NORTHERN KENTUCKY LAW REVIEW

Volume 32 General Law Issue Number 1

GENERAL LAW ISSUE

ARTICLES
Presumed Innocent, Feared Dangerous: The Eighth Amendment’s Right to Bail
Joseph L. Lester ................................................................................................. 1

The Statutory and Executive Development of the National Security Exemption to Disclosure Under the Freedom of Information Act: Past and Future
David B. McGinty ............................................................................................... 67

The Contractual Alternative to Marriage
Allen M. Parkman ............................................................................................. 125

The Suburban Advantage: Are the Tax Benefits of Homeownership Defensible?
Mark Andrew Snider .......................................................................................... 157

NOTES
Inconsistency among the Circuits: Is the New Provider Exemption Ambiguous?
Lynne A. Berkemeier ......................................................................................... 189

County of Wayne v. Hathcock: The Resurrection of the Public Use Limitation on the Power of Eminent Domain
M. Ryan Kirkham ............................................................................................... 215

A Breath of Fresh Air: A Smoking Ban’s Legal Invasion of Property Rights in Lexington Fayette County Food & Beverage Ass’n v. Lexington-Fayette Urban County Gov’t
Matthew A. Stinnett .......................................................................................... 239
Northern Kentucky Law Review is published four times during the academic year by students of Salmon P. Chase College of Law, Northern Kentucky University, Highland Heights, Kentucky 41099. Telephone: 859/572-5444. Facsimile: 859/572-6159. Member, National Conference of Law Reviews. All sections which appear in this issue are indexed by the H.W. Wilson Company in its Index to Legal Periodicals. Northern Kentucky Law Review articles are also available on microfilm and microfiche through University Microfilms International, Ann Arbor, Michigan.

Subscription rates are $35.00 per volume, $10.00 per individual issue. If a subscriber wishes to discontinue a subscription at its expiration, notice to that effect should be sent to the Northern Kentucky Law Review office. Otherwise, it will be assumed that renewal of the subscription is desired.

Please send all manuscripts to the address given above. No manuscript will be returned unless return is specifically requested by the author.
To the memory of

Gentry Aubrey

a fellow law student at Chase
who impacted us all.

*
**GENERAL LAW ISSUE**

**ARTICLES**

Presumed Innocent, Feared Dangerous: The Eighth Amendment’s Right to Bail  
*Joseph L. Lester* ........................................................................................................... 1

The Statutory and Executive Development of the National Security Exemption to Disclosure Under the Freedom of Information Act: Past and Future  
*David B. McGinty* ...................................................................................................... 67

The Contractual Alternative to Marriage  
*Allen M. Parkman* .................................................................................................... 125

The Suburban Advantage: Are the Tax Benefits of Homeownership Defensible?  
*Mark Andrew Snider* ................................................................................................ 157

**NOTES**

Inconsistency among the Circuits: Is the New Provider Exemption Ambiguous?  
*Lynne A. Berkemeier* ................................................................................................ 189

*County of Wayne v. Hathcock*: The Resurrection of the Public Use Limitation on the Power of Eminent Domain  
*M. Ryan Kirkham* ..................................................................................................... 215

A Breath of Fresh Air: A Smoking Ban’s Legal Invasion of Property Rights in *Lexington Fayette County Food & Beverage Ass’n v. Lexington-Fayette Urban County Gov’t*  
*Matthew A. Stinnett* .................................................................................................. 239
PRESUMED INNOCENT, FEARED DANGEROUS: THE EIGHTH AMENDMENT’S RIGHT TO BAIL

by Joseph L. Lester*

I. INTRODUCTION

For 13 months Samuel Moore sat in a Crisp County, Georgia, jail. 1 He was jailed for loitering and a year-old arrest warrant for selling drugs. 2 Because he had a criminal history, he did not care much for the police officers who picked him up two days before Christmas; nor they for him. 3 There was no presumption of innocence for a man in his mid-forties who must have been up to no good; after all, he was a felon. 4 Nine months after his arrest, without a lawyer or any assistance whatsoever, Samuel filed a handwritten motion begging the Crisp County court to give him a copy of the charges filed against him. 5 He had been in jail for the better part of a year and had never been formally told of his alleged indiscretion. 6 His case had slipped through the cracks. Three days after Samuel filed his motion, the district attorney dismissed all charges. 7 But instead of being released immediately, Samuel spent another four months in jail. 8 Samuel was punished for a crime that he was neither convicted of nor even prosecuted further than his arrest. 9

A fundamental premise in our criminal justice system is the presumption of innocence given to every defendant. 10 "A person when first charged with a crime

---

* Joseph L. Lester is an Associate Professor of Law at Thomas Goode Jones School of Law, Faulkner University. Special thanks to Jason Britt for his valuable research assistance.

2 Id.
3 Id. Samuel’s distrust of the police caused him to refuse to divulge his name to the police. Id.
4 Id.
5 Id.
6 Id.
7 Rankin, supra note 1, at A-1.
8 Id. Samuel was released when attorney Atteeyah Hollie, from the Southern Center for Human Rights in Atlanta, inquired about him after other inmates told her about Samuel. Id. He was released without fanfare the next day. Id.
9 See id.
10 In re Winship, 397 U.S. 358, 363 (1970). The court stated:
is entitled to a presumption of innocence." The presumption should be at its strongest at the setting of bail. As short and as plain as the language of the Eighth Amendment is ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted"), it is ironic that it is "some of the most ambiguous language in the Bill of Rights." Controversy exists as to whether there is an absolute right to bail or only a protection against excessive bail. As a result of this controversy, it is unclear what role, if any, the presumption of innocence should play at pretrial criminal proceedings.

This article explores the important connection between the presumption of innocence and bail during the preliminary stages of a criminal prosecution. As the Supreme Court stated in Stack v. Boyle, "unless the right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." The first section of this article deals with the presumption of innocence, its origins and historical importance and the vital role that it should play in all formal court proceedings. The second section discusses bail: the purpose of bail, the process of setting bail, the right to bail and the constitutionality of bail. The third section explores the ever-emerging practice of preventive detention as an alternative to bail. The fourth section

The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence -- that bedrock "axiomatic and elementary" principle whose "enforcement lies at the foundation of the administration of our criminal law."

Id. (quoting Coffin v. United States, 156 U.S. 432, 453 (1895)).


12 See generally Estelle v. Williams, 425 U.S. 501, 518 (1975). The court stated:

Jurors may speculate that the accused’s pretrial incarceration, although often the result of his inability to raise bail, is explained by the fact that he poses a danger to the community or has a prior criminal record; a significant danger is thus created of corruption of the fact finding process though mere suspicion.

Id.

13 U.S. Const. amend. VIII.


18 See infra text accompanying notes 24-86.

19 See infra text accompanying notes 87-54.

20 See infra text accompanying notes 255-18.
examines the statistical data regarding pretrial detention and release to prove a correlation between being held without bail or on a high bail and the rate of conviction. This article’s thesis is that a defendant who is granted or afforded pretrial release stands a greater chance of not being convicted because a free defendant puts a higher burden on the government to prove its case. Therefore, it is crucial that at times like these when the public’s insecurity is high because of recent terrorist events, all states should reexamine their bail practices to make sure our liberty is not a casualty of our fear.

II. THE PRESUMPTION OF INNOCENCE

The presumption of innocence is a concept that is firmly fixed in our law. Its origins are ancient in nature, and its existence has been a hallmark of justice. The phrase is more than just a term of art; it plays a very important role in the fair administration of justice. It is not an idea that relies on empirical data for justification. In fact, it may be possible that the empirical data, if

21 See infra text accompanying notes 419-48.
22 “The basic purpose of a trial is the determination of truth.” Tehan v. United States, 382 U.S. 406, 416 (1966). This justifies punishing by taking away the guilty party’s liberty. If the accused is already restrained in a jail cell before a trial, then there is no rush for the prosecution to get a conviction because the danger is at least temporarily subsided. See, e.g., United States v. Infelise, 934 F.2d 103, 104-05 (7th Cir. 1991). On the contrary, a prosecutor has more motivation to hurry a trial date along if the accused is free. See generally id. Contra United States v. Hanhardt, 156 F. Supp. 2d 988, 1001 (N.D. Ill. 2001). A free defendant means that the prosecutor has to affirmatively act to restrain the defendant. See, e.g., Infelise, 934 F.2d at 105.
24 See Bryant v. State, 23 So. 40, 42 (Ala. 1897) (“[The legal presumption of innocence] attends the accused until his guilt is placed beyond a reasonable doubt.”); see also People v. Winthrop, 50 P. 390, 392-93 (Cal. 1897) (“[The] presumption of innocence accompanies [the accused] throughout the trial.”); see also 9 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2511, at 530 n.1 (Chadbourn rev. 1981).
25 Professor Greenleaf found the presumption in the Biblical book of Deuteronomy. 3 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 29 (6th ed. 1860). Other scholars find it in Roman law. Coffin v. United States, 156 U.S. 432, 454 (1895). It is clear that “the presumption of innocence was recognized in the second half of the eighteenth century as a basic constitutional right granted to every person.” State v. Simmons, 614 P.2d 1316, 1318 (Wash. Ct. App. 1980) (McInturff, J., concurring) (“[A] fundamental philosophy flowing through our concept of due process is the presumption of innocence until proven guilty.”).
26 See Kitai, supra note 16, at 271-72. Kitai states:
collected, would disprove an actual presumption of innocence.\textsuperscript{27} For example, according to Bureau of Justice statistics, more than half of the suspects arrested for federal crimes are convicted.\textsuperscript{28} Nevertheless, the presumption of innocence is a bedrock concept of criminal justice born not out of experience but public policy.\textsuperscript{29} The presumption of innocence has little to do with predicting the final outcome of a trial,\textsuperscript{30} but it is a fundamental principle of due process.\textsuperscript{31}

A. The Presumption of Innocence Is Not a Real Presumption

The expression “presumption of innocence” is an imprecise term.\textsuperscript{32} It is not an irrebuttable presumption.\textsuperscript{33} In fact, for many scholars it is not considered a

For even if the presumption of innocence reflects a factual truth based on empirical experience or human nature, justifying the presumption of innocence solely on factual grounds is insufficient. To illustrate, if the ratio of criminal offenses to individuals in the population shifts to reflect that the majority of the population commits offenses, the statistics would then invalidate a factual presumption of innocence. Additionally, assuming a factual basis to the presumption leads to difficulty in justifying the use of the presumption for certain groups who statistically commit a high number of crimes. The residents of a specific high-crime neighborhood would be an example of such a group.

\textit{Id.}

\textsuperscript{27} Id.


After reaching a high of 61\% in the 1994 study, the felony conviction rate fell to 55\% in 1996 and 52\% in both 1998 and 2000. This rate was still slightly higher than the 50\% rate in the 1990 study. Sixty-four percent of defendants were convicted of a felony or a misdemeanor in 2000 the same as in 1990, but this continued a downward trend from a high of 72\% in 1994.

\textit{Id.}

\textsuperscript{29} As the trial system developed over time the modern practice of truth seeking by evidentiary proof, as opposed to the medieval inquisitorial purges involving physical tests or ordeals, required that “in the eye of the law every man is honest and innocent, unless it be proved legally to the contrary.” William S. Laufer, \textit{The Rhetoric of Innocence}, 70 \textit{WASH. L. REV.} 329, 332 (1995) (citing Records of Massachusetts, iii, 434-35, cited in James Bradley Thayer, A Preliminary Treatise on Evidence at the Common Law 552 (1898)).


\textsuperscript{32} See Laufer, supra note 29, at 340.
The Supreme Court in *Coffin v. United States* described the presumption of innocence as an actual presumption insofar as it is “an instrument of proof created by the law in favor of one accused, whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law has created.” The legal scholars of the time were quick to rebuke the Court’s characterization. John Henry Wigmore summarized the critique of *Coffin*, writing that, “this term has been the subject of two special fallacies, namely, 1, that it is a genuine addition to the number of presumptions, and, 2, that it is *per se* evidence.” In the face of such criticism, the Supreme Court changed its tack and now maintains the phrase is more descriptive than substantive. It has been suggested that a better term of art might be an “assumption of innocence” to distinguish it from an actual presumption.

The primary application of the presumption of innocence is at trial as an aid to the jury in understanding the burden of proof, but it is not always required. For example, in *United States v. Velaz-Vasquez*, the failure to give specific jury instruction on presumption of innocence was not error because the overall instructions conveyed that idea clearly. That court found that since the judge explained at length and repeatedly that the government at all times bore the burden of proof, the jury had that information without a specific instruction. See *United States v. Velaz-Vasquez*, 116 F.3d 58, 61 (2d Cir. 1997).

For the most part the presumption of innocence has been required as a jury instruction, a warning or a balance to affirm in the jury’s mind that the state has the burden of proof. See James J. Gobert, *In Search of the Impartial Jury*, 79 J. CRIM. L. & CRIMINOLOGY 269, 276 (1988).

**Id.**
burden of proof beyond a reasonable doubt, there was no error with the trial judge’s instruction regarding the presumption of innocence.42

Even though the presumption of innocence is not really a presumption in terms of being actual evidence, the burden of proof required at trial should also apply to pretrial proceedings.43 Courts have tied the presumption of innocence to the burden of proof required by the government.44 Thus, for many scholars the phrase “presumption of innocence” is devoid of independent meaning.45 It is clear that it does have some meaningful purpose because the phrase has been carefully maintained and never specifically declared unavailable.46 For the presumption to have its full meaning, it must apply at all stages of the judicial process.47 Having the presumption only at the actual trial limits the usefulness of the presumption because if it is not available every time the government seeks to deprive a suspect of his liberty, it is of little value.48 The presumption of innocence is the starting point at which a judicial officer and the jury should view the accused.49 It is not a presumption that can be rebutted during the trial, but instead “hovers over the prisoner as a guardian angel” from the moment of indictment until the verdict is determined.50

42 See id.
43 See Kitai, supra note 16, at 259.
44 See Taylor, 436 U.S. at 485-86.
45 See supra note 34.
46 18 U.S.C.A. § 3142(j) (West 2000 & Supp. 2003). Congress reiterates the fact that there is a presumption of innocence by explicitly stating, “Nothing in this section shall be construed as modifying or limiting the presumption of innocence.” Id.
47 See generally Escobedo v. Illinois, 378 U.S. 478, 490-91 (1964) (holding that the right to counsel under the Sixth Amendment to the Constitution, made applicable to the States under the Fourteenth Amendment to the Constitution, required counsel to be present when requested by the defendant during all critical stages of the proceedings, including but not limited to pretrial interrogations).
48 See generally In re Groban, 352 U.S. 330, 344 (1957) (Black, J., dissenting) (“One can imagine a cynical prosecutor saying: ‘Let them have the most illustrious counsel, now. They can’t escape the noose. There is nothing that counsel can do for them at the trial.’”). This case deals with the right to counsel but the analogy is the same. What value is the presumption of innocence if when it is finally available the evil for which it is to be a shield has already attacked?
49 See, e.g., People v. Purcell, 758 N.E.2d 895, 898 (Ill. App. Ct. 2001) (“The presumption of innocence attaches to the accused from the onset of the proceedings and is one of the underpinnings of an accused’s right to bail,” (citing Stack v. Boyle, 342 U.S. 1, 4 (1951))). But see Parker v. State, 843 So. 2d 871, 878 (Fla. 2003) (disagreeing with defendant’s contention that state statute authorizing pretrial detention upon a showing of probable cause violates substantive due process because that burden of proof is too low a burden on which to base pretrial detention).
50 9 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2511, at 531 (Chadbourn rev. 1981) (quoting ANONYMOUS, TEN YEARS A POLICE JUDGE 207 (1884)).
The presumption of innocence before trial means that the indictment is not considered as evidence.51 The natural tendency when an accusation is made is to believe the accusation.52 The presumption of innocence should limit the court’s perception of the validity of the accusation and not allow the accusation to influence a decision regarding pretrial release.53 So, while not being evidence itself, the presumption of innocence does play a role in how other evidence is weighed.54

B. The Presumption of Innocence Does Not Involve Innocence

“Presumption of innocence” as a phrase is miscast.55 The presumption is not that the accused did not commit the crimes charged and is actually innocent.56 The presumption is a statement of the allocation of the burden of proof.57 Criminal trials are not exercises in determining guilt or innocence.58 The finder of fact, be it a jury or a judge, is to decide only whether the defendant is guilty or not guilty.59 An acquittal does not necessarily mean that a defendant is innocent.60 The only certain statement from such a result is that the government did not meet its high burden of proving guilt beyond a reasonable doubt.61 Without proving guilt beyond a reasonable doubt, the government is precluded from exacting punishment.62 The presumption of innocence afforded to an accused is a safety precaution to assure that only the guilty are punished.63 Since

51 See Laufer, supra note 29, at 356-60.
52 See id.
53 See Kitai, supra note 16, at 259.
54 See Laufer, supra note 29, at 356-60.
55 See id. at 374-79.
56 See id.
57 See id.
58 See id.
59 See id.
60 See Laufer, supra note 29, at 374-79.
61 See id.
62 As a matter of substantive due process punishment should not be available prior to an adjudication of guilt. See Kevin F. Arthur, Preventive Detention: Liberty in the Balance, 46 Md. L. REV. 378, 406 (1987); see also Lansdowne v. State, 412 A.2d 88, 91 (Md. 1980) (“The reasonable doubt standard plays a vital role in the American scheme of criminal procedure. The requirement that the prosecution prove guilt beyond a reasonable doubt is constitutionally mandated by the Due Process Clause of the United States Constitution, Amendments V and XIV.”).
the presumption is not a presumption of actual innocence, it would be more accurate to describe it as a presumption of legal innocence. Thus, there is a connection between the presumption of innocence and punishment: One cannot have the latter until the former is overcome.

C. The Presumption of Innocence Plays a Necessary Role in Criminal Justice

Regardless of whether it is defined as an actual presumption or simply an affirmation of who carries the burden of proof, there is no disagreement that the presumption of innocence still exists and plays an important role in the American criminal justice system. Most state courts still acknowledge the presumption of innocence, but its usefulness and influence varies greatly.

---

64 See Laufer, supra note 29, at 389, 390 (stating that a presumption of legal innocence is more accurate since the choices at trial are guilty or not guilty and not guilty or innocent).
65 See supra note 25.
66 See, e.g., Snyder v. State, CR-99-1356, 2003 WL 22463403, *10-12 (Ala. Crim. App. Oct. 31, 2003) (holding that restraining a defendant in the courtroom does not violate the presumption of innocence if done discreetly); Anderson v. State, 108 S.W.3d 592, 601 (Ark. 2003) (“The State’s burden of proof beyond a reasonable doubt is the only mechanism by which the State may overcome the presumption of innocence.”); Hendershott v. People, 653 P.2d 385, 393-94 (Colo. 1982) (stating that an affirmative defense is protected by the presumption of innocence); State v. Molnar, 829 A.2d 439, 446 (Conn. App. Ct. 2003) (“Presumption of innocence . . . is a basic component of a fair trial.”); Parker v. State, 843 So. 2d 871, 874 (Fla. 2003) (“The presumption of innocence is a basic tenet of our criminal justice system and attaches to each person charged with a crime.”); Vasquez v. State, 527 S.E.2d 235, 236 (Ga. Ct. App. 1999) (holding that presumption of innocence does not apply to conviction appeals); MDS Inv., L.L.C. v. State, 65 P.3d 197, 204 (Idaho 2003) (“[T]he presumption of innocence is the right of a criminal defendant to be acquitted unless the prosecution proves his guilt beyond a reasonable doubt.”); People v. Brooks, 803 N.E.2d 626, 631 (Ill. App. Ct. 2004) (holding that presumption of innocence is enjoyed until jury finds guilt beyond a reasonable doubt); Butcher v. Commonwealth, 96 S.W.3d 3, 8 (Ky. 2002) (stating that the presumption is merely descriptive of the burden of proof); State v. Peterson, 673 N.W.2d 482, 487 (Minn. 2004) (holding that lack of jury charge as to presumption of innocence violated due process); Payton v. State, 2001-KA-01658-SCT., 2003 WL 22510533, at *3 (Miss. Nov. 6, 2003) (stating that “permitting the jury to see the defendant bound and shackled improperly encroaches on the defendant’s presumption of innocence . . . [and] may be grounds for the reversal of conviction,” (citing Hickson v. State, 472 So. 2d 379, 383 (Miss. 1985), and Rush v. State, 301 So. 2d 297, 300 (1974)); Commonwealth v. Cosnek, 836 A.2d 871, 874 (Pa. 2003) (“It is the continuing presumption of innocence that is the basis for the requirement that the state has a never-shifting burden to prove guilt of each essential element of the charge beyond a reasonable doubt.”); State v. Mollman, 674 N.W.2d 22, 24 (S.D. 2003) (stating that the “[presumption of innocence] can be effective only if courts guard against practices which unnecessarily mark the defendant as a dangerous character or suggest that his guilt is a foregone conclusion,” (citing State v. Weatherford, 416 N.W.2d 47, 53 (S.D. 1987)))); State v. Carter, 121 S.W.3d 579, 588 (Tenn. 2003) (“Jury verdict of guilty removes the presumption of innocence and replaces it with one of guilt.”); see also Chavez v. Cockrell, 310 F.3d 805, 809 (5th Cir. 2002)
Some say that the reasonable doubt standard “provides concrete substance for the presumption of innocence,”67 while others view it as an actual protection for the defendant.68 The best application of the presumption of innocence means that “no person ever has to prove his or her innocence.”69 This is applicable both at trial and at pretrial hearings.70 The presumption of innocence is a tool to assure that the burden of proof can never be shifted to the defendant.71

The presumption of innocence must be vigorously defended because of the ease in which a presumption of guilt can develop during a criminal proceeding.72 For example,

the treatment itself of the prisoner negatives the presumption. If he is presumed innocent, why is he manacled? Why is he put in jail? Why is he let out only on bail? . . . The fact that he is restrained of his liberty presumes guilt. There is no other construction to be placed on the restraint.73

It is clear that the presumption of innocence must be maintained in the eyes of a jury.74 But a judicial officer is just as susceptible to bias as a juror.75 A

―

67 State v. Smith, 674 N.W.2d 398, 400 (Minn. 2004).
70 See Kitai, supra note 16, at 259.
71 There is a distinction between shifting the burden of production and the burden of persuasion. It is constitutionally permissible to shift the burden of production at times so long as the state always has the burden of persuasion. See Advisory Committee Notes, Fed. R. Evid. 301, in FEDERAL RULES OF EVIDENCE HANDBOOK 37 (2003-04). But see Davis v. Allsbrook, 778 F.2d 168, 173 (N.C. 1985) (“We hold that a state may constitutionally shift the burden of production to a criminal defendant so long as the presumption relied upon meets the standards of County Court v. Allen, 442 U.S. 140, 99 S. Ct. 2213, 60 L. Ed. 2d 777 (1979).”).
72 See Kitai, supra note 16, at 259.
74 See Estelle v. Williams, 425 U.S. 501, 503 (1975) (dealing with the prejudicial impact of a defendant wearing prison garb during trial). “The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice.” Id.
75 See Kitai, supra note 16, at 286.
judicial officer may be more vulnerable to the risk of implied bias based on the mere status of the defendant.76 A juror may only hear a handful of cases, but a judicial officer will hear thousands.77

The presumption should apply to all proceedings, not just the trial.78 It should attach when formal criminal procedures begin.79 The presumption of innocence should last from the moment formal criminal proceedings begin to the end of the trial.80 It is only after a fair trial and a conviction that the presumption disappears.81 To be afforded the presumption only at trial grants the prosecution

76 With advances in technology many courts now have video arraignment where the arrestees from the previous night or weekend are arraigned via video teleconferencing. See Patricia Raburn-Remfry, Due Process Concerns in Video Production of Defendants, 23 STETSON L. REV. 805, 805 (1994). The arrestees are often disheveled in appearance and it is obvious that they are in jail. See, e.g., id. at 813. This impersonal touch may reduce the amount of sympathy for the arrestees and certainly does not convey that there is presumption of innocence. See id. at 813.


78 See WIGMORE, supra note 73, which provides:

It is greatly to be feared that the so-called presumption of innocence in favor of the prisoner at the bar is a pretence, a delusion, an empty sound. It ought not so to be, but – it is. Rufus Choate said that “this presumption is not a mere phrase without meaning”; that . . . “it is as irresistible as the heavens till overcome”; that “it hovers over the prisoner as a guardian angel throughout the trial”; that “it goes with every part and parcel of the evidence”; “that it is equal to one witness.” That is just what it should be, but this is just what it is not.

79 See, e.g., People v. Purcell, 758 N.E.2d 895, 898 (Ill. App. Ct. 2001) (“The presumption of innocence attaches to the accused from the onset of the proceedings and is one of the underpinnings of an accused’s right to bail,” (citing Stack v. Boyle, 342 U.S. 1, 4 (1951))). But see Parker v. State, 843 So. 2d 871, 878 (Fla. 2003) (disagreeing with defendant’s contention that state statute authorizing pretrial detention upon a showing of probable cause violates substantive due process because that burden of proof is too low a burden on which to base pretrial detention).

80 The presumption of innocence should be available at all times that the Supreme Court requires that counsel be made available. See generally Alabama v. Shelton, 535 U.S. 654, 674 (2002) (affirming Alabama Supreme Court’s holding that a defendant who receives a suspended or probated sentence to imprisonment has a constitutional right to counsel); see also Gideon v. Wainwright, 372 U.S. 335, 344-45 (1963). In Gibbons, the court stated:

[Precedence [and] reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth.

Id.

81 See Ross v. Moffitt, 417 U.S. 600, 610 (1974) (“The purpose of the trial stage from the State’s point of view is to convert a criminal defendant from a person presumed innocent to one found
the upper hand in all pretrial proceedings -- especially the first appearance when bail is set. A judicial officer should give the benefit of the doubt to the accused and not the government when assessing the accused for the first time. It is easy for a judicial officer to become too familiar with the prosecuting attorney or other agents of the government and to defer to their preliminary assessment of guilt without fully and completely examining the situation. Given the sheer volume of cases heard, it is easy to imagine how a judicial officer could lose his or her sense of balance and delegate responsibility to other parties. Depending on the jurisdiction, courts could simply accept bail amounts set by the legislature, local rules, the prosecutor, the police or pretrial services -- most of whom are adverse parties to the accused. It is the responsibility of the judicial officer to maintain the presumption of innocence.

III. Bail

Bail is an under-appreciated yet critical part of the American criminal justice system. “Under a system of criminal law that has as its basic tenet the idea that a person is innocent until proven guilty, the concept of bail has always been guilty beyond a reasonable doubt.”); see also State v. Carter, 121 S.W.3d 579, 579 (Tenn. 2003) (“Although an accused is originally cloaked with a presumption of innocence, a jury verdict of guilty removes that presumption and replaces it with one of guilt, shifting the burden of proof to the defendant to demonstrate the insufficiency of the convicting evidence,” (citing State v. Dellinger, 79 S.W.3d 458, 489 (Tenn. 2003))).

82 See Foote, supra note 14, at 998.
83 See generally id.
84 See generally Laufer, supra note 29, at 356-60.
85 In federal court the prosecutor and the pretrial services both make recommendations as to bail based on their own methods and motives. See, e.g., United States v. Edson, 487 F.2d 370, 372 (1st Cir. 1973) (considering the recommendations made by two jail officers). A judicial officer should not shirk his or her own personal responsibility to set a reasonable bail. See, e.g., id.; see also Bell v. Wolfish, 441 U.S. 520, 571 (1979) (Marshall, J., dissenting).
87 See Stack v. Boyle, 342 U.S. 1, 11 (1951) (Jackson, J., concurring).
enigmatic." It's purpose is to provide an opportunity for the court to keep an accused in constructive custody. Justice Jackson wrote:

The practice of admission to bail, as it has evolved in Anglo-American law, is not a device for keeping persons in jail upon mere accusation until it is found convenient to give them a trial. On the contrary, the spirit of the procedure is to enable them to stay out of jail until a trial has found them guilty.

The difference between being released prior to trial and being incarcerated often is the difference between an acquittal and a conviction. No matter how quickly a case is fast-tracked through the system, a detained defendant will suffer some material harm. The defendant will be displaced from work and familial duties, as well as suffer the stigma of being a prisoner. But most important, a freed defendant is able to better defend himself against the government. A freed defendant can better assist his attorney in gathering evidence and securing witnesses so that the government’s burden to convict remains high. Pretrial detention severely limits a defendant’s ability to defend himself simply because his ability to contact the world is necessarily restricted. The setting of bail, although “often . . . done in haste [and at times] fixed without . . . full inquiry and much consideration,” is one of the most crucial steps in the

---

89 Annotation, Pretrial Preventive Detention By State Court, 75 A.L.R.3d 956, § 2(a) (1977). This section states:

It has been said that the primary purposes of bail in a criminal case are to relieve the accused of imprisonment, to relieve the state of the burden of keeping him pending the trial, and to keep the accused constructively in the custody of the court to assure that he will submit to its jurisdiction and be in attendance thereon whenever his presence is required.

90 Stack, 342 U.S. at 7-8 (Jackson, J., concurring).
91 See infra notes 419-48.
93 See, e.g., Morrissey v. Brewer, 408 U.S. 471, 482 (1972) (stating that incarceration after conviction deprives prisoner of freedom “to be with family and friends and to form the other enduring attachments of normal life”); see also United States v. Barber, 140 U.S. 164, 167 (1891) (stating that pretrial detention deprives detainees’ families of support and assistance).
94 See Morrissey, 408 U.S. at 482.
95 See Kitai, supra note 16, at 285-86.
96 See id.
administration of criminal justice.\footnote{Stack v. Boyle, 342 U.S. 1, 11 (Jackson, J., concurring).} Bail should be fixed only after careful deliberation by a neutral party.\footnote{See Foote, supra note 86, at 1160.} Any shortcuts in this procedure are a direct assault on individual liberty and should always be guarded against.\footnote{See Stack, 342 U.S. at 11 (Jackson, J., concurring).}

The purpose of bail is singular: namely to assure the defendant’s presence at trial.\footnote{See BLACK’S LAW DICTIONARY 135 (7th ed. 1999).} “Like the ancient practice of securing the oaths of responsible persons to stand as sureties for the accused, the modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture serves as additional assurance of the presence of an accused.”\footnote{See Stack, 342 U.S. at 5.} Generally the sole exception to bail was a high risk of flight.\footnote{See Neil Howard Cogan, The Pennsylvania Bail Provisions: The Legality of Preventive Detention, 44 TEMP. L.Q. 51, 72 (1970).} However, in most cases capital crimes have been used as a surrogate for risk of flight.\footnote{State v. Sauve, 621 A.2d 1296, 1301 (Vt. 1993) (“Bail provisions, like Vermont’s original bail clause, used capital crimes as a surrogate for a high risk of flight on the grounds that those facing the death penalty would have the highest incentive to leave the jurisdiction.”).} Any other use of bail exceeds the scope and purpose of bail.\footnote{See, e.g., Clay v. State, 757 So. 2d 236, 241 (Miss. 2000) (“The purpose of bail is to secure the presence of the accused at trial, not necessarily to expedite the judicial process.”).} Bail set at a high amount for the purpose of detaining a defendant is called preventive detention, which is still unconstitutional.\footnote{There is a difference between setting bail and ordering preventive detention. BLACK’S LAW DICTIONARY 135, 459 (7th ed. 1999). If pretrial detention is ordered then no bail is considered at all. See Kevin Phillips, Bail, 85 GEO. L. J. 1072, 1074-76 (1997). In fact, the detention determination should take place separate and apart from the determination of bail. See id. Under the federal rules, bail should be discussed at a defendant’s first appearance but if pretrial detention is to be considered a separate hearing is set. 18 U.S.C.A. § 3142(a), (f) (West 2000 & Supp. 2003). The practice of actually setting a bail amount that is far beyond what a defendant could afford is still unconstitutional under the Eighth Amendment’s excessive bail clause. See Kevin Phillips, Bail, 85 GEO. L. J. 1072, 1075-76 (1997). A pretrial detention that results because a defendant cannot pay a reasonably set bail is not preventive detention. See id. at 1076.}

Considering the fact that a decision regarding bail must be made of every defendant,\footnote{Once a suspect is arrested a decision must be made as to what to do with the arrestee. See United States v. Medina, 775 F.2d 1398, 1401 (11th Cir. 1985). The arrestee after being hooked will either be released on his own recognizance or on some security be it a cash or property bond or the arrestee will be detained until trial. See id.} there is not a wealth of litigation on the issue. Bail is not an issue that is thoroughly appealed because “[r]elief in this type of case must be speedy if it is to be effective.”\footnote{Stack v. Boyle, 342 U.S. 1, 4 (1951).} A lengthy appeal through the court system often
renders the issue moot, as the accused either goes to trial or is released.\textsuperscript{108} As a result, bail as a Constitutional issue has not been heavily litigated in the Supreme Court.\textsuperscript{109}

“The right to bail is a cornerstone of our criminal justice system.”\textsuperscript{110} Without a right to bail and the corresponding presumption of innocence, our system of criminal justice loses its morality and reflects a change in our culture that we prefer to think the worst about someone instead of what is good.\textsuperscript{111} Justice Brown in \textit{United States v. Barber} writes:

\begin{quote}
But in criminal cases it is for the interest of the public as well as the accused that the latter should not be detained in custody prior to his trial, if the government can be assured of his presence at that time; and, as these persons usually belong to the poorest class of people, to require them to pay the cost of their recognizances would generally result in their being detained in jail at the expense of the government, while their families would be deprived, in many instances, of their assistance and support. Presumptively they are innocent of the crime charged, and entitled to their constitutional privilege of being admitted to bail, and, as the whole proceeding is adverse to them, the expense connected with their being admitted to bail is a proper charge against the government.\textsuperscript{112}
\end{quote}

\begin{footnotes}
\textsuperscript{108} See, e.g., Tyler v. United States, 705 A.2d 270, 274 (D.C. Cir. 1997) (explaining that preventive detention cases necessarily move fast and usually evade review).

\textsuperscript{109} The pre-eminent Supreme Court case on bail, \textit{Stack v. Boyle}, does not address the constitutionality of bail but defers to an analysis of the legislative procedures set forth in the Federal Rules of Criminal Procedure. See \textit{Stack}, 342 U.S. at 7-9 (Jackson, J., concurring). The issue itself often does not remain ripe to make it through the appellate process. See \textit{United States v. Salerno}, 481 U.S. 739, 756 (1987) (Marshall, J., dissenting) (holding that the issue of pretrial release was moot as for respondent Salerno as he was found guilty under an indictment unrelated to the present case and was sentenced to 100 years); see also \textit{Broussard v. Parish of Orleans}, 318 F.3d 644, 650 (5th Cir. 2003) (holding that a ‘pay fee prerequisite’ to release on bail did not violate procedural or substantive due process).

\textsuperscript{110} Mello v. Superior Court, 370 A.2d 1262, 1267 (1977) (Doris, J., dissenting).

\textsuperscript{111} See Kitai, \textit{supra} note 16, at 266 (“Another theory attributes the presumption of innocence . . . to a belief that human beings, created in the image of God, are good by nature.”). But see Joseph C. Cascarelli, \textit{Presumption of Innocence and Natural Law: Machiavelli and Aquinas}, 41 AM. J. JURIS. 229 (1996) (“Machiavelli suggests that men might be neither bad nor good by nature, but may instead be malleable [and that] ‘goodness and badness’ are nothing more than the result of habits formed by ‘good’ and ‘bad’ laws.”).

\textsuperscript{112} United States v. Barber, 140 U.S. 164, 167 (1891).
\end{footnotes}
A. A History of Bail

Professor Caleb Foote describes the history of the right to bail as being a central right and character of our Anglo-Saxon common law. He found that “three of the most critical steps in the process – the Petition of Right in 1628, the Habeas Corpus Act of 1679, and the Bill of Rights in 1689 – grew out of cases which alleged abusive denial of freedom on bail pending trial.” The Supreme Court in Carlson v. Landon described the history of the Eighth Amendment as such:

The bail clause was lifted with slight changes from the English Bill of Rights Act. In England that clause has never been thought to accord a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail. When this clause was carried over into our Bill of Rights, nothing was said that indicated any different concept. The Eighth Amendment has not prevented Congress from defining the classes of cases in which bail shall be allowed in this country. Thus in criminal cases bail is not compulsory where the punishment may be death. Indeed, the very language of the Amendment fails to say all arrests must be bailable.

The Judiciary Act of 1789 codified the right to bail in non-capital cases in the federal courts.

“In England, there was a series of crimes and situations where the arrested person could ‘have no other sureties but the four walls of the prison.’”

\[113\] See Foote, supra note 14, at 966.
\[114\] Id.
\[115\] Carlson v. Landon, 342 U.S. 524, 537 (1952) (holding that deportation was not a criminal proceeding, therefore there was no right to bail in deportation cases). See Ingraham v. Wright, 430 U.S. 651, 664-66 (1977) (discussing the historical origins of the Eighth Amendment’s cruel and unusual punishments clause finding that the American counterpart to the English Bill of Rights of 1679, the Virginia Declaration of Rights of 1776, was actually the primary source for the language of the Eighth Amendment to the United States Constitution and its purpose was to restrict both Congress and the Judiciary). See also Ann M. Overbeck, Editorial Note, Detention for the Dangerous: The Bail Reform Act of 1984, 55 U. Cin. L. Rev. 153, 193-97 (1986).
\[116\] Judiciary Act of 1789, § 33, 1 Stat. 91 (1789).
\[117\] Given the proximity of time between the 1789 Judiciary Act and the drafting of the Eighth Amendment it would be reasonable to conclude that the Framers did not intend for bail itself to be a constitutional right and that it may not be available in all criminal cases. See M. Gray Styres, Jr., Note, United States v. Salerno: Pretrial Detention Seen Through the Looking Glass, 66 N.C. L. Rev. 616, 620 n.52 (1988).
\[118\] Carlson, 342 U.S. at 546 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *298).
Historically bail was available for all cases except capital cases.\textsuperscript{119} At first glance that would seem to make bail an option in many crimes, but under 17th century English common law, most crimes were punishable by death.\textsuperscript{120} This precedent is still evident today, as most states require bail to be available in all crimes not punishable by life imprisonment or death.\textsuperscript{121} But while the English model was certainly a foundation for the American common law, American common law from its beginning was not as overbearing.\textsuperscript{122} Likewise the English Bill of Rights was instrumental in the formulation of the American Bill of Rights.\textsuperscript{123} But just as American common law, the American Bill of Rights went further than its predecessor and was more sensitive to possible abuses of the government.\textsuperscript{124}

\textsuperscript{120} Id. at 485 (“In English common law, there were more than 200 capital crimes. This number was reduced to fewer than twenty in the common law of the American Colonies.”).
\textsuperscript{122} See Foote, supra note 14, at 975 (observing that a Pennsylvania charter called “Laws Agreed Upon in England,” the phrase permitting bail for capital offenses except “where proof is evident, or the presumption great” first appeared and was subsequently placed into various state constitutions, including but not limited to Arizona (see, e.g., ARIZ. REV. STAT. § 13-3961(A)(2002)); see also Charter of Liberties and Frame of Government of the Province of Pennsylvania in America (April 25, 1682), reprinted in COLONIAL ORIGINS OF THE AMERICAN CONSTITUTION 271, 281-83 (Donald S. Lutz ed., 1998). This use and perception of bail in the developing American law was, according to Caleb Foote, “an entirely indigenous development which deviated sharply from English precedent.” Foote, supra note 14, at 975.
\textsuperscript{124} The impetus of the Bill of Rights is the protection of the individual. See Loguidice v. State, 309 S.E.2d 355, 362 n.10 (Ga. 1983). From the First Amendment’s protection of religious freedom, freedom of the press, freedom to assemble, and freedom from quartering soldiers to the Second Amendment’s right to bear arms to the Fourth Amendment’s freedom from unreasonable searches...
As American law matured, the number of capital offenses decreased and “the individual American colonies began to permit the denial of bail in non-capital cases.” 125 Death was not viewed as the only possible punishment that might provide motivation to flee, but it was still the most compelling. 126 Bail became unavailable in certain special circumstances, such as when the charged crime carried a punishment that was substantial. 127 That trend continues today as more and more states are adding to the list of no-bail offenses even with the increasing availability of preventive detention. 128

The use and functioning of bail was so inconsistent in the mid-20th Century that Congress was compelled to pass the Bail Reform Act of 1966. 129 Before 1966, federal courts relied on bail “almost exclusively” to ensure a defendant’s presence at trial. 130 The Bail Reform Act of 1966 required the federal courts to release any defendant charged with a non-capital offense on his or her recognizance or on an unsecured appearance bond unless the court determined that the defendant would fail to appear for trial under such minimal supervision. 131 Eighteen years later the Act was amended to expand the options a court could consider in lieu of bail, specifically preventive detention. 132

and seizures to the Fifth Amendment’s due process protection and its right against self-incrimination to the Sixth’s Amendment’s right to counsel and a jury trial, it should be evident that the Eighth Amendment was a restriction on all branches of the government, not just the judiciary. See Paul E. Miller, Preventive Detention – A Guide to the Eradication of Individual Rights, 16 How. L.J. 1, 7 (1970).

125 Simpson, 85 P.3d at 485 n.10. See Articles, Lawes, and Orders, Divine, Politique, and Martiall for the Colony in Virginea (1610-1611), reprinted in COLONIAL ORIGINS OF THE AMERICAN CONSTITUTION 314, 316-26 (including as other capital offenses certain crimes upon the third repetition such as slandering or disobeying the orders of the colony’s governing officers or cursing “the name of God”). 126 See, e.g., United States v. Nichols, 897 F. Supp. 542, 547 (W. D. Okla. 1995), aff’d, 61 F.3d 917 (10th Cir. 1995).

127 Scott v. Ryan, 548 P.2d 235, 236 (Utah 1976) (“The capital offense exception accentuates the gravity of the nature of the offense in order to sustain a denial of [the] fundamental right [of bail]. The second exception represents an intention to create a classification of comparable gravity.”).

128 For example, Arizona passed ballot proposition 103 in 2002 that amended Article II, § 22 of the Arizona Constitution by adding “sexual assault, sexual conduct with a minor under fifteen years of age or molestation of a child under fifteen years of age” as exceptions to the right to bail. 2002 Ballot Propositions, Proposition 103 (2002), available at http://www.a2505.gov/election/2002/info/pubpamphlet/english/prop103.htm (last visited October 3, 2004). Before this amendment only capital offenses were excluded from an absolute right to bail.


131 See id.; see also H.R. REP. No. 89-1541 (1966).

B. The Applicability of the Eighth Amendment

The original intent of the Eighth Amendment is debatable.\footnote{See Foote, supra note 14.} It has been traditionally viewed as not having universal application but availability only in particular cases.\footnote{See United States v. Edwards, 430 A.2d 1321, 1327 (D.C. 1981), cert. denied, 455 U.S. 1022 (1982). The court stated: First, a fundamental right to bail was not universal among the colonies or among the early states [and s]econd, the language of several state constitutions explicitly limiting the power of the judiciary to set excessive bail negates any suggestion that the excessive bail clause was intended to restrict the definition of bailable offenses by the legislature. Id. (citing United States v. Edwards, 430 A.2d 1321,1325-31 (D.C. 1981)).} The Eighth Amendment right to bail applies only in criminal cases; it does not apply to deportation\footnote{See Carlson v. Landon, 342 U.S. 524, 536-37 (1952).} or other administrative proceedings,\footnote{See generally id.} or to bail after conviction.\footnote{See Braden v. Lady, 276 S.W.2d 664, 666 (1955).} It does not necessarily apply to juvenile proceedings either.\footnote{See Schall v. Martin, 467 U.S. 253, 281 (1984) (upholding section of New York Family Court Act authorizing pretrial detention of accused juvenile delinquent based on finding that there was “serious risk” that juvenile “may before the return date commit an act which if committed by an adult would constitute a crime”).} The limited applicability granted to the Eighth Amendment is another sign of its perceived insignificance and lack of authority.\footnote{See Broussard v. Parish of Orleans, 318 F.3d 644, 650 (5th Cir. 2003).}

It is unclear if the Eighth Amendment’s prohibition against excessive bail applies to both the legislative and the judicial branches.\footnote{In re Nordin, 192 Cal. Rptr. 38, 41 (Cal. Ct. App. 1983). The court stated: While the United States Supreme Court has never expressly ruled on the question, federal law is clear to the effect that the prohibition against ‘excessive bail’ contained in the Eighth Amendment is to be understood as a restraint upon judicial discretion respecting the amount of bail and not as an attempt to regulate the legislative power respecting eligibility for bail. Id. (citing United States v. Edwards, 430 A.2d 1321,1325-31 (D.C. 1981)).} The dominant view is that it applies only as a restriction on the judiciary but not on the legislature.\footnote{In re Nordin, 192 Cal. Rptr. at 41.} The rationale behind this point of view is that it is the only conclusion that avoids the conflict that would occur in most states and the federal government because the legislative branches of each have declared what crimes are bailable, while most state constitutions as well as the federal Constitution include the “no
excessive bail” clause. Just because a legislative branch has asserted itself on an issue does not mean that the Court has no authority to overrule that action if it is unconstitutional. Nevertheless, the consensus is that the Eighth Amendment’s protection of bail is only that the judiciary may not set bail unnecessarily high. As a result, the birth of preventive detention in the Bail Reform Act of 1984 was viewed as a way that Congress could assist the judiciary in the setting of bail. With the “sweeping changes” in the 1984 Act, Congress hoped to “give the courts adequate authority to make release decisions that give appropriate recognition to the danger a person may pose to others if released.” By authorizing pretrial detention by statute, Congress provided more freedom to the court to circumvent the Eighth Amendment.

The purpose of bail is to facilitate release of an accused. The only clear mandate of the Eighth Amendment is that bail may not be excessive. This

142 See Edwards, 430 A.2d at 1327 (“[T]he language of several state constitutions explicitly limiting the power of the judiciary to set excessive bail negates any suggestion that the excessive bail clause was intended to restrict the definition of bailable offenses by the legislature.”).
143 The Supreme Court certainly has the power to apply the Eighth Amendment’s prohibition on excessive bail to the legislative branch. See Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (establishing the Supreme Court’s authority to rule on the constitutionality of laws). Sometimes stare decisis is a bad thing. See Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (overruling the separate but equal doctrine that survived over 50 years).
144 See Foote, supra note 86, at 1125.
145 Jerold Israel, et al., Criminal Procedure and the Constitution; Leading Supreme Court Cases and Introductory Text 504 (Thomson West 2003). The authors stated:

   For many years [preventive detention] was accomplished sub rosa; the magistrate would set money bail purportedly for the purpose of assuring the defendant’s appearance at trial, but the amount would be high enough to prevent the defendant’s release. But because of reform in bail laws contemporaneous with more direct attention to the question of whether such detention is justified, the process of preventive detention is today a much more open one.

Id.

147 Before the Bail Reform Act of 1984, if a federal judge wanted to detain a defendant before trial he or she would have to set a bail that they believed the defendant could not afford. See Alston v. United States, 343 F.2d 345, 345-46 (D.C. Cir. 1964) (per curiam) (Bazelon, J., dissenting) (“Appellant . . . remains in prison because he is financially unable to provide bond in the amount set.”). To do such would be a clear violation of the Eighth Amendment. See U.S. CONST. amend. VIII. Now with the Bail Reform Act of 1984 judicial officers can show their hands and explicitly order detention and not set bail. See 18 U.S.C. § 3142(e) (2000).
148 See Black’s Law Dictionary 135 (7th ed. 1999). Bail is often the third option that a court should consider behind an unrestricted release and a release with conditions. See, e.g., United States v. Medina, 775 F.2d 1398, 1401 (11th Cir. 1985).
149 U.S. Const. amend. VIII.
prohibition against excessiveness clarifies the preference for pretrial release. It should not be what a defendant can pay but what amount will reasonably assure his attendance for all court proceedings. A high bail shall not be used as a method for pretrial detention. When bail is the only factor in granting pretrial release, it should always be set in an amount that is reasonable. Courts usually have some rational connection between the crime charged and the amount of bail, with the more serious charges requiring a more substantial bail. The reasoning usually follows that the more severe the possible punishment, the greater the likelihood that the defendant would try to abscond and, therefore, the higher the amount of bail.

Most courts have limited their analysis of the Eighth Amendment to the excessiveness of bail and not the availability of bail itself. In fact, the Supreme Court in *Salerno* held that there was no absolute right to bail in finding preventive detention constitutional. The court said, “we agree that a primary function of bail is to safeguard the courts’ role in adjudicating the guilt or innocence of defendants.” However, the Bill of Rights was not penned to guide the courts but to protect individual rights from government’s overbearing reach. To say that the Eighth Amendment prohibits excessive bail but does not

---

151 See *Stack v. Boyle*, 342 U.S. 1, 5-6 (1951).
152 See *Stack v. Boyle*.
155 See *infra* app. 2.
156 *Ex parte* Bogia, 56 S.W.3d 835, 840 (Tex. Ct. App. 2001). The court stated:

Our state and federal constitutions guarantee “reasonable” bail even though that necessarily means the defendant might not appear for trial. “Reasonable bail” is reasonable because it creates and limits the risks of both sides. Any grant of bail risks the defendant’s flight, but bail limits that risk by reducing the money available to fund the flight, while simultaneously creating a fund to finance an effort to re-arrest the defendant.

157 See generally United States v. Salerno, 481 U.S. 739, 752-55 (1987) (finding that the Eighth Amendment does not require a defendant’s release on bail when Congress has mandated detention because of a compelling interest other than defendant’s flight).
158 *Id.* at 752 (“The Eighth Amendment addresses pretrial release by providing merely that ‘[e]xcessive bail shall not be required.’ This Clause, of course, says nothing about whether bail shall be available at all.”).
159 *Id.* at 753.
160 Foote, *supra* note 14, at 969 (stating that the “central concern [of the Bill of Rights] was protection against abuse by Congress”).
not require bail is somewhat counterintuitive.\textsuperscript{161} No bail is the equivalent of excessive bail since it has the same effect.\textsuperscript{162} What good is a Constitutional protection against excessive bail if bail itself is not required? It is the same as saying the Constitution requires due process but only if Congress decides to allow any process at all. Likewise, in light of a right to habeas corpus and protection from excessive bail, it is necessary to have an underlying right to bail or those provisions are meaningless.\textsuperscript{163} The Court in \textit{Salerno} pinned itself into a corner because of the perceived need to justify preventive detention. Caleb Foote writes:

Such an interpretation reaches the extraordinary result of a constitutional provision being merely auxiliary to some other law, which in the federal system must be statutory. It requires one to believe that a basic human right would be deliberately inserted in a constitution in a form which permitted Congress to restrict it at will, or even to render the eighth amendment entirely moot by enacting legislation denying the right to bail in all cases. Such legislative power . . . would constitute an anomaly in the American Bill of Rights whose central concern was protection against abuse by Congress. The difficulty is compounded when it is recalled that the other clauses in the eighth amendment – no excessive fines and no cruel and unusual punishment – traditionally have been interpreted to protect against abuse of legislative but not of judicial discretion.\textsuperscript{164}

“Bail is a fundamental right” and must be upheld.\textsuperscript{165} The Court in \textit{Salerno} was wrong to deviate from its own precedent and declare there was no right to bail.\textsuperscript{166}

\textsuperscript{161} See \textit{Salerno}, 481 U.S. at 760-61 (Marshall, J., dissenting) (“Whether the magistrate sets bail at $1 million or refuses to set bail, the consequences are indistinguishable. It would be mere sophistry to suggest that the Eighth Amendment protects against the former decision, and not the latter.”).

\textsuperscript{162} See \textit{Luyao v. Mascara}, 815 So. 2d 748, 748 (Fla. Dist. Ct. 2002) (per curiam) (“Excessive bail is tantamount to no bail,” (quoting \textit{Alvarez v. Crowder}, 645 So. 2d 63 (Fla. Dist. Ct. 1994))).

\textsuperscript{163} Foote, \textit{supra} note 86, at 1125 (“[T]he missing explicit language in the Constitution for a right to bail] was ascribed to the inadvertent draftsmanship of George Mason, and it was concluded that the only reading of the [E]ighth [A]mendment consistent with Mason’s purpose to provide ‘effectual securities for . . . essential rights’ reveals a right to bail secure against both legislative and judicial abridgement.”).

\textsuperscript{164} Foote, \textit{supra} note 14, at 969.


For all practical purposes, excessive bail is the equivalent of no bail. Since the Constitution prohibits excessive bail and the courts have found that excessive bail is the equivalent of no bail, then it should follow that the Constitution requires bail. Allowing legislatures to decide which cases are subject to bail effectually renders the Eighth Amendment impotent. The Eighth Amendment has a long history of being overlooked and ignored. It is time that the Eighth Amendment should be recognized as a shield of liberty, part of the unique nature and quality of our American sense of fundamental fairness and justice.

It is clear from the plain language of the Amendment that excessive bail falls squarely within the jurisdiction of the Eighth Amendment. The incorporation of the Eighth Amendment as applicable to the states has occurred indirectly, if at all. Regardless, the protection from excessive bail is a fundamental right that should be formally incorporated to apply to the states as part of the American sense of ordered liberty and justice. In fact, all fifty states have procedures for setting bail and most establish bail as a limited state constitutional right.

Statute[s] in which Congress declares that a person innocent of any crime may be jailed indefinitely, pending the trial of allegations which are legally presumed to be untrue . . . have long been thought incompatible with the fundamental human rights protected by our Constitution. Today a majority of this Court holds otherwise. Its decision disregards basic principles of justice established centuries ago and enshrined beyond the reach of governmental interference in the Bill of Rights.

Id.

See Luyao, 815 So. 2d at 748.

See United States v. Barber, 140 U.S. 164, 167 (1891) (“Presumptively [the arrestees] are innocent of the crime charged, and entitled to their constitutional privilege of being admitted to bail.”).

See generally Broussard v. Parish of Orleans, 318 F.3d 644, 650 (5th Cir. 2003) (“The Supreme Court has not frequently considered the contours of the Eighth Amendment’s proscription of excessive bail. In fact, its application to the States has occurred only indirectly.”).


U.S. CONST. amend. VIII (“Excessive bail shall not be required.”).

Schib v. Kuebel, 404 U.S. 357, 365 (1971) (“[T]he Eighth Amendment’s proscription of excessive bail has been assumed to have application to the States through the Fourteenth Amendment.”).

See Peter Preiser, Rediscovering a Coherent Rationale for Substantive Due Process, 87 MARQ. L. REV. 1, 19 n.122 (“The Eighth Amendment prohibition on excessive bail and excessive fines has never been addressed as a due process concern.”).

See Palko v. Connecticut, 302 U.S. 319, 325 (1937) (holding that the Due Process Clause of the Fourteenth Amendment applies to all things that are “implicit in the concept of ordered liberty”).

See infra app. 1.
1. The Process of Setting Bail

The amount of bail should be set at a figure that will reasonably assure that this particular defendant would return to court. A court cannot adequately determine what amount is reasonable for a particular defendant unless the court is aware of the defendant’s income, assets and ability to secure assets. Yet most jurisdictions focus their inquiry on other objective standards unrelated to the particular defendant’s ability to pay. For example, in Texas, courts are to set a bail high enough to motivate return and are not permitted to use bail as an “instrument of oppression.” To accomplish this goal the courts compare three distinct factors: (1) the nature of the offense and the circumstances surrounding the alleged event; (2) the future safety of a victim of the alleged offense and the community; and (3) the ability of the defendant to make bail. Of these items, only the defendant’s ability to pay is appropriate. The other inquiries give too much weight to the alleged crime and raise the innate fear that those accused of violent crimes should receive a higher bail or no bail at all.

The danger of considering the crime charged is that the focus of setting bail then leaves the subjective realm of the defendant and lands in an objective assessment based on the crime charged, which may or may not even be

177 See generally id. at 5.
178 See generally id. at 6.
179 See infra app. 1.
181 Id. art. 17.15(3) (stating that the nature of the event and the surrounding circumstances “are to be considered”).
182 Id. art. 17.15(5) (explaining the future safety of the victim and the community “shall be considered”).
183 Id. art. 17.15(4) (determining that the ability of the defendant to make bail “is to be regarded”).
184 See, e.g., Wright v. State, 976 S.W.2d 815, 821-22 (Tex. Ct. App. 1998) (Smith, J., dissenting) (concluding that a $500,000 bond for aggravated assault was an “instrument of oppression”).
185 See generally United States v. Carswell, 144 F. Supp. 2d 123, 129 (N.D.N.Y. 2001) (finding that “actual charge is irrelevant to defendant’s flight risk or risk to obstruct justice or threaten or intimidate witnesses or jurors,” for purposes of bail statute’s criteria for determining whether detention hearing is necessary, because the case could involve a “crime of violence” without a violent crime having actually been charged). Conversely a “crime of violence” as defined by 18 U.S.C. § 3156(a)(4) and utilized in 18 U.S.C. § 3142(f)(1)(A) may be charged when there is no actual violence, such as the charge of possession of a handgun by a felon in violation of 18 U.S.C. § 922(g)(1). See United States v. Johnson, 704 F. Supp. 1398, 1398-99 (E.D. Mich. 1988). But see United States v. Spires, 755 F. Supp 890, 891-92 (C.D. Cal. 1991) (“Offense may be a ‘crime of violence’ [such as will justify detention hearing] even though force was not actually threatened or used during the offense.”).
relevant.\textsuperscript{186} It is true that some consideration must be given to the crime charged in order to determine what amount will insure that the particular defendant will not flee from his or her particular charge.\textsuperscript{187} For example, a defendant charged with felony-murder might be willing to give up $5,000 to flee the jurisdiction, considering the possible penalties if convicted, while a defendant charged with loitering may not be willing to lose the money considering the minimal penalties involved.\textsuperscript{188} This limited application is acceptable because the focus remains on maintaining the presumption of innocence, and the impetus is to find a fair amount in relation to the crime charged.\textsuperscript{189}

The danger in considering the crime charged is that there would be a tendency to grant the same bail to all defendants charged with the same crime.\textsuperscript{190} Jurisdictions that have preset levels for bail as part of their local rules are unwittingly laying the groundwork for unconstitutional setting of bail.\textsuperscript{191} But that analysis is still incomplete unless the court inquires as to the defendant’s ability to pay, coupled with the possible penalties involved.\textsuperscript{192} It must be determined that $5,000 would be an amount that would compel a defendant to return to court rather than lose the money. A multi-millionaire may not be compelled by a $5,000 loss as much as an hourly earner. The compulsion aspect of bail is peculiar to each defendant, and any tendency to consider collateral matters, such as the nature of the evidence against the defendant, is improper.\textsuperscript{193}

All fifty states as well as the federal government have their own standards for setting bail.\textsuperscript{194} All make some attempt to determine a defendant’s flight risk, but no consistent standard exists for how to take that into account.\textsuperscript{195} For example, most courts look at the defendant’s criminal history; reputation in the community; ties to the community such as employment, family and property; and the nature of the crime charged.\textsuperscript{196} Twenty states also take into account the

\begin{footnotesize}
\begin{enumerate}
\item See Carswell, 144 F. Supp. 2d at 129.
\item See, e.g., United States v. Cisneros, 328 F.2d 610, 618 (10th Cir. 2003).
\item See, e.g., id.
\item See generally Perez v. State, 897 S.W.2d 893, 897 (Tex. Ct. App. 1995) (“[E]ach case must be evaluated upon its unique facts [when setting bail].”).
\item The idea behind setting bail in the local rules is to give the judges a guideline to go by to treat cases the same. See generally Symposium, Interview: A Unique Perspective on Judicial Independence, 25 HOFSTRA L. REV. 799, 807 (1997). But that is exactly what is not supposed to be the case. See id. Defendants should be treated differently because each individual defendant will have his or her own unique economic situation. See id.
\item See, e.g., Wright v. State, 976 S.W.2d 815, 821 (Tex. Ct. App. 1998).
\item See infra app. 1.
\item See id.
\item See id. The following states consider all of these factors: Alabama, Alaska, Arizona, Arkansas, Colorado, Delaware, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Maryland,
weight of the evidence against the accused. Four states delve even deeper to consider any past conduct relating to drug and alcohol abuse, and many others take into account whether drugs were involved in the defendant’s alleged conduct. In contrast, only a handful of states inquire specifically into the defendant’s ability to pay a bond if set (although many inquire about the defendant’s “financial resources” or “financial conditions”). Only one state explicitly sets forth a policy against unnecessary detention.

The use of these factors demonstrates that in the process of setting bail, a defendant’s whole life comes under scrutiny. The value judgments given to a defendant’s status in the community place his or her character in issue. However, a court cannot set a reasonable bail for a particular defendant if it makes no inquiry as to how much bail a particular defendant can afford. For the most part, that is the one aspect of a defendant’s life that is not explored. Unless the defendant threatened violence to potential witnesses, it is improper for the court to look at anything beyond the defendant’s finances in setting bail.

The court is in no position at the first appearance to make a value judgment about the defendant’s character or guilt. If a court looks at too many factors outside of what is reasonable to assure the appearance of the accused, then bail is likely to be excessive.

Many jurisdictions have a standardized bail schedule that sets a typical range for a reasonable bail based on the charged offense. Although these schedules

Massachusetts, Mississippi, Missouri, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Vermont, Virginia, Washington, Wyoming. Id. The following states list most but not all of these factors: Connecticut, Montana, New York, Oregon, Rhode Island, Wisconsin. Id. See id. Alaska, Arizona, Florida, Illinois, Kansas, Louisiana, Maine, Maryland, Missouri, New Mexico, New York, North Carolina, North Dakota, Oklahoma, South Dakota, Utah, Vermont, Virginia, Wisconsin, Wyoming. Id.


See generally Foote, supra note 86, at 1169-70. See Foote, supra note 14, at 992-98.

See, e.g., infra app. 2. Because the nature of setting bail is by definition subjective many local jurisdictions have set forth their own bail schedules to guide the judges in that local jurisdiction. See, e.g., id. For example, California counties such as Riverside, San Diego, Los Angeles, Ventura, San Bernardino, Orange, and Alameda have publicized bail schedules, set pursuant to Cal. Penal Code § 1269b(d) (West 1982), which set a presumptive bail unless other circumstances dictate that a higher bail is appropriate. See id.
are intended merely to aid courts in setting bail, they can often turn into a set amount.\textsuperscript{207} Other jurisdictions have presumptive bail amounts, which in practice are informally codified.\textsuperscript{208} The result is a “going rate” for bail at the initial appearance and an inadequate examination of the defendant’s ability to pay.\textsuperscript{209} As a consequence, defendants may be unnecessarily and unconstitutionally incarcerated. This is especially true for indigent defendants.\textsuperscript{210}

2. Excessive Bail

The Eighth Amendment expressly forbids excessive bail.\textsuperscript{211} It is not uncommon for a jurisdiction to require proof that bail is excessive.\textsuperscript{212} Typically, when bail is excessive, the amount of bail is unreasonably high; but that is not the only way that bail can be excessive.\textsuperscript{213} The burden for producing such proof lies with the defendant.\textsuperscript{214} Only the more egregious cases are appealed past the district or circuit court level\textsuperscript{215} because typically those who cannot afford counsel will most likely be the ones oppressed by its unconstitutional use.\textsuperscript{216} The traditional standard for determining excessiveness is abuse of discretion.\textsuperscript{217} This high standard is usually not met because an appellate court will often yield

\textsuperscript{207} See, e.g., \textit{Ex parte} Bogia, 56 S.W.3d 835, 838 (Tex. Ct. App. 2001) (finding that bail set at $360,000 for second degree felony theft was excessive, the court reduced bond to the scheduled amount of $10,000 because the court preferred the bond preset by the legislature in the bail schedule than the mathematical formula used to set the bond).

\textsuperscript{208} See infra app. 2 (showing felony bail schedules of eight California counties).

\textsuperscript{209} See, e.g., \textit{id}.

\textsuperscript{210} See \textit{Foote, supra} note 14, at 963. (“Compared with other due process problems which have arisen in recent years, bail presents differences in the treatment of the poor which are more pervasive and pernicious.”).

\textsuperscript{211} See U.S. CONST. amend. VIII. Instead of “excessive bail” some state constitutions prohibit “oppressive bail.” See infra app. 1 (Colorado, Illinois, Kentucky, Michigan, Montana, Texas).

\textsuperscript{212} See infra app. 1. Colorado, Illinois, Kentucky, Michigan, Montana and Texas for example require that the bond should not be oppressive but the burden for demonstrating oppressiveness falls on the defendant. See \textit{id}.

\textsuperscript{213} See, e.g., State v. Briggs, 666 N.W.2d 573, 583-84 (Iowa 2003) (finding that possibility of a cash-only bond, as opposed to a property or surety bond, could violate excessive bail clause of state constitution). \textit{But see} Wright v. State, 976 S.W.2d 815, 815 (Tex. Crim. App. 1998) (holding that failure of any bail bondsman in the county to deposit sufficient funds to allow posting of bond set for petitioner did not establish that bail amount was excessive).


\textsuperscript{215} Many cases are set for multiple detention hearings and petitions or motions for reduced bail or bond are common at the local trial level. See \textit{Foote, supra} note 86, at 1179-80. Formal appeals to a designated appellate court are rare. See \textit{id}.

\textsuperscript{216} There is no constitutionally protected right to appointed counsel to file a pretrial appeal as there is to file a first post-conviction appeal. See Douglas v. California, 372 U.S. 353, 356-57 (1963); Griffin v. Illinois, 351 U.S. 12, 17 (1956).

to the factual finding of the lower judge.\textsuperscript{218} Abuse of discretion is the only realistic standard for appeal because every bail set at an amount that is either very difficult or impossible for the defendant to reach would be subject to second-guessing.\textsuperscript{219} Just because bail is set at an amount that a defendant cannot afford does not mean it is per se excessive.\textsuperscript{220} Courts do occasionally find that a lower court has abused its discretion and declared bail to be excessive.\textsuperscript{221} Since each case is supposed to be considered on its own merits, no real pattern exists.\textsuperscript{222} “Excessive” should mean excessive to the defendant in the case at bar, not excessive when applied to a previous situation.\textsuperscript{223} Comparison is only appropriate when the alleged crimes are factually similar and the defendants’ personal history and financial backgrounds are comparable.\textsuperscript{224} Unless that is the case, a court will always be comparing apples and oranges.

It is strange that in the process of setting bail, a court does not have to make a finding of reasonableness. The burden is not on the court to set a reasonable bail since it is only prohibited from setting an excessive bail.\textsuperscript{225} A determination of whether it is excessive can only be made after a defendant cannot make bail unless the excessiveness is plain.\textsuperscript{226} Nothing prohibits a court from taking the

\textsuperscript{218} See Braden v. Lady, 276 S.W.2d 664, 666 (1955) (“One ironbound rule is the reviewing court will not substitute its judgment for that of the trial judge who is in a better position than we to size up the facts and circumstances which should control judicial discretion in fixing the amount of the appeal bond,” (citing 6 AM. JUR. Bail and Recognizance §§ 81-92 and 95 (1938))).

\textsuperscript{219} See Rubac, 611 S.W.2d at 849-50.

\textsuperscript{220} 9A FED. PROC., L. ED. Criminal Procedure § 22:1677 (1993), which states:

\begin{quote}
The imposition of bail does not violate the Bail Reform Act where the defendant states only that he or she cannot post it, and where the defendant presents no supplemental evidence apart from such statement; a court must be able to induce a defendant to go to great lengths to raise funds without violating the condition that bail may not be used to deny release altogether.
\end{quote}

\textit{Id.}

\textsuperscript{221} Ex parte Beard, 92 S.W.3d 566, 573-74 (Tex. Crim. App. 2002) (holding that the defendant charged with capital murder was entitled to reasonable bail and that $8,000,000 bail was an abuse of discretion, the court lowered the bail to $50,000).


\textsuperscript{223} Because the excessiveness of bail is a case-by-case determination, an indigent defendant is more likely to be the victim of bail that is excessive to him or her but not excessive to the average person. \textit{See generally} Foote, \textit{supra} note 14, at 992-98. Ironically when a judicial officer thinks he or she is treating everyone fairly because he or she sets the same bail, say $500 for each charge, actually the judicial officer is treating almost everyone unfairly. \textit{See} Foote, \textit{supra} note 86, at 1130-31.

\textsuperscript{224} See generally Foote, \textit{supra} note 14, at 993-94.

\textsuperscript{225} See U.S. CONST. amend. VIII.

\textsuperscript{226} For example, a bail of one million dollars could be excessive on its face. \textit{See}, e.g., United States v. Salerno, 481 U.S. 739, 760-61 (1987).
time to set a reasonable bail the first time. The burden should be on the court to set a bail that is reasonable.

Bail schedules and presumptive bail amounts are used as objective standards for a reasonable, non-excessive bail. It is only when bail is set above the preset amounts that any reasons must be given. The defendant will have to do more than state that the bail is set at an unreachable amount. By requiring an opportunity for the defendant to try to make bail, the court places an additional burden on the defendant and increases the likelihood that he or she will spend some time in pretrial detention.

The reason for the amount of bail should be clearly stated. Without a statement of why a court set bail at a particular amount, it is difficult to determine if the judicial officer abused his or her discretion. All arbitrariness in the process should be removed by requiring a finding from every judicial officer in every case. Some states with set bail schedules require a written finding if the court makes an upward departure from the schedule. But the standard should be for a finding regardless if the amount is a common amount or not. If the setting of bail is to be subjective, then a judicial officer should not be able to hide his or her decision behind an objective scale.

---

227 See, e.g., infra app. 2.
228 See Ex parte Cowart, 700 So. 2d 1200, 1201 (Ala. Crim. App. 1997) (finding that remand was required for trial court to explicitly state its reasons for setting bail substantially higher than maximum recommended bail according to scale).
229 Most courts require that the defendant demonstrate that he has tried and failed to meet the bail amount before he can make a claim that it is excessive. See, e.g., Ex parte Willman, 695 S.W.2d 752, 754 (Tex. Crim. App. 1985). See also Ex parte Dueitt, 529 S.W.2d 531, 532 (Tex. Crim. App. 1975) (stating that no showing is needed because a court should not require accused to do such a useless thing when clear from circumstances that could not meet the bail amount).
230 See Foote, supra note 86, at 1136.
231 See, e.g., United States v. Mantecon-Zayas, 949 F.2d 548, 550-51 (1st Cir. 1991). Defendant was indicted on federal drug charges and released on $200,000 bond with other conditions. See id. Defendant almost a year later is indicted on more federal drug charges and released on additional $50,000. See id. Even though the defendant made all court appearances and even turned himself in for the second indictment the district court overruled the magistrate and ordered bond set at $200,000 on the second indictment. See id. The defendant could not afford that additional amount and was detained. See id. The First Circuit held that it may not be error to raise the bond to an amount the defendant cannot afford so long as the court states its reasons for the high bail. See id.
232 Many times a case will be sent back down for a finding before the appellate court will rule on an abuse of discretion. See, e.g., Cowart, 700 So. 2d at 1201. This step needs to be avoided by requiring a finding for all decisions because the failure only lengthens the process and delays a person’s release. See, e.g., id.
233 States should at a minimum follow the lead of the federal law that requires a judicial officer to state the reasons for detainment. See 18 U.S.C.A. § 3142 (West 2000 & Supp. 2003).
234 See Cowart, 700 So. 2d at 1201.
3. Due Process Trumps the Eighth Amendment

According to the *Salerno* Court, the constitutionality of the Bail Reform Act of 1984, or any subsequent bail provision, centers on the Eighth Amendment’s excessive bail prohibition and the Fifth and the Fourteenth Amendments’ Due Process Clauses. Before the Bail Reform Act of 1984, federal judges could not openly consider a suspect’s potential danger to society or the protection of society as a reason to justify pretrial detention. The Bail Reform Act of 1984 set forth the process through which an arrestee could be held without any consideration of bail. Federal courts have since been able to order pretrial detention because of the potential dangerousness of the defendant. To find this policy constitutionally sound, the Eighth Amendment’s protection against excessive bail was overshadowed by a focus on the process involved in circumventing the constitutional provision.

