HINCKLEY JOURNAL OF POLITICS

Spring 2001

Volume 3

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Hinckley Journal of Politics

Spring 2001
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A Word from the Director

As director of the Hinckley Institute of Politics, I am delighted to welcome you to the third edition of the *Hinckley Journal of Politics*. Special thanks for this accomplished work go to Natalie Noel and Jeff Merchant, co-editors. Natalie and Jeff have shown the excellent research and writing talents of undergraduate students in political science studies at the University of Utah. Natalie must be singled out for her extreme diligence in the face of an imposing deadline. When Jeff was offered an excellent job in a congressional office in Washington, we could only cheer for him and encourage him to accept it. That left much of the task to Natalie who worked night and day on the final product. Both of the editors also wrote accomplished articles in the journal.

Thanks, too, to Bob Benedict, faculty advisor, and to Dalmas Nelson, faculty emeritus. They both spent considerable time and lent their great expertise to the project. Our editorial board, which oversees the journal, also did a great job. Kudos to the elected officials whose writings are found in these pages.

It is the privilege of the Hinckley Institute of Politics to work with some of the best and brightest students at the University of Utah. It was one of Robert H. Hinckley's goals to advance students to fulfill the highest demands of a democratic society. He wanted to get them involved. He would say students must learn par-ti-ci-pa-tion. By enunciating every syllable, Mr. Hinckley conveyed the importance of students becoming involved in political and civic life.

The goal of the *Hinckley Journal of Politics* is to add meat to the bones of enthusiasm. No political life can succeed without the substance of politics: ideas. And in the great cafeteria of thought of American politics, students must learn to advance their reflections so that practical solutions can be sought.

This journal proves that undergraduate students can proffer the most advanced thoughts concerning politics.

Sincerely,

Ted Wilson
Director
Faculty of Political Science

Editors' Notes

Hinckley Journal of Politics' Mission Statement

The *Hinckley Journal of Politics* strives to publish scholarly papers of exceptional caliber, promoting the intellectual talents and understanding of University of Utah undergraduate students. Contributing articles should address pertinent issues by illuminating key problems and potential solutions, adhering to the highest standards of political research and analysis. The *Journal* seeks to cover issues ranging from local to international political concerns, embracing diverse perspectives and a variety of analytical approaches. With this publication the Hinckley Institute hopes to encourage reader involvement in the intriguing world of politics.

General Comments

It has been an honor to serve as editors for the Spring 2001 edition of the Hinckley Journal of Politics. We thank the student authors and the public officials who have contributed to this year's Journal for their hard work. We are especially grateful for the patient and helpful assistance of faculty advisor Dr. Robert Benedict.

The Journal is one of many wonderful opportunities that the Hinckley Institute provides undergraduate students. We are indeed appreciative of the generosity of the Hinckley family for their vision of student involvement in practical politics and the principle of citizen involvement in government. Thank you to the Hinckley staff for their dedication to students.

We commend the student authors for their involvement in the political process, whether it is serving an internship, working on a campaign, or studying politics. We hope you will find the articles within the Journal thought provoking and timely.

Acknowledgements

The editors of the Hinckley Journal of Politics wish to thank:

- This year's published authors, for their hard work and excellent writings in politics.
- This year's contributing public officials: Congressman Jim Matheson and Congressman Chris Cannon, for their continued efforts in representing the people of Utah and for their support of the Hinckley Institute of Politics.
- This year's Editorial Board members, for reviewing and making the final selection of papers for publication.
- This year's Faculty Advisors: Robert Benedict, Matthew Burbank, Ron Hrebenar, and Kenneth Lawson for their work in reviewing and editing the published student papers.
- Robert H. Hinckley and the Hinckley family. Because of Mr. Hinckley's vision and the support of his family, many students at the University of Utah have been given the opportunity gain a deeper respect and love for politics and our system of government.
- All of the students who submitted papers for publication.
- The many people who have given their support to the Hinckley Institute of Politics.
- The Hinckley Institute of Politics Staff

General Submission Guidelines

The Hinckley Journal of Politics welcomes submissions from University of Utah students of any discipline, members of the faculty, and Utah's public officials of any capacity. Any political science-related topic is acceptable. The scope can range from university issues to international issues. Papers must adhere to the following submission guidelines to be considered for publication.

Submission Guidelines for Students

1. Submission Copies:
Authors must submit two hard copies of their paper and one copy on a 3.5" formatted disk.

2. Submission Information Sheet:
Authors must complete the Submission Information Sheet, available at the Hinckley Institute of Politics.

3. Submission Cover Page:
The first page of the paper should include the author's name, the title of the paper, and an abstract of the paper approximately 150 words in length.

4. Paper Length:
Papers should be between 10 and 20 pages in length.

5. Paper Format:
Papers should be formatted as follows:

- Double spaced (exceptions: tables, charts and quotations longer than four lines).
- Number all pages.
- Use single column format with 1" margins on the top, bottom, left, and right.
- Print on one side of paper
- Use 12 point Times New Roman font.

6. Style Guidelines:
Papers must adhere to the Hinckley Journal of Politics style guidelines and the American Political Science Association (APSA) style of embedded citations for all referencing. Both are available at the Hinckley Institute of Politics.

7. Review and Notification Procedures:
Submissions will be reviewed by the Journal editors, members of the editorial board, and faculty advisors. Submission of a paper does not guarantee publication. Papers that do not adhere to submission and style guidelines will not be considered for publication. Acceptance to the Journal is fairly competitive. The editors will notify potential authors when the decision has been made as to which papers have been selected for publication.

Submission Guidelines for Public Officials:

The *Journal* will consider for publication, essays written by national, state and local public officials. For paper guidelines, public officials may contact the *Journal* editors.

Correspondence May Be Sent To:
Mailing:
University of Utah
Hinckley Institute of Politics
260 South Central Campus Drive Room 253
Salt Lake City, UT 84112-9151
Phone: (801) 581-8501
Fax: (801) 581-6277
Email: jnelson@hinckley.utah.edu

About the Hinckley Institute of Politics

The Hinckley Institute of Politics was established on May 10, 1965 through the generous bequest of the Noble Foundation and Robert H. Hinckley, a long-time regent of the University of Utah, who served in Washington, D.C. from 1938 to 1946 and again in 1948. During those years he established and directed the Civilian Pilot Training Program, served as Assistant Secretary of Commerce for Air and as Director of Contract Settlement after WWII. The Institute is dedicated to promoting respect for practical politics and politicians and to the principle of citizen involvement in government.

Internships

One of the unique activities of the Hinckley Institute is the internship experience gained by approximately 200 students annually. Internships are available locally and in Washington, D.C. Interns have valuable experience in the "real world" and gain an understanding of politics and public service which cannot be found in a classroom.

The Legislative Preparation Class is offered every Fall Semester to students who are interested in serving internships with the Utah State Legislature at the State Capitol. The goal of the class is to prepare students for the work they will be doing as interns with Utah State Senators or Representatives during Spring Semester.

Public Affairs Programs

Programs such as the weekly Coffee & Politics, Books and Banter and occasional Forums bring national, state and local officials to campus to spark lively discussion and promote awareness on a variety of topics. The programs are broadcast on KCPW 88.3 FM in Salt Lake City.

Spring Break in Washington, D.C.

The "Spring Breakers" have the opportunity to visit with leaders in our Nation's Capitol, attend sessions of the House and Senate as well as the Supreme Court, meet with Utah's congressional delegation and enjoy sites in Washington, D.C.

Certificate in Practical Politics

The Department of Political Science and the Hinckley Institute of Politics administer an interdisciplinary academic program in practical politics, which can be used to structure a program of study for the Political Science major or for students who are majoring in other departments. The purpose of the certificate is to encourage students of all disciplines to enrich their college experience and job marketability, by exhibiting knowledge of practical politics by obtaining the certificate.

Hinckley Journal of Politics

Hinckley Journal of Politics is an academic journal which seeks to publish scholarly papers of exceptional caliber, promoting the intellectual talents and understanding of University students in the field of political science.

The Huntsman Seminar in Constitutional Government for Teachers

A program sponsored by The Huntsman Group enables the Hinckley Institute of Politics to host a seminar in practical politics for teachers in secondary education. The primary focus in the seminar is face-to-face encounters between visiting politicians and the participating teachers. These sessions will be supplemented with formal classroom teaching. The purpose is to enrich teacher understanding of the Constitution and to build enthusiasm for politics and community service, which teachers will pass to their students.

Hinckley Institute of Politics Alumni Association

The purpose of the Hinckley Institute of Politics Alumni Association (HIPAA), is to provide a mechanism for continued involvement of members of the Association with the Hinckley Institute of Politics and its activities, and to promote interaction among members of the Association in furthering the purposes of the Institute.

The Scott M. Matheson Leadership Forum

The Scott M. Matheson Leadership Forum was established in honor of the late Governor. The goal of the leadership forum is to enable former elected officials to reflect, write and speak about their experiences once they have left office.

Scholarships and Loans

The Abrelia Clarissa Hinckley Graduate Scholarship was established in 1975 by Robert H. Hinckley as a tribute to his late wife, a well-known civic leader. It is awarded annually to

a student who plans to obtain a graduate degree at the University of Utah and whose interest, formal training and life goals include a commitment to politics and community service ideals.

The Robert H. Hinckley Graduate Scholarship was established in 1983 by Dr. Ben D. Wood, a longtime friend of Robert H. Hinckley. It is awarded annually to a graduate who shares Hinckley's ideals and seeks a career or professional involvement in government or politics.

The John and Anne Hinckley Citizenship Scholarship was established in 1998 by a generous donation by Anne Hinckley in memory of her husband John. The endowment will fund an annual scholarship for Sophomore and Junior students at the University of Utah whose academic and community pursuits promote active citizenship and public service.

The Harry S. Truman Scholarship was established by Congress in 1975 and honors college students who have outstanding leadership potential, plan to pursue careers in public service and wish to attend graduate school. The scholarship will provide up to $30,000 for senior year and graduate studies, covering tuition, books and living expenses.

The Morris K. Udall Scholarship was established by Congress in 1992 to honor Congressman Morris K. Udall and his legacy of public service. Scholarships are awarded to students who intend to pursue careers related to environmental public policy, and to Native American and Alaska Native students who intend to pursue careers in health care and tribal public policy.

The James Madison Memorial Fellowship was named in honor of the fourth President of the United States. The fellowship funds up to $24,000 of each Fellow's course of study toward a master's degree. That program must include a concentration of courses on the history and principles of the United States Constitution.

The Scott M. Matheson Scholarship was established in honor of the late Governor. The scholarships are given to encourage students toward public service and extraordinary leadership in the tradition of Scott M. Matheson.

The Bill Rishel Memorial Loan was established by the late Virginia Rishel in memory of her father Bill Rishel. It is given to encourage women to pursue political and public service careers. Loans will be awarded up to $2,500 for undergraduate and up to $5,000 per year for graduate study at the University of Utah.

The Hinckley Institute of Politics is located in 253 OSH.

For further information call (801) 581-8501.

Department of Political Science

The Department values its relationship with the Hinckley Institute for the opportunities the Institute provides for students to enrich their academic studies with face-to-face encounters with politics.

The Institute's programs complement the academic offerings of the Political Science Department. Courses are available in five sub-fields of the discipline: American Politics, International Relations, Comparative Politics, Political Theory, and Public Administration. For undergraduate students, the Department offers a major with B.A. and B.S. degrees and a teaching minor. Undergraduate certificate programs in International Relations, Public Administration, and Practical Politics are open to both majors and non-majors. At the graduate level, the Department offers M.A. and M.S. degrees, the Master of Public Administration, and the Ph.D. degree. Dual degrees are available at the graduate level with Educational Administration, Law, Social Work, and Health Services Administration.

The Department has several undergraduate scholarships available to entering freshmen and continuing students, some of which are need-based and others wholly merit-based. The Political Science SAC (Student Advisory Committee) and Pi Sigma Alpha honorary society provide opportunities for students to get involved in departmental activities.

If you have questions about the Department and its programs, contact the office at 252 Orson Spencer Hall, 581-7031.

Affirmative Action: Path to Equality or Reverse Discrimination?

By Natalie A. Noel

Higher education is the door to opportunity for social advancement in our society and is often tied to political and social power. This paper will consider the use of race-based preferential treatment in university and college admissions. By examining key court rulings concerning the implementation of affirmative action in Washington, California, Texas, and Michigan, the nature of the Court's fragmented opinions regarding affirmative action programs with respect to university and college admissions will become evident. The debate over affirmative action is generally split between the need to balance the individual guarantee of equal protection under the law, as stipulated in the Fourteenth Amendment and the interpretation of Title VI of the 1964 Civil Rights Act, with the desire to remedy past discrimination and promote diversity in institutions of higher learning. It is the contention of the author that affirmative action policies such as minority outreach and targeted recruitment, strike a balance in the affirmative action debate and are more effective, constitutional methods to achieve opportunity for all and increase diversity, than are quota-based admissions policies that can themselves be discriminatory.

INTRODUCTION

Education is perhaps one of the great equalizers of opportunity. Education increases our understanding of the world in which we live and provides access to the marketplace of ideas. Likewise, in our competitive society, education opens the door to our economy. Employment opportunities and one's socioeconomic status can be directly tied to both formal and informal education. Similarly, one's social and political power can also be tied to one's access and participation in education. Thus, opportunity for admission to state university and colleges is an important local and national concern. Affirmative Action polices in higher education implemented to remedy past or current racial and gender discrimination, remedy low minority enrollment, or increase diversity in higher education have been the source of contention and the center of national debate since the mid-1960s.

This paper will examine the course of affirmative action in the United States over the past thirty years, with respect to preferential treatment based on race, in the admissions process of institutions of higher education. Quota based, dual admission programs, and numerically based affirmative action policies that give preferential treatment to race and gender in college and university admissions are generally constitutionally suspect. It is the belief of the author that affirmative action programs that are not quota based, but rather are focused on minority recruitment and outreach benefit a broad base of individuals and are more inclined to provide a fair admissions system in which persons from both genders and all races have access to higher education.

AFFIRMATIVE ACTION: EARLY HISTORY

In the early 1960s, the Warren and then the Burger Court attempted to address the difficult problem of racial segregation in the nation's public schools. During this period the judicial branch ruled that the Equal Protection Clause of the Fourteenth Amendment required an "affirmative duty" of local school boards to desegregate former "dual-school" systems. Furthermore, the Civil Rights Act of 1964 created the framework for introduction of affirmative action in employment and education. Title VII of the Act applies a comprehensive code of equal employment and opportunity regulations to public and private employers with fifteen or more employees. Title VII leaves the judicial branch the charge to take "such affirmative action as may be appropriate," to remedy the situation. Except in the case of being ordered by a court, employers are not required to adopt affirmative action

Natalie Noel is a senior graduating with a Bachelor of Arts in English and a Certificate in Practical Politics from the Hinckley Institute of Politics. She served as co-editor for this edition of the Hinckley Journal of Politics. Natalie will serve an internship with Senator Robert F. Bennett during the summer of 2001. She wishes to thank those at the Hinckley Institute of Politics and her parents for their continuing support.

remedies. However, "The Equal Employment Opportunity Commission (EEOC) has guidelines to help protect employers or unions from charges of 'reverse discrimination' when they voluntarily take action to correct the effects of past discrimination" (Dale 2001, 3).

Title VI of the 1964 Civil Rights Act prohibits racial and ethnic discrimination in all federally assisted programs and activities; this includes public or private educational institutions. "The Office of Civil Rights of the Department of Education interpreted Title VI to require schools and colleges to take affirmative action to overcome the effects of past discrimination and to encourage 'voluntary affirmative action to attain a diverse student body'" (Dale 2001, 3). In addition, "another Title VI regulation permits a college or university to take racial or national origin into account when awarding financial aid, if the aid is necessary to overcome effects of past institutional discrimination" (Dale 2001, 3). Thus, beginning in 1965, the awarding of occupational and educational opportunities proportionally emerged as an element in preferential affirmative action programs (Ball 2000, xi). Since that time the debate over quota based affirmative action programs has been the focus of much controversy.

AFFIRMATIVE ACTION: THE DEBATE

At its core, the debate over affirmative action is one of issue definition. According to many national polls, the public is more in favor of the concept of "affirmative action" than "preferential treatment." The finding that the former term is more accepted than the latter illustrates the public's concern for fairness and equity, but likewise a reaction against policies that are identified as racially preferential. Given this central dispute about issue definition, both terms will be used throughout this essay.

A primary stance taken by many affirmative action supporters, centers on the issue of redressing past wrongs. Remedial affirmative action addresses the concern that minorities are underrepresented in higher education and have been the victims of past discrimination. Proponents of preferential treatment on this basis argue, "because of America's past racial discrimination, affirmative action programs had to move beyond simple race neutral non-discrimination" (Ball 2000, 12).

Similarly, in regard to higher education, some minorities are underrepresented and proponents advocate the need to diversify campuses by "providing preferential treatment to members of certain identified racial groups" (Ball 2000, 9). Ensuring diversity of students on college campuses is seen as a worthy goal in and of itself, even if it means rejecting in a sense the concept of a color-blind United States Constitution, at least for the purposes of determining admission to institutions of higher learning. This claim "concentrates on the future; its claim is that preferential treatment….go[es] far beyond the benefits received by those who are favored under the policy" (Cahn 1995, 193). Rather, the argument insists that diversity enhances the learning environment in the academic setting. Furthermore, some link diversity to the free expression of ideas. They tie diversity to free speech rights or First Amendment rights. In addition, they counter that we allow for geographic diversity, so why not account for racial diversity, too? Thus, proponents of preferential treatment, on the basis of both remedial and diversity justifications, see the need for positive racial classifications.

On the other hand, opponents of preferential-based affirmative action contend that race and ethnicity are "neutral factors" and should not be relevant in a university admissions process (Ball 2000, 14). They argue that a society committed to the "concept of a color-blind constitution" cannot embrace preferential treatment based on race. Furthermore, they argue that affirmative action admissions policies violate the Equal Protection Clause contained in the Constitution's Fourteenth Amendment, as well as the statutory language of the 1964 Civil Rights Act (Ball 2000, 15). Similarly, opponents contend that admissions policies that use preferential treatment unfairly discriminate against the individual, are unconstitutional, and constitute reverse discrimination. They argue that racial classifications therefore have a negative impact, and as such are rarely positive.

However, some opponents see racial diversity as irrelevant; they assert that "Western learning survived centuries before anyone even thought of carefully balancing the racial composition of classrooms" (Lowry 2001). Others question our traditional focus on race and classification. "Why should ethnic categories that never made sense in the first place (neither Latinos or Asians constitute a race anywhere outside America), and which are becoming less relevant by the day, be accorded more importance than individuals?" (Economist 2001). Furthermore, while some opponents of preferential treatment do agree that racial diversity on college campuses is a worthy goal, they reject quota-based or numerical goal oriented admissions policies as the means for achieving that diversity.

AFFIRMATIVE ACTION PROGRAMS

There are three kinds of affirmative action programs used by colleges and universities in admissions. One type of policy focuses on seeking out qualified minority applicants who will provide diversity to the incoming class. Under this model, the race of an individual is weighed as a positive factor in the decision of the college's admissions committee. A second type of program focuses admissions decisions mainly on traditional numerical scores, but university administrators set a minority recruitment "goal" (i.e. five percent minority admissions). Thus, under this model, the ethnicity of applicants is a factor, but the focus remains upon consideration of those who are the most qualified minority applicants. Hence, implicit in this model is the idea that the university may not meet the "goal" if the selection committee cannot identify enough qualified minority applicants. A third type of affir-

mative action college admission program is a dual admissions process, in which a certain number of seats are set-aside for minority applicants. This program is a quota-based system and differs from the previous program in that all seats set aside for minority applicants are filled (Ball 2000, 9).

COURT RULINGS ON THE USE OF AFFIRMATIVE ACTION IN ADMISSIONS DECISIONS

ODEGAARD V. DEFUNIS 1971

In the early 1970s the University of Washington was a leader in the academic community with regard to their newly implemented admissions policy that took applicants' race and ethnicity into account. Their use of race as a positive factor illustrates a key legal question regarding the use of positive and negative racial classifications.

The University of Washington employed three general criteria in their new law school admissions policy.

1) The past academic performance of the applicant including the Law School Admission Test (LSAT) score; the undergraduate grade point average (GPA); the quality of the undergraduate institution the applicant attended; grades in difficult courses; and the applicant's predicted first year average (PFYA) based on grades in their junior and senior year.
2) The applicant's ability to "make significant contributions to law school classrooms and the community at large."
3) The applicant's "social or ethnic background," as "one factor in the admission committee's assessment of the likelihood of the applicant's successfully graduating from law school" (Ball 2000, 23).

To be automatically admitted, an applicant's PFYA had to be 77 or higher, with the highest possible PFYA score being 81. An applicant with a PFYA score of 74.5 or less was rejected. However, University of Washington School of Law (UWSL) treated two groups differently: those considered "returning military veterans who had at one time been admitted but then were called for military service" and "applicants from one of four identified minority groups: African-American, Hispanic-American, Native-American, and Philippine-American" (Ball 2000, 24). The committee randomly distributed white and non-preferred minority applicants to committee members. Individual committee members used the PFYA index as the major guide in making their recommendation to the committee that the applicant be admitted, rejected, or held for possible placement on a waiting list. However, "the applicant screening process provided special treatment to preferred minority applicants" (Ball 2000, 24). Committee members considered preferred minority applicants' files separately and their files were not distributed randomly. For example, African-Americans' files went to an African American law school student and a faculty committee member who had previously worked in a university program for disadvantaged students, thus resulting in a dual admissions policy.

Marco DeFunis applied to UWSL in 1970 and was rejected. In 1971 he applied again as one of 1,600 applicants competing for 150 seats. Though DeFunis had a PFYA of 76.23 he was initially placed on a wait-list and then rejected. 48 percent of the minority applicants that were considered in the special category that year were admitted, although most scored below the 74.5 cut off point for those considered in the regular admissions process, or non-minority applicants. Of the 150 applicants admitted to UWSL that year, 44 were minority students, a significant number considering that minorities only made up four percent of the applicant pool. It is important to note that DeFunis had a higher PFYA than 38 special minority students.

In 1971, DeFunis levied a lawsuit against UWSL alleging that their admissions policy violated his right to the equal protection of the laws and was therefore a violation of the Fourteenth Amendment's Equal Protection Clause. DeFunis argued that race could not be the determining factor in university admissions and as such was also in violation of Title VI of the 1964 Civil Rights Act (Ball 2000, 22). Furthermore, DeFunis argued that UWSL's policy required "strict scrutiny" by the courts to determine whether or not the affirmative action program served a "compelling interest." DeFunis also argued that "there was no record of the UWSL ever deliberately discriminating against racial and ethnic minorities. Therefore, there was no compelling interest warranting the use of racial goals in the law school admissions process" (Ball 2000, 25). Thus, if it was determined that UWSL had not previously deliberately discriminated against racial and ethnic minorities, then was UWSL's goal of increasing minority enrollment and representation in their law school and the legal profession a "compelling interest" that justified the use of racial goals in the admissions process?

Slade Gorton, the state Attorney General, arguing in behalf of the University of Washington, asserted that UW did have a compelling state interest in overcoming the negative consequences of past racial and ethnic discrimination across America. In 1970, less than two percent of those practicing law were African Americans. Gorton argued that there was a "compelling interest" to diversify the law school, as well as the legal profession (Ball 2000, 26).

At the core of both DeFunis and UW's legal claims lay the issue of racial and ethnic classification. Both agreed that racial or ethnic classifications could be factors in university admissions, but the parties disagreed on whether the Fourteenth Amendment barred benign or positive racial classification. In a certain sense, one of the central disagreements was founded upon the notion of negative and positive racial and ethnic classifications. Is there a difference between positive and negative racial discrimination? This question lies at the heart of the debate between proponents and opponents of affirmative action.

Judge Lloyd Shorett of the Superior Court for King County upheld DeFunis's claim that he had been denied equal protection under the law. Judge Shorett quoted from the historic 1954 *Brown v. Board of Education* opinion stating,

"Public education must be equally available to all regardless of race." Similarly, the judge commented that, "the Fourteenth Amendment could no longer be stretched to accommodate the needs of any race…The only safe rule is to treat all sides alike" (Ball 2000, 27). The remedy for the case resulted in DeFunis's immediate enrollment in UWSL for the class of 1974.

However, the Washington State Supreme Court disagreed and reversed Judge Shorett's order, stating that racial classifications may be used for either of the purposes set forth by UWSL of: 1) remedying past national discrimination and 2) promoting the integration of the races. However, the two dissenters accepted DeFunis's argument that the Constitution is and must be "color-blind." Similarly, they argued "racial bigotry, will never be ended by exalting the political rights of one group or class over that of another. The circle of inequality cannot be broken by shifting the inequalities from one man to his neighbor" (Ball 2000, 28).

Ultimately, the U.S. Supreme Court considered an appeal to hear DeFunis v. Odegaard. In his appeal, DeFunis posed two questions: 1) "Is the affirmative action program in violation of the 'Equal Protection' clause because preference is given to certain racial minorities?" 2) "Is Title VI of the 1964 Civil Rights Act violated because white applicants must meet different and more stringent standards than do persons of certain other races in obtaining admission?" (Ball 2000, 29). Ultimately, the Court did not answer these questions, but instead issued a brief per curiam opinion in which the Court majority of five remanded the case on account of mootness. (DeFunis was scheduled to graduate from UWSL the following June). However, the Court could not dodge the issue for long, as the same controversy over the use of affirmative action arose with regard to the University of California at Davis Law School.

Regents of the University of California at Davis v. Allan Bakke 1978

In 1973, thirty-two year old Caucasian, Vietnam marine veteran, Allan Bakke, challenged the University of California at Davis (UCD) Medical School's dual admission program. Like many universities and colleges at this time, UCD was attempting to increase the small number of minority admissions to its professional schools. Paralleling the DeFunis case, high scores on threshold tests were critical for admission because of the limited number of seats compared to the much larger number of qualified applicants. The university's dual admission program set aside sixteen places for minority students and the regular admission program required a minimum GPA whereas, there was no minimum GPA for minority applicants. Table 1 shows the considerable statistical disparity between those admitted under the two programs. The associate dean and chair of the admissions committee, Dr.George Lowery, argued that the "special admittees were qualified for medical school education; they were, however, just less qualified than the regular admittees" (Ball 2000, 52).

Table 1

	MCAT Science (percentile*)	MCAT Verbal (percentile)	MCAT Quantitative (percentile)	General Information (percentile)	GPA
Regular/Special	R/S	R/S	R/S	R/S	
	83/35	81/46	76/24	69/33	3.5/2.6
Bakke:	97	96	94	72	3.44

*For all, Regular, Special, and Bakke, percentiles are the two-year average (Bakke applied two years in a row)

[Ball, Howard. 2000. *The Bakke Case: Race, Education, & Affirmative Action* p. 52]

Bakke contended that the medical school's practice of setting aside 16 of the one hundred seats annually filled by first-year medical students solely for minority applicants was, in effect, reverse discrimination. This case also centered on whether or not the Constitution's Equal Protection Clause or Title VI of the 1964 Civil Rights Act prohibited a public university from using a quota-based or set-aside admissions policy for minority students.

The first court to hear the *Bakke* case ruled in 1974 that, "The use of this program did substantially reduce the plaintiff's chances of successful admission to medical school for the reason that, since 16 places…were set aside for this special program, the plaintiff was in fact competing for one place, not in a class of 100, but in a class of 84, which reduced his chances for admission by 16 percent." In conclusion, the Yolo County Superior Court said, "No race or ethnic group should ever be granted privileges or immunities not given to every other race" (Ball 2000, 57). However, UCD successfully argued that Bakke would not have been accepted even without the 16 set-asides, citing his age (32) as one factor. Thus, the judge did not order that Bakke be admitted to UCD, but rather ordered the UCD admissions committee to reconsider Bakke's application without regard to either his or any other applicant's race.

A half a year later in a 6-1 ruling, the California Supreme Court concurred that that UCD's preferential admissions policy violated the Fourteenth Amendment. The majority opinion stated that "The Equal Protection Clause applies 'to any person,' and its lofty purpose to secure equality of treatment to all, is incompatible with the premise that some races may be afforded a higher degree of protection against unequal protection than others" (Ball 2000, 59). Because at this time several universities in California had been implementing quota-based affirmative action programs with regard to admissions, a few months following the state Supreme Court ruling the California Board of Regents approved the filing of a petition of certiorari to the U.S. Supreme Court. The question the regents posed was,

> When only a small fraction of thousands of applicants can be admitted, does the Fourteenth Amendment's "Equal Protection" clause forbid a state university professional school

> faculty from voluntarily seeking to counteract the effects of generations of pervasive discrimination against discrete and insular minorities by establishing a limited special admission program that increases opportunities for well-qualified members of such racial and ethnic minorities? (Ball 2000, 64).

Thus, the regents question centers on the notion of using positive racial classifications to achieve remedial affirmative action.

The different groups that filed *amicus curiae* (friend of the court) briefs with the petitioner's request for writ of certiorari illustrates the polarization of the debate surrounding affirmative action. Two of the amicus briefs stated that without the highest court's grant of certiorari and subsequent overturning of the California State Supreme Court ruling, "the movement of minority groups toward meaningful representation in the professions will virtually cease." In contrast, two other amicus briefs asserted that it was necessary for the Court to stem the tide of "rampant" reverse discrimination in higher education (Ball 2000, 64).

The essence of the disagreement in *Bakke* hinged upon the battle over the scope of judicial review. The petitioner preferred to view the special admission program for minority applicants as a means of reaching a "goal" of minority representation at the UCD Medical School, while those siding with Bakke saw the special admissions program as a racial quota. Those defending the UCD Medical School contended that the level of review or judicial scrutiny of the program should be reserved for "discrete and insular minorities." On the other hand, Bakke's lawyers argued that "the California court correctly rejected the notion that the degree of judicial scrutiny accorded a particular racial or ethnic classification hinges upon membership in a discrete and insular minority and duly recognized that the 'rights established [by the Fourteenth Amendment] are personal rights'" (*University of California Regents v. Bakke 1978*).

Unlike *Odegaard v. DeFunis*, the Supreme Court heard *Bakke*. However, their ruling was far from unanimous. On the basis that the institution itself was not shown to have deliberately discriminated in the past, four Justices voted to strike down, as a violation of Title VI of the 1964 Civil Rights Act, UCD Medical School's special admissions program. In addition, another bloc of four Justices asserted that UCD's minority admissions quota designed for remedial purposes in regard to discrimination was not justified by the Constitution, nor the Civil Rights Act. Justice Powell was the tie-breaking vote, though he was certainly fragmented in his decision as well. In his deciding vote, Justice Powell added a fifth vote to one four-Justice bloc by arguing that he "found that neither the state's asserted interest in remedying 'societal discrimination' nor of providing 'role models' for minority students was sufficiently 'compelling' to warrant the use of 'suspect' racial classification in the admission process" (Colamery 1998, 3). However, Justice Powell also added a fifth vote to the other four-Justice bloc by declaring that the goal of achieving a "diverse student body" was a "clearly permissible goal for an institution of higher education." In addition, he contended that race could be considered during the admissions process as "one element of a range of factors," provided that it "did not insulate the individual from comparison with all the other candidates for the available seats" (Colamery 1998, 3). Justice Powell's opinion illustrates his support for affirmative action as a factor in admissions decisions as a means to achieve racial diversity.

In effect, the majority opinion of the Court reaffirmed that the rights detailed in the first section of the Fourteenth Amendment are guaranteed as individual rights and inherently personal rights. Thus, the guarantee of equal protection must be accorded to individuals regardless of their race or their membership or non-membership as a "discrete and insular minority," as stated by the Yolo County Superior Court. Furthermore, the Supreme Court said in *Bakke*,

> The guarantees of the Fourteenth Amendment extend to all persons. Its language is explicit: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." It is settled beyond question that the 'rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights.' The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal (*University of California Regents v. Bakke 1978*).

It is important to note that though the Court declared specific quotas in medical school admissions impermissible, it did not disprove the practice of taking race into account as a factor in admissions. The Court affirmed that, "[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny" (*University of California Regents v. Bakke 1978*). Thus, the historic Bakke ruling affirmed that dual admissions programs and quota-based affirmative action policies violate the Fourteenth Amendment's Equal Protection Clause, while simultaneously holding that positive racial classifications may be permissible, but must be subjected to "strict scrutiny" by the Court and meet the standard of a "compelling interest."

The Court's ruling in Bakke stands in stark contrast to the lower courts' rulings in DeFunis. Over the past thirty years, the fragmented and unclear stance of the judicial branch with regard to affirmative action mirrors the similar lack of consensus on the issue within the public at large. President Clinton's "mend it, don't end it" caution and current President Bush's "affirmative access," mantra, illustrate a desire to provide equal opportunity but a disagreement as how to most effectively proceed. The numerous amicus briefs that were filed on both sides in the *DeFunis* and *Bakke* cases illustrate the fragmentation of opinion among public interest groups.

Two examples of the many public interest groups and parties that filed amicus briefs are, the Anti-Defamation League and the Jewish Rights Council (JRC). Both filed amicus briefs in support of DeFunis's case, while the NAACP and other civil rights organizations filed amicus briefs in support of the University of Washington. The primary interest of the JRC was founded upon the history of anti-Semitism in American higher education. Up to the 1950s, many Jewish applicants encountered problems in their attempt to enter certain undergraduate schools and many professional graduate schools of law and medicine. Many schools limited the number of Jews admitted by using a quota-based admissions process. Thus, this background of religious quotas designed to exclude Jewish applicants from university and college admission led the JRC to reject the idea of positive, or benign, racial quotas that have resulted in their former exclusion. The JRC contended that any racially preferential policies violate the Fourteenth Amendment because, as in the case of *DeFunis*, there were better qualified students who were not accepted. Though not opposed to university recruitment efforts targeted toward qualified minorities, the JRC affirmed their opposition to university admissions processes that used quotas, goals, or set-asides. (Ball 2000, 30).

In contrast to the JRC and other opponents of preferential based affirmative action, amicus briefs in support of Odegaard in the case against UWSL, center on the notion put forth by Justice Blackmun and Marshall in the *Bakke* case, "that color-blindness has come to represent the long-term goal. It is now well understood…that our society cannot be completely color-blind in the short term if we are to have a color blind society in the long term" (Ball 2000, 35). Thus, this argument for racially preferential policies seeks to achieve equity in the long term by advocating positive racial classifications that necessitate making racial distinctions in the short term.

Citizen Participation in Lawmaking

Citizen Activism

As twenty states allow citizens to propose laws, and to vote directly on laws through the initiative process, it is not surprising that a contentious issue like affirmative action would result in ballot measures. A most notable example of a citizen activist opposed to preferential treatment is University of California Regent, Ward Connerly. Connerly spearheaded the effort to eliminate racial preferences in the University of California system and on July 20, 1995, Connerly and other Regents voted to end the University of California's nearly 29-year old policy of giving preference for minorities and women in admissions and jobs. The impact of the policy change resulted in an 81 percent drop in minority enrollment in Berkeley's law school. With regard to the immediate drop, Connerly conceded that, "No one can look at the sharp decline in non-Asian minority admissions and not feel saddened…but I see plenty that is positive." Connerly asserted that, "those blacks who will enter Berkeley today can say with pride that they were admitted on their own" (Terry 1998).

Though Connerly is strongly against preferential treatment based on race and gender, he is a proponent of preferences based on economic need. Connerly advocates giving extra consideration to qualified students who are poor (Terry 1998). Likewise, in the wake of the Regents' change in policy, and in order to address the immediate decrease in minority enrollment, the Regents adopted policies to target low-performing schools and began sending tutors with the goal of helping minority students become more academically competitive.

In 1996, about one year following the University of California Board of Regents ban on preferential treatment based on race and gender, California voters passed by a 54 to 46 percent margin a controversial ballot initiative, Proposition 209. The crux of Proposition 209, the *Prohibition Against Discrimination or Preferential Treatment by State and Other Public Entities*, stipulated that "The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."

Also called the California Civil Rights Initiative, Proposition 209—like the 1995 California Board of Regents ban on preferential treatment of race and gender—was also led by Regent Ward Connerly. He asserted that, "We can continue perpetuating the outdated premise on which race and gender preferences are based…that blacks, women, and other minorities are incapable of competing without a handicap. Or we can resume the journey to a fair and inclusive society. I wouldn't accept a job or college admission based on color. I would not want the stigma, the cloud hanging over me. There could be no greater insult" (Terry 1998).

Opponents of Proposition 209, claimed that with regard to university admissions it "reinforces the 'who you know' system that favors cronies and the powerful." Similarly, they assert that "whether intentional or not, it pits communities against communities and individuals against each other" (*Proposition 209 Initiative Constitutional Amendment* 1996). However, proponents of Proposition 209 countered that the California Civil Rights Initiative, or Proposition 209, simply restated parts of the 1964 Civil Rights Act. Similarly, they asserted that instead Proposition 209 "will stop terrible programs which are dividing our people and tearing us apart." Furthermore, they argued that Proposition 209 will "bring us together under a single standard of equal treatment under the law" (*Proposition 209 Initiative Constitutional Amendment* 1996). The debate over California's Proposition 209 evolved into much more than an individual state proposition. Soon the entire country became embroiled in the issues surrounding the controversy. Proposition 209 merely added fuel to the already flaming national debate sparked by *Bakke*.

Two years following California's Proposition 209, Washington state embarked upon a similar course. After unsuccessfully trying several times to gain approval of legislation similar to the language used in Proposition 209, Washington state Representative Scott Smith filed his proposal as an initiative. The initiative's key provision stipulated that:

> The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting (Bruno 1999, 1)

What became Initiative 200, Washington State Civil Rights Act, differed procedurally from Proposition 209, in that 209 was an amendment to California's state constitution and Initiative 200 proposed a new state statute. In this instance, supporters of the Washington State Civil Rights Initiative (WSCRI) had to garner 179,248 registered voters' signatures in order to require the legislature to either address the issue or require a vote on it by the people. The Washington State Legislature could pass it into law, take no action, or reject it and the initiative would then appear on the November general election ballot, or the legislature could develop an alternative measure to send to the ballot along with the initiative (Bruno 1999, 1).

The backers of the initiative were successful in their signature gathering efforts and thus the initiative went to the Washington State Legislature. The representatives took no action on the measure and as a result Initiative 200 was placed on Washington's November 3rd, 1998 ballot. On election day, Washington state voters passed Initiative 200 with a vote of 58 percent in favor and 42 percent opposed.

Given the earlier discussion of the controversy over how the issue should be defined, it is not surprising that prior to the general election, the American Civil Liberties Union (ACLU) filed a lawsuit challenging the ballot title, alleging that is should include the term "affirmative action," rather than the current wording referring to "preferential treatment." The ACLU was not successful in changing the wording of the initiative title and a judge in Washington state affirmed that the ballot title did accurately and impartially describe the intent of the initiative (Bruno 1999, 2).

