

1999

Introduction

Nicole A. Gordon

New York City Campaign Finance Board

Follow this and additional works at: <https://ir.lawnet.fordham.edu/ulj>

 Part of the [Legislation Commons](#)

Recommended Citation

Nicole A. Gordon, *Introduction*, 27 Fordham Urb. L.J. 5 (1999).

Available at: <https://ir.lawnet.fordham.edu/ulj/vol27/iss1/5>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Urban Law Journal by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

FORDHAM
URBAN
LAW JOURNAL

FROM THE GROUND UP:
LOCAL LESSONS FOR NATIONAL REFORM

A CONFERENCE SPONSORED BY THE NEW YORK
CITY CAMPAIGN FINANCE BOARD
AND THE ASSOCIATION OF THE BAR OF THE
CITY OF NEW YORK

JOSEPH A. O'HARE, S.J.
Chairman
New York City Campaign Finance Board

MICHAEL A. COOPER
President
Association of the Bar of the City of New York

NICOLE A. GORDON
Executive Director
New York City Campaign Finance Board

FROM THE GROUND UP: LOCAL LESSONS FOR NATIONAL REFORM

*A Conference Sponsored by the New York City
Campaign Finance Board
and the Association of the Bar of the
City of New York*

LIST OF PARTICIPANTS

JILL ABRAMSON
Dep. Bur. Chief Wash., D.C.,
New York Times

REBECCA ÁVILA
Executive Director,
L.A. City Ethics Committee

MARTIN BEGUN
Member,
New York City Campaign
Finance Board

MATTHEW CAROLAN
Executive Editor,
The National Review

MICHAEL A. COOPER
President,
Association of the Bar of the
City of New York

KATHLEEN CZAR
Executive Director,
MN Democratic-Farmer-Labor
Party

JOHN DOOLITTLE
United States Representative,
California

JOHN D. FEERICK
Dean,
Fordham University
School of Law

JOHN FUND
Editorial Board Member,
The Wall Street Journal

JOEL GORA
General Counsel,
New York Civil Liberties Union

NICOLE A. GORDON
Executive Director,
New York City Campaign
Finance Board

BILL GREEN
Member,
New York City Campaign
Finance Board

MARK GREEN
Public Advocate,
The City of New York

KEN GROSS
Partner,
Skadden, Arps, Slate, Meagher
& Flom LLP

FRED HERRMANN, Ph.D.
Executive Director,
New Jersey Election Law
Enforcement Commission

HAROLD M. ICKES
Principal,
The Ickes & Enright Group

KEVIN KENNEDY
Executive Director,
Wisconsin Election Board

EDWARD I. KOCH
Former Mayor,
The City of New York

LARRY MAKINSON
Executive Director,
Center for Responsive Politics

JOSEPH MERCURIO
Political Consultant

LAWRENCE M. NOBLE
General Counsel,
Federal Election Commission

JOSEPH A. O'HARE, S.J.
Chairman,
New York City Campaign
Finance Board

TREVOR POTTER
Partner,
Wiley, Rein & Fielding

FREDERICK A.O.
SCHWARZ, JR.
Partner,
Cravath, Swaine & Moore

CHRIS SHAYS
United States Representative,
Connecticut

ROBERT STERN
Co-Director,
Center for Governmental Studies

PAUL TAYLOR
Executive Director,
Alliance for Better Campaigns

This conference was funded in part by grants from the New York Community Trust and the Joyce Foundation.

**FROM THE GROUND UP:
LOCAL LESSONS FOR
NATIONAL REFORM**

*A Conference Sponsored by the New York City
Campaign Finance Board
and the Association of the Bar of the
City of New York**

TABLE OF CONTENTS

INTRODUCTION..... 5
Nicole A. Gordon

WELCOMING REMARKS 10
Michael A. Cooper
Joseph A. O'Hare, S.J.

**OPENING REMARKS: THE STATES AND CITIES AS FEDERAL
LABORATORIES OF DEMOCRACY** 14
Frederick A.O. Schwarz, Jr.

**DEMOCRACY AT A FAIR PRICE? PUBLIC FINANCING OF
ELECTIONS**..... 24
Trevor Potter (Moderator)
Kathleen Czar
John Fund
Harold M. Ickes
Kevin Kennedy

**LOCAL INNOVATIONS AND PRACTICAL ANSWERS TO
CAMPAIGN COSTS** 60
Bill Green (Moderator)
Joel Gora
Mark Green
Joseph Mercurio
Paul Taylor

**ADDRESS: THE NEW YORK CITY EXPERIENCE: LESSONS
FOR A NATIONAL FUTURE**..... 85
Hon. Edward I. Koch

* This conference was held at the Association of the Bar of the City of New York on November 9, 1998. It has been edited to remove the minor cadences of speech that appear awkward in writing.

| | |
|--|------------|
| Is “SUNLIGHT” ENOUGH? THE LIMITATIONS OF DISCLOSURE | 94 |
| <i>John D. Feerick (Moderator)</i> | |
| <i>Jill Abramson</i> | |
| <i>Matthew Carolan</i> | |
| <i>John Doolittle</i> | |
| <i>Fred Herrmann, Ph.D.</i> | |
| <i>Larry Makinson</i> | |
| POLICING THE POLITICIANS: MODELS FOR EFFECTIVE ENFORCEMENT | 126 |
| <i>Nicole A. Gordon (Moderator)</i> | |
| <i>Rebecca Ávila</i> | |
| <i>Ken Gross</i> | |
| <i>Lawrence M. Noble</i> | |
| <i>Trevor Potter</i> | |
| CLOSING REMARKS: THE BEST LOCALITIES HAVE TO OFFER – HOW TO MAKE WASHINGTON LISTEN..... | 156 |
| <i>Chris Shays</i> | |

INTRODUCTION

As this issue of the *Fordham Urban Law Journal* goes to press, campaign finance reform at the federal level has emerged as a core campaign issue for former Senator Bill Bradley and Senator John McCain as they seek the Democratic and Republican nominations for president. In fact, the front page of the “newspaper of record” frequently carries stories that describe campaign finance scandals.¹

The issue of campaign finance reform has occupied an increasingly dominant place in American politics. Campaign finance reform legislation has languished at the federal level while states and cities have enacted various laws intended to curtail the pernicious effects of large political contributions and, in some jurisdictions, to alleviate the demand for these contributions by providing public funds to candidates. Nationwide, for example, more than thirty jurisdictions now have some program for providing public funds for political campaigns.² These field experiments in campaign finance reform are invaluable sources of information and experience for reformers and legislators who grapple with the complex issues of electoral reform.

This information and experience, however, has been largely ignored by those who have discussed campaign finance reform at the federal level. Indeed, numerous well-intentioned proposals to change the system, ranging from modest attempts to curtail the use and flow of “soft money,” to more far-reaching plans to require one hundred percent public funding of campaigns, have often lacked reference to the reform programs in the United States that have enjoyed records of genuine success in the effort to control the role of money in politics.

Accordingly, this issue of the *Fordham Urban Law Journal* presents the proceedings of a national conference on campaign finance reform held on November 9, 1998, and jointly sponsored by the New York City Campaign Finance Board (the “Board”) and

1. See, e.g., Adam Clymer, *From High to Low, Hopefuls for 2000 Are Awash in Funds*, N.Y. TIMES, July 12, 1999, at A1; Alison Mitchell, *Congress Chasing Campaign Donors Early and Often*, N.Y. TIMES, June 14, 1999, at A1; Jill Abramson, *The Business of Persuasion Thrives in Nation's Capital*, N.Y. TIMES, Sept. 29, 1998, at A1; Albert R. Hunt, *To the Campaign Contributors Go the Tax-Cut Spoils*, WALL ST. J., Aug. 5, 1999, at A19; Phil Kuntz & Glenn R. Simpson, *Flush Bush Undercuts Federal Funding of Campaigns*, WALL ST. J., July 1, 1999, at A24; Albert R. Hunt, *The Other Political Scandal in Washington*, WALL ST. J., Nov. 12, 1998, at A22.

2. See EDWARD D. FEIGENBAUM & JAMES A. PALMER, CAMPAIGN FINANCE LAW 96: A SUMMARY OF STATE CAMPAIGN FINANCE LAWS WITH QUICK REFERENCE CHARTS Chart 4 (1996) (listing states with special tax or public financing provisions).

the Association of the Bar of the City of New York (the "Association"). Entitled *From the Ground Up: Local Lessons for National Reform*, the conference brought together practitioners of the field, including a diverse group of journalists, elected officials and local and national government administrators, to discuss what lessons could be learned from nearly twenty-five years of local campaign reform efforts. It attracted an audience from around the country and was rebroadcast several times on C-SPAN. This conference and the resulting materials, such as this publication, represent an effort to bring knowledge gained from local experiments to the attention of those involved in reform at the federal level.

The New York City Campaign Finance Program (the "Program") is itself one such experiment. In 1988, then-Mayor Edward I. Koch and City Council Majority Leader (and current Speaker) Peter F. Vallone enacted New York City's first-ever program of public financing. This comprehensive Program, known as the New York City Campaign Finance Act,³ regulates campaigns for candidates for the offices of Mayor, Public Advocate, Comptroller, Borough President and City Council member. Candidates who join the voluntary Program agree to limit their contributions and spending and provide detailed disclosure of their campaign finances. In return, they can qualify to receive public matching funds for small contributions from New York City residents.⁴

The Program has benefitted from continual refinement by the legislature, guided by the Board's mandated post-election reports that evaluate the effects of the Program and make recommendations for reform.⁵ Since 1988, there have been numerous amendments to the Program,⁶ including: (1) the imposition of a debate requirement for candidates for citywide office;⁷ (2) further lowering the contribution limits for each office;⁸ (3) changing the matching formula for contributions from one-to-one in public funds for contributions of up to one thousand dollars to four-to-one in public

3. N.Y.C. ADMIN. CODE tit. 3, §§ 701-715 (1998); N.Y.C. CHARTER ch. 46, §§ 1051-57 (N.Y. Legal Pub. Corp. 1989 & Supp. 1998).

4. See N.Y.C. ADMIN. CODE tit. 3, §§ 701-715.

5. See N.Y.C. CAMPAIGN FINANCE BD., A DECADE OF REFORM, 1988-1998 (Sept. 1998); N.Y.C. CAMPAIGN FINANCE BD., ON THE ROAD TO REFORM: CAMPAIGN FINANCE IN THE 1993 NEW YORK CITY ELECTIONS (Sept. 1994); N.Y.C. CAMPAIGN FINANCE BD., WINDOWS OF OPPORTUNITY: CAMPAIGN FINANCE REFORM AND THE NEW CITY COUNCIL (July 1992); N.Y.C. CAMPAIGN FINANCE BD., DOLLARS AND DISCLOSURE: CAMPAIGN FINANCE REFORM IN NEW YORK CITY (Sept. 1990).

6. See N.Y.C. ADMIN. CODE tit. 3, §§ 701-715.

7. See *id.* § 709.5.

8. See *id.* §§ 703, 705.

funds for contributions of up to \$250;⁹ (4) banning corporate contributions for candidates in the Program;¹⁰ and (5) subjecting transition and inaugural fundraising committees to the same contribution limits and disclosure requirements as those for participating candidates.¹¹

Preliminary analysis by the Board of admittedly limited data from three City Council special elections held in February 1999 suggests that the new matching formula will have a dramatic effect on the way campaigns are conducted under the Program. For the first time ever, public funds made up the majority of funds available to candidates in the February 1999 elections; the average contribution size dropped by twenty percent from elections in 1997; more contributors gave to campaigns than in 1997; and candidates raised the vast majority of their funds from New York City residents.¹² These results, and the respect accorded to the Program over the past eleven years, testify to the vitality of campaign finance reform at the local level.¹³

As noted by the conference's first speaker, former New York City Corporation Counsel and Charter Revision Commission Chairman Fritz Schwarz, the framers of the Constitution envisioned the states as "workshops of liberty," where experimentation and diversity could flourish, providing valuable lessons for the federal government.¹⁴ Unlike many discussions of campaign finance reform at the federal level, the focus of *From the Ground Up* was not on what *might* happen if reform were to be enacted, but on mining the lessons of local experiments to identify those reforms that could be imported to the federal level.

9. *See id.* § 702(3). The Program originally matched every dollar raised from New York City residents up to \$500 per election, subject to a maximum amount in public funds available for the office sought. *See id.* In 1990, the formula was changed to one-to-one up to \$1000. *See id.* In 1998, the matching rate was changed to four-to-one up to \$250. *See id.* § 705(2). Candidates must also raise a threshold dollar amount in small contributions from a minimum number of City residents to qualify for matching funds. *See id.* § 703(2)(a).

10. *See* N.Y.C. CHARTER ch. 46, § 1052(a)(12).

11. *See id.* § 1052(a)(11).

12. *See* Jonathan Hicks, *Term Law Could Aid Council's Newest*, N.Y. TIMES, Feb. 18, 1999, at B4; N.Y.C. Campaign Finance Bd., Press Release, Feb. 17, 1999. *See also* Bill Bradley, Address at the National Press Club (July 22, 1999).

13. *See, e.g.*, Editorial, *Time to Make a Good Law Better*, N.Y. TIMES, Mar. 2, 1998, at A26; Editorial, *Campaign Reform: Made in New York*, DAILY NEWS, Mar. 2, 1998, at 30. *See also* N.Y.C. CAMPAIGN FINANCE BD., A DECADE OF REFORM, *supra* note 5 (including a comprehensive review of the work of the New York City Campaign Finance Board).

14. *See infra* p. 14.

The timeliness of the conference was underscored not only by nearly daily press coverage of scandal, but also by the forced withdrawal of one featured speaker. Charles G. La Bella, then-U.S. Attorney for the Southern District of California and former Chief of the Justice Department's campaign finance task force, had accepted an invitation to address the conference on the challenges of law enforcement in the political arena. Mr. La Bella had investigated allegations of scandal arising from the 1996 presidential campaign. He recommended that Attorney General Janet Reno appoint an independent counsel under the Independent Counsel Statute to investigate further.¹⁵ The Attorney General declined to make such an appointment.¹⁶ Despite Mr. La Bella's stated intention to confine his remarks to "the law and published court decisions," he was directed by the Justice Department not to participate in the conference.¹⁷ Although the Justice Department maintained that its direction to Mr. La Bella not to participate was not unusual, some observers suggested that the decision was a consequence of his recommendation of an independent counsel.¹⁸ This occurred at a time when unrelated scandals were being investigated by Independent Counsel Kenneth Starr (resulting later in the adoption of two counts of impeachment against President Clinton).

From the Ground Up: Local Lessons for National Reform should be considered the beginning, and not by any means the end, of an examination of data and experience to assist the public in evaluation of federal reform legislation. In particular, materials created as part of the conference, including this transcript, will help to inform the work of the Association's Special Commission on Campaign Finance Reform, co-chaired by Robert M. Kaufman of Proskauer Rose LLP, Fordham Law School Dean John D. Feerick and former Secretary of State Cyrus Vance, as that Commission

15. See, e.g., Editorial, *The Prosecutor Who Spoke Up*, N.Y. TIMES, Aug. 4, 1998, at A12; Editorial, *Reno Cover-Up Continues*, WALL ST. J., Feb. 1, 1999, at A20; Editorial, *Watching the Watchdog*, WALL ST. J., July 1, 1999, at A22.

16. See, e.g., David Johnston, *Reno Rejects Outside Inquiry On Clinton for Campaign Ads*, N.Y. TIMES, Dec. 8, 1998, at A1; Editorial, *Ms. Reno Undermines Justice*, N.Y. TIMES, Dec. 8, 1998, at A26.

17. Letter from Charles G. La Bella to Joseph A. O'Hare, S.J. (Oct. 13, 1998) (on file at the Board). In August 1998, Mr. La Bella was passed over for permanent appointment as the United States Attorney for the Southern District of California, and in February 1999 he was informed that he was to be replaced in that position. He subsequently resigned from the Justice Department. See, e.g., Editorial, *The Sword of Justice*, WALL ST. J., Feb. 12, 1999, at A22.

18. See David Johnston, *Ex-Head of Justice Dept. Inquiry Is Barred from Two Talks on Topic*, N.Y. TIMES, Nov. 6, 1998, at A26.

prepares a comprehensive report on recommendations for national reform.

We hope that the transcript of this conference will help to inform many others of the practical potential and the impediments to campaign finance reform at the federal level.

Thanks are due to the New York Community Trust and the Joyce Foundation, both of which provided grants for the conference. Thanks are also due to Carole Campolo, Deputy Executive Director; Ian Michaels, Press Secretary; and Christopher Odell, Deputy Press Secretary of the Board staff for their extraordinary work in putting this conference together. Thanks are similarly due to the Association, Alan Rothstein, General Counsel; Nick Marricco, Meeting Services Director; and Kristen Ruckdeschel, Public Relations Coordinator.

WELCOMING REMARKS

MR. COOPER: My name is Michael Cooper. I am the president of the Association of the Bar of the City of New York (the "Association") and it is my pleasure to welcome you this morning to this very important conference. It is fitting that a gathering on a subject so basic to the fabric of our government as campaign finance reform should be held in this institution.

This Association was founded in 1870 to combat the corruption in the city government, particularly in the courts, at that time and, ever since its founding in 1870, this Association has been dedicated to furthering government reform. All of us who care about fair and responsive government have to be concerned with the abuses that have been rampant in the financing of election campaigns. And what a perfect moment in time to hold this conference. For we are less than a week from elections in which millions of dollars were spent and in the case of the Senatorial contest in the State of New York, more than ten million dollars by each candidate.

There have been many conferences that have railed against the excesses of money and politics. But today, this conference has a different focus. A focus on what can be done and what has been done to accomplish campaign finance reform. Around the country, state and local governments have been putting into place systems designed to level the playing field for candidates, to curb the undue influence of money in government and to provide greater regulation and disclosure of campaign financing.

One of the best examples is right here in the City of New York. The New York City Campaign Finance Act,¹⁹ passed a decade ago, is a national model. And the Campaign Finance Board (the "Board") has been an outstanding example of a dedicated and effective public agency.

I am proud to have the opportunity to have the Association co-sponsor this program with the Board, and I thank Father O'Hare, the chair of the Board, and executive director Nicole Gordon and the Board's fine staff for their efforts in putting this program together.

To give you some idea of the regard that this Association has for Nicole Gordon, she served until this past spring as a member of our

19. See N.Y.C. ADMIN. CODE tit. 3, §§ 701-715 (1998); 52 R.C.N.Y. § 1-02 (1998) (providing for the establishment of the Campaign Finance Board).

Executive Committee, and is now chair of the Government Ethics Committee of the Association.

Today's conference is part of the ongoing work of the Special Commission on Campaign Finance Reform of this Association. That commission, which is chaired by three former presidents of the Association, Cyrus Vance, Bob Kaufman and John Feerick, is developing a comprehensive approach to campaign finance reform at the federal level. The commission plans to finish its report sometime next year and its work will be greatly informed by today's discussion.

We are quite fortunate to have assembled an excellent array of speakers from different levels of government and varied experiences and points of view. I hope you find the presentations and the exchange of views to be informative and thought-provoking, and that you will value highly your attendance at this conference when you think of it in the future.

Now let me turn this over to Father O'Hare.

FATHER O'HARE: Thank you very much, Mr. Cooper. The Board is, of course, very pleased that the Association joins us today in sponsoring what we think will be a very useful and constructive conference.

I want to thank all of you for coming today. Represented in the room, we have people from across the nation, from many of the states and even from Canada. As Michael Cooper suggested, the theme of today's conference is to see if we can look at programs that actually have worked on the municipal and state level and, with that modesty that is characteristic of New York, see if it is possible that some of the lessons on the local and municipal level could actually be pertinent to the problems at the national and federal level.

As we have seen from watching the debate about our campaign finance system on the federal level, even the most heroic reform efforts have little chance of success as long as law makers continue to see the campaign finance crisis in partisan terms.

We believe that one of the wise features created by the architects of the Campaign Finance Program here in New York City was the provision in the law for a non-partisan Board, and over the last ten years, I think, we have been successful in developing a non-partisan culture on that Board. In contrast to that approach are election commissions that are bi-partisan in nature, which seems often to be a prescription for paralysis.

Despite the famous Clinton-Gingrich handshake, no real progress has been made at the federal level on the issue of campaign finance reform and the resolution of this issue is crucial to a fair decision-making process on every other subject that comes before Congress.

Later today we will hear from at least two political figures, Ed Koch, former Mayor of New York and now National Voice of Reason, and Congressman Christopher Shays, who have in their careers managed to look beyond the trenches of partisan politics.

One of the signature trends of the 1990s has been the increased prominence of states and cities in formulating new ideas about governance. From reducing crime to reforming welfare and public education, states and cities have discovered through their experimentation innovative solutions to the problems that have bedeviled the national government. But while both Democrats and Republicans have publicly embraced the idea of looking beyond the Beltway for answers to national problems, little attention has been given thus far to local innovations in campaign finance reform.

Today's conference is part of an effort to address that situation. Today we will hear from, among others, administrators of local and state campaign finance reform programs, as well as from elected officials and professionals who have run campaigns under these systems.

In political campaigns, pundits sometimes speak of momentum. If there is any hope for campaign reform at the national level, it will need to capture the same sense of movement that propels a candidate to victory. In last week's elections, momentum certainly seemed to be on the side of reform. Voters in Arizona, Massachusetts and New York City all approved campaign finance reform proposals. In Wisconsin, Senator Russell Feingold proved that a candidate can take a tremendous risk, restrict his fundraising and spending, and still win despite a massive influx of funds from out of state.

Earlier this year, the New York City Council approved amendments that will dramatically improve our city's Program, including a provision for a four-to-one rate for public funds to match smaller contributions from city residents. With the victory of the Shays-Meehan bill²⁰ in August, these signs indicate that voters are inter-

20. See H.R. 2183, 105th Cong. (1998). It was passed on August 6, 1998 by a vote of 252-179. The companion Senate version, the "McCain-Feingold bill," S. 1219,

ested in reform, notwithstanding the conventional political wisdom to the contrary.

The purpose of today's conference, once again, is to look at the experience of local campaign finance reform efforts and to identify those reforms that could be translated to the federal level. Today we will have four panel discussions. At the conclusion of each of these panel discussions, the moderators will ask the panelists what, if any, consensus they can reach on reforms that can work at the federal level. And in organizing the conference and inviting people to participate on the panels, we have tried to enlist as wide a spectrum of opinions on these issues as possible.

We have four panel discussions and three featured speakers. We certainly anticipate having time for questions from the audience after each panel and each speaker, but we have a considerable number of issues to address today and we will have to adhere strictly to our time limits.

Before introducing the first speaker of the day, I would like to thank, once again, our co-sponsor, the Association, and also the New York Community Trust and the Joyce Foundation, whose generous support has made this conference possible.

I would also like to thank my colleagues on the Board, Bill Green and Martin Begun, both of whom are here, as well as Nicole Gordon, the executive director who has enlisted over the last ten years an extraordinary group of dedicated and competent public servants on the staff of the Board.

Our first speaker today is Fritz Schwarz who served as New York City Corporation Counsel in the Koch administration, and then as chair of the Charter Revision Commission in 1989. In that capacity, he helped recast the structure of New York City government. He has also served in a number of other public service positions, including as chief counsel to Senator Frank Church's 1975 Select Committee on Intelligence Activities.

104th Cong. (1996), failed to override a Republican filibuster. *See* S. 25, 105th Cong. (1998).

OPENING REMARKS: THE STATES AND CITIES AS FEDERAL LABORATORIES OF DEMOCRACY*

MR. SCHWARZ: Thank you, Father, thank you Nicole, thank you, Michael. I am indebted to Justice Brandeis for the title. It was he who dissented to the 1932 case of *New State Ice Co. v. Liebmann*,²¹ charged his fellow justices with stymieing the potential progress of the nation by striking down Oklahoma's licensing requirement for sellers of ice. Defending the right of state governments to tailor legislation to local needs, Brandeis opined: "it is one of the happy incidents of the federal system that a single courageous state," or, we would add, city, "may, if its citizens choose, serve as a laboratory; and try novel social, and economic experiments without risk to the rest the country,"²² and, we should add, with potential benefit to the rest of the country.

Just such a happy experiment is the New York City Campaign Finance Act (the "Act").²³ Passed in the wake of grim findings by the Sovern Commission on Integrity in Government of vast opportunities for abuse, influence peddling and other improprieties, the law has, as Mayor Koch predicted in signing it, "achieved a more equitable and open system of financing candidates who seek elective office in New York City."²⁴

With its sensitivity to New York's unique concentration of wealth and power, its increased accountability to the people through disclosure and its creative voluntary incentive-creating structure of participation, the Act embodies the best spirit of local inventiveness.

* For a revised version of these remarks, see Frederick A.O. Schwarz, Jr., *States and Cities as Laboratories of Democracy*, 54 REC. ASS'N B. N.Y.C. 157-65 (Mar./Apr. 1999).

21. 285 U.S. 262 (1932). Specifically, Justice Brandeis stated:

To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.

Id. at 311 (Brandeis, J., dissenting).

22. *Id.*

23. See *supra* note 3.

24. Hearing on Local Law No. 8 of 1988 (Feb. 29, 1988) (statement of then-Mayor Edward I. Koch), cited in Jeffrey D. Friedlander et al., *The New York City Campaign Finance Act*, 16 HOFSTRA L. REV. 345, 345 n.2 (1988).

In keeping with Justice Brandeis's wise assessment of the utility of state experimentation, New York City's success has led the way for reform in other localities — as it hopefully will do in the nation, eventually.

Later panels today will examine the valuable lessons of our city's law in depth. My project, by contrast, as the day's opening speaker, is to give a more general overview of the role of state and local governments in inspiring widespread change.

The purpose of my remarks today is first to trace some of the substantial and invaluable contributions of states and cities to national policy throughout American history starting from the very beginning and into the present day.

I recognize the critical part states historically have played, and continue to play, in pioneering institutional process reforms — for example, state constitutional amendments or campaign financing — as well as their invaluable role as pioneers of substantive, social or economic changes. Next, I examine some of the benefits of using localities as a proving ground for social experiments.

Finally, I raise the question of how such experimentation relates to the values of federalism, generally, and, in particular, how this experimentation relates to the place of minority interests.

I should begin my historical survey by noting that the critical importance of state innovation to the well-being of the federation was, of course, by no means a novel concept when Brandeis spoke in 1932.²⁵

De Tocqueville, an incredibly perceptive observer on this as on many other subjects, observed a century earlier that, in large centralized nations, the law-giver is bound to give the laws a uniform character which does not fit the diversity of places and of mores.²⁶ In keeping with de Tocqueville's call for diversity, the history of American federal law in every era has reflected the adoption of the best — and occasionally the worst — of experiments first implemented in the laboratory of the states.

From the Federal Constitution itself, to the victims' rights and environmental reforms of recent decades, the federal government frequently has followed in the footsteps of trailblazing states and cities.

The laboratory model was much in evidence when the Federal Constitution was drafted, as the founders availed themselves of the

25. See *New State Ice Co.*, 285 U.S. at 311.

26. See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (George Lawrence trans., J.P. Mayer ed., 1988).

constitutions of the original states. In fact, the constitution of our own state was particularly influential as a model for the Federal Constitution.

Alexander Hamilton proudly pointed to the New York Constitution in his *Federalist No. 1*, where he assured New Yorkers, in seeking their support, that the new Federal Constitution was “an analogy to [our] own state constitution.”²⁷

In the area of substantive rights, it is the states to whom the nation owes many of those rights that define what it is to be an American in our Bill of Rights. Free exercise of religion, restrictions on search and seizure, quartering of troops, freedom of the press and safeguards against cruel and unusual punishment appeared in state constitutions before their enactment in our national Bill of Rights.

Many states, particularly Massachusetts, Virginia and New York, consider these rights so critical that only the promise of amendment procured ratification of a Constitution without the Bill of Rights. The early years of the American confederation witnessed legislative state experiments, both for the good and for the terrible. The legislature of Pennsylvania outlawed slavery in 1780 and our own state followed suit in 1799.

Unlike many other states, as early as 1783, Massachusetts interpreted its constitution’s guaranty that all men are born free and equal to require the abolition of slavery.

By 1804, the last northern state had freed its slaves. And until the passage of the regressive Federal Fugitive Slave Act in 1850,²⁸ these same states further enacted new personal liberty laws to enforce the rights of fleeing slaves.

During the last three decades of the 19th century, after the federal civil rights law had been declared invalid, virtually every northern state, as well as a number of western states, prohibited school segregation by statute. And state courts, when called upon, enforced those statutes by requiring school integration, to some extent, at least.

Surely, the record on civil rights in the northern states was hardly perfect, but at least it showed that one could have liberty in states and that that worked and it was something to praise and follow and not something to decry. Of course, the story was different in the south, with a terrible cost to the union. As the northern states had led the fight in expanding rights for people of color, state

27. THE FEDERALIST NO. 1, at 6 (Alexander Hamilton).

28. 9 Stat. 462 (Sept. 18, 1850).

legislatures, especially in the west and the north, set an example in according women the vote.

Wyoming, for example, enacted women's suffrage in 1869, and twenty-four states already had followed when the Nineteenth Amendment passed in 1920. So, again, you have an example of how state allowance of greater freedom led the way and served as an example for the national government.

In the following decades, the states continued to change the landscape of American rights. For example, New York passed the nation's first worker's compensation law in 1910, and other states soon followed. Massachusetts enacted the first minimum wage legislation in 1912. Thirteen states had enacted minimum wage programs by the 1920s, whereas Congress did not follow suit until the New Deal under Roosevelt.

However, during the early decades of the twentieth century, the Supreme Court's application of the now discredited doctrines of substantive due process and freedom of contract struck down hundreds of progressive state laws involving minimum wages and maximum hours. The best-known case, of course, was *Lochner v. New York*²⁹ in 1905.

The frustration of state experimentation that began in the 1930s took on a new dimension in 1942 with Supreme Court decisions vastly expanding the preemptive power of federal legislation.

During the New Deal and the Truman, Eisenhower, Kennedy and Johnson administrations, our national attention was focused on national programs, opening doors to social security, urban housing, education, voting and other civil rights. And during that period, the states did not do as much by way of experimentation, but they continued in the area of rights. And again, New York City led the way. New York City led the way on housing discrimination by passing the first law governing discrimination in public housing in the late 1930s. This law was constantly expanded in New York City to cover all kinds of housing by 1951.

Similarly, in 1957, though the New York City Council was generally derided in those days and not as effective as it is today, it passed the first law in the nation prohibiting discrimination in privately owned housing that did not receive public subsidies or tax abatements.

29. 198 U.S. 45 (1905) (holding a New York statute establishing maximum hours for bakery employees unconstitutional).

At the same time came the southern defiance of *Brown v. Board of Education*.³⁰ Again our attention on the issue of rights was focused quite properly on the reforms which, eventually, after the pressure that came from Martin Luther King, Jr. and other people defying segregation, nationalized the rights of people of color not to be discriminated against. But today, there is again a resurgence of reform in states and localities. The importance of state innovation has come to manifest itself increasingly in recent decades.

For example, with regard to vehicle emissions, California led the way long before the federal statutes on laws that controlled air pollution. National work on the environment is vital, but as an editorial in today's *New York Times* showed, the states and cities are again beginning to lead the way and pressing for environmental improvements.³¹

Again, the states were focusing on fundamental rights as well as substantive matters in the field of women's rights. Many states passed constitutional amendments and legislation protecting women against discrimination before the national government did so. Still more recently, cities and states, again, particularly New York City, have been standard bearers in the area of gay rights. In 1986, New York City passed a landmark gay rights law³² under Mayor Koch, and this past June the city passed a domestic partners law,³³ which leads the way for seeing whether laws of that kind make sense, work and are fair. As of 1998, ten states and the District of Columbia have enacted civil rights protections for gay people. Of course, that issue is one that is being experimented on in both directions.

If you read the newspapers, you can see the experiments that are seeking to suppress gay rights in some locations and the experiments that are seeking to protect them in others. So, state and local experimentation is not always in a great direction, but it often is.

Similarly, the state courts, since Justice William Brennan's influential speech on state constitutions and the protections of individual rights,³⁴ have done a great deal to protect individual rights even

30. 347 U.S. 483 (1954).

31. See Editorial, N.Y. TIMES, Nov. 9, 1998, at A25.

32. See N.Y.C. ADMIN. CODE § 8-107 (1998).

33. See N.Y.C. ADMIN. CODE § 8-108 (1998) ("The city ordinance requires that if a finding of immediate family status can be made without regard to the formalities of marriage, it must also be made without regard to sexual orientation.")

34. See William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

as the United States Supreme Court has begun to pull back from the landmark decisions of the Warren era. And our own Chief Judge Judith Kaye, speaking to the Association of the Bar of the City of New York ("Association") in one of the Cardozo Lectures, illustrated how the state courts can be trailblazers in protecting individual freedoms.³⁵

Turning back to the contributions of states and localities in the area of the institutional process of reform, this has been every bit as invaluable to national progress. It is, for example, to the Massachusetts Constitution that we owe separation of powers and our tripartite system of government.

In his *Federalist No. 66*, Hamilton, for example, refuted criticism of certain aspects of the Constitution, including the Impeachment Clause, by referring to how the New York State Constitution dealt with that subject.³⁶ In the early part of this century, the progressive movement led the way in dealing with issues that are part of today's discourse.

The many vital concepts of today's politics entered public discourse as the progressives sought to ensure the protection of the public against special interests and boss-led machine politics. It is the same movement that Michael was referring to that earlier led to the creation of this Association, that was substantively important.

Initiatives, referendums, recalls and term limits are all things that are not necessarily always benign and sometimes are perverse, but they are examples of where seeing how they work in a locality will help the nation decide whether they are good or bad ideas.

The primaries, direct primaries and special prosecutors' experiments, which have not always been benign, are things that came also, if you look back into history, first from states and localities.

And popular sentiment of the early part of this century was then embodied in the Seventeenth Amendment which led to the direct election of Senators instead of the previous system of election by the state legislatures.

As later panels today will discuss in more detail, today's headlines reflect a renewed commitment to democratic reform. A second progressive era might be upon us. The people in states and localities are concentrating (because they know they must) on dealing with the failings of big government, the miring of the federal

35. See Judith S. Kaye, *Dual Constitutionalism in Practice and Principle*, in 3 BENJAMIN N. CARDOZO MEMORIAL LECTURES 1401, 1415 (1995).

36. See THE FEDERALIST NO. 66 (Alexander Hamilton).

government in gridlock and the overly dominant effect of big money in our politics.

And as you know, in referenda held this year in Maine, Massachusetts and Arizona, the public voted in favor of campaign finance reform. It is a movement which the local areas are pushing for and we are going to see more and more experimentation that will hopefully drive the federal legislators into believing they must do the same thing.

Then there are other efforts to focus on: in Oregon, to conduct elections by mail, and in Texas, to permit voting by computer. All these experiments are part of this country's constant effort to perfect our democracy, and it is good and healthy that one can see whether they work in localities and states before one tries to impose them upon the nation as a whole. Of course, in addition to electoral changes, the laboratories of the states and localities are exciting experiments in conducting government efficiently.

If you read the wonderful book called *Reinventing Government*, by David Osborne and Ted Gabler, you can come up with lots of examples of where localities here in New York City, in Arizona, in Wisconsin, have, in fact, undertaken experiments in making their government more efficient.³⁷

Again, it is a test: you can see whether programs like the New York City scorecard program which evaluates, for example, street cleanliness, can have a beneficial effect on making the government do better by informing the public where it has or has not done well.

Let us take the experiment of school vouchers. That is a very, very controversial subject. One can argue powerfully against school vouchers as being something that dilutes the public schools. On the other hand, it is an idea, it seems to me, with sufficient possible power to reform the public schools and the school system in general, that it is worthwhile to see how, in fact, it works in some localities so that one has the benefit of actual experiment instead of pure rhetoric.

Therefore, one can say clearly there are practical and democratic benefits of experimentation at the state and local levels. However, inasmuch as Justice Brandeis postulated that states might experiment without risk to the rest of the country, this discussion of his idea would not be complete if I did not pause to recognize that it is the rare experiment that is truly without danger. Institutional pro-

37. See DAVID OSBORNE & TED GABLER, *REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR* (Addison-Wesley Pub. Co. 1992).

cess reforms must always comply with the limits of the Constitution, especially those ensuring the value of every person's vote.

However, it is primarily with respect to substantive economic and social changes that one must sound a note of caution about whether one embraces experimentation as always being sensible. Inherent in the new federalism is a belief in a distinct local identity.

But to what extent certain types of differences between localities are a healthy side effect of experimentation is a matter for debate. Caution warns against the over-localization of human rights, for example, and against a retreat from established protections in the name of experiment.

As Professor Charles Black reminds us: “[A]nything concerning the equal protection of a child in Arkansas is just as legitimate a concern of mine as it is of the citizen[s] of Little Rock. . . . The matters of the Constitution — all of them, not just some of them — are national matters.”³⁸ In this respect, you can focus on abortion, and you can say that some of the experiments that are being suggested which were defeated at the polls are ones which are dangerous to constitutional rights.

Related to these questions about the importance of national safeguards is a concern about the effects of local experimentation upon those in the local or regional minority. A longstanding body of thought holds that the protection of minorities is best conducted by unified government. So we have this dilemma. Sometimes we have states and localities leading the way in the protection of minorities. Yet we have to recognize that as a matter of theory and as a matter of practice, you must have strong national standards for the protection of minorities.

Going back to *Federalist No. 10*, James Madison pointed out that a national government serving a diverse group of citizens can protect unpopular minority groups more effectively than can the government of a small homogeneous state.³⁹

In revising the City Charter in 1989, for example, one of the constraints, we felt, of decentralizing land use to too great an extent was the fear of giving insular groups too much power to exclude people who do not look like them.

So it comes as no surprise that some of the experiments at the state level recently have, in fact, been targeted at turning back the

38. CHARLES L. BLACK, JR., *THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY* 142 (1960).

39. *See* *THE FEDERALIST* No. 10 (James Madison).

rights of those who have less voting power, the rights of minorities. And you all know examples of what I am talking about.

When we speak of "experiments," we must bear in mind that, as history is said to be written by the victors, so in some measure must the success or failure of state experiments be determined subjectively.

For example, bare statistics reflecting declining welfare rolls or school performance may conceal individual misery and failure. And though the theoretical advocates of ever greater state and local experimentation point to the possibility of exit from the state, the logistic and economic difficulties of moving from state to state have potentially grave consequences for individuals who are poor and individuals who do not have power. Now, of course some people talk about a race to the bottom among governments competing to do less for the disadvantaged, thus reducing taxes (at least for the short term).

But in the area of campaign finance reform, one does not have to worry about a race to the bottom, because the federal government is already at the bottom. What is going on in campaign finance reform is therefore not a race to the bottom, but an effort to aspire to the top.

Certainly, we have to remember that not all state experiments have been for the best in the light of history. For example, Henry Steele Commager made this observation: "the Massachusetts legislature imposed loyalty oaths on teachers; the Oregon legislature outlawed private schools, and . . . the Tennessee legislature prohibited the teaching of evolution . . . the list could be extended indefinitely."⁴⁰

Fortunately, however, the laboratory of state experimentation is not a sealed room. Laws passed at the state and local level remain subject to the limits of state constitutional requirements as well as of federal law and the Federal Constitution. As Justice Douglas wrote in *Monroe v. Pape*,⁴¹ discussing the purpose of Section 1983 of the Civil Rights Act,⁴² the federal government's obligation as a complement to the states' obligation is: 1) to override certain kinds of state laws; 2) to provide a remedy where state law is inadequate; and 3) to provide a federal remedy where the state remedy, though adequate in theory, is not available in practice.

40. THOMAS E. CRONIN, *DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL* 91-92 (1989).

41. 365 U.S. 167 (1961).

42. 14 Stat. 27 (Apr. 9, 1866) (codified at 42 U.S.C. § 1983 (1999)).

So the genius of “Our Federalism” lies not only in the creative power of cities and states, but in the Constitution’s guaranty of a larger legislative and constitutional context for reform.

Those powers reserved to the states and local governments should not be left to collect dust through disuse or excessive caution. Those who operate at the local level must implement changes wisely, but our dual system of federalism demands that we do implement them. We are duty bound to continue to search for better solutions, which is what the rest of the day will be about. So we are duty bound to continue to search for better solutions to the social and political challenges of our day and to learn from the experimentation of others. As I have tried to show, to do so can be in keeping with the best of our nation’s historical legacy and aspirations as well as our civic mandate. And to do so in the area of campaign finance reform confirms our city as a true laboratory in the most honorable sense, engaged in an experiment of honest, informed, creative — and long overdue — improvements in democracy. Thank you.

DEMOCRACY AT A FAIR PRICE? PUBLIC FINANCING OF ELECTIONS

Campaign reformers have sought to regulate both the supply and demand sides of the campaign cash equation. On the supply side, reform legislation in Congress and across the country has attempted to impose limits on the size of political contributions and, in certain cases, to replace all or part of candidates' funds with public money. Contribution limits diminish the reality and appearance of undue influence upon elected officials by well-financed special interests or individuals. The effect of such limits varies, however, because different jurisdictions regulate to a different extent contributions from various sources, including individuals, PACs, political committees, corporations, unions and lobbyists. Trevor Potter, an election lawyer and former chairman of the Federal Election Commission (the "FEC"), moderated this discussion of the role of contribution limits and public financing.

FATHER O'HARE: Robert M. Kaufman was to have moderated this next panel, but unfortunately he is in the hospital today, so his place is going to be taken by Trevor Potter, former head of the FEC. Mr. Potter, I think it is safe to say, is one of the more highly respected people to have served in that position.

He served as vice chair in 1993 and as chairman in 1994. His previous government service was at the Justice Department and as assistant general counsel for the Federal Communications Commission. Mr. Potter is an editor and author of various publications on election law and campaign finance questions, and is a frequent visiting expert on ABC nightly news, PBS, BBC and National Public Radio.

MR. POTTER: Good morning, everybody.

The panel, as you know, is "Democracy at a Fair Price? Public Financing of Elections," and we have with us this morning a distinguished group of panelists. They are, starting to my far right, Kathleen Czar, who is the executive director of the Minnesota Democratic Farmer Labor Party. A title of a party that reminds us that many things are different in Minnesota.

We also have Kevin Kennedy, the executive director of the Wisconsin Elections Board, and he will be able to tell us some of the recent developments in Wisconsin which, as you know, has both public financing and some recent cases involving some of the

problems with public financing, in particular, when issue advocacy and spending outside of the limits join the rest of the system.

Next to me we have Harold Ickes, who is the former White House Deputy Chief of Staff and is currently a principal of the Ickes & Enright Group. He has had extensive experience in New York City working for the Dinkins campaign, which was publicly-financed, and more recently, of course, he was involved in the Clinton-Gore reelection campaign. I checked with him and he tells me it is fair to paraphrase some of his recent testimony on the subject as, "I did not write the rules, I only play by them." So I think it will be interesting to hear from him how he might indeed, with his inside experience, suggest revising some of them.

And finally, we have John Fund, the voice, indeed the shout, of the *Wall Street Journal* editorial page who, I think, could be described as a skeptic of complex regulatory structures, including public financing.

So it is a very distinguished group of people who bring a wide breadth of experiences to us.

We also have on this panel and on the other panels today, Robert M. Stern, who is the Co-Director of the Center for Governmental Studies in California. Bob, who is a distinguished expert and scholar of the whole area of campaign finance, is going to bring a particular state and local perspective to our panel discussions and will be able to tell us a little bit about what states other than those represented on the panel are up to and what they are proposing.

We meet at a time when there is a great deal of discussion and action at the state level in the area of public financing of elections. We have just had the referenda in Arizona and Massachusetts. We are across the river from New Jersey, which has a public financing system. We are in New York City, which has a well-known, vigorous public financing system and indeed has just authorized a four-to-one matching program. And of course, up the coast further, Maine is about to embark on a full public financing system for the next election.

If I could posit it this way, the original deal for federal public campaign financing was that we would replace or supplement private money with public money. The notion was to either eliminate or diminish the pressure to raise private funds and the influence of private funds in return for what some would describe as "clean money" and others as "taxpayer money," or "food stamps for politicians," depending on your perspective in that debate.

The original deal was a change in financing. I think it is fair to say, at least at the federal level, that we now have a revised deal where we have both public funding and largely unlimited private funding. In the last election a great deal of money was also raised and spent by political parties and by other groups for issue advocacy.

The question before us is really twofold: Is the revised deal a good deal for the public? And as we look at the state examples that we will be talking about this morning, how is public funding actually working? Is it adequate to finance communication? Is there a disadvantage for participants vis-à-vis self-funded candidates? Are there improvements that some states can learn from those examples in front of us?

Having said all that, what I would like to do is call on the panelists for a short opening statement and then we will move into a discussion amongst the panelists. We will start with Kathy Czar from Minnesota.

MS. CZAR: Thank you very much. The Democratic Farmer Labor party, to allay any fears, is the Democratic Party in Minnesota. We only look like a third party now that Ventura has emerged on the scene.

Minnesota has a rather substantial history with public funding of campaigns. After Watergate, the state passed a system of public funding for the statewide and legislative candidates. In exchange for the public subsidies, the candidates agreed to spending limits allowing them access to public money in two ways. The first is a direct subsidy, and that comes post-primary for major party candidates and then another payment after the general elections.

They also can provide their contributors with access to refunds from the state for small contributions. Those refunds are a hundred percent refunded, not a tax credit or a tax deduction. They are available for contributions of up to fifty dollars per person or a hundred dollars per couple who file jointly. What we have seen in Minnesota is, with the amount and the kinds of public funding available, almost one hundred percent participation in the spending limits in both statewide and legislative races.

The contribution refund program has been extremely successful in encouraging candidates and political parties to develop large bases of small donors to appeal to voters, rather than special interests, to finance a significant portion of their campaigns.

Candidates can also count on a substantial amount of money directly from the state, so that they can really cross that threshold

and be competitive. They are then able to communicate, at least marginally effectively, with the voters.

In the gubernatorial election this year, the spending limit was about \$2 million. The public subsidy available to the Democratic and Republican candidates was about \$600,000. Jesse Ventura, as a Reform Party candidate, received about \$350,000 in public funding.⁴³

The political parties also received money from a check-off on the income tax. The amount of that this year for Democrats and Republicans was about \$60,000 each.

I think one of the big questions that people ask about public funding for candidates in exchange for spending limits is, "What happens to the private money?" The money does not leave the political process. We have seen since the mid-seventies in Minnesota and, since 1993 when we substantially reduced contribution limits again, that much of the money has gone to political parties and the legislative caucuses. You can argue, I guess, on both sides about whether that soft money is a corrosive influence or helps parties effectively support their candidates.

I think I would argue that there is a role for soft money in campaigns, that what the parties have provided is technical support, voter files and political expertise.

We have not seen a lot of money in independent expenditures, some this year from the AFL-CIO, the Chamber of Commerce and the MEA, but most of the political discourse is between candidates and between parties. So I think in that sense we have a public financing system that provides, between the contribution refund program and direct subsidies, about sixty percent of the money in legislative races. We have seen very competitive elections. This year, in 134 house races, only seven went uncontested. We have seen the emergence of a viable third party in Minnesota, and, again, about a hundred percent participation in the spending limits.

MR. POTTER: Thank you very much. Kevin Kennedy of Wisconsin.

MR. KENNEDY: Thank you very much. One hundred and fifty years ago, Wisconsin joined the Union as the thirtieth state. Twenty years ago this fall Wisconsin conducted its first election using public funding for legislative and statewide candidates. Forty-eight candidates for legislative office received public funding, along with two for the statewide office.

43. Jesse Ventura is currently the Governor of Minnesota.

By 1982, the number of legislative candidates had almost tripled to 129 candidates. Five candidates for statewide office, including both candidates for governor, accepted public funds. Included in that group in 1982 was a young unknown lawyer who challenged a long-serving Republican State Senator; that candidate, using public funding, managed to win by thirty-one votes. Last week that candidate, Russ Feingold, was reelected to a second term as a U.S. Senator by 35,000 votes.

Candidate participation in Wisconsin's public funding peaked in 1986. That was the last year that we were able to give a full grant to legislative candidates. It was also the year, for political reasons, that the spending limits were frozen, as well as our contribution limits. The source of funding, the taxpayer check-off, started to decline and continued to drop.

The goals of Wisconsin's campaign fund were: 1) to establish spending limits to control the cost of campaigns; 2) to decrease the reliance of candidates on large individual contributors and on special interest allies; and 3) to level the playing field, enabling challengers to conduct a viable campaign.

In Wisconsin, a grant is available in the general election to candidates who win the primary, have an opponent and raise, in the case of legislative candidates, ten percent of their spending limit or, for statewide candidates, five percent of their spending limit in small individual contributions.

The grant in Wisconsin works in conjunction with a cumulative limit on special interest contributions. Ideally, it was designed so that if you get a full grant it replaces the total amount of money that a candidate may receive from political action committees or other candidate committees.

Candidate participation dropped in Wisconsin significantly, partly because the funding has dried up. The spending limits have remained frozen at 1986 levels. We are now twelve years later. Another factor is the growth in Wisconsin, as in the rest of the country, of independent expenditures and issue advocacy campaigns.

What I would suggest is that while there is a very good role for public financing in the mixture of campaign money, as Minnesota shows with its example, what is needed is to make sure that the source of funding is consistent.

The drying-up of the funds probably is the biggest factor in Wisconsin. Many of you are probably familiar with some of the recent

New York Times articles that have talked about the erosion of Wisconsin's progressive tradition in campaign finance.

I would trace that primarily to the lack of a commitment to providing the money. The funding is a dollar check-off on the tax returns, unlike Minnesota where it increased significantly to five dollars and the federal level, which was finally adjusted to three dollars. That has limited the money available for campaign grants.

In 1996, following an election where we saw a large amount of issue advocacy and significant independent expenditures, the governor, Thomas Thompson, established a Blue Ribbon Commission to study campaign finance and decided that as good as our system was, it needed an overhaul.

The recommendation was to keep public funding, but also to budget one dollar per-voter per-year to fund that system. That is exactly the amount that was used by our two U.S. Senate candidates for their campaigns.

MR. POTTER: Thank you very much. Harold.

MR. ICKES: Thank you, Trevor. First, I want to congratulate the New York City Campaign Finance Board (the "Board"), especially its chairman, Father O'Hare, and its extraordinarily effective executive director — and I can speak with some experience having been on the other side of her on more than one occasion — Nicole Gordon, on completing a decade of a very serious effort in this city in the very difficult, seemingly intractable area of financing our electoral process. And I also want to thank them for sponsoring this forum.

I have been an active participant in electoral politics since 1964 when I worked in Mississippi to help an elected integrated delegation to the upcoming Democratic National Convention in Atlantic City.

I have worked in campaigns as diverse as those for district leader in a part of an assembly district in Manhattan to twelve different presidential campaigns. I have worked for twelve different presidential candidates.

As Trevor indicated, I was involved very deeply in the reelection campaign of President Clinton and Vice President Gore.

I come to this debate viscerally in favor of public financing of campaigns, but I must confess, based on the evidence today, I am not sure why.

What are the goals, or what is the goal of providing public funds to candidates for public office? Is it to level the playing field for

those who do not have access to adequate funds? Is it to increase competition, and if so, toward what end?

Is it to try to ensure a more vigorous and informed debate? Is it to induce candidates to participate in the program and thereby, by inference, agree to accept sometimes severe limits on contributions and to abide by limits on spending? Is it to agree to debates, as I know New Jersey has and I think now New York City has? Is it to provide more detailed, accurate, timely and understandable disclosure? Is to reduce the influence of the special interests? Is it to create a political milieu in which elected officials are free from the influence of any group or groups?

Even if some or all of these goals were advanced in a significant way, as a result of providing public funding to candidates, what effect, if any, would there be regarding the debate and ultimate shape of public policy, which officials are elected to develop, enact and administer?

I do not have the answers for any of these questions or for many others that could be raised and will probably be raised today. It does seem to me, however, that there is precious little concrete evidence to support conclusions one way or the other. For example, in his recently published paper comparing the public finance funding systems of Wisconsin and Minnesota, Kenneth R. Mayer states, and I quote, "the critical feature of any campaign finance system and most important evaluative criteria is the degree to which it fosters electoral competition."⁴⁴

His central conclusion is that Minnesota's public financing system has made legislative elections more competitive by providing significant resources to challengers and creating incentives for candidates to abide by spending limits. He found that under Minnesota's system, "incumbents win by narrow margins and tend not to dramatically outspend their opponents."⁴⁵

Assuming for a moment the correctness of his conclusions, Mr. Mayer provides no discussion or evidence regarding the actual effect of this increased competition.

Did it result in more voter participation? What are the effects on the formulating, enacting and administering of public policy? Has it reduced voter apathy and cynicism? Has it reduced the in-

44. Kenneth R. Mayer, *Public Financing and Electoral Competition in Minnesota and Wisconsin* (Apr. 1998) <<http://www.igs.berkeley.edu:8880/CRF/RS/mayer.html#EVALUATING-MINNESOTA'S-SYSTEM>>.

45. *Id.* at <<http://www.igs.berkeley.edu:8880/CRF/RS/mayer.html#CONCLUSION>>.

fluence of the “special interests” in the shaping of public policy, to ask only four questions that could be asked in this regard?

In their very recent book, *The Day After Reform: Sobering Campaign Finance Lessons From the American States*, Michael Malbin and Thomas Gais reached the following conclusion regarding the public finance programs of Wisconsin and Minnesota:

It is possible that public funding with enough money can serve an important public policy goal by helping to encourage the existence of some kind of debate in almost all districts, even if it does not sufficiently override other politically relevant factors that make most districts competitive.⁴⁶

The main conclusion, however, is that there is no evidence to support the claim that programs combining public funding with spending limits have leveled the playing field, countered the effects of the incumbency and made elections more competitive.

As noted by Father O’Hare in his foreword to the Executive Summary of the Board’s recent report, *A Decade Of Reform*, “if considerable progress has been made in fulfilling the Board’s mandate of voter education, the Board recognizes that the progress made in reducing the influence of money on campaigns has been less decisive.”⁴⁷

He goes on to point out that just fifteen percent of all contributors to the 1997 mayoral campaign gave seventy-five percent of all of the money raised. This, despite the fact that in that general election, Ruth Messinger, the challenger, received \$1.78 million in public funds, approximately thirty percent of her total funding, and the incumbent Mayor Guiliani, received \$1.21 million, approximately eleven percent of his total funding.

According to that same report, during the 1997 elections for, I think, over fifty members of the New York City Council, just one incumbent was defeated. And that was a race in the 17th Council District in which neither candidate accepted public funding.⁴⁸

My remarks are not to be taken as a criticism of these programs. Rather, my point is to illustrate the difficulty of showing in a concrete, understandable, persuasive way — at least to me — that public funding of the electoral process has tangible, beneficial, desirable and measurable results. And that is assuming that there is a consensus on what constitutes, “beneficial and desirable.”

46. MICHAEL J. MALBIN & THOMAS GAIS, *THE DAY AFTER REFORM: SOBERING CAMPAIGN FINANCE LESSONS FROM THE AMERICAN STATES* 25, 137 (1998).

47. N.Y.C. CAMPAIGN FINANCE BD., *A DECADE OF REFORM*, *supra* note 5, at 5.

48. *See id.*

Absent such evidence, how can we expect to persuade the American public that spending public monies is in their best interest and promotes the common welfare?

MR. POTTER: Thank you very much. John, from your perspective, what do you make of all this?

MR. FUND: Well, I suppose my role at this meeting is to be the skunk at the picnic, but I will try not to stink up the place too much.

I used to be a campaign finance reformer. I was on the staff of the California State legislature. I think reformers are some of the most sincere, dedicated people in politics. But I think what you are after is sort of a search for the unicorn, which is a marvelous and wonderful creature but it is not to be seen on this earth within our lifetimes. I think that the crux of public financing is the desire to limit overall political expenditures, and, if I may be so bold, overall political speech. There may be some benefits from that, but there are costs, and I do not think that people adequately understand what those costs are.

Let us look at Wisconsin, where there are some requirements for disclosure of issue advocacy ads and various other things, which I think is an opening wedge in the door of further restrictions.

In 1996, a group called the Wisconsin Manufacturers and Commerce Association decided to put \$40,000 of issue advocacy ads on the air attacking various incumbents, but not using the express words, "for" or "against." The State of Wisconsin marched into court and exercised prior restraint because the group refused to register and provide various details about its activities. They had two judges in Madison and Milwaukee throw the ads off the air.

The state's election board also looked at this case. The state's election board attorney suggested that the board not restrict the activities of this group. In fact, what the board's attorney said is that if a choice has to be made between First Amendment freedom of speech and regulations, the First Amendment wins hands down. The unregulated voice is not as dangerous to the republic as the silenced voice.

The board overruled its own attorney and pursued the case, eventually ruling the ads were express advocacy and were subject to its regulation. Curiously, the board chose not to pursue the lawsuit against either the AFL-CIO or the Sierra Club over the same type of ads that were used in that very same election.

Well, various courts have overturned the board's decision. The board deadlocked on a four-to-four vote about appealing those decisions, and that case is now before the Wisconsin Supreme Court, pursued by the attorney general, Jim Doyle.

I think that it should be of great concern to us that ads were thrown off the air. An attorney general seems to be on a crusade against this group. The ACLU has filed an amicus brief. There are real costs involved in this. And let me just close by reminding you of one thing. When you restrict political speech, when you restrict campaign expenditures, you are enhancing some people's power at the expense of other people.

Now, I speak as a self-interested party here. I write for the largest newspaper in this country. I do not seek to exercise political power and influence, but some people ascribe it to me. If you restrict political speech, if you restrict campaign expenditures, you enhance my power and the power of my peers in the media.

Bill Gates has a lawsuit against the Justice Department. He is being sued on antitrust grounds. Nothing that public financing or limits on issue advocacy ads would do would limit his ability to go out and spend a billion dollars, which is what I think he earns in, probably, five hours, to go out and buy a television station and broadcast his views, over and over again. And there is no way that you are going to limit that.

He can run issue advocacy advertisements twenty-four hours a day, all the time. You can say that television stations and newspapers would not engage in that, but let me give an example. In Seattle, there was an initiative on the ballot statewide to end quotas and preference programs. The publisher of the *Seattle Times* ran full-page ads attacking that initiative, in favor of affirmative action, for seventeen days running in his own newspaper. This caused a great deal of distress to the news employees who had to look at this all day and realize that people were viewing their coverage as biased in favor of it. No one could stop him from doing that, and no one would stop him from doing that.

I will just conclude by saying, if you are going to have limits on issue advocacy ads, you are going to enhance my power and the power of the media.

There may be some benefits to public financing, but there are also costs and you should look very, very carefully at those costs because Richard Gephardt had the courage to introduce a constitutional amendment to limit political speech, which I think was a very bold and honest way of approaching it, given the *Buckley v.*

*Valeo*⁴⁹ decision. Richard Gephardt said on the House floor that we have two important values in direct conflict: freedom of speech and our desire for healthy campaigns and a healthy democracy. You cannot have both. That is Richard Gephardt speaking honestly. I submit you can have both and we have to find a way to do that. Public financing is at best an incomplete and flawed approach.

MR. POTTER: Thank you very much, John. Now that you have presented your nonpartisan election views as the dominant voice, that ought to wake up those panelists who were not already concerned.

Let me, if I can, pose a question to each of the panelists and then I am hoping they will question each other. Starting with Kathy and the Minnesota experience, I am curious, in light of the panel's discussion whether or not public financing opens up elections and makes it a more competitive battlefield. There has been some press comment to the effect that Governor-elect Jesse Ventura was, in fact, able to succeed because of public financing and that the \$350,000 he received gave him both credibility and enough of a jump start. What is your view of that?

MS. CZAR: I think Jesse was able to succeed because of public financing, and you can see that as a plus or a minus in the system. But what we saw with the public funding we have is increased interest in politics by people who had been outside the system before.

Jesse was able to raise almost \$200,000 in small contributions using the contribution refund program in the first months of his campaign. He used that money to put together a fairly credible grass roots campaign, and he was in the debates. But it was only in the final weeks of the campaign, when he received \$310,000 in public funding, that he was able to go up on television.

Is that a bad thing? As a Democrat, I'd say we lost. Our candidate lost. Is it a bad thing, in terms of politics for this country? We saw voter participation increase to sixty-three percent in an off-year election, which is phenomenal. I think it is probably among the highest turnouts in the country. We also saw 124,000 people register on election day who had not been registered before. About sixty percent of those people voted for Jesse, and these were people who, the pundits would say, are not to be counted. They are the people who were not polled. They are the people who

49. 424 U.S. 1 (1976).

work for \$30,000 or less, who only have a high school education. They were engaged in the process because there was a candidate there who was able to speak to them.

Ventura was elected without taking any special interest money from lobbyists, so if he can govern, he will be the first leader in the state who really owes nothing to anyone. And that has some sort of interesting implications for public policy.

MR. POTTER: Kevin, how about the Wisconsin experience? In your description of Wisconsin, you highlighted the frozen state of funding, which must mean that there was a lack of support for increasing funding at least until recently.

I am curious, what is the Wisconsin experience in terms of the lack of either public or legislative, whichever it was, support for the system? Maybe if you could also pick up on that Minnesota comment, that one of the criticisms of public financing is that it will fund so-called fringe candidates and the people will resent that or not want their money to go to a candidate who they feel is not a serious player.

Even with the Ventura example or perhaps because of it, how does that play out in your Wisconsin system?

MR. KENNEDY: Well, in Wisconsin, you start with the fact that it has essentially been frozen for the last twelve years. That has been more a result of the legislature coming to the conclusion that any change may benefit one or the other party.

There is no question, if you look at the participation levels, that challengers get more grants than incumbents, because incumbents have more access to special interest money because contributions come to them before the campaign starts. So they will often start with a fairly large war chest which will be funded by the special interests. Given the way we set up our funding program, for each dollar you receive from a special interest, that is one less dollar you are able to take in terms of public funding. That is not true for all candidates.

Also the public, in general, does not support public funding. Wisconsin's system was originally created as an add-on, but because of some line-item vetoing by the governor in 1978, we ended up with a tax check-off.

A check-off generates more money, but the participation level has dropped significantly since 1979. Presently, it is less than half of what it was at that point. The funding is not there, so the candidates do not participate. It becomes a self-fulfilling prophecy.

It is very difficult for third-party candidates in Wisconsin to qualify because they have to get a certain percentage of the vote in a partisan primary to get a grant. We have had one third-party candidate in twenty years receive public funding. But, again, it is mostly challengers, and candidate participation has dropped off because the amount of money that is available is very small.

Now, in this past election, we gave \$200,000 to the Democratic candidate for governor who limited his campaign spending. The incumbent Republican spent over \$6.5 million, whereas the Democratic candidate spent just about \$1 million, about a fifth of which came from public funding.

But we have never had enough money to fully fund a candidate. At the time it was frozen in 1986, that grant, if we had been able to give it, would have been \$485,000. I think that would have been increased by inflation.

That was one of the things that was recognized by the Blue-Ribbon Commission. It recommended spending limits that are roughly equivalent to what Minnesota has now for their statewide offices.

MR. POTTER: Harold, you had a number of good questions about what the system is trying to do.

What should the system, in your view, be trying to do, and, in particular, should we be looking at a system that is limiting spending or a system that is providing seed money? How does that play into what has been referred to by two panelists as money from special interests?

MR. ICKES: Well, the short answer is, I do not know. I raised those issues because it strikes me that so much of the debate about public funding has a set of built-in assumptions: that special interests dominate, that you do not want special interest money, that money is, in fact, bad and that if you only had candidates who could get out there and run having to rely only on voter support and not on anybody's money we would end up with a better system.

And my question is — and again, I do not know the answer to this — to what end? Is it just so that we have more candidates out there running and debating and holding debates that people may or may not listen to? Or is it towards a larger end of affecting public policy?