The right to bail is a fundamental right in and of itself. It does not require the due process clause of the Fifth or Fourteenth Amendments to provide it with meaning. It is not a product of our ever-emerging sense of substantive due process. Just because an activity does not offend the Fifth or Fourteenth Amendment does not mean that the Eighth Amendment is not violated. Therefore, no matter how much process is available, it can never abolish the constitutional command of “no excessive bail.”

---

239 See, e.g., *United States v. Salerno*, 481 U.S. 739, 741 (1987). The *Salerno* court found the 1984 Bail Reform Act was not facially unconstitutional because of the process required by the Act. See *id.* at 748. An accused would have at least two timely opportunities to oppose preventive detention and thus the restriction of liberty was not done without due process of law. See *id.* at 751-52. See also U.S. CONST. amend. V, XIV.
240 See Foote, *supra* note 86, at 1125 (discussing the role of bail as a fundamental right in the development of English liberty following the Magna Carta).
242 The right to bail is a fundamental right that has always been acknowledged as a foundational principle of our criminal justice system. See generally United States v. Barber, 140 U.S. 164, 167 (1891) (“[Arrestees are] entitled to their constitutional privilege of being admitted to bail.”). It is not one of the many “fundamental rights” that the Courts have created from the Due Process Clause and others. See *Palko v. Connecticut*, 302 U.S. 319, 325-27 (1937).
243 See *Salerno*, 481 U.S. at 741.
244 U.S. CONST. amend. VIII.
The absence of bail violates both the due process clauses and the Eighth Amendment.

The well-established notion that bail does not apply in capital cases needs to be reevaluated in light of substantive due process concerns. Due process of law applies to all cases, even the most serious cases. It should be noted that even under Salerno’s restricted due process analysis, the Court started with the presumption that bail should be available unless other circumstances or conditions exist. The presumption of innocence is a product of due process; therefore, the question arises if there is a presumption of innocence for a capital defendant.

Several states allow for bail to be considered unless “the proof is evident or the presumption is great” that the accused committed the crime charged. There is no justification for eliminating the possibility of bail based solely on the crime charged and/or the possible punishment that may result. The significance of the charge should only relate to the amount of bail, not whether it is available at all. Justice Clark wrote,

The Constitution makes no distinction between capital and noncapital cases. The Fourteenth Amendment requires due process of law for the deprival of ‘liberty’ just as for the deprival of ‘life’ and there cannot constitutionally be a difference in the quality of the process based merely upon a supposed difference in the sanction involved.

While Justice Clark argues that the protections given to more severe charges ought to apply to less severe charges as well, the converse should also be true. The text of the Eighth Amendment does not grant more protection to a defendant charged with a less serious crime than it does to a defendant charged with a more serious crime. In fact, the more severe the charge, the more the presumption of innocence needs to be a factor in preliminary proceedings.

245 See Salerno, 481 U.S. at 741.
247 See supra note 121.
249 See id.
250 See id.
251 See id.
252 U.S. CONST. amend. VIII.
IV. PREVENTIVE DETENTION

The Constitution requires that the government prove each and every element of a crime beyond a reasonable doubt before it can take away an individual’s liberty.255 This high standard of proof applies at trial, but is not required at all other times the government attempts to restrain a suspect’s liberty.256 Prior to conviction a defendant may be restrained if the court finds by clear and convincing evidence that the defendant is dangerous.257

In response to what it believed to be an “alarming problem of crimes committed by persons on release,”258 Congress passed the Bail Reform Act of 1984.259 This act fundamentally changed the way that bail was treated in the federal courts.260 A high bail may not be used as preventive detention when preventive detention is not available.261 In fact, one of the primary reasons for the Bail Reform Act of 1984 was to end the practice of judges setting high bails for the purpose of detaining the accused.262 The 1984 Act added several new tools to aid the judicial officer in determining what to do with a defendant.263


When we speak of the presumption of innocence, we are not talking about a process of inference following the establishing of a basic fact. Rather, we are talking about a fundamental principle of our criminal procedure which imposes a burden on the prosecution of establishing the accused’s guilt beyond a reasonable doubt.


256 As the severity and length of the restraint increases, so does the standard of proof required. See Gerstein v. Pugh, 420 U.S. 103, 121 (1975) (citing Brinegar v. United States, 338 U.S. 160, 174-75 (1949)). In order for the police to stop someone, they must have a “reasonable suspicion.” See, e.g., Terry v. Ohio, 392 U.S. 1, 27 (1968). In order to arrest, the police must have “probable cause.” See, e.g., Arizona v. Hicks, 480 U.S. 321, 326 (1987). In order to detain a suspect, without bail, the government must prove their case with “clear and convincing” evidence. See, e.g., 18 U.S.C.A. § 3142(f) (West 2000 & Supp. 2003).


260 Evan Shapiro, Comment, Section 3142(e) of the 1984 Bail Reform Act: Rebuttable Presumption or Mandatory Detention?, 35 BUFF. L. REV. 693, 694 (1986).


Most significantly, the Act added the possibility of pretrial detention if the court believed that releasing the accused “will endanger the safety of any other person or the community.”

The safety of any other person is not an uncommon concern, especially if the person in mind is the victim or a potential witness. This prevention serves the legitimate purpose of protecting the trial itself, and the court has always had the authority to do whatever necessary to maintain the sanctity of the trial. However, the provision for detainment based on the safety of the community, a non-specified threat, is subject to abuse and can lead to unconstitutional detainment.

Because pretrial detention is determined by less than proof beyond a reasonable doubt, it cannot be a procedure that results in punishment. There are five types of punishment available in the criminal justice system: imprisonment, fines, probation, restitution, and death. It is difficult to imagine how being incarcerated is anything but punishment. The Salerno majority did not dispute the premise that punishment with less than proof beyond a reasonable doubt is unconstitutional; it merely found that the detainment set

---


If, after a hearing pursuant to the provisions of subsection (f) of this section, the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, such judicial officer shall order the detention of the person before trial.


266 See United States v. Gilbert, 425 F.2d 490, 499 (D.C. Cir. 1969) (holding that courts have an inherent power to confine accused in order to protect future witnesses at pretrial stage as well as during trial).

267 See Arthur, supra note 62, at 383-84.


270 Id.

271 Id.

272 Id.


274 Since jail is a restriction on liberty it is difficult to imagine that someone would choose to go to jail as opposed to being free. See Barker v. Wingo, 407 U.S. 514, 532-33 (1970) (“The time spent in jail is simply dead time.”). The only practical difference between being in pretrial detention and post-conviction detention is the location of the detention. See, e.g., State v. Avila, 532 N.W.2d 423, 427-28 (Wis. 1995). A pretrial detainee will often be in a local facility while a convicted felon is in the custody of the corrections board and will be housed in a facility anywhere in the state or country to be determined by the state. See id.
forth pursuant to 18 U.S.C. § 3142 was not punishment, but a regulation.\textsuperscript{275} The Salerno court thus indirectly recognized this idea when it characterized pretrial detention as regulatory rather than punitive since it would be unconstitutional to punish with the limited proof offered at a pretrial detention hearing.\textsuperscript{276}

The presumption of innocence is applicable to all criminal cases, but not to regulations that are tangential to criminal cases. The Supreme Court in Bell v. Wolfish first addressed the distinction between punishment and regulation for pretrial detainees.\textsuperscript{277} In Wolfish, the Court held that in order for there to be a Due Process violation, the restrictions of the defendant’s liberty must be for punishment and not legitimate non-punitive government objective.\textsuperscript{278} A few years after Wolfish, the Court reaffirmed this position in a case dealing with juvenile detention.\textsuperscript{279} The regulatory detention was necessary in both cases for a legitimate government objective: the protection of the accused and of the public.\textsuperscript{280}

The difficulty in this division is to differentiate between what is punishment and what is merely restraint based upon some other legitimate need.\textsuperscript{281} The actual result may look the same. Restrictions on liberty and freedom may be a necessary evil in some circumstances.\textsuperscript{282} As Justice Frankfurter stated, “The fact that harm is inflicted by governmental authority does not make it punishment. Figuratively speaking, all discomforting action may be deemed punishment because it deprives of what otherwise would be enjoyed. But there may be

\begin{itemize}
  \item \textsuperscript{275} United States v. Salerno, 481 U.S. 739, 746-48 (1987).
  \item \textsuperscript{276} Id.
  \item \textsuperscript{277} Bell v. Wolfish, 441 U.S. 520, 533 (1979) (concerning the rights of pretrial detainees during their detainment). The Court dismissed an argument that the presumption of innocence prevented them from being treated like convicted felons before they were actually convicted. Id. The Court in a 6 to 3 opinion found, “Without question, the presumption of innocence plays an important role in our criminal justice system . . . . But it has no application to a determination of the rights of a pretrial detainee during confinement before his trial has ever begun.” Id. The holding in this case should be read as limiting only the rights of a detainee and not on the rights of an accused before he/she becomes a detainee. See id. It is clear that the government has a strong interest in maintaining order in a detention facility but does the government have a strong enough interest in placing an accused in such a situation with less than proof beyond a reasonable doubt? See generally id.
  \item \textsuperscript{278} Id.
  \item \textsuperscript{279} See Schall v. Martin, 467 U.S. 253, 256, 274 (1984) (holding that the preventive detention of juveniles did not violate the Due Process Clause of Fifth Amendment because the imprisonment was of the type that served a regulatory purpose – the protection of the juveniles and the community). The court found this to be a legitimate governmental interest and was not the equivalent of punishment. See id. at 269-70.
  \item \textsuperscript{280} Id.
  \item \textsuperscript{281} See, e.g., United States v. Salerno, 481 U.S. 739, 749-50 (1987).
  \item \textsuperscript{282} See id. at 750-51.
\end{itemize}
reasons other than punitive for such deprivation. Using this logic, the Court in *Wolfish* found that if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, then it did not amount to punishment. Yet time spent during this regulatory detention will generally be credited as time served if after a conviction the defendant is sentenced to prison. In this sense regulatory preventive detention is equal to punitive prevention. To the contrary, no credit is given for time on release regardless of the restrictions placed on a defendant’s travel and contacts.

*Wolfish* did not answer the question as to how the presumption of innocence applies before pretrial detention is ordered. *Wolfish* dealt only with what restrictions can be placed on a defendant who is in pretrial detention. The *Wolfish* Court held that the presumption of innocence does not play a role in determining what freedoms a detained suspect is entitled. In *Wolfish*, a class of detainees held prior to their trials sued because their detention was nearly identical to those being held who were actually convicted of crimes. The *Wolfish* Court did not address what, if any, role the presumption of innocence plays at the detention hearing. The clear message from *Wolfish* is that the purpose of the detention is the key. So long as detention is the unfortunate by-product and not the goal, it is permissible. This set a dangerous legal precedent that Congress quickly seized by passing the Bail Reform Act of 1984.

The Court in *Salerno* validated the expansion of pretrial detention to allow for other compelling interests, such as the protection of the public, to hold

---

283 United States v. Lovett, 328 U.S. 303, 324 (1946) (Frankfurter, J., concurring).
287 See generally Kitai, supra note 16, at 258.
288 See *Wolfish*, 441 U.S. at 524.
289 Id. at 532-35.
290 Id. at 526.
291 See Kitai, supra note 16, at 258.
292 See *Wolfish*, 441 U.S. at 538.
293 See United States v. Salerno, 481 U.S. 739, 747 (1987) (“We conclude that the detention imposed by the Act falls on the regulatory side of the dichotomy. The legislative history of the Bail Reform Act clearly indicates that Congress did not formulate the pretrial detention provisions as punishment for dangerous individuals.”).
294 The Supreme Court also skirted the issue of the effect of the presumption of innocence at pretrial proceedings in the only other major pretrial detention case it has heard in the last twenty years. *Id* at 739. Therefore, the presumption of innocence should be in effect at the hearing that authorized the pretrial detention even though it is clear from *Wolfish* that the presumption is temporarily suspended and has no effect on detention once pretrial detention is ordered. See *Wolfish*, 441 U.S. at 532.
greater value than the liberty of the accused. The Court’s holding in *Salerno* was a blow to individual liberty. It set a precedent that stands as a significant step toward a police state because it increases the likelihood that a suspect will be incarcerated pending trial. As the data will suggest, this is bad news for the accused. The presumption of innocence is required at pretrial proceedings to help guard against unnecessary pretrial detention.

It is clear from *Salerno* that detention based on a fear of future danger is permissible. The majority in *Salerno* stated, “We reject the proposition that the Eighth Amendment categorically prohibits the government from pursuing other admittedly compelling interests through regulation of pretrial release.” The compelling interest in this case is the prevention of future crime by defendants on pretrial release. However, this inquiry has no merit because it is impossible to predict the future. Basing future actions on mere allegations of prior indiscretions necessarily requires a substantive discussion regarding the validity of the alleged crime. To have such a discussion at a point when discovery is minimal, and the availability of important witnesses is not required, places the defendant at a severe information disadvantage. Besides, the rules of evidence themselves prohibit the practice of using past actions to prove future actions. This certainly should not be a guiding principle when the future

---

295 See *Salerno*, 481 U.S. at 750-51.
296 See Arthur, supra note 62, at 402.
297 See infra notes 419-48.
298 There are times when pretrial detention is absolutely necessary such as when an accused makes clear and ominous threats against potential witnesses (see United States v. Payden, 768 F.2d 487, 488 (2d Cir. 1985)), but most of the time pretrial detention is not necessary (see Jennifer D. Tinkler, *The Juvenile Justice System in the United States and the United Nations Convention on the Rights of the Child*, 12 B.C. THIRD WORLD L. J. 469, 499 (1992)).
299 The *Salerno* Court reasoned that because the pretrial detention was related to a regulatory purpose and not punishment the presumption of innocence would not play a role because it has no relevance in the prudent functioning of a regulatory scheme. *Salerno*, 481 U.S. at 747-50. This circular logic is met with hostility from Justice Marshall in his dissent. Id. at 762 (Marshall, J., dissenting) (“The majority does not ask, as a result of its disingenuous division of the analysis, if there are any substantive limits contained in both the Eighth Amendment and the Due Process Clause which render this system of preventive detention unconstitutional.”).
300 Id. at 753.
301 Id. at 755.
303 See Kitai, supra note 16, at 285-86.
304 Fed. R. Evid. 404(a) (“Evidence of a person’s character or a trait of character is not admissible for purposes of proving action in conformity therewith on a particular occasion.”). See State v. Trotter, 632 N.W.2d 325, 333-37 (Neb. 2001) (“The exclusion of other bad acts evidence offered
action has not and may never even occur. A presumption of guilt accompanies a defendant instead of a presumption of innocence. The presumption of guilt is not only for the charged crime but also for future crimes.

The Supreme Court has affirmed: “Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.” Yet the lawfulness of the incarceration is the real issue, not the loss of freedoms during a lawful incarceration. The Court constantly plays a chicken-and-egg game with the issue of pretrial detention so that it never has to directly confront it. Faced with the same social pressures as Congress, the Court finds a legitimate government interest in pretrial detention without saying what exactly that is. If the interest is in preventing crime, then what is to prevent the government from detaining all suspects until final adjudication? The interest seems to be that the government can detain those whom it chooses to detain.

The whole concept of preventive detention is repugnant to the presumption of innocence. Pretrial detention has a devastating effect on a defendant’s ability to put up a good defense; the strain of being incarcerated increases the defendant’s willingness to accept a plea-bargain, especially if the offered jail time to show a defendant’s propensity protects the presumption of innocence and is deeply rooted in our jurisprudence,” (citing State v. Sanchez, 597 N.W.2d 361 (Neb. 1999)).

People v. Winthrop, 50 P. 390, 392 (Cal. 1897).

See Arthur, supra note 62, at 403.


In both Wolfish and Salerno, the Supreme Court makes its most far-reaching statements regarding pretrial detention in dicta, yet the real issue is politely passed by focusing on the actions after detention or by taking only the facial challenge to the Bail Reform Act of 1984. Bell v. Wolfish, 441 U.S. 520, 535 (1979) (“The only justification for pretrial detention asserted by the Government is to ensure the detainee’s presence at trial. . . . We, therefore, have no occasion to consider whether any other governmental objectives may constitutionally justify pretrial detention.”); United States v. Salerno, 481 U.S. 739, 741 (1987) (“We hold that, as against the facial attacks mounted by these respondents, the Act fully comports with constitutional requirements.”).

The Salerno Court says the compelling government interest is public safety. Salerno, 481 U.S. at 755. But when the crime charged is a nonviolent crime it is an unsubstantiated leap to say that this defendant is dangerous. See BLACK’S LAW DICTIONARY 378 (7th ed. 1999) (defining violent crime as “a crime that has as an element the use, attempted use, threatened use, or substantial risk of use of physical force against the property of another”). All criminal activity is a threat to public safety, See id. at 377 (defining crime as “a social harm that the law makes punishable”). This rationale starts a slippery slope that can lead to all arrestees facing pretrial detention.

It is argued that preventive detention is valuable in preventing crime and that it is worth the social cost of falsely detaining some while preventing harm to others. See, e.g., Michael L. Corrado, Punishment and the Wild Beast of Prey: The Problem of Preventive Detention, 86 J. CRIM. L. & CRIMINOLOGY 778, 793-94 (1996).
time is short.\textsuperscript{311} A freed defendant is much less likely to accept a plea with a short jail term if he has not tasted jail for a significant period of time.\textsuperscript{312} The data reflect that being detained makes it more likely that a defendant will be convicted.\textsuperscript{313}

The Constitutional challenge in \textit{Salerno} was the legitimacy of the Bail Reform Act of 1984.\textsuperscript{314} The defendant Salerno argued that the Act was on its face unconstitutional because it authorized detention, often associated with punishment, for arrestees whom authorities fear will commit more crimes if released prior to trial.\textsuperscript{315} The Court denied the facial challenge to the Act.\textsuperscript{316} The Supreme Court validated the Act by calling the detention of “dangerous” defendants regulatory and not punitive.\textsuperscript{317} As Justice Marshall points out in his dissent that the semantic game of calling the detention a regulation rather than punishment rings hollow: “The majority concludes that the Act is regulatory rather than punitive measure. The ease with which the conclusion is reached suggests the worthlessness of the achievement.”\textsuperscript{318} Justice Marshall explained further the importance of pretrial release: “Honoring the presumption of innocence is often difficult; sometimes we must pay substantial social costs as a result of our commitment to the values we espouse . . . [but] the shortcuts we

\textsuperscript{311} Bureau of Justice Statistics, \textit{Felony Defendants in Large Urban Counties, 2000}, NCJ 202021, at 24, tbl. 23 (Dec. 2003), available at http://www.ojp.usdoj.gov/bjs/pub/pdf/fdluc00.pdf. Most cases end in a plea bargain and with a guilty plea. \textit{Id}. Only 3\% of felony cases go to trial. \textit{Id}. Ninety-four percent of the felony cases ending in convictions are resolved with a plea. \textit{Id}. For all offenses, 49\% result in a felony guilty plea, 12\% in a misdemeanor guilty plea and 26\% are dismissed. \textit{Id}. It is much easier to take a plea for one year when you have already spent one year in jail. See, e.g., \textit{People ex rel. Johnson v. Redman}, 197 N.Y.S.2d 15, 16 (Sup. Ct. 1960).


\textsuperscript{313} Bureau of Justice Statistics, \textit{Felony Defendants in Large Urban Counties, 2000}, NCJ 202021, at 24, tbl. 24 (Dec. 2003), available at http://www.ojp.usdoj.gov/bjs/pub/pdf/fdluc00.pdf. On the one hand, released defendants for all offenses were convicted 55\% of the time, and 42\% of the time they were convicted of felonies. \textit{Id}. On the other hand, detained defendants for all offenses were convicted in 77\% of the cases with felony convictions the result 68\% of the time. \textit{Id}.

\textsuperscript{314} See \textit{United States v. Salerno}, 481 U.S. 739, 741 (1987) (“We hold that . . . the Act fully comports with constitutional requirements.”).

\textsuperscript{315} \textit{Id}. at 744.

\textsuperscript{316} \textit{See id}. at 741 (“We hold that against the facial attack . . . the Act fully comports with constitutional requirements.”). A facial challenge must prove that no set of circumstances exist under which the Act would be valid. \textit{See id}. at 745. Since that is a most difficult standard to meet, the more interesting question is the constitutionality of the act as applied not on its face.

\textsuperscript{317} \textit{Id}. at 739 (“The Act’s legislative history clearly indicates that Congress formulated the detention provisions not as punishment for dangerous individuals but as a potential solution to the pressing societal problem of crimes committed by persons on release.”).

\textsuperscript{318} \textit{Id}. at 759 (Marshall, J., dissenting).
take with those whom we believe to be guilty injure only those wrongfully accused and ultimately, ourselves.”

It is well-established law that federal and state statutes that conflict with the Eighth Amendment are unconstitutional. Until the Bail Reform Act of 1984, the sole purpose for bail had been the prevention of flight, which relates to the proper functioning of the courts. It is time to end the practice of preventive detention based on future dangerousness to the public at large before it gets out of control. There is a fine balance in our country between individual freedom and public safety. But once liberty is lost, it is difficult to recapture. The balance between civil liberties and public safety often requires a choice of one over the other. Many times the fear of what might happen will persuade many to forego their freedom in order to feel safe. We should always be skeptical of such arguments, though. We must test the restrictions carefully to see if they are absolutely necessary and evaluate whether they are completely effective in keeping the public safe. Considering the “alarming problems” of crimes being committed by persons on release in the late 1970s and early 1980s, it should be noted that the pretrial detention allowed by the Bail Reform Act has made no significant difference in the percentage of those who are rearrested while out on bond. Therefore, preventive detention is a policy that makes the public feel

319 Id. at 760 (Marshall, J., dissenting).
320 See, e.g., Trop v. Dulles, 356 U.S. 86, 101-04 (1958) (holding that Congressional act authorizing expatriation unconstitutional in violation of the Eighth Amendment); Furman v. Georgia, 408 U.S. 238, 239-40 (1972) (holding that the death penalty under Georgia state law was under the given circumstances cruel and unusual punishment under the Eighth Amendment).
321 See Salerno, 481 U.S. at 754 (“Nothing in the text of the Bail Clause limits permissible Government considerations solely to questions of flight.”).
322 Loss of Liberties, FLA. TODAY, Sept. 11, 2003, at 12 (“Certainly, the nation must maintain a balance between freedom and safety, and some of the [Patriot Act’s] tenets have given law enforcement necessary new tools to fight terrorism. But basic civil liberties need not have been sacrificed.”).
324 The percentage of misconduct committed by persons on pretrial release is about 32%. See Bureau of Justice Statistics, Felony Defendants in Large Urban Counties, 2000, NCJ 202021, at 21 (Dec. 2000), available at http://www.ojp.usdoj.gov/bjs/pub/pdf/fdlluc00.pdf. Put another way, approximately one out of every three released defendants is arrested for a new offense, fails to appear in court, or commits some other violation of release conditions. Id. This high number may also stem from the fact that those on pretrial release will often be the first ones suspected of criminal activity. See, e.g., United States v. Quinteros, 769 F.2d 968, 972 (4th Cir. 1985) (“For defendants on pretrial release, the denial of a speedy trial may result in . . . [defendant being] forced to live under a cloud of anxiety, suspicion, and hostility.”). Prior offenders are also often high on
safer but actually does not make the public safer. As a result, individual liberties are being abused for little or no gain.

A. Detention Procedures

Releasing a defendant before trial is the preferred action in both state and federal courts. This default position is altered if there is something about the particular defendant that makes him or her a flight risk or a danger to the community. The federal standard is that release should be granted so long as the judicial officer is “reasonably assured” the accused will not flee or cause harm. The government has the burden to prove risk of flight or harm; given the standard of proof required, this is easily accomplished. The government essentially has to only assert that the defendant is a flight risk or a danger to the community to satisfy its burden. The government does not have to call witnesses or offer any admissible evidence to satisfy this burden. The defendant, however, must present evidence to rebut the government’s

the suspect list as well. See Symposium, Character at the Crossroads, 49 Hastings L.J. 717, 749 (1998) (“[I]t is not always bad to scrutinize prior offenders or to look for similar past conduct.”).


328 Id. It is not certain if this is less or more than a “preponderance” or “clear and convincing” standard of proof. See, e.g., United States v. Shakur, 817 F.2d 189, 195 (2d Cir. 1987) (stating that burden of proof is on Government to show absence of conditions that will reasonably assure presence of defendant at trial by a preponderance of evidence), cert. denied, 484 U.S. 840 (1987).

329 Although the state has the burden of proof the standard is written in the negative so that the defendant has a higher level of production and proof than the state. See, e.g., Shakur, 817 F.2d at 201. The state merely has to present its evidence first. See supra note 328.

330 See Shakur, 817 F.2d at 194-95 (stating that Bail Reform Act requires a district court to engage in two-step inquiry before ordering a defendant released or detained pending trial, the first concerning risk of flight and the second concerning the conditions which reasonably will assure defendant’s presence at trial).

331 See United States v. Hammond, 44 F. Supp. 2d 743, 746 (D. Md. 1999) (stating that a court may consider proffered evidence for the prosecution’s assertion that the defendant is a flight risk or dangerous even if the proffered statements are from uncorroborated sources, but must be reviewed “with great care and accord it limited weight”). But see Simpson v. Owens, 85 P.3d 478, 492-93 (Ariz. Ct. App. 2004) (stating that, in bail denial hearings, parties must have the right to examine and cross-examine the witnesses and to review in advance those witnesses’ prior statements that are written).
The accusation alone, coupled with the indictment, is often enough to keep the judicial officer from feeling reasonably assured.333

Even if the government prevails in its proof, the preference is still for some sort of conditional release.334 Part of the consideration for the conditional release is the setting of bail.335 A court should exhaust all possible conditions of release before seeking detention.336 This would include all less intrusive methods such as house arrest or ankle bracelets.337 With the modern advances in technology, it is possible to track the movements of individuals with great precision.338 Courts can be reasonably assured that defendants will appear for court if they are being tracked. The intrusion into the lives of the accused would be slight as opposed to damage that can occur by spending a week, a month or a year in jail awaiting trial. After considering all of the possible means for conditional release, if none of them will reasonably assure the prevention of flight or danger to the community, then detention is the final option.339 A detention hearing must be held after the preliminary conclusion is made that detention is the only option.340 In fact, approximately one-fourth of the defendants who receive a detention hearing are granted a conditional release of some sort.341 Thus, it is not a foregone conclusion that detention will result

332 See Dunn v. Edwards, 569 S.E.2d 525, 526 (Ga. 2002) (holding trial court’s failure to render findings of fact in order denying bond was not insufficient as a matter of law, where defendant presented almost no evidence on the issue of his ties to the community); Phillips v. State, 550 N.E.2d 1290, 1295 (Ind. 1990) (holding that so long as a defendant is granted a hearing and opportunity to be heard it was not improper to have an initial presumption that no monetary sum could provide adequate assurances against flight).

333 See, e.g., United States v. Contreras, 776 F.2d 51, 54 (2d Cir. 1985) (holding that where an indictment by a grand jury charging an offense is designated in 18 U.S.C.A. § 3142(e) a judicial officer need not hold an evidentiary hearing to determine if probable cause exists).


335 See id. § 3142(a).


337 The ankle or wrist bracelets are tracking devices that, with the use of global positioning satellites, can monitor a person from afar. See Rob Moritz, High-Tech Tracking for Some Parolees Being Considered, Arkansas News Bureau, Sept. 19, 2004, at http://www.ptm.com/arkansasnews_091904.shtml. While this system may be expensive, the cost could be passed on to the accused. See id. For indigent defendants the costs would be minimal, considering the costs included in incarceration. See id.

338 See id.


341 See id.
because the standard of proof changes. Detention should not be assumed, nor should it be liberally applied. Pretrial detention is a conclusion that requires careful and thoughtful consideration.

Under federal law, to order preventive detention a judicial officer must find, after having a hearing, that “no condition of release could give reasonable assurances” of either the return of the accused or the protection of the community. This standard is greater than the standard at the initial phase because here the risk must be a “serious risk.” While this standard appears high, it is actually easily satisfied with proof of fear and/or outrage. There are several options to releasing an accused that can serve the protective purpose of bail while allowing the freedom for bail. In fact, given the technology today, it may be possible to keep better track of a defendant if released than in jail by using global positioning satellites. For a court to find that no condition of release would provide reasonable assurance is a strong condemnation of the accused. With the variety of alternative restrictions available, sending an accused to jail is an extreme measure that too often is the default. The Court has recognized the maturation process of the Eighth Amendment’s prohibition on cruel and unusual punishment in that it considers the “evolving standards of decency that mark the progress of a maturing society.”

---

342 Essentially to avoid a detention hearing a defendant had to convince the judge that he or she could be reasonably assured that the defendant would not flee the jurisdiction or harm anyone. See, e.g., Perez v. State, 897 S.W.2d 893, 897 (Tex. Ct. App. 1995). Even though the same language is used in the detention hearing as in the preliminary assessment the courts have clarified the standard of proof. United States v. Cisneros, 328 F.3d 610, 616 (10th Cir. 2003) (finding that, at a pretrial detention hearing, the government must prove risk of flight by a preponderance of the evidence and dangerousness to any other person or to the community by clear and convincing evidence).

343 See generally 18 U.S.C.A. § 3142(f) (West 2000 & Supp. 2003) (setting forth the procedure under which a detention hearing is held). This hearing is considered separate and apart from the issue of bail. Id. A hearing under this section is appropriate after a preliminary determination that the defendant does not qualify for bail. Id.

344 Id. § 3142(e).

345 Id. §§ 3142(f)(2)(A), (B) (requiring now that both risk of flight and dangerousness must be a serious risk).

346 For example, as a condition of release the court could impose travel restrictions, a curfew, restrictions on whom the accused could associate with or contact, and/or have the accused check in periodically with a probation officer, among other things. See id. §§ 3142(c)(B)(i)-(xiv).

347 Florida, Maryland, Kansas and the District of Columbia have procedures for violent sex offenders to wear bracelets that through global positioning satellites could monitor an individual, in these situations parolees, to make sure the individuals do not go wander into areas that they might be tempted. See Duren Cheek, Use Satellites to Keep Eye on Sex Criminals?, The Tennessean, March 11, 2004. Tennessee is also considering such a measure. Id. The cost for this monitoring could be paid for by the accused and that would accomplish the dual benefit of granting the accused his or her freedom and still providing the state with the assurance of public safety. Id.

should apply to the first part of the Eighth Amendment as well. The ability to monitor an accused released on bond is so improved that to ignore this technological advance in the face of overcrowded jails, budget shortfalls and increased personal insecurity is to purposefully stunt the development of the law and law enforcement. It is always preferable to have restrictions placed by a judicial officer on the condition of release, regardless of the conditions, than to be incarcerated until trial. A release with conditions better provides for the protection of the presumption of innocence, as the accused will be able to carry on with his or her daily activities without much interruption.

Instead of a presumption of innocence, a defendant may instead face a contrary presumption. Under federal law, if a defendant is charged with a crime of violence, a capital offense or a drug-related offense with a possible punishment of ten or more years, then a rebuttable presumption arises that no condition will suffice based on the crime charged. The burden then shifts to the defendant to prove that he or she is not a flight risk and is not a danger to the public. This burden shifting from the government to the defendant is contrary to the presumption of innocence because the presumption of innocence is apparently sufficiently rebutted simply with the charging instrument. Since the challenge in Salerno was a facial challenge, this issue has never squarely been in front of the Court.

350 See id.
351 See id.
352 See id.
353 See id.
354 See Ex parte Hall, 844 So. 2d 571, 573 (Ala. 2002) (“It is well established that a person accused by indictment of a capital offense must overcome the presumption of his guilt by proof, in order to be entitled to bail.”).
355 See 18 U.S.C.A. §§ 3142(e)(3), (f)(1) (West 2000 & Supp. 2003). The presumption for detention includes two elements. Id. The first is that no condition will assure the defendant’s presence at trial and the second is that no conditions will reasonably assure the safety of the community. See id. The defendant must prove both assurance of appearance and assurance of public safety to overcome this presumption. See id.
356 See id.
357 The presumption for detention arises only on a finding of probable cause by the judicial officer that the defendant committed the charged crime. See id. Probable cause is the same standard that allowed the defendant to be arrested and indicted. See, e.g., Arizona v. Hicks, 480 U.S. 321, 326 (1987). A finding of probable cause is nothing new and is implicit in the felony charge. See 18 U.S.C. § 3142(e) (2000).
B. Evidentiary Concerns

Inquiry at the bail hearing should be limited to the defendant’s risk of flight or danger to the community, if any, and the amount of bail necessary to defend against those risks. What should not be bantered about is the guilt or innocence of the defendant.\(^{359}\) No inquiry as to evidence against the defendant should be offered or considered because the defendant should not have to defend himself at this preliminary proceeding.\(^{360}\) The lack of discovery and the lack of admissible evidence places the defendant in a very precarious position.\(^{361}\) Once the government proffers evidence that involves guilt, a defendant is forced to rebut that claim, unsubstantiated or not, if he or she hopes to prove that he or she is not a risk for flight or danger.\(^{362}\) The government has nothing to lose at this early juncture, while the defendant may lose his liberty.

Once a suspect is arrested, he or she will appear before a judicial officer.\(^{363}\) After taking a plea of not guilty, a release of the defendant is ordered or bail will be set.\(^{364}\) All that a judge knows about the accused is his or her name, criminal record, and the charge against him or her.\(^{365}\) Armed with this information and usually a recommendation from the prosecutor, the judicial officer is to set the amount of bail.\(^{366}\) If the government makes an allegation that the defendant is a danger or if the alleged crime is one of a designated set, then the accused is placed in an awkward position of having to begin its defense before the government offers proof.\(^{367}\) The presumption of innocence leaves the defendant and is replaced by a presumption of guilt.\(^{368}\)

Unfortunately, for a defendant in this situation, his or her ability to present proof may be severely limited. The Bail Reform Act requires that the defendant “shall be afforded an opportunity to testify, to present witnesses, to cross-examine witnesses who appear at the hearing and to present information by proffer or otherwise.”\(^{369}\) These rights are really fool’s gold in that there is no

---

\(^{359}\) See United States v. Chen, 820 F. Supp. 1205, 1207-08 (N.D. Cal. 1992) (finding that pretrial release under Bail Reform Act of 1984 neither requires nor permits pretrial determination of guilt and evidence of guilt is only relevant in terms of likelihood that defendant will fail to appear).

\(^{360}\) See Arthur, supra note 62, at 185.

\(^{361}\) See id.

\(^{362}\) See id.

\(^{363}\) See Fed. R. Crim. P. 5(a).

\(^{364}\) See, e.g., United States v. Blackman, 1999 F.3d 413, 414 (7th Cir. 1999).


\(^{366}\) See, e.g., United States v. Dohm, 597 F.2d 535, 552 (5th Cir. 1979) (Goldberg, J., dissenting).

\(^{367}\) See id.

\(^{368}\) See Ex parte Hall, 844 So. 2d 571, 573 (Ala. 2002).

absolute right to any of what is promised by statute.\textsuperscript{370} So even if some of the rights are provided, without all it is difficult to present a case. For example, there is little value to cross-examination if the government only proffers evidence.\textsuperscript{371} Likewise, there is no absolute right to present witnesses if the court, in its discretion, does not allow it.\textsuperscript{372} If a court decides that it will accept only proffers, then the defendant is at a great disadvantage as to weight because everything proffered on behalf of the defendant could be construed as self-serving.\textsuperscript{373} But all that is proffered by the government is likely to be given weight, especially if the proffer deals with a potential danger to the community.\textsuperscript{374}

For a judicial officer to be in a position to determine future dangerousness by hearing potentially only proffered evidence from the prosecution and the nature of the crime charged is more akin to a plot in a science-fiction movie than our criminal justice system.\textsuperscript{375} Yet that is precisely what Congress proscribed for federal law enforcement, and likewise many states have similar assessments.\textsuperscript{376} When faced with the political backlash of letting a “dangerous” suspect back out on the street, what judicial officer would not be biased toward detention?\textsuperscript{377}

\textsuperscript{370} A district court has wide discretion in the form of evidence it will accept at a bail/detention hearing, such as to choose if to proceed by live or proffered testimony (see, e.g., United States v. Hurtado, 779 F.2d 1467, 1480 (11th Cir. 1985)), to allow for adverse witnesses to be called (see, e.g., United States v. Gaviria, 828 F.2d 667, 669-70 (11th Cir. 1987) ("[A] defendant only has a conditional right to call adverse witnesses")), and to allow hearsay and restrict cross-examination (see, e.g., United States v. Delker, 757 F.2d 1390, 1397-98 (3d Cir. 1985) (upholding lower court’s refusal to subpoena witnesses whose out of court statements were used against defendant)); see also United States v. Winsor, 785 F.2d 755, 757 (9th Cir. 1986) (holding that without a proffer from the defendant that the government’s proffer was in error the court did not have to allow cross-examination).

\textsuperscript{371} There is little value in cross-examining the one proffering the evidence. See, e.g., United States v. Williams, 798 F. Supp. 34, 36 (D.C. Cir. 1992). By accepting proffered testimony then hearsay testimony is admissible in contrast to the current prohibition against hearsay testimony in criminal cases. See Crawford v. Washington, 124 S. Ct. 1354, 1365 (2004) (holding that a showing of unavailability is required for testimonial hearsay evidence to be admitted).

\textsuperscript{372} See, e.g., Williams, 798 F. Supp. at 36.

\textsuperscript{373} Faced with the proposition of risking the safety of the community versus intrusion to one individual’s liberty in detention as a value determination it is easy to see which side a court is most likely to come down on. See, e.g., United States v. Nichols, 897 F. Supp. 542, 547-48 (W.D. Okla. 1995), aff’d 61 F.3d 917 (10th Cir. 1995).

\textsuperscript{374} In the futuristic movie “Minority Report” directed by Steven Spielberg and starring Tom Cruise, genetically altered psychics predict crime before it happens and the state arrests criminals before they complete their criminal deeds. See MINORITY REPORT (20th Century Fox 2002).

\textsuperscript{375} See, e.g., Tyler v. United States, 705 A.2d 270, 277 (D.C. Cir. 1997).

\textsuperscript{376} See Thomas E. Scott, Pretrial Detention Under the Bail Reform Act of 1984: An Empirical Analysis, 27 AM. CRIM. L. REV. 1, 49 (1989) (discussing United States v. Traitz, 807 F.2d 322 (3d Cir. 1986), in which a very uncomfortable court allowed house arrest for a defendant charged with
The traditional solution was to treat as irrelevant the crime charged and focus only on risk of flight and future dangerousness. Thus, the inquiry for the risk of flight should be limited to the traditional factors such as employment and ties to the community. Likewise, the proof for dangerousness should be limited to any threats or actions that would indicate the accused would cause harm to another person. It may not be a simple task to exclude the crime charged from the determination of bail, but it is the only way that a defendant can be assured of a fair hearing and still enjoy his presumption of innocence. The defendant’s liberty is at stake at a bail hearing much as it is at trial. The major difference is that in the trial the government will have to prove its entire case beyond a reasonable doubt, while at a bail hearing the government merely has to propose that it has apprehended the appropriate suspect. It is fundamentally unfair to base bail or pretrial detention on the crime charged. While it is true that the more serious the possible punishment the greater the incentive to flee, it is also true that when the government seeks to deprive individuals of their fundamental right of freedom for a significant period of time, the government should have a higher standard of proof and process.

C. The Appellate Process for Pretrial Detention

Under common law it was customary for a judicial officer to make an assessment of an arrestee soon after the arrest. At this hearing a decision as to what to do with the accused was made. He was either released or detained.

a violent crime and having a colorful past). Scott writes, “Decisions such as Traitz underscore the judiciary’s natural caution in employing innovative release techniques, such as home confinement, especially in situations where the stakes are high and mistakes in judgment could pose a danger to individuals and the community.” *Id.*

378 See Cogan, supra note 102, at 72.

379 See Arthur, supra note 62, at 391.


381 See Querubin v. Commonwealth, 795 N.E.2d 534, 539-40 (Mass. 2003) (finding that freedom from physical restraint was a fundamental right but nevertheless found that there is no absolute right to bail).

382 See Gerstein v. Pugh, 420 U.S. 103, 114 (1975) (citing 2 M. Hale, PLEAS OF THE CROWN 77, 81, 95, 121 (1736); 2 W. Hawkins, PLEAS OF THE CROWN 116-17 (4th ed. 1762)).

383 See Gerstein, 420 U.S. at 114-15. The court stated:

At common law it was customary, if not obligatory, for an arrested person to be brought before a justice of the peace shortly after arrest who would examine the prisoner and the witnesses to determine whether there was reason to believe the prisoner had committed a crime. If there was, the suspect would be committed to jail or bailed pending trial.
with the strong preference for release. The general idea was that “a person accused of crime shall not, until he has been finally adjudged guilty in a court of last resort, be absolutely compelled to undergo imprisonment or punishment.” That same concept is evident today in the various bail provisions. For example, the federal statute still requires some determination of bail at the defendant’s first appearance. If the court sets bail at an amount that the accused cannot afford, or it refuses to set bail at all and orders detention, then the issue is immediately appealable. The standard of review on appeal depends on where the first appearance took place. If in federal court a magistrate made the initial determination on bail, then the issue can be taken up in the district court de novo. An appeal from the district court will be reviewed on an abuse of discretion standard.

Id. (citing 1 M. HALE PLEAS OF THE CROWN 583-86 (1736)).

384 See id.
386 18 U.S.C.A. § 3142(a) requires a determination “upon appearance before a judicial officer” which has been interpreted to mean at the first appearance especially if detention is the result. See 18 U.S.C.A. § 3142(f)(2)(B) (West 2000 & Supp. 2003) (“[T]he [detention] hearing shall be held immediately upon the person’s first appearance before the judicial officer unless . . . [someone] seeks a continuance.”); United States v. O’Shaughnessy, 764 F.2d 1035 (5th Cir. 1985), reh’g granted, 772 F.2d 111, 112 (5th Cir. 1985) (stating that the first appearance requirement must be strictly applied).
389 See Leon, 766 F.2d at 80 (stating that a district court should fully reconsider a magistrate’s denial of bail); United States v. Tortora, 922 F.2d 880, 883 (1st Cir. 1990) (stating that the district court engages in de novo review of contested pretrial release or detention order of magistrate); United States v. Cisneros, 328 F.3d 610, 616 (10th Cir. 2003) (stating that it is within a district court’s authority to review a magistrate judge’s detention or release order sua sponte with the standard of review being de novo); United States v. Luisa, 266 F. Supp. 2d 440, 445 (W.D.N.C. 2003) (stating that the district court acts de novo and must make an independent determination of the proper detention or release).
391 See id.
392 See, e.g., id.
D. Constitutional Concerns Regarding Pretrial Detention

The greatest danger of pretrial detention lies in the fact that a suspect may be held in jail for an indefinite period of time with less than evidence beyond a reasonable doubt. The Supreme Court in Taylor v. Kentucky urged judges to use the Due Process Clause to safeguard “against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt.”393 The procedure for setting bail is fraught with danger for the defendant because the evidentiary standards are so much lower.394 A defendant must be prepared to present a case if there is any resistance to being released on his or her recognizance.395

In order to justify detention without bail under the federal guidelines, a judicial officer must find that “no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community.”396 If the judicial officer makes such a finding, then a rebuttable presumption arises that the defendant must be incarcerated before his or her trial.397 The Salerno court found this process sufficiently tedious to override any due process concerns.398 However, the court mistakenly began its due process analysis on a misguided premise: namely that pretrial detention was not punishment but a regulation.399 This is completely abhorrent to the principle it set forth in Taylor.400 All the findings and hearings in the world will not change the fact that Congress has authorized that a suspect may be detained for an indefinite period of time on evidentiary standard of less than

---

395 See id.
399 See id. at 753; see also Christopher Slobogin, A Jurisprudence of Dangerousness, 98 NW. U. L. REV. 1, 12-13 (2003). In an article focusing on preventive detention for convicts after they finish serving their terms, Christopher Slobogin makes a distinction between preventive detention and punishment when he writes:

Preventive detention is based solely upon a prediction concerning future offenses and can occur only if there is such a prediction. Therefore, preventive detention is not criminal punishment. Indeed, the concept of ‘punishment’ for some future act is incoherent. Accordingly, to the extent procedural protections depend upon characterization of a proceeding as criminal, they are not required in preventive detention proceedings.

Id.
beyond a reasonable doubt and with inadmissible evidence.\footnote{See 18 U.S.C.A. § 3142 (West 2000 & Supp. 2003) (allowing for the nature of the charges to be used as evidence, which it is not and it allows for the prosecution to merely proffer its evidence of anticipated misconduct).} The result is that for an arrestee to have any hope of being released on bail, let alone having bail set, he or she must be prepared to make a defense at this first appearance.\footnote{See, e.g., United States v. Williams, 798 F. Supp. 34, 36 (D.C. Cir. 1992).} The presumption of innocence should not burst with an indictment. That clearly cannot be true or else it would never exist at trial. The Due Process violation is not that the process set forth in federal law does not provide an opportunity for the defendant; it is that the entire process should not exist at all.

When a federal court finds a defendant is presumptively dangerous, the burden shifts to the defendant to prove whether any condition or combination of conditions will reasonably assure the appearance of such person and the safety of any other person and the community or he or she would face jail for an indefinite period of time until final adjudication.\footnote{See 18 U.S.C. § 3142 (e), (f) (2000).} A federal court may use the indictment, as well as other inadmissible hearsay evidence, in deciding whether to release.\footnote{See id. § 3142. Four factors are to be considered: 1-Nature of the offense charged; 2-Weight of the evidence against the accused; 3-Criminal history; 4-Potential danger to any person or the community. Id.} Since an arrest requires probable cause, for a court to not find probable cause is not grounds to allow bail; it should be grounds to dismiss the case altogether.\footnote{See id. at tbl. 2.} The subjective aspects of the test are by their very nature objective. As a result, pretrial detention is a foregone conclusion in almost all cases where the suspect is charged with a top class felony.\footnote{See id.}

E. Other Protections Against Unjust Pretrial Detention

The Eighth Amendment’s right to bail is generically different from, but directly connected to, the Sixth Amendment’s right to a speedy trial.\footnote{See Barker v. Wingo, 407 U.S. 514, 519-20 (1972).} When a defendant is unable to make bail, his Sixth Amendment right to a speedy trial becomes even more important.\footnote{See id.} As a matter of practice, courts in all jurisdictions give some preference for defendants who are detained as opposed to

\footnote{Bureau of Justice Statistics Special Report, Federal Pretrial Release and Detention, 1996, NCJ 168653, at 3, fig. 2 (Feb. 1999), available at http://www.ojp.usdoj.gov/bjs/pub/pdf /fprd96.pdf. Of the 56,982 defendants arraigned at initial court appearance 318 had their cases initially dismissed. Id.}
those who are released. The Speedy Trial Clause provides some procedural protection for a defendant held on a high bond or preventive detention. A violation of the Speedy Trial Clause occurs when a defendant’s case meets the four criteria set forth in *Barker v. Wingo*.

The first hurdle that must be overcome involves a determination as to the amount of time that has passed between the indictment and the trial. While a defendant does not have to be incarcerated to be prejudiced from a long delay, it does make the argument more compelling. The Speedy Trial Clause is a procedural safeguard for an unjustly detained defendant, but it is not a salve for poor process in setting bail.

Also, since an accused has a right to counsel once the adversarial process has commenced, then it should follow that the presumption of innocence should apply as well. Congress specifically requires that the accused have a right to be represented by counsel if they choose to have counsel or if they cannot afford counsel to have appointed counsel for a bail hearing that might involve detention. The protection of counsel was enough to convince the Supreme Court that the pretrial detention process was in fact due process as required by the Fourteenth Amendment. But this procedural due process remedy does not cure the basic problem of proof at this stage of the adversarial process. The analysis of these Sixth Amendment rights, the Supreme Court has found new meaning via the Due Process Clause of the Fourteenth Amendment. The bail clause of the Eighth Amendment is due the same consideration and re-evaluation.

---

410 See id.
411 See id. at 530-31. First, the defendant must allege that the interval between accusation and trial has crossed the threshold dividing ordinary from “presumptively prejudicial” delay; second, the defendant must show that the government was responsible for the delay; third, the defendant must in due course assert his right to a speedy trial; fourth, the delay must have presumptively prejudiced the defendant’s ability to prepare an adequate defense. See id. at 530-32.
412 Typically a delay for approximately a year is required before the court will find it “presumptively prejudicial” and dismiss the charges. See Gregory Joseph, *Speedy Trial Rights in Application*, 48 FORDHAM L. REV. 611, 623 n.71 (1980).
413 See Doggett v. United States, 505 U.S. 647, 648 (1992) (holding that an 8-1/2 year delay between the indictment and trial was long enough for consideration of a Sixth Amendment violation even though the defendant was not aware of the charges for most of the time).
415 See Alabama v. Shelton, 535 U.S. 654, 654 (2002) (holding that counsel must be appointed to indigent defendant even if the possible punishment is a suspended sentence because that suspended sentence may end up as a deprivation of the person’s liberty).
418 See id.
V. THE PRACTICAL EFFECT OF PRETRIAL DETENTION

The effect of pretrial detention in any case is significant. If pretrial detention is ordered, or if bail is set at a level that the defendant cannot afford, and the defendant is detained as a result, then the likelihood that the defendant will accept a plea bargain increases and perhaps so does the probability that the government will prevail at trial. For instance, in 2000, in the seventy-five largest counties in the United States, 62% of felony defendants were released prior to the final disposition of their case. Defendants charged with violent felonies were more likely to be either denied bail or not released on bail. Murder defendants were least likely to be released on bail, while those charged with fraud were most likely to be freed. Not surprisingly, the conviction rate for murder defendants was at 66%, while the conviction rate for fraud was 52%, the lowest of all categories. Compare that to the fact that the conviction rate for all detained defendants was almost 50% higher than those who were released. Although it is difficult to compare apples and oranges, there is a strong correlation between pretrial detainment and conviction. The two run hand in hand. A person in jail is more likely to accept a plea bargain to end his time in jail, especially if probation is offered, than is a person who is out on bail. The same pressures do not apply to a released defendant as to one who is incarcerated.

419 See id. at 359-60.
420 See Foote, supra note 14, at 960-61 (“Statistical data in the bail studies of the possible correlation between pretrial jail status and increased likelihood of conviction is incomplete.”).
422 Id. Forty-four percent of defendants charged with a violent crime (specifically, murder, rape, robbery, assault and other violent crimes) were held until disposition, compared to only 36% of defendants charged with property or drug-related crimes or 34% of those accused of public-order offenses. Id.
423 Bureau of Justice Statistics, supra note 421. Eighty-seven percent of murder defendants were held until their case was disposed. Id. Murder is often the one crime that bail may not be available at all. See Bail Reform Act of 1966, 18 U.S.C.A. § 3142 (2002). In many jurisdictions bail is not constitutionally required in murder cases. See id. This would account for the number being so high. See id.
424 Bureau of Justice Statistics, supra note 421. Eighty-seven percent of murder defendants were held while only 15% of fraud defendants were held until disposition. Id.
425 Id. at 24, tbl. 23.
426 Id. at 24, tbl. 24.
427 See id.
428 See id.
429 See Laufer, supra note 29, at 359-60.
430 See Kitai, supra note 16, at 285-86.
Also, it is likely that a freed defendant will be able to put on a better defense at trial.431 A freed defendant can assist in finding witnesses, has fuller access to his or her attorney, and most important, does not suffer from the same pressure to accept or initiate a plea bargain.432 A freed defendant also has little incentive to speed a trial along. It is not uncommon for freed defendants to have more than double to triple the time in between indictment and trial than a detained defendant.433 In fact, the longer a case goes without being tried, the more difficult the case becomes for the government.434 Depending on the backlog of cases in a jurisdiction, a released defendant’s case is much more likely to simply get lost in the system, as was often the case in Franklin County, Kentucky.435 Sometimes a detained defendant’s case gets lost as well.436 The outrage over the situation in Franklin County, Kentucky, is not the same as the outrage in Coffee County, Georgia.437 The system failed in both counties, but the plight of Samuel Moore is more troubling to the American criminal justice conscience because of the punishment without process.

Because the types of crimes prosecuted in federal court differ from state court, the application of bail to the final outcome is more difficult to ascertain.438

431 See id.
432 See id.
433 The median time from arrest to adjudication by pre-trial releases for the most serious offenses except murder was 105 days for released defendants and 40 days for those detained. Bureau of Justice Statistics, Felony Defendants in Large Urban Counties, 2000, NCJ 202021, at 23, fig. 14 (Dec. 2000), available at http://www.ojp.usdoj.gov/bjs/pub/pdf/fdluc00.pdf. There are several reasons for this with the most pressing issue relating to a defendant’s Sixth Amendment right to a speedy trial. See U.S. Const. amend. VI. Incarceration is a key element, although not required, to a speedy trial claim. See United States v. MacDonald, 456 U.S. 1, 8 (1982).
434 See Barker v. Wingo, 407 U.S. 514, 521 (1972). The older a case the greater the chance that evidence will be lost or destroyed. See United States v. Hanhardt, 156 F. Supp. 2d 988, 1001 (N.D. Ill. 2001). Witnesses’ memories fade or the witness may no longer be available to testify. See id. This can also work against the defendant’s ability to gather evidence for trial but with the high standard of proof on the government the defendant benefits the most from delay. See id.
435 Jason Riley et al., Justice Delayed is Justice Denied, LOUISVILLE COURIER-JOURNAL, October 12, 13, 14 & 19, 2003. In a four-part exposé the various Kentucky court systems were compared with some counties having criminal cases on the docket for over eight years and several hundred cases statewide being dismissed for lack of prosecution. Id. Franklin County was one of the most egregious situations where more than 300 cases were thrown out for lack of prosecution since 2000. Id. According to the article the strategy for most defense attorneys was to get their client released from jail and then just lay low as the prosecution would often overlook cases that were not brought to their attention. Id.
436 See supra notes 1-9.
438 There is about an 85-88% conviction rate for both sets of defendants depending on the year and the source of the data. See Thomas E. Scott, Pretrial Detention Under the Bail Reform Act of 1984: An Empirical Analysis, 27 AM. CRIM. L. REV. 1, 15 (1989) (“Both in 1987 and in 1988
As for the data, there is no statistical difference between being released and being detained.\textsuperscript{439} The primary reason is that most pretrial detention is consolidated in one type of quasi-criminal area: immigration.\textsuperscript{440} Nevertheless, a significant portion of federal defendants are detained until trial.\textsuperscript{441} Any effect that pretrial detention has for increasing the rate of conviction would be less noticeable given the high rate of conviction for federal criminal cases. The overall conviction rate in federal court is significantly higher than in state court.\textsuperscript{442} Also, in 2001, only 27% of the suspects arrested for federal criminal matters were not charged with any crime.\textsuperscript{443}

There is a significant difference in the likelihood of pretrial release depending on the federal jurisdiction. For example, in Nebraska 61% of the defendants were detained even though only 16.1% were considered presumptively detained in accordance with 18 U.S.C.A. § 3142(e).\textsuperscript{444} Compare this to the Southern District of West Virginia and the Eastern District of Wisconsin, where the same number of defendants were considered presumptively detained; yet the court only detained 20.9% and 23.4% respectively.\textsuperscript{445} All but five districts have more defendants detained than were considered presumptively detained.\textsuperscript{446} This suggests that the presumption against release is difficult to overcome regardless of the jurisdiction. Overall, approximately 85% of all detainees were ultimately convicted of a criminal charge. . . . It seems that disposition in the majority of the these cases resulted from some form of plea bargaining.\textsuperscript{447}; see also Bureau of Justice Statistics, Federal Criminal Case Processing, 2001 with trends 1982-2001, NCJ197104, at 11, tbl. 5 (Jan. 2003), available at http://www.ojp.usdoj.gov/bjs/pub/pdf/fccp01.pdf. Between October 1, 2000 and September 30, 2001, 88.8% of defendants charged were convicted of some crime. Id.\textsuperscript{439} This is not conclusive proof that pretrial detention does not play as big of a factor in federal criminal cases because it is unknown what effect the pretrial detention had on the defendant’s willingness to plea bargain. See Rachel King, Bush Justice: The Intersection of Alaska Natives and the Criminal Justice System in Rural Alaska, 77 OR. L. REV. 1, 25-26 (1998).\textsuperscript{448} Bureau of Justice Statistics Special Report, Federal Pretrial Release and Detention, 1996, NCJ 168653, at 5 (Feb. 1999), available at http://www.ojp.usdoj.gov/bjs/pub/pdf/fprd96.pdf. Immigration cases account for approximately 20% of all those detained. Id.\textsuperscript{441} Id. at 3, fig. 2. Of the 56,982 federal defendants arraigned, 19,254 were detained by the court. Id. This does not include the number of those who were granted bail but could not afford it. Id.\textsuperscript{442} Bureau of Justice Statistics, Federal Criminal Case Processing, 2001 with Trends 1982-2001, NCJ 197104, at 11, tbl. 5 (Jan. 2003), available at http://www.ojp.usdoj.gov/bjs/pub/pdf/fccp01.pdf. 88.8% of all defendants in federal court are convicted. Id.\textsuperscript{443} Id. at 9, tbl. 3.\textsuperscript{444} Bureau of Justice Statistics Special Report, Federal Pretrial Release and Detention, 1996, NCJ 168653, at 16-17, appendix tbl. A3 (Feb. 1999), available at http://www.ojp.usdoj.gov/bjs/pub/pdf/fprd96.pdf. Id.\textsuperscript{445} Id.\textsuperscript{446} Middle Alabama, Southern Iowa, New Hampshire, Eastern Oklahoma, Puerto Rico. Id.
14.4% of all defendants were considered presumptively detained, and 85% of those were unable to meet their burden of proof and were detained until trial.

VI. CONCLUSION

Given the current trend toward detention-first policies, coupled with the public’s willingness to sacrifice personal freedoms after 9/11/01, there must be clear guidelines for courts to follow if they seek to detain a defendant prior to conviction. Without precise standards for bail and the bail procedure, courts will continue to administer inconsistent justice. There remains too much potential for abuse in the system. The difference in the abuse of the bail system now is that it is explicit, notorious and applauded. Instead of simply hiding political agendas in high bails, courts can express their views openly by citing their concern for public safety. Speculation regarding a defendant’s future dangerousness, especially if the alleged crime involves terrorism, has no place in the American system of criminal justice. Certainly, such considerations have no place at a pretrial hearing because of the ease in which the government can shift the burden of proof to the defendant. It is too easy to lock individuals away if there is the threat of danger and the risk seems high. However, that is not the American system of criminal justice. That mindset is not part of our fundamental freedom or ordered liberty. The burden of proof must always fall on the government.

The fundamental purpose of bail is to assure that a defendant will return to court for trial. The presumption of innocence plays a large factor in our pre-bail policies and procedures. To deny bail for reasons other than maintaining the sanctity of the judicial process is to presume guilt. The lack of a true presumption of innocence is leading to more restrictive bail measures, such as

---

447 Id.
448 Id. at 9.
450 See S. 1606, 108th Cong. (2003). The bill was introduced to “strengthen and enhance public safety through pretrial detention and post release supervision of terrorists, and for other purposes.”
452 See U.S. CONST. amend. VIII.
453 See supra note 148.
454 See State v. Henderson, 466 P.2d 116, 118 (N.M. Ct. App. 1970) (“In a criminal prosecution defendant is presumed to be innocent, and this presumption remains with him until his guilt is established beyond a reasonable doubt.”).
455 See Laufer, supra note 29, at 356-60.
preventive detention. The result will not be significantly less crimes committed by those awaiting trial; instead, only the number of wrongly accused suffering material harm will increase. Protecting the innocent is more important than putting society at risk. As jails continue to swell to accommodate these more restrictive policies, the likelihood for unequal justice also grows.

Pretrial hearings should not be motivated by fear but by freedom. Temperance must control when there is a possibility of pretrial detention because of the “vital liberty interest at stake.” Courts must protect themselves from emotional knee-jerk reactions in dealing with individuals accused of heinous crimes by establishing and following detailed procedures to inquire into a defendant’s ability to make bail and other conditions or restrictions available without focusing on what the defendant is accused of doing. Eliminating extraneous considerations that will only enflame the heart and bias the mind, a court can take the time to give all defendants the due process they are required by the Constitution. It is time that the Eighth Amendment right to bail is reinvigorated to make sure that pretrial detention is not an unconstitutional mode for punishment. Only then can we be about the business of convicting the guilty, as opposed to punishing the unfortunate souls like Samuel Moore. After all, we are supposed to be innocent until proven guilty. It is time we started acting as though it were true and recognized the defendant’s right to bail as a fundamental right.

---

457 United States v. Montalvo-Murillo, 495 U.S. 711, 716 (1990) (involving whether the proper remedy for the lack of a timely hearing on the part of the government as required by statute remedied release of the defendant). The court held that it would not. Id.
458 See Klienbart v. United States, 604 A.2d 861, 871 (D.C. 1992) (“A court order denying bail or other conditions of release must do more than repeat statutory language and hypothetical risks; it must clearly state the reasons and rationale for holding in jail – based on regulatory, not punitive concerns – a person who is innocent until proven guilty.”).
459 See supra notes 1-9.
### Appendix 1: State Comparisons for Setting Bail

<table>
<thead>
<tr>
<th>FACTORS FOR SETTING BAIL</th>
<th>ALABAMA</th>
<th>ALASKA</th>
<th>ARIZONA</th>
<th>ARKANSAS</th>
<th>CALIFORNIA</th>
<th>COLORADO</th>
<th>CONNECTICUT</th>
<th>DELAWARE</th>
<th>FLORIDA</th>
<th>GEORGIA</th>
<th>HAWAII</th>
<th>IDAHO</th>
<th>ILLINOIS</th>
<th>INDIANA</th>
<th>IOWA</th>
<th>KANSAS</th>
<th>KENTUCKY</th>
<th>LOUISIANA</th>
<th>MAINE</th>
<th>MARYLAND</th>
<th>MASSACHUSETTS</th>
<th>MICHIGAN</th>
<th>MINNESOTA</th>
<th>MISSISSIPPI</th>
<th>MISSOURI</th>
</tr>
</thead>
<tbody>
<tr>
<td>The amount of bail shall not be oppressive</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
</tr>
<tr>
<td>Is the amount of bail sufficient to assure the presence of defendant</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
</tr>
<tr>
<td>Past performance appearing at court</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
</tr>
<tr>
<td>Defendant’s ability to make bail (including “financial resources” and “financial condition”)</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
</tr>
<tr>
<td>Sources of funds used to make bail</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
</tr>
</tbody>
</table>

2005 | THE EIGHTH AMENDMENT’S RIGHT TO BAIL

55
### Appendix 1: State Comparisons for Setting Bail (continued)

<table>
<thead>
<tr>
<th></th>
<th>Alabama</th>
<th>Alaska</th>
<th>Arizona</th>
<th>Arkansas</th>
<th>California</th>
<th>Colorado</th>
<th>Connecticut</th>
<th>Delaware</th>
<th>Florida</th>
<th>Georgia</th>
<th>Hawaii</th>
<th>Idaho</th>
<th>Illinois</th>
<th>Indiana</th>
<th>Iowa</th>
<th>Kansas</th>
<th>Kentucky</th>
<th>Louisiana</th>
<th>Maine</th>
<th>Maryland</th>
<th>Massachusetts</th>
<th>Michigan</th>
<th>Minnesota</th>
<th>Missouri</th>
</tr>
</thead>
<tbody>
<tr>
<td>Defendant's age, background, family ties, relationships</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
</tr>
<tr>
<td>Defendant's reputation, character and health</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
</tr>
<tr>
<td>Defendant's residence, ownership in local property</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
</tr>
<tr>
<td>Defendant's employment status and history</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
</tr>
<tr>
<td>Defendant's criminal record</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
</tr>
<tr>
<td>Nature of charges; and the likelihood of conviction only relating to flight risk</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
</tr>
</tbody>
</table>
### Appendix 1: State Comparisons for Setting Bail (continued)

|                    | ALABAMA | ALASKA | ARIZONA | ARKANSAS | CALIFORNIA | COLORADO | CONNECTICUT | DELAWARE | FLORIDA | GEORGIA | HAWAI | IDAHO | ILLINOIS | INDIANA | IOWA | KANSAS | KENTUCKY | LOUISIANA | MAINE | MARYLAND | MASSACHUSETTS | MICHIGAN | MINNESOTA | MISSISSIPPI | MONTANA | NEVADA | NEW HAMPSHIRE | NEW MEXICO | NEW YORK | NORTH CAROLINA | OHIO | OKLAHOMA | OREGON | RHODE ISLAND | SOUTH CAROLINA | SOUTH DAKOTA | TENNESSEE | TEXAS | UTAH | VERMONT | VIRGINIA | WASHINGTON | WEST VIRGINIA | WISCONSIN | WYOMING |
|--------------------|---------|--------|---------|----------|------------|----------|-------------|----------|---------|---------|-------|-------|---------|---------|------|-------|---------|---------|-------|---------|----------------|----------|-----------|------------|---------|---------|-------------|---------|----------|-------------|--------|--------|-------------|---------|-----------|-------------|----------|---------|
| Probability of committing a violation of law if released |         | ⬜     | ⬜       | ⬜        | ⬜          | ⬜        | ⬜            | ⬜        | ⬜       | ⬜       | ⬜    | ⬜    | ⬜       | ⬜       | ⬜    | ⬜    | ⬜       | ⬜       | ⬜    | ⬜    | ⬜            | ⬜        | ⬜         | ⬜          | ⬜       | ⬜       | ⬜            | ⬜        | ⬜         | ⬜          | ⬜       | ⬜       |
| Protection of the public or danger to society | ⬜     | ⬜     | ⬜       | ⬜        | ⬜          | ⬜        | ⬜            | ⬜        | ⬜       | ⬜       | ⬜    | ⬜    | ⬜       | ⬜       | ⬜    | ⬜    | ⬜       | ⬜       | ⬜    | ⬜    | ⬜            | ⬜        | ⬜         | ⬜          | ⬜       | ⬜       | ⬜            | ⬜        | ⬜         | ⬜          | ⬜       | ⬜       |
| Does the alleged crime involve violence or weapons? | ⬜     |       | ⬜       | ⬜        | ⬜          | ⬜        | ⬜            | ⬜        | ⬜       | ⬜       | ⬜    | ⬜    | ⬜       | ⬜       | ⬜    | ⬜    | ⬜       | ⬜       | ⬜    | ⬜    | ⬜            | ⬜        | ⬜         | ⬜          | ⬜       | ⬜       | ⬜            | ⬜        | ⬜         | ⬜          | ⬜       | ⬜       |
| Weight of the evidence against the defendant | ⬜     | ⬜     | ⬜       | ⬜        | ⬜          | ⬜        | ⬜            | ⬜        | ⬜       | ⬜       | ⬜    | ⬜    | ⬜       | ⬜       | ⬜    | ⬜    | ⬜       | ⬜       | ⬜    | ⬜    | ⬜            | ⬜        | ⬜         | ⬜          | ⬜       | ⬜       | ⬜            | ⬜        | ⬜         | ⬜          | ⬜       | ⬜       |
| Consideration of alleged injury to victim or victim's property | ⬜     |       | ⬜       | ⬜        | ⬜          | ⬜        | ⬜            | ⬜        | ⬜       | ⬜       | ⬜    | ⬜    | ⬜       | ⬜       | ⬜    | ⬜    | ⬜       | ⬜       | ⬜    | ⬜    | ⬜            | ⬜        | ⬜         | ⬜          | ⬜       | ⬜       | ⬜            | ⬜        | ⬜         | ⬜          | ⬜       | ⬜       |
| If any threats have been made against any potential witnesses | ⬜     | ⬜     | ⬜       | ⬜        | ⬜          | ⬜        | ⬜            | ⬜        | ⬜       | ⬜       | ⬜    | ⬜    | ⬜       | ⬜       | ⬜    | ⬜    | ⬜       | ⬜       | ⬜    | ⬜    | ⬜            | ⬜        | ⬜         | ⬜          | ⬜       | ⬜       | ⬜            | ⬜        | ⬜         | ⬜          | ⬜       | ⬜       |
### Appendix 1: State Comparisons for Setting Bail (continued)

|                     | ALABAMA | ALASKA | ARIZONA | ARKANSAS | CALIFORNIA | COLORADO | CONNECTICUT | DELAWARE | FLORIDA | GEORGIA | HAWAI’I | IDAHO | ILLINOIS | INDIANA | IOWA | KANSAS | KENTUCKY | LOUISIANA | MAINE | MARYLAND | MASSACHUSETTS | MICHIGAN | MINNESOTA | MISSISSIPPI | MISSOURI | MONTANA | NEBRASKA | NEVADA | NEW HAMPSHIRE | NEW JERSEY | NEW MEXICO | NEW YORK | NORTH CAROLINA | OHIO | OKLAHOMA | OREGON | PENNSYLVANIA | RHODE ISLAND | SOUTH CAROLINA | SOUTH DAKOTA | TENNESSEE | TEXAS | UTAH | VERMONT | VIRGINIA | WASHINGTON | WEST VIRGINIA | WISCONSIN | WYOMING |
|---------------------|---------|--------|---------|----------|-----------|----------|-------------|----------|----------|---------|---------|-------|---------|---------|------|--------|---------|-----------|-------|----------|--------------|-----------|-----------|-------------|-------------|----------|---------|----------|----------|----------------|-------------|-----------|----------|------------|--------|---------|--------|-------------|------------|-------------|-----------|----------|-------|-------|--------|--------|--------------|-------------|-----------|----------|
| Number of serious crimes pending against defendant |         | •      |         |          |           |          |             |          |          |         |        |       |         |         |      |        |         |           |      |          |              |           |           |             |            |          |          |          |               |             |            |           |          |
| Probability of flight |         | •      |         |          |           |          |             |          |          |         |        |       |         |         |      |        |         |           |      |          |              |           |           |             |            |          |          |          |               |             |            |           |          |
| What reasonable restrictions could be placed on defendant |         |        |         |          |           |          |             |          |          |         |        |       |         |         |      |        |         |           |      |          |              |           |           |             |            |          |          |          |               |             |            |           |          |
| Is the defendant currently on pretrial release when accused of new charges |         | •      | •       | •        | •         | •        | •           | •        | •        | •       | •      |       | •      |         |      |        |         |           |      |          |              |           |           |             |            |          |          |          |               |             |            |           |          |
| Recommendation of prosecutor or pretrial services |         |        |         |          |           |          |             |          |          |         |        |       |         |         |      |        |         |           |      |          |              |           |           |             |            |          |          |          |               |             |            |           |          |
### Appendix 1: State Comparisons for Setting Bail (continued)

<table>
<thead>
<tr>
<th>FACTORS FOR SETTING BAIL</th>
<th>MONTANA</th>
<th>NEBRASKA</th>
<th>NEW HAMPSHIRE</th>
<th>NEW JERSEY</th>
<th>NEW MEXICO</th>
<th>NORTH CAROLINA</th>
<th>OHIO</th>
<th>OKLAHOMA</th>
<th>OREGON</th>
<th>RHODE ISLAND</th>
<th>SOUTH CAROLINA</th>
<th>SOUTH DAKOTA</th>
<th>TENNESSEE</th>
<th>TEXAS</th>
<th>UTAH</th>
<th>VERMONT</th>
<th>VIRGINIA</th>
<th>WEST VIRGINIA</th>
<th>WISCONSIN</th>
<th>WYOMING</th>
</tr>
</thead>
<tbody>
<tr>
<td>The amount of bail shall not be oppressive</td>
<td>●</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>●</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Is the amount of bail sufficient to assure the presence of defendant</td>
<td>● ● ● ● ● ● ● ●</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>●</td>
<td>● ● ● ● ●</td>
<td>● ● ● ● ● ● ● ●●</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Past performance appearing at court</td>
<td>●</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>●</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Defendant's ability to make bail (including “financial resources” and “financial condition”)</td>
<td>● ● ●</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>●</td>
<td>● ● ● ●</td>
<td>● ● ● ● ● ● ● ●●</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Sources of funds used to make bail</td>
<td>●</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>●</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>State</td>
<td>Defendant's age, background, family ties, relationships</td>
<td>Defendant's reputation and character and health</td>
<td>Defendant's residence, ownership in local property</td>
<td>Defendant's employment status and history</td>
<td>Nature of charges, likelihood of flight risk</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>---------------</td>
<td>---------------------------------------------------------</td>
<td>-----------------------------------------------</td>
<td>-----------------------------------------------</td>
<td>---------------------------------------</td>
<td>------------------------------------------</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Wyoming</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Wisconsin</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>West Virginia</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Washington</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Virginia</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Vermont</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Utah</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Texas</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Tennessee</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>South Dakota</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>South Carolina</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Rhode Island</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Oregon</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Oklahoma</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ohio</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>North Dakota</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>North Carolina</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>New York</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>New Mexico</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>New Jersey</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>New Hampshire</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Nevada</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Nebraska</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Montana</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td>●</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
### Appendix 1: State Comparisons for Setting Bail (continued)

<table>
<thead>
<tr>
<th>Probability of committing a violation of law if released</th>
<th>MONTANA</th>
<th>NEBRASKA</th>
<th>NEVADA</th>
<th>NEW HAMPSHIRE</th>
<th>NEW JERSEY</th>
<th>NEW MEXICO</th>
<th>NEW YORK</th>
<th>NORTH CAROLINA</th>
<th>NORTH DAKOTA</th>
<th>OHIO</th>
<th>OKLAHOMA</th>
<th>OREGON</th>
<th>PENNSYLVANIA</th>
<th>RHODE ISLAND</th>
<th>SOUTH CAROLINA</th>
<th>SOUTH DAKOTA</th>
<th>TENNESSEE</th>
<th>TEXAS</th>
<th>UTAH</th>
<th>VERMONT</th>
<th>VIRGINIA</th>
<th>WASHINGTON</th>
<th>WEST VIRGINIA</th>
<th>WISCONSIN</th>
<th>WYOMING</th>
</tr>
</thead>
<tbody>
<tr>
<td>Probability of committing a violation of law if released</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Protection of the public or danger to society</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Does the alleged crime involve violence or weapons?</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Weight of the evidence against the defendant</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Consideration of alleged injury to victim or victim's property</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>If any threats have been made against any potential witnesses</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>State</td>
<td>Number of serious crimes pending against defendant</td>
<td>Probability of flight</td>
<td>What reasonable restrictions could be placed on defendant</td>
<td>Is the defendant currently on pretrial release when accused of new charges</td>
<td>Recommendation of prosecutor or pretrial services</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>--------------</td>
<td>--------------------------------------------------</td>
<td>-----------------------</td>
<td>----------------------------------------------------</td>
<td>-------------------------------------------------------------------</td>
<td>--------------------------------------------------</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Wyoming</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Wisconsin</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>West Virginia</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Washington</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Virginia</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Vermont</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Utah</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Texas</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Tennessee</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>South Dakota</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>South Carolina</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Rhode Island</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Oregon</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Oklahoma</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ohio</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>North Dakota</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>North Carolina</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>New York</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>New Mexico</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>New Jersey</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>New Hampshire</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Nevada</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Nebraska</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Montana</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
### Appendix 2: Selected California Counties’ Bail Amounts

<table>
<thead>
<tr>
<th>CRIME CHARGED</th>
<th>Alameda</th>
<th>Los Angeles</th>
<th>Orange</th>
<th>Riverside</th>
<th>San Bernardino</th>
<th>San Diego</th>
<th>Ventura</th>
</tr>
</thead>
<tbody>
<tr>
<td>Possession of Narcotics</td>
<td>N/a</td>
<td>N/a</td>
<td>N/a</td>
<td>$5,000</td>
<td>N/a</td>
<td>$5,000</td>
<td>N/a</td>
</tr>
<tr>
<td>Possession For Sale of Narcotics</td>
<td>N/a</td>
<td>N/a</td>
<td>N/a</td>
<td>$25,000-$1,000,000</td>
<td>N/a</td>
<td>N/a</td>
<td>$50,000</td>
</tr>
<tr>
<td>Transport For sale of Narcotics</td>
<td>N/a</td>
<td>N/a</td>
<td>N/a</td>
<td>$25,000-$1,000,000</td>
<td>N/a</td>
<td>$50,000</td>
<td>$50,000</td>
</tr>
<tr>
<td>Sale of Narcotics</td>
<td>N/a</td>
<td>N/a</td>
<td>N/a</td>
<td>$50,000</td>
<td>N/a</td>
<td>N/a</td>
<td>$50,000</td>
</tr>
<tr>
<td>Give/Etc Minor Controlled Substance</td>
<td>N/a</td>
<td>$50,000-$5,000,000</td>
<td>$50,000</td>
<td>N/a</td>
<td>$40,000-$5,000,000</td>
<td>$10,000-$50,000</td>
<td>$50,000</td>
</tr>
<tr>
<td>Hire A Minor To Sell Controlled Substance</td>
<td>N/a</td>
<td>$50,000-$5,000,000</td>
<td>$50,000</td>
<td>N/a</td>
<td>$40,000-$5,000,000</td>
<td>$25,000</td>
<td>$50,000</td>
</tr>
<tr>
<td>Sell/Etc Minor Controlled Substance</td>
<td>N/a</td>
<td>$50,000-$5,000,000</td>
<td>$50,000</td>
<td>N/a</td>
<td>$25,000</td>
<td>$100,000</td>
<td></td>
</tr>
<tr>
<td>Possess Marijuana For Sale</td>
<td>$10,000</td>
<td>$20,000-$100,000</td>
<td>$20,000-$100,000</td>
<td>$5,000-$250,000</td>
<td>$10,000-$50,000</td>
<td>$25,000</td>
<td>$20,000</td>
</tr>
<tr>
<td>Sell Marijuana</td>
<td>$15,000</td>
<td>$20,000-$100,000</td>
<td>$25,000-$100,000</td>
<td>N/a</td>
<td>$35,000</td>
<td>$20,000</td>
<td></td>
</tr>
<tr>
<td>Transportation of Marijuana</td>
<td>N/a</td>
<td>$20,000-$100,000</td>
<td>$25,000-$100,000</td>
<td>N/a</td>
<td>$15,000-$50,000</td>
<td>N/a</td>
<td>N/a</td>
</tr>
<tr>
<td>Sell Marijuana To Minor</td>
<td>N/a</td>
<td>$40,000-$100,000</td>
<td>$50,000-$100,000</td>
<td>N/a</td>
<td>$30,000-$50,000</td>
<td>$50,000</td>
<td>$50,000</td>
</tr>
<tr>
<td>Furnish Marijuana To Minor</td>
<td>N/a</td>
<td>$40,000-$100,000</td>
<td>$50,000-$100,000</td>
<td>N/a</td>
<td>$30,000-$50,000</td>
<td>$15,000</td>
<td></td>
</tr>
<tr>
<td>Use Minor in Sale of Marijuana</td>
<td>$25,000</td>
<td>N/a</td>
<td>$25,000</td>
<td>N/a</td>
<td>N/a</td>
<td>N/a</td>
<td>$50,000</td>
</tr>
<tr>
<td>Heroin, Cocaine Crimes &gt; 1KG</td>
<td>N/a</td>
<td>$1,000,000</td>
<td>N/a</td>
<td>$1,000,000</td>
<td>$100,000</td>
<td>N/a</td>
<td></td>
</tr>
<tr>
<td>Heroin, Cocaine Crimes &gt; 4KG</td>
<td>N/a</td>
<td>$2,000,000</td>
<td>N/a</td>
<td>$2,000,000</td>
<td>$150,000</td>
<td>N/a</td>
<td></td>
</tr>
<tr>
<td>Heroin, Cocaine Crimes &gt; 10KG</td>
<td>N/a</td>
<td>$3,000,000</td>
<td>N/a</td>
<td>$3,000,000</td>
<td>$200,000</td>
<td>N/a</td>
<td></td>
</tr>
<tr>
<td>Heroin, Cocaine Crimes &gt; 20KG</td>
<td>N/a</td>
<td>$4,000,000</td>
<td>N/a</td>
<td>$4,000,000</td>
<td>$250,000</td>
<td>N/a</td>
<td></td>
</tr>
<tr>
<td>Heroin, Cocaine Crimes &gt; 40KG</td>
<td>N/a</td>
<td>$5,000,000</td>
<td>N/a</td>
<td>$5,000,000</td>
<td>$250,000</td>
<td>$200,000</td>
<td></td>
</tr>
<tr>
<td>Heroin, Cocaine Crimes &gt; 80KG</td>
<td>N/a</td>
<td>$6,000,000</td>
<td>N/a</td>
<td>$6,000,000</td>
<td>$300,000</td>
<td>N/a</td>
<td></td>
</tr>
<tr>
<td>Possess Controlled Substance</td>
<td>$10,000</td>
<td>$1,000,000</td>
<td>$20,000</td>
<td>$10,000</td>
<td>N/a</td>
<td>$5,000</td>
<td></td>
</tr>
<tr>
<td>Possess Controlled Substance For Sale</td>
<td>N/a</td>
<td>$20,000-$500,000</td>
<td>$5,000,000</td>
<td>N/a</td>
<td>$15,000-$500,000</td>
<td>$20,000</td>
<td>$50,000</td>
</tr>
<tr>
<td>Manufacture/Etc Controlled Substance</td>
<td>$50,000</td>
<td>$75,000</td>
<td>$75,000</td>
<td>$100,000-$1,000,000</td>
<td>$500,000-$800,000</td>
<td>$50,000</td>
<td>N/a</td>
</tr>
</tbody>
</table>
Appendix 1 Endnotes

2. ALASKA STAT. § 12.30.020 (Michie 2002).
5. CAL. PENAL CODE § 1275 (West 1982).
6. COLO. REV. STAT. § 16-4-105 (2002).
18. LA. CODE CRIM. PROC. ANN. art. 334 (West 2003).