Public perception as measured by a *Seattle Times* poll that took place several days prior to the election, reinforces the importance of how the issue is defined. The poll indicated that Initiative 200 had garnered widespread support across all age and income groups. The poll also found that both Initiative 200 supporters and opponents agreed that "affirmative action" needed to be reformed. However, the groups differed on whether or not Initiative 200 was the best approach to reform. The *Seattle Times* poll and the ACLU's attempt to change the wording on the ballot provides additional evidence that, public perception and opinion is divided. By and large, it would seem that Americans don't want to end "affirmative action" altogether, but rather have serious qualms with "preferential treatment" (Bruno 1999, 2).

Following Initiative 200's approval, Ward Connerly, backer of Proposition 209 and leader in the movement to end preferential treatment, stated his belief that, "We are one [Supreme] Court decision away from ending preferences" (Bruno 1999, 7). Whether Connerly is right about the Supreme Court or not, the judicial branch will certainly play a role in interpreting initiatives such as 200. For example, the Washington Attorney General issued a memorandum prior to the election that identified some of the major impact-related questions raised by the initiative. Specifically, the unspecified meaning of "preferential treatment" the memorandum stated, "is not defined in the statute [proposed by the initiative] and does not have a historical legal use or 'well-accepted, ordinary meaning'" (Bruno 1999, 4). Determining the exact or even relative meaning of "preferential treatment" is important in the case of Initiative 200 because, unlike Proposition 209, which amended the state constitution, Initiative 200 as a new state statute would be interpreted in terms of existing laws. Thus, according to the memorandum,

> One [of] the most significant questions of interpretation, if the initiative were approved, would be how to square the "no discrimination or preferential treatment" language with older statutes requiring agencies to consider the needs of particular groups, some of which are the same categories mentioned in the initiative (Bruno 1999, 4).

The memorandum explained that it would be up to the courts to decide, "if the legislative intent behind the Initiative is clear enough to supersede any pre-existing, inconsistent statutory language" (Bruno 1999, 5). However, the complication occurs in the fact that "legislative intent" of an initiative is in effect voter intent. Therefore, the fracture in public opinion, (as illustrated in the pre-election polls), over what constitutes effective affirmative action reform illustrates the difficulty in ascertaining public opinion generally, as well as a specific meaning of "preferential treatment." Clearly, disputes about the implementation of Initiative 200 will have to be resolved by the courts.

RECENT LEGAL DEVELOPMENTS

STUDENT DIVERSITY IN HIGHER EDUCATION

Justice Powell's argument in Bakke was that using preferential treatment to attain a specific percentage of minorities for its own sake is unlawful. However, he argued that diversity as a way to improve education was a "constitutionally permissible goal," because learning "is widely believed to be promoted by a diverse student body" (*University of California Regents v. Bakke 1978*). Powell's opinion in the *Bakke* case has given rise to the notion that diversity in the educational setting is a "compelling interest." However, Justice Powell made it clear that he views this type of diversity in broader terms than simply race. He stated, "[t]he diversity that furthers a compelling

state interest encompasses a far broader array of qualifications and characteristics of which ethnic origin is but a single though important element." (Dale 2001, 6). Powell's opinion illustrates the importance that the race of a candidate not be the "sole" or "determinative" factor, while simultaneously asserting that diversity in higher education in a worthy goal.

Recently, the Supreme Court denied review of a Fifth Circuit Court decision in a 1996 case *Hopwood v. State of Texas (Hopwood II)*[1]. The Fifth Circuit concluded that any use of race in the admissions process was forbidden by the Constitution. The University of Texas School of Law had two separate paths for assessment of applicants; one for blacks and Mexican-Americans and another for whites and all other "non-preferred" minorities. Much like *Bakke*, there was a disparity in the application of standards to the differing groups. Similarly, the applications for the preferred group were never compared to those in the other group. "Race was always an overt part of the review of an applicant's file" (Dale 2001, 7).

In direct contrast to Powell's opinion in Bakke, the three judge appellate court rejected Powell's diversity rationale and held in *Hopwood II* that the desire to create a diverse student body never provides a "compelling" justification for the use of race in student admissions. The *Hopwood II* court recognized Justice Powell's rationale as "not binding precedent," in consideration that no other Justice formally joined in his opinion.

Similarly, the court determined that the law school failed to demonstrate sufficient continuing effects of prior illegal acts that would justify remedial affirmative action.

Instead, the appellate panel held that,

> For the admissions scheme to pass constitutional muster, the State of Texas, through its legislature, would have to find that past segregation has present effects; it would have to determine the magnitude of those present effects; and it would need to limit carefully the "plus" given to applicants to remedy that harm. A broad program that sweeps in all minorities with a remedy that is in no way related to past harms cannot survive constitutional scrutiny (Dale 2001, 7).

The effect of *Hopwood II* was to narrow the scope in relation to what constitutes sufficient past discrimination and its continuing effects upon the admissions process. Thus, without an adequate justification the implementation of a preferential admissions policy was rejected.

To heighten the difference between Powell's opinion and that of *Hopwood II*, and to complicate matters further, another Fifth Circuit panel "reviewed an appeal from an injunction order entered by a federal district court from the 1996 *Hopwood II* decision" (Dale 2001, 8). In the latter part of 2000, *Hopwood v. State of Texas (Hopwood III)*, affirmed the ruling in *Hopwood II* that rejected Powell's diversity rationale in Bakke. However, *Hopwood III* reversed the injunction that *Hopwood II* placed to forbid any consideration of racial preferences in admissions. Instead, in *Hopwood III*, the district court held that the injunction resulting from *Hopwood II* was in conflict with Bakke. Specifically, the court held that the injunction,

> Forbids the University from using racial preferences for any reason, despite Bakke's holding that racial preferences are constitutionally permissible in some circumstances. Consistent with that position, Hopwood II does not bar the University from using race for any and all remedial purposes; rather Hopwood II bars the University from using race to remedy the effects of previous discrimination in other components of Texas's public education system only. By enjoining any and all use of racial preferences, the district court went beyond the holding of Hopwood II and, in the process, entered a judgment that conflicts with Bakke (Dale 2001, 9).

Thus, the overall effect of *Hopwood III*, was to lift the previous court's injunction, while leaving in place the constitutional rationale and conclusion of the appeals court in *Hopwood II* (Dale 2001, 9).

In Washington, the Ninth Circuit court created a conflict with the Fifth Circuit court by ruling in the case *Smith v. University of Washington* that the "extensive use of race-based factors" in UWSL admissions process was constitutional. Instead of rejecting Justice Powell's diversity rationale in *Bakke*, the Ninth Circuit court argued that Justice Powell's opinion provided "the narrowest footing upon which a race-conscious decision making process could stand" (Dale 2001, 9). Though passage of Initiative 200 limits the significance of this ruling, it does shed light on the fragmented nature of the judicial opinion. *Bakke's* precedent is important because the Supreme Court has yet to address affirmative action in higher education since the Bakke decision (Dale 2001, 9).

The judicial divide inherited from the fragmented *Bakke* opinion is also mirrored in two recent cases involving the University of Michigan. Two separate federal district courts took decidedly different approaches to the University of Michigan's admission policies (Dale 2001, 9). The University of Michigan has been operating under what is commonly known as the "Michigan Mandate." Under the Michigan Mandate, undergraduate applicants are evaluated using a grid system in which applicants are ranked by their test scores and high school GPA. The admissions system awards a 20-point advantage to black and Hispanic students on a 150-point scale. Incidentally, the university also awards "six points for geographical factors, five points for leadership skills, three points for an outstanding essay, and so on" (Dale 2001, 10).

In the first case, *Gratz v. Bollinger* decided in 2000, the Ninth District court upheld for diversity reasons the University of Michigan's race-based undergraduate admissions policy. In *Gratz*, the court reached a similar conclusion as the Ninth Circuit court in Smith. That is, they held that

1 Hopwood v. State of Texas 1994 (Hopwood I) A federal district court ruled that the University of Texas School of Law's dual admissions policy violated the Fourteenth Amendment's Equal Protection Clause and held that separate evaluations for minority applicants were unconstitutional because they were not "narrowly tailored to the state's compelling interest in diversity and overcoming past discrimination." The court held that giving a "plus" to minority students was lawful, though a separate standard for minorities and non-minorities was not (Springer 2001).

the practice of using race as a "plus" factor is necessary to ensure a diverse student body, which is a "compelling governmental interest." The *Gratz* district court disagreed with "*Hopwood's* conclusion that the reticence by a majority of the *Bakke* Justices to embrace the Powell rationale necessarily implied a rejection of that theory" (Dale 2001, 10). Likewise, the *Gratz* court majority opinion justified affirmative action in higher education as a "permanent and ongoing interest." This ongoing interest being diversity, the Gratz court stated the following:

> On the diversity issue, diversity is not a 'remedy.' Therefore, unlike the remedial setting, where the need for remedial action terminates once the effects of past discrimination have been eradicated, the need for diversity lives on perpetually. This does not mean, however, that universities are unrestrained in their use of race in the admissions process, as any use of race must be narrowly tailored. Hopefully, there may come a day when universities are able to achieve the desired diversity without resort[ing] to racial preferences. Such an occurrence, however, would have no effect (sic) on the compelling nature of the diversity interest. Rather, such an occurrence would affect the issue of whether a university's race-conscious admission program remained narrowly tailored. In this Court's opinion, the permanency of such an interest does not remove it from the realm of "compelling interests," but rather, only emphasizes the importance of ensuring that any race-conscious admissions policy that is justified as a means to achieve diversity is narrowly tailored to such an interest (Dale 2001, 10).

This opinion clearly illustrates this court's view that using a "plus" factor or positive racial classifications for preferred minority students is not the same as the unconstitutional dual admissions system in the case of *Bakke*. In addition, the Gratz court's strong support of the diversity rationale focuses the question of preferential treatment upon the diversity justification, rather than the argument of race-based admissions policies as a remedy for past discrimination.

Recently, in the case of *Greutter v. Bollinger 2001*, a federal district court contradicted the *Gratz* ruling by nullifying a special admissions program for minority law students at the University of Michigan School of Law. Judge Friedman disagreed with Powell's diversity rationale and subsequently *Gratz* by concluding that diversity was not a compelling state interest. Friedman declared racial classifications to be unconstitutional "unless they are intended to remedy carefully documented effects of past discrimination" (Dale 2001, 12). In addition, the court held that even if diversity were to rise to the status of a "compelling state interest," the University of Michigan School of Law's policy was not sufficiently narrowly tailored. The court found the policy to be too "ill defined" and "amorphous" to allow for "predictable and quantifiable bounds" (Dale 2001, 12). The court also held that the law school's goal of 10-12 percent minority enrollment was in effect a "quota system." Further, the "lack of principled explanation" for giving preference to certain groups resulted in a policy that was not narrowly tailored. Finally, the court was critical of the school's implementation of affirmative action without first expanding recruiting efforts or trying alternatives, such as, a lottery system to combat the problem of low minority enrollment.

THE JUDICIAL FUTURE OF AFFIRMATIVE ACTION IN ADMISSIONS DECISIONS

The issues surrounding the use of race in admissions decisions reflected in court opinions illustrate the controversy over the two theoretical justifications for preferential treatment. Though nearly all the cases presented in this section agree with the concept of requiring that affirmative action policies demonstrate a "compelling state interest;" the courts are divided as to the standard that either the diversity rationale or remedial justification argument must meet.

In addition, public opinion illustrates this same philosophical divide. How does an admissions policy fairly determine applicants who warrant redress from past discrimination? If the policy compensates groups rather than individuals, as an editorial in the Economist argues:

> Poor Latinos might ask why their children are being held to higher academic standards than the children of black doctors. And a wide array of other groups could legitimately ask why they were being denied the fruits of preferential treatment: Chinese-Americans whose ancestors were treated like chattels; Japanese-Americans, whose ancestors were interned during the second world war; and native Americans whose ancestors were robbed of their land and their dignity (Economist, March 2001).

Justice Douglas's separate dissent in *DeFunis* argued that giving preferences to applicants who were economically disadvantaged, such as, "a poor Appalachian white or a second-generation Chinese in San Francisco," or other "would-be lawyers with limited backgrounds," was a more constitutional policy than using race or ethnicity (Ball 2000, 45). If affirmative action is used as a method for increasing the opportunity of the disadvantaged, is race a proper determining factor? Affirmative action proponents that contend the policy's goal is increased opportunity for the socioeconomic disadvantaged ignore larger issues of demographics and in particular the untenable implication that poverty plagues only minorities or the converse implication the all minorities are poverty-stricken.

ALTERNATIVES TO PREFERENTIAL TREATMENT

PERCENTAGE PLANS

In November 1999, Florida Governor Jeb Bush unveiled his "One Florida Initiative" ending racial or gender set-asides, preferences, and quotas in state hiring, contracting, and university admissions. The initiative's "Talented 20" plan guarantees Florida high school graduates in the top twenty percent of their classes admission to at least one state school. Bush declared the plan would "further increase minority enrollment in the state university system" (Egalitarian 1999).

In addition to the Talented 20 Program, the One Florida Initiative calls for an increase in funding for need-based scholarships, funding for free Preliminary SAT (PSAT) testing for all Florida tenth graders, increased minority outreach and recruitment, and forms "opportunity alliances" between Florida universities and low-performing schools (Hirst 2000).

The Florida plan is similar to the Texas "10% Plan" which was implemented in 1997, and California's 4 percent plan which was adopted soon after Proposition 209 as an alternative to race-based preferential treatment. However, unlike the Florida and Texas plan, California's percentage plan retains existing eligibility requirements.[2] Proponents of the percentage plans contend that they are a more progressive way to achieve diversity than preferential treatment. Instead of focusing solely on race they account for relative disadvantage. This focus on disadvantage, as Clint Bolick of the Institute of Justice puts it, "begins to address the roots of the problem, which are more economic and educational than racial, even though they disproportionately afflict minority individuals" (Bolick 2000).

Florida Governor Jeb Bush attributed a twelve percent increase in the number of minority freshmen enrolled at the state's ten universities to the first year success of his "Talented 20" plan. David Colburn, Provost at the University of Florida publicly questioned Bush's plan at its initial release, but now praises Bush for his efforts toward challenging the university. Colburn said that the university increased minority recruitment by giving out an extra $200,000 in grants to minority students in Jacksonville area high schools (Selingo 2000a). However, while Bush and Colburn hailed such programs as a means to expand opportunity to a greater number of minority students, other critique percentage plans as more problematic than beneficial.

For example, the academic quality and rigor of high schools varies widely. Thus, as a result some students are more qualified than others to attend college. Critics contend that the plan lowers academic standards and requires remedial courses (Selingo 2000b, A34). In addition, academic disparities among high schools will in turn adversely affect student class ranking, such that one student may not make the top twenty percent in a highly competitive, high-achievement high school, while another student with a lower GPA may be eligible for the "Talented 20" plan in their less rigorous high school. As one author puts it "at bad high schools, some top seniors aren't ready for college. Do they deserve guaranteed seats? And at the best schools, students cram in honors courses yet can't beat out the academic superstars at the top of their class. Is it fair to have their destinies ride on class rank?" (Selingo 2000c, A31). More specifically, one student who attends one of Florida's more competitive high schools, Palmetto Senior High, and ranks 213th out of her class of 634, has a 3.9 GPA, high SAT score, and several advanced placement courses will not make the top twenty. She says she feels cheated and is frustrated that "Here you are at a different school working harder, while the people at other schools are doing easier work and getting further ahead" (Selingo 2000c, A31). However, Florida Education Chancellor, Adam Herbert contends that students from top schools should not have a problem getting in. Rather, he asserts that, "What we are really talking about is an additional group of students that come from our low-performing schools that previously did not apply" (Diamond 2000).

Despite immediate minority enrollment increases, many affirmative action proponents still advocate a return to preferences. Palmetto's principal, Janet Hupp asserts that minority students at her school may have lower GPA's and class ranks as a result of a competitive, integrated high school, such as Palmetto. She contends that they score higher than the national average on the SAT and are better helped by affirmative action programs than class rank based percentage plans. In addition, the U.S. Civil Rights Commission deems California, Texas, and Florida's percentage plans an inadequate replacement for racial preferences. The Commission contends that the class rank systems further discourages the integration of high schools and argue that in the long term percentage plans will not increase minority enrollment at public institutions (Selingo 2000c, A31).

Thus, not only does the disparity among high school achievement raise concerns about equity, but percentage plans also raise constitutional questions similar to those that arise with dual admissions systems. Could the academic disparities among students who are eligible for Florida's "Talented 20" be a violation of the Fourteenth Amendment's Equal Protection Clause? Proposition 209 backer and race-based preferential policy foe, Ward Connerly calls Florida's "Talented 20" plan a "lawsuit waiting to happen." Connerly contends, "If you're picking a number because you know that number is going to favor one group or another based on race, that's no different than a system of explicit preferences" (Selingo 2000c, A31). Connerly supported California's 4 percent plan only after assurances that it would not result in lower academic standards.

The primary benefit of percentage plans is that they have the potential of drawing in economically disadvantaged students of all races. Percentage plans aim to increase the opportunities of underprivileged students, by admitting students who perform at the top of their class in a disadvantaged school. However, in so doing, students who may be unprepared for college are guaranteed admission alongside higher achieving students. Percentage plans may increase opportunity, but they must also prevent declining standards, and be "narrowly tailored" in order to pass constitutional muster. Clearly, the "percentage plan" concept is too recent to receive close scrutiny from policy makers or the courts. Perhaps

2 Though it is not in the scope of this paper to discuss this, it is important to note Richard C. Atkinson's, President of the University of California system, recent proposal to eliminate the requirement that applicants take the SAT. There is widespread opinion both favorable and unfavorable concerning the proposal.

Florida's twenty percent plan is too broad. California's 4 percent plan, because it is more closely tied to test scores, may constitute a more "narrowly tailored" plan. However, the smaller the percentage plan, the less impact it will have for better or for worse. "Narrowly tailored" percentage plans, more likely to pass constitutional muster, may help provide opportunities to some disadvantaged students, but unlike Florida's twenty percent plan, they will have a smaller impact on minority students.

EXPANDED OUTREACH & RECRUITMENT PLANS

In addition to percentage plans, Florida as well as other universities, have increased their efforts to recruit underrepresented minorities. Despite the concern that the demise of affirmative action in admissions would result in a lack of commitment to minority students, the opposite seems to be true. On the whole, "colleges from coast to coast are aggressively vying for qualified[3] minority students" (Kleiner 2000). Though it is important to note the decline in minority student enrollment at UC Berkeley directly following passage of 209; the increased efforts of universities to aggressively expand outreach and recruiting of underrepresented minorities is a positive outcome of court rulings and citizen lawmaking. According to recent figures, "The percentage of minority students admitted to the University of California has nearly reached affirmative action levels" and "of the students the UC system admitted for the fall 2001 first-year class, 18.6 percent were black, Latino, Chicano, and American-Indian." The percentage is just slightly under 1997's 18.8 percent, which was the last time that UC system used racial preferences in admissions (Sturrock 2001). Dennis Galligani, associate vice president for the UC system student academic services, states that he is "especially pleased with the high increase in underrepresented students who were admitted," and adds that, "we'd like to believe the investment in our outreach efforts is paying off" (Sturrock 2001). The increases in minority enrollment across the board are promising, though at the state's most prestigious school, UC Berkeley, the increase in underrepresented minorities has yet to reach the 1997 level.

In the long run, focusing on outreach and recruitment efforts to attract qualified minorities and economically disadvantaged applicants is a much better process than creating a dual admissions system in which individuals are discriminated against, less qualified students are given admittance over more qualified students, or race is used as a determinative factor in deciding between equally qualified students. Furthermore, "many public institutions in the states with affirmative action bans have tinkered with their race-based scholarship programs to try to maintain diversity—opening them up to all students from economically disadvantaged schools" (Kleiner 2000).

3 "Qualified" here refers to scholastic achievement as measured by standardized tests and GPAs

Similarly, in the aftermath of Proposition 209, the University of California at Berkeley greatly expanded its outreach programs. They are spending $150 million, more than twice the pre-209 number, in efforts "to increase the pool of qualified minority students" (Kleiner 2000). Again, though the initial drop in minority enrollments is unfortunate, the benefit of increased outreach and recruitment efforts for both minority and disadvantaged students is a more constitutional method for reaching both short term and long-term goals of increasing diversity and opportunity. Similarly, The University of Washington is focusing on college transfers as a way to increase diversity and compensate for Initiative 200's ban on preferential treatment.

In certain academic disciplines women are a minority. Similar to programs that seek to increase racial diversity; some universities also focus on outreach programs that seek to increase the gender diversity in certain disciplines. One local example of an outreach program is the University of Utah's Access Program for Women. This program is designed to increase the number of women who choose to study science. Twenty-one female high school graduates who have committed to attending the University of Utah and have indicated their interest in studying the sciences are selected to live on campus during the summer semester immediately following their graduation from high school. The women are chosen based upon an application that considers their GPA, class rank, ACT/SAT scores, a one page letter expressing their interest in science and career goals, high school transcripts, two letters of recommendation from high school science or math teachers, advanced placement test scores, academic awards, science projects, extracurricular activities, high school honors, etc. The program is a fifteen-week, semester program and each week the students learn from professors from various science-related programs. The advantages of this program are numerous; students are able to meet advisors and professors in their specific field of study prior to their initial semester. One former ACCESS Program participant who is nearing completion of her degree in materials science and engineering stated, "It was helpful to know some teachers already and have an idea of what to expect in the classroom" (Miller 2001).

Similarly, other benefits associated with these types of programs are directly tied to the opportunity of minorities within a specific major, and in this particular case women. The ACCESS Program gives women a chance to interact with other women prior to the regular classroom setting, and as this particular ACCESS Program participant commented, "It was really nice to be around other girls who had similar goals," and "it was nice to start out in an all girls' class in a male-dominated field." Similarly, she commented that it was "nice to know other women that would be in your Fall Semester classes" (Miller 2001).

Other types of efforts that illustrate "affirmative action" in higher education include scholarships and programs that

specifically target minority students. The University of Utah Eccles School of Business was recently awarded a 2001 University of Utah Diversity Award. The business school provides scholarships and support for minority business students through their Minority Opportunities Program. "About half the recruits are first-generation college attendees and 86 percent are Utah residents. In addition to scholarships, the program offers a four-week Summer Institute to introduce students to the campus and provide preparatory coursework and learning skills. Since the program's inception in 1996, the business school has seen a 30 percent increase in enrolled minority students" ("U of U Announces 2001 Diversity Awards").

Conclusion

Though the intentions of quota based affirmative action programs are laudable, the fact remains that under a quota based system individuals remain victims of discrimination. Admissions policies that utilize dual admissions programs and numerical goals in the form of quotas are clearly in violation of the Fourteenth Amendment's guarantee of equal protection under the law because judicial rulings have in effect determined Fourteenth Amendment rights to be largely individual and not group rights. In contrast, judicial decisions have been in conflict in regard to the use of racial classifications as a positive factor in admissions decisions. While opinion is divided over whether or not there can be positive racial classifications, the only definitive judicial theme in this regard, has been the consistent holding that positive racial classifications cannot be *the* determining factor in admissions decisions. The lower courts continue to remain divided, though, over the issue of using race as a "plus factor" specifically to increase diversity. The Supreme Court's holding in *Bakke* that positive racial classifications must undergo "strict scrutiny" and serve a "compelling interest," is the only judicial precedent set by the high court in which the use of positive racial classifications was considered. Thus, the question of how as a society we can most equitably increase opportunity for higher education to all our citizens remains a difficult one. The "percentage plans" enacted by governors of several states show promise in terms of increasing enrollment of underprivileged students. However, these plans raise equity issues as well, and have yet to be tested by the courts.

Affirmative action policies that do not rely on quotas, set-asides, or numerical goals, but rather focus upon outreach and recruitment programs for targeted students can be effective in increasing enrollment and participation among underrepresented groups. Though increased recruitment and outreach programs will not immediately yield large numbers of underrepresented minorities, they are a more equitable way to increase opportunity and bring about racial diversity than overtly, racially preferential admissions policies. Though these approaches to affirmative action may take longer to bring about change; the coupling of this approach with plans to improve failing high schools and improve the academic rigor and opportunity offered disadvantaged students of all races is not only a far better solution constitutionally, but a far better solution ethically.

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Microcredit in International Development

By Jeff Merchant

The institution of microcredit represents a new and effective form of developmental assistance. Microcredit succeeds by putting money directly in the hands of the poor, adapting to their unique cultures, and stimulating personal empowerment. Although not a panacea for economic disparity, microlending holds a great potential for alleviating poverty when coupled with more traditional aid programs and the forces of globalization.

INTRODUCTION

Rajamma lives in India. For years she worked as a lowly maid in an "upper-caste" household so she could feed her malnourished children the leftover scraps of food her employers left after dinner. Finally, she became so impoverished she borrowed money from one of the rich landowners in her village. When she could not repay the loan, her daughters were taken to his house to live in virtual slavery. Fortunately for Rajamma, her story does not end in tragedy. She joined the Bridge Foundation, a microcredit organization, which loaned her a milk cow for the equivalent of about $200. Through hard work and her own innovation, she purchased a half-acre of land, paid for the release of her children, and took out a larger loan to begin irrigation for groundnut production—all in one year. Now, her children are learning vocations and attending school. She has maintained her success as a businesswoman (Serageldin and Yunus 2000).

Rajamma's story is not isolated. Today, microcredit institutions are popping up throughout the world, in both developing and developed countries, serving the poorest of the poor. With over 7,000 of these organizations worldwide, loaning more than 16 million people well over $2.5 billion (Srinivas 2000), microfinance has revolutionized traditional models of international development in just a few years (New York Times 1997). As countries look for ways to decrease spending and shore up deficits (Economist 1997), this innovative concept is beginning to catch on in the United States, the European Union, and many non-governmental organizations (Sarno 1998).

Of the types of international aid, microfinance is the most promising. It is the only form of aid that empowers its beneficiaries, is customized to the culture it serves, and creates sustainability—and in some cases profit—for the organizations that provide it. Microcredit, is not a panacea for the world's developmental problems, especially in the realm of poverty eradication. While microcredit is currently a necessary element of international development, it is essential that the United States and other countries provide more traditional forms of aid to supplement the economic and social benefits of this remarkable system.

Jeff Merchant is a senior graduating with a degree in Political Science and a minor in Asian Studies. He currently works as a legislative assistant in the United States Congress, specializing in foreign policy and international relations.

MICROCREDIT AND INTERNATIONAL DEVELOPMENT: DEFINITIONS IN CONTEXT

It is necessary to create a workable definition of international development and microcredit/microfinance before addressing the complexities of these issues. International development is difficult to define. The *Development Dictionary* describes the process of "development" thusly: "There is nothing in modern mentality comparable to it as a force guiding thought and behavior. At the same time, very few words are as feeble, as fragile, as incapable of giving substance and meaning to thought and behavior as this one" (Esteva 1992). Of course, there are debates as to what constitutes "development," but it is true that "development defies definition" (Cowen and Shenton 1996). Although the meanings maybe complex, and diverse, for this discussion, development simply refers to the process by which the citizens of a nation-state become more economically and socially empowered. Cowen and Shenton's *Doctrines of Development* best depicts this definition by saying:

> Development can be construed as "a process of enlarging people's choices;" of enhancing "participatory democratic processes" and the "ability of people to have a say in the decisions that shape their lives;" of providing "human beings with the opportunity to develop their fullest potential;" of enabling the poor, women, and "free independent peasants" to organize for themselves and work together.

INTERNATIONAL DEVELOPMENT THEORY

Models of development have shifted dramatically over time. Originally, theories of development derived from European

concepts of modernization and expanded by Western scholars; a school of thought which saw development as a linear path leading from the backwardness of "traditional society" towards a modernized "age of high mass-consumption" (Rostow 1991). This "orthodox" view of development was popular throughout most of the 1950s and 1960s, creating the rationale for international aid. Aid flowed from developed nations like the United States to the "less developed" nations throughout the world, since they were "helping" those nations that could not help themselves (Dickson 1997).

Traditional aid led many developing nations to reject notions of orthodoxy, arguing developed nations had taken advantage of them. For example, one school of theorists rejected the entire international system, which they believed forced a dichotomy between the developed and the developing. Rather than a linear path, these theorists saw development as "a world system composed of a developed center or core and an underdeveloped periphery" (Dickson 1997). The core created manufactured products from raw materials provided by the periphery. Raul Prebisch, the chair of the Economic Commission of Latin America (ECLA), argued that industrialized countries have greater economic growth than developing nations, because developed nations take cheap raw materials from poor states, and then sell expensive manufactured goods to them (Baer 1962). Eventually, this unequal exchange, leads to a wider economic gap between the core and the periphery (Dickson 1997).

Some theorists took this concept a step further, arguing that the capitalist system forced underdevelopment by its "persistence of commercial rather than industrial capitalism in the underdeveloped world" (Frank 1966). They rejected both modernization theories and the theories initially created by Prebisch and the ELCA, arguing that neither took historical factors into account nor addressed the overall economic theory used by the international system (i.e. capitalism). Additionally, these critics abandoned the notion that there was one universal theory that could apply to all cultures (Amin 1972).[1]

Currently, development debates center on new neo-liberal concepts of political economy. Today's theorists deny two mainstream concepts in development theory: first, that the developing world constitutes a "special case" and needs to have special considerations, with particular policies and economic theories; and second, that the nation-state should play a key role in economic development. Modern theorists instead embrace the notion that neo-liberal concepts of development have been affirmed by the continued dominance of globalism in the economy.

Globalism is defined as "the idea that, through a series of mechanisms, the world has become more closely interconnected, and by implication that it will continue to become more closely interconnected…Globalization [is] a qualitative change in the nature of social activities, linkages which are of an intensity never before experienced" (Dickson 1997). Because capitalism is self-propelling, neo-liberals believe that capitalist elements of globalism will push money and resources into and out of every country, so long as they participate in the international market. Because prevailing theories advocate that developing countries no longer need special attention, many policies today that are based on traditional theories are beginning to seem out of place.

Microcredit Defined

It is within the context of the neo-liberal model of international development that this discussion will consider microcredit. The concept of microcredit was born in 1976 when Bangladeshi economics professor Muhammad Yunus loaned $27 to 42 very poor people (about 64 cents each) in the village of Jobra (Burritt 1997). The people in the village made bamboo stools. In order to get the needed supplies, they had to borrow money from loan sharks at exorbitant interest rates. By extending credit to those rejected by traditional banks and financial institutions (i.e. the poor without collateral, the illiterate, and women), Yunus not only helped these people pull themselves slowly out of poverty by giving them the resources they needed to start small businesses, but he also got his money back. Eventually, Yunus was able to form the Grameen Bank, the world's most famous microfinancing institution (Guzzetta, Lusk, and Stoesz 1999).

In a very loose way microcredit, microfinancing, and microenterprise all refer to the same notion: the practice of extending small loans to the poor, usually in the amount of $50, $100, or $300 to help establish a small business or enterprise (Ihle 1997). "It [microcredit] is firmly embedded in the notions of self-reliance and concepts of free-market capitalism" (Ros-Lehtinen 1997). Microcredit is identified by certain characteristics. First, it is informally structured, which is essential to meet the needs of the poor (Johnson and Rogaly 1997). Second, its funds are loaned to the poorest of the poor, the bottom 50 percent of people living under the poverty line in a particular country (Gibbons and Meehan 2000)[2]. Since these attributes are able to attract people who have no where else to go but up, they have helped make microcredit a success.

The *New York Times* recently reported about a microcredit program the United Nations is pursuing in Madi, Kyrgyzstan. In this community, the poorest of residents once scraped to keep their families from dying of malnutrition or exposure. When microcredit was introduced to one woman in this community, she was able to buy a few hens. Over time, the woman sold the eggs produced by these hens, and

1 That is, they understood that people in Pakistan lived completely different lives than Germans, and that holistically speaking, their customs were almost always incompatible.

2 Gibbons and Meehan use the Microcredit Summit's definition of the "poorest" families, as those who live in households with incomes that place them in the bottom 50 percent of the people living below the poverty line as defined in each country. Those in the top 50 percent under the poverty line are deemed "poor."

acquired new hens and a rooster. Eventually, she sustained a modest chicken and egg business. Today, with the help of microcredit, she has a large chicken farm, a healthy baby dressed in quality clothing, and the money to send her children to school (Frantz 2000).

WHERE DOES MICROFINANCING FIT IN THE INTERNATIONAL DEVELOPMENT DEBATE?

At a time when the United States and other nations consistently cut foreign aid budgets, it is necessary to approach international aid and development from the most basic levels. As globalization occurs, it is evident that national and regional political, social, and economic issues are becoming increasingly intertwined. Clear examples include the financial crisis in Asia, the instability in Russia, the chaos in the Balkans, and the challenges of peace in the Middle East. Even the recent US presidential election "crisis" implicated global economics. Indeed, "the so-called third world can no longer be perceived as a distant reality beset with problems that have little or no bearing on our comfortable lives here in the first world…the dangers of underdevelopment a continent away are similarly knocking on our door" (Hoy 1998). Issues of environmental degradation, infectious disease, civil war, and political uncertainty clearly no longer stop at a longitudinal line or riverbank (Hoy 1998).

The United States government does not balk at explaining why it gives aid: to protect its territorial and political security. Historically, U.S. aid was only bestowed upon allies for security purposes, often supporting the installation of abusive right-wing governments to decrease the threat of communism. Aid has been given to stimulate foreign markets for potential American business investments. In theory, aid goes towards helping people in need. In fact, nearly all donor countries give aid for the purpose of getting something (usually political or economic benefits) in return (Hoy 1998).

Aid is crucial to international development as it resolves the issues of instability in developing countries. The most universal cause of this instability is poverty. Poverty facilitates conflict as people fight over water, food, clothing, and shelter. Alleviating this global ill is the primary objective of microfinance institutions, which have grown out of the inability of many governments to look beyond their own political agendas.

Microcredit practitioners are confident they can help many people because microcredit is a simple solution to the very complex problem of development. Microcredit follows the basic principles of the free-market, giving those with innovative ideas the money to start working. When the poorest people in the world use this capital, they are often able to pull themselves out of poverty and, in the process, allow their children to escape the cyclical nature of poverty. This makes microcredit a preferred method of aid, because government involvement is minimal. It is also a relatively inexpensive method of distributing aid.

In 1997, the Microcredit Summit (made up of the world's most successful microfinancing organizations) was held in Washington, D.C. At the meeting, several international microfinance institutions pledged to reach 100 million of the world's poorest families by 2005 (Adams et al. 2000) and give them the opportunity to rise out of poverty.

Microcredit is becoming an attractive alternative to more traditional types of aid. Originally, aid was viewed as a handout to poor nations. The money was given to governments, which sometimes squandered or siphoned off money. Today, with microfinance, governments become an unnecessary and unwanted middleman. The United States Agency for International Development (USAID) has begun its own programs to further microcredit. The Microenterprise Initiative dedicated $400 million from 1994 to 1996, supporting over 150 institutions in 40 countries. Microcredit has presented itself as an answer to many nations' aid woes, creating successful businesses for the world's poor, improving economic output of underdeveloped nations, and establishing strong institutions that are not only sustainable, but in some cases profitable (Schneider, 1997).

WHY MICROCREDIT WORKS

There are three key reasons why microcredit is so reputable. First, microenterprise gives people a sense of empowerment. Second, microcredit is capable of customizing itself to those it serves and alleviating poverty. Finally, microfinancing is making a unique form of aid sustainable and is viewed more favorably than many less economical alternatives.

EMPOWERMENT

One unique aspect of microcredit is that it only works if the people choose to use it. Rather than receiving a one-time handout, people are given the opportunity to help themselves—and their community—to a better life. Empowerment comes as individuals use microcredit to lift themselves and their families out of poverty. Credit creates economic and social power, since credit affords the privilege of receiving resources. Because financial institutions decide on the credit-worthiness of an individual, they are an important social tool. Since they require collateral, paperwork, and often complicated legal procedures, banks have traditionally established what some call "a financial apartheid" (Yunus 1998). For poor people, a simplified process for receiving financial benefits decreases the level of powerlessness they experience, and enables them to begin the process of escaping poverty.

CUSTOMIZING MICROCREDIT ALONG CLASS AND CULTURAL LINES

Microfinancing also helps empower people by giving them social power. However, it can only do so if people want and understand social power. By adjusting itself to the people it serves, microcredit addresses the social issues of the country in which it is used. Customization occurs because microcredit is

highly decentralized and localized. Each person finds a way to utilize their own culture and improve the likelihood for success (Guzzetta, Lusk, and Stoesz 1999).

Perhaps more importantly, microcredit is able to adjust to class. Microcredit has a powerful ability to adapt to culture. Since the concept of credit is a broad historical factor in nearly all societies, microcredit has a useful advantage; it immediately focuses on the best ways to approach extending loans to people. It is necessary to distinguish that monetary culture is usually dissimilar in different societies. What may be acceptable in China is often unacceptable in the United States[3].

The best example of this concept is the Grameen Bank. The Grameen Bank of Bangladesh is the best-known microfinance institution and a worthy example. The Grameen Bank has set up membership criteria based on two factors: (1) the maximum holdings of land can be no more than one-half acre and (2) there can be only one member per household. Obviously the first rule is founded in local economics, an individual with larger land holdings is considered middle-class or upper-class. The second rule rests on the notion that in many Bangladeshi families, whether the man or woman earns the money, the man controls it. If women are raising a family alone, it is practically impossible to secure a loan. This rule affords single mothers greater autonomy to formulate positive financial decisions regarding their family and business.

After the basic criteria are established, the Grameen Bank model begins to reveal some aspects of Bangladeshi culture. In order to receive a loan, a group of five people must come to the bank. Each member must know the others and be of the same sex. Since no one in the collective has collateral, there is group liability. Loans are given to the two poorest members, who have a limited time to pay the loan back. After the loan is repaid, the next two get loans, which they must pay back. The last person gets a loan after the third and fourth members pay their loans back. The key is that because there is group liability, if anyone defaults, all members are cut off. This "peer-group monitoring" system leads to "social collateral," more commonly referred to as peer pressure (Khandker 1998). Men and women are also separated because of cultural aspects of gender. In most cases women receive upwards of 75 percent of all loans (Adams et al. 2000).

SUSTAINABILITY AND PROFITABILITY OF MICROFINANCE INSTITUTIONS

One key characteristic of microcredit is the high interest rate that is charged for a loan. This rate, which is often 30 to 50 percent higher than commercial rates, is necessary to help maintain the sustainability of microcredit programs. Additionally, even with the high interest rate, there is an average 91 percent repayment rate, much higher than many commercial banks in developing nations (Kole 1999).

Although sustainability and profitability are the desired outcomes of many microfinance institutions, it is highly unlikely that every borrower will be a success story. A recent study grouped microcredit organizations into three areas: Subsidy Dependent, Operational Efficiency, and Fully Self-Sufficient or Profitable. Subsidy Dependent institutions rely fully on donor support in the form of grants or other subsidies. Operational Efficient institutions are able to cover administrative costs (salaries, rent, etc.) with revenue from interest and fees, but unable to meet demand for new loans. Fully Self-Sufficient or Profitable institutions are completely independent and can turn to larger commercial banks for additional loans. They are also able to pay for those loans out of interest from their members. The study, which focused on eleven key microfinance institutions, found that ten had reached operational efficiency and five were fully self-sufficient or profitable. It concluded that most organizations could reach the third level within five years of operation (Christen, Rhyne, and Vogel 1994).