I think there is a tacit assumption, at least in some people's minds, and certainly in mine, that in this whole discussion about

how we conduct our elections, the ultimate goal is the effect that elected officials have on the designing, enacting and administering of public policy. Presumably, people can disagree with me, but that certainly seems to me the long-term goal on this.

And the problem that I have with all of the studies, all of the talk, all of the systems is that there is nothing that I have seen that gives any concrete measure that public policy and the shaping of public policy would be any different with the funding of candidates.

If you just take the New York City Campaign Finance Program, which is a vigorous program, has a terrific Board and that has some serious dollars to play with — obviously Father O'Hare and Nicole would like more, but it is some serious money — and yet you take the New York City Council, where only one incumbent was defeated in 1997.

So was there more competition? Maybe. What is the quality of that competition and toward what end is that competition? So while I guess my short answer is, I am not convinced that we have yet seen any great benefit, but it depends upon what the benefit is. And the problem is, the debate is defined so that as long as we have more candidates in, and even though they lose by narrower margins, then it is a success.

Well, it is if that is the measure. But the ultimate measure is not that, but the effect on the commonweal and public policy. And I question whether there is any concrete evidence we have seen in that regard.

MR. POTTER: It sounds as if you are equating the public good with the defeat of large numbers of incumbents, a position I want to hear more about.

John Fund, one recent election, going back a cycle, was the election of Governor Christine Todd Whitman in New Jersey. I might term her a favorite of the *Wall Street Journal's* editorial page.

MR. FUND: Not in all matters.

MR. POTTER: Not in all matters, but certainly at the time of her first election as governor of New Jersey, she was widely applauded by your page, and, of course, she was not only publicly financed, but some of the press coverage suggested that was, in fact, the reason for her election. Essentially she had state money and there was a spending limit so she could not be outspent by her well-known opponent.

What is your view on that, and does that, perhaps, move you at all towards suggesting an appropriate goal for public financing, as

opposed to the notion of simply restricting political speech, which you defined as an inappropriate goal?

MR. FUND: Well, I agree with Harold Ickes in that I do not think you could parse out the impact of public financing. Voters vote for candidates for all kinds of reasons. I do not think we can empirically determine that. One thing we can empirically determine though, is that incumbents want to be reelected and they will do almost anything to get reelected. Ninety-nine percent of the incumbents in the House of Representatives just got reelected and I assure you that much of the problem that you are going to have in passing public financing in non-initiative states, and certainly in Congress, is that asking members of Congress to design a public financing system which meets very many of the goals that Mr. Ickes laid out as possible goals, asking them to have a level playing field and open up a system to challenge, is like asking chickens to deliver themselves to Colonel Sanders. It will not happen.

And I will give you two examples of how the system can be rigged. The spending limits that are often proposed per Congressional district or per state legislative district often seem to settle in the \$600,000 to \$700,000 range for Congress and the \$100,000 to \$200,000 range for state legislative seats.

That happens to be a level at which most political scientists have determined is to the incumbent's advantage, in terms of all of his staff and his name recognition, which effectively makes it difficult for a challenger to ever outspend an incumbent effectively and will make it difficult to ever defeat an incumbent, as we have seen in most states with public financing models.

That should give you an idea of how the game is going to be rigged. I will further point out that it is curious that we index almost everything in public life. We index your tax deduction, we index all kinds of things in the income tax code. We index almost everything; inflation indexes are built into our life — except the thousand dollar campaign contribution limit that was enacted in 1974. That has not gone up one dollar. Counting inflation, it is now down to about \$280. So while you could contribute a thousand dollars in 1974, effectively you can only contribute \$280 today.

I do not think public policy has been enhanced by that. I certainly think competitiveness in elections has not been enhanced by that. Why is that thousand dollar limit there? Because it means that, basically, candidates can only raise money under that system if they are incumbents or if they have powerful special interests behind them.

Now, you can say public financing is an alternative to that model. I do not think it works because the same games will be played with that. You should be aware of it.

Now, in some of the initiative states, I think you might be able to make more progress. And you will notice that most of you in local areas have had the most success in initiative states. I would simply just urge you to remember that incumbents do not have the commonweal at heart when it comes to their own reelection prospects. They have their own interests at heart. They are self-interested players. You cannot expect them to act differently because when they get into the back rooms, and I have been in those back rooms, the conversation is very pointed, very direct and very cynical. Every year at Christmas time, I take out a group of Republican congressmen to dinner and I take out a group of Democratic congressmen to dinner. And I raise all kinds of reform ideas. The reform agenda that I usually come up with to propose on the *Wall Street Journal* editorial page is the reform agenda that they blanched the most at.

For example, I proposed once that we have a “none-of-the-above” option on the ballot. Actually, if “none-of-the-above” won, you would have a special election and there would be new candidates. The old candidates would not be able to run.

I will never forget an incumbent looked at me with absolute horror on his face and said, “I cannot believe you can propose that. You are suggesting that I could lose to an empty chair.” And I said, “yes, but only if the chair was better.”

I just tell you that all the proposals that I have heard about public financing and expenditure limits are very interesting. Some of them are actually appealing to me philosophically. But I defy you to find a group of incumbents that won't be able to game the system so that it ultimately leads to the kind of ninety-nine percent incumbent retention rate we just saw one week ago.

MR. ICKES: I think John has really put his finger on it. There are two big issues. One is the initial issue he raised about freedom of speech. But there is also a decrying by the good government groups — and I often join in that — that there is no public support or serious public support or overwhelming public support, or whatever kind of public support one needs for meaningful campaign finance reform.

And I suggest to you two things. One, incumbents have to vote it through, and that is our system, and if you do not like it, you've

got to move to another country. Two, we have not yet made the case that it is in the best interest of people.

We have not been able to show them that serious reform is going to bring about the new millennium. And we talk in terms of how many candidates we finance, et cetera, et cetera, et cetera. But as other observers have noted, there are many other issues involved in whether a candidate wins or loses.

And I do not know about the new governor-elect in Minnesota, I do not know whether the public financing resulted in his being elected. I suspect it is very hard to prove that, but we have not made the case yet.

MR. POTTER: The great thing about the federal system is that there are so many different approaches and, of course, you do not actually have to move to another country; you merely have to move to a state that has an initiative process, and then you can at least try this at the local level.

I want to turn to Bob Stern, because he is in a state with an initiative process that does not have public financing. Indeed, California has sort of the antithesis of it, which is huge sums of private financing, indeed intensely private financing, in the last election.

Two questions for you. What is going on in California, and why has public financing not caught on there? Then to the extent, Bob, you want to dive in to the other issues here, could you maybe address where you think there is public support and where there is not in the rest of the country?

MR. STERN: Thanks. It is nice to be back here. I was here eleven years ago, actually, testifying before the Feerick Commission on the New York City campaign law and then before the New York City Council, and I again want to congratulate New York City, one of the few jurisdictions where the public officials actually passed meaningful campaign reform.

And I was going to say to Harold, I am from the other country where the initiative process does work and public financing is making a comeback, thanks in part to the initiative process; also, some organizations like Public Campaign have been supporting these things throughout the country.

You have, in Maine, Arizona and Massachusetts, three states that have passed public financing through the initiative process. One state, Vermont, passed it through the legislative process. And all those states are "clean money" states.

In California, Trevor, we actually have passed public financing, and it is alive and well in Los Angeles, where in 1993, two incumbents out of, I believe, seven or eight, were defeated.

The challengers received public financing and the incumbents received public financing. Really, in the first election since the passage of public financing in Los Angeles, incumbents were defeated.

In Long Beach, also this year, the voters reaffirmed their support for public financing of campaigns, and California voters actually passed public financing in 1988 through a statewide initiative. But another measure which actually called for the repeal of public financing got more votes.

It went into effect, it turns out, because of constitutional questions and also questions of which got more votes. So I think there is a lot of activity throughout the states. Many jurisdictions, as well, have public financing and the public has supported public financing when it is put on the ballot. The problem, of course, is that only half the states have the initiative process, and as both John and Harold pointed out, it is very difficult to get the incumbents to pass legislation that affects themselves. And in my mind public financing does.

However, when Andy Rooney on *60 Minutes* starts talking about campaign financing, as he did last night, I think there is hope for all of us.

MR. POTTER: Bob, let me just parse the term you just used because I think it goes to a point that several panelists have made about what the goal of public financing is intended to be.

You stated that Arizona, Maine and Massachusetts are now all "clean money" states. It is an interestingly loaded phrase and I am curious to know what you mean by it. What is in it and what is out of it?

MR. STERN: Well, there is a major movement going on now to adopt public financing in a different form.

In the past we have always had matching funds, where you had to raise a certain number of contributions and then each contribution under \$250 was matched.

In Maine, Arizona and Massachusetts they are taking a different approach, saying, "if you collect enough five-dollar contributions, then you get a chunk of money and you do not have to worry about matching it anymore."

Now, while all those states have passed these measures, none has gone into effect yet, and we won't be seeing what the results are

until the year 2000. So the jury is really out on “clean money,” but it is a new approach to public financing, which I think has some merit. I think both approaches have merit; we really have to see how well it works.

In Los Angeles, as I said, the public financing has worked at the City Council level, but it did not work at the mayoral level where we had a rich candidate come in and blow away the opponents. I think, in a sense, when the states, and most states other than Minnesota and Wisconsin generally focus on the statewide races, I think the focus needs to be more on the legislature. But, again, that is the toughest place because the legislators have to pass it.

So I think that “clean money” is an approach whose time will come perhaps as we see the results of it. Matching funds has been the traditional way in all states, however, maybe with the exception of Arizona, New York City and also Los Angeles.

So passing it is one thing. In Massachusetts, for example, the legislature now has to appropriate the money. The question will be whether the legislature appropriates sufficient funding.

So in conclusion, the question, I guess, is if we have a ninety-nine percent incumbent reelection rate in Congress, shouldn't we try something that maybe reduces that to something less than ninety-nine percent?

MR. POTTER: Thank you. Harold, there you have your answer. California is, in fact, a different country. Bob has described this miraculous new system of “clean money” where instead of using the traditional matching funds, we will have full public funding of the election in return for no private funds being involved. You will have no worries about matching funds.

It occurs to me that may have a peculiarly familiar ring to you since that is the description often given of the funding system for our presidential general elections. In the primaries, you have matching funds, but in the general elections you are given \$70 million dollars of public funds in return for no private money in the system.

Do you have any views as to whether this radical new idea is going to, in fact, work?

MR. ICKES: Point one, I think it is worth trying. I mean, do not get me wrong on that. I think it is certainly worth trying. Again, I will beat my dead horse once again, what is the ultimate goal of the electoral process?

It seems to me that it is not just the amount of money we hand out and the number of candidates that are waging battle in a particular district, but it is a larger goal. The real question, it seems to me, which we won't be able to get any answer to for a considerable period of time, is whether there is a measurable and beneficial effect on public policy. At least that is my test; people have different tests.

Coming back to the question, however, there is full public funding. There was a debate within the Clinton campaign early on as to whether or not the president should go under the Campaign Finance Act in the 1996 election. He was against it, I was in favor of it; the president finally came down in favor of it. And I think that the thing seemed to have worked out well. Whether it worked out well because they went under it or not I do not know. You get, as you point out, about \$70 million, \$60 million dollars in the general election.

However, there is enormous spending outside the system and that obviously can, not necessarily does, have an influence. And this goes back to John's point about free speech.

I mean, what do you do about the First Amendment? What do you do about *Buckley* and especially footnote 52?⁵⁰ Do you revisit that, and does the Supreme Court, after twenty or twenty-five years' experience, come back and take another look at that?

It strikes me that if you look at the votes in the *Colorado* case,⁵¹ I am not sure I would want to send up any legislative initiatives to this current Supreme Court and expect them to revise footnote 52 in terms of what many reformers would want.

But there is a lot of spending on the outside. There are very large interest groups on both sides of the aisle. The AFL-CIO, as well as others under our First Amendment system, has a right to spend money, and I understand that there is always the question about whether an expenditure is truly independent if it is an advocacy expenditure. Those are very difficult lines from a factual point

50. See *id.* at 44. Footnote 52 refers to the Court's construction of certain provisions of the Federal Election Campaign Act of 1971 as "applying only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." *Id.* at 43. The footnote states that:

This construction would restrict the application of § 608 (e)(1) to communications containing express words of advocacy of election or defeat, such as "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," "reject."

Id. at 43 n.52.

51. See *Colorado Republican Fed. Campaign Comm. v. Federal Election Comm'n*, 518 U.S. 604 (1996).

of view. Then you have the whole issue that came before, in 1996, about the issue ads which are not even covered by the statute.

So it is nice to have the money. We applauded it. It was transferred immediately, we put it to use. But there are other very big financial factors that, at this point, seem uncontrollable.

MR. POTTER: Kathy, how does Minnesota deal with any of this? Because Harold makes the point that in addition to having public funding you will inevitably have private outside spending. And I am not personalizing this at all because I think it has occurred in the last election in both parties. But the outside spending may well be in the national committee of one's own party, so it is not very far outside.

How does Minnesota deal with that in terms of your public financing system?

MS. CZAR: We have a statute that is currently being challenged in federal court that says any spending by the political party on behalf of its candidate is not an independent expenditure, but is, in fact, a contribution. And the parties are limited in what they can contribute to their candidate. The law has not been thrown out at this point.

So through this election cycle, the parties were limited in what they could do on behalf of their candidates.

MR. ICKES: How will the *Colorado* case intersect with that? It strikes me that the *Colorado* case was squarely on point.⁵² That was a spending case, not a contribution case. And it was a spending of hard money, as I understand it, by the Colorado Republican Committee, who did not have a candidate at the time and who was advertising against, I think, Tim Wirth for Senate.

But it strikes me, if you look at the *Colorado* case, that that would basically run afoul of your rule about party spending, would it not Kathy?

MS. CZAR: The argument that the attorney general is making at this point is that the *Colorado* case speaks to a point at which the party does not have a candidate on the ballot. Our law refers to the time after which the ballot for the general election is set.

Also, we allow a greater coordination between the candidates and the party in multi-candidate aspects of the campaign, which is

52. *See id.* (holding that Federal Election Campaign Act provision that imposed limitation on Colorado Republican party's pre-primary election expenditures made to oppose the Democratic incumbent in United States Senate campaign violated party's rights under the First Amendment).

not permitted under federal law. So we are making the case that it is a different statute.

MR. FUND: If I might just add something. I think we have to have a dose of cold, hard reality here about court decisions and how hard it is to overturn them.

The Supreme Court practices *stare decisis*, which is great respect for prior decisions. And I will note that in the early 1990s, there was a majority on the Supreme Court that, after twenty years of argument, decided that *Roe v. Wade*⁵³ was probably flawed constitutional law, came out of whole cloth, the “emanations of the penumbras.”

But partly because of how the public policy debate had moved on and partly because they did not want to be in the habit of overturning prior decisions, they chose not to overturn *Roe*.

I will tell you right now that unless there is a dramatically different Supreme Court, and I mean dramatically different, you are not, I repeat, not going to overturn *Buckley*. In fact, if in this current Court it were sent back up, you might see it expanded and fewer restrictions allowed.

And I think that just as the anti-abortion movement has had to learn to live with *stare decisis* in *Roe*, I think as a practical matter, simply because I think your time is valuable, do not count too much on *Buckley* being overturned. It has only happened a handful of times in all of American history that a major decision has been overturned. Do not count on it.

MR. POTTER: Well, of course, John’s right that it is rare to overturn and completely repudiate a major decision. So litigants are then left with, how does *Buckley* affect the decisions that follow?

MR. FUND: Well, we have seen it in the district courts. The FEC constantly loses. I have never seen a record like this outside of the old Chicago Cubs. I mean every time, it is like they march up the hill like Pickett’s charge, and they get slaughtered at the district court level.

So the district courts are pretty clear. Political money, political contributions are related to political speech. And that happens over and over again. And at some point you have to try a new approach.

53. 410 U.S. 113 (1973).

MR. POTTER: If we are fortunate, when we turn in a few moments to the question and answer session we might hear more on that from the general counsel of the FEC who is with us in the audience this morning.

Kevin, how do you see this all from the Wisconsin perspective where you have had some of these battles?

MR. KENNEDY: Well, we have had some battles with the speech issue. We have a restriction on the political parties, which is a little different from Minnesota's. If you want to engage in independent expenditures, you are welcome to do it. But we won't treat you as a political party anymore. We will treat you as a political action committee.

We are not going to restrict their speech, we just aren't going to give them the additional benefits that we give to parties.

So the parties have looked at the issue and are playing around the edges with spending. I think one of the things you have to recognize in what is happening here is that all of this is trying to test how far we can push or regulate the system.

What is going on in Wisconsin is simply, can Wisconsin's law be extended to regulate issue advocacy? We will have an argument on that in our Supreme Court in January.

The courts looked at issue advocacy before we had a lot of issue advocacy spending in the 1998 campaigns, and ads were not stopped before the election. Judges are probably better educated this time around. Even our board took a different position on the complaints that were filed this time around.

MR. POTTER: It strikes me that there is an interesting movement of this discussion over to John Fund's playing field. Because John started out by saying that what we are really talking about here is whether we can restrict and limit campaign speech. The discussion has been focusing on, is it constitutional to limit it? What about the speech that escapes the limit?

The question that occurs to me is, if we did not accept John's premise that it is the purpose of public financing to limit speech, but rather that there is some other purpose, what would that other purpose be?

MS. CZAR: Can I take a stab at it? I think that for me the best impact of public funding is that the party can recruit good candidates, good people to run for office.

And those people, if they're challengers, will have adequate resources to get their message out to the voters. And I think there is

a huge difference between an incumbent who wins without a challenge or with a token challenge, and an incumbent who wins with a two percent margin, whose record has been scrutinized by the press, whose votes have been put up on TV, who has had to answer for the money he has taken.

I think you get a different kind of legislature. I think you get a different kind of public policy when you have vigorously contested elections.

So in my job, I have to find people to run in seats where it is unlikely that they will win. If I have to tell these people, as I do with our Congressional candidates, "you will essentially be a fundraising machine for a media campaign that will get predominately negative," they are not likely to run.

If I get to tell a candidate, "we can help you raise the seed money through the contribution refund program, you will get substantial support from the state, you will not have to spend three hours a day raising money. You will be able to talk and reach voters with your programs and your platforms." They will say, "I'll take a chance." And sometimes they win.

But every campaign that those people are engaged in makes for better policy down the line, I think.

MR. STERN: Trevor, you really hit the nub of it, I think, in the sense that this is the dilemma that everybody has, and that is, you just give public money without any restrictions, and no one has tried that.

Political scientists have argued for that for years: let us give everybody a certain amount of money, but let us not put any restrictions on them.

Incumbents would not go for it, because incumbents would say you are giving all my opponents public money and there are no restrictions on them. And probably the public would not go for it either.

The public has been passing public financing measures, but with restrictions, and the public loves to limit spending. The public hates these thirty second commercials and hates all this spending.

So if you took away all of the restrictions, probably the public would not pass it either.

MR. POTTER: John, and then we are going to open it up.

MR. FUND: Again, I will point out that public financing is inextricably linked to limits on all of these issue advocacy ads and other independent expenditures that people do not like.

It is true that in 1998 no court threw ads off the air a week before the election. That was largely because it was up before the Supreme Court. It could happen again. I know how judge-shopping works.

I can name certain judges in certain states where if I wanted to throw an ad off the air, under this system, I could go and find it and have it thrown off the air a week before the election, as was done in 1996.

The attorney general of Wisconsin has shown up in court and said that political speech standards "should be developed on a case-by-case basis similar to obscenity standards."

He reasons that since courts are able to determine what is obscene, so too should they be able to determine what constitutes political speech. This is his quote: "there is no need for the new rules to be defined with such God-like precision that the regulatory power of the states is removed."

That is not the rule of law, that is the rule of man. That is called discretion. And any time you are going to get judicial or regulatory discretion in political speech, you are treading down a very dangerous path. Which is why the ACLU and other groups have entered into this case. This is "discretion."

Discretion means gaming the system. Sometimes it will be gamed in areas that you would like, and sometimes it will be a very rude surprise and it will happen just a few days before an election.

MR. POTTER: So there you have it. The question is, "is political speech obscene?" Questions from the audience. If you have a question for a particular member, if you will identify that member of the panel, otherwise throw it open and we will argue among ourselves.

AUDIENCE: I am Elizabeth Lubetkin Lipton. I am president of the Women's City Club. We have supported campaign finance for many years.

Just a quick question to anyone on the panel, Harold Ickes, particularly. We talk about limiting campaign finance funding or expenditures because we want not only wealthy candidates to win.

What about limiting the time that campaigning can go? I do believe in both England and France they do limit the amount of time, and that is one way also to decrease funding or spending?

MR. ICKES: Elizabeth, your question is, what are the merits, in my view, of limiting the time that people can campaign? Well, I am all in favor of it. Having been through God knows how many pres-

idential campaigns that seem to run at least four years each, I would be in favor of that.

Again, I do not know, I have not given any thought to the constitutional implications of that. Certainly, it seems to me, it has very serious constitutional implications if you are going to enact a federal law or a state law which says that the campaigns can only start now and end then.

There may be some basis for that, but it seems to me that John Fund might well have a problem on that, because it really does tread all over the right to speak.

MR. STERN: The Los Angeles ethics law does limit the amount of time that a candidate can raise funds. For a citywide candidate, they can only raise funds in the last two years before the election. For City Council races, it is only eighteen months before the election. And that law has not been challenged.

AUDIENCE: Jonathan Gelman, an attorney here in the city. The question, I guess, is for Mr. Fund. When you talked about how the restrictions on spending could affect the power of certain groups at the expense of others, I wonder if you might refine that and say that, in a sense, what you are doing is shifting the balance a bit, if you have spending limits, from more costly media, like television and particularly negative ads, to less costly media, once you have more limited means, like the print media, where there at least is a bit more for readers to discriminate what is going on. And I wonder if shifting the balance a bit might be beneficial?

MR. FUND: Well, you shift the balance a bit only if people read newspapers. And I assure you, from circulation figures of the top fifty newspapers around the country that were just released last week, you can bring a horse to water but you cannot make it drink.

You cannot make people read something that they won't. We have become an illiterate nation, and that is a whole other subject. And I noticed that in Minnesota and Wisconsin there were lots of campaign commercials, including in races where there was public financing.

I do not think you are going to get around that. You may not like television commercials, and voters may tell you that they do not like them, but most voters get most of their information from television, and exit polls will prove that over and over again.

So your argument may not be with the system and may be with the electorate.

MR. POTTER: Here we go, the voters are wrong. Yes, sir.

AUDIENCE: Paul Windels, also a lawyer in New York City. I would like to direct a question either to Ms. Czar or Mr. Kennedy, particularly picking up on something that Mr. Ickes said about the advantages of incumbency.

In your public finance system, what restrictions do you have on the amount that legislators can spend on staff that is devoted to "constituent services," read "campaign outreach," and the amount that they can spend on newsletters, which at least in the New York experience are little more than glorified campaign flyers?

MS. CZAR: In Minnesota, we are on to them. The legislators are allowed to send out one post-session newsletter. In the even numbered years, the legislative session generally ends in April.

Half of that newsletter is counted as a campaign expenditure. Any other constituent services they perform after that cut-off are counted as campaign expenditures.

MR. KENNEDY: In Wisconsin, there is a restriction on elected public officials at all levels of government. Within the period after the campaign starts circulating nomination papers, they cannot distribute more than fifty items that are paid for at state expense.

It eliminates to a certain extent abusing the newsletters, although they all come out before the deadline. But incumbents will always have an advantage, because they have been in the office. A lot of attention is drawn to them over the period of time they are in office. But it is one way of bringing it back. And they constantly challenge it to determine how far they can push it.

MR. FUND: I just have one quick question. How do you value a constituent service? How do you put a value on it; in other words, if somebody gets a lost check restored to them from a government bureaucracy, how do you value that?

MS. CZAR: Not the individual constituent services but the correspondence to or advertising by an incumbent that is about the previous legislative session.

MR. FUND: What do you count against their limit, outside of the newsletters?

MS. CZAR: Incumbents used to do congratulatory letters to all of the high school graduates in the district, encouraging them to be active and involved in the community.

MR. FUND: Well, if they give congratulatory speeches, I suppose we could count that, too.

MR. POTTER: Next question.

AUDIENCE: When you offer campaign finance, or in some cases I might consider it free money, you might have more takers who have no interest in actually winning an election.

Another way free speech might be called advertising. I am wondering whether or not you know of any cases in any other states where candidates are promoting a business or are promoting other issues rather than winning an election?

MR. FUND: I know the Reform Party people pretty well. And, you know, there was a split in the Reform Party because the national organization had not helped Jesse Ventura at all in Minnesota.

And I am told that many people were convinced that, win or lose, Jesse Ventura was going to do just fine because if he had narrowly lost, his radio talk show would have done very, very well.

But I do not think Jesse Ventura was running for that motivation, let me make that clear, but another person like a Jesse Ventura in another state could certainly run to promote their radio talk show or their law practice or almost anything else. It is conceivable.

MR. STERN: I have not heard of that. I think because politicians are in such low regard that it would be a disaster —

MR. FUND: So are radio talk show hosts.

MR. STERN: Disaster for a businessperson to try to benefit from it.

MS. CZAR: I think that any public financing has to require a candidate and/or a party to meet a threshold to be viable. In Minnesota, to be a major party, the party has to have a candidate for statewide office who gets five percent in the previous general election.

MR. POTTER: Of course the question presumes that the candidate will not be subject to such personal scrutiny that their reputation is ruined rather than expanded by their race.

AUDIENCE: I would like to address this to Mr. Fund, with a request that his paper expose some of the things that go on in this program here so people around the country will not make the same mistakes.

I have here the public payment report for the 1997 primary election. Sal Albanese gets \$254,250 and Ruth Messinger gets \$1,281,407. Five times as much. Now they want to give four-to-one matching funds, she would get twenty times as much.

Mark Green, who they have not completed the audit of yet, got \$366,745 for running against a phantom opponent and he is going to be one of the featured speakers here.

The program is full of holes and they do not want to hear any criticism of it.

MR. POTTER: Let me put the question to the panel, if I can.

MR. FUND: This is one of the problems with public financing. With public financing you get audited and sometimes the audit can go in one of two directions. They can be overzealous and used to trip up people and to try to get them indicted or embarrassed depending on where their money has gone. Or the audits can basically gloss over a lot of problems.

I simply recall the advice of Ronald Reagan who was once asked about public financing. He said beware of it: when you get into bed with the government, you will never get a good night's sleep.

You know, \$366,000, that is a lot of money. The public will demand accountability. Just as the public is demanding accountability for National Endowment for the Arts grants. And if Mr. Green wants to send his money for an upstate Congressional campaign, I am not going to argue against that. But there are some people in the public who will say that is not the purpose of the money. And I think you get into a whole other range of debates.

Scrutiny comes with public money. It is inevitable.

At least with the money that they raise privately, they can go spend it on whatever they want, within limits, and I think disclosure, which we are going to be discussing in another panel afterwards, is at least a partial answer, because the Internet and modern technology allow us to do things with disclosure that were never contemplated twenty years ago, when we had this last debate on campaign finance reform.

MR. POTTER: Bob Stern, what about gaming the system, do you see that possibility on a nationwide basis?

MR. STERN: Political consultants are very creative people and they can game any system. We have to point out, Ronald Reagan did accept the public money in all the elections he ran in.

So I think, when I started writing legislation twenty-three years ago, I was asked to write perfect legislation. And I wrote legislation. It became an initiative. I have learned that there is no such thing as perfect legislation. But you can improve the system, and I think that if it's gamed you can do something about.

MR. POTTER: Next question from the gentleman there.

AUDIENCE: Thank you. My name is Micha Sifri, I am a senior analyst for Public Campaign.

Since there was no campaign finance reform advocate on the panel who tried to answer Harold Ickes' questions, I am just going to briefly answer them and then throw a question back to Harold.

The goal, I think, of the "clean money" approach is not just to get more competition, which I think is the only thing people really talked about here. Nor is the goal to get money out of politics, which is I think the phantom that John Fund is boxing with.

But it is really just to break the direct dependence of candidates on private special interest money to finance their campaigns, to free candidates from the money chase so that they do not have to spend all their time in "coffees" and on the telephone calling people for money.

It is all to make it possible for good people to run who aren't capable of calling up that little fraction of the population that can write the thousand-dollar checks, and it is to dampen special interest influence both on the electoral process as well as on the governing process.

So my question back is, right now we have a system where one quarter of one percent of the population gives eighty percent of the funds that go into federal campaigns. Eighty percent of those people make more than one hundred thousand dollars a year, compared to just five percent of the population.

Do you think that is a good status quo, that it is healthy for our democracy to have our elections based on such a thin elite, when most of the population — we have heard a lot of talk about free speech — most of the population has no speech in the system?

MR. FUND: Since I am the one accused of shadowboxing here, let me say that this is a question that is a very good one. And I have worked with Micha on things like "none-of-the-above" ballot initiatives, so we have some ground for agreement.

This is directly related to the size of our government. Let me be blunt. A government this big, which can direct economic outcomes, it can reward certain businesses, it can punish certain businesses, it can drag other businesses into antitrust litigation. A government that big is going to have lots of money chasing it.

Money in politics is like a river: you can divert the flow, but you will not be able to dry it up, so long as you have a government that is this powerful. It takes — state, local and federal — about forty

percent of the nation's gross national product. And this is a fundamental, philosophical question.

If you want less special interest money in politics, you can have a smaller government; that is one way to get there. Now, many of the people in this room might not want that: therefore, you are going to get the special interest money, because it will find a way to influence the system. Senator John McCain, who's a great fan of campaign finance reform, admitted to me that there is a direct correlation between the extent to which an industry is regulated by the federal government and the extent to which it floods Washington with lobbyists, special interest campaign contributions and PAC dollars.

And the smaller and less regulated the industry, such as, until recently, the computer industry, the less it is involved in politics and the less special interest influence it exercises. The huge anti-trust suit against Microsoft might wake them up, and you will notice that Microsoft lobbyists used to number in the single digits, but they now number in the triple digits. And that is a direct result of government intervention.

So if you want a big government, you are going to get some baggage with it, and if you want to reduce special interest contributions, you might want to rethink the extent to which you would have the federal government intervene in these economic players' behavior.

AUDIENCE: We can debate that, but I would appreciate hearing Mr. Ickes' response.

MR. ICKES: I do not disagree even with any of the statistics you cite. I, again, come back to the point, it is not clear to me that public policy would be any different under a "Clean Money" Act, where nobody has to do anything except hold their hand out and get some money out of the government and then run for election. There is an enormous bias against incumbents which Trevor raised in making a point about my remarks.

Incumbents were not born. They got elected. And one can argue that you are really discounting the good sense of the American people. I do not discount the importance that money has, and I think there ought to be a leveling of the playing field.

I am not convinced that these systems have leveled the playing fields, and I am certainly not convinced yet that even if you level the playing field, there is going to be a material difference in public policy. Putting that aside, however, I am all for going forward on

it. But it strikes me that this whole issue of campaign finance, in some measure, really is pejorative about the will of the people.

There is a bias, it seems to me, on the part of reformers against incumbency, as if incumbency were bad. Incumbents were not born, they got elected. And they get reelected sometimes because people think that they have done a good job. Point one. Point two is the fact that this election, I think, had the lowest turnout since 1944 of eligible voters, defined as those who could vote if they, in fact, were registered.

Tell me whether "clean money" is going to affect that.

AUDIENCE: All I can say is in states that have progressive campaign finance laws, we have seen greater voter participation, not just more turnover but more participation. So, I think, yes, maybe the jury is still out, but I do not think we can accept the current status quo as the best of all worlds.

MR. POTTER: We have time for one last question.

AUDIENCE: My name is Alex Forger, a lawyer in New York. My experience is formulated by three years in Washington as president of the Legal Services Corporation with the 104th and 105th Congress.

I wonder, particularly from Mr. Ickes, whether the full public funding will do anything in respect to the impact that money has in formulating policies on the legislative halls, having witnessed the Legal Services funding being slashed by one third and saddled with every kind of restriction Congress could think of, and watching the growers manage to influence the vote, vis-à-vis the migrant workers; the housing industry against the tenants; and the Christian Coalition religious right having enormous influence on the actual votes in committees. Whereas the thirty-eight million poor people for whom Legal Services was created had no PAC or lobby and do not influence through contributions.

Am I naive in thinking that campaign reform in the financial area will make any difference in that, or will influence be exerted, in any event, on programs that affect people who have no particular standing in the country?

MR. ICKES: Again, we do not know, and that is what the interesting part about this debate is, we do not know and there are people who advocate stoutly that public policy will, in fact, immeasurably change.

I question that. I think that the special interests are going to figure out how to influence the legislative process, whether there is

money or whether there is some other way of doing it. I agree with John. Influence is going to flow in some way.

Right now a lot of influence is waged by money, I do not deny that in any way, shape or form. But I am not at all convinced and I certainly do not think the American people are convinced that the common welfare is going to be improved substantially.

I am not saying it won't be, we just do not know.

AUDIENCE: But incrementally it might help?

MR. ICKES: It may.

MR. POTTER: We are drawing to the close of this session. My program says that at this stage we should identify the consensus of the panel. I would like to just have a chance starting with Kathy and running down, to ask the question reflecting on this, with your background and having heard the discussion this morning, can you identify what you think the goal of public financing realistically should be? If there is to be public financing, what should it set out to accomplish?

MS. CZAR: I think in his opening remarks Mr. Ickes ran through a fairly comprehensive list. I think you want to have competitive elections. I think you want to have candidates with the ability to be heard by the electorate. I think you want to have a limit to the influence of special interests.

I think, realistically, you want to make sure that there is a place for the money to go. That river that you cannot dam up. And for money that is going outside of the direct campaign system, you want to make sure that there is some kind of disclosure, some kind of enforcement for people who break the campaign finance laws.

I think, ultimately, the goal is to restore faith in the government, in the people that we elect. And, I think that there is not a silver bullet. I think it has to be incremental. I am encouraged by the votes on initiatives in this last cycle, and I hope that the people in Washington are paying attention.

Because I think that with a balanced system of public funding for candidates and some other reforms that are going to be talked about today, we really can engage people in a different kind of political debate and maybe we will move away from thirty-five percent participation in an off-year election and see sixty, seventy or eighty percent of the people, who can vote, voting.

MR. POTTER: John, you have pointed out some of the down sides of all of this. Do you see an area that you think is worth focusing on?

MR. FUND: Well, we had our own Supreme Court disappointment when, by five-to-four, the Supreme Court voted that term limits could not be imposed on the state level on federal officials and that put a severe crimp in the term limits movement.

I still think that term limits are a good idea, and I will make a prediction that in the New York City Council, where I do not think you have had significant change on the basis of public financing, you are going to see open seats, competitive elections and new blood, one way or another, very soon. Because twice the voters in New York City have said that they do want term limits.

That is another interesting experiment. Let me end on a note of agreement with the other panelists. Louis Brandeis talked about the laboratories of democracy. Our federal system is wonderful in that it allows the states to experiment, within parameters. I am in favor of that. I think that some of the laws in Maine, Massachusetts and Vermont are going to be overturned by the courts. Some of it will probably remain and we will see how it works. I will just remind you about the initiative states, though. It is not a slam dunk that they will pass. Arizona was fifty-one to forty-nine, with no appreciable campaign waged against it.

You can cite polls all that you want, but there is some message in the fact that both in Wisconsin and in the national presidential campaign system that Mr. Ickes participated in, the percentage of people that checked that three-dollar box without any extra tax liability, the three dollars that goes to the presidential campaign fund, has declined from twenty-one percent in the 1970s to thirteen percent today. And is it continuing to decline.

So regardless of public expression of support for campaign finance reform, in general, the current version of it does not have public confidence and has lower participation where it counts: the check-off box on the IRS form every year.

MR. POTTER: John, since you have the opportunity to write more on this in other public fora, I am quickly going to let Kevin dive in and see if he has a thought on it and then we will end up with Harold.

MR. KENNEDY: I will just say that the goals that people have talked about for public funding have been identified by just about everyone, and they are not exclusive just to public funding, in

terms of wanting competitive elections, wanting to involve the electorate and wanting to limit spending.

But public funding is one factor and I do not think that we can overlook it. I think there are some difficulties in measuring it, as Mr. Ickes pointed out, but it is clearly one source of funding that is available, and there are many cases where you can point out where it did work. You can point to the case of the Senator in Wisconsin in 1982 who ousted an incumbent and has now moved on to the U.S. Senate.

MR. STERN: When we are looking at reforms, we look at the impact on the governmental process, and we look at the impact on the electoral process. I think you need to separate those. Obviously, in terms of the electoral process, we are talking about more competition and more voter participation.

When you look at the governmental process, you are looking at less influence on the government by special interests. However, I have to end on sort of a depressing note. I have been doing this for about twenty-seven years now, and my wife came to me and said you have been doing this for twenty-seven years, what have you accomplished? Have you increased public confidence in government, have you made for more participation? And if my answer is not quite what I would like it to be at this point, hopefully, in the future it will be better.

MR. POTTER: Any last thoughts, Harold?

MR. ICKES: No. I end where I began. I think that many of the things that have been articulated today and articulated in this debate as goals are merely means. And it seems to me that the ultimate goal, and in my view only, is that what we are talking about when we talk about campaign finance is the election of public officials. And why are we concerned about that? Is it because of the effect they have on public policy? And so I come back to where I opened up.

Are we convinced that public policy is going to be materially changed if we have "clean money," if we have no incumbents, if we have whatever you are talking about? All the other things that have been articulated, it seems to me, in large measure, are merely means to those goals.

I am applauding the experimentation that is taking place in the states. I think we ought to move forward on it. I share some of his reservations on the free speech area, but the system is going to

change whether we want it or not. And we ought to have more experimentation, we need more data.

MR. POTTER: We end where we will start. We are going to take a short break and the next panel will be "Local Innovations and Practical Answers to Campaign Costs." So we will have a chance to talk about those laboratories. Thank you, panelists, very much.

LOCAL INNOVATIONS AND PRACTICAL ANSWERS TO CAMPAIGN COSTS

Limiting the demand side of the campaign cash equation has been the most difficult challenge for reformers. The Federal Election Campaign Act Amendments of 1974 established mandatory spending limits for all federal candidates. The Supreme Court's decision in *Buckley v. Valeo*,⁵⁴ however, overturned the expenditure limits on First Amendment grounds. At the same time, the Court ruled that voluntary limits on campaign expenditures may be imposed as the price of receiving a government benefit, such as public matching funds. The *Buckley* decision has led to a bifurcated federal system in which presidential candidates may voluntarily subject themselves to the spending limits of the public financing program,⁵⁵ while House and Senate candidates (for whom no subsidy program exists) can spend unlimited amounts on their campaigns. Many state and local governments have devised their own programs of public campaign subsidies, which are often employed as inducements to candidates not only to limit their spending, but to provide greater disclosure; restrict contribution amounts; and, in some places, mandate participation in debates. Reformers have also sought to alleviate some of the demand for campaign cash, in the form of free television time, nonpartisan voter guides and other free media for campaign information to reach the voters. Former Congressman Bill Green, a member of the New York City Campaign Finance Board (the "Board"), moderated this panel.

MR. B. GREEN: Let me welcome you all to the panel on "Local Innovations and Practical Answers to Campaign Costs."

My name is Bill Green. I am a former member of Congress and currently serve as a member of the Board.

We have a very distinguished panel discussing this subject. Let me go from my far right.

Joel Gora is associate dean of the Brooklyn Law School and general counsel of the New York Civil Liberties Union. He has had long experience in this field going back to his service as national staff counsel and associate legal director for the American Civil Liberties Union, in which capacity, I gather, he served as co-coun-

54. 424 U.S. 1 (1976).

55. As this volume goes to press, George W. Bush, the front-runner in the quest for the Republican nomination for President, has announced that he will forego federal public financing, having raised nearly \$50 million for his campaign over a year before the election in 2000.

sel for the plaintiff in *Buckley*. He has also been an author of a number of books on legal and civil rights.

Next to him is Mark Green, who probably has had the most varied experience in dealing with campaign finance reform issues. That started with his experience as Ralph Nader's right-hand man and as head of Congress Watch for the Nader organization in the 1970s, and continued as a candidate for federal office, most recently, for the Democratic nomination for the U.S. Senate.

He has twice been elected Public Advocate of New York City, in which capacity, of course, he has been dealing with the city campaign finance laws as a participant. And in his role as Public Advocate, he has also been very concerned with those laws from a legislative point of view.

The Public Advocate position in New York City is perhaps an unusual one. In addition to its ombudsman function, the Public Advocate also has the right to file legislation with the City Council, and campaign finance happens to be one of the areas where Mark Green has been most interested.

To my immediate left, we have Joseph Mercurio, who is a political consultant with a quarter of a century's experience involved primarily in polling, direct mail and electronic media services. He has worked for nearly five hundred campaign and ballot initiatives.

Next to him we have Paul Taylor, who is executive director of the Alliance for Better Campaigns. His original career was in journalism, where he was a reporter for twenty-five years, the last fourteen of them with the *Washington Post*.

Most interestingly, from 1992 to 1995 he was with the *Post's*, South African Bureau, as its chief, reporting on the transition from apartheid to democracy. And then in 1996 he started the Free TV for Straight Talk Coalition. They launched the Alliance in January 1998.

We have Robert M. Stern as another resource for the panel on state and local government initiatives around the country. Mr. Stern is Co-Director of the Center for Governmental Studies, based in Los Angeles, and past General Counsel of the California Fair Political Practices Commission.

Let me just make some very brief opening remarks. I was particularly interested in the first panel because, while these kinds of fora tend to focus on spending and contribution issues and the size thereof, there was more emphasis than I had anticipated on the role of public financing as a means of access to candidacy.

On reflection, I decided I shouldn't have been so surprised, because when the Board held its post-election hearings in January of this year, a fair number of the people who testified before us testified to the importance of the program in terms of enabling them to make a start in political activity and candidacy where, otherwise, they felt they would not have had the resources to do it.

Now, I must confess that those who so testified were mostly candidates in primaries for the City Council. And despite campaign finance reform, most of our Council races are still essentially one-party races decided in the primaries.

So it may be that the access given to those involved in races at the entry-level position for local political activity may not be relevant in terms of access to the political process for others around the country, and other more expensive kinds of races.

I leave it to my colleagues on this panel whether they want to discuss that or whatever else is on their minds.

Again, as I indicated, Mark Green has had the greatest variety of experience, both as a critic of Congress and as a candidate involved in both the city and the federal systems, and then as a public official with election reform very much within his jurisdiction.

So I ask Mark Green, New York City's Public Advocate, to start us off.

MR. M. GREEN: Thank you, Bill Green, and thank you Bill and Nicole for the invitation, because I have long regarded the New York City Campaign Finance Act and Board as the exemplars in the country, the pioneers for what other cities and states in the federal government should be pursuing.

Let me pick up, at the risk of sounding personal, on Bill's comment that I have the most varied experience.

In 1972, I wrote a book with Ralph Nader, *Who Runs Congress?*⁵⁶ Its thesis: money talks, and other than incumbency, the most decisive variable in predicting who wins elections is the size of a bank account.

I then ended up running for the U.S. Senate in New York in 1986, against the then-incumbent, Al D'Amato, who spent the then-record \$13 million in a general election. And two months ago, I came out of a primary for the U.S. Senate, running against a Democrat, who won and, of course, who spent the most money in American history in a primary.

56. MARK J. GREEN ET AL., *WHO RUNS CONGRESS?* (1972).

And I realized either my book was wrong or my candidacy was wrong. It turns out I was a better author than candidate.

I was wrong only in that money did not just talk, money shouted.

The most important and most difficult issue facing legislators, in my view, most important because it is really tough to reform or affect so many other issues areas: the environment, defense spending, so long as companies that pollute and defense contractors have their thumb on the electoral scale.

Every incumbent by definition is an expert in campaign finance laws, because they used them and got there and are not all that happy to change the system that has enabled them to politically prosper.

In my view, big, tainted, legislatively-interested money is poisoning our democracy, and I say this as a student of and participant in the process. It leaves, as Senator Bob Byrd once aptly said, the two legislatures of part-time legislators and full-time fund raisers.

When Bill Bradley acknowledges in his autobiography that he spent forty percent of his first term raising money, you can see the level of the problem.

Second, this process, even before people run and win or lose, prices out good women and men who think they cannot afford the ticket of entry. When I was a little-known candidate for the U.S. Senate in 1986, I remember the Democratic State Chairman saying: "Senator Mark Green, you're a very nice fellow, where is your \$5 million start-up money?" In our first meeting! And I replied, "I had it when I left the office."

He had been picked by then-Governor Mario Cuomo, and I pointed out that if candidate Mario Cuomo in 1982, when he seemed an unlikely winner, had been asked such a question, he would not be the governor and this Democratic State Chair would not be the chair.

Third, clearly many candidates enter office with strings attached. And if you do not think that big interests who give big monies do not occasionally pull the strings, I suggest you try running for office with integrity and then getting phone calls from people who enabled you to hold the office.

And finally, as I mentioned, other than incumbency, the variable of money is the best predictor of who wins, and I wonder if that is what the founding fathers had in mind for the New York State legislature. This year, we set the record. One hundred percent of incumbents who ran, won.

The solution is a lower ceiling on what people can spend by placing a cap on spending by candidates, or on soft money. And raising the floor under what candidates can spend by public subsidies such as matching public funds or, a form of public subsidy, free or subsidized radio or TV time.

And I am a strong believer in higher floors, which is what happens in the campaign finance system in New York City. And I would argue that if matching funds is a good enough process to run for mayor of New York City and president of the United States, maybe it would not be such a bad idea to apply it for statewide office in our state and other states and for Congressional and Senate offices as well.

We just came off a gubernatorial race — and again this is not a partisan comment — what counts is not the money you raise, what counts is the net money at the end to spend on voter contact, by radio, television or persuasion mail.

And irrespective of your party, it is just uneven, unhealthy and unfair that at the end of the gubernatorial race, the incumbent had nine million dollars available and the Democratic nominee and challenger had \$250,000 available.

When you are outspent two-to-one, you can win. Let me say, when you are outspent thirty-six-to-one, you can have Lyndon LaRouche at thirty-six and Franklin Roosevelt at one, and I would bet on the person who had the thirty-six-to-one ratio.

Finally, an expenditure cap is important, because it means that nobody can, in a sense, buy the election by inundation. And let me just conclude with two final points.

It is very interesting when you run for office and your opponent, as just happened to me, outspends you twelve-to-one in voter contact in the last month. What it means is you cannot watch TV with your family, which I regard as a loss of my free speech or free viewing rights.

Finally, in New York City we are in an interesting moment. The Vallone-Green bill,⁵⁷ which I proudly gaveled into law when we overrode the mayor's veto forty-four-to-four, says that if you opt out of taking corporate money, as no federal candidate is allowed to take, then any gift up to \$250 is matched four-to-one by the public treasury and the maximum gift has been cut from \$8500 to \$4500.

57. See N.Y.C. ADMIN. CODE tit. 3, §§ 708-710(1), 801 (1998); see also New York City Council, New York City Local Law 39 of 1998 (visited May 1, 1999) <<http://leah.council.nyc.ny.us/law98/int0345a.htm>>.

What that means is clean public money. The taxpayer who passes me in the street cannot claim to own me if I use public money. Clean public money supplants, if not preempts, interested money, money with strings attached. The mayor has gotten a referendum enacted that bans all corporate gifts, which, I believe, now is complementary to the bill that we have enacted. Because what it says now is, you cannot opt for gifts from corporate treasuries.

Now everybody is in a situation where we have races that have an equal playing field, where merit more than money is the best predictor of success. Thank you very much.

MR. B. GREEN: Next we will hear from Joel Gora of the New York Civil Liberties Union. As we have heard here today, obviously First Amendment considerations and *Buckley* have been looming over us, so I think it is quite appropriate that we now hear from Joel Gora.

MR. GORA: Thank you, Congressman Green and Mark Green. It is an honor for me to be here today. Those of you who looked at your printed programs see that I am substituting for Nadine Strossen and I am a very poor substitute, because she is terrific as president of the ACLU. What I lack in her skills and talents, I make up for at least in longevity, because I have been dealing with campaign finance issues for ten years longer than Mark Green has, since 1962. And I have learned a number of lessons, which I will try to briefly share. But I would like to make it clear at the outset, the ACLU, with which I have worked on these issues for almost thirty years, is fully in favor of campaign finance reform.

I am going to propose a three-part program of reform that I think will agree with a lot of what Mark Green has said and will solve a lot of the problems he has mentioned that he has had as a candidate, and then after that is done, if he cannot get elected, it will only be his fault and not the fault of campaign finance.

Here are the three things I think you have to think about.

Number one, stop the preoccupation with limiting campaign spending, because that is limiting free speech. If that is too esoteric a First Amendment issue for you, it does not work. If there is anything we have learned from thirty years of campaign funding controls, it is that limits do not work.

We limited contributions at the federal level and we have seen the rise of PACs, the rise of issue advocacy, the rise of soft money spending by parties, to fill the vacuum.

By the way, speaking of issue advocacy and special interests, you would be interested to know, based on a wonderful article in the *New York Times*, that the Sierra Club spent \$6 million in the last year or so targeting the defeat of fifteen members of the House and eight Senators with whom they disagreed on environmental issues.

Abortion rights groups targeted former Senator Al D'Amato in radio ads and television ads condemning his position on abortion. To me, those ads are the essence of democracy. Others call those ads "phony" issue ads or special interest ads. But they are wrong.

So the effort to limit political funding just won't work practically, not to mention constitutionally. So that is a dead end.

What we should do is try to find ways to enable candidates to raise funds rather than limit their ability to do so.

Number two, full and effective and meaningful disclosure, so that I, as a voter, can decide who has got too much influence, who is a special interest, who is in league with whom.

Full and effective disclosure, which we have in New York City, which I think is very important, which we have late and untimely at the federal level and which we have nonexistent at the state level would be the second part of my program of campaign finance reform, and the ACLU supports that as well. I think that is adequate, but not sufficient.

The final thing you need is the positive aspect, the third way of campaign finance reform. And that is serious and varied methods of public resources to support political candidacy.

I do not just mean matching funds, although I think that is a good idea. And I do not just mean direct grants, or public seed money to all candidates, not just those that meet a threshold, although I think that is a good idea.

I also mean the free "frank"⁵⁸ once, twice, three, four times in an election year. Public officials get it, and many of them use it during a campaign season to send out mailings saying what a wonderful job they do, and then they talk about "leveling the playing field."

Well, they did not appropriate money for their opponents to spend. One answer I heard in the earlier panel this morning is, let us limit the amount of franked mail that representatives and councilmembers can send out, so that way we sort of level the playing field.

58. "Frank" is a reference to the use of free congressional mailings available to incumbents. In the United States Congress, members are provided "franked" envelopes that contain a pre-printed signature of the member.

In my mind, that is lowering the playing field. I want to raise it. I want to allow my representatives to communicate with me in a reasonable fashion and a reasonable number of times. But I also want to provide resources and funds, public and private, for the *opponent* of that representative to communicate to me.

Because what I want in the two months before an election is not, as flawed bills like McCain-Feingold and Shays-Meehan⁵⁹ would do, to shut everybody up. I want to get everybody to speak up, and I want to provide them with a variety of resources and public and private benefits to enable them to get their message out.

I think the value of that third way is that it is really the *first* way. It is the First Amendment way: the government, Congress and otherwise, shall make no law abridging the freedom of speech. Thank you very much.

MR. B. GREEN: Thank you. And now for a somewhat different perspective, that of one who advises candidates and people putting propositions on the ballot about how to spend the money, Joseph Mercurio.

MR. MERCURIO: Yes, I am one of those people. In the last couple of federal cycles, I have, in addition to doing campaigns and acting as a consultant to other consultants, spent a lot of time training foreign candidates in their own elections and training foreign consultants in operating elections. And it is interesting to see their perspective on our elections.

It is a pretty dismal report. We do not have a lot of the electorate involved in elections. And we do not have a lot of elections that are actually contested.

In New York City, here where we are, there are hardly ever any contested elections. Some of the statewide and citywide elections are contested, but at the assembly, congressional, state legislative and City Council levels, there are virtually no contested elections. We do not even have it in the primaries here any longer.

Part of the problem is that we have systems that are fairly anti-democratic, whether it is the Board of Elections and how they structure access to voter lists or the ceilings placed on campaign spending or the difficulty new candidates have in finding money to start with.

I think the Board here in New York City is one of the best around, and it is a very good start in getting at campaign financing. But we really cannot limit discourse. I think we have to trust the

59. See *supra* note 20.

electorate and we have to trust them because discussions of issues and performance in office are the two singular things that I disagree with Mark about.

Those are the things that determine outcomes. The only thing you have when you have money in a campaign is the ability to inform voters about that.

And I think it is dangerous to have limits on spending because you set up a situation where independent groups could, in effect, dominate the process and, in specific elections, throw people out or dominate the public policy discussion without candidates being able to compete or defend themselves.

In New York, it was mentioned that we had an election for the Senate in which there were advocacy commercials designed to defeat the incumbent Senator.

He had a position on a very important public policy issue: choice. He was endorsed by the Right to Life party in the state. He held that position in his voting throughout his career. I did some of the commercials on the other side of that candidate. I did the Liberal Party pro-choice commercials. There were other Liberal Party commercials another producer had.

That was an important piece of the public policy discussion in this election. It increased turnout, it increased public participation and, I think, it was a very useful thing to have.

But you really cannot have that happen if the candidate has a cap on his spending. It really is not fair in the public policy debate to only have third parties doing that kind of issue advertising.

There are all sorts of conversations about what the public likes or dislikes in television advertising, and whether we should allow such lavish spending on television.

A lot of people get their information from television advertising. And the system does not work effectively for print advertising, direct mail advertising and literature in campaigns.

You get a lot of people who say they are heavily involved with the issues in campaigns and they do not follow the television debate. But then when you talk to them at a cocktail party and they tell you that, they start using phrases out of the commercials as the way they talk about the campaign.

If you wanted to take the influence of big money out of campaigns, you could do something very simple. As you saw in the Senate race, the Liberal Party did a direct mail campaign and they sent out 900,000 pieces of mail.

They are a political party, so they get to mail stuff at a substantially lower rate than a candidate does. They get the nonprofit rate when they mail stuff. Most campaigns and most political spending is by candidates who aren't involved in large enough elections to use large amounts of television.

If the federal government was serious about campaign finance reform, they could do a lot by simply changing the postage rate that candidates pay from the bulk rate that commercial advertisers get for the charitable rate that nonprofits get. That would go a long way to changing the system and lowering the cost to campaigns.

MR. B. GREEN: Thank you, Joe. Finally, Paul Taylor, executive director of the Alliance for Better Campaigns.

MR. TAYLOR: Thank you, Congressman. Thank you for having me.

As we meet here this morning, there is a meeting going on in Washington, D.C. of a group entitled "Advisory Committee on Public Interest Obligations of Digital Broadcasters." I think this group is onto something that is a small, tangible, practical fix to some of the problems we have been discussing this morning.

A fix that, because it is small and tangible, has a chance of actually being achievable, and it does not run afoul of the concerns that Joel Gora and others have raised about the First Amendment.

It was a group that was appointed by President Clinton about a year and a half ago. It was made up of public interest advocates and leaders in the broadcast industry.

It was appointed shortly after the nation's 1600 television stations were awarded additional space on the nation's air waves in order to facilitate their transition to digital technology, a transition that is beginning even as we speak.

The question was, should the public get something back in return for this award of extra spectrum space? Other users of the spectrum, cell phones, et cetera, are paying billions of dollars to the government, but the broadcasters got the new space for free, continuing a tradition that started in 1934 with radio.

Our model for broadcasting has been: we the people give you the broadcasters exclusive monopoly rights to use our air waves, but in return we expect you to be public trustees to serve the public interest, convenience and necessity. And one question before the advisory group was: should the award of air time during the campaign season be part of that public interest obligation?

To pick up on Mr. Mercurio's theme, that is the case in virtually every country around the world. That is just the way it is done. Candidates and/or parties get time to go on the air to deliver their messages.

We do not do it this way, and there are two reasons we do not. One is the broadcast industry. It has a lot of clout in Washington and it does not want to give up its air time. And the other, of course, is incumbents who understand that such a system would, on balance, be better for challengers, because it would tend to level the playing field.

A total of 163 bills calling for free air time have been introduced in Congress since 1960, and every one of them has gone down in flames. This advisory group was created by President Clinton in the hopes it would come forward with a recommendation on free air time.

Indeed, in Clinton and Gore, you have two national leaders who are committed to this and you have a Federal Communications Commission for the first time, so far as I know, that has three of the five members committed to this.

Still this body that is meeting today is only an advisory body; it is not going to recommend a mandatory system of free air time because it recognizes that political realities will prevent it.

But it is going to recommend something that I think is highly attractive and may provide a way to a better system, a way to improve the culture of campaigns, the discourse of campaigns, and reduce some of the problems with big spending and lack of competitiveness.

What it will recommend is a voluntary industry standard that applies to every television station in the country, and it should be expanded to radio and cable as well, but we will start with the television stations. In the final thirty days before every election, television stations must devote five minutes a night in prime time to what is called "candidate-centered discourse."

That means debates, mini-debates, issue presentations and extended interviews. This is not government mandated, obviously, for government cannot get in the business of telling a journalistic enterprise what it should do with its time.

This is saying that the industry ought to set this as a standard for its members. And if we create a world in which night after night for the last thirty days before an election when you turn on your television set and watch the local news, you are getting Schumer and D'Amato discussing issues, rather than what you get now,

which is Schumer and D'Amato's thirty-second spot. I think that is a better world. And if every station does it, I think it has the power and the reach to go where the audience is, to go where the nonvoters are, quite frankly, and deliver those voters information in a more attractive, more nourishing package than they get from the thirty-second spot.

Somebody did a survey of local television stations, which, unlike newspapers that are losing readers, are hanging onto their audience. They have high credibility with their audience, and someone did a survey in the past election in about twenty-five states, a survey of more than one hundred local stations, and discovered that if you watch that ten o'clock or eleven o'clock news show, you watch that half hour, you will see four times more political ads in the course of that half hour than you will see political stories about the campaign.

I say this as a former journalist. I think, to some degree, print and broadcast journalists have abdicated their responsibilities to cover these campaigns and to deliver meaningful information to citizens. I think we are left with campaigns, when they become high profile campaigns, such as New York has just experienced, where it is a gouge-your-eyes-out exercise of negative ads. I think it is heavily implicated in the forty-year decline in turn-out and public confidence. And this system is entirely voluntary, it promotes good discourse and may alleviate some of the problems of campaign finance. I think it is worth a shot. Thank you very much.

MR. B. GREEN: Does any member of the panel want a second go to question what someone else has said?

MR. M. GREEN: Sure. First, Joe Mercurio said that if you limit discourse, it is dangerous and unfair. Indeed, if you set an expenditure cap too low, it could be dangerous and unfair. Say nobody can spend more than one hundred dollars to run for City Council. That would be a pro-incumbent law because incumbency has its advantages and challengers have to have enough money to be able to speak.

Basically, the system we have now, Joe, is unbelievably unfair. It's as if one candidate has a bull horn and the other is limited to a whisper. That is the real world result of the current system we have now. I am reminded of Sam Rayburn's comment that when he hears a reformer speak, he wishes one of them would once run for sheriff.

If you have run for office, you know the issue is not whether it is unfair if we go to expenditure caps. The current system is unfair.

Second, expenditure caps work. We have had it presidentially, we have had it municipally. Nixon outspends McGovern \$60 to \$20 million. In 1976 and in 1980, the two incumbent presidents spend equal to the challengers and both incumbent presidents, Ford and then Carter, lose.

I am not saying they should or shouldn't have lost. But clearly, it was more competitive because of the expenditure cap which was constitutional under *Buckley*, because it was part of a voluntary system of matching funds.

In New York City, Koch outspends Bellamy in a primary in 1985 approximately ten to one. It wasn't competitive. Of course, to change that would be unfair and dangerous, Joe.

Well, the city did change it and in 1989 and in 1993, municipally, the incumbents lost. Koch in 1989 and then Dinkins in 1993. Again, when you pay your money you take your choice, but that system of expenditure caps above and a floor below work to make elections more competitive. And I would say under strict scrutiny tests, to have elections that are competitive is a compelling state interest as opposed to having Kremlin-like elections.

Finally, the statement is made by the Court, because of your good arguments, Joel, that money is speech. I will never be a Justice, but I will respectfully dissent.

If money is speech, why do we have laws against bribery? Why do we have laws against deceptive advertising? For years, I enforced laws against deceptive advertising.

The real world result of opposing expenditure caps is thousands of candidates spending millions of hours raising billions of dollars instead of legislating. And oppressing donors who get dozens and hundreds of calls from people around the country because they end up on lists, in a dance of mutual legal corruption.

The donors do not like it, the candidates do not like it, but if they do not call and raise, and if donors do not give, everybody is afraid they won't get reelected and their economic interests won't be listened to.

I think that is corrupt, it is unfair, and what is dangerous is the status quo, not the reforms that have been proven to work.

MR. B. GREEN: Joel, let me give you a chance to respond.

MR. GORA: Number one, I agree with Mark Green: incumbents cannot be trusted to decide what the rules about political

finance ought to be because they are always going to set them in a way most favorable to them. If they are deciding how much is enough speech to campaign on, you know what they are going to decide.

Number two, I think a Soviet-style system that Mark referred to is one where the government decides how much speech you can have. That is what I am trying to argue against.

Number three, one can argue about why different elections came out the way they did, whether the fact that incumbents were knocked out in mayoral races was a result of campaign funding rules or was a result of grievances accumulated against incumbents or whatever it might be.

But if you want a poster child for the failure of campaign funding that is limits driven, take a look at the 1996 presidential campaign. In 1995, the president of the United States realized after the election of a Republican Congress for the first time and the Contract with America and Harry and Louise, that the only way that he was going to rebound as he masterfully did was to get out his message that the Democrats were the good guys, the Republicans were the bad guys and the Republicans were going to take away your Social Security.

And that is what generated the multimillion-dollar fundraising in the White House. And that is what generated the multimillion-dollar image and issue advertising by the Democratic National Committee, and all of that happened before the presidential campaign and presidential funding got started.

So I think if you want to look for a model of how the system of public funding based on limits does *not* work, take a look at the last presidential election.

MR. B. GREEN: Could I ask a question of all of the participants? And I want to get back to Harold Ickes' point. What difference does campaign finance reform make if, as he pointed out, only one incumbent who ran for reelection to the City Council lost in New York City, which is generally regarded as having one of the most effective campaign finance reform laws in the country.

As he pointed out by way of comparison, in New York State, which has one of the weakest campaign laws at the state level, there is the same result. Virtually no turnover in the state legislature. Federally, we have sort of a mixed bag — low contribution limits, no spending limits — and the same result in the House, very few incumbents beaten. What is the difference?

MR. MERCURIO: Well, that is a partial answer also to Mark's comments. You had an election here for Congress in Brooklyn replacing Chuck Schumer when he left to work for the Senate. In the primary you had four candidates running. One of them, Noach Dear, spent more than all the other candidates. And he did not win.

The truth is that in politics, the best way to kill off bad candidates is to advertise them heavily. I can say that, knowing Mark won most of his elections. It is not true that money simply wins elections. You have to have content in the media.

It is also true that if you have got the best candidate with the best viewpoints to match up very well with his electorate, he cannot win unless he can communicate. And the only way you can communicate in our society is by spending some money. The book Mark spoke of costs money to print, and it probably costs money to buy.

You cannot have discourse in this country without spending some money. And in terms of television advertising, it is very difficult to deal with television and radio in our system. Everybody talks about "free airwaves."

Stations must already charge candidates the lowest unit rate charged to the most favored commercial client for the same advertisement program.