Appendix 2 Endnotes
THE STATUTORY AND EXECUTIVE DEVELOPMENT OF THE
NATIONAL SECURITY EXEMPTION TO DISCLOSURE
UNDER THE FREEDOM OF INFORMATION ACT:
PAST AND FUTURE

by David B. McGinty

I. INTRODUCTION
II. DEVELOPMENT OF THE SYSTEM OF CLASSIFICATION OF NATIONAL SECURITY
INFORMATION & THE DEVELOPMENT OF THE NATIONAL SECURITY
EXEMPTION TO DISCLOSURE UNDER THE FOIA
   A. Stage I: Implicit National Security Concerns: 1938-51
      1. 1946: Administrative Procedure Act: The Beginnings of a
         Public Right to Government Information
   B. Stage II: Explicit National Security Information: The Truman
      Order, 1951-52, & The Eisenhower Order, 1953-72
         “Amendment” that Established the Public’s Right to
         Information
   C. Stage III: Bringing the Classification System in Line with the Newly
      Enacted FOIA: The Nixon Order, 1972-78
      1. 1974: Amendment to the FOIA, Honing Exemption 1
   D. Stage IV: Short-Term Restriction: The Carter Order, 1978-82
   E. Stage V: Reigning in the Carter System for Classification: The
      Reagan Order, 1982-95
      1. 1986: Amendment to the FOIA, Terrorist Exclusion
   F. Stage VI: The Present Classification System: The Clinton Order,
      1995-present
      1. 1996: Amendment to the FOIA, The Electronic FOIA
   G. Summation of Classification Orders
III. THE BUSH ADMINISTRATION AND POST-9/11 CLASSIFICATION
   A. Ashcroft Memorandum
   B. Card Memorandum
IV. STAGE VII: POSSIBILITIES FOR THE FUTURE OF CLASSIFICATION &
    EXEMPTION 1 TO THE FOIA
   A. Standards for Classification

1 Managing Director, Law In Print, LLC, Bryn Mawr, PA. BA, Samford University; JD, Temple
University; LLM, Villanova University (candidate). Other articles by Mr. McGinty can be found in
the European Journal of Law Reform, Journal of International Economic Law (Xiamen), New York
like to thank Professor Jan Ting of Temple University, and Peter C. Buckley of Fox Rothschild,
LLP, for their adept insight and support during the development of this article.
B. Defining the Interest to be Protected
C. Time Requirements for Declassification
D. Regulating Intra-Executive Access to Information
E. Reclassification of Previously Declassified Non-Disclosed Information
F. Denial of the Existence or Non-Existence of Information
G. Possible Congressional Action

V. CONCLUSION

I. INTRODUCTION

There are a wide range of services that a collective of individuals might want to have supplied collectively. Perhaps the most crucial are national defense and law and order. . . . Without national defense, members of a collective would hardly be in a position to make decisions about anything else. Similarly, without order, there could be no market economy.²

A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance; And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.³

The constant struggle between the need to protect the people of the United States and the need to provide for an efficient and ethical government has produced a long and storied history concerning the protection of government-held national security information. Congress and the Executive have used various methods to find an appropriate balance between the potentially conflicting immediate desires of the people and the government charged with protecting the people.

The major instruments of this struggle have been executive orders classifying national security information and the development of The Freedom of Information Act (FOIA).⁴ But, while the FOIA is the primary tool for public

---

⁴ It should be at least noted that there exists a tension between the FOIA and the Privacy Act, i.e., they potentially work against each other to the detriment of the subjects of the documents. The Privacy Act of 1974, 5 U.S.C.S. § 552a(b)(2) states:
access to information regarding the workings of government and the national security, there are other major legislations that allow such access. There are three main pieces of legislation that allow such access, but they allow access to very narrow areas of information when compared to the FOIA. First, the Privacy Act of 1974 requires the disclosure of non-exempt government agency records concerning the individual requesting the information. Second, the Government in the Sunshine Act requires that all non-exempt government meetings be open to the public. Finally, the Federal Advisory Committee Act requires federal agencies to provide committee charters to the Library of Congress, to allow the public access to committee meetings, and to supply transcripts of such meetings upon request.

This article does not explicitly consider these acts and their impact on the public’s access to government-held information. Instead, it focuses on the development of and interaction between the FOIA’s exemption to disclosure of classified information concerning the national defense or foreign relations, and executive orders for classifying such information.

Furthermore, under the current FOIA there are several other exceptions that do not explicitly seek to protect national security information or prevent its disclosure, but unclassifiable national security-related information is often withheld under these exemptions. While this article does not discuss or analyze

No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be required under § 552 of this title.

Id. While the Privacy Act “manages to restrict the federal government data” that could get into the public’s hands, see Elbert Lin, Prioritizing Privacy: A Constitutional Response to the Internet, 17 BERKLEY TECH. L.J. 1085, 1113 (2002), thus protecting the privacy of the individuals discussed, the FOIA allows the divulgence of information to the public with simple notice given to the individuals who are the subject of the information. Martin E. Halstuk, Blurred Vision: How Supreme Court FOIA Opinions on Invasion of Privacy Have Missed the Target of Legislative Intent, 4 COMM. L. & POL’Y 111, 123 (1999). In other words, the “freedom of information” that civil rights and other advocates often fight to exercise or broaden could cause damage to the individuals that such advocates seek to protect. This does not mean that such organizations are not performing a vital role for mandating that the government abide by the established “rule of law,” but it is not fanciful to imagine that an Al Qaeda operative who is detained by the U.S. government does not want the ACLU’s help or her/his personal information broadcast around the world. See also Ctr. for Nat’l Sec. Studies v. U.S. Dep’t of Justice, 331 F.3d 918, 925-26 (D.C. Cir. 2003); U.S. Dep’t of Def. v. Fed’l Labor Relations Auth., 510 U.S. 487, 494-96 (1994) (barring disclosure of requested agency employee’s home addresses under Exemption 6 to the FOIA, 5 U.S.C. § 552(b)(6)); Michael Hoefges et al., Privacy Rights Versus FOIA Disclosure Policy: The “Uses and Effects” Double Standard in Access to Personally-Identifiable Information in Government Records, 12 WM. & MARY BILL OF RTS. J. 1, 5-9 (2003).

7 Id. § 552b(b).
8 Id. app. 1 §§ 9-11.
9 Id. § 552b(3) - (9).
the development and current status of these exemptions and exceptions to the FOIA disclosure, they are worth mentioning briefly to properly establish that merely because asserted national security information may not qualify for the national security exemption, it may still be lawfully withheld under other exemptions. First, Exemption 3 to the FOIA provides that information does not have to be disclosed if another statute exempts disclosure.10 Among these acts, the most important are the National Security Act of 1947,11 National Environmental Protection Act (NEPA),12 and the Atomic Energy Act of 1954.13 Second, Exemption 5 to the FOIA provides information does not have to be disclosed if the information could be prevented from civil discovery as an “intra-agency memorandum.”14 Third, Exemption 7, which was the “hot topic” of the latest major case involving the Center for National Security Studies,15 exempts information that is, basically, held for law enforcement purposes.16 So long as there is a law enforcement purpose for withholding requested information at the time that the Government responds to the request, Exemption 7 allows for nondisclosure even if the information was not originally compiled for a law enforcement purpose.17 It is obvious from the letter of these exemptions that a discussion of each of them deserves the same attention concerning national security information as does studying Exemption 1.18 At least a basic knowledge of their existence is important when determining whether national security information may be withheld, because whether Exemption 1 applies or not, all hope may not be lost for disclosure or withholding. Here, the focus is on the first

12 40 C.F.R § 1506.11 (2000).
15 Ctr. for Nat’l Sec. Studies v. U.S. Dep’t of Justice, 331 F.3d 918, 924 (D.C. Cir. 2003) (applying often-accepted “mosaic” theory typically applied to Exemptions 1 and 3 to Exemption 7).
17 John Doe Agency v. John Doe Corp., 493 U.S. 146, 155 (1989) (deciding that the Government could withhold information originally obtained as part of an audit that at time of request could potentially interfere with grand jury proceedings). See also F.B.I. v. Abramson, 456 U.S. 615, 630 (1982) (holding that Exemption 7 to the FOIA applied to documents originally compiled for law enforcement purposes and summarized in new document prepared for non-law enforcement purpose because documents were originally exempt). Note that Exemption 7 has changed drastically since these cases were decided, arguably making their holdings moot. See 5 U.S.C. § 552(b)(7) (2000).
step: Exemption 1 to the FOIA, the “classification exemption,” the “national security exemption.”

It is necessary to understand fully the history and development of the government classification system to understand the significance of the terms of the present-day government classification system and the national security exemption to the FOIA. The classification system and its development are all the more important because courts rely heavily on agency determinations concerning classification and what constitutes a national security interest, which makes the letter of classification orders important to study at length.\(^{19}\) Such extreme deference to agency determinations and regulations may de facto establish law for nondisclosure of national security information.\(^{20}\)

The development of a formal and uniform system for classification of national security information was completely non-existent until 1938, arguably not until 1951.\(^{21}\) As will be seen, before 1951 each agency established its own policies for classification and there was no congressional restriction on the nondisclosure of government-held information to the public.\(^{22}\) Through what can be separated into six distinct stages of development, numerous executive orders have reacted to contemporary circumstances or political will to balance the necessity of public access to information with the necessity to protect the public from inside and outside national security threats.\(^{23}\) Each of these stages and each new order are dependent upon their predecessors and should be considered from a historical perspective because all new orders must be able to be effectively and efficiently implemented within infrastructures that have existed for years (possibly decades) under prior regulations.

Section II of this article analyzes each of these six stages of development in light of prior executive and congressional actions. Stage I involved implicit national security concerns, and spanned from 1938 to 1951.\(^{24}\) Stage II involved the first explicit national security concerns, and spanned from 1951 to 1972, including orders by both Presidents Truman and Eisenhower, and the introduction of the FOIA.\(^{25}\) Stage III was the first to have to consider the newly enacted FOIA, and spanned from 1972 to 1978.\(^{26}\) Stage IV was the shortest

---

\(^{19}\) Maynard v. C.I.A., 986 F.2d 547, 555-65 (1st Cir. 1993).

\(^{20}\) See id.

\(^{21}\) In 1938, Franklin D. Roosevelt signed into law “An Act To prohibit the making of photographs, sketches, or maps of vital military and naval defensive installations and equipment, and for other purposes.” Pub. L. No. 75-418, 52 Stat. 1, 1 (1938). The President was to define installations or equipment as requiring protection. Id. However, this Act was silent as to the process of classification. An organized system of classification was not set forth until the Truman Order of 1951. Exec. Order No. 10,290, 16 Fed. Reg. 9795 (Sept. 24, 1951) (Harry S. Truman). For further discussion see infra Parts II.A, II.B.

\(^{22}\) See infra Part II.A.

\(^{23}\) See, e.g., Exec. Order No. 11,652, 37 Fed. Reg. 5209, 5209 (Mar. 8, 1972) (Richard Nixon) (discussing the interest in citizens in readily available governmental information and also the protection of information that bears directly on the effectiveness of national defense).

\(^{24}\) See infra Part II.A.

\(^{25}\) See infra Part II.B.

\(^{26}\) See infra Part II.C.
stage, involving President Carter’s short-lived, arguably classification-restrictive
order, lasting from 1978 to 1982.\textsuperscript{27} Stage V consisted of an executive order
issued by President Reagan in 1982, lasting through the Bush I Administration
and into President Clinton’s first term in office.\textsuperscript{28} Finally, Stage VI began in
1995 with President Clinton’s classification order and is the stage our nation is in
today.\textsuperscript{29}

Section III of this article discusses the current administration’s interpretations
and actions concerning the FOIA and the Clinton Order, arguing the current Bush
Administration’s interpretation and classification under the Clinton Order is in
line with the prior administration’s interpretation. Section IV discusses
dispossibilities for a Stage VII in the development of the FOIA and the
classification system, emphasizing what aspects of classification and disclosure
should be considered in light of the history of the FOIA and the classification
orders.

II. DEVELOPMENT OF THE SYSTEM OF CLASSIFICATION OF NATIONAL SECURITY
INFORMATION & THE DEVELOPMENT OF THE NATIONAL SECURITY EXEMPTION
TO DISCLOSURE UNDER THE FOIA

It is necessary to fully understand the history and development of the
government classification system to appreciate the significance of the terms of
the present-day government classification system and the national security
exemption to the FOIA. The classification system and its development are all the
more important because courts rely heavily on agency determinations concerning
classification and what constitutes a national security interest, which makes the
letter of classification orders important to study at length.\textsuperscript{30}

The development of a formal and uniform system of classification of national
security information was completely non-existent until 1938, and arguably non-
existent until 1951.\textsuperscript{31} As will be seen, before 1951 each agency established its
own policies for classification and there was no congressional restriction on the
nondisclosure of government-held information to the public.\textsuperscript{32} Through what can

\textsuperscript{27} See infra Part II.D.
\textsuperscript{28} See infra Part II.E.
\textsuperscript{29} See infra Part II.F.
\textsuperscript{30} See Maynard v. C.I.A., 986 F.2d 547, 555-65 (1st Cir. 1993).
\textsuperscript{31} In 1938 Franklin D. Roosevelt signed into law “An Act To prohibit the making of photographs,
 sketches, or maps of vital military and naval defense installations and equipment, and for other
 purposes.” Pub. L. No. 75-418, 52 Stat. 1, 1 (1938). The President was to define installations or
equipment as requiring protection. However, this Act was silent as to the process of classification.
 Id. An organized system of classification was not set forth until the Truman Order of 1951. Exec.
 Order No. 10,290, 16 Fed. Reg. 9795 (Sept. 24, 1951) (Harry S. Truman). For further discussion
 see infra Parts II.A, II.B.
\textsuperscript{32} See infra Part II.A.
be separated into six distinctive stages of development, numerous executive orders have reacted to contemporary circumstances and political will to balance the necessity of public access to information with the necessity to protect the public from inside and outside threats.\(^33\)

Since 1966, executive orders establishing a system for the classification of national security information have had to align themselves with the FOIA.\(^34\) As will be seen, since the FOIA’s enactment and establishment of a national security exemption to disclosure, the executive system for classification has generally progressed in both formality and oversight.\(^35\)

Naturally, the case law concerning the nondisclosure of information that government agencies have classified is vast. For example, in the last ten years, there have been over five hundred published cases in which national security information and the FOIA were at issue.\(^36\) This case law is not the subject of this article, although a handful of cases are mentioned. A case law analysis does not aid one to a great degree in understanding the development of the classification executive orders because, since judicial review of classification and disclosure has been in place, it is impossible to actually know what the FOIA case law actually stands for—because one cannot see what is revealed and litigated in camera (that which never makes it into the open court). The only information that the public knows it can obtain under a particular executive order is the information that is allowed; the public does not know the effect of the order on non-requested information and information for which disclosure is denied. Each case could in itself be, and often has been, the subject of numerous articles—discussing such novel concerns as: “What is a government ‘record’? What constitutes a ‘reasonable’ record search?”\(^37\) While it is understood that changes from one order to another may be partially a response to past case law, this article is not concerned with such speculation but looks at the development and effect of such changes on their face. And, concerning the present Administration’s actions of classification and disclosure, it is well-accepted that “any effects may not be clear until denials of information during this time period are appealed, litigated, and decided—a process that could take several years.”\(^38\)

In this article, the development of the executive orders concerning classification and the development of Exemption 1 of the FOIA is discussed in

---

\(^{33}\) See, e.g., Exec. Order No. 11,652, 37 Fed. Reg. 5209, 5209 (Mar. 8, 1972) (Richard Nixon) (discussing the interest in citizens in readily available governmental information and also the protection of information that bears directly on the effectiveness of national defense).


\(^{35}\) See infra Parts II.A-E.

\(^{36}\) LexisNexis search performed on April 11, 2004, searching the entire U.S. Federal court system using the search terms “‘freedom of information act’ and ‘national security.’”


six stages. Stage I involved implicit national security concerns, and spanned from 1938 to 1951.\footnote{See infra Part II.A.} Stage II involved the first uses of explicit national security concerns, and spanned from 1951 to 1972, including orders by both Presidents Truman and Eisenhower, with the introduction of the FOIA.\footnote{See infra Part II.B.} Stage III was the first to have to consider the newly enacted FOIA, and spanned from 1972 to 1978.\footnote{See infra Part II.C.} Stage IV was the shortest stage, involving President Carter’s short-lived, arguably classification-restrictive order, lasting from 1972 to 1982.\footnote{See infra Part II.D.} Stage V consisted of an executive order issued by President Reagan in 1982, lasting through the Bush I Administration and into President Clinton’s first term in office.\footnote{See infra Part II.E.} Finally, Stage VI began in 1995 with President Clinton’s classification order and is the stage our nation is in today.\footnote{See infra Part II.F.} While the present system, which has been in place since 1995, may not be perfect, it is a world removed from most of the United States’ history of presumptive nondisclosure—a world in which the U.S. government could withhold information from the public without reason or even inter-executive accountability.\footnote{Prior to 1938, agencies could disclose or withhold information in accordance with their own standards since no laws existed concerning such matters. See supra note 31.} The next section of this article discusses the current administration’s interpretations and application of the Clinton Order, and the impact of a new reality of influential non-state actors.

A. Stage I: Implicit National Security Concerns: 1938-51

There is a storied history leading up to the executive orders that apply to Exemption 1 of the FOIA, which concerns classified national security-related information. As the predecessor of today’s Exemption 1 did not appear until 1966,\footnote{Amendment to Administrative Procedure Act, Pub. L. No. 89-487, 80 Stat. 250 (1966).} the beginning of this history of government classification of national security information began outside of the bounds of the FOIA.\footnote{Of course, there are extensive discussions to be had concerning issues dealing with treasonous acts and others that existed and may have punished certain disclosures of information.} These regulations were some of the earliest attempts to implicitly define what information was crucial to national security.

In 1938, an act was adopted setting criminal penalties for making “any photograph, sketch, picture, drawing, map, or graphical representation” of presidentially defined “vital military and naval installations or equipment.”\footnote{Pub. L. No. 75-418, § 1, 52 Stat. 3, 3 (1938).} Before this time, and after, each executive agency and department had its own regulations and standards for classifying information.\footnote{See text accompanying note 50.} This can be seen in the
explicit acceptance in 1940 there were documents being classified as “secret,” “confidential,” and “restricted” by executive officials such as the Secretary of War and Secretary of the Navy.\(^{50}\)

In 1940, President Franklin D. Roosevelt expanded his 1938 Act criminalizing the disclosure of representation of military-related information,\(^{51}\) extending protection to such other places as “commercial establishment[s] engaged in the development or manufacture of military or naval arms, munitions, equipment, designs, ships, or vessels for the United States Army or Navy.”\(^{52}\) The classification marks were “secret,” “confidential,” and “restricted,” but neither standards nor regulations were provided concerning the use of the different labels.\(^{53}\) Further, the intra-office exchange of documents was regulated by scattered procedures, when procedures were present at all.\(^{54}\)

In 1946, President Harry S. Truman issued the first in a series of executive orders making the system of classification and information transfer uniform within the executive branch.\(^{55}\) The first order, *Providing for the More Efficient Use and for the Transfer and Other Disposition of Government Records*, mandated each agency “establish and maintain an active continuing program for the effective management and disposition of its records.”\(^{56}\) In addition, the order stated records were not to be transferred if the head of an agency had “certif[ied] that such records contain[ed] confidential information, a disclosure of which would endanger the national interest or the lives of individuals.”\(^{57}\) These are the two foundational regulations that have been expanded and contracted over the history of presidential action in the classification of government-held information: administration and the determination of who/what needs to be protected at particular times.\(^{58}\)

President Truman, in 1950, added the classification category “top secret,”\(^{59}\) thus expanding the categories to “top secret,” “secret,” “confidential,” and

---

\(^{50}\) *See* Exec. Order No. 8381, 5 Fed. Reg. 1147, 1147 (Mar. 22, 1940) (Franklin D. Roosevelt).

\(^{51}\) *See* id.

\(^{52}\) *Id.* § 1(f).

\(^{53}\) *Id.* § 1. *See generally* ARVIN QUIST, SECURITY CLASSIFICATION OF INFORMATION (1989).

\(^{54}\) *See, e.g.*, Exec. Order No. 9157, 7 Fed. Reg. 3505, 3506 (May 9, 1942) (Franklin D. Roosevelt) (laying out the procedure for obtaining information from the Department of Commerce only).


\(^{56}\) *Id.* § 1.

\(^{57}\) *Id.* § 5 (emphasis added). In 1947, President Truman also issued an order that provided that the Security Advisory Board of the State-War-Navy Coordinating Committee establish disclosure rules concerning “the handling and transmission of confidential documents and other documents and information.” Exec. Order No. 9835, § VI(2), 12 Fed. Reg. 1935, 1938 (Mar. 21, 1947) (Harry S. Truman).

\(^{58}\) *See, e.g.*, Exec. Order No. 12,356, §§ 1.1, 1.2, 47 Fed. Reg. 14,874, 14,874-76 (Apr. 2, 1982) (Ronald Reagan) (setting forth and defining the classification levels and authority to classify); *see also* id. § 5.2 at 14,881 (setting forth guidelines for the Information Security Oversight Office).

\(^{59}\) As discussed, the earlier statute only provided three categories of classification. Exec. Order No. 8381, § 1, 5 Fed. Reg. 1147, 1147 (Mar. 22, 1940) (Franklin D. Roosevelt).
Still, these categories existed with neither definition nor distinction.  

1. 1946: Administrative Procedure Act: The Beginnings of a Public Right to Government Information

To understand what was going on in the executive branch during Stage I, it is necessary to look at what actions Congress was taking to regulate the disclosure of information and protect national security. After ten years of considering various ways to better manage the administrative regulation of private enterprises, in 1946, Congress adopted the Administrative Procedure Act (1946 Act) “to improve the administration of justice by prescribing fair administrative procedure.” In then-Attorney General, Tom C. Clark’s letter of favorable recommendation, he supported this act, describing it as having a “hopeful prospect of achieving reasonable uniformity and fairness in administrative procedures without at the same time interfering unduly with the efficient and economical operation of the Government.” Mr. Clark’s letter did not discuss issues of disclosure nor a public “right to know.”

Throughout the Congressional Comments concerning the Administrative Procedure Act, and its early proposals and drafts, discussions revolved around establishing a uniform administrative procedure and system for judicial review. The legislative discussions did not concern the public’s right to information nor the necessity of government transparency and/or disclosure. In essence, this early form of the modern FOIA performed four basic tasks:

1. It provides that agencies must issue as rules certain specified information as to their organization and procedure, and also make available other materials of administrative law (sec. 3).

2. It states the essentials of the several forms of administrative proceedings (sec. 4, 5, and 6) and the general limitations on administrative powers (sec. 9).

---

66 See id.
67 Id. at 1195-1203 (outlining the legislative history of the Act). Notice, though, that although there were discussions of establishing judicial appeals for administrative wrongs done, there were no remedies laid out in Section 3 for the improper denial of access to information. See H.R. REP. NO. 89-1497, at 2422 (1966) (discussing the 1946 Section 3, “[a]bove all, there is no remedy available to a citizen who has been wrongfully denied access to the Government’s public records”).
3. It provides in more detail the requirements for administrative hearings and decisions in cases in which statutes require such hearings (sec. 7 and 8).

4. It sets forth a simplified statement of judicial review designed to afford a remedy for every legal wrong (sec. 10).69

Although there was an absence of discussions about a public right to know, Section 3 of the Administrative Procedure Act did deal with “public information.”70 Section 3 required to be disclosed, in the Federal Register, each agency’s organization, the “general course and method by which [agency] functions are channeled and determined,” and substantive rules that the agencies adopt.71 Further, Section 3 required the publication of administrative opinions and orders.72 And, finally, the section required “matters of official record” were to be made available “to persons properly and directly concerned except information held confidential for good cause found.”73

In addition to this exception, there were two exemptions that applied to all three mentioned subparts—the proscribed information did not have to be disclosed “to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency.”74 These sweeping exemptions came without limiting definitions or discussion.75 By 1966, as the House Report attached to the amendment of the 1946 Section 3 stated, “[i]n fact, section 3 of the Administrative Procedure Act has become the major statutory excuse for withholding Government records from public view.”76

Further, admittedly in the Congressional Comments, the Report stated:

[The] provisions of section 3 are of the broadest application because, while some functions and some operations may not lend themselves to formal procedure, all administrative operations should as a matter of policy be disclosed to the public except as secrecy may obviously be required or only internal agency ‘housekeeping’ arrangements may be involved.77

72 Id. § 1002(3)(b).
73 Id. § 1002(3)(c) (emphasis added).
74 Id. § 1002 (emphasis added).
75 Id.
Thus, administrative agencies' operational structures, procedures, opinions, and orders were made transparent by Section 3.78

Last, while Section 3, the foundation for the current FOIA, was an obvious effort to have the administrative process and standards for decision making made transparent and efficient, it was not overtly concerned with making the information being processed known to the general public or with the public's right to that information.79 The distinction must be recognized. According to the Attorney General’s Manual on the Administrative Procedure Act, Section 3 was based on the idea “that administrative operations and procedures are public property which the general public, rather than a few specialists or lobbyists, is entitled to know or have ready means of knowing with definiteness and assurance.”80 While it is even doubtful such information was made available to the “general public,” this available information was limited to organization, procedure, and opinion documents;81 it did not include the actual information collected, held, and used by the agencies.82 This limitation of what was to be made public was accentuated by the fact the determination of what was an “official record,” and thus should have been made available to the public, remained in the hands of each agency.83 So, according to the 1946 Act and the Attorney General's interpretation, there was a right to know how the government was generally operating, but not what it knew or was specifically doing.84

Notably, from 1942 to 1944 no reported work was done in Congress concerning adjusting the administrative processes due to national security concerns. This is notable because of the attack at Pearl Harbor and the Japanese Internment. While the attack at Pearl Harbor was noted in the Congressional Comments to the 1946 Act,85 when the United States had suffered one of the most devastating attacks on its national security and violations of its sovereign boarders, no action was taken by Congress (the People) to push through a lessened or greater restriction on the disclosure of agency information—at least not under the guise of creating a more equitable and organized administrative procedure.

---

78 See id.
79 The focus of the Administrative Procedure Act, rather, was “[t]o improve the administration of justice by prescribing fair administrative procedures.” Administrative Procedure Act, Ch. 324, Pub. L. No. 79-404, 60 Stat. 237, 238 (1946).
82 See id.
84 See id.
B. Stage II: Explicit National Security Information: The Truman Order, 1951-52, & The Eisenhower Order, 1953-72

The more formal and systematic regulation of the government classification of national security information began in 1951. Congressional and Executive actions from 1951 to 1972 can be separated as “Stage II,” as it is more formal than the previous group of regulations that operated up until 1951, and includes the enactment of the FOIA in 1966 and initial Executive reactions thereto.

Again, it was President Truman who took the next step in the formalization of the government classification system. The 1951 executive order (Truman Order) sought (1) “to protect the national security of the United States” and (2) “to establish a system for the safe guarding of official information the unauthorized disclosure of which would or could harm, tend to impair, or otherwise threaten the security of the nation.” Such broad language and purpose may seem inane or like lip service to the citizenry that its government was acting properly, but transparency was not the concern; the sole concern was the protection of the nation, thus broad standards were acceptable. In time, Congress would cause the Executive to more narrowly draw the classification system by making the public right to know a primary concern.

The Truman Order set many important keystones concerning national security that remain today in descendant orders. There are also several important distinctions to be made when looking at whether a new administration’s regulation of national security information is more or less restrictive than this order.

First, Section 1(d) of the Truman Order established classification was only to be used “to protect the national security.” Not only was the classification to be in the interest of the national security, per the order all classified information had to be “official information the safeguarding of which is necessary in the interest of national security.” With the adoption of the FOIA, this section became unnecessary because the exemption concerning executive classification also requires that the information relate to national security. But, without the

---

86 The fact it was President Truman taking such actions comes as no surprise as his presidency came on the heels of a great international power shift and a need for soft walking domestically and internationally. See 12 THE NEW ENCYCLOPEDIA BRITANNICA Truman, Harry S. 4 (15th ed. 2002). Consider that among many other challenges, President Truman faced the fears of Russia colonizing Greece and Turkey and the North Korean attack of South Korea. Id. As he brought his “Fair Deal” (which greatly expanded the executive branch of the government), the need to protect information within the government to safeguard the nation and world order from another world war had to have been of chief importance. Id.


90 Id. § 4 at 9797.

FOIA it can be seen President Truman is self-limiting the sphere of information that the government can keep from its constituents.

Second, the Truman Order kept the four categories of classification that the Stage I orders established, but they were defined here. 92  "Top Secret" information was defined as information the disclosure of which "would or could cause exceptionally grave danger to the national security." 93  "Secret" information was defined as "information which requires extraordinary protection in the interest of national security." 94  Information classified as "confidential" was "information [which] requires careful protection in order to prevent disclosures which might harm national security." 95  And, finally, information could be assigned the classification "restricted" if the information had "such bearing upon national security as to require protection against unauthorized use or disclosure, particularly information which should be limited to official use." 96  Thus, to be kept secret, accepting only the least of the standards need apply, information only had to be determined to have a "bearing on national security." 97  In this order, there was no definition of what "national security" encompassed. 98  The press and journalists objected to the lack of definitions before the order went into effect, 99  but it went into effect nonetheless.  As will be seen later in this article, the future definitions of "national security" are negligibly more helpful than no definition. 100

Once the information was classified under this order, the order established who was to determine whether a non-executive branch individual could view the information. 101  Section 30(b) established the head of the possessing agency had to authorize access, but did not provide standards for who should be able to view the information. 102  The Truman Order set limited parameters on the amount of time information could be classified. 103  Merely "wherever practicable" did a date or event at which the information would be downgraded in classification or

---

93 Id. § 25(b) (emphasis added).
94 Id. (emphasis added).
95 Id. (emphasis added).
96 Id. (emphasis added).
97 Id.
100 See infra Part IV.
102 Id. § 30(b).  It will be shown that future orders establish that even within the executive branch, access to classified information will be restricted based on trustworthiness, considering the scope of the individual’s official positions, and so forth. See infra Part IV.
declassified have to be established.\textsuperscript{104} Obviously, this failed to consider whether the national security issue that triggered the need to have the information classified had dissipated.\textsuperscript{105} Moreover, there were no set guidelines for the review of information or responsibility to review, other than the simple statement that it was the “responsibility and obligation of every government official to keep classified security information in his custody constantly under review, and to initiate action toward downgrading or declassification as soon as conditions warrant.”\textsuperscript{106}

Finally, there was little guidance or regulation on who had the ability to classify information.\textsuperscript{107} Section 24(c) provided heads of agencies could authorize “appropriate officials within his agency to assign information to the proper security classification,” and that the ability to classify information as “top secret” or “secret” should be “maintained at a high level within the agency.”\textsuperscript{108} This lack of guidance failed to align with the history leading toward executive uniformity and assured protection of information. Consider, for example, in smaller agencies an individual who is at a “high level within the agency” may include novice local managers.

Even though President Truman’s 1951 order had its shortcomings, it was a revolution in the establishment of a system of classification and protection of national security information.\textsuperscript{109}

But, in 1953, the classification system changed, as there was both a shift in leadership, and arguably in priorities. In 1953, newly elected President Dwight Eisenhower ordered \textit{Safeguarding Official Information in the Interests of the Defense of the United States} (Eisenhower Order).\textsuperscript{110} Notice the change in the title, from Truman’s “national security” to Eisenhower’s “national defense.”\textsuperscript{111} The relevance of this change is, of course, left to argument, but this change in terminology is seen throughout the new order.\textsuperscript{112}

Overall, the Eisenhower Order tightened up what President Truman had ordered, i.e., the new order restricted the government’s ability to classify information.\textsuperscript{113} This may have been the result of an accepted right of, or need for, the public to know what the government is doing; this may be due to changed circumstances providing a more limited need for secrecy. Both of these possibilities are reasonable, and may not be mutually exclusive. As the Eisenhower Order stated, “it is essential that the citizens of the United States be

\begin{footnotes}
\item[104] Id. \S 28(a).
\item[105] See id.
\item[106] Id. \S 28(c).
\item[107] Id. \S 24(c) at 9798.
\item[108] Id.
\item[109] See supra notes 86–108 and accompanying text.
\item[112] Id.
\item[113] Id.
\end{footnotes}
informed concerning the activities of their government. . . .”\footnote{114}

On the other hand, Stalin’s death and the signing of a treaty with North Korea eased Cold War tensions.\footnote{115}

Notwithstanding, the Eisenhower Order had several more restrictive elements concerning national security\footnote{116} (here arguably limited as “national defense”). First, classification was reserved only for matters “in the interest of national defense.”\footnote{117} Any discussion of the purpose or effect of this change must be considered in light of the fact that in 1959 the order was amended by President Eisenhower because “such action [was] necessary in the best interests of the national security.”\footnote{118}

Second, the classification categories were changed.\footnote{119} The hotly debated “restricted” classifications of the Truman Order was not reinstated.\footnote{120} Further, the three remaining classifications were given more limiting language,\footnote{121} and examples of what type of information fit into each category were given.\footnote{122} Generally, the new classification standards of the Eisenhower Order no longer required disclosure to be “danger[ous],”\footnote{123} but stated disclosure had to potentially cause “damage.”\footnote{124} Information to be classified as “top secret” was given a second criterion to be met: “The Top Secret classification shall be applied only to that information or material the defense aspect of which is paramount, and the unauthorized disclosure of which could result in exceptionally grave damage to the Nation . . . .”\footnote{125} The least critical example of what “could result in exceptionally grave damage to the Nation” was information that could lead to “the compromise of . . . intelligence operations.”\footnote{126} It can be seen in current circumstances that this could include the withholding of information concerning detainees to ensure the ability to continue gathering information on terrorist cells

\footnotetext[115]{3 THE NEW ENCYCLOPEDIA BRITANNICA Cold War 444 (15th ed. 2002).}  
\footnotetext[116]{See, e.g., Exec. Order No. 10,501, § 1, 18 Fed. Reg. 7049, 7049 (Nov. 5, 1953) (Dwight D. Eisenhower).}  
\footnotetext[117]{Id. § 1.}  
\footnotetext[120]{Compare Exec. Order No. 10,501, § 1, 18 Fed. Reg. 7049, 7049-51 (Nov. 5, 1953) (Dwight D. Eisenhower).}  
\footnotetext[122]{Compare Exec. Order No. 10,501, § 1, 18 Fed. Reg. 7049, 7049-51 (Nov. 5, 1953) (Dwight D. Eisenhower).}  
\footnotetext[124]{Exec. Order No. 10,290, § 25(b), 16 Fed. Reg. 9795, 9798 (Sept. 24, 1951) (Harry S. Truman).}  
\footnotetext[125]{Exec. Order No. 10,501, § 1(a) - (b), 18 Fed. Reg. 7051 (Nov. 5, 1953) (Dwight D. Eisenhower).}  
\footnotetext[126]{Id. § 1(a) (emphasis added).}  
\footnotetext[127]{Id.}
and potential action. The “secret” designation was reserved for information that “could result in serious damage to the Nation.” Two of the examples given for this category include information the disclosure of which could “jeopardize[e] the international relations of the United States” or “endanger[] the effectiveness of a program or policy of vital importance to national defense.” Finally, “confidential” information was defined as “defense information or material the unauthorized disclosure of which could be prejudicial to the defense interests of the nation,” of which no examples were given. Now, it may be seen why these more detailed definitions and examples of what qualifies for classification are as broad as no definition of national security. After all, the new “national defense” interest existed without specific definition, as did the “national security” interest in the earlier orders.

The timing requirement for declassification and downgrading was also changed. In the new order, a date and event for either action was to be provided at the time of classification “to the fullest extent practicable,” whereas in the Truman Order such a date or event was to be provided “wherever practicable.” On its face, the new standard appears to dictate a date or event specification more frequently, but, again, without examples or further regulation, this is a matter of semantics to be decided by potentially novice individuals according to their own ideas of what matters to the national defense.

The two final major changes in the new order concerned access and oversight. Access was restricted to those who were determined to be “trustworthy” and “whose official duties require such access in the interest of promoting national defense.” This standard brought the protection of national security information in line with the tenet of protecting the information more so than the prior order, which merely provided that classified information could be obtained by “persons whose official duties require knowledge of such information.”

Finally, the new order established more guidelines for oversight within the executive branch by (1) providing that the National Security Council continually

---

127 See id.
128 Id. § 1(b) (emphasis added).
129 Id.
131 See id. § 1.
132 See id.
133 Id. § 7 at 7051-52.
134 Id. § 4 at 7051.
138 Id. § 7 at 7053.
review the implementation of the classification system, and (2) designating a person on the president’s staff to handle complaints from non-governmental entities concerning the implementation of the classification system.

In total, the Eisenhower Order was a more formal and thorough regulation of the government classification of national security information, and represented a possible (at least semantic) tightening of the government’s ability to classify information. After its publication, the Eisenhower Order was amended several times with some effect on national security.

In 1959, an amendment by President Eisenhower provided classified information could be made available to “trustworthy” individuals performing historical research if such research was “clearly consistent with the interests of national defense.” The second amendment, also by President Eisenhower, enumerated specific agencies that had the power of original classification. These agencies were separated into two different groups: (1) those “having primary responsibilities for matters pertaining to national defense,” and (2) those “having partial but not primary responsibility for matters pertaining to national defense.” In the latter category, the head of the department, agency, or governmental unit possessed the power of original classification without delegation, whereas in the former group the head of the department, agency, or governmental unit, as well as “responsible officers or employees” the head or his representative designated, possessed the power of original classification.

Among other changes, most significantly a 1961 amendment established more definite standards for downgrading and declassification. Under this new system, information from foreign governments and international organizations was exempt from downgrading and declassification; information specifically designated “extremely sensitive information or material” could be exempted from downgrading and declassification; information or material warranting “some degree of classification for an indefinite period” was to be downgraded every twelve years but never completely automatically declassified; and all

---

141 Id. § 16.
144 Id. § 2 at 3777.
146 Id. (as appearing at amended sec. 2(a)).
147 Id. (as appearing at amended sec. 2(b)).
148 Id. (as appearing at amended sec. 2(b)).
149 Id. (as appearing at amended sec. 2(a)).
150 Exec. Order No. 10,964, § 1(B), 26 Fed. Reg. 8932, 8932 (Sept. 20, 1961) (John F. Kennedy) (as appearing at amended sec. 4(a)).
151 Id. (as appearing at amended sec. 4(a)(1)).
152 Id. (as appearing at amended sec. 4(a)(2)).
153 Id. (as appearing at amended sec. 4(a)(3)).
other classified information was to be automatically downgraded every three years until it reached the lowest classification, then declassified at twelve years after its original classification.\textsuperscript{154} Still, it is perceiveable all information that once “\textit{could be prejudicial to the defense interests} of the nation”\textsuperscript{155} could always warrant “some degree of classification,”\textsuperscript{156} thus removing it from this new standard for automatic declassification.

The final three amendments to the Eisenhower Order account for reorganizations in the government, and did not have a major impact on the classification or disclosure of national security information.\textsuperscript{157}

1. 1966 & 1967: The Freedom of Information Act: The “Amendment” that Established the Public’s Right to Information

It was not until 1966 that congressional will gathered to amend Section 3 of the 1946 Act “to clarify and protect the right of the public to information . . . .”\textsuperscript{158} With this amendment, the U.S. Government's ability to withhold information with national security implications was restricted, at least in that the government now had to be able to fit the information into more narrowly drawn exemptions.\textsuperscript{159} There were several earlier proposals to amend Section 3, but all were either defeated or died under consideration.\textsuperscript{160} In 1966, the amendment to the 1946 Act’s Section 3 passed unanimously by a vote of 308-0.\textsuperscript{161} Moreover, a general public right to information, not merely the right to information of persons “properly and directly concerned therewith,”\textsuperscript{162} was clearly a major concern of the Committee on Government Operations, who referred the bill.\textsuperscript{163} As this committee stated, the amendment “would revise the section to provide a true Federal public records statute by requiring the availability, to any member of the public, of all of the executive branch records described in its requirements, except those involving matters which are within nine stated exemptions.”\textsuperscript{164} This amendment progressed the 1946 Section 3 that was “not a general public records law in that it [did] not afford to the public at large access to official records

\textsuperscript{154} Id. (as appearing at amended sec. 4(a)(4)).
\textsuperscript{156} Exec. Order No. 10,964, § 1(B), 26 Fed. Reg. 8932, 8932 (Sept. 20, 1961) (John F. Kennedy) (as appearing at amended sec. 4(a)(4)).
\textsuperscript{158} Amendment to Administrative Procedure Act, Pub. L. No. 89-487, 80 Stat. 250, 282 (1966).
\textsuperscript{159} See id.
\textsuperscript{160} See, e.g., S. 2504 (Wiley), 84th Cong.; S. 2541 (McCarthy), 84th Cong.; H.R. 7174 (Moss), 85th Cong.; S. 2148 (Hennings), 85th Cong.; S. 1666, 88th Cong.; S. 1160, 89th Cong.; H.R. 5012, 89th Cong.
\textsuperscript{161} 112 CONG. REC. 13,661 (1966).
\textsuperscript{162} H.R. REP. NO. 89-1497, at 2418 (1966).
\textsuperscript{163} Id.
\textsuperscript{164} Id.
Finally, a public right to information was mentioned, and mentioned explicitly, in Public Law 89-487 (1966 Amendment). This was an amendment, not a new act, but in fact it established new rights and law.

The Congressional history properly laid out the major ways that Section 3 of the 1966 Amendment reorganized public information, all of which impact information the disclosure of which could concern national security: (1) replacing the “properly and directly concerned” standard of who could access information with “any person,” (2) stating nine explicit exemptions to replace the vague exemptions of “good cause found,” “requiring secrecy in the public interest,” and “internal management,” and (3) providing judicial appeal.

165 Id.
167 See id.
169 Administrative Procedure Act, § 3(c), Ch. 324, Pub. L. No. 79-404, 60 Stat. 237, 238 (1946).
170 Amendment to Administrative Procedure Act, § 3(c), Pub. L. No. 89-487, 80 Stat. 250, 251 (1966). This section reads:

Except with respect to the records made available pursuant to subsections (a) and (b), every agency shall, upon request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute and procedure to be followed, make such records promptly available to any person.

Id.
171 Id. § 3(e). This section reads:

The provisions of this section shall not be applicable to matters that are: (1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy; (2) related solely to the internal personnel rules and practices of any agency; (3) specifically exempted from disclosure by statute; (4) trade secrets and commercial or financial information obtained from any person and privileged or confidential; (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a private party in litigation with the agency; (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; (7) investigatory files compiled for law enforcement purposes except to the extent available by law to a private party; (8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of any agency responsible for the regulation or supervision of financial institutions; and (9) geological and geophysical information and data (including maps) concerning wells.

Id.
173 Amendment to Administrative Procedure Act, § 3(c), Pub. L. No. 89-487, 80 Stat. 250, 251 (1966). (“Upon complaint, the district court of the United States . . . shall have jurisdiction to enjoin the agency from the withholding of agency records and to order the production of any agency records improperly withheld from the complainant.”).
As stated, the 1966 Amendment replaced the “properly and directly concerned” standard of who could access information with “any person.” In the 1946 Act, only “persons properly and directly concerned” with a government “matter” could be provided information upon request and absent an exception allowing nondisclosure. The 1966 Amendment did away with that narrow allowance, providing information is to be made “promptly available,” upon proper request and absent an exemption “to any person.” This change remains in the FOIA.

Second, the 1966 Amendment laid down nine better defined exemptions for when the government is not required to disclose information, replacing the vague exemptions of the 1946 Act. The 1946 Act provided information did not have to be disclosed if it involved either “any function of the United States requiring secrecy in the public interest,” “any matter relating solely to the internal management of an agency,” or “information held confidential for good cause found.” The better-articulated exemptions under the 1966 Amendment only allowed nondisclosure of information if the matter was:

(1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy; (2) related solely to the internal personnel rules and practices of any agency; (3) specifically exempted from disclosure by statute; (4) trade secrets and commercial or financial information obtained from any person and privileged or confidential; (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a private party in litigation with the agency; (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; (7) investigatory files compiled for law enforcement purposes except to the extent available by law to a private party; (8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of any agency responsible for the regulation or

---

174 Administrative Procedure Act, § 3(c), 60 Stat. at 238.
175 Amendment to Administrative Procedure Act, § 3(c), 80 Stat. at 251. (See supra note 101).
176 Administrative Procedure Act, § 3(c), 60 Stat. at 238.
177 Note that there were, at the time, scholars who thought that keeping the “properly and directly concerned” standing requirement should not have been changed because it was necessary in balancing the rights or interests of the individuals concerned in the information and those of the requester. Kenneth Culp Davis, The Information Act: A Preliminary Analysis, 34 U. CHI. L. REV. 761, 765-66 (1967).
178 Amendment to Administrative Procedure Act, § 3(c), 80 Stat. at 251.
180 See Amendment to Administrative Procedure Act, § 3(e), 80 Stat. at 251.
181 Administrative Procedure Act, § 3, 60 Stat. at 238.
182 Id.
183 Id.
184 Id. § 3(c).
supervision of financial institutions; and (9) geological and
geophysical information and data (including maps) concerning
wells. 185

This change was a preview of the modern Exemption 1 (the classified
national security information exemption) to the FOIA. 186

According to Subsection F, these exemptions were to be interpreted
narrowly: “Nothing in this section authorizes withholding of information or
limiting the availability of records to the public except as specifically stated in
this section . . . .” 187 Further, Subsection F established the exemptions to
disclosure of information do not apply when Congress sought information,
stating “nor shall this section be authority to withhold information from
Congress.” 188 The House report explained what this section is intended to mean,
saying that the subsection:

[R]estates the fact that a law controlling public access to
Government information has absolutely no effect upon
congressional access to information. Members of the Congress
have all of the rights of access guaranteed to ‘any person’ by S.
1160, and the Congress has additional rights of access to all
Government information which it deems necessary to carry out
its functions. Thus, it appears that under Subsection F that there
is an added protection for the public in that if the disclosure of
information to the general population may threaten the national
security, one could petition an appropriate member of the
Congress to obtain and review the information to keep the
Government in check and protect the desire for a transparent
democracy, so long as the congressional access is necessary to
carry out its functions. 189

Third, the 1966 Amendment established: “Upon complaint, the district court
of the United States . . . shall have jurisdiction to enjoin the agency from the
withholding of agency records and to order the production of any agency records
improperly withheld from the complainant.” 190 The court was to review the
matter de novo, with the burden on the withholding agency to defend its
action. 191 Furthermore, these judicial appeals were to be given priority on the
docket of the court. 192 This was a major step in checking the executive branch’s

185 Amendment to Administrative Procedure Act, § 3(e), 80 Stat. at 251.
187 Amendment to Administrative Procedure Act, § 3(f), 80 Stat. at 251.
188 Id.
189 Id.
190 Id.
191 Id.
192 Id.
The 1966 Amendment was not merely an amendment of Section 3 of the 1946 Act; it was a revolution, a metamorphosis. What the House Report concerning the 1966 Amendment discussed as the “Abuse of the ‘Public Information’ Section,” was actually merely the result of an inefficient law that no longer met the newfound desire for a more transparent (or at least better regulated) administrative process. The Section 3 exceptions in the 1946 Act, as previously mentioned, were so broad any information could be lawfully withheld, and the Government used the law as it stood. Then the public will shifted. It was only in hindsight, looking through the lens of a changed ideal that the general public should have access to governmentally held and used information, did Congress find the lawful operation under the broad exceptions as “abuses.”

Yet still, there were no explicit discussions of "national security" in the congressional record attached to the 1966 Amendment. This was not due to the absence of pressing national security issues. Between 1946 and 1966 the United States was in the midst of great battles at home and abroad. For example, consider these few concerns: U.S. involvement in the Korean War from 1950 to 1953; United States’ financial backing the French defending French Indochina around 1950; on June 19, 1953, Julius and Ethel Rosenberg were executed for releasing secret information about U.S. atomic weapons to the Soviet Union; 1954 saw the very public McCarthy hearings that accused a panoply of officials and citizens of being Communist; military troops were being deployed domestically to break down the walls of segregation (for example in the 1957 opening of Central High School in Little Rock); the space race was underway, partially marked by the United States' launch of Explorer I in 1958; the secret 1962 installation of Soviet missiles in Cuba; the assassination of President John F. Kennedy on November 22, 1963; the alleged attack of a U.S. ship in the Gulf of Tonkin in 1964; and U.S. planes began bombing raids in North Vietnam in February of 1965. These are only a small sample of the events that show there were national security concerns between 1946 and 1966. Of course, it may never be known exactly why no discussion of these issues found its way

---

193 See id.
195 See id.
196 See id.
197 See id.
199 Id.
202 Id.
205 Id. at 800.
into the record for the 1966 Amendment. Perhaps this absence is due to the possibility that the national security concerns were already taken care of in the Executive order exemption\textsuperscript{208} (i.e., the first exemption) and the other exemptions contained in the 1946 Act.\textsuperscript{209}

On July 4, 1967, the Act was moved to its own section, where it remains today, 5 U.S.C. § 552.\textsuperscript{210} The information was not changed, only reorganized (for example, the exemptions in the 1966 Amendment that were at 5 U.S.C. § 1002(3)(e) of the Administrative Procedures Act were shifted to 5 U.S.C. § 552(b)). The 1967 reorganization established the modern Freedom of Information Act (FOIA).\textsuperscript{211}

The FOIA as it stood was highly criticized, even viewed as inane due to its inherent ambiguities.\textsuperscript{212} The forthcoming Nixon and Carter Orders greatly adjusted the classification system to bring it in line with the new FOIA, and continued the development of a sophisticated system for classification, maintenance, and declassification of national security information.\textsuperscript{213} Further, it can be seen how new circumstances effected the development of the FOIA and the classification orders.

C. Stage III: Bringing the Classification System in Line with the Newly Enacted FOIA: The Nixon Order, 1972-78

In 1972, President Richard Nixon established the first post-FOIA order concerning the classification of government documents (Nixon Order).\textsuperscript{214} This order was based on the prior executive orders concerning classification and took into consideration the newly established FOIA.\textsuperscript{215} The Nixon Order arguably

\textsuperscript{208} Amendment to Administrative Procedure Act, § 3(e)(1), Pub. L. No. 89-487, 80 Stat. 250, 251 (1966).
\textsuperscript{209} Administrative Procedure Act, 60 Stat. 238 (1946).
\textsuperscript{215} Id. at 5209. The first paragraph of the Order reads:

The interests of the United States and its citizens are best served by making information regarding the affairs of Government readily available to the public. This concept of an informed citizenry is reflected in the Freedom of Information Act and in the current public information policies of the executive branch.

\textit{Id.}
tightened the classification categories, 216 established greater restrictions on the
government by providing fewer individuals with original classification power, 217
applied a stricter declassification schedule, 218 and fortified the system of
executive review. 219

In 1966, the FOIA required that for government information to be withheld
from public view it had to fit one of nine exemptions to public disclosure. 220
Concerning classified information specifically, information could be withheld if
the matter was “specifically required by Executive order to be kept secret in the
interest of the national defense or foreign policy . . . .” 221 This meant, from 1966
until the Nixon Order in 1972, information classified under the existing
Eisenhower Order because of its potential danger or damage to “the Nation”
could not have been withheld from disclosure even though it was properly
classified, 222 unless it also needed to be “kept secret in the interest of the national
defense or foreign policy.” 223 Thus, for the period between 1966 and 1972, there
was a wide gap or inconsistency between the executive order concerning
classification and the national security exemption in FOIA.

As stated, President Nixon’s 1972 order tightened the classification
categories. 224 The Nixon Order kept the three classification categories (“top
secret,” “secret,” and “confidential”) from its predecessor, 225 but defined the

216 See id. § 1 at 5209-10.
217 See id. § 2 at 5210-11.
218 See id. § 5 at 5213-15.
219 See id. § 5(c) at 5215-16.
220 Amendment to Administrative Procedure Act, § 3(e), Pub. L. No. 89-487, 80 Stat. 250, 251
(1966). This section includes the following exemptions:

(1) specifically required by Executive order to be kept secret in the interest of
the national defense or foreign policy; (2) related solely to the internal
personnel rules and practices of any agency; (3) specifically exempted from
disclosure by statute; (4) trade secrets and commercial or financial information
obtained from any person and privileged or confidential; (5) inter-agency or
intra-agency memorandums or letters which would not be available by law to a
private party in litigation with the agency; (6) personnel and medical files and
similar files the disclosure of which would constitute a clearly unwarranted
invasion of personal privacy; (7) investigatory files compiled for law
enforcement purposes except to the extent available by law to a private party;
(8) contained in or related to examination, operating, or condition reports
prepared by, on behalf of, or for the use of any agency responsible for the
regulation or supervision of financial institutions; and (9) geological and
geophysical information and data (including maps) concerning wells.

221 Id. § 3(e)(1).
Eisenhower).
223 Amendment to Administrative Procedure Act, § 3(e)(1), 80 Stat. at 251.
(Dwight D. Eisenhower).
categories more strictly. In all categories, the interest necessitating protection was changed from “the Nation” back to the pre-1953 interest, “national security.” Remember, from 1953 until this order, to be classified as “top secret” information had to be “paramount” and its unauthorized disclosure “could result in exceptionally grave damage to the Nation.” Under the Nixon Order, the “paramount” criterion was removed and the other criterion changed, making “top secret” information was that which its unauthorized disclosure “could reasonably be expected to cause exceptionally grave damage to the national security.”

Further, the examples provided in the new order added the characterization “vital” to various examples, thus necessitating a higher degree of consequence for information to fit into the “top secret” category. Whereas one standard of the “top secret” classification was removed, the remaining standard was restricted to only information affecting national security, not the nation in total. Further limiting the government’s ability to classify information, the categories of “secret” and “confidential” also replaced the prior interest of concern, “the nation,” with “national security.”

Second, the Nixon Order established greater restrictions on the government by providing fewer individuals with original classification power. The 1961 order, which amended the Eisenhower Order and delineated departments with certain classification power, provided forty-five departments and agencies with the ability to classify documents at any level. The Nixon Order limited this power greatly, so that only twelve departments and agencies had the ability to classify information as “top secret,” and twenty-five departments and agencies had the ability to classify information as “secret.”

Further, the Nixon Order applied a stricter downgrading and declassification schedule, even in light of its potentially nullifying exemptions from automatic declassification. Generally, classified information was to be downgraded every two years, with originally “top secret” information declassified after a

---

229 Id.
230 Id. at 5209-10.
231 Id.
232 Id. at 5210.
233 Id. § 2 at 5210-11.
236 Id. § 2(B) at 5211.
237 See id. § 5(A) at 5213.
238 See id. § 5(B), (E) at 5213-14.
maximum of ten years, originally “secret” information declassified after a maximum of eight years, and originally “confidential” information declassified after a maximum of six years. There were two major exemptions to these general rules concerning explicit or implicit national security threats. Exemption (5)(B)(3) excepted: “Classified information or material disclosing a system, plan, installation, project or specific foreign relations matter the continuing protection of which is essential to the national security.” Again, there was no definition of “national security” in this order, but if information was requested under the FOIA, for it to be properly withheld it had to be “kept secret in the interest of the national defense or foreign policy.” And, Exemption (5)(B)(4) excepted: “Classified information or material the disclosure of which would place a person in immediate jeopardy.” Even if any exemption originally applied so the automatic declassification and downgrading standards did not apply, after thirty years of classification all materials were to be declassified. But, even to this standard there were exemptions, which included information the head of the agency or department that originally classified the information had determined, in writing, “require[d] continued protection because such continued protection is essential to the national security or disclosure would place a person in immediate jeopardy.” Notice these two higher exemptions are those national security concerns that potentially effected declassification or downgrading in the first place. To be exempt from declassification, the disclosure of the information merely had to place “a person in immediate jeopardy,” but within the letter of the order this jeopardy could be financial or miniscule.

Finally, the Nixon Order fortified the system of executive oversight, but it remained archaic. The Nixon Order arguably created a more transparent process by requiring uniform review of all exempted material. Namely, the Nixon Order provided for a new “Interagency Review Committee” to assist the National Security Council with the information requests under FOIA and classification review. The Interagency Review Committee was officially established on April 23, 1971, by another Executive Order.
Therefore, taking into consideration the newly enacted FOIA, the Nixon Order was a giant step in self-regulating the government’s classification of information and remained in tack for the duration of Presidents Nixon and Gerald Ford’s administrations.

1. 1974: Amendment to the FOIA, Honing Exemption 1

In 1974, over the veto of President Ford, Congress unanimously adopted an amendment to the FOIA with major national security implications, and effects on the system of classification.254 One source of the strong political will to revise and strengthen the disclosure elements of the FOIA was the national security threat in the Watergate scandal.255 This amendment made a major change affecting the disclosure and classification of national security information: tightening the national security exemption—establishing more expansive judicial review.256

As the 1966 FOIA’s exemptions were new, they inevitably had problems.257 One of the major problems was defining the illusive executive privilege exemption, Section (b)(1), or “Exemption 1” as it has been called in this article. The exemption was ambiguous, which necessitates a look to the legislative history and congressional intent to determine how the exemption was meant to be applied.258 In this regard, in 1967 the Attorney General published a selection of legislative history supporting an information-restrictive approach to the statute’s interpretation.259 To help alleviate these problems, the national security exemption was changed by adding the information had to be properly classified (which was subject to judicial review).260 The revised exemption exists in the


256 See Amendment to the Freedom of Information Act, 88 Stat. at 1561-64.
same form today, exempting information that is: “(A) Specifically authorized under criteria established by an executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such executive order.”

D. Stage IV: Short-Term Restriction: The Carter Order, 1978-82

Next, in 1978, President Jimmy Carter revolutionized the classification system (Carter Order), but many of these changes only lasted through his administration. The Carter Order, like the Nixon Order, stated in its preamble the need to find a balance between the public’s right to know and the protection of the nation: “in order to balance the public’s interest in access to Government information with the need to protect certain national security information from disclosure . . . .” But, what made the Carter Order revolutionary was the fact it: (1) cleared up any possible confusion between the interests of “national security,” “national defense,” and “the nation;” (2) established stronger regulations for the use and abuse of the classification system; (3) required a time or event for all classified information to be declassified and/or downgraded; and (4) established and detailed the responsibilities of the Information Security Oversight Office.

The major change of the Carter Order was its definition of what national security interests needed protection. This order left the definitions of the “top secret” and “secret” classes of information the same as they were in the 1972 Order, but changed the minimum standard, that of “confidential.” Under the Carter Order, information could only be classified as “confidential” if its unauthorized disclosure would “cause identifiable damage to the national security.” Thus, under the new order the government had to be able to

On complaint, the district court of the United States . . . has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth . . . and the burden is on the agency to sustain its action.

Id.

263 Id.
264 Id.
“identify” some potential damage to the national security, not merely state that there would be a potential for damage.267

At first glance it may seem this order actually loosened the government’s ability to classify information by deleting the examples given in the Nixon Order for what fit into the “top secret” and “secret” categories.268 Such a conclusion would be incorrect, because the Carter Order more than made up for the deletion. For the first time in the history of executive orders providing for the classification of information, a definition of “national security”269 and an exclusive list of what could be considered in the interest of national security were provided.270 The provided definition may not have been the most helpful, but it was at least a starting point: “‘National security’ means the national defense and foreign relations of the United States.”271 This at least eradicated the confusion that may have arisen under the previous acts that switched back and forth between using the terms “national defense,” “the Nation,” and “national security.” Furthermore, and foremost, Section 1-301 of the Carter Order provided an exclusive list of items that could be classified, i.e., what information is within the definition and in the interest of “national security:”

(a) military plans, weapons, or operations; (b) foreign government information; (c) intelligence activities, sources, or methods; (d) foreign relations or foreign activities of the United States; (e) scientific, technological, or economic matters relating to the national security; (f) United States Government programs for safeguarding nuclear materials or facilities; [and] (g) other categories of information which are related to national security and which require protection against unauthorized disclosure as determined by the President, by a person designated by the President pursuant to Section 1-201 [(i.e., individuals’ with the ability to classify information as “top secret,”)], or by an agency head.272

While this exclusive list of national security information may seem like a stricter or more narrowed statement of what was a national security interest, its import may be nominal. Consider the catch-all Section 1-301(g), which includes within the meaning of national security information “other categories of information which are related to national security and require protection . . . .” 273

Basically, whatever an agency head, even an agency head without “top secret”

267 Id.
270 Id. §1-301 at 28,951.
272 Id. § 1-301 at 28,951.
273 Id. § 1-301(g).
classification power, determines to be information that could have an effect on the national defense or foreign relations may be classified, i.e., withheld.\(^{274}\)

The standard for access to classified information remained basically the same, requiring that the individual be trustworthy and access be “necessary for the performance of official duties."\(^{275}\)

Additionally, there were stronger regulations for the use and abuse of the classification system.\(^{276}\) To begin with, a new adage was added, stating the classification of information “may not be used to conceal violations of law, inefficiency, or administrative error, to prevent embarrassment to a person, organization or agency, or to restrain competition."\(^{277}\) Further, for the first time there were specific prohibitions\(^{278}\) and administrative sanctions for such prohibited action.\(^{279}\) Administrative sanctions could be passed on officers and employees who:

(a) knowingly and willfully classify or continue the classification of information in violation of this Order or any implementing directives; or (b) knowingly, willfully and without authorization disclose information properly classified under this Order or prior Orders or compromise properly classified information through negligence; or (c) knowingly and willfully violate any other provision of this Order or implementing directive.\(^{280}\)

The sanctions for such actions included, but were not limited to, “reprimand, suspension without pay, [and] removal . . . . "\(^{281}\) Having delineated actions that could not be taken and explicit repercussions for such breaches arguably established a more honest system to protect classified information by alleviating an Executive agent’s inclination to classify information higher than necessary and/or classify more information than necessary.

