarks, *supra* note 191, at 78–79.

²¹⁵ *Statement of the Commission*, *supra* note 185, at 9–10.

²¹⁶ *Id.* at 10.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.* at 10–11.

tool or expressed interest in using the contracts for hedging.”²²¹ Those authors “stated that direct participants in the motion picture industry, such as studios and producers, may benefit from having motion picture revenue futures contracts.”²²²

In light of the Commission hearing on DBOR contracts and the public comments submitted to the CFTC, the Commission approved MDEX’s DBOR contract on the movie *Takers* for trading on its DCM on June 14, 2010, and Cantor’s DBOR contract on the movie *The Expendables* on June 28, 2010.²²³ Approval by the CFTC on MDEX’s contracts, however, was short lived.²²⁴ Once the Financial Reform Act was signed into law by the President, trading of DBOR derivatives became a banned activity.²²⁵

E. Ban on DBOR Exchange Products

As stated earlier, the Financial Reform Act was passed in response to the financial collapse of 2008, and imposed sweeping changes to the U.S. financial regulatory system, including the regulation of derivatives.²²⁶ Among these changes was the joint regulation of the previously unregulated OTC swap market by the SEC and CFTC.²²⁷

The Wall Street Transparency and Accountability Act (WSTA), in addition to increasing regulation over swaps, banned trading of box office derivatives.²²⁸ Specifically, the Act amended the definition of a commodity in the CEA to include an enumerated list of agricultural commodities

and all other goods and articles, except onions . . . and motion picture box office receipts (or any index, measure, value, or data related to such receipts), and all services, rights, and interests (except motion

²²¹ *Id.* at 11.

²²² *Id.*

²²³ *Id.* at 11–12 (approving MDEX’s product request); *Statement of the Commission*, U.S. COMMODITY FUTURES TRADING COMM’N, June 28, 2010, at 1, available at <http://www.cftc.gov/ucm/groups/public/@otherif/documents/ifdocs/dborcommissionstatement0622810.pdf> (approving Cantor’s futures contract on *The Expendables*).

²²⁴ Paul Harris, *House-Senate Committee Bans Futures Trading: MPAA ‘Heartened’ With Decision; Major Blow to Exchange Companies*, VARIETY (Jun. 25, 2010, 10:29 AM), <http://www.variety.com/article/VR1118021065.html?categoryid=13&cs=1>.

²²⁵ *Id.*

²²⁶ *Times Topics: Financial Regulatory Reform*, N.Y. TIMES, http://topics.nytimes.com/topics/reference/timestopics/subjects/c/credit_crisis/financial_regulatory_reform/index.html (last updated Jul. 21, 2010).

²²⁷ Wall Street Transparency and Accountability Act of 2010, H.R. 4173, 111th Cong. §§ 712(a)–(b) (2010), available at <http://www.sec.gov/about/laws/wallstreetreform-cpa.pdf> (dividing jurisdiction over security-based swaps with the SEC and all other swaps with the CFTC).

²²⁸ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 721(a)(4), 124 Stat. 1376, 1659 (2010).

picture box office receipts, or any index, measure, value or data related to such receipts) in which contracts for future delivery are presently or in the future dealt in.²²⁹

In changing the definition of a commodity, Congress, without conducting a hearing on the issue prior to drafting the Financial Reform Act,²³⁰ banned trading of all DBOR derivatives.²³¹ Beginning in 1864 with the Anti-Gold Futures Act, Congress has occasionally attempted to ban trading of derivatives on specific commodities and other underlying instruments. As of December 2010, however, DBORs—along with onions—were the only two commodities on which Congress deemed it unlawful to trade derivative contracts.²³²

1. Previous Bans on Specific Derivative Contracts

As mentioned previously, Congress' first attempt at derivatives regulation occurred on June 17, 1864, when it passed the Anti-Gold Futures Act.²³³ The Act made it unlawful to enter into any futures contract for the purchase of gold coin, gold bullion, or foreign exchange.²³⁴ The Act had the unintended consequence of leading to the further decline in the value of the Union's "fiat currency," and was repealed a mere two weeks after

²²⁹ 7 U.S.C.S. § 1a(4) (LEXIS, through P.L. 111-237).

²³⁰ On April 22, 2010, the House Agriculture Subcommittee on General Farm Commodities and Risk Management held a hearing on DBOR derivatives. See Press Release, House Agric. Comm., Subcommittee Reviews Proposed "Movies Futures" Market (Apr. 22, 2010), available at http://agriculture.house.gov/list/press/agriculture_dem/PR042210GFCRM.html. However, the ban on DBOR contracts in the Financial Reform Act was originally drafted by the Senate Agriculture and Senate Banking, Housing, and Urban Affairs Committees. The Financial Reform Act passed by the Senate on May 20, 2010 was required to be reconciled with the Wall Street Reform and Consumer Protection Act of 2009, which was passed by the House on December 11, 2009. The original House bill did not include a ban on DBOR derivatives, and the House Agriculture Subcommittee hearing on this issue did not take place until after the bill was passed. House Agriculture Committee Chairman, Collin C. Peterson, who did attend the House Agriculture Subcommittee on DBOR contracts, as well as House Agriculture Subcommittee on General Farm Commodities and Risk Management Chairman Leonard Boswell, were members of the joint House-Senate conference committee in charge of reconciling the Financial Reform Act. Reps. Peterson and Boswell, as far as this author can tell, were the only individuals on the conference committee who attended the House Agriculture Subcommittee hearing. See generally *Hearing to Review Proposals to Establish Exchanges Trading "Movie Futures": Hearing Before the Subcomm. on General Farm Commodities and Risk Management of the H. Comm. on Agriculture*, 111th Cong. (2010); *House Conferees Appointed on H.R. 4173*, U.S. HOUSE OF REPRESENTATIVES, http://financialservices.house.gov/FinancialSvcsDemMedia/file/key_issues/Financial_Regulatory_Reform/Conferees_List_Final.pdf (last visited Sept. 14, 2010).

²³¹ See Harris, *supra* note 224.

²³² Dodd-Frank Wall Street Reform and Consumer Protection Act, § 721(a)(4).

²³³ Greenspan, Government Regulation and Derivative Contracts, *supra* note 47.

²³⁴ Anti-Gold Futures Act, ch. 127, 13 Stat. 132, (1864).

it was passed.²³⁵ It would be nearly a century before Congress once again banned trading on a specific commodity future.²³⁶

When Congress passed the CEA in 1936, it imposed an absolute ban on options for regulated commodities.²³⁷ Until the CEA was amended by the CFTCA in 1974, there existed no restrictions on the trading of options on unregulated commodities.²³⁸ On September 21, 1981, however, the CFTC adopted a comprehensive set of regulations to govern exchange-trading of options on futures contracts under a controlled and monitored three-year pilot program, and on February 15, 1985, the CFTC approved the first option on a physical commodity: gold bullion.²³⁹ Commodity options, which are now fully regulated by the CFTC, can be traded on DCMs if the exchange meets the prior approval or self-certification requirements of the CEA.²⁴⁰

Perhaps the most pervasive manipulation of the commodity markets between the years of 1930 and 1970 took place in the onion markets.²⁴¹ As a result of the severe price swings in onions, the CEA was amended in 1955 to give the Commodity Exchange Authority power to regulate trading in onion futures.²⁴² In 1956, Congress gave consideration to prohibiting trading in onion futures, with hearings being held before the House Agriculture Committee, which concluded that there was a causal relationship between trading onion futures and

²³⁵ Jenny Wahl, *Give Lincoln Credit: How Paying for the Civil War Transformed the United States Financial System*, 3 ALB. GOV'T L. REV. 700, 725 n.109; Greenspan, Government Regulation and Derivative Contracts, *supra* note 47.

²³⁶ David S. Jacks, *Populists Versus Theorists: Future Markets and the Volatility of Prices*, 44 EXPLORATIONS ECON. HIST. 342, 353 (2007) (discussing the passage of the Onion Futures Act in 1958).

²³⁷ Commodity Exchange Act, ch. 545, sec. 4c(3)(B), 49 Stat. 1491, 1494 (1936).

²³⁸ 3 JERRY W. MARKHAM, A FINANCIAL HISTORY OF THE UNITED STATES: FROM THE AGE OF DERIVATIVES TO THE MILLENNIUM (1970–2001) 44 (2002).

²³⁹ *History of the CFTC*, U.S. COMMODITY FUTURES TRADING COMM'N <http://www.cftc.gov/About/HistoryoftheCFTC/index.htm> (last visited Oct. 11, 2010).

²⁴⁰ *Proposals to Establish Exchanges Trading "Movie Futures:" Hearing Before the S. Comm. on General Farm Commodities & Risk Mgmt., House Comm. on Agric.* 111th Cong. 6–7 (2010) (testimony of Dan M. Berkovitz, General Counsel, U.S. Commodity Futures Trading Commission), available at <http://agriculture.house.gov/testimony/111/no42210/Berkovitz.pdf>.

²⁴¹ See, e.g., Vincent W. Kosuga, 19 Agric. Dec. 603, 603 (1960) (highlighting that the Commodity Exchange Authority alleged upward manipulation of spot market onion prices and onion futures contracts for November and December of 1955 on the CME, and further alleging downward manipulation of spot market onion prices and onion futures contracts for January and February of 1956 on the CME); BOB TAMARKIN, THE NEW GATSBYS: FORTUNES AND MISFORTUNES OF COMMODITY TRADERS 29 (1985) ("Hardly a day passed, it seemed, without somebody trying to corner the onion market or squeeze prices higher or push them lower.").

²⁴² Act of Jul. 26, 1955, Pub. L. No. 174, 69 Stat. 375 (1955).

fluctuations in the cash price of onions.²⁴³ The Committee recommended that “futures trading be prohibited if the futures market could not be operated so as to prevent injury to onion producers.”²⁴⁴ The same recommendation was made by the Senate Committee on Agriculture and Forestry, which stated that:

[B]ecause speculative activity in the futures market was apparently adversely affecting cash onion prices, Congress added onions to the commodities subject to regulation under the Commodity Exchange Act This has not cured the situation . . . [and i]t now appears that speculative activity in the futures markets causes such severe and unwarranted fluctuations in the price of cash onions as to require complete prohibition of onion futures trading in order to assure the orderly flow of onions in interstate commerce.²⁴⁵

As a result of the Senate and House Committee recommendations, on August 28, 1958, Congress passed the Onion Futures Act, which banned trading of futures contracts on onions.²⁴⁶ Until 2010, the passage of the Onion Futures Act was the only time since the Anti-Gold Futures Act that Congress imposed an outright ban on a specific commodity futures contract.²⁴⁷ Although there had been previous attempts to ban futures contracts on other commodity exchanges, these bills had been ultimately unsuccessful due to lobbying by congressional constituents with agricultural interests.²⁴⁸

Even though the subject underlying single security futures contracts are not commodities, the most recent ban on a specific derivative contract prior to the ban on DBOR derivative contracts stemmed from the failure of the CFTC and SEC to agree on how these instruments were to be regulated.²⁴⁹ The divergent opinions of the two agencies led to the Shad-Johnson Jurisdictional Accord, which banned trading of single security

²⁴³ See *Chicago Mercantile Exchange v. Tiekens*, 178 F. Supp. 779, 781–83 (N.D. Ill. 1959).

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ See 7 U.S.C. § 13-1(a) (1958).

²⁴⁷ Jacks, *supra* note 236.

²⁴⁸ See, e.g., Roberta Romano, *The Political Dynamics of Derivative Securities Regulation*, 14 YALE J. ON REG. 279, 329 n.165 (1997) (discussing the lobbying efforts of onion and potato farmers in the 1950s). See also William H. Jones, *Church Introduces Plan to Ban Trading of All Potato Futures*, WASH. POST, Feb. 3, 1977, at D11 (quoting Senator Frank Church as saying, “[t]ime and time again, potato producers from across the nation have indicated that they have no desire to have trading in futures. They are tired of being the innocent victims of economic power plays by . . . spectators”); *History of the CFTC*, *supra* note 239 (noting that on July 21, 1964, Sen. Edmund Muskie introduced a bill to ban potato futures, but the bill did not become law).

²⁴⁹ CFTC AND SEC—ISSUES RELATED TO THE SHAD-JOHNSON JURISDICTIONAL ACCORD, *supra* note 81, at 5.

futures contracts for nearly twenty years.²⁵⁰ This ban was eventually lifted, though, when Congress passed the CFMA, and today single security futures are jointly regulated by the CFTC and SEC.²⁵¹

Despite attempts over the years to ban specific commodity derivative contracts, the only current commodities on which it is unlawful to trade derivatives are onions and DBORs.²⁵² While there has been little support to allow trading of onion futures over the last half-century, the ban on DBOR derivatives merely stems from poor timing.

III. THE CASE FOR DBOR DERIVATIVE CONTRACTS

It is not entirely clear what Congress' intent was behind specifically banning DBOR derivative contracts in the Financial Reform Act. One can assume, however, that after the sub-prime mortgage crisis and the financial sector fallout in 2008, investors and elected officials became extremely wary about the use of derivatives. As the historical portion of this Article details, however, derivatives have been traded in the United States since 1849.²⁵³ While these instruments were originally used as hedging devices for individuals and organizations involved in the agricultural sector, in the 1970s, derivatives began to be used by financial institutions, and the character of these devices expanded.²⁵⁴

²⁵⁰ Shad-Johnson Jurisdictional Accord, Pub. L. No. 97-303, 96 Stat. 1409, 1409-10 (1982) (codified at 7 U.S.C. § 2a(ii)(II-III) (1994)). See also 7 U.S.C. § 2(C)(i-ii)(I-III) (2006) ("the Commission shall have no jurisdiction to designate a board of trade as a contract market for any transaction whereby any party to such transaction acquires any put, call, or other option on one or more securities (as defined in section 77b(1) of title 15 or section 3(a)(10) of the Securities Exchange Act of 1934 [15 U.S.C. § 78c(a)(10)] on January 11, 1983), including any group or index of such securities, or any interest therein or based on the value thereof"); Sanford A. Fine, *Back To the (Single Stock) Future: The New Regulatory Framework Governing Single-Stock Futures Trading*, 54 ADMIN. L. REV. 513, 515 n.8 (2002) (noting that 7 U.S.C. § 2a(ii)(II-III) (1994) codifies "a portion of the Shad-Johnson Accord concerning the prohibition on trading futures on an individual security or in a narrow-based index"); CFTC & SEC—ISSUES RELATED TO THE SHAD-JOHNSON JURISDICTIONAL ACCORD, *supra* note 81, at 5-6 ("These three CEA amendments led to a dispute between SEC and CFTC that was eventually resolved through the Shad-Johnson Jurisdictional Accord. . . . [T]he accord prohibited futures (and options thereon) on single corporate and municipal securities.").

²⁵¹ Dean Kloner, *The Commodity Futures Modernization Act of 2000*, 29 SEC. REG. L.J. 286, 293 (2001).

²⁵² Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1659, § 721(a)(4) (2010) (to be codified at 7 U.S.C. § 1a).

²⁵³ Gary Gensler, *History of Derivative Regulation, Culprit OTCs*, COMMODITYONLINE, (July 2, 2010, 3:35 PM), <http://www.commodityonline.com/news/History-of-derivatives-regulation-culprit-OTCs-29636-3-1.html>; Dodd, *supra* note 156, at 1.

²⁵⁴ See EUGENE F. BRIGHAM & MICHAEL C. EHRHARDT, FINANCIAL MANAGEMENT: THEORY AND PRACTICE 822 (Jack W. Calhoun et al. eds., 12th ed. 2008); FINANCIAL CRISIS

Many people analogize the trading of derivatives to gambling.²⁵⁵ This suggestion could not be further from the truth, however. As Nobel prize winning economist Vernon L. Smith stated, “[g]ambling involves the deliberate creation of artificial zero-sum opportunities to engage in risk taking decisions that redistribute existing resources.”²⁵⁶ Professor Smith continued, “[DBOR derivative contracts] are in the class of variable-sum stock and derivatives’ markets in which information on the future outcome of productive and technological activities is dispersed, uncertain, and rendered valuable to society when aggregated into prices [such as agricultural commodities].”²⁵⁷ While some may find it difficult to understand what a DBOR futures contract has in common with a wheat futures contract, the fact remains that both of these instruments provide individuals with opportunities to hedge their financial risk.²⁵⁸

INQUIRY COMM’N, PRELIMINARY STAFF REPORT OVERVIEW ON DERIVATIVES 3 (2010), available at <http://www.fcic.gov/reports/pdfs/2010-0630-psr-derivative-overview.pdf>; Rob Kirby, *Understanding Derivatives to Understand the Credit Crisis*, MARKET ORACLE (Oct. 20, 2008, 5:23 PM), <http://www.marketoracle.co.uk/Article6890.html>; Thomas F. Siems, *10 Myths About Financial Derivatives*, CATO INSTITUTE, (Sept. 11, 1997), <http://www.cato.org/pubs/pas/pa-283.html>.

²⁵⁵ Shahien Nasiripour, *Derivatives Just “A Sophisticated Form Of Gambling,” U.S. Senators Say; Propose Bill Allowing State Gambling Laws To Apply*, HUFFINGTON POST (last updated Nov. 10, 2009, 11:24 PM), http://www.huffingtonpost.com/2009/11/10/derivatives-just-a-sophis_n_352994.html (“In describing the complex and little-understood world of derivatives trading as ‘a sophisticated form of gambling,’ three U.S. Senators proposed legislation that would enable state gambling regulators and attorneys general to examine the practice.”); Jane D’Arista & Gerald Epstein, *Congress Should Force Big Banks to Stop Gambling With Our Money*, ALTERNET (May 10, 2010), http://www.alternet.org/economy/146806/congress_should_force_big_banks_to_stop_gambling_with_our_money/ (“The derivatives business is straight gambling.”).

²⁵⁶ Public Comment of Vernon L. Smith in Response to Concept Release on the Appropriate Regulatory Treatment of Event Contracts (May 7, 2008), available at <http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/frcomment/08-004c001.pdf>.

²⁵⁷ *Id.*

²⁵⁸ For a discussion on the benefits of wheat futures contracts, see Mark B. Major & Alan May, *MontGuide: The Futures Hedge (Short Hedge)*, MONT. STATE UNIV. (Dec. 2009), <http://msuextension.org/publications/AgandNaturalResources/MT200919AG.pdf> (noting that a wheat futures (short) hedge can be beneficial because, “[b]y locking in the futures price on the futures market, downside price risk is eliminated”); Mykel Taylor et al., *Hedging v. Forward Contracting for Wheat*, AGMANAGER.INFO (September 2003), <http://www.agmanager.info/marketing/publications/marketing/forwardcontracting.asp> (“When the cash price at harvest is higher than the expected price (i.e., price increases), the loss in the [wheat] futures market reduces the actual price received. When the price at harvest is lower than the expected price (i.e., price decreases), the gain in the [wheat] futures market offsets the loss in the cash market and thus increases the actual price received. It is this variation in price from which the producer is protected by hedging in the futures market.”). For a discussion on the benefits of DBOR futures contracts, see Dr. Kris, *Movie Futures Face Big Questions*, SEEKING ALPHA, (March 8, 2010), <http://seekingalpha.com/article/192390-movie-futures-face-big-questions> (“[A] company’s movie futures will create liquidity and provide studios with a hedging mechanism besides making the little guy an active participant.”); Ryan Pertz, *Fast Forward: Distributing Film Risk*, NEWBIZVIEWS (Apr. 28, 2010), <http://www.newbizviews.com/2010/04/28/fast->

Film companies, like any other commercial entity (e.g., a farmer) must sell what they produce at a profit in order to continue to exist as a viable business. Film companies specifically are in the business of selling successful films.²⁵⁹ Unfortunately, if film companies fail to produce enough successful films, they will not be long for the industry.²⁶⁰ To put it in economic terms, a film company has an incentive to produce quality films. Because film companies have this incentive, one could certainly envision a situation where such an entity would take a long position in a film futures contract. If a film company truly believed in their film, there would be no reason not to take such a position, because they would, in essence, have the opportunity to “double down”²⁶¹ on their product. Not only would the film company generate revenue from the initial sale of the movie, but if the movie generated enough box office receipts, the film company would earn even more money when it collected on its long positions.

On the flip side, film financiers, distributors, and theaters generate their revenue from box office receipts.²⁶² Thus, in order for these individuals and companies to remain viable, enough revenue must be generated at the box office to at least break even. Because there is always the risk that a film will “flop,” these individuals and companies would enter into a short position to hedge against this risk. If a film failed to produce

forward-distributing-film-risk/ (“Like commodity forwards, movie futures can serve a practical purpose: they could enable the primary risk bearers (movie financiers in this case) to distribute a portion of their risk.”).

²⁵⁹ See Shannon McCoy, *The Government Tunes in to Tune Out the Marketing of Violent Entertainment to Kids: The Media Violence Labeling Act, The Media Marketing Accountability Act and the First Amendment*, 4 VAND. J. ENT. L. & PRAC. 237, 245 (2002) (“Film studios promote and advertise films to make money, not merely to express themselves artistically.”).

²⁶⁰ See Moore, *Financing Drama*, *supra* note 144, at 26.

²⁶¹ This author is fully aware that he is using a gambling phrase in an article that tries to dispel the myth that derivatives are nothing more than a form of gambling.

²⁶² Aljean Harmetz, *Where Movie Ticket Income Goes*, N.Y. TIMES (Jan. 28, 1987), available at <http://www.nytimes.com/1987/01/28/movies/where-movie-ticket-income-goes.html> (“The distributor of a movie—the studio that releases a film to theaters—usually ends up with less than fifty percent of the money paid for tickets.”); Mark Litwak, *Protecting Film Investors*, MARK LITWAK’S ENTMT LAW RESOURCES, http://www.marklitwak.com/articles/general/protecting_film_investors.html (last visited Oct. 2, 2010) (“[A]n intelligent investment in a motion picture can earn substantial returns. While film investments are risky, the potential return from a hit can be enormous. No [sic] only can the film earn revenue from box office receipts, but there are many ancillary sources of income.”); Sarah Morgan, *10 Things Movie Theaters Won’t Tell You*, YAHOO! FINANCE (Dec. 31, 2009), http://finance.yahoo.com/family-home/article/108494/things-theaters-wont-tell-you?mod=family-kids_parents (“[G]enerally speaking, theaters pay somewhere between 35 and 70 percent of box office receipts to the studio as a film-rental fee In most cases, the studio takes the biggest cut in the first week, and the percentage drops from there.”).

enough revenue at the box office to equal these entities' investments, the settlement on their DBOR contracts would, in theory, provide the capital necessary to allow the entities to break even.

If the long and short positions of these individuals and organizations are in balance, enough liquidity would be available in these markets to encourage others (e.g., marketing partners, minor investors, film talent, speculators) to buy and sell these same contracts. A DBOR market, which would clearly provide information about the expected success or failure of a film, would allow commercial and speculative investors to rebalance their particular positions as needed.

Movie studios may argue that no incentive exists for them to short a movie because filmmakers would decide never to work with that studio again; the theory being that if a studio does not believe a film will produce sufficient box office revenue, it must not believe in the quality of a filmmaker's work. This, of course, is the basis for the natural long position of the studios. However, as stated earlier, only about one-in-three films are expected to have the potential to come close to breaking even.²⁶³ Thus, even if a studio did short its own film because it did not believe sufficient box office revenue would be generated, filmmakers would never know about this position because DCMs and the CFTC are kept anonymous.²⁶⁴

As the CFTC observed in its order approving MDEX's DBOR contract, DBOR numbers—the majority of which are prepared automatically by Rentrak—are not subject to manipulation.²⁶⁵ The small percentage of call-around data,²⁶⁶ even if it were attempted to be manipulated by the theaters or studios, would have a *de minimis* effect on the settlement data for these futures

²⁶³ Moore, *Financing Drama*, *supra* note 144, at 26.

²⁶⁴ 7 U.S.C.A. § 6g(b) (West 2009) ("Every registered entity shall maintain daily trading records. The daily trading records shall include such information as the Commission shall prescribe by rule."); § 12(a)(1) (stating that, "except as otherwise specifically authorized in this chapter, the Commission may not publish data and information that would separately disclose the business transactions or market positions of any person and trade secrets or names of customers").

²⁶⁵ *Statement of the Commission*, *supra* note 185, at 5–6.

²⁶⁶ See Richard Shilts, Director, Division of Market Oversight on Meeting of the Commodity Futures Trading Commission to Discuss: Futures and Binary Options Based on Box Office Receipts, (May 19, 2010), *available at* <http://www.cftc.gov/PressRoom/SpeechesTestimony/shiltstatement051910.html> ("A small amount of box office receipts are not reported through Rentrak; they are reported directly from those theatres to the distributor. This data is referred to as call-around data. Once the distributor sums the Rentrak and call-around receipt data, that number is reported back to Rentrak which in turn distributes it to Variety Magazine, BoxOfficeMojo.com, and other news organizations and interested parties.").

contracts.²⁶⁷ Assuming *arguendo* that Rentrak's numbers could potentially be manipulated, there would be no incentive for Rentrak to do so because it has no direct interest in DBOR numbers.²⁶⁸ The fact that DBOR settlement prices are linked to a third party index is no different from agricultural commodity derivative contracts (e.g., feeder cattle futures which are linked to USDA indices).²⁶⁹ The reputation of Rentrak, like the USDA, is important, however. Rentrak numbers have been a marketing tool that film studios have used for more than twenty years.²⁷⁰ It is highly unlikely that Rentrak would start falsifying DBOR numbers now. The price basis for DBOR contract settlement, therefore, is not in question, and Congress, like the CFTC, should not be concerned about the potential for inaccurate settlement of these contracts.

Perhaps the greatest reason for allowing DBOR derivatives trading is the potential increase in capital that would flow into the film industry. As noted earlier, film financing has begun to dry up over the past few decades.²⁷¹ This is directly correlated to the risk associated with financing a film.²⁷² If investors could be assured that they would be able to hedge this risk, they would certainly be more likely to invest in the film industry.²⁷³ Additionally, by increasing the amount of capital available to the film industry, the number of motion pictures exported from the U.S. would increase.²⁷⁴ The potential for increased film financing, along with the ability for individuals and organizations whose revenue streams are directly tied to DBORs, is reason enough for Congress to repeal the ban on DBOR derivatives and allow trading of these contracts.

CONCLUSION

Whether DBOR derivative contracts fail due to lack of interest should be left to the exchange participants to decide, not

²⁶⁷ *Id.* at 6.

²⁶⁸ *Id.*

²⁶⁹ *See id.* at 6–7.

²⁷⁰ *See About Rentrak*, RENTRAK CORP., <http://www.rentrak.com/section/corporate/about/index.html> (last visited Sept. 14, 2010).

²⁷¹ Moore, *Raising Film Financing*, *supra* note 143, at 4.

²⁷² *Id.*

²⁷³ Moore, *Financing Drama*, *supra* note 144, at 26.

²⁷⁴ *See, e.g.*, NAT'L EXPORT INITIATIVE, REPORT TO THE PRESIDENT ON THE NATIONAL EXPORT INITIATIVE: THE EXPORT PROMOTION CABINET'S PLAN FOR DOUBLING U.S. EXPORTS IN FIVE YEARS 40 (2010), available at http://www.whitehouse.gov/sites/default/files/nei_report_9-16-10_full.pdf (outlining recommendations for doubling U.S. exports over the next five years). Given the emphasis on increasing U.S. exports, it seems curious to this author that legislation potentially limiting the number of exports—which is what could potentially occur to feature films by banning box office derivatives—would be enacted.

Congress. DBORs, along with onions, are the only commodities on which derivatives trading is currently unlawful. When onion futures were banned in 1958, however, it was the result of a three year long process that included hearings before multiple congressional committees.²⁷⁵ DBOR contracts, however, had the simple misfortune of poor timing. Were it not for the sub-prime mortgage crisis and the resulting economic fallout, it is unlikely that Congress would have given the CFTC's decision to allow trading of DBOR derivatives a second thought. Nonetheless, Congress—who clearly arrived late to the table—decided that simply because DBOR derivatives are similar to the CDSs that helped lead to the economic collapse in 2008, they deserved to be banned. This is undoubtedly the wrong approach to take. Unfortunately, the ban on DBOR derivatives may be a sign of things to come. In an environment where the vast majority of new derivative exchanges and contracts are highly regulated by the CFTC and SEC, congressional stifling of financial innovation is both unnecessary and potentially harmful to a financial industry that could lose future markets to international competitors.

²⁷⁵ See *90 Years of Blood, Sweat and Onions*, ONION WORLD, (July/Aug. 2003), <http://www.columbiapublications.com/onionworld/julyaug2003.htm#ow29> ("In the 1950s those of the onion industry contended with futures trading on the Chicago Merchantile Exchange In the December 1955 [National Onion Association] annual meeting, a resolution was passed to eliminate futures trading The [National Onion Association] was the vehicle that moved the U.S. Congress to pass law that would ban futures trading Seven bills were presented to Congress to have it discontinued, countless letters were written in opposition and members of the industry traveled to Washington, D.C., to appear before congressional committees. Futures trading was officially banned in 1958."); *History of the CFTC*, *supra* note 239 (noting that following a complaint regarding the manipulation of onion futures in 1956, "Congress held hearings to consider banning onion futures trading [In 1958 t]he Onion Futures Act ban[ned] futures trading in onions").

Modern Stalking Laws: A Survey of State Anti-Stalking Statutes Considering Modern Mediums and Constitutional Challenges

Ashley N. B. Beagle*

INTRODUCTION

It began like any other dating relationship: John and Jane met through mutual friends on several occasions and then began to date. However, after a few months, the dating relationship ended, and their relationship transformed into a stalking nightmare. Immediately after the break-up, John began contacting Jane frequently and begging her to take him back. John called Jane's cell phone, left her voice mail messages and text messages, and eventually left her messages on MySpace.¹ With his Blackberry,² John had the ability to contact Jane at any time through its Internet and phone functions. One message was remorseful and sensitive, filled with thoughts of longing, love, and eternal happiness, and the next was full of anger and jealousy because the relationship had ended and Jane had moved on. Weeks turned into months, and months turned into years, as John continued with this behavior. At points, John even contacted Jane's friends and family members begging for her new address and questioning whether she had a new cell phone number because she refused to return his calls. Almost two years later, Jane logged on to her MySpace account to find message after message from John begging her to take him back and marry him, to give him a current address, and to just call him so he could hear her voice again. John had found Jane on MySpace and had written her messages for months. Scared and

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¹ "MySpace" is a "[s]ocial networking site that allows its users to create webpages to interact with other users." *MySpace*, BUSINESSDICTIONARY.COM (Oct. 18, 2010), <http://www.businessdictionary.com/definition/Myspace.html>.

² A "Blackberry" is a "[m]obile smart device that combines a number of functions including emails, web browsing, text messaging, schedule management, and mobile phone into one portable handset." *Blackberry*, BUSINESSDICTIONARY.COM (Oct. 18, 2010), <http://www.businessdictionary.com/definition/BlackBerry.html>.

frustrated, Jane deleted her MySpace account in the hopes of finally erasing John from her life.

While the names have been changed, the story is real and is becoming all too common as technology continues to increase and expand the ways in which stalkers can stalk and harass their victims.³ Each year, approximately 3.4 million people over the age of eighteen are stalked in the United States, according to the Supplemental Victimization Survey (SVS) of 2006.⁴ Approximately twenty-five percent of victims reported being stalked through a medium such as e-mail or instant messaging, and more than half of all stalking and harassment victims reported being stalked by the telephone or through phone messages.⁵ While stalking is often analyzed and categorized by the type of stalker committing the unwanted behavior, the resulting harm to stalking victims spans a wide spectrum, leaving victims scared, traumatized, and depressed for years after stalking incidents.⁶

This Comment analyzes current anti-stalking statutes in the United States as they apply to stalking that occurs through the mediums of the Internet and the telephone. It focuses on the need to protect stalking victims by broad stalking legislation that can withstand constitutional challenges, and argues that existing statutes should be amended, or new statutes enacted, in order to cover all forms of stalking behavior.⁷ Part I provides an in-depth overview of stalking in the United States by describing the types of stalkers, typical stalker characteristics, methods of stalking, and effects on the victim. Part I also addresses the history of anti-stalking law in the United States by detailing the law prior to the enactment of anti-stalking statutes and discussing general

³ This story is real and ongoing, with the last MySpace incident occurring about one and a half years prior to the date of this Comment. The names have been changed for the purpose of respecting the involved parties' privacy.

⁴ KATRINA BAUM ET AL., BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: STALKING VICTIMIZATION IN THE UNITED STATES 1 (2009).

⁵ *Id.* Approximately 62.5% of all stalking and harassment victims reported phone stalking in the form of phone calls and messages. *Id.* at 2.

⁶ Joseph C. Merschman, *The Dark Side of the Web: Cyberstalking and the Need for Contemporary Legislation*, 24 HARV. WOMEN'S L.J. 255, 261, 264–65 (2001). "Thirty percent of female victims and twenty percent of male victims seek psychological counseling" as a result of stalking, and approximately twenty-five percent of stalking victims consider suicide. *Id.* at 265.

⁷ In discussing anti-stalking statutes in this Comment, "general anti-stalking statutes" refer to the initial anti-stalking statutes enacted to address stalking which focus on physical contact, and "specialized anti-stalking statutes" refer to statutes that address stalking by the mediums of the Internet and the telephone. In analyzing specialized anti-stalking statutes, this Comment addresses both stalking and harassment laws as they generally cover the same behavior as it relates to stalking through the mediums of the Internet and the phone, and "stalking" statutes will therefore include both stalking and harassment laws.

anti-stalking statutes and constitutional challenges to anti-stalking statutes. Part II analyzes current anti-stalking statutes as they relate to stalking through the mediums of the Internet and telephone and discusses continuing constitutional challenges to anti-stalking statutes. Part III proposes amendments to existing laws so as to withstand constitutional scrutiny and encourage states to enact amendments to cover all forms of stalking in order to ensure that victims stalked through newer mediums are adequately and consistently protected.

I. HISTORY OF STALKING AND ANTI-STALKING STATUTES IN THE UNITED STATES

A. Overview of Stalking Behavior

Stalking involves “repeated harassing or threatening behavior,” rather than an isolated instance of criminal conduct.⁸ In California, for example, the crime of stalking is defined as “willfully, maliciously, and repeatedly follow[ing] or willfully and maliciously harass[ing] another person and . . . [making] a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family.”⁹ Merely annoying, bothersome contact can develop into a serious, life-threatening situation.¹⁰ Stalking behavior is not limited to males or females, although stalkers are predominantly male and their victims are predominantly female.¹¹ Stalkers’ motivations vary according to their typology, and include anger, jealousy, revenge, delusion, fantasy, and an endeavor to win the victim’s affection.¹²

⁸ Naomi Harlin Goodno, *Cyberstalking, A New Crime: Evaluating the Effectiveness of Current State and Federal Laws*, 72 MO. L. REV. 125, 126 (2007). See also Merschman, *supra* note 6, at 260 (noting that less than half of all stalking victims are directly threatened, and instead a stalker’s accumulated conduct creates reasonable fear in the minds of their victims).

⁹ CAL. PENAL CODE § 646.9 (West 2010). Compare ALA. CODE § 13A-6-90 (LexisNexis 2005), COLO. REV. STAT. ANN. § 18-9-111 (West 2009), and FLA. STAT. ANN. § 784.048 (West 2008) (requiring a credible threat), with ARIZ. REV. STAT. ANN. § 13-2923 (West 2010), and TEX. PENAL CODE ANN. § 42.072 (Vernon 2003) (rejecting a credible threat requirement).

¹⁰ Christine B. Gregson, *California’s Antistalking Statute: The Pivotal Role of Intent*, 28 GOLDEN GATE U. L. REV. 221, 226 (1998). The ultimate potential consequence of stalking is the victim’s death, and approximately 67% of homicides committed against women by their intimate partners involved prior stalking of the female victim by the male perpetrator. STALKING RESOURCE CTR., STALKING FACT SHEET (2009), http://www.ncvc.org/src/main.aspx?dbID=DB_statistics195 (follow “Stalking Fact Sheet” hyperlink) [hereinafter STALKING FACT SHEET].

¹¹ According to the SVS, twenty out of one thousand females were likely to be stalking victims compared to approximately seven out of one thousand males. BAUM ET AL., *supra* note 4, at 3. Additionally, “[f]emale victims of stalking were significantly more likely to be stalked by a male (67%) rather than a female (24%) offender.” *Id.* at 4.

¹² Gregson, *supra* note 10, at 226; Merschman, *supra* note 6, at 260.

Stalkers can be divided into three main categories that describe their stalking relationship with their victim: erotomaniacs, love obsessional stalkers, and simple obsessional stalkers.¹³ An understanding of each type is necessary to formulate and assess effective anti-stalking legislation.

1. Stalker Types

The first stalking category consists of individuals who have “erotomania,” known as “erotomaniacs.”¹⁴ Erotomaniacs have a delusional belief that their victim loves them and they view their victim as unattainable, such as the classic example of celebrity stalking.¹⁵ This stalker becomes obsessed with his or her victim and creates an imaginary relationship with the victim.¹⁶ The erotomaniac does not know his or her victim and rarely will initiate face-to-face contact. Instead, this type of stalker uses less confrontational stalking methods, such as phone calls or letters; therefore, the erotomaniac is the least likely of the three stalker types to become violent.¹⁷ An erotomaniac is most often a socially immature individual who is unable to maintain close relationships.¹⁸ Unlike the other two types of stalkers, this stalker is more likely to be a female, and the majority of her victims are likely to be older men with a higher socioeconomic status.¹⁹ Overall, erotomaniacs compose only ten percent of all stalkers.²⁰

¹³ Belinda Wiggins, *Stalking Humans: Is There a Need for Federalization of Anti-Stalking Laws in Order to Prevent Recidivism in Stalking?*, 50 SYRACUSE L. REV. 1067, 1072–73 (2000).

¹⁴ Tatia Jordan, *The Efficacy of the California Stalking Law: Surveying Its Evolution, Extracting Insights from Domestic Violence Cases*, 6 HASTINGS WOMEN'S L.J. 363, 365 (1995); Merschman, *supra* note 6, at 263. “Erotomania . . . is classified diagnostically as a delusional disorder, known as ‘de Clerambault’s syndrome.’” Joseph A. Davis & Marcella A. Chipman, *Stalkers and Other Obsessional Types: A Review and Forensic Psychological Typology of Those Who Stalk*, in STALKING CRIMES AND VICTIM PROTECTION: PREVENTION, INTERVENTION, THREAT ASSESSMENT, AND CASE MANAGEMENT 3, 4 (Joseph A. Davis ed., 2001) (hereinafter STALKING CRIMES).

¹⁵ Davis & Chipman, *supra* note 14; Wiggins, *supra* note 13, at 1072.

¹⁶ Merschman, *supra* note 6, at 263.

¹⁷ Davis & Chipman, *supra* note 14, at 9. The SVS reports that approximately 9.7% of stalking victims identified their stalker as a stranger. BAUM ET AL., *supra* note 4, at 4. See also Merschman, *supra* note 6, at 261 (“[T]he NVAW [National Violence Against Women] Survey [from 1998] found that only 23% of female victims reported being stalked by strangers . . .”).

¹⁸ Merschman, *supra* note 6, at 263. Additionally, this stalker tends to be older and more intelligent than other mentally ill persons who commit crimes. *Id.*

¹⁹ Wiggins, *supra* note 13, at 1072.

²⁰ *Id.* The case of Rebecca Schaeffer, see *infra* Part I.C, involved the case of an erotomaniac stalker. See also Laurie Salame, *A National Survey of Stalking Laws: A Legislative Trend Comes to the Aid of Domestic Violence Victims and Others*, 27 SUFFOLK U. L. REV. 67, 80–81 (1993).

The second type of stalker is labeled the “love obsessional” stalker.²¹ This stalker does not have a relationship with his or her victim; however, unlike erotomaniacs, he or she has usually had some sort of contact with the victim.²² The love obsessional stalker engages in a campaign to make his or her victim aware of the stalker’s existence.²³ This stalker is often a well-educated, affluent professional whose personal life revolves solely around stalking the victim.²⁴ Unlike the erotomaniac, the love obsessional stalker is not under a delusion that the victim loves him or her.²⁵ Instead, the obsessional stalker is likely to suffer from a personality disorder such as schizophrenia.²⁶ In contacting their victims, love obsessional stalkers are most likely to use mediums such as phone calls and letters.²⁷ As with erotomania, celebrity stalkers often fall within the love obsessional typology.²⁸

The final category of stalkers is known as the “simple obsessional” stalker.²⁹ The simple obsessional stalker traditionally has had a previous relationship with his or her victim or “some previous knowledge” of his or her victim.³⁰ The simple obsessional stalker usually becomes a stalker when prompted by a specific event, such as the ending of a relationship, or a perception of mistreatment by the victim.³¹ As a result of this

²¹ Wiggins, *supra* note 13, at 1072–73.

²² *Id.*; Davis & Chipman, *supra* note 14, at 5. This contact could be a fleeting occasion such as at the bank or in the grocery store, or on a more regular basis such as a co-worker or neighbor. *Id.* at 10. Approximately 45.1% of stalking victims know their stalker in a capacity such as a neighbor, co-worker, or acquaintance. BAUM ET AL., *supra* note 4, at 4.