And you have got differences in the way the geography is set up. Not all states and not all Congressional districts are created equally in terms of television. That is one of the problems that suppresses democracy and democratic participation in New York City. We have a media market that makes it impossible for candidates to get covered in electronic media. They do not even get covered in the daily newspapers.

In most places candidates regularly debate on the news in the local newspapers. You do not have that here, and that is one of the reasons why we have so few contested elections in New York City and why you need a higher ceiling built on spending. So that you could actually have discourse.

MR. B. GREEN: Let me give Paul Taylor a shot.

MR. TAYLOR: I think the statistic is the winning candidate has more money in something like ninety-five percent or more of the cases. How much of that is cause and how much is effect? I think a little bit of both.

I think the biggest reason incumbents do so well is that the district is gerrymandered. They have all the advantages of the incumbency that we have discussed earlier. And in 1998 life is good for the great majority of Americans, so they are not going to rock the boat.

So I would be careful about tidy assumptions. I would also accept the premise, that there is no question money plays big time in politics. It always has, always will, and my sense is let us try to manage that rather than think we can eliminate that nexus. It is going to always be with us.

MR. B. GREEN: Bob Stern has been signaling me that he has a contribution to make at this point.

MR. STERN: Well, I do not think we can blame the campaign finance laws for the all the evils or benefits. There are many other factors obviously.

The question really is, do campaign finance laws improve a bad situation? I think some do and some do not. What if you repeal the presidential campaign finance law? What if you repeal the New York City campaign finance law, what kind of system would you have then?

Also, I think you need to take into account that the federal campaign finance law really hasn't changed in twenty-four years. Campaign consultants and also presidents are going to game the system.

I think that you need to see if you can change the laws to keep up with the modern technology. The problem then, of course, is that you have incumbents trying to change the laws or not trying to change the laws, and that would be very difficult.

Finally, we have not really talked about the new technology, and I think that we really need to explore that to some degree. We have something called the Democracy Network here in New York City, where voters could actually see debates by the candidates over the Internet. In the future, I think, with the Internet getting faster and faster, we may be seeing debates by candidates over the Internet, where voters can actually pick a candidate, pick an issue and see the candidate talk about that issue.

And for active voters, who are the minority, obviously, and even for some passive voters, this will be the opportunity for them to see the candidates, free of charge, in the sense that it will be free to the voters and free to the candidates to debate each other over television.

MR. B. GREEN: Could I ask those that want to ask questions to start lining up at the microphone, but I know Mark Green wants one final shot at things.

MR. M. GREEN: I too would like to involve the public. We have seen how elite opinion on the impeachment of Bill Clinton is so out of step with public opinion on impeachment and Bill Clinton. On campaign finance issues, let me just stipulate that when the public can get to vote on it, as they have in Massachusetts and Arizona last week, there is overwhelming support for the position that is contrary to that of the ACLU and Joe Mercurio.

I would just ask Joe a question that in a sense comes out of what Paul said. It is easy to always find an example of anything. A big money spender who lost, a little money spender who won, as with your Noach Dear example on the race to succeed Schumer.

But since eighty-nine percent of the people who spent the most money for House races won in 1992, ninety-two percent who spent the most won in 1996, and ninety-five percent who spent the most in house races won in 1998, do you not think that the Noach Dear example is aberrational and that by and large money correlates with success. So you cannot just say that it is not significant.

Let me ask a question of Joel, since we have both invoked Kremlin-like analogies. It is unarguable now that it is more democratic to run for the Russian legislature, more competitive, open and democratic to seek office in the Russian legislature, than the American legislature. And that is deplorable.

MR. B. GREEN: Let me hold the responses by the panelists until the wrap-up so that we have a chance to have the people who are waiting patiently at the microphone have their turn. And if you could identify the panelists to whom your questions are addressed, I would appreciate it.

AUDIENCE: Thank you. My name is John Bonifaz. I am the director of the Boston-based Voting Rights Institute which specializes in campaign finance litigation. Among our current cases is *Kruse v. City of Cincinnati*,⁶⁰ which is the first test case in twenty-two years to directly revisit the Supreme Court's ruling in *Buckley*, a case in which a petition for certiorari is now pending before the Court.

I would like to thank Mark Green for his comments and for his longstanding leadership on this issue. My question is directed to

60. 142 F.3d 907 (6th Cir. 1998).

Joel Gora who, I understand, is sitting in for Nadine Strossen but nevertheless is here representing the ACLU. I, too, am an ACLU member, a dues-paying member, but I happen to disagree vehemently with the ACLU's national office position on this issue. And in the interest of full disclosure, I think there are some things this audience ought to know that Joel did not tell you.

The first is that the official position of the national office of the ACLU on the issue of campaign financing is that both expenditure and contribution limits should be removed. There should be no limits whatsoever in the campaign finance system.

Second, the national office of the ACLU is very much involved in suing the State of Maine. It filed suit through the Maine Civil Liberties Union on Wednesday of last week, challenging the public financing system that is in place there, a voluntary system.

Third, the northern California and southern California ACLUs remained neutral in 1996 on the campaign finance reform initiatives there, despite the national office's position. The State of Massachusetts, the ACLU there, remained neutral on the Massachusetts clean money campaign reform.

In Arizona, the ACLU is part of the coalition that helped get "clean money" passed. And in Ohio and in New Mexico, both of those ACLU chapters have remained neutral in the case of the City of Cincinnati's case and in Albuquerque, which has had campaign spending limits successfully on the books for twenty-four years in its local elections.

And finally, nine past presidents and legal directors of the ACLU have recently come out calling for the reversal of the ACLU's position and the reversal of *Buckley*.

So my question is, Joel, are you really sure, are you really sure in 1998, that the position that you and the national office of the ACLU advocate on the question of campaign financing is supported by the rank and file membership of the ACLU?

MR. GORA: Let me just respond to the last question. John Bonifaz and I go across the country committing free speech against each other, and that is a good example of it.

In response to the last question, the ACLU is a very democratic organization. It has a national board of directors selected nationally and through its affiliates. The issue of campaign finance or the ACLU's policy on it has been before that board in the last twenty-five years more than almost any other issue.

Every time it is before that board, the policy that I articulated has been reaffirmed with only minor dissents, because the ACLU knows what the First Amendment is all about.

Number two, public funding issues are ones where the ACLU and I and Mark Green and many others are in favor of generous kinds of public funding. So the notion of quarreling with certain public funding arrangements is one that you have to approach very carefully. What I would say on the specifics is that bills like the one in Maine which John supports are bills that, although they provide public funding, they have some serious First Amendment flaws.

Number one, they so lowered the ability of a candidate to raise money privately by lowering private contribution limits that they, basically, coerced people or tried to coerce people into the public funding system.

In my view, the public funding system should be a valid alternative choice that a candidate has. Not something that is compelled by the fact that we gerrymander all the other rules.

Number two, and of particular concern in Maine, is a device whereby if you go out and spend money independently to support a publicly-funded candidate, that does not count against that candidate's limit.

If you go out and write an ad against that funded candidate or in favor of a nonpublicly-funded opponent, the government gives the funded candidate more money to respond to the ad.

So that does not level the playing field. That tilts the playing field in favor of the publicly-funded candidate to create another coercive pressure to force people into accepting the limits-driven basis of public funding.

So, yes, there may be some public funding schemes that have some merit. There are others that are deeply flawed, and groups like the ACLU will try to assess each case on the merits. But the basic point is, why spend all your time with public funding that is driven by limits, when you could remove many of those limits and allow candidates to get their messages out better?

I am speaking about limits. If I were to decide to challenge Mark Green for the Democratic nomination for the Senate seat in the year 2000, and if you put an overall expenditure limit in, that would not mean a thing to me. Because my problem is getting a message out so that I could counteract the years and years of valid public service that has given Mark Green the greatest voter identification and name recognition of any candidate in the field.

I do not care if he is limited or I am limited. What I need is money. I need it through private sources. I would like to be able to call up some of my law school pals and ask them for a contribution, but I am limited in what I could do for that. That is all the federal system gives me, period: a thousand dollar cap on contributions, then it's "go out and raise as much as I can."

I would like to get out of that box and provide ways to give me, as a person who is not well-known, but maybe has some good ideas, a chance to take on somebody like Mark Green. Give me various public and private resources, let people who contribute to me get up to a one hundred dollar tax credit. Give me a free mailing every three months, if I am a valid candidate and can get on the ballot. There are all kinds of things you can do. I think the problem is the people who call themselves reformers, who are the ones that are linked to the old fashioned, limits-driven, government handout method of public funding.

I am going to get out of that box. I am going to provide people with a banquet of benefits, government-provided and privately-provided, to have democratic funding of political campaigns, not government funding of campaigns.

MR. B. GREEN: If we can keep the questions a little shorter, the answers a little shorter, maybe more of the people on that line will have a chance.

AUDIENCE: My name is Larry Noble. I am general counsel of the Federal Election Commission (the "FEC"). I'm not here to gang up on Joel; I have a question for Joel. I was pleased to see that you said the ACLU is in favor of disclosure.

Can you define for us who the ACLU is in favor of having disclosed? Is it everybody, people who put out issue ads, or is it just people who expressly advocate the election?

MR. GORA: That, I think, is partly a rhetorical question because you know the position. The position is — I am proud to say, I have been a part of twenty-five years of creating First Amendment doctrine — that there has to be a bright line between campaign speech and issue speech. The bright line is based on express advocacy of an electoral outcome. And by virtue of that bright line, people who engage in issue discussion, even if it comes close to the line, are free to do so.

The Supreme Court has said that, and ten federal courts, disagreeing with the positions of the FEC that Larry so ably is general counsel of, have agreed, following the Supreme Court.

And so, yes, my position is that if you want to go out and raise an issue, even though it involves a candidate, you do not have to disclose, file your name with the government, and you certainly should not be subjected to the regime of controls and limits that candidates and their committees are subjected to because of the concerns identified in *Buckley* with respect to corruption. So that is number one.

Number two, in terms of disclosure, people who do give money to campaigns and to political candidates, my position is that disclosure of large sources of funding is a valid way to enable voters to decide who has got too much influence.

The problem is, I think, just as a matter of personal privacy, the FEC requires disclosure of any contribution, I think, in excess of two hundred dollars.

So if I give what is really a modest contribution by many standards, my boss finds out to whom I have given money. So I think that disclosure is important but only when it focuses at the level of contribution that could raise concerns about the potential of corruption in the long run.

AUDIENCE: Thank you. I thought that would be your answer.

MR. B. GREEN: Yes.

AUDIENCE: Hi. I am Susan Anderson, legislative director for Public Campaign. I want to thank you. I thought your opening comments were quite eloquent about the peril. I just want to offer a friendly amendment and question about the New York system that you hold up as a model. Here are three stats from the last mayoral election, one being that eight percent of Giuliani's and Messinger's money came in non-matchable amounts of one thousand dollars or more, that more money came from outside the City, also not matched, than from the four outer boroughs and that two-tenths of one percent of the population gave half the total funds raised. The revised system that you mentioned, I think, will definitely ameliorate the situation.

I think it is still going to force candidates to spend a significant time raising money from private sources. It is going to place a premium on the \$250 contributor, which is pretty much beyond the means of the majority of the poor and working population of the city, and there is also going to still be a huge role for the \$4500 contributor who is not matched.

So, therefore, do you think that New York City has arrived at reform, at real reform as you talked about it earlier, or do you

think that New York and other local jurisdictions need to consider a next stage in terms of a more full system for funding candidates, one that would not have them having to look for the \$250 contributor for those campaigns given those stats.

MR. M. GREEN: I think you have to walk before you can run. And I think the Vallone-Green bill⁶¹ does improve the law significantly, although I do not doubt that the clean money/clean elections group may have had an even better idea but which could not have gotten enacted.

Now, you made a small mistake when you said it still forces candidates or motivates candidates to seek \$250 gifts. The four-to-one match is of gifts up to \$250. And that is a big difference. Because when you are running, if you have a direct mail campaign and you get thousands of people to give twenty-five dollars, you multiply that by four, suddenly direct mail and thousands of people who give you money that is not legislatively interested is as important as the next Regency breakfast you might have.

The law says that up to fifty-five percent of the money that you spend can be public money. Personally, I would have liked it to have gone up to seventy or eighty percent. But politically, we could not get that enacted.

Again, allow me to get personal, but then Bill started by saying I have this varied experience. Someone like me could seek federal office again or municipal office again.

Let me assure you that when you think about running in a system where you have to raise \$10 to \$20 million in thousand dollar increments without public funds, it affects your judgment as compared to a system where there is half the money in public funds and you do not quite have to be forced to sell yourself to economic interests.

And let me say that when Joel eloquently answered the question about disclosure, I am for disclosure. Putting aside disclosure of soft money contributions, disclosure of direct contributions is desirable, necessary, but not sufficient by a long shot.

The tire industry in Ohio — or the oil industry in Dallas or the real estate industry in New York — more likely than not gives a lot of money to all competitive candidates. So even if you disclose contributions, desirable as that is, it does not adequately remove the potential for corruption.

61. See *supra* note 57.

Because if two candidates are both getting maximum amounts from the most dominant local industry, it does not really tell you enough, and that is independent, of course, of whether or not you have a thirty-six-to-one ratio of one candidate outspending another, which is the system we have in the state because we do not have expenditure limits.

MR. B. GREEN: I should mention that we shall be having a panel this afternoon on "Is Sunlight Enough?" So I hope we can have questions more directed towards this panel's issues.

AUDIENCE: I think I have an idea which would solve half the problem.

In citywide, statewide or nationwide elections, candidates need money for one thing and that is TV. How do you make TV less attractive to candidates without infringing on their freedom of speech? What if the FEC or Congress passed a law that said anyone using the public resource, such as television, to promote themselves for the political campaign, that person must be the only person appearing or speaking in the ad either on radio or TV? For a radio ad, the candidate must speak, on TV ads you have a little picture.

I think it would be supportable under the Constitution because you are not saying what they can say, just who can say it. And in the Senate or in the Congress, when a person is elected, they cannot have a substitute or an actor say their lines for them, they have to speak for themselves.

Wouldn't you hit the saturation point for TV much quicker? How many times did D'Amato or Schumer want to put his own face and his own voice on the TV? Therefore, there would be fewer ads, the ads would not be as murderous, and the candidates would not have to raise as much money.

The only thing it does not deal with is issue advocacy and people attacking the candidate.

MR. B. GREEN: One clarification. My campaign advertising buyers told me I had to appear in the ad or have my voice in the ad to get the best rate, but Joe Mercurio was describing that it is not a requirement. Otherwise, if you are willing to pay more —

MR. MERCURIO: I am not sure you would say that if you sat through thirty takes of a candidate trying to do a commercial.

AUDIENCE: We are not electing actors and spokesmen, we are electing —

MR. MERCURIO: It is still words and ideas.

MR. STERN: This is an idea that Senator Danforth of Missouri had and actually introduced it as legislation, saying, basically, if you want to get the lowest rate from television, then you have to appear in the ad.

The legislation went nowhere. I think the incumbents were against it because they felt they were not that telegenic. I think the TV industry was against it. You have to remember that television right now is, if not the most powerful lobby, one of the most powerful lobbies in Washington, and they have been opposing any sort of restrictions.

It used to be, for example, that in initiative campaigns if one side had more money than the other and spent \$10 million on initiative campaigns, the other side was given one quarter of the amount of money spent by the TV stations and radio stations. That was a requirement of the Federal Communication Commission.

In 1992, the television industry took care of that and that has been repealed. So you get one-sided TV now. But it is an interesting idea, one that has been proposed before. It has just not gone anywhere.

MR. TAYLOR: There is even a name for it. There is a bill in North Carolina along these lines called "Stand By Your Ad." It did not make it out of the North Carolina legislature, has never made it anywhere close to in or out of the committee in Congress.

I think it is a good idea, in a political and civic sense. The political realities are, it will go nowhere and whether or not there are constitutional difficulties in prescribing how a candidate can communicate is something I will leave to higher authorities.

It seems to me at the very least it is an awfully close question.

MR. B. GREEN: We are going to have time for only one more question, I am sorry to say, because we do have to finish.

AUDIENCE: I am going to ask you to comment on my plan which is under serious consideration from the mayor's charter revision commission and which has been praised by Robert Wagner, Jr., former head of Citizen's Union, and Sam Roberts when he wrote a column, and it could begin in the year 2000, one year before the mayoral campaign and it will give you a chance to see how it works. If it works it will save the taxpayers innumerable money because it will only cost two million dollars. It involves using public funds for one purpose, to inform the public about the candidates, not give the money to politicians or consultants and

lawyers and everybody else who will get the money. The money will go straight to informing the public equitably about the candidates. It involves the use of public TV and it involves the use of an enhanced voters' directory.

Now, you know the plan because you have heard it many times.

MR. B. GREEN: Is this question directed at me?

AUDIENCE: No. Father O'Hare has heard it many times for many years. And Nicole Gordon has heard it many times. If it works, it will save the public immeasurable money in the year 2001 because Ruth Messinger would be getting \$5 million, not \$1.2 million.

MR. B. GREEN: That is a misconception. Because while it is a four-to-one match, the amount that is matched is reduced from a thousand dollars to \$250. That undoubtedly increases the total amount of public funding but it does not quadruple it.

AUDIENCE: But if it is tried in the year 2000, you are going to have a chance to see. I hope, Father O'Hare, that you will give it more serious consideration.

MR. B. GREEN: I am being told that it is time for the wrap up. I am afraid I am going to have to halt this discussion at that point.

Is there any consensus here that anyone has found? Maybe I should ask Bob Stern to see if he has been able to find a consensus on the panel. I noticed he has been taking notes very assiduously. Maybe I will turn to him for that consensus.

MR. STERN: Well, I was hoping that maybe disclosure was the consensus. But then we found out from Joel that full and effective disclosure really is not full and effective disclosure, but partial disclosure.

I guess the consensus that we all have is that there are some problems that are not going to be resolved by any of us up here, but will have to be resolved in the legislatures by the FEC and also passed by the initiative process.

MR. B. GREEN: With that, I think I shall call this panel to an end and thank all the panelists for what has been a very lively second half of the morning.

ADDRESS: THE NEW YORK CITY EXPERIENCE: LESSONS FOR A NATIONAL FUTURE

FATHER O'HARE: We began this morning with an address from Fritz Schwarz, who served as Corporation Counsel during the Koch Administration here in New York City. Our speaker now to begin this afternoon is Mayor Koch himself. It is a great pleasure to introduce him.

I should say this. Several times in the course of the morning, different speakers, from a range of different points of view on the ideological spectrum, all seem to agree that you can never expect incumbents to pass campaign finance reform legislation.

The argument being, and it makes good conventional sense, that those who have been elected to office in a given system are not going to vote to change the system that has been the matrix of their success. But here in New York City in 1988, that conventional wisdom was turned on its head when Mayor Ed Koch, working with then-Majority Leader of the City Council, now Speaker of the City Council, Peter Vallone, passed the Campaign Finance Program (the "Program") in February of 1988. And truth to tell, in the first campaign in which the Program was in operation, the municipal campaign of 1989, to the surprise of many pundits, Ed Koch was defeated in the Democratic primary. So he was one of the architects of the legislation and he also suffered some of the consequences.

I should also say something that is not well known: that Ed Koch was the first of three incumbent mayors to be fined by the Program. He is the only one of the three who did not make a big fuss about it, though.

It is a great pleasure for me to introduce the former mayor of New York City, and voice of reason for the United States, Edward I. Koch.

MR. KOCH: I was not defeated because of campaign financing, I was defeated because of longevity, and I look back on the Program as one of the most important things that I participated in.

So, first I want to say to Father O'Hare and Nicole Gordon who were there at the beginning and are still with us conducting the affairs of the New York City Campaign Finance Board (the "Board"), that the two of you, if I had the authority, would be declared national treasures. I have said this on prior occasions. I want to repeat it for this audience. We do not have that designa-

tion. It exists in Japan. But if I were so authorized, the two of you would receive that award for what you have done.

Campaign finance reform requires courageous leadership, and appointments to any commission charged with overseeing the administration of laws must be people of the highest caliber.

Many of you may recall that, in addition to Father O'Hare, the original Board included a former president of the City Bar Association, Bob McKay, a former public schools chancellor, Frank Macchiarola, and an attorney who is now a federal circuit court judge, Sonia Sotomayor.

Father O'Hare is the only chairman the Board has ever had. I should say, "almost," because the story behind that "almost" began in April of 1993 when Father O'Hare's first term as chairman came to an end and Mayor Dinkins did not reappoint him or appoint a successor.

Therefore, during the 1993 elections, Father O'Hare was a hold-over chairman. And that meant, in effect, that Father O'Hare was serving at the pleasure of Mayor Dinkins, who, at the time, was also a candidate for reelection participating in the Program. During the fall election, the Board was presented with several questions about whether the Dinkins campaign was in compliance with the campaign finance laws. And in one case, the Dinkins campaign agreed to reimburse the Democratic State Committee for over \$200,000 in radio and print advertising, while the Board was considering whether those advertisements were independent and whether they should be counted against the campaign's spending limit.

In another case, the Board acted before the general election to assess a civil penalty for the Dinkins campaign's violation of the primary election spending limit.

Mayor Dinkins' campaign committee was fined \$320,000 for the 1993 race, and, as Father O'Hare pointed out, my own campaign committee was fined \$35,000 for the 1989 campaign, my last year as mayor. Similarly, Mayor Giuliani's campaign committee was fined almost a quarter of a million dollars in the 1997 race.

I must tell you that fines of that nature are painful. Not just because of the amounts — the costs do not come out of your pocket, they come out of the campaign funds that you have raised — but because it means that someone you relied on did not do their job of making sure everything was done in accordance with the applicable laws or the rules and therefore you, the candidate, look stupid. And some say "venal," even though few, if any, candi-

dates exercise control over the spending or the raising of campaign monies and certainly no control over the bookkeeping involved. That is delegated.

Even when you and your campaign take some lumps as a consequence of these laws, the main thing is that you get over it and continue to do your best for the city.

Unfortunately, that is not what happened. On the last working day of Mayor Dinkins' term, December 30, 1993, the Board's offices received an unanticipated fax from the office of the mayor. Surprise, Father O'Hare: you are out and a new chairman, Thomas J. Schwarz, had been appointed.

Well, this became the biggest appointment controversy since *Marbury v. Madison*.⁶² No one questioned the new appointee's credentials, but it was clear to everyone that Father O'Hare's midnight replacement had been political retribution for the strong and proper actions the Board had taken during the election.

Because it was the week between Christmas and New Year's, the city was asleep, particularly the press. So Peter Powers and I (he was to be the first deputy mayor under Mayor Giuliani) called every editorial board and every opinion maker in the city, and they, in turn, called upon the new appointee to resign.

Then I stood with Mayor Giuliani at a press conference with leaders of the various civic groups and the other Board members, calling for the new chairman's immediate resignation.

Mayor Giuliani stated at the press conference that he intended to reappoint Father O'Hare. The Dinkins appointee buckled, fortunately, and resigned. And one of Mayor Giuliani's first acts in office was to reappoint Father O'Hare on January 10, 1994.

Bizarrely, Mayor Rudy Giuliani did something comparable to David Dinkins' action, in an appointment that was, in retrospect, equally abhorrent. A vacancy occurred in his administration at the time the Board was considering whether to fine the Giuliani campaign committee for violations, and allow me to quote the Board's most recent report which describes the events:

The manner of former Board member Erazo's appointment in September 1997 was a subject of some controversy. Mr. Erazo arrived unexpectedly to take his seat on the Board near the end of a public meeting on September 18th, during which the Board was hearing arguments regarding over-the-limit contributions received by the Giuliani campaign.

62. 5 U.S. 137 (1803).

Although the Board had been notified in a letter from the Mayor dated August 13, 1997, that Mr. Erazo was appointed to the Board “pending the successful completion of [his] Department of Investigation background check,” the Board had not received notice of the completion of the background check by the time of the September 18th meeting.

. . . [T]he Department of Investigation . . . confirmed by telephone that morning that Mr. Erazo’s background check had not yet been completed. Accordingly, Chairman O’Hare declined to seat Mr. Erazo in Mr. Williams’ place on the Board for the public meeting and vote. (Later that afternoon, a letter was transmitted to the Board confirming completion of the Department of Investigation’s background check and Mr. Erazo took his place on the Board.)

Several civic groups and editorial boards protested the circumstances of the appointment.⁶³

Joe Erazo — who I know, a nice man, a devoted stalwart in the Giuliani Administration — ultimately resigned from the Board in June of 1998 when he became the executive director of Correctional Health Services at the Health and Hospitals Corporation. He did not lose Giuliani favor. He has yet to be replaced. Mr. Erazo did not vote, to his credit, on the Board’s decision to fine the Giuliani campaign \$242,000, which was the amount assessed by the Board.

A regulatory agency can only be as good as its leadership. I cannot overstate the importance of appointing quality people to this kind of Board and making those appointments in a manner that is consistent with the agency’s non-partisan mission.

We must be ever-vigilant to make sure that elected officials are following the better angels of their nature when they make these kinds of appointments.

To go back to the beginning, I must say that the opportunity for campaign reform in New York City arose in circumstances that were painful to me.

Queens Borough President Donald Manes’ suicide led to revelations of corruption among political party leaders and some officials in my administration. Betrayals diminished my own effectiveness in my third term as Mayor and caused me enormous personal pain. But it also created a climate for reform, leading to the enactment of a number of remedial measures.

63. N.Y.C. CAMPAIGN FINANCE BD., *A DECADE OF REFORM*, *supra* note 5, at 115.

The New York City Campaign Finance Act⁶⁴ was the most significant and far-reaching of the many measures that we took. For years, the State Assembly had attempted to bring about meaningful contribution and expenditure limits and public campaign financing through state legislation.

These proposals received new impetus in the spring of 1986 from the recommendations of a commission jointly appointed by then-Governor Cuomo, and myself as mayor, and chaired by Michael Sovern, then the president of Columbia University.

The Sovern Commission made many recommendations, including limits on campaign contributions, public campaign financing, merit-based selection of judges, greater uniformity and clarity in the rules for public contractors, prohibitions on party leaders and legislators practicing before state agencies, and the establishment of a state ethics commission to enforce stronger disclosure laws.

Through the spring of 1987, we pushed hard, first for campaign reform through state legislation for both the city and for state elections, and then for city elections alone when it became clear that the state legislature would never pass legislation that would apply to state elections.

When it became clear that the state legislature was unwilling to enact needed reforms, I directed my then-Corporation Counsel Peter Zimroth to undertake an exhaustive legal analysis of the subject. He concluded that the City Council did have the authority to enact a voluntary public financing program for candidates for the five city offices: Mayor, Comptroller, Public Advocate (formerly known as the City Council President), Borough President and City Council members.

The Corporation Counsel's Office prepared a comprehensive reform bill. I announced at a press conference the bill's introduction in the City Council in the fall of 1987.

The New York City campaign finance bill, known as Local Law 8 of 1988,⁶⁵ created a voluntary program in which candidates choosing to join must abide by contribution limits, which were much lower than the state law, and spending limits, which do not exist under the state law, and public disclosure requirements, which are not very detailed under the state law, but are under the city law.

Candidates were also subject to an audit for compliance, in return for the opportunity to qualify for public funds that match contributions from individuals living in New York City, once the

64. N.Y.C. ADMIN. CODE tit. 3, §§ 701-715 (1998).

65. 1988 N.Y.C. Local Law 8.

candidate has demonstrated a threshold of support from New York City residents. Under the current Program, contributions are limited to \$8500 in a mayoral campaign.⁶⁶ Spending in mayoral races is also limited to \$5.5 million in the primary in the aggregate and \$5.25 million in the general election, in the aggregate.

Changes enacted by the City Council last month and by the voters last Tuesday have together resulted in an even better campaign law in New York City — perhaps the most progressive in the country.

The Board believes that the new Charter proposal overrides the Council law by eliminating the candidate's second choice. In other words, leaving in place a voluntary program with a corporate contribution ban and a four-to-one matching rate.

I understand that the Board's conclusion has been disputed by Mayor Giuliani, and now, as it works its way through the courts, we will see what happens. Based on past performance, if the court rules in favor of the Board, the mayor will denounce the courts as political hacks, as he has in the past.

Ten years after I signed the reform bill into law, the state has still done virtually nothing in this area. We need campaign reforms at all levels of government: federal, state and local. There is no other way to reduce the pernicious perception that, in politics and in government, money talks.

There are a few who suggest that there is outright bribery, but I do not, frankly, think there is. There could be an occasional crook, but I do not believe that is the coin of the realm; but they are correct when they suggest that campaign money brings more access and more impact than it ought.

I speak from a lifetime of experience at all levels of the political structure. I speak as a district leader who defeated Carmine DeSapio back in 1963, he then being the "boss of bosses," as we referred to him.

I was a City Councilman for two years. I was a candidate for governor, defeated quite correctly by Mario Cuomo. He was happy there, I would have been very unhappy there. I was a congressman and a three-term mayor.

Now, we all know what the problems are in the endless money chase during the campaign season, which demeans many good candidates who hate their own involvement in money raising, and I

66. The contribution limit for Mayoral candidates has since been lowered to \$4500. See N.Y.C. ADMIN. CODE tit. 3, § 703(1)(f).

speak from experience. It is terrible, it is just terrible. And they have no alternative if they are to have a chance of winning.

Now to the problem of so-called soft money donations given not to candidates but to political parties.

In 1998, the soft money raised included \$44 million by the Democrats and \$53 million by the Republicans. I wasn't sure of these figures because I had seen larger ones, but the larger ones are for a two-year cycle, I am told, so these are correct.

These hefty sums pay for issue ads, which are thinly disguised campaign commercials attacking an opposing candidate's record. But in Wisconsin, Senator Russell Feingold's recent successful race for reelection showed that a totally candid, honest, courageous candidate can, even when he disarms unilaterally, win, against all expectations and against expenditures by an opponent with tons of money. That opponent would not agree to forgo the benefits of soft money which was spent in large amounts on his behalf.

The McCain-Feingold and Shays-Meehan bills⁶⁷ would have limited campaign spending and prevented the recurrence of recent federal campaign abuses.

The House bill, Shays-Meehan, passed in August by a vote of 252 to 179. In the Senate, the McCain-Feingold bill was pulled from the floor by majority leader Trent Lott, who feared that the Senate might just adopt it.

Now, I have a few suggestions for Senators McCain and Feingold to consider. One, I believe that you can limit soft money contributions per person to the same one thousand dollar limit that applies to hard money. There is no restriction that says soft money cannot be limited.

Two, I was on the House Administration Subcommittee in 1973 which approved the current one thousand dollar federal contribution limit. My committee is the one that came in with campaign financing at that time.

But the mistake we made — and it never came up, it boggles my mind — was that we failed to provide for inflation. I mean, a thousand dollars today would, in true dollars, be \$3200. And there should be an inflator placed in the law.

I believe public financing should be available for congressional candidates. I remember the discussion very well. At that time, there were only two people on the committee who supported that, and that was John Brademas and me. Everybody else said, "well,

67. See *supra* note 20.

I'll give them four dollars because, they were all congressmen, and they did not want anybody running against them who would be well financed." So there was absolutely no support for that.

I think it is changed. I think today people understand that it is irresponsible to go on the way we have gone on. I believe public financing should be available for congressional candidates, and in addition, instead of, the current sham check-off for public financing for the presidential elections where you mark a box that says take a dollar or whatever the amount is out of the general treasury, we should add additional monies from the Treasury for that purpose.

Elections should, in all cases, make public financing available through a straight-forward budget appropriation. I believe that is sensible rational and the best approach. It has worked in New York City. The unrestricted spending now permitted in congressional races, in particular the Senate, is best illustrated by the obscene amounts spent in New York's recent Senatorial race between D'Amato and Schumer, with D'Amato spending \$18 million and Schumer \$11 million.

I also believe that, at every governmental level, contributions by corporations and labor unions should be subject to the same limitations, whether by law or by constitutional amendment, whatever it takes. There are differences in the three different levels of government as to what each of them can do.

The city law can also be improved. The strict but reasonable contribution limits and extensive disclosure requirements should apply to every candidate for city office, not just those who seek public financing. Everybody.

There should be no "out" allowing the use of your private wealth. And when people talk about the constitutional protection, there is also something called the constitutional amendment.

The campaign season should be restricted to a limited time period, and free or very low-cost television time should be provided to candidates by FCC rules imposed on TV licensees to mirror what has been done in Great Britain.

Again, I want to reiterate that I support, where necessary, a constitutional amendment to achieve all of these proposals, including the removal of the current right of candidates to avoid campaign limitations by using their own wealth and refusing to accept public financing as provided for under the U.S. Supreme Court decision of *Buckley v. Valeo*.⁶⁸

68. 424 U.S. 1 (1974).

A few years ago, President Clinton and Speaker Gingrich shook hands and agreed to create a commission to study and make recommendations on campaign finance reform. This spoken commitment proved to be totally false. It should come as no shock that they were both capable of that. No commission to date has been appointed.

A new day has been born, however, with the announcement of Speaker Gingrich's resignation. Perhaps the new Speaker, along with the current Senate Majority Leader and the president, will feel compelled as a result of public pressures to commit to taking the measures needed to sweep the Augean stables clean.

Will elected officials find the courage to put public interest above self interest? We did it in New York City. The challenge to every elected official is, "will you help provide a more level playing field in the interest of improving democracy and elective government?"

Won't the members of the New York State legislature agree that there is something radically wrong in our state when, as recently occurred, every member of the state legislature — one hundred percent — was reelected. That is an outrage. And on prior occasions, while it may not have been one hundred percent, this may have been just really something unique, it is generally ninety-eight percent.

It is outrageous in these elections, because of the lack of campaign financing, and the outrageous spending that exists under state law, that people running for office for the first time rarely have an opportunity to win.

There is more to a successful career than getting reelected, as important as that is. And I can tell you, personally, that the rewards of a forced retirement from government can often be quite wonderful. Thank you.

IS “SUNLIGHT” ENOUGH? THE LIMITATIONS OF DISCLOSURE

Although politicians and reform advocates continue to disagree about contribution limits, public financing and other substantive efforts to reform the campaign finance system, most political observers and practitioners agree on the need for full and effective disclosure of campaign finances. Many opponents of public financing and spending limits argue that full disclosure is the only desirable reform, as it allows the voters to see who supports candidates, and to make that a factor when deciding for whom to vote. Timely disclosure of campaign finances is essential to enforcing regulations and has become a mainstay of political reporting. Disclosure issues have become increasingly important with the explosion of “issue advocacy” advertisements during the 1996 presidential campaign. These advertisements, which may mention candidates or issues by name, fall outside federal regulations because they do not “expressly advocate” the election of a particular candidate. Under existing law, the sponsors of these advertisements are not required to disclose any information about their sources of funding. John D. Feerick, Dean of Fordham University School of Law, co-chair of the Special Commission on Campaign Finance Reform of the Association of the Bar of New York City (the “Association”) and former chairman of the New York State Commission on Government Integrity, moderated this discussion of what effective disclosure can and cannot accomplish.

MR. FEERICK: Good afternoon. My name is John Feerick, one of the three co-chairs of this Association’s Special Commission on Campaign Finance Reform. Our panel will follow the general format of the previous two panels.

And with that let me introduce the members of this panel and then I will have a comment or two about the subject, “Is Sunlight Enough? The Limitations of Disclosure.” Each of the panelists will speak for three to five minutes, following which, each of the panelists will have an opportunity to comment on what they have heard.

I will have a few questions for the panel, and following that there will be an opportunity for those of you in the audience to put questions to the panelists. And then we will wrap up and see if we can draw any consensus on anything to pass along to the organizers of the program.

To my far right is Jill Abramson, who is the enterprise editor in the Washington Bureau of the *New York Times*. She is a most distinguished investigative reporter who has covered money and politics and many other areas in Washington. She also served as the deputy bureau chief for the *Wall Street Journal*.

Next to her is Matthew Carolan, executive editor of the *National Review*. He also writes a column for *Newsday* with Raymond Keating and also has written for the *New York Times* and the *Washington Times*, among others.

Before working for *National Review*, I should indicate that Matt taught philosophy at several New York-area colleges and twice ran for elective office as a third-party candidate.

Sitting next to me is Dr. Frederick M. Herrmann, who has been Executive Director of the New Jersey Election Law Enforcement Commission for over a decade.

He is the author of many publications about history and government and is a past president of the Council on Governmental Ethics Laws, an international organization, and also has served as the chairperson of the Northeastern Regional Conference on Lobbying.

In 1993, he was the recipient of the annual award of the Council on Governmental Ethics Laws for his continued efforts to promote the highest level of ethical conduct among government officials and candidates for public office in the international arena.

To my immediate left is Larry Makinson, who serves as executive director of the Center for Responsive Politics (the "Center"). The Center, located in Washington, D.C., is a nonpartisan, nonprofit research group that specializes in the study of Congress and, particularly, the role that money plays in its elections and actions.

He is a pioneer of computer-assisted research into money and politics and has written many books and numerous reports tracking the pattern on money and politics, primarily at the federal level.

To his left is a most distinguished member of Congress, Congressman John T. Doolittle from California. He has been a member of the House of Representatives since 1990, and he has been a particular leader in areas having to do with ethics and government reform.

He is the sponsor of the Citizen Legislature and Political Freedom Act, a leading bi-partisan campaign finance bill in the House which would repeal the current failed regulations and require full and frequent disclosure of all campaign contributions.

He is also the author of the "Truth-in-Testimony" rule which requires all witnesses testifying before House committees to disclose all federal grants and contracts. In addition, he has been one of the members of Congress who took a leadership role in exposing the House check-bouncing scandal, pressing for full disclosure of all overdrafts and bringing national attention to the issue of congressional reform. We certainly are appreciative of his coming here to be part of this program today.

And no panel in this program will be complete without the expertise of Bob Stern.

On the subject of sunshine, let me start by saying that disclosure requirements are designed to reveal the financial supporters of candidates and enable voters to assess candidates more intelligently. Justice Brandeis has stated, "publicity is justly commended as a remedy for social industrial diseases. Sunlight is said to be the best of disinfectants, electric light the most efficient policeman."⁶⁹ What kind of disclosure is taking place?

With respect to the national level, candidates for the presidency, vice presidency and Congress must make detailed disclosure to the Federal Election Commission (the "FEC") of all contributions over two hundred dollars. This disclosure includes the donor's name, address, occupation and employer. The FEC does not require disclosure of the identities of bundlers or intermediaries who collect contributions from others and give them to the campaign.

Candidates for the presidential election in the year 2000 will be required to file their disclosure reports electronically.

Generally, there is a big lag, I believe, at the federal level from filing to posting and then on to the Internet. Even though the FEC requires detailed disclosure, it has only limited auditing powers.

New York State, as has been indicated by previous speakers, and also by a commission I chaired on government integrity, quite frankly lags in the area of disclosure, and that is a mild statement. It does not require disclosure of the donor's employer, it does not require identities of bundlers, and up to now, there has been no ability for candidates to file electronically, although I understand that electronic filing is in the future of the New York State law, I believe, in the next general elections here in the state.

New York City, as indicated by prior panels, has a very full disclosure law. New York City requires the disclosure of campaign contributors' employment information and the voluntary program

69. LOUIS BRANDEIS, *OTHER PEOPLE'S MONEY* 62 (1933).

here in New York even extends to disclosure with respect to the identities of bundlers.⁷⁰ New York City requires electronic disclosure and allows public access to its electronic databases.⁷¹

And if you missed it, out in the lobby is a computer terminal that will give you some idea as to what you can access with respect to the New York City campaign finance system.

So let me now go to our panel for their perspectives on the subject of this program, "Is Sunlight Enough? The Limitations of Disclosure." Jill?

MS. ABRAMSON: Well, I am going to begin by saying that sunlight certainly is not everything, but it sure beats darkness. I have been covering money and politics as a journalist for more than ten years now. And for all of those years, I have kept a folder on my desk that is called "Rosemary's baby."

That folder is a list that President Nixon's secretary Rosemary Woods kept in her top left desk drawer, and it was a secret list for the 1972 election of the President's top contributors.

And I keep the list around. It is just interesting to see the names and look at it every now and then. It did not become public until right before the 1972 election, when Common Cause litigated. That was in essence the first modern public disclosure at the federal level that we had, when "Rosemary's baby" became public.

I really do think that the kind of disclosure that we have at the federal level is something to be grateful for. It is a guidepost for journalists and it is a guidepost for the public.

We do know where most of the money is coming from, even if we do not know what it is after. After the 1988 elections, there was another really important disclosure requirement which was the requirement that the two political parties disclose their soft money contributors.

President Bush's Team One Hundred and the copycat group that was quickly organized by the Democratic nominee, Michael Dukakis, was the first time we saw groups of \$100,000 donors.

But in 1988, the parties did not have to disclose where the money was coming from. And when they were forced to, the public and journalists like me were able to see who was giving these big party donations.

But sunlight really is not enough, as I certainly learned covering the 1996 elections, where at the *Wall Street Journal*, I co-wrote the

70. See N.Y.C. ADMIN. CODE tit. 3, § 703(6).

71. See N.Y.C. CHARTER ch. 47, § 1062 (1998).

first major story about contributions that were linked to an off-shore company called the Lippo Group. Mind you, this was 1996 and names like James Riady were new to the public and new to reporters.

But what we did not know was that in 1992, four years earlier, James Riady and his wife had given more than \$1 million to various state parties, where the money was not discovered until the Thompson Committee began scrubbing state disclosures for contributions and found all this money.

We were all shocked back in 1972 that there were people secretly giving million dollar contributions to President Nixon. This was a million dollars of money that was effectively buried and forgotten for more than four years.

And so, what we have seen gradually is that there are so many disclosure loopholes now that it really is easy for big interests to hide and disguise huge donations. That was true in 1996 for casino and tobacco interests. Money is also hidden away in nonprofit groups; on the Republican side, there is something called Triad Management and, on the Democratic side, millions of dollars are given to minority voter turnout groups.

This year we saw money hidden away in those ads that People for the American Way ran to counter Republican issue ads. Again, the process of finding these donations is difficult. You have to go state by state where disclosure requirements are spotty. They vary from state to state, and in a place like South Carolina where we know a lot of gambling money was in play, we may never know because that state has such weak disclosure laws.

MR. FEERICK: Thank you very much. Matthew Carolan, executive editor of the *National Review*.

MR. CAROLAN: Thank you very much for inviting me to this discussion. I bring, I would say, a more mundane perspective than Ms. Abramson, who has a distinguished career in this field.

From my own experience as a third-party candidate before I became engaged in journalism, I remember the experience of filling out campaign finance forms for New York State when I ran for statewide offices as a third-party candidate. And it was at the same time that I was teaching a course in philosophy, and I, during that campaign season, had assigned term papers for the undergraduates. I do not know how many of you have read undergraduate term papers, but I had a choice at the time to either mark a stack of undergraduate term papers or fill out the campaign finance state-

ments. I could say those term papers looked extremely interesting at the time.

I also believe very much in disclosure. I think it is very important and I bring a perspective from a conservative or libertarian side to this discussion.

One of the philosophical points that animates my interest in politics is something called "rational ignorance," that is, the public practice of rational ignorance. People do not take a lot of interest in politics because it is expensive, for example, to find out who is taking your tax money. And for the few cents that come out of your pay check, it is not necessarily worth your time to fight it.

Yet, if you are on the other end of the pipeline, whether it be in Washington or in New York City, it is certainly worth the time and effort to be on the receiving end of everyone's tax money. That is an old economic theory called rational ignorance.

If that applies to the political process, it seems to me it is also going to apply to a subject like disclosure.

It was certainly boring for me to fill out the forms, and I cannot imagine that it would be very exciting for the public to go through the minutiae and find out who is funding whom.

It does upset people when the press does its job, but I will also point this out: the press itself engages in what could be called civic journalism. I do not mean to sound cynical, but I think we could say that the press has a certain interest, the editorial boards have interests in their own candidates, and disclosure of campaign finance is sometimes a weapon to be used against another party. So you are facing tremendous obstacles.

I think a more important point to remember is to reflect on the proper purposes of government, and the perspective that I will bring to this is that government engages in tremendous amounts of redistribution of wealth, corporate welfare, individual welfare, taxes, regulations, et cetera.

There is a tremendous vested interest which is extremely difficult to overcome, even with all sorts of procedural mechanisms to prevent that from happening. Money will be spent, and if it is not in legitimate checks, it will be in suitcases full of cash.

I think the most important thing is to reflect on the purposes of government and what government should be about.

MR. FEERICK: Thank you very much. Our next speaker is Frederick M. Herrmann, who is the Executive Director of the New Jersey Election Law Enforcement Commission.

DR. HERRMANN: Thank you. I guess it gets even more mundane still as the director of a state elections agency.

Before I address "Is Sunshine Enough," I would like to make a few comments about whether or not there is enough sunshine. Up until a few years ago, I think the answer in the United States was, no, there is not enough.

The Center did an excellent study a few years ago in which they said that in most agencies, disclosure was nothing more than a filing cabinet, a table and a chair.

And I do not think we really had disclosure in this country, if we expected the average citizen to take a day off from work and travel to the state capitol or wherever the state ethics agency was, and sit at this table and go through piles and piles of paper reports.

But the good news is things have changed drastically just in the past few years and according to a study by the nonpartisan legislative staff in the State of New Jersey, today thirty states and the federal government are in the process of developing or actually do have computerized disclosure.

And I am happy to say that because of an initiative by Governor Christine Todd Whitman of New Jersey and the support of the New Jersey legislature, my agency was given \$1 million for this fiscal year to recomputerize our operation. So we are in the process right now of working on scanning and imaging technology which will allow us to take our 25,000 reports and put those on our Web site so that any citizen can take a look at that Web site and click on the candidates running and take a look at who gave the money and how the money was spent.

We are also working on searchable databases, which will also be on our Web site and which will allow citizens to search for such things as contributors and the candidates whom they gave to. And we also will be developing electronic filing which we hope to have ready for the general assembly races in 1997, which will allow candidates for our lower house to file with us electronically.

I would like to take this opportunity to thank Father O'Hare and Nicole Gordon and the New York City Campaign Finance Board for their kindness, their time, and their expertise in helping us with this project.

So, in the future, in New Jersey, and also in many jurisdictions throughout the United States, citizens will be able to go to a public library, a community center, an educational institution or even their own home and take a look at these reports, and this is true

disclosure. So now let me turn to the major question, "Is disclosure enough?"

Many states and localities do not think that it is. I just want to review briefly some of the provisions of state and local law across the country that go beyond disclosure.

Contribution limits are probably the second most popular reform in this area after disclosure. A contribution limit system that sets those limits low enough to keep out undue influence, yet high enough to allow candidates to raise enough money to get a message out, is a system that has been shown in this country to work.

The disclosure of occupation and employer information is very important for candidates — not just giving names and home addresses, which was the case in many jurisdictions prior to the nineties.

If you take a look at a typical candidate's report in the past, you will see a list of names — fifty names, fifty different addresses. None of the names and the addresses would be the same, and you might conclude, well, we have adequate disclosure.

But if you add another couple of columns and say, give us the occupation and employer information and you find out that ninety-five percent of these contributors are vice presidents of the same corporation, you have a different picture.

Many localities and most of the states in the nation now ban direct corporate contributions and direct contributions from unions. There has been experimentation with limiting vendor contributions and lobbyist contributions.

A number of states have PAC registration. We have it in New Jersey. This is important because, although PACs do report their contributors and their expenditures, many times we do not know who they are.

So it is important to get information about who controls and initiates these committees or entities and also to have a statement of objectives about them.

Amazingly, sixty percent of the states in the nation do not ban personal use of campaign money, which is quite incredible because this is probably the one thing we would expect most of them would do.

Having one candidate per committee is important for disclosure. So, too, is continuous reporting, not just reporting a couple of times before and after an election, but throughout a person's term in office.

Also, I think we have talked about this a little bit, issue advocacy — suggesting instead of directly stating something — that should be regulated.

So, perhaps simple sunshine is not enough. There are other regulatory provisions which have been used and work. And I believe that thinking that you do not need anything more than disclosure is sort of like going to a football game — having no rules and no referees and thinking that the fact that the fans are watching the game will keep the players playing fairly. And I submit that in that kind of situation you are going to have something more akin to a group mugging than to organized sport.

MR. FEERICK: Thank you very much. The next speaker to my immediate left is Larry Makinson who serves as the Executive Director of the Center, particularly studying money in elections and congressional actions.

MR. MAKINSON: I can also mention that we do not take positions on issues. We do not lobby, we are not that kind of a group. What we do is provide information, and I want to provide a little bit of information here, just to give you some kind of a sense of what we do.

First of all, the importance of money. It has been said before that money is a pretty good predictor of elections. In fact, in the recently finished Congressional elections, ninety-four percent of the people in the Senate, Al D'Amato not being among them, who spent the most won. And in the House of Representatives, ninety-five percent of the people that had the most money won.

The reelection rate for incumbents was ninety percent in the Senate and 98.3 percent in the House. If you went to election day and there was a roughly equal amount of money between both candidates for a House of Representatives seat, you were in a very exceptional place.

In fact, in about sixty percent of the races in the country, one candidate had ten times more than the other candidate. That was the average. You talk about not getting your message out. The people who did win in close races were almost always within a two-to-one margin. It is impossible without that.

Having said some of that, is disclosure enough? No, there are a few more things you need to do. But I also would like to talk about sunshine, because I do not think we have sunshine now. I do not think it is even as good as Fred has talked about, and I am

working at the federal level, which has probably the best disclosure next to New York City, which also has electronic filing.

The reality is, you want to find out the biggest source of money. If you look at what people put down on their occupations and employers at the federal level, you find out that the two biggest sources of money in this country are homemakers and retirees.

That does not tell you a lot. You need to know more than just that information. Also, another thing you find out, a lot of people put down "executive." A lot of people put down "self-employed." Some people put "information requested," which just says, "we do not know what this guy does, we just put 'information requested' so there is something on the report instead of a blank space."

We did find that members of Congress actually are pretty good. Candidates overall identified about ninety-one percent of their donors with some kind of occupation and employer. But that is still not great. It could be a lot better.

What happens if they do fill everything out? Well, if you looked at Al D'Amato and Chuck Schumer, for example, I think one of the most interesting things about them is what is *not* on the reports.

One of the things that we do at the Center is standardize the occupations and employers and also categorize them by industry. The contribution limit is one thousand dollars per election or one thousand dollars for the general and one thousand dollars for the primary. If you think that just two thousand dollars is all one interest can give to a member of Congress, you are mistaken.

Morgan Stanley Dean Witter & Company gave \$50,400 to Al D'Amato. Morgan Stanley Dean Witter & Company ranked eleventh on the list of D'Amato's contributors.

The State of New York, which includes people who work for the City of New York, was just ahead of it with \$50,600. Further ahead was Ernst and Young, Bell Atlantic, Paine Webber, the Equitable Companies, Bear Sterns, Goldman Sachs, Citigroup and the biggest of all, MBNA America Bank, giving a grand total of \$240,670.

This is with a thousand dollar per election contribution limit. If we do not see this kind of information together, what good is it? What is it but a bunch of names with addresses? If they put down "investment banker," what are you learning? Al D'Amato is the head of the banking committee; I would like to know what sorts of things he did for MBNA America Bank.

So I think one of the things we should disabuse ourselves of is that disclosure is something that only takes place during elections. I think there ought to be disclosure when people are voting on

things. I think we ought to know more about who is really giving the money.

If you want my idea of what real sunshine is, it is when you are looking at C-SPAN and someone says something about the realtors, and on screen pops up, "Realtor's Association, \$851,000" or something like that.

That is disclosure. That is the kind of disclosure that we ought to have, if you really want to have a sense of who is getting what from whom.

I would say that the system we have right now is partly cloudy at best and there is a lot of smog in the air. And yet, even if we had the greatest disclosure, it would not be everything. I think we also need a few other things. I am not going to get into a whole bunch of them, because, again, we do not lobby, and also my time is running out.

I might say that soft money is one of the ones that is pretty difficult to justify. The idea of the justification for soft money is that it is supposed to help state and local officials. Well, okay, if that is the case, then allow soft money to the national parties, but tell me what the rationale is for the Democratic Congressional Campaign Committee, the Democratic Senatorial Campaign Committee, the National Republican Congressional Campaign and the National Republican Senatorial Committee.

These four committees are aimed at only one thing: electing members of their party to the House or the Senate. They have all got soft money accounts, they are collecting tons of money, and I have a list, if anyone wants it, of the people giving to them. Philip Morris is at the top of the list, giving \$687,000 to those four committees.

Now, the point is that we have gotten to a system where it is not a matter of what you can give, it is a matter of who do you write the check out to, because if there is a will, there is a way to give it, and it's taking place.

MR. FEERICK: Thank you very much. Our next speaker is Congressman John Doolittle, a member of the United States House of Representatives from California who also serves as a Republican Deputy Whip.

MR. DOOLITTLE: I will be the skunk this afternoon. It is difficult in the time that we have to know really how to communicate what needs to be said. But let me just say that I believe deeply in

campaign reform, but not in the kind that many of our speakers up here seem to promote.

We have a problem with this system. It is a terrible problem. In fact, I do not really know anybody who thinks it is a very good system. But this situation reminds me of the sick patient who goes to the doctor and he gets a diagnosis and the course of treatment is begun. And the patient, rather than getting better, continues to remain sick, and then the doctor is called back and increases the dosage. And the more medicine that is given, the sicker the patient gets.

This patient has been misdiagnosed. All things that we hear criticized today, the main things, whether it is the terrible influence of soft money in our elections, the issue advocacy ads that are becoming so prevalent today or the criticism of independent expenditures, all of these things are direct creations and direct consequences of the very regulations that were put in place, at least at the federal level, some twenty-four years ago.

What I find fascinating is that a couple of elections ago the great evil was PACs. What happened? You do not hear that much about PACs any more. We have moved on to soft money. Nothing changed about PACs, of course.

Also, when PACs were the great evil, you could note that those too are the direct result of the so-called campaign reform that we have in present law. Why? Because PACs can give five times as much as individuals.

I have taken this approach — believe me, when I did this, I did not particularly want to do it, but I needed to call to your attention something I read that George Will wrote in one of his columns. He said that the First Amendment is under greater threat today than at any time since the 18th century. And that is because it is a bipartisan threat. It is not just Democrats, it is also some Republicans.

And there is a great sentiment that is being expressed. There always is more regulation. I find that fascinating. We know what the answer is, it is more regulation. Now, what's the question? That is not my answer.

Regulation has caused the mess that we see in the campaign reform system right now, and as this patient gets sicker and sicker we are heaping more and more of the same medicine on it. The direct and natural flow of money is from the contributor to the candidate.

When you block the natural flow of money, it will flow in other directions. And it is now flowing heavily in this area of issue advocacy.

Now, people have refused to rediagnose this, but want to pile on more of the same old medicine, and when you restrict that enough, you will see a profusion of independent expenditures, which, clearly, the Supreme Court has ruled cannot be regulated. Why do we want to encourage the least responsible form of political speech in the society? Why do we not tear down these barriers, let the money flow directly from the contributor to the candidate, in any amount, to the *n*th degree and simply have full disclosure?

Let the electorate decide whether \$100,000 from one source is undesirable. If they do not deem that to be undesirable, we ought to content ourselves to live in a free republic where freedom of speech reigns.

If it is thought to be undesirable, the candidate will be defeated in the election. I think it is clear that the founders wanted to keep government out of the business of campaigns. I think it is clear the founders really meant it when they wrote in the First Amendment, "Congress shall make no law abridging the freedom of speech."

Most of our campaign reformers work day and night trying to figure out how to abridge the freedom of speech while calling it something else. That is wrong. Furthermore, it does not work.

If this approach worked, would we have the mess that we presently have in this system?

MR. FEERICK: Thank you, Congressman. Robert Stern.

MR. STERN: Thank you very much. I think in response to what John said, I would point out a situation in California quite a few years ago. I did a study of the campaign disclosure statements of the California Medical Association. I noted that they had given, to every single incumbent but one, at least \$500.

They had given to the most conservative of the Republicans, and the most liberal of the Democrats, so I called them up and said, "Gee, I noticed you have given to every incumbent but one," and they said, "Which one?" I gave the name, you probably know him, Rich Rosenthal, and they said, "Oh, we better go give to him."

I said, "Why are you giving to every single incumbent, why are you giving in some situations to both sides?" And the answer was four words: losers do not legislate. And what happened, of course, was that the interests had given to both sides.

So, John, what happens when the tobacco industry gives \$100,000 to both sides? What is the voter supposed to do when the California Medical Association gives to both sides or gives to all incumbents?

The problem is that even if you have full disclosure, the public may still not know what to do. We also had the situation where a legislative candidate running for the state assembly received \$125,000 from a tobacco company three days before the election. There was no disclosure because nobody could get it out in time, even though there were late contribution filings.

Now, the good thing, though, I have to say, is that electronic filing is really going to help, and the states and federal government are moving much, much faster than I had ever imagined. I thought, frankly, that the legislators would resist this, and some of them are. But in state after state, we are seeing electronic filing passed, and we will see, I think, within four to six years, the opportunity for voters actually to get the information over the Internet very quickly. That will be a big help.

The other thing that is very important in terms of disclosure is the occupation and employer information. Many candidates do not list occupation and employer. We passed a measure out in California — and several jurisdictions also have this — that says, if you do not list the occupation and employer information when you receive the check, you cannot cash the check.

That means a hundred percent compliance in those jurisdictions, because the candidates want to cash the check. Occupation and employer information is very important, as other speakers have pointed out, in order to track down who is really giving.

Finally, I am happy to disagree with Matthew. I do not think we will see or have seen recently suitcases full of cash. No matter what the law would be, I have more confidence and more faith in the candidates. I think they will disclose as little as they have to disclose. I do not think they will take the cash, and I think that most people are trying to comply with the laws even if the laws do not necessarily give us all the information we need.

MR. FEERICK: Thank you very much. I indicated I would give each of the panelists a brief opportunity to respond to anything they heard from the other panelists. Anybody want to take advantage of that?

DR. HERRMANN: I think it was Mark Twain who once wrote that the only problem with organized religion was that nobody ever

tried it, and I think this might be said of campaign finance reform in this country.

When we have things like soft money, issue advocacy and ethics agencies that are underfunded; when we do not have adequate enforcement power, and are not adequately independent, it is little wonder that the system does not work.

I do not really think we have made enough of an effort, and so I would have to respectfully disagree with the Congressman. I do not think we have tried enough, and that is the problem, not that we have not tried at all.

MR. MAKINSON: I would like to say something, too. On the question of what do you do if both sides give. When I was reading the list of Al D'Amato's contributions, one of the more interesting things I find about Al D'Amato and Chuck Schumer is that of the top twenty donors, seven of them are exactly the same.

So you do have a little problem of how do you make a decision. Also, I agree with Congressman Doolittle that the electronic filing is really important. One of the big frustrations that we have at the Center is the fact that it is going to be four to six weeks until we see what was filed with the FEC.

Now, people use computers in all these big campaigns to generate pieces of paper, which they then give to the FEC. The FEC then hires inputters to take this paper and put it back into a computer.

Not only is that a completely ridiculous waste of taxpayers' funds, which is something else that should be dear to the Congressman, but it also makes it impossible to find out where the money is coming from until after it is too late.

MS. ABRAMSON: As a journalist, I do not come to this subject as an advocate for any particular set of reforms, and I do not really see an interest like tobacco giving to both sides as a problem. I see it as a story.

Many industries in this country give pragmatically to both sides. That is not new. What is a problem to me is someone who wants to chronicle that very pragmatism on a national scale, *i.e.* look at the federal contributions as well as the state.

And I know that because this past year the *New York Times* invested in hiring extra researchers on gambling and tobacco interests to try and look at the money on a fifty-state basis. And what we came up with at the end of the day was an incomplete picture,

where really in terms of what is available right now on-line, real time, is four states.

Everything else you still have to go to the state capitol and start sifting through disclosures. So while I share your optimism and applaud your state for trying to be on-line and up to date, it is still as cumbersome as anything to try to get the big picture.

MR. CAROLAN: Just going back to the suitcases full of cash remark: I am not saying that is taking place right now. What I am saying, though, is that I agree with the congressman. That is, there is a tremendous amount of populist distrust of large corporations.

We have seen it throughout the elections when contributors were giving — and I do not think it is fair, by the way, to use Al D'Amato as the quintessential example here. I grew up in Al D'Amato's political territory. I would like to think he's something of an anomaly when it comes to these things.

But the fact is that you cannot just throw your hands up and say, "My gosh, they all give money to the same people, they are all throwing money around, it is a terrible evil thing," without asking yourself, why are they giving all this money, and why do so many people give so much money to the government whether it be in the tobacco industry, or any industry?

And it is because of the enormous clout that they wield from the regulatory point of view, from the redistributive point of view. And to suggest, I think the congressman is right. Money flows like water, it flows downhill. Think of it from a common sense point of view.

If someone is trying to take money out of your pocket, you are going to try to stop them. And if you are in a tightly contested business climate and your opponent has gained a leg up, you are going to either try and gain your own leg up or you are going to try and stop your opponent.

It is common sense but you have to ask why does that happen? It happens because of the power of government to control so many aspects of life. And you cannot just have a populist revulsion at the size and scope of money. It is unthinking. I think it does not get back to first principles of government, and the way that government power operates.

I think that the public is generally disgusted with the huge amounts of campaign cash. But I do not think the public really reflects a great deal on the power of government. I think that the public has great expectations as to what government is going to do for them.

As I think George Will once said, individuals are usually philosophically conservative but operationally liberal. They do not like paying tax money but they like receiving all the benefits. We have to have a more serious reflection about the power of government and what it does to people and how it intrudes on their lives.

MR. FEERICK: Can I just ask the panel to go back to the subject of disclosure and what I've heard on the program so far today. Before this panel, one speaker thought that requiring disclosure of gifts at two hundred dollars or more, perhaps, should be rethought.

I also heard some commentary about the absence of information with respect to those behind a lot of the independent expenditures and I took from some of that discussion perhaps the question that there should be greater disclosure with respect to people involved in special advocacy associated with election campaigns.

I also noted that people who play the role of getting others to give, except perhaps in the New York City Program and maybe some other municipal programs, are not an element of the disclosure either at the state or federal level.

What I would like to focus the panel on, then, is how might we change and improve the existing disclosure laws aside from what has been suggested with respect to electronic filing.

MR. DOOLITTLE: Well, I might jump in on that. The bill that I did introduce and will introduce again, amongst other things, is something that Bob was talking about. We did not allow the FEC's "best efforts" rules, which is in present law, where if the campaign "makes the best efforts" to obtain this information and cannot produce the information based on the exertion of best efforts, they can just keep the money anyway.

We banned the acceptance of such contributions under the law, — this is our own personal practice, to return those where we cannot substantiate who gave the money. That would be one thing and I think there would be some improvement.

And, I think, the amazing ability to have all this on the Internet is a very significant development when we finally can get to the point where that can happen. I think that would transform the way campaigns work because some of these big contributions come at the last minute and it is too late to react at that point.

With the Internet, you could be right there, day by day, knowing what happened.

MR. MAKINSON: That is taking place right now in the FEC which is listing, this year, the late contributions within, I think, twenty-four or forty-eight hours.

One of the important things to recognize is that we are supposed to talk about something pragmatic here about disclosures. The better the disclosure you have, the greater the impetus for people who do not want disclosure to find ways of hiding.

One of the very troubling things that I have seen, and I think, maybe I am wrong, that Congressman Doolittle's bill addresses this to some extent, is the money that goes from the federal system to the state level.

There is a lot of money hidden at the state level. I read in a terrifying article in the *Legal Times* a couple of weeks ago that half of the leadership PACs of Congress — these are PACs operated by members who give money to other members — are actually functioning with soft money accounts at the state level that have never been reported nationally, on the rationale that it is not affecting federal elections. The better disclosure gets, the more you are going to see people finding the loopholes hiding money in the state level. It is happening a lot right now. We know some of the money. I think the disclosure we have is great but it is only the tip of the iceberg.