Most microcredit organizations have a difficult time recovering initial losses in the form of administrative costs (Khandker 1998). However, many institutions have become successful, profitable businesses serving the poor and recycling profits to expand their reach. An example of this is Banco Solidario of Bolivia, which received large subsidies from USAID. Today it serves over 81,555 clients and boasts a loan portfolio of $74 million (Guttman 1999).

SOCIAL IMPLICATIONS OF MICROCREDIT

Beyond the empowerment of the poorest of the poor and the altruistic aspects of microfinance, there have been many studies that show direct societal benefits from microcredit. Since it is most often women who are persecuted, the social and political benefits of microcredit are as positive as the economic ones. Because of microenterprise, Kuwaiti women are slowly obtaining voting rights. "In Rwanda the government is revising discriminatory laws…[and] Cote d'Ivoire (Ivory Coast), Senegal and Tanzania recently passed laws against female genital mutilation" (Loar 2000).

Development practitioners believe the ability of poor people to break away from poverty has improved general health as well. Since the introduction of microcredit, there has been greater access to education and health care, dramatically reducing the spread of AIDS and other diseases (Roemer 2000). With children free to attend schools and not having to work, many are breaking the cycle of poverty that has haunted their families for generations. Studies show there is a significant statistical increase in the number of both boys and girls that attend school when their parents receive microcredit (Khandker 1998). Health care, which few of the poor ever received, is now a possibility for many. Nutrition levels have been shown to increase, leading to decreased disease (Khandker 1998). There are even reports of microcredit increasing voter turnout. Since 1991, The Grameen Bank

3 The United States has approximately 300 of its own microcredit institutions serving people from the Arkansas delta to inner-city Chicago (Burritt 1997).

has encouraged borrowers to vote. Today, many loan recipients are campaigning and winning elections themselves (Mann 1999).

Interestingly, studies show that microlending also helps those who are ineligible or unwilling to take loans. At the village level, when microcredit is introduced, it opens up the job market, decreasing the number of eligible workers, and thereby potentially increasing the wages of the non-self-employed (borrowers). These programs significantly increase village level production, as well as household income. Household expenditures also increase, and in one case, the use of microcredit decreased the amount of extremely poor persons in a community from 33 percent to ten percent (Khandker 1998).

THE LIMITATIONS OF MICROFINANCE

Up to this point, it may seem that microfinance is a key solution to many of the world's problems. It is not. At least, it is not if used alone. Even the most ardent supporters of microcredit admit that it is not a panacea, but rather a key element in the fight against poverty (Serageldin and Yunus 2000). In fact, many even doubt that the microcredit system is even the best alternative for helping the poorest of the poor.

One recent study examined the viability of the poorest people to use credit if given to them. It found that in general, without any land, or other assets, it was irrelevant if they were given money. Why buy a cow when there is no where to graze it? The study concluded saying that the better off the borrower is, the more effective use of the loan; while moderately poor people did well with the loan, the extremely poor, in some cases, were worse off. For these people, business failure meant bankruptcy, seizure of assets, and in a few cases, suicide due to peer pressure (Hulme and Mosely 1996). Another study found that many microfinance organizations slowly moved away from helping the poorest people to helping those only moderately poor (Tomlinson 1995).

Often, what benefits the poorest even more than credit is the opportunity to save. Traditionally, this is not guaranteed because of the formal business practices of most banks. Informal savings accounts are especially valuable to the poor because it gives them a place to put their money. For many poor, illiteracy and other issues keep them from creating a savings account at a formal banking institution. A great example of these informal accounts is Bank Rakyat Indonesia (BRI). In December of 1993, BRI had $2.1 billion in individual savings accounts, by December 1995, there was over $14.5 million in fully accessible savings accounts (Robinson 1994). Some microfinance institutions, such as Grameen Bank, mandate savings as a precondition to receiving a loan (Khandker 1998).

Finally, about eight percent of the poorest people in the world live in developed countries. Many of these countries, including the United States, have experimented with microfinance. In general, the U.S. does not possess key empirical aspects that would make microcredit work. First, a majority of its workforce is not self-employed. Developing countries have a very large amount of people that are self-employed, while developed states tend to larger service sectors. Second, rules regarding banking and lending eliminate the possibility of an informal economy. Without this informality, the poorest people in developing countries are dependent (or at least more dependent) upon others to fully understand the ramifications of their actions. Third, in the developing world, the main deterrent for most people is a lack of credit. In the U.S., just about anyone can get a loan. Even if one cannot, the primary issue is typically not money but a lack of skills (Buntin 1997).

There are examples of microcredit in the U.S., many of which have failed. One example of this is the Good Faith Fund, which was established to function like the Grameen Bank. While two million people joined the Grameen Bank, just fifty joined Good Faith Fund (one of the first microcredit funds in the U.S.); and while the Grameen Bank had a two percent default rate, the Good Faith Fund had a 40 percent default rate (Buntin 1997).

CONCLUSIONS

Microcredit, as a concept, is perhaps the most exciting concept in applied international development in the last 30 years. Within the context of the neo-liberal agenda, microfinancing fits in perfectly with globalization while maintaining the flexibility necessary to make it feasible anywhere in the developing world.

However, while it is very promising, microfinance has limitations, and is not the cure-all for poverty. Incorporating different types of aid, in the form of training, access to land, and technology all depend greatly on the public sector. Microfinance institutions show the best results when they work hand in hand with governments, both developed and developing (United Nations 1998). Still, with organizations like USAID giving a larger percent of its budget to microcredit programs, while maintaining others, international development aid is going the right direction.

The most valuable aspect of microcredit monies, as a form of aid, is that they go directly to the people that need them. There is an effective system of loan repayment, usually resulting in a higher ratio than exists with commercial banks. This happens because the people receiving the loans feel a sense of control over their own lives, and are given a form of social power. Additionally, the ability of microfinance institutions to acculturate and become sustainable is essential to helping the people served.

Although microcredit may not reach the poorest of the poor, it does help alleviate the plight of many moderately poor people in the developing world. Stories like Rajamma's are not uncommon in the halls of Grameen Bank or the BRI. In addition, the social benefits of microcredit extend beyond just those who borrow into the entire community. Microcredit is

an essential tool in the continued development of the world. It is the most effective way developed nations can create profitable aid programs, and give directly to those who need it most. Unlike many other development programs, microcredit is not giving a handout, but rather, it is giving a hand up to millions of the world's poor.

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The Sanctions Dilemma: Saddam vs. the UN

By Amy DeFrank

Sanctions against Iraq are a contentious subject both within the United States government and within the United Nations. This paper examines the effectiveness of the United Nations' enforcement mechanism, the multinational Maritime Interception Force (MIF), as well as the humanitarian and economic effects of the sanctions upon Iraq. An analysis of the risks and benefits of ending the sanctions concludes that due to the limited effectiveness of the MIF, the sanctions in their current form are not worth the resources or the political capital required to maintain them.

INTRODUCTION

The controversy over the employment of economic sanctions as an instrument of U.S. foreign policy did not begin, nor will it end, with the sanctions regime currently in place against Iraq. The sanctions were first instituted on August 6, 1990, with the passage of UN Security Council Resolution 661. This resolution imposed a broad range of economic sanctions on Iraq in response to its invasion of Kuwait in hopes of compelling Iraq to withdraw from the country (United Nations Security Council 2000). These measures have been modified numerous times by the UN in the intervening decade, yet they remain as an ongoing attempt to contain Iraq and force it to conform to international will and standards.

When these sanctions were first imposed, it was with the backing of a large majority in the international community. However, in recent years, that once broadly based coalition of states has begun to crumble, often pitting the U.S. and the United Kingdom against other Security Council member nations on the issue of sanctions. Even within the U.S., an increasing number are speaking out against Iraqi sanctions and calling for them to be lifted, particularly due to the poor humanitarian situation in that country.

An entire book would be required to examine the sanctions regime in its totality. Therefore, this paper focuses only upon selected aspects, beginning with a component of the enforcement side of the regime – the multinational Maritime Interception Force (MIF). It examines and evaluates the operations of the MIF, and offers conclusions about the sanctions policy.

Amy DeFrank earned a Bachelor of Arts Degree in Political Science, a certificate in International Relations, and minors in History and French from the University of Utah. She will be pursuing an M.A. in Security Policy Studies at George Washington University.

THE OPERATIONS AND FAILINGS OF THE MIF

The MIF derives its authority from UN Security Council Resolution 665, passed on August 25, 1990 (United Nations Security Council 2000). As a maritime force in the Persian Gulf charged with the enforcement of sanctions against Iraq, the MIF intercepts and boards vessels in international waters suspected of carrying contraband, particularly illegally exported Iraqi oil. Though the U.S. by far has always played the largest role in the MIF, it was originally conceived as a force comprised of assets from a significant number of nations. However, the U.S. currently provides an overwhelming majority of the forces used for these operations, with the UK being the only other consistent contributor (U.S. House Committee 2000). Recently, the U.S. Department of State has become increasingly engaged in an effort to encourage old and new MIF partner countries to participate more actively by contributing ships and personnel to help enforce the sanctions. However, as present support for the sanctions regime in general is relatively low, this has been somewhat of an uphill struggle. At this time, the majority of the vessels comprising the MIF are diverted from the U.S. carrier group stationed in the Gulf. In all, the U.S. maintains a presence of approximately thirty vessels in the area, which are called upon to perform a wide variety of duties (U.S. House Committee 2000).

Since its inception in 1990, the MIF has queried more than 28,000 vessels, boarded over 12,000, and diverted over 700 for carrying illegal cargo (Department of State 2000b). Despite these seemingly impressive numbers, the MIF only intercepts a small fraction of the smugglers operating in the Gulf. State Department personnel involved in the process believe the MIF intercepts only five to ten percent of the smugglers moving through the Gulf. In fact, it has been estimated that oil smuggling topped over 100,000 barrels per day in January 2000. Subsequent rises in oil prices provide incentives to continue, and indeed increase smuggling activities (Department of State 2000b).

Why does the MIF intercept so few smugglers? A variety of factors contribute, including: Iranian complicity, the United Arab Emirates' (UAE) "revolving door," increasingly intelligent and innovative smugglers, the sheer volume of the smuggling, and very limited MIF resources. All of these difficulties can be illustrated through the following discussion of the process by which a vessel is queried, boarded and subsequently diverted if found to be carrying illegal cargo.

A vessel acting under the authority of the MIF may issue a query to another vessel, typically outbound, in the Persian Gulf. If it appears that all is in order and there is no intelligence from other sources to suggest that the queried vessel is involved in illegal activities, then the ship is allowed to proceed. However, if any questions posed by the MIF are not answered to its satisfaction, or the vessel does not issue a reply, then it may be boarded by MIF personnel. In addition, the MIF occasionally possesses satellite photos of certain vessels, which clearly show them uploading oil from an illegal port or from another ship known to be involved in smuggling activities. Mina al Baqr is the only port through which oil exports have been authorized under the oil-for-food program in the Gulf. Therefore, if satellite photos exist of a queried vessel taking on oil at any other port, then that oil is illegal and intended for smuggling. Many smugglers go through a loading facility called Abu Flus, which receives its oil from the refinery Basarah. Basarah was destroyed in the 1998 air strikes, but has since been rebuilt and currently produces 140,000 barrels of oil per day, all of which is unauthorized (Department of State 2000b). Therefore, a vessel may be boarded on the basis of the intelligence gleaned from satellite photos.

Yet, even if the MIF possesses evidence of smuggling, it is not always able to approach those vessels involved. The MIF is authorized to operate only in international waters and may not conduct surge operations (MIF naval operations which enter a nation's territorial waters), without the express permission of that country's government. For a country to acquiesce to such operations would be to allow the MIF (primarily the U.S. as it supplies the majority of the assets) to greatly infringe upon that country's territorial sovereignty. Therefore, the MIF can typically intercept smugglers only when they venture into international waters. Over the years, oil smugglers leaving Iraq have developed a very effective system allowing them to avoid coalition forces in the Gulf with the help of an old foe, Iran.

Upon taking oil from an illegal loading facility, such as Abu Flus, or from another vessel, a smuggler may then enter Iranian territorial waters. Territorial waters are internationally recognized as extending outward twelve miles from a country's shore. The smuggler is then able to hug the coastline and remain in these waters until reaching the Strait of Hormuz. In this narrow waterway, the territorial waters of Iran and Oman overlap, allowing the smugglers to cross the Strait without ever entering international waters. They can then offload the oil in Oman or continue and exit the Gulf, thus leaving the operational jurisdiction of the MIF. By remaining in territorial waters for their entire journey, the smugglers effectively stay beyond the reach of MIF vessels.

Yet it is only with the complicity of Iranian officials that the smugglers are able to operate in Iranian waters. According to reports, the Iranian Revolutionary Guard charges smugglers approximately fifty dollars per ton of oil, which buys passage through Iranian waters and provides falsified documents stating that the oil on board is Iranian rather than Iraqi (Global Intelligence Update 2000). The smugglers merely add this "fee" into the cost of doing business and then take advantage of a system that allows a large number of them to avoid entanglements with the MIF. If Iran were to crack down on smuggling through the Gulf, as it has sometimes done in the past at the urging of the UN and U.S., the amount of oil being illegally exported would drop dramatically. In what may be viewed as a political nod to the UN and U.S., Iran has on several occasions closed its waters to smugglers for periods, forcing them to use international waters. In fact, it did so in early 2000, though after a few months it reopened its waters to smugglers again, allowing large a number through. It is therefore apparent that the revenue Iran receives from the smugglers provides a powerful incentive for the country to aid the smugglers, and it may take a significant increase in political pressure on this issue for Iran to refuse passage on a more permanent basis.

However, if a smuggler does not use this system and passes through international waters, it may be boarded. Once boarded, an inspection of the cargo is performed and crew members are interviewed. If illegal exports are found to be on board, then the ship must be diverted in accordance with UN regulations. Some may question how MIF personnel are able to determine if oil found on board is illegal Iraqi oil and not legitimate oil from a neighboring country such as Iran. The MIF is typically able to make such a determination on the basis of several factors. In many cases, documentation found on board the vessel (charts, logs, GPS plots, etc.) indicates from which port the oil was obtained. In other instances, the satellite imagery or other outside intelligence is available. Furthermore, often crew members will provide information to MIF personnel about the ship's activities. However, on occasion less evidence is available and/or the situation is particularly politically sensitive and additional proof is needed before a divert may be made. In these cases, samples of the suspect oil are taken and flown to the U.S. for analysis by labs in California. Scientists in the U.S. have developed a technique that enables them to pinpoint not only the oil's country of origin, but also the oilfield from which it originated.

If the evidence collected proves the vessel boarded to be involved in smuggling operations, it is then diverted, not back to Iraq, but to a third country. The process of determining where to divert the vessel possesses its own difficulties. The country to which a smuggler is sent must first agree to accept the vessel, a task to which many Gulf countries are not always willing to agree. A country is most likely to accept a smuggler

if it has a pre-established connection with the vessel in question, (i.e. the company who owns the vessel is based in that country). Thus, the U.S. must then first look for any association between a ship and a possible divert state. Approximately eighty percent of the time, that country is the United Arab Emirates (UAE), which provides a level of cooperation to the UN force that has proven essential to its operation. However, the fact that a majority of the vessels possess a connection to the UAE is a major reason why this country is willing to accept such a large number of diverts.

Once the ship is diverted to the UAE, the oil is offloaded and sold, and the vessel is auctioned off – often back to the original owner at a fraction of its worth. This additional expense is then simply factored into the smugglers' cost of doing business, as is the Iranian payoff discussed earlier. This is what has become known as the UAE's "revolving door" among government personnel involved in MIF operations. In fact, many ship owners, upon learning their vessel will be diverted, immediately will identify themselves to the UN as the vessel's owners. This allows them to speed the process along, thus helping them to more quickly buy back their vessel and return it to smuggling. Unfortunately, the UAE does not typically seek out and punish in a criminal court those who are financing these illegal activities. Such actions could be a significant deterrent to the businessmen involved in the smuggling operations, as the cost of engaging in this business suddenly could be much higher. However, while the UN and U.S. may encourage such enforcement actions, all that is required under the UN resolution is that the oil be offloaded, sold, and the profits be deposited in a UN account. Any further action is left to the host country. Moreover, the U.S. is reluctant to apply too much diplomatic pressure on the UAE over this issue, for fear that it may then retaliate by refusing to accept diverted vessels, thus causing enormous problems for the MIF. This delicate situation with the UAE facilitates the smuggling process by keeping costs of interception at a relatively low level.

Few countries other than the UAE are willing to accept more than a few diverted vessels. The processing of a smuggling vessel does impose some burden on the accepting country and many Gulf states feel that they already sufficiently contribute to the sanctions regime. Kuwait refuses to accept any diverted vessel with Iraqi citizens among the crew. The approval process in Saudi Arabia to accept a vessel typically takes so long that the MIF very rarely requests ships be diverted there. Oman will occasionally accept a vessel, as will Bahrain if pressed (though as Bahrain is the headquarters for the U.S. Fifth Fleet and the MIF, the U.S. is unlikely to press them). This forces the MIF to rely heavily on the UAE to accept diverts. If more of the Gulf States were willing to accept vessels on a regular basis, the reliance on the UAE would be lessened, thus opening the door to the possibility of applying more pressure on other gulf states to close their "revolving door." Furthermore, recent discussions within the State Department and U.S. Navy have raised the possibility of expanding the list of countries to which vessels may be diverted.

Unfortunately for the MIF, the smugglers have also developed new tactics and strategies that hinder MIF effectiveness. One increasingly common tactic used by smugglers is the blending of the illegal Iraqi oil with that of Iranian or another country's oil in an attempt to mask its origin from any lab tests. While the oil analysis process developed by U.S. scientists is sophisticated enough to recognize this and identify the origins of the different components, it does significantly complicate and slow a process already long and complicated. Moreover, if another country performs an analysis using its own methods (which are not comparable in sophistication to the U.S. tests), the blending is likely to cause inaccurate or indeterminate results. This may create political difficulties when the oil in question is owned by a certain company or is aboard a vessel of a certain flag. For example, a large Russian flagged tanker, the Academik Pustovoyt, was recently intercepted in the Gulf. United States analysis determined the oil to be a mixture of Iranian and illegal Iraqi oil (United Nations Noon Briefing Highlights 2000). In this case, there was other evidence available before the oil analysis was done, but since the Royal Dutch Shell oil company owned the cargo and the tanker was Russian, it was felt that these tests needed to be performed in hopes of mitigating possible political difficulties. Initially, Shell disputed the results of the tests, claiming that oil analysis could not pinpoint its origin. This contentious issue was finally settled after numerous meetings, some of them at relatively high levels, and Shell agreed to deposit two million dollars into the UN account (United Nations Noon Briefing Highlights 2000). While awaiting the outcome of the dispute, MIF vessels detained the Academik Pustovoyt in the Gulf. While U.S. scientists produced conclusive results about the oil's origin the smugglers' tactics caused valuable MIF resources to be diverted to detain a single vessel.

The sheer volume of smuggling makes such a diversion of resources an increasingly significant concern. As previously noted, vessels from the U.S. carrier battle group in the Gulf comprise the large majority of MIF operational forces, along with a few British ships. Performing Maritime Interception Operations (MIOs) are only one of several duties that this group must perform, and often they must gauge the opportunity costs of engaging in one task over another. Furthermore, as oil prices continue to rise, the number of smugglers is also likely to rise as the profit incentive increases. Yet the number of UN naval assets remains constant; thus the MIF is being asked to do more with an identical force structure.

Clearly, the MIF is faced with numerous difficulties that greatly hinder its effectiveness. While MIOs have put a dent in smuggling operations over the past decade, those operations have been by no measure shut down. In December 1999, Leonodas Drollas of the Center for Global Energy Studies estimated that Iraq pulls in between 300-400 million dollars from illegally smuggled oil every year (MacVicar 1999). With subsequent rises in oil prices, and increased

Iranian complicity, this has only escalated. In fact, the U.S. State Department estimated that in January 2000, smuggling reached 100,000 barrels per day, and that Baghdad earned over 25 million dollars in that month alone (Department of State 2000b). Oil prices and the number of smugglers have both soared in the intervening months. Thus, despite some impressive numbers when viewed on a stand-alone basis, the MIF has been largely unable to prevent Iraq from reaping major financial benefits from illegal trade. Saddam Hussein has thus profited greatly from smuggling. The considerable revenue he has gained through these means has been used to construct extensive personal palaces throughout the country and finance his personal guard. He has accumulated considerable personal wealth while enhancing his political position by focusing the attention of the international community on the poor humanitarian situation in his country and blaming it on the sanctions.

Currently, the MIF does not possess the capacity to improve upon its performance. What would most greatly aid the MIF and significantly hinder smugglers would be an end to or significant reduction of Iranian complicity. The U.S. and UN must apply considerable political pressure on the Iranian government to crack down on smuggling, but both seem unwilling to press hard for fear of damaging slowly improving relations with Iran. In fact, in a U.S. State Department February 29, 2000 press conference cited several times in this paper, the issue of Iranian complicity was addressed. Then spokesperson James Rubin skirted the issue and used very conciliatory language toward Iran, a fact on which the reporters picked up and even commented (Department of State 2000b). Political sensitivities in the region may hinder the implementation of any changes. A similar situation exists with the UAE. Heightened pressure on the UAE to prosecute those criminals behind the smuggling would raise the cost of smuggling and increase the turnaround time of diverted vessels. However, before that option can be undertaken, efforts must first be made to ensure that other states would accept diverted vessels, should the UAE then decide to retaliate against such pressure.

As we have seen, the effectiveness of the MIF has been hamstrung by a number of factors. Should all or some of the above proposals be pursued, it is likely that the enforcement of sanctions in the Gulf would improve dramatically (as has been the case in the past when Iran bowed to political pressure). Indeed, while proposals are regularly discussed, due to wavering support for sanctions even within the branches of the U.S. government resistance often arises to any new policies that would indicate a harder stance on sanctions. Thus the MIF appears largely ineffective, and without the previously discussed reforms, the cost of maintaining such a force seems to outweigh the limited services it is able to provide. Moreover, as a component of the sanctions regime, it is criticized for contributing to the humanitarian difficulties in Iraq.

The Humanitarian Crisis: Are Sanctions to Blame?

Very few contest the fact that the current humanitarian situation in Iraq is dismal. However, there is copious disagreement over the bearer of the blame for the country's current state. Many cite the UN sanctions as the primary causative agent, a situation that Hussein exploits to his political advantage, both at home and abroad. Opponents of the sanctions point to hold-ups in oil-for-food contracts, the lack of food and medical supplies, the deteriorating infrastructure, and so on, as major factors contributing to the overall poor welfare of the Iraqi people. UN sanction supporters argue that Hussein earns hundreds of millions every year from smuggling operations, money he then spends on palaces and his personal guard rather than his starving population. In other words, proponents point to Hussein as the primary reason for the current condition of his people, while opponents place the blame on sanctions. While sanctions undoubtedly do contribute to the poor conditions in Iraq (as would be expected from such broadly based sanctions), it is also apparent that Hussein greatly exacerbates the problem. He clearly has the ability to improve the condition of his people to some degree if he so chooses. However, he can use their dismal situation to his political advantage in his push to have the sanctions lifted. The following section is a brief discussion of the current humanitarian crisis in Iraq, an analysis of the two opposing positions outlined above, and an argument for the lifting of sanctions.

There can be little doubt that the humanitarian situation in Iraq is grave. After eight years of war with Iran, and ten years of virtual diplomatic and economic isolation from the international community beginning with its invasion of Kuwait, Iraq suffers from a variety of problems. Yet agreement ends there. Facts and studies are disputed by both sides who contend that the other side is misinterpreting data, or deliberately overlooking contradictory information. For example, a study released by the UN Children's Fund (UNICEF) on August 12, 1999 revealed that the infant mortality rate for children under five years old has more than doubled in the past ten years in south and central Iraq. However, the study also indicates that the infant mortality rates have fallen to pre-war levels in the north. In Northern Iraq, the UN, rather than the Iraqi government, administers the oil-for-food program and sanction supporters point to this as evidence that it is Hussein who is to blame for the worsening situation (Department of State 2000c). Yet others claim that this discrepancy is not primarily due to the difference in who controls the program in the area, but rather due to a combination of factors. They point to benefits to the population from widespread overland smuggling across the borders in the north, the greater dependency of the south on an irrigation system that is largely deteriorating, and the greater presence of non-governmental organizations (NGOs) in the north (Economist 2000). Thus, the fact remains that mortality rates

are lower in UN-controlled areas, but how much significance one should give this is uncertain.

Other central issues are the deteriorating infrastructure and the need for spare parts in many industries. The budget that allowed for spare parts under the oil-for-food program was recently increased in a UN Security Council meeting, but opponents do not believe this will help significantly. Currently, many of the problems are encountered when possible dual-use items come into question. Certain machines and chemicals that are necessary in the oil or farm industries may have also more nefarious uses, and therefore these contracts are held up by the UN in order to further investigate the planned end use of these items. If it can be determined that the end use will indeed be legitimate, contract approval is given. It is a difficult problem for the UN when a contract is submitted to provide a legitimate and needed item that very well may have an illegitimate use as well. This then forces delays or refusals of contracts, resulting in criticism of the sanctions regime, and the continued decay of the infrastructure. Moreover, this deterioration of the infrastructure compromises Iraq's ability to produce that which is needed to sustain itself, forcing it to become ever more reliant on imports. Though figures show that Iraq now imports as much food as it did before the Gulf War, its capacity to produce its own food has been diminished, especially as the country is currently experiencing its worst drought in fifty years with an irrigation system in grave need of repair (Department of State 2000c). Sanction supporters point to the fact that Hussein seems to get the required items he needs to build palaces, with elaborate fountains, and rebuild illegal oil refineries. These items, and the money used to purchase them, Hussein obtains primarily through illegal means and uses them to benefit himself and those comprising his inner circle.

The oil-for-food program itself has also been the subject of much criticism from those who would see sanctions lifted. They view the contract approval process as slow and bureaucratic, citing late-arriving shipments, and a number of contracts that have been placed on hold (these holds do not include any contracts for food). In contrast, those who back sanctions state that approximately 90 percent of all orders placed have been approved, thus only a fraction are currently being held up, primarily due to legitimate concerns about their dual-use capabilities. Of course, sanction supporters are also quick to point out that Hussein has never taken full advantage of this program. As early as 1991, the Security Council attempted to create the oil-for-food program out of concern for the humanitarian situation, only to have it rejected by Hussein. The Council adopted a second oil-for-food resolution in 1995, which again met with refusal from Iraq. Finally in 1996, after five years of delays, Iraq agreed in theory to comply with the program, developed to help its own citizens (Department of State 2000c). The failure to order all the supplies for which money has been set aside under the program, including nutritional supplies for children and pregnant and nursing mothers, has also been a source of criticism by supporters of the sanctions.

The Iraqi government also has been condemned for making poor choices when it does spend the money that it has been allocated. For example, six million dollars of the money allotted for medical supplies and equipment was used to purchase a gamma knife, used for complicated neurosurgery. Another four million was spent on a MRI machine. Ten million dollars was therefore spent on advanced equipment when many hospitals do not have enough disinfectant, sutures, vaccines or other such basic materials and medicines (Department of State 2000c). Another dubious use of the allocated money can be found in the importation of alcohol. Alcoholic beverages are legal under the oil-for-food program because they are classified as foods, but alcohol is illegal in Iraq. Nevertheless, significant quantities of alcohol are imported to benefit the privileged, using money intended to help the people of Iraq through the purchase of necessary food staples.

The population is suffering from general malnutrition and an overall low standard of living. Sanitized water is not always available in some areas, the electrical system is deteriorating as much of everything else is, and the average relative wage of the Iraqi citizen has fallen drastically (Economist 2000). With the large number of children dying and the poor situation in general, some NGOs have begun to call the sanctions genocide. Yet Hussein is clearly far from doing all that is possible for his population. In fact, there is evidence that some of the food and medicine imported for his people under the oil-for-food program is then exported to be resold. On August 11, 1999, a Kuwaiti coast guard seized a vessel whose cargo contained 75 cartons of infant powder and 25 cartons of infant feeding bottles. The ship's captain admitted to committing six other similar violations (Department of State 2000a). The vessel, M/V Minimare was also diverted by UN forces and found to have contained 2,000 metric tons of rice that could have been used to feed the Iraqi population, but was instead to be sold for hard currency (Department of State 2000c). Therefore, not only is Hussein not taking advantage of all that is allowed under the oil-for-food program (which was further expanded on June 8, 2000), but that which his country does receive under the program does not always stay in the country.

Hussein himself has accumulated massive amounts of personal wealth throughout this time period: in July 1999, Forbes magazine estimated Saddam's personal wealth at six billion dollars (Department of State 2000c). One of the numerous palaces he has constructed since the end of the Gulf War is Abu Bhurayb Palace, which is complete with crystal chandeliers, gold faucets, and elaborate fountains and waterfalls. In the middle of a severe drought, the water resources diverted to these fountains could greatly benefit a people whose crops are suffering from a severe lack of water. Furthermore, the pumping systems used in such fountains could be used for sanitation or irrigation needs, again depriving the population of valuable resources (Department of State 2000b). It is estimated that Hussein has spent over two billion dollars on palaces since the end of the war, clearly illus-

trating the excess in which he indulges. Luxury cars have been provided for top government officials, along with extra rations and a plethora of other luxury goods, which benefit only those in Saddam's inner circle. Saddam openly uses the money gained from illegal activities to increase his considerable wealth, without applying it toward alleviating any of the numerous problems suffered by his people. Reports have also been received of Saddam using the illegal money to build up that which he desires most – strategic and tactical military capabilities.

The Risks and Benefits of Lifting Sactions

The suffering of the average Iraqi citizen, and what appears to some as the failure of the sanctions has caused many, to advocate lifting or substantially limiting the sanctions. However, this raises a very important question. What are the possible risks and rewards of lifting the sanctions?

This question is very hotly contested, with many taking hard-line stances on either side. However, both sides acknowledge that there are pros and cons to each option. Many opponents of sanctions have begun to call them a form of genocide and cite the poor humanitarian situation in the country as the primary reason for lifting the sanctions. They believe that with their removal the standard of living for Iraqi citizens will improve. No longer would there be delays in oil-for-food contracts or the prohibition of dual-use items that are crucial components in the oil or farming industries. They point to the deteriorating infrastructure that apparently has at times prevented Iraq from producing the amount of oil allowed under the oil-for-food program (though caps on production have recently been lifted and the budget allowed for spare parts expanded). They argue that the ending of sanctions would allow Iraq to acquire items needed to repair its refineries, which were previously prohibited as dual-use items or held up in the contract approval process. If sanctions were lifted, Iraq would not be limited in conducting repairs, allowing it to enhance its oil production and thus be able to purchase more food and medicine for its population. As of 31 January 2000, the value of spare parts contracts on hold was $291 million, more than half of the $506 million in approved contracts. The UN Security Council has become increasingly concerned with the deterioration of Iraq's oil industry. Consequently, it was one of the subjects addressed at some length in its 24 March 2000 meeting (United Nations Noon Briefing Highlights 2000).

Most advocating the ending of sanctions do have concerns about the development of Iraq's weapons of mass destruction (WMD) program. However, they argue (and the argument is supported by this author) that the current sanctions regime is almost completely ineffective in controlling Hussein's efforts to acquire such weapons, due to the amount of smuggling the sanctions have been unable to restrict. Moreover, with the termination of onsite inspections in 1998, it has become very difficult to determine Saddam's capabilities. Therefore, it is argued that the sanctions are accomplishing very little of their original purposes and only hurting the general public, not Hussein and his inner circle. Sanctions opponents give one more major reason for lifting the sanctions: it would deprive Saddam of a domestic political tool he employs to rally the population around himself and against the UN (particularly the U.S.).

Supporters of the UN sanctions largely believe otherwise. They do not believe the lifting of sanctions would significantly improve the lives of the ordinary Iraqi. Hussein's current behavior is used as evidence that should sanctions be ended, he would not necessarily devote any of the additional resources that would become available to lessening the plight of the common Iraqi citizen. They argue that he would largely continue his present pattern of spending and use newly obtainable resources to develop his military, not repair the country's infrastructure or come to the aid of his starving citizens. In direct rebuttal to opponents of sanctions, supporters commonly state that Hussein has had the capacity to rebuild his oil facilities had he chosen to do so. Basarah, an illegal refinery, was destroyed in the 1998 strikes, yet the Iraqi regime had enough spare parts for its repair. However, the Iraqi government often claimed it was unable to meet oil-for-food production targets due to a lack of spare parts with which to repair the refineries.

A major concern frequently voiced by proponents is the fear that the removal of sanctions will give Hussein a free reign to pursue a WMD program. While current sanctions have not completely prevented the dictator from the development of such weapons, the sanctions may have at least slowed it down and complicated it to a degree. Many supporters also view a lifting of sanctions as giving in to Saddam and admitting defeat. This is a step that some of them are unwilling to take.

The Sanctions Regime: The Need to Either Strengthen or End

So what is the answer? After being involved in MIF operations at the U.S. Department of State for four months and conversing with numerous personnel involved in the process, this author believes that the sanctions regime cannot remain as is. It needs to be dissolved, or be reinforced to close the significant gaps that exist and became more effective. Perhaps if the enforcement side of the regime were given more teeth, the UN would be better able to prevent Hussein from illegally accumulating the large financial resources needed to develop weapons systems. Yet if they are to remain as they are currently, the author believes that sanctions should be lifted because they are doing very little to deny Hussein the resources he needs to pursue his main goals, though they may make his pursuit a little more difficult. The considerable resources employed in the region to enforce these sanctions would be better used elsewhere, if they are not allowed to be as effective as they are capable of being. Furthermore, though

it is probable that Hussein will continue to let his people suffer even with the lifting of the sanctions (he has presented little real evidence of good intentions), he could no longer place the blame on the UN for Iraq's plight, thus losing an important domestic political tool.

Though the sanctions have been relatively ineffective, it is difficult, in general, to judge sanctions in terms of success. As David A. Baldwin pointed out in his paper, Success and Economic Sanctions, there is little agreement over what it means when one asks if sanctions "work" (Baldwin 1999). Without agreement on this basic concept, political scientists and economists have been unable to find an accepted way of measuring their success. Thus it is impossible to declare whether the sanctions have actually "worked."

Iraqi sanctions have become an increasingly contentious issue over the past several years, and it appears that they are likely to remain so in the immediate future. One of the major problems Iraqi sanctions pose for the U.S. government is the political minefield that surrounds the issue. It is so hotly contested on each side that any move in any direction by the UN is likely to attract major criticism. However, inaction on this matter has also been criticized since many believe, as does this author, that the sanctions regime as it currently exists, is not worth the resources required or the political damage caused by pictures of starving children in Iraq. Either changes must be made to the MIF and to the sanctions in general, or they should both be ended.

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Ten Chairs: Nine are Leather; One's Electric. The Supreme Court's Struggle for Equal Justice in Capital Punishment.

By Jackson Spencer Wixom

America continues to struggle with the death penalty issue, with some calling it "cruel and unusual" punishment, and others asserting that it represents a sure-fire path to justice. In the context of the theme "Equal Justice Under Law," etched in stone on the U.S. Supreme Court Building, this paper considers whether the Supreme Court's increased emphasis on procedural efficiency in denying writs of certiorari and stays of execution denies equal justice based on the merits of a prisoner's case. While noting some benefits of procedural efficiency, the paper concludes that tightening the procedural process does come at the expense of substantive justice, thus making the goal of "equal justice" more illusive.

INTRODUCTION

A focal point in the courtroom of the United States Supreme Court is a polished bench of Honduran mahogany with nine stuffed leather chairs seated behind it. Each chair is labeled with a gold plate that indicates its respective Justice. The quality of these seats is a symbol of the privilege and honor associated with being a Justice of the United States Supreme Court. Coupled with this privilege, however, is a grim responsibility. The nine Justices who occupy these chairs must ultimately decide who of hundreds of condemned candidates will next sit in another, less-comfortable chair.

The "tenth" chair is not found in the Court building. It sits instead in a small, bare room within the guarded walls of a state penitentiary, either in Florida, Georgia, or one of the nine other "death penalty" states. At the flip of a switch the hard seat of wood, metal, and leather straps hums with approximately 2,000 volts of electricity (Methods of Execution 1999). All of these features guarantee that this will be the last chair its occupant will sit in.

Historically, the American people have shown a lack of agreement in determining the moral nature of the death penalty. Christians find conflicting teachings concerning the death penalty in the Holy Bible. Leviticus states, "he that kills any man shall surely be put to death" (Leviticus 24:17) and Exodus states, "Thou shalt not kill" (Exodus 2:14 King James Version). In a legal sense, the U.S. Constitution's Eighth Amendment is debated continually as well. Does the death penalty violate the common right that, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted?"

The ethical debate placed aside, the death penalty does revolve around one concrete fact; once human life is taken it cannot be replaced. Therefore, the Supreme Court as the ultimate decision maker in all death penalty cases, shoulders the responsibility to guarantee to the American people that every death penalty case is handled in a fair and equal manner. The motto, "Equal Justice Under Law," stretched across the front of the Supreme Court building makes this responsibility clear to all citizens of the United States, including death row inmates.

To better understand the meaning of "Equal Justice," the latter word can be divided into two key categories: substantive justice and procedural justice. Throughout history, the Supreme Court has followed a system of Stare Decisis (Latin for "Let the decision stand") in order to ensure procedural justice. "This refers to the legal rule that when a court has decided a case by applying a legal principle to a set of facts, that court should stick by that principle and apply it to all later cases with clearly similar facts" (Oran's 2000). The Supreme Court recognizes that imperfections and biases push our legal system away from perfect justice as, what John Rawls defines as, "The procedure adopted to bring about the correct result." A lack of absolute truth in criminal trials inhibits the possibility of universally achieving this just result. However, Rawls definition of "pure procedural justice" is what our legal system hopes to achieve, "a correct or fair procedure such that the

Spencer is a senior graduating with a Bachelor of Arts degree in English and a minor in Business. Spencer served a Hinckley Internship with the United States Supreme Court. He plans to work for Equico Capital Resources, an investment banking firm.

outcome is likewise correct or fair, whatever it is, provided that the procedure has been properly followed" (Feinberg 1973).

Substantive justice is more subjective in nature and ensures to every American "The basic law of rights and duties" (Oran's 2000). Substantive justice measures each case individually. To ensure both aspects of justice, the Court must apply law in a general sense to create precedent and follow established procedure. At the same time, the Court must apply the law in a personal sense to individual cases in order to supply substantive justice.