Furthermore, this Order added a new, powerful restriction on the Executive.\(^{282}\) Section 3-505 stated:

No agency in possession of a classified document may, in response to a request for the document made under the Freedom of Information Act or this Order's Mandatory Review provision,

\(^{274}\) See id.


\(^{277}\) Id.

\(^{278}\) Id.

\(^{279}\) Id. § 5-502 at 28,961.

\(^{280}\) Id.

\(^{281}\) Id. § 5-503.

\(^{282}\) Exec. Order No. 12,065, § 3-505, 43 Fed. Reg. at 28,957.
refuse to confirm the existence or non-existence of the document, unless the fact of its existence or non-existence would itself be classifiable under this Order.283

Note the existence of the document did not have to be classified, but only had to be within the realm of classifiable information.284 Thus, although this seems to be a restriction on the executive’s ability to deny the existence of records, it likely was a modest limitation considering the breadth of issues within the definition of national security under this order. But, it is interesting, as will be seen under the Reagan and Clinton Orders, how President Carter made a sweeping negative statement concerning denial, then provided an equally broad exception to the rule.285

The next major change made by the Carter Order was its requirement that all classified information be given a set date or event, within six years of original classification, at which it must be declassified.286 The only exception to this rule stated “officials with Top Secret classification authority and agency heads listed in Section 1-2 may classify information for more than six years.”287 But, if the information was classified for more than six years, there was to be a review of the classification within twenty years of original classification, generally, or within thirty years for foreign government information.288 These standards were unheard of until this order. There had been regulations that information was to be given a date or event for downgrading or declassification,289 but the exceptions always swallowed the general rules. In the Carter Order, there was a practical rule with a narrowly drawn exception,290 which possibly better protected the national security.

Finally, the Carter Order established and detailed the responsibilities of the Information Security Oversight Office.291 The organization set up by President Nixon, the Interagency Information Security Committee,292 remained in existence to discuss the implementation of the executive order for classification.293 The new Information Security Oversight Office was set up to directly implement and make regulations for the implementation of the Executive orders and the FOIA, taking into consideration the suggestions of the existing Interagency Information Security Committee.294

283 Id.
284 See id.
285 See infra Parts II.E and II.F.
286 Id. § 1-401 at 28,952.
287 Id. § 1-402.
288 Id.
291 Id. § 5-2 at 28,959.
294 Id. § 5-2 at 28,959.
Clearly, the Carter Order was a revolution in the development of a classification system.\textsuperscript{295} It continued the work of bringing the classification orders more in line with the spirit of the FOIA. But, this system of classification only remained in force for four years, as it was changed at the beginning of President Ronald Reagan’s first term in office.\textsuperscript{296}

E. Stage V: Reigning in the Carter System for Classification: The Reagan Order, 1982-95

In 1982, President Ronald Reagan ordered a new system for classification that resembled President Carter’s 1978 Order in many ways, but made the classification system minutely more flexible.\textsuperscript{297} This flexibility could also be characterized as increasing the government’s ability to facilitate secrecy or as a heightened desire to protect national security information. Regardless of how it is described, the Reagan Order lasted, without amendment, from 1982 until 1995, over two years into President William J. Clinton’s first term in office.\textsuperscript{298} This order made several changes with national security implications, including:

- Lowering the standard to classify information as “confidential;”\textsuperscript{299}
- Adding new information under the definition of “national security;”\textsuperscript{300}
- Re-loosening the time requirements on automatic declassification and downgrading;\textsuperscript{301}
- Mandating the denial of the existence or non-existence of information when the mere acknowledgment of the information’s existence or non-existence could be classified;\textsuperscript{302}
- Explicitly allowing agencies to make classification and reclassification decisions upon receipt of an FOIA request;\textsuperscript{303}
- And changing the access requirement so only persons with an “essential” need to view classified information could access the information.\textsuperscript{304}

First, the Reagan Order lowered the standard to classify information as “confidential.”\textsuperscript{305} The new “confidential” classification deleted “identifiable,” a prior qualifier of the damage necessary to be expected upon an unauthorized disclosure of information.\textsuperscript{306} Thus, information could have been classified as

\textsuperscript{297} See id.
\textsuperscript{299} See id. § 1.1(a)(3) at 14,875.
\textsuperscript{300} See id. § 1.3(a) at 14,876.
\textsuperscript{301} See id. § 1.4 at 14,877.
\textsuperscript{302} Id. § 3.4(f)(1) at 14,880.
\textsuperscript{303} Exec. Order No. 12,356, § 1.6(d), 47 Fed. Reg. at 14,878.
\textsuperscript{304} Id. § 4.1(a) at 14,880.
\textsuperscript{305} See id. § 1.1(a)(3) at 14,875.
“confidential” if an “unauthorized disclosure . . . reasonably could be expected to
cause damage to the national security.” 307 As discussed earlier, information
merely has to be classified to be exempt from disclosure. 308 Therefore, the
barrier to the lowest level of classification is what matters in regards to FOIA
exemption.

Second, the Reagan Order added three new items to the exclusive list of
information that could be classified, i.e., the order expanded the definition of
classifiable national security information. 309 The three additions to what
information could be classified were: “the vulnerabilities or capabilities of
systems, installations, projects, or plans relating to the national security;” 310
“cryptology;” 311 and “a confidential source.” 312 These concerns were most likely
already protectable under the Carter Order’s catch-all, but by placing this
information explicitly within the scope of classifiable information neither the
President nor an agency head had to approve the classification of such
information. 313

Next, the Order re-loosened the time requirements on automatic
declassification and downgrading. 314 Section 1.4(a) changed the duration of
classification from the 6, 25, and 30 year standards with definite dates for review
and/or declassification that were in place under the Carter Order, 315 to the
following: “Information shall be classified as long as required by national
security considerations. When it can be determined, a specific date or event for
declassification shall be set by the original classification authority at the time the
information is originally classified.” 316 Thus, although a more sophisticated
system of review had been established by the Carter Order, the Reagan Order
determined no formal system was necessary to protect the public’s right to know
what its government was doing and what information it held. 317

Further, the Reagan Order mandated the denial of the existence of
information when the mere acknowledgment of the information’s existence or
non-existence could be classified. 318 Remember the Carter Order provided a yet-
unseen restriction on the government:

Reagan).
308 Id. § 6.1(g) at 14,883.
309 Id. § 1.3(a) at 14,876.
310 Id. § 1.3(a)(2) at 14,876.
311 Id. § 1.3(a)(8).
312 Id. § 1.3(a)(9). See Judith A. Bigelow, Comment, Meeting the Agency Burden Under the
Confidential Source Exemption to the Freedom of Information Act, 60 WASH. L. REV. 873 (1985)
for a discussion on the “confidential” group of information.
Reagan).
314 See id. §1.4 at 14,877.
Carter).
317 See id.
318 Id. § 3.4(f)(1) at 14,880.
No agency in possession of a classified document may, in response to a request made under the Freedom of Information Act or this Order's Mandatory Review provision, refuse to confirm the existence or non-existence of the document, unless the fact of its existence or non-existence would itself be classifiable under this order.\(^{319}\)

The Reagan Order replaced this government-restrictive language with the positive mandate: “An agency shall refuse to confirm or deny the existence or non-existence of requested information whenever the fact of its existence or non-existence is itself classifiable under this Order.”\(^{320}\) The Reagan Order did not change what the Carter Order did, but simply stated it differently and made it mandatory to deny the existence or non-existence of information if such status could be classified.\(^{321}\) The Carter Order made a sweeping negative statement, such a denial could not be made, then provided a broad exemption; whereas the Reagan Order made a sweeping allowance for denial but qualified it in the exact same way as the Carter exception to the rule but with a mandate to deny.\(^{322}\)

In this same line of thought, the Reagan Order explicitly allowed agencies to make classification and reclassification decisions upon receipt of a FOIA request.\(^{323}\) Although the government could initially classify a document, it could reclassify the documents under executive orders issued after its initial classification decision.\(^{324}\) In other words, under the Reagan Order, if a document was originally classified under the Carter Order, subsequently declassified, then requested post-Reagan Order, the government could reclassify it upon request for disclosure. Thus, if a document's necessity for classification had not yet presented itself or the information had proverbially fallen through the cracks of classification until requested, an agency could classify the information when it recognized the sensitivity of disclosure.

Finally, the Reagan Order changed the access requirements so only those with an “essential” need to view classified information could access the


\(^{322}\) Id.


\(^{324}\) See, e.g., Branch v. F.B.I., 700 F. Supp. 47, 48 (D.C. Dist. 1988), where plaintiff, a writer and historian, filed a Freedom of Information Act (“FOIA”) request for documents and files that defendant had compiled between the years 1952 and 1963 on Stanley Levison, a friend and advisor to Dr. Martin Luther King, Jr.

\(^{325}\) See, e.g., King v. U.S Dep't. of Justice, 830 F.2d 210, 216-17 (D.C. Cir. 1987); Afshar v. Dep't. of State, 702 F.2d 1125, 1136 (D.C. Cir. 1983).
information. General access restrictions were broadened to allow more persons access but access was better regulated. The Carter Order allowed classified information to be viewed by persons who were “determined to be trustworthy” without stating who was the determiner of trustworthiness, whereas the Reagan Order provided trustworthiness was to be determined “by agency heads or designated officials.” Clearly, that was the restriction or regulation of the standard. The individuals who could access classified information was broadened by the second factor. The Carter Order stated persons were to be trustworthy and access had to be “necessary for the performance of official duties.” This seems to have required that the information aid the individual in the performance of her or his official duties, thus the information had to relate to her or his authority. On the other hand, the Reagan Order allowed access to trustworthy individuals if “such access [was] essential to the accomplishment of lawful and authorized Government purposes.” Thus, an individual could view classified information that was outside of the scope of her or his official position to, for example, aid a fellow bureaucrat or advisor in determining an appropriate course of action or to see if there may be some derivative impact on her or his responsibilities that would not be clear to the untrained eye.

Accordingly, the numerous changes made by the Reagan Order arguably resulted in a more information-protective order. However, even if such was the case, it is understandable considering the circumstances present from 1982 until the issuance of a new order in 1995. Also remember the Carter Order was an initial attempt to balance the government’s classification system (i.e., the need to protect national security) with the rights established under the FOIA. Possibly, the Carter Order overly restricted the government’s ability to protect the nation, considering the soon-to-come international and domestic issues present from 1982 to 1995. A few of these pressing issues included: the intensification of the Iranian hostages and the attempted assassination of President Reagan in 1981; U.S. involvement in the Persian Gulf War, signing of a second agreement with the Soviet Union further reducing nuclear armaments, and the

---

329 Id.
330 Id.
331 Id.
333 See id.
335 See id.
337 See infra text accompanying notes 337-41.
breakup of the Soviet Union in 1991,\textsuperscript{339} the formal ending to the Cold War after a meeting between Boris Yeltson and President George H. W. Bush at Camp David in 1992,\textsuperscript{340} and the bombing of the World Trade Center in New York City,\textsuperscript{341} and ordering the bombing of Iraq in retaliation for the alleged plot to assassinate President George H. W. Bush in 1993.\textsuperscript{342}

These events show there were immense high-profile national security threats justifying a restriction of critical national security information. Further, the end of the Cold War and the official mending of relations in South East Asia set the stage for the next classification order.

1. 1986: Amendment to the FOIA, Terrorist Exclusion

In 1986, Congress created a “terrorist exclusion” to disclosure under the FOIA.\textsuperscript{343} This exclusion provided that upon request agencies could deny whether or not a document existed when requested.\textsuperscript{344} Although this exclusion does not directly deal with Exemption 1, it is important to national security information because it codifies in the FOIA what several executive orders battled over: the denial of the existence or non-existence of information, except that this rule in the FOIA has a much broader application as it applies to all information that the government holds, not just classified/classifiable information.

F. Stage VI: The Present Classification System: The Clinton Order, 1995-present

In 1995, President William J. Clinton ordered \textit{Classified National Security Information} (Clinton Order), replacing the Reagan Order.\textsuperscript{345} Today’s classification system is still administered under this order. In the introduction to the order, President Clinton expressed his recognition and the effect of changes in the world: “In recent years . . . dramatic changes have altered, although not eliminated, the national security threats that we confront. These changes provide a greater opportunity to emphasize our commitment to open Government.”\textsuperscript{346}

The changes and interesting aspects of the Clinton Order include: demanding an articulable impact on national security to justify classification,\textsuperscript{347} further

\textsuperscript{339} Id.
\textsuperscript{340} Id.
\textsuperscript{341} \textsc{3 the New Encyclopedia Britannica} Clinton, William J. 389 (15th ed. 2002).
\textsuperscript{342} Id.
\textsuperscript{346} Id. at 19,825.
\textsuperscript{347} See id. § 1.3 at 19,826.
developing what is considered a national security interest,\(^{348}\) reestablishing a set time limit for declassification and downgrading, but on different terms than earlier time limits;\(^{349}\) establishing the most restrictive standard concerning the denial of the fact of information’s existence or non-existence;\(^{350}\) replacing the two-prong access test with a three-prong test;\(^{351}\) including more actions subject to administrative sanctions;\(^{352}\) and providing a more thorough inter-executive procedure.\(^{353}\)

The Clinton Order demands an articulable impact on national security to justify classification.\(^{354}\) The basic definitions of “top secret,” “secret,” and “confidential” are all the same as they were under both the Carter and Reagan Orders, but more aptly make use of the qualification the Carter Order placed in the definition to “confidential,” which the Reagan Order deleted (that the damage be identifiable).\(^{355}\) As part of the Carter Order’s standard for “confidential,” information had to be information the disclosure of which could “cause identifiable damage to the national security.”\(^{356}\) The Clinton Order more aptly articulates this interest, adding to all three categories that the information’s disclosure would cause “damage to the national security that the original classification authority is able to identify or describe.”\(^{357}\) Adding this requirement to all of the classifications is the most respective of a public “right to know” to-date, because it requires an articulable basis for classification. This seems to shift classification from being a standard procedure to being a limited-use procedure. But, this may be an inane addition, like the “identifiable damage to the national security” wording in the Carter Order,\(^{358}\) because a classifying agency can simply state a broad damage that could result from disclosure.\(^{359}\)

Second, the Clinton Order further develops the explication of national security interests as they were discussed under the Carter and Reagan Orders.\(^{360}\)
While the Clinton Order retains the Carter and Reagan Orders’ strict definition of “national security,” it deletes two groups of information that were classifiable under the Reagan Order. Section 1.5 omits the Carter and Reagan Orders’ catchall for information considered classifiable, and also omits the Reagan Order’s “confidential source” category. Thus, the Clinton Order narrows the class of information that can be classified, i.e., it narrows the practical definition of “national security” information.

Next, the Clinton Order reestablishes a time limit on classification, setting a ten-year mark for declassification. This is four years more lenient than the Carter Order’s six year general rule for declassification, but remember the Reagan Order had deleted a standard time frame for declassification and replaced it with a system for declassification as permissible. The Clinton Order maintains an exemption from the ten year general declassification rule for information “the unauthorized disclosure of which could reasonably be expected to cause damage to the national security for a period greater than” the ten year general rule and:

[T]he release of which could reasonably be expected to: (1) reveal an intelligence source, method, or activity, or a cryptologic system or activity; (2) reveal information that would assist in the development or use of weapons of mass destruction; (3) reveal information that would impair the development or use of technology within a United States weapons system; (4) reveal United States military plans, or national security emergency preparedness plans; (5) reveal foreign government information;

---

362 Exec. Order No. 12,356, § 1.3(a)(9), 47 Fed. Reg. 14,874, 14,876 (Apr. 2, 1982) (Ronald Reagan) (“[O]ther categories of information that are related to the national security and that require protection against unauthorized disclosure as determined by the President or by agency heads or other officials who have been delegated original classification authority by the President.”); National Security Information, Exec. Order No. 12,065, § 1-301(g), 43 Fed. Reg. 28,949, 28,951 (June 28, 1978) (Jimmy Carter) (“[O]ther categories of information which are related to national security and which require protection against unauthorized disclosure as determined by the President, by a person designated by the President pursuant to Section 1-201, or by an agency head.”).
(6) damage relations between the United States and a foreign government, reveal a confidential source, or seriously undermine diplomatic activities that are reasonably expected to be ongoing for a period greater than [the ten years provided in the general rule]; (7) impair the ability of responsible United States Government officials to protect the President, the Vice President, and other individuals for whom protection services, in the interest of national security, are authorized; or (8) violate a statute, treaty, or international agreement.  

Fourth, the Clinton Order establishes the most restrictive standard concerning the denial of the existence or non-existence of information. The Carter Order stated the government could deny the existence of a requested document if “the fact of its existence or non-existence would itself be classifiable under this Order.” Similarly, the Reagan Order mandated: “An Agency shall refuse to confirm or deny the existence or non-existence of requested information whenever the fact of its existence or non-existence is itself classifiable under this Order.” But, President Clinton’s order establishes a stricter standard, the existence or non-existence of the information actually be classified under the order: “An agency may refuse to confirm or deny the existence or non-existence of requested information whenever the fact of its existence or non-existence is itself classified under this order.” This standard requires the fact of information’s existence or non-existence be classified, not merely classifiable. Accordingly, in this regard, the Clinton Order restricts the government’s ability to move efficiently to protect the national security by requiring the existence or non-existence of information also be classified.

Fifth, the Clinton Order changes the standard for access to classified information from the two-pronged test, trustworthiness plus necessary/essential, to a three-part test. The Clinton criteria for access provides classified information may be made accessible to an individual if: “(1) a favorable determination of eligibility for access has been made by an agency head or the agency head’s designee; (2) the person has signed an approved

368 Id. § 3.7(a) at 19,835.
372 Id.
nondisclosure agreement; and (3) the person has a need-to-know the
information.” A “need-to-know” is “a determination made by an authorized
holder of classified information that a prospective recipient requires access to
specific classified information in order to perform or assist in a lawful and
authorized governmental function.” Thus, there are now two individuals who
have to determine whether access is proper: the head of the agency or her
designee whose agency originally classified the information, and the individual
contemporarily holding the information. Further, the amorphous
“trustworthiness” standard is replaced by an affirmative allowance by those
charged with the protection of the information and contractually obliging the
individual to secrecy. While this strict system is in-line with the purpose of
classification (to protect the national security by keeping information out of
dangerous hands and from aiding in damage to the United States), in comparison
to more lenient standards it stifles the government’s efficiency in responding to
threats and sharing information.

Sixth, the Clinton Order’s administrative sanctions for improper actions
concerning classified information are more expansive than the predecessor
orders. For example, the Reagan Order provided sanctions for actual
unauthorized disclosure of classified information. On the other hand, the
Clinton Order provides sanctions when an individual merely commits an act that
“could reasonably be expected to result in an unauthorized disclosure of
classified information.”

Finally, the Clinton Order establishes a much more thorough inter-executive
system for inter-agency oversight. However, there remains a provision stating
the Attorney General can provide interpretations of the order.

This order remains in effect, and since its establishment in 1996 there have
been six amendments to the order. All six amendments expand the agencies
with original classification authority. In 1996 and 1997, President Clinton
added numerous individuals with original “top secret” classification

375 Id.
376 Id. § 4.1(c).
377 See id. § 4.2(a), § 4.1(c) at 19,836.
378 Id. § 4.2(a).
379 Id. § 5.1(b) - (c) at 19,838.
Reagan).
Clinton).
(Ronald Reagan), with Exec. Order No. 12,958, §§ 5.2 - 5.6, 60 Fed. Reg. 19,825, 19,838-42
Clinton).
384 See infra notes 386-90 and accompanying text.
385 Id.
authorization. Current President George W. Bush has made four additions to those with original classification authority: three with authority for original classification as “secret” and one with such “top secret” authority. In December of 2001, President Bush gave the Secretary of Health and Human Services “secret” classification authority; in 2002, he gave the Administrator of the Environmental Protection Agency and the Secretary of Agriculture “secret” classification authority; and, in 2003, he provided “top secret” classification authority to the Director of the Office of Science and Technology Policy.

1. 1996: Amendment to the FOIA, The Electronic FOIA

In 1996, Congress amended the FOIA to take into consideration the development and use of technology in the government and how it could be used to improve public access to information. While the amendment does not change Exemption 1 to the FOIA, it does clarify information in electronic form is to be disclosed the same as non-electronic information and encourages the use of electronic systems to lessen the barriers to public access to information by creating fewer issues concerning the feasibility of finding and providing requested information.

G. Summation of Classification Orders

The classification of national security information has developed into a storied and complex system. Before a uniform system existed, executive agencies had full discretion to classify information without having to justify its classification or nondisclosure. Major changes have occurred since the

393 See id. § 2 at 3048-49.
394 Id. § 3 at 3049.
395 Id. § 4.
396 See supra Part II.A.
enactment of the FOIA, which drove the executive branch to bring its classification system in-line with the political will of the nation. This is shown, in small part, by the most basic establishment of a definition of “national security” since 1972.\(^{397}\)

Under the current system, the executive branch has voluntarily, narrowly constructed (at least compared to what was once done) its definitions of categories of classification, advancing into another realm of protection from the 1951 “restricted” category classifying information having a “bearing on national security”\(^{398}\) and the 1953 “confidential” categories’ “prejudicial to the national defense interests of the nation.”\(^{399}\)

But, courts still struggle to apply the language of even the Clinton Order, and always give deference to agency expertise on what is a national security concern.\(^{400}\) In essence, courts have not required agencies to identify the specific harm that could result from disclosure, even though identification of a specific harm is part of the current system of classification, because courts “punt” determinations of national security interests to the executive.\(^{401}\)

### III. THE BUSH ADMINISTRATION AND POST-9/11 CLASSIFICATION\(^{402}\)

As seen during the previous discussion, the executive branch and the Congress have both enacted orders and statutes to react to new threats to the national security and to lessening and heightening needs for nondisclosure. However, since President Clinton’s proclamation that “[i]n recent years . . . dramatic changes have altered, although not eliminated, the national security threats that we confront,”\(^{403}\) many incidents have occurred involving the United

---


\(^{400}\) See, e.g., Ctr. for Nat’l Sec. Studies v. U.S. Dep’t of Justice, 331 F.3d 918, 926-27 (D.C. Cir. 2003) (exemplifying the current trend toward greater deference to agencies concerning terrorism, i.e., national security information); Nat’l Sec. Archive v. C.I.A., No. 99-1160, slip op. at 8 (D.D.C. 2000) (“Agencies have more experience in the national security arena than courts do, and therefore their judgment warrants deference as long as the agency can demonstrate a logical connection between a withheld document and an alleged harm to national security.”).

\(^{401}\) Id.


States that have arguably altered the national security threats the nation confronts—requiring, necessitating and justifying greater protection of national security information. These national security breeches by previously ineffective non-state actors include, in part: the 1998 embassy bombings; the successful strike against the USS Cole in October of 2000; the attacks on the World Trade Center, Pennsylvania, and The Pentagon on 9/11; and the use of anthrax strikes beginning in October of 2001.

Reacting to these major events that effected the national security (both the national defense and foreign relations), Congress has taken numerous steps to protect the United States, including the adoption of legislation like the Patriot Act and The Homeland Security Act. Congress could have amended the FOIA to expand the exemptions from disclosure, thus arguably better protecting the national security by securing the flow of dangerous information. Furthermore, President Bush has issued numerous orders to better protect the United States, including among many others the Executive Order on Terrorist Financing. Consider that in enacting the Executive Order on Terrorist Financing, President Bush stated:

I . . . find that grave acts of terrorism and threats of terrorism committed by foreign terrorists, including the terrorist attacks in New York, Pennsylvania, and the Pentagon committed on September 11, 2001, acts recognized and condemned in UNSCR 1368 of September 12, 2001, and UNSCR 1269 of October 19, 1999, and the continuing and immediate threat of further attacks on United States nationals or the United States constitute an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States, and in furtherance of my proclamation of September 14, 2001, Declaration of National Emergency by Reason of Certain Terrorist Attacks, hereby declare a national emergency to deal with that threat.

---


408 Id. at 49,079.
As serious and dire as these new circumstances are for the United States, President Bush’s only response concerning the restriction of information has been: in 2001, giving the Secretary of Health and Human Services “secret” classification authority;\(^{409}\) in 2002, giving the Administrator of the Environmental Protection Agency\(^{410}\) and the Secretary of Agriculture\(^{411}\) “secret” classification authority; and, in 2003, providing “top secret” classification authority to the Director of the Office of Science and Technology Policy.\(^{412}\) He could replace or substantially amend the Clinton Order, which past presidents have done when new national security concerns presented themselves. President Bush has not done so. He has and is continuing to operate within the confines of the Clinton Order, which set out to restrict the government’s ability to classify information for a time of much lessened national security threats than those the United States currently faces.\(^{413}\)

The Bush Administration has taken a few actions post-9/11 concerning classification, but they are all within the bounds of the Clinton Order and the FOIA—and arguably within the Clinton Administration’s stated interpretation of the classification system.\(^{414}\) The actions include:\(^{415}\) a 2001 memorandum issued by Attorney General Ashcroft concerning the classification of information in a post-9/11 world,\(^{416}\) and a 2002 letter from White House Chief of Staff Andrew Card concerning classification.\(^{417}\)


\(^{413}\) See Exec. Order No. 12,958, 60 Fed. Reg. 19,825, 19,825 (Apr. 17, 1995) (William J. Clinton) ("In recent years . . . dramatic changes have altered, although not eliminated, the national security threats that we confront. These changes provide a greater opportunity to emphasize our commitment to open Government.").

\(^{414}\) See Patrice McDermott, Information Disclosures by Government: Data Quality and Security Concerns Symposium: Withhold and Control: Information in the Bush Administration, 12 KAN. J. L. \\
& PUB. POL’Y 671, 681 (2003) (discussing various ways that she sees that the Bush Administration has restricted the disclosure of information, but does not mention that such action goes against any existing law).

\(^{415}\) Discussions on whether the Bush Administration’s actions are proper is a subject for political debate, which takes place everyday and is obvious from the implications of these actions. Again, determining whether these actions are proper or not is not the subject of this article; this article is an analysis of the development and affects of executive and congressional action concerning the classification of national security information.


A. Ashcroft Memorandum

Attorney General John Ashcroft’s memorandum discussing the implementation of the 1995 Clinton Order is substantially similar to former Attorney General Janet Reno’s implementation—it simply takes into consideration changed circumstances.\footnote{Compare Ashcroft, \textit{supra} note 416, with Janet Reno, Memorandum for Heads of Departments and Agencies (Oct. 4, 1993), http://www.fas.org/sgp/clinton/reno/html.} On October 12, 2001, Attorney General Ashcroft issued the \textit{Memorandum for Heads of All Federal Departments and Agencies}.\footnote{Ashcroft, \textit{supra} note 416.} This one-page memo, it has been argued, shifts from a presumption of disclosure, under its predecessor interpretation of the Clinton Order made by former Attorney General Janet Reno,\footnote{Reno, \textit{supra} note 416.} to a presumption of nondisclosure.\footnote{McDermott, \textit{supra} note 414, at 681.}

As has been the case since the Carter Order in 1978,\footnote{Exec. Order No. 12,065, § 6-202, 43 Fed. Reg. 28,949, 28,961 (June 28, 1978) (Jimmy Carter).} Attorney Generals are called upon by agency heads to provide interpretations of the classification orders.\footnote{Exec. Order No. 12,958, § 6.1(b), 60 Fed. Reg. 19,824, 19,842 (Apr. 20, 1995) (William J. Clinton).} In 1981, former Attorney General William French Smith issued an interpretation of the then executive order, stating the Department of Justice (hereinafter “DOJ”) would defend agency decisions to not disclose information so long as there was a “\textit{substantial} legal basis” for nondisclosure.\footnote{United States Department of Justice, Office of Information and Privacy, Attorney General's Memo on FOIA http://www.usdoj.gov/oip/foia_updates/Vol_II_3/page3.htm (last visited Oct. 12, 2004) (emphasis added).} Then, in 1993, former Attorney General Janet Reno issued a memorandum stating the DOJ would “apply a presumption of disclosure,” and directly stating it would not defend nondisclosure “merely because there is a ‘substantial legal basis’ for doing so.”\footnote{Reno, \textit{supra} note 418.} This is where commentators get their incorrect basis that the Reno Memorandum is more encouraging of disclosure than the to-come Ashcroft Memorandum. It is near ignored that two paragraphs later Janet Reno states, “Where an item of information might technically or arguably fall within an exemption, it ought not to be withheld from a FOIA requester unless it need be.”\footnote{Id. (emphasis added).} There is no broader language, accepting circumstances may change,\footnote{Remember that in the preamble to the Clinton Order he stated that his contemporary circumstances allowed the opportunity to provide for more openness. Exec. Order No. 12,958, 60 Fed. Reg. 19,825, 19,825 (Apr. 17, 1995) (William J. Clinton) (“In recent years . . . dramatic changes have altered, although not eliminated, the national security threats that we confront. These changes provide a greater opportunity to emphasize our commitment to open Government.”).} than this; perhaps if the planes were flown into the World Trade Center, information “need be” legally withheld. Ashcroft’s “\textit{sound} legal basis” test may be an even lower hurdle than a Reagan “\textit{substantial} legal basis” standard to
justify withholding records. But, while there may be evidence more information was disclosed during the Clinton Administration under the Reno interpretation, surely the Reno interpretation provides for broad discretion on withholding information if circumstances deem it necessary (as the law requires in any case).

Accordingly, the Ashcroft Memorandum is not as drastic of a change from the Reno interpretation as one might presume. The Ashcroft Memorandum makes two major assertions. First, Ashcroft encourages agencies to disclose information “only after full and deliberate consideration of the institutional, commercial, and personal privacy interests that could be implicated by disclosure of information.” Thus, he encourages them to apply a watchful eye to their disclosure decisions. Second, he states the DOJ will defend disclosure decisions “unless they lack a sound legal basis or present an unwarranted risk of adverse impact on the ability of other agencies to protect other important records.”

It is understandable how one would draw the conclusion that this memorandum sets up a presumption of nondisclosure because it states that the DOJ will defend agency decision “unless . . .,” but the effect of this memorandum is the same as the Reno memorandum: nondisclosure is permissible if there is a need not to disclose it and there is a legal basis (i.e., an exemption) for nondisclosure.

The major misconception of this memorandum is that it establishes new law. But, this is merely the DOJ’s interpretation and starting point for implementation of the classification executive order and general FOIA disclosure. Such standards and withholdings are still subject to judicial review to ensure they are in-line with the letter and spirit of the FOIA. Nonetheless, it may be argued, considering the history of judicial deference to executive agencies’ determinations of what is a threat to national security, an Attorney General’s interpretation of the classification order may establish law de facto.

429 Ashcroft, supra note 416.
430 See id.
431 See id.
432 See id.
433 See id.
436 See, e.g., Ctr. for Nat’l Sec. Studies v. U.S. Dep’t of Justice, 331 F.3d 918, 926-27 (D.C. Cir. 2003) (exemplifying the current trend toward greater deference to agencies concerning terrorism, i.e., national security information); Nat’l Sec. Archive v. C.I.A., No. 99-1160, slip op. at 8 (D.D.C. 2000) (“Agencies have more experience in the national security arena than courts do, and therefore their judgment warrants deference as long as the agency can demonstrate a logical connection between a withheld document and an alleged harm to national security.”).
B. Card Memorandum

On March 19, 2002, White House Chief of Staff Andrew Card issued a memorandum with the subject: “Action to Safeguard Information Regarding Weapons of Mass Destruction and Other Sensitive Documents Related to Homeland Security.”437 This memorandum instructs agencies to reexamine their guidelines for the review of information regarding “weapons of mass destruction, as well as other information that could be misused to harm the security of our nation and the safety of our people.”438 “Weapons of mass destruction include chemical, biological, radiological, and nuclear weapons.”439 Most crucial to this FOIA discussion is the new terminology used in the guidelines that Mr. Card sent with his memorandum.440 This letter discusses three types of information agencies should reexamine: classified information, previously unclassified or declassified information, and sensitive but unclassified information.441 Section I of the memo restates the declassification schedule for information concerning weapons of mass destruction in the Clinton Order.442 Section II, “Previously Unclassified or Declassified Information,” emphasizes in the review of information previously unclassified or declassified information that “could reasonably be expected to assist in the development or use of weapons of mass destruction . . . should be classified,” or reclassified if not declassified and not disclosed, in accordance with the Clinton Order.443

Finally, Section III discusses “sensitive but unclassified information.”444 This section states sensitive information about weapons of mass destruction “should be carefully considered, on a case-by-case basis, together with the benefits that result from the open and efficient exchange of scientific, technical, and like information.”445 Further, concerning this sensitive information: “[a]ll departments and agencies should ensure that in taking necessary and appropriate actions to safeguard sensitive but unclassified information related to America’s homeland security, they process any Freedom of Information Act request for

437 Card, supra note 417.
438 Id.
439 Id.
441 Id. It is important before this discussion continues to remember that simply because national security information is not classified or classifiable does not mean that it must be disclosed; it may fit into one of the other common FOIA exemptions discussed briefly in the Introduction. See supra Part I (discussing briefly Exemptions 3, 5, and 7 to the FOIA).
443 Id. § II (citing Exec. Order No. 12,958, §§ 1.8(d), 6.1(a), 60 Fed. Reg. 19,825 (Apr. 17, 1995) (William J. Clinton)).
444 Id. § III.
445 Id.
records containing such information . . . by giving full and careful consideration to all applicable FOIA exemptions.446

Section III has most concerned recent writers on President Bush and the FOIA,447 but their concerns are feeble because the reality is, although such statements may not be desirous, the Bush Administration’s interpretation is a fair reading of the law—it is legally sound. If the use of an exemption brings about an undesired result, then Congress can surely limit the FOIA to restrict the Executive’s ability to classify such information. Such a restriction could include adding criteria to Exemption 1 (which has been done before) or defining what information concerns “national defense and foreign relations” (thus qualifying for the FOIA national security exemption) instead of allowing executive orders to establish the standard.

IV. STAGE VII: POSSIBILITIES FOR THE FUTURE OF CLASSIFICATION & EXEMPTION 1

As has been analyzed, the development of executive orders classifying national security information has been intricate. The development has gone through six definite stages of ebb and flow, while working within the development of the FOIA.448 Throughout the history of these classification executive orders, Presidents have exercised their powers to amend and revoke the orders as new circumstances and events have affected the necessity of classifying certain information.449 Certainly, new circumstances have arisen during George W. Bush’s presidency, but he has done little to in fact change the actual laws and regulations in reaction to the rise of “effective” non-state actors.450 Thus far, the administration must be comfortable working within the bounds of the Clinton Order.

Despite operating within the bounds of the Clinton Order for four years, it has been rumored the current administration is considering issuing a new executive order. If the current administration or the next decides to issue a new order, there are several considerations it must deal with, based on the historical development of the classification system and the fact any new order must allow for an effective and efficient shift in the executive branch to the new classification system.

446 Id.
447 See, e.g., McDermott, supra note 414, at 674-76 (emphasizing that Section III of the Card Memorandum raises concern because the government can protect information by applying exemptions to the FOIA to information that may not fit within the national security exemption).
448 See supra Parts II.A - II.F.
449 See id.
450 See supra Parts II.F, III.
The keystone issues that must be dealt with include: standards for classification; defining the interest(s) to be protected; time requirements for declassification; regulating inter-executive access to information; reclassification of previously declassified yet non-disclosed information; and the denial of the existence or non-existence of information.\textsuperscript{451}

A. \textit{Standards for Classification}

The most efficient way to expand or contract the classification system is by expanding or contracting what information is classifiable. The current classification categories are the most narrowly drawn because they require that “the original classification authority [be] able to identify or describe the damage” to the national security that disclosure would cause.\textsuperscript{452} In the future, a president could further restrict the classification of information by, for example, explicitly defining what must be identified or described and to whom it must be identified or described.\textsuperscript{453} Based on past orders, a future president could reasonably increase classification authority, from the most open definitions to the least: (A) reinstating pre-FOIA-like categories based on a lower standard of disclosure resulting in “prejudicial” results instead of articulated damage;\textsuperscript{454} (B) deleting this requirement of an articulable basis for classification (which would make the classification categories identical to those of the Reagan Order);\textsuperscript{455} or (C) deleting this requirement and adding back to the “confidential” category that the danger be “identifiable” thereby finding a middle ground between the Clinton Order and the Reagan Order (which would make the classification categories identical to those of the Carter Order).\textsuperscript{456}

\textsuperscript{451} See infra Parts IV.A - F.
\textsuperscript{453} The options provided based on past orders are limited to those that are believed to be reasonable considering the current atmosphere in the United States and the present status of the FOIA. So, for example, it is not discussed that an executive order could simply revert back to what has been discussed as Stage I, where information did not have to be disclosed as long as an agency determined, without oversight or review, that circumstances “requir[ed] secrecy in the public interest.” Administrative Procedure Act, 5 U.S.C. § 1002 (1944).
\textsuperscript{454} Exec. Order No. 10,501, § 1(a) – (c), 18 Fed. Reg. 7049, 7051 (Nov. 5, 1953) (Dwight D. Eisenhower). The category “classified” was defined in the Eisenhower Order as “defense information or material the unauthorized disclosure of which could be prejudicial to the national security interests of the nation.” Id. § 1(c).
\textsuperscript{456} See supra Part II(D); Exec. Order No. 12,065, §§ 1-102 to 1-104, 43 Fed. Reg. 28,949, 29,950 (June 28, 1978) (Jimmy Carter).
B. Defining the Interest to be Protected

In the same line as altering the classification categories themselves, future orders must consider whether to expand or contract the defined interest(s) to be protected. As was seen pre-FOIA, there could be a change from a national security basis for classification to narrowed classifications of only national defense information (excluding presently included foreign relations information) or expanding to the all-inclusive information the disclosure of which could harm the “Nation.” The only present limitation on the executive is, to remain within the bounds of Exemptions to the FOIA, the interest protected by classification must be considered within the interest of the “national defense or foreign policy” to justify nondisclosure. Accordingly, any future executive order could not provide for the classification of information that it wants to meet disclosure exemption standards to be merely in the “public interest.” At present, the Clinton Order defines “national security” as “the national defense or foreign relations of the United States.” Further, considering the past three classification orders have delineated lists of what types of information can be exempted from the general declassification rule, on top of the bar of importance that it must meet, any future order must consider this list. For example, an administration may want to re-enter the Reagan Order’s category of “confidential information” or some other category, or delete one of the existing categories. Namely, if an administration wants to open up the amount of information that can be classified as well as establish the government’s ability to adjust to new threats to the national security, it should reinstate the Carter and Reagan Orders’ catch-all provision for information an agency head or the president deems necessitates classification in the interest of national security.

---

462 Exec. Order No. 12,958, § 1.6(d), 60 Fed. Reg. 19,825, 19,828 (Apr. 17, 1995) (William J. Clinton). This section reads:

At the time of original classification, the original classification authority may exempt from declassification within 10 years specific information, the unauthorized disclosure of which could reasonably be expected to cause damage to the national security for a period greater than that provided in [the general rule], and the release of which could reasonably be expected to: (1) reveal an intelligence source, method, or activity, or a cryptologic system or activity; (2) reveal information that would assist in the development or use of weapons of mass destruction; (3) reveal information that would impair the development or use of technology within a United States weapons system; (4) reveal United States military plans, or national security emergency
C. Time Requirements for Declassification

The fits and starts for extending and restricting the time requirements and standards for automatic downgrading and declassification of information are overwhelming. Standing at the extremes of these differences are the Carter Order at one end and the Reagan and Nixon Orders at the other (with the current administration governed by a moderate version).465 The Carter Order established a general rule for the automatic disclosure of information six years after original classification.466 If information met one of the narrow exceptions to the general six-year rule, the classification of the information had to be reviewed every ten years.467 On the other end of the spectrum, future administrations may consider reverting back to the Reagan Order’s standard, which merely provided information could remain classified “as long as required by security considerations.”468 The longest general time for classification was under the Nixon Order, which dire circumstances may suggest a reversion to, which provided a general rule of thirty years for classification so long as disclosure would result in “immediate jeopardy” to the nation or an individual.469 The current law, as explained in Section II(F) of this article, sets a ten year general rule for declassification with a moderately broad exception that the ten year maximum does not apply to information that may “reasonably be expected to cause damage to the national security for a period of greater than that provided . . .”470 This exemption seems sufficient to protect national security in the current national security environment, and it is flexible enough to protect information should national security threats worsen.

preparedness plans; (5) reveal foreign government information; (6) damage relations between the United States and a foreign government, reveal a confidential source, or seriously undermine diplomatic activities that are reasonably expected to be ongoing for a period greater than that provided in [by the general rule]; (7) impair the ability of responsible United States Government officials to protect the President, the Vice President, and other individuals for whom protection services, in the interest of national security, are authorized; or (8) violate a statute, treaty, or international agreement.


465 See infra notes 466-70 and accompanying text.


467 Id. § 3-401 at 28,955.


D. Regulating Intra-Executive Access to Information

Regulating the intra-executive access to information is also important in classification orders, because the more expansive the list of individuals with access to classified information, i.e., the less access to information is restricted, the more likely the purpose of classifying information will be defeated by enhancing the chance of leaks. While limiting the list of such individuals or the over-regulation of access stifles agency cooperation and the government's ability to meet national security threats, as the United States learned from the events of 9/11, intra-agency cooperation and shared access is critical to the protection of national security. The current system is a great balance of these concerns, because it defines standards for individuals requesting information, whereas prior access standards used nebulous standards such as determining whether the individual seeking access was “trustworthy.” One noteworthy difference is the change between the Carter Order and Reagan Order’s standards for access. The standards were the same, in that both required an individual seeking access to information to be “trustworthy,” but the Reagan standard shifted the second prong for access: the Carter Order stated access had to be “necessary for the performance of official duties,” whereas the Reagan Order stated access had to be “essential to the accomplishment of lawful and authorized Government purposes.” Thus, the Reagan Order better effectuated the purpose of classification by limiting the individuals who could access information, whereas the Carter Order defeated the purpose of classification concerning intra-executive access. The implications of this “necessary” – “essential” distinction should be considered by future presidents. The current system has a three-prong test for access: granted access by the agency head or her designee who originally classified the information; a signed nondisclosure agreement; and granted access determined by the contemporary holder on a “need-to-know” basis. A “need-to-know” is “a determination made by an authorized holder of classified information that a prospective recipient requires access to specific classified information in order to perform or assist in a lawful and authorized governmental function.” Thus, there are now two individuals who have to determine whether

---


473 See infra notes 474-76 and accompanying text.


478 Id. § 4.1(c).
access is permissible (the head of the agency or her designee whose agency originally classified the information, and the individual contemporarily holding the information).\textsuperscript{479} Further, the amorphous “trustworthy” standard has been replaced by an affirmative allowance by those charged with the protection of the information and contractually obliging the individual to secrecy.\textsuperscript{480} This system meets the purpose of classification to protect information that could result in damage to national security, but it stifles efficiency by requiring two individuals to grant access.\textsuperscript{481} All three orders have their positive points, but it is up to a future administration to determine whether, among other access considerations, it wants to reinstate the “trustworthy” test, require that access be necessary or essential to an official duty, or require access be strictly on a need-to-know basis. Whatever the decision, these standards should be watched closely as they are essential to the actual protection of national security information.

E. Reclassification of Previously Declassified Non-Disclosed Information

As seen in the concern about the Card Memorandum,\textsuperscript{482} the reclassification of previously declassified non-disclosed information should be dealt with in any future classification order. Although under the current order such action is most definitely legal, leaving this area up to interpretation is not in the interest of national security. If an administration wants to ensure it can classify information of which national security implications have been resurrected, such as those over weapons of mass destruction discussed in the Card Memorandum, the administration should ensure such reclassifications can withstand judicial scrutiny (understanding under Exemption 1 of the FOIA the information must be properly classified).

F. Denial of the Existence or Non-Existence of Information

The denial of the existence or non-existence of information is yet another crucial element of executive orders with major national security implications. The Clinton Order established the most government-restrictive standard concerning the denial of the fact of information’s existence or non-existence.\textsuperscript{483} The Carter Order stated the government could deny the existence of a requested document if “the fact of its existence or non-existence would itself be classifiable

\textsuperscript{479} See id.
\textsuperscript{480} See id.
\textsuperscript{481} See id.
\textsuperscript{482} See supra Part III.B; see also Card, supra note 417.
under this Order." The Reagan Order mandated denial if the information’s existence or non-existence was classifiable: “An Agency shall refuse to confirm or deny the existence or non-existence of requested information whenever the fact of its existence or non-existence is itself classifiable under this Order.” But, President Clinton established a stricter standard, the existence or non-existence of the information must be classified: “An agency may refuse to confirm or deny the existence or nonexistence of requested information whenever the fact of its existence or nonexistence is itself classified under this order.” This standard requires the fact of information’s existence or non-existence be classified, not merely classifiable. Accordingly, in this regard, the current order restricts the government’s ability to move efficiently to protect national security by requiring the existence or non-existence of information already be classified. Any future action should critically question which of these three options it wishes to enact (or another action).

G. Possible Congressional Action

Finally, there are actions Congress can take to restrict or loosen the restriction on the classification of national security information. However, Congress must realize any further restrictions on the Executive Branch may stifle its ability to react to future unseen dangers that threaten the nation. If these decisions are left in the executive’s hands, agencies may act quicker to protect the national security when new threats manifest. Congress could statutorily

---

484 Exec. Order No. 12,065, § 3-505, 43 Fed. Reg. 28,949, 28,957 (June 28, 1978) (Jimmy Carter) (emphasis added). The section reads:

No agency in possession of a classified document may, in response to a request made under the Freedom of Information Act or this Order's Mandatory Review provision, refuse to confirm the existence or non-existence of the document, unless the fact of its existence or non-existence would itself be classifiable under this order.

Id.


487 Id.

488 The difference between the Clinton and Carter Orders concerning inter-executive access to information and the denial of the existence or non-existence of information is a great example of why it is difficult to determine whether one order is more restrictive of the government, effective at the protection of the nation, and so forth, than another. For example, consider (as discussed) that the Carter order was inefficient in its regulation of inter-executive access, but established the strictest guidelines for the declassification of information. See supra text accompanying notes 275-90. Compare that to the Clinton Order, which was moderate on its declassification guidelines, and arguably the least efficient concerning the denial of the existence or non-existence of information because the existence or non-existence has to be itself classifiable to be denied. See supra text accompanying notes 364-72.
ameliorate the tradition and tendency of judicial deference to the executive concerning what a national security interest is under the FOIA. A great starting point for such a restriction is the delineated list in the executive orders of what information may be classified.\textsuperscript{489} Congress may want to more narrowly draw these categories, or broaden them as the need arises. In the same line of thinking, Congress could define “national security” concerning Exemption 1 more narrowly than the definition in the executive orders. Currently, the definition of “national security” is the same as the standard to qualify for Exemption 1 nondisclosure: information concerning the national defense or foreign relations.\textsuperscript{490} If Congress is not content with the present administration’s volume of classification or the types of information being classified it should use more narrow terminology for what classified information qualifies for exemption under Exemption 1.\textsuperscript{491}

Any upcoming action taken by a future President or Congress has many issues with major national security implications to consider. In the near future threats to the nation, which were previously unthinkable, are sure to present themselves — as the bombing of Pearl Harbor, Watergate, and the attacks of 9/11 seemed unfathomable before they occurred. Whatever actions are taken by a future President or Congress will hopefully be mindful of the need for a safe homeland and the need for efficient rules to protect the nation in the most open manner possible.

V. CONCLUSION

The constant struggle between the need to protect the people of the United States and the need to provide for an efficient and ethical government has produced a long and storied history concerning the protection of government-held national security information. Congress and the Executive Branch have used various methods to find an appropriate balance between the potentially conflicting immediate desires and rights of the people and the government charged with protecting the people.

Surely, in the future, effective threats to the nation will present themselves that are unthinkable at present. Before any future action is taken by a President or Congress, there are many issues with major national security implications that should be considered. These issues include: standards for classification; defining the interest to be protected; time requirements for declassification; regulating

\textsuperscript{491} Of course, classified but non-qualifying information may still fit another exemption under the FOIA.
inter-executive access to information; reclassification of previously declassified non-disclosed information; and the denial of the existence or non-existence of information.

Whatever actions are taken, hopefully the President and Congress will be mindful of the need for a safe homeland and use efficient rules to protect the nation in the most open manner possible. Considering the statutory and executive development of the national security exemption to disclosure under the FOIA is an appropriate place to start.
I. INTRODUCTION

What’s so great about marriage? This may seem an unusual question as historically most adults have aspired to and entered into it. Yet, we are observing some conflicting reactions to marriage. People who have not had access to it are demanding it, while the parties who can marry are delaying, rejecting or failing to successfully establish it. Same-sex couples are obtaining the right to marry in some jurisdictions. Meanwhile, opposite sex couples are increasingly rejecting or delaying it with the median age at first marriage increasing to the highest level in U.S. history. The divorce rate has increased dramatically since World War II. Still, successfully establishing a long term
relationship continues to be extremely important to people. When polled, people indicate that having a successful marriage is one of their most important goals.

It seems to be a logical time to reconsider whether marriage is the best institution for establishing long term relationships or whether there are alternatives to it that will increase social welfare. Historically, marriage has been viewed as the preferred state for most adults and their children. But a common conclusion today is that the institution of marriage is in trouble with the decline in successful marriages attributed to a shift toward more self-indulgent behavior. On closer scrutiny, this has to be a less than satisfactory explanation as substantial social science literature suggests that individuals have always tended to base their decisions on their perceived self-interest. It is suggested here that the problem with having a successful marriage is not due to people basing decisions on their self-interest so much as how they interpret how decisions will improve their welfare. Based on their perceived self-interest, people are making decisions that have reduced the likelihood that their marriage will be a success. Beyond the obvious need for love and physical attraction, the keys to a successful marriage are sacrifices on behalf of the relationship, the expectation of reciprocity by the other family members, and a commitment by both spouses to their relationship. With that in mind, the law should encourage people who desire a successful marriage to search diligently for a partner and

---


9 According to an annual survey of high school seniors conducted by the Survey Research Center at the University of Michigan the percentage of students who say that they believe in the importance of marriage and the family life has increased from 75% in 1980 to 78% in 1995. A 1992 Gallup poll of youth aged 13-17 found that 88% planned on marrying. See David Popenoe et al., supra note 1, at 43.

10 The benefits of marriage are summarized in LINDA J. WAITE & MAGGIE GALLAGHER, THE CASE FOR MARRIAGE 42 (2000).

11 Janet Z. Giele, Decline of the Family: Conservative, Liberal and Feminist Views, in PROMISES TO KEEP 91 (David Popenoe et al. eds., 1996).


13 BECKER, supra note 13, at 112.

14 Id.

15 Id.

16 This perspective on the family is essentially an economic one. Id.
then, when they make a commitment to that partner, to make decisions during the relationship that will increase the likelihood that it will be successful.\textsuperscript{17}

Current marital laws do not encourage these actions. When a couple marries, they enter into an arrangement over which they have very little control during it and potentially at its dissolution.\textsuperscript{18} On closer scrutiny, the statutes governing marriage in most states create perverse incentives that discourage people from taking the steps that are mostly likely to make their marriages a success.\textsuperscript{19} Central to these perverse incentives has been the shift from mutual consent/fault to unilateral/no-fault grounds for divorce along with financial arrangements at divorce that inadequately compensate spouses for sacrifices during marriage.\textsuperscript{20} One important reason that the compensation can be inadequate is because the courts do not address the effect of marriage on the spouses’ income earning capacities systematically.\textsuperscript{21} Seldom is limiting a career, for example, adequately compensated at divorce.\textsuperscript{22} By making divorce easier and often less financially costly to a divorcing spouse, this shift reduces the incentives for spouses to make a long-term commitment to their marriage.\textsuperscript{23} Their self-interest encourages them to focus more narrowly on themselves and less on their family.\textsuperscript{24}

Current marital statutes that permit unilateral divorce and regulate the financial and custodial arrangements at divorce do not accommodate the preferences of those people who view a long-term commitment as important in achieving a successful marriage.\textsuperscript{25} Seldom do these people recognize the conflict between their preference for a long-term relationship and the perverse incentives of unilateral divorce that encourage them to limit their commitment that is likely to reduce their ability to obtain that goal.\textsuperscript{26} While people have found numerous

\begin{footnotesize}
\textsuperscript{17} See Allen M. Parkman, Good Incentives Lead to Good Marriages, in REVITALIZING THE INSTITUTION OF MARRIAGE FOR THE TWENTY-FIRST CENTURY 69 (Alan J. Hawkins et al. eds., 2002).
\textsuperscript{18} John Dewitt Gregory et al., UNDERSTANDING FAMILY LAW 85 (1993).
\textsuperscript{19} For a discussion of the perverse incentives created by no-fault divorce, see Allen M. Parkman, Good Intentions Gone Awry: No-Fault Divorce and the American Family 71 (2000).
\textsuperscript{20} Id.
\textsuperscript{22} Id. at 86.
\textsuperscript{23} Parkman, supra note 19, at 96.
\textsuperscript{24} Id. at 125.
\textsuperscript{25} All the relevant data over recent decades show that adults of all ages say that having a happy marriage is one of the most important life goals. See Norval D. Glenn, Values, Attitudes, and the State of American Marriage, in PROMISES TO KEEP 15, 20-21 (David Popenoe et al. eds., 1996).
\textsuperscript{26} In a Time/CNN poll in 1997, 50% of respondents said that they believed that it should be harder than it was in 1997 for married couples to get a divorce. Walter Kirn, Should Breaking Up Be Harder To Do? The Debate Over Easy Divorce Rages On, TIME, August 18, 1997, at 48, 49. Only 46% said no. Id. More importantly, 61% responded that it should be harder than it was then for married couples with young children to get a divorce. Id.
\end{footnotesize}
reasons to justify unilateral divorce, encouraging a long-term commitment to their spouse is not one of the identified attributes. Ignorance of the perverse incentives in unilateral divorce has lead courts to attack private contractual alternatives to statutory marriage as contravening the public policy of encouraging marriage.

Social welfare could be improved for many people if they could reject the current legal marriage that provides for unilateral dissolution with often limited compensation for a divorced spouse throughout their marriage. In its place, they could establish an arrangement that requires more compensation for sacrifices during their marriage if it is dissolved. While unilateral dissolution is attractive early in a marriage when spouses are still gauging their commitment to their relationship, eventually it is important to encourage sacrifices on behalf of the marriage by requiring compensation for those sacrifices if the marriage is later dissolved.

Eventually providing potential compensation for sacrifices has important incentives for spouses. If marriages can be dissolved easily and at low cost to the initiating spouse, people’s self-interest suggests to them that they should shift the focus of their choices toward themselves and away from their family. When people make a weak commitment to marriage, the likelihood of its success is reduced. Alternatively, when it is eventually costly to dissolve a marriage, self-interest encourages decisions based on a deeper concern for the welfare of the other family members because of the love and reciprocal acts anticipated.


28 A minority of U.S. states recognize the right to contract among cohabitating couples. For a summary of these laws, see Katherine C. Gordon, *The Necessity and Enforcement of Cohabitation Agreements: When Strings Will Attach and How to Prevent Them, A State Survey*, 37 BRANDEIS L.J. 245 (1998/1999). Some states recognize the right based on express agreements, implied agreements, and equitable remedies (Arizona, California, Connecticut, Florida, Hawaii, Indiana, Iowa, Kansas, Missouri, Nevada, New Jersey, North Carolina, Pennsylvania, Vermont, Washington, West Virginia, and Wisconsin); the right to express and implied agreements (Alaska, Maryland, Nebraska, Oregon, and Wyoming); and the right to express agreements, but no implied agreements or equitable remedies (Minnesota, Kentucky, Michigan, Mississippi, New Hampshire, New Mexico, New York, North Dakota, and Ohio). Id. Other states will not enforce agreements between cohabitating couples (Georgia, Illinois, and Louisiana). Id.

30 PARKMAN, supra note 19, at 57.

31 Fundamental to economics is that people respond to incentives. See N. GREGORY MANKIW, *PRINCIPLES OF ECONOMICS* 7 (3d ed. 2004).

32 One way would be for states to change their divorce laws to eventually require mutual consent for divorce. See Allen M. Parkman, *Reforming Divorce Reform*, 41 SANTA CLARA L. REV. 379, 414 (2001). Since marriage is a status with the grounds for divorce based on the domicile of either spouse, these statutes would have to be enacted in most states for them to effect the incentives facing spouses and that is unlikely to occur. Id. at 380.

33 Id. at 381.
during the relationship. The likelihood increases that the marriage will be a success.

So if unilateral/no-fault divorce discourages a concern for other family members, how do we reverse its perverse incentives? Couples can only provide a credible long-term commitment to each other by eventually making divorce costly. Since this is not possible under existing marital statutes in most states, couples must revert to marriage-like relationships based on a contract. These relationships can be described as a “contractual marriage.” While some definitions of marriage base it on a legal union, the meaning used here is that a marriage occurs when a couple makes a long-term commitment to each other. The partners are described as spouses to emphasize that they are married. Most of the issues addressed here are also appropriate for same-sex couples, although the distinction between statutory and contractual marriage emphasized here is less relevant in most jurisdictions.

The first section of this article presents the basic nature of marriage. This section is followed by a discussion of the costs of divorce that are often ignored by divorcing spouses. The reasons why statutory marriage does not encourage the acts by spouses that will result in the preferred marital outcomes are then presented. Why a contractual marriage may provide a more desirable outcome than statutory marriage for many couples will be developed next. Finally, the article discusses the current status of contracts between cohabitating couples.

---

34 Becker, supra note 13, at 124.
35 Id.
36 Parkman, supra note 32, at 379.
37 Id. at 381.
38 Most states grant a no-fault divorce based on the request of only one spouse. See Ira Mark Ellman & Stephen D. Sugarman, Spousal Emotional Abuse as a Tort?, 55 MD. L. REV. 1268, 1276 n.24 (1996). In only four states (Mississippi, New York, Ohio and Tennessee) is mutual consent required for a no-fault divorce. Id.
39 There are a number of practical guides for cohabitating couples to draft contracts. See Ralph Warner et al., Living Together: A Legal Guide for Unmarried Couples (11th ed. 2001) and Dorian Solot & Marshall Miller, Unmarried to Each Other 137 (2002).
41 Regrettably, with unilateral divorce, some people enter marriage without the expectation that it is a long-term commitment. See Lynn A. Baker & Robert E. Emery, When Every Relationship Is Above Average, 17 LAW & HUM. BEHAV. 439, 446 (1993). Still, traditionally, the key element of marriage was the expectation that it was a long-term commitment. Id.
42 Solot & Miller, supra note 39, at 119.
44 See discussion infra Part III.
45 See discussion infra Part IV.
46 See discussion infra Part V.
47 See discussion infra Part VI.
II. THE BASIC NATURE OF MARRIAGE

A marriage consists of an arrangement into which two people enter with the anticipation that a long-term commitment to each other will improve their welfare.48 While love and physical attraction bring people together, a long-term commitment is usually necessary to complement their attraction to produce a successful marriage.49 It is common to focus on love as the essential element of a successful marriage with the conclusion that either spouse should have access to a divorce when it no longer exists.50 A closer consideration of the attributes of marriage that are most likely to lead to a rewarding intimate relationship are sacrifices on behalf of the relationship, the expectation of reciprocity by the other family members, and commitment by both spouses to the relationship.51 The sacrifices that accompany marriage, especially those associated with parenthood and career adjustments, differentiate it from cohabitation.52 Certainly, most people enter marriage with the expectation that it is a long-term commitment.53 That commitment should encourage the sacrifices and reciprocity that enriches the relationship.

We usually associate marriage with an institution that is created, governed and dissolved based on statutes.54 In the United States, the states have always had the central role in the regulation of marriages.55 Marriage traditionally has been defined as the “voluntary union of a man and a woman to the exclusion of all others”56 and for it to be effective in most states, it must be based on statutes

48 While this approach can be associated with a variety of disciplines, it has been stated in the most rigorous fashion by the economist/sociologist Gary Becker. See BECKER, supra note 13.
49 Before the ready availability of contraceptives, regular sexual activities for many people were restricted to marriage, but that has changed dramatically in recent decades to the point that sex is a less important reason for marriage. For a discussion of the state’s concern about sexual activities outside of marriage, see Laurence Drew Borton, Sex, Procreation, and the State Interest in Marriage, 102 COLUM. L. REV. 1089, 1093 (2002). Moreover, it has decreased the state’s concern about children born outside of marriage. Id.
50 An insightful comment on the physical aspects of marriage is that “If the sex is good, it’s only 3% of a relationship; if it’s bad, it’s 97%.” EDMUND L. VAN DEUSEN, CONTRACT COHABITATION 14 (1974).
51 Making marriage a long-term relationship protected the specialization that traditionally has been associated with childrearing and domestic activities. See BECKER, supra note 13, at 30.
52 For a discussion of the different nature of marriage in contrast to cohabitation, see PARKMAN, supra note 19, at 42.
53 Baker & Emery, supra note 41, at 446.
55 Id. at 34.
56 See, e.g., Hyde v. Hyde, L.R. 1 P & D 130 (1866).
that usually require a license and an authorized official.\textsuperscript{57} Even when a couple creates a marriage informally through a common law marriage, the couple is still bound by the same rules as people who have complied with statutory requirements.\textsuperscript{58} A married couple enters into an arrangement in which they traditionally have had very little control over their rights and obligations during marriage and potentially after its dissolution.\textsuperscript{59} Moreover, marriage is treated as a status rather than a contract resulting in the rights and obligations being based on the domicile of either spouse.\textsuperscript{60} Since there can be a variety of state marital statutes, spouses cannot know the laws that will govern their marriage and potentially its later dissolution.\textsuperscript{61}

While these concepts of sacrifice, reciprocity, and commitment can occur separately, they usually will complement each other so they will collectively be referred to here as a long-term commitment. A long-term commitment to marriage encourages important, but subtle, processes that lie at the foundation of successful marriages, while avoiding critical problems associated with judicial decisions at dissolution.\textsuperscript{62}

Consider first the benefits of a long-term commitment. A credible long-term commitment to a relationship is an important source of psychological comfort and material well-being.\textsuperscript{63} An aspect of short-term relationships such as dating and cohabitation that leaves parties uncomfortable is the recognition that the relationship is not permanent and will not last.\textsuperscript{64} Therefore, they are confronted

\textsuperscript{57} For example, marriage could be contracted in England only by a ceremony after 1753. See Clark, supra note 54, at 24.

\textsuperscript{58} Id. at 45.

\textsuperscript{59} Gregory et al., supra note 18, at 58.

\textsuperscript{60} Some authors have argued that statutory marriage should be treated as a contract rather than as a status to clarify the law that will be applied at dissolution. See F. H. Buckley & Larry Ribstein, Calling a Truce in the Marriage Wars, 2001 U. ILL. L. REV. 561, 562 (2001).

\textsuperscript{61} For a discussion of the problems associated with divorce reform as long as marriage is treated as a status, see Parkman, supra note 32.

\textsuperscript{62} Waite & Gallagher, supra note 11, at 182.

\textsuperscript{63} Stability has been found to be an important source of satisfaction in marriage. See Robert H. Lauer, Jeanette C. Lauer & Sarah T. Kerr, The Long-Term Marriage: Perceptions of Stability and Satisfaction, 31 INT’L AGING & HUM. DEV. 189, 190 (1990). Glenn and Weaver found that for most people marital happiness was the most important area of life’s domain. See Norval D. Glenn and Charles N. Weaver, The Contribution of Marital Happiness to Global Happiness, 43 J. MARRIAGE & FAM. 161, 165 (1981). In fact in many relationships, happiness there was more important than happiness in all other domains combined. Id. Uncertainty and conflict tend to reduce marital satisfaction. See Lonnie R. Snowden, Tracy L. Schott, Suzanne J. Awalt & Jo Gillis-Knox, Marital Satisfaction in Pregnancy: Stability and Change, 50 J. MARRIAGE & FAM. 325, 330 (1988); see also Michael P. Johnson, Commitment to Personal Relationships, in 3 ADVANCES IN PERSONAL RELATIONSHIPS 117 (Warren H. Jones & Daniel W. Perlman eds., 1991). Commitment is also associated with the investment model of relationships that suggest that they are more likely to persist if invested resources increase the costs of ending a relationship. See Caryl E. Rusbult, Commitment and Satisfaction in Romantic Associations: A Test of the Investment Model, 16 J. EXPERIMENTAL SOC. PSYCHOL. 172, 175 (1980).

\textsuperscript{64} Waite & Gallagher, supra note 11, at 45.
with issues such as when and why the relationship will be dissolved.\textsuperscript{65} Generally, people find uncertainty to be an undesirable state.\textsuperscript{66}

A long-term relationship can also increase the material welfare of a couple by enhancing their access to goods and services.\textsuperscript{67} Economists have noted that people do not receive enjoyment from just income, but rather from the process of combining time with income to produce the goods and services that ultimately give them enjoyment.\textsuperscript{68} The items produced with time and income are called commodities.\textsuperscript{69} Marriage can provide an opportunity to increase a couple’s access to commodities.\textsuperscript{70} These commodities can consist of a clean house, gourmet meals, and high-quality children, for example.\textsuperscript{71} A family’s welfare is increased when each member considers the welfare of all family members in making decisions about the commodities to produce.\textsuperscript{72} In the process of producing commodities, married couples benefit from assuming roles and pursuing activities that they would not have pursued if they had remained single.\textsuperscript{73}

Some of these activities involve personal sacrifices based on the expectations of benefits from the ongoing relationship.\textsuperscript{74} The most obvious sacrifices occur due to parenthood and career adjustments.\textsuperscript{75} Parenthood can require at least one parent to make personal sacrifices by limiting his or her career to accommodate childcare responsibilities.\textsuperscript{76} Many married couples can continue to pursue careers and enjoy the same activities as when they were single until they become parents.\textsuperscript{77} While parents may initially assume that they will make equal adjustments to accommodate parenthood, they usually discover that their family’s welfare is improved if one parent adjusts his or her life to assume primary responsibility for childcare, while the other parent places a primary emphasis on income earning. This is essentially driven by the reality

\textsuperscript{65} Id.
\textsuperscript{66} This is clearly evident in financial markets. \textit{See} \textsc{Gabriel Hawawini} \& \textsc{Claude Viallet}, \textsc{Finance for Executives} 29 (2002).
\textsuperscript{67} \textsc{Waite} \& \textsc{Gallagher}, \textit{supra} note 11, at 26.
\textsuperscript{68} Economists have described the items produced by combining time and income as “commodities.” \textit{See} \textsc{Gary S. Becker}, \textit{A Theory of the Allocation of Time}, 75 \textsc{Econ. J.} 493, 495 (1964).
\textsuperscript{69} \textsc{Becker}, \textit{supra} note 13, at 23.
\textsuperscript{70} \textit{Id.} at 82.
\textsuperscript{71} \textit{Id.} at 24.
\textsuperscript{72} \textit{Id.} at 297.
\textsuperscript{73} \textit{Id.} at 43.
\textsuperscript{74} These sacrifices will often result in a spouse limiting a career in a way that restricts their opportunities for on the job training, which has been shown to be an important source of the human capital that ultimately results in higher earnings. \textit{See} \textsc{Gary S. Becker}, \textsc{Human Capital} 30 (3d ed. 1993).
\textsuperscript{75} \textit{See} \textsc{John Barron} \& \textsc{Dan A. Black}, \textit{Gender Differences in Training, Capital, and Wages}, 28 \textsc{J. Hum. Res.} 343, 350 (1993).
\textsuperscript{76} \textit{Id.}
\textsuperscript{77} \textsc{Waite} \& \textsc{Gallagher}, \textit{supra} note 11, at 107.
that higher paying jobs often have attributes such as unexpected overtime and travel that would interfere with childcare responsibilities. Accordingly, if both parents reject flexibility, the family is worse off than if one parent makes that choice.

While this emphasis on childcare can be very important for their family’s welfare, it imposes a cost on the parent making that choice if the marriage is dissolved. An important source of higher incomes is on-the-job training and experience that occurs through employment. Employees who indicate to their employer that they have reduced their commitment to a career—to assume additional parental responsibilities, for example—are less likely to be chosen for income-enhancing opportunities. A parent who leaves the labor force due to childcare responsibilities will forfeit all these opportunities. The decision by a parent to assume these responsibilities is encouraged by commensurate benefits from the love of their children and love and income from the parent who is freed up to place a stronger emphasis on his or her career. However, since those benefits will generally occur in the future, the durability of the marriage is an important factor encouraging these personal sacrifices.

An increasingly important source of potential sacrifices during marriage occurs due to the career adjustments within a two-income household. When a family only consisted of one income earner, the family almost automatically made adjustments to accommodate the employment opportunities of that income earner. With two income earners becoming much more common in families, the adjustment process has become much more complicated. The opportunities that can enhance the career of one spouse may have to be accommodated by adjustments that can be detrimental to the other spouse’s career. Spouses frequently have careers that require them to

---

78 The insight that less convenient employment opportunities tend to pay a higher wage dates back to Adam Smith. See Adam Smith, The Wealth of Nations 100 (Modern Library Edition 1937).
79 Barron & Black, supra note 75, at 350.
80 Becker, supra note 74, at 29.
81 Considerable empirical evidence supports the prediction that people who assume primary responsibility for childcare will receive less on the job training. See Barron & Black, supra note 75, at 345. This phenomenon is often referred to as the “mommy track.” See Felice N. Schwartz, Management Women and the New Facts of Life, 67 Harv. Bus. Rev. 65, 71 (1989).
82 Schwartz, supra note 81, at 66.
83 From 1970 to 1993, the proportion of dual-earner couples increased from 39% to 61% of all married couples. See Anne E. Winkler, Earnings of Husbands and Wives in Dual-Earner Families, 121 Monthly Lab. Rev. 42, 42 (1998).
84 This was due to practical as well as legal concerns. See Clark, supra note 54, at 250. The practical concerns follow from the husband being the primary source of income. Id. Legally, the husband was obligated to support his family and his wife to manage the household. Id.
85 Winkler, supra note 83, at 42.
work long and inflexible hours or to relocate if they expect a higher income or a more rewarding job. The family’s welfare may be enhanced by the other spouse making career adjustments to accommodate these changes. If one spouse has a job that requires him or her to travel frequently, the other spouse may reject similar jobs so that both spouses can be home together more frequently. Relocation will often enhance the income and opportunities of one spouse while having an adverse effect on those of the other spouse. The near-term costs incurred by one spouse have to be balanced against the long-term benefits from the actions of the other family members. Consequently, the durability of the marriage is an important factor in the willingness of the spouses to make the best decisions for the family.