MR. FEERICK: Does that suggest that we have, perhaps, a problem in the whole disclosure system depending on the state? Having chaired a commission that focused on New York State, I know we have some representatives of the Election Board here, and I applaud the initiatives you are taking.

My sense is that the disclosure at the state level in New York amounts to a national embarrassment. There is so little.

MR. MAKINSON: I agree. There is a lot of money in New York, more than anywhere else. And yet, what does anyone in New York or anyone in this room know about who paid for the election that reelected one hundred percent of the incumbents? It is a travesty that you cannot answer the question.

I might also mention that candidates know this. You also have to understand that enforcement is necessary. The best analogy I can think of for the campaign consultants and the candidates is that they are like sixteen-year-old kids in the back seat of a car with their girlfriend. They will go as far as they possibly can until someone slaps them in the face.

And one of the things that we are seeing already about taking advantage of the weak laws, and I am speaking from past experience here, are a number of candidates for president who have set up PACs in the State of Virginia, which has no limits on who can give. Corporations can give, unions can give — there are no limits on how much they can give.

The State of Virginia is turning into the Cayman Islands of campaign contributions. And it is going to continue. They are always looking for the loopholes, and they are great at finding them.

MR. STERN: I think one thing we have not talked about is who is behind the ads, not the candidate ads, because we know who is behind the candidate ads, but who is behind the issue ads, who is behind the independent expenditure ads.

In California, we did pass an initiative, actually now twice, requiring the top two donors to any independent group to be listed in the television ad or listed in the radio ad, and that way the voters know who is paying for those ads.

I think that is very important. Whether it be independent expenditures, whether it be issue ads or whatever, we need to know who is behind the ads through disclosure, not on the documents, but in the ads themselves.

MR. FEERICK: Maybe this is more for the lawyers of the Bar Association. Do you see any constitutional limitations to the extent that you have studied that subject?

MR. STERN: I am sure Joel Gora will find a lot of problems with it.

MS. ABRAMSON: At the federal level there are already constitutional issues that have been raised and a lot of the nonprofit groups that run these ads have so far they have succeeded in saying that they should not have to disclose their membership lists to the public. Which is, essentially, what you would have to do if you want to know who is behind all the ads.

MR. STERN: I am not saying a membership list, I am just saying, the top two donors or at least a group. If it is “Citizens for Good Government” what have we learned? Let us find out if “Citizens for Good Government” are a committee sponsored by the Sierra Club.

MR. DOOLITTLE: I know this is supposed to be on disclosure, but that is why I got into this issue of repealing much of the existing regulations. Because the one relates to the other.

And unlike the sixteen-year-olds in the back seat trying to violate the law of chastity without really doing it, when it comes to campaigning, that is our God given freedom of speech. That should be encouraged. We shouldn't be sitting around here in a room thinking up new ways to regulate this and control it.

I agree with the ACLU man who spoke here. They are defending the Constitution. There are tremendous constitutional problems with trying to force disclosure on independent expenditures.

I mean, the Supreme Court already threw out attempts to regulate issue advocacy back in *Buckley v. Valeo*,⁷² a case which has been repeatedly validated.

So we shouldn't be thinking of how we are going to convince them to change their minds. Why do we not live by the law, not only its letter, but its spirit, deregulate and do something that works?

Disclosure works. Deregulate, let people see where the money flows. Do not re-regulate and give rise to these little boxes of soft money and more independent expenditures and more PAC money. You know Virginia has a great transparent system. So does California before the next initiative bollixes it up.

MR. FEERICK: I do not hear anybody on the panel, and maybe my hearing is gone, object to any of the disclosure advances as they are in the law right now. What I am talking about is the federal law and some of the other developments with reference to electronic filing. I do not hear anybody on the panel say that is not a direction we should continue to go in. Is that fair?

MR. CAROLAN: I would just make an observation and that is there is also an assumption that disclosure is a kind of panacea because it will tell us all the bad people that are out there trying to influence the elections.

We could ask ourselves another question which is, is there a legitimate reason why someone might want to hide a contribution to a candidate? Take for example a businessman who is a practicing homosexual, but does not want anyone to know that, and that individual wants to make a contribution to a group that has been advocating a candidate's call for more AIDS funding or something like that.

Again, there is a sort of mad populist distrust of money in government that suggests that anyone who is hiding from public scru-

72. 424 U.S. 1 (1974).

tiny is therefore a bad person, and we forget that there is power of government and there are things that people do not want other people to know about themselves. But they still want to exercise their right to influence the electoral process.

To say we have to rout them out in order to find all the sources of corruption in our society, is, I think, unnuanced. And I think disclosure, for all the good things that might happen with disclosure, there will be unintended consequences like there are in every law that tries to rout out human corruption through a purely procedural manner. A society is only as good as its citizens, not its laws.

MR. FEERICK: Matt, I do not interpret you to say, correct me if I have drawn an improper inference, that we should change where we are in terms of our federal disclosure law, in terms of elections to Congress and national office.

MR. CAROLAN: I think that when you see people trying to change laws about issue advocacy, for example, trying to say we want to know who is contributing to these issue advocacy ads, that is a place where people's privacy should be respected, and the courts have spoken on that.

I agree with disclosure, but I also have some problems with it, and that is, I think that there is again an assumption that we must rout out everyone who contributes to the political process. And I think that the right to contribute to the political process is what the founders were going for.

They were not going for the right of everyone to know everyone else — it is an impossible task. As I say, I think rationally a lot of people are not going to pay attention. They are not really interested that much because they see the end result. They see the policies and they know that those policies are affecting their lives and they have thrown up their hands toward these policies and toward the power of government and they do not think they can change government, in general.

It is not about Philip Morris or about Anheuser Busch or some other group. I think that in days to come Anheuser Busch will suddenly be running for the tall grass. Philip Morris is running for the tall grass now.

When we demonize alcohol, when we talk about how beer companies are trying to target children, for example, they will be running for the tall grass, and they will try to hide their contributions. It is a matter of who government demonizes at the present time.

DR. HERRMANN: Just briefly I want to say, the First Amendment is not an absolute right, and the government does have a right under the *Buckley* decision, as the Court ruled, to balance free speech, which is core democracy, against the right of the government to protect itself against corruption.

So I think, clearly, we do have to regulate this to a certain extent and we have to do it carefully because of the First Amendment.

The main point I want to make, though, in terms of disclosure is that it is absolutely essential that we adequately fund ethics agencies in this country, which we have not done.

Most of the ethics agencies in this country do not have enough money to do the job, many of them do not have the enforcement powers to do the job. They cannot issue penalties of substantial amounts to dissuade people from breaking the law. Many of them cannot investigate, many of them cannot make criminal referrals if they find criminal activity. It is a real problem.

The *New York Times* did a story about my agency a number of years ago and they had a picture of our entire enforcement staff, which was one person holding a box.

This does not work, so it is absolutely essential to have agencies have the power to do audits, because the reports that we get can be entirely made up if we do not do the audit. I mean, we are not seeing the actual records, so there has to be an effective audit process in place so that you can actually check this material. And if you do not, even if you disclose it — I think everybody here agrees with disclosure — what are you disclosing?

It could be the classic garbage in, garbage out situation, if the information that we are putting up on the Internet is incorrect. So there has got to be staff to review these reports, and to penalize those people that do not obey the law.

MR. MAKINSON: I certainly agree with that. I also agree that every agency I have run across is understaffed, underfunded and also under fire by the people that are supposed to be regulated.

On the question of disclosure and what you do if you are giving to a gay rights group or something like that, the limit is \$200. If you give more than \$200, it's going to appear, and I do not disagree completely with where you are coming from with that argument. I think there is a level of privacy that needs to be respected.

We had a policy at the Center of using organization names as opposed to individual names and that is largely because I do agree with that. Although lately we are now doing what everyone else is doing which is that they give and you look it up.

But we have had requests in the past, in one case from an Arab group wanting the names of all our pro-Israel donors, that we have not granted. I might also mention that what you see from most members of Congress in their campaign contributions is a mixture of two main sources.

Number one, their committee assignment is in Washington, which largely affects the PAC contributions but sometimes also lobbyists' contributions and bundled individual contributions. The second source is basically the economic elite of where they come from.

If they come from Texas, there will be a lot of oil money, if they come from New York, there is going to be a lot of financial money. A lot of that money is background noise. That is to me not as interesting.

The reality about the reason that members of Congress have so much money coming from the industries that they regulate is because that is the first place they go when it is reelection time. That is the kind of disclosure that the voters really need to know about.

If you are in Indiana and you are getting money from the oil industry, I want to know about it. It is probably not because of the district profile.

So I think there are some problems with privacy that are sensitive and need to be taken care of. We have a two hundred dollar limit at the federal level to do that. If I can tip the scales, the overwhelming thing we ought to see is where are the conflicts of interest and only through disclosure are we going to find that information.

MR. FEERICK: Let me suggest this might be a good time to receive some questions from the audience and then we can come back and wrap it up. I would ask each member of the audience who speaks to identify themselves to the extent that they feel comfortable with that.

AUDIENCE: I am Rachel Leon. I am the executive director of Common Cause-New York and I just want to make a brief comment and ask a question particularly of Larry and Robert.

In New York, where we finally did at least get state level elections to be electronically filed, which will happen next year, I think one of the main reasons that happened was because our governor was widely criticized for alphabetizing his donors by first name.

As always, it tended to be a scandal that actually moved us a little bit forward. But we have been really stuck trying to get local

computerization. We have New York City, we now have state level races, but we really need to get county information and local information. So I would like to ask the two panelists, particularly Larry and Robert, for national information on what is happening in other cities and smaller districts, because I think that is really key.

MR. STERN: Well, I want to be a little careful in terms of requiring every candidate to file electronic information, because I do not think that somebody who is raising or spending five, ten or fifteen thousand dollars should buy a computer.

I think there should be some minimal threshold, \$50,000 or something like that, at least until everybody gets a computer, and only about forty percent of us have computers.

In terms of what works, San Francisco is very active, Seattle is very active, Los Angeles is very active. A lot of the larger communities are getting heavily involved in electronic filing, as are many state jurisdictions. So it is very encouraging. We have a long way to go. I think we go through in fits and starts with it, because this is very complicated information and it is all coming in around the same time.

So I do not think everything has to be perfectly done. But I am very encouraged by it, much more than I was last year and I hope that by next year, we will even be further along the road.

MR. MAKINSON: I agree with what Bob said that we do not want to have the threshold so low that someone has to buy a computer to run for office. But most people do have computers who run for office anyway.

I think one of the interesting things I would like to point out is that in my research, which really has been mostly at the federal level but also at the state level in Alaska and sometimes at the municipal level, the lower you get to the municipal level, the more direct the *quid pro quo*'s between campaign contributions.

I would love to see on a ballot who the top donors were. Because these are people going in for zoning changes. These are government contractors.

One of the things that I have seen — and a couple of the states have required it; possibly Connecticut is one of these — is that if you are a registered lobbyist, you have to declare that, if you have a government contract, you have to declare that. I think that is a very good reform at the local level.

There ought to be a standard that we have at every level of government where people can really see who is paying for the cam-

paings of these people because they are going to find some very interesting stuff that will definitely help in the voter group.

MR. CAROLAN: I would like to point out that the newspapers ran for the first time in the State of New York a whole series on contributors. A number of the newspapers formed a consortium to investigate who contributed what in New York State. I did not see much of a difference in this election. I did not see great public outrage. I think that despite all of that information that was provided for the first time, we did not see parades down the streets saying "Throw the bums out." The governor was elected, we had discussions about what the governor's *quid pro quo* was. The governor was reelected by twenty-some odd points.

I think people see that, and I can say my own experience with people on the local level is that they throw their hands up and say, "What can we do about it?" And the fact that the information is there, does not necessarily make a lot of people feel very confident that something is going to change.

Newspapers go on campaigns against particular candidates, but, again, I think the public, generally, is cynical because of the degree of power that the government wields. And the government is going to give out its contracts to whomever and the money is going to flow to those people.

I think we need to get back to first principles about what the government does.

MS. ABRAMSON: I think your assumption is somewhat mistaken that the goal of putting the information out there is to incite outrage. I see my job as just putting the information out there in pieces. I am not trying to get rebellion in the streets, but if the information is available and you can provide it to the public, I see no reason not to.

MR. MAKINSON: I would also say that the outrage is over the fact that special interests, whoever they may be, are really the ones who control. If you do not have a lot of money you cannot play with those guys.

I lived in Washington for four wonderful years and lived on the Oregon coast and none of my neighbors were interested in politics and all of them were convinced that the best you can expect from a politician is a relatively benign crook, but a crook nonetheless.

MR. STERN: Just one quick point. Almost any time a measure is on the ballot dealing with campaign finance reform, the outrage is sufficient enough that it passes.

AUDIENCE: This question is directed to Congressman Doolittle, and as I understand your presentation, you believe that disclosure is sufficient. You feel that the principle of freedom of speech is so strong that we shouldn't be overregulated. I think that is the essence of what I got from your remarks.

I will identify myself as directing this to you as a Republican State Senator from New Jersey, and I give that because I am somewhat on the same plane as you, as a state-elected official, as you are in Congress.

Now, the case has been made by a lot of the people at the table here for disclosure and the nuances and the perfecting of disclosure, and this is an admirable objective. But when you say that this is the only thing we should do and that we should not apply limits, I think that misses the entire point of corruption. And I think anybody that has served in office where you have a constituency of more than 100,000, you realize that campaign contributions do corrupt.

Mr. Makinson said in his analysis that sixty percent of the members of Congress had a ten-to-one ratio in campaign contributions. Does that not mean that these people are getting contributions while they are in office to build up war chests to so great an extent as to discourage opponents to shut out people who might be running against them?

So my basic question is, how can you just be for disclosure, without providing limits and certain regulations to cut down on the corrupting influences of campaign contributions?

MR. DOOLITTLE: Because I do not buy into the fact that campaign contributions are corrupting. If I did, I might feel differently. But repeated studies show — and you yourself know that you pay more attention as a state Senator — what your constituents' interests are, to what your own philosophy is and maybe what the party's position is, than you do to who is contributing to you. I mean, I am sure you have, as I have, people who disagree who both contribute to you. As a Republican, I do not believe in big government, I do not believe in regulations.

I am not saying that at some points it might not be necessary, but my first instinct is not to regulate. And that is what I am constantly hearing increasingly even from our Republicans. The more they regulate in this area, the worse it gets.

We start then complaining about symptoms of the regulations, treating them as if they were the problem, like soft money. Now we are going to order disclosure of the donors. That is completely

the wrong way to go. Remove the existing regulation, let the money flow in its natural course and disclose it in a timely and complete basis.

AUDIENCE: Respectfully, Congressman, you and I have a basic disagreement and I would only counter with this: why do they keep giving increasing amounts in campaign contributions unless they produce results?

MR. DOOLITTLE: They keep giving increasing amounts because campaigns keep increasing in cost, which is largely a function of the price of advertising. It is very basic.

MR. FEERICK: Senator, would you just identify yourself.

AUDIENCE: I am Senator Bill Schluter from the State of New Jersey and I have been there a long time. I even voted as a delegate for Goldwater back in 1964.

MR. FEERICK: We appreciate your participation. Next.

AUDIENCE: Thank you. Charles D'Arcy, Kings County Republican Committee. Could we turn it backwards and look at a situation? We have been concentrating on possible evil contributions from corporations and various issues that have come up regarding soft money, discovery and disclosure.

What about elected officials in the campaign season who take the discretionary money, the \$50,000 Assembly allotment or the \$100,000 state Senate allotment, and distribute it to interest groups within that community for the sole purpose of, may I use the expression, "buying votes?" Equally, the end of not-for-profit agencies who are in receipt of congressional largess — such as the Sierra Club.

So I would be interested in knowing if there are any views on the other side of the tapestry with regard to elected officials distributing monies so graciously given to them, either as a not-for-profit grant, or for services in their community or as a direct discretionary grant within that community?

MR. FEERICK: You have obviously expressed yourself on that subject. I do not know if that is a subject that any member of the panel that is here on the disclosure issue would like to speak to.

MR. DOOLITTLE: I am not as familiar with what goes on in New York. I would just observe that there are real advantages to incumbency and while I personally oppose taxpayer financing of campaigns, for those who support it, at least you can argue, it levels

the playing field. But the major types of campaign finance reforms we've had in Congress this year have excluded that.

So, both the Shays-Meehan and McCain-Feingold bills⁷³ have had this heavy hand to regulation, doing things that are clearly unconstitutional and that have been struck down before by the courts and will be struck down again if they ever become law, and doing things that are undesirable and producing a result that is unworkable and locking in the advantage of incumbency.

Out of pure self-interest as an incumbent, I should vote for the cockeyed proposals. Because it would guarantee that I would remain in office as long as I chose. Because I have a taxpayer-financed staff, I have the right to communicate with my constituents in an almost unlimited degree, directly via the mail or through other means. I have huge name identification, and contrasting that, when I first ran for office, I never held any office. Nobody knew me, so I could not go out and do some sort of a mailer and get a lot of people to respond like I can now, because they did not know me or who I was or anything else.

But I could get large contributions, which I did get, a handful of them, and I was able to run my campaign, a very low budget campaign, and knock out the dean of the state Senate in 1980 for about \$100,000, which was the total cost of my campaign. If McCain-Feingold or that type of law had been in effect, I never would have made it. That is what I find so insulting about this campaign reform. It is an incumbency protection act. The inference here is that somehow to oppose Shays-Meehan is to take the position of the incumbents. Just the reverse is true: the incumbent has got all his advantages. Shays-Meehan locks them all in, and locks in the advantage of the incumbency.

So I think you are raising incumbent advantages that already exist, in one form or another will always exist, unless you have public financing as part of the equation, and I do not think it will be part of the equation in the near future.

AUDIENCE: My name is Theresa Wang and I am a graduate student particularly interested in public affairs.

My question is for the congressman and this is really kind of a theoretical, philosophical question. As I understand what you are saying, you are for full disclosure, but you feel that there is no need for any regulation or limits, especially on contributions.

73. See *supra* note 20.

My question is this: when this country was founded, voting was based on property rights. Congressman Doolittle, it appears to me that you're accepting of a political process that would, in effect, have come full circle and that, once again, one's political voice is based on one's wealth. Can you just comment?

MR. DOOLITTLE: One's influence in society depends upon a number of things. Wealth certainly has something to do with one's influence. That has always been the case, is the case now, and probably always will be the case, except in a perfect world which we do not have.

AUDIENCE: My name is Amy Paulin and I am an advocate in Westchester County, which is a little north of New York City for those of you who are unfamiliar.

What is frustrating to me is I worked very hard on a bill in Westchester County, and we saw it defeated twice — not just once, but twice. At this point, I feel discouraged, although perhaps a little encouraged by coming today, and again moving forward on that initiative.

What is frustrating is that I see all of the issues and all of the problems lumped into one pot and somehow this one solution is going to be our answer to everything and it varies so.

In Westchester, we have seen some undue influences, certainly government contracts are direct results of contributions, but county legislative races are much more low scale and we see average people with little money actually running, although that is changing.

So we have issues in Westchester and I am sure in New Jersey. In Congress, as we all know, there are different issues in different states, but we are packaging one thing. And what I was disappointed with was not hearing some other initiatives or other ideas, that now I can go back to Westchester and say, okay, we are not going to do public financing because they do not think that there is enough public momentum or public support to do that and that is why our county executives are opposing it.

But there are other things that we can do to move toward the same goals, toward increasing average people's ability to run against incumbents, toward limiting campaign contributions.

What else is out there? Is there nothing out there for me to bring back? That is what I want to know. If there is something out there, then perhaps you can share it with me so that I can go back home and try to adopt some things that may be doable?

MR. FEERICK: I know that Bob Stern has a comment and as you know, Nicole Gordon, who is at the center of what is going on in this country, is there for those in Westchester as she has been, and I have been a participant as well in your process.

MR. STERN: I think the important thing to remember is there is not just one solution to any of these problems. In California, when we drafted the reform act in 1974, we recognized that and said that the cities and counties would adopt their own laws, and they have.

We have eighty cities and counties adopting different laws in California with different thresholds, different disclosure requirements, different contribution limits, sometimes a ban on contractors who are making campaign contributions, prohibiting them if they are seeking contracts. We have public financing.

So throughout the states, I think that they are really experimenting with a lot of different solutions and I think what is nice about it is, you can look at all these jurisdictions, pick what you think is the best from each of these jurisdictions, and then go with your best approach.

MR. FEERICK: We are almost down to the last two or three minutes. Do we have consensus, Jill?

MS. ABRAMSON: I do not think this panel has a consensus. I would like to close just by saying we have really focused this whole time on problems and what does not work. But as someone who has covered this subject for ten years, when I began, I was going down to the FEC and looking at the names of political action committees that were things like the "Good Citizens for Good Government." And I had no idea what interests they were attached to. Back then there wasn't a Center, and the FEC had less money than it does now.

Sometimes you have to say the glass is half full. I think in terms of disclosure, our glass at the federal level is more than half full and it amazes me that people, not reporters, but any citizen with access to the Internet can go to the Center Web site. The FEC, much maligned by everybody, including journalists, has, in terms of its disclosure and career staff, the most helpful, user-friendly agency in the federal government from where I sit as a reporter, and you can find out an amazing amount of stuff that five years ago, you could not.

MR. CAROLAN: Very quickly. I would just like to say again how much I enjoyed being here. In talking to the people here, I

find that people are on tremendous intellectual journeys about what is the proper way to arrive at clean campaigns and good government and so forth. And, obviously, I have had my own drum beat about reducing the power of the government.

If I could just make a suggestion for those of you who are interested. The Cato Institute has done some very well-researched, thoughtful studies on the subject of campaign finance regulation and addresses some of the concerns of the lady who had the question before and that the congressman has discussed — which is that there are pernicious ways in which well-intentioned laws to regulate the money in the political process actually shut out diverse viewpoints, such as those of third-party candidates with unique ideas, and give us a kind of plain vanilla mediocre candidate who will mouth generalities as a way of, for example, collecting as many one thousand dollar contributions as they can rather than saying something bold with the assistance of maybe one \$250,000 contribution.

So I would recommend that you look to the Cato Institute. I think they bring a very fair, strong and interesting dimension to the discussions. I would recommend that to any of you who are searching this question through.

DR. HERRMANN: I think we just have to find a way to balance the core principle of democracy, which is the First Amendment, with protecting the government from corruption. I think in finding that balance, we will find the correct way to regulate campaign financing.

MR. MAKINSON: I would say we do not have to wait. It does not take an act of Congress for this system to be cleaned up. It takes interest by people out there to do it themselves. Our motto at our Web site⁷⁴ is, do not wait for Congress to investigate, do it yourself. If you are complaining about the choices on the ballot that you see in November, do not wait until November to be heard. One of the things we have on the Web site is the e-mail address of every member of Congress. Send them a message. You can look at their campaign profiles on the Web. If you see something you do not like, tell them. If you see something you do like, tell them. But the most important thing you can do is tell them you are watching. That is all it takes. Do not underestimate the power of voters watching their elected representatives. It can go a long way.

74. <<http://www.opensecrets.com>>.

MR. DOOLITTLE: Freedom works, and we should encourage more political speech, not less. That is why I offer the proposal that I do. We want to invite people to be able to access the system, to be able to run as candidates. If they are not of wealthy means themselves, they ought to be able to go out and get some large contributions from people who back their ideas, so they can disseminate their views and then stand before the electorate and see if they meet the test.

The system we presently have discourages challengers. I would like to see that changed, and that is why I offer a new diagnosis, and new prescriptions for the problem.

MR. STERN: In terms of consensus, I think John and I would agree and the rest of the panel would agree on two things. First, electronic filing is very important and would be very useful. And second, at least candidates should file full disclosure.

MR FEERICK: I want to thank everyone here. We are going to be available to chat with you informally. Thank you.

POLICING THE POLITICIANS: MODELS FOR EFFECTIVE ENFORCEMENT

Without effective enforcement, even the most comprehensive campaign regulations will fail to achieve desired results. Enforcing regulations on political activity, however, has proven to be one of the most difficult challenges of campaign finance reform, as agencies that police officeholders' activities are also subject to the officeholders' oversight, receive budgets determined by the officeholders and often carry out mandates created by (and subject to amendment by) those officeholders. Without fairly administered enforcement powers, and the resources to carry them out, no agency in this field can operate effectively. This discussion of the necessary elements for effective enforcement of campaign finance regulations was moderated by Nicole A. Gordon, Executive Director of the New York City Campaign Finance Board (the "Board") and chair of the Government Ethics Committee of the Association of the Bar of the City of New York.

MS. GORDON: I would like to ask you all to please sit down. We are going to start on the last panel discussion.

I will first introduce the people on the panel and then offer a few comments of my own on the subject, if I may.

To my right is Rebecca Ávila. She is the Executive Director of the Los Angeles City Ethics Commission, which is known among campaign finance regulatory agencies as one of the very best. Her agency directs a program of public matching funds, lobbyist registration and governmental ethics. Before joining the Ethics Commission she was an associate director of Common Cause and an executive policy analyst on the staff of Governor Booth Gardner in Washington State.

Next is Ken Gross. He is a partner at Skadden, Arps, Slate, Meagher & Flom in the Washington, D.C. office. He was formerly head of enforcement at the Federal Election Commission (the "FEC"). So he comes here to bring expertise in, I would say, three areas: one as having enforced the federal laws and another as having represented candidates before the FEC, and also in other jurisdictions as well.

Next is Larry Noble. He is the general counsel for the FEC. He has also served as president of the Council on Governmental Ethics Laws, and most recently has been targeted for ouster by Congress and perhaps we will have some more to say about that.

Then to my left is Trevor Potter, who was introduced to you earlier. I won't repeat anything about him except to remind you that he did serve as chair of the FEC and is widely regarded as one of the finest members of the FEC ever to have served.

And then Bob Stern, who, I think, by now certainly needs no repeat introduction but whose presence has been really invaluable today. And I want to thank him especially for his participation.

So in that same order, I am just going to ask the participants here to speak, but before I do that, I want to mention just a few things about New York City and our experience here.

The first is that on the subject of models for effective enforcement, of course, questions are raised about adequate independence for the agencies: adequate budgets for agencies, and, in general, what the posture is of the agency and whether it takes an aggressive posture with respect to enforcement.

And on one of those earlier points, I would like to say that we have a mantra at the Board, which is that we think a nonpartisan agency as opposed to a bipartisan agency is the way to structure enforcement of campaign finance laws. Our Board, we are pleased to say, has a history of a nonpartisan culture that began at its very inception in 1988 and has been maintained through the years.

Our law does provide that there are five members of the Board. Two are appointed by the mayor, two by the City Council Speaker and the chair is appointed by the mayor after consultation with the Speaker.

The two members who are appointed by the mayor without consultation and the two members appointed by the Speaker must be of different political parties, and that is in the statute, the same way that many bipartisan commissions are set up.

But the difference is that our law provides that our Board must operate in a nonpartisan manner. So there is a direction there that puts a very different emphasis on the work of the Board from what you see in a lot of election enforcement agencies.

Another item that I think is of immediate interest is that the City Charter in 1989 was amended to provide that there be special protection for the money that is paid out to candidates under the New York City program. Our Board has the extraordinary power to direct the Commissioner of Finance to replenish the public fund from which candidates' matching funds come, if there is a shortfall.

It is an extraordinary power. I do not anticipate invoking it, and I certainly hope that it will never be necessary. But that is a very important protection for our budget. And just recently, in the new

Charter revision that was passed just a few days ago in New York City, two additional protections have been built into our City Charter.

One is the provision that requires the mayor to include the Board's own estimate of its requirements for the coming fiscal year in the executive budget that is submitted to the City Council. That means that the Board is the only agency that has that power to have its own number put into the budget in the first round. It does not mean that the number will ultimately be the number that emerges from the budget process for the Board, but it is a very different approach from what one sees elsewhere.

Another important protection was built in because we had a history of vacancies on the Board. After a certain period, if the mayor or the Speaker fails to fill a vacancy, then the Board has the power to appoint members to fill those vacancies.

Finally, on the subject of enforcement, we have had a history of going forward with enforcement during the period of the election campaign, which is, of course, a difficult thing to do and sometimes a controversial thing to do. But in the view of the Board, very often justice delayed is justice denied in the case of campaign finance complaints.

So, with that little introduction about New York City, I would like to turn to Becky Ávila.

MS. ÁVILA: Good afternoon. It is a pleasure to be here again. I want to thank Nicole, not only for the invitation to be here today but also for the extraordinary support she has provided to our agency since our inception in 1991.

We are about three years behind New York City and so we have the tremendous benefit of being able to draw on them, and on their experience.

Let me begin first by giving you just a brief description of our agency and the structure that was written into place, actually, by Bob Stern, based on his observations of our state agency and I think on his observations at the federal level as well.

We have a five-member commission. They are part-time volunteers. Each is appointed by a different elected official. In the City of Los Angeles we have nonpartisan elections. So the issue of partisanship is not one that we have had to face in our jurisdiction. But each of the commissioners is appointed by a different elected official with the notion being that no single elected official, therefore, could control the decisions of the Ethics Commission.

So the Mayor, the City Attorney, the Controller, the Council President and the Council President *pro tem*, each have an appointment to our Ethics Commission, and must all be confirmed by the City Council.

They each serve a five-year term. They cannot serve more than one full five-year term. They have the authority to hire and fire the executive director. The executive director is also subject to a term limit of ten years. And the executive director has the authority to hire and fire his staff.

We have twenty-one members on our staff. In addition to campaign finance laws, as Nicole mentioned, we also have ethics and lobbying within our jurisdiction.

With regard to enforcement specifically, our commission has the authority to levy administrative penalties. The monetary fines are established in the law. They are five thousand dollars per count or three times the amount of the violation, whichever is greater.

The commission, as a body, after a public hearing, must determine whether a violation has occurred, and determine the amount of the penalty. Because it acts as the judge in our process, the role of prosecutor and the duty to investigate is therefore delegated to the staff.

According to our charter, our investigations are conducted confidentially. Any member of the staff can be terminated for revealing any information related to an investigation, and it is also cause for removal of a member of the commission if she or he becomes aware of any confidential information and releases that.

We have the authority to issue subpoenas and to put people under oath and to compel their testimony, two very important tools I am sure you can appreciate for any investigative agency.

We also have the duty to conduct audits. We conduct mandatory audits of campaigns that spend over \$100,000 and then a random sample of twenty percent of those that spend less. We also are required to conduct audits of anybody who received public matching funds. That threshold results in auditing virtually every candidate in each competitive election.

The investigations that are initiated by the staff can be initiated for a variety of reasons, either because of the complaint received by our agency or because the staff, through review of disclosure statements or through the audits, has seen something that we think merits review.

We do not have to seek the approval of our commission in order to initiate an investigation or to begin an audit. I think that is a

very important part of our process. We are, as I mentioned before, relatively new. We have only been in place for seven years, and in that seven years we have had fifty-four enforcement actions, and we have levied a total of \$825,000 in fines.

The fines have ranged from fifty dollars for the smallest to \$447,000, which was half of a total fine of \$895,000 that we split with the state agency. It was in a money laundering case.

I think, to a large extent, the jury is still out. We have strong enforcement mechanisms, but we are still a very young agency. Up until this point, the vast majority of our cases have involved campaign finance violations, but primarily they have involved contributors: cases involving laundering of campaign contributions or failure to disclose the true source of the contributions.

We are embarking on a new era, however, of investigating and enforcing violations that involve the results of audits, and so we are dealing directly with elected officials.

We have had two cases involving elected officials and with regard to our budget, we have not seen any attempts to attack the agency's funding because of our enforcement actions. But I think that is in part because we are young, and because we still enjoy a widespread amount of public and local media support. The *Los Angeles Times*, particularly, has been very supportive of our agency and I think even more importantly, our City Council and the other elected officials all view us as having widespread public support.

So as we grow older and the Ethics Commission becomes a more established part of city government, it will be interesting to see whether or not there will be greater attempts to attack the funding of the agency.

MR. GROSS: Over the last twenty plus years, since Watergate and *Buckley v. Valeo*,⁷⁵ we have not had comprehensive campaign finance reform at the federal level.

There is no question that there has been a serious erosion. The reform movement reasserted a corporate and labor prohibition which had been in the law for most of the century. Yet what we have now is the situation where if a client comes to me and says, I want to contribute a million dollars to the political process, the only question is whether they want it disclosed or not.

There are simple ways around the restrictions in the law. I had a case recently where someone was standing in the United States federal district court being sentenced for making illegal political

75. 424 U.S. 1 (1974).

contributions, and I felt like saying that I have an iron clad defense here, because anybody who violates the law has the built-in defense that they do not understand the law and could not have willfully violated it because if they had come to me first, we could have figured out a way for them to do this perfectly legally, in ten times the amount of money that was contributed. Instead of sitting next to them in court, I would be sitting next to them at a swearing-in to a Caribbean ambassadorship.

But the progress of the erosion had been somewhat slow in the 1980s. The PACs were the devils, and the presidential candidates set up these little committees before they ran for office that allowed them to take an extra \$5000 in contributions, and everybody was wringing their hands about it.

And then soft money came along in the 1990s and the national party committees figured out a way to spend money on getting out the vote and administrative expenses, and that is when the corporations and labor unions started writing checks for a million dollars to the national party committees.

And then in 1996, thanks to court decisions, came the issue advocacy stuff, groups such as 501(c)(4) organizations, 501(c)(5) labor unions, 501(c)(6) trade associations and for profit corporations, everybody is doing it.

And that is spending money on television ads without regulation, without disclosure, perfectly unregulated as long as the ad does not contain the words "vote for" or "vote against," which has been supported by a series of court decisions going back to *Buckley*.

The courts have ruled consistently that you cannot regulate this area of law unless there is a bright line, and the regulated community knows whether it is being regulated. Not some fuzzy vague line that regulators tend to like to keep the regulated community guessing. But the problem with that is that vague line-drawing chills First Amendment speech.

So the legislature is taking a crack at this and, as we heard from Congressman Doolittle in the last session, the House passed legislation, but they did it with the comfortable knowledge that Senator McConnell on the Senate side said that the McCain-Feingold legislation⁷⁶ will pass the Senate over his dead body. So there was no lack of clarity there as far as where the Senate's position was on the McCain-Feingold legislation.

76. See *supra* note 20.

And as a matter of fact, if you go back to when we had a Democratic Congress and a Republican president, the Democratic Congress passed campaign finance reform knowing that Bush would veto it, which he did, and then when there was a Democratic Congress and a Democratic president, we wondered what was going to happen.

And the Democrats realized that they were in danger of getting what they were hoping for and suddenly those proposals for campaign finance quickly changed and now we have a situation with a Republican congress and a Democratic president and still the same stalemate.

That is all in the wisdom of Congress and suggests where the laws are right now. The trouble that I have is that the law abhors a vacuum. And the vacuum is being filled by the Department of Justice and by the FEC by legislating through enforcement.

We have the Department of Justice with, I guess, still 130 federal prosecutors over at the campaign finance task force, searching around for violations of law, pursuing matters such as issue advocacy, the provision that I talked about before. The regulators have no business being in the criminal arena when it comes to cases and issues such as that.

There is no question that there are certain cases that warrant criminal pursuit if there is fraud or there is a concerted effort to evade the disclosure of individuals with substantial amounts of money.

But this area of issue advocacy is simply not susceptible to criminal enforcement, and it is disturbing to see it come up in a criminal context when there are barely two lawyers in Washington who can agree on the parameters of the law. So there needs to be a kind of perspective on what is criminal and what is civil in this area of the law. It was meant to be mostly a civil statute.

So my concern here continues to be that we should not legislate through enforcement.

MR. NOBLE: Thank you, Nicole. Thank you for inviting me. I am actually going to start off a little differently than I had planned to. I first want to ask Ken, other than that, what do you like about the system?

MR. GROSS: I did not even have time to get to the FEC.

MR. NOBLE: Rather than describe what the FEC does, I am just going to say that it is a six-member body, made up of three Republicans and three Democrats. I found today's debate about a

nonpartisan versus a bipartisan commission: interesting. We are, in theory, a nonpartisan commission. We never had anyone but a Republican or a Democrat on the FEC. And everything the FEC does it has to do by four votes. And you can do the math about what happens in many cases.

Congress established the FEC with numerous safeguards for the respondents, knowing that they would be the respondents in many cases. We have small resources. Ken mentioned what the Department of Justice has working on the campaign finance task force, and they have more people working on the task force for the 1996 election than we have to cover all elections nationwide.

So I would say that the agency is not this behemoth out there violating people's First Amendment rights, but rather struggling, I think, and doing a very credible job given what it has to work with.

I do want to give you some late breaking news for those who accuse us of being like the Chicago Cubs. Actually, I was going to say like the Redskins, coming from Washington, which is no better a feeling. There is a case going on now between the Republican National Committee (the "RNC") and the Ohio Democratic party (the "ODP") and the FEC, which is a direct challenge to our present regulations on soft money.⁷⁷

The case raises many of the issues Ken Gross just talked about concerning the clarity of the rules, the clarity of the lines. Just fifteen minutes ago, I received a call that the court of appeals had denied the RNC's and ODP's request for a preliminary injunction, saying that they had not shown irreparable harm and that it was not so clear they were likely to succeed on the merits.

So I would say the game is not yet over and that the battle continues. And I think there are many people who are rushing very quickly to announce the death of campaign finance reform and the present rules. But I think the courts have not gone quite as far as those who would like to see the rules ended. And I would advise you to stay tuned. Rather than go into great detail about what we do, I want to give you some topics to think about for effective enforcement, because there are a number of different models for enforcement. You can argue for an odd number of commissioners, you can argue for different ways of making appointments.

What I would suggest is that you really have to start a little bit earlier on in the process. We first need clear laws with clear purposes and everybody agreeing about what those laws are.

77. See *Republican Nat'l Comm. v. Federal Election Comm'n*, No. 98-5263, 1998 WL 794896 (D.C. Cir. Nov. 6, 1998).

I have no doubt that some who enacted the Federal Election Campaign Act⁷⁸ were trying to create an illusion of enforcement. Others had different ideas about what they wanted. Some felt disclosure was most important, others felt limitations and the prohibitions were most important.

It is very hard to run an enforcement program unless you have a clear idea of what it is you are trying to enforce and there is some general consensus about what is important in the process.

In that regard, I would also say that the perfect is often the enemy of good. We are never going to have a perfect system, but at least with some idea of what you are trying to do, we can move towards a better system.

You have to have a willingness to enforce and this is a sub-part of having a clear goal of what you are trying to do. Do not enact enforcement laws unless you are serious about them, unless you are going to give the agencies resources to do what they are supposed to do, and unless you are going to reward enforcement.

What tends to happen, at least on the federal level, is that when you do go about enforcing the laws, there is a lot of criticism for your enforcement. I think the message often being sent is, we want these laws in place, but we do not necessarily want them enforced.

It is important to recognize that no one likes to have laws enforced against them. A couple of years ago, I was returning from a Wye River conference, not the Middle East one, though the Middle East may be easier to settle than the campaign finance reform debate, and I got a speeding ticket on the way home.

I have to admit, I did not like the idea of getting a speeding ticket. I also have to admit, I was speeding. And I also have to admit that I had no right to say to the officer that "I am going to cut your budget if you give me this ticket."

And sometimes I am hard pressed to understand why there is not more acceptance of the fact that if you are going to pass an enforcement law, you are going to enforce it, and you are going to have people who are unhappy about enforcing it.

Finally, with regard to the structure of the board. I think it is important to keep in mind that these boards should be in practice and in law nonpartisan. I also think that the appointees have to have a common goal and a common purpose.

I think it is very difficult when you get appointees on a board who are going in all different directions because of what they feel

78. 2 U.S.C. § 431 (1994).

about the law. And I think that means the appointing authority has to have a common goal and a common purpose and an understanding of what it is trying to do.

And while I do not think it is absolutely necessary that you have a man of the cloth on a board, though it obviously does not hurt, I think there is a lot to be said for things that you cannot legislate.

The ideas and commitments the members hold cannot be written into the law or if they could, you could not enforce them. But those things are critical and go towards the type of people you appoint to the system. Thank you.

MR. POTTER: I would like to thank Nicole and the Board for the opportunity to be here. This is not my first experience with the Board. When I was at the FEC, I came up here because I had heard that New York City was a model in a number of ways in terms of how to run an agency and I wanted to find out how they did it.

And having by that time met Father O'Hare, I have followed with great interest his activities these last couple of years and those of his fellow Board members, because it struck me that there were aspects of the Board that differed significantly from what the FEC faces.

And I might highlight a couple of those, just as a way of taking off on what Larry said and then talking about the types of support commissions receive and who is on them.

Here you have an intensely scrutinized environment. It may be a large city, but it is really a small political world. And you have a great deal of sunlight and a great deal of attention focused not just on politics, but on the regulation of money and politics and on the enforcement of the election laws.

The *New York Times* and other editorials here carry a lightning bolt-like quality that perhaps dissipates as they travel further afield. It is often said that the FEC has no real constituency, that nobody is closely focused on what the FEC is doing or not and who is being appointed or not, at least in terms of individuals who are concerned that the law be adequately and fairly enforced.

I think that is not true in New York City, and from what I know, it is not true in Los Angeles. So what that may say is that when you have a greater community interest and a closer proximity to the regulatory institution, you may get a better institution than where there are only a few people who are intensely interested but who tend to be those who are being regulated, and the rest of the interest is diffused across the country.

Also, I would note, and I think this is a commendation to New York City, it actually has a sizable staff in comparison to the amount of money being dispensed and in comparison to the number of candidates with whom it is dealing, and I think that is very helpful.

When I was at the FEC and came up here, we were just talking about computerized disclosure and I asked Nicole how they were doing it. She explained — it may have changed — but at that time, candidates could actually come down, put their disks into the machines and sit down with a staffer and go through it to make sure they got the report right before they filed it, which meant when it went on the public record it was clean and easy for people to read.

It worked here, but again, I think that is something that would not translate well. I went back to Washington and explained this and they looked at me and said, “How many thousands of candidates would we have to provide this service to and how would they get here? They cannot just take the subway.”

So I think there are some differences in scale. In terms of the FEC itself, an important issue that I think is sometimes underestimated is that there is now no real consensus on what law the FEC ought to be enforcing.

We have come a long way in twenty-five years in terms of what Congress would like to see. I think it is arguable that there is no consensus in Congress today. There is a sort of fifty-fifty split in what the law ought to be.

Should corporations and unions play a role in federal elections or is that an abhorrent thought? We have a system now where the law says absolutely not, but in practice, of course, we just call it “issue advocacy.”

Maybe we need to step back and look at whether or not we want to have a prohibition because, as Larry says, if you are going to have a prohibition, you will lose, I think, a great deal of public credibility if you are not enforcing the prohibition.

And if what we are discovering is that we do not want to enforce it because it brings too many problems, then we need to have a rational discussion and make that decision, so that the FEC understands what the consensus is and can enforce that consensus rather than get caught in the middle between warring visions of what the regulatory scheme ought to be.

Finally, it seems to me, once you have decided on that consensus, you then need to have a clear penalty, one that needs to, in some

way, affect the candidates and not just the poor person who is the treasurer of the campaign.

The ability of a candidate to say, "That wasn't my violation, that is somebody else's," and then pay what is referred to as the "traffic ticket" for the violation, I think, does encourage people not to take the rules seriously.

The British have a system where if you violate the rules, you lose office, on the theory that you have got there by improper means and therefore shouldn't be there. That may be draconian but that certainly affects the candidates directly and I do not think anything we do now, short of sending them to jail, which we prefer not to, seems to be a real deterrent.

MS. GORDON: Bob, do you have some observations?

MR. STERN: Yes. I also want to thank Nicole. I have been up here on the panel all day. I am very invigorated, actually, I am ready to keep on going. But I won't spend a whole lot of your time because I have had more of an opportunity than these people have.

The Day After Reform is a book put out by Michael J. Malbin.⁷⁹ In the book, he reports that the average amount of money that the enforcement staff or the administrative staff in the states has is \$354,000 to administer the campaign finance laws.

The average staff is eight persons. That is not the eight enforcement persons, that is eight persons total, from the clerical people to the administrative people to the attorneys, if there are any. So that is not very much staff.

And I think one thing that we really need to be aware of is that when we are talking about passing these laws, we need to do something about the administration of the laws.

When we were willing to put up reform back in 1974, we gave the state commission a guaranteed budget of \$1 million plus the cost-of-living. That is the only jurisdiction in the country that has given an agency a guaranteed budget. They now have a budget of about \$3.5 million.

We said the legislature could increase it but could not decrease it. I think that is the way we have to go, to give the agencies guaranteed budgets. Otherwise, there will be no "speeding tickets" given out.

The second big problem that I see in the campaign finance area is money laundering. Money laundering is going on everywhere in the country. Becky talked about her investigation: she had a staff

79. See *supra* note 46.

person looking through campaign statements and they saw that in one day a flight attendant, a gardener and a student gave \$500 contributions to the same office holder.

That started the investigation. They found out that this Taiwanese company had given \$172,000 to state and local candidates throughout California. They fined that company around \$890,000, along with the state Fair Political Practices Commission.

Recently somebody in Florida was convicted of money laundering and is being sent to jail. I think money laundering is — what we know about it — only the tip of iceberg.

Then the question is, what do you do when you find out that there has been a violation? Do you just fine the person and let them pay out of campaign funds? That is generally what happens.

In 1996, California passed an initiative saying that the Fair Political Practices Commission could itself bring misdemeanor charges against candidates,⁸⁰ the theory being that if a candidate realized they might have to go to jail for even a weekend, there would be much more of a deterrent against violating the law.

The measure passed, but it has been declared invalid for other reasons. It is still in court and we will see what happens. But I do know that a lot of campaigns, a lot of treasurers, a lot of attorneys were quite worried about that provision saying, “we are used to paying a fine, we are not sure we want to pay through going to jail.”

Finally, I think that it may be important to look at the structure of the commissions, and I found that the part-time commissions work better than full-time commissions. I am not quite sure how it would work at the FEC, but it would mean certainly fewer meetings of the FEC, and maybe that would be the benefit.

MS. GORDON: Thank you, Bob. Since you referred to that book, I do want to alert the audience, and maybe Becky will agree with me, that one manner in which the book is incomplete is that it does not deal with L.A. or New York City. Therefore, I think when you read it you have to keep in mind that whatever averages are in there do not reflect these two cities that are bigger than most states.

Since the subject of the press came up a couple of times here, I am wondering how much people on the panel think that publicity is the bigger deterrent compared with fines or other penalties.

80. See CAL. GOV'T CODE § 91000(d) (West 1997) (“The Commission has concurrent jurisdiction in enforcing the criminal misdemeanor provision of this title.”).

MS. ÁVILA: I think there is a difference between elected officials or candidates and other violators. I think, for the elected officials and candidates, publicity is a big deterrent.

I think, for example, for the Evergreen Corporation, which was the corporation we fined in the big laundering case, it meant one day's worth of bad headlines and paying the fine, which is the cost of doing business. We wished we could have done more in a case with that kind of violation.⁸¹

MR. GROSS: You know, it is funny. I was going to make the same comment but from a different perspective. I was going to say that I thought political committees that are regularly engaged in the process endure adverse press much better than the part of the regulated community, such as corporations, that have zero tolerance for adverse publicity.

They are in the business of making widgets, and if they have a political action committee or they make a contribution, the last thing they need is the most minor article in the newspaper about their conduct. But if you have an aggressive political committee or group out there, pro-life or pro-choice, that is in business to be in the political process, then that adverse publicity is accepted in a much better way.

But there is no question that adverse publicity is a deterrent, although I am a little bit concerned that the FEC requires admissions of violations in their conciliation agreements across the board for all respondents. That has been an impediment to some quicker resolution of cases. Because, you know, the resolution of a case stands for itself anyhow. But it is kind of interesting from a different perspective. It is really the same thought, but it came out the opposite way because of the nature of the respondent that I tend to be involved with.

MR. NOBLE: I will take the middle road. I think, actually, it is important to both types of groups, but I think they are also connected. I think the level of publicity you get also has to do with the level of civil penalty that you get.

And with regard to Ken's comment about getting admissions of violations, it is also true with the FEC, generally, that we require an admission of violation. One of the things I have always thought would be an interesting trade off, but we are not there yet, is to get civil penalties high enough where the admission of violation becomes less important.

81. *United States v. Burns*, 162 F.3d 840 (5th Cir. 1998).

For example, I think it was a number of years ago when American Airlines agreed to a \$4 million penalty with the FAA but said it did nothing wrong. I think people generally understood that you do not pay \$4 million unless you did something wrong.

I would say it is one thing to have no admission with a thousand dollar civil penalty or \$1500 civil penalty where they can say honestly from their perspective, "Look, it would cost me more to pay Ken Gross for another day or two to argue this than it would to pay the \$1500, and I am not admitting a violation."

If, on the other hand, they are paying \$10,000 or \$50,000 in penalties, then the admission of violation becomes less important and the press will pick it up. I think the press is an integral part of this. I think that unless the press picks up what is going on, unless they are reported as violations, then there will be little interest in it.

I think it has a lot to do with what Trevor talked about in terms of building a constituency for what is going on.

MR. POTTER: It sounds as if Ken and I should go back and warn our clients that the general counsel is now looking for \$4 million in penalties that will —

MR. GROSS: But you do not have to admit to violations.

MR. POTTER: I think everyone has gotten very adept at spinning the whole press game. It is pretty predictable that in the campaign cycle the candidates will file FEC complaints against each other and stand on the steps and say this is horrible and it is a violation. They know that it may never be resolved or it may be resolved two or three years later. But they get that initial press hit.

Somebody actually ends up admitting a violation either because they are thankful they did not have to admit more, on the one hand, or, on the other, because they have given up fighting and say, "Oh, the heck with it, it costs too much to pursue this, I will admit it."

In either of those cases, they are very good now at saying, "This is just something that we are paying to get rid of. We think we had a good case, but it really wasn't worth pursuing and it is a relatively minor violation."

Those words just rolled off my tongue without knowing what the violation was. I think part of the confusion out there is you see television ads that say, "admitted violating the campaign finance laws."

Well, was it a late report that the treasurer forgot to file, or was it a serious case of impermissible foreign money being smuggled in?

Those distinctions tend not to get made and so I think in some cases the press is less useful than you might expect.

And it is very easy for someone to say, "Well, there is an expert on this side and an expert on that side and they disagree, so who knows what the law is?"

MS. GORDON: In the example you just cited, is the FEC in a position to make that distinction for the press or is that something the FEC just leaves for other people to judge?

MR. POTTER: I think it would be interesting to hear Larry's views of why, because I think my answer is, no. The FEC tends to say relatively little. It almost never holds a press conference to explain something, and its policy is to say, "Here is the violation," and it will give you a string of statutory cites to glaze the press' eyes over, and then "Here is the penalty."

I do not think they are in the business at all of rating the violation or saying "This is a really serious one," or "This is relatively garden variety."

MR. STERN: I think it is important that the agency does hold press conferences. I know that when the Ethics Commission fined the Evergreen Corporation nearly \$900,000, they did hold a press conference and it was major, major news.

But I think the press is getting a little jaded to the fines and the fines have to be ratcheted up before you can get the interest, and I think there is only so much you can fine the officials.

So I think, in a sense, where there is not that much publicity, I am not sure the fines mean that much because the fines are a cost of doing business. They are not personal fines, so I think we have to come up with some more creative ways. And Trevor has come up with what is called the death penalty, which mandates that when you commit a violation, you are out of office. That is a death penalty; that is as bad as you get.

If you have something like that, a candidate is going to be much more careful. As for the misdemeanor question, I think candidates will be much more careful also if they think they are going to jail. So I think, besides publicity and fines, we have to come up with more creative ways of letting the candidates know that if they do commit serious violations, as opposed to the ticky-tacky violations, there are serious consequences.

MS. GORDON: Larry, I know you have had, or the FEC has had, a lot of its own recommendations for improvements. Could you describe what some of those are?

MR. NOBLE: The FEC makes legislative recommendations every year. And because of the nature of the FEC, the legislative recommendations tend to be procedural in nature. They tend not to be substantive recommendations because it would be hard to get agreement on substantive recommendations. And the FEC's standard line is that we will enforce whatever Congress passes.

The procedural recommendations, though, generally, are pretty much ignored by Congress. For a number of years, probably one of the most substantive we ever made was when we recommended getting rid of the state-by-state limits in presidential campaigns, because they were not working. They were a tremendous strain on our resources, and we could see no purpose to them. This is where, in the presidential primary campaigns, they have a state-by-state limit on what they can spend.

We have actually done a lot to do away with them ourselves, through the regulatory process.

MS. GORDON: Why?

MR. NOBLE: There are a lot of reasons and theories on why. One reason is that some people like the state-by-state limits. It tends to affect the nature of a campaign.

Another reason is that, basically, it has been considered that anything dealing with campaign finance reform is death to bring before any of the bodies of Congress, as you have seen. Because all of a sudden, everybody starts tacking everything onto it, and you do not get a bill passed. So I think this is one of the reasons why.

I do have to give credit to Congress for one thing this past year, which is that we did get more money. This year, Congress did give us another \$2.8 million than what we were expecting. It did earmark some of it, though, for computers, which it has a tendency to do, but that is a recommendation we have been making. The last couple of years, we have been asking for more resources.

Other recommendations we have made have gone toward electronic filing, which everybody has agreed is a good idea but has not been mandated and it will not happen in a widespread way unless it is mandated. So those are the types of recommendations that we can make that, generally, are not really considered seriously by Congress.

As in Shays-Meehan and McCain-Feingold,⁸² there were some of the recommendations we had made in the past, that did make their ways into those bills, and we all saw how successful that was.

MS. GORDON: Then the FEC does not normally make substantive recommendations about changes in the law?

MR. NOBLE: No. It has not made substantive recommendations about changes in the law.

MS. GORDON: What about L.A.?

MS. ÁVILA: We do — it is sort of a routine part of what we do to review the laws that are in existence and to make recommendations to the Council and the Mayor.

MS. GORDON: And how responsive has the legislature been to the recommendations that you have made?

MS. ÁVILA: Well, in part, I think because of our local political culture, there are a number of people in the Council who have identified themselves as reformers. So there are people on the Council who are invested in seeing some of these changes move forward.

MS. GORDON: Whereas in Congress there is not much of that?

MR. NOBLE: There are people who are also reformers in Congress who have tried to move some of these things, and we get calls periodically asking, "What would you like to see in a bill?"

Again, the Commission is reluctant; not just reluctant, it will not go forward, it will not take a position on whether there should be public financing of congressional elections. You will never see the FEC take a position on that.

In fact, it has even gotten to the point that we will, occasionally, get the question, "All right, we are not asking you to take a position on whether there should be public financing, but if there was public financing, what would it cost the agency to do that?" And the agency has split on what the cost of that would be. For that reason, it has not been able to put forward a cost of public financing of Congressional elections.

MR. GROSS: I thought for a long time that the worst thing you can do is go to Congress and talk about comprehensive campaign finance reform.

It makes the hair stand up on the back of the members' necks, and I think the only way we are ever going to get anywhere is

82. See *supra* note 20.

through incremental reform. Some of the suggestions that I have made in the enforcement procedure areas have been to try and make the agency an adjudicative agency, which gives the respondents a right to address the FEC directly. They do not have such a procedure right now. Perhaps we need someone like an administrative law judge to oversee the progress of the enforcement process because the time it takes to resolve cases is probably our biggest criticism. It is one I am a little sensitive to because there was one leveled at me when I was at the FEC.

I know how difficult it is to move a case quickly and cases age more quickly in the election process than anywhere else. A complaint gets filed two weeks before the election and everybody wants to know why you are still working on the case two weeks after the election.

So I am very sympathetic to some of those criticisms, but I do believe that there are some structural changes in the direction of making the agency more adjudicative that would be helpful to the respondents, and perhaps give more definitive direction as to the length of investigations in some of these cases.

MS. GORDON: Speaking of respondents, I think one challenge we all face is that we, in some cases, are giving benefits like public money to candidates. We are also auditing them and enforcing laws against them and, at the same time, these are the very people who are passing the budgets and the laws that we administer. Another item that came up a little earlier today that maybe hasn't gotten enough treatment so far is the whole subject of large versus small campaigns.

There are campaigns that have varying abilities to deal with the laws and the complexity of them. Antagonism gets built up between an agency and the legislators, for example. I wonder whether there are ways that, in the various agencies, people have found to lower the ante and make the relationship better. Becky, do you have any experience with that?

MS. ÁVILA: I think it is helpful that we have a staff that is dedicated to assisting committees' compliance with the law. So there are mandatory training sessions that everybody has to attend. We have staff assigned to each campaign to assist it with setting up its paperwork and filling out the report.

I think members of the regulated communities see us as both an assistant, a way to help them get what they need to get done, as well as a policing agency. And it is important to have both roles.

MS. GORDON: Do you have different standards and different procedures for large campaigns compared to small ones?

MS. ÁVILA: No.

MR. GROSS: And losing campaigns as opposed to winning campaigns. I think one of the things we experience in this area of the law is that regulating communities encompass a wide variety of entities, like the SEC, you know, where they regulate public corporations. Here you have campaigns that are out of business, you have Senator Glenn who is still paying off his campaign debts. Maybe he can do a little better now that he has come back from space.

These are sad situations, really, when someone runs for office and really does not have the resources to handle some of the issues that come before campaigns and the agencies are still going after a lot of these entities.

MR. STERN: Nicole, when I was with the Fair Political Practices Commission, we did have a legislative program, and I thought, in a sense, that helped us with the legislators because we were not just going over there, guiding their hands. We were trying to go over there and work with them on trying to make the laws better, and I think they appreciated that.

So I think to some degree, although not to a great degree, that was a way to build relationships with the legislators, as opposed to actually having a formal legislative program.

MR. POTTER: Although, answering your question, Nicole, from the perspective of having seen this on both sides of the FEC, I think I could generalize and say that the vast majority of the candidate cases that the FEC sees and deals with involve challengers. That is not to say that all challengers lose, because I think there are a number of cases where the FEC ends up dealing with people who become members of Congress and Senators.

But the source of violations that tend to occur — reporting violations, limit violations, misunderstanding or failure to pay attention to attribution rules, designation rules and all these complexities — tend to be by people who are either new to the political process or starting off on a relatively small scale, who learn it later. And once they become an incumbent, they have lawyers and accountants.

Incumbents have been through the process. They have lawyers and accountants at their disposal, and they are less likely to make those sorts of mistakes than a small campaign that suddenly becomes a big campaign without the infrastructure in place.

That is a gross generalization, and Larry may have a different view. But my sense of it is that even when members of Congress who are upset about something the FEC has done, that arises from a violation and an investigation connected with their first campaign rather than their work as an incumbent.

MR. NOBLE: I do not know whether that is true or not; I have never done a study of that. I will say, we have a number of cases against long-time incumbents. We also have cases against political parties that have been around for a long time where it is harder, I think, for them to say that they did not know the rules.

We do take into account in our enforcement process how new the campaign is and how serious a player it was: we take that into account even with political parties. We are aware of the fact that on a local level you often have a political party or a party organization that changes every election cycle.

Still, when these people are playing in the field, I think they have a certain responsibility to put the resources into compliance, put the resources into finding out what the law is. And one of the things you find in this area often is that people just, and I hate to plug Trevor or Ken, but people just do not want to pay the lawyers, do not want to pay the accountants to actually do it right.

The other thing we find that is interesting about incumbents is that they will often get angry at us for dropping a case against somebody who challenged them, even if the person was not necessarily a serious challenger.

You may have somebody that only got ten or fifteen percent of the vote and did not file a report, or did not file a couple of reports. And the long-time incumbent won again, as they have been doing, and during the campaign, filed a complaint against their challenger. We are short of resources, and we have an enforcement prioritization system whereby we drop a lot of our cases without actually working on them. You look at that type of case and you would say, this does not look like somebody who is very serious; it was a one-time campaign, and you find that the incumbent gets very angry because if it is their opponent that committed the violation, it is the worst sin that ever happened in American politics.

But if you committed the violation, it was obviously an inadvertent oversight that we are being much too difficult about it. I think that is a real problem that we face on a day-to-day basis.

MS. GORDON: Larry, you sound very reasonable, and we have heard that the FEC is underfunded and that you lose practically

every case you bring. I know from your press releases that you dismiss whole sets of cases for various reasons, including lack of resources. Trevor says you challenge challengers more than you do incumbents. So why do they hate you so much? Why are they trying to fire you from your job?

MR. NOBLE: Well, I would like to look at it as an institutional issue. What this was about was that there was an attempt —

MS. GORDON: Actually, maybe you better explain what happened.

MR. NOBLE: There was an attempt to put what was called a term limit on the staff director and general counsel of the FEC. And it had a couple of different forms at various times, but, basically, it would require the staff director and general counsel to come up this January for a revote by the FEC.

It took four votes to hire us. Everything the FEC does, it does by four votes. It takes four votes to hire us, and this would require us to get four votes again this January with the idea being that any three commissioners could remove the staff director or general counsel, and, given the bipartisan make-up of the FEC, either side could control who is the general counsel or staff director.

Putting aside the personal feelings I had about that, institutionally, my fear was that it would really tell the general counsel and the staff director not to bring controversial cases, not to go after anybody, because what happens is that either side can at any point veto you.

There was a big fight about this in Congress and there were a number of people who saw it as an institutional issue and who defended the positions of the general counsel and staff director and, ultimately, it did not pass this year.

I have been told a number of different things about why it happened. I think, generally, it was that my office was seen as being too aggressive in certain types of cases it was bringing.

It is interesting. Years ago we were considered as much too petty in that we were bringing up too many of these “traffic ticket” type cases, too many non-filers, late filers. Now the complaint is that we are going after too many of these big cases and too many of these cases that deal with large organizations, and I will be up front about it, there was a claim of bias in the cases that we brought: “Anti-Republican bias.”

It was interesting because all we do is make recommendations to the FEC. It took four votes to bring any cases we brought, and, in

fact, of every study done of the cases we brought, none of them found that there was, in fact, any political bias in any of the cases we brought.

MR. GROSS: This is a very unfair thing, I think, that Congress is doing. They shouldn't be reaching into the bureaucracy trying to remove a member of the staff because of a couple of lawsuits that were brought against the Christian Coalition and some other entities that seemed to have raised the hackles of certain members of Congress.

The FEC, first of all, had to vote to bring these cases notwithstanding the general counsel's recommendation. So I just think it is an effort that should stop, although I do not know that it will. And secondly, it particularly irks me, because every time they try and remove Larry, he gets another editorial in the *New York Times*, extolling what a great guy he is, which he is, but I do not have to read about it in the newspaper.

MR. NOBLE: Having somebody attack you for your job is great for credibility.

MS. GORDON: I am now going to invite people who have questions to come up to the microphone. If any panelists have anything they want to say —

MR. POTTER: Nicole, just while the questioners are coming up, I agree with Ken. I think there was a great deal of confusion on the Hill about what was going on at the FEC and their real motivations about reaching into an agency.

At the same time, I think there are two other elements there. One, ultimately, is that we want the general counsel to be somebody who can be genuinely independent. The proposed new system would have meant he needed four votes to stay and either party could have knocked him out. The current reality is that the general counsel only needs a base of either party to stay, so that it becomes important not to irritate both parties, but to keep one at least comfortable.

It seems to me there may be a point in favor of getting him out of that box entirely and going to a truly independent term of office, serving for a ten-year period or something like that, where you say, "This is the job, you do it for ten years, and absent gross malfeasance, you cannot be removed," like the director of the FBI. But at the same time, you, at the end of that, are not eligible for reappointment. Because it seems to me that otherwise you are always

going to have the issue of which commissioner is upset at which point, which in the real world is —

MS. GORDON: The standard practice in any commission is that you serve at the will of the majority of the commission.

MR. POTTER: But when you have a three-three commission it makes that majority element much more political.

MS. GORDON: Would you favor it if the FEC has an odd number of members?