The Supreme Court has and continues to encounter difficulties in covering both aspects of equal justice. Ethical questions surface that do not have clear answers. The intent of this paper is not to give answers, but to display the questions in order to better understand the Supreme Court's struggle towards equal justice. Questions such as these are what drive our country towards a better form of government.

Substantive Justice or an Abuse of Federalism

Capital Punishment has traveled a bumpy road in the latter part of the twentieth Century. In 1971, the Supreme Court affirmed its blessing of capital punishment in *McGautha v. California*, when it "rejected petitioners' common claim that permitting the jury to impose the death penalty without any governing standards violated due process" (Lockhart et. al 1991).

The issue caught fire one year later when the Supreme Court delivered its opinion in the case of *Furman v. Georgia*. Capital punishment in the United States ground to a halt with the Furman decision. A slim five to four majority, (Justices Stewart, White, Douglas, Brennan, and Marshall) wrote a basket of separate concurring opinions that together constituted the Court's majority opinion. The five justices backing *Furman* basically felt that the death penalty violated the "equal protection" and "cruel and unusual punishment" clauses of the Fourteenth and Eighth Amendments, but each justice wanted to say this in his own way. For example, Justice Douglas concluded that the death penalty was given disproportionately to poor and socially disadvantaged defendants and was therefore a violation of "equal protection." Justice Stewart concluded that since Congress had failed to create a mandatory death sentence for certain types of capital crime, capital punishment occurred too randomly not to be considered "cruel and unusual" (*Furman v. Georgia 1972*).

At the time of *Furman*, the Court was also reviewing petitions from cases in which juries had issued the death penalty for crimes other than homicide, crimes such as rape. The Court was also examining the constitutionality of capital sentencing that was carried out without any procedural clarification from the trial judge to the respective sentencing juries. The *Furman* majority decided that this form of free-for-all capital punishment sentencing was way out of hand. Justice Stewart felt the randomness of the death sentence under *McGautha* made it much like being "struck by lightning" (Hall 1992).

In a majority of capital punishment cases, the defendant is sentenced to death in a state trial court. The case usually follows a designated state appeals process to the state Supreme Court. The case can then be appealed to the federal judiciary if the defendant can find a violation of his or her constitutional rights in the judicial process. In such a scenario, the case moves first to the Federal District Court, then to the Federal Circuit Court, and finally, to the United States Supreme Court; which makes the final determination in the case.

When the Supreme Court issued its *Furman* decision, the Justices built a dam at the end of the previously explained appellate system. States continued to issue the death penalty and those convicted continued to follow the appeals process; however, *Furman* did not allow the death sentence to be carried out. Ironically, the Supreme Court's anti-death penalty sentiment lasted only five years before returning to the jurisprudence that drove *McGautha*. The death penalty dam was broken with the execution of Utah inmate Gary Gilmore.

Gilmore was convicted on multiple counts of first-degree murder, the result of a one-night armed robbery rampage through Provo, Utah. For years, the State of Utah was unable to execute Gilmore because of the Supreme Court's decision in *Furman*. However, a little before noon on the January 17th, 1977 the Utah authorities were given the green light to execute Gilmore. The condemned man was led to a warehouse behind the Utah State Penitentiary; strapped into a chair and shot with one bullet through the chest. Gilmore's execution by firing squad became the first use of capital punishment in the United States since 1967.

Gilmore's execution was legal due to the Supreme Court's decision in *Gregg v. Georgia*. With this decision, the Court's majority, (Justices Stewart, Powell, Stevens, White, Burger, and Rehnquist), reaffirmed the constitutionality of the death penalty. The Court rejected its earlier *Furman* claim that the use of the death penalty was too random and ungoverned to be constitutional. In the *Gregg* case, the Justices ruled that, "the concerns expressed in Furman that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance" (*Gregg v. Georgia 1976*).

Gregg, of *Gregg v. Georgia*, was originally convicted and sentenced to death on two counts of armed robbery and two counts of murder. Under the Georgia capital sentencing statute, the jury was properly informed on how to issue the death penalty. They were instructed to consider any mitigating circumstances related to Gregg's crimes, such as his young age, his cooperation with police, and his emotional state at the time of the offense. The jury could then use any of these circumstances as justification for lessening the degree of Gregg's punishment.

In order for Gregg's jury to issue the death penalty, they were required to find him guilty of at least one, of a possible ten aggravating circumstances that intensified the nature of his crime. These factors included other felonies such as armed robbery and rape. Also under Georgia law, Gregg's death penalty conviction was guaranteed review by the Georgia Supreme Court to assure that the trial courts followed three specific guidelines: (1) "No arbitrary factor can tamper the decision of the jury." (2) "The evidence proves the existence of an aggravated circumstance in connection with the crime." (3) "The penalty is not excessive or disproportionate in relation to similar cases" (Lazarus 1998). The Supreme Court agreed with this Georgia statute and justified the jury's decision to give Gregg a death sentence.

Here the first question about death penalty equality arises. The *Furman* decision showed the Justice's apprehension that the death penalty was not being issued according to equal procedural justice. Gregg showed that death penalty sentencing could be considered equal justice, when regulated with specific sentencing guidelines. The Court, however, decided not to specify any federal guidelines in its *Gregg* decision.

Woodson v. North Carolina, which was issued the same day as *Gregg* in 1976, made the justice's decision against federal sentencing guidelines quite clear. "The two crucial indicators of evolving standards of decency respecting the imposition of punishment in our society—jury determinations and legislative enactments—conclusively point to the repudiation of automatic death sentences" (*Woodson v. North Carolina 1976*). The reasoning behind *Woodson* is the Supreme Court's desire to uphold the idea of federalism, which is defined as, "a system of political organization with several different levels of government coexisting in the same area, with the lower levels having some independent powers" (Oran's 2000). Thus, with respect for the separation of powers, the Supreme Court must leave the creation of federal sentencing guidelines to Congress.

The Supreme Court has also indicated the need for state legislatures to maintain power in making capital punishment decisions. A set of federal sentencing guidelines in *Gregg* might have appeared to be an excess of nationalism and judicial activism on the Court's part. On the other hand, this lack of any universal guide was bound to cause inconsistencies in substantive justice, due to varying precedents among states. Under *Woodson*, the most heinous crimes can be committed in non death-penalty states without the defendant worrying about receiving a death sentence. Precedent varies even among state legislatures in death penalty states. The *Gregg* opinion does not establish standards on how to determine aggravating and mitigating circumstances, but it suggests that variables such as these must exist to provide equality in sentencing. *Gregg* also fails to explain to what degree aggravating and mitigating circumstances should affect a jury in making its decision, or how a jury should determine whether or not any special circumstances even exist.

According to figures from year-end 1997, the death penalty statutes in participating states are all over the map. In Tennessee, Wyoming, and North Carolina, the defendant only needs to be convicted of first-degree murder in order to receive the death penalty; only a conviction of capital murder, which is defined as "something more than intentional killing," is needed for a person to be executed in New Hampshire (*Sawyer v. Whitley 1992*). On the flip side, eighteen aggravating factors must be found for a death sentence in Alabama and thirteen for a death sentence in Nevada. Most death penalty states require the jury to find at least one aggravating factor in addition to the capital crime in order to issue the death penalty. However, the lists of possible factors vary among these states, from as many as fifteen to as few as eight (Snell 1998).

To resolve these inconsistencies, the Court would need to create federal sentencing guidelines; something *Woodson* forbids them from doing. The Tenth Amendment guarantees the states the right to create laws not already guaranteed in the constitution, as it proclaims: "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people" (Lockhart et. al 1991).

Since the Court has no universal guidelines to govern death penalty sentencing, they must evaluate the justice of each death penalty case according to different sentencing guidelines depending on the respective state. This creates a great deal of additional work for the Court and opens the door for inequality.

Weeks v. Angelone 2000 is a recent example of the many death penalty cases the Court must evaluate individually. The *Weeks* case was heard in oral argument on December 6th, 1999. Lonnie Weeks was sentenced to die in Virginia for gunning down a highway patrolman during a late night traffic stop. He was on probation at the time for a 1992 drug conviction and had recently participated in a burglary and car theft. He was also driving a stolen car at the time of the shooting. The sentencing jury was informed of these aggravating factors in the *Weeks* case and they were told that the factors could be used in justifying a sentence of death. They were also told of a mitigating factor that pointed to Weeks's religious upbringing. The jury felt confused and wanted to ask the judge before deliberations if they were required to issue the death penalty to Weeks because the prosecution had proven without a doubt the existence of more than one aggravating factor.

The jury wasn't sure if they were allowed by law to ignore the aggravating factors and instead show mercy on Weeks because of the one mitigating factor. The prosecution objected to the question and the judge sustained their objection. Instead of answering, the judge ordered the jury to re-read the state's sentencing instructions. The jury moved to deliberations and returned Weeks a sentence of death.

All of Weeks's original appeals were denied at the state and federal level. He later petitioned the 4th District Court

for *habeas corpus* relief claiming that the judge's failure to explain to the jury how to use the state sentencing statute violated both his Eighth and Fourteenth Amendment rights. The appeal eventually reached the Supreme Court who stayed Weeks's execution and granted his petition of certiorari.

The Court delivered its *Weeks* opinion on January 19, 2000. A five-to-four majority, consisting of Justices Rehnquist, O'Connor, Scalia, Kennedy, and Thomas, felt that the judge used the best method of explanation possible for the jury and the sentence of death should stand. As stated by the Court, "Given that petitioner's jury was adequately instructed, and given that the trial judge responded to the jury's question by directing its attention to the precise paragraph of the constitutionally adequate instruction that answers its inquiry, the question becomes whether the constitution requires anything more. We hold that it does not." (*Weeks v. Angelone 2000*). The thin five-to-four margin on the *Weeks* decision further emphasizes the fact that death penalty cases coming before the Court have legitimate arguments on both sides.

Thus, the Court is in a no-win situation. In this dilemma, the justices must either risk usurping the role of the states in a federal system and engaging in judicial activism by laying down uniform sentencing guidelines, or if the status quo persists, they must prepare themselves for a greater amount of difficult cases. The more each case is measured independently and compared to different, state-legislated criteria, the greater the possibility of substantive inequality creeping into the death penalty sentencing process.

The Procedural Trap

Creating substantive justice among death penalty cases is not the Court's only obstacle. Questions also arise concerning the Court's procedure when handling habeas petitions of certiorari and stays of execution. The writ of habeas corpus was designed to grant relief to convicted felons whose constitutional rights have been violated in the judicial process, "It is most often used to get a person out of unlawful imprisonment by forcing the captor and the person being held to come to court for a decision on the legality of the imprisonment" (Oran's 2000). The stay of execution, defined as "A stoppage or suspension of Judgment," gives the Supreme Court and lower appellate courts the right to keep a state from executing an inmate while the inmate's case is being reviewed and decided (Oran's 2000).

In 1983, the Court ruled in *Barefoot v. Estelle* that federal appeals courts could treat death-sentenced habeas petitioners to a special shortened version of the usual appellate process. This decision was monumental for the Court in developing a tight appeals procedure. The Court instructed the Federal Circuits not to grant stays of execution unless there was a "substantial showing" of a violation of federal law (*Barefoot v. Estelle 1983*). Also, in the case of *Sawyer v. Whitley* any indication that a habeas petition could have been included in an earlier appeal and was not; constituted an "abuse of writ" and resulted in an automatic denial of habeas relief (Schrader 1996). These new rules made granting certiorari or receiving a stay of execution much more difficult for death row inmates because their petitions were compared to the ideal standard of *Sawyer* and *Barefoot*. Petitions that were considered late or mediocre were now automatically thrown out.

A perfect example of possible inequality in the new, tighter process came to the Court in 1984. The case involved James Hutchins, a man convicted of murdering three police officers, who was sentenced to death in 1979. While awaiting his execution, Hutchins's attorneys filed a petition for federal habeas relief that was full of new misconduct claims against the state, none of which ever emerged at Hutchins's original trial. The habeas petition was also filed right before Hutchins's scheduled execution. The federal district judge denied the petition, but never gave an explanation as to why. As a last ditch effort, Hutchins attorneys appealed to Circuit Judge James Phillips and received a stay of execution with only days to spare before Hutchins's execution. This contradictory move by the Circuit Judge infuriated the Supreme Court's pro-death penalty majority and the Court promptly vacated Judge Phillips's stay. A few hours after the Court handed down its decision to vacate the stay, James Hutchins died in the electric chair.

The reason the Supreme Court vacated Judge Phillips's stay had nothing to do with the substance of Hutchins's habeas petition. No federal judge, including the nine Justices, ever actually ruled on the petition itself. Instead, the issue which decided Hutchins's fate was procedural: the proper filing of his habeas petition according to the process established. The Court refused to even consider the claims of misconduct only because the defendant had not made them earlier in his trial and appeals process, thus making them contrary to *Sawyer*.

Granted, the justices must find ways of protecting themselves from the procedural burdens of baseless petitions that are filed only as a desperate act by death row inmates to avoid execution. However, the possibility still exists that the claims of James Hutchins may have been legitimate. The Supreme Court does not grant equal justice when it considers some habeas petitions and refuses to consider others based only on a procedural factor such as a filing deadline. The time for setting strict guidelines should be when the cause for the eventual certiorari petition is being formed, i.e. during the sentencing process. The Court sends conflicting messages when its ambiguity in sentencing allows for more petitions, but then its tight appeals procedures kill these petitions without proper consideration of their content.

A Numbers Game

In 1981, a more moderate Justice Stewart retired and was replaced by the first woman to ever sit on the Supreme Court, Justice Sandra Day O'Connor. The conservative Justice

O'Connor gave the Court a pro-death penalty majority when dealing with the certiorari petitions and writs of habeas corpus of those sentenced to die.

According to the Supreme Court rules of conduct, when issuing a stay of execution, the justices are required to have a majority, (five votes) to grant the stay. In order to give the minority of the court a voice in the acceptance of petitions of certiorari, only four votes are required to accept the petition. This practice is commonly known as "the rule of four" (Lazarus 1998). The Court must be careful not to indicate prematurely the outcome of a case. If the Court's acceptance of certiorari petitions required a five-person majority vote, its acceptance or denial of a certiorari petition would insinuate the direction the Court was planning to rule.

In a majority of cases, trial courts in the individual death penalty states sentence the defendant to die on a certain date. After the trial court's ruling, unless a state or federal appellate court grants a stay of execution, the death sentence is carried out on its scheduled date. When the defendant's case reaches the Supreme Court, the justices in the anti-death penalty minority must recruit members of the pro-death penalty majority in order for a petition of certiorari to truly be considered.

Even if the Court's anti-death penalty minority is able to collect the necessary four votes to grant review of a defendant's petition, unless the case receives the majority fifth vote to stay execution, the defendant will die with his or her case pending on the Court's docket. The Supreme Court's acceptance of a petition of certiorari will not stop a state from carrying out an execution. Only the vote of five Justices to grant a stay of execution can force a state to not flip the switch.

Just such a scenario became reality in the case of Alpha Stephens. Stephens was a black man sentenced to die in Georgia for killing a white man. The case received the attention of the Legal Defense Fund (LDF) and the National Association for the Advancement of Colored People (NAACP). Both organizations had just sponsored an in-depth investigation into the 2400 post-*Furman v. Georgia* homicides occurring in Georgia. The investigation, labeled the Baldus study (after its author David Baldus of the University of Iowa,) concluded that Georgia's system for death penalty sentencing established by *Gregg v. Georgia* was not necessarily biased against black defendants, but biased against those who committed crimes against whites. In the book *Closed Chambers*, Edward Lazarus writes, "The study further revealed that the victim's race played an especially powerful role in 'mid-range' cases…For these cases, in which prosecutors and juries wielded the most discretion, a defendant who killed a white person faced odds of receiving the death penalty as much as 30 percent higher than if the victim were black" (Lazarus 1998).

Stephens's attorneys wanted to use the study as part of their second federal habeas petition. The petition claimed that Stephen's sentence was racially motivated. The Eleventh Circuit Court ruled that Stephens's lawyers should have used the Baldus study on their first federal habeas petition. The judge felt that to accept such a study on the second petition would be what *Sawyer* considered an obvious abuse of the habeas writ. The judge decided not to consider the nature of Stephens's claim, and he immediately denied Stephens's petition and vacated his stay, based on this "abuse of writ" doctrine.

Under the before mentioned *Sawyer v. Whitley* opinion: the federal judiciary can deny all cases that involve; (1) "successive claims covering the ground of earlier petitions," (2) "new claims which were not raised earlier through inexcusable neglect," or (3) "procedurally defaulted claims in which the petitioner failed to comply with state procedural rules." The federal judiciary can now automatically deny all petitions that fall under these three categories. An exception is only made if the petition proves that the case contains a "fundamental miscarriage of justice" (*Sawyer v. Whitley 1992*).

At the point of desperation, Stephens's attorneys appealed to the Supreme Court to overturn the Eleventh Circuit's denial and grant a temporary stay of execution. The Eleventh Circuit Court was currently in the process of deciding the case of *McCleskey v. Zant 1991*. *McCleskey* also dealt directly with the Baldus Study, and Stephens's attorneys wanted to convince the Supreme Court that the *McCleskey* outcome would determine whether the statistics brought forth in the Baldus Study were valid in proving racial bias.

On the vote of five Justices (Brennan, White, Marshall, Blackmun, and Stevens), the Supreme Court granted Stephens a stay of execution. The justices felt that the pending decision on the validity of the Baldus study in *McCleskey* would directly apply to Stephens's case as well. With a stay in place, Stephens filed a certiorari petition that asked the Court to ignore the "abuse of writ" decision by the Circuit Court and to hear his habeas petition. Something odd happened when the Justices met in conference to consider Stephens's petition. Justice's White and Blackmun voted to deny the certiorari petition even though they had just voted to grant Stephens a stay.

The change in opinion of White and Blackmun left Stephens's certiorari petition one vote short of the four necessary votes to be accepted by the Court. When the Court announced its denial of the certiorari petition, the stay was automatically lifted and Stephens was again moving toward his scheduled execution.

Stephens's attorneys appealed to the Court one last time with a third federal habeas petition that challenged the jury instructions at Stephens's original trial. The Court's anti-death penalty minority was eventually able to convince Justice Blackmun to change his mind and vote to grant the certiorari petition. However, these four votes were still not enough to re-instate a stay of execution; a stay would require Justice White to change his mind as well. However, Justice White stuck to his decision to deny the stay. On December 11th, the day of Stephens's execution, Stephens was put to death in the electric chair with the Supreme Court never hearing the certiorari petition they had voted to accept.

In the capital punishment appeals process, the minority

of the Court appears to have lost its voice. In all Supreme Court cases, criminal and civil, a significant minority (at least four Justices) has reserved some power in the acceptance of certiorari petitions. With the death penalty, however, the power to stop a state from carrying out the execution rests only in the hands of the Court's majority at this stage. This procedure may hinder the Court's ability to grant procedural equality since the anti-death penalty minority has no voice. The case of Alpha Stephens alone is sufficient proof that some degree of inequality exists. The Court is so tightly bound by the rules for accepting habeas petitions and granting stays of execution that inmates' pleas may not receive the adequate substantive consideration they deserve.

A Trick To Stay Alive

The Court's desire to standardize the appeals process is not without good reason. On November 9, 1999, an article by Joan Biskupic appeared in the *Washington Post* announcing the Court's refusal to accept certiorari petitions dealing with claims that housing inmates on death row for extended periods of time violated their Eighth Amendment rights (Biskupic 1999). The Court did not issue a formal reason as to why it denied certiorari on these particular cases, but Justice Thomas issued a statement in the Washington Times to clarify his position. He wrote, "I am unaware of any support in the American constitutional tradition or in this Court's precedent that a defendant can avail himself of the panoply of appeals and then complain when his execution is delayed" (Murray 1999). Justice Thomas went on to say that the United States Supreme Court develops "Byzantine death penalty jurisprudence," by permitting several levels of appeals to occur in the first place (Greenhouse 1999).

Justice Breyer disagreed with the reasoning of Justices Thomas. He wrote in his dissent, "A growing number of courts outside the United States-courts that accept or assume the lawfulness of the death penalty-have held that lengthy delay…. renders ultimate execution inhuman, degrading, or unusually cruel" (Greenhouse 1999).

In his dissent, Justice Breyer referred to two cases in particular that were part of those denied certiorari by the Court. The first, *Moore v. Nebraska*, involves Carey Dean Moore who has been on death row since being convicted of the 1979 murders of two cab drivers, Reuel Van Ness Jr. and Maynard Helgland. After a round of appeals, the federal courts felt that Nebraska's capital sentencing laws were too vague and granted Moore a new sentencing hearing in 1995. Moore was again sentenced to death, but these appeals and federal rulings had delayed his execution for fifteen years (Murray 1999).

The second case is *Knight v. Florida*. Thomas Knight was originally convicted of abducting and murdering a Miami couple, Sydney and Lilian Ganz in 1974. While awaiting execution by electrocution six years later, Knight fatally stabbed a prison guard. In 1995, the 11th Circuit Court of Appeals ruled that the trial jury should have considered Knight's traumatic and abusive childhood when sentencing him to death and they ordered a re-sentencing hearing. At the new hearing, Knight was once again sentenced to death.

Thomas Knight's attorneys wrote in his petition of certiorari, "To execute someone after holding him for more than two decades in the agonizing suspense and close confinement reserved for those who are about to die is an inhuman, degrading punishment and a denial of the fundamental human dignity" (Murray 1999).

The Supreme Courts of Jamaica, India and Zimbabwe have ruled that prolonged waiting on death row violates basic human rights. Justice Breyer feels that the United States should attempt to align itself with this international trend.

In both cases referenced by Justice Breyer, the defendants were granted re-sentencing hearings due to rulings in federal courts that their original sentencing hearings were in some way unconstitutional. Justice Breyer's argument is that it was not multiple appeals that kept these inmates on death row for so long, but the fact that the federal judiciary delays in considering legitimate pleas.

The argument over whether or not an extended death-row waiting period merits "cruel and unusual punishment" is one of the strongest justifications for the Court's streamlined appeals process. With decisions such as *Sawyer* and *Barefoot*, the Court displays in a loud and clear manner its desire to move the appeals process forward and to carry out scheduled executions.

The tight procedures for the acceptance of certiorari petitions and for granting stays of execution help to remove inequality in the trial to execution period. This makes the process speedy for all death-row inmates and they are thus unable to play the "slow torture" card back against the justice system. In this sense, the Court should be commended for keeping a tight hold on the appeals system.

Conclusion

The Supreme Court must face many obstacles in its struggle to provide every American with "equal justice." They must consider the inequality that exists among individual cases when death penalty sentencing is governed by state legislatures. *Gregg v. Georgia* does not cover all Americans in one uniform blanket of justice. Some defendants are given softer sentences only because they commit crimes in states that object to capital punishment. At the same time, the Court must protect the legislative power of Congress and the rights of states. Federalism is a cherished part of our government and the Court must be careful not to overstep its authority.

Approximately 3,335 people currently live on death row. The U.S. executed 45 people in 1996; it executed 74 in 1997, and 96 in 1999 (Snell 1998). If this trend continues, the Court's work in regard to death penalty cases will only continue to increase and the U.S. judicial process will continue to slow down.

The Court must also examine the inconsistency that exists in granting certiorari to habeas petitions and in granti-

ng death penalty stays of execution. The Court needs to reconsider rules of conduct that cause the contents of habeas petitions to go unnoticed because too much emphasis has been placed on the appeals procedure and not on the substance of the appeals themselves.

Without the ability of the Court's minority to stop an execution, the Court's acceptance of a death penalty certiorari petition is meaningless. Even when four of the nine justices feel that an inmate's federal habeas petition raises constitutional concerns, they are helpless to act without the blessing of the majority.

At the same time, the tight, established appeals procedure set down by the Court is not without its benefits. Death row inmates are trying to turn the tables on the justice system and claim that their delayed executions are a form of unjust punishment. The Court must require a quick and universal appeals process in order to combat this argument and to further sentencing equality.

The questions raised in this paper examine a major part of the reasoning behind the United States judicial system. In a country that professes to be free and equal, we need influential men and women to continually evaluate the system and work to ensure that both substantive and procedural justice are served. The system is not perfect and conclusions are not universally drawn. However, the impartial, powerful justices of the Supreme Court help to make the Constitution a living document that does its best to provide every American the "equal justice under law" that he or she deserves.

ENDNOTE

*Though he would not be quoted in this paper, I would like to thank Mark Miller, the United States Supreme Court Judicial Fellow. His assistance and guidance aided its completion.

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The Proliferation Of Nuclear Weapons: The New International System and the Middle East

By Kevin F. Jowers

Nuclear weapons entered the arena of international politics with the close of World War II. Although the ensuing Cold War passed without these weapons being used in combat, the post- Cold War world has introduced a new international system. As a result, many of the conditions that helped maintain nuclear peace during the Cold War have disappeared and risks of future proliferation and use of nuclear weapons have increased. This article examines the changes in the international system since the end of the Cold War and discusses the realist arguments for and against the proliferation of nuclear weapons. The author also focuses on the Middle East, the dynamics of which make the region a useful paradigm for assessing the risks posed by future proliferation to the international system.

INTRODUCTION

The threat of nuclear war was a matter of constant concern during the Cold War. While that era came to a close without nuclear weapons being used in combat, the international system that has emerged has brought with it increased concern over the future of proliferation and possible use of nuclear weapons. The conditions that promoted nuclear peace during the Cold War have largely disappeared and the characteristics of the post-Cold War world, as seen by realists, have increased the incentives of states to pursue nuclear capability. While realists disagree over the consequences of future proliferation to international security, an analysis of the Middle East highlights a number of reasons why the debate over nuclear weapons will continue to require close attention from the international community.

REALISM AND NUCLEAR WEAPONS

A predominant school of thought in looking at international conflict is that of realism. According to this view, states are rational, unitary actors working toward essentially the same ends. Like people, states are self-interested and seek to dominate others. Realists see the international system as one in which states exist as anarchic; meaning that there is no central authority with power above that of the states to which a state can appeal to for relief or protection. As a result, states exist in a system of self-help, which given the continual competition among states requires each to provide for its own security and protect its interests as best it can (Russett and Starr 1996, 25).

With no one else to count on for protection, nuclear weapons are often seen as a powerful instrument of security enhancement. Few states are willing to encroach upon a nuclear state and risk provoking the devastating consequences of a nuclear confrontation. The destructive power alone of nuclear warheads is reason for concern as even small-scale use could result in future security considerations or in widespread repercussions in terms of destruction. The possibility of nuclear weapons proliferating, particularly to states plagued by instability and ongoing disputes, greatly increases the risk that even a minor conflict could escalate to the use of nuclear weapons. Also, as the number of warheads increases, so do the possibilities of their use, whether through premeditated planning, false alarms, accidents, or nuclear terrorism.

A BRIEF HISTORY OF PROLIFERATION

Since the introduction of nuclear weapons into the international system, the spread of nuclear capabilities has been limited to a small number of states. Prior to the collapse of the Soviet Union, five states were known to possess a nuclear arsenal: the United States, the Soviet Union, Great Britain, France, and China (Nye 1997, 187). In addition, Israel has been reputed to possess nuclear weapons since the 1970s, although the Israelis have not publicly acknowledged such claims (Cohen 1998, 51-52). With the end of the Cold War the incentives and possibilities for further proliferation of nuclear weapons have increased. As recently as May 1998 two more states, India and Pakistan, confirmed their inclusion into the number of nuclear states by testing nuclear devices.

Kevin F. Jowers graduated from the University of Utah with a Bachelor of Arts degree in Political Science and Spanish, and is currently attending The University of Texas School of Law. He served a Hinckley Internship during the Spring of 1999 at the Middle East Policy Council in Washington, D.C.

Israel, India, and Pakistan have begun testing nuclear devices largely out of security concerns. Israel is a small state surrounded by potentially hostile nations, while India and Pakistan have long-standing disputes with each other and fear the imperialistic intentions of China, another neighboring nuclear state. These states have, for the most part, advocated a no-first use policy with regard to their weapons. However, the presence of nuclear weapons and the continuing territorial dispute between India and Pakistan over the Kashmir, already the source of past wars between the countries, has fueled considerable international concern that a future conflict could escalate to a nuclear exchange. On a global scale, it is feared that as the number of states with nuclear weapons increases, so does the possibility of their use, particularly in the hands of states with questionable motives, such as Iraq, Iran, and North Korea, who are believed to be actively pursuing nuclear capability.

THE COLD WAR AND THE NEW INTERNATIONAL SYSTEM

THE COLD WAR STALEMATE

Since the United States ended World War II by dropping two atomic bombs on Japan, the problem of nuclear weapons has been one of the most debated and troublesome topics in the study of international relations. The destruction of Hiroshima and Nagasaki in 1945 demonstrated the immense destructive power contained in a single nuclear warhead and signaled the beginning of a nuclear arms race, primarily between the United States and the Soviet Union. A prevalent fear throughout most of the Cold War was that a direct confrontation between the two superpowers would result in the use of nuclear weapons. From the 1970s onward, both superpowers possessed such large stockpiles of weapons that each had a "mutual assured destruction" (MAD) capability, meaning that either side could absorb an enemy attack and still have enough weapons to retaliate with a destructive nuclear strike of its own (Russett and Starr 1996, 277). In reality, by the end of the Cold War both superpowers possessed the capability of destroying each other many times over.

Despite the ideological differences between the United States and the Soviet Union, the superpowers shared a common interest in avoiding nuclear war. Due to the large stockpile of weapons that each country possessed, both the Soviet Union and the United States recognized that engaging the other in a direct confrontation risked the possibility of a nuclear exchange and considerable destruction on both sides. The resulting stalemate was often referred to as the "balance of terror" (Nye 1997, 120-123). The fear of being drawn into a direct confrontation helped temper the actions of the two superpowers during the Cold War and induced them to play a strong role in controlling the actions of subordinate states.

While the balance of terror played a role in maintaining the nuclear peace during the Cold War, other factors also contributed. With two superpowers with widely different ideologies, each served as an easily identifiable enemy for the other. In order to contain the other side's power, each superpower developed a sphere of influence over smaller states, with promises to provide protection and aid. Thus, the bipolar international system allowed many smaller states to align themselves under the protective umbrella, including the nuclear arsenal, of either the United States or the Soviet Union. The protection offered by the superpowers served as a surrogate for central authority in the international system and diminished the need of smaller states to pursue their own means of protection. The ability of powers such as the United States and the Soviet Union to influence the behavior of lesser states during the Cold War is no longer a reality in today's multipolar international system, due to increased parity among states and the lack of a clearly defined enemy against which to fashion a foreign policy.

Another important factor in maintaining the nuclear peace was the large buffer zone created by the distance between the two superpowers. This buffer zone allowed sufficient time to assess and respond rationally to a perceived threat. Unfortunately, there is no comparable buffer zone for states in the Middle East, or for neighbors such as India and Pakistan. The response time for a perceived threat in such circumstances might be extremely limited and could lead to less than rational decisions, particularly when nuclear weapons are an option in the face of an imminently perceived threat to security.

BEYOND THE COLD WAR: THE NEW INTERNATIONAL SYSTEM

Particularly since the end of the Cold War, the proliferation, or spread, of nuclear weapons to an increasing number of states in the international system has been an issue of great debate. During the Cold War, the United States and the Soviet Union played an active role in discouraging lesser states from the pursuit of nuclear weapons. Seen from the realist viewpoint, the protection offered by the superpowers effectively diminished the anarchic nature of the international system by allowing the superpowers to assume some of the burden otherwise borne by each state in providing for its own defense. The protection offered by the nuclear arsenal of each superpower significantly reduced the need of weaker states to pursue such weapons of their own.

However, with the end of the Cold War, a new international system emerged and with it has come increased concern over the proliferation of nuclear weapons. Rather than being a world of peace as some had suggested, the post-Cold War world had numerous conflicts and wars. The erosion of Cold War alliances, particularly within the former Soviet bloc, and the lack of an easily defined enemy decreased the ability of the more powerful states to influence the actions of lesser states. As many of the previous security arrangements lost significance, reliance on the superpowers for protection also decreased. In addition, the superpowers themselves are less willing and less able to provide the same level of protec-

tion as during the Cold War. Consistent with realist thought, as the self-help needs of the international system increased, states became more concerned about providing for their own security. Given the continual competition and perceived threats from others, and with few guarantees of protection from stronger states, nuclear weapons are perceived by some states as the ultimate guarantor of security (Nye 1997, 187).

CONFLICTING ARGUMENTS OVER PROLIFERATION

THE CASE FOR PROLIFERATION

Although there is considerable apprehension among realists regarding the possible consequences of the proliferation of nuclear weapons, it is not universally regarded as a reason for concern. Many analysts credit the possession of nuclear weapons as a key factor in preventing the Cold War from becoming "hot." The balance of terror between the United States and Soviet Union discouraged either side from introducing nuclear weapons into a conflict. Many hold that nuclear weapons will have a similar moderating effect in the future.

A number of analysts make a case for allowing the proliferation of nuclear weapons. Some go so far as to say that the international system would be stable if *all* states had such weapons. The foremost among those who advance an argument in favor of proliferation is Kenneth Waltz (Russett and Starr 1996, 315), who argues that the gradual spread of nuclear weapons could actually promote peace and security. However, Waltz is careful to note that he supports a gradual spread of nuclear weapons rather than a rapid spread or no spread. As a realist, he recognizes that states will tend to security as they see best. However, due largely to the number of states, including Brazil, Argentina, and South Africa, that can produce nuclear weapons but have not, Waltz is doubtful of the likelihood of widespread proliferation (Nye 1997, 187). Based on this view, Waltz (1993) argues that, for the most part, states should be allowed to tend to their own security as they see fit, except in particular cases where the pursuit of nuclear weapons could lead to regional instability. The majority of states will continue to feel more secure without a nuclear arsenal. For other states, nuclear weapons would provide them with greater protection than conventional weapons and allow them to behave more reasonably (1993, 527, 552-554).

Due to the immense damage that can be caused by even a small number of nuclear warheads, the possible losses in a nuclear confrontation outweigh any possible gains. Given this, Waltz believes that the balance of terror that was so effective during the Cold War in preventing conflict between superpowers will likely continue to be a factor in the post-Cold War world. With the risk of a nuclear exchange making the possible costs of war extremely high, Waltz questions who would dare to start one. In addition, a nuclear state is more difficult (or is at least perceived to be more difficult) to defeat than is a state that does not possess nuclear weapons, thereby reducing the incidence of war even further. With such a capability, Waltz believes that nuclear weapons may make a defensive, rather than an offensive, ideal possible. Finally, Waltz argues that states gaining nuclear capabilities in the present and future will have more incentives to manage their weapons responsibly since they will be more aware of the risks involved in a nuclear confrontation than were earlier nuclear states (1993, 554-555).

THE CASE AGAINST PROLIFERATION

Other realists are more skeptical about the possible consequences of the proliferation of nuclear weapons. It is widely feared that as more states possess nuclear warheads, the possibility of their use also increases. Lincoln Wolfenstein and Lewis Dunn are among those who oppose further proliferation of nuclear weapons. Wolfenstein (1996) takes an extreme argument by saying that nuclear weapons should not only be prevented from proliferating, but should be eliminated entirely from the world in order to eliminate the danger of nuclear disaster. He argues that as long as countries maintain large stockpiles of weapons, one cannot rule out the possibility of their use, whether accidentally or deliberately. He points out that the history of false alarms is not reassuring in this regard. In addition, nuclear weapons are generally seen as non-usable in most wars, which brings into question the deterrent value of such weapons. In support of his argument, Wolfenstein cites the Korean War and the Gulf War as conflicts in which nuclear weapons neither deterred war nor influenced the outcome (1996, 263-265). The mere possession of such weapons, however, carries with it the risk of even a small-scale conflict escalating to a nuclear exchange.

Dunn (1993) does not argue that there should be no nuclear weapons, but he is nonetheless concerned about the risks of nuclear weapons proliferation, particularly to conflict-prone regions such as the Middle East. Such a spread, coupled with high regional tensions, greatly increases the possibility that nuclear weapons will be used. Dunn is concerned that future nuclear states may include those with long-standing animosities, volatile leadership, or political instability, all of which heighten the risk that a miscalculation or breakdown in communications could threaten the nuclear peace (1993, 514-516). In addition, though third-world states that gain access to nuclear warheads may be well aware of the associated risks, there is a danger that such states would be deficient in both the technology and the resources to construct the extensive safety measures and devices adopted by the United States and the Soviet Union to reduce the threat of accidental or unauthorized use.

Dunn is also concerned that the possession, or likelihood of possession, of such weapons could exacerbate tensions between unfriendly states and risk drawing stronger states into a conflict between regional enemies. A threat to use nuclear weapons may be used as an instrument of blackmail or coercion against a weaker opponent. Another risk is a preventive strike, with either nuclear or conventional weapons, by a state

in order to preserve its regional monopoly on nuclear weapons and thus maintain a military advantage. An example of such action was Israel's bombing of Iraq's Osiraq nuclear reactor in 1981. There is also a risk of nuclear weapons being seized by a rebel or terrorist group to gain leverage over a state. In such a situation, a threat to use such weapons on civilian or strategic targets could greatly improve the group's bargaining power against a state and deter an attack against them (Dunn 1993, 514-516, 521-525).

The Middle East: Paradigm of the New International System

In looking towards the future of the post-Cold War world, the Middle East is a region central to the proliferation debate. The dynamics of this region, as seen from the realist perspective, make it a fitting paradigm of the international system as a whole and give added incentives for each state to provide for its own security. The Middle East is a volatile region and the proliferation of nuclear weapons would intensify the animosities within the region and increase the destructive potential of future conflicts.

Since World War II a number of wars have been fought in the region. Israel and several of the Arab countries in the region were involved in a several conflicts between the 1940s and 1970s, largely over issues of ethnicity, religion, and nationalism. In the 1980s, the Iran-Iraq War lasted eight years and led countries in the region to support one side or the other based on their own security concerns: Saudi Arabia and Jordan, fearing Iranian revolutionary power, sided with Iraq, while Syria supported Iran out of concern over the rising power of neighboring Iraq. Israel also provided covert assistance to Iran since Iraq was perceived as a closer threat. Following Iraq's invasion of Kuwait in 1990, most Arab states sided against Iraq in the Gulf War, due in part to the urging of the United States and the United Nations, but also out of fear of an increase in Iraq's power, particularly following such clear-cut aggression against a smaller state. In addition there are a number of ongoing territorial disputes in the region (Nye 1997, 152-155).

The long-standing animosity between the Arabs, Palestinians, and Israelis is an ongoing source of tension and violence in the region. Rather than minimizing the conflict, peace talks have repeatedly failed to achieve their aim. Aggressive and militaristic regimes and leaders in Iran and Iraq, states with a history of disregarding international norms, have worked toward building a nuclear capability for a number of years. In addition, numerous terrorist groups operate in the Middle East and have strong ties to regimes in the region, such as those of Iraq and Libya. There is considerable concern over what such groups would do with a nuclear arsenal at their disposal. Finally, the presence of Israel as a nuclear state is a cause for concern among its Arab neighbors (Van Ham 1993, 59-60).