If a couple feels comfortable that they have made a credible long-term commitment to each other, these welfare-enhancing sacrifices are encouraged. Alternatively, if a marriage is viewed as fragile because it can be dissolved unilaterally with potentially only limited compensation for these sacrifices, people become more reluctant to make them with a corresponding deterioration in their family’s welfare. For example, if a marriage can be dissolved easily, parents have incentives to increase their emphasis on their careers and de-emphasize domestic activities forcing their spouse and children to accommodate those choices. The focus on their careers may not be driven primarily by financial necessity or the attractive characteristics of the jobs, but rather as a hedge against the potentially adverse effects of divorce. Even without children, both spouses may focus on their careers to the detriment of their overall welfare. They might be better off with less income, but more time together. In effect, with a credible long-term commitment to marriage, spouses are encouraged to

---

87 Adam Smith was the first to note that jobs differ in their intrinsic characteristics. Fewer workers are willing to accept positions with less attractive characteristics, so adjusted for other characteristics such as education and experience, the workers willing to work under less desirable conditions will be paid more. See Lloyd G. Reynolds et al., Labor Economics and Labor Relations 207 (9th ed. 1986).
88 See Rusbult, supra note 63, at 175.
89 Id.
90 Id.
91 Id.
92 Parkman, supra note 17, at 70.
93 Id. at 75.
94 While many jobs are interesting and fulfilling, the decline in retirement age as incomes have increased suggests that many people do not find it difficult to leave the labor force. See Murray Gendell & Jacob S. Siegel, Trends in Retirement Age by Sex, 1950-2005, Monthly LAB. REV. 22, 24 (July 1992). For example the labor force participation rate for men 60 to 64 years of age has declined from 83% to 55.5% over the period between 1950 and 1990. Id.
make decisions based on the best interest of all affected parties with the understanding that reciprocal acts will justify their actions.\textsuperscript{96} If marriage can be dissolved unilaterally, there is an incentive to focus more narrowly on one’s own self-interest.\textsuperscript{97}

In summary, marriages benefit from a credible long-term commitment. This commitment is important because it encourages people to take steps during marriage that may not necessarily be in their short-term, narrowly-defined self-interest, but because reciprocal acts of other family members is in everyone’s long term best interest.

III. THE COST OF DIVORCE

The laws governing divorce have a much more profound effect on the quality of on-going marriages than is commonly recognized.\textsuperscript{98} Not only do the laws affect the dissolution of marriage, they also have a significant effect on on-going marriages as they influence the incentives facing spouses.\textsuperscript{99} Spouses are most likely to make a credible commitment to their marriage if they anticipate that they will be compensated for any costs that they incur because of that commitment.\textsuperscript{100} Not all marriages are successful.\textsuperscript{101} Still, a divorce will only increase social welfare when the benefits of it to all affected parties exceed the costs to those parties.\textsuperscript{102} Alternatively, if spouses seeking a divorce are not confronted with all the costs of the choice, the divorce may reduce social welfare as the costs to the other parties exceed the benefits to the person seeking the divorce.

It is important that divorcing spouses be confronted with the costs associated with a divorce. Current statutes seldom require courts to consider all costs.\textsuperscript{103} For example, the costs incurred by spouses as a result of limiting a career are seldom adequately considered at divorce.\textsuperscript{104} In addition, there are important, but subtle, costs that a divorcing spouse currently does not have to consider at

\textsuperscript{97} Id.
\textsuperscript{98} See Parkman, supra note 19, at 19.
\textsuperscript{99} Id.
\textsuperscript{100} A central conclusion of economics is that people respond to incentives. See Mankiw, supra note 31, at 7.
\textsuperscript{101} Sociologists have estimated two-thirds of recent first marriages end in divorce. See T.C. Martin & L. Bumpass, \textit{Recent Trends in Marital Disruption}, 26 DEMOGRAPHY 37 (1989).
\textsuperscript{102} See Becker, supra note 13, at 331.
\textsuperscript{103} See Parkman, supra note 32, at 387.
\textsuperscript{104} See Parkman, supra note 21, at 86.
divorce frequently resulting in a reduction in social welfare if a divorce occurs. If divorce is available unilaterally, the divorcing spouse will often not have to address these costs when considering whether to dissolve the marriage.

First are search costs. Companionate marriage has made the determination of a desirable mate much more difficult. When spouses assumed much more specialized roles in marriage, individuals could increase their welfare by marrying a broad range of people. There has been a convergence in the opportunities available to men and women as women are less dependent on men for income and men less dependent on women for household services. With the resulting reduction in the gains from specialization within marriage, it has become increasingly important for a successful marriage that spouses love and communicate with each other. In that environment, many people have found that it is more difficult to find an acceptable spouse. While most people want to marry, the frustration associated with the difficulty of finding a desirable mate is reflected in the increase in the median age at first marriage for both men and women. Searching for a desirable mate is potentially a long, costly and frustrating process. Most marrying couples hope that they will never have to go through that process again. However, if a marriage can be dissolved easily and at a low cost, one spouse—the divorcing spouse—can decide that the benefits of establishing a new relationship exceed the costs. Meanwhile, the divorced spouse is being forced to incur the search costs associated with establishing a comparable relationship. These costs exist even if the divorced spouse is indifferent to the divorcing spouse.

106 For example, on the American frontier, marriages were arranged without the parties knowing each other because of the gains that the parties expected from a marriage to essentially anyone. See RAY ALLEN BILLINGTON, AMERICA'S FRONTIER HERITAGE 215 (1974).
107 The process by which spouses attempt to improve the quality of their marriage through empathy and understanding has been described as their giving “gifts.” See Allen M. Parkman, The Importance of Gifts in Marriage, 42 ECONOMIC INQUIRY 483, 483 (2004).
108 Surveys consistently show that most people view having a happy marriage as one, if not the most important, of life’s goals. See Glenn, supra note 25, at 87. People also respond that they plan on eventually marrying. See Arland Thornton & Linda Young-DeMarco, Four Decades of Trends in Attitudes Toward Family Issues in the United States: The 1960s Through the 1990s, 63 J. MARriage & FAM. 1009, 1018 (2001).
109 The median age at first marriage increased for both men and women between 1970 and 2000. U.S. BUREAU OF THE CENSUS, AMERICAN FAMILIES AND LIVING ARRANGEMENTS 9 (2001). For women it increased from 20.8 to 25.1, while for men it increased from 23.2 to 26.8. Id.
110 The party who initiated a divorce is much more likely to remarry quickly than is the other spouse. See Megan M. Sweeney, Remarriage and the Nature of Divorce: Does It Matter Which Spouse Chose to Leave?, 23 J. FAM. ISSUES 410, 411 (2002).
111 Five years after the dissolution of a first marriage, less than 50% of women divorced between 1980 and 1984 had remarried. See U.S. BUREAU OF THE CENSUS, First Marriage Dissolution and
Indifference may not be the case resulting in the second cost of divorce that is associated with the loss of companionship.112 While the divorcing spouse has obviously decided that other relationships are superior to the current one, the divorced spouse may still be attracted to their spouse with the result that the divorce will impose a cost on him or her. Social scientists have described the bonds that develop in a marriage as marriage-specific capital.113

Last is the cost of divorce to the children. Child support payments are only intended to cover the financial costs of the children,114 but there are additional costs that children may incur as a result of their parents’ divorce. No one would encourage the continuation of an abusive relationship, but many divorces occur in a household in which that is not the problem.115 Researchers have shown that many divorces occur in households in which the conflict between the spouses is not extreme.116 After divorce, the children will have more limited access to their parents, while frequently having to live within a household in which the lone parent will be over-extended.117 Growing up in a single-parent household or even in one with a stepparent has been shown to result in poorer results than growing up with one’s biological parents.118 If the quality of children’s lives deteriorates after divorce, that will not only impose a cost on them, but also will impose a cost on the custodial parent.

In sum, a divorce should only occur if the benefits of the divorce to all affected parties exceed the costs. Social welfare is reduced when a divorcing spouse must consider only his or her benefits and costs, rather than those of all affected parties. However, knowledge of this possibility can encourage spouses to limit their commitment to their marriage. The only way to create a credible long-term commitment to marriage is to force a spouse considering divorce to address all of the costs of divorce to all affected parties.

---

112 With the decrease in gains from couples assuming specialized roles during marriage, it has become increasingly important that they are compatible and that they enjoy each others company. See WALLERSTEIN & BLAKESLEE, supra note 105, at 202.
113 See BECKER, supra note 13, at 329.
114 Child support attempts to make the parent’s share in the financial cost of raising their child even if they are no longer living together. See Marsha Garrison, The Goals and Limits of Child Support Policy, in CHILD SUPPORT: THE NEXT FRONTIER 16 (J.T. Oldham et al. eds., 2000).
116 Id. at 5.
118 Id. at 29.
III. STATUTORY MARRIAGE

The statutory marriage normally available in the United States does not force divorcing spouses to consider all of the costs associated with divorce. Unilateral divorce and inadequate compensation at divorce for costs incurred during marriage do not provide adequate incentives for a long-term commitment to marriage. Up until approximately thirty-five years ago, residents of the United States had essentially one marital option, which was a marriage that was based on the expectation that couples would be married for their joint lives. Divorce was only available due to specific acts of a spouse with the fault grounds for divorce being adultery, cruelty or desertion. During that period, most divorces were actually based on mutual consent using fabricated testimony to establish the fault grounds. Fault divorce was not a perfect system because it could lock people into marriages that they wanted to dissolve. However, it was probably an acceptable system at that time, because the potential costs of divorce to all the family members were high as men could seldom support two families and women were unlikely to be able to support a family at all.

Over recent decades the laws governing marriage have changed dramatically in most industrial countries. Most important has been the change in the grounds for dissolution and the basis for the financial and custodial arrangements at that time. Marriage has changed from being a relationship that was difficult to dissolve to one that can easily be terminated. The grounds for divorce shifted from fault, which was in effect mutual consent, to no-fault, which

---

119 See Parkman, supra note 36, at 387.
120 Id. at 380.
122 CLARK, supra note 54, at 496.
123 Collusive practices were common under fault divorce. See MAX RHEINSTEIN, MARRIAGE, STABILITY, DIVORCE AND THE LAW 247 (1972); see also Donald Schiller, A Survey of Mental Cruelty as a Ground for Divorce, 15 DePaul L. Rev. 159, 163 (1965).
124 CLARK, supra note 54, at 497.
125 Some authors have suggested that there has been a “privatization” of family law. See Lynn D. Wardle, Relationships Between Family and Government, 31 CAL. WESTERN INT. L.J. 1, 1 (2000) and LINDA J. WAITE & MAGGIE GALLAGHER, THE CASE FOR MARRIAGE 143 (2000). Nothing could be further from the truth. While unilateral divorce has given one spouse much more control over the marriage, it has been at the expense of the other spouse losing control. Under mutual consent divorce, the spouses had much more control over their marriage and were in a position to often ignore the applicable statutes in their negotiated agreements. With unilateral divorce, either spouse can dissolve the marriage and then the courts are called upon to apply the statutes that apply to the financial and custodial arrangements at divorce.
126 In our more complicated world, some authors have questioned the applicability of a one-size-fits-all marriage that is currently available by statute. See Barbara Stark, Marriage Proposals: From One-Size-Fits-All to Postmodern Marriage Law, 89 CAL. L. REV. 1479, 1493 (2001).
provides spouses with the ability to dissolve their marriage unilaterally. This shift has had profound, but subtle, effects as these laws have a strong influence on the incentives facing married couples and—to a great extent—the quality of their marriage. The financial arrangements at divorce also shifted away from fault to an equitable—usually equal—division of a limited range of property and limited spousal support. These financial arrangements provide inadequate compensation for costs incurred by spouses who limit their career for the benefit of their family and ignore the potential search and companionship costs of the divorced spouse and costs incurred by the children.

If a long-term commitment is so important for a successful marriage, one has to wonder why society so willingly accepts unilateral divorce. Changes in society reduced the benefits of a long-term commitment to marriage for some people. With fewer gains, their current marriage became less attractive to some spouses. The likelihood increased that some people, either because they initially made a mistake, or later experienced a change in circumstances, concluded that they would be better off dissolving their marriage.

Most fault divorces were negotiated in an environment in which the spouses could ignore the financial and custodial arrangements prescribed by law arriving at their own arrangements. These negotiated divorces only occurred when both spouses concluded—not necessarily amiably—that they were better off divorced. Part of the inducement for participation by an initially unwilling spouse was compensation from the initiating spouse to cover the costs that the unwilling spouse expected to incur. These divorces often left some people, especially members of the legal profession, uncomfortable as the couples frequently had to fabricate testimony to establish the fault grounds—usually cruelty—to obtain a divorce. Concern developed that people were being locked into marriages that they wanted to end, but could not because their spouse

---

127 COTT, supra note 121, at 206.
128 See CLARK, supra note 54, at 590.
129 See Parkman, supra note 21, at 81.
131 Id.
134 Id. at 952.
135 Id. at 953.
136 See RHEINSTEIN, supra note 123, at 8. The American Bar Association continues to be one of the most ardent defenders of unilateral divorce. Press Release, ABA, Family Law Attorneys Reject Return to Fault-Based Divorce Finds ABA Survey (October 18, 1996).
would not participate in a divorce. The resulting reform movement produced unilateral, no-fault divorce. Seldom has the subtler cost of unilateral divorce been recognized as it is a significant deterrent to spouses making a credible long-term commitment to their marriage.

While spouses undoubtedly continued to assure their partners of commitment to their marriage, the credibility of their assurances were diluted by unilateral divorce. No assurances—written or oral—can override the state’s preemption of the grounds for divorce. With unilateral divorce, negotiations—at least as to the grounds for divorce—were no longer necessary.

An important repercussion of unilateral divorce is the increase in the importance of the statutes governing the financial and custodial arrangements at divorce as the courts were called upon to apply these statutes. Under fault/mutual consent divorce, these statutes could be ignored. That was no longer the case with unilateral/no-fault divorce as the need for negotiations was dramatically reduced. These statutes do not require the courts to recognize some of the costs of divorce or to accurately estimate the value of the property affected by the marriage. While a court can divide the couple’s easily identifiable assets such as their house, car and financial wealth, there are numerous costs of divorce which it cannot adequately determine. The courts have been less capable of considering the search, companionship and children costs of divorce as well as determining the effect of the marriage on the careers of the spouses.

It was not recognized that the adoption of unilateral divorce, like most choices that we have to make, faces tradeoffs. The tradeoff for unilateral divorce is that while making it easier to dissolve a marriage can be important for people who discovered that they made a mistake and now want to dissolve their marriage; it reduces the incentives for other people to incur

---

137 Often the fault grounds did not exist or they were difficult to prove. See Lenore J. Weitzman, The Divorce Revolution 26 (1985). This gave the spouse who did not want the divorce substantial power. Id.
138 Mnooin & Kornhauser, supra note 133, at 953.
139 Today only four states (Mississippi, New York, Ohio, and Tennessee) require mutual consent for a no-fault divorce. See Ellman & Sugarman, supra note 38, at 1270. The deterrent effect of unilateral divorce is discussed in Parkman, supra note 19, at 10.
140 Clark, supra note 54, at 496.
141 Mnooin & Kornhauser, supra note 133, at 954.
142 Parkman, supra note 21, at 51.
143 Id. at 52.
144 Id.
145 Id. at 69.
146 Id. at 53.
147 Id. at 55.
148 For a discussion of no-fault divorce in America, see Weitzman, supra note 137, at 15.
sacrifices for the benefit of their marriage. In a triumph of the obvious over the subtle, the viewpoint of those people wanting out of unsuccessful marriages (the obvious) overcame the viewpoint of those people who wanted the benefits that flowed from a long-term commitment to their marriage (the subtle).

In sum, consider the situation in which people find themselves in a statutory marriage in the United States. First, in most states either spouse can dissolve the marriage unilaterally at any time. Second, while the couple can contract over some of the financial arrangements at divorce, they have little control over the ongoing allocation of responsibilities and rights during marriage. Third, if they divorce, the statutory financial arrangements will normally provide for an equal division of identifiable property usually ignoring important costs that may have occurred due to the marriage. Psychological costs to the divorced spouse and the children are ignored as are the career effects on the custodial parent. Fourth, provisions for child support generally only address the direct financial costs of raising the children and the non-custodial parent will have little control over how child support funds are spent. Last, to the extent that the financial arrangements at divorce consist of periodic payments, there exists the on-going hassle of collecting the payments. There must be a better system.

V. CONTRACTUAL MARRIAGE

Contractual marriage can improve on the outcomes resulting from statutory marriage by encouraging people to search more diligently for a partner, and then during their marriage to more conscientiously make decisions that will increase the likelihood that the marriage will succeed. Central to this process is the need to confront spouses with the potential costs of divorce for all parties.

---

149 Id.
150 PARKMAN, supra note 19, at 1.
151 For a discussion of contracting alternatives available to spouses, see GREGORY, ET. AL., supra note 18, at 77.
152 PARKMAN, supra note 19, at 8.
153 Id. at 176.
154 Id. at 174.
155 For example, in 1999 only 74% of custodial parents with a child support agreements or awards received any payments. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 373, tbl. 566 (2003).
156 It is suggested here that couples committed to a long-term relationship have two alternatives: a statutory marriage and a contractual marriage. It seems unfair to view as “married” people who have rejected these two alternatives and yet that is the approach taken by the American Law Institute. AMERICAN LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS 907 (2002). In Chapter 6, it addresses domestic partnerships creating that
The contract that is most likely to accomplish these goals would provide for easy, low-cost dissolution early in the marriage followed by more costly dissolution later in the marriage. It, therefore, would provide for termination at-will early in the marriage followed by larger compensation as the duration of the relationship increases. Termination at-will is appropriate early in the marriage as the costs of dissolution are low and the potential benefits high. The costs are low because the spouses have probably only made minor adjustments in their pre-marriage lifestyle at that time. Meanwhile, the benefits of dissolution are potentially high, because with new information a spouse may decide that this relationship is less attractive than anticipated and that the person would be much better off in another relationship. A provision for a low cost dissolution of marriage during this period should address some of the concerns of those who worry about people being locked into unsuccessful marriages.158

As the marriage starts to benefit from sacrifices by the spouses such as those due to parenthood or career adjustments, then the amount of compensation should increase. A marriage based on a contract should provide for two types of compensation.159 First is compensation for identifiable sacrifices such as limiting a career to provide childcare. The contract might provide for a financial obligation to the spouse incurring the sacrifice at that time. Depending on the couple’s financial condition at that time, there could be a combination of a financial transfer then or the recognition of a future obligation. These funds would become that spouse’s separate property. If the marriage continues, that spouse would be expected to contribute those funds to family expenditures. Alternatively, if the marriage is dissolved, that spouse would take those funds with him or her. Second, there would be compensation for unidentifiable costs of dissolution. There are costs that someone who has committed to a relationship will incur if it is dissolved; the most obvious being the search, companionship, and children costs noted above. Therefore, the contract could provide that if a spouse wanted a divorce, then he or she would have to compensate the other spouse an amount that would increase with the duration of the marriage.

status with its rights and obligations for couples who have lived together for a certain period even if that was not their intent. Id. For a discussion of the problems associated with this chapter, see David Westfall, Unmarried Partners and the Legacy of Marvin v. Marvin: Forcing Incidents of Marriage on Unmarried Cohabitants: The American Law Institute’s Principles of Family Dissolution, 76 NOTRE DAME L. REV. 1467, 1467 (2001).

157 From an economic perspective, people weigh the costs and benefits of alternatives choosing those with the highest gain. If people are confronted with less than the full cost of an alternative, they may end up making choices that do not increase social welfare, e.g. the net gains may be negative. See MANKIW, supra note 31, at 6.

158 This has certainly been one of the most compelling arguments for no-fault divorce. See WEITZMAN, supra note 137, at 68.

159 For practical guides to drafting marriage-like agreements, see WARNER, ET AL, supra note 39, at 122 and SOLOT & MILLER, supra note 39, at 137.
Statutes currently confer substantial rights on married couples. Since a couple using a contract is not legally married, they will have to prepare documents to cover situations covered by statute for legally married couples. Some examples would be a health care proxy, a durable power of attorney for financial management and a will.

It is important to recognize the evolution of the commitment envisioned here. People date with no legal and few socially-imposed obligations to each other. The commitment to each other is limited and there are normally no long-term expectations. Eventually, they might conclude that they have found a person to whom they might be willing to make a long-term commitment. Marriage becomes attractive at that time. Still, the couple is becoming more familiar with each other and with familiarity their expectations may change. We can never be certain of the effects of decisions about the future, but at some point a couple will benefit from more strongly discouraging the dissolution of the relationship. A contract can be used to accomplish that goal.

As with commercial contracts, some people may eventually regret that they entered into the contract. The costs of forcing people to conform to the conditions of contracts must be balanced against the costs of permitting them to not fulfill their obligations. A marriage contract entails more uncertainty about performance than most commercial contracts. In recognition of those uncertainties, the process described here encourages the parties to make informed decisions. During the dating and no-fault dissolution phases of their relationship, they can dissolve the relationship easily at a low cost. However, to continue to permit the easy dissolution of the relationship, when it would benefit from a long-term commitment, is potentially very costly. Weighing the costs and benefits, the courts have not hesitated to impose remedies for the breach of commercial contracts and similarly the costs and benefits of the marital contract

---


161 SOLOT & MILLER, supra note 39, at 142.

162 Id.

163 People can realize that they are going to be unable to perform the obligations specified in a contract. A definite and unconditional repudiation of a contract by a party that is communicated to the other is a breach of a contract that creates an immediate right of action. See A. L. CORBIN, CORBIN ON CONTRACTS 940 (1952).

164 Contract damages encourage efficient outcomes by confronting parties with performance or compensation. Normally, contract remedies do not require parties to perform under the contract, but rather they are given the option of performing or compensating the non-breaching party for the costs that they have incurred due to the breach. See RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 130-40 (5th ed. 1998); see also CORBIN, supra note 163, at 160.

165 As a result, it has been suggested that a marriage agreement should be treated as a relational contract. See Elizabeth Scott & Robert E. Scott, Marriage as a Relational Contract, 84 VA. L. REV. 1225, 1225 (1998).
suggest that eventually dissolution should become costly to an initiating spouse.166

A contractual marriage provides increased flexibility and predictability compared with a statutory marriage.167 A contract provides increased flexibility because spouses currently have only a limited ability to modify the perverse provisions of a statutory marriage and then usually only with regard to some of the financial arrangements at divorce.168 The courts have traditionally been reluctant to interfere in ongoing marital relationships making it difficult for married couples to establish unique rights and responsibilities for their marriage.169 Pre- and post-marital agreements between spouses most commonly deal with issues of property and financial support for one or both spouses describing the property and support to which each will be entitled in the event of divorce or death.170

Contractual marriage can be subject to the flexibility provided contracting parties under other circumstances. A contractual marriage can address some of the common problems that marriages often face. Contracting parties, so long as they avoid the sexual aspects of their relationship, can create a contract specifying their rights and responsibilities in most states.171 Provisions dealing with common concerns such as spousal abuse and drug use can reduce or eliminate the compensation of the other party at dissolution. To encourage the resolution of marital disputes, the contract could call for family counseling prior to dissolution. Adjustments in the compensation required at dissolution can be used to encourage this counseling. Rather than being the basis for litigation, a contract can be an important planning tool.172 For example, a couple may want to specify their rights and responsibilities with regard to conflicting educational and career opportunities.

166 POSNER, supra note 164, at 131.
167 That inflexibility is reflected in discretion given cohabitating couples to draft their own agreement. See WARNER ET AL., supra note 39, at 7; see also SOLOT & MILLER, supra note 39, at 7.
168 See LAURA W. MORGAN & BRETT R. TURNER, ATTACKING AND DEFENDING MARITAL AGREEMENTS 448 (2001). While the Uniform Premarital Agreement Act, 9U.L.A. 35 (West 2001 & Supp. 2002), Section 3(a)(8) provides for couples to contract with respect to “any other matter, including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty,” concerns about agreements eventually being held to be unconscionable limits the application of this Act. See HARRY D. KRAUSE, FAMILY LAW 102 (3rd ed. 1995).
169 See CLARK, supra note 54, at 14.
170 ABA, GUIDE TO FAMILY LAW 12 (1996).
172 While it is suggested here that people should attempt to draw up contracts that can be enforced if they are breached, in many cases people draw up agreements that are so indefinite that they are unenforceable as contracts. See Robert E. Scott, A Theory of Self-Enforcing Indefinite Agreements, 103 COLUM. L. REV. 1641, 1642 (2003). These agreements reflect the use of contracts for planning as they rely on self-enforcement rather than a legal mechanism. Id.
The predictability of a contractual marriage follows from the certainty of contract law in contrast to family law. Contractual principles are established either by the common law or the parties’ choice of law which shall govern their contract. Alternatively, statutory marriage is treated as a status resulting in the marital laws to which a couple is subjected being those of the state in which either spouse is domiciled. Consequently, spouses cannot know with certainty the statutes that will be applied if their marriage is dissolved. Moreover, in contrast to a commercial contract, the courts will scrutinize pre- and post-marital agreements, for example, if at divorce the less wealthy spouse cannot be self-sufficient and the agreement provides little property or support. Then in most states, the courts are likely to step in and order some distribution of property or support in favor of the less wealthy spouse. Ex post, a commercial contract may turn out to be less fair than had been initially contemplated, but it is not normally the prerogative of courts to adjust its provisions due to the change in the individuals’ circumstances that do not affect the performance of the contract.

Still most parties probably do not want to micromanage their marriage. The most important component of a contractual marriage is the provision for compensation for making a commitment to the marriage if it is dissolved which, in turn, creates important incentives during marriage. Similar to personal service contracts, a provision that neither party can terminate the relationship is unenforceable. Therefore, the incentives created in the contract will have to be based on transfers during marriage or liquidated damages at dissolution. A contractual marriage can be viewed as a relational contract that tends to be vague about the specific responsibilities of the parties with the default clause having a central role. The default clause in a contractual marriage might provide for transfers during marriage and a variety of liquidated damage provisions that compensate the spouses for sacrifices incurred during the marriage.

As with most commercial contracts, the initial goal of the parties is performance of the contract rather than to collect under the liquidated damages

174 Marvin, 557 P.2d at 122.
175 The laws of the state in which a couple is married only creates a status, while the ongoing marriage is governed by the laws of the parties’ domicile. See Krause, supra note 168, at 90.
176 Courts have applied a fairness as well as an unconscionably test to antenuptial agreements. Morgan & Turner, supra note 168, at 422.
177 Id. at 424.
180 See Scott & Scott, supra note 165, at 1306.
provisions. The same is true with a contractual marriage. The intent will not be to see how much will be transferred when the marriage is dissolved, but to provide an incentive structure that encourages a successful relationship that is never dissolved. One way to encourage commitment and discourage divorce is eventually to make divorce more costly. One problem with statutory marriage is that any attempt to provide for liquidated damages at divorce will be closely scrutinized.

Some have noted that a provision including a financial transfer if there is divorce can be viewed as encouraging divorce. However, the current divorce laws already encourage divorce for opportunistic spouses. Current marital laws tend to systematically under-compensate spouses for sacrifices during marriage, so spouses who make those sacrifices are treated unfairly at divorce. Having the ability to avoid compensation for these sacrifices provides a windfall for some divorcing spouses. The situation of many divorced women who committed themselves to being housewives and mothers is well known with the injustices being reduced as married women attempt to maintain their careers during marriage. If the compensation attempts to compensate the spouses for sacrifices during the marriage, the financial arrangement at dissolution should be much fairer than today. A spouse who is considering the dissolution of the marriage should be confronted with the alternatives of continuing the marriage, the quality of which has benefited from the commitment of their spouse, or compensating their spouse for costs of this commitment.

The spouse who would prefer to continue the marriage, therefore, will either have their marriage or will have compensation for relying on their long-term commitment. If their goal is a successful relationship, the larger the transfer the greater is the incentive to make sacrifices for the benefit of the relationship. Because of the potentially large costs of dissolution for people who have made a substantial commitment to their marriage, these damage provisions may also

181 Contracts serve a very important role in the efficient functioning of markets. See Posner, supra note 164, at 101.
182 The traditional view was that antenuptial agreements could control property division upon death, but any attempt to control the consequences of divorce was void as against public policy. This changed with Posner v. Posner, 233 So. 2d 381 (Fla. 1970), and now these contracts can be valid. Id. at 383. A major concern is that a contract will eventually be declared void as against public policy with the most common reason being that it is viewed as encouraging divorce. See Morgan & Turner, supra note 168, at 380. What is sometimes not appreciated is that a provision that encourages divorce by one party deters it for the other. Id.
183 Liquidated damages in a contract can always create this problem, and it can be a special concern in marital agreements. See Jeffrey Evans Stake, Mandatory Planning for Divorce, 45 Vand. L. Rev. 397, 440 (1992). The key is to provide for damages that are an accurate reflection of the costs that will be incurred by the party breaching the agreement. Id.
184 See Parkman, supra note 21, at 62.
185 This can be particularly unjust when a spouse has sacrificed a career for the benefit of the marriage and then is not compensated at divorce. Id. at 75.
186 Id.
have to be substantial. Courts do not currently appreciate the full costs of divorce, so it is less likely that a court will enforce liquidated damages based on a pre- or post-marital agreement in a statutory marriage than in a contractual one. 187

Some authors have already recognized the potential importance of contracts between cohabitating couples. Lenore Weitzman suggests that cohabitating couples need to clarify rights and obligations with respect to whether either partner has rights to the property and income of the other; which assets each partner owns; whose debts are whose; titles to assets acquired together and the quid pro quo for the agreement that makes the agreement enforceable. 188 While these contracts have usually been envisioned as dealing with the allocation of wealth acquired during a relationship, a logical extension is that these contracts can be an important source of incentives to encourage actions that benefit a long-term relationship.

An important provision of a contractual marriage in states that provide for common law marriage is to make it clear in the contract that the couple is not married in the sense that the state statutes apply. 189 A common law marriage is treated similar to marriages created with a license and a ceremony, which many couples might want to avoid. 190

In sum, a contractual marriage provides flexibility and predictability that is unavailable in a statutory marriage. Most important are provisions for transfers based on costs incurred during marriage that should be the basis of compensation if the marriage is dissolved. The potential for compensation for sacrifices should encourage the long-term commitment that is central to a successful marriage.

VI. THE CURRENT STATUS OF CONTRACTUAL MARRIAGE

Because of romantic notions of marriage and the ignorance of the perverse incentives of statutory marriage, people generally have not considered contractual marriage. Still, many states have already recognized the right of couples to enter into enforceable contracts. 191 This has been particularly important for same-sex couples, who traditionally have been precluded from

187 GREGORY ET AL., supra note 18, at 82.
188 WEITZMAN, supra note 137, at 255.
189
CLARK, supra note 54, at 45.
Gordon, supra note 28, at 247.
statutory marriage in all states.\textsuperscript{192} We are concerned with the status of contracts between the parties and those with third parties.

A. Contracts Between Parties

Traditionally, agreements between unmarried couples that attempted to create rights and obligations similar to marriage were unenforceable.\textsuperscript{193} However, the recent trend has been to enforce contracts between cohabitating adults unless the agreement depends solely on unlawful meretricious relations.\textsuperscript{194} Courts have been willing to enforce contracts between unmarried couples based on common law principles of implied contract, equitable relief and constructive trust.\textsuperscript{195} Most of these cases deal with contracts for distributing assets when a relationship ends. Still, the decisions imply that the courts will enforce contracts specifying transfers during marriage and liquidated damages at dissolution.

The trend to enforce contracts between cohabitating adults can be most clearly illustrated with the seminal case of \textit{Marvin v. Marvin}.\textsuperscript{196} In that case, the singer Michelle Triola (who eventually changed her name to Michelle Marvin) lived with the actor Lee Marvin for six years and, when he “compelled” her to leave his house in 1970, she sued saying that the two of them had entered into an oral agreement that they would combine their efforts and earnings and share them equally.\textsuperscript{197} Moreover, she also argued that they agreed that all property accumulated as a result of their efforts would be combined.\textsuperscript{198} The trial court dismissed her complaint.\textsuperscript{199} After viewing the prior cases, the appellate court reversed and remanded the case stating:

Adults who voluntarily live together and engage in sexual relations are nonetheless as competent as any other persons to contract respecting their earnings and property rights. Of course, they cannot lawfully contract to pay for the performance of sexual services, for such a contract is, in essence, an

\textsuperscript{192} A few states have extended some of the rights of married couples to unmarried couples. See William C. Duncan, \textit{Domestic Partnership Laws in the United States: A Review and Critique}, 2001 BYU L. REV. 961, 963 (2001). Hawaii provided limited rights to “reciprocal beneficiaries” and Vermont permits the creation of “civil unions,” while California provides limited rights to same-sex couples and couples over sixty-two-years-old. \textit{Id.}


\textsuperscript{194} \textit{Id.}


\textsuperscript{196} 557 P.2d 106, 106 (Cal. 1976).

\textsuperscript{197} \textit{Id.} at 110.

\textsuperscript{198} \textit{Id.}

\textsuperscript{199} \textit{Id.} at 111.
agreement for prostitution, and is unlawful for that reason. But they can agree to pool and to hold all property acquired during the relationship in accord with the law governing community property.200

On remand, the trial court again rejected Michelle Marvin’s other contract claims concluding that the parties had agreed to nothing more than “to live together as unmarried persons so long as they both enjoyed their mutual companionship and affection.”201 The trial court, however, did award her $104,000 for rehabilitation.202 Finding no legal basis for the rehabilitation award, the appellate court on review deleted the rehabilitative award.203

While courts have become more willing to enforce contracts between unmarried couples, a range of situations exists.204 At one extreme are Washington and Nevada as they have begun to treat some unmarried opposite-sex couples as if they were married for purposes of property claims at the end of their relationship. In Connell v. Francisco,205 a couple lived together from 1983 to 1990 combining a personal and business relationship.206 The court held that income and property acquired during a meretricious relationship should be characterized in a similar manner as income and property acquired during marriage.207 Traditionally, a meretricious relationship had been associated with a sexual relationship making any contract illegal.208 In this Washington case, a meretricious relationship is defined as “a stable, marital-like relationship where both parties cohabit with knowledge that a lawful marriage between them does not exist.”209 In a Nevada case, Western States Construction v. Michoff,210 a couple lived together for nine years in a personal and business relationship.211 The woman left the relationship and sued for half of the couple’s assets.212 The trial court held that express and implied agreements existed between the parties

200 Id. at 116.
202 Id. at 874.
203 Id. at 877.
204 For a summary of cases, see George L. Blum, Annotation, Property Rights Arising From Relationship of Couple Cohabiting Without Marriage, 69 A.L.R. 5th 219, 226 (1999).
206 Id. at 832.
207 Id. at 836.
208 For example, in Marvin v. Marvin, 557 P.2d 106, 109 (Cal. 1976), the court concludes that courts should enforce express contracts between non-marital partners except to the extent that the contract is explicitly founded on the consideration of meretricious sexual services.
209 Connell, 898 P.2d at 834.
211 Id. at 1221.
212 Id. at 1222.
to acquire and hold the properties as if they were married.\textsuperscript{213} It applied the community property laws by analogy.\textsuperscript{214} At the other extreme are courts like those in Illinois and Georgia that have refused to enforce agreements between co-habiting couples even if the agreements are in writing. In \textit{Hewitt v. Hewitt},\textsuperscript{215} the couple had lived together for 15 years in an unmarried relationship that had resulted in three children.\textsuperscript{216} Initially, the wife filed for divorce and then amended her complaint alleging equitable relief, implied contract, fraud and unjust enrichment.\textsuperscript{217} The Illinois Supreme Court held that an express oral contract between an unmarried couple was unenforceable because “plaintiff’s claims are unenforceable for the reasons that they contravene the public policy, implicit in the statutory scheme of the Illinois Marriage and Dissolution of Marriage Act, disfavoring the grant of mutually enforceable property rights to knowingly unmarried cohabitants.”\textsuperscript{218} Part of the court’s justification for that decision was the Illinois legislature’s rejection of no-fault divorce at that time noting that private agreements were terminable at will.\textsuperscript{219} While Illinois eventually passed a no-fault divorce statute,\textsuperscript{220} this case has not been reversed.\textsuperscript{221}

Georgia courts have also rejected contracts between unmarried couples. In \textit{Rehak v. Mathis},\textsuperscript{222} an unmarried couple lived together for 18 years.\textsuperscript{223} When Hazel Rehak was told to vacate the house, which was only in the man’s name, she sued on an equitable action seeking an award of $100 per month for the time that she lived with and took care of Archie Mathis as well as exclusive title to the house.\textsuperscript{224} The trial court granted a summary judgment based on cohabitation being illegal consideration.\textsuperscript{225} The trial court’s decision was upheld on appeal.\textsuperscript{226} In many jurisdictions, courts have examined the factual circumstances underlying unmarried cohabitating relationships and have regularly enforced express and implied contracts between unmarried cohabitants and provided

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{213} \textit{Id.}
\item\textsuperscript{214} \textit{Id.} at 1223.
\item\textsuperscript{215} 394 N.E.2d 1204 (Ill. 1979).
\item\textsuperscript{216} \textit{Id.} at 1205.
\item\textsuperscript{217} \textit{Id.} at 1204.
\item\textsuperscript{218} \textit{Id.} at 1211.
\item\textsuperscript{219} \textit{Id.} at 1210.
\item\textsuperscript{220} 750 ILL. COMP. STAT. 5/401 (2003).
\item\textsuperscript{221} A later case, \textit{Spafford v. Coats}, 455 N.E.2d 241, 244 (1983), distinguishes its decision from \textit{Hewitt} by noting that rather than providing household services as consideration for real property the plaintiff made monetary payments toward the purchase of personal property.
\item\textsuperscript{222} \textit{Id.}
\item\textsuperscript{223} \textit{Id.} at 82.
\item\textsuperscript{224} \textit{Id.}
\item\textsuperscript{225} \textit{Id.}
\item\textsuperscript{226} \textit{Id.}
\end{enumerate}
\end{footnotesize}
In most of the cases in which an agreement was recognized the couple had acquired property together. The courts have been less willing to consider agreements for support based exclusively on cohabitation and a sexual relationship. Problems frequently arise when a person dies and their partner attempts to acquire an interest in the property on which they lived. Even when a couple had lived together for 30 years, the courts have been unwilling to establish a property right for the survivor when their partner dies.

Florida provides important examples of the potential use of contracts between cohabiting adults both for different sex and same-sex couples. In Crossen v. Feldman, the opposite sex couple entered into an oral contract arguing that Feldman would support Crossen during her pregnancy and for a reasonable time thereafter in return for Crossen quitting her job during her

227 See Cook v. Cook, 691 P.2d 664, 672 (Ariz. 1984) (determining that valid agreements supported by proper consideration between unmarried cohabitants will be enforced by the courts according to the intent of the parties); Boland v. Catalano, 521 A.2d 142, 146 (Conn. 1987) (concluding that the existence of a sexual relationship between unmarried cohabitants did not preclude enforcement of an express agreement to share equally in the assets accumulated while living together as long as the agreement was not founded upon their sexual relationship); Mason v. Rostad, 476 A.2d 662, 666 (D.C. 1984) (finding that a man could recover the reasonable value of the work contributed toward the renovation of another's house reduced by the benefits he received from the arrangement despite the fact they were unmarried and living together); Spafford v. Coats, 455 N.E.2d 241, 244 (Ill. App. Ct. 1983) (finding that a female unmarried cohabitant who furnished most of the money for several vehicles purchased during a cohabitating relationship was not barred by their cohabitation from bringing an unjust enrichment claim against the other cohabitant who retained control over the vehicles); Wilcox v. Trautz, 693 N.E.2d 141, 147 (Mass. 1998) (holding that unmarried cohabitants may lawfully contract concerning property, financial, and other relevant matters); Hudson v. DeLonjay, 732 S.W.2d 922, 927 (Mo. Ct. App. 1987) (opining that a man and woman living together without marriage may contract with each other); Collins v. Davis, 315 S.E.2d 759, 761 (N.C. Ct. App. 1984) (reasoning that a married man living with a single woman was not barred from bringing a suit in equity for unjust enrichment when he contributed to the purchase of a house titled in the woman's name, if the agreement was not based exclusively on sexual intercourse); Tarry v. Stewart, 649 N.E.2d 1, 5 (Ohio Ct. App. 1994) (finding that the parties did not enter into a cohabitation agreement, and that under the facts, one party would not be unjustly enriched if allowed to keep the property in which they lived during their cohabitation); Wilbur v. DeLapp, 850 P.2d 1151, 1154 (Or. Ct. App. 1993) (holding that the unmarried parties who lived together intended that the female cohabitant have a one-half interest in property held in the male partner's name); Lawlis v. Thompson, 405 N.W.2d 317, 317 (Wis. 1987) (holding that non-marital cohabitation alone would not preclude a cohabitant from bringing an unjust enrichment claim against the other cohabitant).

228 See Long v. Marino, 441 S.E.2d 475, 476 (Ga. Ct. App. 1994) (suggesting that the law will not support a contract founded on the immoral consideration of unmarried cohabitation) and Schwegmann v. Schwegmann, 441 So. 2d 316, 326 (La. Ct. App. 1983) (concluding that unmarried cohabitation does not give rise to property rights analogous to those arising from marriage, and that claims in equity are barred when sexual relations are interwoven with other tendered benefits).

229 In re Estate of Alexander, 445 So. 2d 836, 840 (Miss. 1984) (deciding that the legislature was better suited to handle unmarried cohabitation policies and expressing concern that extending equitable principles would resurrect the abolished common-law marriage doctrine).

pregnancy. Crossen sued when, having quit her job, Feldman would not provide support for their child. Feldman asserted as affirmative defenses the statute of frauds and that the claim was for “palimony” which was not a recognized cause of action in Florida. The court rejected the “palimony” defense by stating that it would not attempt to define what may or may not be “palimony,” since it held that the case simply involved whether these parties entered into a contract for support, which is something that they are legally capable of doing. Because the trial court did not rule on the statute of frauds issue, the appellate court did not address it.

Another Florida case illustrates the use of contracts between cohabiting adults. While it deals with a same-sex couple, it cites to Crossen for support. In Posik v. Layton, Nancy Layton, a doctor, wanted to move her practice. In order to induce Emma Posik to give up her job and reside with her, the two entered into an agreement that Posik would maintain and care for the home and Layton would support them and make a will leaving her entire estate to Posik. One of the clauses in the contract was one for liquidated damages of $2,500 per month for the remainder of Posik’s life, if a range of events occurred. The agreement was in writing and drafted by an attorney. Posik sued when Layton moved out and took up residence with another woman. The trial court found that because Posik’s economic losses were reasonably ascertainable, the monthly payment amounted to a penalty and was therefore unenforceable. On appeal, the appellant court found that an agreement for support between unmarried adults is valid unless the agreement is inseparably based upon illicit consideration for sexual services. The agreement had to be in writing to meet the requirements of the statute of frauds with which the parties had complied. The court held that the contract was enforceable and the monthly payments were not a penalty.

The court recognized that the contract was very favorable to Posik. However, there was no allegation of fraud or overreaching. The court cited to

---

231 Id.
232 Id.
233 Id.
234 Id.
235 Id.
237 Id. at 759.
238 Id. at 760.
239 Id.
240 Id.
241 Id.
242 Posik, 695 So. 2d at 760.
243 Id. at 762.
244 Id.
245 Id.
246 Id.
247 Id.
Carnell v. Carnell,248 “the husband also contends that the agreement is so unfair and unreasonable that it must be set aside. . . , the freedom to contract includes the right to make a bad bargain.”249 The controlling question here is whether there was overreaching and not whether the bargain was good or bad.”250 The Carnell court further opined that:

Contracts can be dangerous to one’s well-being. That is why they are kept away from children. Perhaps warning labels should be attached. In any event, contracts should be taken seriously. Dr. Layton’s comment that she considered the agreement a sham and never intended to be bound by it shows that she did not take it seriously. That is regrettable.251

These cases provide additional guidance for couples considering a contractual marriage. The legal environment varies among the states. Therefore, a couple should be aware of the state in which they might consider drafting an agreement or indicate in the agreement the choice of law made by the parties. Based on contract and conflict of laws principles, a couple can be reasonably certain that their agreement will be enforceable in states other than the one in which it was created.252 It is important that the contract be in writing not only for practical purposes but also in order to satisfy statute of fraud requirements.

B. Contracts with Third Parties

While the ability of parties to create an enforceable contract between themselves has increased, a problem still exists with contracts with third parties. Traditionally, there were numerous benefits available to a married couple from employers and the government that were denied to cohabitating couples.253 The benefits provided by the government include each spouse being entitled to statutorily defined property rights at divorce or death;254 to certain rights if their

247 Id.
249 Id. at 506.
250 Id.
251 Posik, 695 So. 2d at 763.
253 See Duncan, supra note 192, at 964.
spouse died intestate;\textsuperscript{255} to sue for loss of consortium;\textsuperscript{256} to gain access to the spouse’ pension, Social Security benefits, disability benefits, Workman’s Compensation, and some insurance policies;\textsuperscript{257} to file tax returns jointly;\textsuperscript{258} and to assume health planning for an incapacitated spouse.\textsuperscript{259} Some state and local governments have shown flexibility, especially as to employee health benefits. Ten states, the District of Columbia and 175 city and county governments or quasi-governmental agencies provide health insurance benefits to an employees’ domestic partners.\textsuperscript{260}

Employers have also frequently restricted fringe benefits only to people related by law to the employee. However, there has been a movement to provide similar benefits to “domestic partnerships.”\textsuperscript{261} The Human Rights Campaign identified 5,698 employers who provided health benefits to domestic partners in 2002 with the number committed to provide them in 2003 increasing to 5,724.\textsuperscript{262} These employers will include 182 of the Fortune 500 companies and 182 colleges and universities.\textsuperscript{263} Some employers offer the benefits to both same-sex and opposite-sex couples, while others exclude opposite sex couples.\textsuperscript{264}

In sum, cohabiting parties often cannot control their relationships with third parties. However, governments and employers have gradually started to provide benefits to “domestic partners” that traditionally have only been available to married couples. Therefore, where a couple lives and the companies with which they seek employment can be important.

\textbf{VII. CONCLUSION}

One of the fundamental human rights is the right to marry with the common perception being that this marriage should be the one established by statute. The combination of unilateral divorce and inadequate compensation for sacrifices made during marriage makes statutory marriage unattractive for some people.

\textsuperscript{255} UNIF. PROBATE CODE §§ 2-102, 2-103 (1993).
\textsuperscript{256} Seff, supra note 254, at 156.
\textsuperscript{257} DUFF & TRUITT, supra note 189, at 65.
\textsuperscript{258} Seff, supra note 254, at 157.
\textsuperscript{261} Duncan, supra note 192, at 965.
\textsuperscript{262} HUMAN RIGHTS CAMPAIGN FOUNDATION, supra note 260, at 22.
\textsuperscript{263} Id.
\textsuperscript{264} SOLOT & MILLER, supra note 39, at 165.
Many relationships would eventually benefit from a credible long-term commitment by the spouses, which is not available under statutory marriage. A credible long-term commitment encourages sacrifices for the benefit of the relationship while also providing important psychological gains. However, for a long-term commitment to be credible, it has to be costly to terminate a relationship. Couples should consider contracting to recognize these costs and provide for them rather than entering into a statutory marriage.
THE SUBURBAN ADVANTAGE: ARE THE TAX BENEFITS OF HOMEOWNERSHIP DEFENSIBLE?

by Mark Andrew Snider*

I. INTRODUCTION

If owning a home is the American dream,1 then owning a home might also be described as a tax dream2 for the 69.8 million householders who have attained

---

* Juris Doctor, Washington and Lee University School of Law, 2004; B.S. Denison University, 2001. The author wishes to thank Maureen B. Cavanaugh for her help in formulating this Article.

the goal of homeownership. Through tax deductions and provisions allowing nonrecognition of gain, the Internal Revenue Code (hereinafter “the Code”) provides several tax benefits to taxpayers who own the home in which they reside and who itemize their deductions. These tax benefits are not available to people who live in rental properties or to people who live with others who qualify for the homeownership benefits. From reviewing demographic data, it is evident that these Code provisions primarily benefit American taxpayers who dwell in the suburbs, where homeownership is much more prevalent than in urban areas.

2 See Joseph A. Snoe, My Home, My Debt: Remodeling the Home Mortgage Interest Deduction, 80 KY. L.J. 431, 467 (1992) (“[C]ommentators have compared the plight of renters to that of homeowners and concluded that the interest deduction favors homeowners.”).


4 This Article focuses on two homeownership deductions: the allowance of deductibility for most home mortgage interest under § 163(h)(3) and the allowance of deductibility for state and local real property taxes under § 164(a)(1). See infra Part III and Part IV. This Article also discusses § 121’s allowance for the nonrecognition of gain on the sale of a taxpayer’s principal residence. I.R.C. § 121 (2003).

5 Every taxpayer is allowed to include the deductions listed in § 62 in computing his adjusted gross income. JAMES J. FREELAND ET AL., FUNDAMENTALS OF FEDERAL INCOME TAXATION 548 (12th ed. 2002). In addition, a taxpayer automatically receives a “standard deduction” under § 63(b) unless he opts to itemize deductions not included in § 62. Id. Deductions not listed in § 62 are known as itemized deductions, which include deductions for home mortgage interest and real property taxes. Id. The standard deduction is designed to permit taxpayers to take advantage of the deductibility of some tax items without having to keep records of their deductible expenditures. Id. at 574. A taxpayer is wise to choose the standard deduction if the standard deduction amount is greater than the amount of his adjusted itemized deductions. Id. at 575. However, some individuals are forced to itemize their deductions under § 63(c)(6). Id. For a good discussion of when a taxpayer is better off itemizing deductions, see id.

It may seem as though homeowners who choose to take the standard deduction rather than itemized deductions do not benefit from §§ 163(h)(3) and 164(a)(1). See MICHAEL J. GRAETZ & DEBORAH H. SCHENK, FEDERAL INCOME TAXATION 425 (4th ed. 2002). However, the standard deduction implicitly compensates a non-itemizing taxpayer for lost itemized deductions such as home mortgage interest and real property taxes. Id. That is, the standard deduction is as large as it is because it contemplates that those taxpayers who choose the standard deduction will lose the opportunity to take deductions for many expenses they probably have. Id. See S. Res. 885, 78th Cong. (1944), reprinted in 1944 C.B. 858, 860 (“The standard deduction is in lieu of the nonbusiness deductions and certain credits against net income and against tax . . .”).

The nonrecognition of gain from the sale of a principal residence under § 121 is available to all taxpayers. See GRAETZ & SCHENK supra, at 652.


7 See, e.g., Marie A. Failinger, A Peace Proposal for the Same-Sex Marriage Wars: Restoring the Household to its Proper Place, 10 WM. & MARY J. WOMEN & L. 195, 264 (2004) (noting that tax deductions and credits favor the “household concept” over the nuclear family).

8 As of 2003, the United States Census Bureau had recognized 370 Metropolitan Statistical Areas and 565 Micropolitan Statistical Areas. See Office of Mgmt. & Budget, Executive Office of the
This Article offers a critique of tax benefits for homeownership in a framework that evaluates the effects that the Code’s homeownership provisions have on suburban taxpayers compared to urban taxpayers. In doing so, this Article will concentrate on three Code sections. Code § 163(h)(3) generally allows homeowners to deduct home mortgage and home equity interest payments. Section 164(a)(1) allows homeowners to deduct their state and local real property taxes. Finally, § 121 allows most homeowners to avoid the recognition of most, if not all, of the gain on the sale of a principal residence. It is beyond the scope of this Article to compare the effects of these provisions on rural taxpayers. This Article also does not discuss the effects that other Code provisions have on suburban taxpayers.

Homeowner benefits of the Code are very popular among taxpayers. Over $200 billion in home mortgage interest deductions were taken by homeowners in 1995, making it by far the single largest itemized deduction. Deductions for taxes amounted to $189 billion, a large amount of which was for state and local real property taxes. Taxpayers also enjoyed $20.4 billion in savings in 1995 by excluding from gross income most gain realized on the sale of a principal residence.
residence. In comparison, $50.4 billion in medical insurance deductions, $29.5 billion in charitable deductions, and $17.7 billion in life insurance deductions were taken by Americans in 1995.

II. OPERATION OF APPLICABLE I.R.C. SECTIONS

A. I.R.C. § 163(h)(3)

Homeowners are generally permitted by I.R.C. § 163(h)(3) to deduct the interest paid on the debt incurred to finance the purchase of a “qualified residence,” which includes a taxpayer’s principal residence and one other home. This benefit is subject to the relatively generous provision that the deductible interest is limited to the interest costs of carrying $1 million in indebtedness (termed “acquisition indebtedness”) on the two homes. For acquisition indebtedness to be deductible, it must be secured by a qualified residence and be incurred in “acquiring, constructing, or substantially improving” the home. Homeowners are also entitled to deduct the interest on “home equity indebtedness” up to $100,000. Funds from home equity indebtedness may be used for any purpose, including personal consumption for

17 MICHAEL J. GRAETZ & DEBORAH H. SCHENK, FEDERAL INCOME TAXATION: PRINCIPLES AND POLICIES 46–47 (3d ed. 1995); see also Lee A. Sheppard, Should Sales of Personal Residences Be Exempt from Tax?, 50 TAX NOTES 1433, 1433 (1991) (noting that eliminating the age restriction on § 121 alone cost the Treasury more than $1.8 billion over five years). The cost of the more generous provisions of current § 121 is even higher. See I.R.C. § 121(a) (2003) (allowing up to a $250,000 exclusion per taxpayer ($500,000 if married filing jointly) on the sale of principal residence).

18 GRAETZ & SCHENK, supra note 17, at 46–47.

19 I.R.C. § 163(h)(3)(A) (2003). Section 163(h)(3) is a significant departure from the normal rule of § 163(h), which states that there shall be no deductions permitted for personal interest expenses. See I.R.C. § 163(h)(1) (“In the case of a taxpayer other than a corporation, no deduction shall be allowed under this chapter for personal interest paid or accrued during the taxable year.”).

20 Id. § 163(h)(4)(A)(i).

21 Id. § 163(h)(3)(B)(ii) (stating the limit is reduced to $500,000 in the case of a married individual filing a separate return).

22 Id. § 163(h)(3)(A)(i).

23 Id. § 163(h)(3)(B)(i).

24 Id. § 163(h)(3)(B)(i). Acquisition indebtedness includes debt incurred by refinancing acquisition indebtedness. Id. The amount of refinancing debt that qualifies as acquisition indebtedness can never exceed the outstanding principal of the debt that is refinanced. Id.

25 I.R.C. § 163(h)(3)(C)(ii) (2003). Home equity indebtedness must also be secured by the home and may not exceed the fair market value of the home, reduced by the amount of acquisition indebtedness also attributable to the home. Id. § 163(h)(3)(C)(i).

26 Id. § 163(h)(3)(C).
items such as college tuition and automobiles. Any excess interest is nondeductible under the rules of § 163(h).

B. I.R.C. § 164(a)(1)

Taxpayers who itemize their deductions are permitted to deduct state and local real property taxes from their federal income tax liability under I.R.C. § 164(a)(1). While § 164(a) provides for deductibility of several other kinds of taxes, the deduction for real property taxes is the part of the Code section that is most directly related to homeownership.

C. I.R.C. § 121

Internal Revenue Code § 121 generally allows a homeowner to exclude up to $250,000 ($500,000 if married filing jointly) of gain realized on the sale or exchange of a principal residence. For this nonrecognition provision to apply, a taxpayer must have owned and used the home as his principal residence for a

---

27 Id. Some see this as a reason to abolish the deduction for interest on home equity indebtedness. See infra notes 109–10 and accompanying text.
28 Id. § 163(h). Special rules for debt incurred before October 13, 1987 allow for the deductibility of interest incurred from debt in excess of $1,000,000. Id. § 163(h)(3)(D). This Article will not examine this section in detail.
29 See id. § 164(a)(1) (“Except as otherwise provided in this section, the following taxes shall be allowed as a deduction for the taxable year within which paid or accrued: (1) State and local, and foreign, real property taxes”).
30 See I.R.C. § 164(a) (2003) (providing for deductibility of “state and local personal property taxes,” “state and local, and foreign, income, war profits, and excess profits taxes,” “the GST tax imposed on income distributions,” and “the environmental tax imposed by § 59A”).
31 See Roberta F. Mann, The (Not So) Little House on the Prairie: The Hidden Costs of the Home Mortgage Interest Deduction, 32 ARIZ. ST. L.J. 1347, 1348–49 (2000) (“The Federal income tax system subsidizes the dream of home ownership through the home mortgage interest deduction, the property tax deduction, and the exclusion of imputed rental income from owner-occupied housing, as well as other forms of preferential treatment.”).
34 I.R.C. § 121(a) (2003). For example, a taxpayer who lives in a Manhattan apartment during the week cannot use § 121 to exclude gain on the sale of his Westchester County country house, even if he has spent two-year's time at the house, accumulated through many get-away weekends, in the five years before the house's sale. See Stolk v. Comm'r, 40 T.C. 345, 355 (1963) (holding that an apartment used during the week constituted a principal residence and that gains from sale of a home visited on weekends must be recognized).
total of two or more years in the preceding five years. Of special interest to suburban and rural homeowners is § 121’s definition of “residence” which includes the acreage surrounding a principal residence. When a taxpayer sells a principal residence that qualifies under § 121, the gain on the subsequent sale of another principal residence every two years also qualifies for nonrecognition under § 121. Section 121, adopted in 1997, replaced a “once in a lifetime” exclusion of up to $125,000 in gain. The current § 121 also replaces the old provisions of § 1034 that allowed gain to be nonrecognized on the sale of a principal residence if a new residence of greater or equal value was purchased by the taxpayer within a specified period of time. This Article will concentrate on the current, more generous language of § 121.

III. SUBURBAN HOMEOWNERSHIP STATISTICS

A. I.R.C. § 163(h)(3)

At the end of World War II, central cities were the population and wealth centers of America's metropolitan areas. By 1990, however, only 37% of...
people living in metropolitan areas resided in central cities, and the per capita income of urban dwellers had fallen to less than 60% of suburban per capita income. In 1999, the average household income in suburbia exceeded $76,000, while the median household income nationwide was only $40,816. Based on the above stated statistics, it is not surprising, then, that poorer urban residents are less likely than suburbanites to own their own homes. Nevertheless, during the 1990s, nearly two out of three American taxpayers were able to attain the goal of homeownership. While 73.6% of suburbanites owned their own home in 1999, a majority of city residents also lived in owner-occupied housing (50.4%). Another positive sign is that during the 1990s, the percentage increase in the number of owner-occupied residences (18.3%) was much larger than the percentage increase in rental units (8.3%).

42 Mieszkowski & Mills, supra note 41, at 135.
43 See Poindexter et al., supra note 41, at 165 (citing Larry Lederbur & William Barnes, Metropolitan Disparities and Economic Growth, Research Report of the National League of Cities 1 (1992)). In fact, in many cities, including Baltimore, Boston, Chicago, Cleveland, Detroit, Newark, and Philadelphia, urban per capita income is less than half of suburban per capita income. Id. In discussing this idea, Anthony Downs wrote:

In 1990, median household income was 38 percent higher in the suburbs than in the central cities. In metropolitan areas of 1 million or more residents, household income was 45 percent higher in suburbs; in smaller metropolitan areas the difference was 26 percent. Low-income people are becoming more and more concentrated in central cities . . . .

ANTHONY DOWNS, NEW VISION FOR METROPOLITAN AMERICA 47 (1994). Since 1970, the U.S. metropolitan population has grown 25% overall, with suburban population increasing by 40% and city population increasing only 8%. Ingo Winzer, Urban Mortgage Markets, Mortgage Banking, Sept. 1996, at 18.
44 Larry Fleischman, Winning the War for Suburbia, Editor & Publisher, Aug. 7, 1999, at 17.
45 Daniela Deane, Agents: A Study in Determination; More Join Ranks in Highly Competitive Field, Wash Post, Nov. 30, 2002, at H1. While the nationwide median household income is likely less than the nationwide average household income (due to less upward skewing by very high earners in the median figure), the disparity in household income between suburban taxpayers and other taxpayers is evident. See Carmen DeNavas-Walt & Robert W. Cleveland, Money Income in the United States: 2001, at 6 (tbl. 2) (2000), available at http://www.census.gov/prod/2002pubs/p60-218.pdf (showing that average household income was $42,873 in 1999).
46 See Office of Policy Dev. and Research, U.S. Dep’t of Hous. and Urban Dev., Issue Brief No. III, Homeownership: Progress and Work Remaining 3 (Dec. 2000) [hereinafter Issue Brief] (showing that, in 1999, homeownership in the suburbs was 73.6% and only 50.4% in central cities).
47 HOUSING CHARACTERISTICS, supra note 3, at 3.
48 Between 1993 and 1999, suburban homeownership rates increased from 70.3% to 73.6% and city homeownership rates increased from 48.6% to 50.4%. Issue Brief, supra note 46, at 3. “Forty percent of the new homeowners between 1994 and 1999 were minorities, even though less than [one-fourth] of the population was comprised of minorities.” Id.
49 HOUSING CHARACTERISTICS, supra note 3, at 3.
A comparison of home-owning city taxpayers with home-owning suburban taxpayers reveals that most suburban homeowners benefit more from § 163(h)(3) than do most city homeowners.\(^{50}\) This is a result of the fact that in most—but by no means all—metropolitan areas, average housing prices in suburban areas are higher than in central city areas.\(^{51}\) As a result, mortgages\(^ {52}\) and mortgage interest deductions are also higher, on average, in suburban areas than in urban areas.\(^ {53}\)

However, the correlation is imperfect because in many metropolitan areas, city homes cost more than suburban homes.\(^ {54}\) In these metropolitan areas, urban homeowners have a greater potential for § 163(h)(3) deductions than do suburban homeowners. Further, a comparison of home prices shows much greater inter-metropolitan area disparity\(^ {55}\) than intra-metropolitan area disparity.\(^ {56}\) That is, urban homeowners in many metropolitan areas—particularly

\(^{50}\) See Winzer, supra note 43, at 18 (noting that city home prices vary in relation to suburban home prices depending on metropolitan area).

\(^{51}\) See id. For example, in 1996, the average city home in Atlanta cost 141% of the average suburban Atlanta home. Id. City home prices were also higher in Portland, Oregon (134% of suburban price), New York (134%), and Minneapolis (112%). Id. at 20, fig. 2. In most surveyed metropolitan areas, however, city home prices were less—often dramatically less—than suburban home prices. Id. For example, the average city home in the Baltimore metropolitan area cost just 55% of the average suburban home. Id. City home prices were also lower in Washington, D.C. (96% of suburban price), New Orleans (94%), Nashville (94%), Dallas (91%), Chicago (89%), San Francisco (84%), Detroit (79%), Denver (77%), Boston (73%), and Philadelphia (55%). Id.

\(^{52}\) Of the 55.2 million owner-occupied homes in the United States in 2000, “70% were mortgaged and 30% were nonmortgaged.” ROBERT L. BENNEFIELD, U.S. CENSUS BUREAU, HOME VALUES: 2000, at 9 (2003) [hereinafter HOME VALUES]. The median value of mortgaged homes ($128,800) was much higher than the value of nonmortgaged homes ($96,900). Id. Logically, as the cost of a taxpayer's home increases, the size of his mortgage payment also is likely to increase. Interest.Com, Mortgage Calculator, available at http://mortgages.interest.com/content/calculators/index.asp (last visited Nov. 10, 2004). Correspondingly, the size of his § 163(h)(3) deduction also is likely to increase.

\(^{53}\) See Janice Fanning Madden, Jobs, Cities, and Suburbs in the Global Economy, 572 ANNALS AM. ACAD. POL. & SOC. SCI. 78, 87 (2000) (arguing that deductibility of interest on home mortgages is more likely to benefit suburban residents, who have higher priced homes and, thus, larger mortgages, and who, therefore, benefit more from itemized deductions); see also Richard Voith, Do Suburbs Need Cities?, 38 J. REGIONAL SCI. 445, 445–64 (1998) (discussing relative decline in urban housing values). Richard Voith argues that homeowners who own houses valued less than $80,000 generally get no added value from itemizing their deductions under I.R.C. § 163(h)(3). Id. He also notes that as of 1998, 57% of central city residents, but only 37% of suburban residents, live in homes worth less than $80,000. Id.

\(^{54}\) See HOME VALUES, supra note 52, at 4 (noting that median value of single-family homes in Manhattan is more than $1 million). Extremely high home values also exist in San Francisco ($296,000), Washington, D.C. ($196,000), and elsewhere. Winzer, supra note 43, at 18.

\(^{55}\) That is, disparity between the average home price throughout one metropolitan area compared to the average home price throughout another metropolitan area. See supra note 54.

\(^{56}\) That is, disparity between one metropolitan area's central cities and its suburbs. See Winzer, supra note 43, at 18. For example, the greatest disparity between city and suburban home prices in Winzer's study was 55%. Id. at 18. The median home price in Flint, Michigan ($49,700), however, is just 13% of the median home price in the San Francisco metropolitan area ($396,400). HOME VALUES, supra note 52, at 7. The median home value in the United States was $119,600 in
metropolitan areas in the Northeast and on the West Coast—benefit more from § 163(h)(3) than do suburban homeowners in other metropolitan areas due to the dramatically higher price of homes in some metropolitan areas. As a result, it is clear that § 163(h)(3) does not always benefit suburban homeowners more significantly than urban homeowners.

A comparison of all city taxpayers with all suburban taxpayers shows that suburban taxpayers are more likely than urban taxpayers to benefit from § 163(h)(3), due to both higher homeownership rates and higher housing prices in the suburbs. In the second quarter of 2003, metropolitan area homeownership stood at 66.2% nationwide. Within metropolitan areas, 74.6% of suburban residents, but only 52.0% of city residents, lived in owner-occupied residences. Professor John A. Powell has noted that wide-scale homeownership is nonexistent in many of America's cities, especially in poor areas populated by minorities. Again, large differences in homeownership rates exist by region. Great differences also exist between central cities and suburbs within the same metropolitan area. Consequently, suburban taxpayers are more likely to benefit from the deductibility of home mortgage interest under § 163(h)(3) because of suburbanites' increased proclivity to be homeowners and the increased likelihood that suburbanites will own expensive homes.
B. I.R.C. § 164(a)(1)

The average city homeowner paid $1164 in real property taxes in 2001 while the average suburban homeowner paid $1524 in real property taxes. Consequently, the average suburban homeowner who itemizes his deductions receives $360 more in deductions under § 164(a)(1) than the average urban homeowner. Likewise, a suburban homeowner who owns a home worth $1000x receives greater relief under § 164(a)(1) than does a city homeowner who owns a home of comparable value. This is because state and local property taxes represented $9 per $1000 assessed value for urban homeowners and $10 per $1000 for suburban homeowners. As a result, because homeownership rates, housing values, and real property tax rates are higher in suburban communities than in urban communities, suburban taxpayers are able to deduct larger amounts under § 164(a)(1) than are urban taxpayers.

C. I.R.C. § 121

From 1950 to 2000, the median value for homes in the United States has more than doubled. Home values rose 31% in the 1950s, 11% in the 1960s, 43% in the 1970s, 8% in the 1980s, and 18% in the 1990s. According to some estimates, between the time the 2000 census was taken in the late 1990s and July 2003, the national median home value increased from $119,600 to $182,000, an increase of about 50%. While this increase seems strikingly high, it nevertheless illustrates the strong investment benefits of homeownership.

---

67 Id.
68 See id. at tbls. 1B-7 and 1C-7.
69 Id.
70 See Madden, supra note 53, at 87.
71 HOME VALUES, supra note 52, at 2.
72 Id.
73 Id. at 1. It must be remembered that the 2000 census was conducted during the late 1990s. Further, the census's numbers were based on values as established by homeowners' estimates, which may have been low.
74 Daniela Dean, July Home Sales Set Record; But Some Experts Say Surge Marks Boom's “Last Hurrah,” WASH. POST, Aug. 26, 2003, at E1 (“The national median existing home price—$182,000—was up 12.1 percent in July from the same month of 2002.”).
75 See Your Home as an Investment, at http://www.hbadenver.com/consumerinfo/investment.asp (last visited Oct. 8, 2004) (stating that a home is an “outstanding investment” because it is stable and explaining the tax benefit compared with other investments).
Studies have shown that over the past twenty years, suburban residences have appreciated at considerably higher rates than urban residences.\textsuperscript{76} Because homeownership rates are also higher in suburban areas than in urban areas,\textsuperscript{77} it is evident that suburban homeowners, on the whole, have a greater potential than city homeowners to benefit from \S\ 121.\textsuperscript{78} This section also penalizes urban residents in another way: gain on a second home or a vacation home must be recognized even if a taxpayer's principal residence is rented.\textsuperscript{79} Therefore, if a taxpayer sells an owner-occupied second residence, he must recognize gain on its appreciation even if he does not own his principal residence.\textsuperscript{80}

IV. ANALYSIS

A. Arguments Against Homeownership Tax Benefits

1. General Arguments Against Homeownership Tax Benefits

Many scholars argue that provisions §§ 163(h)(3), 164(a)(1), and 121 deviate from the “normal” operations of the Code.\textsuperscript{81} They contend that each of these provisions is a departure from the normal rules of progressive income taxation, because items that would otherwise be nondeductible personal expenses (here, mortgage interest and real property taxes) or result in the recognition of gain (here, appreciation of a principal residence) are given special tax preference.\textsuperscript{82}

Scholars have termed these tax provisions “tax expenditures” because by not taxing income allocated to paying mortgage interest or real property taxes, or not recognizing as income the gain realized on the sale of a principal residence, the


\textsuperscript{77} See \textit{Housing Vacancy Survey, supra} note 60 and accompanying text.

\textsuperscript{78} See \textit{id.} However, § 121 does more to encourage investment in low-value urban housing than did old § 1034. \textit{See I.R.C. § 1034} (1988) (repealed). Section 1034 penalized people who moved from high housing-cost areas to low housing-cost areas. \textit{See id.} Therefore, current § 121 does not discourage suburbanites from moving to lower-cost central cities in the way that § 1034 did. \textit{See I.R.C. § 121} (2003).

\textsuperscript{79} See \textit{supra} note 34 and accompanying text.

\textsuperscript{80} \textit{Id.}

\textsuperscript{81} See Stanley S. Surrey & Paul R. McDaniel, \textit{The Tax Expenditure Concept: Current Developments and Emerging Issues,} 20 B.C.L. REV. 225, 228 (1979) (arguing that tax incentives are “departures from the normal tax structure”).

\textsuperscript{82} \textit{Id.}
Treasury is favoring these activities through indirect monetary assistance.\textsuperscript{83} Stanley S. Surrey and others argue that provisions such as §§ 163(h)(3), 164(a)(1), and 121 provide governmental subsidies to taxpayers who are able to take advantage of the provisions.\textsuperscript{84} In order to better target government expenditures to solve perceived problems, these scholars argue for the replacement of many tax expenditures with direct governmental grants.\textsuperscript{85} Opponents of the homeownership tax benefits argue that homeownership grants (that is, direct subsidies) to poor Americans struggling to buy a home go further in achieving the policy goal of homeownership than “tax expenditures,” which primarily benefit upper-income earners.\textsuperscript{86} Surrey believes direct subsidies are more politically responsive, because they “are continually being assessed as to their effectiveness (in terms of achieving objectives), efficiency (in terms of cost-benefit relationships), equity (in terms of social welfare achieved), and overall priority (in terms of a proper allocation of resources).”\textsuperscript{87}

Commentators have argued that tax provisions that benefit certain groups, such as homeowners, ultimately also benefit upper-income taxpayers unfairly at the “expense” of lower-earning taxpayers.\textsuperscript{88} And, as discussed above, many upper-income taxpayers are suburban homeowners.\textsuperscript{89} These observers note that homeownership tax provisions benefit upper-income taxpayers more than lower-income taxpayers because these deductions and nonrecognition provisions effectively apply to a taxpayer’s marginal tax rate.\textsuperscript{90} That is, taking advantage of these provisions allows a taxpayer to remove the “last dollar earned” from his

\textsuperscript{83} See id. (“Direct assistance may take the form of a government grant or subsidy . . . . Instead of direct assistance, the government may work within the income tax system to reduce the tax otherwise owed by a favored activity or group.”).

\textsuperscript{84} See Stanley S. Surrey, \textit{Federal Income Tax Reform: The Varied Approaches Necessary to Replace Tax Expenditures with Direct Governmental Assistance}, 84 \textit{Harv. L. Rev.} 352, 353–54 (1970) (“These tax expenditures take many forms, such as special exclusions or exemptions from income, deductions, credits against tax, deferrals of tax, or preferential tax rates.”).