²³ Davis & Chipman, *supra* note 14, at 5.

²⁴ *Id.* at 10. A specific type of love obsessional stalker is known as the “workplace-type stalker,” a “workaholic . . . who perceives proof of reciprocal interaction with the victim through innocuous circumstances.” *Id.* A workplace stalker’s behavior is often overt rather than hidden and is observed by other co-workers. *Id.* at 11.

²⁵ Jordan, *supra* note 14, at 365–66. Unlike the love obsessional stalker who may have schizophrenia, the erotomaniac generally does not suffer from a mental condition other than the delusion that they are loved by their victim. *Id.*

²⁶ *Id.* “Schizophrenia is a serious mental illness characterized by incoherent or illogical thoughts, bizarre behavior and speech, and delusions or hallucinations such as hearing voices.” *Schizophrenia*, AM. PSYCHOL. ASS’N (2009), <http://www.apa.org/topics/schiz/index.aspx>.

²⁷ Gregson, *supra* note 10, at 227.

²⁸ *Id.* at 226; Wiggins, *supra* note 13, at 1072–73.

²⁹ Jordan, *supra* note 14, at 366.

³⁰ *Id.*; Wiggins, *supra* note 13, at 1072. This relationship or knowledge can be that of co-workers, acquaintances or former intimate partners such as an ex-girlfriend or ex-wife. *Id.* The SVS found that 30.3% of stalking victims either were or had been in an intimate relationship with their stalking offender. BAUM ET AL., *supra* note 4, at 4.

³¹ Davis & Chipman, *supra* note 14, at 5. Because stalking laws criminalize otherwise constitutional conduct, there is some concern that a former partner’s behavior could be misinterpreted as stalking rather than as an innocent, harmless attempt to regain their partner’s love. See generally Kenneth R. Thomas, *The Problem of the*

event, the stalker seeks to “either restore the relationship or [to] seek retribution.”³² The stalker has usually preceded the stalking behavior with domestic violence or similar behavior, and during the stalking “mission,” he or she maintains an outwardly normal appearance.³³ Simple obsessional stalkers are the most dangerous stalker type and the most likely to confront their victim in person and to physically harm their victim or their victim’s property.³⁴ Accordingly, the simple obsessional victim is the most common and least protected type of victim.³⁵

2. Typical Characteristics

Stalkers in general, regardless of their typology, have certain characteristics in common, the existence of which is higher than among the average population. Initially, people with “attachment difficulties and a history of failed relationships” are more likely to become stalkers.³⁶ Additionally, persons with a history of violence, violent criminals, and persons who threaten former partners are also more likely to become stalkers.³⁷ Most stalkers are also emotionally or mentally disturbed, and a majority of stalkers suffer from personality disorders such as histrionic, antisocial, or borderline personalities.³⁸

Persistent Suitor: Can Antistalking Laws Distinguish Between Love and Madness?, 41 FED. B. NEWS & J. 620 (1994) (questioning whether stalking laws can effectively separate constitutional conduct from unconstitutional stalking). However, stalking laws intentionally address otherwise constitutional conduct when that conduct reaches a certain level and then becomes criminal and is no longer entitled to constitutional protection. Merschman, *supra* note 6, at 272–73. Additionally, many stalking laws include provisions that expressly exclude constitutional conduct. See, e.g., ALA. CODE § 13A-6-92 (LexisNexis 2005) (excluding constitutional conduct from conduct addressed by the statute).

³² Jordan, *supra* note 14, at 366.

³³ Davis & Chipman, *supra* note 14, at 5. “Many simple obsessional cases of stalking fall into the domestic violence realm where ex-spouses or ex-partners are stalking victims who are attempting to escape abusive relationships.” Jordan, *supra* note 14, at 366.

³⁴ Gregson, *supra* note 10, at 228.

³⁵ Davis & Chipman, *supra* note 14, at 5. Simple obsessional stalking victims are the least protected victim because of the nature of their prior relationship with their stalker. This victim often rationalizes and excuses the stalker’s behavior until the victim has been harmed. *Id.*

³⁶ STEPHEN J. MOREWITZ, STALKING AND VIOLENCE: NEW PATTERNS OF TRAUMA AND OBSESSION 1 (2003). Additional common “stalker” characteristics include “difficulty in establishing an identity, and a desire for attention.” Jennifer L. Bradfield, *Anti-Stalking Laws: Do They Adequately Protect Stalking Victims?*, 21 HARV. WOMEN’S L.J. 229, 235 (1998).

³⁷ MOREWITZ, *supra* note 36.

³⁸ Bradfield, *supra* note 36; DETECTIVE MIKE PROCTOR, HOW TO STOP A STALKER 260 (2003). Histrionic personality disorder is a disorder where the afflicted person shows a continuing pattern of dramatic and attention-seeking behaviors. *Histrionic Personality Disorder*, ENCYCLOPEDIA OF MENTAL DISORDERS, <http://www.minddisorders.com/Flu-Inv/Histrionic-personality-disorder.html> (last visited Oct. 19, 2010). Antisocial personality disorder is “a pervasive pattern of disregard for, and violation of, the rights of others.” AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF

3. Stalking Methods

In order to accomplish their stalking behavior, stalkers use a variety of mediums and methods. This behavior can be passive, such as making unwanted phone calls to their victim's home and work, stealing and reading their victim's e-mail, calling their victim and hanging up repeatedly, and sending their victim unwanted photos and harassing messages.³⁹ Bolder stalking behaviors include following a victim, spying on a victim or standing outside a victim's home or work, vandalizing a victim's property, and threatening to harm a victim, or a victim's family or pets.⁴⁰ The worst-case stalking scenario results in violence toward the victim, including rape, assault, and murder.⁴¹

As technology continues to develop, stalkers are taking advantage of new mediums such as the Internet to stalk their victims.⁴² A relatively recent and growing form of stalking behavior occurs through electronic media and is known as "cyberstalking."⁴³ Cyberstalking is defined as stalking involving the "use of the Internet, e-mail, or other electronic communications devices to stalk another person,"⁴⁴ and has effectively expanded the ways in which stalkers harass their victims.⁴⁵ Cyberstalkers have unique characteristics that distinguish them

MENTAL DISORDERS: DSM-IV-TR 701 (2000) [hereinafter DSM-IV]. Borderline personality disorder is "a pervasive pattern of instability of interpersonal relationships, self-image, and affects, and marked impulsivity." *Id.* at 706.

³⁹ TK LOGAN ET AL., PARTNER STALKING: HOW WOMEN RESPOND, COPE, AND SURVIVE 19 (2006).

⁴⁰ Mary L. Boland, *Model Code Revisited: Taking Aim at the High-Tech Stalker*, 20 CRIM. JUST. 40, 41 (2005).

⁴¹ Merschman, *supra* note 6, at 260.

⁴² Boland, *supra* note 40, at 41.

⁴³ *Id.* See also Ann Wolbert Burgess & Timothy Baker, *Cyberstalking*, in STALKING AND PSYCHOSEXUAL OBSESSION: PSYCHOLOGICAL PERSPECTIVES FOR PREVENTION, POLICING AND TREATMENT 201, 205–06 (Julian Boon & Lorraine Sheridan eds., 2002) (discussing cyberstalking in the collegiate context).

⁴⁴ Amy C. Radosevich, *Thwarting the Stalker: Are Anti-Stalking Measures Keeping Pace with Today's Stalker?*, 2000 U. ILL. L. REV. 1371, 1376 (2000).

⁴⁵ Goodno, *supra* note 8, at 126. Cyberstalkers can stalk their victim by using Internet search engines to locate and harass their victims and monitoring their victim's activities through the use of browser history, interception of emails, and spyware. Cindy Southworth & Sarah Tucker, *Technology, Stalking and Domestic Violence Victims*, 76 MISS. L.J. 667, 667–70 (2007). Stalkers can also use "Keystroke Loggers" that record every key typed on a computer to monitor their victim and can set up websites to harass their victim or encourage others to do so. *Id.* Additionally, stalkers can impersonate their victim as a further way to terrorize and harass the victim. Bonnie D. Lucks, *Electronic Crime, Stalkers, and Stalking: Relentless Pursuit, Harassment, and Terror Online in Cyberspace*, in STALKING CRIMES, *supra* note 14, at 161, 187. As a consequence of the relative ease with which a cyberstalker may stalk their victim online as compared to a traditional stalker, a cyberstalker may consider their "online stalking" less harmful than more traditional methods. Joanna Lee Mishler, *Cyberstalking: Can Communication Via the Internet Constitute a Credible Threat, and Should an Internet Service Provider be Liable If It Does?*, 17 SANTA CLARA COMPUTER & HIGH TECH. L.J. 115, 117 (2000).

from an ordinary stalker because of the Internet forum.⁴⁶ Cyberstalkers have the ability to instantly stalk and harass their victims by widely dispersing a stalking message, stalking from a further distance, concealing their own identity, stealing their victim's identity, or stalking their victim through a third party.⁴⁷

In addition to stalking through the Internet, stalkers continue to use more traditional mediums of stalking, such as the phone, although supported by ever-increasing technological advances.⁴⁸ Many stalkers use a telephone as their first weapon of choice to harass and threaten their victims because of the prevalence of phones and their low cost in comparison to other technologies.⁴⁹ In addition to using telephones to make harassing phone calls and leave threatening messages, stalkers can also trace their victim's land line phone records to monitor their victim's activities and whereabouts.⁵⁰ Additionally, with the growth of caller ID and Global Positioning System (GPS) chips in phones that keep internal records of calls and the cell phone users' location, stalkers can access their victim's call-history and location to further monitor their victim.⁵¹ As a result of the prevalence of telephone stalking, many states have enacted criminal statutes that exclusively penalize telephone stalking or telephone harassment.⁵²

To further complicate matters, as technology increases and blurs distinctions between various mediums, stalkers can track and follow their victim's activities using several mediums at once.⁵³ An example is seen in the growth of handheld devices like the Blackberry that provide Internet access, allow instant text

⁴⁶ Goodno, *supra* note 8, at 128–29.

⁴⁷ *Id.* at 128–32. Cyberstalkers can also terrorize their victim by sending viruses, spam, or e-mail bombs, or by flooding their victim's Internet conversation. Kimberly Wingteung Seto, *How Should Legislation Deal with Children as the Victims and Perpetrators of Cyberstalking?*, 9 CARDOZO WOMEN'S L.J. 67, 73 (2002). See generally Gene Barton, *Taking a Byte Out of Crime: E-mail Harassment and the Inefficacy of Existing Law*, 70 WASH. L. REV. 465 (1995) (discussing stalking by means of e-mail harassment and the interrelation between anti-stalking laws and e-mail stalking). See also Ellen Luu, *Web-Assisted Suicide and the First Amendment*, 36 HASTINGS CONST. L.Q. 307, 320–21 (2009) (noting the potential for increased difficulty in the investigation and prosecution of cyberstalking cases because of the ability of a stalker in one jurisdiction to stalk a victim in another jurisdiction over the Internet).

⁴⁸ Southworth & Tucker, *supra* note 45, at 673.

⁴⁹ *Id.*

⁵⁰ *Id.* at 674. State anti-stalking laws may specifically criminalize stalking by means of GPS devices. See, e.g., 720 ILL. COMP. STAT. ANN. 5/12-7.3 (West 2010) (defining "stalking" to include "plac[ing] a person under surveillance," which is further defined as including "placing an electronic tracking device on the person or the person's property").

⁵¹ Southworth & Tucker, *supra* note 45, at 674.

⁵² See *infra* Part II.A.

⁵³ Southworth & Tucker, *supra* note 45, at 675.

and e-mail messaging, and allow the user to send photos.⁵⁴ Essentially, a stalker could pursue his or her victim using both the Internet and the phone all at once, potentially complicating prosecution of the stalker's behavior.⁵⁵

4. Effects on the Victim

While stalkers' behavior varies depending on their relationship with the victim and the mediums and methods they use to stalk their victim, the victims generally suffer similar types of harm, which varies only by degree. Stalking victims essentially have their privacy destroyed and, as a result, become paranoid and fearful.⁵⁶ This fear can manifest itself in victims as a fear of others, a fear of new things, and a fear of falling asleep.⁵⁷ As a result of this fear, victims may withdraw from their social world and find it hard to engage in their daily activities and maintain relationships.⁵⁸ Victims can become intensely emotionally disturbed and their lives can be permanently altered, including losing their jobs and even being forced to move to a different location.⁵⁹ "The prevalence of anxiety, insomnia, social dysfunction, and severe depression is much higher among stalking victims than the general population, especially if the stalking involves being followed or having one's property destroyed."⁶⁰ A 1998 statistic indicated

⁵⁴ *Id.*; see *supra* note 2. Several states have modified their anti-stalking laws to include stalking by means of text messaging or instant messaging. See, e.g., NEV. REV. STAT. ANN. § 200.575 (LexisNexis 2006); OR. REV. STAT. ANN. § 166.090 (West 2010); UTAH CODE ANN. § 76-5-106.5 (LexisNexis 2008); WASH. REV. CODE ANN. § 9.61.260 (West 2010) (addressing stalking or harassment by means of "text messaging"). See also OKLA. STAT. ANN. tit. 21, § 1172 (West 2009); TEX. PENAL CODE ANN. § 42.07 (Vernon 2003) (addressing stalking or harassment by means of "instant messaging").

⁵⁵ Southworth & Tucker, *supra* note 45, at 675. A stalker's use of a combined medium like the Blackberry could potentially complicate prosecution when the government must decide whether to pursue punishment under a cyberstalking statute or a phone-stalking statute in those states that have specific anti-stalking statutes.

⁵⁶ Gregson, *supra* note 10, at 228.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Merschman, *supra* note 6, at 264–65. Over fifty percent of stalking victims miss five or more work days because of their stalking, and one-in-seven stalking victims move because of the stalking. BAUM ET AL., *supra* note 4, at 6, 7.

⁶⁰ STALKING FACT SHEET, *supra* note 10. Stalking victims may suffer a variety of clinical mental disorders, in addition to depression and generalized anxiety disorder, including obsessive-compulsive disorder and Post-Traumatic Stress Disorder. Radosevich, *supra* note 44, at 1372. Depression is generally defined as the "feeling of dejection, gloominess, cheerlessness, joylessness, and unhappiness." DSM-IV, *supra* note 38, at 788. Anxiety is defined as "an abnormal and overwhelming sense of apprehension and fear often marked by . . . physical symptoms [such] as tension, tremor, sweating, palpitation, and increased pulse rate." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 97 (3d ed. 1993). Obsessive-compulsive disorder, or "OCD," is a neurotic state characterized by "recurrent obsessions and compulsions." DSM-IV, *supra* note 38, at 456–57. Post-traumatic stress disorder, or "PTSD," involves "intense fear, helplessness, or horror" as

that between three and thirty-six percent of stalking victims suffer an assault or battery, and two percent of stalking victims are killed by their stalker.⁶¹ As a result of these serious effects, states have considered stalking a crime and enacted various statutes to punish stalking behavior.⁶²

B. The Law Prior to Anti-Stalking Statutes

Prior to 1990, no criminal statutes dealt specifically with stalking, and the existing legal measures to combat stalking were severely limited and inadequate.⁶³ Under certain previous laws, a stalker could not be legally arrested until he or she had physically harmed his or her victims,⁶⁴ thereby inhibiting the ability to protect victims from injury.⁶⁵ Additionally, some laws, such as California's law prohibiting terrorist threats,⁶⁶ had a heightened requirement that a victim must have been aware that the stalker's threat would be fulfilled immediately in order for it to be classified as a violation.⁶⁷ This requirement effectively limited the ability of law enforcement to protect victims before an actual attack.⁶⁸ Furthermore, even if a stalker's threat was held to be sufficient for criminal prosecution, the sanctions were often mild, with some states treating harassment as a misdemeanor.⁶⁹

The statutes used in California to prosecute stalking behavior prior to 1990 included Penal Code sections 653m and 422,⁷⁰ which prohibited placing annoying and obscene phone calls and making terrorist threats, respectively.⁷¹ Both statutes "were designed to protect victims from specific instances of threatening or annoying activities," rather than from a series of harassing acts.⁷² As these statutes did not specifically address cumulative

well as "persistent reexperiencing of the traumatic event . . . resulting from the exposure to . . . extreme trauma." DSM-IV, at 463.

⁶¹ Wiggins, *supra* note 13, at 1073.

⁶² *See infra* Part I.C.

⁶³ Suzanne Cavanagh et al., *Stalking: Recent Developments*, in STALKING AND DOMESTIC VIOLENCE: CURRENT ISSUES 11, 11–12 (L.G. Wang ed., 2004).

⁶⁴ *Id.* *See, e.g.*, ALA. CODE § 13A-11-8(a)(1)(a) (LexisNexis 2005) (requiring physical harm under a harassment statute, including "strik[ing], shov[ing], kick[ing], or otherwise touch[ing] a person or subject[ing] him or her to physical contact"). *See also* Silvija A. Strikis, *Stopping Stalking*, 81 GEO L.J. 2771, 2774 n.21 (1993) (discussing physical contact requirements of laws prior to anti-stalking statutes).

⁶⁵ MOREWITZ, *supra* note 36, at 59.

⁶⁶ CAL. PENAL CODE § 422 (West 2010).

⁶⁷ *Id.*; MOREWITZ, *supra* note 36, at 59.

⁶⁸ MOREWITZ, *supra* note 36, at 59.

⁶⁹ ALA. CODE § 13A-11-8(a) (LexisNexis 2005); MOREWITZ, *supra* note 36, at 59.

⁷⁰ CAL. PENAL CODE § 422; CAL. PENAL CODE § 653m (West 2010).

⁷¹ Gregson, *supra* note 10, at 231–32.

⁷² *Id.* at 233.

stalking behavior—a course of stalking conducted over time—they were too narrow to sufficiently protect stalking victims.⁷³

In addition to criminal prosecution of stalking behavior, victims were able to obtain protective orders, such as a temporary restraining order, under limited circumstances.⁷⁴ In order for a stalking victim to obtain a protective order in California, the victim had to prove that “the harassment would cause a reasonable person to suffer substantial emotional distress,” and that the victim had in fact suffered emotional distress.⁷⁵ Without such concrete proof, a stalking victim was helpless.⁷⁶

Despite the limited legal remedies in place for a stalking victim, the members of the criminal legal community were hesitant to pursue criminal remedies for stalking.⁷⁷ To begin with, law enforcement officers were hesitant to enforce the then-existing laws which presumably resulted in fewer arrests.⁷⁸ Should a stalker actually be arrested, prosecutors were reluctant to charge the perpetrator in certain cases such as stalking within a domestic relationship.⁷⁹ Of the cases that were actually prosecuted, judges proffered lighter penalties in stalking cases that involved wife battering.⁸⁰ However, ultimately, stalking statutes were enacted in every state to deal with the insufficiency of existing statutes and to adequately protect stalking victims.⁸¹

C. General State Stalking Statutes

In 1990, California was the first state to enact an anti-stalking statute that directly addressed the criminal prosecution of stalkers.⁸² California enacted this statute largely in response

⁷³ *Id.* at 232–33. Stalking generally consists of multiple acts or cumulative behavior, therefore a statute that fails to criminalize minor acts that accumulate over time will necessarily exclude some stalking behavior. *See supra* Part II.A.

⁷⁴ Gregson, *supra* note 10, at 229–30. A temporary restraining order is “a protective court order that prohibits a stalker from further harassing the victim.” *Id.* Restraining orders provide limited protection for stalking victims because they apply only to certain victims, such as statutes limited only to spousal abuse, and even a victim who receives a restraining order against their stalker is not guaranteed protection. Bradfield, *supra* note 36, at 236–39. Ohio’s domestic abuse restraining order statute is an example of a statute that limits protection to “acts against a family or household member.” OHIO REV. CODE ANN. § 3113.31(A)(1) (West 2009); Bradfield, *supra* note 36, at 237 n.34.

⁷⁵ Gregson, *supra* note 10, at 230.

⁷⁶ *Id.*

⁷⁷ MOREWITZ, *supra* note 36, at 59.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Salame, *supra* note 20, at 70.

⁸² CAL. PENAL CODE § 646.9 (West 2010); Julie A. Finney, *The Paradox of Actual Substantial Emotional Distress Within the Context of California’s Criminal Stalking Law*, 29 W. ST. U. L. REV. 341, 345 (2002).

to the 1989 death of a famous television actress, Rebecca Schaeffer.⁸³ Prior to her murder, Schaeffer had been stalked by Robert Bardo, an obsessed fan, for two years before he ultimately murdered her.⁸⁴ Schaeffer's death brought the need for adequate stalking legislation in California to the media's attention, resulting in California's anti-stalking statute.⁸⁵ Following California's lead, all fifty states had anti-stalking statutes in place by 1995.⁸⁶

Since California was the first to enact an anti-stalking statute, its statute became a model that other states followed in creating their own anti-stalking statutes.⁸⁷ California's statute consists of three elements: an act, a threat, and intent.⁸⁸ The current statute reads as follows:

(a) Any person who willfully, maliciously, and repeatedly *follows* or willfully and maliciously *harasses* another person and who makes a *credible threat* with the *intent* to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family is guilty of the crime of stalking . . .⁸⁹

Anti-stalking statutes in other states can be divided into three groups based on the combination of elements they have adopted from California's statute.⁹⁰ Some states require all three elements of California's anti-stalking statute: an act, a threat, and intent.⁹¹ Another group of states requires either an act or a threat combined with the perpetrator's intent.⁹² The third group of states requires an act and the perpetrator's intent.⁹³ The intent required to satisfy the anti-stalking statutes varies among the states, ranging from those states that require a general intent, such as Idaho and Illinois, to those that require a specific intent, such as Connecticut and Texas.⁹⁴ Additionally, state

⁸³ Finney, *supra* note 82, at 344–45. While Schaeffer's death was the primary impetus for California's enactment of the first anti-stalking law, the stalking murders of four other California women around the same time received additional media attention and contributed to the situation. *Id.*

⁸⁴ Bradfield, *supra* note 36, at 244; Cavanagh, *supra* note 63, at 12.

⁸⁵ CAL. PENAL CODE § 646.9 (West 2010); Jordan, *supra* note 14, at 367.

⁸⁶ Merschman, *supra* note 6, at 266.

⁸⁷ MOREWITZ, *supra* note 36, at 61.

⁸⁸ *Id.*

⁸⁹ CAL. PENAL CODE § 646.9(a) (West 2010) (emphasis added).

⁹⁰ MOREWITZ, *supra* note 36, at 61.

⁹¹ *Id.* These states include Alabama and Arkansas. *Id.* See ALA. CODE § 13A-6-90 (2005); ARK. CODE ANN. § 5-71-229 (West 2009).

⁹² MOREWITZ, *supra* note 36, at 61. The states requiring only two elements include Delaware and South Dakota. *Id.* See also DEL. CODE ANN. tit. 11, § 1312 (2008); S.D. CODIFIED LAWS § 22-19A-1 (2006).

⁹³ MOREWITZ, *supra* note 36, at 61. This grouping of states includes Connecticut and Idaho. *Id.* See also CONN. GEN. STAT. ANN. §§ 53a-181c, 53a-181d (West 2007); IDAHO CODE ANN. §§ 18-7905, 18-7906 (2004).

⁹⁴ MOREWITZ, *supra* note 36, at 62–63.

statutes can further be categorized by their levels of punishment and penalties for stalking behavior, varying in regard to the first offense and subsequent offenses in terms of misdemeanors and penalties.⁹⁵

D. Constitutional Challenges to Stalking Statutes

With the advent of state anti-stalking laws came constitutional challenges from adversely-affected defendants.⁹⁶ The majority of the constitutional challenges to anti-stalking statutes fall into two groups: challenges to the statutes as being overbroad and challenges to the statutes as being unconstitutionally vague.⁹⁷ Challenges claiming stalking statutes are overbroad allege that the statutes penalize conduct that is constitutionally protected.⁹⁸ Vagueness challenges allege that the stalking statutes are insufficient to place the public on notice of what conduct is illegal and that such laws can lead to arbitrary, discriminatory enforcement.⁹⁹ While a few cases have held certain anti-stalking statutes unconstitutional, courts have generally upheld these laws.¹⁰⁰

Broadness challenges to anti-stalking statutes allege that they are overly broad because they criminalize behavior protected under the First Amendment, such as the right to exercise free speech.¹⁰¹ Statutes can survive broadness challenges if a limited but constitutional interpretation of the law is possible, or, more generally, if they do not seriously threaten

⁹⁵ *Id.* See, e.g., CONN. GEN. STAT. ANN. §§ 53a-181c, 53a-181d, 53a-181e (West 2007) (varying the punishments for stalking in the first, second, and third degree to a Class D felony, Class A misdemeanor, and Class B misdemeanor respectively); ALASKA STAT. §§ 11.41.260, 11.41.270 (2008) (varying the punishments for stalking in the first and second degree to a Class C felony and Class A misdemeanor respectively).

⁹⁶ Merschman, *supra* note 6, at 271.

⁹⁷ *Id.*

⁹⁸ Suzanne L. Karbarz, *The First Amendment Implications of Anti-Stalking Statutes*, 21 J. LEGIS. 333, 337 (1995). See, e.g., *Johnson v. State*, 449 S.E.2d 94, 96 (Ga. 1994) (upholding Georgia's stalking law as not unconstitutionally overbroad, reasoning that "to the extent that the challenged statutes do proscribe communicative conduct, their restriction is clearly limited to a 'knowing and willful' course of harassment and intimidation").

⁹⁹ Salame, *supra* note 20, at 94.

¹⁰⁰ MOREWITZ, *supra* note 36, at 64. Compare *State v. Bryan*, 910 P.2d 212, 212 (Kan. 1996) (holding a state stalking law unconstitutionally vague insofar as the statute used the terms "alarms," "harasses," and "annoys" without including definitions for such terms), with *Bouters v. State*, 659 So.2d 235, 238 (Fla. 1995) (upholding Florida's stalking law as neither unconstitutionally overbroad nor overly vague because it applied only to criminal conduct and clearly defined the term "harasses"), and *People v. Bailey*, 657 N.E.2d 953, 961-63 (Ill. 1995) (upholding Illinois' stalking law as not unconstitutionally vague or overbroad because the term "follow" was not vague and the statute did not infringe upon the defendant's freedom of speech).

¹⁰¹ Jordan, *supra* note 14, at 374-75.

constitutionally protected conduct.¹⁰² The U.S. Supreme Court has held that “a government may criminalize true threats without violating the First Amendment’s protections against overly broad statutes.”¹⁰³ Therefore, since most stalking behavior can be interpreted as creating a violent threat, this conduct may be penalized under anti-stalking statutes consistent with the Constitution.¹⁰⁴

The second type of constitutional challenge to state anti-stalking statutes involves claims that the statutes are overly vague. To comply with the Due Process Clause, a penal statute must “define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.”¹⁰⁵ Ultimately, statutes must sufficiently put people on notice of what conduct is prohibited. “However, this requirement ‘does not preclude the use of ordinary terms’ in the statute, as long as the terms have a common usage and understanding.”¹⁰⁶

While many defendants have brought vagueness challenges, courts have generally upheld anti-stalking statutes.¹⁰⁷ *Bouters v. State* is an example of a vagueness challenge that failed.¹⁰⁸ In *Bouters*, the defendant was prosecuted for terrorizing his ex-girlfriend under Florida’s anti-stalking statute, which prohibited harassment, and the defendant challenged the statute’s use of the term “harasses” as unconstitutionally vague.¹⁰⁹ The Florida Supreme Court held that the statute was not “impermissibly vague”—and therefore was constitutional—because the statutory use of “harasses” did not create a subjective standard, but rather created a “reasonable person” standard.¹¹⁰

¹⁰² MOREWITZ, *supra* note 36, at 64–65.

¹⁰³ Merschman, *supra* note 6, at 272 (citing *Watts v. United States*, 394 U.S. 705, 707 (1969)).

¹⁰⁴ *Id.*

¹⁰⁵ Merschman, *supra* note 6, at 273 (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)).

¹⁰⁶ Gregson, *supra* note 10, at 241 (quoting *People v. Heilman*, 30 Cal. Rptr. 2d 422, 427 (Cal. Ct. App. 1994)).

¹⁰⁷ Merschman, *supra* note 6, at 274. See, e.g., *State v. Whitesell*, 13 P.3d 887, 900 (Kan. 2000) (upholding Kansas’ stalking statute as not unconstitutionally vague); *People v. Stuart*, 797 N.E.2d 28, 41 (N.Y. 2003) (upholding New York’s stalking statute as not unconstitutionally vague); *Luplow v. State*, 897 P.2d 463, 464, 472 (Wyo. 1995) (upholding Wyoming’s stalking statute as not unconstitutionally vague).

¹⁰⁸ See generally *Bouters v. State*, 659 So.2d 235 (Fla. 1995).

¹⁰⁹ *Id.* at 236, 238. “Under the [Florida] statute, ‘[h]arasses’ means ‘to engage in a course of conduct directed at a specific person that causes substantial emotional distress in such person and serves no legitimate purpose.’” *Id.* at 238. See also FLA. STAT. ANN. § 784.048(1)(a) (West 2008).

¹¹⁰ *Bouters*, 659 So.2d at 238 (citing *Pallas v. State*, 636 So.2d 1358, 1361 (Fla. Dist. Ct. App. 1994)). Additionally, states that have modeled their anti-stalking statute

Ultimately, statutes with adequate definitions of prohibited conduct and objective (i.e., reasonable person) standards are more likely to withstand vagueness challenges, and statutes that exclude constitutional conduct are more likely to withstand broadness challenges.

II. SPECIALIZED ANTI-STALKING STATUTES AND LINGERING CONSTITUTIONAL CHALLENGES

As stalking became more prevalent and new mediums, such as the Blackberry, surfaced, state law evolved to create statutes that specifically addressed the newer forms of stalking and interpreted older, general stalking statutes to cover this behavior as well.¹¹¹ Anti-stalking statutes can be divided into three main categories based on how they address cyberstalking and stalking by use of a telephone: (1) states that have enacted new anti-stalking statutes to deal with changing mediums,¹¹² (2) states that have amended and modified existing anti-stalking statutes to incorporate newer mediums,¹¹³ and (3) states that have general anti-stalking statutes that do not specifically discuss the newer mediums of stalking.¹¹⁴ Throughout the addition and amendment process, state anti-stalking statutes have continued to face constitutional challenges on vagueness and overbreadth grounds.¹¹⁵ A court's holding that a stalking statute is unconstitutional renders uncertain the legal basis for any stalking cases prosecuted after such a finding until a subsequent statutory amendment can be passed, and thereby leaves stalking victims unprotected in the meantime.

A. Specific Anti-Stalking Statutes

Specific Anti-Stalking statutes are statutes that states have created to directly address stalking by a specific medium. This may be accomplished through enactment of a new statute or amendment of an existing statute in order to encompass stalking

language after the federal laws and define "harassment" according to the federal definition have also survived constitutional challenges on vagueness grounds. MOREWITZ, *supra* note 36, at 68. Federal law defines "harassment" as "a course of conduct that causes the victim to experience substantial emotional distress." *Id.* See, e.g., FLA. STAT. ANN. § 784.048(1)(a) (West 2008); GA. CODE ANN. § 16-5-90(a)(1) (2007); OKLA. STAT. ANN. tit. 21, § 1173(F)(1) (West 2002) (defining harassment to include a "course of conduct" and "emotional distress").

¹¹¹ Statutes criminalizing stalking behavior through both traditional mediums and newer mediums such as the Internet can be found in stalking and harassment statutes. See *supra* note 7.

¹¹² See *infra* Part II.A.1.

¹¹³ See *infra* Part II.A.2.

¹¹⁴ See *infra* Part II.B.

¹¹⁵ See *infra* Part II.C.

through the newer medium.¹¹⁶ These statutes are comprised of those that address telephone stalking, and those that address cyberstalking—that is, stalking by means of the Internet. Approximately one-third of all states have anti-stalking statutes that specifically address cyberstalking.¹¹⁷ The majority of the remaining states have amended their general anti-stalking statutes to cover stalking by electronic means or the Internet.¹¹⁸ Additionally, many states have anti-stalking statutes that address stalking or harassment by use of the telephone.¹¹⁹ However, some state statutes address substantially more conduct and mediums than others, and consequently appear to provide more complete protection for victims stalked by various electronic and telephone mediums, such as the Blackberry.¹²⁰

1. New Statutes

As stalkers increasingly began to use new technologies such as the Internet to stalk their victims, some states chose to address the issue of cyberstalking head-on by specifically enacting statutes that covered cyberstalking in addition to their existing general anti-stalking statutes.¹²¹ The creation of

¹¹⁶ Goodno, *supra* note 8, at 141, 144.

¹¹⁷ Mike Harris, *Cyberstalking Case Linked to State Law from 1990: Expert Finds Little Similarity with L.A. Cyberbullying Trial*, VENTURA COUNTY STAR (Jan. 4, 2009), <http://www.vcstar.com/news/2009/jan/04/cyberstalking-case-linked-to-state-law-from-1990/>.

¹¹⁸ See *infra* Part II.A.2.

¹¹⁹ See *infra* Part II.A.1, 2.

¹²⁰ See *infra* Part II.A.1.

¹²¹ Goodno, *supra* note 8, at 144 (noting that as of 2007, six states had created new “cyberstalking” statutes that specifically and solely address cyberstalking: Illinois, Louisiana, Mississippi, North Carolina, Rhode Island and Washington). See 720 ILL. COMP. STAT. ANN. 5/12-7.5 (West 2009); LA. REV. STAT. ANN. § 14:40.3 (2007); MISS. CODE ANN. § 97-45-15 (West 2008); N.C. GEN. STAT. ANN. § 14-196.3 (West 2000); R.I. GEN. LAWS § 11-52-4.2 (2002); WASH. REV. CODE ANN. § 9.61.260 (West 2010). Other states have enacted new laws or amended existing statutes to essentially become new laws that address stalking through the Internet, electronic means, and electronic communication, including: Arkansas, California, Illinois, Maryland, Michigan, Mississippi, Montana, Oklahoma, South Dakota, Texas, Utah, Vermont, Virginia, West Virginia, and Wisconsin. ARK. CODE ANN. § 5-41-108 (2006) (penalizing “[u]nlawful computerized communications”); CAL. PENAL CODE § 653.2 (West 2010) (addressing “electronic communication device[s]”); CAL. PENAL CODE § 653m (West 2010) (criminalizing “contact by electronic communication device” with “intent to annoy,” and created by amending a telephone statute to become a telephone and electronic communication statute); 720 ILL. COMP. STAT. ANN. 135/1-2 (West 2009) (addressing “[h]arassment through electronic communications,” and created by amending statute to become an electronic communications harassment statute); MD. CODE ANN., CRIM. LAW § 3-805 (LexisNexis 2002) (addressing the “[m]isuse of electronic mail”); MICH. COMP. LAWS ANN. § 750.411s (West 2004) (including “posting messages through electronic medium[s]”); MISS. CODE ANN. § 97-29-45 (West 2008) (addressing “[o]bscene electronic and telecommunications,” created by amending statute to become an “electronic and telecommunications” statute); MONT. CODE ANN. § 45-8-213 (2009) (discussing “[p]rivacy in communications” and including “electronic communication[s],” and created by amending statute to focus on

additional anti-stalking statutes by these states indicates legislative recognition that existing general anti-stalking statutes are insufficient to address the problem of cyberstalking.¹²² The state of Washington provides a good example of a state's decision to enact a new statute despite the fact that an existing statute could have been used to prosecute cyberstalking.¹²³ Although Washington's general statute included electronic communications, the Washington legislature felt the need was sufficiently great to enact a new statute that specifically addressed cyberstalking.¹²⁴

As with statutes addressing cyberstalking, states enacted similar laws to address stalking by means of the telephone.¹²⁵

electronic communications); OKLA. STAT. ANN. tit. 21, § 1172 (West 2008) (penalizing "[o]bscene, threatening or harassing telecommunication or other electronic communications," and created by amending phone calls statute); S.D. CODIFIED LAWS § 49-31-31 (2009) (criminalizing "[t]hreatening or harassing contacts by telephone or other electronic communication device," and created by amending telecommunications statute); TEX. PENAL CODE ANN. § 33.07 (Vernon 2010) (addressing "[o]nline harassment"); UTAH CODE ANN. § 76-9-201 (2010) (criminalizing "[e]lectronic communication harassment," and created by amending phone statute); VT. STAT. ANN. tit. 13, § 1027 (2009) (penalizing "[d]isturbing the peace by use of telephone or other electronic communications," and created by amending phone statute); VA. CODE ANN. § 18.2-152.7:1 (2009) (punishing "[h]arassment by computer"); W. VA. CODE ANN. § 61-3C-14a (LexisNexis 2005) (discussing "[o]bscene, anonymous, harassing and threatening communications by computer"); WIS. STAT. ANN. § 947.0125 (West 2005) (criminalizing the "[u]nlawful use of computerized communication systems").

¹²² Goodno, *supra* note 8, at 144.

¹²³ *Id.* Washington's general anti-stalking statute penalizes conduct that an individual "[k]nows or reasonably should know that the person is afraid, intimidated, or harassed, even if the stalker did not intend to place the person in fear or intimidate or harass the person." WASH. REV. CODE ANN. § 9A.46.110(1)(c)(ii) (West 2009); Goodno, *supra* note 8, at 144. The statute then includes "electronic communication" within its definition of criminal "contact." WASH. REV. CODE ANN. § 9A.46.110(4) (West 2009).

¹²⁴ WASH. REV. CODE ANN. § 9.61.260 (West 2010); Goodno, *supra* note 8, at 144. Additional states have enacted new statutes to address cyberstalking or stalking by means of the Internet or electronic communication although their existing general anti-stalking statutes had been amended to incorporate such conduct, including: California, Illinois, Louisiana, Michigan, Montana, North Carolina, Oklahoma, South Dakota, Texas, Utah, Vermont, and Wisconsin. See CAL. PENAL CODE § 646.9 (West 2010); 720 ILL. COMP. STAT. ANN. 5/12-7.3 (West 2009); 720 ILL. COMP. STAT. ANN. 5/12-7.4 (West 2002); LA. REV. STAT. ANN. § 14:40.2 (2007); MICH. COMP. LAWS ANN. §§ 750.411h, 750.411i (West 2004); MONT. CODE ANN. § 45-5-220 (2009); N.C. GEN. STAT. ANN. § 14-277.3A (LexisNexis 2009); OKLA. STAT. ANN. tit. 21, § 1173 (West 2002); S.D. CODIFIED LAWS § 22-19A-1 (2006); TEX. PENAL CODE ANN. § 42.07 (Vernon 2003); UTAH CODE ANN. § 76-5-106.5 (2008); VT. STAT. ANN. tit. 13, § 1061 (2009); WIS. STAT. ANN. § 940.32 (West 2009).

¹²⁵ See, e.g., CAL. PENAL CODE § 653m (West 2010) (addressing "[t]elephone calls or contact by electronic communication device with intent to annoy"); MISS. CODE ANN. § 97-29-45 (West 2008) (penalizing "[o]bscene electronic and telecommunications"). Specialized statutes that were created to address stalking or harassment by means of the telephone include: harassing communications statutes, phone harassment statutes, phone misuse statutes, and criminal threats statutes. See ARK. CODE ANN. § 5-71-209 (2005) ("[h]arassing communications" statute); KAN. CRIM. CODE ANN. § 21-4113 (West 2008) ("[h]arassment by telephone" statute); CAL. PENAL CODE § 422 (West 2010) ("[c]riminal threats" statute that includes "cellular telephones" and "telephones" within its definition

Unlike cyberstalking laws however, many telephone harassment laws pre-date the first anti-stalking law of 1990.¹²⁶ As technology increased and expanded, states even extended stalking or harassment statutes to incorporate text messaging.¹²⁷ Some states expanded the definitions of stalking to include harassment by “electronic communication” that appear to encompass a wider range of mediums, including mediums such as the Blackberry or the iPhone.¹²⁸

2. Amended Statutes

A second group of states amended existing general anti-stalking statutes to incorporate cyberstalking or stalking by electronic means.¹²⁹ The majority of state anti-stalking statutes

of “electronic communication device”); MD. CODE ANN., CRIM. LAW § 3-804 (LexisNexis 2002) (“[m]isuse of telephone facilities and equipment” statute).

¹²⁶ Bradfield, *supra* note 36, at 240–41. *See, e.g.*, FLA. STAT. ANN. § 365.16 (West 1999) (first enacted in 1963); IDAHO CODE ANN. § 18-6710 (2004) (first enacted in 1980); OHIO REV. CODE ANN. § 2917.21 (West 2006) (first enacted in 1972).

¹²⁷ *See supra* note 54.

¹²⁸ Compare N.Y. PENAL LAW § 240.30 (McKinney 2008), with OKLA. STAT. ANN. tit. 21, § 1172 (West 2008), and OR. REV. STAT. ANN. § 166.065 (West 2010).