MR. POTTER: I think that if the number of commissioners is odd, the question is who has a majority, and one party is going to mistrust the FEC. If it has two Democrats, two Republicans, and two independents, then the question becomes, whose independents are they and —

MR. STERN: As far as I know, the FEC is the only one that has that problem. You look at state after state having these commissions, New Jersey, New York, California, there has never been any talk about partisan commissions.

Congress obviously wanted a very weak FEC. It got a very weak FEC. Congress continues to make appointments to the FEC, in essence, and I think an odd-numbered FEC would make sense. It would also maybe get away from this whole idea of three-three splits and make the FEC much more responsive, I think.

MR. NOBLE: I also think there is a cultural issue here, which is, regardless of the system that you set up, if you reward people for doing the job that you want them to do, they will tend to do that job.

If you reappoint commissioners who enforce the law fairly and evenly, then you will get commissioners who will enforce the law fairly and evenly. If you tell commissioners who enforce a law fairly and evenly that they are not going to be reappointed, then the next person in there is not going to enforce the law.

Personally, I am against term limits for commissioners, as well as for staff for a reason that I think people often overlook when they consider term limits: with most jobs, you try to do a good job to keep your job. If you tell someone that you are out no matter what in four years, six years, ten years, then — and we have seen this in certain instances — as the term starts winding down, her or his interest goes somewhere else. And it is not that all of a sudden they are not beholden to anybody necessarily. It is now they are beholden to somebody else. Maybe it is somebody outside, and

they now have to start worrying about who they are going to anger on the outside if they are going to try to find a position after leaving the FEC. So I do not think the term limit issue is such a simple solution.

AUDIENCE: My name is Mike and I am a political science student at Fordham University. My question goes to enforcement and how it applies to federal elections in general. For those who did serve on the FEC, do you think that in general, if we are able to enforce every case where we do see a violation, the little cases as well as the big cases, do you think that that would create a better environment for elections in general, or do you think that going at ticky-tack cases would hurt the process in general?

MR. POTTER: I think it is important to go back to the point I made earlier that we find some way of differentiating between serious violations and less serious ones.

To answer your question by an example, I believe it to be the case that every single publicly-funded presidential campaign since the system began in 1976 has had some violations.

This means that the auditors have found some problems with the way the money is spent. Some of those undoubtedly were very minor; some were not. But as we establish this track record, you end up with somebody saying when a violation is discovered, "Well, every campaign has had a violation, that is just the way the system works. It is not really a violation, it is just a technical issue."

So I think the failure to differentiate makes it harder then to focus on the areas that you would like to change. So when you move on to the whole enforcement area, I favored the FEC's decision to prioritize cases and then say which cases are simply not important enough to handle.

The argument against that was, "Do we want to send a signal that filing a late report is not a problem and, therefore, you can get away with it?" So I think it is a difficult balance. But if you proceed with equal strength against everything, I think the risk is that you end up, in the real world, stuck in molasses, proceeding very slowly and appearing to be ineffective.

MR. NOBLE: I would never advocate a system where you go after everything. One of the theories, though, is that you want to keep your hand in everything. Again, I do not think it is different in any kind of law enforcement. You do not want to put all your

resources into going after murderers because there are other crimes being committed.

On the other hand, if you try to stop every burglary, write every speeding ticket, you are not going to be able to handle the more important ones. So you try to keep some sort of balance in it.

I think we are nowhere near yet the resources we need to keep the balance, but I think that we have the traffic cops out there for the late filers and the nonfilers but we also go after the big cases.

MS. GORDON: Becky, do you go after everything?

MS. ÁVILA: No. No, but it is the decision made by the staff based on a variety of factors.

MS. GORDON: Larry, what are the resources that you think you do need? What do you have now and what do you think you need?

MR. NOBLE: Right now with what Congress just gave us, my office will have about 110 people. We probably will have about sixty lawyers. We just recently doubled our investigative staff, so we have two investigators, and we are going to try to double it again to get four investigators.

Yet that is inadequate. I have been asked the question of what we need, and Senator Glenn asked me during one of the hearings what we needed, and when I hesitated, he threw out a figure of \$50 million and I said it sounded good as a start.

I would like to do it incrementally. First of all, if they dump \$50 million on us immediately it would be very hard to get our staff up there and do it in an orderly fashion. But I think that adding several million dollars a year to the agency and staffing up, I think you would probably get close to that level, \$50 million.

Look at what we spend on law enforcement in other areas. The FEC is the only agency that does this civilly nationwide. We have no offices outside of Washington, and we are doing it now with a staff smaller than, as I said before, what the Department of Justice is putting into just the 1996 elections.

So I do not think we are close to what we need. Now I will have to say, in all fairness to the commissioners, a number of them disagree.

MR. STERN: Nicole, I was just amazed when Larry said he had two investigators, three investigators — I mean, Becky has three investigators with a staff of twenty. Something is wrong here when have you a staff of 115 and you only have three investigators.

But in response to your questions, it is very, very easy to go after the simple cases; it is a snap. But those are the people who are usually the minor candidates or the minor committees. It is very difficult to go after the people who are well represented — it is long and tedious and you alienate people and you often do not win. But those are the important cases and you really have to go after the big ones.

MR. POTTER: If I could just put one tiny point in and that is to go back to what Larry was saying. Again, I cannot emphasize, in my view, how important it is for there to be a consensus in Congress and in the federal government about what these laws ought to be and what sort of behavior is right and wrong. Because without it you are going to end up where we are now.

The House of Representatives' leadership recommended a smaller budget. It was overturned on the floor and largely by a party line vote.

Larry now has \$2.8 million more than he had before. If he uses that portion that he can for new staff, he faces the fact that the new budget cycle is already in place, that Congress will be voting this spring on the size of his budget. If leadership did not like it last year and does not like it this year, they will cut him off and he will have to fire the new people in October that he has hired some time in the spring, by the time he advertises and gets them aboard.

So we really need some consistency here, and I do not think you can get that without a consensus of support in Washington.

MS. GORDON: We have time for one more question.

AUDIENCE: There have been some references to the Democratic and Republican make-up of the FEC. I just would like to know whether or not you think it weakens the FEC, and if it does, in the enforcement versus rule-making, how big a problem it is. What measures could be taken that might politically rectify it?

MR. NOBLE: I think the general thinking now is that it is not necessarily a good situation. I have to tell you that, up until very recently, I was a strong advocate of that make-up and I will tell you why.

When we brought a case like we have now against the Christian Coalition, and the organization would claim that this was a partisan attack. The answer is, no, it took four votes, at least one, in this case, Republican and, therefore, it was not partisan.

I have stood before judges who, when given the argument that this is just partisan, have asked me what the vote of the FEC was.

And you tell them the vote of the FEC was four, five or six to nothing. You can see their expression change, "yes, fine, this is not partisan."

So there is something to be said for that. Also, keep in mind that probably ninety percent of what we do is not split along party lines. Most of the routine stuff goes through routinely. That is why you call it routine stuff. But, as you would expect, it is some of the bigger, sexier, more controversial issues that do split three-three.

So there are definitely benefits to having that type of make-up, but it comes at a very high cost because you can have very strong partisan splits. And it carries over from enforcement; you see it in rule-makings also.

In rule-makings what you try to do is get to some type of compromise. So you are constantly looking for, in essence, the lowest common denominator where you can finally bridge those gaps and get the four votes that you need.

MR. GROSS: I have not advocated a change in the structure of the FEC, as odd as it is. There is only one other agency in all of Washington that is even-numbered, and that is the International Trade Commission. It is a kind of strange thing just to have an even-numbered FEC.

But I, actually, think it probably works as well as it is going to work. Now, we have three new commissioners on the FEC and it is kind of a new day because the FEC has not changed in a material way for years.

So I think that we are going to see some changes because of the new commissioners on the FEC and maybe there will be a shift from making law through regulation as opposed to enforcement actions that are, maybe, out there ahead of the law.

For example, there is a pending rule-making on issue advocacy. I think maybe that is a better way to handle it, and a commission which is bipartisan is better suited to that type of activity.

MS. GORDON: I am going to ask the panelists to wrap up, and I do want to caution the audience on this subject as on the others. There are lots of other resources out there. Our colleagues from Connecticut, for example, are here and they have a very strong enforcement record and they would be people whom you would want to talk to on this particular subject.

And I think this entire conference is really a starting point rather than a concluding point for the kind of inquiry we have been conducting.

Having said that, maybe we can just go down the line here. I guess not everybody thinks that the local lessons on this subject are suitable for federal treatment. But Becky, do you favor urging Congress, assuming it could speak with one voice on the subject, to go to a different structure of enforcement powers from what exists now at the federal level?

MS. ÁVILA: Yes. I think something has to be done. I would have to say that one of the things I do not hear a lot of talk about — and I am not quite sure why — is that one answer is to strengthen the role of the staff in the enforcement investigation process. The need for Larry to have to go to his commission before he initiates an audit or begins an investigation, to me, is just a tremendous weakness, and I would like to see that change.

MR. GROSS: I am in favor of Father O'Hare moving to Washington if he's interested. And I would like Congress to address campaign finance, as long a shot as it appears, but I really would like to see it on an incremental basis rather than trying to take on such huge looming issues that are surely going to raise constitutional objections.

And for the FEC in these more difficult areas, such as issue advocacy, I would like to see it address them through rule-making procedures rather than attempt to enforce the law in an area where I do not think we have enough definition or clarity for the regulated community.

MR. NOBLE: I think where I would like to see the focus is on getting a consensus about what it is we are supposed to be doing.

I am less concerned about the structure the FEC has. As I said, I have defended the structure of the FEC. I think there is a lot to be said for it on the federal level.

But I think what we need is a culture that feels that these laws are important, and a consensus about what the laws are, what we want to do with them, and how they should be enforced, and then let us go do the job.

But tell us what you want to do and then let us do it. The worst possible situation is to set up an agency so that you can say you have done something and pass laws so you can say you passed them and then not be serious about enforcement, or give the agency the resources to enforce it and then punish the agency when it does enforce it.

MR. POTTER: Since I have trouble believing we spent an entire day in a series of panels talking about politics and no one has

raised the subject of sex, I have to do it, and I will say that my motto at this stage of this panel is "k.i.s.s.," which as you know is, "keep it simple, stupid." It really strikes me that one of the problems we have in this area is getting Congress to write laws that are relatively simple and can be understood and followed then the FEC able to write regulations that do not take on the complexity of an ancient code.

It is a problem. And I think when Congress looks at campaign finance reform, people who do not know anything about enforcement agencies start creating these very complicated rules.

I wish, for once, that an important consideration of Congress as it is looking at the federal election laws would be, "Is it going to be enforceable?" And when Congress looks at the various bills for change in the FEC, what normally tends to happen is that they cut out the FEC section, saying that is too controversial.

They then talk about what the law ought to be, as opposed to how in the world it is going to be enforced. I think that leads to a real lack of credibility when inevitably you discover it is very complicated and hard to enforce.

So something simple would be helpful.

MR. STERN: I find the FEC to be extremely unique in the sense of how people regard the FEC versus the other agencies throughout the states and cities. They do not have the respect of the legislative body, and they do not seem to have the respect of the media, because of the way Congress set it up, and because of the way Congress really controls not only the appointments but also tries to get rid of people.

So I am not quite sure how to change this tradition of twenty-three years we have had at the FEC. I like the idea of term limits, and I think that was a good step by Congress. I think we should have an odd number of commissioners, and I think the FEC should have administrative penalties so that they do not have to go to court.

Possibly, the appointment authority should be returned to the president, in fact, rather than leaving it the way it is right now, where Congress is making appointments. But I am not too optimistic about future changes in the FEC.

MS. GORDON: Thank you all. I want to thank all our panelists for helping us discuss this very important subject.

**CLOSING REMARKS:
THE BEST LOCALITIES HAVE TO OFFER — HOW TO
MAKE WASHINGTON LISTEN**

MR. BEGUN: I found this conference remarkable. And I do not know about most of you, but I learned a lot. And I want to congratulate my colleagues, our chair, Father O'Hare, and former Congressman Bill Green who was here before, and Nicole Gordon and the entire staff. They have brought to this audience a remarkable array of talented people, men and women, from all over the country and they are to be congratulated. So before we adjourn, I would like to give Nicole and the chair and the staff a round of applause.

There is one issue that did strike me over and over again and we kept skirting it. It was mentioned but never delved into. It is becoming, at least to me, increasingly clear that the standards and the regulations for high level public positions may be very different than for the local level. This is so in some measure because media buys do not affect aldermen, selectmen and councilmembers, although they do, to a limited extent, affect members of the House.

Elections for councilmembers, where big money does not play as much of a role, will be tested in New York in another two years because of term limits. The terms of forty-one of the fifty-one members of the City Council will expire.

But the candidate for local office is measured on the same playing field and on the same basis as somebody running for Congress or U.S. Senate. I think therein lies the problem, because campaign finance reform on the federal level seems to be inevitable. We are down that road and we may not be speeding down the road, but we are trotting towards that conclusion.

The gentleman is going to close out our session today is a remarkable individual. He has been in the House of Representatives since 1987. And he has a reputation. I am a part-time resident of the State of Connecticut — not in his district, but way over on the west side of the state — and I hear people talk about him with the affection usually accorded to someone who has just left office.

He just won reelection, and deservedly so, in his district. He has charted an independent course on certain important issues. He has been a remarkably effective legislator in the House of Representatives. And he has a piece of legislation that has borne his name

with great pride, and I say, Congressman Christopher Shays, you are a great credit to public life.

MR. SHAYS: Thank you very much. I am struck by the fact that I am going down to Washington without the same euphoric feeling I had four years ago. Four years ago we were set to begin the 104th Congress and Republicans had taken over for the first time in forty years. It had shocked and surprised a few people, but we were prepared for it. We had a plan, and we set out to carry out that plan.

The first bill we passed was a bill that I had been working on with Joe Lieberman and Senator Grassley and also with another colleague on the other side of the aisle. It was to get Congress under the same laws that we imposed on the rest of the nation.

Because we had exempted ourselves from about eleven very important laws: equal pay, forty-hour work week, sexual harassment, OSHA and our fire safety laws, in some cases. We were exempt. And the first bill signed into law by the president was congressional accountability, getting our Congress under the same laws that we imposed on the rest of the nation.

Our founding fathers always thought that the public would be protected from Congress because, of course, Congress would have to abide by the laws that they imposed on the rest of the nation. Little did they know that we, for a period of time, hadn't done that. So that was the kind of feeling that we went in with, and after doing that, Senator Feingold and Senator McCain got through lobbying disclosure. We took it in the House and, to the surprise of some of the Senators who were looking forward to having it come back, we passed it and sent it directly to the president.

The Senate had a gift ban of fifty dollars; before, it could accept \$250 a year, and meals were not included. So it wasn't uncommon for a member of Congress to meet a lobbyist in Paris and have a nice meal costing hundreds and hundreds of dollars. The Senate allowed the fifty dollars in gifts, including meals, and the House got the bill and said, "no gifts."

We also banned proxy voting, which gave chairmen such extraordinary power. Now they could not take names out of their pockets and vote for the members who were not there. It gave the minority more say because the majority had to make sure they were there. And it took away some of the clout of chairmen, which under the Democrats had just gotten to be a little obscene.

I do not say that in a partisan way. It took Democrats about twenty years to get arrogant, and it took us only about two. But I

say this because on a bipartisan basis we accomplished congressional accountability, a gift ban, lobbying disclosure and getting proxy voting out. And we have a last effort: campaign finance reform.

I naively thought that if it did not happen in the first two years of this new Republican Congress it would happen in the next term, and I learned, very quickly, that that wasn't the case. But what I also learned was that there is an inevitability to campaign finance reform.

The problem is that it will become so obscene before Congress acts, and then when it acts, in my judgment, it will be bipartisan and almost unanimous.

I would like to make a few key points. One is, I do not think there is any easy solution. I do not think there is any one right answer, but I do believe that dirty money disclosed, all things being equal, beats no money any day of the week.

Yes, dirty money disclosed, all things being equal, beats no money any day of the week. Because that money, if used effectively, can give an advantage to the person who has accepted this tainted money. I am just going to say tainted — but it is not always tainted money — I am just saying even if it was, its disclosure won't change the impact of the positive effect money can have on elections.

And if people then say, what about what happened with D'Amato and Schumer, my contention is dirty money not spent well does not beat no money, but if it is spent well it will.

And what I did not know when I started to really get involved in this battle on campaign finance reform was how little of the law I really understood even though it was a part of me, because I had to live by it.

I did not know, for instance, that it was against the law since 1907 for corporate treasury money to be used in campaigns. How could it be against the law since 1907 if corporate treasury money is at almost every event I attend?

When I go to that major event there is wine at the table and so on. I did not know it was illegal for union dues money to be used in campaigns since 1947. I did not know that. It could not be illegal because it is happening all the time. Then I began to realize the impact of two things: soft money and sham issue ads.

Soft money is the unlimited sums contributed by individuals, corporations, labor unions and other interest groups to the political parties that get routed right back down to the candidates. And it is

so obvious it just stares us in the face, and we act like it does not happen.

I do not know why that is not illegal since it has been a total abuse. It is not used in ways it is supposed to be used. And it is happening because of sham issue ads. They are, in many cases, great campaign ads. I do not mean they are sham ads, they are sometimes very effective ads, but they are campaign ads. They do not say "vote for," or "vote against," but they are basically encouraging you to do that because they say "someone is a slimeball and tell him to stop being a slimeball." Call up his office and tell him to stop being a slimeball.

Actually, I do not know what that word means. I hope it is not a bad word. In this day and age, I use things that I hear and then find out what they really mean. But the bottom line is, those two things have made a mockery not of the 1974 law, but of the 1907 law and the 1947 law. And for me as a Republican, I think the most difficult thing for me to accept was to hear my own Republican leadership, the Speaker and the Majority Leader in the Senate, talk about how McCain-Feingold or Shays-Meehan⁸³ simply did not address the abuse. And they would talk to my Republicans and people that I turned to for support and say we totally ignored the abuses of union dues money, because we did not have that provision called "pay check protection," where the union member had to sign off on their money being used.

That is true. We do not have "pay check protection" in the bill. But we do not allow for a union leader or a union member to have their dues money used in campaigns. We do one thing better than what my leadership accused us of not doing. We shut it down.

We shut down corporate treasury money and we shut down union dues money from getting into the campaigns directly. People who work in corporations can contribute to PACs, and they can contribute individually. Employees, workers or union members who want to contribute to campaigns can contribute to political action committees, and they can contribute individually. They are very much a part of the political process, they have their voice.

But we shut down the corporate treasury money and union dues money because we banned soft money and because we call those sham issue ads, run sixty days before an election, what they truly are: campaign ads. And they come under the campaign laws.

83. See *supra* note 20.

Now, Mrs. Devos of Amway came up to me and said to me, “you have no right to tell me how to spend my money, Chris.” And I said, “we do not.” The law says you can limit what someone contributes, but you cannot limit what they spend. McCain-Feingold adheres to this.

And so if she chooses to spend whatever she wants on a campaign, she can do it, with one little difference. Now it is called a campaign expenditure, not a sham issue ad. And as a campaign expenditure, she has to report what she spends and where she spent it. It has to be disclosed. And a lot of the battle over this bill in the House was by third parties who did not want to disclose even though they said they were for something like Congressman Doolittle wanted. It was because the party leaders did not want to get rid of soft money.

My biggest argument to my own leadership was, you lose the mantle of reform and legitimacy. I said it this way: you lose your right to have a legitimate investigation of the president if you say you are going to have this investigation to hold the president accountable and you did not do the other part that is required of any legislative body that investigates.

When you learn, you reform. And my side of the aisle said, if we do that, it will imply that the president did not break the law, because then he will just say, “the law needed to be amended.” Well, he could say that, and he would be right. But he would also be wrong if he said, “I have not done anything wrong.”

When Democrats investigated Watergate, they investigated President Nixon, they held his administration accountable, and they reformed the system. And I would contend that reforming the system gave them legitimacy to investigate and hold the president accountable.

It is what made us realize it wasn't just about using their power to get the president. And I weep that my own party did not get that. Because had they, there would have been a lot more credibility.

For instance, it is not against the law in my judgment for the vice president to call from the White House and ask for soft money contributions. Why? Because soft money is not deemed campaign money. It is not illegal for us, in my judgment, to go overseas and ask for money overseas, for soft money, because soft money is not deemed campaign money.

I think you get the point. We've got to either ban it or call it what it is, campaign money, and then you make it hard money.

Now, what we did not do in this legislation, that we know we have to do, is deal with the issue of the Supreme Court's ruling that spending is freedom of speech,⁸⁴ and we are not going to change that. But we have to enable someone who does not have resources to deal with someone who has extraordinary resources.

So I went to the Speaker and I said, "you do not like our bill but you have been concerned about Ross Perot and what he can do." There is a solution. Even someone on my side of this argument won't like it, but I will fight for it. That would be that if you run against a wealthy person you can collect unlimited sums from whomever and do the Doolittle disclosure up to what a wealthy person spends. And the only thing you have to do is require them to say up front what they are going to spend. That you can do legally and then they are locked in.

Once you get to that point, you follow the individual requirements of limits. And the other thing we probably should have done is, given that we banned soft money to political parties, we probably should have increased hard money donations like the freshman bill did.

That would have probably been a more balanced bill, but our view was, if we got the first part done, both sides would come running to do the second. They would be more than willing to raise the hard money contributions.

And I think they would be more than willing to deal with what to do when you run against a wealthy person. I will conclude by just saying that someone in the Seattle area came to me and was unhappy that we did not deal with wealthy people. They said they have a lot of twenty-eight year-olds retiring in the Seattle area. I think you all know why and how. They are wondering what their new profession is going to be, and some are concerned about that.

Why don't I throw it open for questions. Are there some questions here?

AUDIENCE: Since you were a Peace Corps volunteer, I wonder if you have looked internationally for solutions to our problem?

MR. SHAYS: The answer is no, but I probably should have. I was in Fiji, and I do not know what they do. In Fiji, they had a coup when they did not like the government.

84. See, e.g., *Buckley v. Valeo*, 424 U.S. 1 (1974); *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990).

AUDIENCE: One of our speakers, Trevor, mentioned that in England if you violate the election law, you are out. Would you be in favor of that?

MR. SHAYS: I would not want to respond quickly to something I have not thought about because that is pretty significant. The answer is, I am willing to consider it. The problem is who says you are out? That is the problem.

AUDIENCE: It sounded like a good idea to me to get some teeth —

MR. SHAYS: Well, you want all of us out, that is the problem. You probably would love that.

AUDIENCE: No. But I hope you will look internationally.

MR. SHAYS: Let me just say to you before we get to that part, we happen to have a viable federal election commission. Besides our banning soft money and calling sham issue ads, campaign ads we strengthen the Federal Election Commission (the "FEC") enforcement and disclosure. The soft money that still could be used by unions and corporations internally would be required to be disclosed.

The problem with the FEC is that you basically have an impotent Commission given that it is truly bipartisan, which really means they both have the right to kill and not the right to move. And in my judgment, you should have an equal number of Republicans and Democrats who then have to select the next person to be the deciding vote if necessary.

AUDIENCE: I should make the disclosure, I wrote the Peace Corps legislation.

MR. SHAYS: Well, you are a hero to me.

AUDIENCE: Bill Gullin is the name.

MR. SHAYS: Bill, you are a hero. You must have been a very young man, but being in the Peace Corps was a dream from eighth grade on, and my wife now works in the Peace Corps.

MS. GORDON: I would like to know what your view is on why, against all the odds, this past term the Shays-Meehan bill did pass. Secondly, what your prognosis is in the next Congress for both Houses to do something.

MR. SHAYS: I can only explain it biblically. God works in strange and mysterious ways. What really happened was a whole host of things. The public is not indifferent to this issue. They are

just frustrated by it, and a lot of members know it. When members say the public does not care, they really almost rant and rave in my conference about how the public does not care, but they will never do it publicly. So number one, I think the public does care.

The other thing is that I went to the Speaker early on and I said, "I can tell you how to defeat campaign finance reform," and he did not pay much attention. I said, "look at me, I can tell you how to defeat campaign finance reform." And finally he says, "okay Shays, tell me how."

I said, "just give us an honest vote." We do not have the votes. Because I just wanted to start with a vote, I would have been grateful to have a defeat by the vote. That notwithstanding, our leadership did not take it up the whole year and Democrats then jumped on *en masse*, and rightfully so, and I mean this with lots of respect.

This bill would not have moved forward had Democrats not held together, but you would not have seen it held together if there were not some very strong souls who believed in the presentation on the Democrats' side of the aisle.

Usually the minority is for the bill and hopes the majority has the bad sense to kill it. And we had the bad sense — my party had the bad sense — to kill it in the Senate. But anyway, the Democrats started the process that was provided by Republicans in terms of having the ability to pull out a bill from committee. And a few Republicans signed on.

We also had the Speaker promising us a vote in February and at the latest March, and when we came to March they did not want to bring up the bill. And then they had a very disingenuous process. They had a process where they put it on a consent calendar, which basically means you need a two-thirds vote, and you cannot amend it, and you are limited to forty minutes, twenty minutes on a side.

Ultimately, on a Friday, they told us they were not going to bring up the bill. This is important to answer the question. They announced after all the members had left on Friday, they were going to bring up the bill on Monday before the members returned. And there would be four bills and they all would be returned on the consent calendar or the suspension calendar and they were going to be four Republican bills.

It meant we could not amend it. I said to the Speaker, "if you are going to do that, at least bring every bill up so every bill will be debated." I think their concern was that Shays-Meehan might have gotten a majority and had it done that, even though it would not have passed, the press could have really jumped on it.

But the bottom line is, to answer your question, the public paid attention, the press was outstanding, the editorial board writers just kept focusing in on it, and the more disingenuous my own side of the aisle became, the more successful this process was. And in the end we did something they did not do in the Senate.

In the Senate, they had a debate about constitutionality. This is not a debate about constitutionality. That is a red herring. This bill is not unconstitutional. If there is one part of it that would be challenged in court, it would be the "reasonable person" issue ad provision. That is, if it looks like a duck and quacks like a duck, it is a duck, therefore it is a campaign ad.

The Supreme Court maybe on that one would throw it out. But the other parts will hold, and it is not about denying people the right to speak, because we give them the right to speak, through their PACs and their individual contributions.

So the Senate got into this big theoretical debate about constitutionality and the House talked about reality.

AUDIENCE: I am Rachel Leon, I am the director of Common Cause-New York. First of all —

MR. SHAYS: You are a hero.

AUDIENCE: You are the hero.

MR. SHAYS: New York City has done an extraordinary job.

AUDIENCE: We were really proud, first of all, because we had nine out of thirteen Republicans in New York State in the House vote for this, and we actually did have one of the best percentages of any state.

MR. SHAYS: That is amazing.

AUDIENCE: I was wondering if you could tell us about your experience in Connecticut, because you actually won in the state-house a ban on soft money at the state level and we have been so frustrated with that here in New York State: we got it passed in the Assembly, but in the Senate they laughed at us. When we tried to bring it up, we had Senator Leichter here who did a lot to try to force it to the floor, but it is a real struggle here.

So I would like to hear how that worked at the state level?

MR. SHAYS: You want me to answer that question without offending anyone from New York.

I think the honest answer would be, I do not know why it did not happen in New York, but I do know why it ultimately happened in Connecticut.

Connecticut has a bicameral committee. We have the House and the Senate sit together and they work on one bill together. And quite often it means you might have a Republican House and a Democratic Senate or vice-versa. And so there is a lot more interaction between the House and the Senate in Connecticut.

So when a bill gets out, it gets sent either to the House or the Senate, but it is the same bill that then goes to the other chamber. Too much mischief can happen when both chambers have their own committee and they have to vote on their own bill and so on.

It forces some of the problems with the ego to be worked on with the committee, and it is hard to play the games. I would imagine that is why it happened. We have a pretty progressive state, but I think New York has done some pretty progressive things as well.

AUDIENCE: Ed Davidson of Common Cause. You said you were not looking forward to the next Congress as you were four years ago.

MR. SHAYS: I am just older and wiser.

AUDIENCE: As a reformer, I just wonder what your predictions are for reform in this Congress?

MR. SHAYS: Someone asked me if I was going to run for any leadership position. I told them I would have an easier chance being elected President than I would to be a leader in my own conference.

I think the Senator can describe it to you. When you push campaign finance reform you make people angry, particularly in your own party and some in the other. And it is an institutional kind of issue. But I decided that while everyone is worried about leadership, I am going to be worried about passing this bill with a whole host of other people.

And I do not mean to imply that people shouldn't be concerned about leaders, but there is a group of us on both sides of the aisle that are meeting and talking now. It does not have to be McCain-Feingold or Shays-Meehan. It can be something different, and it does not have to include our names and all of that. But we are going to be driving that as hard as we can, whether we are in the very front of the line or in the middle.

I would not go so far as to say I would not run again if it does not pass, but I have the conviction that I think that before the next two years you will see a meaningful and good bill, provided one thing happens. Provided the Democratic leadership and Mr. Gephardt

are as straightforward and honest and as sincere as they were in the past.

If the temptation is now that they may be the majority and they may want to wait until they are in charge and so on, then we will have a hard time.

Shall we call it quits? Thank you very much.

FATHER O'HARE: I think it has been a long day but a very instructive day. I want to thank all those who participated: our panelists, our three speakers, Congressman Shays, Ed Koch, Fritz Schwarz and all those who have participated. It has been a wonderfully engaged audience, and while we have perhaps not reached that kind of crystal clear, limpid consensus we thought this morning we would arrive at, I think we have made a few advances in mutual understanding and appreciation of both the challenges and also the possibilities of this very important area of election reform.

Once again, to echo what Martin Begun said, this would not have taken place without the extraordinary dedication of the staff of the New York City Campaign Finance Board, Nicole Gordon and the very dedicated people whom you see around this room who have worked very hard on this for a period of months. So in my role as chairman, could I ask you to give our staff one last round of applause. Thank you very much.

ROUNDTABLE DISCUSSION
THE FUTURE OF NEW YORK:
1898, 1998*

CHAIR

*Robert Himmelberg***

MODERATOR

*Daniel Soyer****

PANELISTS

*David C. Hammack*****

Fred Siegel†

Ester R. Fuchs††

RESPONDENT

Kenneth T. Jackson†††

DEAN HIMMELBERG: Good afternoon. I am Robert Himmelberg, the Dean of Fordham's Graduate School of Arts & Sciences. I welcome you to this symposium on the Future of New York: 1898, 1998.

This is, of course, the centennial year of our great metropolis, the centennial of the creation of New York as we know it today. The "new" New York was created amidst great expectations for the future, expectations of national leadership, of population expansion, and of wealth. Today, on the verge of New York's second century, expectations, after a time of troubles, are on the rise again. What can the future bring? The question is as relevant today as it was in 1898, and we have today four of America's most distinguished urban scholars, to address this.

Professor Soyer, who planned this conference of Fordham's History Department, will say a few words about the speakers.

* The discussion was held on November 16, 1998, at Fordham University School of Law. The remarks have been edited to remove the minor cadences of speech that appear awkward in writing.

** Dean, Fordham University Graduate School of Arts and Sciences.

*** Assistant Professor of History, Fordham University.

**** Elbert Jay Benton Professor of History, Case Western Reserve University.

† Professor of History, The Cooper Union for the Arts and Sciences; Senior Fellow, Progressive Policy Institute.

†† Professor of Political Science and Public Policy, Columbia University and Barnard College; Director, Columbia Center for Urban Research and Policy.

††† Jacques Barzun Professor of History and the Social Sciences, Columbia University.

PROF. SOYER: As Dean Himmelberg said, this symposium was called in honor of the centennial of the consolidation of Greater New York. What did the people expect and hope for from this great city that they were creating one hundred years ago? How did the city measure up to these expectations and hopes? What is the outlook for New York today? How does New York's past help it to determine its future? These are the questions that you are going to be looking at today. As the Dean said, we have assembled several of the most distinguished scholars who have dealt with these questions in their writings from various perspectives.

Before I introduce the speakers, I would like to thank the Fordham University Graduate School of Arts & Sciences and especially Dean Himmelberg for sponsoring this event, along with the Department of History.

Our first speaker today is Professor David Hammack. He is the Elbert Jay Benton Professor of History at Case Western Reserve University. He is widely recognized as the foremost expert on the politics of New York City's consolidation at the end of the nineteenth century. His book, *Power Society: Greater New York at the Turn of the Century*,¹ which was published in 1982, was nominated for a Pulitzer Prize. It is a pleasure to introduce Professor Hammack.

PROF. HAMMACK: Thank you very much. It is a real pleasure to be at Fordham today. I want to thank Daniel Soyer for inviting me here. Coming here has given me a new perspective on Greater New York in the 1890s and on what has happened since then.

I thought it might make sense to look at the changes between 1898 and the present — well into the twentieth century. It would make more sense to do that than to focus only on the vision of the future at the time of the creation of Greater New York. I want to start with the creation of Greater New York and what was hoped for at the time, then I will discuss what changes have occurred since. By looking at the future from this point in the past, we might be able to better look at the future we now face.

Let me begin with a statement from Abram S. Hewitt's mayoral address in 1886 that, in many ways, launched the movement to consolidate Manhattan with Brooklyn and, what became the other boroughs that created Greater New York. Hewitt was by far the

1. DAVID C. HAMMACK, *POWER AND SOCIETY: GREATER NEW YORK AT THE TURN OF THE CENTURY* (1982).

least known candidate in this famous and highly contested mayoral election; he beat Theodore Roosevelt and Henry George. The Henry George campaign is often viewed as one of the high points of organization on the left in the history of New York City. Hewitt beat both George and Roosevelt by appealing to a vision of the future for New York, a broadly inclusive vision that many voters at that time accepted. Hewitt said in his speech:

The imagination can place no bounds to the future growth of this city in business, wealth, and the blessings of civilization. Its imperial destiny as the greatest city in the world is assured by natural causes, which cannot be thwarted except by the folly and neglect of its inhabitants.²

This, commercial vision, contained all the elements in favor of consolidating the outer boroughs with Manhattan and creating Greater New York.

Casting this vision of Greater New York within a commercial vision was fitting, considering New York City's excellent reputation for financial management and fiscal probity was one of the key elements in making the consolidation intelligent and successful. By the 1890s, New York was known internationally for careful management of its finances, honest administration, good collection of taxes and punctiliously honoring its debts. Predictably, at the time of consolidation, New York City's program for development was a major reason for creating a successful, consolidated city.

Such prudence, of course, was not the case up until the early 1870s, when Samuel J. Tilden, one of Abram Hewitt's associates and eventual competitors, unseated the famous Tweed ring and took over control of the City of New York. For the next twenty years, there was close work and cooperation between business leaders, symbolized by Tilden, one of the great railroad lawyers, and his partner Andrew Green on the one side, and the Democratic party, led by Honest John Kelly and Tammany Hall, on the other. Throughout this period, these groups ensured city expenses were kept to a minimum, that taxes were regularly collected, that property owners were not needlessly burdened and that bondholders received interest and principle when they were due. As a result, New York City, armed with a reputation for fiscal management and prudence, was a strong contender to go into the credit markets and borrow money. This turn of events was quite

2. Abraham S. Hewitt, Mayoral Acceptance Speech (1886) (copy on file with the speaker).

fortunate because Greater New York in the 1890s needed to borrow a lot of money.

Brooklyn, by contrast, was a paradox. Brooklyn citizens and residents were proud of their New England heritage. They were Protestant, whereas New York had become diverse and polyglot. That was a matter of pride. The leading church at the time was probably the Congregationalist Plymouth Church. To be sure, residents did not have the Catholic churches in mind when they spoke about Brooklyn being the city of churches in the 1890s, at least not those who styled themselves as the spokespeople for the City of Brooklyn.

Brooklyn's finances, however, were another matter. Brooklyn experienced rapid growth in the mid-1890s during a movement that absorbed all of Kings County into it. The budgets, balance sheets and financial arrangements of county towns, as they were called, were not in very good shape. Brooklyn reached the state debt limit; it could not borrow any more money. It was said in the mid-1890s that no one would ever figure out what Brooklyn's finances were.

To make matters worse, Brooklyn did not have an adequate supply of water for its population. Although Brooklyn used wells, the wells rapidly became polluted because Brooklyn did not have an adequate sewer system. In addition, most of the streets in Brooklyn were not paved. Despite these failings, people still tried to move to Brooklyn from Manhattan and build small houses and get themselves away from the crowds of lower Manhattan. They moved into areas that had no paving, no water system and no sewer system. It was not a healthy prospect to say the least.

Brooklyn had problems, fiscal and otherwise, and had no means of addressing them. Manhattan's leaders had very good connections with national finance leaders. They had a lot of ideas about how to finance the improvements that were widely accepted and were necessary for Brooklyn, Manhattan and the entire region. As a result, accompanying the consolidation was a program for improvement that was carried out. It is instructive just to list the major improvements that were contemplated and were, in fact, carried out within ten or twenty years of consolidation.

One of the main objectives of consolidation, as Hewitt suggested, was the creation of a single municipal government to rule over the entire New York harbor and all of the shoreline on the New York side of the New York metropolitan region. It is because there was such a focus on the harbor, which was essential to New

York's position in international shipping, that the consolidation included all the claims and extended beyond what is now Kennedy Airport, going as far as the Whitestone Bridge on the north side of Queens.

Secondly, consolidation was necessary in order to build a number of internal improvements. Bridges across the East River to supplement the Brooklyn Bridge, as well as bridges across the Harlem River needed to be built. As a separate consideration, the part of dictating consolidation also made it possible to extend the rapid transit system. Initially, this system ran only within Manhattan and up to the Bronx. As soon as consolidation occurred, a parallel rapid transit system for Brooklyn was developed. In addition to Brooklyn's lack of appropriate water services, Queens too did not have an adequate water supply or sewers. Brooklyn and Queens needed the streets paved, fire and police stations to provide public order and safety, and provisions to maintain the quality of those streets. That was the agenda that was widely discussed regarding consolidation.

In thinking about where New York has come and where it might go in the future, it is important to note what was not on the agenda in the 1890s. The consolidation did not concern government provision for social services, education at any level, hospitals and health matters. These issues were certainly important — at the center of some very contentious political debates in the 1890s. For example, during the election of 1894, which approved the consolidation of the five boroughs, voters approved the new state constitution, which contained two measures concerning these social issues. One provision, remembered in infamy in the Catholic community, stated that state money would not be used to support schools sponsored by religious communities. This constitution also provided that New York State would, as the municipalities could, provide funds to support welfare organizations maintained by religious communities, most notably orphanages and foundling homes.³ Thus, while these issues were of great concern in the 1890s, the consolidation effort did not concern them.

Politics in New York during the 1890s were tense with ethnic and religious conflict. This attributed to failure of the consolidation, and the new New York State Constitution, to address the issue of social services. Just before the state constitutional convention in 1894, for example, the Union League Club, the chief social organi-

3. New York supported other kinds of social welfare agencies as well – a continuation of a longstanding tradition that goes back to the 1790s in New York.

zation that served the Republican Party in New York City, blackballed the son of one of its founders because the founder was Jewish. When the Union League Club was created at the outbreak of the Civil War, there was no question raised about having Jewish leaders join with Catholics and Protestants in creating the club. By the 1890s, however, anti-Semitism had risen to such a point that Jesse Seligman's son was not an acceptable candidate for membership in the Union League Club.

This was a great scandal at the time, creating a great problem for the Republican Party that consistently attracted many Jewish votes. In fact, in the early 1890s, one of its candidates for mayor was Edward Einstein, who had run in the 1870s as a German and then ran in the 1890s and was identified as Jewish. In response to the embarrassment of the Union League Club blackballing Seligman's son, the state Republican Party named Edward Lauterbach as the chairman of the Republican County Committee for Manhattan. Lauterbach was a Jewish leader who was very much involved in negotiations between the American-Jewish community and European governments over how to respond to the situation in Russia at the time. In the state constitutional convention, Lauterbach carefully arrived at a compromise between those who wanted state aid for schools and the welfare institutions and those opposed to state aid for any religious institution. As a result, the plan for the future was to grant money to public education and to subsidize private welfare institutions.

Looking forward, from the point of view of a New Yorker in 1898, the main focus of city government was on physical and economic development for purposes of encouraging economic growth of the region as a whole. Transportation and communications systems were of paramount importance, followed by improvements in the labor force through investments in education. Providing safe and healthy housing for the people who lived and worked in New York also became a priority.

By considering the goals of New York at the time of consolidation, one may look forward from that point, considering the hundred years that followed, and then ask what can we learn about New York's future today. First, however, we must define "New York City." I think a historical perspective helps raise some questions about that.

One way to answer this question is to ask about the municipality's role in the region in terms of population and municipal functions. In 1898, Greater New York City — Brooklyn, Manhattan,

Staten Island, the Bronx and Queens — essentially included the entire population of New York State within the metropolitan region. Greater New York included, in fact, almost all the territory that underwent suburban development on the New York State side of the Hudson River for the next fifty years.

Considering this development, it took very long-range thinking to create a single arena in which economic and suburban development would take place, all, remarkably, under a single government. This plan to have a single municipality manage that development largely succeeded. At least, New York retained that responsibility and retains a great deal of responsibility down to the present. A few new entities were, of course, developed to handle specific problems, notably the Port Authority of New York and New Jersey, to deal with the challenge of building bridges and tunnels across the Hudson, and the Triborough Tunnel and Bridge Authority to handle the financing of public works in the context of the fiscal stresses of the Great Depression. New York is notable for the degree to which its single municipal government has gained and retained responsibilities and for its success in resisting the creation of those special districts. Therefore, the idea of a comprehensive government for a very large area succeeded in preserving and maintaining itself.

In 1898, New York also had perhaps the most fully developed set of nonprofit organizations in the United States. These organizations were extravagantly praised in a 1900 *Atlantic Monthly* article by Everett P. Wheeler, a leading Episcopalian, who took care in that article to praise Catholic efforts as well as those of members of the other religious communities.⁴ Wheeler noted, but did not emphasize, that these organizations received and continued to receive much of their funds from city government.⁵ Those organizations were also part of municipal New York as it was defined in the beginning, and that pattern continued.⁶

By the 1940s, New York City had assumed the widest array of service delivery responsibilities of any city in the United States. At the same time, however, it had lost control over most of the great regional transportation facilities that provided the original reason for its creation. Moreover, while New York was created to manage physical development, it had largely achieved what it set out to do

4. See Everett P. Wheeler, *The Unofficial Government of Cities*, ATLANTIC MONTHLY, Mar. 1900, at 370, 374.

5. See *id.* at 371.

6. See *id.* at 372.

in that area by the 1940s and has not done a great deal to add to that since.

In the 1970s, Greater New York might well have been described as the twenty million people who lived within a three-state commuting region that nearly extended from Princeton to New Haven. Municipal New York contained merely a third of that population, including a very large share of its poorest members. Even with New York City's remarkable auxiliary of nonprofit organizations, now heavily funded by the federal government, New York City was not positioned to play the dominant role in regional economic development that it played throughout the nineteenth century and the first decades of the twentieth century.

Put another way, the New York that was created in 1898 embraced essentially all of New York State population of the metropolitan region. Thus, the leaders of that political entity, the municipal government, were really planning for the economic development of all the people within the entire New York metropolitan area. By the 1970s, however, the City of New York developed into a very great city, almost three times as large as it had been in 1900, and only accounted for a third of the regional population. The region had integrated even more tightly than it did at the beginning of the twentieth century. As a result, there was no way New York City could play a regional economic development role, the kind that had been envisioned for it by Hewitt at the time of planning for Greater New York.

We can consider New York City in terms of the composition of the body politic as well. Women, remember, could not vote in 1898. In 1898, ethnically, the city was largely German and Irish, but was already well on the way to containing nearly equal proportions of Italians, Russian Jews, Jews from Austria and Hungary, Catholics from Central Europe, as well as people of Irish and German heritage. Proportions were changing very rapidly, and that was the result of the many interesting consequences for planning political careers and attempting to rise to leadership in the first twenty years after consolidation.

Thus, one characteristic of New York, even in that period, was very rapid change. One thing that is notable, if we think about New York today, is that what had once been a somewhat significant African-American population in the greater city constituted only about one percent of the population in 1900. Again the growth was more rapid after 1910, but the African-American population in 1900 was very small.

Some of the city leaders who pushed for the creation of Greater New York in 1898 worked to exclude immigrants from the voting booths. The Supreme Court had ruled in *Plessy v. Ferguson*,⁷ just before consolidation, that black people could be excluded from white facilities. That same Court was turning a blind eye to the violent exclusion of black people from the southern electorate, an exclusion that culminated in years of consolidation of the five boroughs into Greater New York.

The "Dillon Rule"⁸ that interpreted municipal governments as agents of property owners and prevented them from any action that might redistribute wealth from the rich to the poor, was still in effect at the time of the consolidation. In fact, John F. Dillon himself played a role in the creation of Greater New York. These are points that I think are worth emphasizing in a talk at a law school.

All of this has changed over one hundred years. Women got the vote in 1920; immigration and naturalization laws were greatly tightened, then relaxed and tightened once more; and the civil rights movement ended legal segregation. People from the Caribbean began to arrive in significant numbers in the 1940s and Asians arrived throughout the 1970s. Since the 1960s, judges have been ruling that even those convicted of crimes have extensive rights that governments must spend money to satisfy. Today's New York City contains a very different population and works under very different rules from those that prevailed one hundred years ago.

Many of these changes could not have been anticipated by those who created Greater New York. New York City now has a very changed electorate, working under very different rules, trying to accomplish different purposes with the structure that was created one hundred years ago for a much more limited set of purposes.

There are perhaps three trends you will notice here. One is a steady expansion of individual rights, producing an increasingly diverse and demanding body politic. There is a notable shift in the responsibilities of municipal government in the building and maintaining of physical facilities safely to the provision of health care, education and social services. Finally, there is a continuing growth in development of the economy and population of the entire metropolitan region.

7. 163 U.S. 537, 551-52 (1896), *overruled by* *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

8. JOHN F. DILLON, *COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS* (5th ed. 1911).

It is worth emphasizing that while many New Yorkers worked hard for all these developments, critical decisions were not always made in New York nor solely by New Yorkers. They were made by Presidents; members of Congress; Justices of the United States Supreme Court; by the States of New Jersey, New York and Connecticut; and by economic factors, notably managers of business firms — small as well as large; and also by individual renters and homebuyers.

With city planning over the years, planners have often sought to predict population and economic trends, but they have paid less attention to changes in institutional arrangements — an almost always neglected trend in individual political and civil rights. It is my impression that at present we are in a period of considering whether the evolution of rights will continue, will stay where it is, or will be reversed. Whatever the result, the consequences will be important for the city.

Those are some thoughts on how we might think about how New York City is moving from the perspective of 1898 and looking forward. We will now turn to some questions about the relation of local government to the global economy that raise another set of questions that face New York today. In the future we might learn something from looking at how this relationship played out in the past.

New York in 1898 was enmeshed as much in a global economy as New York is enmeshed in a global economy today. In 1898 the city already faced decline in its share of the import trade, and it lagged behind New Orleans and other ports in exports out of North America. Like other east coast cities, New York had already lost primacy in manufacturing, especially in the manufacturing of steel and mechanical goods. Production in those areas had already moved to the Great Lakes industrial places that were running from Buffalo and Pittsburgh through Cleveland and Detroit to Chicago and Milwaukee.

The major impetus for the creation of Greater New York was, in fact, an effort to respond to these shifts in trade that were already going on to mobilize municipal government in this region in such a way as to take action that would retain the existing import trade and support the manufacturing that was related to it. Europe's economy already specialized in finance, in communication, and in the light manufacturing in fields that drew their chief advantage from access to current information and specialized information about markets—not only in New York, but across the United

States and, in fact, in much of the western hemisphere. New York was, in the 1890s, the great business center of the United States. Its thriving industries were in such fields as women's fashion and clothing, women's coats and millinery, notions, furs, news gathering and editing, and publishing—publishing of fiction as well as nonfiction. Entertainment was also a thriving industry. Broadway already was established as the place to make your reputation. New York was the center for printing connected to its publishing industry, and for interior decoration connected to the fashion industry and also the financial and business services.

The 1890s were a very exciting period from the point of view of the development of financial and business services. In 1890 it was not possible to buy an industrial security on the New York Stock Exchange. You could buy government bonds, you could buy railroad stocks and bonds, and that was the inventory of Wall Street. It changed in the mid-1890s so that by 1896, the Dow Jones Industrial Average already existed, and by 1900 most of the firms in the Fortune 500 were created with very substantial management if not international headquarters in Manhattan.

New York was a financial center and a center of small manufacturing tied to information. The key point was access to information. New York was where information arrived first from Europe, where it was processed, where it was evaluated and where decisions were taken on it. If you wanted to be in an industry that was connected with fashion or to the latest information, you had to be in New York. In the manufacturing industries you could take advantage of information, plus you were in New York, because so many people wanted to be in New York and be close to information. Prices of real estate were very high; and if you wanted to make something that was heavy, or something made out of raw materials that had to be moved with great effort, you went somewhere else.

So New York was already very much the center of the world economy and was by no means isolated and was by no means commander of its own economic destiny. In 1898, New York was also home to a strong group of international merchants, and they also needed to access information, as well as to the municipal investment in harbor facilities. In fact, they were the leaders in moving toward the creation of Greater New York. Hewitt himself was an iron importer and a competitor with American production of steel, and he was looking to reduce the cost of moving goods through New York harbor in the 1880s when he had that great imperial

vision of what might be accomplished by an expansion of New York's powers.

It was these merchants, Hewitt and his associate merchants and bankers, who took the lead in pushing Greater New York, in developing transit and communication facilities in the city and supporting a massive expansion of the city's schools in the twenty or thirty years after consolidation. All of these investments were in their own interest. They persuaded others that they would serve their interests as well.

Now Greater New York, the tri-state New York region as a whole and private business firms have continued to make major investments in New York's transportation and communications infrastructure. Greater New York has greatly increased its investment in public education from first grade through graduate school. One hundred years of history might lead us to ask whether these investments have been sufficient, whether other investments have been well considered, and whether public discussion of alternative economic policies have been sufficiently thoughtful.

Let me emphasize the increased investment in education with the observation that as late as the 1950s, less than half of the children who enrolled in public school actually finished high school. So apart from the increasing numbers of students in school, simply getting students all the way through required continuing expansion of the schools and confrontation of additional challenges with a much wider school population.

I have suggested some implications for the future in ways of thinking about New York. Mostly, I would suggest implications for the future ways of thinking about the relation of New York City to the region's economy. Let me end by connecting some concerns about economic development and service delivery to the institutional structure of New York.

One of the points that I have emphasized, and I expect may come up in later presentations this afternoon, is that New York exceeds all other cities in the scope of activities for which its government takes responsibility. One of the interesting institutional arrangements in New York is the fact that the city has continued to rely to a very great extent on a remarkable, and probably still the most fully developed, array of nonprofit organizations of any city in the United States. I have recently become interested in the whole question of the development of nonprofit organizations, and it seems to me as I come back and look at New York that it makes a lot of sense to think about nonprofit organizations as an integral

part of the institutional structure through which New York is governed.

There has been a lot of attention to the role of municipal unions and municipal bureaucracies in limiting opportunities for change in New York, but another element in the New York picture is certainly the existence of many nonprofit organizations that also have claims on resources which have to be taken into account. They also have political connections themselves. This perhaps emphasizes what might be seen as the negative side. On the other hand, nonprofit organizations obviously have many virtues in delivering a variety of services, tailoring services to particular populations, and being able to solve problems that are difficult to solve through government entities. There has been great conflict in the last year over exactly what responsibilities ought to be afforded to business improvement districts in the city, which illustrates the fact that they are governing entities.

The business improvement districts in New York rely on tax money, and the mayor has raised questions about their role and responsibility and their powers since they do have tax money; and since they have tax money, he seems entitled to raise that kind of question. On the other hand, clearly, business improvement districts have been able to accomplish a number of purposes.

The last thought I would leave is this: private associations, private organizations, nonprofit business improvement districts all clearly can be very effective in providing a variety of services, and in tailoring of service to particular audiences, and that has been their strength and the reason why they have been supported in New York over the entire history of the city. On the other hand, nonprofit organizations are dependent on governments and on markets for resources. They cannot invent resources by themselves, and as a result they are sometimes not very effective instruments in addressing questions of equality and comprehensiveness. It is perhaps for that reason that the City of New York has expanded municipal functions under the influence of changing conceptions of citizenship and of individual citizen's rights. Exactly how all of these pressures and concerns will be squared in the future I am not sure. So I am glad to stop at this point and let others take the question.

PROF. SOYER: The next speaker is Professor Fred Siegel. Professor Siegel is Professor of History at Cooper Union for the Arts & Sciences in New York and a Senior Fellow of the Progressive Policy Institute. He is the author of, *The Future Once Happened*

*Here: New York, D.C., L.A., and The Fate of America's Big Cities.*⁹ He has also written for the *New Republic*, *New Atlantic*, *Public Interest*, *Washington Monthly*, as well as numerous academic publications.

PROF. SIEGEL: It doesn't pay to underestimate the resilience of New York, no matter how many times we shoot ourselves in the foot. You only have to look at the concentration of media empires in and around a revived 42nd Street to feel optimistic.

If I were giving this talk at the start of the decade, at a time when the talk about the end of cities was rampant, I would have quickly pointed to at least four threats to our future: the collapse of the rule of law, the challenge to Wall Street from Tokyo's surging banks, the extraordinary mishandling of the last recession, and the challenge of the telecommunications revolution to all centralized institutions. Today, the first two of these problems are off the table. The city's achievement in reducing crime is the single greatest urban public policy success of the past three decades, while much of the Japanese banking system is effectively bankrupt. We are likely to do a better job of handling the third, while the fourth, the telecommunications challenge, yields a far more ambiguous answer.

Our current preparation for the possibility of an economic downturn shows that the city does have a learning curve even if it is often flat.

The city did not immediately go into recession after the October 1987 Wall Street crash. We skated along on thin ice for a few years, but when the national recession compounded our problems Mayor Dinkins responded to declining private sector revenues as John Lindsay had twenty years earlier with massive tax increases. The economy hemorrhaged jobs only after the additional taxes drove up costs and pushed both companies and middle class residents out of the city.

What is not in immediate danger, reports Comptroller Alan Hevesi, is the city's fiscal stability. Thanks to prudent fiscal management by the mayor, who has proceeded with both cautious revenue estimates and a \$600 million dollar rainy-day fund, the city budget can hold up for the next year or two. But if, as is usually the case, a recession in New York is the prelude to a national recession, the city will be at a fiscal crossroads.

9. FRED SIEGEL, *THE FUTURE ONCE HAPPENED HERE: NEW YORK, D.C., L.A., AND THE FATE OF AMERICA'S BIG CITIES* (1997).

After near bankruptcy in the 1970s, we learned to keep an honest budget. The question now is whether, after the Dinkin's debacle of the early 1990s when we regularly raised taxes in the face of a recession, we've learned not to sacrifice the private sector to public spending.

The challenge of the telecommunications revolution has played out in complex and to some degree unexpected ways.

In the early 1990s cyberprophet George Gilder eagerly anticipated the death of the city.¹⁰ He argues that cities are nothing more than the leftover baggage from the industrial era. Cities, he and others argued, will be largely replaced by the telecosm, a global communications network driving a world information economy.

In what can only be described as the "eclipse of distance," we are now almost able to communicate coast to coast by fiber optic cable with the same speed that your hard drive communicates with your CD-ROM player, and at comparable cost. The Federal Communications Commission recently noted that as a result of recent technological advances, the underlying costs of providing telephony are becoming virtually distance insensitive. This telecommunications speed means that people can be plugged in via expanding bandwidth to a vast variety of cultural experiences, like viewing great paintings that were once available only in the museums of world cities. According to Gilder, the telecosm can destroy cities because it can provide all the exuberant variety that can be found in one's living room.¹¹

Gilder overstates his case but there is no doubt that the information highway is reshaping the urban landscape. Consider what the telephone did to earlier cities. Before the phone, explains Ithiel de Sola Pool, businesses had to cluster together: Every city had a furriers' neighborhood, a hatters' neighborhood, a fish market, an egg market, a financial district, a shippers district and so on. The phone allowed these districts to disperse but that deconcentration was slowed by another innovation: the skyscrapers that provided the most advanced telephone wiring and allowed businesses to move up instead of away. Initially, the phone helped dissolve the solid knot of traditional business neighborhoods and help create the great new downtowns, but at a later stage, it helped disperse those downtowns to new suburban developments.¹²

10. *See generally* GEORGE GILDER, *MICROCOSM* 12-13 (1989).

11. *See generally* GEORGE GILDER, *LIFE AFTER TELEVISION* 25 (1990).

12. *See id.* at 33-34.

Something similar to the first stage de Sola Pool described is occurring today. The economy is decentralizing in part due to telecom, but still Manhattan is holding its own, this time because our skyscrapers are again ahead of the curve when it comes to advanced wiring.

New York State got in on telecom deregulation early. That provided an incentive for competing telecom companies to invest in one of the few areas where the city has substantially upgraded its infrastructure, the provision of fiber optic cables for high speed data transmission. As part of the deregulation, Merrill Lynch, Western Union and the Port Authority set up the Teleport Communications Group ("TCG") in 1985 to offer satellite uplinks for financial institutions and broadcasters. TCG linked seventeen big dishes on Staten Island by fiber optic cable to Manhattan. In 1997 alone, local phone companies invested \$1 billion in the New York metro area.

As Kenneth Phillips, Vice President of telecommunications policy for Citibank stated: "the turf on which this revolution has taken place is largely from 59th Street, on the North, to Battery Park on the South, and of course stretches clear across the island from the Hudson to the East River. This comparatively small area of land has over twice the telecom switching capacity of the average foreign country . . . more word processors than all the countries of Europe combined."¹³

PROF. SOYER: Our next speaker is Ester Fuchs. She is a Professor of Political Science and Public Policy at Barnard College and Columbia University and director of the Columbia Center for Urban Research and Policy. She is the author of *Mayors and Money: Fiscal Policy in New York and Chicago*.¹⁴

PROF. FUCHS: I want to thank you for being here today and for including me on this panel with all these gentlemen whose books I have read.

I am the only political scientist here today which puts me at a great disadvantage among historians. So I am going to pretend for the moment that I too have some capacity to examine the past in explaining the present and predict the future. I will also try to take into account of what my two colleagues have already said.

I think that New York City has always been characterized in the past as exceptional, and this is part of what I want to talk about

13. Kenneth Phillips (remarks on file with the speaker).

14. ESTER R. FUCHS, *MAYORS AND MONEY: FISCAL POLICY IN NEW YORK AND CHICAGO* (1992).

today. What does that mean? Exceptional, means being different, being too over the top. When you talk about New York, you talk about New York as a global city. We have stopped comparing it to other cities in the United States. Our comparisons are with Paris, London or Tokyo if we want to understand what is going on in New York rather than Los Angeles or Chicago.

We talk about New York as too liberal politically. We talk about New York as a being too big. We talk about New York as having too many people, and as having too much government, as Professor Hammack mentioned earlier. New York City is the largest municipal government in this country. It has an economy and a budget that are larger than those of most third world countries, let alone cities around the world. When we talk about New York having too much government that is considered a quality.

We also talk about New York's past policies as having been over the top. In discussion of turn of the century local party organizations, New York City's political machine is characterized as one of the most corrupt, but most effective machines — the best machine at integrating new immigrants into the city and the best machine at skimming off the dollars for the developers and people who did business with the city. So even the negative aspects of New York City's history can be twisted and viewed as positive attributes.

When we look at New York during the New Deal, the period New York City government expanded, again it seems too much and too big. New York created a system of free city universities, and it created a hospital network that has expanded beyond anything that exists anyplace else in the country. We created a system of public schools that in fact worked. The city even floated bonds for unemployment relief during the Depression. New York did not trust the federal or state governments to take care of its unemployed. It was going to do it itself. That is part of the explanation for this over the top city.

In the 1950s and 1960s, New York did it bigger and better. But did these policies work? Certainly in the post-urban renewal period, New York wiped out more old low tenement housing than any other city in the country. The city engaged in massive redevelopment projects, like Lincoln Center, and built more bridges and tunnels than any other city. The city's declared war on poverty, it embraced decentralization with a vengeance. I think much of this did not work; but if we were going to give parents the opportunity get involved in the school system, parents in every community all over the city, would be given the opportunity.

Of course on fiscal policy we certainly are over the top. We were the ones who had the fiscal crisis in 1975, when the President of the United States in that *Daily News* headline basically said "Drop Dead, New York," essentially saying you are not part of this nation, and we will not help you, and you will have to figure out how to bail yourself out alone from the fiscal crisis. So even in crisis, whether it was a crisis created by the Depression, whether it was a crisis of racial unrest in the 1960s, or the fiscal crisis in 1975, New York did its crises bigger, better or worse than anybody else. At the same time, New York looked for solutions in a more constructive way with greater gusto and with a great capacity to experiment than most other cities.

The present state of the city is a little different than past. In the present, we are trying to look more like other cities. Our Mayor tells us that is what we should strive for. Our crime rate is going down. Of course he would argue we are doing it better than everybody else, and we are bringing it down at a greater rate; but in fact it is to make us look more like the rest of America. We have got to stop jaywalking to look more like the rest of America. We have got to be polite to look more like the rest of America.

Of course, we have got to cut back the public sector to look more like the rest of America, and we have got to increase our tourism so that we can create an economy that looks like the rest of the world. Other global cities around the world also depend on tourism. We have got to cut back spending in the neighborhoods because it is downtown and it is businesses that are important to our economy. One of my professors when I was a graduate student, Paul Peterson, wrote a book called *City Limits*.¹⁵ He argued that cities were constrained in what they could do by their place in the federal system and that in the end Mayors would have to respond to the business community because the business community provides the tax revenues that make cities run.

To be like everybody else, we in New York must respond first and foremost to the business community, to the developers, the real estate industry and to the financial services sector because they too will save the City's future. They will provide the tax base, they will provide the jobs, they will provide the health care, they will tell the schools what they need to do and they will make sure that mass transit is maintained. They will make sure that the tunnels that Fred holds so dear will get built. So while I agree with

15. PAUL E. PETERSON, *CITY LIMITS* (1981).

what Fred has proposed maybe our emphasis is different as to where these changes will come from.

It is my view, that, in order for us to have a successful future, we had better start charting the exceptional course again and not depend upon making New York like the rest of America. There is Times Square and lower crime rates, which are both wonderful. But if we turn Times Square into Disneyland, there is a Disneyland already. That is why Disney does it better. It is authenticity that the tourist comes to New York for, not to see what is in the rest of America.

So even our ace in the hole in tourism will decline and if we ruin this, we ruin what has really been exceptional and unique about New York. In the context of charting the exceptional course, we will have to be innovative. We will have to innovate politically, and I do not mean by creating a Charter Revision Commission to stop a pro-Yankee Stadium referendum from appearing on the ballot. That is not what I mean by political innovation.

What I mean by political innovation relates to the old-fashioned function of cities in providing a crucible of democracy. We will have to innovate and be more inclusive. We will have to innovate in making sure that our new immigrant communities become citizens and engage in politics. Professor Robert Putnam of Harvard University discussed the problem of civic engagement in terms of the decline in social capital in an article called *Bowling Alone*.¹⁶ For Putnam, the decline in social organization membership has contributed to the decline in political involvement.¹⁷ I do not see that as a problem at all. I could care less if you want to bowl alone. What I care about is if you are going to go to the polls and vote, if you are going to become active in political organizations, if you are going to be capable of being mobilized around issues that are important to you and your community. Involvement in bowling leagues, soccer clubs or even churches does not necessarily translate into political participation. I will argue that it is a decline in the institutions of political incorporation that is dangerous right now to the functioning of our democratic process.