\textsuperscript{85} See Surrey & McDaniel, \textit{supra} note 81, at 278 (arguing that different tax expenditure provisions should be analyzed to see which should be (1) eliminated entirely, (2) changed to direct grants, and (3) kept as tax expenditures).

\textsuperscript{86} Surrey states:

\begin{quote}
The most fundamental aspect of housing and urban problems is that the housing and tax policies of the past had helped most Americans move into decent homes but that the same Americans were denying the support needed in establishing policies and laws that would do the same for low-income citizens who live under deplorable conditions in our core cities.\end{quote}


\textsuperscript{87} Surrey & McDaniel, \textit{supra} note 81, at 287–88.

\textsuperscript{88} \textit{Stanley S. Surrey & Paul R. McDaniel, Tax Expenditures} 78 (1985).

\textsuperscript{89} See \textit{supra} notes 44 and 60 and accompanying text.

\textsuperscript{90} See Surrey & McDaniel, \textit{supra} note 88 (noting that in deducting interest on home mortgages, the effective amount “paid” by the government depends on an individual income tax bracket).
marginal rate. For a home-owning taxpayer in the 35% bracket, each dollar deducted or not recognized because of these provisions results in an additional $0.35 in his pocket, whereas for a home-owning taxpayer in the 15% bracket, each dollar deducted or not recognized because of these provisions results in only an additional $0.15 in his pocket. This results in what has been termed an “upside-down” subsidy, a process that gives a smaller subsidy to those with lower incomes.

Thomas and Mary Edsall have maintained that the widening gap between upper-income and lower-income Americans is exacerbated by the Code. The Edsalls found that between 1980 and 1990, the bottom two deciles' pretax income decreased 8.4% and 2.3%, respectively, whereas the top decile's income increased 37.1%. After taxes, they found that the bottom two deciles' reduction in income widened to 10.3% and 3.4%, respectively, while the top decile's gains in income increased to 41.1%. Further, low-income taxpayers are unlikely to have enough itemized deductions—that is, deductible expenses in excess of the standard deduction—to make itemizing §§ 163(h)(3) and 164(a)(1) expenses a realistic choice.

Tax analysts have emphasized that §§ 163(h)(3), 164(a)(1), and 121 of the Code result in lower income tax revenues than would otherwise occur if these provisions were eliminated. For example, analysts have calculated that if § 163(h)(3) were repealed, an additional $48.5 billion dollars could have been raised in 1999 and an additional $56.8 billion could have been raised in 2003. Analysts have also found that if state and local property taxes were not deductible, the federal government would have taken in an additional $40 billion in 1995. The Treasury also foregoes billions more in revenue by not fully

---

92 That is, each deducted dollar down to the last dollar that would cause the taxpayer to enter the next-lower marginal tax rate.
93 See *Graetz & Schenk*, supra note 5, at 22 (describing the progressive tax system in the U.S. as “the rate of tax applied to an individual's income increases as income increases”). Gain on the appreciated value of a home, if taxed, would be at capital gains rates rather than the ordinary gain rates illustrated here. I.R.C. § 1(h) (2003). However, capital gain rates are also graduated. Id.
94 *Surrey & McDaniel*, supra note 88, at 77.
96 *Id.* at 219.
97 *Id.* at 220.
99 See Mann, supra note 31, at 1353.
100 See id. n.23.
taxing the gain realized on sales of principal residences.\textsuperscript{102} Correspondingly, if §§ 163(h)(3), 164(a)(1), and 121 were eliminated from the Code, marginal tax rates could be significantly lowered without a corresponding decrease in federal tax revenue.\textsuperscript{103} Because suburban taxpayers are more likely to own their own home, and are more likely than urban homeowners to own expensive homes, suburbanites benefit more from the Code’s current provisions than they would from decreased marginal rates for all taxpayers.\textsuperscript{104}

Studies have shown that the amount of income that escapes federal taxation as a result of the homeownership provisions is much greater than the combined costs of all federal housing subsidies and local rental assistance programs.\textsuperscript{105} Opponents, alternatively, cite statistics showing that federal housing subsidies are wasteful and have failed to accomplish positive change.\textsuperscript{106} Regardless, because over half of the deductions taken for home mortgage interest aid taxpayers with expanded incomes of more than $100,000,\textsuperscript{107} many people question whether Congress’s desire to promote quality housing targets the wrong income groups.\textsuperscript{108}

Some scholars argue that allowing the benefits of homeownership to subsidize general personal consumption is especially reprehensible.\textsuperscript{109} These scholars argue that the deductibility of interest on home equity indebtedness under § 163(h)(3) furthers this questionable nonhousing policy.\textsuperscript{110}

The homeownership provisions of the Code arguably fuel unwelcome suburban sprawl.\textsuperscript{111} Provisions allowing for the deduction of home mortgage interest and real property taxes, as well as exclusion of home appreciation from gross income, increase the odds that a taxpayer will buy a larger and more

\begin{footnotes}
\footnote{local taxes would have raised an additional $188.1 billion between 1994 and 1998. Carol Douglas, \textit{State Tax Notes Outline}, 4 \textit{St. Tax Notes} 416, 419 (1993).}
\footnote{See I.R.S. Bulletin, supra note 14.}
\footnote{See Mann, supra note 31, at 1391.}
\footnote{See Madden, supra note 53, at 87.}
\footnote{See id. at 844. Housing-related tax expenditures in 1995 were more than $100 billion, while direct subsidies for housing were only $24.1 billion. \textit{Howard}, supra note 14, at 26–28 (aggregating data from tables 1.2 and 1.3).}
\footnote{See I.R.C. § 163(h)(3)(C) (2003).}
\footnote{See Mann, supra note 31, at 1360.}
\footnote{See, e.g., \textit{Powell}, supra note 62, at 93 (lamenting that home equity loans were designed to assist homeowners in sending their children to college).}
\footnote{See id.}
expensive home, as these provisions lower the actual costs of homeownership.\footnote{See Daniel J. Hutch, The Rationale for Including Disadvantaged Communities in the Smart Growth Metropolitan Development Framework, 20 Yale L. & Pol'y Rev. 353, 357 (2002) (stating that tax deductions lower cost of homeownership).} As larger and more expensive homes are increasingly built on the suburban fringe,\footnote{See White House Press Release, Vice President Al Gore Releases New Figures Showing Accelerated Loss of Farmland to Development (Dec. 6, 1999), www.nhq.nrcs.usda.gov/CCS/GoreRlse (showing that between 1992 and 1997, nearly 16 million acres of forest and open space were lost to development, which was more than twice the rate of sprawl between 1982 and 1992).} negative externalities associated with sprawl increase.\footnote{See Mann, supra note 31, at 1370–71 (“Sprawl has significant environmental and social costs. . . . Sprawl gobbles up open space and farmland, destroys habitat for wildlife, and results in a middle class exodus from the central city causing in turn crime and the segregation of poorer and minority populations in the declining central city.”).}

2. Arguments Against Specific Homeownership Tax Provisions

William Hellmuth has noted that two factors of the operation of § 163(h)(3), in particular, result in greater benefit to upper-income earners: “The benefits vary directly with (1) the level of income and the marginal rate, \[and\] (2) the market value of housing a family owns . . . .”\footnote{William F. Hellmuth, Comprehensive Income Taxation 163, 194 (Joseph A. Pechman ed., 1977).} This same truth applies to §§ 164(a)(1) and 121, as well. Deductions for real property taxes benefit a higher earner who owns an expensive home more than a lower earner who rents a home or owns an inexpensive home.\footnote{See Lee Anne Fennell, Home Rules, 112 Yale L.J. 617, 632 (2002) (reviewing William A. Fischel, The Homevoter Hypothesis: How Home Values Influence Local Government Taxation, School Finance, and Land-Use Policies (2001) and stating that high income earners benefit more from property tax deduction and other deductions than low income people).} A higher earner is also more likely to realize substantial gains on the sale of a principal residence.\footnote{See Majorie E. Kornhauser, A LegislatorNamed Sue: Re-Imaging the Income Tax, 5 J. Gender Race & Just. 289, 302 n.28 (2002) (stating that higher income earners usually have more capital gains).}

The deductibility of state and local tax is often criticized as being regressive.\footnote{For a discussion of how provisions that are seemingly regressive can be made progressive with rate changes, see Thomas D. Griffith, Theories of Personal Deductions in the Income Tax, 40 Hastings L.J. 343, 360–63 (1989).} Higher income taxpayers are more likely to have more expensive homes and correspondingly higher property tax bills.\footnote{See Fennell, supra note 116, at 632 (stating that “local taxes are higher for an expensive house”).} Deductions are worth more for taxpayers in higher marginal tax brackets, and itemizers tend to be
wealthier than those taxpayers opting for the standard deduction. While in practice these observations may be true, the deductibility of property taxes is not inherently regressive, as rate adjustments could restore progressivity while also permitting property tax deductibility.

Nevertheless, the property tax deduction, as applied today, benefits high-tax jurisdictions more than low-tax jurisdictions and, thus, residents of those high-tax jurisdictions. This occurs because each dollar an itemizing taxpayer pays in state and local real property taxes is subsidized by the federal government at the percentage of his marginal tax rate. This shifts the federal tax burden from high-tax states to low-tax states. If § 164(a)(1) is viewed as a tax expenditure, as it was viewed by the IRS's Treasury II report and continues to be viewed by many analysts, it is evident that marginal tax rates could be significantly lowered if the money itemizers pay in real property taxes was includable in taxable income.

Buying a home is often described as being as much of an investment decision as it is a housing decision. Therefore, it could be said that allowing nonrecognition of gain from the sale of a principal residence under § 121 is incongruous with the gain recognition rules applied to other investments. Under § 1001, gains realized on the sale of stocks, bonds, artwork, and other investments are fully included in a taxpayer's gross income. It is arguable that Congress should not provide a policy preference for investments in principal

---

120 Of course, itemizers must forgo the standard deduction, which theoretically compensates those who choose it for the loss of their ability to deduct items such as state and local property taxes. See Fennell, supra note 116, at 632 (lower income earners usually benefit more from the standard deduction while higher income earners benefit from itemizing).

121 See Griffith, supra note 118, at 360–63.

122 See Fennell, supra note 116, at 632.

123 See Walter Williams, J. Kenneth Blackwell, John Fund, & Steve Forbes, The Flat Tax Rate: Revitalizing the American Dream (Apr. 8, 1996), at http://newheritage.org/Research/Taxes/HLS69.cfm. For example, query two taxpayers in the 35% marginal tax bracket. Taxpayer A, a resident of New Hampshire, pays $1000 a year in real property taxes. Deducting this amount saves A $350 in federal income taxes per year. Taxpayer B, a resident of Kentucky, pays $200 a year in real property taxes. Deducting this amount saves B $70 in federal income taxes. In other words, $650 of A's New Hampshire tax liability is funded by A, and $350 is funded by the U.S. Treasury. The U.S. Treasury funds only $70 of Kentucky's tax assessment. See id.

124 See Fennell, supra note 116, at 632.


126 See id.

127 See infra notes 134–42 and accompanying text (describing investment nature of home buying).

128 See I.R.C. § 1001(a),(c) (2003), showing how other gains are taxed:

The gain from the sale or other disposition of property shall be the excess of the amount realized herefrom over the adjusted basis . . . . Except as otherwise provided in this subtitle, the entire amount of the gain or loss, determined under this section, on the sale or exchange of property shall be recognized.

129 See id.
residences over investments in other appreciable assets, especially when those taxpayers most likely to benefit from § 121 are the same segment of the population already blessed by having purchased a home in a booming suburban area.¹³⁰ This argument rings especially true because large amounts of tax-free appreciation are realistically available to only some of the nation's homeowners, particularly residents of certain affluent suburban areas where homes appreciate at much higher rates than in most central cities and rural areas.¹³¹

B. Arguments For Homeownership Tax Benefits

Despite the criticisms of the Code discussed in Part IV.A above, it remains true that Congress, through the political process, has decided that the provisions in §§ 163(h)(3), 164(a)(1), and 121 are beneficial for taxpayers as a whole.¹³² Promotion of homeownership is Congress's principal reason for including these sections in the Code.¹³³ What arguments can be made for supporting these special Code provisions? What arguments can be made for encouraging homeownership? What political realities exist that make these homeownership benefits sacrosanct in the American taxation tradition?

1. General Arguments for Homeownership Tax Benefits

As one commentator has noted, Americans have “good financial cause” to prefer owning a home to renting, in that homeownership allows taxpayers to “accumulat[e] the ultimate prize: equity.”¹³⁴ The government goal of spurring private savings for retirement and dire financial emergencies, by supporting

¹³⁰ See Julian C. Juergensmeyer, Symposium on Urban Sprawl: Local and Comparative Perspectives on Managing Atlanta's Growth, 17 GA. ST. U. L. REV. 923, 930 (2001) (stating that one of the advantages of suburban living is “higher homeownership rate”).
¹³¹ See Poindexter, supra note 76, at 19–21 (noting that home value appreciation is more common in affluent suburban neighborhoods than elsewhere). Taxpayers who reside in areas that experience low home value appreciation, like in upstate New York, are therefore forced to invest in taxable assets in order to enjoy asset appreciation. See G. Scott Thomas, Little Appreciation in WNY Home Value (Nov. 26, 2001), at http://www.bizjournals.com/buffalo/stories/2001/11/26/story1.html.
¹³³ See Mann, supra note 31, at 1352.
¹³⁴ Allison D. Christians, Breaking the Subsidy Cycle: A Proposal for Affordable Housing, 32 COLUM. J.L. & SOC. PROBS. 131, 146 (1999). While renters and homeowners incur monthly housing costs, only homeowners have a property ownership in an asset as a result of their monthly housing payments. See Top 10 Reasons to Buy a Home, at http://www.docmortgage.com/htm/Ownership%20vs.%20Rent.htm (last visited Oct. 8, 2004) (stating that “Rental payments are gone once you have made them. But with each mortgage payment, you are “buying” something tangible, you are building equity.”).
homeownership, seems a laudable method of empowering Americans to self-save. Many observers have echoed Joseph Snoe's assertion that "Congress' desire to encourage Americans to buy homes or to help those who want to own a home is sufficient justification for easing the financial stress of paying mortgage interest with after-tax dollars." The same pro-ownership rationale could certainly justify the deductibility of real property taxes and the nonrecognition of gain on the sale of a principal residence. But can the ability of upper-income suburban Americans to use these provisions be defended?

Homeownership is the most important way Americans accumulate wealth, as residences almost invariably experience long-term appreciation. While renters "throw away" their monthly housing payments, homeowners' monthly housing payments, which are often no more than rental payments for comparable housing, build a property interest for the homeowner in the home. By encouraging homeownership through beneficial tax provisions, Congress has recognized the tangible economic benefits that come from increased levels of homeownership—benefits that accrue to not only the homeowner himself, but also to the rest of society that no longer has to provide him with housing or ensure his financial welfare.

---

136 Snoe, supra note 2, at 466; see also 132 C.R. 13,591 (1986) (statement of Sen. Gramm) ("There is no basic principle in tax law that is more supported by the American people than the principle that you ought to be able to deduct interest on your home from your taxes.").
137 See Snoe, supra note 2, at 466.
138 See James E. Long & Steven B. Caudill, Racial Differences in Homeownership and Housing Wealth 1970–1986, 30 ECON. INQUIRY 83, 99 (1992) (noting that residences are American taxpayers' largest investments); see also Why It Still Pays to Buy a House, FORTUNE, May 3, 1993, at 22 (explaining why appreciating home values make homeownership economically beneficial even during periods when home appreciation is less than inflation).
139 That is, renters have no property interest in their home at the end of a given period of time.
140 See Glenn B. Canner et al., Householder Sector Borrowing and the Burden of Debt, FEDERAL RESERVE BULLETIN, Apr. 1995, at 323, 331 n.10. ("Renters, of course, have monthly rental payments that may be comparable in size to the mortgage payments of households with similar age and income characteristics.").
141 See RESTATEMENT (THIRD) OF PROPERTY § 4.1 (2004) (stating that a mortgage creates a security interest only in the mortgagee and does not affect owner's fee simple (citing Cienega Gardens v. United States, 331 F.3d 1319, 1328–29 (2003))).
142 See Mathias, supra note 6, at 59. Homeownership can be said to be more socially beneficial than renting because most Americans want to own their own home. See id. (citing studies showing that "86% of Americans believe that home owners are better off than renters"). It seems logical that Americans have housing preferences and that Congress would want to facilitate those housing preferences. See John R. Hicks, The Foundation of Welfare Economics, 49 ECON. J. 696, 698 (1939) ("We assume each individual (each free economic unit) to have a certain scale of preferences, and to regulate his activities in such a way as best to satisfy those preferences."). However, not all scholars believe that the best social policy is knowable or reachable by manipulating economic policy. See Nicholas Kaldor, Welfare Propositions of Economics, 49
Homeownership imbues most poor Americans\textsuperscript{143} and, admittedly, many affluent Americans, with social, familial, and economic advantages.\textsuperscript{144} These advantages empower Americans with economic stability and improved quality of life. Homeownership, especially suburban homeownership, increases stability, safety, and security for homeowners, allows taxpayers to live in higher quality residences, gives homeowner's children access to better schools, and improves neighborhood cohesiveness.\textsuperscript{145} Several commentators have persuasively argued that vast, sprawling suburban neighborhoods actually produce positive health and societal externalities.\textsuperscript{146} Increasing Americans' access to living in such desirable environments, by encouraging homeownership, then, seems a worthy societal goal.

\begin{footnotesize}
\footnotesize
\begin{itemize}
\item \textsuperscript{143} Even a majority of Americans (51.2\%) earning less than the median income were homeowners in 1999. \textit{Issue Brief}, supra note 46, at 4. 78.6\% of Americans earning more than the median income were homeowners in 1999. \textit{Id}. However, the homeownership gap between wealthy and poor Americans is closing. \textit{See id}. The gap was 27.4\% in 1999 and 28.7\% in 1994. \textit{Id}.
\item \textsuperscript{144} It must be noted that homeownership carries with it some costs and risks. Homeownership decreases mobility, reduces the ability to flee a declining neighborhood, and creates the risk of investment loss if a home must be sold during a period of economic downturn. \textit{See}, e.g., Michael H. Schill, \textit{Privatizing Federal Low Income Housing Assistance: The Case of Public Housing}, 75 \textit{Cornell L. Rev.} 878, 918 n.165 (1990) (noting that in the late 1980s, depreciation in real estate values occurred in many markets (citing Sean A. Burn, \textit{Outlook for the Economy and Real Estate}, 2 \textit{Real Est. Outlook} 2, 4 (1989))). A taxpayer may also lose the equity in his home if it is foreclosed upon. \textit{See The Consequences of Real Estate Foreclosure}, at http://www.foreclosureanswer.com/consequences.html (last visited Oct. 8, 2004). Further, deductions under §§ 163(h)(3) and 164(a) push many Americans into the Alternative Minimum Tax, under which their tax liabilities dramatically increase due to a denial of most deductions. \textit{See Graetz & Schenk, supra note 5}, at 795. Finally, if a homeowner sells a home encumbered with either recourse or a nonrecourse debt, he is obligated to include as income the outstanding amount of the obligation. \textit{See Crane v. Comm'r}, 331 U.S. 1, 14 (1947) (requiring taxpayer to include amount of recourse debt relief in amount realized upon real property sale); \textit{Comm'r v. Tufts}, 461 U.S. 300, 307 (1983) (requiring taxpayer to include amount of nonrecourse debt relief in amount realized upon real property sale).
\item \textsuperscript{146} Clint Bolick, \textit{Point/Counterpoint: Subverting the American Dream: Government Dictated “Smart Growth” is Unwise and Unconstitutional}, 148 \textit{U. Pa. L. Rev.} 859, 860–62 (2000) (citing statistics showing that only a tiny 3.1\% of the United States' land is developed and showing that more and more land is devoted to parkland and wilderness); \textit{Office of Tech. Assessment, The Technological Reshaping of Metro. America} 196–98 (1995) (advocating sprawling suburban lifestyle, with its cheaper housing, flexibility of business and residential use, and fewer health problems associated with over-crowding).
\end{itemize}
\end{footnotesize}
Other societal benefits also result from increased homeownership rates. Homeownership improves the maintenance and preservation of the nation's housing stock, and stabilizes neighborhoods, and increases citizen involvement in community life. Encouraging affluent taxpayers—and not just middle-income taxpayers—to become homeowners improves the quality of residential neighborhoods overall and generates positive externalities for all Americans. Spurring sales and construction of higher-end housing strengthens the economy by generating property taxes, employing laborers who pay taxes, stimulating the real estate industry, generating mortgage banking business, and facilitating the purchase of expensive furniture and appliances. Therefore, Congress's tax policy should benefit all homeowners equally. It should not be used as a pawn of interclass sparring, whereby wealthy Americans are called upon to fund the government's entire fisc, but only poor Americans are allowed to reap the benefits of deductions.

Tax experts have consistently derided provisions like §§ 163(h)(3), 164(a)(1), and 121 as being inconsistent with the generally progressive structure of the federal income tax system. Commentators who oppose homeownership benefits are fond of pejoratively calling these provisions "subsidies" and stating that they "cost" the federal government money. As such, these commentators must perceive any Code provision that deviates from a purely progressive, Haig-Simon concept of income as a "subsidy." In reality, nothing

149. See Forrester, supra note 1, at 407 n.185 (noting that homeowners are more likely to participate in civic life (citing Terry C. Blum & Paul W. Kingston, Homeownership and Social Attachment, 27 Soc. Persp. 159, 173 (1984)); see Forrester, supra, at 407 n.185 (noting that homeowners are more likely to vote (citing Nat'l Ass'n of Realtors, Homeownership: Key to the American Dream 22 (1988)); Struyk, supra note 147, at 25–26.
150. See Mann, supra note 31, at 1354 (stating that homeowners in general take a more active role in the community and maintain better living conditions).
151. See Howard, supra note 14, at 93 (“Home builders, building material suppliers, developers, realtors, lenders, and construction unions consider the [home mortgage interest deduction program] essential to their livelihoods . . . .”).
152. But see Mann, supra note 31, at 1359–63 (stating that tax policies do not encourage all Americans to be homeowners, but the policies do favor the rich).
153. But see Mann, supra note 31, at 1363 (stating that the rich are the majority that benefit from the tax policy).
154. See supra notes 81–85 and accompanying text.
155. See Mann, supra note 31, at 1362 (arguing that the home mortgage interest deduction results in the federal government “subsidizing” wealthy taxpayers' housing).
156. See id. at 1353 (“[T]he home mortgage interest deduction alone is estimated to cost the United States government $262.6 billion in lost tax revenue . . . .”).
158. Mann, supra note 31, at 1353 n.24. For example, Mann implies that the home mortgage interest deduction is a “subsidy” because it reduces the tax burden of some taxpayers. Id.
that closely resembles a Haig-Simon income tax system exists in the United States; this renders suspect the argument that homeownership provisions are “unnatural” departures from the Code.159

Scholars such as Boris Bittker have noted that the concept of “tax expenditures” is inherently ambiguous because there is no settled definition of what tax model represents the “pure tax model” against which deductions and exemptions should be measured.160 Surrey’s “tax expenditure” analysis is illustrative of this point.161 Under Surrey’s rubric, a large part of our established federal taxation system—including hundreds of provisions dealing with business expenses, depreciation, fringe benefits, child support, educational expenses, casualty losses, medical expenses, and charitable giving—would all qualify as “subsidies.”162 Since it is impossible to determine what a pure model of income taxation would resemble, it is inaccurate to identify §§ 163(h)(3), 164(a)(1), and 121 as inequitable “tax expenditures.”163 Further, under these commentators' paradigms, any tax scheme that does not confiscatorily tax at one hundred percent “costs” the government money.164 In reality, America is a nation of private property and free enterprise; it is the government's taxation that “costs” taxpayers.165

A democratic argument can also be furthered for supporting homeownership through the Code. Politicians are acting as responsive representatives when they consider and enact the tax policy preferences that a majority of Americans want.166 The homeownership provisions that result from Congress's responsiveness are politically expedient tax policy judgments supported by the

---

159 It is disingenuous to compare the homeownership provisions to a progressive income tax system, and thereby conclude that the provisions violate the progressivity of the Code, because no such tax system exists in the United States. “Tax scholars have long recognized that the major comprehensive tax system in the United States shares features of both an income and a consumption model. It is a hybrid tax.” Edward J. McCaffrey, Tax Policy Under a Hybrid Income-Consumption Tax, 70 TEx. L. Rev. 1145, 1146 (1992). “Reflection reveals that there are good reasons for striking a middle course: both popular and philosophical perspectives argue that we may want to hold consumption and income ideals concurrently.” Id. at 1147. “[W]e see that its consumption-type elements flow largely to the treatment of retirement savings, residential housing, and human capital . . . .” Id. at 1174 (emphasis added).

160 See Boris I. Bittker, Accounting for Federal “Tax Subsidies” in the National Budget, 22 NAT'L TAX J. 244, 247–48 (1969) (noting the indeterminability of the “cost” of all tax expenditures, as no one agrees to what tax system the cost of tax expenditures should be measured against).

161 See supra notes 81–85 and accompanying text.

162 See id.

163 Bittker, supra note 160, at 258 (“[T]he lack of an agreed conceptual model makes it impossible to say whether a large number of structural features of the existing federal income tax laws are, or are not, ‘tax expenditures’ . . . .”).

164 See supra notes 81–85 and accompanying text and supra notes 159–60.

165 See Welch v. Henry, 305 U.S. 134, 146–47 (1938) (recognizing that taxes are a way to apportion the cost of government among those enjoying the benefits of government).

166 See, e.g., supra note 136 (quoting Sen. Gramm that the majority of Americans support deductibility of interest on home mortgages).
A majority of Americans live in the suburbs and a majority of American families own their own home. Therefore, if a majority of voting taxpayers support a federal income tax code that includes benefits for homeownership, these provisions should not be seen as dubious simply because they coincidentally tend to favor one demographic group more than another. The Code routinely provides different benefits to different taxpayers. After all, oil and gas provisions benefit primarily western states' taxpayers, education credits benefit students and their families, and the partial nonrecognition of Social Security income benefits older Americans.

And, as some commentators have noted, the provisions that allow homeownership deductions are the “average guy's only tax shelter.” This represents what Michael Graetz has described as the “Archie Bunker attitude” toward the federal income tax system, in which the average American taxpayer resents the high level of income taxation and the perceived existence of extensive tax loopholes for the wealthy and sophisticated businesses. For these taxpayers, deductions and other homeownership provisions represent some modest benevolence in an otherwise malevolent high-tax regimen.

There is strong democratic appeal in supporting these homeownership tax provisions because, ultimately, these provisions represent the will of the people of the United States, as evidenced through the votes of their elected Congressmen. Setting tax policy is a distinctly legislative and majoritarian

---

167 Id.
169 Supra note 48.
170 See, e.g., Mann, supra note 31, at 1359–63 (stating that tax policies do not encourage all Americans to be homeowners, but the policies do favor the rich).
174 See, e.g., Mann, supra note 31, at 1348 n.3.
175 See Mann, supra note 31, at 1348 n.3 (“In one episode of the 1970s comedy, ‘All in the Family,’ Archie told his wife . . . ‘All those rich guys have their tax shelters and this is my tax shelter.’” (citing Michael J. Graetz, The U.S. Income Tax: Should It Survive the Millennium?, 85 TAX NOTES 1197, 1199 (1999))).
176 See Mann, supra note 31, at 1348 (stating that “the home mortgage interest deduction is America's favorite itemized deduction”).
177 See JOHN RAWLS, A THEORY OF JUSTICE 195 (rev. ed. 1999) (“First of all, the authority to determine basic social policies resides in a representative body selected for limited terms by and ultimately accountable to the electorate.”).
exercise.\textsuperscript{178} Alas, tax policy development may be one of the few areas of federal policy formulation that is not automatically vulnerable to extra-democratic litigation seeking to sacrifice the majority’s preferences at the alter of “individual rights”\textsuperscript{179} and purported “policy reasons.”\textsuperscript{180} In other words, tax policy formulation remains a mainly pure political, democratic exercise, one that is free from the counter-majoritarian trend of judicialization\textsuperscript{181} that has otherwise firmly entrenched itself in contemporary American lawmaking.\textsuperscript{182} The fact that higher-income suburban taxpayers—who shoulder much of the burden of government’s

\textsuperscript{178} The United States Constitution provides that “[t]he Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States . . . .” U.S. CONST. art. 1, § 8 cl. 1. The Sixteenth Amendment gave Congress the power to collect income taxes. \textit{Id.} at amend. XVI. Taxing statutes are almost never subject to constitutional attack. \textit{Freeland et al., supra} note 5, at 20. Specifically, the Constitution allows nonuniformity in how income is taxed, permitting certain items of income, and two people with equal gross income, to be subject to vastly different income tax liabilities. \textit{See, e.g.}, Knowlton v. Moore, 178 U.S. 41, 106 (1900) (explaining that the Constitution does not require that all items of income be taxed in uniform manner, so long as geographical uniformity is preserved). \textsuperscript{179} \textit{See, e.g.}, Stenberg v. Carhart, 530 U.S. 914, 930 (2000) (overturning Nebraska ban on partial-birth abortion despite fact law overwhelmingly supported by Nebraska legislature and Nebraska citizens); \textit{see also} Timothy L. Raschke Shattuck, \textit{Note, Justice Scalia’s Due Process Methodology: Examining Specific Traditions}, 65 S. CAL. L. REV. 2743, 2777–83 (1992) (noting that Justice Scalia, Robert Bork, and others decry that majority  will, expressed through the democratic process, is often thwarted in areas where Framers’ envisioned majoritarian principles would govern). \textit{But see generally} \textit{Lani Guinier, The Tyranny of the Majority} (1994) (arguing that although judicial review is inherently anti-popularist, it may serve a role in protecting the individual rights of holders of minority viewpoints). \textsuperscript{180} \textit{See, e.g.}, Mainstream Mkgt. Servs. v. FTC, 2003 U.S. Dist. LEXIS 16807, at *45 (D. Colo. Sept. 25, 2003) (finding unconstitutional federal do-not-call registry, despite fact it is overwhelmingly supported by Congress and American voters), \textit{stay of decision granted}, 2003 U.S. App. LEXIS 20366 (10th Cir. Oct. 7, 2003), \textit{aff’d in} Mainstream Mkgt. Servs. v. FTC, 2004 U.S. App. LEXIS 2564, at *47 (10th Cir. Feb. 17, 2004); Grutter v. Bollinger, 123 S. Ct. 2325, 2342 (2003) (finding race-based law school admissions policy constitutional despite fact that large majority of American’s reject use of race in admissions decisions). \textsuperscript{181} In most other areas of the law, the veto power of the judiciary has resulted in a “judicialized society,” a term that has come to describe the shift of policy-making authority from the political branches of government (that is, the legislative and executive branches) to the politically-insulated judicial branch. \textit{See Torbjörn Vallinder, The Global Expansion of Judicial Power} 13 (C. Neal Tate and Torbjørn Vallinder eds., 1995) (describing “judicialization” as “the infusion of judicial decision-making and of courtlike procedures into political arenas where they did not previously reside”). \textsuperscript{182} \textit{See Frank I. Michaelman, Brennan and Democracy}, 86 CAL. L. REV. 399, 399 (1998) (“Do we see some slight to democracy, some ‘Counter-Majoritarian Difficulty,’ . . . in unelected judges deciding the legal validity of the enactments of popular assemblies and thereby ruling the country? . . . I am one who does see the difficulty, who tries to take democracy seriously.”); \textit{John Hart Ely, Democracy and Distrust} 103 (Harvard University Press 1980) (“In a representative democracy value determinations are to be made by our elected representatives . . . .”). \textit{Id.} at 67. “[W]e may grant until we’re blue in the face that legislatures aren’t wholly democratic, but that isn’t going to make courts more democratic than legislatures.” \textit{Id.}
huge expenses—stand to benefit from the provisions of §§ 163(h)(3), 164(a)(1), and 121 undoubtedly assuages their distaste for the otherwise confiscatory nature of the Code.183

The fact that the average taxpayer’s “distaste” for the Treasury does not amount to all-out rejection of the tax Code is also likely due in large part to the deductions allowed in the Code.184 These homeownership Code provisions are politically sacred and it is likely that without them the Code would be politically untenable.185 While academics may debate whether the homeownership Code provisions fit into the Haig-Simons definition of “income” and whether the benefits of homeownership amount to “tax expenditures,” the answer is ultimately irrelevant because the existing Code would be politically impossible without these provisions.186 As a result, tax policy analysts should hold their collective noses and admit that a pristine progressive federal income tax system does not exist in America, and probably should not.187

2. Arguments for Deductibility of Home Mortgage Interest

The Code has enabled homeowners to deduct mortgage interest since its enactment in 1913.188 Historically, the largest segment of consumer debt has been mortgage debt incurred to purchase a home.189

183 Further, many well-compensated itemizing taxpayers are limited in their ability to use §§ 163(h)(3) and 164(a) because of the Alternative Minimum Tax. See I.R.C. §§ 56–58 (2003) (providing operating rules for AMT). To calculate whether a taxpayer is subject to AMT, the taxpayer's alternative minimum taxable income (AMTI) must be calculated. See GRAETZ & SCHENK, supra note 5, at 795–07. AMTI is found by taking a taxpayer's regular taxable income and adjusting it upward under the rules of §§ 56 though 58. See I.R.C §§ 56–58. In calculating AMTI, no miscellaneous itemized deductions are allowed, such as the home mortgage interest deduction and deductions for real property taxes. Id. at § 56(b)(1)(A)(i)–(ii). As a result, not as many higher-income taxpayers are able to benefit from §§ 163(h)(3) and 164(a)(1) as it would otherwise seem. See GRAETZ & SCHENK, supra.

184 See, e.g., I.R.C. § 62 (2003) (listing items available for itemized deduction); see also HOWARD, supra note 14, at 21 (showing that the deduction of home interest cost government $53.5 billion).

185 See Forrester, supra note 1, at 408 (noting political risk of eliminating popular tax benefits of the Code).

186 See id.

187 See GRAETZ & SCHENK, supra note 5, at 22 (stating that our system of taxation is progressive but the degree varies).

188 See Mann, supra note 31, at 1352 (noting that until 1986, all interest payments, whether personal or business, were deductible). President Reagan labored to save the mortgage interest deduction during the 1986 Code revision. See JEFFREY H. BIRNBAUM & ALAN S. MURRAY, SHOWDOWN AT GUCCI GULCH 57 (1988) (quoting President Reagan as saying, “I want you to know we will preserve the part of the American Dream which the home-mortgage-interest deduction symbolizes”).

189 In 1995, 67.3% of all consumer debt was mortgage debt. See I.R.S. Bulletin, supra note 14, at tbl. 1.
For most American homeowners, buying a home is an investment. The mortgage interest deduction is thereby justified, as it mirrors the deductibility of other investment interest. Likewise, the purchase of a vacation home is also a substantial investment that warrants a taxpayer to deduct the mortgage interest paid.

The “upside-down” subsidy nature of the home mortgage interest deduction is, of course, a direct result of the progressivity of the Code. One sure way to eliminate the upside-down subsidy nature of any deduction would be to tax all earners at the same rate—whereby deductions would benefit all taxpayers equally. Because upper-income earners are taxed more highly on their marginal income, any deductions that accrue to them are also going to generate higher tax savings. But this is only fair. If Congress has reasonably decided that the income a taxpayer allocates to certain purposes is to be treated as deductible (that is, “nonincome”) for policy reasons, then a taxpayer’s total income has effectively decreased, and he should be taxed at a lower marginal rate. In this way, the homeownership provisions are a refinement of, not a departure from, a progressive Code.

Further, while taxpayers with higher value homes (and correspondingly higher mortgage interest payments) enjoy a greater reduction in taxes under § 163(h)(3) than do taxpayers with less mortgage interest, taxpayers of all income levels generally favor the retention of the home mortgage interest deduction. This is perhaps because lower-income taxpayers hope to one day own an expensive house that will yield them a large mortgage interest deduction. Moreover, these taxpayers likely perceive it as fair that a taxpayer who pays a

---

190 See Mann, supra note 31, at 1357 (stating that homeowners’ purpose in purchasing a home is “personal housing and investment”); see also Long & Caudill, supra note 138, at 99.
191 Joseph Snoe has noted, however, that a key difference of home interest deductibility is that the taxpayer can deduct the interest in the year in which it is paid. See Snoe, supra note 2, at 497.
192 See Graetz & Schenk, supra note 5, at 30 (defending progressive system because it is “an essential to taxation based on ability to pay”).
193 See id. at 34 (“Unlike payroll, consumption, wealth or income taxes, the amount of a head tax would vary with work effort or earnings, consumption, savings, risk taking, or investment.”).
194 See, e.g., supra note 52 (stating that deduction amounts increase as price of homes increase).
195 That is, taxable income.
196 See Graetz & Schenk, supra note 5, at 30 (explaining generally how itemized deductions adjust gross income to lower tax rate applied).
197 Some scholars view personal deductions as “refinements” of the federal income tax system rather than “departures.” See, e.g., William D. Andrews, Personal Deductions in an Ideal Income Tax, 86 Harv. L. Rev. 309, 313–14 (1972) (“The central question about any particular deduction provision is whether there is good reason, in refining the concept of personal consumption as a component of taxable income, to exclude the particular goods or services for which the deductible expenditure is made.”).
vastly larger sum of money to the federal government in income taxes should receive a larger deduction than someone who pays little in income taxes.

3. Arguments for Deductibility of State and Local Property Taxes

Under a pure Haig-Simons tax scheme, state and local taxes would be deductible and any resultant government benefits consumed would constitute income.199 Under the Haig-Simons definition of income, personal income is defined as the algebraic sum of (1) the market value of goods and services consumed and (2) the change in value of accumulated wealth over the time period.200 As a result, money used to pay state and local property taxes should not be included in income, because no gain results merely from the paying of such taxes.201 The subsequent governmental benefits received do constitute a gain and, therefore, are income.202 It is clear that such a regime would be an inefficient administrative nightmare and, as a result, state and local property taxes must be either entirely deductible or entirely nondeductible.203

It would be appropriate to disallow the deductibility of state and local property taxes if it could be shown that there is a reasonably tight correlation between a taxpayer's property tax payments and the benefits he derives from the services funded by such taxes.204 In such a case, state and local property taxes represent payments for consumable personal goods and services which, under normal tax policy, are not tax deductible.205 Some have argued that it is reasonable to begin any analysis with the presumption that the benefits derived from property taxes have the same distribution as the property tax liability distribution.206 This hypothesis, however, seems to ignore the obvious. While a

199 See Mathias, supra note 6, at 49 (giving the Haig–Simons definition of personal income).
200 See generally HENRY C. SIMONS, PERSONAL INCOME TAXATION 50 (1938).
201 See id. at 51 (“[T]he essential connotation of income . . . is gain . . . .”).
202 See Brookes D. Billman & Noel B. Cunningham Jr., Nonbusiness State and Local Taxes: The Case for Deductibility, 28 TAX NOTES 1107, 1111 (1985) (“Since . . . the payment of taxes is neither consumption nor savings, the payment of taxes would not be included in the tax base. Under the Haig-Simons definition of income, however, the value of the benefits received by the taxpayer . . . does constitute income and should be included in the base.”).
203 Some scholars do advocate “partial, functional deductibility, the partial deductibility of state and local taxes based upon the nature of the public services financed by those taxes.” Edward A. Zelinsky, The Deductibility of State and Local Taxes: Income Measurement, Tax Expenditures and Partial, Functional Deductibility, 6 AM. J. TAX POL’Y 9, 10 (1987). Zelinsky would allow deductibility for taxes paid for medical care, education, police, and welfare, which he says are necessary for a minimally acceptable standard of living, but not for recreational facilities, for example, which are luxuries. Id. at 10–11.
204 See, e.g., id. at 11 (“Federal taxpayers in various locales should thus receive differing deductions depending upon the composition of the state and local services they finance.”).
206 See, e.g., ALAN PEACOCK, PUBLIC FINANCE AND STABILIZATION POLICY 151, 164 (Warren L. Smith & John M. Culbertson eds., 1974) (“[P]ublic goods benefits are distributed simply according to the allocation of taxes!”).
person living in a $1 million mansion in a particular jurisdiction likely pays ten times more in property tax than does someone living in a $100,000 home, he does not benefit tenfold from schools, parks, roads, and police protection.207

For most tax commentators, the fairness of a quasi-progressive income tax system is at least partly based on whether a taxpayer's tax liability is commensurate with his ability to pay.208 State and local real property taxes absolutely reduce a taxpayer's ability to pay federal income tax.209 A taxpayer who earns $100,000 and pays $4,000 in state and local property taxes does not have the same ability to pay federal income tax as an individual who earns $100,000 and pays only $1,000 in property taxes.210 Thus, the deduction is a necessary step in properly adjusting the tax base to avoid a tax upon a tax and to maintain the Code's focus on taxing based on ability to pay.211

Some have also argued that property taxes should not be deductible because these taxes are avoidable, as individuals have the freedom to limit their taxes and move to low-tax jurisdictions.212 Louis Kaplow has argued that:

[T]axes and public expenditures are chosen by residents through the political process. In addition, individuals “vote with their feet.” Individuals whose taxes exceed benefits received have an incentive to move to another jurisdiction, and jurisdictions will attract individuals who would be permitted to pay less than their share. If there is sufficient mobility and a sufficient variety of jurisdictions from which to choose, one might expect the equilibrium to be one in which taxes equal benefits.213

This argument fails for a number of reasons. First, while all real property owners are taxed on property owned in a jurisdiction, only the residents of the jurisdiction—whether property owners or not—are able to vote in that jurisdiction.214 As a result, many property owners have absolutely no say in what tax rates are imposed upon them by representatives elected by others.215 Second, while Kaplow encourages residents to “vote with their feet,”216 in

---

207 Id. at 160 (stating that state and local tax allocations benefit low-income earners more).
208 Id.
209 See Billman & Cunningham, supra note 202, at 1108.
210 See id.
211 See id.
212 See Kaplow, supra note 101, at 421.
213 Id.
214 While property-owning residents at least have a vote, they do not have a veto. R. Musgrave & P. Musgrave, Public Finance in Theory and Practice 346 (4th ed. 1984).
215 Generally, voter registration is only based on residency and not property ownership. See, e.g., http://www.hamilton-co.org/BOE/howtoreg.asp#TOQUALIFY (last visited Oct. 8, 2004).
216 Kaplow, supra note 101, at 421.
reality, taxpayers must live relatively close to their place of employment.\textsuperscript{217} A taxpayer who is employed in New York City, for example, has convenient living choices only in New York, New Jersey, and perhaps Connecticut, all of which are states with extremely high real property taxes.\textsuperscript{218} Very few employed taxpayers have any real ability to choose Alabama as the jurisdiction in which to own real property.\textsuperscript{219}

The property tax deduction facilitates fiscal coordination in our imprecise federal system and, therefore, is an indispensable component of the financing system of our federal system of government.\textsuperscript{220} Real property taxes are not merely “use” taxes that approximate an individual's burden on local governmental services.\textsuperscript{221} Instead, they often mimic “ability-to-pay” taxes that are imposed to carry out income redistribution within society.\textsuperscript{222} State and local property taxes clearly result in income redistribution, as many state and local government benefits are social programs that almost exclusively benefit lower-income taxpayers.\textsuperscript{223} Hence, taxpayers in jurisdictions that provide a large amount of income-redistributive benefits reduce the need for expenditures by the federal government.\textsuperscript{224} As a result, these state and local payments should be

\begin{itemize}
\item \textsuperscript{218} See \textit{Property Taxes: A State-by-State Ranking}, KIPLINGER'S RETIREMENT REPORT, July 2002, at 2 (noting that New Jersey, Connecticut, and New York rank first, third, and fourth, respectively, in per capita real property taxes, each with per capita real property tax rates over $1300 per year).
\item \textsuperscript{219} The per capita tax rate in Alabama is $210 per year. \textit{Id.}
\item \textsuperscript{220} See Billman & Cunningham, supra note 202, at 1110–11. Of course, this ideal world does not exist and taxpayers' governmental benefits are often much less than their taxes.
\item \textsuperscript{221} See Zelinsky, supra note 203, at 13 (stating that “deductibility of state and local taxes . . . is an important source of federal aid to the states”).
\item \textsuperscript{222} See 68 AM. JUR. 2D Sales and Use Taxes § 167 (2004) (“A ‘use’ tax, sometimes referred to as a ‘compensating’ tax, taxes the privilege of using, storing, or otherwise consuming tangible personal property or services, usually at a rate equivalent to the sales tax.”).
\item \textsuperscript{223} See Billman & Cunningham, supra note 202, at 1111.
\item \textsuperscript{224} For example, family protective services, special education, elderly meal programs, day care programs, welfare benefits, Medicaid, and health care are provided mostly to low-income residents. See Peacock, supra note 206, at 160.
\item \textsuperscript{225} See Musgrave & Musgrave, supra note 214, at 564–72 (noting that states and localities have taken over a number of income-reallocation social programs); see also Zelinsky, supra note 203, at 15, stating:
\end{itemize}
deductible, as they compensate for tax outlays the federal government would ostensibly have to make in their absence.225

Real property taxes also generate a considerable amount of positive externalities that benefit people who are not subject to the taxes that fund them.226 Real property taxes pay for the education of children who may soon leave the taxing jurisdiction, pensions of government retirees who move to warmer climates, environmental clean-ups that help “downstream” communities, police protection for visitors, and road and bridges used by the traveling public.227 Suburban communities tend to provide high levels of these valuable services.228 The deductibility of real property taxes encourages these localities to provide quality services that benefit individuals residing both inside and outside of the jurisdiction.229 Deductibility reduces mass out-migration from jurisdictions that provide large amounts of valuable, but expensive services.230 If state and local taxpayers were not permitted to deduct the costs of providing these positive externalities, it is possible that jurisdictions would engage in a “race to the bottom,” marked by ever-decreasing services and costs.231

Elected officials from New York, the most outspoken advocates of the deduction, have expressed their position... arguing that the high taxes of the Empire State reflect its discharge of the nation’s obligation to the poor and disadvantaged and that the deduction is an appropriate means of assisting New York with this national concern.

225 Deductibility of these taxes also decreases taxpayer opposition to taxes used to fund income-redistributional activities. See Zelinksy, supra note 203, at 15.
226 See Zelinksy, supra note 203, at 30 (“[W]e must ultimately confront the multijurisdictional nature of public finance in the United States and the spill-overs which may arise from governmental services.”).
227 Id.
229 Once it is evident that both the federal government and state and local governments provide services that benefit an itinerant American populace, “it becomes essential for at least one level of government to provide for deductibility of these taxes in order to integrate an overall measure of ability to pay.” Billman & Cunningham, supra note 202, at 1114.
230 See Kaplow, supra note 101, at 439.
4. Argument for Nonrecognition of Gain on Sales of Principal Residences

Homeownership is the primary way Americans accumulate wealth, as residences almost invariably experience long-term appreciation, and Americans often do not engage in other methods of long-term savings. The § 121 exemption from income of most of the appreciation of a taxpayer's principal residence encourages not only homeownership but also personal savings. Because suburban homes appreciate more rapidly than city homes, encouraging suburban homeownership permits more Americans to accumulate more wealth more rapidly. Suburban homeownership is simply a better investment than urban home-buying. Congress is right to encourage high-return investments in an age when so many Americans live beyond their means.

Section 121 does not permit an unlimited exclusion of gain on the sale of a principal residence. Sales of “mega” houses, which are increasingly common in many suburban locales, often result in more appreciation gain than can be exempted under § 121. Therefore, the wealthy are not fully insulated from having to recognize gain on the sale of their homes.

---

232 Michael J. Boskin, Frontiers of Tax Reform 10, 24 (1996) (“The equity in their homes is the largest asset for a majority of American families . . . .”).
233 Edith H. Jones & Todd J. Zywicki, It's Time for Means-Testing, 1999 B.Y.U. L. Rev. 177, 221 (arguing that modern cultural norms have encouraged millions of Americans to live beyond their means).
234 See Dalrymple, supra note 135.
235 See Poindexter, supra note 76, at 19–21 (noting that suburban homes appreciate more rapidly than homes in central cities).
237 See supra note 46 and accompanying text.
238 See Jones & Zywicki, supra note 233 and accompanying text.
240 See Annette Nellen & Ron Platner, Disposition of a Principal Residence After TRA ’97: Perspectives, Planning, and Problems, 25 J. Real Est. Tax’n 319, 319 (1998) (“Yet the $500,000 cap on excluded gain often is not sufficient for the owners of highly appreciated homes where the residence has either substantially appreciated in recent years or has a low adjusted basis reflecting a history of prior § 1043 rollovers.”).
241 Some tax planners have gone so far as to argue for the repeal of the limits § 121 imposes on the amount of gain that can go unrecognized.

The presence of the once every two year limitation of new § 121 is contrary to simplification efforts taken by Congress a few years ago with respect to the two-year limitation of old § 1034 . . . . Taxpayers who reside in parts of the country where it is possible for homes to appreciate beyond the § 121 dollar limits will find that the new tax planning technique implicit in new § 121 is
V. CONCLUSION

Ultimately, while there appears to be a correlation between the taxpayers who benefit the most from §§ 163(h)(3), 164(a)(1), and 121 and the taxpayers who own suburban homes, there does not appear to be any nefarious plot by Congress or the Treasury to single out wealthy suburbanites for special tax benefits. Poor, wealthy, urban, and suburban Americans all benefit from these provisions. It has been shown that spurring homeownership is a laudable policy goal. Further, while benefit disparities exist between the central city and the suburbs of some metropolitan areas, far greater disparities exist between different metropolitan areas. The perceived unfairness of these provisions on lower-income city dwellers has been shown to be a direct result of the fact that suburbanites have higher tax liabilities and more expensive residences. In all, the benefits reaped from deductibility of home mortgage interest and real property taxes and nonrecognition of home appreciation gain seem to outweigh any negative effects. Therefore, the tax benefits of homeownership should be maintained in the Internal Revenue Code.

Arguably, the dollar limitations of new § 121 will also promote an inefficient use of a taxpayer's financial resources by requiring a person to sell a home in order to optimize the tax planning benefits available under the law. In response to limits under § 121, Nellen and Platner discuss how an owner of a “mega” home can sometimes convert the residence into § 1031 property. Under § 1031, an owner can defer gain recognition if he exchanges qualifying § 1031 property for another “like kind” qualifying property. I.R.C. § 1031(a) (2003).

If Congress wishes to provide lower-income city dwellers with additional housing benefits, it should create a household exemption for renters rather than gutting the provisions that benefit homeowners. Any enacted provision, however, should maintain the policy preference for homeownership because of the societal benefits of homeownership over renting discussed in Part IV.B.

See supra Part V.
INCONSISTENCY AMONG THE CIRCUITS: IS THE NEW PROVIDER EXEMPTION AMBIGUOUS?

by Lynne A. Berkemeier

I. INTRODUCTION

II. BACKGROUND LAW
   A. Legislative Delegation to Federal Agencies
   B. SNF’s and the New Provider Exemption

III. FACTS OF THE CIRCUIT SPLIT DECISIONS
   A. Maryland General Hospital, Inc. v. Thompson
   B. South Shore Hospital v. Thompson
   C. Providence Health System v. Thompson
   D. Ashtabula County Medical Center v. Thompson

IV. ANALYSIS
   A. Interpretation of the “Plain Meaning” of the Regulation
   B. Use of the Provider Reimbursement Manual
   C. The Significance of the CON/DON Rights
   D. Application of the Administrative Procedure Act
   E. The Future of the New Provider Exemption and Agency Review in General

V. CONCLUSION

I. INTRODUCTION

When thinking of the term “provider,” what definition comes to mind? At first blush, it seems that the term’s plain meaning would be that a provider is one who furnishes or supplies.¹ However, when the term is used in the new provider exemption under 42 C.F.R. § 413.30(e),² is the provider merely a recently established provider which still furnishes or supplies, or is there something more? Does the fact that a provider seeking the exemption must have a

---

² 42 C.F.R. § 413.30(e) (1995).
certificate of need or determination of need to provide its services change the
definition of “provider”? Is the basis for the promulgation of the regulation
relevant, or does “provider’s” plain meaning override? Finally, does the
Secretary of an agency have latitude for his interpretation of one of his agency’s
regulations, or again, does the plain meaning prevail? As this casenote
illustrates, the United States Courts of Appeal have had differing opinions on
this subject.

Section II of this note lays out the background law relating to this subject,
specifically Congress’ delegation to federal agencies for legislation related to
specialized areas of law, and background specific to 42 C.F.R. 413.30(e).3
Section III provides the facts of four circuit split decisions on this subject, while
Section IV analyzes the differing opinions, attempting to answer each of the
questions stated above. Finally, Section V concludes the note with the author’s
opinion regarding the interpretation of the ambiguity of the regulation.

II. BACKGROUND LAW

A. Legislative Delegation to Federal Agencies

While Article I of the United States Constitution vests legislative powers in
Congress,4 there has never been a strict interpretation that Congress may not
delegate any of this rulemaking authority.5 In fact, Congress has employed such
delegation to federal agencies such as the Securities and Exchange Commission
and the Social Security Administration.6 Congress has done this for several
reasons. First of all, Congress’ knowledge base in an area may be limited and
therefore it may desire the assistance of specialists who have expertise in an area
to fulfill Congress’ ideas for a program.7 Congress would establish the basis for
the program, and then delegate to an agency the “elaboration” of this program.8

Another reason Congress may delegate legislative authority to a federal
agency is that it may be more cost effective.9 The cost of an agency making a
decision is lower than that of Congress, and therefore the time and detail needed
for a specialized area may be better suited to an agency.10

3 Id.
4 U.S. Const. art. I, § 1.
6 Id. at 2-3.
7 Id. at 11.
8 Id.
9 See id. at 10.
10 See id.
Finally, agencies may adjust the standards in their legislation as their specialized areas change or develop.\(^{11}\) This flexibility is beneficial, especially with areas in which the agency has experience and Congress does not.\(^{12}\) Waiting for Congress to study a specialized situation first and then become more familiar with it may slow the legislative progress, whereas an agency already familiar with the area can act accordingly and more quickly.\(^{13}\)

These federal “agencies typically have both legislative and judicial powers concentrated in them.”\(^{14}\) Agencies promulgate rules specific to their specialized areas and adjudicate cases based on these rules.\(^{15}\) This delegation to federal agencies is not without review, however. Congress passed the Administrative Procedure Act (APA)\(^{16}\) in 1946.\(^{17}\) This act helps identify agency functions and provides for courts to review whether or not agencies stay within their legal jurisdiction.\(^{18}\) While there have been criticisms of the APA, “the terms of the Act have changed little,” since its enactment.\(^{19}\)

**B. SNF’s and the New Provider Exemption**

Medicare,\(^{20}\) the federally funded health insurance program enacted in 1965 for the elderly and disabled,\(^{21}\) is found in Title XVIII of the Social Security Act.\(^{22}\) Included in the Medicare Act is the reimbursement for services provided by skilled nursing facilities (SNF’s),\(^{23}\) as well as the discretionary determination by the Secretary of Health and Human Services (Secretary) for the reasonable costs for delivery of these SNF services.\(^{24}\) The Secretary has the ability to make exemptions and exceptions for higher reimbursement to SNF’s as he deems appropriate.\(^{25}\)

\(^{11}\) AMAN & MAYTON, supra note 5, at 10.

\(^{12}\) Id.

\(^{13}\) Id.

\(^{14}\) BERNARD SCHWARTZ, ADMINISTRATIVE LAW § 1.5 (3d ed. 1991).

\(^{15}\) Id.


\(^{17}\) AMAN & MAYTON, supra note 5, at 10.

\(^{18}\) Id.

\(^{19}\) Id.


\(^{21}\) DOROTHY E. NORTHROP & STEPHEN COOPER, HEALTH INSURANCE RESOURCES – OPTIONS FOR PEOPLE WITH A CHRONIC DISEASE OR DISABILITY 23 (Demos Med. Pub., Inc. 2003).


\(^{24}\) 42 U.S.C. § 1395v(v)(1)(A) (1994); see also Hennepin County v. Bowen, 689 F. Supp. 1, 2-3 (D.D.C. 1988) (reversing the case, but noting that the Secretary decides how costs are determined).

\(^{25}\) 42 U.S.C. § 1395yy(c) (1996). But see St. Luke’s Methodist Hosp. v. Thompson, 315 F.3d 984, 988 (8th Cir. 2003) (noting that while the Secretary has discretion, “this is not to say that [he] may do whatever [he] wishes”).
An SNF is “a facility or part of a facility that primarily furnishes either skilled nursing care and related services or rehabilitation services.”\(^{26}\) It is a short-term care facility whose services are furnished either in a “hospital’s extended care wing” or separate nursing facility.\(^{27}\) Patients that have been in a hospital due to serious illness or surgery may be transferred to an SNF for a period of a few days to a few weeks, to receive extended 24-hour monitoring and rehabilitation.\(^{28}\)

Under 42 C.F.R. § 413.30(e), now codified at 42 C.F.R. § 413.30(d)\(^ {29}\) but referred to as section (e) in this note and as applied within the cited cases, the “new provider exemption” provides that

> exemptions from the limits imposed under this section may be granted to a new provider. A new provider is a provider of inpatient services that has operated as the type of provider (or the equivalent) for which it is certified for Medicare, under present and previous ownership, for less than 3 full years . . . .\(^ {30}\)

Under this exemption, new providers are granted a higher reimbursement rate than the routine cost limits (reimbursement caps under the Medicare plan for medical services and supplies) for the first two years of the SNF’s operation.\(^ {31}\) The purpose of this exemption is “to allow a provider to recoup the higher costs normally resulting from low occupancy rates and start-up costs during the time it takes to build its patient population.”\(^ {32}\)

---

\(^{26}\) *St. Elizabeth Med. Ctr.*, 307 F. Supp. 2d at 75 (explaining 42 U.S.C. § 1395i-3(a)).


\(^{28}\) *Id*.

\(^{29}\) 42 C.F.R. § 413.30(d) (1999). The regulation now reads:

> Exemptions. Exemptions from the limits imposed under this section may be granted to a new SNF with cost reporting periods beginning before July 1, 1998 as stated in § 413.1(g)(1). The intermediary makes a recommendation on the provider’s request to CMS, which makes the decision. A new SNF is a provider of inpatient services that has operated as the type of SNF (or the equivalent) for which it is certified for Medicare, under present and previous ownership, for less than 3 full years. An exemption granted under this paragraph expires at the end of the SNF’s first cost reporting period beginning at least 2 years after the provider accepts its first inpatient.

*Id*.

\(^{30}\) Maryland Gen. Hosp., Inc. v. Thompson, 308 F.3d 340, 343 (4th Cir. 2002) (citing 42 C.F.R. § 413.30(e) (1995)).

\(^{31}\) *Id.* at 342.

During the early to mid-1990’s, there was a near-80% increase in the number of patients who utilized the Medicare SNF benefit. This almost tripled the Medicare SNF payments per day, and amounted to a rise in expenditures from almost $2.5 billion in 1990 to over $12 billion in 1997. Payments to SNF’s had “been among the fastest growing components of Medicare spending.” As a result, in 1997 Congress enacted the Balanced Budget Act (BBA), part of which directly addressed these rising costs under Medicare. Under the BBA, SNF’s were to begin receiving reimbursement on July 1, 1998 under the Prospective Payment System (PPS). The new PPS system allowed for reimbursement based on predetermined rates per day of care, versus the prior reimbursement that had no limits on ancillary services received while in an SNF (such as therapy). Under PPS, there is a fixed daily amount of reimbursement plus additional reimbursement based on individual therapy and nursing needs, which are more restricted depending on which category each patient is placed in at the SNF.

Reimbursement under PPS was phased in from 1998 to 2001, with the rates being a blend of the SNF’s prior average reimbursement rate and the federally-determined rate. The first-year’s payment during the transition period, beginning July 1, 1998, consisted of 75% of the SNF’s prior reimbursement rate in 1995 and 25% of the federally-determined rate; the second-year’s reimbursement rate was a 50/50 split between the SNF’s average rate and the federally-determined rate and so on, until 2001 when the reimbursement rate was based solely on the federally-determined rate. While the federal reimbursement portion was pre-determined based on the average amount SNF’s received in 1995, including an update for inflation, the SNF-based portion was

33 Paul I. Grimaldi, *Prospective Per Diem Rates for Skilled Nursing Care*, J. HEALTH CARE FIN. 49, 49 (Spring 2002).
34 Id.
35 *Medicare Payment Advisory Comm., Report to the Congress: Medicare Payment Policy* 84 (March 1999).
39 Id.
40 Id.
41 See Grimaldi, *supra* note 33, at 54 (discussing the PPS transition period).
42 See also *Medicare Payment Advisory Comm., Report to the Congress: Medicare Payment Policy* 9 (March 2000) (discussing the transition period).
44 *Medicare Payment Advisory Comm., Report to the Congress: Medicare Payment Policy* 23 and n.29 (March 2002).
based on the 1995 rate the specific facility received (including any increased reimbursement for the new provider exemption).\textsuperscript{45} SNF’s that did not receive the new provider reimbursement exemption prior to July 1, 1998 were reimbursed based on the combination of their specific reimbursement rate and the federally-determined rate.\textsuperscript{46}

Because the BBA looked to 1995 reimbursement levels for setting future reimbursement rates under PPS, facilities desired the new provider exemption.\textsuperscript{47} In 2001, in \textit{Paragon v. Thompson},\textsuperscript{48} the United States Court of Appeals for the Seventh Circuit determined that 42 C.F.R. § 413.30(e) was “ambiguous on what constitutes a provider” and therefore deferred to the Secretary’s determination of the new provider exemption under the facts of the case.\textsuperscript{49} The court relied on the United States Supreme Court’s holding that deference is owed to an agency’s interpretation of a regulation when “the regulation concerns ‘a complex and highly technical regulatory program,’ in which the identification and classification of relevant ‘criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns.’\textsuperscript{50} While the Supreme Court acknowledged that reviewing courts must apply the Administrative Procedure Act (APA),\textsuperscript{51} as incorporated in the Social Security Act,\textsuperscript{52} to the interpretation of regulations, the Court acknowledged that they must defer to the Secretary’s interpretation unless the plain language of the regulation or its intent compel otherwise.\textsuperscript{53}

Circuit cases subsequent to \textit{Paragon} have been inconsistent in their determinations of the interpretation of 42 C.F.R. § 413.30(e), with the Fourth and Sixth Circuits finding the regulation unambiguous in cases in 2002 and 2003, respectively, while the First and Ninth circuits agree with \textit{Paragon} that the regulation is ambiguous, based on their 2002 and 2003 cases.\textsuperscript{54} In all four circuits, as well as \textit{Paragon}’s Seventh Circuit, each new SNF required either a certificate of need (CON) or determination of need (DON), which help a state

\begin{flushleft}
\textsuperscript{45} See Grimaldi, supra note 33, at 54 (discussing the payment rates).
\textsuperscript{46} Medicare Payment Advisory Comm., Report to the Congress: Medicare Payment Policy 9 (March 2000).
\textsuperscript{47} South Shore Hosp., Inc. v. Thompson, 308 F.3d 91, 96-97 (1st Cir. 2002).
\textsuperscript{48} Paragon Health Network, Inc. v. Thompson, 251 F.3d 1141 (7th Cir. 2001).
\textsuperscript{49} Id. at 1148-49.
\textsuperscript{53} Thomas Jefferson Univ., 512 U.S. at 512.
\end{flushleft}
limit or expand its number of skilled nursing beds. The necessity of additional beds or transfer of skilled beds based on these CON/DON’s have also played a part in some of the courts’ determinations of whether or not an SNF was a “new provider.”

III. FACTS OF THE CIRCUIT SPLIT DECISIONS

A. Maryland General Hospital, Inc. v. Thomson

In 1994, Maryland General Hospital (MGH) established its SNF (in this case known as a transitional care center or TCC) by purchasing the rights to 24 patient beds from three other SNF’s which were not previously connected or related to MGH in any way. MGH requested the new provider exemption under 42 C.F.R. § 413.30(e), but was denied by the Secretary. MGH appealed to the district court, which upheld the Secretary’s denial of the exemption. MGH then appealed to the United States Court of Appeals for the Fourth Circuit, which vacated the district court’s decision and remanded with instructions to find for MGH.

The appellate court held that the new provider exemption was straightforward, and that, while the regulation did not specifically define “provider,” its interpretation of the word was consistent with the term as used in other parts of the Medicare Act, making the term relate to a “business-entity.” Further, the court found that this “business-entity” interpretation was supported by the interpretation given in Medicare’s Provider Reimbursement Manual (PRM) in effect at the time of the case. The court rejected the Secretary’s interpretation of the regulation that the change in ownership did not change the fact that the beds purchased by MGH were previously used during the three preceding years as SNF beds. The court focused primarily on the regulation’s

56 South Shore Hosp., Inc. v. Thompson, 308 F.3d 91, 101-02 (1st Cir. 2002).
57 Maryland, 308 F.3d at 340.
58 Id. at 343.
59 Id.
60 Id.
61 Id. at 343, 348.
62 Id. at 343-44 (citing 42 U.S.C. § 1395x(u) as “defining provider of services as a hospital, critical access hospital, skilled nursing facility, comprehensive outpatient rehabilitation facility, home health agency [or] hospice program”).
63 Maryland, 308 F.3d at 344 (highlighting the word “institution”).
64 Id. at 344-45.
concentration on “newness” for the provider institution, and held that the Secretary disregarded this in his interpretation.65

While the Secretary relied on Paragon for his interpretation that the term “provider” was ambiguous, the Fourth Circuit found the Seventh Circuit’s reasoning unpersuasive.66 The Fourth Circuit held that the Seventh Circuit’s hypotheticals used in its decision to show that the term was ambiguous (i.e., the firing of all staff and hiring of a new one, but making no other changes, would still constitute the same “provider”) would not be present if the term “provider” were used when referring to an institution or facility.67 The Fourth Circuit held that the Seventh Circuit in Paragon ignored the ordinary meaning of the term “provider” and therefore found the Seventh Circuit’s decision unpersuasive.68

In its ultimate conclusion, the Fourth Circuit applied the ordinary meaning of the term “provider” and held that because MGH had not previously run an SNF when it applied for its exemption, then as a new business institution looking to operate an SNF, MGH was entitled to the new provider exemption.69 It conceded that an agency’s interpretation of a regulation is important when the regulation is ambiguous, but in this case, the court found no ambiguity in 42 C.F.R. § 413.30(e), and therefore found for MGH.70

However, in his dissent, Judge Gregory held that the Secretary applied a reasonable interpretation of the new provider exemption.71 He agreed with the Secretary’s interpretation that a transfer of beds under a CON, rather than the creation of new beds under a CON, imputed the prior operating history of those beds to the new owner (with MGH being the new owner).72 The 24 beds MGH received had all come from SNF’s that had been operating longer than three years and thus did not qualify for new provider status.73 MGH conceded that this was true, but argued that these particular 24 beds were not operational SNF beds, but were merely waiver beds74 (a maximum additional 10 beds that SNF’s could add into operation without needing a new CON).75 The Secretary

65 Id. at 345.
66 Id.
67 Id. See Paragon Health Network, Inc. v. Thompson, 251 F.3d 1141, 1148 (7th Cir. 2001) (noting that many attributes make up a “provider,” but the mere changing of any of these attributes does not create a “new provider.” For example, an SNF hiring a completely new staff after ridding the old one would not make the SNF a “new provider.” Or, if the administration and physical facility remained the same, but a whole new staff was hired and all new equipment was brought into the SNF, the SNF would remain the same “provider.” A “new provider” could be established, however, if all of the attributes comprising the SNF had never been part of another facility).
68 Maryland, 308 F.3d at 346.
69 Id. at 347.
70 Id. at 347–48.
71 Id. at 348.
72 Id. at 349.
73 Id.
74 Maryland, 308 F.3d at 349.
75 Id. at 343.
countered MGH’s claim regarding waiver beds by reasoning that it was not whether the beds themselves were operational in the preceding three years, but whether the facility itself was operating during this time period. The Secretary held that distinguishing the CON for new beds from one for existing beds (as in this case) supported the new provider exemption, and that because the transfer of rights to beds only did not increase the number of skilled beds available, granting an exemption for these beds would defy the purpose of the CON in limiting the number of skilled beds.

Finally, Judge Gregory noted in his dissent that Congress gave the Secretary the authority to determine when to grant exemptions to SNF’s under 42 U.S.C. § 1395yy(c), and that in this situation, the Secretary tried to enforce 42 C.F.R. § 413.30(e) through a reasonable interpretation that was “neither plainly erroneous nor inconsistent with the language of the regulation.”

B. South Shore Hospital, Inc. v. Thompson

South Shore Hospital bought DON rights for skilled beds from a nursing home, and began operation as an SNF in 1995. It petitioned the Health Care Financing Administration (HCFA) for the new provider exemption, but was denied. The Provider Reimbursement Board (Board) then reviewed the case, and likewise denied the request. The Board found that the previous nursing home’s operations were imputed to South Shore, making it ineligible to qualify for the new provider exemption. The district court, however, reversed the Board’s decision, concluding that South Shore was a new provider, and remanded the case to the Board to determine South Shore’s level of reimbursement. The Secretary appealed this decision.

Finding 42 C.F.R. § 413.30(e) ambiguous, the United States Court of Appeals for the First Circuit reversed the decision. The court found that the phrase “previous ownership” in the regulation was not defined, and further stated that the terms “provider” and “institution” were “central to an understanding of the exemption, and those terms subsume any number of components” which may

---

76 Id. at 349.
77 Id. at 350.
78 Id. at 351.
79 South Shore Hosp., Inc. v. Thompson, 308 F.3d 91 (1st Cir. 2002).
80 Id. at 96.
81 Id. at 97.
82 Id.
83 Id.
84 Id.
85 South Shore, 308 F.3d at 97.
86 Id. at 98.
87 Id. at 106.
or may not lead to the determination that a new provider had been created. The Secretary looked back at the former nursing home’s operations and “determined that it had functioned as the equivalent of an SNF during the previous three years” to its transfer of bed rights to South Shore, thereby denying the new provider exemption. South Shore merely acquired a DON for the transfer of rights to the beds, not a DON for rights to new beds. Additionally, the court pointed out that the moratoria that the state had on DON rights limited the number of available skilled nursing beds, lessening the possibility for low occupancy rates for the SNF’s early years (which previously brought financial drain on SNF’s).

Finally, the court reiterated that it should give deference to an administrative agency regarding the determination of a regulation when Congress had granted this authority. This was especially appropriate when the interpretation of a regulation required the balancing of “factors within the scope of the Secretary’s expertise.”

C. Providence Health System v. Thompson

In 1990, Providence Health System obtained a CON and purchased the rights to 12 skilled nursing beds from an existing nursing facility, subsequently opening an SNF in 1993. In 1996, HCFA denied Providence’s request for the new provider exemption and Providence appealed to the Board, which upheld the denial. Providence then sought judicial review in district court, which reversed the decision and granted Providence the new provider exemption. The Secretary appealed, and the United States Court of Appeals for the Ninth Circuit reversed and found for the Secretary.

In looking at 42 C.F.R. § 413.30(e), the court held that its plain language did not clearly address “previous ownership.” The Ninth Circuit was persuaded by Paragon’s holding that the terms “provider” and “previous ownership” were

88 Id. at 98.
89 Id. at 99.
90 Id.
91 South Shore, 308 F.3d at 100.
92 Id. at 101, 106 (noting the court also held that the party challenging the Secretary’s decision has the burden of showing that the Secretary did not apply a reasonable standard to the interpretation of the regulation).
93 Id.
94 Providence Health Sys. v. Thompson, 353 F.3d 661 (9th Cir. 2003).
95 Id. at 663.
96 Id. at 664.
97 Id.
98 Id. at 663.
99 Id. at 668.
100 Providence, 353 F.3d at 665.
ambiguous, as well as the First Circuit’s holding that the terms “provider” and “institution” “subsume any number of components” which may or may not lead one to believe that a new provider had been created.