¹²⁹ Goodno, *supra* note 8, at 145. States that amended their general statutes to cover stalking or harassment by electronic means or cyberstalking include: Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, Wisconsin, and Wyoming. *See* ALA. CODE § 13A-11-8 (LexisNexis 2005) (amending “[h]arassing communications” to include “electronic communication”); ALASKA STAT. §§ 11.41.260, 11.41.270, 11.61.120 (2008) (including “electronic communications”); ARIZ. REV. STAT. ANN. §§ 13-2921, 13-2921.01 (2010) (including electronic means); CAL. PENAL CODE § 646.9 (Deering 2008) (including “electronic communication device”); CAL. PENAL CODE § 422 (Deering 2008) (including “electronic communication device”); COLO. REV. STAT. ANN. § 18-9-111 (West 2004) (including a “computer”); CONN. GEN. STAT. ANN. §§ 53a-182b, 53a-183 (West 2007) (including a “computer network”); DEL. CODE ANN. tit. 11, §§ 1311, 1312 (2008) (including “telephone” communication and “by any action, method, device or means” respectively); FLA. STAT. ANN. § 784.048 (West 2008) (including “cyberstalk[ing]”); GA. CODE ANN. § 16-5-90 (2007) (including a “computer,” “computer network,” and an “electronic device”); HAW. REV. STAT. ANN. §§ 711-1106, 711-1106.4, 711-1106.5 (LexisNexis 2009) (including “electronic communication”); IDAHO CODE ANN. §§ 18-7905, 18-7906 (2004) (including “electronic communications”); 720 ILL. COMP. STAT. ANN. 5/12-7.3, 5/12-7.4 (West 2010) (including “electronic communications”); IND. CODE ANN. § 35-45-2-2 (West 2004) (including a “computer network” and “electronic communication”); IOWA CODE ANN. § 708.7 (West 2003) (including “electronic communication”); KAN. STAT. ANN. § 21-3438 (West 2008) (including “electronic means”); KY. REV. STAT. ANN. §§ 508.130-508.150 (West 2009) (including by “computer,” “Internet,” and “electronic network”); LA. REV. STAT. ANN. § 14:40.2 (2009) (including “electronic mail”); ME. REV. STAT. ANN. tit. 17-A, § 210-A (2009) (including “electronic means”); MASS. GEN. LAWS ANN. ch. 265, §§ 43, 43A (West 2008) (including “electronic mail”); MICH. COMP. LAWS ANN. §§ 750.411h, 750.411i (West 2004) (including “electronic communications”); MINN. STAT. ANN. § 609.749 (West 2009) (including electronic means); MO. ANN. STAT. § 565.225 (West 2009) (including “by any means”); MO. ANN. STAT. § 565.090 (West 2009) (including “electronic communication”); MONT. CODE ANN. § 45-5-220 (2009) (including “any other action, device, or method”); NEV. REV. STAT. ANN.

fall into this category.¹³⁰ States have amended their statutes to incorporate cyberstalking or stalking by means of electronic communication in several different ways.¹³¹ States incorporated cyberstalking into their general statutes by either amending statutes to include “cyberstalk[ing],”¹³² or stalking by “electronic communications.”¹³³ “Electronic communications” are defined as communications using either a general “electronic communication device” or by specific mediums such as “electronic mail,” “computer,” or “computer network.”¹³⁴ Additionally, states amended their general statutes to cover cyberstalking behavior by punishing stalking with phrases such as any “method,” “means,” “medium,” or “device.”¹³⁵

California is an example of a state law that was amended to incorporate cyberstalking or stalking by electronic means.¹³⁶ California’s general anti-stalking statute was amended by chapters 825 and 826 in 1998 to address credible threats or harassment made with electronic communications to a victim

§ 200.575 (West 2009) (including “Internet” and “electronic mail”); N.H. REV. STAT. ANN. § 633:3-a (LexisNexis 2007) (including electronic and computer communication); N.H. REV. STAT. ANN. § 644:4 (LexisNexis 2007) (including electronic and computer communication); N.J. STAT. ANN. § 2C:12-10 (West 2009) (including “by any action, method, means, or device”); N.M. STAT. ANN. §§ 30-3A-3, 30-3A-3.1 (West 2009) (including “by any action, method, device, or means”); N.Y. PENAL LAW § 240.30 (McKinney 2008) (including by “electronic means”); N.C. GEN. STAT. § 14-277.3A (2008) (including “electronic transmissions”); N.D. CENT. CODE § 12.1-17-07 (2009) (including electronic communication or transmission); OHIO REV. CODE ANN. § 2903.211 (West 2009) (including “electronic method”); OKLA. STAT. ANN. tit. 21, § 1173 (West 2002) (including “electronic communications”); OR. REV. STAT. ANN. §§ 163.730 (West 2010) (including “electronic communication”); OR. REV. STAT. ANN. § 166.065 (West 2010) (including “electronic threat”); 18 PA. CONS. STAT. ANN. §§ 2709, 2709.1 (West 2009) (including “electronic means”); S.C. CODE ANN. § 16-3-1700 (2008) (including “electronic contact”); S.D. CODIFIED LAWS § 22-19A-1 (2006) (including electronic communication); TENN. CODE ANN. § 39-17-315 (2006) (including “electronic communications”); TENN. CODE ANN. § 39-17-308 (2006) (including “electronic communication”); TEX. PENAL CODE ANN. § 42.07 (West 2003) (including “electronic communication”); UTAH CODE ANN. § 76-5-106.5 (West 2008) (including by “any action, method, device, or means”); VT. STAT. ANN. tit. 13, §§ 1061, 1062, 1063 (2009) (including “electronically communicated threats”); WASH. REV. CODE ANN. § 9A.46.110 (West 2009) (including “electronic communication”); WASH. REV. CODE ANN. § 10.14.020 (West 2002) (including “electronic communication”); WIS. STAT. ANN. § 940.32 (West 2009) (including “electronic means”); WYO. STAT. ANN. § 6-2-506 (2009) (including electronic means). Some of the states that amended their general statutes also enacted new statutes. *See supra* note 124.

¹³⁰ Goodno, *supra* note 8, at 141.

¹³¹ *Id.*

¹³² *See, e.g.*, FLA. STAT. ANN. § 784.048 (West 2008).

¹³³ Goodno, *supra* note 8, at 141.

¹³⁴ *Id.* States adopting this method of amendment include: California, Georgia, Hawaii, and New York. *Id.* at 141 n.99, 142 n.100. *See also* CAL. PENAL CODE § 646.9 (Deering 2008); GA. CODE ANN. § 16-5-90 (2007); HAW. REV. STAT. §§ 711-1106, 711-1106.5 (LexisNexis 2009); N.Y. PENAL LAW § 240.30 (McKinney 2008).

¹³⁵ *See, e.g.*, ME. REV. STAT. ANN. tit. 17-A, § 210-A (2008); MO. ANN. STAT. § 565.225 (West 2009); N.J. STAT. ANN. § 2C:12-10 (West 2005).

¹³⁶ CAL. PENAL CODE § 646.9(g) (West 2008).

over the Internet.¹³⁷ The California statute now states that a “credible threat” means a verbal or written threat, including that performed through the use of an electronic communication device, or a threat implied by a pattern of conduct or a combination of verbal, written, or electronically communicated statements and conduct”¹³⁸

Although many states already had statutes in place to deal with harassing telephone calls and other threatening conduct by means of the telephone,¹³⁹ some states amended their general stalking or general harassment statutes to cover stalking by means of the telephone or initially created stalking statutes to incorporate such behavior.¹⁴⁰ Such amendments to include stalking by means of the telephone are particularly important because of the high percentage of stalking victims that report being stalked through phone calls and voice mail messages.¹⁴¹

B. General, Un-Amended Anti-Stalking Statutes

The third and final category consists of general anti-stalking statutes that have not been amended to include electronic communication but that may be subject to a judicial interpretation that they cover cyberstalking.¹⁴² Crimes committed in

¹³⁷ Lisa A. Karczewski, *Stalking in Cyberspace: The Expansion of California's Current Anti-Stalking Laws in the Age of the Internet*, 30 MCGEORGE L. REV. 517, 521 n.40 (1999) (noting that chapters 825 and 826 amended Cal. Penal Code sections 422, 646.9, 653m). “Chapters 825 and 826 provide that an offense committed through the medium of an electronic communication device is deemed to have been committed where the communication was initially sent or first viewed by the other party.” *Id.* at 521. *See also* 1998 Cal. Legis. Serv. 825 (West).

¹³⁸ CAL. PENAL CODE § 646.9(g) (West 2008).

¹³⁹ *See supra* Part II.A.1.

¹⁴⁰ *See, e.g.*, GA. CODE ANN. § 16-5-90(a)(1) (West 2000); IDAHO CODE ANN. § 18-7906(c)(v) (2004); KAN. STAT. ANN. § 21-3438 (2008). Additionally, some states amended their general statutes to include “electronic communications” with expansive definitions of “electronic communications” that include the telephone. *See, e.g.*, CAL. PENAL CODE § 646.9(g), (h) (West 2008) (amending general stalking statute to include “electronic communications” that defines “electronic communication device” as including “telephones” and “cellular phones”).

¹⁴¹ *See supra* Part I.

¹⁴² Goodno, *supra* note 8, at 141. Note that some states have amended a harassment statute to incorporate stalking by electronic means instead of amending a stalking statute, however, this final category is composed of states that have neither amended a harassment statute nor a stalking statute. Nebraska is currently the only state that appears to fall into this category. Nebraska has neither a specialized anti-stalking statute covering stalking by electronic communication nor has it amended its general anti-stalking statute to cover stalking by electronic communication. *See* NEB. REV. STAT. § 28-311.03 (LexisNexis 2006). According to the National Conference of State Legislatures, three states that do not have statutes that cover cyberstalking behavior are Kentucky, Nebraska, and New Mexico. State Electronic Harassment or “Cyberstalking” Laws, NATIONAL CONFERENCE OF STATE LEGISLATURES (Dec. 21, 2009), <http://www.ncsl.org/IssuesResearch/TelecommunicationsInformationTechnology/CyberstalkingLaws/tabid/13495/Default.aspx>. However, Kentucky’s stalking definition statute

these states may be punishable under the general anti-stalking statute or a telephone anti-stalking statute if the crime involves use of the Internet or a telephone.¹⁴³ These states and their corresponding general anti-stalking statutes are the most ill-equipped to deal with cyberstalking because it is not clear whether their general anti-stalking statutes cover any form of cyberstalking or whether telephone anti-stalking statutes might cover cyberstalking.¹⁴⁴

C. Constitutional Challenges to Specialized Anti-Stalking Statutes and the Case of *Scott v. State*

While specialized anti-stalking statutes are significant improvements over the original stalking statutes in that they cover more stalking behavior and therefore provide more protection for stalking victims, these specialized statutes remain open to vagueness and overbreadth challenges.¹⁴⁵ Specialized anti-stalking statutes continue to use flawed, weak language and are being challenged for failing to sufficiently define terms and for excluding constitutional conduct from within the statute's scope.¹⁴⁶ Without a constitutional law defining stalking or harassment offenses by use of newer mediums, the status of victims subjected to stalking through the use of these newer mediums remains unclear.

includes within its "course of conduct" description, the "use of any equipment, instrument, machine, or other device by which communication or information is transmitted, including computers, the Internet or other electronic network . . ." KY. REV. STAT. ANN. § 508.130(2) (West 2009). Therefore, it appears that Kentucky's general stalking statutes include stalking by means of electronic communication. KY. REV. STAT. ANN. §§ 508.140–508.150 (West 2009). Similarly, New Mexico's general stalking statute was recently rewritten in 2009 to include stalking by "any action, method, device or means," and therefore New Mexico's statute appears to cover stalking by means of electronic communication. N.M. STAT. ANN. § 30-3A-3(B)(2) (2009).

¹⁴³ Goodno, *supra* note 8, at 141. Note that statutes that do not directly address stalking by means of the telephone may not cover all stalking incidents by means of the telephone. For example, Rhode Island's general stalking law prohibits "harassment," and "harasses" is defined as

a knowing and willful course of conduct directed at a specific person with the intent to seriously alarm, annoy, or bother the person, and which serves no legitimate purpose. The course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress, or be in fear of bodily injury.

R.I. GEN. LAWS § 11-59-1(2) (2002); R.I. GEN. LAWS § 11-59-2(a)(1) (2002) (providing that stalking law does not address stalking by specific mediums). *See also* R.I. GEN. LAWS § 11-52-4.2 (2008) (noting that cyberstalking law refers only to "electronic device" and does not directly include stalking by the telephone). A court could find that repeated phone calls or voice messages do not constitute a "course of conduct" or an "electronic device" and therefore would not be covered by the statutes.

¹⁴⁴ Goodno, *supra* note 8, at 141.

¹⁴⁵ *See infra* note 161.

¹⁴⁶ *Id.*

An example of a recent challenge to an anti-stalking statute is *Scott v. State*.¹⁴⁷ In *Scott*, the defendant was convicted of harassing his former wife under a state harassment statute, and the defendant challenged the statute as overbroad and unconstitutionally vague.¹⁴⁸ The defendant's harassing behavior consisted of making repeated telephone calls to his former wife and leaving her "abusive and harassing voice mail messages."¹⁴⁹ The defendant was charged under two sections of Texas' harassment statute.¹⁵⁰ The relevant parts of the statute are as follows:

(a) A person commits an offense if, with intent to harass, annoy, alarm, abuse, torment, or embarrass another, he:

...

(4) causes the telephone of another to ring repeatedly or makes repeated telephone communications anonymously or in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another; ... [or]

...

(7) sends repeated electronic communications in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another.¹⁵¹

In challenging the constitutionality of the statute, the defendant alleged that the phrase "in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another" was unconstitutionally vague because "[i]t is impossible for a citizen to know what, in the disjunctive, is meant by this statute's series of vague terms."¹⁵² The defendant also noted the lack of an objective standard.¹⁵³ Furthermore, the defendant alleged that the statute's prohibition of "repeated" communications was unconstitutionally vague because the statute

¹⁴⁷ See generally *Scott v. State* 298 S.W.3d 264 (Tex. Ct. App. 2009).

¹⁴⁸ TEX. PENAL CODE ANN. § 42.07 (West 2003); *Scott*, 298 S.W.3d at 267.

¹⁴⁹ *Scott*, 298 S.W.3d at 266.

¹⁵⁰ TEX. PENAL CODE ANN. § 42.07(a)(4), (7); *Scott*, 298 S.W.3d at 266. Texas' stalking statute is in the amended category. See *supra* note 129.

¹⁵¹ TEX. PENAL CODE ANN. § 42.07(a)(4), (7). The statute goes on to define "electronic communication" as

a transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic, or photo-optical system. The term includes: (A) a communication initiated by electronic mail, instant message, network call, or facsimile machine; and (B) a communication made to a pager.

TEX. PENAL CODE ANN. § 42.07(b)(1)(A), (B). The *Scott* court then found that voice mail messages were included within "electronic communications." *Scott*, 298 S.W.3d at 267.

¹⁵² *Scott*, 298 S.W.3d at 267.

¹⁵³ *Id.* at 270.

failed to define the number of communications that constituted “repeated.”¹⁵⁴

The *Scott* court first found that First Amendment freedoms were implicated under the statute, then went on to hold that the phrase “in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another” was unconstitutionally vague on its face.¹⁵⁵ The *Scott* court further held that the phrase “repeated” was unconstitutionally vague because it could technically encompass “three phone calls over ten years.”¹⁵⁶ Therefore, the court acquitted the defendant and held sections (a)(4) and (a)(7) of the statute unconstitutional.¹⁵⁷

Currently, there is no pending legislation to amend the statutory sections found unconstitutional by the *Scott* court’s holding on June 24, 2009.¹⁵⁸ The general stalking statute in Texas does not directly cover stalking by means of electronic communication or the telephone, and therefore the harassment statute held unconstitutional by *Scott* was likely the primary means to prosecute stalking or harassing behavior committed through these means.¹⁵⁹ On September 1, 2009, a new Texas statute governing “Online Harassment” became effective; however, the online harassment statute does not appear to cover the full range of activities prohibited under the general harassment statute.¹⁶⁰ Therefore, the current state of Texas stalking and harassment law, as well as that of certain stalking victims, is uncertain.¹⁶¹ Consequently, statutory change is needed in order to ensure that all stalking victims are protected.

¹⁵⁴ *Id.* at 267.

¹⁵⁵ *Id.* at 269, 273.

¹⁵⁶ *Id.* at 273.

¹⁵⁷ TEX. PENAL CODE ANN. § 42.07(a)(4), (7); *Scott*, 298 S.W.3d at 273.

¹⁵⁸ TEX. PENAL CODE ANN. § 42.07(a)(4), (7).

¹⁵⁹ TEX. PENAL CODE ANN. § 42.072 (West 2003); TEX. PENAL CODE ANN. § 42.07.

¹⁶⁰ TEX. PENAL CODE ANN. § 33.07 (West 2003).

¹⁶¹ In states that have not enacted new specialized anti-stalking provisions but that have amended general statutes to incorporate stalking by electronic means or the phone, holding the general statute unconstitutional would potentially harm victims stalked by electronic means or the telephone since there would be no other statute governing such behavior. For example, Texas’s general stalking law does not include stalking by electronic means or the telephone, so holding the harassment statute that covered such stalking methods unconstitutional may leave victims stalked by these methods unprotected, excluding the online harassment statute. See TEX. PENAL CODE ANN. § 42.072; TEX. PENAL CODE ANN. § 42.07; TEX. PENAL CODE ANN. § 33.07. In addition to Texas, several other states have pending constitutional anti-stalking statute problems including Utah and New Hampshire. In *Provo City Corp. v. Thompson*, a “repeated calls” provision of Utah’s electronic communication harassment statute similar to that in *Scott v. State* was challenged as overly broad. UTAH CODE ANN. § 76-9-201 (LexisNexis 2008); *Provo City Corp. v. Thompson*, 86 P.3d 735, 740 (Utah 2004). The Utah Supreme Court refused to reach the constitutionality of the provision because they found that the defendant lacked standing to bring an overbreadth challenge. *Provo City Corp.*, 86 P.3d at 741. Although Utah has amended the statute since 2004, the word “repeated” remains

III. FURTHER STATUTORY AMENDMENT IS NEEDED TO ADEQUATELY COVER STALKING BY ELECTRONIC MEANS AND THE TELEPHONE AND TO ENSURE THE CONSTITUTIONALITY OF ANTI-STALKING STATUTES

In order to provide the best, most complete protection for stalking victims, statutes must cover a broad range of stalking behavior but exclude otherwise constitutional conduct. While the majority of states have enacted new statutes or amended existing statutes to cover stalking by means of the phone or the Internet,¹⁶² at least one state does not have a stalking statute that directly addresses stalking by electronic means, and at least one state has a stalking law that fails to address stalking by means of the telephone.¹⁶³ Other states have stalking laws in place that have been held unconstitutional or could be found unconstitutional.¹⁶⁴

Therefore, states with general, un-amended anti-stalking statutes—Nebraska, and potentially Kentucky and New Mexico—should either amend their general stalking statutes to include stalking by electronic means or cyberstalking, or alternatively, enact new statutes that specifically encompass such stalking behavior.¹⁶⁵ Additionally, there are states with general anti-stalking statutes that have not been amended to include stalking by means of the telephone, as well as states that have not enacted new statutes to cover such behavior.¹⁶⁶ Furthermore, as technology continues to increase and consequently expand the means in which stalkers may stalk their victims, states should continue to amend their statutes proactively to encompass new behaviors and mediums such as text messaging and stalking through use of a Blackberry or an iPhone.¹⁶⁷

undefined. UTAH CODE ANN. § 76-9-201. In *State v. Pierce*, the New Hampshire Supreme Court found the state's harassment statute unconstitutionally overbroad under the state's constitution. N.H. REV. STAT. ANN. § 644:4(I)(f) (LexisNexis 1996); *State v. Pierce*, 887 A.2d 132, 135 (N.H. 2005). Although the New Hampshire statute has been amended since 2005, the overbreadth issue appears to remain uncorrected. N.H. REV. STAT. ANN. § 644:4.

¹⁶² See *supra* Part II.A.

¹⁶³ See *supra* Part II.B (detailing three states without cyberstalking statutes: Kentucky, Nebraska, and New Mexico). See also R.I. GEN. LAWS § 11-52-4.2 (2008) (showing that Rhode Island's anti-stalking statute does not include stalking by telephone).

¹⁶⁴ See *supra* note 161.

¹⁶⁵ See *supra* note 142 and accompanying text.

¹⁶⁶ One of those states is Rhode Island. See *supra* note 143.

¹⁶⁷ See, e.g., NEV. REV. STAT. ANN. § 200.575 (LexisNexis 2006); OR. REV. STAT. ANN. § 166.090 (West 2005); UTAH CODE ANN. § 76-5-106.5 (LexisNexis 2008); WASH. REV. CODE ANN. § 9.61.260 (West 2010) (addressing stalking or harassment by means of "text messaging"). See also N.Y. PENAL § 240.30 (McKinney 2008) (covering a broad range of mediums in its harassment statute including, "causes a communication to be initiated by

States that have stalking statutes that address stalking via newer mediums but that have been found unconstitutional, or may be found unconstitutional, should amend their statutes to exclude constitutional conduct and adequately define statutory terms that may be subject to vagueness challenges.¹⁶⁸ In doing so, these states should look for guidance from other states whose similar statutes have passed constitutional muster.¹⁶⁹ Additionally, court decisions holding a given statute unconstitutional generally discuss the statute's deficiencies; these discussions may also provide the states with helpful guidance in the amendment process.¹⁷⁰

CONCLUSION

As Jane's experience illustrates, advances in technology have expanded the ways in which stalkers can harass their victims, and this has blurred the distinctions between various stalking mediums. While statutory law has similarly increased and developed in an attempt to accommodate stalking through newer mediums, existing laws remain subject to constitutional challenges and vary in the coverage afforded to stalking victims who have been stalked via the Internet and the phone. Stalking victims are best protected by broad legislation that covers stalking by various means, including the Internet and the telephone, but that excludes otherwise constitutional conduct. Therefore, states should proactively amend their existing laws to

mechanical or electronic means or otherwise with a person . . . by telephone . . . or by transmitting or delivering any other form of written communication . . .").

¹⁶⁸ See *supra* note 161.

¹⁶⁹ Statutes that have been found unconstitutional because they appear to criminalize constitutional conduct could be amended to include a proviso that they exclude constitutional conduct. Alabama, for example, has narrowly tailored its harassment statute to pass constitutional review. It defines "harasses" as:

Engages in an intentional course of conduct directed at a specified person which alarms or annoys that person, or interferes with the freedom of movement of that person, and which serves no legitimate purpose. The course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress. Constitutionally protected conduct is not included within the definition of this term.

See, e.g., ALA. CODE § 13A-6-92 (LexisNexis 2005). Statutes that have been held unconstitutional for failure to define a particular word, such as Texas' failure to define "repeated," should look to states that have defined that term. See TEX. PENAL CODE ANN. § 42.07 (West 2003). See, e.g., COLO. REV. STAT. § 18-9-111(4)(c)(IV) (West 2009) (defining "repeated" or "repeatedly" as "on more than one occasion").

¹⁷⁰ For example, *Scott v. State* held Texas' harassment statute unconstitutional because of its "repeated calls" provision as well as for the statute's failure to define the phrase "in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another." TEX. PENAL CODE ANN. § 42.07; *Scott v. State* 298 S.W.3d 264, 269 (Tex. Ct. App. 2009). Therefore, Texas should amend its statute to include definitions for the words "repeated," "alarm," "embarrass," and any similar terms.

withstand constitutional scrutiny and include expansive definitions for stalking through the mediums of the Internet and the telephone.

The Yellow Brick Road to Nowhere: California Same-Sex *Marvin* Rights After Proposition 8

Adam C. Hartmann*

INTRODUCTION

Shortly after Dorothy Gale begins her journey down the yellow brick road in *The Wizard of Oz* she comes to a crossroads that extends in two different directions.¹ She wonders aloud which way to go, when the Scarecrow confuses her by saying that one way is nice, but the other way is nice too, and some people go both ways, which he punctuates by simultaneously pointing in both directions.² California's gay and lesbian population can sympathize with Dorothy's confusion, having been at the mercy of the courts for their property and support agreements, while the courts were metaphorically pointing both ways.³ The picture is not any clearer today—the contractual rights of same-sex couples that have forgone the domestic partnership option remain vague in light of the outcome of Proposition 8.⁴

* J.D. Candidate, Chapman University School of Law, 2011. I would like to thank *Chapman Law Review* 2009–2010 Senior Notes and Comments Editors Katayon Khajebag and Rachel Warren and Professor Gary Gorczyca for their guidance and suggestions. I would especially like to thank my wife, Melissa Hartmann, for her constant inspiration, love and support.

¹ THE WIZARD OF OZ (Metro-Goldwyn-Mayer 1939).

² *Id.*

³ As discussed *infra*, California's same-sex couples do not have the same rights to marry as heterosexual couples; whether unmarried same-sex couples have the same ability to enforce contracts for property and support is the question that sparked this Comment. The "signs" pointing both ways symbolize California cases that have split on whether same-sex couples can enforce cohabitation agreements.

⁴ The ballot measure known as Proposition 8, which was approved by a majority of California voters at the November 4, 2008 election, proposed to add a new section to the California Constitution which provides, "[o]nly marriage between a man and a woman is valid or recognized in California." CAL. CONST. art. I, § 7.5; *Strauss v. Horton*, 207 P.3d 48, 59 (Cal. 2009). For more information on Proposition 8, see CALIFORNIA PROPOSITION 8: GET THE FACTS ON PROP. 8, <http://www.whatisprop8.com/> (last visited Nov. 22, 2010). Unofficial results showed that the measure passed 52.3% to 47.7%, and a color-coded map of the results indicates that only citizens in the coastal areas north of Los Angeles County and a small swath near the California-Nevada border were more likely than not to have voted "no" on Proposition 8, whereas voters in all inland areas and nearly all of Southern California were more likely to have voted "yes" on the measure and thereby approve the state constitutional amendment restricting marriage. *Proposition 8—Eliminates Right of Same-Sex Couples to Marry*, CALIFORNIA SECRETARY OF STATE,

Proposition 8 has been cast as a same-sex *marriage* issue, but it is more than that. Inasmuch as Proposition 8 reiterates the state's public policy favoring marriage, it also casts into stark relief the fact that unmarried couples lack the legislative and judicial protections marriage confers—particularly the right to freely contract with one another for support and property.⁵ California's approval of so-called "cohabitation contracts," or contracts between parties who live together, seemed clear after *Marvin v. Marvin*.⁶ But subsequent California courts have chipped away at the definitive *Marvin* decision⁷ to the point where it is unclear whether same-sex cohabitants can contract with one another for property and support.⁸

This Comment argues that Proposition 8 should spur the California legislature to clarify same-sex couples' cohabitation rights because judicial precedents are inconsistent.⁹ Part I will explore the history and growing popularity of cohabitation in the United States, with particular attention given to sociological factors that have led heterosexuals and homosexuals alike to opt for living together before marriage—or even instead of marriage. Part II will turn to California's community property scheme as it affects unmarried cohabiting partners, since property division is a crucial aspect of cohabitation agreements, and it will examine

ELECTION RESULTS (Nov. 26, 2008, 1:34 PM), <http://vote2008.sos.ca.gov/Returns/props/map190000000008.htm> (move cursor around the map for voting results by county).

⁵ Estimates suggest that married couples enjoy nearly 2,500 combined state and federal rights that unmarried couples do not. *Pittsburgh Considers Domestic Partnership Law*, 2 WESTERN PA FREEDOM TO MARRY COAL. 1, 3 (1997), available at <http://www.cs.cmu.edu/afs/cs/user/scotts/ftp/wpaf2mc/newsletter2-4.pdf>. See Kitty Mak, *California's New Domestic Partner Registration Act May Aid Same-Sex Partners in Providing a Legal Basis for Their Life Relationships*, L.A. CNTY. BAR ASS'N, <http://www.lacba.org/showpage.cfm?pageid=1105> (last visited Oct. 3, 2010) ("there are limits to what [same-sex] couples may be able to accomplish via contract. Private contracts have no legal effect on government-conferred rights and obligations such as tax benefits, parentage, custody and visitation arrangements, and child support obligations").

⁶ See generally *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976). The *Marvin* decision essentially allows cohabitants to contract with one another for property and services, provided the agreement is not based primarily on sexual services. *Id.* at 110, 113. See also *People v. Siravo*, 21 Cal. Rptr. 2d 350, 353 (Cal. Ct. App. 1993) ("Cohabitation" means simply to live or dwell together in the same habitation").

⁷ The pair of cases that threw the *Marvin* standard into chaos are *Jones v. Daly*, 176 Cal. Rptr. 130 (Cal. Ct. App. 1981) and *Whorton v. Dillingham*, 248 Cal. Rptr. 405 (Cal. Ct. App. 1988). The cases were confusing because they centered on nearly identical agreements between same-sex partners, but the latter was upheld while the former was not. *Jones*, 176 Cal. Rptr. at 131, 134; *Whorton*, 248 Cal. Rptr. at 406–07, 409–10.

⁸ Opposite-sex couples could theoretically face the same difficulties enforcing cohabitation contracts after Proposition 8. This Comment focuses on same-sex couples for two reasons: one, *Marvin v. Marvin* remains good law for opposite-sex cohabitation contracts, despite plaintiff Michelle Triola's inability to recover damages; two, it is the author's belief that Proposition 8 served more to reject homosexual relationships than establish a hierarchy of heterosexual relationships.

⁹ See *supra* note 8.

how courts have settled past property issues between unmarried cohabitants. Part III will address the unique aspects of same-sex cohabitation agreements. Part IV will argue that California courts may look at same-sex *Marvin* agreements differently following Proposition 8. Part IV will also illustrate how Illinois brought public policy directly to bear on cohabitation agreements, and will argue that federal or state legislation is crucial in clarifying and protecting the rights of same-sex couples as cohabiting partners. Finally, Part V provides drafts of two potential cohabitation-agreement statutes, one in favor and one against, to show what such statutes might look like, and to urge the legislature to devise meaningful cohabitation statutes that are compatible with existing public policy.

I. COHABITATION AS A SOCIAL TREND

A. Despite its Popularity, Cohabitation Presents Practical and Sociological Challenges, Especially for Same-Sex Couples

Numerous studies suggest the rate of “cohabitation,” i.e., unmarried couples living together, has spiked since the 1960s.¹⁰ The Census Bureau has estimated there were about 6.8 million opposite-sex cohabiting couples in the United States in 2008,¹¹ and an additional 741,000 same-sex cohabiting couples.¹² Although cohabitation has been traced back to the early 1800s in Australia and many European countries, historically it was less

¹⁰ MARY ANN LAMANNA & AGNES RIEDMANN, MARRIAGES & FAMILIES: MAKING CHOICES IN A DIVERSE SOCIETY 189–90 (Chris Caldeira et al. eds., 2009). *See also* NANCY D. POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW 177 (2008) (noting that cohabitation rates have grown significantly since *Marvin v. Marvin*).

¹¹ U.S. CENSUS BUREAU, *As Baby Boomers Age, Fewer Families Have Children Under 18 at Home*, NEWSROOM (Feb. 25, 2009), http://www.census.gov/newsroom/releases/archives/families_households/cb09-29.html.

¹² MARTIN O'CONNELL & DAPHNE LOFQUIST, U.S. CENSUS BUREAU, CONFERENCE REPORT, COUNTING SAME-SEX COUPLES: OFFICIAL ESTIMATES AND UNOFFICIAL GUESSES 6–20 (2009), *available at* <http://www.census.gov/population/www/socdemo/files/counting-paper.pdf>. The 2007 estimate of 741,000 figure for same-sex couples is up from the estimated 594,000 in the 2000 Census. *Id.* Earlier estimates of same-sex couples were unreliable; for example, 253,000 same-sex couples were reported as spouses in the 2000 Census, which was troubling because same-sex marriage was only legalized in 2004, and at that point only in Massachusetts. *Id.* The authors speculate that couples may have selected the “spouse” option because it best represented how they felt, or because it most resembled their civil union or domestic-partnership status. *Id.* The rate of unmarried cohabitation among opposite-sex and same-sex couples has risen more rapidly than first thought. CATHERINE FITCH ET AL., POPULATION ASS'N OF AMERICA, THE RISE OF COHABITATION IN THE UNITED STATES: NEW HISTORICAL ESTIMATES 1 (2005), *available at* <http://www.hist.umn.edu/~ruggles/cohab-revised2.pdf>. Flaws in defining cohabiting couples led the Census Bureau, as well as scholars relying on Census Bureau figures, to dramatically understate the true number of cohabiting couples in the 1960s and 1970s. *Id.*

common in the United States.¹³ Likewise, a late-1980s study indicated that only two percent of adults reaching adulthood just prior to or shortly after World War II reported having cohabited before their first marriage.¹⁴ Since then, the stigmatization of unmarried cohabitation has lessened considerably, a change that marriage researcher David Popenoe attributes primarily to the sexual revolution in the late-1960s, which essentially endorsed premarital sex.¹⁵

In light of an increasing number of cohabiting couples in America and many European nations, proponents of cohabitation advance a number of reasons why cohabitation is desirable—measuring readiness for, interest in, or compatibility for, marriage.¹⁶ Cohabitation is positively deemed an alternative to dating or being single,¹⁷ thus allowing the partners to develop a mature relationship and share finances.¹⁸ As such, while

¹³ ARLAND THORNTON ET AL., MARRIAGE AND COHABITATION 72 (2007). David Popenoe, co-director of the National Marriage Project at Rutgers University, has written that “[i]n America before 1970, for example, cohabitation was uncommon, a deviant and unlawful practice found only among people at the margins of our society.” DAVID POPENOE, NATIONAL MARRIAGE PROJECT, COHABITATION, MARRIAGE AND CHILD WELLBEING: A CROSS-NATIONAL PERSPECTIVE 1 (2008), available at <http://www.virginia.edu/marriageproject/pdfs/NMP2008CohabitationReport.pdf>.

¹⁴ THORNTON ET AL., *supra* note 13 (noting, however, that the population of cohabitation increased significantly after World War II and even began to affect children; by the late 1990s, about 40% of all out-of-wedlock births were to cohabiting parents).

¹⁵ See POPENOE, *supra* note 13. Popenoe’s research has indicated that since 1970, cohabitation has increased more than 1,000%, and cohabiting couples now comprise about 10% of all couples. *Id.* One study indicated that by 1995, 45% of women between the ages of nineteen and forty-four had lived with an unmarried partner. Larry Bumpass & Hsien-hen Lu, *Trends in Cohabitation and Implications for Children’s Family Contexts in the United States*, 54 POPULATION STUD. 29, 32 (2000). Likewise, a 2002 report indicated 48.8% of men and 50% of women between the ages of fifteen and forty-four had cohabited at some point with an opposite-sex partner. See, e.g., CENTERS FOR DISEASE CONTROL AND PREVENTION, FERTILITY, CONTRACEPTION, AND FATHERHOOD: DATA ON MEN AND WOMEN FROM CYCLE 6 (2002) OF THE NATIONAL SURVEY OF FAMILY GROWTH 61 (2006), available at http://www.cdc.gov/nchs/data/series/sr_23/sr23_026.pdf; CENTERS FOR DISEASE CONTROL AND PREVENTION, FERTILITY, FAMILY PLANNING, AND REPRODUCTIVE HEALTH OF U.S. WOMEN: DATA FROM THE 2002 NATIONAL SURVEY OF FAMILY GROWTH 86 (2005), available at http://www.cdc.gov/nchs/data/series/sr_23/sr23_025.pdf. One scholar has argued that the popularity of unmarried cohabitation helps explain the drop in the marriage rate since the 1970s. KATHLEEN HULL, SAME-SEX MARRIAGE: THE CULTURAL POLITICS OF LOVE AND LAW 4 (2006).

¹⁶ THORNTON ET AL., *supra* note 13, at 72–73. Recent studies suggest more than 60% of young men and women would want to live with a partner before marrying them, to make sure they are compatible. *Id.* See also POPENOE, *supra* note 13 (reporting that in a national survey of young adults aged twenty to twenty-nine, 43% agreed that “you would only marry someone if he or she agreed to live together with you first, so that you could find out whether you really get along”).

¹⁷ LAMANNA & RIEDMANN, *supra* note 10, at 190. There are different motivations for living with someone; partners who live together because they don’t want to be single are “uncommitted cohabitators,” while partners who live together in a marriage-like relationship are “committed cohabitators.” *Id.* at 190–91.

¹⁸ Valarie King & Mindy E. Scott, *A Comparison of Cohabiting Relationships Among Older and Younger Adults*, 67 J. MARRIAGE & FAM. 271, 282 (2005) (noting that sharing

cohabitation is gaining recognition socially and legally,¹⁹ hurdles remain. Historian Stephanie Coontz has concluded that the United States has not yet completed a transition from a society where cohabitation was a form of courtship before marriage to one where cohabitation is acceptable but remains socially and legally different than marriage.²⁰ Other research indicates that marriages preceded by cohabitation tend to break up at higher rates, and cohabitation leads to a higher rate of breakups overall, even when the couple does not marry.²¹ Cohabitants are generally younger, less educated, less religious, earn less income, and are more likely to have experienced parental divorce or marital problems during childhood.²² In contrast, married people are happier, healthier, wealthier, and live longer.²³

II. COHABITATION AND COMMUNITY PROPERTY

A. A Brief History of Community Property

With cohabitation gaining popularity among the population at large, it was inevitable that by the early 1970s, California courts would have to start determining how property should be divided when cohabitation relationships end.²⁴ California is one

living expenses was a popular reason for cohabitation among both older and younger survey subjects).

¹⁹ POLIKOFF, *supra* note 10, at 177–78 (noting that the American Law Institute (ALI) created a “domestic partners” category in its 2006 *Principles of the Law of Family Dissolution* that applies marital dissolution rules to qualifying cohabiting couples). A number of commentators sharply criticized the ALI’s move, including Ron Haskins, welfare policy adviser to President George W. Bush, who said that “[c]ohabitation is a plague . . . and we should do what we can [to] discourage it.” *Id.* at 179. *See generally* Nancy D. Polikoff, *Making Marriage Matter Less: The ALI Domestic Partner Principles are One Step in the Right Direction*, U. CHI. LEGAL F. 353, 358–80 (2004). For another perspective on cohabitation, see HEATHER BROOK, CONJUGAL RITES: MARRIAGE AND MARRIAGE-LIKE RELATIONSHIPS BEFORE THE LAW 153 (2007) (“[Cohabitation] is simultaneously romantic and mundane; a scene of potential liberation and regulation. For some, cohabitation is shameful, even sinful. For others, it is a situation arising almost accidentally, out of apathy or convenience rather than by design.”).

²⁰ LAMANNA & RIEDMANN, *supra* note 10. *See also* BROOK, *supra* note 19, at 165 (describing marriage as a sign of actively accepting state regulation and cohabitation as passively being regulated by the state).

²¹ Bumpass & Lu, *supra* note 15, at 33.

²² NATIONAL MARRIAGE PROJECT, THE STATE OF OUR UNIONS 2007: THE SOCIAL HEALTH OF MARRIAGE IN AMERICA, <http://www.virginia.edu/marriageproject/pdfs/SOOU2007.pdf>. At least one study has suggested that same-sex couples break up no more often than heterosexual couples. DONALD J. CANTOR ET AL., SAME-SEX MARRIAGE: THE LEGAL AND PSYCHOLOGICAL EVOLUTION IN AMERICA 75 (2006) (concluding that “the factors that can contribute to relationship quality, satisfaction and stability are similar for heterosexual and homosexual couples”).

²³ LAMANNA & RIEDMANN, *supra* note 10. *See also* NATIONAL MARRIAGE PROJECT, THE STATE OF OUR UNIONS 2007, *supra* note 22.

²⁴ *See generally* *In re Marriage of Cary*, 109 Cal. Rptr. 862 (Cal. Ct. App. 1973). *See also* *Beckman v. Mayhew*, 122 Cal. Rptr. 604 (Cal. Ct. App. 1974). Both of these cases were superseded by *Marvin v. Marvin*. For more explanation, see *infra* note 51.

of eight “community property” states,²⁵ where certain property acquired during a marriage is presumably dedicated to the maintenance of the relationship and is hence “community” property.²⁶ Community property is owned equally by both spouses and is divided equally if the marriage is dissolved.²⁷ California’s community property system likely originated with the Visigoth tribes in Europe; it then moved to Spain and the Spanish territories and, finally, the United States.²⁸ California, in its first Constitution of 1849, referred to a wife’s separate and community property rights for the first time.²⁹ The following year, the California legislature enacted a statute that defined the contours of California community property law³⁰—a statute that remains largely intact today.³¹

²⁵ See GAIL BOREMAN BIRD, CASES AND MATERIALS ON CALIFORNIA COMMUNITY PROPERTY 15 n.21 (2008). Community property states include California, Arizona, Idaho, Louisiana, New Mexico, Nevada, Texas and Washington. *Id.* Wisconsin is often considered the ninth community property state because it adopted a version of the Uniform Marital Property Act in 1986. *Id.* See also Howard S. Erlanger & June M. Weisberger, *From Common Law Property to Community Property: Wisconsin’s Marital Property Act Four Years Later*, 1990 WIS. L. REV. 769, 769 (1990).

²⁶ Erlanger & Weisberger, *supra* note 25.