I think we will have to innovate politically to become more inclusive. Of course, we will have to innovate in the economy as my two colleagues have pointed out. I agree completely with Fred. We have to innovate in the area of manufacturing because of what

16. Robert D. Putnam, *Bowling Alone: America's Declining Social Capital*, 6 J. DEMOCRACY 65 (1995).

17. *See id.*

some economists and sociologists call the growing mismatch between the skills of our urban population and the jobs that we have in the city. We will also have to innovate so that small businesses like Ridgewood Farms have the opportunity to grow and incubate, whether in the manufacturing sector or in the retail sector or in high technology. The city's economic development policy cannot just be AT&T or Chase Manhattan, or the Stock Exchange threatening to leave Manhattan and getting a wonderful package of tax incentives to stay. While I believe that we must compete with New Jersey's predatory practices, that is not enough.

Finally, the most important area we will have to innovate is education. We will have to innovate in education whether the Board of Education likes it or not, whether the teachers' union likes it or not, whether the parents like it or not, whether the taxpayers like it or not. If we do not innovate in education and bring about a first rate, public school system, we will no longer be the shining light on the Hudson, the city of the future, the city in which we all take pride.

So what are our prospects for achieving these kinds of innovations? What I would like to do is briefly go back and look at some recent transformations both in politics and in fiscal policy. I think that there is an important link between what you can do in the city, the kinds of electoral coalitions that get formed and the kinds of budget policies that are created.

When I look at elections and politics, I always look at electoral coalitions, specifically at the race, ethnicity and gender of these voters. While we have focused on race and ethnicity, gender is actually an increasingly important part of this analytic framework. Some of you may have noticed that in every recent election there has been a gender gap. Women also tend to make up fifty-two percent of the electorate while men are forty-eight percent. Women have significant political clout that has not really been exercised, especially in local politics.

My interest in politics is not just about who votes and who does not, but the question of how different voting coalitions affect the issue agenda for the city, of what gets done and what does not get done after the election. So I think two important parts of the puzzle are who does and does not vote; and the fiscal landscape of the city. Some of you who know my work know I have emphatically argued that fiscal policy should not be left to accountants and to

the managers because, in fact, budgets are political documents.¹⁸ The budget summarizes the political priorities of any city or any nation.

There are obviously some important moral and social issues that do not relate to budgets, but even something like abortion — and forgive me for jumping into a hot issue — but even something like that which we assume is a question of moral principles or ethical choice has budgetary implications. If you cut back funding for protection of abortion clinics, there is a choice being made by the body politic about what it values and what it does not value.

Consequently, I would argue that virtually everything in the political arena has a budget line item associated with it in some fundamental way, so budgets do reflect political priorities. The budget needs to be understood both in terms of its expenditure and its revenue side. Local governments raise revenue by taxation, borrowing and transfers from other levels of government. Since local tax revenue (especially property taxes) accounts for the largest part of a city's total revenue, the fiscal condition of the city still is very much dependent on the state of the local economy. When the city's revenue base grows, there is generally more money available to spend on services. However, when it declines, the city makes choices about which programs to cut or eliminate or which taxes to increase. Therefore, all of these pieces are linked. The fiscal condition of the city will very much determine what needs are addressed by that city. What will be the policy in that city?

Let me present some data on the fiscal situation in New York now, how it has changed since 1975 and what some analysts like the Independent Budget Office and the Comptroller's office, think about the prospects for the future. Right now things look pretty good, but will the revenue surpluses continue over the long term? I think it is a complex question.

I start my analysis of the fiscal prospects of New York by looking at the 1975 fiscal crisis, which I think had its origin in other long-term processes and historical events that Professor Hammack talked about. When you look at the 1990s and try to understand what is going on, it is important to understand that the 1975 fiscal crisis affected New York City as well as virtually every other city in the country, and I would suggest that this relates to a structural problem in our federal system.

18. See, e.g., FUCHS, *supra* note 14, at 226-27.

There have been several important political developments, since 1975 that will have an impact on what we can do from the standpoint of the politics of the fiscal policy process. They include the 1980 taxpayer revolt, the decline of federal aid, and, of course, term limits.

First, the rhetoric of fiscal crisis dominates the policy agenda in every city in the country. The rhetoric of the fiscal crisis is very simple. After New York's 1975 fiscal crisis, a great deal of public attention was paid to the budget process. It is not that people really understand it a lot better now, but they know basically that you cannot carry over deficits from one year to the next. Those in positions of authority have a much more difficult time hiding those deficits or rolling them over to the next fiscal year, or engaging in the accounting gimmicks that were so prevalent among cities — not just New York — before 1975. What the rhetoric of the fiscal crisis has made clear is that it is a legal imperative for cities to balance their budgets at the end of the fiscal year. When balanced budgets are understood to be politically paramount, policy choices are limited.

If the tax revenue coming in does not look like it can support your existing expenditure, you have got three revenue choices. One, you can go to the bond market and try to borrow more money; two you can try to get money from other levels of government — that is to say the state government or the federal government; or three, you can levy taxes or increase user fees, going directly to the people to try and raise the revenue. If none of these revenue choices are made, you must cut spending.

The real surprise in the post-fiscal crisis period is how easy it is to balance the budget. All you really have to do is cut spending. Cutting spending does not have anything to do with what the needs of the city are. Cutting spending is a pretty simple exercise. First, you determine how much of the budget is fixed costs, the amount the city is legally required to spend.

Fixed costs include interest on debt. Interest on debt as a percentage of the budget has increased significantly. A fixed cost may also be mandated by the state and the federal government, although they usually do not money needed to fulfill the mandate. We might accept that the mandate will produce "good" public policy, like the Clean Air and Clean Water Acts, nevertheless we have to raise money from local tax dollars to pay for it. Most mandates come in the area of what we call redistributive policy, like Medicaid or welfare.

If the fixed cost is not mandated and it is not debt, it might also come from a contract with your municipal employees. At the point that the contract expires one can renegotiate the contract; but, in fact, it is quite difficult to get give-backs from municipal employee unions in any way that actually improves the long term fiscal health of the city.

When you look at New York City's budget — the Citizens Budget Commission and other organizations vary on this — between seventy-five percent and eighty percent of the costs are fixed. What amounts to be twenty percent of the \$35 billion budget is not an insignificant amount of money, but it is not likely that dramatic changes that you might think can be made in the budget from one fiscal year to the next. From a political point of view, changes which require the state or federal government approval are the most difficult.

So even when you choose to cut spending, the choices that you have are fairly predictable. You are going to usually look at the place in the budget where you are spending the most money, and you are going to cut spending in areas where the city has some formal legal authority. You are going to cut spending, I would argue, from areas in the budget that affect the groups that have the weakest political voice. This speaks clearly to the relationship between politics, the budget and political outcomes.

While there are all these other alternatives that you might have to factor into your budget, the legacy of New York City's fiscal crisis is essentially that we do not raise taxes anymore because if you are a politician anywhere in this country who runs on a platform that says, "I will raise your taxes," you do not have to be a prophet to predict that that person is going to lose — not only lose, but lose big.

The last politician who said he was going to raise taxes was Walter Mondale. Even Michael Dukakis was smart enough not to say, "I am going to raise taxes." Walter Mondale said, "I have got to be honest with you the American people," and that cost him the election. We have not seen anybody run for mayor of New York since 1975 who said, "I am going raise taxes, I am going to restructure the property tax rate or propose other tax-related changes that a lot of good government associations call for." Sometimes government hides changes so people do not realize they are really being taxed at a higher rate. Some of you who live in single family homes will probably notice that water rates have increased quite dramatically. You might notice new user fees, but those are called revenue

enhancements. They are not taxes that people generally detect, like property tax, income tax or sales tax.

Raising taxes is no longer a realistic option in city politics; and certainly if you go to the bond market when you think there is about to be an imbalance in your budget, what happens is very simple and it is another legacy of the fiscal crisis. They say, "Sure we will lend you some money, but the interest on your debt will increase as a result of your need." Of course the cost to the city of borrowing becomes prohibitive, and you are responsible because you are really trading off the future for the present need.

Next, you go to the state government or you go to the federal government who tell you to, "Forget it." I do not even have to go into the details of the transformation of intergovernmental relations since 1975. Actually, since 1978 there has been an enormous decline in federal, intergovernmental transfers. State transfers are more complicated, but in New York we still get a reasonable proportion of money from the state. It is, however, targeted to particular programs with little flexibility associated with it.

Frankly, the notion that we are going to get money again from the federal government in the age of less government is highly unlikely. As a result, you are left with one option in times of economic scarcity — reduce spending in order to balance your budget. Moreover, you have to do it within one fiscal year without any cushion for unpredictable dips in the economic cycle. The budget generally reflects a one-year lag in revenues. You are spending in anticipation of the next year's revenues, so there is a certain irrationality built into the city budget process that makes it more difficult than it should be to keep budgets balanced without cutting spending on services that people think are important.

As for the questions about which services are important, which should be cut and what is the quality of our services, I will present some data on that in a moment. In the past, we did a good job cutting our budgets by postponing so many capital expenditures that we have made it more costly to fix our deteriorating infrastructure. For example, deferred maintenance in the subway system has increased the cost of repair significantly. We still have not come close to affecting the infrastructure problem in the school system or on our tunnels and bridges. My colleagues at Lamont-Doherty Laboratory, which is a science campus at Columbia, who study natural hazards and disasters, have detailed maps showing likely environmental impacts on our poorly maintained bridges and tunnels.

The conditions are quite frightening if you actually understand them. Fortunately for elected officials, the public does not know about it and pays very little attention to these kinds of things. The way the process is set up takes the costs of repairs and projects which may be reasonable to do in the present to the point of future crisis when they are prohibitively expensive.

In the 1980s, an upturn in the economy allowed us to increase our spending. I will not go into those details, but instead will bring us right up to the 1990s and our period of great economic prosperity, in which we are talking about budget surplus.

I truly was amused during the last budget debate by the conversation about how we will spend our budget surplus. The surplus for the fiscal year 1998 budget was between \$2 and \$2.2 billion. The surpluses that we expect for fiscal 1999 is somewhere between \$1.1 and \$2.1 according to the Independent Budget Office.

At the same time, all of the financial oversight organizations talk about budget gaps. Now we do not have to be accounting wizards to raise our eyebrows and ask the question, "How can you have a surplus and a budget gap at the same time?" While I do not balance my checkbook, I know that sounds wrong. They are projecting that in 1999 we will have a \$1.4 billion budget gap. In the year 2001 we will have a \$2.8 billion budget gap.

One thing wrong with this picture is that we are talking about surpluses. We had a very brief budget conversation in June 1998. It was probably the least covered budget by the media that I have even seen. The media barely brought it up. Usually the newspaper prints a table showing where the money is going and where it came from. They barely broke it out in a graphic. Much of the coverage was preoccupied with the Yankee Stadium issue and the Charter revision issue that held up budget negotiations. For the first time, under the new Charter, the City Council passed a different budget than the mayor proposed, the Mayor vetoed it, and then the council overrode the veto. The Mayor's predictable response was "I do not care what you do, even if it is in the City Charter." He is very good at ignoring the law when it suits his political purposes. It is amazing to any of us who read the City Charter that the Mayor would actually say that he does not have to follow the budget passed by the City Council.

What I found interesting about the discussion of a budget surplus was the issue of how we were going to spend it. The Council speaker proposed fiscal responsibility, calling for putting some money away in a rainy day fund. That had to be exciting for all the

good government and good fiscal managers — that we might have a little rainy day fund for when we actually do not have enough money to balance our budget, when we do not have the surplus.

The speaker also spoke about retiring some municipal debt. This is also important because the interest on debt is a portion of our total spending has been increasing. Most of the fiscal oversight agencies predict that we will be doing rather poorly on debt management in the year 2000. The Giuliani administration has refinanced a considerable amount of debt, leaving us with more debt-related costs today than we have had in the recent past. Buying back some of the debt makes some sense from a fiscal point of view.

There were also suggestions about how to spend the surplus we had from the budget. I find that amusing. Elected officials talked mostly about tax relief. Everybody thought about what kind of tax cuts we could put into place. Would it be tax cuts for small business, would it be property tax relief for homeowners and would we reduce sales tax on clothing? All of this sounded good to those of us who pay, yet the surplus conversation starts to unravel if we think about the budget in simple terms. Before I consider revenue as a surplus, an analogy to personal finances is instructive. I assume that I have taken care of my family's basic needs like food, clothing and shelter. After basic needs are accounted for, I might think about the vacation in Disney World that the kids really want to take. That is a surplus.

By any stretch of imagination, I do not think anybody, including the Mayor, would argue that we have taken care of basic needs in the City of New York. Our school system needs a significant infusion of capital for infrastructure. Maybe buying some books for the library, or providing computers and hooking some of them up onto the Internet would be a good way to spend the so-called surplus. Maybe cleaning some of the parks in the outer boroughs instead of just in the Manhattan business district would be an interesting way to spend the surplus. Or paving streets in neighborhoods in Brooklyn and in Queens, or maybe putting money into capital projects for the subway system.

We could sit here and think about social welfare and health needs, part of the city's responsibility right now and a huge burden on the budget. Welfare rolls are going down, which is good news, but are we focusing sufficiently on the problem of poverty in the city. While people may think it is sufficient to reduce welfare rolls, some people think that the point is to reduce poverty. Talking

about a surplus when our basic service delivery system needs a major infusion of capital is a bad joke. We have not really considered the long-term structural deficit in a serious way. The surplus discussion is simply an artifact that comes from the rhetoric of the fiscal crisis.

If we are not talking about these issues during a point when we are in a growing economy, what is going to happen when the economy turns down as my colleagues have explained to you is inevitable? Wall Street cannot continue at this rate. We are in some ways like a third world country economy, too dependent on one financial sector for our fiscal well being.

It is clear that we will have to create a balance in the economy. After losing 320,000 private sector job between August 1998 and May 1993, the employment statistics have turned around. According to the New York State Comptroller, during the first eight months of 1998, average private employment in New York City increased by 78,400 jobs, 2.7 percent as compared to the same period in 1997. However, the business service sector registered the greatest gain. Moreover, according to the Department of City Planning, within every industry group from professional managers to machine operators, occupations which require a higher level of knowledge and skill account for a rising share of total employment. Finally, all of the city's economic monitors predict that the city's economic and fiscal fortunes will be determined by Wall Street for the foreseeable future.

The labor force has changed in its complexion, with an increase in the percentage of low-skilled, non-white workers. This will exacerbate the city's labor force "mismatch" problem. And then there are the looming impending problems related to welfare. Federal law has placed a five-year eligibility limit on Welfare. An individual who has not found a job or is not capable of caring for themselves will become reliant on city and state based social services systems or the voluntary sector. In the year 2001, when the five-year limit kicks in, it is estimated that 350,000 single mothers with small children who will have to find entry-level jobs in the private sector, because they no longer will be eligible for Workfare or Welfare. They will have to obtain low-skilled jobs because these are mostly women who do not have high school diplomas.

This is a problem that nobody is talking about and no one wants to look at, and that is really critical for understanding what the future of New York could look like. We could wave a magic wand and all these women are exempt from the five-year limit. At least

something along those lines will have to happen because even the current administration admits that we will not find 350,000 entry-level jobs in the private sector at that point. People are projecting a total of about 20,000 new jobs in the economy in the next two or three years.

These policy decisions must be put into political perspective. I will briefly give you some of the information that I find challenging and interesting about the transformation of electoral politics in New York City. Part of it relates to changes in the population. The statistics have already been said about the increase in a nonwhite population as compared to the white population. The Census projects that within the Hispanic population, the greatest growth will continue to be among Dominicans and not Puerto Ricans. This population tends to be at the lower end of the income scale. What is really fascinating to me is the extent to which we have ignored these populations in the political process, particularly new immigrants.

What I mean by ignored is that many of these immigrants who could be citizens are not becoming citizens, those who do become citizens are not registered to vote, and those who are registered to vote are not voting. Right now we have about seventy percent of our eligible voters registered to vote. That means there are 1.5 million eligible voters who are not registered.

In a survey recently completed by the Center for Urban Research and Policy at Columbia University, we found that only fifty-one percent of Dominicans say they are registered to vote. This is not surprising when forty-one percent of Dominican respondents told us they were *not* citizens. Among those who are citizens, the Dominicans are much less likely to vote than their Puerto Rican counterparts. The Census projects that the greatest population growth in the city will be among Dominicans.

If the trend among the populations reflect the current citizenship and voter registration trends, we are going to have an extremely small percentage of our population voting. Let me offer just a few more statistics.

I have some data from the Census, the Voter Assistance Commission and the Board of Elections. In the 1961 mayoral race, 74.8 percent of registered voters actually voted. The percent of the voting age population that was registered at this time was only 60.7 percent, and this has remained fairly constant over time. The percentage of the voting age population who voted was about 45.5 percent.

The trend from 1961 shows a fairly steady decline. There is a blip in 1985. If you remember Ed Koch ran against himself in the mayoral race appearing on both the Democratic and Republic tickets. So turnout was down for the 1985 race. The most interesting statistic is the difference between the 1993 election and the 1997 election. In 1993, there was only a 54.4 percent turnout among registered voters. In 1997, only 39.3 percent of registered voters voted in the Mayoral race. This is the race that was reported by the media to be a landslide victory and mandate for Mayor Giuliani. I find it interesting how one can define a mandate when in fact only thirty-nine percent of registered voters actually turned out. The percentage of registered voters that actually voted for the Mayor, not of eligible voters but registered voters, was about twenty-two percent.

This trend in voter participation will be our biggest political challenge for the next millennium. How will we incorporate both the immigrant and new immigrant populations into the electoral process and into our political democracy. In the end we can talk about the economy and we can talk about fiscal policy, but if we begin the new century with a population of non-citizens and citizens who are disaffected from the political process, we will not have a city that functions effectively in either sphere.

PROF. SOYER: Our respondent is Kenneth T. Jackson, Jacques Barzun Professor of History and the Social Sciences at Columbia University. Prof. Jackson's book, *Crabgrass Frontier: The Suburbanization of the United States*,¹⁹ won both the Parkman and Bancroft prizes. He is also the editor of the *Encyclopedia of New York City*.²⁰

PROF. JACKSON: I think we have the notion that the situation is worse, at least in relevant terms, to where we were one hundred years ago.

Poverty. Does anybody think there are more poor people than a hundred years ago? Housing. Does anybody think housing is worse now than it was one hundred years ago? What about transportation? Look at pictures of the streets. They had not built the subway yet. Then there was pollution, a hundred thousand more horses on the street, each one of them leaving more than ten pounds of manure on the streets every day. Civil rights — women could not vote. Blacks might have been able to vote, but they were

19. KENNETH T. JACKSON, *THE SUBURBANIZATION OF THE UNITED STATES* (1985).

20. KENNETH T. JACKSON, *THE ENCYCLOPEDIA OF NEW YORK CITY* (1995).

discriminated against in every other way. Homosexuals, no one ever heard of that problem. Anti-Semitism was out in the open. Think about public health, think about income inequality, and think about public education. As mentioned, most people did not go beyond grammar school.

It was not ideal one hundred years ago. We did have jobs, lots of jobs, good jobs, and the port was the busiest in the world; but everybody was not wild about the city. Let me paraphrase several commentators: New York has reached the climax of her commercial supremacy. No city can maintain its control when its chief claim is that it is the dearest place in the world to do business. The cost of everything related to trade and commerce has increased here beyond the point of profit.

What has happened? I think we can look back on the twentieth century and say New York was the capital. We can say that New York especially was the capital of capitalism probably since World War I, when Great Britain shifted.

Let me just comment very quickly on a couple of comments that have been made. I have just a couple of minor comments. Professor Hammack exaggerated a little bit when he said that the greater city in 1898 incorporated virtually all of the population in the metropolitan region until WWII. It very definitely did not include New Jersey in the first place. Also places like Scarsdale, Bronxville, White Plains, East Chester, Mount Vernon, New Rochelle all almost stopped growing after World War II.

The industrial decline of New York City perhaps started a hundred years ago but it did peak in industrial employment in 1954. New York was the industrial center in the world in 1954, more than Los Angeles, more than Chicago, more than anywhere in Germany, more than anywhere else.

* * * *

DEAN HIMMELBERG: Thank you for coming. You have certainly been a great audience.

SUBURBANIZATION AND MARKET FAILURE: AN ANALYSIS OF GOVERNMENT POLICIES PROMOTING SUBURBAN GROWTH AND ETHNIC ASSIMILATION

*William E. Nelson**
*Norman R. Williams***

The social history of America in the twentieth century is one of suburbanization. At the turn of the century, most Americans lived in large, dense urban centers. Single tenements often housed multiple generations, even several different families. Today, the tenements remain, but where open pastures and forests once encircled America's cities, single-family homes dot the landscape. It comes as no surprise that by 1970 more Americans lived in suburbs than in cities or rural areas. By 1980, Houston was the only one of the nation's fifteen largest metropolitan areas in which the majority of residents lived in the central city.¹

A variety of factors contributed to this mass exodus from the central cities — government action, on both the national and state levels, foremost among them. Suburbanization was made possible by government policies whose effect, if not avowed purpose, was to encourage families to relocate from urban centers. For example, generous mortgage guarantee programs administered by the Veterans Administration and the Federal Home Administration encouraged returning World War II veterans and the rest of a growing American middle-class to buy new homes in the suburbs rather than continue to rent housing in the cities. Similarly, civil rights legislation hastened suburbanization by ensuring that ethnic

* Joel and Anne Ehrenkranz Professor of Law, New York University. A.B., Hamilton College, 1962; L.L.B., New York University, 1965; Ph.D., Harvard University, 1971. Helpful comments and criticisms were offered by the members of the Legal History Colloquium at New York University, and the author is deeply grateful and indebted for this valuable assistance. Research support was provided by the Filomen D'Agostino and Max E. Greenberg Faculty Research Fund of New York University School of Law.

** J.D., *summa cum laude*, New York University School of Law, 1995; A.B., *magna cum laude*, Government, Harvard, University, 1991. Mr. Williams is an associate in the New York office of Mayer, Brown & Platt.

1. See KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* 283-84 (1985).

minorities, notably Jews and Irish and Italian Catholics, would get their chance to buy suburban homes.

Government policies, however, have not always favored suburbanization. As early as the turn of the century, real estate developers contemplated "suburbanization" and for several decades worked towards that goal.² At the same time, families living in crowded urban tenements would have moved eagerly to the suburbs for better housing, but paradoxically, despite the presence of willing sellers and potentially eager buyers, suburbanization did not occur on a large scale.³ Low wages, unfavorable mortgage loan terms and ethnic and religious discrimination excluded potential buyers from the market.⁴ In the aftermath of World War II, however, the government took an active role in the market.⁵ Once the government removed market obstacles, such as high interest rates, restrictive credit practices, and discrimination, land owners and builders more easily sold their properties, middle and working class Americans became suburban home owners, and the suburban housing market operated more efficiently.⁶

This Article attempts to analyze the relationship between government policy and suburbanization by examining the growth of Nassau County, New York, a paradigmatic suburban locale, between 1920 and 1980. Part I examines the suburban housing market in Nassau from 1920 to 1940. This Part illustrates how high mortgage foreclosure rates prevented land owners and builders from selling properties at a profit, while at the same time, depriving buyers of the chance of secure home ownership. Part I then turns to the dramatically different post-World War II market's low mortgage foreclosure rates, which furthered the realization of suburbanization in an efficient fashion, beneficial to both sellers and buyers.

Part II focuses on Nassau County's transportation infrastructure, documenting the negligible impact that the infrastructure had on suburban growth. Parts III and IV develop a historical explanation for the market failures of the 1920s and 1930s and for the successful development of the suburban housing market in the postwar era.

2. *See id.* at 144-46.

3. *See id.*

4. *See* William E. Nelson, *The Changing Meaning of Equality in Twentieth-Century Constitutional Law*, 52 WASH. & LEE L. REV. 3, 39-45 (1995).

5. *See* DAVID POPENOE, *THE SUBURBAN ENVIRONMENT* vii (1977).

6. *See* JACKSON, *supra* note 1, at 11 (stating that "suburbanization has been as much a governmental as a natural process").

The main goal of this article is to document the importance of the role of government activity in the market's functioning. In pursuit of that goal, Part V concludes by refocusing attention on the demand side of the market equation to, hopefully, encourage renewed interest in government subsidization of consumer demand. Although this article may seem like an apologia for post-World War II suburbanization, such an apologia is not the article's aim. Noting the large body of scholarship that looks askance at the forms suburbanization has taken over the course of the past half century,⁷ and conceding that many of the conclusions of this scholarship are sound, this Article does not incorporate this scholarship because it does not address the Article's two main points.

The first point is that New York City tenement dwellers, most of whom belonged to religious and ethnic minorities, wanted to move to the suburbs.⁸ Whatever their faults, the suburbs offered materially better housing conditions than did the city.⁹ Moreover, the process of suburbanization contributed to the incorporation of Jews and ethnic Catholics into the American socio-economic mainstream.¹⁰ Even in retrospect, it seems clear that the Jewish and Catholic tenement dwellers who moved to Nassau County in the aftermath of World War II improved their well-being.

At the other end of the market, real estate developers throughout the century were seeking to make profits. Although government and the private market, as we shall see, subsidized them beginning in the earliest decades of the century, they could not make profits, but instead suffered significant losses in mortgage foreclosures. They began to earn money only after the government began subsidizing buyers.¹¹ Perhaps some will urge that the connection between subsidization of buyers and the earning of profits by sellers is one of pure historical coincidence. The second and

7. See MARK BALDASSARE, *TROUBLE IN PARADISE: THE SUBURBAN TRANSFORMATION OF AMERICA* 206-09 (1986) (examining the problems of suburbs in the last two decades, especially problems resulting from a rapid growth and industrialization — without changes in people's values or the social structure); SCOTT DONALDSON, *THE SUBURBAN MYTH* 1-22 (1969) (defending the American suburb from "unjust and irrational" criticism and "the tirade of critical abuse" to which it has been subjected); ROBERT GOLDSTON, *SUBURBIA: CIVIC DENIAL* (1970); JACKSON, *supra* note 1, at 224-30, 272-82; JOHN R. STILGOE, *BORDERLAND: ORIGINS OF THE AMERICAN SUBURB, 1820-1939* at 4-5 (1988).

8. See DONALDSON, *supra* note 7, at 3-4.

9. See JACKSON, *supra* note 1, at 219-30 (discussing the decline of housing in New York City after World War II).

10. See Nelson, *supra* note 4, at 39-68.

11. See *id.*

main lesson of this article, however, is that government subsidization of and legal assistance to buyers served as a prerequisite to efficient functioning of the Nassau County suburban real estate market, because it brought to willing sellers buyers who were not only eager, but also able to make the purchases they desired.¹² This lesson is more timely today, perhaps, than it has been at any point since the Great Depression.

I. THE SUBURBAN HOUSING MARKET

In 1910, New York City was the most crowded urban center in the United States.¹³ In New York City, 49% of all residents lived on the island of Manhattan, which had a population density of 161 people per acre — a figure far above that for Brooklyn (32.5), the Bronx (15.6), Queens (3.8), and the still predominantly rural Staten Island (2.2).¹⁴ Population densities in the most crowded neighborhoods of Manhattan such as the Lower East Side, exceeded 700 people per acre.¹⁵ The apartment buildings and tenements of Manhattan were literally overflowing with humanity. The extension of the subway system to areas outside of Manhattan in the 1910s prompted new development in the outer boroughs, thereby slightly easing urban overcrowding.¹⁶ Manhattan's population declined 20% during the next two decades, while New York City's population as a whole increased 45%, with the result that by 1930, Manhattan's population density was an improved, if not sparse, 128.9 people per acre.¹⁷

Nevertheless, New York City, particularly Manhattan, remained a densely populated urban center, where millions of individuals hoped and clamored for more space. In contrast, the sylvan countryside of Nassau with its rolling fields awaiting development beckoned to the families trapped in the crowded tenements of New

12. See Nelson, *supra* note 4, at 26-28, 53-61 (discussing the development of legal and economic assistance to ethnic and racial minority groups, enabling them to relocate from cities to suburbs); see generally JACKSON, *supra* note 1, at 190-218 (addressing suburban development as a result of federal subsidies).

13. See Clifton Hood, *Subways, Transit Politics, and Metropolitan Spatial Expansion*, in *THE LANDSCAPE OF MODERNITY: ESSAYS ON NEW YORK CITY, 1900-1940* at 199 (David Ward & Olivier Zunz eds., 1992) (noting that "Manhattan was among the most congested urban districts in the world").

14. See *id.*

15. See *id.*

16. See *id.* at 203-04.

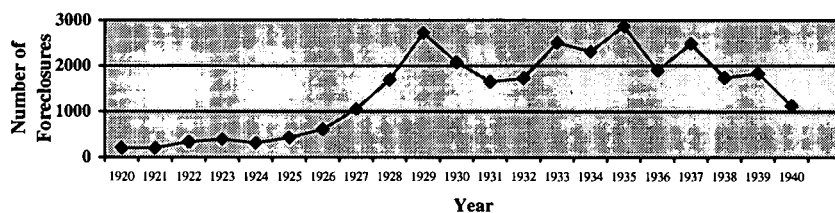
17. See *id.* at 204.

York City.¹⁸ Attempts by real estate developers in the 1920s and 1930s to construct new housing in the county for these families, however, largely failed. Although the suburban housing market in Nassau County would explode in the wake of World War II, as families by the hundreds of thousands relocated to its peaceful, uncrowded villages, the housing market of the 1920s and 1930s remained hugely inefficient.

A. Foreclosures as a Sign of Inefficiency

Mortgage foreclosure rates are a useful indicator of this inefficiency. By this measure, the market in Nassau prior to World War II differed substantially from that after the war. Table One¹⁹

TABLE 1



depicts the estimated annual number of mortgage foreclosure actions filed in New York State Supreme Court for Nassau County during the 1920s and 1930s. The Table reveals two interesting facts about the malfunctioning suburban housing market during those two decades. First, it shows that, except for 1924, the total number of foreclosures increased every year from 1920 to 1929, only to level off for several years but then peak in 1935, at more than four-

18. In 1920, the population density of Nassau County was 460.3 individuals per square mile, compared with 103,822.9 for New York County (Manhattan). BUREAU OF THE CENSUS, FOURTEENTH CENSUS OF THE UNITED STATES: 1920. STATE COMPENDIUM: NEW YORK. STATISTICS OF POPULATION, OCCUPATION, AGRICULTURE, MANUFACTURE AND MINES AND QUARRIES FOR THE STATE, COUNTIES, AND CITIES 12 (Table 1) (1924) [hereinafter 1920 CENSUS]. By 1950, Nassau's population density had increased to 2,242.6 individuals per square mile, compared to New York County's 89,095.5. BUREAU OF THE CENSUS, CENSUS OF POPULATION: 1950. A REPORT OF THE SEVENTEENTH DICENNIAL CENSUS OF THE UNITED STATES 11 (Table 5) (1952) [hereinafter 1950 CENSUS]. In one decade, by 1960, Nassau's population density virtually doubled to 4333.9, while New York's declined further to 77,194.6. BUREAU OF THE CENSUS, THE EIGHTEENTH DICENNIAL CENSUS OF THE UNITED STATES. CENSUS OF POPULATION: 1960. VOL. I: CHARACTERISTICS OF THE POPULATION. PART 34: NEW YORK 13 (Table 6) (1963) [hereinafter 1960 CENSUS].

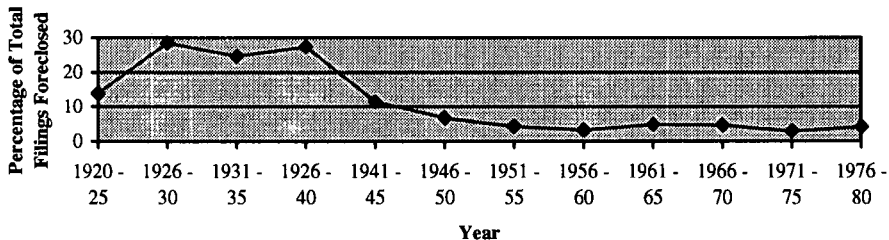
19. The annual numbers in Table 1 are derived from a statistical sample of all civil filings in Nassau County. They are not accurate at the standard 95% level of confidence for every year, but the general pattern displayed in Table 1 would be replicated by anyone doing a similar statistical sample.

teen times the 1920 rate. Some slight improvement occurred thereafter, but foreclosures in 1939 were still more numerous than in 1928, the year before the Great Depression, and in 1940 were still more than five times the 1920 figure.

Second, the Table suggests that the Nassau market collapsed prior to the Great Depression.²⁰ After remaining relatively steady through 1926 at approximately 14% of all filings, foreclosure actions rose to 21% of filings in 1927 and thereafter exceeded 25% in every year until 1939, except for 1931 and 1932, when they still exceeded the 1926 rate.

Of course, the population of Nassau County increased during the 1920s. According to census data, in 1920 there were 126,120 individuals living in the county.²¹ By 1930, the population had more than doubled to 303,053.²² Even after adjusting for this population growth, however, the number of foreclosures initiated in Nassau County rose dramatically in the late 1920s and early 1930s. In fact, the annual number of foreclosure actions filed per capita for 1927-1939 was more than twice that for the period immediately preceding, 1920-1926.

TABLE 2



20. The urban real estate market also started to decline during this time period prior to the Depression. In 1927 real estate in New York City appreciated 12%, but property values increased only 9% in 1928, 8% in 1929, 6% in 1930, 3% in 1931, and 1% in 1932. See ROBERT A. CARO, *THE POWER BROKER: ROBERT MOSES AND THE FALL OF NEW YORK* 326 (1974).

21. See 1920 CENSUS, *supra* note 18, Table I (State Compendium: New York. Statistics of Population, Occupation, Agriculture, Manufacture and Mines and Quarries for the State, Counties, and Cities).

22. BUREAU OF THE CENSUS, FIFTEENTH CENSUS OF THE UNITED STATES: 1930. POPULATION. VOL. III: REPORTS BY STATES, SHOWING THE COMPOSITION AND CHARACTERISTICS OF THE POPULATION FOR COUNTIES, CITIES, AND TOWNSHIPS OR OTHER MINOR CIVIL DIVISIONS Table 11 (1932) [hereinafter 1930 CENSUS].

As Table Two shows,²³ the period after World War II differed even more dramatically from the 1927-1939 period. The Table shows that the number of foreclosure actions as a percent of total litigation in Nassau County was at or above 25% in every five-year period during 1926-1940; after falling back to 11.4% for the 1941-1945 period and 6.7% for 1946-1950, the percentage fell to 4.0% for the next five-year period and never exceeded 5.0% thereafter. Total foreclosure cases, which had been over 2,000 per year during most of the 1930s fell to an average of 502 per year for 1941-1945 and to only 286 per year for 1946-1950. Of course, the population of Nassau County underwent dramatic growth in the years following World War II. In 1940, Nassau's population was 406,748.²⁴ The number rose to 672,765 by 1950²⁵ and to 1,300,171 by 1960.²⁶ Thereafter, the population growth stabilized at 1,428,080 in 1970²⁷ and declined slightly in 1980 to 1,321,582.²⁸ Despite this huge population increase, foreclosure cases did not rise to an average of over 1000 annually – less than half the 1930s rate — until the second-half of the 1970s, when the county had approximately four times as many people and four times as much litigation as it had had in 1930. These figures suggest a wholesale transformation in the suburban housing market in Nassau County after World War II.

The high rate of mortgage foreclosure actions prior to World War II, as a total number, as a percent of total litigation, and as a per capita rate, is indicative of an inefficient suburban housing market, particularly when compared to the low number of foreclosure actions after World War II. Large numbers of foreclosures occur only when the market fails to clear at a price at which sellers are willing to sell and buyers are able to buy, with the result that buyers pay a higher price than they can afford, subsequently be-

23. Using standard statistical methods, it can be asserted at a 95% confidence level that the difference between foreclosure rates prior to 1940 and after 1951 is significant.

24. BUREAU OF THE CENSUS, SIXTEENTH CENSUS OF THE UNITED STATES: 1940. POPULATION. VOLUME II: CHARACTERISTICS OF THE POPULATION. PART 5: NEW YORK - OREGON 39 (Table 21) (1943) [hereinafter 1940 CENSUS].

25. 1950 CENSUS, *supra* note 18, at Table 5 (Vol. I: Number Of Inhabitants).

26. 1960 CENSUS, *supra* note 18, at Table 6 (Vol. I: Characteristics Of The Population. Part 34: New York).

27. BUREAU OF THE CENSUS, 1970 CENSUS OF POPULATION. VOLUME I: CHARACTERISTICS OF THE POPULATION. PART 34: NEW YORK Table 9 (1973) [hereinafter 1970 CENSUS].

28. BUREAU OF THE CENSUS, 1980 CENSUS OF POPULATION AND HOUSING. CENSUS TRACTS NASSAU—SUFFOLK, N.Y. Table P-1 (1983) [hereinafter 1980 CENSUS].

come unable to pay their bills, and thereby lead themselves, and, at times, sellers as well into economic ruin.

Consider, for example, a dwelling for which a seller seeks a down payment of \$2000 and ten subsequent annual payments, including interest, of \$1000 per year. If a buyer eager to own the dwelling is in fact capable of making those payments, the market will clear at the specified price, and both the buyer and the seller will be better off. The sale, that is, will constitute a Pareto improvement, and the real estate market can be said to function with Pareto efficiency. The market will remain efficient even if a particular buyer subsequently proves unable to make the annual \$1000 payments, as long as some other buyer is able and willing to repay what the first buyer has spent and to assume the first buyer's remaining obligations. In such circumstances, the second buyer will simply purchase the interest of the first buyer. The original seller will be no worse off, nor will the act of resale have made the first buyer worse off. The resale will still be Pareto efficient, since the second buyer will consider herself better off.

What happens, however, when high transaction costs or other external economic impediments make willing buyers unable to pay the price being sought? If a real estate developer or other initial seller is lucky, he will learn quickly of his inability to sell at his desired price and will either lower the price or merely hold onto the property in its existing state until market conditions improve, without making further improvements. Of course, some risk attaches to such a course of action: a developer who has financed an acquisition of realty through borrowing may prove unable to pay its loans if it cannot resell at an anticipated price and, if so, may face foreclosure at the hand of its creditors. Indeed, developers and other real estate companies were the defendants in 22.2% of all foreclosure actions between 1920 and 1939 — a total, in all, of 6283 foreclosures.

B. Deficiencies in Foreclosure Sales as a Sign of Inefficiency

A developer or other seller can end up even worse off if an initial sale occurs and the buyer subsequently proves unable to make required payments. Then, foreclosure will occur, and at least one or possibly both of the parties will suffer a catastrophic loss. If a foreclosure sale yields a price below the amount still owned on the purchase, the buyer will lose the house and the amounts spent on the down payment and any subsequent annual payments, and will also find herself liable on a deficiency judgment for the difference

between the auction price and the total of the payments still owed.²⁹ The seller will receive less than full payment plus the right to collect on a deficiency judgment that will likely prove uncollectible. Both the buyer and the seller will thus be worse off than if the original sale had never occurred.

C. Surpluses in Foreclosure Sales as a Sign of Inefficiencies

A second sort of inefficiency may also occur during foreclosure cases, and in fact sometimes did occur in Nassau County during the 1920s and 1930s. In many of the foreclosure cases that proceeded to final judgment during the two decades, the price obtained at an auction sale exceeded the amount owed on the mortgage, resulting in a distribution of a surplus to the owner of the mortgaged property. In fact, foreclosure sales with surpluses constituted 4.3% of foreclosure filings between 1920 and 1939. This data is strange because foreclosures, if they are conducted efficiently, should never produce surpluses. In an instance in which a foreclosure auction produces a surplus, a private sale should produce an even larger surplus, since transaction costs in a private sale are much lower than in a judicial foreclosure. If mortgaged property can be sold in a private sale at an amount that will pay off the mortgage and produce a surplus, it is in everyone's interest that a private sale, rather than a foreclosure sale take place. Foreclosures should occur only when property cannot be sold at an amount sufficient to retire existing indebtedness. The only other time that foreclosures can occur so as to routinely produce surpluses is when the market is operating so inefficiently that owners of mortgaged property cannot estimate the price they can obtain by selling it.

Thus, the facts of frequent foreclosures against both home owners and developers, of frequent deficiencies in foreclosure sales, and of occasional surpluses, demonstrate that the suburban housing market in Nassau County operated in a highly inefficient manner in the decades prior to World War II. Despite the existence of thousands of families who wished to move from the crowded tenements of the city to the open expanses of the suburbs and the existing homeowners and land developers who sought buyers, the two parties — buyer and seller — often failed to come together in the market to consummate a transaction. The high foreclosure

29. Buyers were liable for deficiency judgments in 36.4% of all foreclosure cases between 1920 and 1939.

rates testify to this market failure, as does the frequency with which foreclosure sales produced either deficits or surpluses.

This same market, however, became much more efficient in the years following the war, when hundreds of thousands of families relocated from New York City to Nassau County. The puzzle is to explain what altered the suburban landscape of the New York metropolitan region during the first half of the 1940s. More specifically, the question is what transformed the suburban housing market in Nassau County? The next several sections address this question, beginning first with a factor of obvious importance — the County's transportation infrastructure.

II. THE TRANSPORTATION INFRASTRUCTURE

No place can become a bedroom community for a nearby city until an infrastructure exists for transporting commuters between their jobs and their homes. In much of the United States, no such infrastructure existed prior to World War II. In Nassau County, though, all the precursors to suburban development existed by that time. By 1920, Nassau already possessed a well-developed transportation infrastructure, and major investments in the 1920s and early 1930s only made Nassau County even more accessible and appealing to potential commuters. Transportation to and from the urban business center of Manhattan was possible via either commuter rail or that newly emerging technological wonder, the automobile.

A. The Long Island Railroad

By 1898, the Long Island Rail Road ("LIRR")³⁰ possessed an extensive rail network with three main lines running the length of the island.³¹ Although the idea of extending the LIRR into Manhattan via bridge or tunnel circulated in the minds of the Railroad's directors for several decades prior to the turn of the century, the impetus for building rail tunnels underneath the East River did not receive determined backing until the Pennsylvania Railroad acquired the LIRR in 1900.³² In 1910, the East River Tunnels were

30. The LIRR was founded in 1834 to connect New York and Boston via Long Island because it was thought impossible, due to the hills and rivers of Connecticut, to build an overland route. Such an overland route was completed in 1848. See MILDRED H. SMITH, *EARLY HISTORY OF THE LONG ISLAND RAILROAD: 1834-1900* 2 (1958).

31. *See id.* at 54.

32. *See SMITH, supra* note 30, at 54-55; 7 VINCENT F. SEYFRIED, *THE LONG ISLAND RAIL ROAD: A COMPREHENSIVE HISTORY* 76-79 (1984).

completed and opened to passenger rail service, finally allowing Long Island commuters to ride the rails from their suburban homes nonstop to Pennsylvania Station in the heart of Manhattan.³³ No longer were commuters required to disembark in Queens or Brooklyn and ride ferries across the river. The savings in time were immense: express trains from Babylon in Suffolk County, some six miles east of Nassau County, reached Pennsylvania Station in sixty-three minutes.³⁴

Though the opening of the East River tunnels was a landmark event in New York's rail history, other improvements in rail service also contributed to the shortening of the commuting time between Nassau County and New York City. Grade crossings — the intersections of rail lines and carriage roads — posed a threat to public safety and required trains to slow down when approaching the crossing. The death of five well-connected individuals in 1897 finally drew attention to the danger of grade crossings and compelled the LIRR, with financial assistance from the state legislature, to undertake a massive, long-term program to eliminate dangerous intersections.³⁵ By World War I most grade crossings in Queens, the portion of Long Island between Manhattan and Nassau, had been eliminated, thereby improving both the safety and speed of rail service in the area.³⁶

Electrification of the rail lines also increased the speed of rail service. The development of the East River and Hudson River Tunnels required electrification: steam locomotives were inoperable in the long tunnels.³⁷ Electrification entailed an enormous investment by the LIRR, requiring the purchase of new trains, the construction of an electrical generation plant and electrical substations, and the laying of the third rail. With the completion of the electrical generation station in Long Island City in 1905, preparations were made to inaugurate electrical rail service,³⁸ which was much faster than steam locomotives on short-distance, commuter

33. See SEYFRIED, *supra* note 32, at 104-05; GEORGE H. BURGESS AND MILES C. KENNEDY, *CENTENNIAL HISTORY OF THE PENNSYLVANIA RAILROAD COMPANY: 1846-1946* 524 (1949).

34. See *First Passenger Train to Babylon Was Run Fifty Years Ago Today*, *BROOKLYN EAGLE*, Oct. 28, 1917. According to the Long Island Railroad's November 1997 timetable, the fastest express trains between Babylon and Pennsylvania Station take 52 minutes.

35. See SEYFRIED, *supra* note 32, at 20.

36. See *id.* at 21.

37. See *id.* at 53.

38. See *id.* at 56.

runs.³⁹ On July 18, 1905 the first electrical train pulled out of Manhattan Crossing in East New York bound for Rockaway Beach.⁴⁰ By the end of 1905, the LIRR had electrified its first line to Nassau County.⁴¹ Electrification of other lines proceeded apace, with electric train service reaching Hempstead in 1908⁴² and Lynbrook by 1910, halving the commuting time from ninety to forty-five minutes.⁴³ By 1925, the LIRR had invested \$25 million in electrification and had successfully electrified 115 of the 398 miles of rails on Long Island.⁴⁴ Not until the 1980s did the railroad begin the electrification of additional trackage.

Residents of Nassau County warmly welcomed electrification, often with village-wide celebrations the day electric rail service commenced.⁴⁵ In 1925, for example, when the LIRR inaugurated electric train service to Babylon in Suffolk County, Lynbrook, which was a station on the Babylon line, planned a "boisterously appropriate" celebration to mark the day.⁴⁶ Nor was the potential impact of these improvements lost on railroad executives. Prior to the turn of the century, the LIRR had relied primarily on summer travel, weekend excursion, and freight hauling for its revenues.⁴⁷ However, as affluent city residents began to construct summer cottages, particularly along Nassau County's "Gold Coast," the railroad discovered a new source of revenue, one that would eventually become the life-blood of the LIRR: the commuter.

The LIRR quickly sought to capitalize upon and expand this emerging market by directly encouraging suburban relocation. Promotional pamphlets published by the railroad extolled the virtues of Nassau County, such as the "alluring characteristics of blue water and umbrageous woodland" along the county's North

39. *See id.* at 69.

40. *See id.* at 69, 201.

41. *See id.* at 73.

42. *See Development of L.I.*, SOUTH SIDE MESSENGER, Feb. 21, 1911; *Electrification Plans Began to Form in 1905*, NASSAU DAILY REVIEW, May 20, 1925.

43. 2 HENRY ISHAM HAZELTON, THE BOROUGH OF BROOKLYN AND QUEENS; COUNTIES OF NASSAU AND SUFFOLK: LONG ISLAND, NEW YORK: 1609-1924 870 (1925). According to the November 1995 timetable, the fastest train between Lynbrook and Pennsylvania Station now takes 32 minutes.

44. *Electrification Plans Began to Form in 1905*, *supra* note 42.

45. *See, e.g.*, HAZELTON, *supra* note 43, at 870; *Cheering Villages to Greet Special Train Inaugurating Long Island Electrification*, NASSAU DAILY REVIEW, May 19, 1925; *Even Lynbrook Swings in Line to Celebrate Great Change in Transportation*, NASSAU DAILY REVIEW, May 20, 1925.

46. *Even Lynbrook Swings in Line*, *supra* note 45.

47. *See SEYFRIED*, *supra* note 32, at 188.

Shore.⁴⁸ The 1903 pamphlet left less to the imagination and advertised more bluntly that

The suburban places on Long Island offer to business men who must needs be at their desks daily, the best opportunity to locate their families where they have all the desirable advantages of the country, and where they themselves may spend each night without making the daily journey to and from the city a tiresome feature of daily life.⁴⁹

Not surprisingly, the directors of the LIRR were among the first to recognize the opportunities for suburban development being created by the railroad. The LIRR, beginning in 1902, purchased through its own real estate subsidiary, the Stuyvesant Real Estate Company, large tracts of land in Queens for railroad use.⁵⁰ Similarly, the directors of its parent company, the Pennsylvania Railroad, recognized that land near railroad lines would quickly appreciate in value as the lines were electrified or otherwise made more accessible to Manhattan. Having the benefit of knowing in advance what lines would be so improved, the directors themselves purchased large tracts of land in Queens and Nassau Counties.⁵¹ In 1903, the LIRR counsel, William J. Kelly, incorporated the Matawok Land Company.⁵² Recognizing the huge profits to be made through real estate speculation, the Matawok Land Co. bought substantial acreage as far east as Floral Park.⁵³ Regardless of whether it was from the hope of increased ridership or from profits from real estate development or most likely from a combination of both, it was with less than altruistic motives that the LIRR assured potential riders that Nassau County's variety of features made it an ideal setting "for a vacation, a summer's rest, or for the site of a permanent home."⁵⁴

Other individuals also foresaw the financial gains to be made by investing in the suburban real estate market. Individuals such as William K. Vanderbilt and others engaged in a speculative real estate boom that inflated the value of some rural acreage in Queens

48. *Long Island*, published by the Passenger Department of the Long Island Railroad (1917), at 15.

49. *Long Island Illustrated*, published by the Passenger Department of the Long Island Railroad (1903), at 10.

50. See SEYFRIED, *supra* note 32, at 15.

51. *See id.*

52. *See id.*

53. *See id.*

54. *Along the Sunrise Trails of Long Island*, published by the General Passenger Department of the Long Island Railroad (1923), at 3.

ten-fold.⁵⁵ The Cord Meyer Development Co., receiving assistance from the Matawok Land Co., invested heavily in Forest Hills.⁵⁶ By 1907, most of the available undeveloped land in Queens had been purchased, and land speculation consequently waned in that county. However, the rural acreage of Nassau County to the east beckoned to savvy real estate developers,⁵⁷ such as the Long Beach Improvement Company, which in 1907 purchased acreage on Long Beach to develop a suburban community and vacation resort complete with a hotel and boardwalk.⁵⁸ In 1912 the Amsterdam Development and Sales Company purchased eight farms in Malverne, a predominantly rural, farming community.⁵⁹ By 1920, Malverne, by then an incorporated village, contained over one hundred homes, along with a school and several churches.⁶⁰ The railroad's importance in the development of these suburban communities cannot be overestimated. In 1928, William Gibson completed construction on his 700-home development near Valley Stream.⁶¹ To ensure rail service to his new community, Gibson constructed a railroad station at his own expense and donated it to the LIRR.⁶²

As more and more families relocated to Nassau County during this first burst of suburbanization, ridership swelled during the early part of the twentieth century. Total ridership more than doubled from 14,520,218 in 1901 to 30,978,615 in 1910, exploding thereafter to 72,743,820 in 1920 and exceeding 100 million in 1925.⁶³ In response to the opening of the East River Tunnels, commuting traffic alone increased from 7,744,860 in 1909 to 11,534,562 in 1912.⁶⁴ In fact, commuter traffic grew explosively during the 1910s and 1920s across the county.⁶⁵ In 1927, the LIRR carried 112 million passengers — one eighth of the total railroad ridership in the United States — of whom 63 million traveled into or out of Manhattan.⁶⁶ By 1930, more than 30,000 commuters made the

55. *See id.*

56. *See id.* at 16.

57. *See Development of L.I.*, SOUTH SIDE MESSENGER (Feb. 21, 1911).

58. *See* EDWARD J. SMITS, NASSAU: SUBURBIA, U.S.A: THE FIRST SEVENTY-FIVE YEARS OF NASSAU COUNTY, NEW YORK: 1899 TO 1974, 161 (1974).

59. *See id.* at 161-62.

60. *See id.* at 162.

61. *See id.*

62. *See id.*

63. *See* SEYFRIED, *supra* note 32, at 191.

64. *See id.*

65. *See* SMITS, *supra* note 58, at 155. For example, Freeport, which had 475 commuters in 1911, had 2211 by 1923, and Rockville Centre witnessed its commuter traffic grow from 589 in 1911 to over 3000 by 1929. *See id.*

66. *See Long Island R. R. Reveals Rapid Growth*, MAG. N.Y., Feb. 1929.

daily journey aboard the LIRR from Nassau County to New York City.⁶⁷ The incredible improvements in rail service during the first decade of the twentieth century — the East River Tunnels, the elimination of grade crossings, and the electrification of the main lines — had opened new communities to suburban development with its concomitant reliance on commuter transportation. As the LIRR noted itself in one of its less humble, though not entirely inaccurate, moments, “[t]he popularity of Long Island as a place of residence can be truthfully credited to its high type of transportation service (including many miles of electrified lines) which brings all parts of this glorious land within easy reach of the center of New York City (7th Avenue & 33rd Street).”⁶⁸ Only as an afterthought did the LIRR think to give some of the credit for Nassau County’s growth “to its healthful climate, to its unique geographical location and its pleasant and tastefully designed houses and cottages.”⁶⁹

Nor did community leaders, recognizing the potential financial windfall, overlook the railroad’s contribution to suburban development in their hamlets. Babylon historian Benjamin P. Field noted:

What the railroad has done for Babylon, it has likewise done for all the communities of the South Shore. It has brought them nearer to New York, the greatest city in a country of one hundred million population. It has made them convenient dwelling places for hundreds of city workers who now form our army of commuters and has opened an outlet for our young men and women to the big business fields of New York.⁷⁰

B. The Automobile and Highways

The rapid emergence of the automobile during the 1910s and 1920s facilitated the development of an alternative, though generally slower, method for suburban residents of Nassau County to commute to work in Manhattan. With the opening of the Brooklyn Bridge in 1883, the Williamsburgh Bridge in 1903, and the Manhattan and the Queensborough Bridges in 1909,⁷¹ it became feasible, though time-consuming,⁷² to drive from Long Island to Manhattan.

67. See SMITS, *supra* note 58, at 155-56.

68. *Along the Sunrise Trails*, *supra* note 54, at 3.

69. *Id.*

70. *Veteran Long Island Men . . . First Locomotive . . .*, BROOKLYN EAGLE, Nov. 4, 1917.

71. See SEYFRIED, *supra* note 32, at 214.

72. One 1931 study, for example, showed that the average, rush-hour motorist spent 43 minutes crossing the Queensborough Bridge. See CARO, *supra* note 20, at 330.

As automobile prices dropped due to Henry Ford's assembly-line manufacturing process, they became an engine of suburban development. For example, the number of registered automobiles in Nassau County climbed from 8,766 in 1916 to approximately 40,000 in 1922 and exploded to 112,000 by 1930.⁷³

The State constructed Nassau County's highway system to keep pace with the spread of automobiles. Prior to the 1920s, the county had lacked an extensive highway system capable of handling a large amount of automotive traffic. The main transportation arteries, such as Merrick Road, Jericho Turnpike, Hempstead Turnpike and others, were poorly-surfaced, two lane roads in desperate need of repair and widening.⁷⁴ The original post road, Merrick Road, was often congested, particularly on weekends when residents of the city sought the recreational playgrounds of Nassau County.⁷⁵

The first major highway improvement occurred in 1914, when William Vanderbilt completed construction of a private, toll road, the Long Island Motor Parkway, which ran from the city limits across Nassau to Suffolk County.⁷⁶ The 1920s, in turn, witnessed tremendous investment in Nassau County's highway infrastructure. Existing roadways such as Merrick Road, Jericho Turnpike, Hempstead Turnpike, and North Hempstead Turnpike were widened and paved with concrete,⁷⁷ and new highways were built where once only farmland had existed. Legislation sponsored by New York State Assemblyman Thomas McWhinney funded the construction of the Sunrise Highway, and the first stretch of the Highway from Brooklyn to Lynbrook opened in 1928.⁷⁸ Nevertheless, it was the Long Island State Park Commission, under the leadership of the indomitable Robert Moses, that initiated the massive highway construction program in the county. The Southern State Parkway, running from the New York City line to Wantagh, opened in 1929, and construction began on the Northern State Parkway.⁷⁹ In 1931

73. See SMITS, *supra* note 58, at 152.

74. See *id.*

75. See *id.* at 151.

76. See *id.* at 153. Despite the hefty (and exclusionary) one dollar daily toll charge, the Parkway never earned a profit. See *id.*

77. See *id.*

78. See *id.* at 151.

79. See CARO, *supra* note 20, at 282, 308.

the Southern State Parkway was extended from Wantagh to Massapequa and, the year after that, to Amityville in Suffolk County.⁸⁰

Although some villages had opposed the construction of new highways out of fear of unleashing a tidal wave of "rabble" from the city,⁸¹ communities quickly began to perceive, much as they had with the LIRR, the substantial financial benefits they would gain from road construction near their villages.⁸²

Within a year of the opening of the Southern State Parkway, both the Nassau and Suffolk County Boards of Supervisors appropriated millions of dollars to condemn land for the right-of-way for proposed highways.⁸³ Real estate developers so adored Robert Moses for constructing new roadways, which they hoped would increase land values, that the East Islip Community Association, for example, presented Moses with a silver cup showing its appreciation.⁸⁴

Despite the extensive transportation infrastructure existing in Nassau County by the end, if not the beginning of the 1920s, suburbanization did not occur, at least not on any scale resembling the massive influx of residents after World War II.⁸⁵ Nassau County prior to the war remained largely undeveloped.⁸⁶ Even with the large-scale improvements in rail and highway travel, and even with the presence of real estate developers banking on

80. *See id.* at 313. Only one new highway, the Long Island Expressway, was built after World War II.

81. *See id.* at 187, 204-05.

82. *See id.* at 206-07.

83. *See id.* at 312.

84. *See id.*

85. *See id.*

86. According to census reports, prior to the turn of the century, only 6491 dwellings were built in Nassau County. During the 1900s 7894 new houses were built and 12,132 more during the 1910s. *See* 1940 CENSUS, *supra* note 24, at 317 (Table 22). The 1920s witnessed the first wave of suburbanization in the county as 54,465 new homes were built during the decade. The Depression curtailed some development as only 38,905 new homes were built during the 1930s. Shortages caused by World War II resulted in only 16,475 new homes being built in the first half of the 1940s, but the beginning of the suburbanization boom led to the construction of 59,165 new homes in the second half of the decade. *See* 1950 CENSUS, *supra* note 18, at 38 (Table 20). By 1950, 38% of the dwellings in Nassau County had been built less than ten years earlier. BUREAU OF THE CENSUS, A STATISTICAL ABSTRACT SUPPLEMENT, COUNTY AND CITY DATA BOOK 1952 293 (Table 3) (1953) [hereinafter 1950 STATISTICAL ABSTRACT]. This enormous suburban construction primarily produced only one type of structure. In 1940, the vast majority of the houses (89.3%) were that most familiar symbol of suburbia: the one-family, detached structure. *See* 1940 CENSUS, *supra* note 24, at 384 (Table 27). By 1950, the percentage of owner-occupied homes that were one-family, detached dwellings increased to 92.5%. *See* 1950 CENSUS, *supra* note 18, at 16 (Table 17).

suburbanization, Nassau County's potential as a suburban home for hundreds of thousands of families was a reality in the decades before World War II only for tens of thousands. In contrast, population growth after World War II was measured in the hundreds of thousands.⁸⁷ For instance, in one year, 1949, 75,595 people relocated to Nassau County, more than 11% of the county's population as a whole.⁸⁸

With tenement dwellers eager to move, with real estate developers ready to sell, and with a transportation infrastructure capable of bringing workers to their job, why did the market for suburban development fail during the 1920s? Why, in turn, did it become efficient two decades later? Something occurred during the early 1940s that transformed the suburban housing market and altered forever the suburban landscape in the New York metropolitan area. That something was the law.

III. EQUALITY FOR HOME BUYERS

A. Nassau's Exclusion of Blacks, Catholics and Jews, 1920-1945

Part of the answer to the market failure of the 1920s and 1930s lay in the demographics of the county. Prior to World War II, Nassau County's population remained largely white, Anglo-Saxon, and Protestant ("WASP").⁸⁹ Jews and Catholics, particularly Catholics from Ireland and Italy, were prevented from purchasing homes in Nassau County by a variety of official and unofficial means.⁹⁰ African-Americans were, of course, also unwelcome.⁹¹ Prior to World War II, in short, Nassau County contained "restricted" communities, such as Garden City, in which only WASP's were welcome.⁹²

Despite *Buchanan v. Warley*,⁹³ municipal zoning laws may have been used to exclude unwanted demographic groups from communities. The illegality of such a practice makes it difficult to trace, and no cases outlawing exclusionary zoning arose during the pre-war era. As we shall see, however, cases outlawing exclusionary

87. See CARO, *supra* note 20, at 898-99.

88. See 1950 CENSUS, *supra* note 18, at 154 (Table 42).

89. See Nelson, *supra* note 4, at 28.

90. See *id.* at 28 n.122.

91. See *id.* at 33.

92. See *Synagogue Loses L.I. Zoning Plea*, N.Y. TIMES, May 15, 1956, at 33 ("Until about five years ago, Garden City was in effect, a 'restricted' community, with few Jewish families living here. But in the last few years the Jewish population has increased, with the center now numbering 200 members.")

93. 245 U.S. 60 (1917) (holding that city zoning laws that discriminate on the basis of color violate the Fourteenth Amendment of the Federal Constitution).

practices against Catholics and Jews did arise in New York after the war, and the existence of the cases, which outlawed the practices, suggests that the practices were not new.⁹⁴

Restrictive covenants were a second legal device for keeping Jews, Catholics and Blacks out of communities, although there is no direct evidence about the extent of their use in Nassau. One case during the 1930s, however, upheld the enforcement of such a covenant when an African-American sought to purchase a house in suburban Westchester County,⁹⁵ and there is no question that the use of racially restrictive covenants was widespread.⁹⁶ Nor is there any doubt about the utilization of restrictive covenants to accomplish discrimination on ethnic and religious grounds.⁹⁷

Besides legally sanctioned discrimination, unofficial means of excluding Jews, ethnic Catholics, and African-Americans also existed. The Ku Klux Klan (the "KKK" or "Klan"), though still predominantly a Southern phenomenon, maintained a large, well-organized presence on Long Island prior to World War II.⁹⁸ The KKK held its first organizational meeting on Long Island in Freeport on September 7, 1922, which drew about 150 prospective members.⁹⁹ The Klan organizer, introduced only as Mr. Smith, railed against Jewish control of anything from newspaper stands — he alleged that 25,000 of the 27,000 news stands in New York City were Jewish-owned — to the motion picture industry.¹⁰⁰ Klan membership grew quickly thereafter as Freeport became the center of Klan activity in Nassau County.¹⁰¹ In 1923, the *New York Times* estimated that 200,000 persons belonged to the Klan statewide, and approximately 10% of the Klan's New York state membership came from Long Island.¹⁰²

The Klan was virulently anti-Jewish, anti-Catholic and anti-immigrant. Given the small population of blacks in Nassau County in

94. See *Community Synagogue v. Bates*, 136 N.E.2d 488 (N.Y. 1956) (striking community efforts to prevent construction of a synagogue); *Diocese of Rochester v. Planning Board*, 136 N.E.2d 827 (N.Y. 1956) (striking down community efforts to prevent construction of a Roman Catholic church and school).

95. See *Ridgway v. Cockburn*, 296 N.Y.S. 936 (Sup. Ct. Westchester Co. 1937).

96. See John P. Dean, *Only Caucasian: A Study of Race Covenants*, 23 J. LAND & PUB. UTIL. ECON. 428 (1947).

97. See 50 AMERICAN JEWISH YEARBOOK (5709) 1948-1949 768 (Harry Schneiderman & Morris Fine eds., 1949).

98. See *Long Island Sees Biggest Klan Crowd*, N.Y. TIMES, June 22, 1923, at 1.

99. *Klu Klux Klan Organized*, THE DAILY REVIEW, Sept. 8, 1922, at 1.