Undoubtedly the most advanced military technology in the region belongs to Israel, which is the only Middle Eastern state believed to have acquired nuclear capability, thus far. There is a strong belief throughout the world that Israel's nuclear arsenal consists of at least 200 weapons (Power 1995, 201). Nevertheless, Israel's use of these weapons is limited to some degree by its strong ties to the United States, from which much of Israel's technology comes, as well as a large amount of foreign aid annually. In addition, for at least the next several years, Israel will remain dependent upon U.S. early-warning systems for an alert against an incoming missile attack. It was largely due to urging from the United States that Israel did not attempt retaliatory strikes against Iraq for the Scud missile attacks on Israeli cities during the Gulf War (Inbar 1998).

Possession of nuclear weapons gives Israel the ultimate deterrent and, at least in the minds of Israelis, their best defense against any aggressive designs of its neighbors. From the realist standpoint, Israel's possession of nuclear weapons is understandable: it is a small state surrounded by a number of larger, antagonistic states, some of which seek to destroy the Israeli state altogether. A number of wars were fought between Israel and its Arab neighbors and there is a continual sense of apprehension in Israel over possible future threats, a mentality enhanced by the memory of the Holocaust. Part of the Israeli culture is now rooted in the conviction that nuclear weapons are vital to Israel's security and that no Arab nation should be allowed to possess a nuclear capability as they could threaten the very survival of Israel. The bombing of the Osiraq nuclear reactor was a demonstration of this latter conviction (Cohen 1998, 52-54; Feldman 1997, 104-105).

Although widely recognized as possessing nuclear weapons, Israel never publicly acknowledges such possession, following a policy referred to by Avner Cohen as "nuclear opacity" (1998, 51). This ambiguous nuclear policy serves Israel well by allowing the state's security to benefit in the face of its neighbors, and yet avoid the political and economic costs often incurred by states actively pursuing nuclear weapons. With regard to relations outside of the Middle East, Israel is able to largely avoid problems of international non-proliferation norms because the United States, a long-time ally, actively seeks to prevent the proliferation of nuclear weapons to other states in the region. Within the region, the purposeful ambiguity in Israel's nuclear policy has avoided actively encouraging any of its Arab neighbors to pursue a countervailing nuclear capability. Although Israel repeatedly insists that it would not be the first state to introduce nuclear weapons to the region, the inability of its neighbors to rule out the possibility of a retaliatory nuclear strike, even against a conventional weapons attack, undoubtedly tempers the actions and relations of a number of Arab states toward Israel (Feldman 1997, 96-98).

In addition to Israel, other states in the Middle East continue to pursue nuclear weapons of their own, particularly Iraq, Iran, and Libya, although the latter has scaled back its efforts in recent years. There is considerable international

concern over the motives of these states in seeking nuclear weapons due to their history of disregarding international norms, including suspected state-sponsored terrorism and ties to terrorist organizations. In addition, their largely authoritarian regimes and past aggressive behavior fuel the international community's commitment to prevent nuclear technology from proliferating to these states (Power 1995, 193). Although they cite self-protection, both against each other and against Israel, as a major reason for pursuing nuclear weapons, it is believed by many in the international community that these states do not seek such weapons primarily for defensive purposes. Rather, it is feared that nuclear weapons would serve more of an offensive purpose to threaten other states and assert themselves as the regional hegemon, as well as to extend their influence outside of the Middle East. These states are also considered more likely to be involved in the proliferation of nuclear technology to other countries. Subsequently, greater efforts—including economic sanctions, political pressure, and even the use of force—have been made by the international community, particularly the United States, to prevent these states from gaining a nuclear capability (Feldman 1997, 180).

With regard to Israel, a number of states in the Middle East perceive Israeli possession of nuclear weapons as destabilizing to the region and are concerned about the possible offensive use of such weapons or as a tool of political blackmail. In following with realist thought, a major motivation (or at least justification) for states such as Iran and Iraq to acquire nuclear weapons is to counter Israel's nuclear monopoly in the region and thus increase their own security. This mentality is further heightened by their perception of a discriminatory approach from much of the Western world that tolerates Israel's nuclearization while actively hindering similar pursuits by Arab states. In addition, these states are motivated by a desire to overthrow a sense of technological and cultural inferiority, particularly in light of Israel's technological accomplishments and efforts to maintain its nuclear monopoly in the region (Feldman 1997, 123-126).

The efforts by both Iran and Iraq to obtain nuclear weapons are propelled in part by each state's desire to assert itself as the region's hegemon, as well as by the fear of allowing the other to gain a military advantage. In light of such ambitions, particularly after Iraq's invasion of Kuwait, an Arab state gaining possession of nuclear weapons would alarm not only Israel, but also other Arab states and could trigger an accelerated regional arms race and increase the risk of such weapons being used (Feldman 1997, 135-138).

From the late 1980s through the early 1990s, Iranian leaders expressed interest in obtaining nuclear weapons in order to protect their state against Iraq and Israel. Concern over Iran increased due to factors such as the existence of a secret military research unit and the importation of questionable nuclear goods and dual-use items. Concern was further heightened by Iran's testing of a long-range missile in mid-1998. Some U.S. and Israeli sources have estimated that Iran could possess a nuclear-weapon capability within the next several years. Iran, however, holds that allegations about its alleged bomb-making intentions have been largely fabricated in an attempt to distract attention from Israel's bomb threat (Power 1995, 198-199).

In comparison with the attention given to Iran, the nuclear designs of Iraq are subject to an even greater amount of scrutiny. International weapon inspectors had made regular inspections of suspected Iraqi nuclear facilities since the end of the Gulf War in 1991 until 1998, when the operations were suspended. Looking back, it appears that the true extent of Iraq's nuclear program prior to the Gulf War was largely underestimated. Although Iraq would still have lacked the means to deliver the bomb, analysts now believe that when Iraq invaded Kuwait, the country was roughly two years away from producing an atom bomb with indigenous facilities. Although the allied bombings during the Gulf War and the subsequent weapon inspections set back the Iraqi nuclear program considerably, reports from weapon inspectors and Iraqi defectors lead many of the major powers and the United Nations to believe that Iraq is still on the nuclear path, prompting fear that Iraq could go nuclear after sanctions are lifted (Venter 1999, 45-50). This is a scenario that neither Iraq's Middle East neighbors nor the United States and its European allies want to face.

THE FUTURE OF PROLIFERATION

As an analysis of the dynamics of the Middle East can attest, there is no easy solution to the proliferation of nuclear weapons. As long as a self-help system exists, states will pursue policies they believe are best able to provide protection. Fortunately, there are a number of states that either do not have designs of acquiring a nuclear capability or are unlikely to have the resources necessary for such an undertaking in the foreseeable future. While not every country will pursue nuclear weapons, a number of states will see them as necessary, or at least desirable, particularly when a potentially hostile neighbor has a nuclear capability.

In reality, arguments for either complete disarmament or for universal proliferation are unrealistic. Due to the anarchic nature of the international system, which has only increased since the end of the Cold War, current nuclear states will be unwilling to risk compromising security by giving up all of their nuclear weapons. Coupled with the resources required for such an undertaking, particularly in the face of Russia's ongoing economic crisis, universal disarmament is not a viable option. Likewise, those who believe that universal proliferation would create a secure world are overly optimistic. The dangers inherent in an increasing number of nuclear states throughout the world are readily apparent in the risks posed by the tensions and dynamics present in the Middle East. Also, simple logic dictates that as the number of nuclear

weapons increases, so do opportunities for their use, whether by an accidental launch, premeditated planning, or terrorist attack. Such factors, particularly in the context of the post-Cold War world, make the possibility of a universal nuclear peace very unrealistic.

A more practical solution is to work on limiting the future proliferation of nuclear weapons and gradually reducing the number of nuclear armaments, although it is doubtful that the number will reach zero in the foreseeable future. Particular attention ought to be paid to prevent proliferation to states that would be more likely to use nuclear weapons for more than defensive purposes. One of the first steps is to reduce the self-help characteristics of the international system through confidence-building measures. Agreements for the non-use of nuclear weapons and nuclear weapon-free zones (NFZs), such as those established in Latin America and the South Pacific, are one possibility (Van Ham 1993, 90). Efforts must also be made to encourage responsible handling and guarding of nuclear weapons, as well as improved safety measures for those weapons already in existence.

In the Middle East greater efforts must be made to overcome the mutual distrust, long-standing disputes, and continued hostilities that characterize the region. Until some progress is made in lessening the tensions associated with these problems, including some concrete steps towards peace between the Arabs, Israelis, and Palestinians, any type of NFZ or arms-limiting agreement is unlikely to be realized, particularly given Israeli possession of nuclear weapons. Threats in the region could be reduced somewhat by measures to facilitate the peaceful resolution of conflicts and disputes, although even limited measures of this type will not be easily agreed upon.

The question of nuclear proliferation is one of great concern for the present and future of international relations. Although realists disagree about the benefits and risks associated with the presence of nuclear weapons, the potential costs associated with any use of nuclear weapons is extremely high. The end of the Cold War introduced a new international system and altered many of the conditions that allowed the Cold War to preserve a nuclear peace. Given the characteristics of the post-Cold War world, particularly as highlighted by the dynamics of the Middle East, proliferation remains a real threat and one that requires continued attention. The international community, as well as individual states, must take an active approach to discourage the proliferation of nuclear weapons and promote confidence-building measures and peaceful dispute resolution.

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The Constitutionality of Flag Burning: Hate or Free Speech? An Analysis of Texas v. Johnson

By Nicholas Barker

Ever since the Supreme Court handed down its 1989 ruling in Texas v. Johnson allowing desecration of the American flag as protected symbolic speech under the First Amendment, conservative forces in the United States have fought to pass a constitutional amendment that would make flag desecration a special category of speech subject to regulation by Congress. Arguments for and against a right to flag desecration made by the Supreme Court in the 5-4 Johnson decision and reactions to flag desecration will be discussed, with emphasis on legislators' and lobbyists' attempts to pass a flag protection amendment. General theories of free expression, in particular the work of philosopher John Stuart Mill and civil libertarian Alexander Meiklejohn, will show the necessity of supporting a right to flag desecration in a nation based on a concept of government by the people.

"A society that will trade a little liberty for a little order will lose both, and deserve neither."
- Thomas Jefferson, in a letter to James Madison

INTRODUCTION

Outside of the 1984 Republican National Convention in Dallas, surrounded by protesters chanting "America, the red, white and blue, we spit on you" (*Texas v. Johnson* 1989, 399), Gregory Johnson doused an American flag with kerosene and set fire to it in protest of the policies of President Ronald Reagan. After Johnson was arrested under a Texas statute protecting "venerated objects" (*Texas v. Johnson* 1989, footnote 1), Korean War veteran Dan Walker scooped up the fragments of the burned flag and respectfully buried them according to Army regulations. When asked for comment, Walker said, "I still do not know what they were protesting" (*Seattle Times* 1989, A1).

Thus began one of the most emotional First Amendment battles in our recent history, with most people angry at the disregard of the flag's special role in American culture. Indeed, values promoting Old Glory have been inculcated into American society ever since the founding of our country. For decades, school days were initiated by a harmony of voices repeating the Pledge of Allegiance, with attention focused on the Stars and Stripes. The sounds of thousands of people singing the Star Spangled Banner in unison at sporting events is as much a part of our national identity as barbecues and fireworks on the Fourth of July. Why then should we allow anyone to desecrate the banner that has contributed so much to our nation?

The simple answer is that the First Amendment says so. This paper will outline the development of a constitutionally protected right to burn the flag as protected symbolic speech, and show that in a politicized society such as the United States, unpopular expressions such as flag burning must and should be tolerated. I offer two reasons for this: 1) every opinion must have an opportunity to be expressed, so that through discussion of conflicting ideas people can come closer to comprehending the truth which these opinions purport to represent, and 2) free speech is a prerequisite to the principle of government by the people, because every member of society must be as informed as possible to enable the fullest citizen participation in government. However, we must first examine the courts' treatment of flag burning, which forms the constitutional justification for the arguments that follow.

THE ADJUDICATION OF *TEXAS V. JOHNSON*

The Texas State Court of Appeals upheld Johnson's conviction, provoking an appeal to the Texas Court of Criminal Appeals, where the law was struck down because of constitutional case law interpreting the First Amendment's guarantee

Nicholas Barker is a junior at the University of Utah majoring in Political Science and Economics. *Nicholas would like to thank: Natalie Noel, Daniel Levin, Dan Jones, Doug Wright, Ron Hrebenar, and everyone at the Hinckley Institute.*

of free speech. After this decision, the State of Texas took the case to the Supreme Court of the United States.

The Court announced its 5-4 decision in March 1989. Justice Brennan wrote the opinion, in which Marshall, Blackmun, Scalia, and Kennedy joined. Rehnquist wrote the dissent, in which White, O'Connor and Stevens joined. The majority upheld the Court of Appeals' decision that Johnson's act conveyed a message, and was therefore considered 'speech' under the First Amendment.

"Johnson was convicted of flag desecration for burning the flag rather than for uttering insulting words. This fact," wrote Justice William Brennan, "somewhat complicates our consideration of his conviction under the First Amendment. We must first determine whether Johnson's burning of the flag constituted expressive conduct, permitting him to invoke the First Amendment in challenging his conviction." In order to determine if Johnson's actions constituted "speech," the Court applied the symbolic speech test, formalized in *United States v. O'Brien*, stipulating that the conduct must have "intent to convey a particularized message," and that "the likelihood was great that the message would be understood by those who viewed it" (*Texas v. Johnson* 1989, 404).

In support of this, Brennan quotes *West Virginia Board of Education v. Barnette* (1943), that "symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality is a short cut from mind to mind" (*West Virginia Board of Education v. Barnette* 1943, 632; *Texas v. Johnson* 1989, 405). The Court concluded that flag burning was symbolic speech, much like "the expressive nature of students' wearing of black armbands to protest American military involvement in Vietnam" (*Texas v. Johnson* 1989, 404), upheld by the Court in *Tinker v. Des Moines Independent Community School District* (1969). In support of this, Johnson explained his reason for burning the flag: "The American Flag was burned as Ronald Reagan was being re-nominated as President. And a more powerful statement of symbolic speech…couldn't have been made at that time…we had new patriotism and no patriotism" (*Texas v. Johnson* 1989, 406). In these circumstances, Johnson's burning of the flag was conduct "sufficiently imbued with elements of communication" (*United States v. O'Brien* 1968, 409) to implicate the First and Fourteenth Amendments.

However, the *O'Brien* standard also stipulated that there may be restrictions on symbolic speech if there is a "sufficiently important governmental interest" unrelated to the suppression of free expression that would justify restricting First Amendment protection. Texas' argument for the important governmental interest was twofold: first, the prevention of breaches of the peace, and second, the preservation of the flag as a symbol of nationhood and national unity. The first point did not stand because Texas admitted in oral argument that "no actual breach of the peace occurred at the time of the flag burning or in response to the flag burning" (*Texas v. Johnson* 1989, 408). In regard to the second point, Texas' concern that "such conduct will lead people to believe either that the flag does not stand for nationhood and national unity, but instead reflects other, less positive concepts," only arises when "when a person's treatment of the flag communicates some message" (*Texas v. Johnson* 1989, 410). This, says Justice Brennan, relates the Texas law "to the suppression of free expression within the meaning of *O'Brien*," meaning that the *O'Brien* criteria for justifiably restricting expression are not met. Furthermore, "a government cannot mandate by fiat a feeling of unity in its citizens. Therefore, that very same government cannot carve out a symbol of unity and prescribe a set of approved messages to be associated with that symbol when it cannot mandate the status or feeling the symbol purports to represent" (*West Virginia Board of Education v. Barnette* 1943, 639; *Texas v. Johnson* 1989, 401). Therefore, Texas could not force the preservation of the flag as a national symbol.

Next, Brennan tackles the question of whether, regardless of *O'Brien*, Texas' interest in preserving the flag as a symbol of America justifies Johnson's conviction. It is noted that Johnson was prosecuted because he burned the flag in protest, not as a means of disposing of it because it was dirty or torn – which federal law designates as the preferred means of disposing of a flag unfit for display (36 U.S.C. 176k). Thus, the Texas law is "not aimed at protecting the physical integrity of the flag in all circumstances, but is designed instead to protect it only against impairments that would cause serious offense to others" (*Texas v. Johnson* 1989, 411), meaning prosecution depends on the intent of the person burning the flag. Brennan says this is irrational: "if we were to hold that a State may forbid flag burning wherever it is likely to endanger the flag's symbolic role, but allow it wherever burning a flag promotes that role…we would be saying that when it comes to impairing the flag's physical integrity, the flag itself may be used as a symbol…only in one direction." The effect would be to prescribe a set of orthodox messages to be associated with the flag. Moreover, in the words of *West Virginia Board of Education*, to sustain the Texas statute mandates "that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind" (*West Virginia Board of Education v. Barnette* 1943, 634). Concluding, Brennan says that "if there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable" (*Texas v. Johnson* 1989, 414).

This position was attacked by Chief Justice Rehnquist, who said that, "for more than 200 years, the American flag has occupied a unique position as the symbol of our Nation, a uniqueness that justifies a governmental prohibition against flag burning in the way respondent Johnson did here" (*Texas v. Johnson* 1989, 422). Amid stories and poems ranging from the Revolutionary War to Vietnam, Rehnquist built upon the historical significance of the flag as the primary reason for his opinion that flag desecration represents a special case that

deserves special exemption from the First Amendment. According to the Chief Justice, "the American flag… does not represent the views of any particular political party, and it does not represent any particular political philosophy. The flag is not simply another 'idea' or 'point of view' competing for recognition in the marketplace of ideas…Americans regard it with an almost mystical reverence regardless of what sort of social, political, or philosophical beliefs they may have" (*Texas v. Johnson* 1989, 429).

Furthering his argument, Rehnquist recalls from *Chaplinsky v. New Hampshire* (1942) that "the right of free speech is not absolute…the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words – those which by their very utterance inflict injury or tend to incite an immediate breach of the peace," are not meant to be protected by the First Amendment (*Chaplinsky v. New Hampshire* 1942, 571-572; *Texas v. Johnson* 1989, 430). Rehnquist also argues that a governmental prohibition would not stifle the ability to protest any aspect of America, because Johnson's protest of U.S. policy "conveyed nothing that could not have been conveyed…just as forcefully in a dozen different ways" (*Texas v. Johnson* 1989, 431).

Lastly, Rehnquist appeals to the civic sense of the public, arguing that "surely one of the high purposes of a democratic society is to legislate against conduct that is regarded as evil and profoundly offensive to the majority of people – whether it be murder, embezzlement, pollution, or flag burning" (*Texas v. Johnson* 1989, 435). His suggestion of legislation was realized soon after the Court announced Johnson's innocence.

THE RESPONSE TO *TEXAS V. JOHNSON*

Congress immediately responded with the Flag Protection Act of 1989, which criminalizes the conduct of anyone who "knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon" a United States flag, except conduct related to "the disposal of a flag when it has become worn or soiled" (*United States v. Eichman* 1990, 314). Just days after passage, the Act was struck down by the Supreme Court in *U.S. v. Eichman*, by a 5-4 vote (all Justices in *Eichman* voted the same as in *Johnson*), because "the Act…suffers from the same fundamental flaw" as the Texas law, "and for the reasons stated in Johnson…the Government's interest cannot justify its infringement on First Amendment rights" (*United States v. Eichman* 1990, 317-318).

Reacting to the judgment, the Citizen's Flag Alliance said, "Americans were outraged. Public opinion surveys showed three out of four Americans favored protection for the flag, and a similar number believed a constitutional amendment was needed to achieve that goal" (The Citizens Flag Alliance 2000). In 1995, certain members of Congress began pushing for an amendment, to provide that "the Congress shall have power to prohibit the physical desecration of the flag of the United States" (104th Congress 1995, H.J.Res.79). The House passed the resolution, 312-120 (roughly 72 percent), but it died in the Senate, where the 63-36 vote fell short of the necessary two-thirds vote. While Senate passage would still have required the approval of three-fourths of state legislatures to become law, forty-nine state legislatures had enacted proposals supporting a flag protection amendment (Mauro 1998, A16).

In the 105th Congress (1997-1998), the House approved the proposal 310-114 (roughly 73 percent), but the Senate never voted on it because preliminary tallies showed it would not pass. The amendment was proposed again in the 106th Congress (1999-2000), and for the third time, it failed to pass. In the House, the vote was 305-124 (roughly 71 percent), but in the Senate it garnered only 63 yeas, 4 short of the required two-thirds majority. Most recently, the amendment was brought up again in the 107th Congress, but as of publication had not been voted on.

The debate took on a social as well as a political character, when many activists lobbied in support of the amendment. Most notable of these was the Citizens' Flag Alliance, made up of "more than 135 organizations…with collective membership around 20 million" (The Citizens Flag Alliance 2000). President of the Alliance, Daniel Wheeler reports that, "in poll after poll, more than 80 percent believe the flag deserves protection" (Wheeler 1999c, A8), in contrast to numbers reported by the Gallup Poll, whose most recent survey (1999) shows 63 percent in favor (see Appendix 2). Regardless, Wheeler proclaims that "80 percent of Americans say the Court was wrong, that flag burning is not speech, it is hateful conduct" (Wheeler 1999b, A10). According to the opinions of many Americans who have editorialized their views on the issue, he may be correct. Says one amendment supporter, "any true American…would not resort to burning our precious flag…anyone burning our flag should be denied citizenship and expelled from American soil. They do not deserve to be a part of this American system" (Chiasson 2000, B8) Another concerned citizen has expressed that "the Constitution was given as a statement of liberty," and "was not intended to serve as a…hiding place for those who would destroy and undermine the structure which was provided at so great a price." Continuing, he says that if anyone "doesn't believe in the symbol of this country" they should "move to Iran, Russia or North Korea, where they won't see it flying" (Crane 1999, B10). Clearly, many private citizens vehemently resent flag burning, and this extends to national heroes. General Norman Schwarzkopf, leader of U.S. forces in Operation Desert Storm stated, "I regard legal protections for our flag as an absolute necessity and a matter of critical importance to our nation. The American flag, far from a mere symbol or a piece of cloth, is an embodiment of our hopes, freedoms and unity" (Justis 1999, E3).

Opponents of the amendment voice their opinions just as strongly, though perhaps not as fanatically. Representative Gary Ackerman (D-New York) believes, "if a jerk burns a flag, America is not threatened. If a jerk burns a flag, democracy is not under siege. If a jerk burns a flag, freedom is not at risk and

we are not threatened. My colleagues, we are offended; and to change our Constitution because someone offends us is, in itself, unconscionable" (AllPolitics 1999, 1). This argument seems reasonable given that only eight flag burnings have been reported yearly for the entire United States since the decision in *Johnson* (O'Connor and Sabato 2000, 167). Other citizens have expressed contempt for the amendment because they consider flag burning a victimless crime. Says one man, "if I strike someone, I risk inflicting real harm. However, if I destroy a piece of my own property, even an American flag, I hurt no one." He continues, saying "once we attempt to regulate the 'offensive,' we've made the transition from political correctness to thought control" (O'Connor 1999, A14). Another says, "I do not like flag burning, but why give more recognition to those who do it? … Does 'the problem' need to be raised to a constitutional level? Or, is public outrage enough?" (Mackley 2000, A10).

National heroes also come down against the amendment – former senator, astronaut and Marine, John Glenn has said "it would indeed be a hollow victory to protect the symbol by taking any chance at chipping away at the freedoms themselves" (AllPolitics 1999), maintaining that "those who have made the ultimate sacrifice did not give up their lives for a red, white and blue piece of cloth" but rather "because of their allegiance to the values, the rights and principles represented by that flag" (Goldstein 2000, 236). Retired general Colin Powell echoed this sentiment in a letter to the Senate Judiciary Committee saying that while he was "rightfully outraged" by flag desecration, it did not damage "our system of freedom," whose First Amendment applies protection "not just to that with which we agree or disagree, but also that which we find outrageous. I would not amend that great shield of democracy to hammer a few miscreants" (Goldstein 2000, 239).

These conflicting opinions do not resolve the debate, but they do show that flag burning is a complex issue with many people, both public and private, supporting many different arguments. The most accurate way to test public support for the amendment is to conduct opinion polls. Five surveys published by the Gallup organization, conducted from 1989 to 1999 show amendment support ranging from 62 percent to 71 percent in favor, and 24 percent to 36 percent opposed (see Appendix 2). Perhaps the most cited number is the "80 percent support" frequently mentioned by members of the Citizens' Flag Alliance, who have conducted nearly 30 polls of their own. However, the only well-documented poll published by the Alliance was a 1998 Gallup Poll they commissioned, which "found 76 percent of respondents favor the amendment" (Taylor 1999). This number has been challenged by a Freedom Forum survey conducted in July 1999 that found only "51 percent favored a constitutional amendment to protect the American flag from desecration" (Elvin 2000, 34). Says Elliot Mincberg, legal director for People for the American Way, "this survey further reinforces the notion that the alleged support may be a mile wide, but it's only an inch deep," because "once you get out the specifics of the amendment and what it will do…support drops way down" (Taylor 1999). However, Flag Alliance President Daniel Wheeler has attacked this survey as inaccurate due to its informing respondents before questioning that "the passage of a flag amendment would mark the first time in the nation's history that the Constitution had been amended to restrict freedoms guaranteed by the First Amendment" (Taylor 1999).

The question remains: do these specific, one-issue surveys tell the truth about public sentiment? Robert Goldstein of Michigan's Oakland University says no: "the public as a whole has completely lost interest in this issue. The public is not in fear for their lives because of these flag-burners" (Taylor 1999). He continues, "when pollsters ask Americans about the most important issues, fewer than 1 percent of respondents mention flag desecration," which is insignificant, because "if they are really concerned about something, they will spontaneously respond to an open-ended question" (Taylor 1999). There have been other signs that concern about the issue is low: in Indianapolis (home of the Citizen's Flag Alliance and the American Legion) on Flag Day, 1999, only 150 people showed up at a celebration to "retire" a flag with a ceremonial burning, and support the flag desecration amendment (Goldstein 2000, 241).

Regardless of whose numbers are correct, the debate over the amendment will continue. Will lawmakers propose it again, and if so, will it pass? Or is it more appropriate to ask, should it pass? This question invites a normative response that reflects one's individual values and beliefs.

FLAG BURNING THROUGH A LIBERAL DEMOCRATIC LENS

Two documents that best reflect American attitudes toward freedom, the Declaration of Independence and the United States Constitution, both derive their substance from liberal democratic theory. Preservation of individual dignity and a limited government where the majority rules while protecting minority rights are basic tenets of American government. Just as Thomas Jefferson believed that governments derive their just powers from the consent of the governed, so too does our national identity derive its meaning and value from the collective opinion, the outcome of millions of individual opinions. In expressing an individual opinion, every person has worth in the marketplace of ideas, and this ability to participate in meaningful discourse is the cornerstone of the First Amendment's guarantee of freedom of speech.

Most would take it as given that free speech is important, given the legal protection afforded to it by the First Amendment. But the question remains to be answered, why is freedom of speech important? Drawing upon two-hundred plus years of constitutional law and political theory, I offer two main answers: the first lies in the role of free speech as a means of finding truth, and therefore making advances and solving problems. The second answer, in line with the intent of this nation's founders, proposes that free speech is a necessary precondition for an informed citizenry that must make

critical decisions at the ballot box to guide government in the direction they see fit, and therefore perform their role in the social compact that is the United States of America. I draw support for the first answer from the work of philosopher John Stuart Mill and its applications to the conclusions of the Court in *Johnson*. In regards to the second, the case law on free speech, and its interpretations by civil libertarian Alexander Meiklejohn demonstrate the essential role free speech plays in the fulfillment of civic participation under the U.S. Constitution.

Regarding the first answer, the search for truth requires an environment that tolerates and welcomes dissent. Mill notes that "the will of the people…practically means…the majority," and that "these people…may desire to oppress a part of their number; and precautions are as much needed against this, as against any other abuse of power" (Mill 1978, 4). This forms the basis for the idea of majority rule with minority rights, that government cannot coerce people to accept one view. Mill continues by saying that the public good "authorizes the subjection of individual spontaneity to external control, only in respect to those actions of each, which concern the interest of other people" (Mill 1978, 10). By saying this, Mill sets up a dichotomy in the realm of speech: because the goal of society is to maximize utility, the majority can curtail any speech that harms other people (regarding the Johnson case, the flag was stolen, and there was some destruction of property such as overturning potted plants, in which case charging the violators with theft or vandalism would be an appropriate course of action). With regards to the propensity of speech to cause harm, the Supreme Court's ruling in *Brandenburg v. Ohio* (1969) provides the proper rule: "[The Court's] decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action" (*Brandenburg v. Ohio* 1969, 447). Otherwise, the individual can engage in any opinions they wish. The Court reflects this idea in its analysis of whether Johnson's act was "a breach of the peace," in which case, harm would have been done to others. Since it was not, Mill would argue that the Court not uphold the conviction.

Furthermore, the Court ruled against Texas' argument that they could arrest Johnson to "preserve the flag as a symbol of national unity," justifying Mill's idea that "there needs protection against the tyranny of the prevailing opinion and feeling; against the tendency of society to impose…its own ideas and practices as rules of conduct on those who dissent from them" (Mill 1978, 4). This is crucial because society may not "fetter the development…of any individuality not in harmony with its ways, and compel all characters to fashion themselves upon the model of its own" (Mill 1978, 5).

Opponents of flag burning would criticize this, arguing that within a democracy, if the majority of the people want a ban, then that should become the law. However, "those who have been in advance of society in thought and feeling…have occupied themselves…in inquiring what things society ought to like or dislike, rather than in questioning whether its likings or dislikings should be a law to individuals" (Mill 1978, 7). The principle of individual rights, and therefore minority rights means "that the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others" (Mill 1978, 9).

Finally, Mill explains why freedom of opinion is so important to the exposition of truth: every opinion has intrinsic value, and is meaningful in and of itself.

> If all mankind minus one, were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind…the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it (Mill 1978, 16).

The only way we can move towards discovering truth is to constantly temper widely regarded ideas by exposing them to disagreement, and to let the best idea win. It is important to keep dissent alive for the good of humanity, because "however unwillingly a person who has a strong opinion may admit the possibility that his opinion may be false, he ought to be moved by the consideration that however true it may be, if it is not fully, frequently, and fearlessly discussed, it will be held as a dead dogma, not a living truth" (Mill 1978, 34). In the end, the exposition of truth culminating in the fulfillment of human potential is the motivation for Mill's emphasis on the necessity of dissent and free discussion of ideas.

Regarding American society, Alexander Meiklejohn argues that "no one can deny that the winning of the truth is important for the purposes of self-government. But that is not our deepest need…If men are to be their own rulers…whatever truth may become available shall be placed at the disposal of all the citizens of the community" (Meiklejohn 1948, 88). Although finding truth is important, the First Amendment's primary role "is a device for the sharing of whatever truth has been won. Its purpose is to give to every voting member of the body politic the fullest possible participation in the understanding of those problems with which the citizens of a self-governing society must deal" (Meiklejohn 1948, 88). This supports my second contention, that unabridged free speech is vital to fulfill the Constitution's principle of self-government.

The crucial role voting plays in self-governance provides the basis for an unalienable right to free speech. While Mill's development of truth hinges on the right of the speaker to express opinion, Meiklejohn's argument goes further by asserting the necessity of the public to hear and evaluate those opinions. "When a free man is voting, it is not enough that the truth is known by…some scholar or administrator or legislator. The voters must have it, all of them" (Meiklejohn

1948, 88). Citizens cannot govern themselves based on flawed information, because this allows biased outcomes that make them subservient to those people whose opinions dominate the public sphere. This is unacceptable, given that "under the compact upon which the Constitution rests, it is agreed that men shall not be governed by others," but "that they shall govern themselves" (Meiklejohn 1948, 89). This constitutional obligation provides for the public that "no idea, no opinion, no doubt, no belief, no counterbelief, no relevant information, may be kept from them" (Meiklejohn 1948, 89). Only by considering all opinions when making decisions on electoral and public policy matters can we be assured that American government is operating at its fullest potential, and that the Constitution's pronouncement of popular sovereignty is being realized. In this line of reasoning, Justice Brennan's assertion that "the flag's deservedly cherished place in our community will be strengthened, not weakened, by our holding" (*Texas v. Johnson* 1989, 419) is correct: the flag as the symbol of the American system can only be strengthened by a decision that protects the public's obligation to keep that system working through the process of self government.

For Meiklejohn, "the essential point is that we are pledged together to create a society in which men shall have the status of governors of themselves." We must move as a body critical of its own elements, but not hostile towards them: "not with bayonets behind, but purposes ahead. And if we fail in that…without regret, without scruple, we have abandoned the Constitution" (Meiklejohn 1948, 82). What then, is the best way for American society to make progress? "We must accept and applaud the assertion that the Constitution is an experiment," in which our plan of government, being based on imperfect knowledge, "must be forever open to amendment, forever on trial," with no one knowing "how slow or how quick, how superficial or how radical, those changes will be" (Meiklejohn 1948, 85). One might argue that this justifies a constitutional amendment to prohibit flag desecration, as a perfectly legitimate "evolution" of the Constitution. The point, however, is this: to single out and ban one form of expression forever stifles development of the Constitution in the area of free speech. We the people would cease to have sovereignty over ourselves in that area, antithetical to the proclamation of self-governance contained in the Constitution.

The solution lies in the free exchange of ideas, what Justice Oliver Wendell Holmes first termed 'the marketplace of ideas.' This principle tells us that the only truth we can rely on "is that which we win for ourselves in the give and take of public discussion" (Meiklejohn 1948, 86). Even if Chief Justice Rehnquist believes that Johnson's act "was no essential part of any exposition of ideas" (*Texas v. Johnson* 1989, 430), the chance that in witnessing the act one might be compelled to reconsider her or his beliefs, possibly resulting in a shift of opinion, means that a display of opinion such as Johnson's may not be prohibited. In the marketplace of ideas, "unwise ideas must have a hearing as well as wise ones…un-American as well as American," and these ideas "may be expressed, must be expressed, not because they are valid, but because they are relevant" (Meiklejohn 1948, 26-7). If anyone seriously entertains these ideas, we the voters need to hear them, for "to be afraid of ideas, any idea, is to be unfit for self-government" (Meiklejohn 1948, 27).

Conclusion

The Court made it clear in *Texas v. Johnson* that the Constitution allows flag burning as an acceptable form of symbolic speech. Although some in Congress believe that they are justified in changing the Constitution to fit their beliefs, I disagree. Proposing any amendment to the Constitution, even one to prohibit flag desecration, may be legitimate: but by any standard which values freedom, tolerance, diversity, limited government, truth, the fulfillment of human potential, government by the people, the notion of "banning any type of free speech that does not cause imminent harm" is unintelligible. I have shown that a ban on flag desecration would not be in accord with a liberal-democratic approach to civil liberties. The application of Mill's analysis shows that banning flag desecration conceals the truth by circumscribing what we can discuss, and concerning symbolic speech, how we can discuss it. Meiklejohn's arguments demonstrate that if we are to govern ourselves, we must not only tolerate but also embrace the opinions of others, for only in having a more complete understanding of the truth can we be effective in politics. Given all this, it seems obvious that Americans should tolerate flag burning as a form of free expression.

In addition, arguments supporting a right to desecrate the American flag find their basis in logic and sound legal theory, whereas arguments supporting a ban on flag desecration usually rest on appeals to emotion and unbridled patriotism, and are for the most part devoid of reason or legal justification. After his recent introduction of the flag amendment, Utah Senator Orrin Hatch supported his position, saying "it is time for us to make unequivocally clear that certain behavior in the country is and should be recognized as wrong and punishable by law" (Salt Lake Tribune 1999, A1). Let us examine this statement: Senator Hatch believes flag desecration is "wrong," a normative opinion without bearing on whether it should be regarded as legal or illegal, a question which was settled in *Texas v. Johnson*. He continues: "by passing the flag protection constitutional amendment, we will reaffirm the very basis of the Constitution" (Salt Lake Tribune 2001, A1). My response to this is, "how so?" Nowhere in the Constitution are the American flag or restrictions on free speech mentioned, and therefore there is no basis in the Constitution for banning flag desecration.

Consider arguments by Major General Patrick Brady, chairman of the board of directors of the Citizen's Flag

Alliance: he says that flag burning "teaches that…the courts, not the people, own the Constitution" (U.S. Newswire 2001). I realize that every citizen of the United States has a stake in the system of government outlined by the Constitution, but that same document explicitly outlines that "the judicial power shall extend to all cases, in law and equity, arising under this Constitution" (U.S. Constitution, Article III, Section 2), a grant which has been interpreted for 200 years to mean that the Supreme Court is the ultimate interpreter of constitutional meaning. Thus, Brady's argument is without merit: if he purports to defend the Constitution, he should recognize the right of the courts to interpret it.

He also states that those who call flag burning 'speech' "demean the First Amendment and the Bill of Rights and threaten the very foundation of our Constitution as defined by our founders" (U.S. Newswire 2001). Perhaps if the founders had intended there to be a limitation on flag desecration, they would have written one in themselves. Brady's argument is without merit, and is at best an opinion. Furthermore, how does flag desecration threaten "the very foundation of our Constitution?" There is not a shred of logic or justification behind this statement.

Finally, Brady appeals to the public's emotions and sense of patriotism: "our flag ignited a fire in the hearts of our patriots. Burning the flag will put that fire out" (U.S. Newswire 2001). This argument is nothing but abstraction, with no basis in reality. Metaphors and figurative speech may make for good sound bytes, but they cannot form the basis for jurisprudence, especially in an area of law so vital as First Amendment free expression.

Still, opponents of flag burning have just as much right to their opinion as do flag burners. But what they must realize is that instead of subverting the intent of the Constitution and desecrating free speech rights with an amendment, there is an alternative that consecrates the First Amendment and ensures that the intent of the framers remains intact. Justice Louis Brandeis put it best when he said that as long as we have "confidence in the power of free and fearless reasoning applied through the processes of popular government" (Meiklejohn 1948, 53), we have nothing to fear from opinions we disagree with, for "if there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence" (Meiklejohn 1948, 53). Rather than clinging to misguided notions that the government can legislate respect for the flag with an amendment, those who revile flag desecration should instead try to convince the few flag burners to reconsider their position on the issue.

The question is this: what is more important, the symbol of our freedom, or the freedom itself? The rights of free expression embodied in the First Amendment are likely the most important that we possess, because they open the door to innumerable other freedoms that we enjoy as Americans. Regardless of one's individual position on whether the act of flag desecration is right or wrong, the right to do so is necessary and should be welcomed as a symbol of the United States' absolute commitment to the importance of free expression. For as long as we can publicly discuss ideas, we are better equipped to find truth and govern ourselves effectively. Essentially, "the unabridged freedom of public discussion is the rock on which our government stands. With that foundation beneath us, we shall not flinch in the face of any danger" (Meiklejohn 1948, 91). The desirability of free expression is superceded only by its necessity: only through understanding the essential role free speech plays in ensuring a just order can we truly take advantage of the freedom we possess and fulfill our potential as a society.