²⁷ *Id.* at 71 n.10. In this regard, community property is an equitable system that protects the less affluent spouse’s interests, at least as compared to the common-law property system used in the vast majority of states. One scholar suggests that in common-law property jurisdictions, property is divided at divorce as if the parties had never been married at all. Ronald J. Scalise, Jr., *Undue Influence and the Law of Wills: A Comparative Analysis*, 19 DUKE J. COMP. & INT’L L. 41, 87 (2008).

²⁸ See *supra* note 25. One scholar, in tracing community property back to warrior tribes such as the Visigoths, maintains the community property system promoted a type of marriage partnership, whereby “community property regimes . . . provide a way to recognize the contribution of both spouses to the success of the family unit.” Scalise, *supra* note 27.

²⁹ BIRD, *supra* note 25, at 15–16. For years in California, men were believed to control a married couple’s community property. Erlanger & Weisberger, *supra* note 25, at 773 n.17 (explaining that until 1927, a wife only had an “expectancy interest” in community property because her husband had more meaningful control over her separate or community property). Section 803 of the California Family Code, known colloquially as the Married Women’s Separate Property Presumption, provided that real or personal property held in a wife’s name alone, which was acquired via a written instrument before January 1, 1975, was presumed to be the wife’s separate property. CAL. FAM. CODE § 803 (Deering 2010). Currently, a husband’s and wife’s interests in community property are considered present, equal and existing. CAL. FAM. CODE § 751 (Deering 2010).

³⁰ Kelly M. Cannon, *Beyond the ‘Black Hole’—A Historical Perspective on Understanding the Non-Legislative History of Washington Community Property Law*, 39 GONZ. L. REV. 7, 14 (2004).

³¹ See CAL. FAM. CODE § 760 (Deering 2010). See also *supra* note 25. For an early perspective on California’s community property system, see *Meyer v. Kinzer*, 12 Cal. 247, 251–52 (Cal. 1859) (holding that “[t]he statute proceeds upon the theory that the marriage, in respect to property acquired during its existence, is a community of which each spouse is a member, equally contributing by his or her industry to its prosperity, and possessing an equal right to succeed to the property after dissolution”). California’s community property statute was so influential that Washington copied it nearly word-for-word nineteen years later. Cannon, *supra* note 30, at 14–15.

B. California Courts Tackle Cohabitation Agreements

Amid cohabitation's growing popularity, the California Court of Appeal issued two rulings in a two-year period that oscillated between setting a clear standard for enforcing cohabitation agreements and expressing a disdain for nonmarital relationships in general.³² In 1973, a California court applied marriage-like property principles to a cohabitation case, revealing that the judiciary had an active and valid interest in enforcing cohabitants' property rights.³³ In *In re Marriage of Cary*, an unmarried couple lived together for more than eight years, had four children together, and held themselves out as married in all their financial and social dealings, although they were not legally married.³⁴ When the male partner moved to dissolve the arrangement and divide the property, the trial court awarded his partner half of the marital property, and the appellate court subsequently affirmed the decision.³⁵ According to the California Court of Appeal, three sections of the Family Law Act³⁶ provided that each party should receive an equal distribution of the community property as if the couple had been validly married.³⁷ The *Cary* court clarified that "the Family Law Act applies not only to valid marriages. It expressly covers a family relationship based on a void or voidable marriage where 'either party or both parties believed in good faith that the marriage was valid.'"³⁸ The male partner argued that *neither* he nor his partner believed

³² See *In re Marriage of Cary*, 109 Cal. Rptr. 862, 862 (Cal. Ct. App. 1973). See also *Beckman v. Mayhew*, 122 Cal. Rptr. 604, 604 (Cal. Ct. App. 1974).

³³ See *Cary*, 109 Cal. Rptr. at 862. While California courts had settled cohabitants' property claims for years before *Cary*, the case is significant because it showed some of the social forces in motion that led to *Marvin v. Marvin* three years later, which was a landmark case in California property law. See *infra* note 51.

³⁴ *Cary*, 109 Cal. Rptr. at 863.

³⁵ *Id.* at 863, 867. In upholding the marriage-like relationship in this case, the *Cary* trial court essentially adopted a "de facto approach to marriage." Ellen Kandoian, *Cohabitation, Common Law Marriage, and the Possibility of a Shared Moral Life*, 75 GEO. L.J. 1829, 1847 n.75 (1987).

³⁶ See CAL. CIV. CODE §§ 4000–5137 (Deering 2010). Effective January 1, 1994, the Family Law Act sections of the California Civil Code were repealed and replaced with equivalent provisions in the California Family Code. Jennifer Klein Mangnall, *Stepparent Custody Rights After Divorce*, 26 SW. U. L. REV. 399, 399 (1997).

³⁷ *Cary*, 109 Cal. Rptr. at 865. One scholar has opined, "*Cary* effectively asked: 'Has this nonmarital family behaved like a marital family? If so, why not apply our already well-developed family law?'" Grace Ganz Blumberg, *The Regularization of Nonmarital Cohabitation: Rights and Responsibilities in the American Welfare State*, 76 NOTRE DAME L. REV. 1265, 1293 (2001).

³⁸ *Cary*, 109 Cal. Rptr. at 865–66. The *Cary* court likened the couple's relationship to that of a "putative spouse," a legal status that effectuates equitable property division when there is a good-faith belief in an otherwise invalid marriage. See CAL. FAM. CODE § 2251 (Deering 2010). Other scholars have compared the Carys' relationship to a common-law marriage, which California abolished in 1895. Charlotte K. Goldberg, *The Schemes of Adventuresses: The Abolition and Revival of Common-Law Marriage*, 13 WM. & MARY J. WOMEN & L. 483, 487–88 (2007).

in good faith that their union was a valid marriage, and the Family Law Act did not address a scenario where the parties had *no* good-faith belief in the validity of their union—so the court should leave the parties where it found them.³⁹

The court disagreed, noting that Mr. Cary's argument would force the Legislature to basically endorse deceit.⁴⁰ A "spouse" who deceived his partner into believing they were married would get half of the community property, while two partners who already knew they were not validly married would be left to fend for themselves with no help from the courts.⁴¹ The *Cary* decision was significant because it elevated some cohabitants from just "living together" to a quasi-married status, affording those cohabitants the same community property protections as putative spouses.⁴² In its closing remarks, the *Cary* court explained how closely a cohabitation relationship had to resemble a marriage in order to gain enforcement from the courts:

It should be pointed out that the criteria for application of the rule we apply to the case before us is much more than that of an unmarried living arrangement between a man and woman. The Family Law Act obviously requires that there be established not only an ostensible marital relationship but also an actual family relationship, with cohabitation and mutual recognition and assumption of the usual rights, duties, and obligations attending marriage.⁴³

Although the Family Law Act has since been repealed,⁴⁴ the *Cary* court clearly threw its weight behind cohabitation relationships that approached, mimicked, or became nearly synonymous with marriage, and disdained cohabitation relationships that represented temporary, casual lifestyle choices. But subsequent courts, including the California Court of Appeal just two years later, rejected *Cary*'s "marriage-like"

³⁹ *Cary*, 109 Cal. Rptr. at 865. The Family Law Act of 1970 ushered in California's no-fault divorce regime, whereby spouses could seek a divorce based on "irreconcilable differences," without having to prove the other spouse was responsible. Herma Hill Kay, *An Appraisal of California's No-Fault Divorce Law*, 75 CAL. L. REV. 291, 291 (1987). "Fault" was likewise not considered in spousal support and property-division awards. *Id.* By ascribing fault to *both* partners, Mr. Cary attempted to circumvent the Family Law Act, which provided relief in the (far more common) cases where one partner had a good-faith belief that the marriage was valid but the other did not. *Cary*, 109 Cal. Rptr. at 865.

⁴⁰ *Cary*, 109 Cal. Rptr. at 865.

⁴¹ *Id.* at 865–66.

⁴² Although the Carys lived together for a number of years, the court did not consider them to have a common-law marriage, nor was the decision based in any way on that prospect. *Cary*, 109 Cal. Rptr. at 867. California abolished common-law marriage in 1895. *See infra* note 129.

⁴³ *Cary*, 109 Cal. Rptr. at 867.

⁴⁴ *See supra* note 36.

standard in favor of clear distinctions between cohabitation and marriage, and a firmer anti-cohabitation stance overall.⁴⁵

Two years later, a different California Court of Appeal cited precedent for taking a stricter view of cohabitation arrangements.⁴⁶ In *Beckman v. Mayhew*, the court held that absent an agreement between the partners, a cohabiting partner would not automatically assume a share of the couple's earnings, and thereby rejected the *Cary* court's reliance on the then-valid Family Law Act.⁴⁷ As the *Beckman* court noted:

The Family Law Act deals with divisions of property at the termination of solemnized marriages and . . . at the termination of putative marriages. Neither in terms nor by implication does it deal with non-marital family relationships of the kind involved in *Vallera*, *Keene* and the present case.⁴⁸

The *Beckman* decision was significant because it tightened the judicially-created rules for when a cohabiting partner could

⁴⁵ See *infra* note 48.

⁴⁶ *Beckman v. Mayhew*, 122 Cal. Rptr. 604, 608 (Cal. Ct. App. 1974). The *Beckman* court's "stricter view" of cohabitation relationships was not unilaterally grounded in precedent, however. Notably, the *Beckman* court did *not* heed the precedent that *Cary* had set two years earlier, making the *Beckman* court's reference to *stare decisis* a curious one indeed.

⁴⁷ *Id.*

⁴⁸ *Id.* at 607. One scholar has suggested the *Beckman* court sympathized with the female partner's plight but felt "constrained by precedent" in denying relief. Christina M. Fernandez, *Beyond Marvin: A Proposal for Quasi-Spousal Support*, 30 STAN. L. REV. 359, 363 n.14 (1978). As the *Beckman* court noted, perhaps less elegantly, "[w]e are not permitted to violate *stare decisis* for the sake of straws in the wind." *Beckman*, 122 Cal. Rptr. at 608. The precedent relied upon by the *Beckman* court included *Vallera v. Vallera*, 134 P.2d 761, 762–63 (Cal. 1943), and *Keene v. Keene*, 371 P.2d 329, 330 (Cal. 1962), which held that cohabiting partners who knew they were not validly married to their partners (i.e., the opposite of putative spouses), did not earn the right to share in the couple's earnings and accumulations simply by virtue of their cohabitation. A written agreement would likely be a different matter. In its decision, the *Beckman* court rejected not only *Cary*, but also *In re Estate of Atherley*, a case where a woman who lived with a married man for twenty-two years was awarded half of his estate. The court found that she was entitled to the property because they had "cohabited, pooled resources, resided together continuously, contributed services to joint projects, and otherwise conducted business as if they were man and wife." *In re Atherley*, 119 Cal. Rptr. 41, 48 (Cal. Ct. App. 1975). The *Atherley* court agreed with *Cary* that a partner in a so-called "meretricious" relationship, who knew he or she was not actually married, deserved the same property rights as a putative spouse—those who *do* believe in good faith, but incorrectly, that they are married to their partners. *Id.* at 46–48. The *Atherley* court, like *Cary*, grounded its decision in the Family Law Act. The court cautioned that

all meretricious relationships, however, do not automatically trigger this rule . . . the criteria for application of the rule . . . is much more than . . . an unmarried living arrangement between a man and woman. The Family Law Act . . . requires . . . there be established not only an ostensible marital relationship but also an actual family relationship, with cohabitation and mutual recognition and assumption of the usual rights, duties, and obligations attending marriage.

Id. at 48.

expect to recover a share of the couple's resources and injected a sense that unmarried relationships could create inequality between cohabitating partners.⁴⁹ The *Beckman* court was reluctant to protect what it called "non-marital family relationship," clarifying that its "descriptive term applies to a relationship which [many call] *meretricious*."⁵⁰

C. The Advent of the *Marvin* Agreement

Whatever concerns the California Court of Appeal had about cohabitation were blown away in 1976 when the California Supreme Court's decision in *Marvin v. Marvin* set a standard for contractual agreements between intimate partners that still resonates today.⁵¹ In 1964, the actor Lee Marvin and his girlfriend Michelle Triola made an oral contract that, while they lived together, they would pool their earnings, share equally any property acquired during the relationship, and "hold themselves out to the general public as husband and wife."⁵² Additionally, Triola agreed to furnish her services as a homemaker,

⁴⁹ This view is supported by Justice Paras' concurring opinion in *Beckman*, when he noted that the decision "promotes a public policy favoring legally binding marriages, with consequent sounder and more secure familial ties. This public policy has not changed and should not change." *Beckman*, 49 Cal. Rptr. at 608 (Paras, J., concurring).

⁵⁰ *Id.* at 605 n.1. For one definition of "meretricious," see *Atherley*, 119 Cal. Rptr. at 44 n.6, which states that "a meretricious relationship exists if unmarried persons knowingly live together." Generally, "meretricious" is defined as "relating to prostitution," but the term is also used to mean "unmarried persons knowingly live together," as it does in *Atherley*. Eric Olsen, *How Do Courts Divide Property Acquired During a Pseudomarital (Meretricious) Relationship?* Foster v. Thilges, 61 Wash. App. 880, 812 P.2d 523 (1991), 28 IDAHO L. REV. 1091, 1091 n.1 (1992); *Atherley*, 119 Cal. Rptr. at 44 n.6. Of the community property states, only Washington treats unmarried cohabitants as equivalent to marital spouses. Olsen, *supra* at 1092. Arizona, New Mexico, Nevada, California and Wisconsin treat unmarried cohabitants as contractual partners and divide assets based on whatever agreement the parties had. *Id.* at 1902-93, 1096.

⁵¹ See generally *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976). *Marvin* added to the lexicon an enduringly popular but non-legal term, "palimony," which puns on the support, or "alimony," which one might pay to a cohabitant, or "pal," rather than an ex-spouse. Some have questioned the case's impact, noting that the available contractual and equitable remedies it endorsed were the same ones available beforehand. Ann Laquer Estin, *Ordinary Cohabitation*, 76 NOTRE DAME L. REV. 1381, 1381 (2001). "With all its celebrity, the *Marvin* decision stands more as a cultural icon than as a legal watershed." *Id.* at 1383. Indeed, *Marvin* did not clear up the question regarding which cohabitation agreements were enforceable. There is a line of cases that involving same-sex partnership agreements that are uncommon in California and seem to have undergone greater judicial scrutiny compared to their opposite-sex partnership counterparts. See generally *Jones v. Daly*, 176 Cal. Rptr. 130 (Cal. Ct. App. 1981); *Whorton v. Dillingham*, 248 Cal. Rptr. 405 (Cal. Ct. App. 1988). See also *infra* note 68.

⁵² *Marvin*, 557 P.2d at 110. Inasmuch as the Marvin-Triola agreement spelled out the financial terms of their union, at least one scholar would liken it to "first-degree promising," an early stage along the relationship continuum that emphasizes the actors' self-interested, economic well-being. Eric G. Andersen, *Three Degrees of Promising*, 2003 BYU L. REV. 829, 832 (2003). Second-degree and third-degree promising are comparatively more spiritual and less financial in nature. *Id.* at 832-33.

housekeeper, cook, and companion in exchange for Marvin's agreement to "provide for all of [Triola's] financial support and needs for the rest of her life."⁵³ During the cohabitation, which lasted until May 1970, Marvin acquired significant amounts of property that included motion picture rights worth more than \$1 million.⁵⁴ The cohabitation ended when Marvin made Triola leave the residence in May 1970 after about a year and a half of financially supporting her.⁵⁵ Marvin was married during much of his cohabitation with Triola, and his final divorce decree from Betty Marvin was not filed until January 1967.⁵⁶ Triola sought declaratory relief to ascertain her contractual and property rights, and sought a constructive trust over half of the property the couple acquired during the cohabitation.⁵⁷ Marvin claimed the agreement was unenforceable because their relationship was illicit, adulterous, and illegally promoted divorce. He also analogized between their agreement and a breached promise to marry, noting that the promises were basically the same in the two agreements and a breached promise to marry was not actionable.⁵⁸

⁵³ *Marvin*, 557 P.2d at 110. See also Brook, *supra* note 19, at 164 (disputing the contention that cohabiting partners have no duty to support one another financially).

⁵⁴ *Marvin*, 557 P.2d at 110.

⁵⁵ *Id.* Oral agreements, such as the one in *Marvin*, present particular problems. As one scholar points out:

Unfortunately, few cohabiting couples make such express contracts. Especially in states which limit the *Marvin* remedy to express agreements, this contract-law approach invites outright perjury concerning an oral understanding, or what might be called quasi-perjury, by which one of the cohabitants, after the breakup of the couple, 'recalls' a conversation about their agreeing to share their lives together which he or she after-the-fact contorts (perhaps even in good faith) into a community-property type pooling contract.

William A. Reppy, Jr., *Property and Support Rights of Unmarried Cohabitants: A Proposal for Creating a New Legal Status*, 44 LA. L. REV. 1677, 1687 (1984). After her relationship with Marvin ended, Triola began a cohabitation relationship with actor Dick Van Dyke that lasted until her death in 2009 at age seventy-five. Elaine Woo, *Lawsuit Against Well-Known Actor Made Palimony a Fact of Life*, WASH. POST, Nov. 1, 2009, at C8, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/10/31/AR2009103102007.html>. In 1983, Triola told the press that she had a written contract with Van Dyke to avoid further legal problems. *Id.*

⁵⁶ *Marvin*, 557 P.2d at 111.

⁵⁷ *Id.* at 110–11.

⁵⁸ *Id.* at 112–15. Specifically, Marvin claimed his agreement with Triola and the typical breached promise to marry each included implied promises of support and pooled resources. *Id.* Because an action based on a breached promise to marry was barred by section 43.5(d) of the Civil Code, an agreement (like Marvin and Triola's) that included the same implied promises, but did *not* include a promise to marry, should not be actionable either. *Id.* at 115–16. Marvin did not prevail on this line of reasoning, and the court noted that since the statute's enactment in 1939, no lawyer had ever invoked that line of reasoning. *Id.* at 116. Other courts have adopted the *Marvin* court's conclusion that promises between unmarried partners that are *independent* of a breach of promise to marry are enforceable. See *Miller v. Ratner*, 688 A.2d 976, 976 (Md. Ct. Spec. App. 1997); *Kozlowski v. Kozlowski*, 403 A.2d 902, 908 (N.J. 1979) (noting that "[w]e do no more than

The court rejected each of Marvin's claims and held that unmarried cohabitants could make and enforce contracts regarding earnings and property, although in this case, the court had found no agreement, express or otherwise, between Marvin and Triola.⁵⁹ The court ruled that generally, agreements "expressly and inseparably based upon an illicit consideration of sexual services" were invalid, while relationships like the one in *Marvin*, which merely "contemplated" a nonmarital relationship, were valid and severable.⁶⁰ Finally, the court rejected Cary's reliance on the Family Law Act of 1970, deciding instead that courts and not the legislature should sort out property claims among cohabitants: "provisions of the Family Law Act do not govern the distribution of property acquired during a nonmarital relationship . . . [which] remains subject solely to judicial decision."⁶¹

recognize that society's mores have changed, and that an agreement between adult parties living together is enforceable to the extent it is not based on a relationship proscribed by law, or on a promise to marry").

⁵⁹ *Marvin*, 557 P.2d at 116. Some sources suggest the *Marvin* decision reflected a newfound judicial tolerance of nontraditional family relationships, inasmuch as the decision declined to find the couple's agreement based upon illegal consideration. See HARV. LAW REVIEW ASS'N, *Property Rights Upon Termination of Unmarried Cohabitation: Marvin v. Marvin*, 90 HARV. L. REV. 1708, 1713-14 (1977).

⁶⁰ *Marvin*, 557 P.2d at 113-14. "Meretricious" has been defined several ways by California courts. The *Marvin* court used "nonmarital" and "meretricious" interchangeably throughout the decision. Other courts have found that "meretricious" simply means "of or relating to prostitution," while acknowledging that other states have widened the definition to mean "unmarried cohabitants." See *Zoppa v. Zoppa*, 103 Cal. Rptr. 2d 901, 905 (Cal. Ct. App. 2001). See also *supra* note 50.

⁶¹ *Marvin*, 557 P.2d at 106, 110. Significantly, the *Marvin* court here used the term "nonmarital relationship" rather than "cohabitation," possibly anticipating the questions about what qualified as "cohabitation." *Id.* In *Cochran v. Cochran*, Patricia Cochran (whose last name was changed to match with her boyfriend's) sued her boyfriend and sometimes live-in lover—the late, infamous attorney Johnnie Cochran—for breach of a *Marvin* agreement. *Cochran v. Cochran*, 106 Cal. Rptr. 2d 899, 900-01 (Cal. Ct. App. 2001). Mr. Cochran moved for summary judgment on Ms. Cochran's claim that he breached their *Marvin* agreement, arguing that he was not cohabiting with her when the agreement was made—the couple spent an average of two to four nights together per week. *Id.* at 902-05. In denying Mr. Cochran's motion, the court decided to

save for another day the issue whether consenting adults need cohabit [sic] at all in order to enter an enforceable agreement regarding their earnings and property. Assuming for discussion's sake that cohabitation is required, [the court] conclude[s] that the rationale of *Marvin* is satisfied in appropriate cases by a cohabitation arrangement that is less than full-time. Here, as so construed, there was sufficient evidence to raise a triable issue of fact on the cohabitation element.

Id. at 905.

III. SAME-SEX PARTNERS AND *MARVIN* AGREEMENTS

A. *Jones v. Daly* (1981) and *Whorton v. Dillingham* (1988)

The *Marvin* case set a contractual standard⁶² for heterosexual couples that same-sex couples soon began to test. Despite the courts' exclusive power to adjudicate *Marvin* agreements, California appellate courts did little to clarify the *Marvin* holding for same-sex couples.⁶³ In essence, courts have determined that same-sex cohabitation agreements are enforceable when they include agreements for services separate from the "cohabitation state."⁶⁴ However, courts have not fully defined which activities *are* or *are not* naturally part of the

⁶² Not every commentator looks favorably upon contractual relationships between intimate partners. JONATHAN GOLDBERG-HILLER, *THE LIMITS TO UNION: SAME-SEX MARRIAGE AND THE POLITICS OF CIVIL RIGHTS* 81 (2002) (stating that it "connotes a worldview in which the accretion of social obligation is dissolved in the intentional arrangements of the autonomous individual of the marketplace").

⁶³ See *Jones v. Daly*, 176 Cal. Rptr. 130, 130 (Cal. Ct. App. 1981); *Whorton v. Dillingham*, 248 Cal. Rptr. 405, 405 (Cal. Ct. App. 1988). While *Marvin* likened "meretricious" relationships to prostitution, other courts (like *Zoppa*) have defined "meretricious" relationships simply as those between unmarried, committed partners. See *supra* note 60; *Soltero v. Wimer*, 150 P.3d 552, 555 (Wash. 2007) (holding that "[a] 'meretricious relationship' is a stable, marital-like relationship where both parties cohabit with knowledge that a lawful marriage between them does not exist"). In *Gormley v. Robertson*, a Washington appellate court, in holding that the meretricious relationship doctrine was applicable to same-sex couples, noted that:

[A] same-sex relationship cannot be a meretricious relationship because such persons do not have a 'quasi-marital' relationship Because persons of the same sex cannot legally marry, they are 'not entitled to the rights and protections of a quasi-marriage, such as community property-like treatment But it is of no consequence to the cohabitating couple, same-sex or otherwise, whether they can legally marry. Indeed, one of the key elements of a meretricious relationship is knowledge by the partners that a lawful marriage between them does not exist. . . . [Although] the ability of same-sex couples to legally marry is for the legislature to decide, . . . the rule that courts must 'examine the [meretricious] relationship and the property accumulations and make a just and equitable disposition of the property' is a judicial, not a legislative, extension of the rights and protections of marriage to intimate, unmarried cohabitants.

Gormley v. Robertson, 83 P.3d 1042, 1045–46 (Wash. Ct. App. 2004). Delaware courts have used "meretricious" to refer to a married person cohabiting with an unmarried person. See, e.g., *Williamson v. Williamson*, 104 A.2d 463, 464–64 (Del. Super. Ct. 1954). Meanwhile, some courts seem unsure of how to classify unmarried same-sex cohabitants. For example, the Georgia Supreme Court has ruled that a "live-in lover" statute permitting modification of alimony does not apply to a same-sex lover. See *Van Dyck v. Van Dyck*, 425 S.E.2d 853, 854–55 (Ga. 1993). Similarly, an Alabama court found that while alimony can be terminated when a spouse is living with an opposite-sex partner, the termination clause does not apply to a same-sex lover. See *J.L.M. v. S.A.K.*, 18 So.3d 384, 388–89 (Ala. Civ. App. 2008).

⁶⁴ *Whorton*, 248 Cal. Rptr. at 409–10. Despite the court's careful explanation about compensable services, the court in *Chiba v. Greenwald*, 67 Cal. Rptr. 3d 86, 92 (Cal. Ct. App. 2007) suggested that homemaking services were not the operative factor in *Whorton*, which suggests that the *Jones* agreement failed because of the explicit reference to serving as a "lover." See *infra* note 69. See also *Jones*, 176 Cal. Rptr. at 130–31.

cohabitation state, thus leaving open the question which services make a cohabitation contract enforceable. For example, in *Jones v. Daly*, one same-sex partner sued for declaratory relief entitling him to half of his deceased partner's estate.⁶⁵ Three months into their relationship, the pair made an oral agreement that they would combine their earnings and efforts, share any and all property, "hold themselves out to the public at large as cohabiting mates, and [plaintiff] would render his services as a lover, companion, homemaker, traveling companion, housekeeper and cook."⁶⁶ In return, the decedent agreed to support the plaintiff financially for the rest of the plaintiff's life, an arrangement that lasted until the decedent's death approximately two years later.⁶⁷

The California appellate court dismissed the plaintiff's action for declaratory relief and sustained the defendant's demurrer to the complaint, finding that the cohabitation agreement was inescapably based upon the couple's sexual relationship.⁶⁸

The court noted that "[n]either the property sharing nor the support provision of the agreement rests upon plaintiff's acting

⁶⁵ *Jones*, 176 Cal. Rptr. at 130–31.

⁶⁶ *Id.* at 131–33 (noting that sexual services were an inseparable part of the consideration for the contract).

⁶⁷ *Id.* at 131.

⁶⁸ *Id.* at 134. See, e.g., Jean Braucher, *Cowboy Contracts: The Arizona Supreme Court's Grand Tradition of Transactional Fairness*, 50 ARIZ. L. REV. 191, 205 n.89 (2008) (noting that the *Jones* agreement foundered because it explicitly referred to the same-sex couple as "lovers"); Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997, 1103 n.473 (1985) (indicating that the *Jones* court's conclusion that sexual services could not be severed from the other services under the agreement was essentially the same as the conclusion in *Marvin*, despite the court's attempt to distinguish *Jones* from *Marvin*). Looking at the *Marvin* decision in terms of *Jones*, it is unclear what made Triola's services severable where *Jones*' were not, other than the gender of the parties involved. One possibility is that homosexual relationships are, fair or not, considered to be based primarily on sex. In *Lawrence v. Texas*, a landmark 2003 case that struck down Texas' anti-sodomy law, Justice O'Connor suggested that Texas' law was based on the presumption that same-sex intimate relationships were irreducibly based on sex:

[B]ecause Texas so rarely enforces its sodomy law as applied to private, consensual acts, the law serves more as a statement of dislike and disapproval against homosexuals than as a tool to stop criminal behavior Texas argues, however, that the sodomy law does not discriminate against homosexual persons. Instead, the State maintains that the law discriminates only against homosexual conduct. While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is *closely correlated with being homosexual*. Under such circumstances, Texas' sodomy law is targeted at more than conduct. It is instead directed toward *gay persons as a class*.

Lawrence v. Texas, 539 U.S. 558, 583 (2003) (emphasis added). Justice Scalia's dissent in *Lawrence*, inasmuch as it goes right to the sexual question, echoes the viewpoint Justice O'Connor criticized. His dissent frames *Lawrence* in terms of a "fundamental right" to engage in homosexual sodomy, as noted in the *Bowers v. Hardwick* decision some seventeen years prior. *Lawrence*, 539 U.S. at 586 (Scalia, J., dissenting).

as [decendent's] traveling companion, housekeeper or cook as distinguished from acting as his lover. The latter service forms an inseparable part of the consideration for the agreement and renders it unenforceable in its entirety."⁶⁹

Seven years later, the California Court of Appeal found that a cohabitation agreement was enforceable when the services in question included bodyguard, business partner, chauffeur, and secretary.⁷⁰ The court reasoned that those services were separate from the sexual relationship and thus comprised separate consideration for the agreement.⁷¹ The court reached that result although the sexual services were an *express* part of a same-sex couple's cohabitation agreement, unlike the agreements in *Marvin* and *Jones*.⁷² Distinguishing its holding from the *Jones* decision, the *Whorton* court found that "*Jones* is factually different in that the complaining party did not allege contracting to provide services apart from those normally incident to the state of cohabitation itself."⁷³ In contrast, the *Whorton* couple had an agreement that included for-pay and gratuitous services, where they were severable and able to serve as consideration for their agreement.⁷⁴ Basically, California appellate courts have

⁶⁹ *Jones*, 176 Cal. Rptr. at 134. Nonmarital agreements that "facilitate adultery" were considered so immoral that nothing, even a written agreement, could make them enforceable. See *McCall v. Frampton*, 438 N.Y.S.2d 11, 13 (N.Y. App. Div. 1981). To mitigate the illegal or immoral nature of the cohabitation contract, an agreement had to include non-domestic services that could form an independent basis for the contract, allowing the non-sexual services to be severed from the sexual ones. See *id.* at 13 (finding that "where the [cohabitation] agreement consists in part of an unlawful objective and in part of lawful objectives, under certain circumstances the illegality may be severed and the legal components enforced"). Despite the *Marvin* court's assertion that domestic services comprised lawful and adequate consideration, the *Jones* plaintiff failed to recover. *Jones*, 176 Cal. Rptr. at 134.

⁷⁰ *Whorton v. Dillingham*, 248 Cal. Rptr. 405, 409 (Cal. Ct. App. 1988).

⁷¹ *Id.* at 408–09.

⁷² *Id.* at 408.

⁷³ *Id.* at 410. The court here may be referencing the "lovers" issue raised by Braucher. See *supra* note 68. Denying relief to the *Jones* plaintiff for, essentially, cohabitating is curious because he was as close to married as he could get in the days before domestic partnerships. As one commentator said of the decision, "The *Jones* holding makes even less sense than holdings declining enforcement in a heterosexual context, since in the context of homosexual cohabitation no option to marry exists." Marjorie Maguire Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CAL. L. REV. 204, 286 n.305 (1982).

⁷⁴ The *Whorton* court explained that the chauffeur and business partner duties were "significantly different than those household duties normally attendant to nonbusiness cohabitation and are those for which monetary compensation ordinarily would be anticipated." *Whorton*, 248 Cal. Rptr. at 410. But, over time, California courts changed their stance on homemaking services functioning as consideration for a *Marvin* agreement. Nearly twenty years after *Whorton*, the California Court of Appeal said of contracts that centered on one party's homemaking services:

[A] 'promise to perform homemaking services is, of course, a lawful and adequate consideration for a contract . . . otherwise those engaged in domestic employment could not sue for their wages' *Marvin* expressly rejected the

determined that same-sex cohabitation agreements are enforceable when they include “for-pay” services, but it is unclear which services are for-pay and which are not, and whether domestic duties should qualify as paid services, or are simply an expected part of a sexual relationship.

B. Same-Sex Cohabitants and the Severability Problem

The enforceability of cohabitation agreements is particularly important for California’s same-sex couples, who have a major stake in such agreements,⁷⁵ because same-sex couples cannot legally marry in California.⁷⁶ Shortly after the *Marvin* decision, the California Legislature drew a sharp distinction between heterosexual and same-sex couples when it amended section 300 of the California Family Code to exclude same-sex partners from entering a lawful marriage.⁷⁷ That distinction was reinforced in 2000 when California voters approved Proposition 22, which likewise restricted California to recognizing only marriages between a man and a woman.⁷⁸ Same-sex couples had gained

argument that the partner seeking to enforce the contract must have contributed either property or services additional to ordinary homemaking services.

Chiba v. Greenwald, 67 Cal. Rptr. 3d 86, 92 (Cal. Ct. App. 2007) (internal citation omitted).

⁷⁵ At least one critic argues that same-sex marriage might restrict same-sex couples’ freedom rather than enhance it. See David L. Chambers, *What If?: The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 MICH. L. REV. 447, 487 (1996). See also Janet Halley, *Recognition, Rights, Regulation, Normalisation: Rhetorics of Justification in the Same-Sex Marriage Debate*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 97, 107 (Robert Wintemute et al. eds., 2001) (interpreting Chambers’ ideas to mean “the danger to gay liberty [from marriage] is mitigated by the increasing availability of antenuptial agreements and other contractual inroads on marriage as a rigidly state-defined status”).

⁷⁶ The California Family Code states that “only marriage between a man and a woman is valid or recognized in California.” CAL. FAM. CODE § 308.5 (Deering 2010). However, same-sex couples can register as domestic partners, a status that confers many of the same rights and privileges as those of marriage. CAL. FAM. CODE § 297.5 (Deering 2010).

⁷⁷ Lockyer v. City of San Francisco, 95 P.3d 459, 468 n.11 (Cal. 2004) (finding that “the language in Family Code section 300 specifying that marriage is a relation ‘between a man and a woman’ was adopted by the Legislature in 1977, when the provision was set forth in former section 4100 of the Civil Code The legislative history of the measure makes its objective clear”).

⁷⁸ Proposition 22, passed in 2000 but struck down by the California Supreme Court in May 2008, added section 308.5 to the California Family Code, which defined legal marriage as only between a man and a woman. CAL. FAM. CODE § 308.5 (Deering 2010). See also Bird, *supra* note 25, at 203. Some scholars have argued that section 308.5 merely clarified which out-of-state marriages California would recognize, and thereby did not affect the possibility of same-sex marriage *within* California, since the section was part of section 308 of the California Family Code, “validity of foreign marriages.” See Enrique A. Monagas, *California’s Assembly Bill 205, the Domestic Partner Rights and Responsibilities Act of 2003: Is Domestic Partner Legislation Compromising the Campaign for Marriage Equality?*, 17 HASTINGS WOMEN’S L.J. 39, 46–47 (2006).

only a limited form of recognition in 1999, when the California Legislature enabled same-sex couples to register as domestic partners.⁷⁹ While the rights domestic partners enjoy echo some of the protections that traditional married couples enjoy,⁸⁰ some note, accurately, that domestic partnerships are not the functional equivalent of marriage for same-sex couples.⁸¹ Others have argued that the registration requirements for domestic partnerships will invalidate already-existing *Marvin* agreements.⁸² And, whether a same-sex couple has opted for their lone “marriage” option may well determine whether one partner can enforce a cohabitation agreement in today’s post-Proposition 8 political landscape.⁸³

⁷⁹ Section 297 of the California Family Code defines domestic partners as “two adults who have chosen to share one another’s lives in an intimate and committed relationship of mutual caring.” CAL. FAM. CODE § 297 (Deering 2010). To qualify, the partners must file a Declaration of Domestic Partnership with the Secretary of State, and must meet the following requirements: 1) Each partner is at least eighteen years of age; 2) they share a common residence; 3) neither partner is married to or involved in an active domestic partnership with anyone else; 4) the partners are not related by blood in a way that would disallow them from marrying otherwise; and 5) they are of the same sex or one or both partners is over the age of sixty-two. *Id.*

⁸⁰ See CAL. FAM. CODE §§ 297, 297.5 (Deering 2010).

⁸¹ See *Knight v. Superior Court*, 26 Cal. Rptr. 3d 687, 690 (Cal. Ct. App. 2005) (holding that by creating domestic partnerships, the Legislature had not created same-sex marriage by a different name thereby rejecting the argument that domestic partnership is the functional equivalent of marriage). In fact, domestic partners do not receive a number of marital rights and benefits. For example, they may not file federal joint tax returns and they are not entitled to numerous benefits provided to married couples by the federal government, such as marital benefits relating to Social Security, Medicare, federal housing, food stamps, veterans’ benefits, military benefits, and federal employment benefit laws. See generally U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-04-353R, DEFENSE OF MARRIAGE ACT: UPDATE TO PRIOR REPORT (2004), available at <http://www.gao.gov/new.items/d04353r.pdf>. The *Knight* court went on to highlight other differences between domestic partnerships and traditional marriage: minors may marry with parental consent but cannot become domestic partners, heterosexual prisoners may marry but their homosexual counterparts may not become domestic partners, domestic partnerships are much more easily dissolved than marriages, and, unlike traditional marriage, domestic partnerships may not be recognized by other states, nor may other states recognize domestic partners’ rights to visit their hospitalized partner and to make medical decisions for him or her. The court concluded, “The numerous dissimilarities between the two types of unions disclose that the Legislature has not created a ‘same-sex marriage’ under the guise of another name” (citations omitted). *Id.* See also Grace Ganz Blumberg, *Legal Recognition of Same-Sex Conjugal Relationships: The 2003 California Domestic Partner Rights and Responsibilities Act in Comparative Civil Rights and Family Law Perspective*, 51 UCLA L. REV. 1555, 1566 (2004) (“[D]omestic partnership legislation may be surer and less socially divisive than constitutionally compelled same-sex marriage or civil union . . . [but] the choice is not society’s or the state’s to make. Only gay men and lesbians can choose to forgo ultimate rights in favor of a surer, but lesser, alternative.”) (emphasis added).

⁸² See Monagas, *supra* note 78, at 50 (explaining that Assembly Bill 205 could void same-sex couples’ cohabitation agreements once those couples seek to register with the state as domestic partners).

⁸³ See *infra* Part IV.C and note 113. Some commentators noted in the wake of *Marvin* that marriage as a concept was in flux, and courts were backing away from

Historically, gender has not impacted couples' abilities to enforce cohabitation agreements, as courts have not considered the gender of the parties when determining the enforceability of a cohabitation agreement.⁸⁴ Rather, the relative severability of the sexual relationship—the extent to which the sexual relationship can be considered separately from the other bases for the agreement—has been determinative in the enforceability of cohabitation agreements, a point emphasized by the *Marvin* court.⁸⁵ The underlying assumption in *Marvin* and its progeny, which includes *Jones* and *Whorton*, is that sexual relations are an implicit aspect of an intimate relationship, and sex is one of the things an intimate partner is expected to provide for his or her partner.⁸⁶ Accordingly, an agreement where one partner's sexual performance makes up most or all of that partner's consideration under the contract would be an illegal contract and void as against public policy.⁸⁷ However, if a court determines that the sexual relationship is tangential to the agreement, then the agreement can be upheld.⁸⁸ A California court confronted with a *Marvin*-type agreement that implicitly or explicitly includes sexual relations has the *option* to sever the sexual relationship—which represents illicit consideration—from the other services in the contract, and uphold the rest.⁸⁹ In deciding

defining it. See Homer H. Clark, Jr., *The New Marriage*, 12 WILLAMETTE L. J. 441, 442 (1976).

⁸⁴ However, the *Jones* decision casts some doubt upon this conclusion. See *supra* note 66.

⁸⁵ *Marvin v. Marvin*, 557 P.2d 106, 114 (Cal. 1976).

⁸⁶ *Id.* But see *Hall v. Duster*, 727 So. 2d 834, 837 (Ala. Civ. App. 1999) (holding that “[s]exual relations between the parties is not an indispensable element of cohabitation”).

⁸⁷ Just as the *Marvin* court's rationale has been questioned in light of *Jones*, so too has the *Marvin* court's view of the illegality of sexual services in a cohabitation agreement. See William Van Alstyne, *The Unbearable Lightness of Marriage in the Abortion Decisions of the Supreme Court: Altered States in Constitutional Law*, 18 WM. & MARY BILL RTS. J. 61, 72 n.53 (2009) (arguing that “[cohabitation] agreements were formerly void on public policy grounds (akin to contracts of prostitution or meretricious criminal cohabitation). But nonmarital cohabitation is currently not merely lawful in most jurisdictions, rather, it is on its way to becoming a protected *civil* right”).