100. See *id.*

101. See DAVID M. CHALMERS, HOODED AMERICANISM: THE HISTORY OF THE KU KLUX KLAN 256 (1981).

102. See *id.* at 260.

the 1920s, the Klan's concern primarily focused on the small but growing population of Jews and Catholics, particularly those who had immigrated from Eastern or Southern Europe.¹⁰³ The Klansman's Creed, a virtually sacred pledge taken by all Klansmen nationwide, expressly stated that "I believe in the limitation of foreign immigration. I am a native-born American citizen and I believe my rights in this country are superior to those of foreigners." One letter sent by the KKK to Protestant pastors in the state exhorted them to form local Klans and vote for "Protestants only who have no marriage affiliations with Catholics or Jews, or partners with either."¹⁰⁴ The letter closed with "Save the county and your State from Jews and Catholics."¹⁰⁵ At one Klan rally in Suffolk County organized by the Suffolk, Nassau and Queens County Klans, an unidentified minister addressed the 25,000 Klansmen in attendance and warned that the Roman Catholic Church was a political party in disguise and that Jews in America sought only money and political influence — as if such ambition did not flourish in WASP circles.¹⁰⁶ When the Cure of Ars Catholic Church was established in Merrick in 1926, the KKK burned a cross in its parking lot,¹⁰⁷ and when the Irish-American Catholic Al Smith ran for President in 1928 on the Democratic Party ticket, flaming crosses burned on the hills of Alabama and Mississippi, and by order of the Suffolk County GOP — a Klan dominated organization at the time — on the hills of Suffolk.¹⁰⁸ Although many religious leaders condemned the Klan, not all did.¹⁰⁹ One Protestant pastor in Nassau County, the Rev. C.I. Oswald, pastor of the Freeport Presbyterian Church, delivered a vehement defense of the Klan in a sermon en-

103. See SMITS, *supra* note 58, at 147 (1974); see also CARO, *supra* note 20, at 148; Laura Durkin, *Illuminating Darker Side of LI's Past*, NEWSDAY, Nov. 7, 1982; Patricia M. Roniger, *The Women's Klan of L.I., Sisters of the Klansmen*, LONG ISLAND HERITAGE, May 1983, at 1.

104. *Klan Urges Pastors to War on Catholics*, N.Y. TIMES, Jul. 1, 1923, at 14.

105. *Id.*

106. See *Long Island Sees Biggest Klan Crowd*, *supra* note 98, at 1, 10.

107. See Transcript Of Interview Tapes of Miss Katherine Reif for the Merrick Historical Society 9 (1976) (on file with the authors).

108. See CARO, *supra* note 20, at 148.

109. See, e.g., *Klan on Long Island*, N.Y. TIMES, Oct. 28, 1923, at B1. Some Protestant pastors may have seen it in the best interest of the church not to antagonize the Klan. Several Protestant churches in Nassau County received silk American flags and purses of gold from local Klans. See *K.K.K. Gives Church Flags and Purse*, NASSAU DAILY REVIEW, Mar. 9, 1925; *Crowd Sees Klan Give Gold Purse and Flag*, NASSAU DAILY REVIEW, Jan. 12, 1925.

titled "Has the Ku Klux Klan the Right to Organize in New York State?"¹¹⁰ In Rev. Oswald's opinion, the answer was yes.

Cross-burnings and rallies drawing thousands reminded Catholics and Jews alike that Nassau County was not open to them. The Klan parade in Merrick contained a placard which read "No Koons, Kikes, or Katolics!"¹¹¹ These Nassau County Klan rallies and parades drew thousands of hooded members.¹¹² At one rally in Lindenhurst in 1927, 10,000 Klansmen watched as the Klan initiated more than 1,000 new members.¹¹³ 10,000 Klansmen paraded in Oceanside in 1925,¹¹⁴ and the annual Klorero — the K.K.K. version of a convention — in Mineola in 1926 drew 3,000.¹¹⁵ Although reports of Klan-organized violence were rare, they were not unheard of in Nassau County. Cross-burnings occurred across the county during the 1920s, scaring residents of Valley Stream,¹¹⁶ lighting the sky above Garden City,¹¹⁷ and frightening blacks in Freeport.¹¹⁸ The intimidating effect of cross-burnings cannot be overestimated. As Klan historian William Randel noted, "the symbolic power of the fiery cross . . . casts a shadow on many a neighborhood to know that it harbors a potentially hostile element which at any moment may disrupt the illusion of peace."¹¹⁹

For those relatively few Catholics and Jews who were not deterred from moving to Nassau County by the cross-burnings and Klan Konventions, the Klan employed more direct means of intimidation. On August 14, 1924 eight men entered the Freeport pharmacy owned by Ernest Louis, a Jew accused but cleared of child molestation.¹²⁰ They informed him that "[w]e don't want your type around here. You have eight days to get out. This is a warning

110. *Pastor Defends Klan*, N.Y. TIMES, Oct. 15, 1923, at 17.

111. Transcript of Interview Tapes of Miss Katherine Reif, *supra* note 107, at 9.

112. See, e.g., *Klansman Parade on Merrick Road*, N.Y. TIMES, Jul. 12, 1925, at 4.

113. See *Long Island Klan Initiates 1,000 at Holiday Fete*, N.Y. HERALD TRIBUNE, Jul. 5, 1927.

114. See *10,000 Klansmen Burn Cross at Oceanside*, N.Y. TIMES, Jul. 26, 1925, at B16.

115. See Val Duncan, *The Good Old, Bad Old Days on LI: The Arrival of the Hate Groups*, NEWSDAY, May 6, 1965, at 1.

116. *Klan Celebration Scares Residents of Valley Stream*, N.D. REVIEW, Feb. 23, 1928.

117. *Fiery Klan Crosses Light Long Island*, N.Y. TIMES, Oct. 14, 1923, at 14.

118. *3 Flaming Crosses Fired by the Ku Klux To Frighten Negroes in Long Island Towns*, N.Y. TIMES, Feb. 13, 1923, at 1.

119. WILLIAM PEIRCE RANDEL, *THE KU KLUX KLAN: A CENTURY OF INFAMY* 224 (1965).

120. Duncan, *supra* note 115, at 2.

from the Ku Klux Klan.”¹²¹ Louis dismissed the threat as a joke, but a few days later as he walked along Bayview Avenue with his wife, a car approached and a group of men jumped out, forcing Louis into the car.¹²² After driving around for a few hours, the kidnappers deposited the dazed druggist in Hicksville. Within a couple of weeks, Louis and his family moved from Nassau County back to New York City.¹²³ Although he denied that the threat or kidnapping had anything to do with his decision, Louis remarked that “I haven’t money enough to stay here and fight, anyway, and I have lost all my business on account of the whole thing.”¹²⁴ Though a search was conducted for the kidnappers, the likelihood of their apprehension was remote: less than a week after the kidnapping, 2,000 Klansmen paraded through Freeport led by the village Police Chief John Hartman.¹²⁵

Within a few years of its establishment, the Long Island Klan achieved an aura of legitimacy in communities increasingly worried about the influx of Eastern and Southern European immigrants. In 1923, the Kamelia, the female auxiliary of the Klan, won the prize for most popular organization in the county at the Lynbrook firemen’s tournament, outpolling both the Republican and Democratic Clubs of Lynbrook.¹²⁶ One year later, provoking a small controversy, the Klan donated a flagpole to the Freeport High School, a gift graciously accepted by the local school board.¹²⁷ The Klan became so embedded within the community that one county historian proudly listed it, along with the Elks, the Knights of Columbus, and the Masons, as an example of the county’s “fraternal organizations.”¹²⁸

In response to this rising activity by the Klan, New York State Senator Jimmy Walker, the future Mayor of New York City, introduced a bill that, while exempting labor and benevolent organizations, required private organizations to disclose membership lists.¹²⁹ The bill passed by a narrow margin.¹³⁰ In response to the

121. *Id.*

122. *See id.*

123. *Menaced by Klan, Druggist to Move*, N.Y. TIMES, Sep. 5, 1924, at 36.

124. *Id.*

125. Heidi Fried, *Early Jewish Settlement In Nassau County: The Communities, The People, The Synagogues 3* (unpublished manuscript available at the Long Island Studies Institute at Hofstra University).

126. *Fiery Klan Crosses Light Long Island*, N.Y. TIMES, Oct. 14, 1923, at 14.

127. *Flagpole Splits Town*, N.Y. TIMES, Nov. 9, 1924, at 20.

128. HAZELTON, *supra* note 43, at 892.

129. *See* CHALMERS, *supra* note 101, at 255.

130. *See id.*

new law, the Klan unsuccessfully attempted to incorporate as a benevolent organization under the name of Alpha Pi Sigma, Inc. After that effort failed, the Klan challenged the constitutionality of the legislation, but again the Klan lost.¹³¹

The law achieved its intended effect as Klan influence began to wane in the 1930s. In 1933, the three-day "konklave" of the New York and New Jersey Klans held in Freeport attracted only 150 members.¹³² The last recorded Klan session occurred in Valley Stream in 1937.¹³³ Nonetheless, the demise of the Klan did not mean the end of xenophobia in Long Island. The German-American Bund, a pro-Nazi organization led by Fritz Kuhn, infiltrated the German-American Settlement League's camp near Yaphank, renamed it Camp Siegfried, and named streets after Hitler, Goering, and Goebbels. Armbands with swastikas and Nazi flags were prevalent on Camp grounds. The *New York Times* reported that "[o]n Sunday afternoons in 1938, the Long Island Rail Road ran special trains out to Camp Siegfried, in Yaphank, where as many as 50,000 people might gather to watch Nazi rituals and hear speeches describing the region as an Aryan paradise."¹³⁴ The rising tide of anti-fascism, together with the fact that the Camp's führer, Kuhn, was jailed in 1939 for pilfering the Bund's accounts, presaged the end of the Bund.¹³⁵ Even Adolf Hitler, attempting to keep the United States neutral by denying reports of rising German militarism and mistreatment of the Jews, contributed to the Bund's demise by ordering all German nationals, who comprised 73% of the Bund's membership, to resign or lose their German citizenship.

Still the demise of organized hate groups did not signal the end of racial violence in Nassau County.¹³⁶ Indeed, the Klan merely reflected, albeit in a more virulent and organized form, the native Long Islanders' distrust and fear of "foreigners" — a term that included Jews, Irishmen, Italians, and virtually any other Southern or Eastern European immigrant.¹³⁷ Even as late as 1949, someone shot an arrow into the Freeport home of a Jewish couple with a

131. See *People ex rel. Bryant v. Sheriff of Erie County*, 206 N.Y.S. 533 (Sup. Ct. 1924), *aff'd sub nom. People ex rel. Bryant v. Zimmerman*, 210 N.Y.S. 269 (App. Div. 1925), *aff'd*, 241 N.Y. 405 (1926), *aff'd*, 278 U.S. 63 (1928).

132. *Klan Meets at Freeport*, N.Y. TIMES, Sep. 3, 1933, at 4.

133. See Duncan, *supra* note 115, at 2.

134. Lem Coley, *Bigotry on L.I. Then and Now . . .*, N.Y. TIMES, Dec. 2, 1979, at 26.

135. See Duncan, *supra* note 115, at 2.

136. See David Behrens, *Long Island Our Stories: The KKK Flares Up on LI*, NEWSDAY, May 6, 1998.

137. See CARO, *supra* note 20, at 147-48.

note attached to the arrow warning the couple against selling their home to a Black family.¹³⁸ A week later, a home owned by a Black family in Roosevelt was stoned.¹³⁹

Though crude, these means were effective. Despite the fact that the overflowing tenements of the New York City contained thousands of families willing and able to relocate to the suburbs, the population of immigrants from Eastern and Southern Europe remained small in Nassau County during the years prior to World War II. In 1920, the foreign-born white population of Nassau County was 25,998, or 20.6% of the total county population.¹⁴⁰ By 1930, the foreign-born white population grew to 63,437, or 20.9% of the county population. Interestingly, most of these immigrants came from Northern Europe, not Central or Southern Europe. German immigrants (11,588) outnumbered those from the United Kingdom (England, Scotland, Wales and Northern Ireland) with 10,168, from Italy with 9145, and from Poland with 5923.¹⁴¹ Although the foreign-born white population had grown by 1940 to 64,733, this represented only 15.8% of the county's total population.¹⁴² Meanwhile, Nassau's African-American population remained minuscule. The Black population of the county, which had grown from 2.4% of the population in 1920 to 3.3% in 1940, fell to 2.6% in 1950.¹⁴³ Even more importantly, blacks were practically excluded from owning real property in the county and thereby acting as a force to prop up housing demand. In 1940, Blacks owned only 432 of the 61,371 owner-occupied homes in Nassau County, a mere 0.7%.¹⁴⁴

138. See *Nassau Klan Rise Denied*, N.Y. TIMES, Aug. 25, 1949, at 25.

139. See *id.*

140. See 1920 CENSUS, *supra* note 18, at 38 (Table 9). Immigrants from Italy constituted the largest proportion of this group with 4290, slightly outnumbering the 4073 German immigrants. Poles with 3644 and the Irish with 3499 followed. See *id.* at 53-54 (Table 12).

141. See 1930 CENSUS, *supra* note 22, at 298-99 (Table 18). For a breakdown of the second-generation, native white population by parents' country of origin in Nassau County, see *id.* at 300-01 (Table 21).

142. See 1940 CENSUS, *supra* note 24, at 39 (Table 21). Germans still constituted the largest part of this group with 12,050. Immigrants from Italy (9973), the United Kingdom (9458), and Ireland (5013) followed. See *id.* at 63 (Table 24).

143. See 1920 CENSUS, *supra* note 18, at 38 (Table 9); 1940 CENSUS, *supra* note 24, at 39 (Table 21); 1950 CENSUS, *supra* note 18, at 290 (Table 3).

144. See 1940 CENSUS, *supra* note 24, at 317 (Table 22). In 1950 blacks owned 1056 of the 142,285 owner-occupied homes, an unchanged seven percent. See 1950 CENSUS, *supra* note 18, at 16 (Table 17).

B. The Law's Proclamation of Equality, 1944-1956

Change began in 1945, when New York State became one of the first states in the nation to enact a modern Civil Rights statute prohibiting racial, ethnic or religious discrimination in a variety of contexts.¹⁴⁵ Although the 1945 act did not deal explicitly with the purchase or sale of real property, it nonetheless established a basic principle of racial, ethnic and religious equality.¹⁴⁶ A more important development occurred in 1949, when the New York Court of Appeals, in response to the U.S. Supreme Court's decision in *Shelly v. Kramer*,¹⁴⁷ invalidated the use of restrictive covenants,¹⁴⁸ thereby removing one of the principal means of excluding racial, ethnic, and religious minorities from residential communities.¹⁴⁹

A third change in legal doctrine occurred more slowly, but it had an undoubted impact on the ability of religious minorities, especially Jews, to settle in Nassau County.¹⁵⁰ It dealt with the ability of municipalities to use their zoning powers to prevent construction of minority religious facilities and thereby exclude religious individuals by denying them a convenient place to practice their faith.¹⁵¹ The leading case was *Community Synagogue v. Bates*,¹⁵² in which the Village of Sands Point on Nassau's North Shore sought to keep a Reform Jewish Congregation out of the community. In 1952, the Community Synagogue purchased a four-acre estate upon which it wished to locate but several neighbors had fought the sale in court, arguing that restrictive covenants in the deed prohibited the use of the property for anything other than residential use. In response, the congregation purchased an option to buy the magnificent Holmes estate, the Chimneys, which had been used as a home for French sailors, as a merchant marine rehabilitation center, and as a U.S. Navy Officer's Club. Six days prior to the sale, the Sands Point Village Board amended its zoning ordinance, however, to require approval by the Village Board of Zoning Appeals of individual religious organizations before they could locate in the village. When the congregation applied for a permit, the board imposed a series of strangling regulations that limited the congregation's construction to only five percent of the property,

145. See 1945 N.Y. Laws 292.

146. See *id.* at 10.

147. 334 U.S. 1 (1948).

148. See *Kemp v. Rubin*, 81 N.E.2d 325 (N.Y. 1948).

149. See Nelson, *supra* note 4, at 43.

150. See *id.* at 49-50.

151. See *id.* at 45.

152. 136 N.E.2d 488 (N.Y. 1956).

required the building to be taller than fifty feet, mandated 150 square feet of paved parking for each seat in use, and prohibited all "accessory uses" like religious education and board meetings. The political support for the congregation, from individuals such as the Democratic candidate for Governor and neighbor of the congregation, Averill Harriman, convinced the village to rescind the ordinance. However, it still refused to issue a certificate of occupancy to the congregation, claiming that the synagogue would pose a threat to the character of the community and to the public's health, safety, and welfare. The congregation filed suit, but both the Supreme Court and the Appellate Division ruled in favor of the village.¹⁵³ Only when the New York Court of Appeals in 1956 overturned the lower courts' rulings did the congregation finally find its way clear to locate its synagogue in Sands Point.

Other congregations, such as Temple Or-Elohim in Jericho and the Garden City Jewish Center, also encountered hostility from communities and local zoning boards in the 1950s,¹⁵⁴ and, even as late as the 1970s, zoning regulations prevented the Seaford Jewish Center from renovating a building for a synagogue in the village.¹⁵⁵ However, in these cases,¹⁵⁶ as in others,¹⁵⁷ the law came to the

153. 147 N.Y.S.2d 204 (App. Div. 2d Dep't 1955).

154. See TOBIE NEWMAN & SYLVIA LANDOW, "THAT I MAY DWELL AMONG THEM:" A SYNAGOGUE HISTORY OF NASSAU COUNTY 44-45, 73 (1991).

155. By the 1970s and 1980s, opposition may have stemmed not so much from religious intolerance as from genuine apprehension about the effect of the new synagogues on residential neighborhoods. In 1981, fears of increased traffic and noise prompted Cederhurst village residents to oppose the construction of a synagogue by Young Israel of Lawrence-Cedarhurst. Only after three years of court battles did the congregation receive a permit to build a synagogue, though of a size much smaller than originally planned. See *id.* at 29-30.

156. See *Seaford Jewish Ctr., Inc. v. Board of Zoning Appeals of Hempstead*, 368 N.Y.S.2d 40 (App. Div. 2d Dep't 1975); *In re Garden City Jewish Ctr.*, 155 N.Y.S.2d 523, 528 (Sup. Ct. Nassau Co.), also reported at 157 N.Y.S.2d 435 (Sup. Ct. Nassau Co. 1956).

157. See *Jewish Reconstructionist Synagogue of North Shore, Inc. v. Incorporated Village of Roslyn Harbor*, 342 N.Y.S.2d 534 (1975), *cert. denied*, 426 U.S. 950 (1976); *Mikveh of South Shore Congregation, Inc. v. Granito*, 432 N.Y.S.2d 638 (App. Div. 2d Dep't 1980); *Slevin v. Long Island Jewish Medical Center*, 319 N.Y.S.2d 937, 948 (Sup. Ct. Nassau Co. 1971); *Westbury Hebrew Congregation, Inc. v. Downer*, 302 N.Y.S.2d 923 (Sup. Ct. Nassau Co. 1969); *Brandeis School v. Village of Lawrence*, 184 N.Y.S.2d 687 (Sup. Ct. Nassau Co. 1959); *Five Towns YM & YWHA, Inc. v. Plaut*, 178 N.Y.S.2d 190 (Sup. Ct. Nassau Co.), *aff'd*, 181 N.Y.S.2d 182 (App. Div. 2d Dep't 1958); *Temple Israel of Lawrence v. Plaut*, 170 N.Y.S.2d 393 (Sup. Ct. Nassau Co. 1957), *rev'd on other grounds*, 177 N.Y.S.2d 660 (App. Div. 2d Dep't 1958); *Hoelzer v. Incorporated Village of New Hyde Park*, 150 N.Y.S.2d 765 (Sup. Ct. Nassau Co. 1956). See also *Unitarian Universalist Church of Cent. Nassau v. Shorten*, 314 N.Y.S.2d 66 (Sup. Ct. Nassau Co. 1970); *North Shore Unitarian Soc'y v. Village of Plandome*, 109 N.Y.S.2d 803 (Sup. Ct. Nassau Co. 1951). But see *Congregation Gates of Prayer v. Board of*

assistance of the congregations, and the Jewish synagogues were permitted to move into town. The most telling sign of change came in 1976 when Congregation Shaaray Tefila was able to resolve its zoning difficulties without recourse to litigation by enlisting the support of the Mayor of Lawrence, Martin Rosen.¹⁵⁸

C. The Entry of Minorities into the Real Estate Market

As a result of these dramatic changes in legal doctrine, hundreds of thousands of immigrants and their descendants obtained the opportunity, previously denied to tenement-dwelling city residents, to relocate to suburban Nassau. By 1960 immigrants and their children comprised 39% of the county's population.¹⁵⁹ While Nassau County had remained anti-immigrant prior to World War II, the children of the excluded immigrants became increasingly able to relocate to the county once the war ended.

This demographic trend is confirmed by comparing religious populations before and after World War II. Unfortunately, census data does not provide information about religion, but comparative religious populations can be estimated by looking at the number of religious institutions.

Examination of the number of Roman Catholic parishes in Nassau suggests, for example, that the Catholic population, predominantly Irish and Italian, constituted a relatively small proportion of the county population prior to World War II.¹⁶⁰ *The Official Directory & Buyers Guide To Catholic Institutions* catalogues the number of parish churches founded decade-by-decade in the county.¹⁶¹ The first parish, St. Patrick's in Glen Cove, was established in 1856, but only fourteen parishes existed by the turn of the century. Although the Catholic population increased in the first three decades of the twentieth century, the 1950s witnessed the largest migration of Catholics into Nassau County with twelve new parishes established. Thereafter, the relocation of Catholic families into the county dropped off. Nevertheless, of the sixty-six par-

Appeals of Lawrence, 368 N.Y.S.2d 232 (App. Div. 2d Dep't 1975); *YMCA of Greater New York v. Burns*, 207 N.Y.S.2d 631 (Sup. Ct. Nassau Co. 1960).

158. See NEWMAN & LANDOW, *supra* note 154, at 82, 148.

159. See 1960 CENSUS, *supra* note 18, at 355 (Table 82).

160. This demographic reality is illustrated by using the establishment of Roman Catholic parishes as a rough measure of Catholic migration into the county.

161. This information is compiled from 1992-93 BLUE BOOK: OFFICIAL DIRECTORY & BUYERS GUIDE TO CATHOLIC INSTITUTIONS 269-89 (The Tablet Publishing Company, Inc., Brooklyn, 1992).

ishes currently in existence, one third of them were founded after 1940.

Similarly, but to an even more significant extent, the Jewish population in Nassau County was virtually nonexistent in the years prior to World War II but grew dramatically thereafter.¹⁶² The first synagogue, Congregation Tifereth Israel, was established in Glen Cove in 1897.¹⁶³ In the following four decades, only twenty-one more synagogues were founded to serve the small Nassau Jewish community.¹⁶⁴ At the end of World War II, of the 4,000 residents of Old Westbury, there were still only twenty-five Jewish families living in the village.¹⁶⁵ As a consequence, congregations possessed small memberships with only a handful of families.¹⁶⁶ During the 1940s, however, fifteen synagogues were founded, and an astounding 46 congregations were established in the 1950s. The Jewish population county-wide doubled in the 1950s alone.¹⁶⁷ In Great Neck, the Jewish population more than doubled in the 1940s from 4,000 in 1940 to 10,000 in 1950 and then almost doubled again during the 1950s to 18,000 by 1960.¹⁶⁸ In 1960, there were an estimated 329,100 Jews residing in Nassau County, 25.3% of the county's total population of 1,300,171.¹⁶⁹

162. Religious populations are difficult to estimate since the United States Census does not ask residents to identify their religious affiliation. The establishment of synagogues is a rough proxy for a more detailed study of the Nassau County Jewish population. However, a significant percentage of Jews do not belong to a synagogue, and individual congregations consist of varying numbers of families, particularly over time. Moreover, membership information supplied by synagogues may overestimate the number of Jews associated with the congregation. See Fried, *supra* note 125, at 1-2; see also MAX I. DIMONT, *THE JEWS IN AMERICA* 9-10 (1978).

163. See ROBERT REED COLES & PETER LUYSTER VAN SANTVOORD, *A HISTORY OF GLEN COVE* 26 (1967).

164. For the individual founding dates of virtually all Nassau County synagogues, see NEWMAN & LANDOW, *supra* note 154. The decade by decade comparison here is compiled from the information contained in this invaluable source.

Note, however, that the founding date does not necessarily reflect the date of formal incorporation of the congregation since many congregations met and performed services prior to filing incorporation papers. For those synagogues that were founded outside of Nassau County but later relocated there, the date noted is that of relocation.

165. See *id.* at 128.

166. For instance, Temple Gates of Zion in Valley Stream, founded by 25 families in 1929, possessed a membership of only 40 families in 1932 and 80 in 1939. See *id.* at 156.

167. See *id.* at 13.

168. See Jay Schulman, *The Jews of Great Neck: A Heritage Affirmed*, in *ETHNICITY IN SUBURBIA: THE LONG ISLAND EXPERIENCE* 71 (Salvatore J. LaGumina ed. 1980).

169. See AMERICAN JEWISH COMMITTEE, *AMERICAN JEWISH YEAR BOOK* 1961, Table 1 at 59 (1961).

Even more significantly, this influx of Jewish families outpaced the overall population growth rate during this same period.¹⁷⁰ When two housing developments were completed in Oceanside in 1951, for instance, almost all of the new residents were Jewish.¹⁷¹ While the county population increased from 672,762 in 1950 to 1,300,171 in 1960 — a 93% increase — the number of congregations in the county grew from thirty-seven to eighty-three — a 125% increase. Established congregations also expanded in order to accommodate this rapid population growth,¹⁷² and, in contrast to the early congregations, synagogues after World War II were composed of hundreds of families.¹⁷³ Population growth somewhat stabilized as only sixteen synagogues were founded in the 1960s, ten in the 1970s, and three in the 1980s. Nonetheless, a recent study suggested that a half million Jews live in Nassau County, one twelfth the entire American Jewish population.¹⁷⁴

Even the African-American population of Nassau County began to grow slowly after 1950, when it constituted a mere 2.6% of the county total.¹⁷⁵ But, thereafter, the black population rose to 3.0% in 1960, 4.5% in 1970, and 6.8% in 1980.¹⁷⁶ Even more importantly, black home ownership also increased. In 1940, as we have already seen, blacks owned only 432 of the 61,371 owner-occupied homes in Nassau County, a mere 0.7%.¹⁷⁷ By 1970 the situation had improved somewhat with black families owning 8,510 out of the 324,069 homes in the county, an increase to 2.6%.¹⁷⁸

In sum, when Nassau in the post-World War II era encouraged Catholics, Jews, and even blacks to move into the county, the number of eligible buyers in its real estate market increased dramatically, the demand for its housing rose, and the market began to clear efficiently. An important transaction cost — discrimination — had been eliminated. While the WASP sellers who had formerly

170. See Fried, *supra* note 125, at 21; see also Schulman, *supra* note 168, at 71.

171. See NEWMAN & LANDOW, *supra* note 154, at 119.

172. See *id.* at 13.

173. Temple Beth-El in Great Neck, one of the largest in the county, counts more than 1500 families among its membership. See *id.* at 59.

174. See Fried, *supra* note 125, at 21.

175. See 1920 CENSUS, *supra* note 18, at 38 (Table 9); 1940 CENSUS, *supra* note 24, at 39 (Table 21); 1950 CENSUS, *supra* note 18, at 290 (Table 3).

176. See 1960 CENSUS, *supra* note 18, at 176 (Table 28); 1970 CENSUS, *supra* note 27, at 220 (Table 34); 1980 CENSUS, *supra* note 28, at Table P-7.

177. See 1940 CENSUS, *supra* note 24, at 317 (Table 22). In 1950 blacks owned 1056 of the 142,285 owner-occupied homes, an unchanged 0.7%. See 1950 CENSUS, *supra* note 18, at 16 (Table 17).

178. See 1970 CENSUS, *supra* note 27 (Vol. I: Housing Characteristics for States, Cities, and Counties. Part 34: New York, Tables 29, 30).

sought to exclude racial, ethnic, and religious minorities from their midst were themselves transformed into a minority, their transformation brought them increased sales prices, an end to mortgage foreclosures, and an efficient and prosperous real estate market. In an extraordinary Pareto improvement, the end of discrimination made virtually everyone in Nassau better off.

IV. THE FINANCING OF SUBURBANIZATION

The massive suburbanization of Nassau County in the wake of World War II, of course, did not result solely from action by the government to rid suburban communities and their housing markets of racial, ethnic, and religious discrimination. Prohibiting discrimination did little to help families living in overcrowded tenements who could not afford to relocate to the suburbs. Funding the suburban housing market was at least as important as ensuring that the market was open to all who could afford to enter it.

The residential mortgage, which is often the primary, if not the sole, means for most families to finance the purchase of their own home, is a key determinant of the affordability of suburban housing. Since residential construction is particularly dependent on mortgage financing, the mortgage credit market directly influences suburban development.¹⁷⁹ Not surprisingly, the rapid suburbanization of Nassau County occurred at the same time that action by the government, private lenders, and real estate developers lowered the cost of mortgages and thereby made suburban housing extremely affordable, in certain instances even less expensive than renting a crowded apartment in the city.

Prior to World War II, mortgage financing was difficult to secure, particularly for working class families. Private financial institutions such as banks and savings and loan associations maintained prohibitively strict lending rules, especially in regard to downpayment requirements and maturity provisions — matters that respond to and affect real estate markets even more than interest rates.¹⁸⁰ Prior to World War II, most banks were compelled by law to require a forty percent downpayment,¹⁸¹ with the result that families seeking to purchase a home would need savings equivalent to a year or more of their wages in order to enter the housing market. Of course, few

179. See JOHN P. HERZOG & JAMES S. EARLEY, HOME MORTGAGE DELINQUENCY AND FORECLOSURE 4 (1970).

180. See SAUL B. KLAMAN, THE POSTWAR RESIDENTIAL MORTGAGE MARKET 78 (Princeton University Press 1961).

181. See HERZOG & EARLEY, *supra* note 179, at 12.

Americans possessed such savings. On the basis of limited data, it appears moreover that the maximum length of conventional mortgages prior to the middle of the century was only fifteen years.¹⁸² Finally, home mortgage interest rates between 1920 and 1934 fluctuated only minimally — between 5.8 and 6.2% — and then declined during the course of the late 1930s gradually and only to 5.0%.¹⁸³

After World War II, mortgage financing became both more affordable and easier to obtain as the federal government, in order to stimulate residential housing construction, took an active role in the mortgage credit market. As one author has observed, “The postwar years brought about a revolution in the terms of home mortgage loans in America.”¹⁸⁴ Between the end of 1945 and 1956, the amount of outstanding residential mortgage debt in the U.S. rose from \$23.3 billion to \$112.1 billion, an increase of 381%.¹⁸⁵

During these same years, government participation in the mortgage market increased dramatically. In 1944, Congress authorized the Veterans Administration to guarantee residential mortgages obtained by returning veterans.¹⁸⁶ One year after hostilities ended, VA-guaranteed mortgages represented nine percent of all residential mortgage debt. A decade later, in 1956, the VA guaranteed \$28.4 billion worth of mortgages, or 25% of all outstanding residential mortgage debt.¹⁸⁷ In 1945, the Federal Housing Administration (“FHA”) mortgage insurance program, created in 1934 to combat the Depression, insured mortgages worth in aggregate \$4.3 billion, or eighteen percent of all residential mortgage debt.¹⁸⁸ By 1956, the amount of FHA-insured mortgages rose 351% to \$19.4 billion, though FHA-insured mortgages still constituted only seventeen percent of the total outstanding mortgage debt.¹⁸⁹ Within a decade, the federal government thus became a substantial, if not dominant, player in the residential mortgage market.

Several factors account for this unprecedented government participation in the financial markets in the decade following World War II. Demand for new housing was high as more than 3 million

182. *See id.* at 7-9.

183. *See KLAMAN, supra* note 180, at 287.

184. HERZOG & EARLEY, *supra* note 179, at 12.

185. *See KLAMAN, supra* note 180, at 33.

186. *See* Servicemen’s Readjustment Act of 1944, Pub. L. No. 346, 58 Stat. 284 (1944).

187. *See KLAMAN, supra* note 180, at 33.

188. *See id.*

189. *See id.*

married couples were forced to share living quarters with other families.¹⁹⁰ Federal subsidization of construction of new rental housing received additional support from a Congressionally-authorized FHA program passed in 1949 that stimulated construction of rental housing near military bases.¹⁹¹ Congress also postponed the expiration of the liberal section 608 program until 1950.¹⁹² More than anything else, however, the federal government hoped to stimulate suburban housing construction by creating a favorable financial environment for families wishing to purchase a home of their own. At the end of 1945, Congress amended the Servicemen's Readjustment Act of 1944¹⁹³ to encourage the VA loan guarantee program.¹⁹⁴ The amendment doubled the maximum guarantee amount from \$2,000 to \$4,000 and extended the maximum maturity on mortgage loans to twenty-five years.¹⁹⁵ Moreover, qualified lenders were authorized to grant VA-guaranteed loans to eligible veterans without first receiving approval from the VA.¹⁹⁶ Finally, the Veterans Administration gave mortgages without requiring any downpayment in nearly half of all cases.¹⁹⁷

Similarly, the Housing Act of 1948 amended the terms of the FHA mortgage insurance program to increase maximum insurable loan amounts and the length of time for repayment, while also lowering required downpayments.¹⁹⁸ Additionally and perhaps most importantly, the 1948 Act increased the ability of the Federal Na-

190. *See id.* at 50. To address this problem, the federal government for a short period after the war under the Veterans Emergency Housing Program limited the construction of nonresidential structures so as to free resources for suburban development. *See id.* This program, initiated in May 1946, reimposed wartime construction controls and extended the liberal wartime FHA mortgage insurance provisions. Most of the program expired in mid-1947, but the emergency FHA insurance provisions, which, among other things, raised the maximum insurable loan amount, were extended until 1948. Even then, the Housing Act of 1948 resurrected the emergency FHA provisions, though only for construction of new rental properties. *See id.* at 53 & n.6.

191. *See* Act of Aug. 8, 1949, ch. 403, Pub. L. No. 211, 63 Stat. 570 (adding Title VIII to the National Housing Act).

192. *See* KLAMAN, *supra* note 180, at 55 n.11.

193. *See* Servicemen's Readjustment Act of 1944, *supra* note 186.

194. *See* Servicemen's Readjustment Act, ch. 268, sec. 500(a) (8), 59 Stat. 623 (1945).

195. *See id.* at 626-627.

196. *See id.* at 626.

197. *See* KLAMAN, *supra* note 180, at 158.

198. *See id.* at 53. *See also* FEDERAL HOUSING ADMINISTRATION, FIFTEENTH ANNUAL REPORT 1-4 (1948) [hereinafter *FHA ANNUAL REPORT*].

tional Mortgage Association ("FNMA") to purchase federally-underwritten home mortgages.¹⁹⁹

Chartered in 1938, the Federal National Mortgage Association, otherwise known as Fannie Mae, merits special attention since it played such a substantial role in the development of the large residential mortgage market. By acquiring federally-backed loan obligations on the secondary debt market, FNMA encouraged additional lending by freeing private capital. In 1948, FNMA reorganized under a new charter that permitted its purchase of VA as well as FHA loans,²⁰⁰ and expanded its secondary market operations by issuing advance commitments to acquire federally-backed mortgage instruments.²⁰¹ Although originally authorized only to purchase one fourth of the federally-underwritten mortgage loans originated by a particular lender, the Housing Act liberalized this restriction to allow the purchase of one half of the loans, and a year later FNMA received authorization to purchase all eligible VA loans.²⁰² In response to the liberalization of these regulations, the mortgage portfolio of FNMA expanded at a rapid pace limited only by the Congressionally-imposed ceiling on the amount of mortgage debt it could acquire. Nevertheless, within a three year period, Congress greatly increased the maximum permitted mortgage holdings from \$1.5 billion to \$3.75 billion by July, 1952.²⁰³ In a very real sense, FNMA's secondary market operations represented a direct subsidy to the residential mortgage market, which kept conventional mortgage interest rates under 5.0% between the end of the war and 1953²⁰⁴ and close to the 4.0% VA rate and the 4.25 to 4.5% FHA rate during those years.²⁰⁵

199. See KLAMAN, *supra* note 180, at 53. See FHA ANNUAL REPORT, *supra* note 198, at 1-4.

200. Under its original charter, FNMA was authorized only to purchase FHA loans and its maximum borrowing authority was a relatively small \$220 million. The 1948 reorganization increased the borrowing authority to \$840 million. See Pub. L. No. 864, 80th Congress (Jul. 1, 1948). For a year from August 1946 until June 1947, the Reconstruction Finance Corporation Mortgage Company was authorized to purchase VA loans. After the RFC's termination, no federal secondary market facility existed for VA loans until the Housing Act expanded FNMA's authority to include them. See KLAMAN, *supra* note 180, at 54 n.8.

201. See KLAMAN, *supra* note 180, at 54.

202. See *id.*

203. See *id.*

204. See *id.* at 287.

205. See *id.* at 285.

Although not all federal action during this time period was expansionary,²⁰⁶ the limited contractions in federal involvement paled in comparison to the huge growth in federal subsidies to suburban housing. Although the Housing Act of 1950²⁰⁷ rescinded FNMA's authority to make advance commitments and withdrew the VA's authority to guarantee second mortgages granted in conjunction with FHA-insured first mortgages, this change constituted a relatively trivial reduction in federal involvement in the home mortgage market.²⁰⁸ Meanwhile, the same act raised the ceiling on the maximum insurable amount of VA loans from \$4,000 to \$7,500 and increased the guarantee from fifty to sixty percent.²⁰⁹ Most importantly, the Housing Act of 1950 authorized the 30-year mortgage for VA-guaranteed loans, the 30-year FHA loan was authorized in 1954, and 35-year mortgages were later authorized in some cases.²¹⁰ In response to these liberalizing provisions in federal legislation, the average maturity for a VA or FHA mortgage on a new home increased roughly ten years during the period from 1946 to 1967.²¹¹ By 1965, the average maturity of a FHA mortgage was

206. The outbreak of the Korean hostilities, in particular, led to some retrenchment as Congress backed away from its expansive subsidization of the suburban housing market through mortgage incentives. Among other contractionary measures, downpayments on FHA and VA loans were increased by five percent and the maximum insurable amount on a FHA loans was reduced from \$16,000 to \$14,000. *See id.* at 57. Various agencies such as the National Production Authority, Office of Price Stabilization, and Wage Stabilization Board imposed restrictions on nonessential construction in order to conserve wartime resources. *See id.* Between 1951 and 1953 FNMA reduced its involvement in the secondary mortgage debt market. *See id.* at 64-65. In 1950, the Federal Reserve Board of Governors promulgated Regulation X, which created a comprehensive schedule of downpayment requirements, maximum maturities, and loan-to-value ratios for VA and FHA loans. *See id.* at 58. Congress authorized the President to impose real estate construction credit restrictions in the Defense Production Act of 1950, and Executive Order No. 10161 delegated this authority to the Board, provided that the Home Finance Administrator concurs in its decision. *See id.* at 57-58. However, in 1952, the Board suspended Regulation X, and a year later FHA and VA credit provisions were returned to their pre-war levels. *See id.* at 60. By the end of 1953 the federal government resumed its expansionary policies.

207. 64 Stat. 48 (1950).

208. *See KLAMAN, supra* note 180, at 54-55, 55 n.10.

209. *See id.* at 55. The act also expanded the FHA's authority by creating two new, liberal mortgage insurance programs, one for housing in rural communities and another for cooperative housing projects. *See id.* In an especially intrusive involvement in the residential mortgage market, Congress authorized the Veterans Administration to directly participate in the private mortgage market by granting mortgage loans on terms equal to those on its guaranteed loans in areas where private lenders refused to grant VA loans. *See id.*

210. *See HERZOG & EARLEY, supra* note 179, at 7.

211. *See id.*

31.7 years, compared with twenty-one years in 1946.²¹² VA mortgage maturities, which averaged 19.8 years in 1946, grew to 29.4 years in 1965.²¹³ The loosening of government regulations regarding maximum maturity length also encouraged conventional mortgage lenders to grant mortgages with longer payment schedules. The average maturity of conventional loans for new homes increased from 14.3 years in 1950 to 25.4 years in 1967, although conventional mortgage maturities remained noticeably shorter than that for government-backed mortgages in every year.²¹⁴ This lengthening in average maturity had a significant effect on mortgage affordability since mortgage payments decrease as the length of the mortgage rises.

This high degree of government participation in the mortgage market directly and indirectly influenced the affordability and terms of private mortgages available to American families in the wake of World War II. The VA-guaranteed and FHA-insured mortgages became the primary method for working class American families who otherwise would not have been able to secure mortgage financing from private lenders to escape the overcrowded cities and relocate to the suburban countryside. Testifying to this fact, both the number and the percentage of homes with mortgages in Nassau County increased in response to this growth in available credit for the purchase of a suburban house. In 1920, of the 28,921 homes in Nassau County, only 14,807 were owner-occupied, and of that figure, only 9529 (or sixty-four percent) had mortgages.²¹⁵ In comparison, by 1950, there were 137,934 owner-occupied dwellings, of which 101,807, or 73.8%, had mortgages.²¹⁶

Perhaps even more important than these government-influenced changes in the residential mortgage market, the federal income tax code created a dramatic preference for home ownership over rental housing. The deduction for mortgage interest payments, for one, provided an incredibly lucrative subsidy to the suburban housing market by reducing the after-tax cost of purchasing a home.²¹⁷

212. *See id.* at 8.

213. *See id.*

214. *See id.*

215. *See* 1920 CENSUS, *supra* note 18, at 85 (Table 24).

216. *See* 1950 CENSUS, *supra* note 18, at 46 (Table 21).

217. To illustrate this, let's take an oversimplified example. Imagine a couple with an annual income of \$50,000, which places them in the twenty percent federal income tax bracket (average, not marginal, tax rates are used here). They purchase a \$200,000 home by securing a mortgage loan with an annual interest rate of five percent. Interest payments on the mortgage the first year equal \$10,000. After deducting

Although the mortgage deduction was part of the 1916 tax code and still exists today in modified form,²¹⁸ the importance of the deduction increased when the average tax rate increased dramatically during World War II.²¹⁹ Prior to the War, when even the highest marginal, much less average, tax rates were comparatively low, the deduction minimally favored home owners over renters. In 1916, the highest marginal tax rate was only thirteen percent, which itself only applied to the gross income earned over \$2 million.²²⁰ When federal income tax rates increased in the 1940s, however, to a top marginal rate of ninety-four percent on incomes in excess of \$200,000,²²¹ the importance of the deduction grew and its inherent preference for home ownership did likewise.

In addition to the mortgage interest deduction, homeowners received a variety of other tax benefits, such as a deduction for state and local property taxes and an exemption from including imputed rent — the “market value of the housing services produced by [their] property” — in taxable income, even though imputed rent represents income in a very real sense.²²² In contrast, rental payments for apartments have never been deductible and thus must be paid in after-tax dollars.²²³ Today, the mortgage interest deduction, along with other tax provisions such as the property tax deduction²²⁴ and the special treatment of capital gains resulting from

the interest payment, the taxable income of the couple is \$40,000, of which \$8000 is paid in taxes, leaving the couple with an after-tax, after-mortgage income of \$32,000.

Now imagine that the same couple does not purchase the house but instead rents the house at an annual rental of \$10,000. The couple pays \$10,000 in taxes in addition to the annual rent, thereby leaving them with an after-tax, after-rent income of only \$30,000. By purchasing the house with a mortgage, the couple has effectively received \$2000 in a direct subsidy from the federal government.

218. See An Act to Increase the Revenue, ch. 463, 39 Stat. 756, 759 (1916) (codified in modified form at 26 U.S.C. 163(h) (1994)). Some types of interest payments were deductible as early as 1864, and by 1870 all interest payments became deductible. See An Act to Reduce Internal Taxes, ch. 255, 16 Stat. 256, 258 (1870).

219. To illustrate, return to the hypothetical couple. With \$50,000 in annual income, an average tax rate of ten percent, and a \$200,000 mortgage with a five percent interest rate, the couple has an after-tax, after-mortgage income of \$36,000. Assuming an annual rental price of \$10,000, the couple receives \$1000 in a homeowner subsidy.

220. See An Act to Increase the Revenue, *supra* note 218.

221. See Individual Income Tax Act of 1944, ch. 210, 58 Stat. 231, 231-32 (1944).

222. Peter W. Salsich, Jr., *A Decent Home for Every American: Can the 1949 Goal Be Met?*, 71 N.C. L. REV. 1619, 1627 (1993) (quoting James R. Follain & David C. Ling, *The Federal Tax Subsidy to Housing and the Reduced Value of the Mortgage Interest Deduction*, 44 NAT. TAX J. 147, 148 (1991)).

223. See *id.* Rent payments were deductible at one time. See Act of Mar. 3, 1863, ch. 74, sec. 11, 12 Stat. 713, 723 (1863).

224. See 26 U.S.C. § 164(a)(1) (1994).

the sale of residential real estate,²²⁵ costs the federal treasury approximately \$80 billion annually.²²⁶ This figure represents an enormous subsidy for those people who can afford to purchase real estate.²²⁷

The net effect of all government activity was to make the cost of owning a home comparable to the cost of renting an apartment for the great mass of postwar Americans. With government activity, monthly mortgage payments compared favorably to monthly rent payments. Thus, at the end of the 1940s, when the median monthly rent for an apartment in Manhattan was \$42.16,²²⁸ the tax deductible monthly mortgage payment on a new house in Levittown, which sold for \$6990,²²⁹ was only \$37.58 per month with no downpayment.²³⁰ With such subsidies, city dwellers could not afford to refuse a move to suburbia. Demand for housing in suburbs like Nassau accordingly rose, sellers were able to obtain a fair price for building lots and houses, foreclosures ceased, and everyone considered themselves better off.

V. THE POSTWAR HOUSING MARKET AS A MODEL OF ECONOMIC JUSTICE

The decade following World War II witnessed a fundamental change in American patterns of living. An intensely urban nation prior to the war, the country redefined *en masse* its conception of the good life. For thousands of returning veterans, the overcrowded tenements of New York City, no longer seemed a place to raise families. Instead, they chose the quiet hamlets of Nassau County amid the rolling hills of Long Island. This scenic location beckoned city residents, who were tired of the noise, filth, and

225. See Taxpayer Relief Act of 1997 sec. 312(a) (1997).

226. See Salsich, *supra* note 222, at 1627-28. This figure is referred to by economists as a "tax expenditure" since it represents the loss of tax revenue due to a deduction or tax credit. See STANLEY S. SURREY & PAUL R. MCDANIEL, *TAX EXPENDITURES* 3 (1985).

227. A study of 1988 tax receipts reported that over half of the tax savings from the mortgage interest deduction are realized by individuals with incomes in the 92nd percentile or higher. See James Poterba, *Taxation and Housing: Old Questions, New Answers*, 82 *EMPIRICAL PUB. FIN.* 237, 239 (1992).

228. See 1950 CENSUS, *supra* note 18, at 46 (Table 21). The median monthly rent was \$40.43 in Brooklyn, \$42.61 in the Bronx, and \$47.67 in Queens. See *id.*

229. See *Dream Builder: William Levitt, 1907-1994*, *NEWSDAY*, Jan. 30, 1994, at 5, 40.

230. This monthly payment is based on a 30-year mortgage at a five percent rate of interest. Of course, a homeowner also had to pay real estate taxes after making the monthly mortgage payments.

overcrowding of urban life, a sentiment with which, for the first time in their history, the federal and state governments agreed.

Government facilitated the dreams of the urban poor in two ways. First, it reversed deeply entrenched practices which had permitted the WASP's of Nassau County to exclude the poor — the “rabble” of the city as one had put it²³¹ — from descending upon the unsuspecting villages of the county. Jews, ethnic Catholics, African Americans — virtually anyone who did not fit the comforting racial stereotype of the WASP — had been an unwelcome, indeed threatening, presence in the communities. Finally, the state called for an end to such exclusionary practices.²³² The passage of fair housing laws, the invalidation of restrictive real estate covenants, the termination of exclusionary zoning practices, and the disintegration of hate organizations such as the KKK opened Nassau County to groups that previously could only dream about its inviting bays and look longingly from afar upon its sylvan hills. By letting the former outcasts buy in, however, government also accomplished another objective in bringing prosperity to real estate developers and saving them from foreclosure of the landed wealth constituting a basis of their livelihood.

Suburbanization was the result, however, of more than just the opening of suburban communities to new residents of various religions and nationalities. While state government opened the market, the federal government fueled it as well. In the wake of World War II the federal government, recognizing that the construction industry held great potential for absorbing and employing the returning veterans, undertook an audacious campaign to ensure that virtually no family who wanted to buy a house in the suburbs would be unable for lack of credit to do so.²³³ For millions, VA and FHA loans became the ticket to a life of backyard patios, automobile garages, and lawns to mow every Saturday. Across the country the subsidized monthly mortgage payment replaced the monthly rent check as whole new communities of tract housing sprung up virtually overnight.

The years following the massive migration to suburbia reflect a gradual slowing in suburban development. Even Nassau County lost population during the 1970s as residents moved further away from the city to more distant suburbs or simply left the state in search of a new life in the distant regions of the Sunbelt. New

231. *See supra* Part III.A.

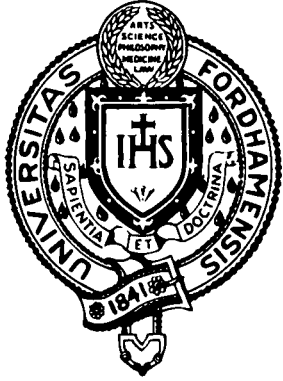
232. *See supra* Part III.B.

233. *See supra* Part IV.

housing construction has stagnated and for millions of Americans the likelihood of owning their own home has again become a distant dream.

This need not be the case. Government, as this article has shown, can play an active and legitimate role in the development and efficient functioning of housing markets — indeed, of all markets. By ensuring that noxious discrimination does not artificially close markets to willing buyers and by subsidizing buyers so as to enhance their market capabilities, government can make them better off while simultaneously improving the well-being of those who have something to sell. The poor need not get poorer while the rich strive to get richer; the poor can have their basic needs satisfied while the rich make a profit satisfying them.

But such a program entails a shift in the way government approaches the economy. For over a decade, supply-side economics with its emphasis on tax and spending cuts has held an ideological grip on the national leadership of both parties. Such thinking must come to an end, and attention must refocus on the New Deal insight that judicious use of government power — and nothing but judicious use of that power — can make all citizens better off. Perhaps, this article's sympathetic portrait of an extraordinary moment in the past, when government policies generated enormous increases in wealth by pumping up demand, distributed those increases to almost the entire community, and thereby incorporated many of the downtrodden into the socio-economic mainstream without expropriating the wealth of the elite, will help to bring the refocusing about.



THE POLITICS OF PERMITS: THE UNCONSTITUTIONALITY OF THE GIULIANI ADMINISTRATION'S PARADE AND RALLY PERMIT APPLICATION PROCEDURES

*Michael L. Landsman**

INTRODUCTION

From the Boston Tea Party, to the Civil Rights marches during the 1950s, to protests against the Persian Gulf War, acts of civil disobedience¹ and other nonviolent political acts have played a significant and controversial role in shaping the course of American history and defining the scope of protection provided by the First Amendment against governmental interference.² These political acts are important because they provide people living in America, regardless of their social, political or economic status, with a nonviolent means of expressing their beliefs. Moreover, these acts (particularly when they are committed in large groups) increase the potential effect that such beliefs may have on changing the government's policies — and society.

The most significant difference between acts of civil disobedience and other nonviolent political acts is that acts of civil disobedience are committed without the government's approval. This is important for several reasons. For example, without such approval, those engaging in acts of civil disobedience ("disobedient protestors") are subject to arrest and other disciplinary action. Such approval also enables law enforcement officials to provide security, divert traffic and take other precautionary measures to protect the protestors, as well as society at large.³ Furthermore, the failure to obtain such approval severely compromises the disobe-

* J.D., New York Law School, 1998; B.A., New York University, 1994. Assistant to Edward I. Koch at Robinson Silverman Pearce Aronsohn and Berman LLP.

1. Civil disobedience is a term generally used to describe public, nonviolent political acts committed with a desire to express disagreement with and ultimately influence the government's laws, policies, and procedures. *See* JOHN RAWLS, *A THEORY OF JUSTICE* 364 (1971).

2. U.S. CONST. amend. I. *See also* GERALD GUNTHER, *CONSTITUTIONAL LAW* 1008-1011 (1991) (citing *Schenk v. United States*, 249 U.S. 47 (1919); *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *National Socialist Party v. Skokie*, 432 U.S. 43 (1977)).

3. The riot following a march protesting hate crimes illustrates why such approval is important. *See* Michael Cooper, *60 Arrested in Rally Against Bias Crimes*, *N.Y. TIMES*, Oct. 20, 1998, at B3. In this case, rally organizers claimed that they did not

ent protestors' ability to convey their message and damages public opinion about their cause. This final reason is critical to protestors who want to pressure political leaders to change their policies or behavior.

It is well settled that the "First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its consent."⁴ The Supreme Court also has determined that any permit restrictions must not be based on the context of the message, but rather must be narrowly tailored to serve a significant government interest, and must leave open ample alternatives for communication.⁵

Based on the strength and clarity of this and other Supreme Court precedents, conventional wisdom suggests that government officials should be knowledgeable about, and particularly sensitive to, constitutionally permissible limitations on the freedom of speech. Like most political organizations, the Giuliani Administration is densely populated with lawyers who are aware of the necessity to provide an expedient, content-neutral permit application procedure for nonviolent political acts. Notwithstanding this knowledge, the Giuliani Administration has consistently denied or delayed applications for parade and rally permits made by certain groups. Because of the complications they encountered during the application process, many of these groups have been forced to turn to litigation.

It would be difficult, if not impossible, to determine the precise percentage of the lawsuits filed against New York City that raise significant questions concerning the First Amendment during the Giuliani Administration. Based on statements made by legal experts and others intimately familiar with recent New York City history, however, it is clear that far fewer of these lawsuits were filed against either the administration of former Mayors Edward I. Koch or David Dinkins.⁶ For example, during an interview concerning the Giuliani Administration's parade and rally permit application procedures, the Executive Director of the New York Civil Liberties

apply for a permit because the City had made it difficult for them to get permits. See Murray Weiss et al., *Gay-Slay Protest*, N.Y. Post, Oct. 20, 1998, at 3.

4. *Police Dep't v. Mosley*, 408 U.S. 92, 95 (1972). See also Amicus Curiae Brief of the New York Civil Liberties Union Foundation, *Million Youth March v. Safir*, 18 F. Supp. 2d 334 (S.D.N.Y. 1998) [hereinafter ACLU Amicus Brief] (on file with the *Fordham Urban Law Journal*).

5. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992).

6. Susan Sachs, *Giuliani's Goal of Civil Civility Runs Into First Amendment*, N.Y. TIMES, July 6, 1998, at B1.

Union ("NYCLU"), Norman Siegel, said "I've been here 13 years, and my legal director has been here even longer, and we've never filed as many cases involving one administration."⁷

The controversy surrounding the Giuliani Administration's parade and rally permit application procedures reached a critical turning point on November 16, 1998, when Federal District Court Judge Leonard B. Sand of the Southern District of New York held that these procedures violate the First Amendment.⁸ This was the third time in more than four months that a federal judge had ruled against the Giuliani Administration in a case concerning the constitutionality of these procedures.

The volume of litigation concerning parade and rally permit applications during the Giuliani Administration raises many questions. Perhaps the most intriguing question, however, is whether there is a relationship between Mayor Giuliani's political achievements, reputation and aspirations, and the denial of parade and rally permits.

Two of the major factors in Giuliani's victory over David Dinkins in the 1993 mayoral election were that many New Yorkers believed he could reduce crime and calm racial tensions in the wake of the Crown Heights program in August of 1991.⁹ Moreover, Giuliani made his name in New York City as a no-nonsense, organized crime busting federal prosecutor.¹⁰ Curiously, groups that apply for parade and rally permits for protests or speeches concerning either law enforcement or racism encounter the greatest amount of bias. Based on the pattern of bias against these groups, it would be useful to discuss two of the most controversial demonstrations during the period of time leading up to Judge Sand's ruling.

I. THE MILLION YOUTH MARCH

The Million Youth March, Inc. ("March") filed its first application for a permit with the New York City Department of Parks and

7. *Id.*

8. *See* Macdonald v. Safir, 26 F. Supp. 2d 664 (S.D.N.Y. 1998). *See also* Alan Finder, *U.S. Judge Upsets New York Law on Granting Permits for Parades*, N.Y. TIMES, Nov. 17, 1998, at B1.

9. *See generally* EDWARD I. KOCH, GIULIANI, NASTY MAN (forthcoming 1999). This book is a compilation of Mr. Koch's newspaper columns about Mayor Giuliani. These columns were published in either the *New York Daily News* or the *New York Post* from January 1994 to February 1999. The Epilogue and Prologue of this book contain material which supports the assertions in this sentence.

10. *Id.*

Recreation (“Parks Department”) in the middle of November 1997.¹¹ According to its application, the applicants sought to conduct an “Educational — First Amendment” event in September of 1998 on Randall’s Island, in Central Park, or on some unspecified street.¹² The event would feature “youth and adult speakers who are concerned about improving the conditions of their people.”¹³

Two months after filing this application on January 22, 1998, the Parks Department denied the organizers’ application for the Central Park location, but granted it for the Randall Island location.¹⁴ Four days after the Parks Department’s decision, the March leaders filed two additional applications.¹⁵ One application specified Malcolm X Boulevard between 110th and 145th Street (“Malcolm X Boulevard”). The other specified the Eastern Parkway, from Flatbush to Utica Avenue in Brooklyn. Five weeks later, both applications were denied, and the organizers appealed to the Community Affairs Unit Commissioner. Throughout the appeal process, there were several meetings held between New York City officials and March organizers. As these meetings continued, press coverage of the controversy began to escalate.

When questioned about this controversy on July 27, 1998, Mayor Giuliani initially responded that the Million Youth March (“March”) was only a hypothetical, and that he “never get[s] involved with hypothetical discussions.”¹⁶ Giuliani also stated that the New York City Police Department (“NYPD”) and the Corporation Counsel offered alternative locations, but that March organizers “rejected those alternatives.”¹⁷ Approximately one week later, Giuliani publicly lashed out at the March organizers. Giuliani first called the lead organizers’ comments “race-baiting and anti-Semitic” and said that “from [his] point of view, this is a hate march.”¹⁸ Giuliani then said that he “would not allow a

11. *Million Youth March, Inc. v. Safir*, 18 F. Supp. 2d 334, 337 (S.D.N.Y. 1998).

12. *Id.* According to the complaint filed in this action, the March calls for, *inter alia*, the “elimination of police brutality and misconduct; and end to violence and conflict in communities of color . . .” *Id.* at 336.

13. *Id.* at 336.

14. *Id.* at 337.

15. *Id.*

16. Leonard Greene, *Clash Brewing on Youth March*, NEWSDAY, July 27, 1998, at A19.

17. *Id.*

18. Amy Waldman, *Giuliani Assails Organizers of Youth March*, N.Y. TIMES, Aug. 6, 1998, at B4.

hatemonger to take over our City in any substantial respect . . . [t]hat just will not be permitted.”¹⁹

Soon thereafter, negotiations between City officials and March organizers broke down, and on August 20, Million Youth March, Inc., filed a lawsuit against NYPD Commissioner Howard Safir and Mayor Giuliani.²⁰ As part of this action, the March leaders filed a motion for a preliminary injunction ordering City officials to allow them to hold a rally on September 5, 1998, on Malcolm X Boulevard.²¹ On August 26, 1998, United States District Court Judge Lewis Kaplan granted the preliminary injunction. Judge Kaplan referred to the Giuliani Administration’s application procedures as “breathtaking in their lack of standard,” and that they “provided a virtual prescription for unconstitutional decision making.”²²

One of the key figures organizing this event was Khalid Muhammad, who is a former leader in the Nation of Islam, and infamous for his anti-Semitic and other offensive and extremely prejudicial remarks. It is also true, however, that there were several other March organizers who did not share Khalid Muhammad’s extremist views. And even if they did, the Constitution protects speech on a content-neutral basis, unless it is expressed in such a way that violates one of the narrow exceptions.²³

On September 1, 1998, the United States Court of Appeals modified Judge Kaplan’s order to allow a four-hour event covering six blocks, instead of a twelve-hour event on twenty-nine blocks.²⁴ On Saturday, September 5, 1998, the Million Youth March was finally held. And, as many commentators expected, the views expressed at the Million Youth March ranged from moderate to the extreme. Some speakers urged conciliation, others hatred.²⁵

Unfortunately, the demonstration ended with a dangerous ruckus. As the event drew to a close, the NYPD decided to turn off the generator providing electricity for the public address system. In an effort to distract participants in the Million Youth

19. David Seifman, *Mayor: I Won’t Let “Hatemonger” Call the Shots on March*, N.Y. POST, Aug. 8, 1998, at 16.

20. See *Million Youth March, Inc. v. Safir*, 18 F. Supp. 2d 334 (S.D.N.Y. 1998).

21. See *id.*

22. Nat Hentoff, *Keep Your Eye On Malik Shabazz*, VILLAGE VOICE, Sept. 29, 1998, at 32.

23. See ACLU Amicus Brief, *supra* note 4, at 3.

24. See Center for New York City Law, 4 CITY LAW 114, Sept.-Oct. 1998.

25. See Jeffrey Goldberg, “I’m Going to Kill You, Cracker,” *And Other Greetings of the Day*, THE FORWARD, Sept. 11, 1998, at 1.

March from the officers attempting to cut the power, a NYPD helicopter swooped down over the march. A melee immediately erupted. Several participants in the event and police officers were injured. Subsequently, six protestors were indicted for attempted assault and reckless endangerment.²⁶ None of the event organizers were indicted.²⁷

The Giuliani Administration's initial refusal to grant March organizers a permit, and Giuliani's verbal attacks on Khalid Muhammed gave Muhammed exactly what he wanted — to generate as much publicity as possible about his racist, anti-Semitic views, and discredit Mayor Giuliani, his Administration, and the NYPD.²⁸ Giuliani's intolerance of Muhammed's intolerant views, exacerbated rather than reduced racial tensions. If the Giuliani Administration had granted the permit after the first request, and Mayor Giuliani refrained from verbally attacking Khalid Muhammed in public, Giuliani would have undermined Khalid's apparent desire to increase racial tension.²⁹ This argument is based on the psychological principle that those whose liberties are protected by a constitution that protects individual liberties will eventually acquire an allegiance to the virtues of such a constitution.³⁰ In other words, if society tolerates rather than suppresses the intolerant, then the intolerant will eventually lose their intolerance.³¹

II. THE OCTOBER 22 COALITION PROTEST

On September 14, 1998, less than a week after the Million Youth March, the October 22 Coalition To Stop Police Brutality, Repression and the Criminalization of a Generation ("Coalition") applied for a permit to march down Broadway in lower Manhattan.³² The Coalition was also organizing similar events in more than fifty cities throughout the United States. These events, as the name of the organization suggests, were to take place simultaneously on October 22, 1998.

26. See David Rohde, *Six are Indicted in Youth Rally Violence*, N.Y. TIMES, Nov. 18, 1998, at B3.

27. *Id.*

28. See Edward I. Koch, *Rudy Gave Hatemongers Just What They Want*, N.Y. DAILY NEWS, Sept. 11, 1998, at 5.

29. *Id.*

30. See generally RAWLS, *supra* note 1, at 219 *et seq.*

31. *Id.*

32. See *MacDonald v. Safir*, 26 F. Supp. 2d 664, 672 (1998); see also Kit R. Roane, *Judge Rules For Police Brutality Rally*, N.Y. TIMES, Oct. 22, 1998, at B3.