APPENDIX 1: CONGRESSIONAL VOTES ON THE FLAG BURNING AMENDMENT

	1st Attempt at Amendment: 104th Congress				
House:	Yea: 312	Nay: 120	72%	H.J.Res.79.	6/28/95
Senate:	Yea: 63	Nay: 36	63%	S.J.Res.31.	12/12/95
	2nd Attempt at Amendment: 105th Congress				
House:	Yea: 310	Nay: 114	73%	H.J.Res.54.	6/12/97
Senate:	Not brought to floor for vote		N/A	S.J.Res.40.	2/4/98
	3rd Attempt at Amendment: 106th Congress				
House:	Yea: 305	Nay: 124	71%	H.J.Res.33.	6/24/99
Senate:	Yea: 63	Nay: 37	63%	S.J.Res.14.	3/29/00

APPENDIX 2: GALLUP POLLS OF PUBLIC SUPPORT FOR THE FLAG BURNING AMENDMENT

Date:	Favor:	Oppose:	No Opinion:
June 1989*	71%	24%	5%
October 1989**	65%	31%	4%
June 1990*	68%	27%	5%
7-9 July 1995***	62%	36%	2%
25-27 June 1999***	63%	35%	2%

* Question wording: "Do you think we should pass a constitutional amendment to make flag burning illegal, or not?"

** Question wording: "Do you favor or oppose a constitutional amendment that would allow federal and state governments to make flag burning illegal?"

*** Question wording: "Do you favor or oppose a constitutional amendment that would allow Congress and state governments to make it illegal to burn the American flag?"

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Campaign Finance Reform

By David A. Owen

This essay provides an overview of the current federal laws and regulations governing the financing of federal campaigns and suggests areas of possible reform. The discussion centers on funds raised and spent by candidates, as well as monies raised by parties and other independent groups and organizations, in their efforts to affect the outcome of elections for federal offices. Included is an overview of the major areas in which reforms are being pursued and the possible effects of these reforms on the federal campaign finance system.

INTRODUCTION

It doesn't take a high-paid pollster, or a top-notch political consultant to make the observation that by and large in recent years the American public has become increasingly detached from politics, and their confidence in the system by which we elect politicians is waning. A simple look at voter turnout numbers for the four most recent national election cycles (National Voter Turnout in Federal Elections: 1960-1996 n.d., 1) will illustrate that more and more Americans are interested less and less about politics and what takes place in our nation's capital.

This increased apathy towards our political process can be attributed to many factors. Some scholars argue that because our economy is doing so well, average Americans have less of a need to rely on politics to solve pressing issues in their lives. However, many others point to an increasing lack of trust in not only politicians (something that has been present ever since the invention of our political process) but also in the system by which they come to power. It is the contention of this paper that our current system of financing federal campaigns through the use of soft money and other loopholes has eroded public confidence in the process of electing leaders for our nation and that only through valid and proactive reform measures can we begin to undo this damage. I will begin by examining how changes in campaign financing led to the phenomenon of so called "soft-money" or non-federal contributions to party committees. I will also discuss another loophole referred to as the independent expenditure law.

David Owen received a Bachelor of Science in Political Science from the University of Utah. David worked for Senator Robert Kerry of Massachusetts and Utah Congressman Jim Matheson. He has plans to attend law school.

Table 1
'Soft Money' Growth

	Republicans	Democrats	
1992	$49.8	$36.3	(Millions)
1994	$52.5	$49.1	
1996	$141.2	$122.3	
1998	$131.0	$91.5	
2000	$244.4	$243.1	

Source: Federal Election Commission reports

SOFT MONEY

> The concept of soft money was developed in 1978 by a Federal Elections Commission ruling, but was not used to any great degree until the 1988 presidential campaign. Since that time, solicitations and donations have grown exponentially, especially during the last few election cycles. In recent years, soft money has been used to buy TV ads that are virtually indistinguishable from ads promoting a candidate (Hope 1999, 2).

The explosive growth in soft money can be seen in Table 1. While soft money was limited to $86 million in 1992, by 1996 Republicans and Democrats raised $263.5 million. The deluge continued in 2000, as both parties raised $487 million, nearly double the sums gathered in 1996.

"Soft money" is unregulated money donated to political parties, ostensibly for party building activities such as voter registration drives, as opposed to the highly regulated donations to specific candidates for federal offices. More specifically, soft money consists of donations to national and state party committees (i.e. the Democratic National Committee, Republican National Congressional Committee etc.) that is used for non-candidate party activities ranging from such things as generic get-out-the-vote drives to performing voter registration and voter identification initiatives. In addition to these "party building" activities, one of the most common and expensive uses for soft dollars is in airing issue advocacy advertisements on television and radio. These are political advertisements which do not specifically advocate the victo-

ry or defeat of any one candidate but rather attempt to "educate" the public about a specific issue. We will return to the topic of issue advocacy later in this paper, as it is at the center of the "soft money" reform debate.

Table 2
Federal Contribution Limits

Contribution	By a Person	By a Political Action Committee
To a candidate	$1,000 per election	$5,000 per election
To a political party (national committee)	$20,000 per election	$15,000 per year
To a political action committee	$5,000 per year	$5,000 per year
Overall limit	$25,000	No limit

Source: Ronald J. Hrebenar, Matthew J. Burbank, and Robert C. Benedict. Political Parties, Interest Groups, and Political Campaigns. Boulder, CO: Westview Press. 1999. p.136

The term "soft money" came about in response to the stringent limits placed by the Federal Elections Commission (FEC) on the amounts individuals, political action committees, labor unions, and corporations may contribute directly to federal candidates (commonly referred to as "hard money). Table 2 summarizes current FEC rules. An individual may contribute a maximum of $1,000 per cycle, which includes both the primary and general election, thus amounting to a total of $2,000 per election. However, individuals are prohibited from contributing an aggregate in excess of $25,000 per cycle unless it is to their own campaign in which case they can contribute an unlimited amount. Political Action Committees (PACs) that qualify as multi-candidate (meaning they meet certain heightened restrictions based on how many people contribute to them as well as how many candidates they contribute to) are able to donate up to $5,000 per cycle or a total of $10,000 an election to a federal candidate (Ortiz 1998, 64).

While it may come as somewhat of a surprise to most people who are unfamiliar with the specifics of campaign fund-raising laws, current Federal Elections Commission rules prohibit corporations from making direct donations to candidates for federal offices. The basis for our current system of campaign financing laws is the Federal Election Campaign Act (FECA) of 1974 which, among other things, created the Federal Elections Commission to regulate fund-raising activities by federal candidates. While this law specifically prohibited corporate contributions to candidates for federal offices, it contained one very important loophole which opened the door some 4 years later to the rise of "soft money": FECA prohibited any non-individual contributions to federal candidates and/or parties with the exception of donations to party apparatuses for the purposes of "party building" activities, as was mentioned above (Corrado 1999, 175). This alone, however, did not authorize unlimited contributions from corporations, unions, or individuals to national parties. The FEC in 1978, in a case involving the Republican Party of Kansas, reversed a previous decision and ruled that parties could use soft (or non-federal) funds to finance a share of their voter drives, so long as they allocated their costs to reflect the federal and nonfederal shares of any costs incurred. "The decision thus opened the door to the use of nonfederal money on election-related activity conducted in connection with a federal election" (Corrado 1999, 172).

Following the FEC's ruling in the case of the Kansas Republican Party, what constituted financing "party building" activities was interpreted on the basis of state campaign finance laws, which differed from state to state. In addition, campaign financing laws on the state level are notoriously more lax than on the federal level. For instance, under current Utah state code, not only are there no limits on the amount of contributions individuals may make to candidates for state offices, but there are also no prohibitions restricting corporate or labor contributions either. Utah has arguably the most relaxed campaign finance laws of any state in the nation. That being said, as of 1978, federal parties were allowed to pour soft "non-federal" dollars into the non-federal coffers of individual state parties, to be used according to state laws regarding campaign financing (which generally were very loose or, in some cases, non-existent). In fact, to date, the only federal laws on the books with regards to the practice of national party committees raising unlimited amounts of "soft money" were established after an arduous rule-making process in 1990 that,

> Included considerable consultation with political party lawyers and accountants. Under these rules, all party committees raising and spending soft money in conjunction with federal elections must file regular disclosure reports of their contributions and disbursements with the FEC. These reports must identify any contributors who give more than $200 to soft money accounts or party building-fund accounts. Monies raised and spent by state and local committees that are unrelated to federal election activity, however, do not have to be reported to the FEC. These funds remain subject to the reporting requirements of applicable state disclosure laws (Corrado 1999, 174-75).

Given the availability of virtually unlimited "non-federal" campaign dollars following the 1990 law, the major parties began raking in previously unseen and unbelievable amounts of soft dollars. The figures in Table 1 raise one essential question: where does all the money go? The answer is quite simple, and surprising. Flashback to the summer of 1996. President Clinton was running for reelection amid growing concerns about his personal life, his record on the economy, and on the heels of the massive Republican landslide in the 1994 midterm Congressional elections which switched control of Congress to the GOP for the first time in decades. Enter soft money, and loads of it. The Democratic National Committee spent millions of dollars of "non-federal" money promoting the "issue agenda" of the Democratic Party as well

as touting many of the legislative victories of the Clinton White House, without actually mentioning or advocating the victory of President Clinton. There was just one catch: these so-called issue advertisements featured, as a commentator, none other then President Clinton. At no time during these advertisements did the President mention his own campaign or urge voters to consider him at the ballot box on election day. Despite this, the clear message to voters was that President Clinton was on television talking about the legislative victories he had won while in office. Under current Federal Elections Commission laws, this type of "issue advertisement" is completely legal and totally unregulated. In response to these advertisements, the Republican National Committee unleashed a barrage of ads featuring their own presidential candidate Bob Dole attacking popular Democratic Party and Clinton Administration positions on issues.

In response to the ballooning phenomenon of soft money, many members of Congress have called for some kind of reform. Two such members of the House of Representatives, Representative Christopher Shays (R-Conn.) and Representative Martin Meehan (D-Mass.) recently drafted a sweeping reform bill which, among other things, sought to ban the use of soft money by all federal and local parties. House Resolution 417 (referred to as the Shays-Meehan Bipartisan Campaign Finance Reform Act of 1999) would ban national party committees, including the political parties' national congressional campaign committees, from soliciting, receiving, directing, or spending soft money. In the fall of 1999, the Bipartisan Campaign Finance Reform Act (BCFRA) narrowly passed the House of Representatives and failed in the Senate by a razor thin margin. The bill attacks issue advocacy by defining "express advocacy" (i.e. advertisements specifically advocating the failure or victory of a given candidate and hence subject to regulation) as anything "using wording (phrases etc.) that could only be construed as specifically favoring a particular candidate, referring to a specific candidate in paid advertising within 60 days of the election, or expressing unmistakable, unambiguous support for or opposition to one or more clearly identified candidates" (Hope 1999, 5-6).

This bill, by far the most comprehensive and successful attempt at true campaign finance reform since the passage of the Federal Election Campaign Act in 1974, brings up several important legal issues with reference to the constitutionality of placing restrictions on political contributions. Opponents of Shays-Meehan claim that at its best, the bill is grossly unfair and at worst, unconstitutional. Much of the opposition stems from the provision of the bill which seeks to ban "sham issue ads" (Keller 1999a). Detractors say that such language is a gross restriction on groups' first amendment rights to communicate their opinions on specific issues of concern to the public and to their supporters. Opponents of Shays-Meehan to claiming that several Supreme Court landmark cases concerning campaign funding and the First Amendment right to free speech have emphatically held that all types of speech not specifically defined as "express advocacy" in campaigns are protected from restriction or regulation by the government.

Perhaps the most credible argument of Congressional Republicans working to defeat the Senate companion bill to Shays-Meehan, the McCain-Feingold Bill, named after Senator John McCain (R-AZ) and Senator Russ Feingold (D-WI) is that a ban on soft-money would be tantamount to unilateral Republican disarmament (Keller 1999b). This argument maintains that the Republicans advantage on soft-money fund-raising is balanced out by the labor unions' overwhelming volunteer, organizational, and financial support afforded many Democratic campaigns. Therefore, opponents of Shays-Meehan assert, without a valid attempt on the part of the government to regulate the ability of organized labor to draw campaign hard-dollars from members as well as advocate specific candidates' victories, a ban on soft money would unfairly harm the Republican Party's ability to get its message out.

Concerning the question of the constitutionality of restricting "non-express advocacy," the Shays-Meehan Bill clarifies the definition of express advocacy in simple terms: if it walks and talks like an "express advocacy" advertisement, it is one and should therefore be regulated under the umbrella of federal laws which govern all other campaign expenditures.

Shays-Meehan provides a solid base for reform by not simply shifting the soft money raising apparatus to state parties, as the Republican Party's reform plan would do, but by banning the use of "non-federal" dollars across the board, with specific exceptions on the state level for very clearly defined party building activities not relating to the election or defeat of any federal candidate (Van Natta 1999). The Shays-Meehan legislation closes the floodgates of unlimited, unregulated, and unaccounted for corporate and individual cash that flows right past federal elections regulations and into federal races. By forbidding national party committees from accepting, spending, or even directing the flow of soft money, this legislation deals a decisive blow to the wealthy and powerful special interests which have for so long eroded the public's confidence in their elected leaders.

Despite the obvious logic and overwhelming public support for meaningful campaign finance reform, its future is not by any means assured. In the fall of 1999, the Senate barely filibustered a mirror version of the Shays-Meehan legislation. Senator Mitch McConnell (R-Ky), known to some as "Darth Vader" because of his defiance to any campaign finance reform legislation, led the battle against the McCain-Feingold measure. McCain-Feingold called for a complete and immediate ban on soft-money dealings by national party committees, but did not address the topic of "issue advertisements" as a concession to conservative Republicans bent on defeating any measure for reform. While McCain-Feingold ultimately perished in the Senate in the wake of a filibuster, it did manage to gain a bipartisan majority of support, just 6 votes shy of

the 60 needed to end a filibuster according to Senate rules.

A more important obstacle for reform than the minutiae of Senate rules is the Republican leadership's ardent opposition to any type of soft money regulation. The Republicans have long enjoyed a significant fund-raising advantage, given their generally more pro-business and lower tax policies that appeal to wealthy constituencies with plenty of money to donate. The proliferation of soft money has only exacerbated the inequity in fundraising between the two parties, and the Republican leadership in Congress is not about to give up that distinct advantage. As long as Republicans retain congressional control, their deeply entrenched opposition all but guarantees the failure of meaningful campaign finance reform.

The only meaningful solution to the infiltration of American politics by enormous sums of corporate, individual, and organized labor's money is to ban its use in federal electoral politics, which is congruent with the original intent of the Federal Elections Campaign Act of 1974. For the past 10 years, citizens' voices have become less and less important while interests such as, major corporations with nearly unlimited sources of money were given front row seats to every step of the policy formulation process in Washington. The clear and simple solution to the problem of unregulated soft money, is to remove the tumor of unrestricted non-federal money from federal campaigns and restrict independent issue advocacy in the same fashion as candidate advertisements. This is the first step in cleaning up America's battered political system. The Bipartisan Campaign Finance Reform Act (BCFRA) seeks not only to ban unregulated soft-money contributions from federal elections, but it also seeks to modernize the system. The other reform proposals involved in BCFRA will be addressed in the following section.

Reforming and Modernizing the Federal Election Campaign Act of 1971

The original Federal Election Campaign Act of 1971 laid out the basic rules and regulations by which federal campaigns have been run in the United States ever since. However, many inside and outside the system have argued that the current set of rules (with contribution limits that have not been altered in decades) is in need of certain forms of modernization. Several bills have been introduced in Congress recently to address the issue of updating the contribution limits and even abolishing them. In this section I will offer a brief overview of existing federal campaign finance laws and proposed efforts to reform them.

FECA laid the groundwork for our modern system of campaign regulations. Under FECA, as was mentioned in the last section, contributions to candidates and candidate committees for federal offices are strictly limited to individuals, or groups that represent contributions made by individuals. Under current law, as established in FECA 1971, individuals are limited to contributing $1,000 dollars per election cycle (both the primary and general cycles being considered separately) with a maximum of $25,000 in aggregate hard-dollar contributions per annum. The Bipartisan Campaign Finance Reform Act of 1999 (BCFRA) proposed amending those limits to compensate for inflation, and the loss of soft money. BCFRA would raise the yearly aggregate total an individual could contribute to $30,000.

Also, under current Federal Election Commission guidelines, an individual can only contribute a maximum of $20,000 to a national party or state party's federal account. (FEC Laws, 439a) The BCFRA would lower that limit, in the aggregate, to $10,000. The BCFRA also proposes significant reform in the area of reporting requirements.

Under current Federal Election Commission regulations, federal campaigns are required to report total amounts of monies raised and spent as well as individually itemize all contributions received that exceed, in the aggregate, $200 per calendar year. Further, campaigns for federal office are required to make the "best effort" possible to identify the occupation and employer of all persons whose contributions must be itemized (i.e. those contributions exceeding an aggregate of $200 per cycle). Title III of the Bipartisan Campaign Finance Reform Act seeks to lower the general reporting threshold from $200 to $50, while it would only require the reporting of the names and addresses of those persons making contributions between the amounts of $50 and $200.

Independent Expenditures

As was discussed in the first section, the definition of different types of advocacy is vital to determining whether or not an advertisement paid for by a national party committee should be counted as a coordinated expense (one where costs are shared between the party and candidate's committees) or an "issue ad" which can be used to bolster a candidate's position on a particular issue without actually stating "Vote for Candidate A." But what if the person or group of persons screening the advertisements are not affiliated with either the party apparatus or the candidate's committee? What are the rules and regulations governing these types of "independent expenditures?"

The answer is simple: there are very few rules and regulations which govern the use of independent expenditures. One might be surprised, even appalled to hear that should Bill Gates decide to spend millions of dollars running campaign advertisements against any given candidate, he is free and welcome to do so under current Federal Election Commission guidelines. There are however a few restrictions on how these ads can be run.

The name "independent expenditure," implies that these activities will be carried out separately from and free of any coordination with the national party committees, state committees, or the candidate's campaign. In addition, as with "soft-money" advertisements, independent expenditure ads

may not expressly advocate the victory or defeat of a particular candidate. However, that is where the regulation of independent expenditures ends.

Upon learning about this loophole, many ask how this is possible. It is inconceivable to most average voters that their vote could be influenced as much by a television advertisement run by a non-profit group or an individual who has a stake in the election. Despite this general antagonism towards the notion of independent expenditures, the development of this phenomenon is fairly easily understood.

As every American school child learns early on in their education, they have the right to free speech and freedom of expression. Inherent in these rights is the ability to express one's beliefs unhindered by government intervention so long as their choice of expression is not deemed harmful or grossly inappropriate. To quote Senator Mitch McConnell (R-KY), "The First Amendment doesn't allow us the latitude to categorize certain kinds of speech as offensive and other kinds of speech as laudable." (Associated Press 1999, 5) Obviously, Sen. McConnell does not support efforts to limit or prohibit independent expenditures.

Because of this Constitutional guarantee, the use of independent expenditure by groups and individuals in recent elections has proliferated. During the presidential primary of 2000, several groups such as the Virginia Right to Life Group poured hundreds of thousands of dollars into races across the country to affect the outcome. An example much closer to home, can be found during a recent election for the Second Congressional District seat in Utah (then held by Republican Merrill Cook). Using the "independent expenditure" loophole in federal campaign financing laws, a group called Term Limits USA, which advocates limiting terms of federal officeholders, spent massive amounts of money in attack ads which criticized Representative Cook for reneging on an agreement he signed with them during an earlier campaign to limit himself to 3 terms. While these ads did mention in small print that they were paid for solely by the Term Limits organization, they were almost indiscernible from attack ads being run by Cook's opponent, Lily Eskelsen.

With reference to the "independent expenditure" loophole, the Shays-Meehan Bill (BCFRA) would require any organization that spends more then $50,000 during a calendar year on federal election activities to file a monthly statement with the FEC. While this would not necessarily close the loophole in current campaign finance laws, it would shed some light on who is behind these advertisements. Current law allows these advertisements to be funded entirely from wealthy individuals or corporations and does not require the groups airing them to reveal the sources of any of these contributions.

CONCLUSIONS

Having worked in and around campaign fund-raising now for the past 2 years, I have been introduced to many of these concepts on a very personal level. During this time I have formed some very strong opinions about the need for effective reform on several different levels. I will start with the area that I find most significant.

> Congress must ban soft money now before it overwhelms our campaign finance laws and our political process. Ending the soft money system requires more than changing the labels put on money. It is not acceptable to impose so-called "limits" on soft money which would simply continue to allow soft money to flow into federal campaigns under a new name. The clear lines walling off corporate and union treasury money from political campaigns should not be breached (Common Cause 1999).

This quote from Scott Harshbarger, the director of Common Cause, accurately reflects my opinion on the issue of soft money reform. Common Cause offers a three pronged solution to the crisis of soft-money in American politics: National parties, candidates, and most importantly, state party apparatuses should be prohibited from soliciting, spending, or directing soft-money in any way to a federal campaign. This notion is clearly embodied in the Shays-Meehan legislation and was also expressed accurately in the failed McCain-Feingold bill. This first step is integral in cleaning up the influence of wealthy individuals and large corporations affecting American elections and policies.

Beyond a ban on soft-money, many other beneficial changes can be made in the system of federal elections. As an intern in the fund-raising office of Massachusetts Senator John Kerry, I witnessed firsthand the constant need to "dial for dollars." For Senator Kerry, this need was enhanced tenfold by what I consider to be his honorable decision to forgo special-interest PAC donations. The current system of campaign financing in this country penalizes good public servants like Senator Kerry by forcing them to devote more time to selling themselves and their candidacy for contributions, while it rewards those who choose to cozy up to special interests and accept large PAC contributions. This malfeasance of logic in our current campaign financing system needs to end, and it can. Through legislation, such as the Bipartisan Campaign Finance Reform Act of 1999, we can take another step towards ridding our system of the special interest money that currently pervades every aspect of American politics.

However, I am not naive about the realities of campaigning in this day and age. It is expensive and many voters are turned off. Substantial amounts of money are required to communicate a message to the minority of the American population that is still listening. Because of these realities, I support public financing of campaigns on both congressional and presidential levels. Through providing public money for elections, we would effectively free candidates and incumbents from the vicious cycle of campaign fund-raising. However, public funding can not be mandatory. Given the restrictions of the Constitution, we may never be able to fully regulate the amount of money an individual chooses to spend out of his or her own pocket for an election. Hopefully by making public

funding an option, we will appeal to those candidates who would rather spend their valuable time out meeting constituents and building a message, instead of sitting in a dark room calling strangers for money.

Also, as we examine efforts to reform the current campaign financing system in this country, we must conclude that the current contribution limits are outdated. I support congressional efforts to increase the amount an individual can contribute by at least $1,000 per cycle while lowering the amount a multi-candidate PAC may contribute by at least $1,500 per cycle. However, this legislation must be accompanied by strong legislation that bans the use of “soft-money” in American politics.

By banning the use of non-federal funds in conjunction with elections for federal office, some would argue that the effect would be a dramatic weakening of the role of the party in the current American political system. My response to that argument is two-fold. First, political parties existed in this country long before the rise of issue advertisements and $250,000 “soft-dollar” contributions. Banning the use of these monies for election-related activities would simply return the major parties to the status they enjoyed before the onset of the 1990’s.

Secondly, an argument can be made that the institutional two-party system in the United States is changing in such a way as to de-emphasize the central role of the party in the process of electing public servants. This process can be observed by noting the decreasing importance of the two major-party conventions (which now serve a mainly ceremonial function in selecting the party’s presidential nominee). This is not to say that the two major parties in the United States are becoming obsolete, but simply that their roles are changing. The time when the parties set the issue agenda for an election year has passed and that responsibility has fallen largely to the individual presidential campaigns.

It is possible to clean up our beleaguered political system. All it requires is the courage of a competent and responsible Congress to come out from hiding behind overly rigid constitutional arguments and special interest monies and agree to pass meaningful legislation that will restore to Americans some faith in their political system. A first step in that direction was the two weeks of Senate debate and recent passage of the McCain-Feingold reform bill in March 2001. Should this effort prove successful, it will do much to restore American’s faith in their political system.

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After Brown: The Challenge to Attain an Equal Unitary Education System

By Jessica Shulsen

Among citizens and educational reformers a central belief exists that the nation's public schools are failing. One reality underlying this perception is that while school administrators and political leaders no longer create a separate school system by law (de jure), a de facto dual system still operates—inferior inner-city schools largely for minority children and superior suburban schools for white children. This paper examines reasons for the dual system, as well as recent Supreme Court decisions holding that school boards are not responsible for desegregating public schools that are virtually one race due to de facto causes. The ability of magnet schools to alleviate the dual system is explored.

INTRODUCTION

In the 2000 presidential election, one of the most controversial issues was not abortion or gay rights, but education. Each candidate declared that he had a solution to the nation's "failing" public school system, and each called his opponent's solutions radical, risky or elitist. Before one explains why education has caused such uproar, one must answer the question why the system needs to be fixed in the first place. For that, one must understand what has happened in the public school system over the past several decades.

The failing schools to which many are referring are inner-city schools. Although, most would argue that *Brown* ended a dual school system in America forty-five years ago, these schools are still plagued by problems stemming from segregation and poverty. Over the past few decades inner-city schools have become overwhelmingly African-American or Latino while the suburban public schools have stayed predominately white. In fact, segregation has quietly been creating a dual system in America's public schools (Orfield et al. 1996, 53).

Two major factors have helped to increase segregation. The first is political changes that can be seen through the Supreme Court's role in desegregating public schools. The second is high residential segregation and changes in the nation' s demographics. The combination of these factors has created two separate and unequal school systems.

The nation cannot produce tolerant and responsible citizens when it denies an adequate education to one group. Minority children lacking a quality education will not have access to institutions necessary to succeed in life. An adequate education can prepare children for college and higher-paying jobs, thus bringing them out of a world of poverty.

Jessica Shulsen received a Bachelor of Science in Political Science from the University of Utah and plans to pursue a degree in law.

THE SUPREME COURT'S ROLE IN PUBLIC SCHOOL DESEGREGATION

The U.S. Supreme Court has played a complex and sometimes conflicting role in eliminating discrimination and upholding civil liberties. The desegregation of public schools was no exception. One can see the rise and decline of the movement for integration through their decisions. The Court had a long history of being a hindrance to eliminating discrimination. It was after all, the institution that confirmed the separate-but-equal doctrine.

However, the tide of the court began to change in the late 1930s. A 1938 case foreshadowed what would eventually happen to the separate-but-equal doctrine. *Gaines v. Canada* dealt with a Missouri law, which paid for a black student to attend a law school out of the state. The Court stated that the law violated equal protection. In other words, a black student had a right to attend law school in his home state (Fisher 1999, 880).

Following World War II, the Court became an even greater protector of individual rights. After World War II the United States was an ever more mobile society, consequently making segregation more and more impractical. African-American soldiers were returning home from fighting alongside whites. President Truman integrated the armed forces in the late 1940s (Fisher 1999, 875). Though black soldiers fought in World War II, at home class revisions remained. The second change brought by the war was the United States emergence as a world leader. The U.S. could not fight communism when its own people were segregated. Also, there were the horrors of Nazi Germany that preached a doctrine of

a master race (Fisher 1999, 875). The country's mobility and pressure to live up to its ideals slowly started to erode the separate-but-equal doctrine. This erosion can be seen in the Supreme Court's decisions regarding education.

African-Americans began to chip away at the doctrine by beginning with higher education. In 1950 Texas had an all-white law school and an all-black law school. The Supreme Court found that the black law school was not equal to the white. A state could not operate a dual system if they were unequal (Fisher 1999, 874). Another important decision in 1950 was *McLaurin v. Oklahoma*. In this case, Oklahoma had one law school, but they separated the black students. In fact, black students were not allowed to even sit in the same room as the white students while hearing a lecture. The Court found that this violated equal protection because the students were not treated the same (Fisher 1999, 875).

Four years later, the separate-but-equal doctrine in education received its final blow. On May 17, 1954 Chief Justice Earl Warren declared, "separate educational facilities are inherently unequal" (Cozzen 1999, 1). *Brown v. Board of Education* forced America' s public school system to desegregate "with all deliberate speed." However, eliminating segregation did not occur through a single decision. Wiping away years of legalized segregation required the cooperation of Congress and the president. The African-American community was well aware that its members needed support from all three branches of government. Through groups such as the National Association for the Advancement of Colored People (NAACP), they applied pressure on the President and Congress.

The *Brown* decision by no means meant that the public was ready to obey it. On the contrary, most segregated school districts did everything in their power to resist. The resistance to the ruling included defying court orders, as Governor Orval Faubus of Arkansas did in Little Rock. In 1957, President Eisenhower sent in armed troops to allow black students to enter Central High School. When he addressed the public about his actions, he noted what harm the confrontation had done to America's reputation as a world leader. "Our enemies are gloating over this incident," he said (Fisher 1999, 877). The President's bold action illustrated that the Court finally had his support for enforcement.

The Supreme Court also gained the support of Congress in 1957. That year Congress passed the first civil rights act since 1875. The legislation created a commission to investigate discrimination. Then in 1960, it strengthened the commission and existing laws on obstruction of court orders (Fisher 1999, 877). Congress passed the most far-reaching civil rights legislation since Reconstruction with the Civil Rights Act of 1964, banning discrimination in not only education, but every arena of public life. Its Title IV provided that desegregation in education be enforced in accordance with *Brown*. Title VI suspended funds in federally assisted programs if they continued to segregate, while Title VII banned employment discrimination in interstate commerce on the basis of "race, color, religion, sex or national origin." It also created the Equal Employment Opportunity Commission to enforce the law (Fisher 1999, 877-878). Title VI became more significant with the passage of Secondary Education Act of 1965, which provided substantial grants to school districts. Now states were forced to choose what they wanted more: segregated schools or federal money (Fisher 1999, 878).

By 1964 the Supreme Court could declare with confidence that there "has been entirely too much deliberation and not enough speed" in desegregating schools, because it now had the backing of Congress and the President (*Griffin v. School Board* 1964, 877). This marked a turning point. Thereafter the Court actively intervened to ensure integration, something it could not do until it had such support. Still, things moved very slowly. But the Court could change its focus from segregation to integration and that is exactly what started to happen.

A Changing Court Agenda: From Desegregation to Integration

In 1968, the Supreme Court took another step to accelerate desegregation with Green v. County School Board. After the Brown decision, New Kent County, Virginia, like many other counties, refused to desegregate. Instead, the school board relied upon Virginia statutes, which were enacted to counter the Brown decision. In 1965, an injunctive relief suit was filed, the Board responded by developing a "freedom of choice" plan to desegregate. The plan permitted students to annually choose between the schools, and those not choosing were assigned to the school they had previously attended. After three years of administrating this plan, the result was no white student had chosen to attend the all-black school and 85 percent of all black students in the district were still attending the all-black school (*Green v. County School Board of New Kent County* 1968).

In its decision the liberal, activist Supreme Court made it clear that it no longer wished to hear simply that schools were trying to desegregate; it wanted results. Justice Brennan wrote, that desegregation was not enough; rather integration was needed at once (Fisher 1999, 878). The Court held that it is a school board's burden to develop a realistic plan that would work. A plan that could not produce "prompt and effective disestablishment of a dual system is intolerable" (*Green v. County School Board of New Kent County* 1968). Second, the Court held that it is the district court's responsibility to assess the effectiveness of the plan while weighing in other alternatives that could be more feasible or effective. In conclusion, the New Kent plan was unacceptable because it had not ended the dual school system; rather it had functioned only to burden the students and their parents with the responsibility that Brown had placed upon the school board (*Green v. County School Board of New Kent County* 1968).

Yet by 1971, there still had been little progress in desegregating public schools. Charlotte-Mecklenburg school sys-

tem had over 84,000 students in 107 schools during the 1968-69 school year. Of those students 24,000 were African-American and of those students 14,000 attended schools that were at least 99 percent black (*Swann v. Charlotte-Mecklenburg Board of Education* 1971). James Swann and several other black students challenged the school board's desegregation plan. The district court found the school board's plan unacceptable and hired an expert to devise a desegregation plan, approved in 1970 by the district court for elementary through high schools. However, the Court of Appeals did not approve the plan for elementary students, declaring that it would be too much of a burden on the students and faculty (*Swann v. Charlotte-Mecklenburg Board of Education* 1971). The case then reached the Supreme Court.

The Supreme Court's decision proved to be the most far-reaching step toward integrating the public school system, marking a shift in the Court's focus. The justices were now asking, "How do we achieve greater racial balance in public schools?" The Court held that its objective was to eliminate "all vestiges of state-imposed segregation" in public schools (*Swann v. Charlotte-Mecklenburg Board of Education* 1971). With this ruling, the Court laid out remedies available to district courts to achieve more racially balanced schools. First, racial quotas could be used, not that every school was to be a near perfect reflection of the racial composition of the community. Rather as a starting point in shaping a solution (*Swann v. Charlotte-Mecklenburg Broad of Education* 1971). Second, district courts could alter school district zones. Noncontiguous zones are permissible, but such zones should be evaluated in light of the objectives the zone is to achieve. Before this decision, local school boards would draw the district zones. Third, and by far the most controversial remedy, was busing. The Justices felt that assigning children to the nearest school would not get rid of the dual school system. Therefore, district courts could require bus transportation to other schools. The Court held that the travel time should not be so great that it would impede the health of the children or interfere with the education process (*Swann v. Charlotte-Mecklenburg Board of Education* 1971). In addition, when the Court permitted the use of busing, it superseded all the states' anti-busing laws (Fisher 1999, 878).

THE PROBLEMS OF ADDRESSING DE JURE SEGREGATION

Until the Swann decision, most of the resistance to desegregation came from the South. It was considered a Southern problem; no one in the North or West seemed to notice that more and more blacks were living in the inner city and attending almost all black schools (Fisher 1999, 878). Southern segregation was *de jure* (by law), but in the rest of the country segregation was *de facto* (due to residential patterns) (Fisher 1999, 878). As it would turn out, the North would be affected the most by the busing policy.

Some criticized this ruling, particularly the transportation provision, on the grounds that it clashed with the Civil Rights Act of 1964. The Act defined desegregation "as the assignment of students to public schools without regard to their race, color, religion, or national origin" (Fisher 1999, 878). Yet, the courts took into account race when developing and implementing desegregation plans. The Act also stated that federal courts are not "empowered to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils." The Court avoided this possible conflict by contending that the law pertained to *de facto* and not *de jure* segregation. However, many justices found that it did not matter whether the segregation was *de jure* or *de facto*. Instead, they found where a segregated school existed there was "prima facie" evidence of a constitutional violation by the district (Fisher 1999, 879). Prima facie literally translates to "at first sight," in other words, it is a fact presumed to be true unless disproved by contrary evidence (Fisher 1999, 1243). However, the Court did not keep this outlook for long. Within a few years, the Court began to withdraw its support of desegregation.

By 1974, Republican President Nixon had appointed four justices (Goldman 1996a). The Court was beginning to move in a conservative direction. If congressional restrictions and harsh public opposition to busing are added, one realizes that forced busing days were numbered. The first strike against the remedy came in *Milliken v. Bradley* (decided in 1974), only three years after *Swann*.

Several parents of black students in Detroit, Michigan filed a suit alleging that the Detroit Board of Education had created and perpetuated school segregation through its policies (*Milliken* 1995). The district court agreed and ordered Detroit to devise a plan for desegregation that included eighty-five outlying school districts, which would mean busing the students. The Court issued such an order because Detroit-only plans would not achieve desegregation. Detroit itself was predominately African-American while the suburbs were predominately white. The District Court wrote, "school district lines are simply matters of political convenience and may not be used to deny constitutional rights" (*Milliken* 1995). The U.S. Court of Appeals agreed, but the Supreme Court did not.

A divided 5-to-4 Supreme Court ruled that the district court's remedy was "wholly impermissible" and did not coincide with *Brown* (Goldman 1996a). A federal court cannot devise a multi-district plan without evidence that the surrounding districts did not operate a unitary school system. An isolated instance of "possible segregative effect" did not justify a broad metropolitan-wide remedy. Further, there was no evidence that the district boundaries were established to perpetuate segregation (*Milliken* 1995). The Supreme Court also emphasized the importance of local control. If such multi-district plans were permitted, district courts would become a "school superintendent," something judges are unqualified to do (*Milliken* 1995).

This case marks a retreat by the Supreme Court on educational segregation. The decision greatly limited the possibility of any lasting city/suburban desegregation, at a time when fewer and fewer whites were living in the city, while minorities were becoming concentrated in central cities (Orfield et al. 1996, 3). This case opened the door for increased *de facto* segregation in public schools. Justice Thurgood Marshall states it best in his dissent:

> Desegregation is not and was never expected to be an easy task…. But just as inconvenience of some cannot be allowed to stand in the way of the rights of others, so public opposition, no matter how strident, cannot be permitted to divert this Court from the enforcement of the constitutional principles at issue in this case. Today's holding, I fear, is more a reflection of a perceived public mood that we have gone far enough in enforcing the Constitution' s guarantee of equal justice than it is the product of neutral principles of law (Fisher 1999, 898).

Unfortunately, Justice Marshall was correct. *Swann* was the last major initiative to foster desegregation in the education system. From this point on, the Court began to narrow its previous decisions, particularly *Swann*.

The most important decisions limiting desegregation came in the 1990s. By the late 1980s, three Reagan appointees and one Bush appointee had created a conservative majority. That majority was solidified in 1991 with the appointment of Clarence Thomas (Goldman 1996a). This majority would decide *Board of Education of Oklahoma City v. Dowell* in 1991.

This case actually began in the early 1970s. The district court in Oklahoma City, holding that the school board had not effectively removed *de jure* segregation, imposed a desegregation plan. It appeared to be successful, as indicated by the district's achieving unitary status in 1977 (*Board of Education of Oklahoma City v. Dowell* 1991). However, in 1984 the school board adopted a new plan, which made a number of schools one race, on the grounds of alleviating the burdens of busing young black children. The parents of some children protested, maintaining that the school district never achieved unitary status. Yet, the district court denied the motion to reopen the case, noting that the 1972 desegregation injunction was terminated in 1977 (*Board of Education of Oklahoma City v. Dowell* 1991).

The Tenth Circuit Court of Appeals reversed, holding in 1986 that while the 1977 order finding the district unitary was binding on all parties involved, nothing in that order indicated that the 1972 injunction itself was terminated. The district court was, therefore, required to hear the parents' complaints against the new student assignment plan (*Board of Education of Oklahoma City v. Dowell* 1991).