⁸⁸ California courts have held for years that cohabiting adults may have an ongoing sexual relationship, even a meretricious one, at the time they make a property agreement and still make an enforceable contract. See *Bridges v. Bridges*, 270 P.2d 69, 71 (Cal. Ct. App. 1954). In *Alderson v. Alderson*, the court held that a relationship based on “many . . . things,” including but not limited to sex, was *not* a relationship expressly based on meretricious considerations. 225 Cal. Rptr 610, 616 (Cal. Ct. App. 1986). The petitioner's consideration for the contract was being respondent's wife and doing “whatever a wife does,” not just sex. *Id.*

⁸⁹ See *Yoo v. Robi*, 24 Cal. Rptr. 3d 740, 751 (Cal. Ct. App. 2005) (reiterating that “although Civil Code section 1599 authorizes a court to sever the illegal object of a contract from the legal[,] it does not require the court to do so”). See also *Armendariz v. Found. Health Psychcare Servs.*, 6 P.3d 669, 696 (Cal. 2000) (“[T]he doctrine of severance attempts to conserve a contractual relationship if to do so would not be condoning an illegal scheme [where t]he overarching inquiry is whether ‘the interests of

whether to enforce a contract with illegal and legal elements, the court must be guided by equitable considerations.⁹⁰ In sum, California courts have held that the enforceability of a cohabitation agreement, for same-sex or opposite-sex couples alike, depends upon the degree to which the agreement contemplates one party furnishing sexual services as consideration; the less this is so, the more enforceable the agreement becomes.⁹¹ This gender-neutral view has led some commentators to call California's enforcement of cohabitation agreements a "pure contract" approach.⁹²

IV. WHAT LIES AHEAD: THE CHANGING FACE OF THE *MARVIN* AGREEMENT

A. California Courts May Treat Same-Sex Agreements Differently Post-Proposition 8

Although California courts have been gender-disinterested, the trend could change in light of Proposition 8, despite the courts' attempt to claim otherwise.⁹³ A "*Marvin* agreement," as used here, is a gender-irrelevant term.⁹⁴ However, prior to Proposition 8, California courts upheld many of the *Marvin*-type cohabitation agreements under a public-policy regime that, while defining the allowable limits of same-sex relationships, had done so in a way that provoked much less controversy than the

justice . . . would be furthered' by severance.") (citation omitted). Cf. *Marathon Entm't v. Blasi*, 174 P.3d 741, 753 (Cal. 2008) (echoing *Yoo* that courts have the power but not the duty to sever illegal aspects of a contract).

⁹⁰ See *Yoo*, 24 Cal. Rptr. 3d at 751. See also *Chiba v. Greenwald*, 67 Cal. Rptr. 3d 86, 93 (Cal. Ct. App. 2007) (holding that despite equitable considerations, petitioner did not deserve to have the legal and illegal aspects of her *Marvin* agreement severed because "[e]quity does not demand acceptance of the most favorable set of multiple conflicting versions of the facts set forth by a party in her pleadings").

⁹¹ See *Marvin v. Marvin*, 557 P.2d 106, 114–15 (Cal. 1976).

⁹² *Hewitt v. Hewitt*, 394 N.E.2d 1204, 1207 (Ill. 1979).

⁹³ See *Strauss v. Horton*, 207 P.3d 48, 76 (Cal. 2009) (finding that "Proposition 8 reasonably must be interpreted in a limited fashion as eliminating only the right of same-sex couples to equal access to the designation of marriage, and as not otherwise affecting the constitutional right of those couples to establish an officially recognized family relationship").

⁹⁴ Notably, the *Marvin* decision uses gender-neutral language throughout, referring to "nonmarital partners" rather than "man" and "woman," which has led some to conclude the court felt *Marvin* applied equally to same-sex couples. See Sharmila Roy Grossman, Comment, *The Illusory Rights of Marvin v. Marvin for the Same-Sex Couple Versus the Preferable Canadian Alternative—M. v. H.*, 38 CAL. W. L. REV. 547, 550 (2002); Rebecca L. Melton, Note, *Legal Rights of Unmarried Heterosexual and Homosexual Couples and Evolving Definitions of "Family,"* 29 J. FAM. L. 497, 512 (1990–1991). More likely, the *Marvin* court's language reflected a desire to erase gender from its decision rather than surreptitiously beckon to same-sex couples, considering the pure contractual approach of California courts described in *Hewitt*.

Proposition 8 debate that polarized the California community.⁹⁵ It is important to realize that, while California has moved away from bringing gender to its discussion of cohabitation agreements,⁹⁶ or other rights that have been granted to homosexual partners,⁹⁷ the state's courts have also not faced a spate of *Marvin* agreements under the current public policy that the marriage designation is reserved solely for a man and a woman.⁹⁸ California courts have already reflected in their decisions the electorate's will that same-sex relationships cannot enjoy traditional marriage.⁹⁹ Until and unless the Legislature clarifies same-sex couples' cohabiting rights, California courts will probably have to shape the contours of cohabitants' property rights, in terms of what the Legislature and voters have already decided.¹⁰⁰

⁹⁵ See, e.g., Jesse McKinley & Laurie Goodstein, *Bans in 3 States on Gay Marriage*, N.Y. TIMES, Nov. 6, 2008, at A1, available at <http://www.nytimes.com/2008/11/06/us/politics/06marriage.html>. Some have argued that California's Proposition 8 electorate was a unique population, where African American voters voted for Proposition 8's ban on same-sex marriage in much greater numbers than Latino voters. See Darren Lenard Hutchinson, *Sexual Politics and Social Change*, 41 CONN. L. REV. 1523, 1535 (2009) (estimating that seventy percent of African American voters and fifty-three percent of Latino voters supported Proposition 8's ban on same-sex marriage). The measure passed by a fifty-two percent to forty-eight percent margin overall and a majority of white voters did not vote for it. See Joe Von Kanel & Hal Quinley, *Exit Polls: Gay Marriage in CA*, CNNPOLITICS (Nov. 5, 2008, 12:25 AM), <http://politicalticker.blogs.cnn.com/2008/11/05/exit-polls-gay-marriage-in-california/>. Others have argued that black voters did not cause Proposition 8 to pass, and have derided the so-called "scapegoating" of blacks stemming from the vote. See, e.g., Jennifer Holladay & Catherine Smith, *A Cautionary Tale: The Obama Coalition, Anti-Subordination Principles and Proposition 8*, 86 DEN. U. L. REV. 819, 828 (2009).

⁹⁶ See *Marvin*, 557 P.2d at 116. See also Grossman, *supra* note 94.

⁹⁷ See *Strauss*, 207 P.3d 48 at 78 (holding that "although Proposition 8 changes the state Constitution . . . in all other respects same-sex couples retain the same substantive protections embodied in the state constitutional rights of privacy and due process as those accorded to opposite-sex couples and the same broad protections under the state equal protection clause").

⁹⁸ CAL. FAM. CODE § 308.5 (Deering 2010). See also *Strauss*, 207 P.3d at 75.

⁹⁹ See *Strauss*, 207 P.3d at 75. The *Strauss* decision was careful to note that Proposition 8 simply reserved the designation "marriage" for unions between one man and one woman, and did not affect "the constitutional right to establish an officially recognized family relationship with the person of one's choice." *Id.* at 74.

¹⁰⁰ For commentary on the courts' role as interpreters, not progenitors, of policy, see *Vierra v. Workers' Comp. Appeals Bd.* 65 Cal. Rptr. 3d 423, 430 (Cal. Ct. App. 2007) (holding that the "[courts'] function is not to make policy, but to interpret the law as it is written"). See also *Cal. Teachers' Ass'n v. Governing Bd. of Rialto Unified Sch. Dist.*, 927 P.2d 1175, 1177 (Cal. 1997) ("[T]he judicial role in a democratic society is fundamentally to interpret laws, not to write them. The latter power belongs primarily to the people and the political branches of government.") (internal citations omitted).

B. *Hewitt v. Hewitt* and the Role of Public Policy in *Marvin* Agreements

Those courts will someday have to answer a question unfathomable in 1976: should same-sex couples even *have the right* to make enforceable *Marvin* agreements? That the answer is probably “yes” obscures the real point, which is that the question can even be posed. That question was not in play in 1981 for *Jones*,¹⁰¹ nor in 1988 for *Whorton*,¹⁰² but it is in play now because of California’s newly-reiterated public policy defining the limits of same-sex relationships.¹⁰³ While it is difficult to predict the success of a same-sex *Marvin* agreement in the wake of Proposition 8, California courts have already made clear that opposite-sex cohabitation relationships enjoy limited recognition rights.¹⁰⁴ It is easy to assume a California court, confronted with a same-sex *Marvin* agreement at some future date, would enforce the agreement by the same guidelines dictated by *Jones* or *Whorton*, as vague as those might be.¹⁰⁵ Yet, the playing field is different now than it was then, insofar as California voters decisively enacted their own public policy regarding same-sex relationships through the Proposition 8 campaign and ballot measure. Consequently, it is perhaps too easy to assume California courts will tune out public policy in making future decisions about same-sex couples—up to and including enforcement of *Marvin* agreements.¹⁰⁶

To ascertain how California courts might treat a same-sex *Marvin* case after Proposition 8, it is instructive to see how other states treat *Marvin* agreements, considering that same-sex marriage ballot initiatives have appeared on thirty-one state

¹⁰¹ See *supra* note 8 and accompanying text.

¹⁰² See *supra* note 8 and accompanying text.

¹⁰³ Proposition 8 was called the “Marriage Protection Act,” which relates to the similar Illinois legislation defining the rights and responsibilities of married partners at issue in *Hewitt*. See *infra* note 106.

¹⁰⁴ See *Elden v. Sheldon*, 758 P.2d 582, 586 (Cal. 1988). In *Elden*, an unmarried cohabitant sued to recover damages resulting from the death of his partner in a car accident, arguing their committed cohabitation relationship resembled a marriage. *Id.* at 582–83. The court declined to equate their cohabitation with a marriage, noting that “the state has a strong interest in the marriage relationship; to the extent unmarried cohabitants are granted the same rights as married persons, the state’s interest in promoting marriage is inhibited.” *Id.* at 586.

¹⁰⁵ See *supra* note 74.

¹⁰⁶ In 1979, the Illinois Supreme Court held in *Hewitt v. Hewitt* that an opposite-sex cohabitation agreement was invalid. What was notable about the decision was the court’s acknowledgement that public policy had played a role in its decision, inasmuch as strengthening marriage was the purpose of the then-recently enacted Illinois Marriage and Dissolution of Marriage Act. See *Hewitt v. Hewitt*, 394 N.E.2d 1204, 1209 (Ill. 1979).

ballots, including California's, and lost each time.¹⁰⁷ The closest analogy to California's post-Proposition 8 public policy is Illinois, whose Supreme Court decided a cohabitation case three years after *Marvin* that continues to affect cohabiting couples there regardless of gender.¹⁰⁸ In *Hewitt v. Hewitt*, the Illinois Supreme Court held that the cohabitation agreement in question was unenforceable because agreements with sexual relations (of any level, presumably) as an explicit consideration were invalid under Illinois law.¹⁰⁹ The court also held that the agreement violated public policy; to wit, enforcing the agreement would mean endorsing a nonmarital relationship at odds with the state's public policy promoting marriage.¹¹⁰ The first part of the holding is typical of other states' decisions, including California's, although in California sexual relations can be part of the agreement as long as they are not an inseparable aspect.¹¹¹ The second part of the holding is significant, not *because* the Illinois court disfavored the agreement but *why*: the court cited public policy grounds for declining to enforce a contract between two consenting adults, thereby augmenting (if not outright replacing) contract law with public policy.¹¹²

¹⁰⁷ Glenn Adams & David Crary, *Maine Voters Reject Same-Sex Marriage Law*, CNSNEWS.COM (Nov. 4, 2009), <http://www.cnsnews.com/node/56583>. Same-sex marriage initiatives have appeared on thirty-one state ballots, with all thirty-one states voting to ban or otherwise restrict same-sex marriage. The states include: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Florida, Georgia, Hawaii, Idaho, Kansas, Kentucky, Louisiana, Maine, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia and Wisconsin. *State Policies on Same-Sex Marriage*, PEW FORUM ON RELIGION & PUB. LIFE, <http://pewforum.org/Gay-Marriage-and-Homosexuality/State-Policies-on-Same-Sex-Marriage.aspx> (last visited Nov. 8, 2010). One factor in Proposition 8's success in California was the relative ease with which the California Constitution could be amended. The California Constitution is far easier to amend than its federal counterpart, while the state constitutions of Connecticut and Iowa—two states that offer same-sex marriage—cannot be amended through the initiative process. *Strauss v. Horton*, 207 P.3d 48, 64 (Cal. 2009).

¹⁰⁸ *Hewitt*, 394 N.E.2d at 1208. It bears noting that *Hewitt* involved an opposite-sex relationship, but the general policy points are instructive. "It is generally agreed that *Hewitt* in no small measure was decided in light of, and perhaps in response to, *Marvin* . . . nearly all reported cases from other jurisdictions since 1979 fall somewhere in between, and most cite, as persuasive authority, one or the other." Richard A. Wilson, *The State of the Law of Protecting and Securing the Rights of Same-Sex Partners in Illinois Without Benefit of Statutory Rights Accorded Heterosexual Couples*, 38 LOY. U. CHI. L.J. 323, 323 n.62 (2007).

¹⁰⁹ *Hewitt*, 394 N.E.2d at 1208.

¹¹⁰ *Id.* See also Wilson, *supra* note 108, at 337, 335 (arguing that the pro-marriage public policy that dictated *Hewitt* also continues to foreclose same-sex couples' *Marvin* rights, although Wilson notes that Illinois does not offer same-sex couples a domestic partnership option).

¹¹¹ *Yoo v. Robi*, 24 Cal. Rptr. 3d 740, 751 (Cal. Ct. App. 2005); *Chiba v. Greenwald*, 67 Cal. Rptr. 3d 86, 93 (Cal. Ct. App. 2007).

¹¹² *Hewitt*, 394 N.E.2d at 1209.

Since *Hewitt* is not a gender-based decision, its rationale could be adopted by a state that has a strong public policy against unmarried, unregistered¹¹³ same-sex couples entering into a marriage-like relationship—a state like California.¹¹⁴ To return to the question that started this section, then, should same-sex couples even have their *Marvin* agreements enforced, and if so, how? Clearly, if *Marvin* agreements are to be enforced at all, they must be available to, and subject to the same requirements for, same-sex couples as well as their opposite-sex counterparts, or else equal protection issues will arise.¹¹⁵ More difficult is deciding how to enforce *Marvin* rights to ensure consistency and fairness. The answer lies in legislation, federal or state, with the caveat that state legislation in this regard is susceptible to repeal.¹¹⁶

¹¹³ Here, “unregistered” means same-sex couples that have opted not to become domestic partners. The logic is that same-sex couples that have not taken advantage of the most “marriage-like” relationship still sanctioned by the state may be at the mercy of a pro-marriage (or failing that, pro-domestic partner) public policy similar to *Hewitt*. An unmarried, unregistered same-sex partner, by asking a court to enforce a nonmarital cohabitation contract, is asking the court on some level to recognize and protect that partner’s interest in a type of relationship contrary to public policy.

¹¹⁴ See Wilson, *supra* note 108, at 339–40 (arguing that the *Hewitt* could be applied to a same-sex cohabitation agreement). The author noted:

Although the holding in *Hewitt* is in fact cognizant of the gender of the parties and the availability of marriage to them, it depends upon neither . . . Illinois courts would not enforce what in effect are private contracts for marriage-like relationships . . . [b]ecause [*Hewitt*’s] holding is not dependent upon the gender of the parties being different (or “opposite sex”), its applicability is likely not so restricted either. Such contracts between unmarried, same-sex couples likely cannot withstand a challenge raising *Hewitt* as a defense.

Wilson, *supra* note 108, at 339–40. California’s same-sex cohabitation agreements are vulnerable to Wilson’s warning about *Hewitt* because Proposition 8 parallels the comparable Illinois legislation in making a strong statement about public policy. See *Maine Voters Repeal Gay-Marriage Law*, MSNBC.COM (Nov. 4, 2009, 8:58 AM), http://www.msnbc.msn.com/id/33609492/ns/politics-more_politics/. See also *State Policies on Same-Sex Marriage*, *supra* note 107. Subsequently, other states’ voters have approved ballot measures banning same-sex marriage. For example, Maine’s vote to repeal same-sex marriage was surprising not only because Maine is a relatively progressive state, but also because the November 3, 2009 vote marks the first time an electorate has rejected a same-sex-marriage measure enacted by a legislature. All of the previously-rejected same-sex marriage initiatives had been put forth by courts. *Strauss v. Horton*, 207 P.3d 48, 63–64 (Cal. 2009). When even legislative pronouncements can be whisked away by voters, California’s “pure contractual” approach may only be a ballot measure away from extinction.

¹¹⁵ Inasmuch as requiring any additional requirements for same-sex couples, *Marvin* agreements would impose special hardships not experienced by similarly-situated opposite-sex partners, thereby triggering equal protection issues. See *Romer v. Evans*, 517 U.S. 620, 633 (1996).

¹¹⁶ See *Hewitt*, 394 N.E.2d, at 1209; Wilson, *supra* note 108, at 336.

C. The Need for Legislative Recognition of Same-Sex Cohabiting Couples

If same-sex cohabiting partners wish to have their *Marvin* agreements consistently enforced, free from the vagaries of state electorates and courts and without the public-policy sword of Damocles¹¹⁷ hanging over their heads, they might pin their hopes on federal legislation.¹¹⁸ However, two obstacles exist that, if taken together, may render the option of federal intervention moot. First, and most significantly, if Congress has the authority to regulate cohabitation agreements, then the issue becomes one of federal law, not state law. However, *Marvin* agreements are essentially contracts, a subject that is typically the domain of state courts.¹¹⁹ In this regard, hoping for federal intervention is something of a Catch-22.¹²⁰ Second, if marriage is solely a state question, many states (like California) do not support same-sex relationships, thus either disallow same-sex marriages or fail to offer domestic partnerships, or both.¹²¹ It is possible that states that offer neither same-sex marriage nor domestic partnerships will nevertheless enforce *Marvin* agreements; however, as *Hewitt* illustrates, public policy lurks in the background of nonmarital

¹¹⁷ Defined as “an impending disaster,” this idiom (first recorded in 1747) refers to the legend of Damocles, a courtier to King Dionysius. The king, tired of Damocles’ incessant flattery, seated Damocles in a chair over which hung a sword suspended by a single hair to impress upon Damocles the precariousness of his position. THE AMERICAN HERITAGE DICTIONARY OF IDIOMS 629 (Christine Ammer ed., 1997).

¹¹⁸ When states’ voters are 31-for-31 in rejecting same-sex marriage initiatives, and Maine voters make history by overturning a legislatively-produced same-sex marriage law, it seems that federal intervention is not only warranted, but necessary. *But see infra* note 126. Such federal recognition would take the form of a statute, but it would have to clear several hurdles that are discussed in Part V.B.

¹¹⁹ Federal courts acquire jurisdiction in cases that present a federal question under the Constitution or federal law, or cases where the parties are from different states and more than \$75,000 is at issue. See 28 U.S.C. §§ 1331, 1332 (2006). By this definition, most cohabitation agreements will be relegated to state court.

¹²⁰ The term “Catch-22,” first coined in Joseph Heller’s 1961 novel of the same name, is defined as “[a] situation in which a desired outcome or solution is impossible to attain because of a set of inherently illogical rules or conditions.” THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 292–93 (4th ed. 2000). See also THE AMERICAN HERITAGE DICTIONARY OF IDIOMS, *supra* note 117, at 108.

¹²¹ As of November 5, 2009, thirty-five states offered neither same-sex marriage nor domestic partnerships. Same-sex marriage is currently available in Connecticut, Iowa, Massachusetts, Maine, Vermont, and most recently New Hampshire, where same-sex marriage has been legal since the beginning of 2010. Christine Vestal, *Gay Marriage Legal in Six States*, STATELINE.ORG (June 4, 2009, 4:40 PM), <http://www.stateline.org/live/details/story?contentId=347390>. Domestic partnerships (also called civil unions) are available in some form in California, Colorado, Hawaii, Maine, Maryland, Nevada, New Jersey, Oregon, Washington and Wisconsin, plus the District of Columbia. FREEDOMTOMARRY, <http://www.freedomtomarry.org/states.php> (last visited Nov. 10, 2010).

relationship questions.¹²² Third, and most troubling, federal legislation has effectively foreclosed meaningful recognition of same-sex cohabitating relationships. It not only defines marriage as a union between a man and a woman, but also allows states to refuse to recognize a “marriage” performed in any other state, thereby ensuring that “marriage” will mean whatever the enforcing state wants it to mean.¹²³ Thus, in many states, unmarried couples must overcome the presumption that their relationships are unworthy of protection because public policy favors a marriage relationship—the same point made in *Hewitt*.¹²⁴

Despite the Maine debacle,¹²⁵ state legislation is a more promising option for same-sex cohabiting couples, particularly in a state like California that already recognizes same-sex couples through domestic partnerships.¹²⁶ The first step in devising proposed legislation is to understand the contours of the issue; in California, the *Jones* case showed that same-sex cohabiting

¹²² Public policy does not always weigh in on *Marvin* decisions, perhaps because such agreements—particularly among same-sex couples—are comparatively rare. But *Hewitt* is an example of how a court can look at a *Marvin* decision through a public-policy lens, without promising results. States vary widely in their treatment of cohabitation contracts. A sampling shows that Georgia, Illinois and Louisiana hold such agreements unenforceable due to their immoral nature. In contrast, Kansas, Washington and West Virginia require no formal or implied agreement, oral or written, but ask only that the partners have lived together for some period of time in a stable domestic relationship. Texas and Minnesota (to some degree) require express agreements to satisfy the Statute of Frauds, while others, including Michigan, New Hampshire, New York and North Dakota require express agreements and will not enforce implied contracts. In states where cohabitation agreements are not subject to the Statute of Frauds, including Arizona, Colorado, Florida and North Carolina, courts tend to follow the *Marvin* rationale of enforcing agreements that are not based upon sexual considerations, or at least have considerations other than sexual services. Furthermore, some states, such as Arizona, Connecticut, Hawaii, Missouri, Nevada, New Jersey and Wisconsin, recognize implied agreements. William A. Reppy, Jr., *Choice of Law Problems Arising When Unmarried Cohabitants Change Domicile*, 55 SMU L. REV. 273, 275–90 (2002).

¹²³ The federal Defense of Marriage Act, passed in 1996, announces itself as “an Act to define and protect the institution of marriage.” Defense of Marriage Act, Pub. L. No. 104-199, § 1738C, 110 Stat. 2419, 2419 (1996). Under the heading “Powers Reserved to the States,” the Act provides that:

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship. . . . [T]he word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.

Defense of Marriage Act § 1738C.

¹²⁴ *Hewitt v. Hewitt*, 394 N.E.2d 1204, 1211 (Ill. 1979).

¹²⁵ See Wilson, *supra* note 108.

¹²⁶ The idea here is that a state offering neither same-sex marriage nor domestic partnerships has no compelling policy reason to enforce *Marvin* agreements, insofar as those agreements endorse unmarried relationships.

partners face severability issues, while Proposition 8 and California's domestic partner statutes show that California's public policy strongly favors formally-recognized relationships regardless of sex.¹²⁷ Thus, a proposed statute must accomplish two primary things if it is to afford same-sex couples a consistent, uniform method of enforcing *Marvin* agreements. First, it must specifically enumerate under what circumstances a same-sex couple may contract for property and services, and particularly when sexual services become severable.¹²⁸ Second, it must ratify the same-sex cohabiting relationship in a way that neither infringes upon the state's public policy favoring marriage, nor seeks to resurrect common-law marriage.¹²⁹

In the end, whether it favors or disfavors same-sex cohabitation agreements, the California Legislature must clarify the rights of same-sex cohabiting couples because the case law is sparse and inconsistent¹³⁰ and Proposition 8 has ushered in a public policy unfavorable to same-sex couples.¹³¹ Just as Proposition 8 defines the rights of same-sex couples wishing to marry, a same-sex cohabitation statute should define the rights of same-sex couples who do *not* wish to marry, or its equivalent.¹³² In an effort to urge the Legislature to decide the issue, this article thus proposes two statutes, one favoring same-sex cohabitation agreements and one disfavoring such agreements. A statute designed to enforce same-sex *Marvin* agreements on a purely contractual basis has already been proposed, but came at a time when California's public policy landscape was vastly different.¹³³ Therefore, each proposed

¹²⁷ Both traditionally solemnized marriage and domestic partnerships have been sanctioned by the Legislature, and hence qualify as "formally recognized."

¹²⁸ See *supra* note 89 and accompanying text.

¹²⁹ See *Norman v. Norman*, 54 P. 143, 146 (Cal. 1898) ("Prior to 1895, section 75 [of the California Civil Code] provided for marriages by declaration, without the solemnization required by section 70; however, the act of March 26, 1895, swept away that easy process of marriage.").

¹³⁰ "Sparse and inconsistent" refers to the relative dearth of *Marvin* decisions, and the clashing *Jones* and *Whorton* decisions in particular.

¹³¹ See *supra* note 98 and accompanying text.

¹³² "Marriage equivalent" refers to domestic partnerships as a marriage-like option for same-sex couples.

¹³³ See generally Kristin Bullock, Comment, *Applying Marvin v. Marvin to Same-Sex Couples: A Proposal for a Sex-Preference Neutral Cohabitation Contract Statute*, 25 U.C. DAVIS L. REV. 1029 (1992). When Bullock published her Comment, the prevailing sign of California's public policy was section 308.5 of the California Family Code which restricted California's recognition of marriage to those between a man and a woman and was enacted following the passage of Proposition 22. Since Bullock's article in 1992, Proposition 8 and the domestic partnership statutes have changed California's views on same-sex relationships considerably.

statute will reflect the public policy aspect implicit in California's same-sex relationships, which the earlier statute did not.¹³⁴

V. TWO PROPOSED CALIFORNIA COHABITATION STATUTES REFLECTIVE OF PUBLIC POLICY

A. Proposed California Family Code Sections 297.6 and 297.7: Rights of Same-Sex Couples to Make Enforceable Cohabitation Agreements¹³⁵

The following are two proposed statutes for the California legislature to consider in order to clarify the uncertainty surrounding Proposition 8. One statute allows California's same-sex cohabiting couples to make enforceable property and support agreements, while respecting the state's public policy favoring marriage as expressed in Proposition 8. The other statute disallows same-sex couples that are not registered as domestic partners from making cohabitation agreements, with the domestic-partner restriction likewise reflective of California's public policy.

§ 297.6: Unmarried couples, regardless of sex, shall have the full and exclusive right to make enforceable agreements for support and division of property, their marital status notwithstanding, as part of any committed relationship, whether including sexual relations or not, where the agreement expressly or impliedly lists any reasonable consideration for the services rendered other than the mere instance of sexual relations.

This section recognizes that such agreements arise from relationships that in no way resemble traditional marriage between a man and a woman, and in enforcing this section and respecting the current public policy of this state, the Legislature in no way approves of or endorses such relationships for their moral character, or for any other reason. Furthermore, this section in no way grants unmarried same-sex couples any of the rights

¹³⁴ While Bullock's statute is intelligently fashioned, it treats same-sex cohabitation contracts as solely a contract issue, while Proposition 8 and other California legislation clearly indicates the state has a strong public policy favoring traditional marriage. Furthermore, Bullock supports her contention that California is increasingly amendable to same-sex *Marvin* agreements by citing only *Whorton* and one Texas case, which does not represent a resounding mandate. Simply put, no one knows whether California courts will continue to enforce same-sex *Marvin* agreements at all, particularly in light of Proposition 8's seismic shift of the public-policy landscape. California courts may continue to treat *Marvin* agreements as purely contractual issues divorced from public policy, but this Comment argues that it is shortsighted to assume that what were once purely contractual considerations will always remain so.

¹³⁵ These section numbers were chosen so the proposed statutes would immediately follow the first domestic partnership statute in the California Family Code.

enjoyed by married persons or domestic partners, nor should any provision of this section impair or otherwise affect the rights of traditional married couples to enjoy any of the rights afforded them under California law.

(a) For the purposes of this section, the following definitions shall apply:

(1) "Unmarried couple" shall refer to the committed relationship of two persons, regardless of sexual orientation, who live full-time with one another in the same residence but have not solemnized their union with formal state recognition, either traditional marriage or a domestic partnership.

(2) "Sex" shall refer to the biological orientation of each partner, with transgendered individuals to be classified according to their biological sex at the time when the agreement was made.

(3) "Agreement" shall refer to an enforceable contract with ample consideration, according to generally accepted principles of California contract law.

(4) "Marital status" shall refer to a traditional marriage as defined in the California Constitution and section 300 of the California Family Code,¹³⁶ or a domestic partnership as set forth in section 297 of the California Family Code, or the absence of either relation thereof.

(5) "Committed relationship" shall refer to relationships where both partners have been exclusively domiciled with one another in a common residence, and where the partners have engaged in sexual relations and other indicia of an exclusive, intimate relationship, for a period of no less than ten (10) years.¹³⁷ Partners whose relationships do not meet the ten year standard, yet who seek to enforce such property or support agreements, will have their recovery, if any, prorated according to a percentage commensurate with the length of their relationship under this section.¹³⁸

¹³⁶ "Marriage is a personal relation arising out of a civil contract between a man and a woman, to which the consent of the parties capable of making the contract is necessary." CAL. FAM. CODE § 300 (Deering 2010).

¹³⁷ This provision is intended to reflect section 4336 of the California Family Code regarding spousal support, where the legislature defines a "long marriage" as one of ten year duration or more. CAL. FAM. CODE § 4336 (Deering 2010). Just as a long marriage has different spousal support requirements than a short one, so too should cohabiting partners have different obligations to one another depending on the length of their cohabitation.

¹³⁸ Likewise, this proposed term is based upon the California Family Code's spousal support provisions. Among the factors governing spousal support is the expectation that a party seeking support will be self-supporting within a time equivalent to one-half of the

(6) “Sexual relations” shall refer to the physical act and shall be construed as one part of, but not an essential or irreducible aspect of, a committed intimate relationship.

(b) For the purposes of this section, home-based activities, including but not limited to cooking, cleaning, and housework in general, and activities typical of a committed partner, including but not limited to moral and emotional support, are not to be considered related in any way to the couple’s sexual relationship, and may constitute adequate, independent consideration for any agreement.

§ 297.7: Unmarried couples, regardless of sex, who share a common residence shall be prohibited from making enforceable agreements for support and division of property, regardless of the length of their relationship, where such couples share a committed relationship marked by sexual relations and/or other indicia of an exclusive intimate relationship, and the partners are neither legally married to one another under section 300 of the California Family Code nor registered together as domestic partners under section 297 of the California Family Code.

(a) For the purposes of this section, the following definitions shall apply:

(1) “Unmarried couple” shall refer to the committed relationship of two persons, regardless of sexual orientation, who live full-time with one another in the same residence but have not solemnized their union with formal state recognition, either traditional marriage or a domestic partnership.

(2) “Sex” shall refer to the biological orientation of each partner, with transgendered individuals to be classified according to their biological sex at the time when the agreement was made.

(3) “Agreement” shall refer to an enforceable contract with ample consideration, according to generally accepted principles of California contract law.

(4) “Marital status” shall refer to a traditional marriage as defined in the California Constitution and

marriage’s duration, up to the ten year limit expressed in section 4336. The idea is that, theoretically, the longer a marriage lasts, the more responsibility one partner has to support the other afterward. CAL. FAM. CODE § 4320 (Deering 2010). The author has adapted the provision to fit a cohabitation agreement, whereby the longer the cohabitation, and therefore the longer the “marriage-like” relation lasts, the greater the expectation that one party must support the other under the agreement.

section 300 of the California Family Code¹³⁹, or a domestic partnership as set forth in section 297 of the California Family Code, or the absence of either relation thereof.

(5) “Committed relationship” shall refer to relationships where both partners have been exclusively domiciled with one another in a common residence, and where the partners have engaged in sexual relations and other indicia of an exclusive, intimate relationship, for a period of no less than ten (10) years.¹⁴⁰

(6) “Sexual relations” shall refer to the physical act and shall be construed as an irreducible aspect of a committed intimate relationship, consistent with the interpretation of the California judiciary.

B. Note on Proposed Cohabitation Statutes

The point of these proposed statutes is to urge the California Legislature to clarify the state of *Marvin* agreements under the new Proposition 8 public policy.¹⁴¹ Section 297.6, which allows *Marvin* agreements, must navigate a public-policy minefield that is hostile to same-sex relationships, so it is much longer and requires a more careful definition of terms.¹⁴² In contrast, section 297.7, which disallows *Marvin* agreements regardless of sexual orientation, is shorter and less ambiguous, and is supported by a public policy subtext disfavoring non-formalized marriage relationships.¹⁴³ While same-sex marriage statutes are not permanent,¹⁴⁴ they can at least offer some insight as to what rights, if any, same-sex couples have in making and enforcing

¹³⁹ See *supra* note 137.

¹⁴⁰ See *supra* note 137.

¹⁴¹ To the extent the California Supreme Court insists Proposition 8 merely reserves the designation “marriage” for opposite-sex couples and otherwise does not affect couples’ constitutional rights to enjoy intimate, committed relationships, the court has already spoken regarding same-sex couples’ *Marvin* rights. Nothing intrinsic to a same-sex relationship *qua* same-sex relationship should affect its *Marvin* standing. See *supra* note 93. However, the *Strauss* decision did not address the practical realities of *Marvin* agreements, and such contractual agreements are not under constitutional purview anyway, but are governed instead by civil law—hence the urgency for legislative clarification.

¹⁴² See *supra* Parts V.A & B. A particular conundrum is distinguishing cohabitation from marriage-like relationships in light of California’s public policy favoring marriage or other formalized relationships, e.g., domestic partnerships. The challenge lies in enforcing agreements arising from relationships that are sufficiently intimate and lengthy so as to warrant governmental protection and recognition, without treating those relationships too much like marriages.

¹⁴³ See *supra* Part V.B. This proposed statute did not need to address the severability of sexual relations, nor the possibility that a same-sex relationship might presume to be “marriage-like” in the sense that the *Hewitt* court disfavored. See *supra* note 105.

¹⁴⁴ See *supra* note 108.

Marvin agreements. After all, some information, however fleeting, is preferable to perpetual uncertainty.

CONCLUSION

With the enduring popularity of cohabitation as a lifestyle choice,¹⁴⁵ it is noteworthy that California courts have yet to clarify cohabitating same-sex partners' rights regarding enforceable property and support agreements.¹⁴⁶ Same-sex partners particularly deserve clarification because their relationships have been circumscribed by legislation ranging from Proposition 22 to Proposition 8.¹⁴⁷ Highlighting the need for clarity on this issue and showing how recent shifts in public policy color the enforceability of such agreements, this Comment offers two proposed statutes to decide the viability of today's same-sex *Marvin* agreements.¹⁴⁸ Proponents of same-sex marriage have talked of mounting a ballot challenge to Proposition 8, perhaps as early as 2012, leaving only speculation in the meantime as to whether same-sex couples' rights have fundamentally changed since Proposition 8 passed in 2008.¹⁴⁹ California's same-sex couples will thus continue their uneven journey along the "yellow brick road," but it is unclear whether they will ever reach the Emerald City.

POSTSCRIPT

The avowed ballot challenge¹⁵⁰ to Proposition 8 was mooted on August 4, 2010, when District Court Judge Vaughn R. Walker ruled in *Perry v. Schwarzenegger* that Proposition 8 was unconstitutional.¹⁵¹ Judge Walker's decision, which unequivocally found that Proposition 8 violated the Equal

¹⁴⁵ See *supra* discussion Part II.A.

¹⁴⁶ This statement not only points out the ambiguity inherent in severing sexual relations from an agreement for services, but also suggests that California courts will not continue to overlook public policy considerations in addressing *Marvin* agreements, if they ever have.

¹⁴⁷ Domestic partnership legislation, as discussed earlier, has also circumscribed same-sex couples' rights, although it has arguably been a positive influence.

¹⁴⁸ See *supra* note 111.

¹⁴⁹ Attendees at a Chapman University School of Law presentation in November 2009 indicated an effort to repeal Proposition 8 was forthcoming, if not in 2010, then in 2012. They will be greeted by a wearied, but not unsympathetic, electorate: in a November 2009 poll, Californians indicated they supported marriage rights for same-sex partners by a 51% to 43% margin. However, nearly 60% of those polled indicated they did not want to vote on the issue in 2010. Cathleen Decker, *State's Voters Support Same-Sex Marriage*, L.A. TIMES, Nov. 8, 2009, at A4, available at <http://articles.latimes.com/2009/nov/08/local/me-gay-marriage-poll8> (last visited Dec. 10, 2010).

¹⁵⁰ See *supra* note 149.

¹⁵¹ Jesse McKinley & John Schwartz, *California's Ban on Gay Marriage is Struck Down*, N.Y. TIMES, Aug. 5, 2010, at A1, available at <http://nytimes.com/2010/08/05/us/05prop.html>.

Protection Clause of the Fourteenth Amendment,¹⁵² immediately set off jubilation among supporters of same-sex marriage and strident rhetoric among those opposed.¹⁵³ Supporters of the legislation immediately filed a motion to stay the decision, which Judge Walker promptly denied.¹⁵⁴ Predictably, the *Perry* decision sparked a series of appeals, not only to the Ninth Circuit Court of Appeals, but also to Governor Schwarzenegger and Attorney General Edmund (Jerry) Brown, pleading with them to defend Proposition 8.¹⁵⁵ Neither has indicated that he will defend the measure, which is slated to go before the Ninth Circuit in December.¹⁵⁶ Proposition 8 is expected to reach the United States Supreme Court no matter what the Ninth Circuit decides, with some already speculating which Justice might provide the swing vote on the sharply-divided Court.¹⁵⁷

Yet, while the recent hubbub over Proposition 8 makes for good newspaper and Internet copy, it leaves unanswered the question that inspired this Comment: whether California's same-sex couples will enjoy greater freedom to make and enforce cohabitation agreements. Most of the public's attention has focused on the agitation over Proposition 8—as if the *Perry* decision needed any historical boost, it came down on President Barack Obama's forty-ninth birthday—and the controversy has drawn legal luminaries such as David Boies and Ted Olson, who became household names during the *Bush v. Gore* controversy.¹⁵⁸ Meanwhile, same-sex couples eschewing domestic partnerships, who must resort to *Marvin* agreements, have remained largely anonymous and on the sidelines.

In that regard, California's cohabitating same-sex couples are to their marriage-seeking counterparts what Deanna Durbin is to Judy Garland. Durbin was one of MGM's first choices for

¹⁵² *Perry v. Schwarzenegger*, 702 F. Supp. 2d 1132, 1138 (N.D. Cal. 2010).

¹⁵³ See *supra* note 151.

¹⁵⁴ *Perry*, 702 F. Supp. 2d at 1138–39. Judge Walker found that proponents of Proposition 8 met neither of the two most critical requirements for issuing a stay: they could not show the likelihood of success on the merits, and they could not show irreparable injury were their motion denied. *Id.* at 1134–38. Judge Walker also questioned whether proponents of the measure had standing to pursue their appeal, but found their argument unconvincing regardless. *Id.* at 1134–36.

¹⁵⁵ Susan Ferriss, *Supporters Pressure Brown, Schwarzenegger to Defend Prop. 8 in Court*, SACBEE.COM (Sept. 2, 2010, 12:00 AM), <http://www.sacbee.com/2010/09/02/2999833/supporters-pressure-brown-schwarzenegger.html>.

¹⁵⁶ *Id.* Judge Walker noted both Brown and Schwarzenegger's unwillingness to defend Proposition 8 in his decision finding the legislation unconstitutional. See *supra* note 151.

¹⁵⁷ Edward A. Adams, *House Supports Marriage Equality Resolution*, 96 A.B.A. J. 62, 62 (2010), available at http://www.abajournal.com/news/article/aba_backs_marriage_equality_for_gays_and_lesbians.

¹⁵⁸ See *supra* note 151.

the role of Dorothy Gale in *The Wizard of Oz*, but has faded into obscurity as Garland became synonymous with the role and the film.¹⁵⁹ If history is a guide, Proposition 8 will be associated with same-sex marriage in the same way Garland is associated with *The Wizard of Oz*, and same-sex cohabitating couples may fade into oblivion the same way Durbin is now best known as the answer to a trivia question. The comparison is apt: Durbin had her heyday in the late 1930s but is largely anonymous now,¹⁶⁰ just as same-sex cohabitation had its heyday in the wake of *Marvin* but such couples get scant attention now. The purpose of this Comment is to highlight the lesser-known stakeholders in the same-sex rights debate, in the hope that California's same-sex couples get better directions from California courts than Dorothy got from the Scarecrow.

¹⁵⁹ Durbin, a Canadian-born actress who won a special "Juvenile Oscar" in 1938, had a film career spanning the late 1930s and 1940s. *Deanna Durbin*, INTERNET MOVIE DATABASE, <http://www.imdb.com/name/nm0002052/bio> (last visited Nov. 12, 2010). For more on Durbin, see 'Tim Dirks' review of *The Wizard of Oz* on the American Movie Classics website, <http://www.filmsite.org/wiza.html>.

¹⁶⁰ PAULINE KAEEL, 5001 NIGHTS AT THE MOVIES 136 (1991). As for the relative invisibility of same-sex couples after *Marvin*, it bears noting that the only prominent same-sex cohabitation cases, discussed *supra*, arose in its immediate aftermath. One puzzling issue is what has happened to all the same-sex *Marvin* agreements since then. Same-sex couples might not be making *Marvin* agreements, or might not be enforcing them, or might simply be keeping their agreements out of court. Which factor predominates is, unfortunately, beyond the scope of this Comment.

Digest: People v. Lessie

Alexandra A. Harman

Opinion by Werdegar, J., with George, C.J., Kennard, Baxter, Chin, Moreno, and Corrigan, JJ.

Issue

What test should courts apply when determining whether a minor defendant has “knowingly and voluntarily” waived his or her *Miranda* rights?