The court deferred to the Secretary’s interpretation because it found the regulation’s language ambiguous. The Secretary narrowly construed “previous ownership” to whether the skilled beds were previously operated by an SNF or the equivalent of an SNF, and the court held that it was reasonable for the Secretary to interpret bed rights as an “essential characteristic of providership.” The secretary found that the transfer of beds to Providence was a change in ownership (or CHOW), as defined in the Provider Reimbursement Manual, and the court held that this application was reasonable under the Secretary’s power to interpret his agency’s own regulations. The court held that “CHOW” was a “term of art” and it was up to the Secretary to interpret this term.

Finally, the Ninth Circuit agreed with Paragon and South Shore regarding the benefits of the moratorium on new skilled nursing beds, and the “policy of preventing under-utilization that undergirds 42 C.F.R. § 413.30(e).” The court found that the Secretary’s broad interpretation of “provider” and “previous ownership” in order to narrow the application of the exemption was reasonable.

D. Ashtabula County Medical Center v. Thompson

In 1995, Ashtabula County Medical Center (ACMC) acquired a CON to put 15 skilled beds purchased from a nursing home into its hospital, and subsequently sought the new provider exemption in 1996. HCFA denied the request and the Board affirmed, inciting ACMC to subsequently bring a claim in federal court. The district court found that the Secretary’s interpretation of 42 C.F.R. § 413.30(e) was unreasonable and ruled in ACMC’s favor. The

101 Id.
102 Id. at 665-66.
103 Id. at 666 (citing Thomas Jefferson Univ. v. Shalala, 512 U.S. 504 (1994)).
104 Id.
105 Id.
106 Providence, 353 F.3d at 666.
107 Id. at 667-68 (noting, as in South Shore, that the burden of proving the Secretary was unreasonable with his interpretation is on the party challenging the interpretation. See South Shore Hosp., Inc. v. Thompson, 308 F.3d 91, 101 (1st Cir. 2002)).
108 Id. at 666.
109 Ashtabula County Med. Ctr. v. Thompson, 352 F.3d 1090 (6th Cir. 2003).
110 Id. at 1092.
111 Id.
112 Id. at 1091.
113 Id.
Secretary appealed this decision, but lost when the United States Court of Appeals for the Sixth Circuit affirmed.\textsuperscript{114}

The Sixth Circuit agreed with the district court that the term “provider” is unambiguous, holding that the term applied to an institution, “not merely to a characteristic or attribute” of the institution.\textsuperscript{115} The court also found that the interpretation in the Provider Reimbursement Manual (PRM) in effect at the time showed that Congress and the Secretary meant to apply “provider” to an institution,\textsuperscript{116} and likewise, the “plain meaning” of the term “provider” referred to an institution.\textsuperscript{117} The court held that ACMC did not operate as an SNF until it purchased the 15 skilled beds, and therefore it qualified for the new provider exemption.\textsuperscript{118}

The Sixth Circuit disagreed with the Seventh Circuit in \textit{Paragon}, holding that the Seventh Circuit focused more on the ambiguity of the term “new” rather than “provider” when drawing the line between the “same provider” and a “new provider.”\textsuperscript{119} Applying relevant definitions in the PRM and in the Medicare Act,\textsuperscript{120} as well as the “normal” usage of the term “provider,” the Sixth Circuit determined that “provider” applied to the institution itself, not to one of the institution’s attributes.\textsuperscript{121} The Sixth Circuit likened ACMC’s purchase of the rights to the 15 skilled beds to the purchase of buying any other kind of asset from a facility, such as an x-ray machine, and therefore held that the new provider exemption applied to ACMC.\textsuperscript{122}

\section*{IV. Analysis}

The facts of the four cases are quite similar. Each SNF had bought CON or DON rights from another facility that was in no way related to the purchasing facility.\textsuperscript{123} The selling facilities had provided skilled nursing services to their patients for at least three years preceding the sale of CON/DON rights.\textsuperscript{124} Each

\begin{thebibliography}{99}
\bibitem{114} Id. at 1097.
\bibitem{115} \textit{Ashtabula}, 352 F.3d at 1094.
\bibitem{116} Id.
\bibitem{117} Id.
\bibitem{118} Id.
\bibitem{119} Id. at 1095.
\bibitem{121} \textit{Ashtabula}, 352 F.3d at 1096.
\bibitem{122} Id. at 1097.
\bibitem{123} Id. at 1092; Providence Health Sys. v. Thompson, 353 F.3d 661, 663 (9th Cir. 2003); South Shore Hosp., Inc. v. Thompson, 308 F.3d 91, 96 (1st Cir. 2002); Maryland Gen. Hosp., Inc. v. Thompson, 308 F.3d 340, 342 (4th Cir. 2002).
\bibitem{124} Id.
\end{thebibliography}
new SNF applied for the new provider exemption under 42 C.F.R. § 413.30(e), and the Secretary denied the request in each case.\textsuperscript{125} However, when the new SNF’s appealed, the Secretary’s decision was upheld in the First and Ninth Circuits, but overruled in the Sixth and Fourth Circuits.\textsuperscript{126} The appellate courts discussed similar topics in their analyses of the cases, but the outcomes were not consistent.\textsuperscript{127} These analysis discussions included the interpretation of the “plain meaning” of the regulation, the application of the Provider Reimbursement Manual, the use and purpose of CON/DON rights, and ultimately, the application of the Administrative Procedure Act to the Secretary’s ruling and the specific facts of each case.\textsuperscript{128} This section discusses these four areas that the courts relied on, as well as suggestions for future decisions regarding whether or not 42 C.F.R. § 413.30(e) is ambiguous.

\textbf{A. Interpretation of the “Plain Meaning” of the Regulation}

The United States Supreme Court has held that when the Secretary’s construction of a “principle is faithful to the regulation’s plain language,” then the Secretary’s application of that interpretation of the principle should be upheld.\textsuperscript{129} However, the plain language interpretation in these particular cases is part of the inconsistency between the circuits. \textit{Black’s Law Dictionary} does not provide a definition of “provider,” but \textit{The American Heritage Dictionary} defines “provider” as one who furnishes or supplies.\textsuperscript{130} Applying this definition to these cases, the plain language interpretation of “provider” seems to suggest that the provider is the facility that “furnishes or supplies” the skilled nursing services. But are the services of the original provider imputed to the new provider (through transfer of SNF bed rights), thereby disqualifying the new provider from the exemption under 42 C.F.R. § 413.30(e)? This remains the question to be answered.

The Fourth and Sixth Circuits interpreted the wording of the new provider exemption differently from the Ninth Circuit, even though all three circuits looked at the definitions provided in the Medicare Act.\textsuperscript{131} While conceding that the exemption does not specifically define “provider,” the Fourth Circuit held that its wording and structure suggest that a “provider” is the institution or

\textsuperscript{125} Id.
\textsuperscript{126} \textit{Ashtabula}, 352 F.3d at 1096; \textit{Providence}, 353 F.3d at 666; \textit{South Shore}, 308 F.3d at 106; \textit{Maryland}, 308 F.3d at 347.
\textsuperscript{127} Id.
\textsuperscript{128} Id.
\textsuperscript{130} \textit{The American Heritage Dictionary} 997 (2nd ed. 1985).
\textsuperscript{131} \textit{Ashtabula}, 352 F.3d at 1096; \textit{Providence}, 353 F.3d at 665; \textit{Maryland}, 308 F.3d at 344.
business providing the skilled nursing services.\textsuperscript{132} Using the definition from a different portion of the Medicare Act to show that the exemption implied a business entity, the court defined “provider of services” as “a hospital, critical access hospital, skilled nursing facility, home health agency, [or] hospice program.”\textsuperscript{133} Likewise, in looking at the same section of the Act, as well as 42 U.S.C. § 395i-3(a), which extends the definition to a distinct part of an institution,\textsuperscript{134} the Sixth Circuit held that “although the term ‘provider’ is not defined in § 413.30(e), its meaning is made clear by referencing” these related statutes in the Act.\textsuperscript{135} However, the Ninth Circuit held that “equating ‘provider’ with ‘institution’ or a ‘distinct part of an institution’” did “not remove the ambiguity from the face of the regulation.”\textsuperscript{136} The Ninth Circuit found that this interplay between words made the exemption “inherently ambiguous,”\textsuperscript{137} while the Fourth and Sixth Circuits found the reference to “institution” to mean that the “exemption depend\[ed\] upon the business entity, itself, providing the skilled nursing services.”\textsuperscript{138} Three circuits, examining the same section(s) of the Medicare Act, and the result is two differing views, both of which seem plausible without further investigation.

The four circuits did agree that if the plain language of the new provider exemption was ambiguous, then deference to the Secretary’s interpretation was required.\textsuperscript{139} In fact, the United States Supreme Court supported this view in \textit{Thomas Jefferson Univ. v. Shalala} when it held that the Court owes deference “to the Secretary’s interpretation unless an ‘alternative reading is compelled by the regulation’s plain language or by other indications of the Secretary’s intent at the time of the regulation’s promulgation.’”\textsuperscript{141} The Secretary’s intent for promulgating 42 C.F.R. § 413.30(e) in 1979 was to “ameliorate the ‘initial underutilization’ faced by many market entrants” during the start-up phase of a new SNF.\textsuperscript{142} The two circuits that noted this reference to the Secretary’s intent for the regulation were the First\textsuperscript{143} and Ninth\textsuperscript{144} Circuits, the two circuits that found the exemption ambiguous. While the SNF in \textit{South Shore} argued that the

\begin{itemize}
\item \textit{Maryland}, 308 F.3d at 343-44.
\item \textit{Id.} at 344 (citing 42 U.S.C. § 1395x(u) (1994)).
\item 42 U.S.C. § 1395i-3(a) (1996).
\item \textit{Ashtabula}, 352 F.3d at 1096.
\item \textit{Providence}, 353 F.3d at 665.
\item \textit{Id.}
\item \textit{Ashtabula}, 352 F.3d at 1096; \textit{Maryland}, 308 F.3d at 344.
\item \textit{Ashtabula}, 352 F.3d at 1094; \textit{Providence}, 353 F.3d at 666; \textit{South Shore Hosp., Inc. v. Thompson}, 308 F.3d 91, 100 (1st Cir. 2002); \textit{Maryland}, 308 F.3d at 347.
\item 512 U.S. 504 (1994).
\item \textit{Id.} at 512 (citing Gardebring v. Jenkins, 485 U.S. 415, 430 (1988)).
\item \textit{South Shore}, 308 F.3d at 95 (citing 44 Fed. Reg. 31,802 (1979) which “recognize[d] that new providers have great difficulty meeting applicable cost limits and believe[d] that some relief from these cost limits [was] warranted”).
\item \textit{Id.}
\item \textit{Providence}, 353 F.3d at 667.
\end{itemize}
plain meaning of the English language commanded that the exemption apply to them (because they were previously not an SNF and merely acquired the rights to SNF beds from another facility), the United States Court of Appeals for the First Circuit held that accepting this argument would “make a mockery of the deference due to the Secretary’s interpretation of his own regulations.”145 The First Circuit held that the Secretary’s interpretation (that the transfer of beds was simply a relocation of the services, thereby imputing to South Shore the skilled nursing services of the prior owner of the beds) was not impermissible.146

The Fourth and Sixth Circuits made a distinction, however, in holding that the plain meaning of the new provider exemption applied to the institution applying for the exemption, not to the “intangible characteristics or attributes” of CON/DON rights acquired by the SNF.147 These Circuits held that if the present facility did not provide skilled nursing services prior to the acquisition of the rights to skilled nursing beds, then the facility qualified as a new provider under the exemption.148 The Fourth Circuit held that “[s]ince there [was] no language in the regulation that would permit the denial of the exemption because an asset of the new institution was previously owned by an unrelated SNF, the Secretary’s interpretation [was] inconsistent with the plain language of the regulation and [could not] be allowed to stand.”149 The Sixth Circuit found this argument persuasive in its determination that the regulation was not ambiguous and in permitting the exemption.150

So, while the four circuits each considered the plain language of the regulation, there were two distinct opinions regarding whether or not this plain language was ambiguous. On its face, it seems that the Fourth and Sixth Circuits’ definition of “provider” is more consistent with its plain meaning, as described in the dictionary. However, the counterargument to this is that an SNF provider cannot furnish skilled nursing services without the CON/DON bed rights to do so. Further investigation into the ambiguity and meaning of the regulation is warranted.

145 South Shore, 308 F.3d at 100.
146 Id. at 99-100.
148 Id.
149 Id.
150 Ashtabula, 352 F.3d at 347 (citing Gardebring v. Jenkins, 485 U.S. 415, 430 (1988)).
B. Use of the Provider Reimbursement Manual

The Provider Reimbursement Manual (PRM) enhances the interpretation of the Medicare Act and regulations pertaining to it. While the Secretary issues instructions for interpretation through this manual, the advice in it is not “legally binding authority.” Although the four circuits agreed that the manual provided guidance to regulation interpretation, the Fourth Circuit placed more emphasis on it and the Sixth Circuit found the Fourth Circuit’s holding persuasive. The Fourth Circuit applied the “new provider” definition offered in the PRM (at the time the SNF bought its bed rights) to Maryland General Hospital (MGH). This PRM definition stated:

A new provider is an institution that has operated in the manner for which it is certified in the program (or the equivalent thereof) under present and previous ownership for less than 3 full years. For example, an institution that has been furnishing only custodial care to patients for 2 full years prior to its becoming certified as a hospital furnishing covered services to Medicare beneficiaries, shall be considered a “new provider” for 3 full years from the effective date of certification. However, if an institution had been furnishing hospital health care services for 2 full years prior to its certification, it shall only be considered a “new provider” in its third full year of operation, which is its first full year of participation in the program. Although a complete change in the operation of the institution, as illustrated above, shall affect whether and how long a provider shall be considered a “new provider,” changes of the institution’s ownership or geographic location do not in [themselves] alter the type of health care furnished and shall not be considered in the determination of the length of operation.

The Fourth Circuit held that the repeated use of the word “institution” indicated that the “provider” in the 42 C.F.R. § 413.30(e) referred to the business entity itself, not to the asset of bed rights from the previous owner of the skilled

---

151 Paragon, 251 F.3d at 1145.
152 Id.
153 Providence Health Sys. v. Thompson, 353 F.3d 661, 667 (9th Cir. 2003).
154 Ashtabula, 352 F.3d at 1093; Providence, 353 F.3d at 667; South Shore Hosp., Inc. v. Thompson, 308 F.3d 91, 103 (1st Cir. 2002); Maryland, 308 F.3d at 347.
155 Maryland, 308 F.3d at 344.
156 Ashtabula, 352 F.3d at 1096.
157 Maryland, 308 F.3d at 344.
158 Id. (citing PROVIDER REIMBURSEMENT MANUAL § 2604.1 (emphasis added)).
The court decided that if an institution, either under present or prior ownership, had not provided skilled nursing services previously, then that institution was entitled to the new provider exemption, even if it had bought its skilled nursing bed rights from a facility providing skilled nursing care for the previous three or more years.

However, the First and Ninth Circuits, as well as Gregory in his dissent in the Fourth Circuit, did not focus on the word “institution,” but rather focused on the manual’s interpretation of change in ownership (CHOW). During the time of the facts of these cases, the PRM defined “change of ownership” as including the sale of ‘all or some portion of a provider’s facility or assets (used to render care)’ so long as such sale ‘affects licensure or certification of the provider entity.’ Relying on this, the Secretary in all of the cases found the transfer of bed rights to be an asset and therefore constituted a CHOW. The Secretary found that because the sale of bed rights reduced the number of skilled beds the selling facility had, the transfer of these rights affected the licensure of the transferring facility, and thus was a CHOW. In South Shore, the Secretary noted that there “need not be a high degree of operational continuity between providers in order for the operation of one to be imputed to the other.” Additionally, Gregory, in his dissent in the Fourth Circuit, agreed with the Secretary’s interpretation that a CHOW was created when there was a transfer of skilled bed rights, because these rights “are such an integral part of SNF operations.”

All four circuits utilized the PRM for guidance in their interpretations of the regulation, but the outcomes were different, based on the portion of the manual relied upon. However, the varying interpretations do not seem misguided, as the PRM is for guidance only, and it seems that each circuit, in formulating its decision, relied on the portion of the manual most beneficial to its holding. Of note is that the Secretary issues the PRM, so it seems logical he should know how to interpret and apply the instructions in the manual. If this were truly the case, then it seems that the Secretary’s interpretation should

---

159 Id. at 344-45.
160 Id. at 346.
161 Providence Health Sys. v. Thompson, 353 F.3d 661, 666 (9th Cir. 2003); South Shore Hosp., Inc. v. Thompson, 308 F.3d 91, 98 (1st Cir. 2002); Maryland, 308 F.3d at 349.
162 South Shore, 308 F.3d at 96 (citing PROVIDER REIMBURSEMENT MANUAL-1 § 1500.7 (1976)).
163 Ashiabula County Med.Ctr. v. Thompson, 352 F.3d 1090, 1093 (6th Cir. 2003); Providence, 353 F.3d at 666; South Shore, 308 F.3d at 98-99; Maryland, 308 F.3d at 344.
164 Providence, 353 F.3d at 666.
165 South Shore, 308 F.3d at 98.
166 Maryland, 308 F.3d at 349.
167 See supra note 154.
168 See supra notes 155-57.
169 South Shore, 308 F.3d at 103.
170 See supra notes 155-57.
171 Paragon Health Network, Inc. v. Thompson, 251 F.3d 1141, 1145 (7th Cir. 2001).
have been upheld in each case, at least with regard to the definitions and explanations in the manual, though this clearly did not happen.

**C. The Significance of the CON/DON Rights**

In each case, a CON or DON was required to operate SNF beds, and in three of the four cases, the Secretary had issued a moratorium against the issuance of new CON/DON rights. The Secretary determined that when only the rights to skilled beds were transferred, there were no new services provided to the public, merely a shifting of services throughout the community. He reasoned that there was no additional public benefit from this shifting of services and that the granting of the exemption under these circumstances would have led to improper higher reimbursement. As pointed out in *Paragon*, the moratorium on CON/DON rights reduced the competition among SNF providers because there were no new beds coming into the market, and thus facilities that purchased these rights from prior providers had a reduced risk of encountering initially high vacancy rates and an overall decreased chance of being underutilized.

The circuits in these cases placed different levels of significance on the CON/DON rights. The Fourth and Sixth Circuits, which found 42 C.F.R. §413.30(e) unambiguous, held that the CON/DON bed rights were merely a single asset of the transferring facility, and did not impute the prior provider’s skilled nursing services to the new owners. The Sixth Circuit in *Ashtabula* went so far as to compare the CON-rights-transfer asset to the purchase of a “used x-ray machine or kitchen oven,” when holding that the transfer rights were a single asset.

Contrast this with the Ninth Circuit which held that CON/DON rights were essential to providing skilled nursing services, and that with the transfer of these rights, there was also a transfer of the “previously owned . . . essential characteristic of providership” that the new facility came to possess. Likewise, the First Circuit found no reason to overturn the Secretary’s

---

172 *Ashtabula* County Med. Ctr. v. Thompson, 352 F.3d 1090, 1092 (6th Cir. 2003); Providence Health Sys. v. Thompson, 353 F.3d 661, 663 (9th Cir. 2003); *South Shore*, 308 F.3d at 96; Maryland Gen. Hosp., Inc. v. Thompson, 308 F.3d, 340, 342 (4th Cir. 2002).
173 *Ashtabula*, 352 F.3d at 1097; *Maryland*, 308 F.3d at 347.
174 *Paragon*, 251 F.3d at 1150.
175 *Providence*, 353 F.3d at 667.
176 *Ashtabula*, 352 F.3d at 1097; *Maryland*, 308 F.3d at 347.
177 *Id.*
178 *Id.*
179 *Providence*, 353 F.3d at 666.
imputation of operations of the CON seller to the buyer facility. The First Circuit agreed with the Secretary’s determination that the selling facility had provided skilled nursing services for at least three years preceding the transfer of CON rights, and that denial of the new provider exemption was reasonable.

Returning to the purpose of 42 C.F.R. § 413.30(e) as documented in 44 Fed. Reg. 31,802, the basis of the regulation in 1979 was to “ameliorate the ‘initial underutilization’ faced by many market entrants” during the start-up phase of a new SNF. Further, the purpose of CON/DON rights was to “track and limit the [s]tate’s capacity for skilled nursing services,” and these rights were required in order to operate an SNF. It seems logical to conclude that these two purposes worked together, and that if there was a limit to the number of skilled nursing providers permitted, then there would have been decreased competition between facilities for patients requiring these services, thereby limiting the “initial underutilization” that was the basis for the regulation.

With this being the case, it seems that the First and Ninth Circuits had the better argument for the significance of CON/DON rights than the Fourth and Sixth Circuits’ holdings that these rights were merely a single asset of an SNF. Without the CON/DON rights for the skilled nursing beds, an SNF could not have been established, and therefore, the Fourth and Sixth Circuits’ holdings regarding the CON/DON rights do not seem as persuasive as those of the First and Ninth Circuits.

D. Application of the Administrative Procedure Act

Review of reimbursement decisions under the Medicare Act is governed by the Administrative Procedure Act (APA). The specific portion of the APA applied in these cases was 5 U.S.C. § 706(2)(A) which stated that “the reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” This standard of review is commonly referred to as the

181 South Shore Hosp., Inc. v. Thompson, 308 F.3d 91, 102 (1st Cir. 2002).
182 Id. at 99.
183 Id.
184 Id. at 95 (citing 44 Fed. Reg. 31,802 (1979)).
186 See Ashtabula County Med.Ctr. v. Thompson, 352 F.3d 1090, 1092 (6th Cir. 2003); Providence Health Sys. v. Thompson, 353 F.3d 661, 663 (9th Cir. 2003); South Shore, 308 F.3d at 96; Maryland, 308 F.3d at 342.
187 South Shore, 308 F.3d at 102.
188 See supra note 51.
“arbitrary or capricious” test. Applying this, courts must consider the relevant facts of the case and “whether there has been a clear error of judgment.” This is a narrow review and courts may not substitute their judgments for that of the agency. As long as an agency uses reasonable policy judgments and explains why it opted for a specific action, courts will generally defer to the agency. Congress grants this deference to agencies because it believes that agencies are more experienced with their particular areas of regulation and thus that they (the agencies) would be the more appropriate department to develop regulations to carry out Congress’ will.

The agency’s decision does not have to be the most natural reading of a regulation, but it must be reasonable with relation to the facts in the record, and may not be arbitrary or capricious. This is a deferential standard, because “a court is reviewing an agency’s application and interpretation of its own regulations.” Courts tend to defer to an agency’s interpretation because an agency is more likely to be aware of the policy implications underlying its interpretation and an agency is more apt to apply the same rationale in similar circumstances (unlike potentially varying interpretations in the various circuits).

These four circuit cases all cited to Thomas Jefferson Univ. v. Shalala, which reinforced that courts “give substantial deference to an agency’s interpretation of its own regulations.” Unless compelled by the regulation’s plain meaning or by the Secretary’s intent when the regulation was promulgated, courts must defer to the Secretary’s interpretation. Further, the United States Supreme Court in Thomas Jefferson held (in referring to the Secretary’s interpretation of the Medicare Act) that

---

193 Id.
194 LUBBERS, supra note 193, at 328.
197 Id. at 473 (citing Citizens for Fair Util. Regulation v. United States Nuclear Regulatory Comm’n, 898 F.2d 51, 54 (4th Cir. 1990)).
199 Ashibula County Med. Ctr. v. Thompson, 352 F.3d 1090, 1094 (6th Cir. 2003); Providence Health Sys. v. Thompson, 353 F.3d 661, 664, 666 (9th Cir. 2003); South Shore Hosp., Inc. v. Thompson, 308 F.3d 91, 106 (1st Cir. 2002); Maryland Gen. Hosp., Inc. v. Thompson, 308 F.3d 340, 343 (4th Cir. 2002).
201 Id. at 512.
202 Id.
[t]his broad deference is all the more warranted when, as here, the regulation concerns “a complex and highly technical regulatory program,” in which the identification and classification of relevant “criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns.”

The Fourth Circuit in Maryland agreed with the above-mentioned holdings of Thomas Jefferson, but because the court found the Secretary’s interpretation of the term “provider” to be inconsistent with the regulation’s plain language (as discussed in section IV.A above), it did not allow the Secretary’s decision to stand. It applied the portion of the APA which required setting aside agency actions that are “not in accordance with law,” even though the Supreme Court had already deferred to the Secretary’s interpretation of the Medicare Act in Thomas Jefferson. While a different portion of the Act was interpreted in Thomas Jefferson, part of the United States Supreme Court’s ruling included the fact that the Medicare Act is complex and that expertise is needed for its interpretation. In support of the Secretary’s ruling in Maryland, how did the Medicare Act lose this complexity? The fact that there is a circuit split decision regarding the new provider exemption under the Medicare Act seems to suggest that this is a confusing and/or complex issue and that the Secretary’s expertise with the Act may be required.

Like the Fourth Circuit, the Sixth Circuit in Ashtabula set aside the Secretary’s interpretation of the new provider exemption because it held that the term “provider” was unambiguous. The court stated that because it found the term (and thus the regulation) unambiguous, it did not have to apply the arbitrary and capricious test of the APA to the interpretation of the regulation. The same arguments made in support of the Secretary as used against the Fourth Circuit may also apply to this Sixth Circuit rationale.

Conversely, the First Circuit held that because the regulation was vague, there would be some interpretation, and that this interpretation would come from

204 Id.
206 Id. at 348.
207 Thomas Jefferson, 512 U.S. at 518.
208 Id. at 507 (noting that Thomas Jefferson dealt with 42 C.F.R. § 413.85(c), which governs the “reimbursement of educational activities,” vs. the new provider exemption under 42 C.F.R. 403.30(e)).
209 Id. at 512.
210 Ashtabula County Med. Ctr. v. Thompson, 352 F.3d 1090, 1094 (6th Cir. 2003).
211 Id.
the Secretary. The court found that it could not dismiss the Secretary’s rationale that with the transference of bed rights came the imputation of the prior provider’s operation as an SNF. The First Circuit’s conclusion included the decision that the “new provider exemption plainly calls for a delicate balancing of a mélange of factors within the scope of the Secretary’s expertise.” This rationale seems to support the holding in *Thomas Jefferson* regarding the substantial deference owed to agency interpretations of their own regulations, especially when the regulation is complex.

Similarly, the Ninth Circuit deferred to the Secretary’s interpretation of the regulation when it held that “if ‘the meaning of [regulatory] language [was] not free from doubt, the reviewing court should give effect to the agency’s interpretation so long as it [was] reasonable, that is, so long as the interpretation sensibly conform[ed] to the purpose and wording of the regulations.’” The Ninth Circuit held that the Secretary’s broad interpretation of the regulation’s language in order to narrow the scope of the new provider exemption “reasonably conform[ed] to the wording and purpose of this regulation.” This rationale, like that used in the First Circuit, seems to comport with the United States Supreme Court holding in *Thomas Jefferson*.

As for further analysis under the APA, the arbitrary and capricious test that most courts apply today derived from the United States Supreme Court decision in *Citizens to Preserve Overton Park, Inc. v. Volpe* in 1971. The Court held that a reviewing court must consider the relevant facts as applied to the Secretary’s decision and whether there was “a clear error of judgment.” The Secretary must use “reasoned decision making,” with an explanation of how he made his decision based on the facts of the case. The court’s role is to “thoroughly review the administrative record” in order to establish that there is a

---

212 South Shore Hosp., Inc. v. Thompson, 308 F.3d 91, 98 (1st Cir. 2002).
213 *Id.* at 101-02.
214 *Id.* at 106.
217 *Id.* at 668.
218 *Thomas Jefferson*, 512 U.S. at 512.
219 *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971). Although *Overton Park* does not deal with Medicare at all (but rather deals with the Department of Transportation Act of 1966 and the Federal-Aid Highway Act of 1968), its application of the arbitrary and capricious test under the APA does apply to review of an agency’s Secretary’s determinations, and as such, this applies to the review of the Secretary’s decisions in this note’s circuit split decisions.
221 *Overton Park*, 401 U.S. at 416.
222 *See Pierce, supra note 220.*
rational basis for the agency action. As long as this is present, the court will support the agency’s wisdom and no further review will be necessary.

Applying this standard of review to the split circuit decisions, only the First and Ninth Circuits deferred to the Secretary’s interpretation. Even though the Secretary provided a rationale for his decisions in Maryland and Ashtabula, the courts disregarded the rationale in favor of its own interpretations of the statute. This seems to be in conflict with the Overton Park decision. The reviewing court is “not empowered to substitute its own judgment for that of the agency” unless the agency’s decision was “arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law.” The counterargument to this may be that the reviewing court found the regulation itself unambiguous and therefore did not have to weigh the Secretary’s interpretation, but in looking at the overall picture of the purpose of the regulation, and the deference owed to an agency in its interpretation of its own regulation, it seems that the weight is with the Secretary in his determination of the ambiguity of the regulation, as well as his awarding or denial of the new provider exemption.

The purposes for Congress delegating to agencies the power to regulate include the expertise that an agency has in a particular area. Applying this, courts tend to defer to agency interpretation because the agency is aware of the underlying policy implications of its interpretations, making it more likely to apply the same rationale to similar circumstances. This is exactly what happened in these cases. The Secretary applied similar rationale to the four requests for the new provider exemption, but only two of the circuits upheld the Secretary’s decision. While the Fourth and Sixth Circuits disregarded the Secretary’s rationale for denial of the exemption because these circuits found the regulation unambiguous, it seems that the Secretary would be in the best position to interpret his own regulation. The Medicare Act vests in the

---

223 Lee Modjeska, Administrative Law Practice and Procedure § 6.14 (1982) (citing Lukens Steel Co. v. Klutznick, 629 F.2d 881 (3rd Cir. 1980), the court reversed the district court’s finding for the Secretary of Commerce and reasoned that the Secretary’s decision was arbitrary and capricious, with no rational basis for his action, because his analysis was inconsistent with the purpose of the act under review).
224 Id.
225 See supra notes 94, 100.
227 Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971); see also supra notes 209 and 211 and accompanying text.
228 Id.; see also supra note 190.
231 See supra notes 94, 100.
232 See supra note 226.
Secretary the discretionary determination for reimbursement of reasonable costs for services provided by SNF’

E. The Future of the New Provider Exemption and Agency Review in General

Because reimbursement under PPS in 1998 rid reimbursement under the new provider exemption, the only current interpretations of 42 C.F.R. § 413.30(e) will be in review of cases on appeal. Taking all of the above arguments into consideration, it seems that the regulation is ambiguous. Concededly, the plain meaning of the word “provider” seems to suggest the institution itself, but as noted, the institution may not provide skilled nursing services without the CON/DON rights for the skilled beds. Taking this into consideration, it does seem that more interpretation (than plain language) of the regulation is required in order to establish its meaning. This suggests that 42 C.F.R. § 413.30(e) is ambiguous, and when this is the case, the reviewing court typically defers to the Secretary’s interpretation. Per the APA, as long as the Secretary applies reasoned decision making when interpreting an ambiguous regulation, the court should defer to the Secretary’s interpretation. Thus, it seems that the First and Ninth Circuits properly applied the administrative review and were proper in finding for the Secretary. Subsequent appellate courts should likewise follow their decisions.

The larger significance of the finding of the ambiguity of the regulation lies in the deference owed to the Secretary’s interpretations of his own regulations. Even though two of the courts in these cases rejected the Secretary’s interpretation, typically the agency interpretation will prevail. The argument against this agency deference is that it may encourage agencies to promulgate ambiguous regulations that would in turn allow Secretaries to make interpretations as they deem appropriate when disputes arise. Certainly this tactic defies Congress’ purpose for granting regulatory authority to agencies.

234 See supra note 23.
235 42 C.F.R. § 413.30(e) (1995).
236 MEDICARE PAYMENT ADVISORY COMM., REPORT TO THE CONGRESS: MEDICARE PAYMENT POLICY 22 (March 2002).
238 LUBBERS, supra note 191, at 328.
240 Id.
241 Id. at 76.
As the circuit split decisions on the specific interpretation of 42 C.F.R. § 413.30(e) demonstrate, an agency’s regulation may be ruled ambiguous by the Secretary, allowing him to formulate his own interpretation. This may be advantageous to him, but the flip side to this would be that too stringent a regulation may tie the Secretary’s hands. As the court stated in Providence, allowing the Secretary to interpret the regulation broadly permits him to narrow the application of the new provider exemption, thus supporting the purpose of the regulation.243

While an agency may seek to issue vague regulations in order to “maximize” power and have “greater latitude to make law through adjudication rather than the more cumbersome rulemaking process,” agencies need to promulgate clear rules that give direction to those affected by them.244 When the attempt at clarity has been unsuccessful, then it seems that the Secretary is likely in the best position to make the determination of the regulation, and then to consistently apply this interpretation (as the Secretary did in these cases). If the regulation is then consistently applied, subsequent parties in similar situations will be on notice of how the regulation will be interpreted. This still leaves open the possibility of purposefully ambiguous regulations, but reviewing courts may use the APA to overturn the Secretary’s interpretation, which should deter any intentionally ambiguous regulations. Agencies, as experts in various fields, are acting through delegation from Congress, and it is their duty to support Congress with as clear and consistent regulations as possible.

V. CONCLUSION

Based on the circuit split decisions in the preceding cases, it seems that the weight of the interpretation of the new provider exemption in 42 C.F.R. 413.30(e) is with the Secretary. While both sides of the argument may have a reasonable basis for their holdings under the plain meaning of the regulation, the other factors considered seem to weigh with the Secretary. The guidance provided by the Provider Reimbursement Manual seems helpful to both views of the regulation, but the manual itself is for guidance only245 and is not “legally binding authority.”246 As noted, CON/DON rights were required to operate

---

243 Providence Health Sys. v. Thompson, 353 F.3d 661, 668 (9th Cir. 2003).
245 South Shore Hosp., Inc. v. Thompson, 308 F.3d 91, 103 (1st Cir. 2002).
246 Providence, 353 F.3d at 667.
skilled nursing beds.\textsuperscript{247} This was a consideration for the provider of skilled services, making the definition of the term “provider” more than one who merely supplies the services and making the term itself ambiguous within the regulation, ultimately rendering the regulation itself ambiguous. When a regulation is ambiguous, the reviewing court typically defers to the Secretary, as long as the Secretary employs reasoned decision making in his interpretation.\textsuperscript{248} The First and Ninth Circuits applied this rationale to the determination of the ambiguity of 42 C.F.R. 413.30(e), and overall seemed to have the stronger argument.

\begin{footnotesize}
\begin{enumerate}
\item Ashtabula County Med. Ctr. v. Thompson, 352 F.3d 1090, 1092 (6th Cir. 2003); Providence, 353 F.3d at 663; South Shore, 308 F.3d at 96; Maryland Gen. Hosp., Inc. v. Thompson, 308 F.3d 340, 342 (4th Cir. 2002).
\item LUBBERS, supra note 191, at 328.
\end{enumerate}
\end{footnotesize}
COUNTY OF WAYNE V. HATHCOCK: THE RESURRECTION OF THE PUBLIC USE LIMITATION ON THE POWER OF EMINENT DOMAIN

by M. Ryan Kirkham

I. INTRODUCTION

II. BACKGROUND LAW
   A. “Public Use” Before Poletown
   B. Poletown

III. STATEMENT OF FACTS, PROCEDURAL HISTORY AND HOLDING OF COUNTY OF WAYNE V. HATHCOCK
   A. Facts
   B. Procedural History
   C. Holding

IV. ANALYSIS
   A. The Court Was Correct to Overturn Poletown
   B. The Hathcock Court’s Formulation
      1. Public Necessity of the Extreme Sort Requires Collective Action
      2. Property Remains Subject to Public Oversight
      3. Property Selected Because of Facts of Independent Public Significance
   C. Heightened Scrutiny is the Necessary Standard of Review
   D. Potential Abuses
      1. Condemnations to Remove “Blight” and City of Norwood v. Burton

V. CONCLUSION

I. INTRODUCTION

Imagine an economically distressed city that has experienced no significant development for years. Economic development has instead occurred in the

* M. Ryan Kirkham is a J.D. candidate for 2006 at Salmon P. Chase College of Law, Northern Kentucky University. He holds an M.B.A. in General Business from Xavier University and a B.S. in Public Affairs from Indiana University.
suburbs and outlying areas where land is plentiful and tax rates are low. One day a well-known developer approaches the city with a plan the developer projects will create thousands of jobs and millions of dollars in tax revenue. The plan calls for acquiring multiple parcels of land within city limits from homeowners, churches, and small businesses, then bulldozing the area and constructing retail, office, and upscale residential properties in their place. The parcels are in a working class neighborhood where the properties are old, but well maintained. The great majority of the residents are happy to take the developer’s offer of fair market value. However, a minority of residents refuse to sell. One of the holdouts is an elderly woman who has lived in her house since her birth in 1918. Another is a 100 year old church, and yet another is a young chiropractor who has just remodeled an old home into an office for his growing practice.

The developer has nothing pre-sold or pre-leased, but the city leaders are convinced that the demand will materialize once the project is completed. The project becomes the city’s “Field of Dreams”\(^1\) in that city leaders believe “if you build it, [they] will come.”\(^2\) It is this “Field of Dreams” view of the potential public benefits that supplies the justification for the city’s use of eminent domain to condemn those properties that the developer has been unable to obtain on the open market.

Not to go down without a fight, the holdouts pool their limited resources and hire an attorney to challenge the condemnation on grounds that the federal and state constitutions prohibit such governmental takings for non-public use. The court denies their request for an injunction on grounds that the public use requirement is satisfied because the city legislators have a rational basis for concluding that the taking will result in some public benefits, such as job creation and increased tax revenue. In finding a rational basis, the court elects not to second guess the city’s judgment on the question of public benefits. Their funds exhausted, the holdouts decide not to appeal the judge’s decision and accept the fact that they will have to part with their properties.

The hypothetical scenario described above is being played out in cities and towns across the country.\(^3\) Between 1998 and 2002, more than 10,000 properties nationwide were taken or threatened by eminent domain, and presently at least a dozen states have eminent domain lawsuits pending.\(^4\) There is a growing trend in which cities take property from small businesses and homeowners and convey it to larger businesses that can generate greater tax revenues.\(^5\) No longer reserved for public roads and schools, the eminent domain power is now seen as an economic development tool for luring big retailers like Costco, Crate &

---

1. Field of Dreams (Universal Studios 1989).
4. Id.
5. Id. at 22.
Barrel, and Target. The Kansas Supreme Court last year, for example, upheld the taking of private property for a Target distribution center.

As authority for the idea that general economic development can satisfy the public use requirement, courts frequently cite the landmark 1981 Michigan Supreme Court opinion Poletown Neighborhood Council v. Detroit. As recently as March of 2004, the Connecticut Supreme Court, in Kelo v. City of New London, cited Poletown as persuasive authority for upholding the taking of private homes for construction of a commercial park designed to complement an adjacent Pfizer research facility. Just 149 days after Kelo, however, a unanimous Michigan Supreme Court, in County of Wayne v. Hathcock, overturned the Poletown decision, denouncing it as a radical departure from constitutional principles. Two months later, the United States Supreme Court agreed to take up the Kelo case on appeal.

This article examines the Michigan Supreme Court’s opinion in County of Wayne v. Hathcock. Part II provides a brief summary of the public use limitation to the eminent domain power in the State of Michigan prior to and including the Poletown opinion. Part III provides an overview of the facts, procedural history, and holding of Hathcock. Part IV.A discusses why the court was correct to overturn Poletown. Part IV.B details the Hathcock court’s formulation for dealing with public use determinations. Part IV.C argues that heightened scrutiny is a necessary ingredient for the Hathcock formulation to work. Part IV.D highlights two cases where the Hathcock formulation could be abused without heightened scrutiny, and Part V concludes this article.

II. BACKGROUND LAW

In County of Wayne v. Hathcock, the Michigan Supreme Court interpreted and applied the Takings Clause of the Michigan Constitution. Article 10,
Section 2 states that “[p]rivate property shall not be taken for public use without just compensation . . . .”16 The issue in the case was whether the proposed condemnation of private property advanced a “public use.”17 This section provides a brief overview of the public use limitation in the state of Michigan prior to and including the Michigan Supreme Court’s 1981 opinion in Poletown Neighborhood Council v. Detroit.

A. “Public Use” Before Poletown

Every document governing the state of Michigan, from the Northwest Territory Ordinance of 178718 to the Michigan Constitution of 1963,19 has acknowledged the government’s power of eminent domain.20 In every case, the power has come with a “public use” limitation.21 Courts universally interpreted this limitation as prohibiting the condemnation of private property for private use.22 Whether a particular condemnation was for a legitimate “public use” had traditionally involved consideration of how the property would be used.23 The Michigan Supreme Court held in 1877 that to be constitutional the use must “be public in fact; in other words, that it should contain provisions entitling the public to accommodations.”24 Condemnations for the laying of a public highway,25 the opening of a public avenue,26 the construction of a public school,27 and the construction of an airport28 were all held to be permissible public uses.29 The court concluded that, in each of these cases, the public retained the right to actually use the land.30

---

17 Hathcock, 684 N.W.2d at 770.
18 See generally 16 Am. Jur. 2d Constitutional Law § 7 (2004) (noting that the Northwest Territory Ordinance was the fundamental governing instrument for all land northwest of the Ohio River until “superseded by the state constitution of [each] new state [after being] admitted to the Union”).
20 Hathcock, 684 N.W.2d at 793.
21 Id.
22 Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 472 (Mich. 1981) (Ryan, J., dissenting). The majority in Poletown said “all agree that condemnation for a private use or purpose is forbidden.” Id. at 458.
23 Hathcock, 684 N.W.2d at 794.
26 In re Opening of Gallagher Ave., 1 N.W.2d 553, 553 (Mich. 1942).
27 Union Sch. Dist. of the City of Jackson v. Starr Commonwealth for Boys, 33 N.W.2d 807, 810 (Mich. 1948).
28 In re Petition of City of Detroit for Condemnation of Lands for Airport, 14 N.W.2d 140, 142 (Mich. 1944).
30 Id.
As to eventual private ownership of property planned for condemnation, the court has upheld statutes providing for private for-profit bridges, canals, turnpikes, ferries, and railroads designed for public travel.\textsuperscript{31} The “public use” limitation was not offended in these cases because the private owners were compelled to dedicate their properties to the public uses for which they were condemned.\textsuperscript{32}

As a general rule, however, a conveyance to a private entity to use the property “as it sees fit” was forbidden as an unconstitutional taking for private use.\textsuperscript{33} In a 1903 case involving a water-power mill, the court stated: “Land cannot be taken, under the exercise of the power of eminent domain, unless, after it is taken, it will be devoted to the use of the public, independent of the will of the corporation taking it.”\textsuperscript{34} The court found that condemnations of private properties to be used for water mills,\textsuperscript{35} cemeteries\textsuperscript{36} and general retail businesses\textsuperscript{37} were invalid private uses.\textsuperscript{38}

In addition to the public’s actual use and control over the property taken, the “government purposes to be achieved by the condemnation” were also considered.\textsuperscript{39} For example, the court held the construction of a pipeline for transportation of oil throughout the state,\textsuperscript{40} and “the removal of slums and blight that endangered public health,”\textsuperscript{41} to be valid legislative purposes, and thus sufficient to pass the “public use” test.\textsuperscript{42} Transportation of oil and the removal of blight were “public uses” in and of themselves.\textsuperscript{43}

In summary, Michigan employed a narrow or limited interpretation of “public use” prior to \textit{Poletown}.\textsuperscript{44} The court generally limited the power of condemnation to instances of actual governmental use, or those situations where the private owner was obligated to use the property to serve the public.\textsuperscript{45} The only noteworthy departure from the rule was in the case of condemnations for the purpose of removing slums and blight, in which case the court found the act of removing the slums and blight to be a “public use” in its own right.\textsuperscript{46}

\textsuperscript{31} \textit{Id.} at 795.
\textsuperscript{32} \textit{Id.}
\textsuperscript{34} \textit{Berrien Springs Water-Power Co. v. Berrien Circuit Judge}, 94 N.W. 379, 380-81 (Mich. 1903).
\textsuperscript{36} \textit{Bd. of Health v. Van Hoesen}, 49 N.W. 894, 897 (Mich. 1891).
\textsuperscript{38} \textit{Poletown}, 304 N.W.2d at 476.
\textsuperscript{39} \textit{County of Wayne v. Hathcock}, 684 N.W.2d 765, 796 (Mich. 2004).
\textsuperscript{40} \textit{Id.}
\textsuperscript{41} \textit{Id.}
\textsuperscript{42} \textit{Id.}
\textsuperscript{43} \textit{Id.}
\textsuperscript{45} \textit{Id.}
\textsuperscript{46} \textit{Id.}
B. Poletown

*Poletown Neighborhood Council v. Detroit* involved the City of Detroit’s use of eminent domain to condemn an inner-city neighborhood known as Poletown. The purpose of the condemnation was to make room for General Motors to build a state of the art factory of 3,000,000 square feet, which was projected to employ 6,000 people. The proposed condemnation was a response to General Motor’s announcement that it would be closing two old-line Detroit plants, and came in the context of an already depressed Detroit economy, where the unemployment rate was 18%. City leaders viewed the new plant as an opportunity to retain 6,000 General Motors jobs, as well as “thousands of allied and supporting automotive design, manufacture, and sales [jobs].”

The issue in this case was whether the government could use the power of eminent domain to condemn property for transfer to a private corporation for use as a private, profit-making enterprise. The property owners argued that the taking of their land was a straightforward example of an invalid private use, which violated Article 10, Section 2 of the Michigan Constitution. The Michigan Supreme Court disagreed, and found the taking to be a legitimate public use.

The court held the public use limitation satisfied when the primary purpose of the condemnation is for the benefit of the public, regardless of “incidental private gain.” The only limitation is that the public benefit must be “clear and significant” rather than speculative. The court found that the proposed automotive plant satisfied these criteria. Thus, the *Poletown* court broadened the “public use” limitation beyond “actual government use” and “private use with an obligation to serve the public” to include pure private use with no obligation to serve the public, as long as the economic benefits to the public are

---

47 *Id.* at 470. The Poletown Neighborhood Council represented about 3,400 area residents whose homes, shops, and churches were on the 465 acre tract being condemned. Thomas W. Merrill, The Economics of Public Use, 72 CORNELL L. REV. 61, 61 (1986).
48 *Poletown*, 304 N.W.2d at 467.
49 *Id.* at 466. Because the new plants were single storied, rather than multi-storied, they required a larger swath of cleared land than was available within city limits; thus, necessitating the use of eminent domain to avoid the plant locating in the suburbs. *Id.*
50 *Id.* at 465.
51 *Id.* at 467.
52 *Id.*
53 MICH. CONST. art. X, § 2.
54 *Poletown*, 304 N.W.2d at 458.
55 *Id.* at 457.
56 *Id.* at 459.
57 *Id.* at 459-60.
58 *Id.* at 460.
“clear and significant.”

III. STATEMENT OF FACTS, PROCEDURAL HISTORY AND HOLDING
OF COUNTY OF WAYNE V. HATHCOCK

Twenty-one years after the Poletown decision, the Michigan Supreme Court had occasion to revisit its rule on the public use limitation on the government’s power of eminent domain in County of Wayne v. Hathcock. This section provides the facts, procedural history and holding of the County of Wayne v. Hathcock. Part III.A provides the facts, Part III.B provides the procedural history, and Part III.C provides the holding.

A. Facts

In 1992, the County of Wayne, Michigan (“County”) implemented a program sponsored by the Federal Aviation Administration (“FAA”) to assist residential property owners affected by increased noise levels in areas adjacent to the recently renovated Metropolitan Airport. The FAA gave the County $21 million to purchase residential properties in voluntary sales, with the condition that the properties be put to an economically viable use. When the County finished this noise abatement program, it owned 500 acres of land near the airport scattered in a checkerboard pattern.

Given the FAA’s mandate that the properties be made economically useful, the County of Wayne conceived the “Pinnacle Project,” a large business and technology park with a conference center, hotel accommodations, and a recreational facility. The park was projected by the County to create thousands of jobs and millions of dollars in tax revenue. After determining that a contiguous land mass of 1,300 acres was required, the County approached property owners in the project area seeking voluntary sales, and eventually purchased an additional 500 acres. By spring of 2000, the County had

59 Id. at 459-60.
60 684 N.W.2d 765, 769-70 (Mich. 2004).
62 Id.
63 Id.
64 Hathcock, 684 N.W.2d at 770.
65 Id.
66 Plaintiff/Appellee Wayne County’s Brief on Appeal at 3, Hathcock (No.124070).
purchased a total of 1,000 acres through the noise abatement program and its own initiative.67 The remaining 300 acres consisted of forty-six parcels scattered throughout the project area.68 The owners of these parcels refused to sell.69

On July 12, 2000, the County invoked its power of eminent domain to acquire the remaining forty-six parcels by condemnation.70 The parcels were appraised and the County issued written offers based on these appraisals to the property owners.71 Twenty-seven owners accepted the offers and sold their parcels to the County, leaving only nineteen parcels in the way of the Pinnacle Project.72

B. Procedural History

In April 2001, the County initiated condemnation actions in Wayne County Circuit Court.73 The property owners responded by filing a motion to review the necessity of the proposed condemnations.74 They argued: (1) “that the county lacked statutory authority to exercise the power of eminent domain in this manner;”75 (2) “that acquisition was not necessary as required by statute;”76 and (3) that acquisition was unconstitutional because the Pinnacle Project “would not serve a public purpose.”77

The Circuit Court held that the takings were authorized by statute, the County did not abuse its discretion in determining necessity, and the Pinnacle Project served a public purpose as defined by the Michigan Supreme Court in Poletown.78 The property owners appealed the matter to the Court of Appeals, where the trial court’s decision was affirmed.79 The Supreme Court granted the property owners’ applications for leave to appeal on November 17, 2003.80

---

67 Id.
68 Id.
69 Id.
70 Id.
71 Id.
72 Plaintiff/Appellee Wayne County’s Brief on Appeal at 3, Hathcock (No.124070).
73 Id. at 4.
74 Id.
76 Id.
77 Id.
78 Id.
79 Id.
80 Id. at 772.
C. Holding

The Michigan Supreme Court concluded that while the condemnations sought by Wayne County were consistent with statutory authorization under MCL 213.23,\(^{81}\) they would not advance a “public use” as required by Article 10, Section 2\(^{82}\) of the 1963 Michigan Constitution, and were, therefore, unconstitutional.\(^{83}\) Accordingly, the decisions of the lower courts were reversed and the matter was remanded for entry of summary disposition in the property owners’ favor.\(^{84}\)

The court’s majority opinion sharply overruled \textit{Poletown},\(^{85}\) and adopted the framework advanced by Justice Ryan’s dissent in that case.\(^{86}\) The court held that the transfer of condemned property to a private entity is appropriate in one of three contexts: (1) where “public necessity of the extreme sort” requires collective action; (2) where the property remains subject to public oversight after transfer to a private entity; and (3) where the property is selected because of “facts of independent public significance,” rather than the interests of the private entity to which the property is eventually transferred.\(^{87}\)

The majority found none of these “saving elements” in the proposed condemnations for the Pinnacle Project.\(^{88}\)

All seven justices on the court agreed with the decision to overrule \textit{Poletown},\(^{89}\) and six of the seven agreed with the majority’s result.\(^{90}\) Writing separately, Justice Weaver agreed with the result but dissented as to the majority’s rationale.\(^{91}\) She argued that the public use limitation should be given the common meaning it had at the time of ratification, as opposed to a “sophisticated” meaning derived from case law.\(^{92}\) She found the common meaning of the public use limitation to be “possession, occupation, and

\(^{81}\) \textit{Hathcock}, 684 N.W.2d at 778.
\(^{83}\) \textit{Hathcock}, 684 N.W.2d at 788.
\(^{84}\) \textit{Id.}
\(^{85}\) \textit{Id.} at 787. The court concluded \textit{Poletown} was “inconsistent with our eminent domain jurisprudence” and “effectively rendered nugatory the constitutional public use requirement.” \textit{Id.}
\(^{86}\) \textit{Id.} at 781.
\(^{87}\) \textit{Id.} at 783.
\(^{88}\) \textit{Id.}
\(^{89}\) \textit{Hathcock}, 684 N.W.2d at 783.
\(^{90}\) \textit{Id.} at 788.
\(^{91}\) \textit{Id.} at 788-89.
\(^{92}\) \textit{Id.}
enjoyment of the land by the public at large,” and the proposed condemnation to be a “straightforward example of the government taking one person’s property for the sole benefit of another.”

Lastly, Justice Cavanagh agreed with the decision to overrule Poletown and the majority’s rational for doing so. He wrote separately, however, to disagree with the majority’s decision to apply the holding retroactively.

IV. ANALYSIS

A. The Court Was Correct to Overturn Poletown

The court was correct to overturn Poletown because, from a practical standpoint, it rendered impotent the constitutional public use limitation on the government’s power of eminent domain. While Poletown required the primary purpose of condemnation to be for a “clear and significant” public benefit, it also stated that this requirement is met by the general economic benefits of job creation and tax revenue. Furthermore, the Poletown court held that the judiciary should apply a deferential standard of review to legislative determinations of whether economic benefits will in fact accrue. Thus, the slippery slope was established.

The Hathcock court rightly pointed out that Poletown’s “economic benefit rationale” could be used to validate virtually any taking on behalf of a private entity. The legislature simply has to determine that the use of the property by a private entity, seeking to maximize its own profit, might contribute to the general health of the economy. Because businesses will always generate more

93 Id. at 797.
94 Id. at 796.
95 Hathcock, 684 N.W.2d at 765.
96 Id. at 799.
97 Id.
98 Id. at 786. See also Thomas W. Merrill, The Economics of Public Use, 72 CORNELL L. REV. 61, 61-62 (1986) (finding that Poletown contributed to making the public use limitation a “dead letter”).
99 See Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 459-60 (Mich. 1981); see also Hathcock, 684 N.W.2d at 786 (interpreting Poletown).
100 Poletown, 304 N.W.2d at 458-59. See also Hathcock, 684 N.W.2d at 785 (interpreting Poletown).
102 Hathcock, 684 N.W.2d at 786; see also Joseph J. Lazzarotti, Public Use or Public Abuse, 68 U.M.K.C. L. Rev. 49, 69 (1999) (referring to Poletown: “with public use so broadly interpreted, it makes no sense to vigorously challenge this point in court”).
103 Hathcock, 684 N.W.2d at 786.
economic benefits, particularly tax revenue, than homeowners, and large businesses will generate more than small, the government will seldom, if ever, lose under the Poletown standard.104 The temptation to abuse their power of eminent domain has been too great for cash strapped city leaders to resist, especially when they know the judiciary will defer to their judgment,105 and with only a small minority of constituents adversely affected by the taking, there will be little political risk.106 Among voters, it is certain to be more popular than raising taxes.107 Consequently, governments have tended to invoke eminent domain powers on behalf of the affluent and politically well-connected at the expense of the mom-and-pop shop and the family simply wanting to keep the home it has lived in for generations.108

By defining the public use requirement in such a way that the government can never lose, and by applying a standard of review that leaves the property owners’ rights up to the political process, which by its nature favors the majority, Poletown made the government’s power of eminent domain virtually limitless.109 A limitless power of eminent domain is a problem because the public use limitation, as part of the Bill of Rights110 and all state constitutions,111 was meant to advance the goal of protecting ownership of private property.112 The Founders

---

105 See Poletown, 304 N.W.2d at 459.
106 Lazzarotti, supra note 102, at 73.
107 See id.
108 Let There Be Blight, WALL ST. J., Apr. 22, 2004, at A18; see also Jennifer L. Kruckenberg, Can Government Buy Everything?: The Taking Clause and the Erosion of the “Public Use” Requirement, 87 MINN. L. REV. 543, 543 (2002). “As urban densities increase and inner-city redevelopment opportunities become more limited, there will be increasing temptations for public agencies to use their power on behalf of select private interests.” Id.
110 See generally 16 AM. JUR. 2D Constitutional Law § 398 (2004) (stating that

“[t]he first 10 amendments to the Federal Constitution . . . are in the nature of a Bill of Rights. Their adoption was insisted on and took place in order to quiet the apprehension of many that without some such declaration of rights, the government would assume, and might be held to possess, the power to trespass upon those rights of persons and property which by the Declaration of Independence were affirmed to be inalienable rights . . . . Without promise of a limiting Bill of Rights, it is doubtful that the Federal Constitution could have mustered enough strength to gain ratification”).

Id.
111 See Shizas v. Detroit, 52 N.W.2d 589, 592 (Mich. 1952). “The characteristic provision found in the Constitutions of the several states, and in that of the United States as well, is to the effect that property shall not be taken for the public use without just compensation.” Id.; see generally 26 AM. JUR. 2D Eminent Domain § 7 (2004) (indicating that under “the requirement of due process in the state constitutions . . . a taking of property which does not comply with the specific [due process] clause . . . . [is] a taking for a private use without just compensation [and] a deprivation of property without due process of law”).
intended it to be a check on government power. The *Hathcock* court recognized that *Poletown* was at odds with this constitutional objective and correctly overturned its holding.

B. *The Hathcock Court’s Formulation*

If the public use requirement is a limitation on the eminent domain power, what is the extent of its limitation? The *Hathcock* court began by setting out the two poles between which the state’s jurisprudence has focused. At one pole is condemnation and conveyance of the property to a public entity for an actual public use, such as for public roads, hospitals, and schools. At the other extreme is condemnation and conveyance of the property to a private entity for purely private use. The latter is clearly prohibited by the public use requirement and the former is not. As to the area between the two poles, the court said the public use requirement is “not an absolute bar against the transfer of condemned property to private entities” as long as it is for public use. Thus, it is possible for private ownership and “public use” to coexist. The problem then lies in determining when ownership by a private entity can satisfy the public use requirement. The *Hathcock* court held that the transfer of condemned property to a private entity satisfies the public use requirement in one of three contexts.

1. Public Necessity of the Extreme Sort Requires Collective Action

First, the court held the public use requirement met where “public necessity of the extreme sort requires collective action.” In these situations, private enterprises generating public benefits, such as “highways, railroads, canals, and other instrumentalities of commerce,” depend on “the use of land that can be assembled only by the coordination [of the] government.”

---

113 *Id.* at 35. “In the mind of the framers, respect for property rights was closely linked to the preservation of individual liberty. The Constitution and Bill of Rights were written in large part to strengthen the protection of property rights.” *Id.*
115 See Ely, supra note 112, at 32.
116 *Hathcock*, 684 N.W.2d at 781.
117 *Id.*
118 *Id.*
119 *Id.*
120 *Id.*
121 See id.
122 *Hathcock*, 684 N.W.2d at 783.
123 *Id.*
The court concluded that the Pinnacle Project’s business and technology park was not an enterprise “whose very existence” depends on the use of land that can be assembled only by eminent domain.125 As proof, the court pointed to the fact that “the landscape of our country is flecked with shopping centers, office parks, clusters of hotels, and centers of entertainment and commerce.”126 The court noted that the formation of such projects does not depend on collective public action through the power of eminent domain.127

2. Property Remains Subject to Public Oversight

Second, the court held the public use requirement met “where the property remains subject to public oversight after transfer to a private entity.”128 In other words, the private entity must remain accountable to the public and the public must maintain a “measure of control.”129

The court concluded that the Pinnacle Project would lack public oversight after being sold to private entities.130 “No formal mechanisms exist to ensure that the businesses that would occupy what are now defendants’ properties will continue to contribute to the health of the economy,” the court declared.131 The court did not detail what type of mechanisms it would find sufficient.132

3. Property Selected Because of Facts of Independent Public Significance

Finally, the court held the public use requirement satisfied “where the property is selected because of ‘facts of independent public significance,’ rather than the interests of the private entity to which the property is eventually transferred.”133 This means that the “underlying purposes for resorting to condemnation, rather than subsequent use of condemned land, must satisfy the Constitution’s public use requirement.”134 The example given was condemnation of blighted housing and the subsequent resale of the property to private persons.135 The underlying purpose in these situations is to remove unfit

125 Id. at 783. Highways, railroads, canals, other instrumentalities of commerce and gas lines were examples given by the court of enterprises that would pass the “public necessity of the extreme sort” test. Id. at 781.
126 Id.
127 Id.
128 Hathcock, 684 N.W.2d at 783.
129 Id. at 782. The court gave the example of a petroleum pipeline, where the private owner pledged to transport in intrastate commerce pursuant to the Michigan Public Service Commission, and the state had the power to enforce the pledge. Id.
130 Id. at 784.
131 See id.
132 Id.
133 Id. at 783.
134 Hathcock, 684 N.W.2d at 783.
135 Id.
housing and thereby advance public health and safety.\textsuperscript{136} The subsequent resale of the cleared land is incidental to that purpose.\textsuperscript{137} The court held that in these situations the “act of condemnation itself, rather than the use to which the condemned land eventually will be put, is a public use.”\textsuperscript{138}

The court concluded that the act of condemning the property at issue to be transferred to private entities for the Pinnacle Project did not serve the public good, and that any public benefits would arise after the lands were acquired by the government and put to private use.\textsuperscript{139} Unlike a blight situation, the court found that the condemnation of the properties for the Pinnacle Project had no facts of independent public significance, such as the need to promote health and safety, which could justify the condemnation of the defendants’ lands.\textsuperscript{140}

Having set forth the three situations in which a condemnation of land and subsequent conveyance to a private entity will satisfy the public use requirement, the \textit{Hathcock} court found none of them to exist in the case of the Pinnacle Project.\textsuperscript{141}

\section*{C. Heightened Scrutiny is the Necessary Standard of Review}

Implicit in the \textit{Hathcock} formulation is the need for a stringent judicial review of the legislature’s determination of whether the public will benefit from the government taking property from one private person and conveying it to another.\textsuperscript{142} This sub-section argues that the use of heightened scrutiny is critical to the prevention of eminent domain abuses.\textsuperscript{143}

One of the \textit{Hathcock} court’s criticisms of \textit{Poletown} was its conclusion that the judiciary’s power to review proposed condemnations is limited because “the determination of what constitutes a public purpose is primarily a legislative function.”\textsuperscript{144} The \textit{Hathcock} court adopted Justice Ryan’s dissent on that issue, in which he declared, “this court has never employed the minimal standard of review in an eminent domain case” and “has always made an independent

\textsuperscript{136} Id.
\textsuperscript{137} Id.
\textsuperscript{138} Id.
\textsuperscript{139} Id.
\textsuperscript{140} \textit{Hathcock}, 684 N.W.2d at 784.
\textsuperscript{141} Id. at 783.
\textsuperscript{142} See id. at 785. The court said that a minimal standard of review is not appropriate in eminent domain cases and that the judiciary should always make an independent determination of what constitutes a public use, regardless of explicit legislative findings. Id.
\textsuperscript{143} See Jennifer L. Kruckenberg, \textit{Can Government Buy Everything?: The Taking Clause and the Erosion of the “Public Use” Requirement,} 87 MINN. L. REV. 543, 566 (2002). Note that this article argues for a court review of governmental takings of private property through its power of eminent domain under a “heightened scrutiny” standard which should be taken to mean a review beyond a rational basis standard such as an intermediate scrutiny standard or strict scrutiny standard.
\textsuperscript{144} \textit{Hathcock}, 684 N.W.2d at 785.
determination of what constitutes a public use for which the power of eminent
domain may be utilized.\textsuperscript{145} The \textit{Hathcock} court held that the public use
requirement is a constitutional question and is “squarely within the court’s
authority.”\textsuperscript{146} By overturning \textit{Poletown}'s very deferential standard of review on
the question of public use, and by independently analyzing the facts of the case,
the court correctly employed a form of scrutiny more stringent than that
employed in \textit{Poletown}.\textsuperscript{147}

Heightened scrutiny requires that the government show a compelling need to
transfer land from one private entity to another and that the means employed are
the most narrowly tailored to satisfy that need.\textsuperscript{148} Such a heavy burden is
necessary for at least four reasons.\textsuperscript{149} First, respect for property rights is directly
connected to individual liberty and is an integral part of the Bill of Rights.\textsuperscript{150} A
standard less stringent than heightened scrutiny simply does not offer enough
protection for such an important right.\textsuperscript{151}

Second, heightened scrutiny is necessary because land is unique, particularly
land situated in the most desirable urban locations.\textsuperscript{152} There is a potential for
improper influence when corporations, armed with potential jobs and tax
revenue as public benefits, have an advantage over those who purchased first on
the open market.\textsuperscript{153} Thus, there is a public policy interest in making sure that
governmental interests more powerful than the duty to recognize the rights of
individual property owners do not improperly influence legislative decisions.\textsuperscript{154}
This interest can be protected by the judiciary applying a stringent form of
scrutiny that probes beneath legislative declarations of public benefits to
determine whether there is a compelling public need, and whether depriving
someone of their property is the best way to satisfy that need.\textsuperscript{155}

Third, heightened review is necessary because government officials are
likely to be swayed by the revenue potential of corporations, creating the
possibility of ulterior motives to declare their actions in condemning property to
be for the “public use.”\textsuperscript{156} Government officials should be required to prove to
the court that their motivations are honorable, rather than forcing private
citizens, already facing stiff odds against corporations with money and power, to

\begin{footnotesize}
\begin{enumerate}
  \item Id.
  \item Id.
  \item See id.
  \item Id. at 566-73.
  \item Kruckenbe, supra note 143, at 565.
  \item Id. at 566-73.
  \item Ely, supra note 112, at 35.
  \item See id. at 36.
  \item Kruckenbe, supra note 143, at 569.
  \item Id.
  \item Id.
  \item Id. at 570.
  \item Id. at 572.
\end{enumerate}
\end{footnotesize}
prove the government’s motivations are improper.\footnote{157}
Finally, heightened review is necessary because, without it, the government has a disproportionate amount of power over the individual property owner in eminent domain proceedings.\footnote{158} A minimal standard of review would create a presumption that any justification put forth by the government is proper.\footnote{159} Add to that the ability of the government to use tax payer revenue to pay for attorneys and appeal rulings, and the deck is stacked heavily against the individual landowner.\footnote{160} The Framers, who listed property rights together with the protections of life and liberty, surely intended to offer more protection to American citizens than what a deferential standard of review would provide.\footnote{161} This “power imbalance” between cities and private citizens justifies a heightened standard of review.\footnote{162}
In summary, the \textit{Hathcock} court was correct in undertaking a more stringent review of the legislative public use determination.\footnote{163} While it did not explicitly adopt the heightened review standard called for in this note, its formulation was not inconsistent with the approach.\footnote{164} Heightened review should be employed because of the importance of property rights to personal liberty, the uniqueness of land, the possibility of government ulterior motives, and the imbalance of power between the government and individuals.\footnote{165}

\textbf{D. Potential Abuses}

While the \textit{Hathcock} court’s opinion was not inconsistent with a heightened review standard on legislative determinations on whether the public will benefit from its condemnation of property, there are two potential weaknesses in the \textit{Hathcock} court’s formulation. Part IV.D.1 discusses condemnations to remove blight and the Ohio case, \textit{City of Norwood v. Burton}.\footnote{166} Part IV.D.2 discusses public oversight and the Connecticut case, \textit{Kelo v. City of New London}.

\begin{enumerate}
\item Condemnations to Remove “Blight” and \textit{City of Norwood v. Burton}

And lo, the city fathers looked upon a choice piece of property

\begin{footnotes}
\item[157] Id.
\item[158] Kruckenberg, \textit{supra} note 143, at 572.
\item[159] Id.
\item[160] Id.
\item[161] Id.
\item[162] Id. at 573.
\item[164] \textit{See id.}
\item[165] \textit{See Kruckenberg, supra} note 143, at 566-73.
\end{footnotes}
and declared, “Let there be blight.” And there was blight. And it was good too – at least for the Ohio businessman who wants that land for a $125 million development, and for the City of Norwood, which wants the developer for the new tax dollars it hopes he’ll bring in.\footnote{Let There Be Blight, Wall St. J., Apr. 22, 2004, at A18.}

The \textit{Hathcock} court’s formulation allows condemnation for the underlying purpose of removing blight.\footnote{\textit{Hathcock}, 684 N.W.2d at 783.} In recent decades, cities throughout the country have undertaken “urban renewal” projects involving the use of eminent domain and private corporations.\footnote{Kruckenberg, supra note 143, at 547.} The cities consider the removal of blight to be a valid public purpose to legitimize their use of the power of eminent domain and the courts have generally construed the determination of blight broadly.\footnote{Id. at 548.} The problem is that the determination of blight is inherently subjective and vulnerable to abuse.\footnote{Id. at 573.}

An example of abuse can be found in \textit{City of Norwood v. Burton}. This case involves an effort by the City of Norwood to condemn residential and small business properties for resale to a private developer for construction of Rookwood Exchange, “a complex of private office space, rental apartments or condominiums, and chain retail stores.”\footnote{Id. at 9.} The project is expected to generate $300,000 in annual revenue for the school system and approximately $1.79 million per year in income tax revenue for the financially troubled City of Norwood.\footnote{Id.}

Unable to accumulate all of the properties on its own, the developer approached the city and convinced it to have an urban renewal study and plan conducted at the developer’s expense.\footnote{Id. at 7.} The study concluded that the properties were deteriorated, deteriorating, and blighted as defined by city codes.\footnote{Id. at 9.} The city adopted the study’s findings as its own, approved the urban renewal plan, and authorized condemnation on the basis of removing these conditions.\footnote{Id.} The plan called for the developer to reimburse the city for all of its eminent domain costs.\footnote{Id.}

A handful of property owners challenged the city, and at trial, the judge...
applied a deferential standard of review to the city’s findings.\textsuperscript{178} Despite this deference, the judge found that the condemned properties were in fact not “slum[s], blighted, or deteriorated.”\textsuperscript{179} In fact, it was undisputed that the properties were in “good to fair condition, generally well maintained,” and were not dilapidated or obsolete.\textsuperscript{180} Nevertheless, the judge upheld the condemnation based on the city’s findings that the properties “probably would” deteriorate or were “in danger of deteriorating” into a blighted area in the future.\textsuperscript{181} This was in deference to the Norwood Code, which included “deteriorating” among the definitions for urban renewal.\textsuperscript{182}

Thus, pending appeal, the City of Norwood is able to condemn land owned by private individuals, not because the land is blighted, but because it may become blighted in the future.\textsuperscript{183} This illustrates a potential weakness in the blight prong of the \textit{Hathcock} formulation. The public use limitation is no limitation at all when blight can be defined so broadly, for every house or building has the potential to deteriorate if it is not maintained. The minimal standard of review utilized prevented the judge from ruling on the real purpose behind the Norwood condemnation, which was to realize the economic benefits projected to result from the developer’s use of the property.\textsuperscript{184} The city simply dressed its condemnation up as an urban renewal project in order to pass judicial scrutiny.\textsuperscript{185} Such abuse could be prevented by applying a heightened standard of review that looks to whether the true purpose of the taking is to remove blight, or whether it is to benefit the interests of a private entity.\textsuperscript{186} Because taking away someone’s private property on the basis that it may some day become deteriorated is hardly a compelling government interest,\textsuperscript{187} the Norwood condemnation would have been found unconstitutional had a heightened standard of review been employed.