A year later, the district court held that the old plan was no longer feasible and that the board had complied in good faith since the original 1972 injunction. Furthermore the plan did not intentionally segregate; therefore it was permissible. Once again, the Court of Appeals disagreed with the district court. In 1989, it reversed the lower court's decision by relying on *United States v. Swift & Co.*, which deals with the "proper application of federal law on injunctive remedies." Employing the so called "*Swift* test," the higher court held that "a desegregation decree remains in effect until a school district can show 'grievous wrong evoked by new and unforeseen conditions[,]' and 'dramatic changes in conditions unforeseen at the time of the decree that…impose extreme and unexpectedly oppressive hardships on the obligator'" (*Board of Education of Oklahoma City v. Dowell* 1991). A few years later the case came before the U.S. Supreme Court.

The Court upheld (5-3) the district court. The Court of Appeals test "for dissolving a desegregation decree is more stringent than is required either by this Court… or by the Equal Protection Clause of the Fourteenth Amendment" (*Board of Education of Oklahoma City v. Dowell* 1991), and the test would "improperly condemn a school district to judicial tutelage for the indefinite future" (*Board of Education of Oklahoma City v. Dowell* 1991). The Oklahoma City school board had complied with the equal protection clause, and it was unlikely the board would go back to discriminating against black students (*Board of Education of Oklahoma City v. Dowell* 1991). In essence, a school board that has complied with desegregation orders for several years could return to *de facto* segregated neighborhood schools.

The Court made it easier for school boards to be considered in compliance with a desegregation order in 1992. *Freeman v. Pitts* dealt with a desegregation order for the school board of DeKalb County, Georgia. A district court relinquished partial control on the grounds that the school board briefly achieved unitary status and that subsequent racial imbalances were due to demographic changes. It found that the board still needed to work on faculty assignments and resource allocation (*Freeman v. Pitts* 1992). The Court of Appeals overruled the decision on the grounds that the school board must meet all factors of a unitary system. It went on to say that the board could not disregard its constitutional duties by citing demographic shifts (*Freeman v. Pitts* 1992). In other words, *de facto* segregation did not excuse such duties.

The Supreme Court, on the other hand, had a different opinion of *de facto* segregation. It held that a district court could relinquish control even if not all of the factors of a unitary school system had been met. It would be far too rigid if schools had to meet all of the so-called *Green* factors. Finally, "racial balance is not to be achieved for its own sake but is to be pursued only when there is a causal link between an imbalance and the constitutional violation" (*Freeman v. Pitts* 1992). The Court was telling the lower courts that segregation is to be remedied only if it is *de jure* and even the courts' options are limited.

Underlying Causes of School Segregation: Residential Segregation

The Supreme Court's decisions regarding segregation are only part of the complex challenge of achieving racially integrated public schools. The second element that must be examined

is residential segregation. This type of segregation is highly important because school zones are drawn using local boundaries. If a neighborhood is segregated, then the local school will be segregated. For example, Detroit is so racially isolated that researchers refer to it as "hypersegregated" (Massey 1993, 83, 221). As was the case in 1974, there is no evidence that the surrounding suburban districts operated a dual system. There cannot be evidence of a dual system when there is no one to discriminate against in the school district. In sum, it is impossible for city schools to desegregate when the neighborhoods are virtually one race. This underlying cause of school segregation has been impacted by dramatic changes in American society, namely the Civil Rights movement. Yet, residential segregation has persisted. The years between 1945 and 1970 marked a time of extensive suburban expansion. Many blacks could not join this exodus because of discrimination in the workforce and housing policies. Employment discrimination kept many out of higher paying jobs that would allow them to leave the city. Housing discrimination kept most African-Americans in certain areas of the city (Massey 1993, 61). Then along with the movement to desegregate schools came the cry to desegregate in all other areas of life. As mentioned earlier, the Civil Rights Act of 1964 banned racial discrimination in employment. The Fair Housing Act of 1968 prohibited discrimination in housing. The courts also prohibited states from building public housing projects in exclusively black neighborhoods (Massey 1993, 83). It initially appeared that these measures and changes in public attitude were working to desegregate many metropolitan cities.

However, despite the initial decline, residential segregation remains relatively high and has changed very little since the 1970s. The decline has actually been very small, from 0.70 in 1970 to 0.66 in 1980. In fact, many scholars consider the decline insignificant (Jargowsky 1996, 140). They point out that many cities still have racial segregation indexes well above 60, which is the threshold for hypersegregation (Musterd 1998, 49). They also note that the 1990 census shows that five of eighteen northern metropolitan areas had a higher index than in 1980 (Massey 1993, 221).

For many reasons segregation remains high in metropolitan areas. One reason is the structural changes in the economy. The shift from manufacturing industries to service oriented industries, along with the relocation of plants overseas or to other cheap labor sites, has caused heavy job losses in the higher-paying manufacturing sector. In turn, this has helped intensify the pattern of minorities in concentrated areas, particularly in Northern cities such as Chicago and Detroit (Musterd 1998, 52-3). At the same time, companies also began locating in the suburbs, which further reduced employment opportunities for segregated minorities (Jarowsky 144).

A second reason is policies of banks and insurance companies. These agencies are reluctant to loan money to minorities who may wish to leave the inner city. In the past, minority neighborhoods were labeled as "high risk" or as having "questionable environmental factors" (Massey 1993, 105). Unfortunately, there is evidence that these stereotypes still exist. Studies still consistently show that black or mixed neighborhoods receive less federally insured loans, less private credit, fewer home improvement loans, and less mortgage money than whites with similar socioeconomic status (Musterd 1998, 106). The late 1980s and early 1990s have shown little change. In 1991, the *New York Times* reported that Federal Reserve data indicated substantial racial disparities in loan rejection rates, which could not be explained by income (Massey 1993, 108). These practices are a major hindrance to minority mobility.

A third factor is discrimination in housing. Government actions can sometimes cause discrimination. In Chicago, for instance, urban "renewal" projects ruined many viable affordable housing neighborhoods. The government then built high-rise public housing projects alongside the city's major expressway for the displaced individuals. Local governments are reluctant to build affordable housing developments, because the projects would not bring as much tax revenue as more affluent development (Musterd 1998, 52). There are also more direct forms of discrimination in housing. In 1988, the U.S. Department Housing and Urban Development (HUD) did a study to determine the extent of discrimination in housing. When John Yinger analyzed the study's results, he found housing was systematically made more available to whites in 45 percent of transactions in rental markets and 34 percent in sales (Massey 1993, 102). Yinger also found a substantial amount of "racial steering" or the guiding of African-American clientele to all black or mixed neighborhoods (Massey 103). The HUD study also measured the severity of housing discrimination or how often blacks are shown, recommended, and invited to see a unit compared to qualified white clients. It found that among advertised rentals, the likelihood whites would be shown a unit that blacks would not be shown was 65 percent (Massey 1993, 104). Discrimination in housing was still prevalent in the 1990s. In February 1997, the Fair Housing Council of Greater Washington D.C. released a report that found that minority apartment seekers experience discrimination more than two out of every five times they tried to rent a unit in the Washington area (Turner 1999, C03). Housing discrimination did not disappear with the Fair Housing Act of 1968, nor is it going away any time in the near future. Coupled with bank and insurance policies and the changing structure of the economy, housing discrimination limits the housing options of minority groups, thus keeping them in the inner city.

One might argue that minority groups prefer to live in a segregated neighborhood. However little evidence supports such a claim. On the contrary, evidence suggests blacks would prefer to live in a mixed neighborhood. The 1976 Detroit Area Survey found that 63 percent of African-American respondents chose a neighborhood half-white and half-black as most desirable (Massey 1993, 89-90). Along with the factors for residential segregation mentioned in the previous

paragraphs, white attitudes also play a role in segregation. A 1980 survey found that 40 percent of whites would be willing to support a law, which states "a homeowner cannot refuse to sell to someone because of their race or skin color" (Massey 1993, 92). It is ironic that 60 percent of white people would refuse to support a law that has been on the books for over a decade. Even more telling are the results of the Detroit Area Survey of white respondents. One-fourth of whites responded that they would be unwilling to enter a neighborhood with a black composition of eight percent and 73 percent of respondents would refuse to live in a neighborhood that was 36 percent African-American (Massey 1993, 93). These attitudes only compound the problems of segregation.

The combination of high residential segregation, the Supreme Court's retreat from its commitment to desegregation, and changes in the population has lead to increased segregation in public schools. One may immediately cite "white flight"- whites fleeing the city for the suburbs- as a contributing factor of minority inner city schools and white suburban schools, but that is only part of the change in demographics. While the United States was busily dismantling desegregation plans, most failed to notice that minority enrollment was increasing while white enrollment was decreasing. Public and private enrollment in elementary and secondary schools reached an all time high in 1998 with 52.7 million children. Enrollment is expected to increase 11 percent by 2008 (U.S. Department of Education 1999). This increase reflects changes in minority birthrates and immigration, rather than changes in the demographics of the white population. White student enrollment decreased 14 percent between 1972 and 1992 (Orfield et al. 1996, 62) and the Department of Education expects that trend to continue. In the next twenty years, it projects an 11 percent decrease in enrollment (U.S. Department of Education 1999). African-American enrollment in public schools has gradually increased three percent from 1972 to 1992 (Orfield et al. 1996, 62). The Department of Education expects that gradual increase to continue over the next two decades (U.S. Department of Education 1999).

If the white enrollment is dropping and black in enrollment is slowly increasing, one may ask where the substantial increase in enrollment is coming from. The answer lies in a group that is far too often overlooked. Latino student enrollment has been increasing since 1970 (U.S. Department of Education 1999). Between 1972 to 1992 Latino enrollment has increased 89 percent (Orfield et al. 1996, 62). Within the next twenty years the Department of Education projects Hispanic enrollment to increase 60 percent for children aged fourteen to seventeen and 47 percent for children aged five to thirteen (U.S. Department of Education 1999). This has major repercussions for the American public school system. In 1996, 36 percent of students enrolled in public schools were considered part of a minority group, a 12 percent increase since 1972. That percentage is projected to soar in the next few decades (U.S. Department of Education 1996). Inner city schools will be affected the most by the expected increase. In 1996 black students accounted for one out of every three students who lived in central cities, which is about the same percentage since 1970. Hispanics, on the other hand, went from accounting for one out of every ten in 1972 to one out of every four in 1996 (U.S. Department of Education 1999). In other words, Hispanics increased from 10.8 percent of students in inner-city schools in 1972 to 25 percent in 1996. They will soon be the largest minority group in public schools (U.S. Department of Education 1999). Thus, inner city Latinos are becoming more segregated from whites than African-Americans are (Orfield et al. 1996, xiii). The increasing number of minority students, the Supreme Court's reluctance to integrate schools that are de facto segregated, and intense residential segregation have made inferior and separate schools inevitable.

The Modern Dual School System: Inner City v. Suburban Schools

The face of the American public school system is changing. This new face is one of a de facto separate-and-unequal school system that consists of inner city and suburban schools. Just as the de jure separate-but-equal school system was not truly equal, the de facto segregated school system is not equal. Inner city schools are plagued with poverty because the local communities are usually poor. In fact, neighborhood poverty has increased since 1970 (Jargowsky 1996, 143).

Median family income made no real gains in the 1970s, then a small increase in the 1980s, but it dropped between 1989 and 1993. In 1993, median family income for whites was $39,300, for African-Americans $24,542, and for Hispanics $23,654. Today both African-Americans and Hispanics make 60 percent of the median white family income. In addition, Hispanic and black children are more than twice as likely as white children to live in poverty (U.S. Department of Education 1999). Having less money to tax means less tax revenue, and thus less money for local schools because the local government finances on average 44 percent of the local school' s budget (Linn 1998, 1). Therefore, inner city schools receive significantly less money than suburban schools. Moreover, inner city schools have more students. Data from the U.S. Department of Education shows that for the 1993-94 school year the average inner city school size was 1,083 compared to 973 students in suburban schools (Choy 1997, 13-4). Inner city schools often face budget crises as well as difficulty finding qualified principals and teachers. Generally, teachers often avoid teaching in high poverty, inner city schools not because they do not wish to help, but rather they are assailed with a host of problems that they cannot solve.

Factors such as family income, family structure, and parent's level of education also have a profound influence on a child's educational opportunities (U.S. Department of Education 1996). This places minority students in inner city

schools at a greater disadvantage because most come from poor families where the parent has little education. For example, in Washington, DC almost half the black adults lack a high school diploma and unemployment is nearly four times greater in the highly segregated southwest region of the district than in the rest of the Washington area (Turner 1999).

These outside factors take their toll in every aspect of inner city schools. Intense segregation and poverty are well connected with low academic achievement. Inner city schools have both higher and earlier drop out rates. In Philadelphia, for example, the drop out rate is four times higher in the city than in the surrounding suburbs. In Los Angeles, e.g., 55 percent of blacks drop out by the tenth grade, but the white suburban drop out rate is significantly lower (Orfield et al. 1996, 66-7).

Inner city students also score much lower on standardized tests than their suburban counterparts. The National Assessment of Educational Progress found that 19 percent of disadvantaged inner city students had "adept" reading skills, but in suburban schools 50 to 55 percent of the students had "adept" skills. In math the difference in scores is even starker. In Chicago, the average suburban school had 35 to 40 percent of its students in the top quartile on nationally normed math tests. Chicago's inner city schools had a high of 22 percent for third graders and a high of 8 percent for tenth graders (Orfield et al. 1996, 65). It is difficult to decide which figure is more frightening, the gulf between suburban and inner city schools or the 14 percent drop from the third to tenth grades in the inner city schools. When comparing elementary schools, one finds that only 23 percent of students in low-income minority schools scored above the national median. However, 74 percent of suburban students scored above the national median (Orfield et al. 1996, 65). These tests scores make it evident that inner city students are not challenged or stimulated as much as their suburban counterparts. They are not given the same opportunity to succeed; rather, they are doomed to fail in such a school system.

One may argue that segregated inner city school children's lower performance on standardized tests does not mean that they are receiving an unequal education or fewer opportunities. But one needs only to examine the curriculum and teachers to know that these students are receiving an inferior education. These students do not receive preparation for college.

Inner city schools have trouble finding qualified teachers. For instance, 40 percent of inner city school principals have difficulty finding qualified science teachers, while only 15 percent of suburban principles have that problem (Orfield et al. 1996, 69). Suburban schools offer higher pay and mostly do not have the problems associated with poverty. For example, 16 percent of teachers at white affluent suburban schools said they did not have all the materials they needed to teach, compared to 59 percent of those in higher poverty, inner city schools. As a result of this and other problems, better-qualified teachers work in suburban schools, rather than inner city schools (Orfield et al. 1996, 68).

When inner city schools do find more qualified teachers to teach higher-level classes, they do not have enough students who are prepared to take such courses. Thus, courses are either discontinued or "watered down" with unprepared students. It is not surprising that suburban high schools offer three times as many high-ability or advanced placement courses (Orfield et al. 1996, 68). In addition, schools plagued by poverty have to spend most of their money on remedial courses, teaching students in other languages, and combating outside problems associated with poverty such as crime, violence, and homelessness (Orfield et al. 1996, 67).

There are few differences in elementary school curricula, but by middle school the inequalities between the two systems begin to emerge. Suburban middle schools are more than twice as likely to teach algebra and foreign languages (Orfield et al. 1996, 68). Both courses are necessary for adequate college preparation. Also, UCLA researcher Jeannie Oaks has found that 59 percent of predominately minority math and science classes are general level courses while 85 percent of predominately white classes are advanced or higher-ability courses (Orfield et al. 1996, 69).

Segregated inner city schools are thus inferior in terms of their resources, the level of competition their students receive, quality or preparedness of their teachers, and in the curricula they offer (Orfield et al. 1996, 64-71). Jim Crow may be dead, but segregation and inequality still reign in the American public school system. When this nation offers its poor and minority people an inferior education, it is only perpetuating a violent cycle of joblessness, poverty, crime, and destitution. This cycle will only grow in severity as public schools enroll more and more poor minority students. This cycle can be broken through an equal and adequate education for all. An African-American or Latino student does not gain some marvelous benefit from sitting next to a white student, rather he gains access to the institutions and opportunities that were denied to him in a completely segregated school, such as adequate preparation for college (Orfield et al. 1996, xv). A college education would allow him to escape a life of poverty. This nation cannot raise tolerant responsible citizens, if it gives only some of its people a quality education.

SEARCING FOR SOLUTIONS: FROM VOUCHERS TO MAGNET SCHOOLS

Now that one knows what has been happening in America's public school system and why it needs to be fixed, one can examine the solutions. The solution that has thrust education onto the political center stage is vouchers. School vouchers are government grants to parents to send their children to private schools (Moe 1995, 1). They are proposed as the save all solution to failing inner city schools. In Cleveland, Ohio, "the city's voucher program allowed four thousand children to escape some of the worst public schools and instead attend private or parochial schools" (New Republic 1999, 11). The key word is "escape," that is exactly what vouchers are.

Vouchers are not a solution to the problems that plague inner city schools.

On the surface vouchers may appear to be a cure-all for poor minority students, but in fact, this individualistic approach would harm the very people that it is intended to help. It would take money away from already financially strapped inner city schools. Their federal funds would go to private schools in the form of government grants to the children fortunate enough to "escape." Inner city schools cannot be expected to improve by "competition" when money is being taking away from them and given to their competitors. Vouchers may bring more diversity into private schools in the beginning, but once such a program is available to families of all income levels, the private school may choose to take middle class white students. Higher income families offer more potential for revenue and private schools are not held to the same enrollment standards as public schools. Unlike their public counterpart, they can pick and choose which students they wish to take.

Moreover, suspicion remains that advocates have more universal plans. They would like to extend vouchers to the middle class. Milwaukee mayor John Norquist said that he wants to phase out the income requirement on Milwaukee's voucher program. He finds that limiting the program to the inner city poor is unfair to middle class families ("Vouchers" 1998). Plans to expand the voucher program give the first glimpse of the advocates' overarching motive. Most of the strongest supporters of vouchers come from the religious right wing of the Republican Party. Twenty-one percent of private schools are nonsectarian and 32 percent are Catholic schools while the remaining 47 percent are other religious schools, which are predominately Protestant (Edmund 1999, 13). From 1984 to 1991 enrollment dropped 9 percent in private schools (Orfield et al. 1996, 62). In other words, a voucher program would be very beneficial to private religious schools.

The solution for America's dual school system is more complex than an easy political one-liner. It requires combating the inequalities between inner city and suburban schools. It requires giving minority students the same educational opportunities; in other words, giving them access to a college education or higher paying jobs. That is not to say that mandatory policies are the only way to achieve an equal unitary educational system. On the contrary, coercive measures may achieve desegregation, but they are unable to alter attitudes and perceptions.

One promising voluntary option to bring about a unitary and more equal education system is magnet schools. These schools first emerged in the 1970s as policymakers began to look for voluntary alternatives to coercive measures such as mandatory reassignment and forced busing. These alternative schools offer specialized curricular themes or special instructional approaches as well as additional resources and funding. These schools were to act as magnets in attracting students from the nearby neighborhoods in order to ensure a racially balanced student population (Henig 1994, 107).

Unlike vouchers, magnets bring much needed resources into poor inner city schools while at the same time achieving a district's goals to desegregate. They offer a valid solution to the nation's current dual educational system, although they cannot remain in their 1970s format. Instead, magnet schools must suit the needs and challenges students in the twenty-first century face. However, before one expounds upon possible changes in magnet schools, one must examine how magnets currently achieve integration and improve inner city schools.

Magnet schools are able to integrate more effectively than many court ordered desegregation plans, because the courts refrain from holding districts responsible for segregation that exists between the city and the suburb. As was discussed earlier, there is often little evidence that the suburbs operated under any sort of *de jure* segregated schools. As a result, mandatory reassignments between inner city and suburban schools are impermissible. Thus, efforts to create a unitary education system become very difficult. Magnet schools help circumvent these difficulties by attracting suburbanites to inner city schools. In fact, researcher Mary Haywood Metz argues that the proliferation of these schools is due in large part to the lower courts confirming them as a viable method of desegregation (Metz 1986, 26-7).

Substantial evidence demonstrates that magnet schools improve interracial exposure. But, exposure rates can vary greatly depending upon demographics. In 1997 the Citizens' Commission on Civil Rights found that magnets offered more interracial exposure than traditional public schools. In St. Louis, which has one of the largest magnet programs in the country, the Commission found that although African Americans accounted for 78 percent of the student population, they comprised 58 percent of magnet enrollments. In Cincinnati 62 percent of African American students were enrolled in magnet schools while 70 percent were attending traditional public schools. Both of these cities were operating under intra and inter-district voluntary plans. The enrollments demonstrate that both cities were able to increase the number of whites attending inner city schools, thus increasing the contact African American and white students experienced on a day-to-day basis (Fuller 1999, 27).

Researchers Bruce Fuller and Richard Elmore found further evidence of interracial exposure in 1994. Their research showed that the ethnic composition of magnet programs varied depending on the ethnic composition of the district. In predominately minority districts, the percentage of minority students in magnet programs was lower than their percent in the district. In districts where a majority of the students were white the opposite was true (Fuller 1996, 166-67). Another study conducted by Claire Smrekar and Ellen Goldring found that in two large districts in St. Louis between half and 60 percent of students were enrolled in the alternative schools (Viadero 1999). Considering the strong evidence in support of interracial exposure, it is difficult to claim that magnets do not aid in desegregating public schools.

The defining and most attractive attribute of magnet

schools is that they provide more resources than non-magnets. Magnets are a practical way to bring those with greater political power and influence, namely middle class whites, into poverty stricken neighborhood schools. If a middle class white child is enrolled in an inner city magnet school, his or her parents have a vested interest in the school as well as the surrounding community. These parents can use their political leverage to bring about changes that those with fewer political resources could not bring about.

Additional financial resources enable administrators to hire better teachers. In fact, research finds that magnet teachers are more qualified, enjoy more autonomy, and have greater access to resources than non-magnet schools. They are also more likely to have advanced degrees (Fuller 1999, 29). Teachers at magnet schools report more adequate instructional resources and assistance. In particular, magnet teachers indicate greater access to professional support staff such as counselors and specialists (Smrekar and Goldring 1999, 89).

Unlike inner city schools, magnets have little difficulty in finding qualified teachers. Magnet school principals are allowed to actively advertise for and recruit new teachers with the specific knowledge and skills needed for program themes. These needs also allow principals to be far more selective. Experience and commitment are given preference over mere seniority, not the case in most typical public schools (Fuller and Elmore 1996, 165-66).

Like suburban schools, magnet programs can offer better pay and a better working environment than inner city schools. In 1994, Researchers Claire Smrekar and Ellen Goldring studied two elementary magnet schools in Cincinnati to gain a better idea of how magnet environments differed from typical public schools. Mathematics and Science Academy enrolled 575 students in kindergarten through sixth grade. The school was located in a predominately white working class neighborhood, and 83 percent of the students were bused. Student population was 51 percent African American and 49 percent white, and 70 percent of students came from low-income families (Smrekar and Goldring 1999, 90). Greenwood Paideia, the other school studied, was located in a racially mixed, middle class neighborhood. Its racial composition was 52 percent African American and 48 percent white and 95 percent of the students were bused (Smrekar and Goldring 1999, 91). Teachers at both schools repeatedly compared their magnet working environments with their experiences at poorly funded inner city and minority neighborhood schools. Definitions of quality in magnet schools were measured in relation to the inner city schools, at which they had previously taught. Many of these elementary school teachers conceded that the magnet curriculum was largely standardized and traditional, but they also noted that magnet schools did not have the outside distractions such as violence that inner city schools had. Instead, these magnets had "a librarian in every school and a computer in every classroom….The magnets provide enough books for entire classroom of students and the desks, chairs, and windows are not broken." Another teacher expressed joy at not having "roaches climbing over my walls and not being called a bitch" (Smrekar and Goldring 1999, 91-3).

Further, students at magnet schools have demonstrated higher achievement levels than their peers in non-magnet schools. In order to prove the causality of magnet schools and higher achievement, various studies have used statistical techniques to control for other factors such as family characteristics and students' pre-magnet test scores, which have been shown to predict current achievement levels (Fuller 1999, 28; Rossell 1990, 120). Studies conducted in Austin, Dallas, and San Diego in 1989 found that magnet schools have "a positive effect on student achievement." More specifically, the study reported that magnet students in Austin had "significantly" higher scores in science and math in grades 9-11. In San Diego magnet students were found to have far greater writing skills, although their critical thinking skills were deemed comparable to non-magnet students. These studies concluded that magnet schools' "smaller classes, increased time on task in the extended day, better programs, coupled with more parental involvement" increased student achievement (Rossell 1990, 121-122). More recent studies also indicate that magnets increase the level of student achievement. A 1997 study conducted in St. Louis found that magnet students had higher scores on the state's assessment tests in mathematics, reading, science, and social studies than students in neighborhood schools. Another study conducted in 1996 in San Antonio concluded that that students in magnet programs scored substantially higher on math and reading assessment than students in non-magnet schools (Fuller 1999, 30-31).

Nevertheless, serious problems exist with current magnet programs. Researcher Christine Rossell documented that significant racial and social-economic stratifications can be linked to magnet themes. She notes that the most popular magnets were the gifted and talented programs located in white neighborhoods. The least popular magnets were the basic skills programs located in integrated or minority neighborhoods. By locating the gifted and talented schools on the outskirts of the city, white higher-income parents are able to stay fairly close to their neighborhood, keeping the more prestigious magnet predominately white. She states, "whites will transfer to minority schools only if the districts place additional funds and a special curriculum there" (Rossell 1990, 130-34, 145). Researchers have also found some middle class and higher working class families would rather be on long waiting lists to certain magnet schools, where their children would be with the children of the highest social class and achievement level possible, than attend a conventional school (Metz 1986, 208). These findings are an indication that magnets sometimes stray from their goal of integration. It appears that the more important goal for some of these schools is pleasing those with more political resources through thematic schools designed to meet their particular interests.

The "creaming off" of higher-income students can also be attributed to the transportation options available to disad-

vantaged students. Transportation subsidies are most often used to facilitate enrollment. They are widely available for elementary schools, with nearly five out of six districts providing full or partial subsidies to students. However, they offer fewer subsidies for middle and high school students. This, of course, creates a substantial barrier for those who wish to attend magnet schools outside their district, especially for low-income students (Fuller and Elmore 1996, 169-70).

Even when public transportation is provided for magnet students, many parents are leery about using it because of the safety concerns and the length of time required to ride the bus each day. In the case studies conducted in Cincinnati and St. Louis, minority parents are much more likely to report that transportation is a crucial issue in considering which school to attend. White parents, on the other hand, reported transportation to be of little concern. This is because they usually attend magnet schools that are close to their neighborhoods (Smrekar and Goldring 1999, 32-33).

Aside from the creaming effect, funding is the greatest criticism magnet schools face. When magnets first emerged as an alternative to mandatory measures in cities such as Cincinnati, under Senator John Glenn's leadership, Congress amended the Emergency School Assistance Act in 1976 to help fund magnet schools (Fuller and Elmore 1996, 7, 155). Then in 1984, as a result of the substantial increases in magnet schools, Congress created the Magnet Schools Assistance Program (MSAP) (Fuller 1999, 26). MSAP provides two-year grants to magnet school programs that desegregate and discourage isolation. The program is crucial to the creation and expansion of magnet schools, because there are considerable starting costs (Smrekar and Goldring 1999, 7-8).

In 1994 the MSAP was re-evaluated under President Clinton's order to review all race-conscious policies in all government agencies (Hendrie 1998a). Congress added new provisions designed to promote more racial integration, which became part of the Elementary and Secondary Education Act. The magnet schools were now to explain exactly how their programs increased interaction among students of different social and racial backgrounds. The new provisions also favor grant applicants "who intend to select students through random methods, such as lotteries" (Schmidt 1994). MSAP continues to be the primary source of funding, providing 138 districts nationwide with $955 million between 1984 and 1994. Some states, such as California, provide magnet schools with state desegregation funds (Fuller 1999, 26).

However, critics maintain that programs such as the MSAP are costly acts that misspend substantial sums of money with little results (Schmidt 1994). One cannot deny that magnet schools cost more than conventional public schools. This is especially true when magnet programs are first instigated. For example, in 1976 St. Louis' average per pupil expenditures for magnet schools were roughly double those for the city's regular schools. In 1986, Yonkers estimated its magnet school renovation and new construction at 11.6 million dollars, not including transportation costs. Yet proponents, such as Rossell, argue that it is only the up-front costs that are significantly more than traditional schools expenditures (Rossell 1990, 200-201). Once the programs are established, the expenditures are quite similar to conventional schools. Districts that receive MSAP funds spend about 10 percent more per student than non-magnet districts. On average, magnets spend $200 more per student than traditional public schools (Fuller 1999, 27).

However, parents and students appear to be willing to pay the costs of magnet schools. In November 1986 the Dayton public school system wished to dismantle one of the music magnet programs. A task force was formed to determine the feasibility of such an action. A group of about two hundred parents whose children attended the music magnet program quickly organized. The task force estimated the extra cost of the program to be $245,000, but the parents argued that the figure included standard operating costs. Furthermore, the only extra cost was for private music lessons, and the parents contributed a fee to reduce this cost. The parents succeeded in keeping the magnet school. A year later Dayton applied for aid to establish 25 magnet schools (Watras 1997, 273-274). Dayton residents are not the only ones who have decided the benefits of magnet schools far out weigh the costs of implementing the programs.

Critics also lament the cost of transportation required for most magnet schools. Proponents of magnet schools admit that transportation costs are higher, but they contend that the voluntary plans make the issue more complex. In a mandatory policy a single bus can take several children to a designated school. Voluntary magnet programs, on the other hand, make bus routes complicated because the children are widely dispersed throughout the city. Often the use of small buses, vans, and even taxis replace a traditional busing policy. It is not surprising that these alternative modes of transportation cost more. In fact, the cost is usually too great for the magnet schools, and parents must shoulder the burden. Nevertheless, this is a burden most parents are willing to bear (Rossell 1990, 138-144).

Magnet schools are not the perfect solution to the dual system that exists between inner city schools and suburban schools. Given the complexity of the problem, there cannot be a completely effective simple solution. Nonetheless, magnets do demonstrate tremendous potential in easing the inequalities between under-funded, inner city minority schools and wealthier, predominately white suburban schools. Undesirable byproducts of magnets schools, such as "creaming" and pockets of isolated same race schools, can be virtually eliminated by altering the way magnets function. Although most magnet programs are located in minority neighborhoods, the more popular magnets need to be located there in order to get more white parents to transfer. Higher levels of integration would be the result of such action (Rossell 1990, 144-145).

The expansion of magnet schools is a worthwhile goal, but they face serious challenges in the future. The greatest

obstacle these schools face is in the courts. Once again, the judicial branch plays an extensive and complex role in the effort to create a unitary education system. The controversy surrounding magnets centers upon their admissions policies. About one third of magnet schools use some type of admissions criteria to determine who will attend. Some use test scores, recommendations from teachers, interviews, and sometimes race as a factor (Fuller and Elmore 1996, 168). When magnet schools began emerging in cities across the country, race was a paramount consideration in admission policies. Today many districts still consider the impact that certain transfers will have on the racial balance in the various schools. However, a series of lawsuits are challenging magnet administrators' authority to consider race in the admissions process (Hendrie 1998b).

One of the most important lawsuits involving this issue is *Montgomery County Public Schools v. Eisenberg* 1999. In June 1999, the U.S. Court of Appeals for the 4th Circuit reversed the Montgomery County, Maryland district court's decision. The district court judge held that the school board could deny Jacob Eisenberg's request for a transfer because of the implications it would have on the racial balance at his school. Eisenberg was white and wished to transfer from his predominately African-American school to a mathematics and science magnet school (Walsh 2000).

As evident from the earlier discussion of the Supreme Court's role in desegregation, the justices have become increasingly wary of any procedure that considers race. Furthermore, the Court has held that school districts are not responsible for segregation caused by outside factors such as residential segregation. Montgomery County had never been under any court order to desegregate, nor was it found that the county intentionally attempted to segregate its schools, which meant the county was a unitary system. As a legally unitary system, "racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only on extraordinary justification" (*Montgomery v. Eisenberg* 1999).

The Appeals Court found that the transfer policy did not meet the strict scrutiny guidelines used to determine the constitutionality of a race-based policy. In fact, the Appeals Court described the transfer policy as "simply too pernicious to permit any but the most exact connection between justification and classification." The opinion also stated that the district was merely racially balancing its school, and "[s]uch nonremedial racial balancing is unconstitutional" (*Montgomery v. Eisenberg* 1999). In sum, the Court of Appeals ruled that Jacob Eisenberg was unfairly denied admission to a magnet school based solely upon his race.

The county then appealed the case to the U.S. Supreme Court. However, in March 2000 the Court declined to consider the case, despite the pleas from education leaders. They would like the Court to provide them clear guidance "on how they may use race, together with other factors, in granting or denying transfers, or devising overall student assignment plans, or admitting students to magnet schools or special academies" (Walsh 2000). This ruling conflicts with other federal rulings as well as rulings from higher state courts (Hendrie 1998b).

The decision has left many magnet districts scrambling to revaluate their admissions policies, and left many frustrated by the legal uncertainty surrounding the issue (Hendrie 1998b). As attorney Maree Sneed, who has worked extensively on desegregation issues stated, "Thirty years ago, school districts were getting sued for not promoting diverse learning environments. Now they're getting sued for actually doing what they were originally sued for not doing" (Hendrie 1998b). Another school administrator commented, "You've got to reduce racial isolation without taking race into account. That is so strange. We're sort of in the twilight zone" (Hendrie 1998b).

Magnets initially provided a legitimate way to circumvent the Supreme Court's decisions, which limited voluntary efforts to desegregate when segregation was due to *de facto* circumstances such as residential segregation. However, their ability to achieve lasting city/suburb integration is now being challenged. A possible way out of the legal entanglement is to establish attendance zone magnets in minority neighborhoods with a lottery system. This would ensure that a large portion of minority students could still benefit from magnet programs.

The underlying question in the debate over segregation and school reform is whether the government should allow race conscious policies to redress past injustices and in a sense regulate race relations in America. The courts have answered yes, but under strict guidelines. More and more those guidelines are being challenged. The lawsuits are in some aspects a testament of how well magnets are able to attract white middle class suburbanites. Many of these parents believe that it is unfair to consider race when making admission decisions. They find that the school board and the government in general do not have the right to regulate race relations. These parents are only seeking a higher quality education for their children.

Nevertheless magnet schools show promise in achieving the goals of integration and improving the quality of inner city schools, while at the same time heeding the legal restrictions placed upon desegregation. Although many magnet schools may not be exceptional, they are the most feasible alternative. One may argue that if the objective is to improve inner city minority schools, then more resources should be funneled into these schools, rather than focusing on integration. However, those who take such a stance do not understand that integration is the best way to improve public schools. Tactics to funnel more money into inner city schools, such as equalization of school funding, are highly contested and impractical. Those with greater political power use their influence in the form of lobbying and lawsuits to challenge such alternatives to school funding.

Magnet schools, on the other hand, attract those with greater financial and political resources to inner city schools. Unlike equalization of funding alternatives, which threaten

to harm wealthier middle class suburbanites, magnets offer to benefit them as well as lower-income inner city residents. The added funding and resources in magnet schools prompts many white middle class suburbanites to transfer to predominately minority schools. These parents bring with them greater financial and political power, which in turn, helps the school secure more resources. Added resources may take the form of more qualified teachers and a safer learning environment. These additional resources help to improve student achievement levels. In short, the added financial and political resources provide a quality education for magnet students, particularly for those who would otherwise attend ill-funded inner city schools. Also, an integrated education promises to teach greater tolerance and respect for those who are different, creating one hopes a more peaceful society.

As Chief Justice Earl Warren penned forty-five years ago in *Brown*, "separate educational facilities are inherently unequal." He also noted, "It is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education" (Fisher 886). This is especially true today, not because there are more minority children, but because an education is a necessity to succeed in today's technology/service driven economy. Inner city students cannot succeed in schools that are inferior in resources, performance, and preparation for higher education. This is a problem that will not go away by ignoring it or offering temporary relief. However, magnet schools have existed for over three decades and with some adjustments, can make significant strides in dismantling the inequalities between inner city and suburban schools, thus providing minority children in inner city schools with a quality education to break the vicious cycle of unemployment, poverty, crime and violence.

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Standing at the Crossroads: NATO in the Twenty First Century

By James Seaman

The end of the Cold War, the disintegration of the Warsaw Pact, and NATO's recent decision to expand, has brought new challenges to the organization. As NATO cannot remain stagnant without losing its will to act, the best policy is to include Russia as a member. Including Russia would alleviate Russia's view of the West as a potential aggressor, give NATO legitimacy in the volatile Balkans and display America's commitment to Russia's efforts to adopt democracy and capitalism. NATO expansion should include all major European players, of which Russia is one.

The North Atlantic Treaty Organization (NATO) was created in 1949, born of east-west Cold War hostility and suspicion. NATO was a military alliance, designed to provide a unified western front against the Soviet-led Warsaw Pact. The Warsaw Pact encompassed most of Eastern Europe and included only Soviet-friendly communist regimes. With the Cold War passing into the archives of history, many have questioned the relevance of NATO. The organization is clearly at a crossroads in terms of what goals and policies, if any, to pursue in the twenty-first century. As NATO's strongest member, the United States plays a significant role in determining the fate of the alliance. While the most recent policy has been to support NATO expansion, this framework presents dangers, especially when one considers the fate of NATO's traditional enemy—the Russians. After considering various policy options, and always keeping a keen eye on history, it becomes apparent that the best choice for the United States is to support a continued policy of NATO expansion—one that will bring Russia into the alliance.

STATUS OF NATO

NATO's original treaty states that the organization's members will consult when the territorial integrity, independence, or security of any member is threatened (Henrikson 1995, 96-97). Essentially, NATO was to guard against European war and security threats in general, not specifically against the Soviet Union or any other particular threat. Throughout the Cold War, of course, all NATO's members assumed that the primary threat to security in Europe was the Soviet Union. It is significant that NATO's original charter did not specify the Soviet threat, though, because this allows one to argue that the end of the Cold War did not automatically signify the end of NATO's original goals. Security in Europe is the goal, thus maintaining the NATO alliance even after the collapse of the Soviet threat means that NATO is pursuing its larger goal of European stability and security. Therefore, considering that NATO's original charter does not point to Eastern European and Russian communism as the reason for its existence, NATO's current expansion eastward is not as ironic as it might at first appear.

Currently, NATO is expanding its membership to include Eastern European nations. The end of the Cold War a decade ago left NATO facing a significant crossroads: to declare the Cold War won and its mission accomplished, to maintain the organization's status quo, or to expand and include former members of the Soviet-led Warsaw Pact. Only in recent years has it become evident that NATO does not wish to maintain the status quo. NATO has begun to expand, officially adding Poland, Hungary, and the Czech Republic. This increases NATO's size to nineteen countries, and drastically changes the organization's composition, with the former enemies of Eastern Europe becoming official members of the alliance. Romania, Bulgaria, and the Baltic States (Estonia, Latvia and Lithuania) may be future candidates for NATO expansion.