Facts

Tony Lessie, a sixteen-year-old boy, was charged with second degree murder and convicted at trial.¹ Lessie had been involved in a gang-related shooting in Oceanside, wherein Rusty Seau was shot and killed.² Months after the incident, Lessie was taken into custody, where he twice confessed to shooting Seau—once at the Oceanside Police Department, and a second time while being questioned in juvenile hall.³ Lessie claimed the judgment should be reversed because he never waived his Fifth Amendment rights, and therefore the trial court erred by admitting his confessions into evidence.⁴

At the time, Lessie had finished the tenth grade and worked in retail.⁵ Lessie also had experience with the criminal justice system as a result of two prior arrests, one for burglary and the other for evading police after being stopped in his car with marijuana.⁶ Following the arrest relating to the shooting, Detective Kelly Deveney told Lessie that he would be able to call as many people as he wished when they arrived at the police department.⁷ Deveney also asked Lessie if he would like to contact anyone in particular, and Lessie responded in the

¹ People v. Lessie, 47 Cal. 4th 1152, 1157 (2010).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.* at 1169.

⁶ *Id.*

⁷ *Id.* at 1158.

affirmative identifying that person as his father, although Lessie did not have his father's phone number at the time.⁸

Upon arrival at the Oceanside Police Department, Deveney informed Lessie that she had retrieved his father's phone number, and she asked whether Lessie preferred to call or to have the department call on his behalf.⁹ Lessie stated that he would like to make the phone call himself.¹⁰ After this statement, Deveney, with Detective Gordon Govier in the room, requested that Lessie fill out paperwork and thereafter informed Lessie of his *Miranda* rights.¹¹ When Deveney asked Lessie if he understood what she said, he said "yeah."¹² Next, Deveney began questioning Lessie about his background and the background of the gang members who were present the day of the shooting, without offering Lessie access to a phone.¹³

Subsequently, Deveney told Lessie that various people, including family members, had identified him as the killer.¹⁴ Lessie initially denied his role in the shooting, but then he confessed, stating, "I was there, I was, I was there and I was the shooter."¹⁵ Lessie claimed that the gang members, specifically James Turner, forced him to shoot Seau as a type of initiation, and Lessie thought he would receive serious bodily injury if he did not comply with the instructions.¹⁶ Lessie confessed that upon Turner's command he shot Seau in the back while Seau was retreating.¹⁷ After his confession, Deveney asked if Lessie would like a moment, and Lessie responded that he wanted to call his father.¹⁸ Deveney then stepped out of the room to confer with Govier, and Lessie again asked to call his father.¹⁹ Deveney told Lessie that a phone was being charged in order for him to make a phone call, but before she allowed him to call she continued to ask questions about the other gang members.²⁰ Once the phone

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*; *Miranda v. Arizona*, 384 U.S. 436, 478–79 (1966) (stating that any individual held in custody must be informed of the privilege against "self-incriminatory statements" by being told that he has "the right to remain silent . . . the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires").

¹² *Lessie*, 47 Cal. 4th at 1158–59.

¹³ *Id.* at 1159. Lessie stated that he was not a part of the gang, but he wanted to become a member. *Id.* at 1157.

¹⁴ *Id.* at 1159.

¹⁵ *Id.*

¹⁶ *Id.* at 1157.

¹⁷ *Id.*

¹⁸ *Id.* at 1159.

¹⁹ *Id.*

²⁰ *Id.* at 1160.

was brought inside, Lessie called his father and left a message stating that he was in custody and instructed his father to call him as soon as possible.²¹

Four months passed before Deveney and Govier conducted a second interview, while Lessie was in juvenile hall.²² Again, detectives informed Lessie of his *Miranda* rights.²³ Lessie answered their questions, reiterated his involvement in the shooting, and filled in factual gaps.²⁴

At trial, Lessie argued that *People v. Burton*²⁵ required the court to exclude his confession from trial because he maintained his privilege against self-incrimination during the initial interrogation by requesting to call his father.²⁶ Lessie further argued that the second interrogation at juvenile hall was improper because he never waived his *Miranda* rights, and thus *Edwards v. Arizona*²⁷ prohibited detectives from initiating further questioning.²⁸ Lastly, Lessie motioned for exclusion based on a violation of Welfare & Institutions Code section 627(b) by law enforcement in failing to allow him a phone call within one hour after confinement.²⁹ The trial court rejected all of these arguments and allowed Lessie's confession into evidence at trial.³⁰ The trial court observed that *Burton* was no longer controlling in light of the 1982 Truth-in-Evidence provision in the California Constitution, which precludes a court from excluding "relevant evidence . . . whether heard in juvenile or adult court."³¹ The trial court instead applied *Fare v. Michael C.*³² and *People v. Hector*³³ and denied that Lessie intended to invoke his

²¹ *Id.*

²² *Id.*

²³ *Id.*; *Miranda*, 384 U.S. at 478–79.

²⁴ *Lessie*, Cal. 4th at 1160.

²⁵ *People v. Burton*, 6 Cal. 3d 375 (1971). See *infra*, note 41 and accompanying text.

²⁶ *Lessie*, Cal. 4th at 1162. In *Burton*, the court formulated a distinct test for cases involving minor defendant's invocation of the Fifth Amendment privilege by holding that a minor maintains this privilege upon a request to see a parent either before or during interrogation. *Id.* at 1163 (quoting *Burton*, 6 Cal. 3d at 383–84).

²⁷ *Edwards v. Arizona*, 451 U.S. 477 (1981). See *infra*, note 28.

²⁸ *Lessie*, 47 Cal. 4th at 1160 (citing *Edwards*, 451 U.S. at 484–85). The court in *Edwards* stated that "an accused . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Edwards*, 451 U.S. at 484–85. Thus, Lessie contends that he should not have been subjected to further questioning after the initial meeting with detectives where he requested to call his father.

²⁹ *Lessie*, 47 Cal. 4th at 1161.

³⁰ *Id.* at 1160–61.

³¹ *Id.* at 1160 (citing CAL. CONST. art. I, § 28(f)(2)).

³² *Fare v. Michael C.*, 442 U.S. 707 (1979). See *infra*, note 47 and accompanying text.

³³ *People v. Hector*, 83 Cal. App. 4th 228 (2000).

Fifth Amendment right by requesting to speak with his father because Lessie never explicitly stated such a purpose.³⁴ In finding that Lessie waived his Fifth Amendment rights, *Edwards* could not apply.³⁵ The court also held that the violation of the Welfare and Institutions Code did not justify the remedy of evidence exclusion.³⁶

On appeal, the trial court's conviction was affirmed.³⁷ Lessie petitioned for review, and the Supreme Court granted it.³⁸

Analysis

The court cited *Miranda* to reiterate the foundation for protecting the Fifth Amendment by allowing individuals in custody the right to remain silent and the right to counsel.³⁹ Next, the court looked to the appropriate application of *Miranda* to cases involving minor defendants. The court considered the rationales of *Burton* and *Fare* to determine whether a minor's request to speak with a parent was sufficient to invoke the minor defendant's Fifth Amendment rights.⁴⁰

In *Burton*, the court reversed a sixteen-year-old male's conviction for murder because his confession was wrongly admitted into evidence after the minor had requested and been refused the opportunity to speak with his father.⁴¹ The court in *Burton* stated that a minor defendant may maintain his Fifth Amendment rights by "[a]ny words or conduct which 'reasonably appears inconsistent with a present willingness on the part of the suspect to discuss his case freely and completely with police at that time . . .'"⁴² The *Burton* court held that a minor defendant calling upon a parent while in custody was sufficient to invoke the Fifth Amendment privilege.⁴³

The court reasoned that *Burton* had been limited by the 1982 provision of the state Constitution, entitled Truth-in-Evidence, which prohibited courts from excluding any evidence relevant to criminal proceedings dealing with either adults or minors.⁴⁴

³⁴ *Id.*

³⁵ *Id.* at 1160–61.

³⁶ *Id.* at 1161.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 1162 (citing *Miranda v. Arizona*, 384 U.S. 436, 444–45, 467, 473–74 (1966)).

⁴⁰ *Id.* at 1162–68.

⁴¹ *Id.* at 1162 (citing *People v. Burton*, 6 Cal. 3d 375 (1971)).

⁴² *Burton*, 6 Cal. 3d at 382 (quoting *People v. Randall*, 1 Cal.3d 948, 956 (1970)).

⁴³ *Id.* at 383–84.

⁴⁴ *Lessie*, 47 Cal. 4th at 1163 (quoting CAL. CONST. art. I, § 28(f)(2)) (stating that "[t]he 1982 Truth-in-Evidence provision provides that 'relevant evidence shall not be excluded in any criminal proceeding, including pretrial and post conviction motions and

Despite this limitation, the court acknowledged the need to follow the U.S. Supreme Court's decision in *Miranda*, which "bind[s] the state courts under the federal Constitution's supremacy clause despite the Truth-in-Evidence provision."⁴⁵ The court then recognized that although *Burton* had never been "expressly overruled," the U.S. Supreme Court's decision in *Fare* proves that *Burton* is no longer good law.⁴⁶

In *Fare*, the U.S. Supreme Court reversed a lower court's decision to exclude a sixteen-year-old's confession in a case where the minor defendant's request to see his probation officer had been denied prior to the interrogation that elicited his confession.⁴⁷ The lower court in *Fare* had applied the *Burton* rationale in stressing that a minor's relationship with his or her probation officer is similar to that of a "personal advisor who would understand his problems and needs and on whose advice the minor could rely."⁴⁸ The U.S. Supreme Court reversed the lower court's decision based on the rationale that an attorney is situated to provide unique assistance within the criminal justice system that neither a probation officer nor another adult of close relation to a minor can provide.⁴⁹ The high court further reasoned that when a minor makes no explicit request to speak with an attorney:

[T]he determination whether statements obtained during custodial interrogation are admissible against the accused is to be made upon an inquiry into the totality of the circumstances surrounding the interrogation, to ascertain whether the accused in fact knowingly and voluntarily decided to forgo his rights to remain silent and to have the assistance of counsel.⁵⁰

The court used this rationale to address Lessie's argument distinguishing the situation in *Fare*, where a minor defendant requested to speak with his probation officer, from the situation in *Burton*, where the minor requested to speak with a parent.⁵¹ The court stated that the rationale in *Fare* cannot be read so narrowly as to not extend to the situation presented by *Burton*.⁵² The court further identified the other factors to be considered under the totality of the circumstances approach, including an

hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court." (internal citations omitted)).

⁴⁵ *Lessie*, 47 Cal. 4th at 1164 (internal citations omitted).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 1165 (quoting *In re Michael C.*, 21 Cal. 3d 471, 476 (1978)).

⁴⁹ *Id.* at 1165 (citing *Fare v. Michael C.*, 442 U.S. 707, 722 (1979)).

⁵⁰ *Id.* at 1165–66 (quoting *Fare*, 442 U.S. at 724–25).

⁵¹ *Id.* at 1165.

⁵² *Id.*

“evaluation of the juvenile’s age, experience, education, background, and intelligence, and . . . whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights.”⁵³

Lastly, the court reiterated the difficulties courts have encountered in attempting to reconcile *Burton* and *Fare*.⁵⁴ The court also acknowledged the need for courts to proceed cautiously in determining whether a minor acts knowingly and voluntarily.⁵⁵ Ultimately, the court reasoned that, in light of the California Constitution’s Truth-in-Evidence provision and the federal law according to both *Miranda* and *Fare*, the totality of the circumstances test is appropriate.⁵⁶

Based on the totality of the circumstances test, the court considered both Lessie’s request to see his father as well as his background, education, and age.⁵⁷ Accordingly, the court reasoned that Lessie did not invoke his Fifth Amendment rights because he explicitly stated that he understood his *Miranda* rights as read to him, he had prior experience with the criminal justice system that did not indicate otherwise, and he never indicated any explicit intention to seek counsel or to remain silent.⁵⁸

Holding

The court affirmed the Court of Appeal’s decision. The court held that the appropriate test to apply to determine whether a minor defendant knowingly and voluntarily waived his Fifth Amendment right is the totality of the circumstances test from *Fare*.⁵⁹ While the court did not give weight to a violation of a defendant’s right to make a telephone call within one hour of confinement, the court considered the purpose of a defendant’s statement that might indicate a desire to maintain his Fifth Amendment rights in addition to the relevant circumstances.⁶⁰ In this case, the court decided that Lessie made no such indication by merely requesting to speak with his father in light of the fact that Lessie had prior experience with the criminal justice system.⁶¹ Thus, based on the relevant circumstances, the

⁵³ *Id.* at 1167 (quoting *Fare*, 442 U.S. at 725).

⁵⁴ *Id.* at 1167–68.

⁵⁵ *Id.* at 1166–67.

⁵⁶ *Id.* at 1168.

⁵⁷ *Id.* at 1169.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 1170.

⁶¹ *Id.* at 1169–70.

court found that Lessie knowingly and voluntarily waived his Fifth Amendment right because: (1) he was informed of his *Miranda* rights and confirmed that he understood them; (2) he possessed a background consistent with such an understanding due to his prior arrests and education level; (3) he gave no explicit indication that he desired to invoke his Fifth Amendment right; and (4) he agreed to answer interrogation questions.⁶²

Legal Significance

The court's decision limits the manner in which courts may interpret a minor defendant's invocation of his or her Fifth Amendment rights during interrogation by overruling the *Burton* decision. A minor's request to speak with a parent will no longer suffice as an automatic invocation of the privilege. Instead, under the totality of the circumstances test, courts are granted the flexibility to consider the relevant circumstances surrounding an interrogation in addition to statements made by a minor defendant. In this case, the court rejected the rule in *Burton* and adopted the totality of the circumstances approach from *Fare*.

⁶² *Id.*

Digest: In re David V.

Ildefonso P. Mas

Opinion by Corrigan, J., with George, C.J., Kennard, Baxter, Werdegar, Chin, and Moreno, JJ.

Issue

Does a bicycle footrest meet the statutory definition for “metal knuckles” in California Penal Code section 12020(c)(7)?

Facts

The State of California charged fourteen-year-old David V. with illegal possession of metal knuckles in violation of California Penal Code section 12020(a)(1), after a police officer found a bicycle footrest in David’s pants pocket.¹ On August 21, 2007, the officer pulled over David for riding his bicycle without a helmet and found the bicycle footrest in David’s pocket after a consensual search.² The officer had previously learned, in gang detail, that a bicycle footrest is often used like brass knuckles by holding the footrest in a closed fist and using it as “an impact punching device.”³ The officer also observed that there was no place on David’s bike to attach a footrest, and that no other footrest was attached to David’s bicycle.⁴

The juvenile court found that the footrest met the statutory definition of metal knuckles in Penal Code section 12020(c)(7), since it was a metal device, “worn for purposes of offense or defense in or on the hand which either protects the wearer’s hand while striking a blow or increases the force of impact from the blow or injury to the individual receiving the blow.”⁵ In addition, the court ruled that David carried the footrest as a weapon.⁶ The court reasoned that the footrest did not fit on his bicycle, that the

¹ *In re David V.*, 48 Cal. 4th 23, 25 (2010). *See also* CAL. PENAL CODE § 12020(a)(1) (West 2010). The footrest recovered was a cylindrical object approximately four inches in length that is meant to be attached on threaded posts on each side of a bicycle’s wheel hub. *In re David V.*, 48 Cal. 4th at 25 n.1. Other names used for this object are “foot stool,” “tooth rest,” and “tooth stool.” *In re David V.*, 166 Cal. App. 4th 801, 805 n.2 (2008).

² *In re David V.*, 48 Cal. 4th at 25.

³ *Id.*

⁴ *Id.*

⁵ *Id.* (quoting CAL. PENAL CODE § 12020(c)(7)).

⁶ *Id.* at 25.

footrest was something used to support the fist for punching, and that it was too big for David to have casually carried in his pocket.⁷

In the Court of Appeal, David argued that the footrest must be attached to his hand to qualify as metal knuckles, since the statutory definition requires that metal knuckles be “worn.”⁸ The Court of Appeal rejected David’s argument and reasoned that the Legislature used the words “worn . . . *in or on* the hand” in the statutory definition of metal knuckles in order to include objects that can simply be held in one’s hand for purposes of attacking another or defending one’s fist while attacking another.⁹ The Court of Appeal then reasoned that there was enough evidence to conclude David possessed the footrest knowing it was a weapon and was willing to use it as a weapon, based on the officer’s observations that there was no apparent reason for David to be carrying the footrest in his pocket.¹⁰ After the Court of Appeal affirmed the juvenile court’s ruling, David petitioned the California Supreme Court for review.¹¹

Analysis

The court catalogued the history of the meaning of metal knuckles in California jurisprudence.¹² Prior to 1985, California Penal Code section 1020 made possession of metal knuckles illegal, but never specifically defined metal knuckles.¹³ In 1968, the court in *People v. Deane* used various dictionary definitions for metal knuckles; yet the court in *Deane* did not clearly define the meaning of metal knuckles.¹⁴ In *Deane*, the defendant claimed that a three-inch metal bar with a metal strap welded to both ends was a toolbox handle and not metal knuckles.¹⁵ The court in *Deane* ultimately held that the jury must be instructed on elements that make a legal object different from an illegal object to determine whether the defendant possessed metal knuckles or a toolbox handle.¹⁶ The definition that appears today in section 12020(c)(7) was added by the legislature in 1984, and in 1988, section 12020 was amended to make clear that the

⁷ *Id.*

⁸ *Id.*; CAL. PENAL CODE § 12020(c)(7).

⁹ *In re David V.*, 48 Cal. 4th at 25; CAL. PENAL CODE § 12020(c)(7).

¹⁰ *In re David V.*, 48 Cal. 4th at 26.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* (citing *People v. King*, 38 Cal. 4th 617, 623–24 (2006)).

¹⁴ *Id.* (citing *People v. Deane*, 259 Cal. App. 2d 82, 86–87 (1968)).

¹⁵ *Id.* at 26–27 (citing *Deane*, 259 Cal. App. 2d at 85–86).

¹⁶ *Id.* at 27 (citing *Deane*, 259 Cal. App. 2d at 90).

statutory definition of metal knuckles is controlling when analyzing section 12020.¹⁷

The court then turned to the plain meaning of section 12020(c)(7) to determine whether the footrest met the statutory definition of “metal knuckles”.¹⁸ The court acknowledged there was a strong argument that a footrest is not metal knuckles, since the plain meaning of “worn . . . in or on the hand” seems to apply to objects that are attached to one’s hand instead of objects simply held in one’s hand.¹⁹ However, the court also acknowledged there was a strong argument the footrest should be considered metal knuckles, since the statute describes metal knuckles as a device that “*either protects the wearer’s hand while striking a blow or increases the force of impact from the blow* The metal contained in the device may *help support the hand or fist.*”²⁰ Consequently, the plain language also leads to the conclusion that the legislature meant to include objects held in a closed fist, since metal knuckles may be used primarily to support the fist instead of providing a harder striking surface.²¹

To answer the aforementioned ambiguity of the phrase “worn . . . in or on the hand” in section 12020(c)(7), the court referred to the history of the 1984 legislation enacting the statutory definition for metal knuckles.²² A Senate Judiciary Committee Analysis surrounding the enactment of the definition in subdivision (c)(7) revealed that the legislature enacted the definition as a “minor modification” to existing laws to ensure the inclusion of a weapon that the legislature was particularly concerned with at the time.²³ This new weapon that caught the Legislature’s attention was described in the Senate Judiciary Committee Analysis as a weapon consisting of:

[A] piece of leather which can be *attached to either the back of the palm of the hand*, along with a strap to secure the device to the wrist and leather loops for the assailant’s fingers. The apparatus is covered with metal cone-shaped spikes which are about three-quarters of an inch long.²⁴

¹⁷ *Id.* at 27.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 28 (citing CAL. PENAL CODE § 12020(c)(7)).

²¹ *Id.* at 27.

²² *Id.* at 28.

²³ *Id.* at 29 (citing ASSEMB. COMM’N. ON CRIMINAL LAW AND PUBLIC SAFETY, ANALYSIS OF SEN. BILL NO. 2248 (1983–1984 Reg. Sess.) for hearing June 27, 1984, p. 1).

²⁴ *Id.* at 28 (citing SEN. COMM’N. ON JUDICIARY, ANALYSIS OF SEN. BILL NO. 2248 (1983–1984 Reg. Sess.) as amended Mar. 28, 1984, pp. 1–4 (second emphasis added)).

Unlike ordinary brass knuckles, this weapon was also used with an open fist since metal studs were sometimes strapped to the palm of the hand.²⁵ As a result, the court reasoned that the Legislature adopted the definition of “in or on the hand” to specifically include this new weapon that had metal attached to parts of the hand other than the knuckles.²⁶ In addition, the court noted another part of the committee analysis, which states, “the proposed definition would also cover any ring . . . because a ring would ‘protect the wearer’s hand’ and increase the force of impact from the blow.”²⁷ The court reasoned that the Legislature was also preoccupied with rings during the enactment of the definition, which are “worn” on one’s hand.²⁸ For these reasons, the court decided that the definition enacted in section 12020(c)(7) did not contemplate objects that are simply held in one’s hand while throwing a punch, such as a bicycle footrest or a roll of quarters.²⁹ The court noted that the Legislature described the definition as a “minor modification” to existing law and did not intend the broad definition of metal knuckles proposed by the prosecution.³⁰

Holding

The California Supreme Court reversed the Court of Appeal.³¹ The court held that a cylindrical object merely grasped in the hand does not qualify as metal knuckles under section 12020(c)(7).³² The court stressed, however, that the language of the statute is flexible and does not require a device to be attached to the hand in a particular fashion to be considered metal knuckles.³³ Ultimately, because a bicycle footrest is merely grasped in the hand and not attached to the hand in any way, David was not in possession of metal knuckles as defined by the statute.³⁴

Legal Significance

The court’s decision precludes objects held in the hand while punching from being considered metal knuckles. This includes

²⁵ *Id.* at 30.

²⁶ *Id.*

²⁷ *Id.* at 29 (citing SEN. COMM’N. ON JUDICIARY, ANALYSIS OF SEN. BILL NO. 2248 (1983–1984 Reg. Sess.) as amended Mar. 28, 1984, pp. 1–4).

²⁸ *Id.* at 30.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 31.

³² *Id.* at 30.

³³ *Id.*

³⁴ *Id.* at 30–31.

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batteries, rolls of quarters, bicycle footrests, and other objects that are commonly used to support the fist while throwing a punch. For a device to qualify as metal knuckles under section 12020(c)(7), the court's decision requires that the device at least be fitted to or wrapped around the hand in some way.

Digest: Committee for Green Foothills v. Santa Clara County Board of Supervisors

Stephanie Brou

Opinion by Corrigan, J., with George, C.J., Kennard, Baxter, Werdegar, Chin, and Moreno, JJ.

Issue

Does the filing of notice of determination (NOD) without environmental review trigger a 30-day statute of limitations under the California Environmental Quality Act?

Facts

In 2000, the Leland Stanford Junior University acquired a permit to add buildings to its campus.¹ Prior to the approval of the permit, an Environmental Impact Report (EIR) prepared for the project identified possible environmental impacts and proposed mitigation measures.² Because the EIR found that the development would substantially impact public access to recreation facilities, a mitigation measure directed Stanford to coordinate with the County parks department and to dedicate trail easements.³ The agreement included trails labeled S1 and C1.⁴ While the trails were approved in the “Trails Master Plan,”⁵ and a supplemental EIR was published regarding the S1 trails, a dispute delayed the C1 trails.⁶ After continued negotiations the County authorized the “Trails Agreement” in 2005, which illustrated the construction, maintenance, and details of the S1 and C1 easements.⁷ The County Board of Supervisors determined that the Trails Agreement did not require further environmental review regarding the C1 trails because it did not constitute a new project subject to independent California

¹ Comm. for Green Foothills v. Santa Clara Cnty. Bd. of Supervisors, 48 Cal. 4th 32, 39 (2010).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.* at 39 n.2.

⁶ *Id.* at 40.

⁷ *Id.*

Environmental Quality Act (CEQA) review, but rather was subsequent activity within the scope of the Trails Master Plan.⁸

On December 20, 2005, the County filed a revised NOD with the county clerk reporting that the County approved an agreement for the C1 and C2 trails.⁹ The NOD also stated that an EIR had been prepared and that findings had been made pursuant to CEQA.¹⁰ On June 9, 2006 (171 days after the revised NOD was filed), the Committee for Green Foothills (Committee) challenged the County's approval of the Trails Agreement.¹¹ The trial court sustained the County's demurrer on the grounds that the NOD triggered a 30-day statute of limitations, and thus the Committee's challenge was time-barred.¹² The Court of Appeal reversed, concluding there was "a reasonable possibility" that a longer 180-day statute of limitations applied.¹³

Analysis

California Environmental Quality Act section 21152(a) requires a local agency that approves or embarks on a project that is subject to CEQA to file an NOD with the county clerk.¹⁴ Also, if an agency approves a project it believes is exempt from CEQA, it must file a notice of exemption with the county clerk.¹⁵ These filings are intended to preserve the public's right to be informed and aware of environmental decisions.¹⁶ Section 21167 establishes an unusually short 30-day statute of limitations for CEQA challenges to be brought, running from the date of NOD or notice of exemption.¹⁷ If no NOD or notice of exemption was filed, the statute of limitations is increased to 180 days from the approval of the project; if a project is begun without a decision regarding the environmental impacts, the statute of limitations is 180 days from commencement of the project.¹⁸ The Committee contended that the Trails Agreement constituted a project separate from the Trails Master Plan, and that the County approved the Trails Agreement without consideration of the

⁸ *Id.* at 41.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 41–42.

¹² *Id.* at 42.

¹³ *Id.*

¹⁴ *Id.* at 42–43 (citing California Environmental Quality Act, CAL. PUB. RES. CODE § 21152(a) (2010)).

¹⁵ *Id.* at 43 (citing California Environmental Quality Act § 21152(b)).

¹⁶ *Id.* at 43.

¹⁷ *Id.* at 44 n.8 (citing California Environmental Quality Act § 21167).

¹⁸ *Id.* at 44 n.8.

environmental effects, thus the 180-day statute of limitations applied.¹⁹

The court found that the statutory language of section 21167 “strongly suggests that the Legislature intended the filing of an NOD to trigger a 30-day statute of limitations.”²⁰ The plain language of section 21167 requires a 30-day statute of limitations for all claims related to a project when a notice is filed.²¹ Only when notice is not given does the 180-day statute of limitations apply.²² Logically, when an agency alerts the public about a decision, the public can be expected to act quickly in challenging that decision.²³ However, when an agency does not give notice, the public is not alerted until constructive notice is given by the start of the project, thus necessitating an extended statute of limitations.²⁴ Statutory language does not support the Committee’s claim that the 180-day statute of limitations should apply despite the filing of an NOD.²⁵

The Regulatory Guidelines implementing CEQA further support the contention that a 30-day statute of limitations applies.²⁶ The Guidelines offer additional rules and statutes of limitations for CEQA challenges.²⁷ Each limitation is either 30 or 35 days when notice is given.²⁸ Similar to section 21167, a 180-day statute of limitations applies *only* when there is not public notice.²⁹

The court found further support for a shorter statute of limitations in two similar bill reports concerning the Department of Water Resources and the Governor’s Office of Planning and Research.³⁰ Both bill reports require claims to be filed within 30 days of notice.³¹ The court relied on the fact that the Guidelines and the two similar bills have identical statutes of limitations in its conclusion that the Legislature clearly intended to impose strict limits on the timeframe of challenging a project.³² The Committee provided no evidence to suggest that the Legislature

¹⁹ *Id.* at 45.

²⁰ *Id.* at 46.

²¹ *Id.*

²² *Id.* at 47.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 47–48.

²⁶ *Id.* at 48–49.

²⁷ *Id.* at 48.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 49–50.

³¹ *Id.* at 49.

³² *Id.* at 49–50 n.15.

intended to increase the statute of limitations six-fold, despite notice being provided.³³

Legislative intent for a short statute of limitations is consistent with policy considerations for prompt filing of challenges.³⁴ CEQA challenges impose financial prejudice and disruption to development and must not be permitted to delay projects.³⁵ Additionally, a clear and short statute of limitations provides certainty.³⁶ Public policy does not support delay or uncertainty that encourages builders to wait 180 days before commencing on approved projects to avoid litigation.³⁷ In fact, unnecessary delay is precisely what the Legislature intended to avoid by imposing a short statute of limitations.³⁸

The Committee argued that the longer statute of limitations should apply because the County did not conduct an environmental review before approving the agreement.³⁹ The court rejected this argument, citing *California Manufacturers Ass'n. v. Industrial Welfare Commission*.⁴⁰ Like the Committee in the instant case, in *California Manufacturers*, an association argued that the 30-day statute of limitations applies only if the agency has conducted an environmental investigation.⁴¹ There, the Court of Appeal determined that the trigger of the 30-day statute of limitations was the notice, not the substance of the agency's decision.⁴² Here, the court agreed and further stated that, where an NOD has been filed, the agency has attempted compliance with CEQA.⁴³ Accordingly, the Legislature intended for the 30-day statute of limitations to apply regardless of environmental review.⁴⁴

Next, the Committee argued that the NOD was invalid and therefore did not trigger the 30-day statute of limitations.⁴⁵ The court noted that several cases have made exceptions to the strict statute of limitations when notice was materially defective.⁴⁶ In

³³ *Id.* at 50.

³⁴ *Id.* (citing *Oceanside Marina Towers Ass'n. v. Oceanside Cmty. Dev. Comm'n*, 187 Cal. App. 3d 735, 741 (1986)).

³⁵ *Id.* (citing *Bd. of Supervisors v. Superior Court*, 23 Cal. App. 4th 830, 837 (1994)).

³⁶ *Id.* at 50.

³⁷ *Id.* at 50–51.

³⁸ *Id.* at 51.

³⁹ *Id.*

⁴⁰ *Id.* (citing *Cal. Mfrs. Ass'n. v. Indus. Welfare Comm'n*, 109 Cal. App. 3d 95, 124–25 (1980)).

⁴¹ *Id.*

⁴² *Id.* (citing *Cal. Mfrs.*, 109 Cal. App. 3d at 125).

⁴³ *Id.* at 51.

⁴⁴ *Id.*

⁴⁵ *Id.* at 52.

⁴⁶ *Id.*

ILWU v. Board of Directors, the court did not enforce a 35-day statute of limitations because the notice was not in substantial compliance of the notice requirements.⁴⁷ Similarly, in *Citizens of Lake Murray Area Ass'n. v. City Council*, the court refused to hold plaintiffs to a 30-day statute of limitations because the county clerk failed to post the notice pursuant to the statute.⁴⁸ While the Committee relied on the foregoing cases, the court distinguished them from the instant case, finding instead that the County's notice contained every provision required by the CEQA guidelines and thus was not materially defective.⁴⁹

The Committee contended that the NOD for the Trails Agreement should be separate and distinct from the NOD for the Trails Master Plan.⁵⁰ Additionally, the Committee alleged that the County issued the NOD to include the C1 and C2 trails with a bad faith intention to conceal these additional trails.⁵¹ While the court agreed that the County could have issued two separate NODs, they declined to impose that additional requirement when nothing in CEQA precludes disclosure of two approvals in a single notice.⁵² Additionally, there was no evidence that the County acted with bad intention.⁵³ In fact, the Board's resolution was passed at a meeting where the Committee's representative was present.⁵⁴ The Legislature intended for NODs to trigger the 30-day statute of limitations.⁵⁵ Thus, it was the responsibility of the Committee to review these notices carefully.⁵⁶

The Committee's final argument was that the revised NOD was invalid because the County failed to make an environmental determination and prepare a corresponding negative declaration or EIR.⁵⁷ The court found this claim unpersuasive, instead determining that no new CEQA document was required.⁵⁸ CEQA does not require a new EIR for every subsequent step in the same project.⁵⁹ After a proper EIR is prepared, a supplemental EIR is only required if substantial changes arise or new information

⁴⁷ *Id.* at 52–53. (citing *ILWU v Bd. of Dirs.*, 116 Cal. App. 3d 265, 273 (1981)).

⁴⁸ *Id.* at 53 (citing *Citizens of Lake Murray Area Ass'n. v. City Council*, 129 Cal. App. 3d 436, 438 (1982)).

⁴⁹ *Id.* at 53.

⁵⁰ *Id.*

⁵¹ *Id.* at 53–54.

⁵² *Id.* at 54.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* (citing California Environmental Quality Act, CAL. PUB. RES. CODE §§ 21108, 21152 (2010)).

⁵⁹ *Id.* at 54.

becomes known that was not available at the time of the original EIR.⁶⁰ The Committee was correct in asserting that if subsequent activity could have environmental effects not considered in the existing EIR, the agency must conduct an initial study resulting in either a negative declaration or an EIR.⁶¹ However, if the agency finds that no new environmental effects could occur, the subsequent activity can be considered within the scope of the project covered by the existing EIR and no new determination is required.⁶²

The Trails Agreement qualified as a subsequent activity subject to potential further environmental review, and thus the County was required to evaluate the potential environmental impact—which it did.⁶³ The County issued a resolution finding the Trails Agreement required no additional CEQA review prior to commencing the Trails Agreement.⁶⁴ The court deemed it unnecessary to examine whether the County's determination was proper.⁶⁵ The fact that the County evaluated the Trails Agreement as subsequent activity to a program EIR and that it had found the Trails Agreement to be within the scope of the EIR was sufficient.⁶⁶ An NOD triggers the 30-day statute of limitations even if environmental review is inadequate.⁶⁷

Holding

The court reversed the Court of Appeal.⁶⁸ The court held the County's filing of the NOD triggered the 30-day statute of limitations.⁶⁹ Because the Committee filed its petition more than 30 days after the NOD, the suit was time-barred.⁷⁰

Legal Significance

The court's decision strictly applies a shorter statute of limitations when notice is given. Because lack of environmental review and potential errors in the notice do not necessarily extend the statute of limitations, potential litigators challenging CEQA must carefully review NODs and file a petition within the 30-day statute of limitations.

⁶⁰ *Id.*

⁶¹ *Id.* at 55.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 55–56.

⁶⁷ *Id.* at 56–57.

⁶⁸ *Id.* at 57.

⁶⁹ *Id.*

⁷⁰ *Id.*

Digest: McCarther v. Pacific Telesis Group

Rebecca J. Kipper

Opinion by Moreno, J., with George, C.J., Kennard, Baxter, Chin, Corrigan, JJ., and O'Rourke, J.¹

Issue

Are sick leave policies that provide for an uncapped number of compensated days off governed by Labor Code section 233?

Facts

Kimberly McCarther and Juan Huerta each took absences from work to care for sick family members.² Although McCarther and Huerta did not work for the same employer,³ as members of the Communications Workers of America labor union, they were subject to the same sickness absence policy under section 5.01F of the union's collective bargaining agreement (CBA).⁴ Under this policy, employees are paid for any day in which they are absent from work due to their own illness or injury for up to five consecutive days in any seven-day long period.⁵ There is no limit on the number of days that an employee may be absent from work,⁶ but there is an attendance management policy in the CBA which sets forth a progressive scheme of discipline, up to termination, for excessive absences.⁷ Although absences for a personal illness or injury are compensated under section 5.01F, they still constitute an absence which is subject to discipline under the attendance management policy.⁸ In addition to paid sick leave, the CBA provides for six paid personal days which are not considered absences for the purposes of the attendance

¹ Associate Justice of the Court of Appeal, Fourth Appellate District, Division One, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

² *McCarther v. Pac. Telesis Grp.*, 225 P.3d 538 (Cal. 2010). McCarther was absent for seven consecutive days. *Id.* at 540. Huerta was absent for five consecutive days. *Id.* at 541.

³ McCarther worked for SBC Services, Inc., and Huerta worked for Pacific Bell Telephone Company. *Id.* at 539.

⁴ *Id.* at 540.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

management policy.⁹ Neither McCarther nor Huerta was compensated for the absences to care for sick family members,¹⁰ and neither was disciplined in connection with the absences.¹¹

McCarther and Huerta brought a representative action against their respective employers¹² for failure to provide employees with paid leave to care for relatives as required by Labor Code section 233,¹³ also called the “kin care” statute.¹⁴ Before class certification was complete, plaintiffs and defendants filed motions for summary judgment and summary adjudication for a determination of whether the defendants’ sickness absence policy under section 5.01F of the CBA qualifies as sick leave as defined in section 233.¹⁵ The trial court held that since employees do not earn or accrue any leave under section 5.01F, the defendants’ absence policy did not constitute sick leave under section 233, and it granted the defendants’ motion for summary judgment.¹⁶ The Court of Appeal reversed the trial court’s decision and held that the absence policy did constitute sick leave within the meaning of the kin care statute.¹⁷ The defendants appealed to the California Supreme Court.¹⁸

Analysis

The court examined the language of the statute in order to determine whether it governs defendants’ sick leave policy.¹⁹ First, section 233 requires that if an employer provides sick leave, then it must also provide kin care leave in “an amount not less than the sick leave that would be accrued during six months at the employee’s then current rate of entitlement.”²⁰ It is clear

⁹ *Id.*

¹⁰ Huerta requested and was granted one paid personal day in connection with his family care absences per the personal day off policy. *Id.* at 541.

¹¹ *Id.* at 540–41.

¹² The employers involved were SBC Services, Inc., Pacific Telesis Group, Advanced Solutions, Inc., Southwestern Bell Video Services, Inc., Pacific Bell Information Services, and SBC Telecom, Inc. *Id.* at 539.

¹³ *Id.* Labor Code section 233 requires that an

employer who provides sick leave for employees shall permit an employee to use in any calendar year the employee’s accrued and available sick leave entitlement, in the amount not less than the sick leave that would be accrued during six months at the employee’s then current rate of entitlement, to attend to an illness of a child, parent, spouse, or domestic.

Id. at 541 (quoting CAL. LAB. CODE § 233 (West 2010)).

¹⁴ *Id.* at 541.

¹⁵ *Id.* Section 233 defines sick leave as “accrued increments of compensated leave.” *Id.* (quoting CAL. LAB. CODE § 233).

¹⁶ *Id.* at 541.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 542 (quoting CAL. LAB. CODE § 233).

from this language that in order to apply the statute to an employer's sick leave policy, it is first necessary to calculate the amount of sick leave that an employee would accrue in a six-month period.²¹ Under the defendants' policy, there is no cap to the number of days that employees can be absent for sick leave as long as they operate within the attendance management policy.²² Therefore, it is not possible to determine how many days of sick leave that an employee would accrue in six months in order to apply section 233.²³

Plaintiffs proposed, and the court dismissed, two ways in which kin care leave could be calculated under defendants' absence policy in order to make section 233 applicable.²⁴ First, as to plaintiffs' suggestion that the rate of entitlement during any six-month period is the five-day increment of leave that an employee earns,²⁵ the court explained that under the defendants' plan, the only period for which the entitlement can really be calculated is for a seven-day period because the amount of compensated time is not "banked."²⁶ Therefore, since the rate of entitlement cannot be calculated for a six-month period, the legislature did not intend section 233 to apply to sick leave policies like the defendants'.²⁷ Further, the Legislature's adoption of section 234, which prohibits employers from counting, for disciplinary purposes, any sick leave taken under section 233, supports this conclusion.²⁸ Presently, due to the lack of a limit on the number of absences, the defendants' absence control policy is the only limit on its sick leave policy.²⁹ Thus, if section 233 applied to the defendants' absence control policy, then section 234 would also apply and would prohibit the defendants' only limit to the number of sick days taken for kin care.³⁰ Since, an employee would be limited in the amount of personal sick leave he could take (by the attendance management policy), but not in the amount of kin care sick leave he could take, this would have the effect of allowing the employee to take more kin care sick leave than personal sick leave.³¹ This result would be

²¹ *Id.* at 542.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 542–43.

²⁷ *Id.* at 543.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* For example, if defendants cannot utilize their attendance management policy, then an employee would be allowed to take unlimited, compensated five day absences for kin care as long as he returned to work for a partial day each week. *Id.*

³¹ *Id.*

directly contrary to the plain language of the statute, which contemplates that employees will only be permitted to use half of their annually accrued sick leave for kin care.³²

The court found the plaintiffs' alternative proposal for calculating the kin care entitlement—that it should be based on the amount of sick leave actually used—equally unpersuasive because it presumed, wrongly, that section 233 is not concerned with certainty and precision.³³ The court noted the flaw in this method, which is that it would be impossible for an employer to determine the exact amount of kin care leave to which its employees are entitled.³⁴ The statute's clear intent is to provide employers with precise guidelines as to an employee's kin care entitlement.³⁵ The plaintiffs' interpretation of the statute ignores this intention and therefore was rejected.³⁶

Finally, plaintiffs' argument as to calculating kin care entitlement failed because it was "self-defeating."³⁷ The clear intent of the legislature, illustrated by the plain language of the statute, is to give employers notice of how many kin care days they were required to provide.³⁸ Plaintiffs' argument, which proposed two different ways of calculating kin care entitlement, resulted in two different calculations under the same policy, which clearly violates the intent of the statute.³⁹ Thus, the court rejected the plaintiffs' arguments and concluded that an employer must have clear guidelines as to an employee's kin care requirements and, therefore, that the amount of kin care leave to which an employee is entitled must be ascertainable from the employer's absence policy in order for section 233 to apply.⁴⁰

In addition to being limited to absence policies in which the amount of kin care leave is ascertainable, the court noted that the reach of section 233 is also limited by the definition of sick leave in the statute.⁴¹ The statute defines sick leave as "accrued increments of compensated leave," and further states that employees may only utilize "accrued and available" sick leave for

³² *Id.* Section 233 plainly states that an employee may take, in a one-year period, kin care leave equal to the amount of regular leave days accrued in a six-month period. *Id.* at 541 (quoting CAL. LAB. CODE § 233).