2. “Public Oversight” and \textit{Kelo v. City of New London}

The \textit{Hathcock} formulation also holds that the public use requirement is met

\begin{footnotesize}
\bibitem{Burton} Burton, No. A0308646, slip op. at 17.
\bibitem{Id} Id. at 24.
\bibitem{Id} Id. at 26.
\bibitem{Id} Id. at 14.
\bibitem{Id} Id. at 11.
\bibitem{Id} Id. at 26.
\bibitem{Burton1} The city’s true motivation can be inferred from its poor fiscal condition, coupled with the economic benefits projected to result from the taking, and the dominant role of the developer in the process. \textit{See Burton}, No. A0308646, slip op. at 6, 14-15, 29. Judge Myers applied a deferential standard of review to the property owners’ pretext claim. \textit{See id.} at 32.
\bibitem{Id} \textit{See id.} The Norwood code does not permit eminent domain for purely economic development, no matter how economically beneficial the development may be. \textit{Id. at} 17.
\bibitem{Krucken} Kruckenberg, \textit{supra} note 143, at 566.
\bibitem{Id} \textit{See 99 Cents Only Stores v. Lancaster Redevelopment Agency}, 237 F. Supp. 2d 1123, 1131 (C.D. Cal. 2001). Avoiding future blight is not a legitimate public use under California law. \textit{Id.}
\end{footnotesize}
when the private entity remains “accountable to the public” and when the public maintains a “measure of control” over the use of the property after transfer to the private entity. The court found the Pinnacle Project lacking “formal mechanisms” to ensure that the private entity’s use would benefit the local economy.

The idea of requiring safeguards to ensure public benefits was at issue in the recent Connecticut case, *Kelo v. City of New London*. That case involved the City of New London’s acquisition of 90 acres of non-blighted residential and commercial properties to be used for the development of a hotel and conference center, high tech research and development office space, upscale residences, retail space, and parking. The city, through its development corporation, would own the land and lease it to a private developer on a ninety-nine year ground lease for a rent of $1.00 per year. The project was projected to generate as many as 3,169 new jobs and as much as $1,249,843 in property tax revenue. The Connecticut Supreme Court held that the taking satisfied the public use requirement based on the view that economic development is a valid public use under the takings clause of the state constitution. The court applied a “deferential and purposive” standard of review to the legislative determination of public use in reaching its holding.

One of the arguments advanced by the property owners in *Kelo* was that the condemnations lacked “reasonable assurances of future public use.” In other words, there were insufficient safeguards to ensure that the projected public benefits used to justify the takings would in fact accrue after the transfer to private entities. This was akin to saying that the taking failed to satisfy the “public oversight” requirement as set forth in *Hathcock*. The majority of the court disagreed with the property owners and found that there were “sufficient statutory and contractual constraints in place to provide reasonable assurances of future public use.” The “constraints” consisted of land use restrictions that limited each parcel to a specific use, such as residential use, hotel use, or retail use. The city could turn to the courts for relief if the developer were to violate

---

189 Id. at 784.
191 See id. at 509.
192 Id. at 510.
193 Id.
194 Id. at 508. The court used *Poletown* as persuasive authority. Id. at 528, 531.
195 Id. at 527-28.
196 *Kelo*, 843 A.2d at 543.
197 Id.
199 *Kelo*, 843 A.2d at 544.
200 Id. at 543.
these restrictions.201 The dissenters argued that this was not much of an assurance of public benefit.202 Land use restrictions alone, they postulated, provide “no statutory assurance that the public will benefit from the development to follow or that the development even will occur.”203 The dissent pointed to the fact that the statute allowed the development plan to be abandoned after three years, and that the properties could be conveyed free of the plan’s restrictions if the properties could not be sold to a private party at market value pursuant to the plan.204 In addition, at the time of the takings, there was no signed agreement with a developer to develop the properties and the real estate market was so depressed that the prospects of achieving the estimated benefits were poor.205 In other words, the project was completely speculative.206 The dissent suggested that, in order to pass constitutional muster, there needed to be a marketing study indicating a near-term demand for the contemplated use, a signed development agreement with specific performance requirements, such as a firm timetable for project implementation, and penalties should the developer fail to perform as required.207 The condemner, in essence, must prove to the court that the prospective public benefits are realistic, and there must be a development agreement between the city and the private developer, ensuring that the future use will in fact benefit the public.208

The fundamental distinction between the majority and the dissent in \textit{Kelo} was that the majority would defer to the legislative determination that a particular plan would have economic benefits, subject to only a good faith, rational basis test, while the dissent would place the burden on the condemning authority to prove that the projected economic benefits were reasonably ensured.209 This illustrates a potential weakness in the “public oversight” prong of the \textit{Hathcock} formulation. The requirement can be circumvented in jurisdictions where the court relies on legislative determinations of public benefit, as opposed to performing its own critical analysis.210 A weak measure of control, like the land use restrictions in \textit{Kelo}, could be sufficient to establish a rational basis for the city to believe that public benefits will accrue.211

\begin{footnotes}
\item[201] \textit{Id.} at 545.
\item[202] \textit{Id.} at 580.
\item[203] \textit{Id.}
\item[204] \textit{Id.}
\item[205] \textit{Kelo}, 843 A.2d at 597. In fact, evidence was presented showing high vacancy in a similar neighboring property and market conditions that did not justify construction of new commercial space on a speculative basis. \textit{Id.} at 598.
\item[206] \textit{Id.} at 602.
\item[207] \textit{Id.} at 599.
\item[208] \textit{Id.} at 600.
\item[209] \textit{Id.} at 602.
\item[210] \textit{See id.} at 580.
\item[211] \textit{See Kelo}, 843 A.2d at 582-83.
\end{footnotes}
Consequently, a court applying minimal scrutiny could approve such a taking.\textsuperscript{212} The result would be a taking of private property for a private developer where the public benefits are entirely speculative.\textsuperscript{215} A speculative development would most certainly fail the narrowly tailored prong of a heightened scrutiny test, even when the economic need is compelling.\textsuperscript{214} Thus, applying a form of stringent review would help prevent the type of eminent domain abuse displayed in \textit{Kelo}.

How much control must the public retain in order to make sure that the public benefits serving as the justification for the taking are actually achieved? Too much control could hamstring the private entity’s ability to best utilize the property, while not enough control could result in the public benefits never coming to fruition.\textsuperscript{215} The \textit{Kelo} dissent suggests that the required amount of control is that which is necessary to reasonably ensure that the public benefits will be achieved.\textsuperscript{216} Marketing studies and development agreements were mentioned as ways to meet this requirement.\textsuperscript{217} This approach is consistent with the \textit{Hathcock} “public oversight” requirement in that both are designed to make sure the public continues to benefit from the property after it is conveyed to a private entity.\textsuperscript{218} The important point here is that the government’s proposed amount of control must ultimately pass heightened scrutiny by the court, which will make sure that the extreme measure of eminent domain is not utilized unless there is a reasonable certainty that compelling government needs will be satisfied.\textsuperscript{219}

While the \textit{Hathcock} court took a big step in the right direction, the \textit{Norwood} and \textit{Kelo} cases illustrate potential areas for abuse under a three-prong formulation. In \textit{Norwood}, the blight justification was abused by including in its definition properties that were not yet blighted, but which could become blighted in the future.\textsuperscript{220} Likewise, the \textit{Kelo} case involved an abuse of the public oversight justification where a purely speculative project was held to pass constitutional muster.\textsuperscript{221} Application of heightened scrutiny along with the three-prong formulation of \textit{Hathcock} could have prevented the abuse in both

\begin{footnotes}
\footnotetext[212]{See id.}
\footnotetext[213]{See id. at 585; see also Kruckenber, supra note 143, at 571.}
\footnotetext[214]{See Kruckenber, supra note 143, at 571-72.}
\footnotetext[215]{See Ely, supra note 112, at 35 (discussing the competing interests of individual property rights and rights of the community to achieve legitimate social goals).}
\footnotetext[216]{See \textit{Kelo}, 843 A.2d at 596.}
\footnotetext[217]{See id.}
\footnotetext[218]{County of Wayne v. Hathcock, 684 N.W.2d 765, 783 (Mich. 2004).}
\footnotetext[219]{See Kruckenber, supra note 143, at 565.}
\footnotetext[221]{See \textit{Kelo}, 843 A.2d at 585.}
\end{footnotes}
cases. On the other hand, the three-prong approach without heightened review would not have prevented the abuse. Therefore, the critical ingredient underlying the Hathcock formulation is a stringent form of judicial review of legislative determinations that the public will benefit from taking property from one private person and conveying it to another.

V. CONCLUSION

In County of Wayne v. Hathcock, the Michigan Supreme Court overturned its landmark Poletown decision and, in so doing, resurrected the public use requirement as a limitation on the government’s power of eminent domain. The court held that the transfer of condemned property to a private entity satisfies the public use requirement when: (1) public necessity of the extreme sort requires collective action; (2) the property remains subject to public oversight; or (3) the property is selected because of facts of independent public significance. Furthermore, the court implicitly applied a form of heightened review to the city’s determination of whether the taking was necessary to benefit the public, and whether the public would, in fact, benefit from the taking.

This note argues that the court was correct to overturn Poletown because the Poletown holding eliminated any practical limitation on the power of eminent domain, and because an unlimited power of eminent domain is at odds with the constitutional objective of protecting property rights. This note further argues that the critical ingredient to the Hathcock court’s three prong approach is the application of heightened scrutiny. Heightened scrutiny requires the government to show a compelling need to transfer land from one private entity to another, and that the means employed are the most narrowly tailored to satisfy that need. It is necessary because of the importance of property rights to individual liberty, the uniqueness of land, the possibility of government ulterior motives.

---

222 See Kruckenber, supra note 143, at 567-68 (discussing how a taking for speculative economic development might pass the compelling government interest prong but would fail the narrowly tailored prong).
223 See id. at 567. “The resulting deference to the legislature and local boards means almost any rationale for a taking, regardless of whether the primary benefit is to a private party or the public, suffices as not arbitrary and capricious.” Id.
224 See supra note 143 and accompanying text.
225 See supra note 148 and accompanying text.
motives, and the imbalance of power between the government and individuals.\textsuperscript{230}

This note concludes by pointing out two potential weaknesses in the \textit{Hathcock} formulation. In \textit{City of Norwood v. Burton}, the blight justification was abused by defining blight so broadly as to include non-blighted properties which had the propensity to become blighted in the future.\textsuperscript{231} Likewise, in \textit{Kelo v. City of New London}, the public oversight justification was abused when token land use restrictions on a totally speculative project were said to be sufficient to ensure the promised public benefits.\textsuperscript{232} Both of these abuses could have been prevented by application of heightened scrutiny in conjunction with the \textit{Hathcock} three-prong formulation.\textsuperscript{233}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{230} See supra note 165 and accompanying text.
\item \textsuperscript{231} See supra note 183 and accompanying text.
\item \textsuperscript{232} See supra note 210 and accompanying text.
\item \textsuperscript{233} See supra note 222 and accompanying text.
\end{itemize}
\end{footnotesize}
A BREATHE OF FRESH AIR: A SMOKING BAN'S LEGAL INVASION OF PROPERTY RIGHTS IN LEXINGTON FAYETTE COUNTY FOOD & BEVERAGE ASS'N v. LEXINGTON-FAYETTE URBAN COUNTY GOV'T

by Matthew A. Stinnett*

I. INTRODUCTION

II. BACKGROUND LAW
   A. Municipal Police Powers
   B. Arbitrary Regulations
   C. Regulatory Takings
   D. Lexington-Fayette Urban County Government Smoke Free Task Force Report – Legitimate State Interests

III. THE FACTS AND HOLDINGS OF LEXINGTON FAYETTE COUNTY FOOD & BEVERAGE ASS'N v. LEXINGTON-FAYETTE URBAN COUNTY GOV'T
   A. The Facts
   B. The Majority Opinion of Justice Wintersheimer
      1. Preemption by State Law
      2. Ambiguity of the Ordinance
      3. Invasion of Property Rights
   C. The Dissenting Opinion of Justice Graves

IV. ANALYSIS
   A. Is the Ordinance an Unreasonable Extension of Municipal Police Power?
      1. Reasonableness of the Burden of Conformance under Kentucky Precedent
         a. The Interpretation of Adams
      2. Reasonable State Interest in Relation to the Use of Police Powers
      3. Alternatives to the Smoking Ban
      4. Smoking Ban is Reasonable
   B. Is the Ordinance Arbitrary under Kentucky Precedent?
      1. Legitimate State Interest
   C. Is the Ordinance a Regulatory Taking?
      1. Test from Lucas
      2. Test from Penn Central
         a. Economic Impact of Regulation on the Claimant

* Matthew A. Stinnett is a J.D. candidate for 2006 at Salmon P. Chase College of Law, Northern Kentucky University. He earned a B.A. in History from Transylvania University in 2002.
b. Extent to Which the Regulation Interferes with the Claimant’s Distinct Investment-Backed Expectations

c. Character of Government Action

V. CONCLUSION

I. INTRODUCTION

Imagine you receive a letter in the mail concerning a college reunion party. After mailing all your old friends from school, you agree to meet them the night before the reception at your old college bar, McCarthy’s Irish Pub. Driving back to your college town, you enter the bar early hoping to get in as much time with your old friends as possible. You immediately see former business friends like Brian and David sitting at the bar with a Guinness. In the corner, best friends from college like E.B., Derek, and Matt have already started sharing laughs.

But after only a few seconds, you notice something is not right. The old Irish tavern still has its warmth, but it is missing something. After a few minutes, you notice that the bar that made the phrase “smoky ambience” so infamous in college does not contain one smoker. It is only then that your friends tell you that the city has recently passed a smoking ban which states that “[n]o person shall smoke within any building.”

If you happen to live in Lexington, Kentucky, or one of the other two thousand cities that enforce some form of a prohibition on smoking, this scene might be familiar. In the spring of 2004, the Kentucky Supreme Court upheld the City of Lexington’s ordinance prohibiting smoking in all buildings that were open to the general public. The court held that the ordinance was not preempted by state law, and was not an invasion of property rights, and was not ambiguous.

Reactions to this decision came from as far away as newspapers in the United Kingdom. The newspapers reported that community leaders in the heart

---

2 Appellees’ Joint Brief, Lexington Fayette County Food & Beverage Ass’n v. Lexington-Fayette Urban County Gov’t, 131 S.W.3d 745 (Ky. 2004) (No. 03-CI-3812), Smoke Free Task Force Report at 5 appended to Appellees’ Joint Brief [hereinafter Smoke Free Task Force].
3 Lexington Fayette County Food & Beverage Ass’n v. Lexington-Fayette Urban County Gov’t, 131 S.W.3d 745, 757 (Ky. 2004).
4 Id. at 752.
5 Id.
6 Id. at 753, 756.
of tobacco country had succeeded in their effort to prohibit smoking. As mentioned, Lexington was not the first city to prohibit smoking, but it was the first city to do so that is centrally located in a state where tobacco was a main cash crop. State lawmakers attempted to strike down the ordinance through legislation, but failed in the end. Now other cities in Kentucky like Bowling Green and Louisville have announced they are considering smoking ordinances similar to Lexington’s. With this issue being debated in many town halls across the nation, the decision by the Kentucky Supreme Court created some guidance for these municipalities and cities by correctly deciding that smoking ordinances are not an invasion of a person’s property rights.

This note examines whether the Lexington smoking ordinance served as an invasion of the property rights of those affected by its enforcement. Section II surveys the law governing municipal police powers, the Kentucky Constitution, and the complex judicial decisions that govern regulatory takings. This section also includes an explanation of the Smoke Free Task Force, a committee created by the Lexington-Fayette Urban County Government Council to study the effects of second-hand smoke. Section III states the specific facts of lexington Fayette County Food & Beverage Ass’n v. Lexington-Fayette Urban County Gov’t and provides an explanation of the majority opinion and dissenting opinion in the case. Section IV gives an analysis of the Kentucky Supreme Court’s opinions and proposes that the court failed to fully examine the reasonableness of the ordinance and the importance of the Smoke Free Task Force Report. In addition, Section IV analyzes an arbitrary contention and regulatory takings argument proposed by the dissent and not addressed by the majority. Section V concludes this note.

---

13 Lexington Fayette County Food & Beverage Ass’n v. Lexington-Fayette Urban County Gov’t, 131 S.W.3d 745 (Ky. 2004).
II. BACKGROUND LAW

A. Municipal Police Powers

The “police power” of a municipal or city government allows it to impose regulations that maintain the “safety, convenience, comfort, and the common welfare of their citizens.” Typically, state constitutions or legislatures grant cities’ police power.

A municipality may regulate for many of the above reasons, but it is important to note the deference municipalities receive to regulate issues of public health. Courts have considered a city’s ability to protect and promote the general public health as the most important function of a city government. “[Protection of public health] is not only a right, but a manifest duty of a city.” The city has the authority to regulate property in order to prevent it or activities upon it from becoming harmful to the public. Traditionally, the courts have granted cities broad discretion in regulating public health matters, concluding that there is no broader field of police power. The right of an individual must yield to the exercise of the municipal power if they ever conflict.

Though the police power seems broad, a city regulation has many limitations in its application. First, any act or regulation created by a city must have some reasonable relation to the purpose of that power as listed above, such as public health or convenience. Second, a city regulation may not conflict with a state statute or a court will deem the regulation preempted by state law.

14 Nourse v. City of Russellville, 78 S.W.2d 761, 764 (Ky. 1935).
16 Nourse, 78 S.W.2d at 764.
17 Id. (stating that “[t]he conservation of public health should be of as much solicitude as the security of life”).
18 Id.
19 Id. at 765 (holding the city’s power to interfere with the citizen in the use and enjoyment of his land was indispensable to the government in order to prevent the situation where “the public would be at the mercy of every man who chose to disregard the safety or comfort of his neighbors”).
20 Adams, Inc. v. Louisville & Jefferson County Bd. of Health, 439 S.W.2d 586, 589-90 (Ky. 1969) (holding that “the fact that [the police power] impinges upon private interests does not restrict reasonable regulation”).
22 See Tolliver v. Blizzard, 137 S.W. 509, 510-11 (Ky. 1911) (holding that the court must see that the police action “tends in some degree towards the prevention of offenses, or the preservation of the public health, morals, safety, or welfare”).
23 Clark v. City of Draper, 168 F.3d 1185, 1188 (10th Cir. 1999) (applying Utah state law).
24 U.S. CONST. art. VI (stating that all federal law trumps any state law).
preempt any municipal law that is inconsistent with the state’s own legislation.\textsuperscript{25} In spite of this, the simple fact that a municipal ordinance creates a greater burden upon the community than the state statute operating in the same field does not necessarily create a conflict making the regulation invalid.\textsuperscript{26}

In general, the police power must constantly balance the rights and liberties of the individual \textit{and} the protection and welfare of the community as a whole.\textsuperscript{27} The test set forth by the Kentucky Supreme Court concerning this balance is “whether, from the standpoint of health and safety, there is a recognizable public interest in [municipal] operation which would justify the exercise of the police power of regulation.”\textsuperscript{28} The court measures the constitutional limitation on police power and its impact on private property by a reasonableness standard.\textsuperscript{29}

\section*{B. Arbitrary Regulations}

The Kentucky Constitution prohibits the state or municipal legislature from enacting laws or regulations that promote “arbitrary” power over its people, thereby abusing the “liberty” of “freemen.”\textsuperscript{30} Any challenge that a statute is too sweeping in its impact based on the arbitrary clause of the constitution “must fail unless the law prohibits a substantial amount of constitutionally protected conduct.”\textsuperscript{31} Thus, when determining whether a statute or ordinance is arbitrary and unconstitutional, a court will analyze whether the language of the statute is rationally related to promoting a legitimate state interest.\textsuperscript{32}

\textsuperscript{25} See Clark, 168 F.3d at 1188.
\textsuperscript{26} Lexington Fayette County Food & Beverage Ass’n v. Lexington-Fayette Urban County Gov’t, 131 S.W.3d 745, 750 (Ky. 2004).
\textsuperscript{27} Nourse v. City of Russellville, 78 S.W.2d 761, 764 (Ky. 1935) (citing Miller v. Schoene, 276 U.S. 272 (1928)) (emphasis added).
\textsuperscript{28} Adams, Inc. v. Louisville & Jefferson County Bd. of Health, 439 S.W.2d 586, 589 (Ky. 1969).
\textsuperscript{29} Id. at 590 (citing City of Louisville v. Kuhn, 145 S.W.2d 851, 853 (Ky. 1940)).
\textsuperscript{30} KY. Const. § 2 (stating “Absolute and arbitrary power denied. Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority.”).
\textsuperscript{32} Pigeons’ Roost, Inc. v. Commonwealth & Div. of Charitable Gaming in the Justice Cabinet, 10 S.W.3d 133, 135 (Ky. Ct. App. 1999) (holding a regulation on gambling constitutional under § 2 of the Kentucky Constitution).
C. Regulatory Taking

The “Takings Clause” of the Fifth Amendment of the United States Constitution provides that the government will justly compensate any person whose property is taken for public use.33 Similarly, the Kentucky Constitution also protects the rights of individuals whose property rights are interfered with by a governmental body.34 Takings commonly involve the physical invasion or occupation of one’s property by the government.35 The United States Supreme Court has determined that “[t]he just compensation provision [of the Fifth Amendment of the Unites States Constitution] is designed to bar [the] government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”36

The United States Supreme Court has crafted three categorical rules37 and an ad hoc test examining the facts of a particular case.38 Of the three bright line rules, only one applies to the analysis of a statute or regulation.39 In Lucas v. South Carolina Coastal Council, the United States Supreme Court held that to constitute a taking, the regulation must deprive the property owner of all economic benefits to his land.40 If the property owner succeeds in this argument, the government must provide just compensation to the opposing party.41

If a claimant does not satisfy any of the three categorical rules, then the final test for takings under the Fifth Amendment is an ad hoc examination of three factors as defined by the United States Supreme Court.42 Scholars have argued

33 U.S. Const. amend. V (stating “[N]or shall private property be taken for public use, without just compensation.”).
34 Ky. Const. § 13 (stating “[N]or shall any man’s property be taken or applied to public use without the consent of his representatives, and without just compensation being previously made to him.”).
37 Dolan v. City of Tigard, 512 U.S. 374, 386 (1994) (holding that a special rule must be created for exactions); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992) (holding a regulation is a taking if it causes the loss of all economical benefits of the land); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 434-35 (1982) (ruling that a taking is present if the government authorizes a permanent physical occupation of the land).
38 See Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978) (holding the factors of “particular significance” are “[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations” as to the “character of the governmental action”).
39 Lucas, 505 U.S. at 1019 (holding a regulation is a taking if it causes the loss of all economical benefits to the land).
40 Id. (emphasis added).
41 Id. at 1007.
that the Penn Central Transportation Company v. City of New York decision that created these three factors is the “single most important modern decision about regulatory takings.” Justice Brennan, writing for the majority, characterized the Court’s holding as a method of examination for a process that has no “set formula.” The key factors expressed by the Court are: (1) “the economic impact of the regulation on the claimant,” (2) “particularly, the extent to which the regulation has interfered with distinct investment-backed expectations,” and (3) “the character of the governmental action.”

The first factor examines what impact a regulation might have on an individual’s business. Though the Supreme Court in Penn Central did not explain this element, precedent has clearly opined that where a regulation causes diminution in market value, there is not a taking if the regulation is reasonably related to the promotion of a legitimate state interest.

The second factor analyzes both the future and present investment-backed expectations of the owner of the land. For example, Justice Brennan stressed that the landmark preservation in Penn Central did not interfere with the owner’s expected continued use of the terminal.

The third and final factor considers the character of the governmental action. The regulation will not be considered a taking if it is reasonably related to promoting the public health, safety and welfare.

In conclusion, an analysis of a regulation as a taking must first negotiate the test from Lucas. If it is determined that the regulation is not a taking, then the analysis shifts to the factors under Penn Central.

D. Lexington-Fayette Urban County Government Smoke Free Task Force Report – Legitimate State Interests

Before even considering enacting an ordinance prohibiting smoking, the Lexington-Fayette Urban County Government Council (“Government”)...
petitioned a Smoke Free Task Force ("Task Force") to analyze the issue. The Task Force operated for over a year gathering evidence regarding second-hand smoke and health concerns that scientifically and legally justified the ordinance.

The Task Force "examined comprehensive peer-reviewed health studies and heard extensive public comment on the proposed ordinance." It gathered various representatives to author reports on the economic impact of the smoking ban and the medical impact of second-hand smoke. Though the final report proffered by the Task Force made no specific recommendations, it did present an overwhelming case that linked second-hand smoke to health problems. Further, the final report concluded that the economic impact of the smoking ban on business was negligible, if there was an impact at all. However, the report did indicate that a smoking ordinance might have a negative impact on bars and taverns that depended on smokers for business.

III. THE FACTS AND HOLDINGS OF LEXINGTON FAYETTE COUNTY FOOD & BEVERAGE ASS’N V. LEXINGTON-FAYETTE URBAN COUNTY GOV’T

A. The Facts

On July 1, 2003, the Government officially enacted a smoking ban prohibiting smoking in all public buildings. The only listed exceptions to the ordinance were private homes and government buildings. The ordinance would

52 Lexington Fayette County Food & Beverage Ass’n v. Lexington-Fayette Urban County Gov’t, 131 S.W.3d 745, 749 (Ky. 2004).
53 Appellee’s Joint Brief at 2, Lexington Fayette County Food & Beverage Ass’n v. Lexington-Fayette Urban County Gov’t, 131 S.W.3d 745 (Ky. 2004) (No. 03-CI-3812) (stating the express mission of the Task Force was to “review scientific information, public opinion, and attitude of appropriate stake holders regarding any changes in the LFUCG regulations relative to second hand smoke in restaurants, taverns, and bars and to recommend any changes to the Council that such review may indicate”).
54 Id.
55 Id. (stating that the Task Force included members “of the food and beverage industry, the tobacco industry, the business and university communities and health department employees”).
56 Id. at 2-3.
57 Smoke Free Task Force Report, supra note 2, at 1.
58 Id. at 4 (concluding that the negative impact will not lead to a major decline in sales).
59 Lexington Fayette County Food & Beverage Ass’n v. Lexington-Fayette Urban County Gov’t, 131 S.W.3d 745 (Ky. 2004).
60 LEXINGTON-FAYETTE URBAN COUNTY, KY., CODE OF ORDINANCES §§ 14-97 – 14-104 (1959); Lexington-Fayette Urban County Gov’t, 131 S.W.3d at 749.
61 Lexington-Fayette Urban County Gov’t, 131 S.W.3d at 749.
have the greatest impact, in terms of enforcement, on restaurants and bars in the county.\textsuperscript{62} The Government originally intended for the ordinance to take effect on September 29, 2003, but the ordinance was delayed through litigation by the Lexington-Fayette Food and Beverage Association ("Association").\textsuperscript{63}

The ordinance required all public buildings or businesses to prohibit smoking on their business premises, regardless of the type of building or business.\textsuperscript{64} Further, the ordinance forbade any individuals from smoking near any entrance of a public building or business.\textsuperscript{65} The smoking ban demanded that all public buildings destroy or dispose of any smoking paraphernalia in their buildings.\textsuperscript{66} The council rested the power to enforce the ordinance in the Lexington-Fayette Urban County Department of Health ("Health Department"), which in turn could impose staggered monetary sanctions as well as possible criminal sanctions.\textsuperscript{67}

B. The Majority Opinion of Justice Wintersheimer

Justice Wintersheimer, writing for the majority, began his analysis by expressing the general issue of the case.\textsuperscript{68} The Kentucky Supreme Court defined the primary issue as "whether a local government has the authority to enact an ordinance which prohibits smoking in public buildings for the purpose of protecting the public from the effects of second-hand smoke inhalation."\textsuperscript{69} The court divided the significant arguments by the Association into three specific issues: whether state law preempted the ordinance, whether there was ambiguity in the ordinance, and whether the ordinance invaded property rights.\textsuperscript{70}

1. Preemption by State Law

The court began its analysis of the issue of preemption by determining whether the city had the authority to enact this type of ordinance.\textsuperscript{71} Justice Wintersheimer expressed that the Kentucky General Assembly granted cities, including urban-county governments, the right to promulgate ordinances without

\begin{itemize}
\item \textsuperscript{62} See id.
\item \textsuperscript{63} Brief of Appellant at 1, Lexington Fayette County Food & Beverage Ass’n v. Lexington-Fayette Urban County Gov’t, 131 S.W.3d 745 (Ky. 2004) (No. 03-CI-3812).
\item \textsuperscript{64} Id. at 1-2.
\item \textsuperscript{65} See Lexington-Fayette Urban County Gov’t, 131 S.W.3d at 753.
\item \textsuperscript{66} See Brief of Appellant at 2, Lexington-Fayette Urban County Gov’t (No. 03-CI-3812).
\item \textsuperscript{67} Id.
\item \textsuperscript{68} Lexington-Fayette Urban County Gov’t, 131 S.W.3d at 748.
\item \textsuperscript{69} Id.
\item \textsuperscript{70} See id.
\item \textsuperscript{71} Id. at 749.
\end{itemize}
statutory authority, “legislation known commonly as ‘home rule.’” Justice Wintersheimer concluded that the city possessed the power to enact any ordinances that were necessary to promote public health, as long as it did not diverge from statutory or constitutional law.

The court agreed with the Association in that there were certain statutes, such as the Kentucky Food, Drug and Cosmetic Act, which discussed smoking bans. However, the court ruled that none of the suggested statutes expressly conflicted with or preempted the Lexington smoking ban. The smoking ban may increase the burden on the municipality by expanding upon state statutes, but as Justice Wintersheimer ruled, such a regulation is within the constitutional police power of the city. Further, Justice Wintersheimer found the statutes did not impliedly conflict with the smoking ordinance.

2. Ambiguity of the Ordinance

In the third section of its opinion, the majority analyzed various ambiguities that the Association argued made the ordinance unconstitutional. The first allegedly vague clause examined by the court was whether the ordinance properly defined the “reasonable distance from the outside entrance of any building” that smokers must maintain. The second unclear clause considered by the majority was the ordinance’s definition and description of “smoking paraphernalia.”

As to the first clause, the court ruled that it was not ambiguous and was therefore enforceable under the ordinance. The standard adopted by the Kentucky Supreme Court when interpreting an ordinance or statute is the “man on the street approach.” The court emphatically concluded that “individuals can reasonably understand that if their tobacco smoke is entering the building they are not at a reasonable or required distance.”

---

73 Id.
75 Lexington-Fayette Urban County Gov’t, 131 S.W.3d at 751.
76 Id.
77 Id. at 750.
78 Id. at 751.
79 Id. at 752-56.
80 Id. at 752-53.
81 Id. at 753.
82 Id. at 753-56.
83 Id. (explaining that “as long as an ordinance or statute can be reasonably understood by those affected by the ordinance and they can reasonably understand what the statute requires of them, it is not unconstitutionally vague”).
84 Id.
The court held the second clause ambiguous, but this conclusion did not cause the court to rule that the ordinance was unconstitutional.\(^85\) The court reasoned that since the ordinance implied that the section requiring the disposal of “smoking paraphernalia” was not essential to the valid provisions, the ordinance was still valid and enforceable.\(^86\)

3. Invasion of Property Rights

Justice Wintersheimer, in the second section of his opinion, discussed whether the ordinance was an invasion of the property rights of private owners.\(^87\) The majority held that the ordinance did not unreasonably interfere with the property rights of business owners.\(^88\)

The court expressed that there is a long-standing precedent holding that the “exercise of police power [that] impinges upon private interest does not restrict reasonable regulation.”\(^89\) Further, the court held that it will always favor the promotion of legitimate state and public interests over the property interests of a private individual.\(^90\) Finally, the court rested its opinion on the distinct fact that the Government performed extensive public hearings and research through the Task Force in order to justify the ordinance without substantially interfering with the rights of its citizens.\(^91\) The court expressed that “evidence was presented that used objective sales data to the effect that ‘no adverse economic effect’ or ‘improved business’ was found.”\(^92\)

C. The Dissenting Opinion of Justice Graves

Justice Graves, the lone dissenter, wrote to express his opinion that the ordinance was a violation of private property rights as a regulatory taking under both Section Two of the Kentucky Constitution and the Fifth Amendment of the United States Constitution.\(^93\) He argued that the “litmus test” for the rights of property owners was ownership itself.\(^94\) Though Justice Graves spent a great deal of time arguing public policy, he concluded that the government should not regulate the legal activity of individuals on private property.\(^95\)

\(^85\) Id. at 756.
\(^86\) Id.
\(^87\) Lexington-Fayette Urban County Gov’t, 131 S.W.3d at 752.
\(^88\) Id.
\(^89\) Id.
\(^90\) Id. (citing Miller v. Schoene, 276 U.S. 272, 279-80 (1928)).
\(^91\) Lexington-Fayette Urban County Gov’t, 131 S.W.3d at 752.
\(^92\) Id.
\(^93\) Id. at 757.
\(^94\) Id.
\(^95\) Id.
Justice Graves’ main contention against the ordinance was that it failed to consider the type and nature of each party that was affected.\textsuperscript{96} He argued that the main goal of any business was to make a profit, a right that the ordinance was interfering with by ostracizing a class of patrons.\textsuperscript{97}

Justice Graves structured his claims on the precedents of protection of property rights in our legal history.\textsuperscript{98} Justice Graves concluded his argument by expressing that the majority was enacting a smoking ordinance that punished a minority, a group the court system should protect.\textsuperscript{99}

IV. ANALYSIS

The Kentucky Supreme Court should have better addressed the issues raised by Justice Graves in his dissent concerning whether the ordinance functioned as a taking or whether it was arbitrary.\textsuperscript{100} Instead, Justice Wintersheimer solely focused on whether the Government’s regulation was reasonable under its exercise of police power.\textsuperscript{101} However, even in that analysis, the court failed to address the complexity of the precedents in the state\textsuperscript{102} and the interpretation of one case raised by the Association.\textsuperscript{103} The Kentucky Supreme Court reached a correct conclusion that the smoking ban is reasonable and constitutional, but in spite of this, the court failed to address whether the smoking ban acts as a taking and whether it is an arbitrary act of police power. In addition, the court failed to fully explain how the Government’s actions were reasonable.\textsuperscript{104}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{96} Id.
\item \textsuperscript{97} \textit{Lexington-Fayette Urban County Gov’t}, 131 S.W.3d at 757.
\item \textsuperscript{98} Id. at 758 (citing VanHorne’s Lessee v. Dorrance, 2 U.S. 304, 310 (1795); Dorothy Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972)).
\item \textsuperscript{99} See \textit{Lexington-Fayette Urban County Gov’t}, 131 S.W.3d at 758.
\item \textsuperscript{100} Id. at 757.
\item \textsuperscript{101} Id. at 749-52.
\item \textsuperscript{102} See Brief of Appellant at 32 n.15, \textit{Lexington-Fayette Urban County Gov’t} (No. 03-CI-3812) (stating that the trial court presented four cases that were on point and open to interpretation).
\item \textsuperscript{103} Id. at 35.
\item \textsuperscript{104} \textit{Lexington-Fayette Urban County Gov’t}, 131 S.W.3d at 752. Though the Kentucky Supreme Court held the smoking ordinance a reasonable exercise of police power, the analysis failed to explain the complexity of the precedents or to fully analyze the importance of the Smoke Free Task Force. See id. at 752, 757.
\end{itemize}
\end{footnotesize}
A. Is the Ordinance an Unreasonable Extension of Municipal Police Power?

Applying the standard of reasonableness, Kentucky courts have addressed the validity of regulations concerning health issues in numerous cases. As expressed by the Kentucky Supreme Court in this case, both federal and state courts have continuously validated regulations furthering the public interest, even to the detriment or destruction of property interests. However, if an ordinance does have a reasonable objective, but serves only as an invasion of property rights “under the guise of [a] police regulation,” then a court may declare the ordinance void. Even with that limitation, a deferential interpretation validating most health-related ordinances has resulted in the Kentucky courts.

1. Reasonableness of the Burden of Conformance under Kentucky Precedent

In considering the burden placed on complaining parties to conform to the ordinance, the Kentucky Supreme Court has consistently held that most burdens are reasonable in order to promote the protection of public health. In the Kentucky Supreme Court’s decision concerning the Lexington smoking ordinance, it did not analyze whether the burden on the complaining parties in conformance was reasonable. In the history of cases addressing health regulations, there are several cases that have required certain actions by private individuals on private property. The relevant cases are as follows:

- Frederick v. Air Pollution Control Dist. of Jefferson County, 783 S.W.2d 391, 395 (Ky. 1990) (validating a regulation requiring all citizens to pay a fee to have their cars tested for vehicle emissions and undesirable levels of pollution).
- Commonwealth v. Do, Inc., 674 S.W.2d 519, 521 (Ky. 1984) (holding that a regulation limiting the use of lead based paints in residential homes was reasonable).

---

105 Appellees’ Joint Brief at 17, Lexington-Fayette Urban County Gov’t (No. 03-CI-3812).
106 Lexington-Fayette Urban County Gov’t, 131 S.W.3d at 752 (citing Miller v. Schoene, 276 U.S. 246, 279-80 (1928)).
107 Tolliver v. Blizzard, 137 S.W. 509, 511 (Ky. 1911) (holding that a city ordinance must have a reasonable relation to the preservation of public health, morals, safety, or welfare).
108 Appellees’ Joint Brief at 17, Lexington-Fayette Urban County Gov’t (No. 03-CI-3812).
109 Id.
City of Louisville v. Thompson, 339 S.W.2d 869, 872 (Ky. 1960) (upholding an ordinance that necessitated all homes be equipped with an inside bathroom and that any water source be connected to hot and cold water lines).

Nourse v. City of Russellville, 78 S.W.2d 761, 765 (Ky. 1935) (finding that a municipal ordinance that demanded that all private homes be linked with the municipal sewerage system was legitimate).

All of these cases validated ordinances involving public health issues where a private party was forced to accept a reasonable burden, sometimes financial, in order to conform. Note that three of the cases\textsuperscript{110} upheld ordinances that “touched upon the autonomy of individuals within their own home.”\textsuperscript{111} Further, three of the cases upheld a financial burden on both private and public parties in order to conform to the ordinance.\textsuperscript{112}

In contrast, the smoking ban does not purport to deny private individuals the right to smoke in their own home, but only in a public building or dwelling.\textsuperscript{113} The fact that the smoking ban does not profess to encompass an invasion of activities in the private home, but only encompasses activities on private property that is open to the public, supports the claim that it is a reasonable invasion of property rights.\textsuperscript{114} Further, the smoking ban does not require the affected parties to bear any financial burden in order to conform to its requirements.\textsuperscript{115} In no way does conformance to the requirements of the Lexington smoking ordinance invade the property rights of any parties. It is a simple and general prohibition against smoking in an area where the public is exposed. The smoking ban, as compared to the above precedent, “is justified by much more than a ‘reasonable basis in fact’ and has more than a ‘reasonable relation to public health.’”\textsuperscript{116} Ignoring the issue of public health, the burden on a party to conform to this statute is both financially and socially reasonable. Though the Kentucky Supreme Court did not address this argument, it is fundamental in understanding the foundation of the contention that the ordinance is reasonable and not an invasion of property rights.\textsuperscript{117}

\textsuperscript{110} See Commonwealth v. Do, Inc., 674 S.W.2d 519, 522 (Ky. 1984); City of Louisville v. Thompson, 339 S.W.2d 869, 872 (Ky. 1960); Nourse v. City of Russellville, 78 S.W.2d 761, 765 (Ky. 1935).

\textsuperscript{111} Appellees’ Joint Brief at 18, Lexington-Fayette Urban County Gov’t (No. 03-CI-3812).

\textsuperscript{112} See Frederick v. Air Pollution Control Dist. of Jefferson County, 783 S.W.2d 391, 395 (Ky. 1990); Thompson, 339 S.W.2d at 872; Nourse, 78 S.W.2d at 765.

\textsuperscript{113} LEXINGTON-FAYETTE URBAN COUNTY, KY., CODE OF ORDINANCES §§ 14-97 – 14-104 (1959).

\textsuperscript{114} See id.

\textsuperscript{115} See id.

\textsuperscript{116} Appellees’ Joint Brief at 18, Lexington-Fayette Urban County Gov’t (No. 03-CI-3812) (citing Graybeal v. McNevin, 439 S.W.2d 323, 326 (Ky. 1969)).

\textsuperscript{117} See supra notes 113-16.
a. The Interpretation of Adams

In one of the only cases invalidating a regulation concerning issues of public health, the court ruled that the regulation in question required an unreasonable burden where private pool owners were obligated to have an attendant on hand at all times when the swimming pool was open.\(^{119}\)

The Association argued that Adams demonstrated a case where a health ordinance was unreasonable because it failed to account for the diversity of the various types of pools.\(^{120}\) The Association used this interpretation in a comparison to the smoking ban’s invasion of private property and its failure to consider the diversity of businesses affected.\(^{121}\) However, a closer reading of the opinion in Adams would find this interpretation erroneous.

In contrast to the Association’s interpretation, the court rested in Adams that “[t]he constitutional right of the legislature to act in this area . . . cannot be determined by labeling appellants’ pools either ‘public’ or ‘private.’”\(^{122}\) The court did not question the authority of the administrative agency in the use of its police powers to regulate water purifications and other safeguards.\(^{123}\) The court failed to express that the issue of a pool serving a private individual or a public community was an issue.

Nor did the court overturn the regulation because of the excessive cost of hiring lifeguards for empty pools.\(^{124}\) The court was silent on whether the financial burden placed on private individuals to conform to the ordinance was reasonable.

The court ruled that the ordinance was unreasonable because the agency in charge of enforcing the regulation was imposing the ordinance on public pools, but did not care to enforce it on private pools.\(^{125}\) Thus, the court did not rule against the regulation for its invasion of private property or failure to delineate between public and private pools, but rather the court ruled that it would not enforce a regulation that the agency itself did not even find necessary to

---

\(^{118}\) Adams, Inc. v. Louisville & Jefferson County Bd. of Health, 439 S.W.2d 586 (Ky. 1969).

\(^{119}\) Id. at 588, 592-93 (upholding the ordinance as a reasonable regulation on the water quality but invalidating the requirement of life guards for private pools).

\(^{120}\) See Brief of Appellant at 35, Lexington-Fayette Urban County Gov’t (No. 03-CI-3812).

\(^{121}\) Id. (stating that the smoking ordinance “is designed to impose an absolute ban of smoking in all buildings generally open to the public without any regard whatsoever for the myriad types of businesses adversely affected by the ban”).

\(^{122}\) Adams, 439 S.W.2d at 589 (expressing that “[t]his practice itself is evidence that the classification of all swimming pools in one category for all purposes is too broad”). See id. at 592.

\(^{123}\) Id. at 588.

\(^{124}\) Id. at 592.

\(^{125}\) Id. (holding that “the practice indicated by the evidence of enforcing certain regulations against owners of one type of pool and not enforcing those regulations against owners of pools in a different category is not a proper legal method of dealing with the varying health and safety hazards”).
enforce. The burden placed on pool owners greatly outweighed any health benefit sought.

The smoking ban bears no resemblance to the invalidated regulation in Adams. First, Adams does not stand for the proposition that an ordinance that indiscriminately imposes burdens on both private and public property is unreasonable. The failure of the smoking ordinance to distinguish between private and public property has no bearing on its reasonableness. Second, unlike the clause requiring lifeguards at private pools, the smoking ban creates no burden on a party to enforce its requirements. Affected property owners must simply prohibit an action, while the regulation in Adams requires private pool owners to take on an affirmative duty. Finally, unlike the case in Adams, the smoking ban has an overwhelming health benefit for the public by reducing the public’s exposure to second-hand smoke. Conversely, the burden intended to be placed on private pool owners in Adams was enormous and the health benefits negligible. The reasonable relation to the health benefits gained from the smoking ordinance greatly outweighs the trivial burden that may be placed on a private business and its property rights. This conclusion, though not addressed by the Kentucky Supreme Court and only implied in Justice Graves’ dissent, furthers the holding that the ordinance is reasonable.

2. Reasonable State Interest in Relation to the Use of Police Powers

Though the above discussion determined that the smoking ban places a reasonable burden on the property interests of the parties affected, the Kentucky courts still require an ordinance to demonstrate a reasonable relation to the state interests furthered by the use of the police powers, such as public health. The Government’s Smoke Free Task Force Report (“Report”) established the critical

126 Id.; see also Appellees’ Joint Brief at 21, Lexington Fayette County Food & Beverage Ass’n v. Lexington-Fayette Urban County Gov’t, 131 S.W.3d 745 (Ky. 2004) (No. 03-CI-3812).
127 Adams, 439 S.W.2d at 592.
128 Appellees’ Joint Brief at 22, Lexington-Fayette Urban County Gov’t (No. 03-CI-3812).
129 See supra note 122.
130 See supra notes 115, 124 and accompanying text.
131 Smoke Free Task Force Report, supra note 2, at 12.
132 See supra notes 117, 127 and accompanying text; see also Lexington Fayette County Food & Beverage Ass’n v. Lexington-Fayette Urban County Gov’t, 131 S.W.3d 745, 752 (Ky. 2004) (holding the “county government considered lengthy public hearings at which evidence of the problems connected with the use of tobacco products and second-hand smoke were extensively discussed by all sides to the controversy”).
133 See supra notes 117, 131 and accompanying text.
134 Tolliver v. Blizzard, 137 S.W. 509, 511 (Ky. 1911) (stating the right of the government “to acquire and dispose of property is subject only to [the municipal police] power”).
conclusive evidence that the smoking ordinance legitimately protects the public’s health interests.\textsuperscript{135}

The Report concluded, through analyzing several studies, that second-hand smoke was a major cause of cancer, heart disease, respiratory disease, sudden infant death syndrome, middle ear disease, and asthma.\textsuperscript{136} Citing over twenty-seven studies, the Report calculated that each year over 53,000 people in the United States die from illnesses brought on by second-hand smoke.\textsuperscript{137} Exposure to second-hand smoke for as short as five minutes was shown to increase an individual’s risk to heart attack or stroke.\textsuperscript{138} The groups shown to experience the greatest impact to second-hand smoke were people who worked as servers, bartenders and hosts in restaurants.\textsuperscript{139} The most persuasive analysis, citing thirteen studies, concluded that “no feasible ventilation system can reduce secondhand tobacco smoke exposure to a safe zero level.”\textsuperscript{140} Thus, even though a restaurant or bar may attempt to separate smokers and non-smokers into different sections, the non-smokers were still exposed to the lethal impact of second-hand smoke.\textsuperscript{141}

With over 2,308 United States municipalities having some form of a tobacco free ordinance, extensive studies have monitored the impact of such regulations.\textsuperscript{142} The Report discovered that in cities that have some form of a smoking ban, the health benefits to the public were extensive.\textsuperscript{143} Citing seven studies, the Report held that smoke-free policies resulted in more smokers quitting successfully, fewer consumed cigarettes by smokers, and fewer children starting to smoke.\textsuperscript{144} With the population of Lexington including two universities and a community college,\textsuperscript{145} the city must realize the benefit of an ordinance that results in fewer youths starting to smoke. The tobacco industry, who vigorously opposes smoking ordinances, has written internal memorandums stating that the “total prohibition of smoking in the workplace strongly affects

\textsuperscript{135} Lexington-Fayette Urban County Gov’t, 131 S.W.3d at 752 (holding the “county government considered lengthy public hearings at which evidence of the problems connected with the use of tobacco products and second-hand smoke were extensively discussed by all sides to the controversy”).

\textsuperscript{136} See supra note 131 and accompanying text.

\textsuperscript{137} Smoke Free Task Force Report, supra note 2, at 12.

\textsuperscript{138} Id. at 12-13 (concluding that exposure increases an individual’s risk 25-35%).

\textsuperscript{139} See id.

\textsuperscript{140} Id. at 12.

\textsuperscript{141} Id. at 13 (referencing the American Society of Heating, Refrigerating, and Air-Conditioning Engineers that “have concluded that ‘source control’ (smokefree) is the only feasible way to protect workers and the general public”).

\textsuperscript{142} See Smoke Free Task Force Report, supra note 2, at 5.

\textsuperscript{143} Id. at 12.

\textsuperscript{144} Id.

\textsuperscript{145} The University of Kentucky, Transylvania University, and Lexington Community College are all located in Lexington, Kentucky.
Further, the internal tobacco memorandums noted that smoking ordinances have the effect of a lower consumption rate and result in an increased quit rate of almost one hundred percent. As compared to no-smoking policies implemented by employers, “[m]ilder workplace restriction[s], such as smoking only in designated areas have much less impact on quitting rates and very little effect on consumption.” Though the goal of the Lexington smoking ban was to reduce the public’s exposure to second-hand smoke, the other benefits were also substantial and beneficial to the smoking community and its health.

The organizations that assisted in creating the report based their findings on national studies. The Report included research that the percentage of Lexington smokers is similar to the national percentage, though lower than the overall Kentucky smoking rates. Further, the Report found that the percentage of adult smokers who had recently attempted to quit in Lexington over the year prior to the publication of the Report was appreciably higher than the state or national averages. Given the evidence that smoking bans help smokers quit, this gave further support to the contention that the smoking ban was necessary and legitimate to further public health in Lexington.

The evidence explained above demonstrates the clear and overwhelming public health risks that second-hand smoke causes. The city may reasonably restrict the use of any dangerous commodities that cause injury to the public through the use of municipal police power. Further, the benefits that accrue from the presence of a smoking ban not only include a reduction in second-hand smoke exposure, but also encourages other smokers to quit and potential new smokers not to start. The Lexington smoking ban is reasonably related to a substantial health benefit to the public which justifies the municipality’s use of its police powers. Though the Kentucky Supreme Court rested on the same conclusion, the above analysis demonstrates the tremendous and irrefutable nature of that conclusion.

146 Smoke Free Task Force Report, supra note 2, at 20.
147 Id.
148 Id.
149 See supra notes 142-48 and accompanying text.
150 Smoke Free Task Force Report, supra note 2, at 1-22.
151 Id. at 21-22 (finding that around 25% of Lexington residents smoke, 31% of Kentucky residents smoke, and 23% of United States residents smoke).
152 Id. at 21 (stating that “58% of Fayette County cigarette smokers had attempted to quit, compared to 48% in Kentucky”).
153 Mansbach Scrap Iron Co. v. City of Ashland, 30 S.W.2d 968, 969 (Ky. 1930) (holding that there is a noticeable distinction between dangerous items that may be prohibited, potentially dangerous commodities that may be regulated, and “intrinsically harmless” objects which are not subject to the exercise of police power).
154 Smoke Free Task Force Report, supra note 2, at 12.
155 See supra notes 142-49 and accompanying text.
3. Alternatives to the Smoking Ban

Both Justice Graves\textsuperscript{156} and the Association\textsuperscript{157} contended that there are alternative approaches to the smoking ban that do not require a blanket prohibition. The Association proffered five pages of alternative methods that would minimize the health risks to the public while still allowing patrons to smoke.\textsuperscript{158} However, a party that does not agree with a government regulation can and will always argue that there are alternative methods of suppressing a certain action. As the brief for the Government pointed out, “the mere existence of such alternatives does not render democratically enacted health regulations unconstitutional.”\textsuperscript{159} The fact that there are alternatives to the smoking ordinance enacted in Lexington in no way compromises the above analysis which proves the reasonableness of the ordinance.

4. Smoking Ban is Reasonable

The Kentucky precedents demonstrate that the smoking ban does not place an unreasonable burden on affected property owners in order for them to conform to its requirements. The Report served as the crucial evidence that justified the reasonableness of the city’s actions.\textsuperscript{160} Further, the health benefits to the public have an overwhelming and reasonable relation to the purpose behind the use of the municipality’s police power in enacting the smoking regulation.\textsuperscript{161} “The exercise of police powers by any government in a proper case marks the growth and development of the law rather than a tyrannical assertion of governmental powers denied by our Constitution or any other superior authority.”\textsuperscript{162} Though the Kentucky Supreme Court failed to address some of the above arguments and their complexities, it came to the correct decision. As expressed by Justice Wintersheimer, the ordinance is reasonable.\textsuperscript{163}

\textsuperscript{156} See Lexington Fayette County Food & Beverage Ass’n v. Lexington-Fayette Urban County Gov’t, 131 S.W.3d 745, 757 (Ky. 2004) (stating that an alternative method was appropriate, but failing to actually list any such alternatives).

\textsuperscript{157} See Brief of Appellant at 36-40, Lexington-Fayette Urban County Gov’t (No. 03-CI-3812) (proposing ideas such as posting warning signs that smoking is harmful, requiring more efficient ventilation systems, and other “practical alternatives”).

\textsuperscript{158} Id.

\textsuperscript{159} Appellees’ Joint Brief at 22, Lexington-Fayette Urban County Gov’t (No. 03-CI-3812) (validating this statement by providing alternatives to three of the cases where the Kentucky Supreme Court upheld the ordinance proving that alternatives do not necessitate unconstitutionality); see also Tolliver v. Blizzard, 137 S.W. 509, 511 (1911) (stating that “[w]here it is possible to conduct the business without harm to the public, all sorts of police regulation may be instituted, which will tend to suppress the evil”).

\textsuperscript{160} See Lexington-Fayette Urban County Gov’t, 131 S.W.3d at 752.

\textsuperscript{161} See supra notes 142-49 and accompanying text.

\textsuperscript{162} Nourse v. City of Russellville, 78 S.W.2d 761, 764 (Ky. 1935).

\textsuperscript{163} See Lexington-Fayette Urban County Gov’t, 131 S.W.3d at 752.
B. Is the Ordinance Arbitrary under Kentucky Precedent?

An ordinance is only arbitrary and unconstitutional if it does not possess a rational relation to the legitimate state interest. The Kentucky Supreme Court failed to address the issues of whether the Government had a legitimate interest in protecting the public from exposure to second-hand smoke. However, Justice Graves raised the argument in his dissent.

1. Legitimate State Interest

Similar to the analysis of whether the Government’s use of police powers was reasonable, the majority should have analyzed the Report to determine if the second-hand smoke was a legitimate health risk to the public and whether the state interest in protecting the public from this health hazard was directly related to the ordinance.

As mentioned above, the Task Force presented overwhelming evidence that second-hand smoke increased health risks to all who were exposed. The Task Force also noted that those most affected were people working in the service industry such as servers and bartenders. The Report provided conclusive evidence of a startling health issue regarding second-hand smoke that Lexington attempted to resolve through the enactment of the smoking ban.

The legitimate state interest in protecting the municipal’s citizens from exposure is directly related to the smoking ban’s prohibition on smoking in public places. The law clearly states that an ordinance is arbitrary if it imposes restrictions “upon the use of private property or the pursuit of useful activities” under the guise of police power.

The definition of what is arbitrary under the Kentucky Constitution has evolved as our society has evolved. “The Constitution, dealing as it does in

---


165 Lexington-Fayette Urban County Gov’t, 131 S.W.3d at 752.

166 Id. at 757 (stating “I would strike down the ordinance as being arbitrary and oppressive and therefore in violation of Section 2 of the Bill of Rights of the Kentucky Constitution.”).

167 Appellees’ Joint Brief at 3, Lexington-Fayette Urban County Gov’t (No. 03-CI-3812) (summarizing that second-hand smoke causes cancer, heart complications, and exposes servers to a greater risk of health problems).

168 Id.

169 Smoke Free Task Force Report, supra note 2, at 12.

170 See supra Part IV.A.

171 Mansbach Scrap Iron Co. v. City of Ashland, 30 S.W.2d 968, 969 (Ky. 1930) (holding there must be some substantial relation between the ordinance and the “public health, safety, morals, or welfare”).
broad outlines and general formulas, through interpretation and a practical adaptation is made conformable to an existing sense of public right and necessity.” 172 As modern times shift, so must the law. 173 The government must act responsibly towards its citizens and this includes being responsive to changing conditions and risks. 174 Even though patrons of bars and restaurants once considered smoking commonplace, the changing times and modern scientific studies have exposed a health risk unacceptable to many. 175 If a growing number of people still do not smoke and they do not desire to be forced to eat in a restaurant where smokers expose them to their habit, the city should respond to that demand. The outmoded perceptions of an older generation must yield to the modern conception of science and health risks. 176 Kentucky’s highest court once wrote that “[a] philosopher has observed: ‘Virtues and vices have frequently changed places as life moved on through the ages; witch burning used to be a virtue and lending money at interest a vice.’” 177 Modern law must adapt to the growing need for protection of its own society. Though smoking was once acceptable, it is no longer an arbitrary act to prohibit smoking in the necessary endeavor of protecting a public that has no other defense to the risks of second-hand smoke. 178

There is a colossal and legitimate public interest in protecting against the effects of second-hand smoke and that interest is reasonably related to the Lexington smoking ordinance. The smoking ban does not act to arbitrarily affect the property rights of “freemen,” it only acts to protect their health. 179 There is no guise or alternate motivation for the Lexington smoking ordinance other than its concern for the general welfare of its citizens. 180 Justice Graves’ effort to contend that the smoking ordinance is arbitrary is unfounded.

C. Is the Ordinance a Regulatory Taking?

Finally, the Kentucky Supreme Court failed to consider the other legitimate contention of Justice Graves: whether the smoking ordinance functioned as a regulatory taking. 181 The United States Supreme Court has crafted three
categorical rules concerning takings. However, the only categorical rule at issue in this case is the rule from *Lucas*. If a property owner does not succeed under the test from *Lucas*, the Supreme Court has expressly defined three factors under *Penn Central* as a final hurdle in determining whether the enforcement of a regulation constitutes a taking.

1. Test from *Lucas*

The test from *Lucas*, as expressed by the United States Supreme Court and adopted by the Kentucky Court of Appeals, is that a regulation operates as a taking under the Fifth Amendment of the United States Constitution if it deprives the owner of all economic benefits to the land.

In *Lucas*, a state legislature subjected the owner of a beachfront property to a regulation that prohibited construction on the property. The United States Supreme Court held that the regulation constituted a taking and that the claimant was left with no economical benefit or productive use of his land.

In this case, where the Lexington owners of public buildings and dwellings are affected by the ordinance, the business owners fail to meet the standard to prove that the regulation constituted a taking under *Lucas*. The smoking ban goes only so far as to prohibit smoking inside the building on the property and does not exclude any other use of the land. The Report concluded that the smoking ban will likely produce no negative economic impact and that there might even be an economic improvement. While the Report admitted that the smoking ban might have a negative impact on bars, the evidence was

---

182 Dolan v. City of Tigard, 512 U.S. 374, 386 (1994) (holding that a special rule must be created for exactions); *Lucas* v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992) (holding a regulation is a taking if it causes the loss of all economical benefits of the land); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 434-35 (1982) (ruling that a taking is present if the government authorizes a permanent physical occupation of the land).

183 *Lucas*, 505 U.S. at 1019 (holding a regulation is a taking if it causes the loss of all economical benefits to the land).

184 *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) (holding the factors of “particular significance” are “[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations[,]” and the “character of the governmental action”).

185 *Lucas*, 505 U.S. at 1019 (holding a regulation is a taking if it causes the loss of all economical benefits to the land).


187 U.S. CONST. amend. V (stating “[N]or shall private property be taken for public use, without just compensation.”).

188 *Lucas*, 505 U.S. at 1009.

189 Id. at 1031.


191 Smoke Free Task Force Report, supra note 2, at 5.
inconclusive. The Report questioned whether the effect on Lexington bars would be similar to the effect in California, where the studies were performed showing decreased business. The Report considered information from various representatives of the hospitality industry, including restaurant owners and hotel operators. The Report cited over thirty studies that have concluded that a smoking ban does not have a negative impact on these businesses. While the Report admitted that a minority of studies illustrate a negative economic impact, the Report disqualified these surveys. The Report pointed to the fact that most were funded by the tobacco industry and that most were “based largely on subjective measures (predicted outcomes based on impressions or estimates of changes) rather than actual, objective, verified or audited data.” Further, Thomas & King, a corporation owning several Lexington restaurants, found that there was no change in its market share when it implemented a no smoking policy in its restaurants.

Regardless of whether there is a negative impact on the profit margin of a restaurant, a valuable use of the property certainly still exists when the ordinance is imposed. Unlike Lucas, where the owner could not even construct a residence on his land, the parties affected by the smoking ordinance are still able to operate a profitable and healthy bar, restaurant, or corporation. The Government and Association may argue over the validity and integrity of the studies analyzed in the Report, but the fact remains that no property owner is affected to the extent required under Lucas. The Association failed to perfect the argument of a regulatory taking under the test from Lucas.

2. Test from Penn Central

If a property owner fails to meet the categorical test from Lucas, the United States Supreme Court has crafted a multi-factored balancing test in Penn Central

192 Id. at 4-5.
193 Id. at 4.
194 Id. at 1-8. These representatives included Council member Mike Scanlon, owner of Thomas & King, Todd Warnick of the Health Department, Lisa Greathouse of Bluegrass Action, and Dr. Ellen Hahn of the University of Kentucky’s College of Nursing. Id. at 1, 19, 21.
195 Id. at 5-8 (pointing to studies from various medical journals, state health departments, national economic policy studies, and other articles).
196 Id. at 5.
197 Smoke Free Task Force Report, supra note 2, at 5 (citing eight various studies).
198 Id. at 1.
199 Id. at 1-5.
200 Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978) (holding the factors of “particular significance” are “[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations” as to the “character of the governmental action”).
to determine whether a regulation constitutes a taking. Like the test from Lucas, the Kentucky Supreme Court also adopted the Penn Central test soon after it was handed down. Unlike the bright line test of Lucas, the balancing test of Penn Central depends upon an analysis of the circumstances and facts of each case and their effect on each factor.

a. Economic Impact of the Regulation on the Claimant

The first factor examines the economic impact of the smoking ordinance on the various businesses affected by its enforcement. Though the United States Supreme Court did not fully explain this element in Penn Central, the language of the case analyzed the impact of the regulation on the fair market value of the claimant. As discussed above, the Report concluded that the Lexington smoking ban would have little, if any, impact on the market value and profitability of any company or restaurant. The market value of any company forced to comply with a smoking ban is not affected by requiring smokers to either not smoke or smoke outside. Though the Association and the parties it represents may argue that they will lose some customers, the Report has clearly proven that their loss will be minimal if any at all.

Further, the United States Supreme Court made clear in its opinion that when a regulation causes significant diminution in property value, it is still not a taking if the regulation is “reasonably related to the promotion of the general welfare.” The Supreme Court has held, for example, that neither the “75% diminution in value” in Village of Euclid v. Ambler Realty Company nor the “87½% diminution in value” in Hadacheck v. Sebastian constituted a taking because the regulation was “reasonably related to the promotion of the general welfare.” Even if the Association or some third party were able to present a study showing an impact on market value, the Kentucky Supreme Court would be forced to ignore the argument. The Report presented clear and convincing

---

201 Id. at 130.
202 See Commonwealth, Natural Res. & Envtl. Prot. Cabinet v. Stearns Coal & Lumber Co., 678 S.W.2d 378, 381 (Ky. 1984) (stating that the court will also consider other factors such as “what uses the regulation permits, that the inclusion of the protected property was not arbitrary or unreasonable, and that judicial review of the agency decision was available”).
204 Id. at 130-31.
205 Id.
206 See Smoke Free Task Force Report, supra note 2, at 5.
207 Id. at 1-5.
208 Id. at 4.
209 Id. (citing Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 384 (1926)).
210 Id. (citing Hadacheck v. Sebastian, 239 U.S. 394, 405 (1915)).
evidence that the prohibition of smoking indoors prevents numerous health risks to non-smokers. There is no question that it is a legitimate state interest to protect the health and general welfare of its citizens.

Finally, the United States Supreme Court has noted that another approach to this factor of Penn Central is to determine if the claimant is able to receive a "reasonable return" from the land when the regulation is enforced. The Court in Penn Central stressed that Penn Central would still be able to obtain a return on its investments by continuing its present use as a terminal. Once again, the parties affected by the Lexington smoking ordinance are still able to operate their property to its fullest extent without any impact on the economic viability of their businesses. Though they might suffer some loss of profit, the businesses will be able to obtain a "reasonable return" on their investment.

The Association would fail to meet the standard of the first factor of the Penn Central test because the smoking ban advances a legitimate state interest and the smoking ban fails to have a significant impact on the market value of the properties involved.

b. Extent to Which the Regulation Interferes with the Claimant's Distinct Investment-Backed Expectations

Whereas the first factor examined the immediate impact of a regulation on the market value of a business, the second factor of the Penn Central test analyzes the present and future expectations an owner of the property might have. Though this factor tends to blend with the first, the Court has attempted to focus its analysis of this factor on whether the expectations of the property owner are still satisfied while the regulation is in place. In Penn Central the United States Supreme Court stressed that the regulation at controversy did not interfere with the continued use of Penn Central as a railroad terminal.

A similar rationale would have allowed the Kentucky Supreme Court to reach the same conclusion concerning the Lexington smoking ordinance. All businesses affected by the enforcement of the ordinance still possess the ability

---

213 See Smoke Free Task Force Report, supra note 2, at 12.
214 See Keystone Bituminous Coal Ass’n v. DeBenedictis, 480 U.S. 470, 497 (1987) (holding the “test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property”).
215 Penn Cent. Transp. Co., 438 U.S. at 135 (1978) (holding “[t]his is no more an appropriation of property by government for its own uses than is a zoning law prohibiting, for ‘aesthetic’ reasons, two or more adult theaters within a specified area”).
216 See Smoke Free Task Force Report, supra note 2, at 5.
217 Id.
219 Id. at 136.
220 Id. (ruling “the law does not interfere with what must be regarded as Penn Central’s primary expectation concerning the use of the parcel”).
to have a functioning and profitable business.\textsuperscript{221} Though many businesses may try to rebut the Report’s conclusion that there is no economic impact,\textsuperscript{222} the fact remains that their expectations of running a viable restaurant, bar, or other business would continue to be satisfied when the regulation is in force.\textsuperscript{223} The ordinance will not stop any businesses in the hospitality industry from fully operating and serving their patrons.\textsuperscript{224} Though the industry will no longer be allowed to permit patrons to smoke indoors,\textsuperscript{225} they have many other services to offer. The smoking ordinance permits the Association and the businesses it represents to obtain their distinct investment-backed expectations in the use of their land.\textsuperscript{226}

c. Character of Governmental Action

Similar to the analysis of the reasonableness of the Government’s use of police powers and the legitimate state interest discussed above, the third factor of the \textit{Penn Central} test considers whether the regulation is “reasonably related to the implementation of a policy . . . expected to produce a widespread public benefit.”\textsuperscript{227} Though later cases have diluted this factor when the regulation was designed to prevent a nuisance,\textsuperscript{228} the United States Supreme Court has not contradicted its rationale and finding in \textit{Penn Central} where the regulation is reasonably related to benefiting the public welfare.\textsuperscript{229}

Though the Court in \textit{Penn Central} admitted that a taking is much more readily found when described “as a physical invasion by [the] government,”\textsuperscript{230} it is not so readily found “when [an] interference arises from some public program adjusting the benefits and burdens of economic life to promote the common

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{221} See Smoke Free Task Force Report, supra note 2, at 1.
\item\textsuperscript{222} See id. at 5.
\item\textsuperscript{223} Id. at 1-5.
\item\textsuperscript{224} See \textit{LEXINGTON-FAYETTE URBAN COUNTY, KY., CODE OF ORDINANCES §§ 14-97 – 14-104} (1959).
\item\textsuperscript{225} Id.
\item\textsuperscript{226} See supra notes 220-24 and accompanying text.
\item\textsuperscript{227} Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 136 n.30 (stating that the court will not depend upon whether a regulation prohibits a noxious act, but whether the regulation is reasonably related to a legitimate state interest).
\item\textsuperscript{228} See, e.g., Hodel v. Irving, 481 U.S. 704, 716 (1987) (stating that where a statute prohibited Native Americans from further devising certain parcels of land, the character of the regulation supported finding a taking because the regulation “destroyed ‘one of the most essential sticks in the bundle of rights that are commonly characterized as property’”) (citing Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979)).
\item\textsuperscript{229} See \textit{Hodel}, 481 U.S. at 718.
\item\textsuperscript{230} Penn Cent. Transp. Co., 438 U.S. at 124 (citing United States v. Causby, 328 U.S. 256, 265-66 (1946)).
\end{itemize}
\end{footnotesize}
good." 231 As was thoroughly discussed above, there is no question as to the legitimate state interest promoted under the Lexington smoking ban. 232 The Court in *Penn Central* expressly noted that when it is found that a regulation promotes public health and welfare, a court has traditionally validated the regulation, even when "that [regulation] destroyed or adversely affected recognized real property interests." 233 The character of the Government’s action in enacting the smoking ban was clearly to protect the health of its own citizens.

3. Smoking Ban is not a Regulatory Taking

With the Lexington ordinance failing both the tests from *Lucas* and *Penn Central*, the contention by Justice Graves in his dissenting opinion that the ordinance constituted a taking is completely unfounded. 234 The fact that the smoking ban has such little, if any, economic impact on the businesses, combined with the overwhelming truth that the purpose behind the legislation was grounded in the protection of the general health of the citizens of the municipality, defeats Justice Graves’ assertion.

V. CONCLUSION

Second-hand smoke is a serious threat to the public at large. 235 Lexington responded to this health threat because a city has no greater duty or function than to protect the health of its citizens. 236 The Lexington-Fayette Urban County Government enacted a statute through which it hoped would end the exposure of its citizens to the dangers of second-hand smoke. 237

The Kentucky Supreme Court ruled correctly that this ordinance was constitutional because it resonated from the core concerns of public health which

---

231 *Penn Cent. Transp. Co.*, 438 U.S. at 124 (holding that "'[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law'" (citing Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922)).

232 See supra Part IV.A.

233 *Penn Cent. Transp. Co.*, 438 U.S. at 125 (pointing to the historical validation of zoning laws that invade property rights “even when prohibiting the most beneficial use of the property”); see also *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387-88 (1926).

234 See supra Parts IV.C.1. and C.2.


236 Nourse v. City of Russellville, 78 S.W.2d 761, 764 (Ky. 1935) (expressing that “[t]he health of a community is the special concern of the local units of government, and to meet local demands there can be no question that the Legislature may invest them with ample authority”).

237 Appellees’ Joint Brief at 18, Lexington Fayette County Food & Beverage Ass’n v. Lexington-Fayette Urban County Gov’t, 131 S.W.3d 745 (Ky. 2004) (No. 03-CI-3812).
legitimizes the use of municipal police powers. The Smoke Free Task Force Report demonstrated damaging testimony that verified not only the harmful effects of second-hand smoke, but also the inability to fight those effects if action was taken that fell short of a broad prohibition. The court failed to expound upon the argument that the ordinance was reasonable under the police powers of the city. The contention was much more complicated than the Kentucky Supreme Court’s opinion and discussion suggested. Though its ruling was proper, the multiple layers to the argument were ignored. Further, the majority opinion neglected to analyze the two counterarguments raised by Justice Graves in his dissent. Both the regulatory takings and arbitrary arguments were unfounded, but it was important for the majority to exhaust all invasions of property issues that arose in the case to set a clear precedent.

The common rants of citizens on the streets of Lexington, Kentucky are that the city government cannot tell a person what to do or not to do with his or her property. People protest that the city is invading their property rights. However, the Kentucky Supreme Court opinion demonstrated that there is no legal truth to that argument. This decision and the methodology with which the Government approached this ordinance serves as an example to other cities considering this stormy topic.

Legally, a smoking ordinance is a proper use of a city’s police powers to protect the health of a city’s citizens. The Smoke Free Task Force Report served as the pivotal evidence that proved the legitimate health risk of second-hand smoke. Though many people may disagree with this conclusion, as Justice Wintersheimer said in the start of his majority opinion, “[a]ny dissatisfaction [with the smoking ordinance] can be raised at the ballot box.” Though the smoking ordinance may be unpopular, it is certainly legal.

238 Lexington-Fayette Urban County Gov’t, 131 S.W.3d at 752.
240 Lexington-Fayette Urban County Gov’t, 131 S.W.3d at 757.
242 Id.
243 Id. at 749.