NATO's current geographical expansion coincides with the expansion of roles for the organization. With the deployment of NATO peacekeeping troops into Bosnia in 1995, and the airstrikes against Serbia in the spring of 1999, NATO's mission has changed from deterring the Soviet Union to active participation in the dramatic events in the Balkans. This new role means an expansion for NATO in two ways. First, NATO has expanded beyond simply a defensive securi-

James Seaman received a Bachelor of Science in Political science and Bachelor of Arts in History from the University of Utah. He plans to work for one year on the Pro Bono Initiative, sponsored by the Lowell Bennion Community Service Center and funded by a Tanner fellowship. He then plans to attend law school.

ty alliance to become an organization apparently dedicated to peacekeeping. Secondly, the use of NATO troops in the former Yugoslavia means NATO has expanded the boundary of the area it considers part of its sphere.

Significantly, Russia sees NATO expansion as a threat. Russia considers the countries of Eastern and Southeastern Europe to be within its sphere of influence. More importantly, the Russians view Eastern Europe as part of its security zone, protecting it from the West. Just as significantly, the Russians have traditionally seen the Serbs (currently at the heart of the Balkan conflict) as brothers, sharing a common Slavic and Christian Orthodox heritage. In October of 1996, the Russian Duma voted 307-0 in favor of a resolution warning that enlargement of NATO could trigger a serious crisis between Russia and the West (Kahl 1998, 23). In fact, Russia may find it has no choice but to rely on the leverage of its nuclear weapons to make up for its lack of conventional military capability.

The Russians may also feel threatened economically by NATO's expansion eastward. Russia currently finds itself in a position of economic weakness. Simultaneously, Moscow finds itself being isolated by the West (the United States in particular) as its old Cold War enemy seeks to expand NATO eastward without offering an invitation to the Russians. This has the potential to rally nationalist sentiments in Russia, sentiments that may appear increasingly anti-American. As NATO expands to include the countries to Russia's west, Russia may increasingly find itself with nowhere to turn but within, perhaps to be swallowed by a resurgence of communism and/or nationalism.

Understanding the Russians

In understanding Russia's suspicion of NATO expansion, it is crucial to appreciate Russian history as a tragic story of invasion, violation, and exploitation from all sides: the east, the south, and particularly the west. In a 1931 speech, Soviet leader Joseph Stalin outlined the nature of Russia's historical abuse:

> She was beaten by the Mongol Khans, she was beaten by the Turkish beys, she was beaten by the Swedish feudal lords, she was beaten by the Polish and Lithuanian Gentry, she was beaten by the British and French capitalists, she was beaten by the Japanese barons (Adams 1986, 63).

Ten years after this speech, Russia was the victim of the largest invasion in military history, as Hitler sent 150 divisions and over three million men across the Russian border in Operation Barbarossa (Beevor, 1998, 12-13). And this was a mere generation after the Kaiser's troops had penetrated deep into Russian territory, causing immense death and destruction in the first World War. Nor can the United States be judged innocent by the jury of Russian history, as 1918 saw President Woodrow Wilson send American troops into Russian Siberia to fight with Czarist loyalists against the Red Army (Service 1997, 102). Twenty-seven million dead in World War II left the Russians desperate to protect their flank against future invasion from the West. In this light, Stalin's insistence on Soviet-friendly regimes in Eastern Europe can be seen as more than crude Soviet aggression.

After two world wars, and a lengthy history of bloody invasion, Russia saw it as a necessity to create a buffer-zone out of the vast plain between itself and Germany to offer protection not only from the Germans, but also from a historically hostile West. While the United States and its Western European allies viewed NATO as a justified defensive alliance in the face of a potentially threatening Soviet Union, Russia saw the alliance as offensive aggression. To the Russians, NATO simply fit into a pattern of Western hostility (Hixson 1995, 30).

The crucial element in all of this history is that American intentions have been interpreted by the Russians differently from the Americans themselves. American ideology produces the American mindset through which these events are viewed. The Russian viewpoint is framed by the turbulent stream of Russian history. Therefore, it is practically inevitable that NATO expansion, in the manner in which it has thus far progressed, will be viewed suspiciously by Russia. Any American who struggles to understand the Russian opinion of NATO expansion should consider the likely American mood if the countries of South and Central America were to join into a defensive alliance, and not extend an invitation to the United States. Furthermore, to make this analogy legitimate, one would also have to imagine that the allied countries of Latin America were economically and militarily powerful, with a history of hostile behavior toward the United States. Indeed, with two huge oceans to the east and west, and with relatively weak military and/or economic entities to the north and south, it is very difficult for any American to understand the defensive attitude undertaken by the Russians.

Russia's sense of isolation is deepened by the rejection of Russian requests to be granted membership in NATO. In 1992-93, Russian representatives expressed readiness to join NATO. Russian President Boris Yeltsin and Russian Foreign Minister Andrei Kozyrev both spoke about entry into NATO as a long-term political goal (Meseznikov 1998, 99). Of course, these Russian overtures were not met with sincere consideration by the West. This rejection of Russia is based on the belief in many Western circles that Russia is too weak to oppose Western plans. This belief could prove especially dangerous, particularly if it leads to attempts to exploit Russia. The danger exists in the possibility of a resurgent Russia in the future. Under such circumstances as a Russian recovery, the United States and Western Europe may pay a heavy price for their current stance toward the Russians.

America's current policy of NATO expansion eastward without (at this point) the likely possibility of extending an invitation to Russia must be viewed as a potential danger. A sense of alienation and isolation could potentially cause an adverse reaction among Russian leaders and the Russian peo-

ple. The United States must realize the position it is in: a definite crossroads, with an opportunity to reach out to the Russians and recent and even centuries of hostility between Russia and the West as a whole. Unfortunately, America's current policy is to encroach on Russia's western protection zone. An opportunity exists to bring Russia into the community of Western nations. The current pattern of NATO expansion in the face of Russian reservations could deepen Russia's sense of being discriminated against and ignored. This pattern could certainly strengthen the position of Russian hypernationalists or other extremist groups who could rally sentiment against NATO expansion in order to discredit current Russian leadership and thereby hinder democratic changes in Russia (Kahl 1998, 22).

POLICY OPTIONS

If the current United States policy of supporting NATO's eastward expansion without the inclusion of Russia is a mistake, policy alternatives must be examined. One possibility is for the United States to support Poland, Hungary, and the Czech Republic as new NATO members, but then cease the endorsement of further NATO expansion which would further threaten Russia's western borders. Clearly, NATO cannot reverse the acquisition of the three former Warsaw Pact nations it has already included in the alliance. Sending a message to the Russians that further expansion is not desired, though, might lessen Moscow's fears of further Western expansion and aggression. In the sense that halting further expansion of NATO might allow for a stronger friendship between Russia and the West, this policy option has distinct benefits.

NATO, however, cannot allow itself to become a stagnant organization. Like any organization, NATO needs solid goals and ideological commitments which will maintain the strength and will of its members. During the Cold War, NATO did not lack a mission because the perceived Soviet threat constantly forged a strong commitment from NATO's members. With the end of the Cold War, though, NATO was suddenly left with an ideological void. If communism and the Soviet threat no longer posed a significant challenge, what would be the purpose of NATO's existence? More specifically, NATO is a security alliance. Extinguishing NATO's primary security threat left the organization without a mission. In one sense, the collapse of communism and of the Soviet Union posed more of a threat to NATO's existence than the Red Army ever did. Without an ideological commitment and without a legitimate security challenge, NATO's members may lose their will to act. Thus the strength and legitimacy of the organization will erode, and NATO will either dissolve or exist as an impotent nominal organization. Maintaining the status quo does not give NATO the challenges it needs to forge renewed commitments from its members. Indeed, the viability of NATO, which currently depends on its systemic character, could be jeopardized unless the alliance expands (Henrikson 1995, 102).

The answer to this problem exists in the two forms of NATO expansion mentioned earlier. One form of expansion is institutional, with the addition of Eastern European nations into the alliance. The second form of expansion is an increase of NATO's military role in Europe—specifically the peacekeeping actions being undertaken in the Balkan region. The institutional expansion certainly provides a new challenge to NATO, as the organization becomes committed to helping democracy and capitalism succeed in Eastern Europe. In fact, the enlargement of NATO shows the United States' willingness to use the military alliance as a means for accomplishing the political objective of encouraging the preferred pattern of development in the countries of Eastern Europe. NATO is now seen not solely as a military alliance, but a political instrument used to promote liberal democracy. In fact, Dariusz Rosati, Polish Minister of Foreign Affairs, said in 1996 that Poland wanted to join NATO for reasons other than defensive security. Rosati suggested Poland sought NATO membership "because we support the beliefs of NATO—a democratic society, preservation of human rights, and a free market economy" (Kahl 1998, 13). Therefore, the institutional expansion of NATO allows for an ideological expansion that gives the member countries of NATO the new challenges needed to forge the will to act.

Clearly, the expansion of NATO gives the organization new challenges and ideological missions needed to keep the organization relevant. On the other hand, many have argued that searching for new roles to replace the Soviet threat is not constructive and that NATO *should* admit its usefulness has expired. It can be argued that NATO is the relic of a bygone, bipolar era, and the organization should therefore declare Cold War victory, and enter into retirement. Dissolving NATO would certainly be a solution to the problem of encroachment on Russia's western boundaries. Yet dissolving NATO would cause the United States to forfeit many of the benefits derived from membership in the organization.

Dissolving NATO would, first of all, cut one of the strongest ties between the United States and Western Europe. The fifty year-old military alliance has left no doubt that the Americans and Western Europeans are committed to one another. The dissolution of NATO would cease this major form of American and European cooperation and mutual commitment. The United States has always viewed Europe as a vital economic and security interest in the world. The existence of NATO guarantees that this economically and strategically significant continent is a strong ally of the United States. The close ties between the United States and Europe are almost taken for granted. The emergence of a strong European Union (EU) could lead to the creation of European interests separate from those of the United States. The EU could potentially develop as a power to rival, or even threaten, the United States both economically and militarily. The current trend in Western Europe is to turn inward economically. Since the introduction of the Single Market in 1986, Western European countries trade more than ever with each other but less with the rest of the world (Coker 1998, 6).

If the economic partnership between the United States and Europe continues to develop into a rivalry, the military unity that NATO provides will become significantly more important in holding together the U.S.-European link. An alliance as close as the one between Europe and the United States cannot be taken for granted. The United States must work to maintain a substantial friendship with the countries of Europe. An enduring commitment to NATO is one of the strongest ways to accomplish this.

NATO should also be recognized as a beneficial organization for its European members. For example, conflicts between Germany and France, Turkey and Greece, as well as Britain and Iceland have all been solved by commitment to one another as NATO allies (Henrikson 1995, 101). In fact, American commitment to NATO is in large part responsible for the forging of common European interests. Before the Cold War, Western Europe was never unified to the degree it has been under NATO. France and Germany, for example, were traditional enemies. NATO was a major reason for putting German and French nationalism aside and forging a mutual commitment between the two countries. Therefore, it can be said that NATO has done much more than simply deter the Soviet Union. By assuring the American-European partnership, by subverting traditional ties of European nationalism, and by forging a commitment to democracy and stability in the eastern half of the continent, NATO has proven to be an organization of substantial significance. To dissolve NATO would be to endanger far too many positive aspects of the alliance.

Including the Russians

NATO's expansion eastward is viewed as a threat by Russia, but halting expansion would leave the organization void of crucial challenges and ideological commitments. Further, dissolving the alliance would cause a forfeiture of the numerous benefits, both to the United States and to Europe, of NATO membership. Only one viable policy option remains: to include Russia in future NATO expansion. This position is certainly controversial, and the process of including Moscow would require convincing many critics that such a move would be worthwhile. Therefore, it is necessary to refute the points of opposition to Russian inclusion in NATO and to understand how Russian membership in the organization would be beneficial to all parties involved.

One of the major arguments against further NATO expansion is the cost of upgrading the military and intelligence capabilities of new NATO members. In February 1997, the Clinton Administration released a study suggesting that the inclusion of Poland, Hungary, and the Czech Republic in the alliance would cost between $27 billion and $35 billion from 1997 to 2007. The United States' share of the expansion was suggested to cost between $150 million and $200 million per year for the ten years following the expansion (Goldgeier 1999, 132). It is important to compare the cost of NATO expansion to the cost of defending new NATO members against a renewed, resurgent Russia. Ivan Eland prepared a Congressional Budget Office estimate in 1996 that included the possibility of a militarily resurgent Russia. According to these numbers, NATO expansion would likely cost $70 billion in the decade following enlargement (Goldgeier 1999, 132). Therefore, while expanding NATO institutionally to include a new member will require a hefty price-tag, this cost is dwarfed by what it will take for NATO to defend its Eastern European members against a future attack from a potentially strengthened and hostile Russia that is excluded from NATO. Consider the cost (in both dollars and lives) it took for America to wage the Cold War. Such a thought is sobering, and it makes a partnership with Russia much more attractive than the potential of a future confrontation with Moscow.

Another argument against the expansion of NATO to include Russia is the notion that, institutionally, NATO will suffer the same fate as the United Nations. The UN is seen by many as a bloated bureaucracy that includes too many diverse interests to operate effectively. The argument is that continued NATO expansion, particularly the inclusion of Russia, will cause NATO to become just as ineffective as the UN. However, one can begin by examining the history of NATO expansion, realizing that past expansion has benefited the organization. The additions of Greece and Turkey in 1952, West Germany in 1955, and Spain in 1982 have made the alliance stronger, not weaker. Much of the inefficiency in the UN derives from the gridlock of differing political interests. While its members have been concerned with political interests, NATO has always been primarily a military alliance, not a political organization. By its nature, NATO has not been prone to the level of stagnation and bureaucratic inefficiency plaguing the UN. However, the shifting of goals to include the encouragement of democracy and capitalism in Eastern Europe has introduced new roles for NATO. The key will be for NATO to adapt. Just as the organization adapted to include additional countries in the past, it must now grow into new changes.

Working in NATO's favor is the fact that commitment to democracy and capitalism are a litmus test for potential NATO members. The pattern is to encourage political and economic homogeneity among members. The UN does not expect its members to meet such rigid qualifications, and thus the organization is racked by discord. For a country like Russia, where the United States has sought for a decade to promote democracy and capitalism, it only makes sense to offer NATO membership as an inducement. Many have raised the question of whether Russia is committed to democracy and capitalism. Perhaps we should ask whether the United States has been fully committed to democracy and capitalism in Russia.

Beyond the examples of past NATO expansion, looking to other examples of European security organizations expand-

ing to include their former enemies is not as far-fetched as it seems. In fact, the Quadruple Alliance, used to defeat Napoleonic France, soon invited France into the alliance and became the basis of the Concert of Europe which would maintain relative peace on the continent for ninety-nine years (Henrikson 1995, 101). By inviting its former enemy into the fold, this nineteenth-century alliance kept peace in Europe because it included the interests of every major power on the continent. The development of the Quadruple Alliance into the Concert of Europe serves as the perfect precedent for how NATO can invite Russia to become part of its alliance.

Furthermore, the inclusion of Russia in NATO will give the organization more legitimacy in dealing with the ongoing crises of the Balkan region. As mentioned earlier, NATO has expanded its role to include peacekeeping missions in the Balkans. The Balkans have also proven to be the most volatile region on the continent. The combination of these two elements suggests that NATO will see more action in the former Yugoslavia. This is an area where Russia can provide NATO with capabilities currently beyond its means. Since the Russians share a common Slavic and Christian Orthodox heritage, the Serbs are much more likely to negotiate with Russia than with a NATO void of Russian influence and interest. NATO must bring the capabilities of its organization in line with the challenges of the external environment it faces (Jackson & Dutkiewicz 1998, 3). In reference to the Balkans, updating its capabilities by including Russia is the most legitimate and potentially successful way for NATO to deal peacefully with the conflicts in the former Yugoslavia.

Furthermore, if NATO plans to expand its roles to include action in the Balkans, it must recognize that this puts the organization in conflict with the Russian sphere of influence. NATO has little choice then, but to realize that its action in the Balkans equates to a shared interest with the Russians. It is impossible for NATO to expand its defined interests into Eastern Europe and the Balkans and not recognize the Russians. The easiest and best way to diffuse the potential conflict between Russia and NATO over spheres of influence is for NATO to include Russia in its alliance. To ignore Russian interests in Eastern Europe and the Balkans is particularly short-sighted for the United States, as these areas are literally next door to Russia, while the United States is thousands of miles away.

As questions arise over how best to keep NATO from becoming as awkward and bureaucratically inefficient as the UN, questions also arise about NATO conflicting with the jurisdiction of the UN. However, the UN should view NATO as a positive contributor to world stability, as NATO has allowed the UN to focus on conflicts and issues outside of Europe. As mentioned earlier, NATO has resolved conflicts between its own members—most significantly France and Germany. By taking care of its own problems, NATO has successfully reduced the potential burden on the UN. Furthermore, NATO has proven more successful than the UN in acting to halt the chaos occurring in the Balkan region. The conflict in Bosnia is the perfect example, as the UN repeatedly proved unable to act with the will needed to stop the fighting and provide relief to the war-torn region. The deployment of NATO forces in 1995 accomplished what the UN could not. Only NATO possesses command of the military forces, communications structures, strategy and intelligence to effectively act in a crisis (Jackson & Dutkiewicz 1998, 3). It can be argued that NATO has done more in its history to contribute to international peace and stability than has the United Nations (Henrikson 1995, 96).

Along with accomplishing its goals in the Balkans more successfully than the UN, NATO reserves the right to intervene where its interests are threatened. Article Four of NATO's 1949 Washington Treaty clearly implies that alliance members are expected to use their partnership as a means for coordinated action in other parts of the world (Henrikson 1995, 96). Clearly, NATO members can seek to protect their collective interests in any part of the world where those interests are threatened. This provides the legal justification for NATO involvement in the Balkans. Because NATO is not defined strictly as a regional organization, it does not fall under the UN's jurisdiction to regulate regional organizations as defined in Chapter VIII, Article 53 of the UN Charter (Henrikson 1995, 97).

CONCLUSIONS

After analyzing NATO's current status, and American support of that status, and after examining alternative policy options for the United States, one can conclude that expanding NATO to include Russia is the best choice for United States policy makers. Current NATO expansion is viewed as a threat by the Russians and this becomes a potential danger when one realizes that Russia will not remain in its current position of weakness forever. Not expanding NATO will lead to a shortage of challenges and the lack of an ideological mission for the alliance. Committing itself to democracy in Eastern Europe, as well as peace in the Balkans, replaces the void left for NATO when the Soviet Union collapsed. Dissolving NATO will rob the United States and the other member nations of the alliance of the benefits they derive from membership in the organization. Only by expanding NATO to include Russia can the United States and the other members of NATO eliminate the cost of arming Eastern Europe against a potentially threatening Russia in the future. Only by expanding NATO to include Russia can the alliance gain the legitimacy needed to diffuse conflicts in the Balkans. Finally, history shows that European alliances have the potential to expand and operate successfully while including the interests of all major powers on the continent, suggesting that NATO does not have to become as inefficient as the UN.

Expanding NATO to include its former enemy will require the support of the nations of Western Europe, not just the United States. As the strongest NATO member, howev-

er, the United States must take the lead in advocating an expanded NATO. Allowing Russia to join NATO will be a significant step toward thwarting major European conflict in the twenty-first century and moving the continent beyond the bloodshed that defined twentieth century European history.

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Striking the Middle Ground on the Education Debate: The Overarching Question of What is Best for *Our* Children

— Representative Jim Matheson, Utah's Second Congressional District

INTRODUCTION

Lately, for a politician to espouse the value of education is as downright American as loving your grandmother and watching baseball. In fact, there is probably not a single public servant who would not claim to believe that education is a high priority. Everyone believes that providing for our future requires the education of our children. However this widening emphasis on education at times creates ideological schisms between political parties and avoids the practical nature of what is being discussed.

THE NATIONAL RHETORIC

The national education debate right now is characterized by three major themes: choice, accountability, and flexibility. In many ways there is great consensus, and in many ways there is bitter partisanship over these three concepts.

CHOICE

Both political parties believe that there should be some form of school choice. No one thinks that every public school is a perfect fit for every child. Yet the form that school choice should take has great variation. President Bush has proposed a program where any child that is in a school receiving Title I funds under the Elementary and Secondary Education Act (Title I funds are given to schools that serve high numbers of children in poverty) which is designated as "dangerous" or as "failing" be given the opportunity to transfer to another school. School transfers are to be financed by breaking apart the Title I funds given to the school, and giving a portion of them to each child to finance their education at another public school or private school, or even to finance tutoring programs.

Educators believe that public funds should remain in public schools, and they should be targeted to the neediest of children. However, opportunities for public school choice, innovative charter schools and magnet school programs receive National Education Association (NEA) support. School choice characterizes the pattern of education debate: consensus on concepts, division on details.

ACCOUNTABILITY

A similar pattern is evolving in discussions about accountability. Everyone believes that schools should be accountable. No politician, educator, or public administrator would declare the value of funding failing programs; no one wants to put money into something, which does not work. The broadly accepted answer is accountability.

President Bush defines accountability as yearly testing of all students in grades three through eight. Without testing educators do not know where a child is, they cannot provide needed remediation, and they cannot be held responsible for the results of their efforts. Test scores should be used as indicators of student progress, and schools failing to meet standards should lose funds, while rewards should be given to those who meet or exceed standards according to the President's plan.

Others express concern about what they call "high stakes testing," the use of a single measure to evaluate students and make funding decisions. They decry the practice of "teaching to the test" in which all that occurs in schools is tailored to a single test. They insist that other forms of assessment are necessary. Again, what emerges is a broad difference in the details, despite agreement on the concept of accountability.

FLEXIBILITY

In the area of flexibility there is again an over-arching acceptance of the principle. Most bureaucrats would not design a program with impossible paperwork and hundreds of restrictions – on purpose. Everyone believes that local educators should have power to make decisions about what occurs in their classrooms and should be supported in providing the best possible education to each of their students. Yet, again the policy implications of these beliefs take very different forms.

Some believe that there should be options for states showing high achievement on standardized tests to opt out of all federal program requirements. There should be no guidelines on how money is to be used, and instead it should all be left to the state's discretion. There is a movement to consolidate federal education programs into few funding streams, and then have limited requirements on how these funds are to

be used. It is a concept of rewarding states that are "accountable" with "flexibility."

In contrast, others would like to preserve the separate federal education programs that currently exist. They contend that each is designed to meet a unique and valuable need, and that they must continue to do so. They see guidelines as checks on the appropriate use of funds to meet federal priorities. Perhaps here, more than in any other case, there is a contrast in the opposing views.

In the middle of all the debate is the practical reality of what really ought to be accomplished on education. Historically, the federal role in education began to help in areas where the states lacked the resources to serve specific student populations. Several examples of these programs include Title I of the Elementary and Secondary Education Act. Title I was designed to provide federal dollars to schools serving a high number of students in poverty, schools shouldering an increased burden because of their student populations. It was not intended to help all schools or all students, but it was intended to meet a specific need that states alone were unable to finance. Impact Aid served a similar role. This funding was designed to help schools serving a large number of students living on federal lands, since federal lands are not taxable by local authorities. Schools serving children living on these lands lose a large base of local tax revenue, which typically would help finance public education. Impact aid is designed to help offset expenditures and provide these schools with the missing operating funds.

Over time, the scope of federal involvement has increased, generating many concerns about over-regulation, increased bureaucracy, and the size of expenditures. These concerns about how the federal government ought to be involved in education have given rise to the discussions on choice, accountability, and flexibility outlined above.

However, the situation in Utah does not necessarily conform to these national concerns. There are many unique characteristics and needs to be considered in education reform.

THE SITUATION IN UTAH

In evaluating education it is necessary to create a context for the debate. This means looking closely at the situation in Utah and the effects of policies at the state level.

Many of the concerns being expressed nationally are valid, but often the pictures of "failing schools" do not accurately depict education in Utah. Utah's schools are characterized by committed teachers, committed administrators, and — perhaps most of all —committed parents who care about quality education. These individuals invest their time in the heroic, daily act known as teaching. Parents give record numbers of volunteer hours to their children's schools (Parent Teacher Association (PTA) organizations are involved in 85 percent of Utah's schools compared to only 20-30 percent nationwide). Recent data shows Utah's schools rank eighth in the nation on the eighth grade NAEP tests.[1] Students continue to score well above the national average on tests and attend college at high rates.

Utah's schools also face tremendous challenges. Census data shows Utah to have the highest ratio of students to teachers in the nation, and Utah also ranks the lowest (51st) in the nation in per pupil expenditure. Classrooms are chronically overcrowded; textbooks are outdated. And, the growth causing these challenges will continue. In the next ten years the State Board of Education estimates that Utah will add approximately 100,000 new students and need to build over 124 new schools, a 15 percent increase.

Overall, tremendous commitment has allowed Utah to overcome the odds against it: too little money and too many children in classes. Granted, these are general statements. They do not account for every situation. Certain parents struggle with uncommitted teachers, and certain teachers struggle with uncommitted parents, however they do represent much of the norm.

Decreasing class size, increasing the resources available, and meeting the increasing challenge of new immigrant and refugee students are all priorities in Utah. These are not partisan issues. They are the reality of what Utah needs. However, the national debate on education does little to address these needs in its current form.

THE MIDDLE GROUND

Despite ideological differences between parties, addressing the challenges in Utah's education system is a practical matter. It is about what works for our schools. It is about meeting priorities. Following are several practical, common sense principles to guide federal decisions on education. These are not steeped in any ideology. They do not conform to either Republican or Democratic priorities. Instead they cut across the rhetoric and ask a simple question: What is best for our children? They do not generate a perfect proposal, but they begin to redefine the way we examine education, specifically the federal role in education.

1. The federal government should meet its obligations and keep its promises. New education programs should not be initiated until the existing ones are adequately funded. This is a simple concept, but one that is often lacking in federal politicking. If states and local schools are depending on federal dollars to meet certain priorities, providing these should be the first objective in federal education policy. New programs create new obligations, and subsequently new revenue sources that local educators come to count on. New programs should be initiated only after existing obligations have been met.

This means that when looking at consolidating existing

1 Bennet, W.J. (2001). The Index of Leading Cultural Indicators 2001. Washington, DC: empower.org.

programs, or creating new programs there must be an overarching rationale for decisions that are made. This requires care to not embrace a plan to consolidate programs just because it sounds like a comprehensive change. Those programs, which work, ought to be preserved. Those, which fail, ought to be consolidated, but it is important to understand the implications for local schools before eliminating programs.

2. The federal government should strive to decrease bureaucracy in education whenever possible. Schools are organizations with teachers having tremendous responsibility. They generally do not have other employees to fill out grant applications, process forms, or interact with government agencies. Things should be as simple as possible, and they should be administered at the local level. Less bureaucracy means fewer strings attached, and it means that programs are administered at the local level. It does not inherently mean state instead of federal; rather it means fewer layers through which funds and administration should pass.

3. The federal government should address areas of critical national concern. The historic model of federal involvement in education is not all wrong. It is based on targeting funds to offset local burdens and meeting identified national objectives. Coordinated efforts to solve specific problems should continue to be a priority of federal education policy.

4. The federal government should fund education within the context of fiscal responsibility. There are many valuable federal priorities within and outside of education which must be weighed out. It is irresponsible to not budget for expenditures. What is necessary is a framework for decision-making, whereby expenditures and revenues are examined, debt is paid down, and valuable federal programs are protected.

THE RESULTS OF COMMON SENSE

The federal government only provides approximately seven percent of funding for local schools and alone it cannot address all the challenges Utah faces in education. Local solutions and local commitments will be necessary and must be sustained to continue Utah's legacy of educational quality and success. However, following the above principles would lead to a federal education policy that would make sense in Utah.

1. If the federal government keeps its promises local schools can better address their unique concerns. Although the federal government does not control the class size in Utah, one of the best ways to address this problem is for the federal government to meet its obligations, for example, fully funding the Individuals with Disabilities Education Act (IDEA). This act promised the states that the federal government would provide for 40 percent of the costs associated with educating special needs students. Over time the federal contribution on behalf of IDEA has never risen over 15 percent. This leaves a tremendous burden on local schools since the cost of educating these students is astronomical. Decisions in federal court require local schools to educate children, however the mandate is not matched by federal funds. The answer is simple. Educating these children is the right thing to do. Providing federal funds to help offset the state's expenditure is appropriate because they place such a burden on the local schools.

If existing programs such as IDEA and Title I are funded first, it is assured that the most needed funds will get to schools. Then, when looking at consolidation of programs and funding other initiatives these principles can be kept in mind. Let me give just two examples of how this may help Utah.

One of the only sources of funding for ongoing teacher training in Utah is the federal Eisenhower Professional Development Program. School Board members report that they have seen greater increases in student achievement through these training activities, than any other program. Nevertheless, over-crowded classrooms are the norm in Utah. Current plans to consolidate the Eisenhower Professional Development Program with Class Size Reduction may free money for a moderate decrease in class size, but it could also remove one of the only sources of professional development available to teachers. Institutions of higher education have also effectively used this funding to provide training for teachers, particularly in math and science. Adjusting this program and administering it to the state may remove the opportunity for universities to obtain these funds.

Secondly, many schools in Utah have started after-school programs using the 21st Century Learning Center grants. These funds pay for homework clubs, which have dramatically increased student academic achievement. They allow for schools to open early and stay open late so that students have a safe place to be rather than on the streets. Often, Utah schools can obtain these competitive grants through hard work, innovation, and teachers' commitment. However, formula allocations frequently shortchange Utah's students because they are based on population or the per pupil expenditure made at the state level (such as with Title I). In a state with the lowest per pupil expenditure and a rapidly increasing student population not always reflected in census data, changing the allocation and administration of these competitive funds may remove the only designated source of money for effective after school programs in Utah.

It is an examination of the implications of such program consolidation that must occur before decisions are made at a federal level. In addition, these existing programs should be a priority over new, in order to assure that Utah does not have to cancel effective programs.

2. If the federal government works to decrease bureaucracy local educators will be more empowered. Accountability measures implemented at the local level will actually create educational success. Utah recently passed U-Pass leg-

islation which is already ahead of the national effort to test students regularly across subject areas. If bureaucracy is decreased, national mandates will not supplant or interfere with these local efforts. There will not be a national test or an indirect effort to create a national curriculum, and Utah schools will not lose dollars in federal attempts to mandate accountability for only seven percent of their funding.

Utah educators will be able to continue their efforts to measure student progress over time, and parents will be provided with important information about their child's school. This will occur because these are state priorities currently being pursued. In addition, local schools will be able to count on funding because it will not pass through another layer of bureaucracy at the state level, whenever possible it will go directly to the districts and the schools. There will also be no undue strings attached to federal education dollars.

Finally, local schools will also continue to provide public school choice, but will be able to recognize their own limitations due to over-crowded classes and schools. Federal mandates will not require these local entities to exceed their capacities. Instead, they will be able to operate in the manner they have already proven successful.

3. If the federal government addresses areas of national concern, Utah's schools will also benefit. An excellent example of this is an increased national focus on math and science education. A national commission has studied how to improve math and science education. A united, systemic attempt to address this nationally would benefit Utah's schools.

Like much of the nation, Utah has a shortage of math and science educators. Fewer students are pursuing higher education in math and science fields, fewer professionals are entering math and science fields, and even fewer are becoming qualified teachers in these areas. And the situation is cyclical. A direct, comprehensive federal effort to address this national concern would also help Utah's students and businesses. Federal programs to repay educational loans for individuals with a math or science degree who become teachers in shortage areas are a good example of limited intrusion, but worthwhile results.

4. If the federal government is fiscally responsible, sustained support for education in Utah will be possible. Long term planning, which includes debt reduction, protection of federal obligations such as Medicare and social security, and realistic spending forecasts, will enable federal support of education to be sustained. There will not be unexpected deficits, unbalanced budgets, and other federal financial crises which force dramatic cuts in discretionary spending. Instead, local educators will be able to plan on federal resources from year to year. There will not be a sudden need to cut the hours of Title I aides because federal funding is frozen or decreasing (such is occurring in Utah this year), instead there will be a comprehensive effort to provide sustained federal funding.

When all the rhetoric of support for education is backed up with the reality of funding, Congress will no longer only talk about how education is valuable, but will demonstrate it by consistently funding its commitments to the nation's neediest students. Federal funding promises fulfilled will mean local funding priorities that can be made a reality – smaller class sizes, better textbooks, and quality teachers for every student.

Conclusion

Despite a seeming unity in the pursuit of quality education, there exist many different approaches to accomplishing such a goal. However, understanding what Utah's needs are and taking a common sense approach to federal policy defines the middle ground. This middle ground is a pragmatic and sensible look at practical solutions, rather than ideological platitudes. This middle ground approach is especially valuable because it is capable of providing what is best for Utah's children.

The Fluidity of Copyright Law: Emerging Internet Technologies Raise Legitimate Questions Surrounding the Nature and Scope of Property Rights & Copyright Protection

By Congressman Chris Cannon (R-UT)

Let me begin by saying that as a Conservative, I believe in and respect property rights - whether the property in question is physical, personal, or intellectual. Without sufficient protection of intellectual property, we would not have companies such as Novell or Ebay, employing thousands of Americans, including many in my district. The global marketplace for books written by American authors, movies created by American directors, and songs performed by American artists flourishes in part because our nation respects creativity and provides a legal framework that encourages it.

Indeed, this tradition of respect for intellectual property in America dates back to the founding of the Republic. No lesser authorities than the framers of the Constitution saw fit to include in that document a paragraph granting Congress the authority to protect creative works. Article One, Section 8, paragraph 8 of the United States Constitution grants Congress the power "To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

It is important to recognize, as the Founding Fathers did, that there are some significant distinctions between physical property and intellectual property. Perhaps the most striking difference between physical property and intellectual property is that when you sell physical property (or give it away), it is gone. Yet, intellectual property may be disseminated thousands of times, often without lessening its value. Indeed, in stark contrast to physical property, in our modern and networked world, intellectual property often becomes more valuable the more it is sold or given away. (Microsoft's distribution of Internet Explorer is but one obvious example of this dynamic.)

These differences extend beyond the conceptual to include the practical. In dealing with the complexities of intellectual property over the years, Congress has balanced competing interests. The Congressionally-guided evolution of copyright law over the last two centuries has sought to maintain a delicate balance that: (1) maintains a strong incentive for authors to write, painters to paint, and composers to compose; (2) ensures that the public will have access to intellectual property for a variety of purposes; and (3) allows creators some measure of (but not necessarily total) control over the destiny of their creations. This balancing act is more difficult than ever as we enter the digital age. In our hands we clutch constructs of law that have served us well in the past, but may quickly become outdated. Nevertheless, our goals remain the same.

Foremost among these goals, I believe, is ensuring that adequate incentives to creativity remain in place. As such, I cannot and will not support anyone who profits off of other people's creativity or innovation, yet fails to compensate the creator.

However, facilitating public access to creative works is also a key goal — one that is in no way inconsistent with Congress providing incentives for creativity. And with that thought in mind, I would like to specifically address the issue of the digital music distribution market place.

As some may know, I have experience as a venture capitalist, starting more than a decade ago with Utah-based Geneva Steel. But as e-commerce has taken hold, I have moved the focus of my efforts to the technology arena.

Like most venture capitalists, I have watched companies such as Musicmaker.com, Riffage.com, and others that had hoped to distribute music via the Internet, go out of business. To be sure, the failure of online music distribution to take hold is, in part, rooted in the immaturity of the marketplace and the lack of residential broadband access that would allow for high-speed downloads of music and information.

But there are also troubling signs that the recording industry may have intentionally chosen not to license music to new entrants to the marketplace. It has been suggested by a number of observers that the industry may be manipulating copyright law to deprive the digital music market of competitive forces. If that charge is proven, the copyright model the recording labels have come to rely upon will almost certainly require adjustment. Any system of distribution that increases costs to consumers, decreases choices, or distorts the market should be thoroughly examined - particularly when that system exists only as an outgrowth of rights to intellectual property conferred by Congress.

Let me reemphasize that Congress' historical approach to copyright law has not been static. Copyright protection is not a black-and-white issue. We can go back to the player piano controversy of the early 1900's to see that there are gray areas in Congress' views of how best to preserve incentives for artists while encouraging distribution and utilization of intellectual property. Early last century, copyright holders fighting the advent of the player piano argued that without absolute control of copyrights, the music

industry was destined to fail. Congress, however, disagreed. It created a compulsory copyright mechanism that ensured artists were paid, while at the same time providing information liquidity in the music marketplace.

This was far from the only time that Congress has modified copyright law to balance intellectual property rights with distributional concerns and technological progress. Twenty-five years ago, Congress enacted amendments to the Copyright Act that authorized compulsory copyrights for cable TV retransmission of broadcast signals. Eight years later, we enacted the Satellite Home Viewer Act to provide satellite carriers with a similar capability. In 1995, we provided a mechanism for artists to collect license fees from satellite and cable digital music services. And just last year, we renewed the Satellite Home Viewer Act to increase competition between cable TV and the direct broadcast satellite industry. Technological advances in the past few years have once again caused a potential crisis in the current copyright regime.

Congress has demonstrated its willingness to modify copyright laws when warranted to ensure that artists, consumers, and creators of new technologies are all treated fairly. Whether the problem of digital music requires such a modification has yet to be determined. But I would hope Congress would not shy from an examination of the issues merely because the same copyright stakeholders who sought from us the sweeping changes of the Digital Millennium Copyright Act two years ago now demand absolute rigidity of the status quo.

Some have suggested that the solution to the problem of digital music distribution is to enact a compulsory copyright or a similar mechanism. I understand that the recording industry is strongly opposed to such an approach for sound recordings on the Internet. But it should be pointed out that their opposition to compulsory licenses appears to many policy makers as less a matter of copyright principle and property rights than a matter of business interests. Were it a matter of principle, then Vivendi-Universal and other labels would not be pursuing a compulsory license for publishing rights.

Clearly, everyone involved would prefer a market-driven resolution to this issue. The recent announcement regarding the industry's new deal with Real Networks is a step in the right direction. However, the fact that the new distribution service is owned in substantial part by recording labels highlights the potential dangers of vertical integration in the marketplace. If anti-competitive practices are taking place, we must be prepared to shift our paradigms regarding music licensing to ensure a vibrant and competitive market for online music.

The Internet continues to bring us wonderful new developments for the world — from entertainment to telemedicine. With it comes frictionless e-commerce, which can only create greater competition in the marketplace. My hope is that as a result of vigorous competition among digital media companies, we will see a decline in the costs of digital music and other information, and with it more options for artists, consumers, and the public as a whole.

As a member of the House Judiciary Committee's Subcommittee on Courts, the Internet and Intellectual Property, I will continue monitoring developments in the digital music marketplace, to see whether the full effects of competition are being diluted in the digital music world because of laws that are outdated. And I will continue to work with other members of Congress to ensure an appropriate balance between protection of intellectual property rights and the need for efficient distribution of information in the digital world.

Final Word

"The character of your work is measured by the materials of your body and your brain that go to make it live. Until you make yourself a part of the thing you do—just so long will you do but little."

Robert H. Hinckley