³³ *Id.* at 543.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 543–44.

kin care.⁴² In order to determine if the defendants' sickness absence policy is sick leave as defined in the statute, the court analyzed the meaning of the word "accrued."⁴³ The most usual definition of accrued is to accumulate over a period of time.⁴⁴ Yet, even under the plaintiffs' proposed, non-temporal definition of accrual as leave that is earned but not yet paid,⁴⁵ it is still clear that section 233 does not apply because the parties had previously stipulated that employees under the defendants' sick leave policy do not accumulate or bank any specific number of paid sick days in a year.⁴⁶

The court dismissed plaintiffs' contention that the definition of the word accrued changes depending on how it is used in the statute.⁴⁷ The plaintiffs claimed that the word accrued, when used in the statute to explain that employees must be allowed to use "accrued and available sick leave" for kin care, means to "come into existence,"⁴⁸ and thus, since the defendants' policy provides employees with an enforceable right to use sick leave, the employees have accrued leave. Therefore, according to the plaintiffs' argument, the policy is controlled by section 233.⁴⁹ This reasoning is flawed for two reasons. First, although Black's Law Dictionary does define the word accrue as a right coming into existence, it only does so in the framework of a cause of action.⁵⁰ Since section 233 does not concern causes of action, a more usual and ordinary definition, such as to accumulate, applies here.⁵¹ Second, if plaintiffs' definition is accepted, then the word accrued would have the same definition as the word available.⁵² The rules of statutory interpretation mandate that a construction which makes a word a surplusage must be avoided.⁵³ Therefore, since accepting plaintiffs' definition would make the word available unnecessary, it is clear that the Legislature intended the two words to have different meanings, and plaintiffs' proposed definition was rejected.⁵⁴

⁴² *Id.* at 544 (quoting CAL. LAB. CODE § 233(a), (b)(4)).

⁴³ *Id.* at 544.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* (citing BLACK'S LAW DICTIONARY 22 (8th ed. 2005)).

⁵¹ *Id.* at 544.

⁵² Available is defined as "present and ready for use." *Id.* at 545 (quoting AMERICAN HERITAGE DICTIONARY 123 (4th ed. 2000)).

⁵³ *Id.* (citing *Dyna-Med, Inc. v. Fair Emp't & Hous. Comm'n.*, 43 Cal.3d 1379, 1387 (1987)).

⁵⁴ *Id.* at 545.

The second, and final, use of the word accrued appears in the statute's definition of the term sick leave as "accrued increments of compensated leave."⁵⁵ The court rejected the Court of Appeal's contention that the words "accrued" and "increments" mean the same thing in this definition because it would cause the word increments to be surplusage, which is clearly not what the legislature intended.⁵⁶ In addition, the court stated again that the usual and commonsense definition of the word accrued means to accumulate,⁵⁷ and once again concluded that section 233 applies only to sick leave policies that provide for an accumulated number of days off; not to policies like the defendants' that provide for an uncapped and unbanked number of days off.⁵⁸

Finally, the court turned to an analysis of the legislative intent of the statute.⁵⁹ Legislative intent must be ascertained by examining both the language of the statute and its legislative history.⁶⁰ The fact that section 233 includes a definition of the term sick leave shows that the legislature was aware that the term could have more than one meaning.⁶¹ If the legislature had meant for every type of sick leave policy to be covered by the statute, they would have stated that expressly; since they did not, it is clear that they meant to exclude some types of sick leave plans.⁶² Even though the plain language of the statute clearly shows a legislative intent to limit the types of policies to which it applies, the court went a step further by examining the statute's legislative history.⁶³ The statutory history is filled with examples of intent to limit the reach of the statute.⁶⁴ The court noted that the phrase "sick leave, as defined" is found throughout the historical documents, which illustrates that the legislature understood the definition in the statute to be limiting.⁶⁵ In addition, the court found it conclusive that, before the statute could pass the legislature, the definition of the term sick leave was changed by amendment from a very inclusive definition that would have likely included defendants' policy to the current definition, which is much more restrictive.⁶⁶ The court concluded

⁵⁵ *Id.* (quoting CAL. LAB. CODE § 233(b)(4)).

⁵⁶ *Id.* at 545.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 542 (citing *Dyna-Med, Inc. v. Emp't & Hous. Comm'n.*, 43 Cal. 3d 1379, 1387 (1987)).

⁶¹ *Id.* at 545.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 546.

⁶⁶ *Id.*

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that the legislative intent was to limit the types of absence policies to which section 233 applied to only those defined in the statute, i.e., those which provide for an accumulated or banked system of sick leave.⁶⁷

Holding

The court reversed the Court of Appeal.⁶⁸ The court held that the kin care statute does not apply to sick leave policies which provide for an uncapped number of compensated days off because it is impossible to determine the amount of sick leave that an employee may take under such a policy.⁶⁹ Therefore, since there is no limit to the number of days that employees may be absent from work under the defendants' sick leave policy, the kin care statute does not apply, and the defendants are not required to provide employees with paid absences to care for sick family members.⁷⁰

Legal Significance

The court's holding prevents an employee who is subject to a paid sick leave policy that provides for an uncapped number of days off from demanding paid kin care leave under section 233. However, the court's decision does not preclude such an employer from complying with section 233. On the other hand, an employer that provides sick leave in the form of an accrual-based system is required to comply with the requirements of the kin care statute by providing its employees with paid kin care leave.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 543.

⁷⁰ *Id.* at 546.

Digest: In re Marriage of Sonne

Blair A. Russell

Opinion by Baxter, J., with George, C.J., Kennard, Werdegar, Chin, Moreno, and Corrigan, JJ.

Issue

What portion of an employee's retirement account is treated as community property, and what portion is treated as separate property, where an employee commingles community property and separate property interests in that retirement account?

Facts

Gordon Sonne was the former Sheriff-Coroner-Public Administrator of Monterey County and a member of the California Public Employees' Retirement System (CalPERS).¹ Members of CalPERS participate in a retirement plan, which consists of an annuity (funded by member contributions) and a pension (funded by employer contributions).² A member's retirement allowance is computed primarily by calculating the number of years a member has served and contributed to CalPERS, otherwise called "service credit."³ During his employment, Sonne accrued a certain amount of service credit in relation to his duties under the CalPERS retirement plan.⁴ During the time Sonne accrued his service credits, he was married to his first wife Dalia; in 1995, Sonne transferred to Dalia one-half interest of his service credit (8.677 years of service credit) pursuant to their divorce, in which Dalia waived all future rights to claim the retirement benefits of Sonne's retirement account.⁵ Following the transfer of his one-half interest of service credit, Sonne remarried to Theresa Sonne.⁶ During the Sonne-Theresa marriage, Sonne had begun to redeposit contributions to his CalPERS account with the use of community funds deducted from his salary, in order to account for the one-

¹ *In re Marriage of Sonne*, 48 Cal. 4th 118, 121 (2010).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

half interest he transferred to Dalia.⁷ When Sonne and his new wife Theresa later separated, the community (funds from the Sonne-Theresa marriage) had redeposited 70.83% of the payments of the original 8.677 years of service credit that was transferred to Dalia.⁸

During the dissolution proceeding of Sonne's second marriage, Sonne and Theresa came up with competing values of how to calculate the amount of money that belonged to the community after Sonne had used community funds to recoup the amount of service credit lost resulting from Sonne's one-half interest settlement to Dalia.⁹ Sonne's expert argued that the community had a right to reimbursement of only the funds used to make the redeposit.¹⁰ However, Theresa's expert contended that "the service credit should be allocated between community and separate property in the same proportion by which those estates had contributed to the redeposit."¹¹ In other words, under Sonne's method of calculation, the community would have a right to the \$31,938.92 that had been redeposited into the CalPERS account (this represented only 5.374% of the actuarial value of the 8.677 years of service credit, which was now valued at \$594,322).¹² Under Theresa's approach, while the value of the 8.677 years of service credit was now \$594,322, Sonne had only originally invested \$45,090.24 toward that amount in the Sonne-Dalia marriage.¹³ Theresa then argued that because the community redeposited \$31,938.92 of the original \$45,090.24 (representing 70.83% of the total value), the community was then entitled to 70.83% of the balance of the service credit account valued at \$594,322.¹⁴ The substantial difference in the amount that would result under these competing methods of valuation was the subject of this litigation.

The trial court adopted Theresa's approach and reasoned that because the community had contributed 70.83% of the redeposit, the community was entitled to 70.83% of the shares of the service credits from the Sonne-Dalia marriage.¹⁵ The trial court chose this method because it found that the service credit from the Sonne-Dalia marriage was to be considered community

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 122.

¹⁰ *Id.* at 122–23.

¹¹ *Id.* at 123.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

property.¹⁶ The Court of Appeal agreed with the trial court that the service credit was community property, but for different reasons.¹⁷ The Court of Appeal reasoned that Sonne did in fact have a separate property interest in his premarital service to his employer “which created his right to repurchase the service credits,” but because Sonne had commingled community property with separate property, there was no way to trace what proportion of the service credit was attributable to him.¹⁸ As such, the Court of Appeal found no way to overcome the presumption that the service credit became community property.¹⁹ According to the Court of Appeal, Sonne’s evidence as to the proper proportion of service credit attributable to him was discredited by the trial court, and as such, the trial court properly concluded that the community property presumption applicable to property purchases during a marriage with community funds required that the service credits be considered community property.²⁰ The Court of Appeal then rejected Sonne’s argument that only a portion of the funds used to repurchase the service credits should be considered community property.²¹ Sonne petitioned for review and the California Supreme Court granted the petition.²²

Analysis

The California Supreme Court declared that the trial court’s ruling that the service credit from the Sonne-Dalia marriage was community property was primarily a question of law to be reviewed *de novo*.²³ The court recognized that the community owns all such rights attributable to employment during marriage before separation.²⁴ In addition, the rule of law, which must be applied in a dissolution proceeding is that:

[T]he superior court must apportion an employee spouse’s retirement benefits between the community property interest of the employee spouse and the nonemployee spouse and any separate property interest of the employee spouse alone [T]he superior court must arrive at a result that is ‘reasonable and fairly representative of the relative contributions of the community and separate estates.’²⁵

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 123–24.

¹⁹ *Id.* (citing CAL. FAM. CODE § 760 (West 2010)).

²⁰ *Id.* at 124.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.* (citing *In re Marriage of Lehman*, 18 Cal. 4th 169, 177 (1998)).

²⁵ *Id.* (quoting *Marriage of Lehman*, 18 Cal. 4th at 177).

Applying this rule of law, the court found that there was a failure to make a reasonable and fair allocation between the contributions of the community and that of the separate property interest.²⁶ The failure occurred when the lower court gave credit to the community for redeposits as consideration for the service credit.²⁷ According to the court, a redeposit of member contributions for a prior period of service is only credit to a previously rendered service.²⁸ By failing to follow this analysis, the lower court gave no credit to Sonne's service for which he received service credit, and failed to recognize that the service credit he received was received prior to his marriage with Theresa, thus was not attributable to their marriage.²⁹ The 8.677 years of service credit which Theresa sought a portion of, was earned during the Sonne-Dalia marriage and was an asset of that community alone.³⁰ When Sonne apportioned his one-half interest to Dalia, and she withdrew that interest, all future CalPERS pension and retirement rights remained with Sonne.³¹ As such, any portion of funds that were attributable to employment before the Sonne-Theresa marriage is separate property of Sonne.³²

The court stressed the issue that Sonne, after giving Dalia a one-half interest of his service credits, retained the right to recoup his previously earned service credits, which Sonne rightfully retained as separate property.³³ However, because Sonne was able to recoup his service credits with the help of community funds from his marriage with Theresa, the problem of how to treat the comingling of community funds and that of separate property arose.³⁴ In evaluating this problem, the court noted that the Court of Appeal erred in finding that where separate and community funds are commingled in a way that is impossible to decipher, the whole will be treated as community property.³⁵ The Court of Appeal erred by assuming that the retirement fund is "a unitary and indivisible asset."³⁶ Instead, a public employee's retirement consists of two components, the annuity and the pension.³⁷ Contributions to an annuity consist of

²⁶ *Id.* at 124.

²⁷ *Id.* at 125.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 126.

³² *Id.* (citing CAL. FAM. CODE § 770(a)(1) (West 2010)).

³³ *Id.*

³⁴ *Id.* at 127.

³⁵ *Id.* (citing *In re Marriage of Mix*, 14 Cal. 3d 604, 611 (1975)).

³⁶ *Id.*

³⁷ *Id.* (citing CAL. GOV. CODE §§ 20000–20085 (West 2010)).

accumulated contributions of a member's retirement plan, and the annuity makes payments for life upon retirement.³⁸ Pensions, on the other hand, are comprised of contributions of employer-controlled funds, and they make payments for life upon retirement.³⁹ When Sonne-Theressa made contributions with community funds to redeposit and recoup the amount of service credit in Sonne's member account, these represented accumulated contributions, and represented payments to the annuity component of Sonne's account.⁴⁰ The pension component of Sonne's member account obligates the employer to pay the pension in consideration for Sonne's service—an obligation that was commenced during the Sonne-Dalia marriage.⁴¹ Therefore, the pension component, which was derived solely from Sonne's service as Sheriff during his previous marriage, represents separate property and not community property.⁴² Being separate property, Theressa had a claim only to a portion the annuity component of the retirement account.⁴³ The Court of Appeal erred in finding that, because the redeposit of contributions to the retirement account were made with community funds, the community was entitled to a fraction of the entire retirement, including the portion during the Sonne-Dalia marriage.⁴⁴ Because the redeposit was a member contribution, and member contributions are used to purchase the annuity portion of the retirement account, the community is only entitled to a portion of the annuity.⁴⁵ The remaining portion is that of the pension, which is derived not from member contributions, but from contributions of the employer.⁴⁶ The pension portion of the retirement account represents a much larger portion than that of the annuity, and any award as to the pension in favor of the Sonne-Theressa community was improper.⁴⁷

The court then ruled that the trial court should have awarded only a portion of the annuity as community property during the Sonne-Theressa marriage.⁴⁸ In essence, the trial court was partially correct in ruling that the community was entitled to a share of the retirement account, but it erred in failing to find that the community was entitled only as to the

³⁸ *Id.* (citing CAL. GOV. CODE § 20018).

³⁹ *Id.* (citing CAL. GOV. CODE § 20054).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 127–28.

⁴³ *Id.*

⁴⁴ *Id.* at 128.

⁴⁵ *Id.* (citing CAL. GOV. CODE §§ 20018, 21362.2(a) (West 2010)).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 129.

portion comprising the annuity. However, no evidence was presented at trial in regard to calculating the amount of contributions the community had made to the annuity portion, since neither Sonne nor Theressa adopted this approach in their valuations.⁴⁹ Under the rule the court adopted from previous authority, the method of apportionment must be reasonable and fairly representative of the contributions from the community and that of separate property.⁵⁰ The court then found that the best method that would accomplish this result would involve valuing the share that the community had made to the annuity portion of the retirement account, and awarding a portion of that amount to each member of the community.⁵¹ Because the parties had not presented evidence as to method of valuation of the annuity, the court gave authority to the trial court to review the apportionment under that method.⁵²

Holding

The court reversed the ruling of the Court of Appeal as to the valuation of what portion of the retirement account was community property, but affirmed the Court of Appeal decision in regard to the proposition that some portion of the retirement account constituted community property arising from the Sonne-Theressa marriage.⁵³ The court then remanded the matter to the Court of Appeal for remand to the trial court, with instructions that the trial court take evidence as to the proper apportionment owed to the community as to the annuity portion of the retirement account only.⁵⁴

Legal Significance

The California Supreme Court's holding resolves the critical assumptions made by both the trial court and Court of Appeal in reaching their decision. It addresses the assumption that where community property (in this case funds) is commingled with separate property, that one must unequivocally trace the proportion contributed by the community and the proportion contributed from separate property in order to avoid the presumption that the community gains title to the whole. According to the court, the apportionment to separate and the apportionment to community property must be reasonable and

⁴⁹ *Id.*

⁵⁰ *Id.* (citing *In re Marriage of Lehman*, 18 Cal. 4th 169, 187 (1998)).

⁵¹ *Id.* at 129.

⁵² *Id.*

⁵³ *Id.* at 129–30.

⁵⁴ *Id.*

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fair and must account for the relative contributions made by the community and by the separate individual. In resolving the fundamentally flawed analysis given by the Court of Appeal, the court stressed that a retirement account is not a unitary asset. It consists of both a pension and annuity under California Code and separate analyses for contributions to both the annuity and the pension must be taken into account.

***Digest: Communities for a Better
Environment v. South Coast Air Quality
Management District***

James V. Bilek

Opinion by Werdegar, J., with George, C.J., Baxter, Chin,
Moreno, JJ., and Pollak, J.¹ and Premo, J.²

Issues

1. Whether a governmental agency may use the maximum emissions allowed under a pre-existing government issued permit as the baseline in determining if an Environmental Impact Report is required to be produced.

2. Whether the use of the actual environmental conditions as a baseline during the examination of a proposed project's environmental impact will deprive the permit holder of his or her vested rights.

3. Whether subsequent review of the approved proposed project will violate the permit's statute of limitations.

4. Whether an exception should be made for a company's proposed project if that proposed project consists of using equipment already installed and subject to government permits.

5. Whether a government agency must use a specific formula in its calculation of the baseline.

Facts

Real party in interest, ConocoPhillips, operates a refinery in Wilmington, CA, which produces chemical products such as diesel fuel, gasoline, and jet fuel.³ The defendant, South Coast Air Quality Management District (District), is a government agency responsible for the regulation of "nonvehicular air

¹ Associate Justice of the Court of Appeal, First Appellate District, Division Three, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

² Associate Justice of the Court of Appeal, Sixth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

³ *Cmtys. for a Better Env't v. S. Coast Air Quality Mgmt. Dist.* 226 P.3d 985, 990 (Cal. 2010).

pollution in the South Coast Air Basin”⁴ The plaintiffs include various labor organizations, individuals who live in the area near the refinery, and an environmental organization.⁵ In order to comply with federal and state environmental regulations mandating a reduction of sulfur content in diesel fuel, ConocoPhillips developed a plan entitled the Ultra Low Sulfur Diesel Fuel Project (the Diesel Project).⁶ Under the Diesel Project, ConocoPhillips planned to replace certain equipment and increase the use of four boilers it had maintained.⁷ These boilers were subject to permits issued prior to the state and federal environmental regulations and, according to the permits, were allowed to operate at certain maximum levels.⁸ ConocoPhillips sought approval from the District to obtain a new permit for the Diesel Project.⁹ According to the California Environmental Quality Act (CEQA), any project that may have significant environmental effects “requires a public agency to prepare an environmental impact report (EIR)”¹⁰ In order to determine if a project will significantly affect the environment, the government agency must compare the conditions of the environment prior to the project’s implementation with the conditions of the environment post-implementation.¹¹ The environment’s state prior to the project’s implementation is referred to as the “baseline,” which consists of “the physical environmental conditions in the vicinity of the project, as they exist at the time . . . environmental analysis is commenced”¹² Furthermore, CEQA guidelines permit government agencies to publish certain threshold levels; if a certain chemical emission surpasses that level, the proposed project will be deemed to have a significant impact on the environment.¹³ In its initial report, the District concluded that the Diesel Project would not have a significant impact on the environment, and thus did not require production of an EIR.¹⁴

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 989 (citing CAL. PUB. RES. CODE §§ 21100(a), 21151(a) (West 2010)). “The purpose of an EIR is to inform decision makers and the public of the potential environmental impacts of a project and to identify feasible alternatives to the project and measures to mitigate or avoid the adverse effects.” *Fed’n of Hillside & Canyon Ass’ns. v. City of L.A.*, 83 Cal. App. 4th 1252, 1258 (2000).

¹¹ *Cmtys. for a Better Env’t*, 226 P.3d at 989.

¹² *Id.* (quoting CAL. CODE REGS. tit. 14, § 15125(a) (2010)).

¹³ *Id.* at 990 n.2.

¹⁴ *Id.* at 990.

One of the plaintiffs' experts opined that the Diesel Project would greatly affect the environment by increasing nitrogen oxide emissions to as much as 661 pounds per day.¹⁵ The District's published threshold for nitrogen oxide emissions is 55 pounds per day.¹⁶ The District itself concluded the Diesel Project would increase nitrogen oxide levels by between 237 and 456 pounds per day, but, since the bulk of this increase—between 201 and 420 pounds per day—would be caused directly by the increased usage of the four boilers (an increased usage within the maximum allowed by their permits), the District regarded the emissions output as below the 55 pounds per day threshold.¹⁷ Thus, in determining the baseline, the District argued that because ConocoPhillips already had permits to use the boilers, its baseline should be the level of emissions that would occur at the boilers' maximum permitted use.¹⁸ In their petition for writ of mandate, plaintiffs argued that the District erred in using this as a baseline, that substantial evidence existed to conclude that the Diesel Project would have a significant impact on the environment, and that the District should have prepared an EIR to determine if any measures could be taken to mitigate the environmental impact of the Diesel Project.¹⁹

The trial court denied the plaintiffs' petition and entered judgment for ConocoPhillips and the District.²⁰ On appeal, the Court of Appeal agreed with the plaintiffs, holding that the proper baseline should be determined by the actual physical conditions, as opposed to potential conditions.²¹ The Court of Appeal further held that if the proper baseline had been used, there would have been sufficient evidence to show that the Diesel Project would have a significant impact on the environment.²² Therefore, the Court of Appeal remanded with orders that an EIR be prepared by the District.²³ The District and ConocoPhillips petitioned the California Supreme Court for review.²⁴ In their argument, ConocoPhillips and the District contended that: (1) as ConocoPhillips had an entitlement to use its boilers at a certain level, the proper baseline should be those

¹⁵ *Id.*

¹⁶ *Id.* at 990 n.2.

¹⁷ *Id.* at 990–91.

¹⁸ *Id.* at 991.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

emissions created by the boilers' maximum allowable level of usage; (2) if the maximum emissions allowed under the permit were not used as a baseline, ConocoPhillips would be deprived of its vested rights under the permit; (3) in allowing a challenge to the District's determination, the court would violate the permit's statute of limitations; (4) regardless of the above arguments, an exception should have been made for ConocoPhillips because its proposed project was simply a modification of a pre-approved project; and (5) the Court of Appeal's order that an average annual emissions level be used as the baseline was improper.²⁵

Analysis

1. What is the proper standard to establish a baseline for purposes of determining if a proposed project will have a significant impact on the environment?

To determine if the District used an improper baseline, the court first turned to the relevant statutory law, particularly section 15125(a) of the California Code of Regulations, which states:

An EIR must include a description of the physical environmental conditions in the vicinity of the project, as they exist at the time the notice of preparation is published This environmental setting will normally constitute the baseline physical conditions by which a lead agency determines whether an impact is significant.²⁶

The court next examined Court of Appeal decisions ruling under this statute and concluded that they held that the proper baseline is to be established by a determination of "*actual* environmental conditions existing at the time of CEQA analysis," not the conditions that *could* exist under an existing permit.²⁷ However, in its determination, the District used as its baseline the emissions that would occur if the boilers were running at the maximum capacity allowed under their permits.²⁸ Furthermore,

²⁵ *Id.* at 989.

²⁶ *Id.* at 992 (emphasis omitted) (quoting CAL. CODE REGS. tit. 14, § 15125(a)).

²⁷ *Id.* at 992–93 (emphasis added) (citing *Fat v. Cnty. of Sacramento*, 97 Cal. App. 4th 1270, 1277–78 (2002); *Env'tl. Planning Info. Council v. Cnty. of El Dorado*, 131 Cal. App. 3d 350, 354, 357–58 (1982); *City of Carmel-by-the-Sea v. Bd. of Supervisors*, 183 Cal. App. 3d 229, 246–47 (1986); *Cnty. of Amador v. El Dorado Cnty. Water Agency*, 76 Cal. App. 4th 931, 955 (1999); *Save Our Peninsula Comm. v. Monterey Cnty. Bd. of Supervisors*, 87 Cal. App. 4th 99, 121 (2001); *San Joaquin Raptor Rescue Ctr. v. Cnty. of Merced*, 149 Cal. App. 4th 645, 658 (2007); *Woodward Park Homeowners Assn., Inc. v. City of Fresno*, 150 Cal. App. 4th 683, 693 (2007)). These cases included factual scenarios in which a permit or regulatory framework allowed for higher increased activity than what was actually occurring. *Cmtys. for a Better Env't*, 226 P.3d at 993.

²⁸ *Id.* at 993.

the District admitted that, normally, no one boiler ran at its maximum capacity allowed under the permit.²⁹ Thus, the court held that the District erred in using as the baseline the conditions that could exist if the boilers were simultaneously being used at full capacity.³⁰ The court reasoned that using the boilers' maximum capacity emissions is not an accurate reflection of the established, existing, and actual environmental conditions prior to the Diesel Project's implementation, but is only a hypothetical determination of what could exist at any given time under the permits.³¹ By using this baseline, the court further reasoned, the District was producing an illusory comparison that would only serve to mislead the public and subvert the true intentions of CEQA.³²

2. Does disallowing a government agency from using the maximum emissions allowed under a pre-existing permit as the baseline in its CEQA analysis violate that permit holder's vested rights?

Despite the established case law, the District and ConocoPhillips argued that an exception should be made because ConocoPhillips possessed an entitlement to use the boilers at their maximum allowable capacity under the permit.³³ To rule otherwise, according to the District and ConocoPhillips, would deprive ConocoPhillips of its vested rights and conflict with the permit's statute of limitations.³⁴ Under the doctrine of vested rights, a property owner who has been issued a government permit, and has substantially developed his or her property in reliance on the permit, has a vested right to complete construction and use the property consistent with the permit.³⁵ The court dismissed this argument, holding that any order by the District could not deprive ConocoPhillips of its right to use its boilers at their maximum allowable level.³⁶ As the court reasoned, the issue is not whether ConocoPhillips has a right to use its boilers at their allowable level, but rather what impact ConocoPhillips' proposed project, including the use of new and

²⁹ *Id.* In fact, a boiler would only run at full capacity if another boiler happened to be shut down. *Id.*

³⁰ *Id.*

³¹ *Id.* at 994 (citing *San Joaquin Raptor Rescue Ctr.*, 149 Cal. App. 4th at 658).

³² *Id.* (citing *Env'tl. Planning Info.*, 131 Cal. App. 3d at 538).

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* (citing *Russ Bldg. P'ship. v. City and Cnty. of S.F.*, 44 Cal. 3d 839, 845–46 (1988)).

³⁶ *Id.* at 995.

modified equipment, would have on the environment.³⁷ Even if, using the proper baseline, the District determines that enough adverse environmental effects will result from the Diesel Project that it would not be approved without limits on the boilers' emissions output, this would not deprive ConocoPhillips of a vested right because ConocoPhillips has "no vested right to *pollute the air* at any particular level."³⁸ Merely conditioning approval of a new project on controlled nitrogen oxide emissions in no way deprives ConocoPhillips of a vested right and does not contradict the terms of its permits.³⁹ The court also stressed that it is always within the District's power to simply deny permits to be issued for the Diesel Project if it determines that nothing could successfully mitigate the effects of the increased nitrogen oxide production, which would clearly result in no interference with ConocoPhillips' rights under the permits.⁴⁰ Furthermore, even if mitigation would require interference with ConocoPhillips' vested rights, as long as the District's initial investigation determined that the Diesel Project would result in a significant environmental impact on the area, CEQA would still require an EIR to be produced.⁴¹ Thus, the court concluded, even if an applicant's vested rights may be interfered with, it is not an excuse to forgo an EIR.⁴²

3. Does review of an order approving a proposed project which entails the use of equipment subject to pre-existing permits violate the statute of limitations?

ConocoPhillips and the District also argued that by allowing judicial review of the boiler permits the courts have violated the statute of limitations for such review, which is 30 or 180 days, depending on the type of challenge.⁴³ The court quickly dismissed this argument for the same reasons stated above: (1) plaintiffs did not challenge the previously issued boiler permits, but rather they challenged the District's approval of the Diesel Project; (2) challenging the type of baseline used to assess the Diesel Project's environmental impact could not result in an order interfering with the permits; and (3) even if an order were

³⁷ *Id.* at 994.

³⁸ *Id.* (citing *Sherwin-Williams Co. v. South Coast Air Quality Mgmt. Dist.* 86 Cal. App. 4th 1258, 1273 (2001); *Mobil Oil Corp. v. Superior Court*, 59 Cal. App. 3d 293, 305 (1976)).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 995–96.

given to modify the permits, that still would not preclude the duty the District has to produce an EIR.⁴⁴ The court therefore held that the statute of limitations on the *permits* does not affect the rights of the plaintiffs in this case to challenge the District's approval of the Diesel Project.⁴⁵

4. Should an exception be made for a company's proposed project if it will require the use of equipment already subject to government issued permits?

ConocoPhillips and the District argued that a long line of Court of Appeal decisions hold that using the maximum allowable emissions as a baseline is an exception to the general rule of using existing conditions where the proposed project is merely a modification of a previously approved project.⁴⁶ The court relied on the fact that the Diesel Project would require the installation of new equipment, in addition to increased use of existing equipment, when it held that this was not merely a modification of a pre-existing project.⁴⁷ Furthermore, ConocoPhillips applied for a new permit, and the District treated the project as a new one that was not exempt under the California Code of Regulations.⁴⁸

5. What is the proper method to accurately calculate the baseline to be used during CEQA analysis?

Finally, the Court addressed the issue of how to properly calculate the baseline.⁴⁹ ConocoPhillips disagreed with the Court of Appeal ruling that required the District to use the annual average nitrogen oxide emission level as its baseline.⁵⁰ The court turned to the CEQA guidelines in section 15125, which state: "[T]hat the lead agency 'normally' use a measure of physical conditions 'at the time the notice of preparation [of an EIR] is published, or if no notice of preparation is published, at the time environmental analysis is commenced.'"⁵¹

The court expressed concern about using a rigid date for

⁴⁴ *Id.* at 996.

⁴⁵ *Id.*

⁴⁶ *Id.* For a discussion on the applicability of the rule which ConocoPhillips argued should apply here, see *Bloom v. McGurk*, 31 Cal. Rptr. 2d 914, 916 (Cal. Ct. App. 1994) (noting that where a new permit involves no change in operations "the project falls squarely within [CEQA's] categorical exemption").

⁴⁷ *Cmtys. for a Better Env't*, 226 P.3d at 996.

⁴⁸ *Id.* See also CAL. CODE REGS. tit. 14, §§ 21166, 15162, 15301 (2010).

⁴⁹ *Cmtys. for a Better Env't*, 226 P.3d at 997.

⁵⁰ *Id.*

⁵¹ *Id.* (quoting CAL. CODE REGS. tit. 14, § 15125(a)).

establishing the baseline because conditions will often change and emissions may fluctuate rapidly.⁵² Additionally, according to the Court, using a rigid date may encourage companies to artificially increase their emissions use in order to establish a higher baseline during the review process.⁵³ Ultimately, the court relied on the absence of CEQA guidelines mandating a precise formula be used to determine that the District (or other responsible governmental agency) has discretion to determine how the proper baseline should be calculated, as long as it is supported by “substantial evidence.”⁵⁴ The court ordered that the District is not necessarily to use any exact formula, but in whatever formula it does use, it must compare the existing environmental conditions before the Diesel Project with the environmental conditions after the Diesel Project.⁵⁵

Holding

The court affirmed the Court of Appeal.⁵⁶ The court held that maximum emissions limits allowed under a permit do not constitute a proper baseline.⁵⁷ Next, the court held that a company is not deprived of its vested rights under a permit it holds by an order to mitigate emissions created by a proposed project.⁵⁸ A review of a proposed project, even if that review determines the project should be denied, in no way will affect any vested rights in pre-existing permits.⁵⁹ Additionally, as the proposed project will require the installation of new equipment, the proposed project is not simply a modification of a prior implemented project and thus is not subject to an exception to the rule that an EIR be produced for any new project that will significantly affect the environment.⁶⁰ Finally, the court held that an EIR must be produced because the Diesel Project will likely significantly affect the environment.⁶¹ As long as the District compares existing environmental conditions with those after implementation of the proposed project, however, it is in the

⁵² *Id.* (citing *Save Our Peninsula Comm. v. Monterey Cnty. Bd. of Supervisors*, 87 Cal. App. 4th 99, 125 (2001)).

⁵³ *Id.* at 997.

⁵⁴ *Id.* at 997–98.

⁵⁵ *Id.* at 998.

⁵⁶ *Id.*

⁵⁷ *Id.* at 993.

⁵⁸ *Id.* at 995.

⁵⁹ *Id.*

⁶⁰ *Id.* at 996.

⁶¹ *Id.* at 992.

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District's discretion to determine how the baseline should be calculated.⁶²

Legal Significance

The Court's decision prevents a governmental agency from using the maximum emissions allowed under a permit as the baseline in its determination of whether or not an EIR is to be produced. Thus, governmental agencies must use actual existing environmental conditions when determining whether an EIR need be produced. The mere fact that a company has a right to produce a certain level of emissions under an existing permit does not mean it has the right to produce a comparable level of emissions in a *new* project. The two projects are distinct, and any government agency contemplating the production of an EIR must treat them accordingly.

⁶² *Id.* at 998.

Digest: Boeken v. Philip Morris USA, Inc.

Whitney M. Zantias

Opinion by Kennard, J., with Baxter, Chin, and Corrigan, JJ.
Dissenting opinion by Moreno, J., with George, C.J. and Werdegar, J.

Issue

Does a common law action for loss of consortium bar a subsequent wrongful death action for loss of consortium under res judicata?

Facts

Judy Boeken's (Boeken) now deceased husband, Richard, was diagnosed with lung cancer in 1999, after smoking cigarettes for forty-two years.¹ In October 2000, while Richard was still alive, Boeken filed an action against Philip Morris USA, Inc. (Philip Morris) for loss of consortium, "seeking compensation for the loss of her husband's companionship and affection."² In her complaint, Boeken specifically "alleged that she suffered 'the loss of love, affection, society, companionship, sexual relations, and support.'"³ Approximately four months after Boeken filed her complaint, she dismissed it with prejudice.⁴

Richard died one year after Boeken dismissed her action for loss of consortium.⁵ Subsequently, Boeken filed a wrongful death action under California Code of Civil Procedure section 377.60 against Philip Morris for the loss of her husband's companionship and affection.⁶ In this complaint, Boeken specifically alleged that she had suffered "loss of love, companionship, comfort, affection, society, solace, and moral support."⁷

Philip Morris then demurred on the complaint, claiming that Boeken's wrongful death action was barred by res judicata, since her earlier loss of consortium claim involved the same primary

¹ Boeken v. Philip Morris USA, Inc., 230 P.3d 342, 344 (Cal. 2010).

² *Id.* at 345.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

right.⁸ The trial court sustained the demurrer without leave to amend, and Boeken appealed.⁹ The Court of Appeal affirmed, concluding that Boeken's initial loss of consortium action against Philip Morris "covered claims for lost companionship and affection between the time of her husband's actual death from lung cancer and the time when he would have died of natural causes if defendant's cigarettes had not wrongfully injured him."¹⁰ Therefore, Boeken's dismissal with prejudice of her loss of consortium claim acted as a res judicata bar, which prevented her "from relitigating the same injury—loss of consortium—a second time in her current wrongful death action."¹¹ Boeken petitioned to the California Supreme Court for review.¹²

Analysis

The court examined the history of wrongful death and survival actions. At common law, there was no recovery for the wrongful death of a spouse; however, in 1862, the Legislature created a wrongful death cause of action.¹³ Until *Rodriguez v. Bethlehem Steel Corp.*,¹⁴ courts did not recognize a cause of action for loss of consortium for the wrongful injury of a spouse.¹⁵ However, the *Rodriguez* court failed to answer whether recovery for loss of consortium damages are limited to predeath damages.¹⁶ The *Rodriguez* holding created a significant distinction between a common law action for loss of consortium and a statutory wrongful death action.¹⁷ Since "loss of consortium is a civil action sounding in tort," punitive damages are available, whereas punitive damages are not available in the statutory wrongful death action.¹⁸

Next, the court examined the precise meaning attached to the phrase "cause of action" within the context of res judicata: "The cause of action is the right to obtain redress for a harm suffered, regardless of the specific remedy sought or the legal theory (common law or statutory) advanced."¹⁹ Thus, the determinative factor, under the primary rights theory, is the

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 346.

¹² *Id.*

¹³ *Id.*

¹⁴ *Rodriguez v. Bethlehem Steel Corp.*, 525 P.2d 669 (Cal. 1974).

¹⁵ *Boeken*, 230 P.3d at 347.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 348.

harm suffered.²⁰ Generally, the same primary right is involved in actions between the same parties seeking compensation for the same harm.²¹ In this case, “[t]he primary right was the right not to be wrongfully deprived of spousal companionship and affection, and the corresponding duty was the duty not to wrongfully deprive a person of spousal companionship and affection.”²² Therefore, Boeken could not sue for the same breach of duty based on a new legal theory in the second lawsuit.²³

Under section 3283 of the California Civil Code, “[d]amages may be awarded, in a judicial proceeding, for detriment resulting after the commencement thereof, or *certain to result in the future*.”²⁴ Thus, a plaintiff is entitled to recover for both the loss of companionship and affection during the trial and in the future for a common law action for loss of consortium.²⁵ In Boeken’s initial complaint, she sought recovery for the loss of her husband’s consortium both now and in the future: “[A]s a result of the cancer he was ‘unable to perform the necessary duties as a spouse’ and would ‘not be able to perform such work, services, and duties *in the future*.’”²⁶ Boeken also alleged in her complaint that she had been “*permanently* deprived’ of her husband’s consortium,” which further illustrates Boeken’s anticipation of her husband’s impending premature death.²⁷

The court also determined that its findings were supported by *Justus v. Atchison*,²⁸ despite Boeken’s claim “that one may not recover at common law damages of a type . . . made the subject of a statutory scheme that occupies the field.”²⁹ The *Justus* court clearly acknowledged that the right to recover in a wrongful death cause of action solely exists under the statute, and was not part of common law.³⁰ Here, the court agreed and found no parallel development for wrongful death at common law.³¹

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 349 (emphasis omitted).

²³ *Id.*

²⁴ *Id.* (quoting CAL. CIV. CODE § 3283 (West 2010)).

²⁵ *Id.* at 349.

²⁶ *Id.* at 350.

²⁷ *Id.*

²⁸ *Justus v. Atchison*, 565 P.2d 122 (Cal. 1977).

²⁹ *Boeken*, 230 P.3d at 351.

³⁰ *Id.* (citing *Justus*, 565 P.2d at 127–29).

³¹ *Id.* at 351.

Boeken's reliance on a comment in the Restatement Second of Torts³² was also rejected by the court.³³ This section in the Restatement applies to situations where the loss of consortium claim is subsequently joined with a wrongful death claim after the spouse has died.³⁴ Here, Boeken sued for loss of consortium prior to her husband's death, and so the Restatement was not applicable. If the court were to limit "loss of consortium claims to the lifetime of the injured spouse," as Boeken suggested, it would lead "to multiple proceedings and the possibility of a double recovery or an inadequate recovery."³⁵ Instead, the problems are minimized by allowing spouses to recover damages under loss of consortium after the death of the spouse.³⁶

Holding

The court affirmed the Court of Appeal's decision.³⁷ The court held that *res judicata* barred Boeken's wrongful death action for loss of consortium.³⁸ Since Boeken brought a prior common law action for loss of consortium, both claims involved the same primary right.³⁹ The dismissal with prejudice of the common law action for loss of consortium is the equivalent of a final judgment on the merits, and therefore the action may not be relitigated.⁴⁰

Dissent

Justice Moreno dissented, explaining that a common law loss of consortium action involves a primary right different from a statutory wrongful death action.⁴¹ Justice Moreno compared the holdings of *Justus v. Atchison*⁴² and *Rodriguez v. Bethlehem Steel Corp.*⁴³ In *Justus*, the court held that the common law loss of

³² The Restatement provides:

In case of death resulting to the impaired spouse, the deprived spouse may recover under the rule stated in this Section only for harm to his or her interests and expense incurred between the injury and death. For any loss sustained as a result of the death of the impaired spouse, the other spouse must recover, if at all, under a wrongful death statute.

RESTATEMENT (SECOND) OF TORTS § 693 cmt. f (1977).

³³ *Boeken*, 230 P.3d at 351.

³⁴ *Id.* at 351–52.

³⁵ *Id.* at 352.

³⁶ *Id.*

³⁷ *Id.* at 353.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* (Moreno, J., dissenting).

⁴² *Justus v. Atchison*, 565 P.2d 122, 127 (Cal. 1977).

⁴³ *Rodriguez v. Bethlehem Steel Corp.*, 525 P.2d 669, 686 (Cal. 1974).

consortium action was allowed because it was different from the statutory wrongful death action, whereas in *Rodriguez*, the court held that a person may recover loss of consortium damages for a nonfatal injury of a spouse.⁴⁴ Justice Moreno believed that these two cases highlighted the differences between a common law loss of consortium action and a statutory wrongful death action.

Justice Moreno also noted the differences between the two causes of action: a common law loss of consortium action involves only a serious injury, but not death; wrongful death includes an action for loss of financial support, but loss of consortium does not; and loss of consortium applies only to spouses, but wrongful death extends to the children of the deceased.⁴⁵ Furthermore, the statute of limitations for a wrongful death action does not begin at the same time as a loss of consortium action, which it would if the two actions were a single action.⁴⁶ Since loss of consortium and wrongful death are different, Justice Moreno concluded that a loss of consortium action would not bar a wrongful death action.⁴⁷ Instead, Justice Moreno proposed that courts “look to accompanying settlement agreements [for the dismissal of loss of consortium claims] to determine precisely the extent to which the parties were also relinquishing wrongful death claims,” since there can be some overlap between the damages recovered for wrongful death and loss of consortium actions.⁴⁸

Legal Significance

The court’s decision precludes, under *res judicata*, a spouse who has dismissed with prejudice a common law loss of consortium action from subsequently bringing a statutory wrongful death action. Now, parties seeking to resolve a common law loss of consortium action, but do not wish to bar recovery under a wrongful death action, will no longer use voluntary dismissal with prejudice as a way of doing so.

⁴⁴ *Boeken*, 230 P.3d at 354 (Moreno, J., dissenting).

⁴⁵ *Id.* at 354–55.

⁴⁶ *Id.* at 355.

⁴⁷ *Id.* at 356.

⁴⁸ *Id.* at 357.

Digest: People v. Ceja

Kelly J. Manley

Opinion by Corrigan, J., with George, C.J., Kennard, Baxter, Werdegar, Chin, and Moreno, JJ.

Issue

Should a theft conviction take precedence when a defendant is convicted of both stealing and receiving the same property, regardless of which offense carries the greater penalty?

Facts

Rafael Ceja was convicted of misdemeanor petty theft and felony receipt of stolen property, stemming from his arrest on June 18, 2006.¹ On that date, a police officer, who was responding to a report of suspicious behavior, saw two men matching the description of the suspects.² Ceja was carrying a speaker box that had been removed from a vehicle nearby.³ Ceja was found guilty by a jury on both of the charges.⁴ He was sentenced to two years in prison for the felony of receipt of stolen property⁵ and the court stayed a 180-day jail term for the theft.⁶

The Court of Appeal, while acknowledging that theft is not necessarily a lesser included offense of receiving stolen property, affirmed the conviction for receipt of stolen property and reversed the theft conviction.⁷ The court relied on the rule that, when a defendant is convicted on charges that include both a greater and lesser included offense, the sentence imposed is only on the greater offense.⁸ The dissent stated that the common law origins of the rules for these crimes make clear that once a defendant

¹ People v. Ceja, 229 P.3d 995, 997 (Cal. 2010).

² *Id.*

³ *Id.*

⁴ *Id.* The court dismissed charges of unlawful taking and receiving a stolen vehicle due to lack of evidence, and a burglary charge because the vehicle was unlocked. *Id.* at 997 n.3.

⁵ The court also added an additional year of prison time for a prior conviction. *Id.* at 997.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* (citing People v. Moran, 463 P.2d 763, 767 (Cal. 1970)).

has been convicted of theft, there is no basis for a conviction of receiving stolen property.⁹

Analysis

The court first looked at the history of the relation between receiving stolen property and theft, considering the common law notion that it is “logically impossible for a thief who has stolen an item of property to buy or receive that property from himself.”¹⁰ The case law showed that there had sometimes been a narrow application of the rule, preventing only *convictions* of the two separate offenses, and sometimes a broad application, precluding a conviction when there was *evidence* to incriminate the defendant in the theft.¹¹ The broader application led to many problems¹² and was largely abandoned¹³ in 1992 when the legislature amended the definition of receiving stolen property by adding to the statute: “A principle in the actual theft of the property may be convicted pursuant to this section. However, no person may be convicted both pursuant to this section and of the theft of the same property.”¹⁴ This amendment to Penal Code section 496(a) effectively abolished the broad application of the common law rule and instead adopted the narrow application, barring dual convictions.¹⁵ However, the court noted that the statute, even with its amendments, was silent on the question before it: “[W]hen a defendant has been improperly convicted of stealing and receiving the same property, what is the appropriate remedy?”¹⁶ The court read section 496(a) to be neutral on its

⁹ *Id.* at 997. The California Supreme Court agreed with the dissenting opinion of the Court of Appeal in this case. *Id.*

¹⁰ *Id.* (quoting *People v. Allen*, 984 P.2d 486, 491 (Cal. 1999)).

¹¹ *Id.* (citing *Allen*, 984 P.2d at 491).

¹² *Id.* “Among other complications, defendants found room to argue that a conviction for receiving stolen property required proof that they did *not* commit the theft.” *Id.* at 997 n.4 (citing *Allen*, 984 P.2d at 491).

¹³ *Id.* at 998 (citing *Allen*, 984 P.2d at 491–94).

¹⁴ *Id.* at 997 (citing CAL. PENAL CODE § 496(a) (West 2010), as amended by Stats. 1992, ch. 1146, § 1, p. 5374). Section 496(a) now reads, in relevant part:

Every person who buys or receives any property that has been stolen . . . knowing the property to be so stolen or obtained . . . shall be punished by imprisonment However, if the district attorney or the grand jury determines that this action would be in the interests of justice, [either] . . . may . . . specify in the accusatory pleading that the offense shall be a misdemeanor A principal in the actual theft of the property may be convicted pursuant to this section. However, no person may be convicted both pursuant to this section and of the theft of the same property.

CAL. PENAL CODE § 496(a).

¹⁵ *Id.* at 998 (citing *Allen*, 984 P.2d at 494).

¹⁶ *Id.* at 998.

face, allowing either of the two convictions to be permissible, so long as only one is allowed to stand.¹⁷

The Attorney General argued that, because the Legislature did not indicate a preference for one over the other, the Court of Appeal was proper in holding that defendants are liable for the greatest offense they commit.¹⁸ Considering *People v. Medina*,¹⁹ the Attorney General referred to the rule that a lesser offense is necessarily included in a greater offense when the greater offense cannot be committed without also committing the lesser.²⁰ The Attorney General also argued as to the applicability of Penal Code section 654, which states: “An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.”²¹

Though the court noted that the Attorney General’s arguments were “superficially appealing,” it ultimately found that they did not hold up to a more thorough assessment of the law.²² The court found that there were considerable distinctions between the rule against multiple convictions based on greater and lesser included offenses, and those against dual convictions of theft and receiving stolen property.²³ The court stated that the amendments to section 496(a) make clear that regardless of which offense carries a greater penalty, a theft conviction will always take precedence.²⁴ Section 654 does not affect the outcome of such a case because it applies not to convictions, but only to sentencing.²⁵

The court looked at the analogy of greater and lesser included offenses, which the Court of Appeal found persuasive.²⁶ It is generally understood that it is impermissible to convict on a greater and a lesser included offense because a defendant cannot commit the greater offense without also committing the lesser offense; allowing convictions on both counts would effectively

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *People v. Medina*, 161 P.3d 187, 196 (Cal. 2007).

²⁰ *Ceja*, 229 P.3d at 998 (citing *Medina*, 161 P.3d at 196).

²¹ *Id.* (quoting CAL. PENAL CODE § 654 (West 2010)).

²² *Id.* at 998.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* The court noted that some cases have confused section 654’s bar against multiple sentences with the rule against convictions for stealing and receiving stolen property, but this court has consistently rejected the proposition to fuse the two rules. *Id.*

²⁶ *Id.*

convict the defendant twice for the lesser offense.²⁷ The Court of Appeal noted that theft is not a lesser included offense of receiving stolen property²⁸ but failed to recognize that the rule against a conviction on both theft and receiving stolen property does not have anything to do with a defendant potentially receiving a double punishment.²⁹ Instead, it is rooted in the principle that “a thief cannot receive from himself.”³⁰ As such, the commission of a theft necessarily excludes the possibility that a defendant may be convicted for receiving the same stolen property.³¹

The amended version of section 496(a) maintains a narrow application of the common law, permitting a “thief in fact” to be convicted of receiving stolen property, but only if he or she is not convicted of the theft.³² The court noted, however, that the bar against dual convictions does not consider which offense is greater and which is lesser.³³ Relying on the explanation given in *Stewart*, the court quoted:

[T]heft or theft-related offenses and receiving stolen property are not *mutually* exclusive offenses; it is the theft or theft-related offense which has the preclusive effect. Thus, if the defendant is found to be the thief he cannot be convicted of receiving the same property, and where he is so convicted it is the receiving conviction which is improper. For this reason it is always the receiving conviction which cannot stand, regardless whether it is the lesser or the greater offense.³⁴

The Attorney General argued that *Stewart* was inapplicable to the present case because it applied the broader form of the common law rule, which would have allowed evidence of theft to serve as a bar against a conviction for receiving stolen property.³⁵ The court disagreed by clarifying and emphasizing the accuracy of the holding of *Stewart*, which dealt with an improper dual conviction, not mere evidence of theft.³⁶ The court in the instant case expressly approved of the *Stewart* court’s analysis of the

²⁷ *Id.* (citing *People v. Medina*, 161 P.3d 187, 197 (Cal. 2007)).

²⁸ *Id.* (citing *In re Greg F.*, 159 Cal. App. 3d 466, 469 (1984)).

²⁹ *Id.* at 998.

³⁰ *Id.* (quoting *People v. Stewart*, 185 Cal. App. 3d 197, 204 (1986)).

³¹ *Id.* (citing *People v. Allen*, 984 P.2d 486, 489–90 (Cal. 1999); *People v. Jaramillo*, 548 P.2d 706, 710 (Cal. 1976); *Stewart*, 185 Cal. App. 3d at 206). The court noted that there is an exception to this rule when there was “complete divorcement between the theft and a subsequent receiving . . . in a transaction separate from the original theft,” as well as in cases of conspiracy between the thief and the individual receiving the stolen property. *Id.* at 998 n.5 (quoting *Jaramillo*, 548 P.2d at 710 n.8).

³² *Id.* at 998.

³³ *Id.* at 998–99.

³⁴ *Id.* at 999 (quoting *Stewart*, 185 Cal. App. 3d at 209).

³⁵ *Id.* at 999.

³⁶ *Id.*

common law rationale for upholding the theft conviction, but not the receiving stolen property conviction.³⁷ The court noted that although the rationale stemmed from the concept that a thief could not be convicted of receiving the same stolen property, this very reasoning—even after the codification of the narrower form of the common law rule—has guided the courts in ascertaining which conviction takes precedence.³⁸

The Attorney General further contended that allowing the court to impose the longer sentence of either theft or receiving stolen property would serve the same interests as the rule governing greater and lesser included offenses.³⁹ In effect, it was argued, it would “provid[e] the jury with ‘a choice from the full range of crimes established by the evidence’ and ‘assur[e] that the defendant is convicted of the greatest crime a jury believes he committed.’”⁴⁰ The Attorney General asserted that a contrary rule would discourage prosecutors from charging the defendant with both the theft and receiving stolen property, but would instead encourage them to charge only for the crime carrying the larger possible sentence.⁴¹ The court rejected this argument, stating that it is the legislature, through section 496(a) that limits the jury to choose only one conviction.⁴² The legislature has given discretion to the prosecutor to decide whether theft or receiving stolen property is the greater or the lesser crime, as the prosecutor generally has the option to charge receiving stolen property as either a misdemeanor or a felony.⁴³ Moreover, the prosecutor can ultimately decide which offenses it wants to charge the defendant with.⁴⁴ Generally, courts do not supervise these “purely prosecutorial function[s].”⁴⁵

Next, to support the contention that the rule should favor whichever conviction carries a more severe punishment, the Attorney General pointed to Penal Code section 654, which calls for the imposition of the longest possible sentence for an offense when a crime is punishable in multiple ways.⁴⁶ The court distinguished the application of this rule by explaining that, while section 654 “presumes multiple convictions but precludes multiple punishments,” section 496(a) “precludes multiple

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* (citing CAL. PENAL CODE § 496(a)).

⁴⁴ *Id.* at 999.

⁴⁵ *Id.* (quoting *People v. Adams*, 43 Cal. App. 3d 697, 707 (1974)).

⁴⁶ *Id.* at 999.

convictions, therefore making multiple punishments impossible.”⁴⁷ The court noted that this provision of section 654 was an addition by the legislature in response to a judicial determination that gave deference to trial courts to choose a lesser sentence.⁴⁸ This amendment was intended to ensure that punishment was proportionate to the crime, and thus prevent the possibility that a defendant may receive a lesser sentence because he or she had been convicted of two crimes instead of one.⁴⁹

The Attorney General then argued that the outcome would be precisely the one the legislature was trying to avoid if the courts were to allow a defendant to escape liability for a felony offense of receiving stolen property just because he or she was also convicted for misdemeanor petty theft.⁵⁰ However, the court again emphasized that, when it came to theft coupled with receiving stolen property, the problem was not with choosing the appropriate sentence, but rather with the prohibition against dual convictions clearly established by section 496(a).⁵¹ The court again emphasized that, unlike section 654, section 496(a) simply does not allow for a choice in sentencing.⁵² The statutory bar against convictions for both theft and receiving the same stolen property was created not because of sentencing concerns, but rather because of the practical problems involved with the prosecution of the receiving stolen property offenses.⁵³ The court further noted that, in its amendments to the Penal Code, the legislature was aware of the common law rule that a theft conviction must preclude a conviction for receiving the same stolen property.⁵⁴

The Attorney General cited *People v. Black*, where “the defendant was convicted for stealing and receiving for the same truck.”⁵⁵ The *Black* court stated that, for the sake of judicial economy, reviewing courts have reversed the lesser conviction

⁴⁷ *Id.*

⁴⁸ *Id.* (citing *People v. Kramer*, 59 P.3d 738, 738–39 (Cal. 2002)).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 999–1000.

⁵² *Id.* at 1000.

⁵³ *Id.* (citing *People v. Allen*, 984 P.2d 486, 491–95 (Cal. 1999)).

⁵⁴ *Id.* at 1000. A legislative committee assessment of the 1992 amendment to section 496(a) shows an agreement with the holding of *People v. Price*, 821 P.2d 610 (Cal. 1991), and notes: “[T]he bill permits a person who steals property to be convicted of receiving or concealing the same property *only in those cases where there is no conviction for the theft of the property.*” *Id.* at 1000 n.7 (quoting Assem. Com. on Public Safety, Analysis of Assem. Bill No. 332 (1991–1993 Reg. Sess.) for hearing Mar. 24, 1992, p.2). The legislature’s concern was with making sure that a defendant may still be prosecuted for receiving stolen property even after the statute of limitations has run for the theft charge. *Id.*

⁵⁵ *Id.* at 1000 (citing *People v. Black*, 222 Cal. App. 3d 523 (1990)).

and allowed the greater conviction to stand.⁵⁶ However, the court here noted that this assertion in *Black* was mere dicta and was based on the “erroneous notion that ‘[t]he rule against twin-convictions announced in *Jaramillo* is based on Penal Code section 654.’”⁵⁷ Once again, the court emphasized that the rule at issue here, section 496(a), is entirely distinct from the prohibition against double punishment in section 654.⁵⁸

When faced with a similar issue, both before and after the amendment to section 496(a), the majority of California courts have reversed the conviction for receiving stolen property and allowed the conviction for theft to stand.⁵⁹ The Court noted that “[t]his practice was well established when section 496(a) was amended in 1992, and the legislature gave no indication that a change was intended.”⁶⁰ In the present case, however, the Court of Appeal “broke new ground” when it reversed the defendant’s conviction for theft in order to preserve the longer sentence received on the receiving stolen property conviction.⁶¹

The court asserted that, generally, statutes should not be read to modify the common law, but instead should be construed to *avoid* conflicts with the common law.⁶² Quoting *California Ass’n. of Health Facilities v. Department of Health Services*, it stated:

A statute will be construed in light of common law decisions, unless its language clearly and unequivocally discloses an intention to depart from, alter, or abrogate the common-law rule concerning the particular subject matter Accordingly, there is a presumption

⁵⁶ *Black*, 222 Cal. App. 3d at 525.

⁵⁷ *Ceja*, 229 P.3d at 1000 (quoting *People v. Lawrence*, 111 Cal. App. 3d 630, 640 (1980)). The court also noted that, in contrast to the case at bar, in both *Black* and *Lawrence* the conviction for receiving stolen property carried the lesser sentence, and the theft conviction was allowed to stand. *Id.* at 1000 n.8.

⁵⁸ *Id.* at 1000 (citing *People v. Allen*, 984 P.2d 486, 492 n.6 (Cal. 1999)). The court further explained that it had previously clarified this rule in *Jaramillo*, which held that the trial court erred in an attempt to comply with section 654 by staying a sentence on a lesser conviction (which could have been based on either theft of a vehicle or mere driving) and instead sentencing the defendant to the greater conviction of receiving stolen property. *Id.* (citing *People v. Jaramillo*, 548 P.2d 706, 709 (Cal. 1976)). This, however, evaded the issue as to whether the defendant could be properly *convicted* of both charges, the same error that has occurred in the present case. *Id.* at 1000. Here, in an attempt to comply with section 654, after the defendant was convicted of both charges, the trial court stayed the sentence on the lesser offense. *Id.*

⁵⁹ *Id.* This practice has often been done “without regard to penalty, often without discussion, and sometimes on the People’s stipulation.” *Id.* The court further noted that a burglary conviction does not bar a conviction on receiving stolen property, because burglary does not require theft. *Id.* at 1000 n.9.

⁶⁰ *Id.* at 1000–01.

⁶¹ *Id.* at 1000.

⁶² *Id.* at 1001 (citing *Cal. Ass’n. of Health Facilities v. Dep’t of Health Servs.*, 940 P.2d 323, 331 (Cal. 1997)).

that a statute does not, by implication, repeal the common law. Repeal by implication is recognized only where there is no rational basis for harmonizing two potentially conflicting laws.⁶³

By requiring that, when charged with both theft and receiving the same stolen property, a defendant is only convicted for the theft, the terms of section 496(a) remain in harmony with the common law rule against dual convictions.⁶⁴

Holding

The court reversed the Court of Appeal.⁶⁵ The court held that if a defendant is convicted of theft, that defendant may not be convicted for receiving the same property.⁶⁶ A contrary holding would be in violation of section 496(a)'s bar against dual convictions.⁶⁷

Legal Significance

This decision precludes an individual from being convicted for receiving the same property for which he or she has been found to have stolen. While there is a bar on being twice punished for the same offense, this holding has nothing to do with sentencing. Rather, it deals with the issue that a defendant who has been convicted for theft necessarily could not have received the same property in violation of law, thus making it impossible for this defendant to be convicted for such a charge.

⁶³ *Cal. Ass'n. of Health Facilities*, 940 P.2d at 331 (internal citations omitted).

⁶⁴ *Ceja*, 229 P.3d at 1001. The court briefly noted the defendant's assertion that, per the *Recio* court, when a defendant is charged with both theft and receiving the same property, "the court should instruct the jury to determine the defendant's guilt on the theft count first, and if it finds the defendant guilty of the theft count first, and if it finds the defendant guilty of the theft, to return the receiving verdict unsigned." *Id.* (quoting *People v. Recio*, 156 Cal. App. 4th 719, 726 (2007)). The court stated that this is the understood practice in federal courts. *Id.* (citing *United States v. Gaddis*, 424 U.S. 544, 550 (1976)). Though the issue of instructing juries was not before this present court, it agreed that when a defendant is charged with both theft and receiving stolen property, the juries should be instructed to reach a verdict on the theft charge first. If the jury decides that the defendant is guilty on the theft charge, it therefore makes it unnecessary for them to consider the charge of receiving stolen property. This practice would maintain consistency with this present case, promote efficiency in jury deliberations, and ensure application of the statutory ban on dual convictions. *Id.* at 1001.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

Digest: Greene v. Marin County Flood Control and Water Conservation District

Christopher L. Tinen

Opinion by Moreno, J., with George, C.J., Kennard, Chin, Corrigan, JJ., Reardon, J.,¹ and Raye, J.²

Issue

Are special fee elections subject to the secret voting requirements in Article II, section 7 of the California Constitution?

Facts

The Marin County Flood Control and Water Conservation District (District) proposed that a new storm drainage fee be imposed on property owners in an area with a history of chronic flooding.³ The proposal called for a fee amount per property owner based on the size and type of parcel owned.⁴ The Marin County Board of Supervisors accepted the proposal, adopted written protest procedures, scheduled a public hearing on the fee, and directed mailing of notices to affected property owners—all pursuant to Article XIID, section 6, of the California Constitution.⁵ No majority protest was presented at the public hearing, and the Board scheduled a special election on the fee to be held solely by mailed ballot.⁶

The ballot mailed to the affected property owners consisted of instructions on one side, the ballot on the other, and contained the name and address of the property owner, the exact amount of the fee to be imposed, and a designated space for a signature.⁷ Returned ballots were received and placed unopened in a “lock

¹ Associate Justice, Court of Appeal, First Appellate District, Division Four, assigned by the Chief Justice pursuant to Article VI, section 6 of the California Constitution.

² Associate Justice, Court of Appeal, Third Appellate District, assigned by the Chief Justice pursuant to Article VI, section 6 of the California Constitution.

³ *Greene v. Marin Cnty. Flood Control & Water Conservation Dist.*, 231 P.3d 350, 352 (Cal. 2010).

⁴ *Id.*

⁵ *Id.* at 352–53 (citing CAL. CONST. art. XIID, § 6).

⁶ *Id.* at 353.

⁷ *Id.*

box,” and were not opened until all the ballots were due.⁸ The fee proposal passed by a slim margin, with roughly twenty percent of the ballots invalidated due to a lack of signature.⁹

Ford Greene, a property owner in the District who voted in the election, demanded a recount of the election results pursuant to Elections Code section 15620 and then, receiving no response from the District, filed a “Verified Complaint for an Election Contest” pursuant to the Elections Code.¹⁰ Greene’s main complaint was that the notice given to the voters did not adequately inform them of the signature requirement due to its inconspicuous size and lack of bold font.¹¹ He further alleged that, as a result of this defect, twenty-one percent of the votes cast—in contrast to the usual one percent invalidation rate in Marin County elections—were invalidated.¹²

The District denied the allegations in its answer, and both parties stipulated to proceed solely on the pleadings and the face of the ballot, thus waiving an evidentiary hearing.¹³ Several other citizen groups intervened, requesting declaratory relief that the election was lawful.¹⁴ Greene answered the intervention with an affirmative defense that the signature requirement violated the ballot secrecy requirement of Article II, section 7 of the California Constitution.¹⁵

The trial court denied Greene’s election contest in its entirety, holding that the requirement to sign ballots was expressly authorized by Article XIID of the California Constitution.¹⁶ On appeal, the Court of Appeal framed the issue to be decided differently.¹⁷ Rather than focusing on the signature requirement, the Court of Appeal noted that Greene’s central legal argument had always been that Article II, section 7’s secret voting requirement applies to an Article XIID, section 6(c) fee election.¹⁸ Proceeding on this basis, the Court of Appeal reversed the trial court, concluding that the secret voting requirement did apply to the fee election at issue and that the District’s

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* See also CAL. ELEC. CODE §§ 16100–16101 (West 2010).

¹¹ *Greene*, 231 P.3d at 353.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* (citing CAL. CONST. art. II, § 7).

¹⁶ *Id.* at 353.

¹⁷ *Id.*

¹⁸ *Id.* at 353–54.

procedures did not adequately protect voter privacy.¹⁹ The District petitioned the California Supreme Court for review.²⁰

Analysis

The court analyzed Proposition 218 and Government Code section 53753 et seq. to determine the underlying constitutional and statutory scheme of Article XIID, section 6.²¹ Proposition 218 was adopted as an addition to Proposition 13, which acted to cut local property taxes by prohibiting local municipalities from enacting any special tax without a two-thirds vote of the electorate.²² Particularly, Proposition 218 added Articles XIIC and XIID to the California Constitution, which extended the reach of Proposition 13's limitations on property and special taxes to analogous special fees and assessments.²³

The court then looked to Article XIID, section 4, which sets forth in considerable detail the procedures for adopting assessments.²⁴ Specifically, subdivision (d) provides that notice be mailed to owners of identified parcels which shall contain the property owner's name, a reasonable identification of the parcel, and either support or opposition to the proposed assessment.²⁵ Article XIID, section 6 provides a somewhat different procedure for property related fee assessments.²⁶ The court noted that section 6 provides that "an agency may adopt procedures similar to those for increases in assessments in the conduct of elections under this subdivision."²⁷

Shortly after passage of Proposition 218, the legislature passed Government Code section 53753, which was designed to facilitate the implementation of Proposition 218.²⁸ Section 53753 did not contain provisions for assessment ballot secrecy as originally enacted.²⁹ Further, the court noted that the statute expressly provided that assessment ballots would be signed, but would not amount to voting for purposes of Article II of the California Constitution or the California Elections Code.³⁰ The

¹⁹ *Id.* at 354.

²⁰ *Id.*

²¹ *Id.* (citing RIGHT TO VOTE ON TAXES ACT; CAL. GOV. CODE § 53753 et seq. (West 2010)).

²² CAL. CONST. art. XIIC–D.

²³ *Id.*

²⁴ *Greene*, 231 P.3d at 354–55 (citing CAL. CONST. art. XIID § 4).

²⁵ CAL. CONST. art. XIID § 4(d).

²⁶ § 6.

²⁷ *Greene*, 231 P.3d at 355 (citing CAL. CONST. art. XIID § 6).

²⁸ *Id.* at 355 (citing CAL. GOV. CODE § 53753).

²⁹ *Id.*

³⁰ *Id.* (citing former CAL. GOV. CODE § 53753(c), (e)(4), as enacted by 38 Stat. 5 (1997)).

court noted that section 53753 was amended three years later to provide a certain measure of assessment ballot secrecy prior to being tabulated, but that the ballots were to be made public record thereafter.³¹

The court then examined the extent of the voting secrecy requirements under Article II, section 7 of the California Constitution.³² This section provides that “voting shall be secret” and the “right to a secret ballot . . . is the very foundation of our elections system.”³³ The court noted that although these secrecy requirements have been uniformly applied to candidate elections, initiatives, and referenda, other types of elections have not been invariably subjected to the constitutional right of secrecy.³⁴ For support, the court looked to *Alden v. Superior Court*, where the court of Appeal concluded that an election to form a water district was not bound by the constitutional secrecy requirements of Article II, section 7 because “the creation of such a district is a legislative act.”³⁵ The court in *Alden* also cited *Tarpey v. McClure*, which upheld the constitutionality of an act that provided for a formation election in which only property owners were entitled to vote.³⁶ The court in *Tarpey* made it clear that the formation of a water storage district is “a function pertaining purely to the legislative branch of the government” and thus could not be challenged based on the constitutional right to a secret ballot.³⁷

The court next turned to whether and to what extent special assessment balloting requires secrecy under Proposition 218 and Article XIID.³⁸ The court pointed out that the Court of Appeal did not decide whether Article XIID, section 4 required secret voting.³⁹ Instead, the Court of Appeal reasoned that “an agency could comply with Article XIID, section 4 while maintaining secrecy in voting.”⁴⁰ However, the question is not whether secrecy *could* be maintained, but rather whether it is *required*.⁴¹ In order to discern the requirements of secrecy under Article XIID, section 4, the court began a constitutional construction analysis.⁴² First, the court looked to the face of the constitutional

³¹ *Id.* at 355–56.

³² *Id.* at 356–57.

³³ *Id.* at 356 (quoting *Scott v. Kenyon*, 16 Cal. 2d 197, 201 (1940)).

³⁴ *Greene*, 231 P.3d at 356.

³⁵ *Alden v. Superior Court*, 212 Cal. App. 2d 764, 770 (1963).

³⁶ *Tarpey v. McClure*, 190 Cal. 593 (1923).

³⁷ *Id.* at 606.

³⁸ *Greene*, 231 P.3d at 357.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 358.

text to give the words their ordinary meaning.⁴³ As the court previously noted, section 4 provides that the ballot must be one in which the property owner indicates their name, an identification of the parcel, and their support of or opposition to the proposed assessment.⁴⁴ The court inferred that the ballot requirements suggest that these pieces of information will appear on a single piece of paper.⁴⁵ Furthermore, section 4 requires that the ballots must be tabulated at a public hearing, which weighs in favor of interpreting section 4 to authorize non-secret voting.⁴⁶

Recognizing a lack of explicit language in section 4, the court consulted “contemporaneous constructions” of the constitutional provision made by the legislature to assess their judgment as to its appropriate reach.⁴⁷ Specifically, the court noted that Government Code section 53753, enacted to address the implementation of section 4, provides that the secrecy provisions of Article II, section 7 of the California Constitution do not apply to the assessment ballot procedures prescribed in section 4.⁴⁸ The court further noted that section 53753 “was later amended to specifically address voter secrecy requirements,” but did not alter the voter identification provisions of assessment ballots.⁴⁹ Therefore, the court concluded that section 4 authorizes a ballot that indicates a property owner’s vote, name, and parcel while allowing public disclosure of the ballots once due.⁵⁰

Finally, the court compared section 4 of Article XIID to section 6 to determine the kinds of balloting procedures set forth in section 4 that may have been incorporated into section 6 elections.⁵¹ The court analyzed the subdivisions of both sections and determined that the notice provisions and rules for public hearings are similar in both sections, but section 6 does not have any provision regarding the composition of the ballot to be sent to property owners in the event of a special fee election.⁵² The court inferred from the plain language of section 6 that “procedures similar to those for increases in assessments in the conduct of elections under this subdivision” includes the use of a ballot

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* (citing CAL. GOV. CODE § 53753).

⁴⁹ *Id.* at 359 (citing CAL. GOV. CODE § 53753).

⁵⁰ *Id.* at 359.

⁵¹ *Id.*

⁵² *Id.* (citing CAL. CONST. art XIID, §§ 4, 6).

similar to the one used in section 4.⁵³ As previously discussed, the ballot set forth in section 4 includes voter identification of both name and property of the voter on the ballot.⁵⁴ Therefore, in the absence of explicit language or legislative history to the contrary, the court concluded that section 6 also authorizes a ballot with voter self-identification.⁵⁵

Holding

The court reversed the judgment of the Court of Appeal and remanded the case with directions to reinstate the judgment of the trial court.⁵⁶ The court held that there was no basis for invalidating the fee election at issue due to its compliance with the required measures of Article XIID, section 6.⁵⁷ Whether or not greater protective measures or voter assurances could have given the ballot heightened secrecy was deemed immaterial.⁵⁸ Therefore, the secrecy requirements employed by the District were sufficient to constitute a valid fee election.⁵⁹

Legal Significance

The court's decision excludes special fee elections from the secrecy requirements provided to candidate elections, initiatives, and referenda under the California Constitution. This ruling precludes property owners from invalidating special assessment elections on the grounds that it violates their right to a secret ballot insofar as it complies with the procedures and provisions of Article XIID, enacted by the passage of Proposition 218.

⁵³ *Id.* (quoting CAL. CONST. art XIID, § 6).

⁵⁴ *Id.* at 360 (citing CAL. CONST. art XIID, § 4).

⁵⁵ *Id.* at 360.

⁵⁶ *Id.* at 364–65.

⁵⁷ *Id.* at 364.

⁵⁸ *Id.*

⁵⁹ *Id.*

Digest: Kleffman v. Vonage Holdings Corp.

Molly S. Machacek

Opinion by Chin, J., with George, C.J., Kennard, Baxter, Werdegarr, Moreno, and Corrigan, JJ.

Issue

Does the transmission of e-mail advertisements from multiple domain names, with the intent of bypassing a spam filter, violate a state statute regulating falsified header information in commercial e-mail advertisements?

Facts

Craig E. Kleffman had received eleven unsolicited email advertisements from eleven different domain names that all advertised Vonage and its broadband telephone service.¹ While none of the domain names specified Vonage as its sender, instead using such domain names as “superhugeterm.com; formycompanysite.com; ursunrchcntr.com; urgrtquirkz.com; countryfolkgoespel.com; lowdirectsme.com; yearnfrmore.com; openwrldkidz.com; ourgossipfrom.com; specialdlvrguide.com; and struggletailssite.com,” each of them can be traced back to the same physical address.²

Subsequently, Kleffman filed a class action lawsuit against Vonage Holdings Corporation.³ He asserted a claim under section 17529.5(a)(2) of the Business and Professions Code, which “makes it unlawful to advertise in a commercial e-mail advertisement that ‘contains or is accompanied by falsified, misrepresented, or forged header information.’”⁴

A traditional Internet service provider (ISP) uses domain names to identify a sender, and then can use the spam filter to block high volumes of advertisements from a particular sender before it reaches the inbox of an ISP client.⁵ Additionally, a client can label a certain sender as spam, which will serve to

¹ Kleffman v. Vonage Holdings Corp., 232 P.3d 625, 627 (Cal. 2010).

² *Id.* at 627.

³ *Id.*

⁴ *Id.* (quoting CAL. BUS. & PROF. CODE § 17529.5(a)(2) (West 2010)).

⁵ *Id.*

block future e-mails from that sender or company.⁶ Kleffman asserted in his lawsuit that if Vonage had sent their advertisements from the same single e-mail address, then it would have been less expensive and time consuming than using multiple domain names.⁷ He further contended that Vonage's only reason for e-mailing from multiple addresses was to intentionally bypass the spam filters of ISPs and that it was a deliberate strategy to trick the email provider and the client.⁸ Kleffman alleged that "[t]he multitude of 'from' identities falsifies and misrepresents the true sender's identity and allows unwanted commercial email messages to infiltrate consumers' inboxes," and therefore that it would "constitute falsified and misrepresented header information prohibited by section 17529.5(a)(2)."⁹

Vonage removed the case to federal court, and the district court granted their motion to dismiss for failure to state a claim under the code section 17529.5(a)(2), without leave to amend.¹⁰ The district court held that Kleffman did not claim that the content of the e-mails from Vonage was false or forged, and while the headers did not specify that the sender was Vonage, they were truthful in their identification of the sender.¹¹ The plain language of the statute requires falsified headers, and it does not prohibit failing to send e-mails from a single domain name.¹² The court also found that if such conduct were prohibited by the statute, then it would be preempted by the federal "CAN-SPAM Act," so it is not for the court to decide.¹³ Kleffman appealed, and under California Rules of Court rule 8.548,¹⁴ the Ninth Circuit asked the California Supreme Court to decide the question: "Does sending unsolicited commercial e-mail advertisements from multiple domain names for the purposes of bypassing spam filters constitute falsified, misrepresented, or forged header information under [section] 17529.5(a)(2)?"¹⁵

Analysis

The court found that the central issue was the scope of section 17529.5(a)(2), and what is unlawful regarding "falsified,

⁶ *Id.* at 627-28.

⁷ *Id.* at 628.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 628 n.3. *See also* 15 U.S.C. §§ 7701-7713 (2006).

¹⁴ *Kleffman*, 232 P.3d at 628 n.4.

¹⁵ *Id.* at 628.

misrepresented, or forged header information.”¹⁶ The court reasoned that the essential goal in statutory interpretation is to establish the legislative intent in order to determine the purpose of the law, especially in terms of language choice.¹⁷ The court noted that the parties agreed on certain subjects, such as the fact that domain names are considered part of e-mail header information for the purposes of the statute.¹⁸ The court also found no dispute that the e-mails were from Vonage or that the domain names used were accurate and fully traceable back to that company.¹⁹ There was no dispute that the question in this case was whether or not the e-mails in question contained falsified or misrepresented header information under the statute.²⁰

The court found that the dispute centered on the language of the statute and the meaning of the word “misrepresented” as it applies to header information.²¹ Vonage contended that the header information would need to be “a false representation of fact” in order to be misrepresented.²² The court looked to *Cooley v. Superior Court*, which articulates the rule of statutory construction that courts should give meaning to every word in the statute, if possible, and should avoid surplusage.²³ The court applied this reasoning to the instant case in order to determine if falsified and misrepresented had different meanings under the statute, and found that the legislature must have meant the words to have separate meanings.²⁴ Kleffman asserted that header information, defined as “source, destination and routing information,” is unlawful under the federal CAN-SPAM Act if it is materially false or misleading, and that the same definition should be applied in this case.²⁵ However, this definition was not adopted during the legislative process behind adopting section 17529.5(a)(2).²⁶ The court rejected Kleffman’s assertion that “misrepresented” should be given the meaning that was used in Business and Professions Code sections 17200 and 17500, which prohibit advertising that is “likely to mislead or deceive, or is in fact false,”²⁷ or the meaning from a “lay” dictionary that defines

¹⁶ *Id.*

¹⁷ *Id.* (citing *People v. Cole*, 135 P.3d 669, 674 (Cal. 2006)).

¹⁸ *Id.* at 628–29.

¹⁹ *Id.* at 629.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.* (citing *Cooley v. Superior Court*, 57 P.3d 654 (Cal. 2002)).

²⁴ *Id.* at 629.

²⁵ *Id.* at 629 n.5 (citing 15 U.S.C. §§ 7704(a)(1), 7702(8) (2010)).

²⁶ *Id.* at 629 n.5.

²⁷ *Id.* at 629–30 (citing CAL. BUS. & PROF. CODE §§ 17500, 17200 (West 2010)).

misrepresent as “[t]he act of giving a false or misleading statement about something.”²⁸ The court found that “misrepresented” and “misleading” had been given different meanings by the legislature, and that if the legislature had intended to use “misleading,” then they would have done so.²⁹ In fact, the court found that the legislature already used “likely to mislead” separately in the next provision of the same statute, showing that the legislature used the terms differently.³⁰

The court found that the legislative history for the statute was relevant to the issue, but that it did not support Kleffman’s position.³¹ The legislative history, as interpreted by the court, “reflects a careful and purposeful distinction between the terms ‘misrepresented’ and ‘misleading.’”³² An amendment made to the bill contained revised language that recognized the linguistic difference between section 17529.5 subsections (2) and (3).³³ The court held that they “must avoid interpretations that would render related provisions unnecessary or redundant.”³⁴ Furthermore, Kleffman based his interpretation of the legislative history on a letter written by the legislative author of the bill and its amendment, which showed intent to prohibit multiple e-mail addresses to avoid a spam filter.³⁵ The court rejected this argument because the letter was not part of the Legislative discussion leading up to the creation of the statute.³⁶

The court further found that if the legislative history is read to prohibit a domain name that did not clearly state the true identity of the sender, it would raise significant problems for federal preemption by the CAN-SPAM Act.³⁷ If a state law attempted to require further restrictions or labels on e-mail headers, it would undoubtedly be preempted by federal statute.³⁸

The court found that a single e-mail with an “accurate and traceable domain name” does not have misrepresented or falsified header information within the meaning of the statute simply because the domain name is “random,” “varied,” “garbled,” and “nonsensical,” as argued by Kleffman.³⁹ Adopting

²⁸ *Id.* at 629 n.6.

²⁹ *Id.* at 630.

³⁰ *Id.* (citing CAL. BUS. & PROF. CODE § 17529.5(a)(3)).

³¹ *Id.* at 631.

³² *Id.* at 632.

³³ *Id.* (citing CAL. BUS. & PROF. CODE § 17529.5(a)(2), (a)(3)).

³⁴ *Id.* at 632.

³⁵ *Id.* at 634.

³⁶ *Id.*

³⁷ *Id.* at 632–33 (citing 15 U.S.C. § 7707(b)(1) (2006)).

³⁸ *Id.* at 633.

³⁹ *Id.*

a practice that prohibits multiple and random domain names, from the same original company, would be overly difficult and impractical.⁴⁰ Additionally, violating section 17529.5(a)(2) is a misdemeanor that allows for up to six months in prison, so the court was reluctant to add uncertainty to the language of the statute.⁴¹

Finally, the court noted that in passing section 17529.5(a)(2), the legislature remarked on spam filters and their potential limitations.⁴² However, it found that such limitations do not justify altering the meaning of “misrepresented . . . header information” in the language of the statute.⁴³

Holding

The court answered the question of law under California Rules of Court rule 8.548.⁴⁴ It held that, generally, commercial e-mail advertisements sent from multiple domain names with the intent to bypass spam filters were not made unlawful by section 17529.5(a)(2).⁴⁵ The court held that the emails in question did not contain or include any misrepresented header information.⁴⁶ Therefore, since the statute only governs falsified, misrepresented, or forged header information, the statute in question did not regulate the electronic advertisements, and the e-mails sent by Vonage were not unlawful.⁴⁷

Legal Significance

The court’s decision prevents a flood of potential litigation from other members of the public who are annoyed, unhappy, or bothered by the amount of commercial e-mail advertisements that they receive on a daily basis. The statute in question only governs and punishes those who send falsified or fraudulent emails. While consumers may continue to be bothered by e-mail advertisements that their spam filters cannot catch, it is not for the court to contort the language that the legislature chose to use.

⁴⁰ *Id.* at 634.

⁴¹ *Id.* (citing CAL. BUS. & PROF. CODE § 17529.5(c) (West 2010)).

⁴² *Id.* at 635.

⁴³ *Id.*

⁴⁴ *Id.* at 628.

⁴⁵ *Id.* at 635.

⁴⁶ *Id.* at 633.

⁴⁷ *Id.*