One month later, the City denied the Coalition's application, and the Coalition immediately filed an appeal. On October 21, 1998, Federal District Court Judge John S. Martin, Jr. granted the preliminary injunction and directed the NYPD to issue a permit authorizing it to organize a march from Union Square Park to City Hall Park using one lane of traffic on Broadway.³³

Judge Martin determined that the one-month delay between the time the Coalition submitted its application and the day the City notified the organization that its application was denied, had prejudiced the plaintiffs' ability to organize their demonstration.³⁴ Judge Martin also found that the facts of this case "give[] rise to an inference that there was a motive related to the content of the speech that these plaintiffs were attempting to exercise."³⁵

Giuliani immediately attacked Judge Martin's decision, and said that "[t]he decision about the impact on public safety should be left to the Police Department, not the imperial Federal Court."³⁶ According to Giuliani, the City would allow Coalition protestors to march on the sidewalk, but not on the busy street.³⁷ Despite his disagreement with the ruling, Giuliani did say that the City would "comply with the court order, but [his] reaction is that the court is wrong and the federal court should stop trying to run the city."³⁸ On Thursday, October 22, the Second Circuit Court of Appeals denied the Giuliani Administration's attempt to stay Judge Martin's order, and permitted more than 1,000 people to march from Union Square Park to City Hall Park in support of the Coalition.³⁹ Significantly, no other City denied the Coalition a permit.⁴⁰

Despite the fact that the Giuliani Administration had claimed that the Coalition's march down Broadway would create chaos, the next day Mayor Giuliani held a parade which attracted over three million people for the New York Yankees down almost the same

33. See Deborah Pines, *Permit Ordered For Protest March; City's Delay in Ruling Held Biased*, N.Y. L.J., Oct. 22, 1998, at 1.

34. See *October 22nd Coalition v. Safir*, No. 98 Civ. 7333 (S.D.N.Y. Oct. 21, 1998).

35. *October 22nd Coalition v. Safir*, 98 Civ. 7333, Transcript of Oral Arg., at 3. See also Margaret Ramirez, *Day of Outrage/7,000 Rally in Protest of Brutality*, N.Y. TIMES, Aug. 30, 1997, at A5.

36. Deborah Pines, *Permit Ordered For Protest March; City's Delay in Ruling Held Biased*, N.Y. L.J., Oct. 22, 1998, at 1. See also Ramirez, *Day of Outrage*, *supra* note 35.

37. See Kit R. Roane, *Permitted by Court, 1,000 March Against Police Brutality*, N.Y. TIMES, Oct. 23, 1998, at B3.

38. Patricia Hurtado, *The March Goes On: Rudy Two-Time Loser on Cop Brutality Rally*, NEWSDAY, Oct. 23, 1998, at A29.

39. See Roane, *supra* note 37.

40. *Id.*

route requested by the Coalition. Giuliani also gave over 5,000 people access to the steps of City Hall and the plaza between 9:00 a.m. and 3:00 p.m.⁴¹

Giuliani was uncharacteristically restrained when publicly commenting about the protest. Notwithstanding Mayor Giuliani's apparent indifference to the Coalition's victory in this case, there are several reasons to believe that he was less than enthusiastic about the Coalition's protest and the publicity it would generate.

First, the Coalition protest in Manhattan was organized by Anthony Baez's mother, Iris Baez, and Abner Louima.⁴² Until the tragic death of Amadou Diallo in February of 1999, the death of Anthony Baez, who died as a result of an illegal choke-hold, and the torture of Abner Louima, who was sodomized with a toilet plunger,⁴³ were the two of the more famous victims of police brutality in New York City history. This protest clearly re-opened the political wounds inflicted on Giuliani by these tragic events.

Second, crime reduction is one of Giuliani's most important political achievements. Many people in the City (even before the Diallo tragedy), however, believe that the "zero tolerance" philosophy expounded by Giuliani fosters "a climate of bareknuckle policing"⁴⁴ and has taken too great a toll on civil rights.⁴⁵ Recent polls also indicate that an overwhelming majority of the members of the Black and Hispanic communities believe that police officers in New York City favor whites.⁴⁶ Because the Coalition protest was certainly going to bring attention to all of these politically sensitive facts, and have a potentially negative impact on Giuliani's popularity, it is easy to see why he would try to discourage it.

Finally, Giuliani has a history of denouncing protest against police brutality. For example, in August of 1997 Giuliani condemned a rally convened to protest the brutal torture of Abner Louima that

41. See *Housing Works, Inc. v. Safir*, 1998 U.S. Dist. LEXIS 19515, at *4 (S.D.N.Y.).

42. See Hurtado, *supra* note 38, at A29. See also David Gonzalez, *Giuliani Loves a Parade, If It's His Own Kind*, N.Y. TIMES, Oct. 24, 1998, at B1.

43. Officer Justin Volpe pled guilty to these charges on May 26, 1999. See David Barstow, *Officer, Seeking Mercy, Admits to Louima's Torture*, N.Y. TIMES, May 26, 1999. Subsequently, a jury found another officer guilty, but acquitted three others. See Joseph P. Fried & Blaine Harden, *Officer is Found Guilty in Torture of Louima*, N.Y. TIMES, June 9, 1999, at A1.

44. John Marzulli and Richard Sisk, *Halt Cop Brutality, Bill Told*, DAILY NEWS, Feb. 26, 1999, at 8.

45. Kevin Flynn, *Two Polar Views of Police and Race at U.S. Hearing*, N.Y. TIMES, May 27, 1999, at B3.

46. Dan Barry & Marjorie Connelly, *Poll in New York Finds Many Think Police Are Biased*, N.Y. TIMES, Mar. 16, 1999, at A1.

was attended by former Mayor David Dinkins, and other prominent black and civil rights leaders as “a free-for-all police bashing rally.”⁴⁷

CONCLUSION

Based on the foregoing discussion, it is clear that Mayor Giuliani and his Administration have engaged in a pattern of discrimination against groups applying for parade and rally permits who criticize one of Mayor Giuliani’s most important political achievements — the reduction of crime.

In the wake of the Diallo tragedy and various public hearings and investigations about police brutality, racism and other problems in the NYPD,⁴⁸ Mayor Giuliani has dramatically curtailed his public statements concerning police misconduct, and those who criticize it. For example, the Giuliani Administration did not force groups organizing tens of thousands of people who protested the shooting of Amadou Diallo to resort to litigation.⁴⁹

However, the Giuliani Administration’s apparent tolerance for these protests was probably not due to any dramatic shift in policy, but rather the enormous political pressure placed on the Mayor by a substantial drop in the polls,⁵⁰ and the adverse court decisions it received in the Million Youth March, and Coalition litigations.

As Giuliani’s second and final term draws to a close and he starts to look ahead to running for his next political office,⁵¹ it will be

47. Ramirez, *supra* note 35. See also David Gonzalez, *About New York; Giuliani Loves a Parade, If It’s His Kind*, N.Y. TIMES, Oct. 24, 1998, at B1.

48. See, e.g., Michael Cooper, *Safir Defends Frisking Policy Before a Panel of Skeptics*, N.Y. TIMES, Apr. 20, 1999, at B4; Benjamin Weiser, *Stop-and-Frisk Policy Faces U.S. Scrutiny*, N.Y. TIMES, Mar. 19, 1999, at B1; Eleanor Randolph, *A Long Day of Venting About the City’s Police*, N.Y. TIMES, May 28, 1999, at A25.

49. Although the City permitted most of these protests to occur without unreasonable restraints, 1,175 protestors were arrested in the Amadou Diallo rallies. See Laura Italiano et al., *1,175 Busted in Protest Hoping DA Will OK Deal*, N.Y. POST, Mar. 30, 1999, at 16.

50. As briefly mentioned above, in February 1999, four New York City police officers shot and killed Amadou Diallo, an unarmed immigrant. The Diallo tragedy quickly became a major political liability for the Mayor, and his approval rating plunged 21 percent in five months. See Dan Barry, *Giuliani Says Diallo Shooting Coverage Skewed Poll*, N.Y. TIMES, Mar. 17, 1999, at B3.

51. In the spring of 1999, Rudy Giuliani created “Friends of Giuliani,” a Federal fundraising committee, to raise money for a potential Senate campaign. One of the tools employed by this committee to raise money for Giuliani’s campaign is a website entitled *Hillaryno.com*. Although neither Hillary Rodham Clinton nor Mayor Giuliani have formally declared their candidacies for the Senate in New York State at the date of publication, both have formed exploratory committees. See Dan Berry, *Message of “Hillaryno.com” is Yes to Giuliani*, N.Y. TIMES, Mar. 30, 1999, at B2; Hil-

interesting to see what effect his administration's record of violating constitutional rights will have on his career. It will be equally interesting to observe Mayor Giuliani's attempt to position himself as someone who is both "tough on crime" and sensitive to the concerns of those who suffer the brunt of police misconduct, i.e., members of the City's minority communities. Mayor Giuliani's ability to continue to contain crime in New York City, and become a leader who can heal the wounds caused by racial tension and the police brutality that occurred during his tenure as Mayor may well be the key to his political future.

HISTORY REPEATING ITSELF: THE (D)EVOLUTION OF RECENT BRITISH AND AMERICAN ANTITERRORIST LEGISLATION

*Gregory C. Clark**

Still the gunman rules and widows pay
A scarlet coat now a black beret
They thought that blood and sacrifice
Could out of death bring forth a life¹

INTRODUCTION

The beast of international terrorism rears its horrible head far too often in modern America. Denizens of major cities cower at the mention of anthrax or nerve gas. Federal facilities went to a “maximum state of alert,” during the recent strike against Iraq while Defense Secretary William Cohen stated that, “It is our anticipation that attempts will be made . . . [A terrorist attack] could happen at any time.”² Oklahoma City residents have yet to fully recover from the bombing of the Alfred P. Murrah Federal Building.³ The United States vehemently opposes terrorist action: “Terror is not a legitimate form of political expression or a manifestation of religious faith. It is murder. And those who perpetrate it, finance it or otherwise support it must be opposed.”⁴

Immediately following most major terrorist incidents, legislatures pass tougher anti-terrorism laws in a frenzy of activity. “One of the memorable phrases that was coined during the troubles in Northern Ireland in the past twenty-five years is ‘the politics of the

* J.D. Candidate, Fordham University School of Law, 2000; B.A., University of Notre Dame, 1997. Tremendous thanks to Sonia Bhatnager for her “constructive” criticism, Bob Schumacher for his push towards perfection and Vivian Encarnacion for her tireless mediation. I would also like to thank my parents for their love and honesty, without which none of this would be possible.

1. U2, *Van Diemen’s Land*, on RATTLE AND HUM (Island Records Ltd. 1988).

2. Phil Kuntz & Hugh Pope, *U.S. Officials Close Embassies in Parts of Africa*, WALL ST. J., Dec. 18, 1998, at A10.

3. See Thomas C. Martin, Note, *The Comprehensive Terrorism Prevention Act of 1995*, 20 SETON HALL LEGIS. J. 201, 201-02 (1996). A van exploded outside the Alfred P. Murrah Federal Building in Oklahoma City on April 19, 1995. See *id.* The explosion killed 167 people, including nineteen children under the age of six. See *id.*

4. Madeleine K. Albright, *We Will Not Be Intimidated*, NEWSWEEK, Aug. 24, 1998, at 33.

last atrocity.' It refers to people taking advantage of the last atrocity to push a political agenda or to score political points."⁵ Following the Oklahoma City bombing, a fiercely resolved administration passed the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA");⁶

Our goal is to make the United States fully a no-support-for-terrorism zone. Our message to anyone who comes into our country intending to raise money for a terrorist organization is, you risk going to jail. And our message to anyone who is a part of a terrorist organization and who wants to enter the United States is, you are not welcome here.⁷

Likewise, in response to the Omagh bombing,⁸ British politicians enacted the Northern Ireland (Emergency Provisions) Act of 1998 ("EPA"),⁹ and the Criminal Justice (Terrorism and Conspiracy) Act of 1998 ("TCA").¹⁰

This Note compares current antiterrorism legislation in the United Kingdom and the United States through the lens of historical development. Part I of the Note traces both the history of British measures to combat terrorism in the context of Northern Ireland, and the corresponding American legislation, including a discussion of the many civil rights violations accompanying the respective laws. Part II explores the provisions of the EPA, TCA and AEDPA. Part III of the Note argues that the traditional counterterrorist strategies do not sufficiently deal with the complexity of terrorism and that the British antiterrorism model, which the AEDPA resembles, is rife with inequities. Accordingly, the Note concludes that American lawmakers should understand the failings of past British legislation in shaping prospective American law.

5. *Counterterrorism Legislation: Hearings on S. 390 and S. 735 Before the U.S. Senate Subcomm. on Terrorism, Technology and Government Information*, 104th Cong. 61 (1995) (testimony of Fr. Sean McManus, President, Irish National Caucus).

6. Pub. L. No. 104-132, 110 Stat. 1214.

7. Secretary of State Madeleine K. Albright, Remarks on Designation of Terrorist Organizations (Oct. 8, 1997) (transcript available at <<http://secretary.state.gov/www/statements/971008.html>>).

8. See *infra* note 152 and accompanying text.

9. Ch. 9 (1998) (Eng.). The current version of the EPA extends the steps taken to control Northern Ireland first enacted in 1973. See *infra* Part I.A.2.

10. Ch. 40 (1998) (Eng.). The TCA permanently codifies the "temporary provisions" of the Prevention of Terrorism (Temporary Provisions) Act initially passed in 1974 to give law enforcement greater tools to combat native insurgency in Northern Ireland. See *infra* Part I.A.2, II.A.

I. BRITISH AND AMERICAN APPROACHES TO TERRORISM

A. History of Terrorism Legislation in Great Britain and Northern Ireland

Northern Ireland's distinct situation defines Great Britain's approach towards terrorism.¹¹ While circumstantially dissimilar to the position of the United States, the British legislature enacted antiterrorist laws dealing with the same type of problems that plague America.¹² The historical development of the "troubles" of Northern Ireland provides a framework for how and why Britain has reached its current legislative position. The problems associated with Ireland and Northern Ireland did not begin with the partition of the island by the British government in 1920.¹³ Celtic tribes likely had their own problems for centuries prior to any British presence in Ireland and, while perhaps relevant to another inquiry, it was the Protestant migration into Ireland that lies at the heart of current British antiterrorism legislation.¹⁴ The resulting social and political climate of Northern Ireland has manifested itself in British legislation. The power struggles between Irish Catholics and British Protestants bred animosity and fear leading to a schism that made citizens foreigners in their own land and ultimately escalated into mindless violence.¹⁵

1. *The Colonization and Partition of Northern Ireland*

Celtic tribes originally settled Ireland and were converted to Catholicism by Saint Patrick around 450 A.D.¹⁶ Since that time, the majority of the Irish have followed the Church in Rome.¹⁷ British presence in Ireland began with the Anglo-Norman invasion of 1169¹⁸ and, finally, King Henry II's capture of Dublin in 1171.¹⁹ King James I encouraged Scottish Presbyterians and English Episcopalians to settle in the northern counties in 1610 in order to help quell Catholic unrest and establish some regional loyalty to the

11. See discussion *infra* Part I.A.1-2.

12. See discussion *infra* Parts I.A.2, II.A.

13. See James T. Kelly, *The Empire Strikes Back: The Taking of Joe Doherty*, 61 *FORDHAM L. REV.* 317, 321 (1992).

14. See discussion *infra* Part I.A.1.

15. See discussion *infra* Part I.A.2.

16. See Kelly, *supra* note 13, at 320.

17. See *id.*

18. See Roger Myers, *A New Remedy for Northern Ireland: The Case for United Nations Peacekeeping Intervention in an Internal Conflict*, 11 *N.Y.L. SCH. J. INT'L & COMP. L.* 1, 16 (1990).

19. See Kelly, *supra* note 13, at 320.

crown.²⁰ Although Protestants ultimately made up the bulk of the population in the northern counties of Ulster,²¹ British conquest of the Emerald Isle was never absolute.²²

Unrest in the North increased in direct proportion to the growing divide between the supplanted natives and the upstart Protestant colonists. Protestants, with their roots in England and Scotland, felt insecure about their place on an island predominantly populated by Catholics and responded by tightening their grip over the areas already under their control.²³ By 1703, the Protestant minority owned almost all of the land throughout Ireland, not just that in the north.²⁴ A type of landed aristocracy formed in Ireland that pushed the Catholic peasantry further from the power structure.²⁵ The Anglican minority, hopelessly outnumbered by Catholic natives,²⁶ maintained their position of dominion through political suppression and, when necessary, brute force.²⁷

The seventeenth and eighteenth-century Protestant Parliament in Dublin instituted a number of harsh regulations to keep Catholics from rising out of the dirt.²⁸ These laws prohibited Catholics from, among other things, voting, holding elected or appointed office, joining the bar, teaching at or attending a university and owning land worth more than five pounds.²⁹ In addition, the Parliament exiled all upper level church officials upon punishment of death.³⁰ Hoping to break the back of native disquiet, this containment agenda only served to heighten social and religious tensions. When Catholics became further incensed, Protestants imposed greater restrictions upon their social and political free-

20. *See id.*; *see also* Myers, *supra* note 18, at 16 ("Native hostilities were especially strong in the North, so England concentrated its seventeenth century plantation of Protestant settlers in Ulster, hoping to solve its Irish problem by uprooting the Catholics." (footnote omitted)).

21. *See* Kelly, *supra* note 13, at 321 n.8. The northern nine counties of Ireland traditionally comprise the ancient province of "Ulster," although modern mention of Ulster refers to the six counties of partitioned Northern Ireland. *See id.*

22. *See id.* at 320.

23. *See id.*

24. *See* Myers, *supra* note 18, at 17 ("[N]ative Catholics owned less than 14% of all of Ireland, and in eight of Ulster's nine counties, Protestants owned 95% of the land. The eighteenth century Irish were no longer citizens in their own country. So it would remain . . . for the next 200 years." (footnote omitted)).

25. *See id.* at 17-22.

26. *See id.* at 16 (indicating that the Protestant minority "never constituted more than one-tenth of the island's population").

27. *See infra* notes 28-34 and accompanying text.

28. *See* Myers, *supra* note 18, at 17-18.

29. *See id.*

30. *See id.* at 18.

doms, generating greater native anger in a dangerous self-perpetuating cycle that would become all too familiar to the Ulster counties.³¹

England formally incorporated Ireland, along with all of its problems, into its kingdom with the Act of Union in 1801.³² Protestant dominion continued limiting Catholics' access to education, employment and other opportunities for advancement, and native discontent likewise continued to increase.³³ Then, as in the past and up into the present, "disputes in Ulster have not focused on points of religious doctrine, but on the use and abuse of political power."³⁴ Irish nationalists campaigned for limited self-rule in 1886, 1893 and finally, successfully, in 1912.³⁵ Protestant unionists threatened civil war at each suggestion of ceding any degree of sovereignty or independence to Ireland, and only demurred conditionally upon the exclusion of the northern counties from any such legislation.³⁶

Real movement towards Irish independence began when Irish nationalists, unsatisfied with the largely ignored and impotent home-rule provisions, voiced their dissatisfaction in the brief and ineffective Easter Rising of 1916.³⁷ Temporarily put on hiatus by World War I, the Irish struggle for self-determination resumed in 1919 as the Irish Republican Army ("IRA")³⁸ waged a fierce guerrilla war against the British.³⁹ The IRA's efforts "led the United

31. See *id.* at 15 ("It was a vicious circle. English consciousness of [Irish resentment] produced a feeling of insecurity . . . the need for security produced strong measures, thus intensifying the Irish feelings at the root of the original feeling of insecurity, and creating the need for still further strong measures.") (alteration in original) (quoting MAIRE O'BRIEN & CONOR O'BRIEN, *A CONCISE HISTORY OF IRELAND* 61 (3d ed. rev. 1985)).

32. See Kelly, *supra* note 13, at 320.

33. See Myers, *supra* note 18, at 19-20 ("In Northern Ireland, being born Catholic or Protestant has historically dictated much more than religious affiliation. To a large degree religious affiliation still dictates origin and culture, class standing, the access — or, more accurately . . . the inaccess — to employment and political control." (footnotes omitted)).

34. *Id.* at 21-22.

35. See Kelly, *supra* note 13, at 320-21.

36. See *id.* at 321.

37. See *id.* The British swiftly crushed the Easter Rising, the first modern Irish revolt against foreign rule in Northern Ireland. See *id.*

38. The Irish Republican Army is a paramilitary, guerrilla organization determined to free *all* of Ireland from British rule. See Myers, *supra* note 18, at 7.

39. See Martin Flaherty, *Human Rights Violations Against Defense Lawyers: The Case of Northern Ireland*, 7 HARV. HUM. RTS. J. 87, 93 (1994); Kelly, *supra* note 13, at 321.

Kingdom Parliament to conclude that autonomy for Ireland was in Great Britain's best interest."⁴⁰

In 1920, with the Government of Ireland Act, Britain formally divided Ireland, establishing separate, subordinate parliaments in Belfast and Dublin.⁴¹ This step in the process towards Irish independence lasted no longer than the self-rule legislation, giving way to the Anglo-Irish Treaty, signed in 1921.⁴² Conditioned upon the retention of the six counties of Ulster by Great Britain, as demanded by the northern Protestants,⁴³ this treaty bequeathed dominion status upon the remaining twenty-six counties of Ireland, establishing the Irish Free State.⁴⁴

Despite a short civil war spurred by the Irish Free State's opposition to the island's partition, a 1925 boundary agreement between the Irish Free State, Northern Ireland and Great Britain formally recognized the division of Ireland and was subsequently filed with the League of Nations.⁴⁵ After leaving the British Commonwealth, the Irish Free State declared itself the Republic of Ireland in 1949, and the United Kingdom recognized Ireland's independence with the Republic of Ireland Act of 1949.⁴⁶

2. *The "Troubles" and the Provisions*

A piece of paper simply does not have the power to erase resentment and discord. While the establishment of an independent Ireland may seem to be the goal sought by Irish nationalists, a comparison of the Constitution of the Irish Free State and the Republic of Ireland Act of 1949 reveals that a freedom that did not encompass all of Ireland would prove unsatisfactory.⁴⁷ In 1967, the Northern Ireland Civil Rights Association briefly lobbied for dem-

40. Flaherty, *supra* note 39, at 93.

41. See Kelly, *supra* note 13, at 321.

42. See *id.* at 322.

43. See Fionnuala Ni Aolain, *The Fortification of an Emergency Regime*, 59 ALB. L. REV. 1353, 1353-54 (1996) ("This partition was precipitated by Northern Ireland's Protestant majority, who were militarily and ideologically opposed to being subsumed into the new Irish Catholic state then emerging from a colonial war of independence with Britain.").

44. See Kelly, *supra* note 13, at 322.

45. See *id.*

46. See *id.* at 322-23.

47. See *id.*

[A]rticles 2 and 3 of the 1937 Constitution . . . proclaim sovereignty over the whole of Ireland. In addition, the Irish Constitution regards every person born in Ireland, north and south as an Irish citizen. . . . Britain recognized [Ireland's] independence through the Republic of Ireland Act of 1949, but cautioned that "in no event [would] Northern Ireland or any part thereof

ocratic social and political reform through a non-violent protest campaign modeled upon the American civil rights movement.⁴⁸ Northern Ireland's governing body, Stormont,⁴⁹ largely ignored these calls for reform, just as the Protestant security force largely ignored the violence inflicted upon protesters by elements of the Protestant majority.⁵⁰ The Irish quickly abandoned the tenets of nonviolence, and in August of 1969 Stormont requested the assistance of the British military to control the streets.⁵¹ On January 30, 1972, the infamous "Bloody Sunday," British paratroopers killed thirteen unarmed protesters during a civil rights march and gave new life to the IRA,⁵² which had effectively remained silent since a brief surge of activity following the Republic of Ireland Act.⁵³ Ireland erupted in violence⁵⁴ and Britain suspended Stormont indefinitely.⁵⁵

Although initiated with the Special Powers Act,⁵⁶ Britain's response to the chaos in Northern Ireland consisted of two sets of legislation: the EPA,⁵⁷ which repealed and replaced the Special Powers Act and applies only to Northern Ireland, and the Preven-

cease to be part . . . of the United Kingdom without the consent of the Parliament of Northern Ireland."

Id. (footnotes omitted) (quoting the Republic of Ireland Act of 1949).

48. See Myers, *supra* note 18, at 22-23.

49. See Flaherty, *supra* note 39, at 93. Stormont was the name of the Parliament of Northern Ireland, which controlled the province from its foundation in 1922 until its suspension by the British Parliament in 1972. See *id.* at 93-94.

50. See Kelly, *supra* note 13, at 323.

51. See *id.*

52. See *id.*

53. See *id.* at 324 n.19.

54. See Myers, *supra* note 18, at 25-26 ("As one Belfast woman lamented, 'The IRA have been waiting for this for years[.] Till all this happened no one listened to them. . . . Paisley and his crowd have played right into their hands. . . . [T]he IRA will get more support than it knows what to do with.'" (alteration in original) (quoting J. HOLLAND, *TOO LONG A SACRIFICE: LIFE AND DEATH IN NORTHERN IRELAND SINCE 1969* 39-40 (1981)).

55. See Kelly, *supra* note 13, at 323-25. Stormont has never since reconvened, and Britain has directly controlled Northern Ireland from March 1972 to the present. See *id.* at 325.

56. Civil Authorities (Special Powers) Act (Northern Ireland), 1922, 12 & 13 Geo. 5, ch. 5 (Eng.); see also Kelly, *supra* note 13, at 323 (stating that the Special Powers Act introduced internment to Northern Ireland).

57. Northern Ireland (Emergency Provisions) Act, 1998, ch. 9 (Eng.); Northern Ireland (Emergency Provisions) Act, 1996, ch. 22 (Eng.); Northern Ireland (Emergency Provisions) Act, 1991, ch. 24 (Eng.); Northern Ireland (Emergency Provisions) Act, 1987, ch. 30 (Eng.); Northern Ireland (Emergency Provisions) Act, 1978, ch. 5 (Eng.); Northern Ireland (Emergency Provisions) (Amendment) Act, 1975, ch. 62 (Eng.); Northern Ireland (Emergency Provisions) Act, 1973, ch. 53 (Eng.).

tion of Terrorism (Temporary Provisions) Act ("PTA"),⁵⁸ which operates throughout Great Britain. The British government intended these "emergency powers" laws to last for the brief period it took to reestablish order in Northern Ireland.⁵⁹ That brief period has yet to expire.⁶⁰

The emergency powers grant extremely broad discretion to both the Royal Ulster Constabulary ("RUC")⁶¹ and the British military in investigations of suspected terrorist activity in Northern Ireland.⁶² Police may stop an individual on the street and question her regarding her identity and recent movements.⁶³ The provisions permit the RUC or military to search a premises and seize any possessions based upon the low threshold "reasonable suspicion" of terrorist activity.⁶⁴ Constables can further confiscate anything found during their warrantless searches if they believe that the item is somehow connected to a crime.⁶⁵

The PTA authorizes the arrest and detention of suspects for questioning without trial.⁶⁶ The RUC can arrest and detain an individual for an initial period of forty-eight hours, which then can be extended to an additional five days upon approval of Northern Ireland's Secretary of State, all without formal charges or an appear-

58. Prevention of Terrorism (Temporary Provisions) Act, 1989, ch. 4 (Eng.); Prevention of Terrorism (Temporary Provisions) Act, 1984, ch. 8 (Eng.); Prevention of Terrorism (Temporary Provisions) Act, 1976, ch. 8 (Eng.); Prevention of Terrorism (Temporary Provisions) Act, 1974, ch. 56 (Eng.).

59. See Elizabeth Kondonijakos, *The Reasonable Suspicion Test of Northern Ireland's Emergency Legislation: A Violation of the European Convention of Human Rights*, 3 BUFF. J. INT'L L. 99, 104 (1996).

60. The EPA and PTA have been continually and consistently renewed every few years. See statutes cited *supra* notes 57-58. "[T]he possibility of special anti-terrorism provisions is in principle acceptable, provided the agenda of the power elite in charge of national security is not, for example, the maintenance of their power but the reassertion of individual rights and other constitutional values." Clive Walker, *Constitutional Governance and Special Powers against Terrorism: Lessons from the United Kingdom's Prevention of Terrorism Acts*, 35 COLUM. J. TRANSNAT'L L. 1, 5 (1997). However, "[t]he use of successive Prevention of Terrorism Acts has often constituted the terror of prevention." *Id.* at 3 (quoting PADDY HILLYARD, SUSPECT COMMUNITY 262 (1993)).

61. The RUC is the British-backed, Protestant-run police force in Northern Ireland. See Myers, *supra* note 18, at 6.

62. Although not discussed here, police riot control tactics included the use of theoretically non-lethal plastic bullets that have killed seventeen people, including eight children, through mid-1989. See Myers, *supra* note 18, at 37.

63. See Aolain, *supra* note 43, at 1354 n.6 (citing Northern Ireland (Emergency Provisions) Act, 1991, ch. 24, §§ 16, 17, 22, 23 (Eng.)).

64. See Kondonijakos, *supra* note 59, at 105.

65. See *id.* at 105-06.

66. See Walker, *supra* note 60, at 3.

ance before a magistrate.⁶⁷ The Ulster police release the majority of those detained without charging them.⁶⁸ Although condemned by the European Commission of Human Rights in 1976,⁶⁹ police subjected IRA suspects to “deep interrogation.”⁷⁰ The “five techniques”⁷¹ used during these detention periods included: wall-standing, hooding, bread and water diet, noise and deprivation of sleep.⁷² While these “techniques” may not seem grossly inhuman, one example may illustrate otherwise:

The non-physical torture reportedly consisted of hooded men being placed in an operating helicopter for a period of time, then being pushed out; since the helicopter was on or nearly on the ground, the men suffered only minor bruises when they fell, but since the men were hooded, they were terrorized, believing they were being pushed out of the helicopter to die.⁷³

On the other end of the spectrum, the police often used detention as a means to chat with various individuals in the community about politics and the peace process.⁷⁴

In a July 1995 report,⁷⁵ the United Nations called for the closing of Castlereagh, one of the centers used for detentions of the former variety, citing the lack of natural daylight, clean cells, clocks, resources for exercise and access to radios or reading material.⁷⁶ The British government also detains seventeen and eighteen year-olds

67. See Aolain, *supra* note 43, at 1361.

68. See *id.* at 1362.

69. “[T]he European Commission of Human Rights unanimously found Britain to be guilty of torture, as well as inhuman and degrading treatment, of republican detainees in Northern Ireland, in violation of the European Convention on Human Rights.” Myers, *supra* note 18, at 27 (citing *Ireland v. United Kingdom*, 1976 Y.B. Eur. Conv. on H.R. 512, 794 (Eur. Comm’n on Hum. Rts.)).

70. See Walker, *supra* note 60, at 60.

71. See Myers, *supra* note 18, at 27-29.

72. See *id.* at 28 n.110.

73. *Id.*

74. See Aolain, *supra* note 43, at 1363. Detainees report that questions regarding specific offenses often did not surface during interrogations: “One states ‘[a]ll they (the RUC) were interested in was the peace process and what I felt about it.’ Another detainee reported, ‘[the RUC] mentioned it [the charges] about 3 times and then its just a discussion on the Peace Process and Gerry Adams jet setting around the World.’” *Id.* (alteration in original) (footnote omitted) (quoting BRITISH IRISH RIGHTS WATCH, *CONDITIONS IN DETENTION IN CASTLEREAGH: PHYSICAL AND PSYCHOLOGICAL ILL-TREATMENT OF DETAINEES AND ABUSE OF THEIR LAWYERS*, App. B Case 157, 161 (1995) (submission to the United Nations Human Rights Committee) (on file with the *Albany Law Review*)).

75. See United Nations, Human Rights Committee, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant*, United Kingdom and Northern Ireland, P 11, U.N. Doc. CCPR/C/79/Add.55 (1995).

76. See Aolain, *supra* note 43, at 1363-64.

in the "hellish" Crumlin Road Jail, built in 1854, alongside hardened adult offenders.⁷⁷ Arresting a person without a warrant and subjecting her to seven days' interrogation⁷⁸ is inconsistent with honoring that person's basic civil rights.

The EPA and PTA designate specific "scheduled"⁷⁹ offenses for prosecution under their specialized procedures. Included in those offenses is the membership in, or financial or practical support of, a proscribed⁸⁰ organization.⁸¹ Commission of a scheduled offense avails a defendant of the Diplock courts, created specially for terrorist offenders, which allow for trial without a jury and conviction based upon uncorroborated confessions gained through lengthy interrogation sessions.⁸² A person who wishes to challenge a confession, according to the 1991 Amendments to the EPA, must establish prima facie evidence that not only was the confession involuntary, but that it resulted from torture, inhuman or degrading treatment, or violence or threats of violence.⁸³ The British eliminated a defendant's right to silence in 1988, allowing negative inferences to be drawn from a suspect's failure to answer a police officer's question⁸⁴ or volunteer information "material to the offence and which he could reasonably be expected to mention."⁸⁵ The combined effect of uncorroborated confessions and the abrogation of the right to silence create a Catch-22 that could ensure the conviction of a defendant whether she confesses to an offense or not, all without the practical reasoning of a panel of her peers.

77. See MaryAnn Dadisman, *The Irish Question: Into the Lion's Den; Britain Grilled on the Human Rights Issues of Northern Ireland*, HUM. RTS. Q., Summer 1994, at 14, 17.

78. Terrorist suspects do have the right to consult with counsel under the EPA and PTA, but not until after the initial forty-eight hour detention period ends. See Flaherty, *supra* note 39, at 112. After that point, the suspect may confer briefly and sporadically with counsel, but at no time does the suspect have the right to have a solicitor present during questioning. See *id.*

79. See Northern Ireland (Emergency Provisions) Act, 1996, ch. 22, sched. 1 (Eng.); Northern Ireland (Emergency Provisions) Act, 1998, ch. 9, § 2 (Eng.); Aolain, *supra* note 43, at 1378.

80. See *infra* note 86 and accompanying text.

81. See Northern Ireland (Emergency Provisions) Act, 1996, ch. 22, §§ 29-30 (Eng.).

82. See Myers, *supra* note 18, at 44-45.

83. See Flaherty, *supra* note 39, at 109 (quoting Northern Ireland (Emergency Provisions) Act, 1991, ch. 24, § 11(2)(b) (Eng.)).

84. See Myers, *supra* note 18, at 47; Criminal Evidence (Northern Ireland) Order, 20 N. Ir. Stat., No. 1987 (1988).

85. Criminal Justice (Terrorism and Conspiracy) Act, 1998, ch. 40, § 2(4)(a) (Eng.).

The emergency powers extend the government's powers of regulation to the associations and physical residence of Northern Ireland's inhabitants. The PTA allows the British government to forbid certain organizations and mete out punishment for membership in those organizations.⁸⁶ The PTA additionally permits the issuance of exclusion orders, removing any individuals if the Secretary of State "is satisfied that [the] person has been concerned in the commission, preparation or instigation of acts of terrorism."⁸⁷ Although review of exclusion decisions is available on the grounds of illegality, irrationality and procedural impropriety,⁸⁸ such appeals rarely meet with success, ultimately resulting in a form of internal exile.⁸⁹

Exclusion orders may result from the consideration of secret evidence from any of a variety of sources, relegating the accused to a position of helplessness, never discovering the nature and content of the allegations made against her.⁹⁰ The British government generally resorts to the limited remedy of exclusion when there is insufficient evidence to procure a conviction against terrorist suspects.⁹¹ Ironically, some higher profile exclusion cases have prevented the likes of Gerry Adams⁹² from entering Britain to speak at a conference in the London Parliament.⁹³

86. See Aolain, *supra* note 43, at 1354 n.6 (citing Prevention of Terrorism (Temporary Provisions) Act, 1989, ch. 4, §§ 1-8, 14 (Eng.)). The proscribed organizations are: the Irish Republican Army, Cumann na mBan, Fianna na hEireann, the Red Hand Commando, Saor Eire, the Ulster Freedom Fighters, the Ulster Volunteer Force, the Irish National Liberation Army, the Irish People's Liberation Organisation and the Ulster Defence Association. See Northern Ireland (Emergency Provisions) Act, 1996, ch. 22, sched. 2 (Eng.).

87. Ch. 56, § 5(1)(a) (1974) (Eng.), cited in Walker, *supra* note 60, at 11.

88. See Walker, *supra* note 60, at 20 n.107.

89. See Aolain, *supra* note 43, at 1384. Compare Walker, *supra* note 60, at 44 ("[E]xclusion was essentially a preventative security measure rather than a condemnatory judgment."), with Aolain, *supra* note 43, at 1385 ("[T]he notion that persons are considered dangerous in one part of the territory, but not in another, defies common sense, particularly given any understanding of the geography of the Northern Ireland conflict.").

90. See Aolain, *supra* note 43, at 1384.

91. See Walker, *supra* note 60, at 17.

92. Gerry Adams is the President of Sinn Fein, the political branch of the Irish Republican Army, and sat in the House of Commons from 1983-1992. See *id.* at 34. An exclusion order was entered against him in 1982. See *id.*

93. See *id.*

B. History of Terrorism Legislation in the United States of America

Political threats against the government and people of the United States have long held a prominent place in the national consciousness. Legislative attempts to control the "terrorist threat"⁹⁴ date back to the passage of the Alien and Sedition Acts in 1798.⁹⁵ In the twentieth century, the assassination of President William McKinley by anarchist Leon Czolgosz awakened modern America to the fear that foreign political violence would intrude upon domestic shores.⁹⁶ While the Alien and Sedition Acts grew out of the tempestuous political climate of a newborn nation, the assassination was a concrete action that prompted Theodore Roosevelt and Congress to create the Immigration Act of 1903.⁹⁷ The Immigration Act enabled the administration to exclude aliens based upon their belief or practice of anarchist principles,⁹⁸ a clear precursor to certain provisions of the AEDPA.⁹⁹ The legacy of the ideological exclusions espoused by the Immigration Act¹⁰⁰ grew with its re-enactment in 1907, adding polygamy to the list of forbidden beliefs.¹⁰¹ Both sets of legislation, however, dealt with the increasingly complex role that the United States played in world

94. See Martin, *supra* note 3, at 207-08. The government did not enact the Alien and Sedition Acts primarily to deal with terrorism, but to "persecute detractors of the political party in power," which could be analogized to modern domestic insurgents and, to some degree, international terrorists. *Id.*

95. Alien Act of June 25, 1798, 1 Stat. 570 (expired 1800); Alien Act of July 6, 1798, 1 Stat. 577; The Sedition Act of July 14, 1798, 1 Stat. 596 (expired 1801). The Alien and Sedition Acts targeted:

persons [who] shall unlawfully combine or conspire together, with intent to oppose any measure or measures of the government of the United States, which are or shall be directed by proper authority, or to impede the operation of any law of the United States, or to intimidate or prevent any person holding a place or office in or under the government of the United States from undertaking, performing or executing his trust or duty

Sedition Act § 1, *cited in* Martin, *supra* note 3, at 207 n.30.

96. See Keisha A. Gary, Note, *Congressional Proposals to Revive Guilt by Association: An Ineffective Plan to Stop Terrorism*, 8 GEO. IMMIGR. L.J. 227, 230 (1994).

97. Immigration Act of March 3, 1903, ch. 1012, 32 Stat. 1213.

98. See Gary, *supra* note 96, at 230-31; *see, e.g.*, United States *ex rel.* Turner v. Williams, 194 U.S. 279, 291 (1904) (upholding deportation of British national for declaration of anarchist affiliations).

99. Pub. L. No. 104-132, §§ 301-302, 110 Stat. 1214, 1246-50 (1996) (allowing Secretary of State to designate certain organizations as 'terrorist,' and prohibiting all fundraising on their behalf); *id.* §§ 401-413 (establishing exclusion and/or removal of alien members in terrorist organizations as designated by the Secretary of State); *see also* discussion *infra* Part II.B.1.

100. Pub. L. No. 162, ch. 1012, 32 Stat. 1213 (1903).

101. See Gary, *supra* note 96, at 231.

affairs and the new challenges to the authority and stability of the federal government, opening the door for further evolution in the American response to terrorism.

Congress endeavored to protect national security while guarding the civil liberties of the Bill of Rights with the enactment of the Espionage Act in 1917.¹⁰² Spawned by the complex international environment surrounding World War I,¹⁰³ the Espionage Act broadened its view beyond participation in a conspiracy¹⁰⁴ to encompass violent interference with foreign commerce¹⁰⁵ and counterfeiting.¹⁰⁶ The Espionage Act was amended with the Sedition Act of 1918 to additionally criminalize any activity that threatened the administration in power.¹⁰⁷

In 1940, Congress instituted the Smith Act,¹⁰⁸ a revisitation of the "guilt by association" doctrine espoused in the Immigration Act of 1903, to discourage membership in certain unpopular political groups.¹⁰⁹ Garbed in language calling to protect the American people from anarchy and civil chaos,¹¹⁰ the Smith Act enabled frightened isolationists to persecute members of the Communist Party and other similarly-situated individuals who held views unpopular with politicians.¹¹¹ Any individual involved in the writing, publishing or distribution of questionable material risked deportation or exclusion, with no consideration for the First Amendment

102. Espionage Act of June 15, 1917, Pub. L. No. 24, ch. 30, 40 Stat. 217 (1917).

103. See Martin, *supra* note 3, at 208-09.

104. Espionage Act tit. 1, § 4.

105. *Id.* tit. 4, § 1.

106. *Id.* tit. 5, § 2.

107. Sedition Act of 1918, Pub. L. No. 150, § 3, 40 Stat. 553, 553-54 (repealed 1921).

108. Alien Registration (Smith) Act, ch. 439, 54 Stat. 670 (1940).

109. See Jennifer A. Beall, Note, *Are We Only Burning Witches? The Antiterrorism and Effective Death Penalty Act of 1996's Answer to Terrorism*, 73 IND. L.J. 693, 697 (1998) (stating that the Smith Act allowed deportation based upon "past beliefs, advocacy, or membership in an organization that advocated forcible overthrow of the government. The key provision made . . . membership in any such organization illegal with a penalty of up to twenty years imprisonment." (footnote omitted)).

110. See John A. Scanlan, *Aliens in the Marketplace of Ideas: The Government, the Academy, and the McCarran-Walter Act*, 66 TEX. L. REV. 1481, 1494 ("The notion that communism was a fundamentally alien ideology, staffed by agents who took their orders from Moscow and directed inevitably toward subversion, world revolution, and the destruction of all democratic institutions . . . was deeply ingrained in the American psyche.").

111. See *id.*; see, e.g., *Dennis v. United States*, 341 U.S. 494 (1951) (affirming the conviction of the top eleven U.S. Communist party leaders under provisions of the Smith Act).

right to free expression that has historically commanded considerable protection.¹¹²

With the Korean conflict and the beginnings of the Cold War looming in the minds of Americans, a frenzied "Red Fear" blossomed into the Internal Security Act of 1950¹¹³ and, over President Truman's veto,¹¹⁴ the more renowned McCarran-Walter Act.¹¹⁵ Despite imposing a number of arduous obligations upon aliens,¹¹⁶ especially Communist party members,¹¹⁷ the McCarran-Walter Act survived the constitutional scrutiny of the Supreme Court.¹¹⁸ This Act, although following the progressive pattern of past legislation, went further than any preceding laws in the scope of its exclusionary powers.¹¹⁹ While it appears that Congress did not pass the McCarran-Walter Act to guard against what the modern world conceives as "terrorism," it arose out of a steadily tightening tradition of removing and monitoring individuals labeled as dangerous by an increasingly anxious majority.

112. See Gary, *supra* note 96, at 232. *But cf.* *Scales v. United States*, 367 U.S. 203, 275 n.8 (1961) (Douglas, J., dissenting) ("[T]he lovers of freedom cannot afford to sacrifice their moral superiority by adopting totalitarian methods in order to create a self-deluding sense of security. Suppression, once accepted as a way of life, is likely to spread.").

113. Ch. 1024, 64 Stat. 987 (1950). The Internal Security Act expressly targeted Communists and Fascists for exclusion. See Gary, *supra* note 96, at 232.

114. See Gary, *supra* note 96, at 232 ("President Truman, a staunch proponent of liberalizing immigration laws, vetoed McCarran-Walter, stating, '[s]eldom has a bill exhibited the distrust evidenced here for citizens and aliens alike . . .'" (footnotes omitted) (quoting President's Message to Congress Vetoing the Immigration and Nationality Act, 1952-53 PUB. PAPERS 441, 444 (June 25, 1952))).

115. Immigration and Nationality (McCarran-Walter) Act, 8 U.S.C. §§ 1101-1525 (1984).

116. See Gary, *supra* note 96, at 235 ("In short, McCarran-Walter gave government officials wide, unchecked discretion to exclude persons on ideological grounds, presuming aliens automatically guilty of being a threat to the United States because of their beliefs and associations.").

117. See Beall, *supra* note 109, at 698 ("The McCarran Act required the registration of all Communist Party members, prohibited any Party member from working in a defense facility, holding office with a labor organization, or, among other things, obtaining a passport, and sometimes required the deportation of past or present Party members.").

118. See *Communist Party of the United States v. Subversive Activities Control Bd.*, 367 U.S. 1, 103, 114 (1961) (refusing to declare McCarran-Walter Act unconstitutional despite First Amendment right of association and due process challenges).

119. See Gary, *supra* note 96, at 233. President Truman stated that "[t]o punish undefined activities departs from traditional American insistence on established standards of guilt. To punish an undefined purpose is thought control." President's Message to Congress Vetoing the Immigration and Nationality Act, 1952-53 PUB. PAPERS 441, 445 (June 25, 1952) (internal quotations omitted).

Government activity finally reached the Bill of Rights' resistance point when some anti-Vietnam protest groups gained the attention of intelligence officials in the late 1960s, garnering surveillance status in the early 1970s.¹²⁰ The FBI's Counterintelligence Program ("COINTELPRO") and the CIA's Operation Chaos compiled lists of thousands of questionable individuals that participated in anti-Vietnam protesting and other "subversive" activities.¹²¹ The intense surveillance of American citizens suspected of anti-government and, later, terrorist action threatened American civil liberties and became much too intrusive, arousing the attention of the Senate Select Committee to Study Governmental Operations with Regard to Intelligence.¹²² This Committee concluded that "the government and intelligence community had overstepped their authority and threatened Americans' civil liberties (i.e., privacy, free speech and freedom of association)."¹²³ Congress rejected the intense scrutiny authorized against Communists and foreigners called for by the Smith Act¹²⁴ and McCarran-Walter Act¹²⁵ when directed instead at American citizens. Congress' reaction briefly halted the march towards "tougher" and more unconstitutional antiterrorist measures.

The stark reality of international terrorism became an impetus for expansion of American terrorist legislation in the eighties. On October 7, 1985, terrorists allegedly affiliated with the Palestinian Liberation Organization ("PLO") hijacked the Achille Lauro cruise liner as it traveled through international waters in the Mediterranean Sea.¹²⁶ In the course of the hijacking the terrorists murdered Leon Klinghoffer, a physically-challenged American citizen.¹²⁷ The ensuing public fallout to the Achille Lauro incident resulted in innovations to antiterrorist legislation.

120. See Roberta Smith, *America Tries to Come to Terms with Terrorism: The United States Anti-terrorism and Effective Death Penalty Act of 1996 v. British Anti-terrorism Law and International Response*, 5 CARDOZO J. INT'L & COMP. L. 249, 259 (1997).

121. See *id.* (stating that COINTELPRO opened over five hundred thousand domestic intelligence files and Operation Chaos, in a six year period, "collected thirteen thousand files and other materials including the names of three hundred thousand people and organizations").

122. See *id.*

123. *Id.*

124. Alien Registration (Smith) Act, ch. 439, 54 Stat. 670 (1940).

125. 8 U.S.C. §§ 1101-1525 (1982).

126. See Smith, *supra* note 120, at 254 n.35 (citing Judith Miller, *Hijackers Yield Ship in Egypt; Passenger Slain, 400 are Safe; U.S. Assails Deal with Captors*, N.Y. TIMES, Oct. 10, 1985, at A1).

127. See *id.*

The United States extended its jurisdiction to foreign nationals involved in acts that harmed American citizens with the Omnibus Diplomatic Security and Anti-Terrorism Act of 1986.¹²⁸ This Act allowed United States officials to prosecute any individual found on American soil who had committed a terrorist act anywhere in the world against an American citizen.¹²⁹ The Anti-Terrorism Act of 1987¹³⁰ attempted to deal directly with the perceived terrorist threat posed by the PLO.¹³¹ This Act explicitly prohibited all fundraising on behalf of the PLO,¹³² and provided criminal punishment for anyone who attempted to further the interests of the PLO.¹³³

Under the Anti-Terrorism Act of 1987,¹³⁴ the Department of Justice attempted to shut down the PLO's Permanent Observer Mission to the United Nations that the Headquarters Agreement¹³⁵ expressly authorized.¹³⁶ The PLO resisted the Department of Justice's action in *United States v. Palestinian Liberation Organization*,¹³⁷ and the New York Southern District Court kept the Permanent Observer Mission open.¹³⁸ The same court, however, upheld the Anti-Terrorism Act of 1987¹³⁹ when sixty-five American citizens challenged it on First Amendment free speech and free-

128. Pub. L. No. 99-399, 100 Stat. 855 (1986) (codified as amended in scattered sections of 22 U.S.C.; most recently amended by Pub. L. No. 103-415 (1994)).

129. See Smith, *supra* note 120, at 256-57.

130. 22 U.S.C. §§ 5201-5203 (1987).

131. See Smith, *supra* note 120, at 257.

132. See *Mendelsohn v. Meese*, 695 F. Supp. 1474, 1476 (S.D.N.Y. 1988). Congress aimed the Anti-Terrorism Act of 1987 solely at the PLO, as "the PLO is 'a threat to the interests of the United States, its allies, and to international law and should not benefit from operating in the United States.'" *Id.* (quoting 22 U.S.C. § 5201(b)).

133. See *id.* (stating that the Anti-Terrorism Act of 1987 rendered illegal the behavior of any person who, "with the purpose of furthering the interest of the PLO: (1) [received] 'anything of value except informational material from the PLO'; (2) [expended] funds from the PLO; or (3) [established] or [maintained] an office" at the direction of the PLO (quoting 22 U.S.C. § 5202)).

134. 22 U.S.C. §§ 5201-5203.

135. Agreement Between the United Nations and the United States of America Regarding the Headquarters of the United Nations, done June 26, 1947, 61 Stat. 3416, 11 U.N.T.S. 11.

136. See Smith, *supra* note 120, at 258 n.67 ("The Headquarters Agreement prohibits the United States from restricting access of invitees to the U.N. regardless of the relationship between the United States and the invitee.").

137. 695 F. Supp. 1456 (S.D.N.Y. 1988) (holding that the PLO Observer Mission to the United Nations, lawfully established under the Headquarters Agreement treaty, cannot be shut down pursuant to the Anti-Terrorism Act of 1987, especially absent an explicit Congressional statutory instruction).

138. See *id.* at 1465.

139. 22 U.S.C. §§ 5201-5203 (1994).

dom of association grounds in *Mendelsohn v. Meese*.¹⁴⁰ The *Mendelsohn* court held that the Anti-Terrorism Act of 1987 may constitutionally “put a halt to the operations of the PLO in the United States apart from the Mission to the United Nations,”¹⁴¹ but does not prohibit an information office “which accepts no money from the PLO and in no sense purports to act in any kind of official capacity for the PLO.”¹⁴² In essence, the court’s ruling in *Mendelsohn* extended the constitutionally permissible control of suspect organizations within the United States from the exclusion powers of the McCarran-Walter Act.¹⁴³ Although Congress’ reaction to COINTELPRO and Operation Chaos in the early seventies¹⁴⁴ indicated that the government could not list and scrutinize suspicious individuals and groups, *Mendelsohn* allowed the government to legislate the permissible behavior of individuals claiming membership in designated groups.¹⁴⁵

With no immediate threat of terror, enlightened drafting and enforcement of antiterrorism legislation appeared with the Immigration and Nationality Act of 1990.¹⁴⁶ This Act temporarily derogated the untethered exclusionary principles of the McCarran-Walter Act to the annals of history.¹⁴⁷ Congress repealed all of those ideological grounds for exclusion, citing “actual participation in a terrorist act”¹⁴⁸ as a guideline for exclusion based upon national security.¹⁴⁹ Under the Immigration and Nationality Act of 1990, mere membership in the PLO was no longer sufficient grounds for exclusion, barring active involvement in an effort of

140. 695 F. Supp. 1474, 1476 (S.D.N.Y. 1988). Sixty-five plaintiffs brought varied claims that the Anti-Terrorism Act of 1987 “violates their rights to receive information and to engage in face to face dialogue.” *Id.* at 1477. Regardless of First Amendment violation allegations, the court held that the Act “may permissibly put a halt to the operations of the PLO in the United States[,] apart from the Mission to the United Nations” *Id.* at 1490.

141. *Id.*

142. *Id.*

143. 8 U.S.C. §§ 1101-1525 (1994).

144. *See supra* notes 122-125 and accompanying text.

145. 695 F. Supp. at 1474.

146. 8 U.S.C. § 1182(a)(3) (1994).

147. *See Gary, supra* note 96, at 240 (“With the repeal of the McCarran-Walter’s ideological exclusions, Congress finally refuted guilt by association as a guiding force in United States immigration law.”).

148. *Id.*

149. *See* 8 U.S.C. § 212(a)(3)(iii) (stating that an alien may be excluded for “any activity a purpose of which is the opposition to, or the control or overthrow of, the Government of the United States by force, violence, or unlawful means”).

political violence.¹⁵⁰ Unfortunately, the progressive changes of the Immigration and Nationality Act of 1990 were short-lived.¹⁵¹

II. CURRENT TERRORISM LEGISLATION

A. The Northern Ireland Provisions in 1998

With Ireland on the verge of peace, a brief eruption of violence in August, 1998¹⁵² set British antiterrorism legislation back onto its old course. The Northern Ireland (Sentences) Act,¹⁵³ which passed in July of 1998, provided for the possibility of declaring the IRA a legal organization and freeing 402 convicted terrorists within two years.¹⁵⁴ Moreover, Home Secretary Jack Straw spoke of repealing the internment provisions of the EPA¹⁵⁵ and allowing the exclusion powers to lapse.¹⁵⁶ In the aftermath of the Omagh bombing however, the British Parliament rushed¹⁵⁷ to enact the TCA.¹⁵⁸ Work-

150. Compare 8 U.S.C. § 212(a)(3)(iii), with Anti-Terrorism Act of 1987, 22 U.S.C. § 5202 (differing in that only a violent, terrorist acts by the PLO would warrant prosecution under the Immigration and Nationality Act of 1990, while the Anti-Terrorism Act of 1987 condemns *all* activity furthering the PLO's interests).

151. See discussion *infra* Part II.B.

152. See House of Commons Hansard Debates, Sept. 2, 1998, at col. 693, available in <<http://www.parliament.the-stationery-office.co.uk/pa/cm199798/cmhansrd/cm980902/debindx/80902-x.htm>> [hereinafter Hansard Debates] (statement of Tony Blair) (indicating that a 200 to 300 pound car bomb exploded on Market Street in Omagh on August 15, 1998, killing twenty-eight people and injuring over 200, the largest death toll from any one terrorist incident in Northern Ireland).

153. Ch. 35 (1998) (Eng.).

154. See John Mullin, *Bill Will Free Terrorists in Two Years*, GUARDIAN (London), June 6, 1998, at 11.

155. See *British to Enact Permanent Anti-Terrorism Legislation*, ASSOCIATED PRESS, Oct. 30, 1997 ("Straw also confirmed he would abandon the controversial policy of interning terrorist suspects without trial."); see also *Minister Wants Review of Powers*, IR. TIMES, Dec. 3, 1997, at 8.

156. See *Home Office: Government Announces Plans for Permanent Counter Terrorism Legislation*, M2 PRESSWIRE, Oct. 31, 1997.

The powers to exclude are draconian. . . . In the light of the recent developments in Northern Ireland, I have come to the conclusion that, at the present time, the exercise of these powers is no longer expedient to prevent acts of terrorism in relation to each of the 12 cases in question. I have therefore today revoked the last 12 orders.

Id.

157. The Criminal Justice (Terrorism and Conspiracy) Act pushed through the House of Commons and the House of Lords in two days during an emergency recall of Parliament. See George Jones, *Lib-Dem Conference: Leadership Is Attacked Over Anti-Terrorist Laws 'Passed in Panic'*, DAILY TELEGRAPH (London), Sept. 24, 1998, at 16. Accusations even flew about alleging that politicians used the Queen to speed the process: "The Queen signed a blank bit of paper. She didn't know what the Bill would be by the time it was finished. To allow that influence to be used during debate is comparable to Charles II entering the House of Commons." *Queen Was Manipu-*

ing in tandem with the newly amended and reenacted Emergency Provisions Act,¹⁵⁹ the Criminal Justice Act presents fresh ammunition for the war against terrorism in Northern Ireland.

Parliament's 1998 amendment of the EPA moved the expiration of the Act's temporary provisions to June 15, 1999,¹⁶⁰ and the expiration of the Act itself to August 24, 2000.¹⁶¹ The new EPA also repeals all prior provisions regarding the internment of suspected terrorists.¹⁶² Most importantly, however, section 5 of the 1998 Emergency Provisions Act requires that police officers "make a code of practice" of audio recording interrogations of individuals suspected of violating scheduled offenses.¹⁶³ Not only will this "practice" create hard incontrovertible evidence of the content of a suspect's statement or confession to the police, but the recording of interrogations will yield the residual benefit of dissuading officers from engaging in techniques that violate a suspect's civil rights. An audio tape can retain incriminating evidence against an overzealous member of the RUC just as easily as it can against a hardened criminal.

After years of renewing the PTA, British policymakers decided that the time had come for permanent anti-terrorism legislation,¹⁶⁴ embodied in the TCA.¹⁶⁵ The TCA retains most of the PTA's provisions,¹⁶⁶ but without the inherent restrictions of temporary legislation that require continual renewal and revision. While exclusion

lated, *Claims Benn*, BIRMINGHAM POST, Sept. 5, 1998, at 2 (quoting former Labour Cabinet Minister Tony Benn).

158. Ch. 40 (1998) (Eng.).

159. Ch. 9 (1998) (Eng.).

160. The EPA set its own expiration date at June 15, 1999, and Parliament has not yet passed a formal extension of the Act, although Northern Ireland Secretary Mo Mowlam has stated that she intends to further extend the Act's duration. See *Politics: Mo Holds on to Anti-Terror Laws*, BELFAST NEWS LETTER, May 14, 1999, at 8.

161. See ch. 9, § 1(3) (1998) (Eng.).

162. See *id.* sched. 2. There is no mention of section 14 of the 1989 PTA, the provision that grants authority for seven-day interrogations without charge discussed in Part I.A.2, anywhere in the 1998 EPA. The TCA gives only cursory reference to those provisions. See ch. 40, § 3 (1998) (Eng.).

163. See Northern Ireland (Emergency Provisions) Act, 1998, ch. 40, § 5 (Eng.); cf. Hansard Debates, *supra* note 152, at col. 867 (statement of Home Secretary Jack Straw) ("There are other safeguards. Since January, there has been a mandatory regime for silent video recording of all interrogations in Northern Ireland.").

164. See *Home Office: Government Announces Plans for Permanent Counter Terrorism Legislation*, *supra* note 156 ("The ceasefire in Northern Ireland and the possibility of achieving lasting peace there does not mean that we no longer need special legislation to investigate, to disrupt and to counter terrorism.").

165. Ch. 40 (1998) (Eng.).

166. See discussion *supra* Part I.A.2.

and internment have fallen to the cutting room floor, the police's broad investigatory powers, a defendant's denial of the right to inference-free silence and the scheduled offenses remain as strong as ever.¹⁶⁷

Parliament added a disturbing new twist to these already plenary powers by allowing into evidence the opinion testimony of police officers.¹⁶⁸ The TCA in part provides that "if a police officer of or above the rank of superintendent states in oral evidence that in his opinion the accused — belongs to an organisation which is specified, or belonged at a particular time to an organisation which was then specified . . . the statement shall be admissible as evidence."¹⁶⁹ Just as with the provisions abrogating the right to silence,¹⁷⁰ the police opinion section of the TCA states that an individual may not be convicted solely on the basis of such opinions,¹⁷¹ but makes no mention of whether a negative inference drawn from silence provides sufficient corroborating evidence to secure a conviction. The admissibility and impact of police opinions do not decrease because of an absence of evidence to back it up.¹⁷²

The TCA's standards extend from the borders of Northern Ireland to international "terrorist" organizations.¹⁷³ The government may enforce the Act with equal vigor against groups based in England that operate abroad.¹⁷⁴ The TCA could render illegal protest demonstrations against the Soviet presence in Estonia,¹⁷⁵ as well as support of the work of Nelson Mandela and the African National

167. See ch. 40, §§ 1-3 & scheds. 1-2 (1998) (Eng.). *But see* Rachel Donnelly, *IRT Home News: Ruling Could Make PTA Convictions Unsafe*, IRISH TIMES, Mar. 31, 1999, at 8 ("The Lord Chief Justice, Lord Bingham, said Section 16 of the PTA undermined a defendant's right to be presumed innocent until proven guilty. It reversed the burden of proof by requiring a defendant to establish that alleged terrorist items in his or her possession were for innocent purposes.").

168. See ch. 40, sec. 1, §§ 2A(2)-(3) & sec. 2, §§ 30A(2)-(3) (1998) (Eng.).

169. *Id.* sec. 2, §§ 30A(2)-(3)(a).

170. See *id.* sec. 2, § 30A(6)(b).

171. See *id.* sec. 2, § 30A(3)(b).

172. See *id.* sec. 1, §§ 2A(2)-(3) & sec. 2, §§ 30A(2)-(3). *But cf.* Donald Findlay, *Cut Crime, Not Corners*, SCOT. ON SUNDAY, Sept. 6, 1998, at 15

Why should we accept the opinion of a policeman? The duty of the police is to collect the evidence, not pass a judgement upon it. . . . Frankly, if the police are not able or prepared to produce that evidence, it seems to me that the mere statement is worth nothing and the innocent may be wrongly convicted.

Id.

173. See ch. 40, §§ 5-7 (1998) (Eng.)

174. See *id.*

175. See Sarah Schaefer, *Liberal Democrat Conference: Northern Ireland - Anti-Terror Measures 'Shocking'*, INDEP. (London), Sept. 24, 1998, at 10.

Congress against apartheid in South Africa,¹⁷⁶ and even the French Resistance during World War II.¹⁷⁷ Although many MP's¹⁷⁸ voiced concern regarding the broad international sections of the TCA,¹⁷⁹ it still passed the House of Commons by a vote of 220 to 24.¹⁸⁰

B. Antiterrorism and Effective Death Penalty Act of 1996

The AEDPA arose in the wake of the Oklahoma City bombing.¹⁸¹ Upon signing the AEDPA into law, President Clinton stated, "So let us honor those who lost their lives by resolving to hold fast against the forces of violence and division, by never allowing them to shake our resolve or break our spirit, to frighten us into sacrificing our sacred freedoms or surrendering a drop of precious American liberty."¹⁸² Unfortunately, some provisions of the AEDPA attempt to restrict terrorist activity at the expense of exactly those "sacred freedoms" America holds so dear.¹⁸³

1. Specific Provisions of the AEDPA

A large portion of the AEDPA provides new tools with which law enforcement and administrative agencies may combat terrorism.¹⁸⁴ Before many of these provisions can go into effect, the Secretary of State must first designate a group as a foreign terrorist organization.¹⁸⁵ On October 2, 1997, Secretary of State, Madeline

176. See Jones, *supra* note 157, at 16 (statement of David Howarth).

177. See *id.*

178. "MP" is a common British abbreviation for a member of Parliament. See T. R. Reid, *Redefining the U.K.; Scotland and Wales Elect First Local Parliaments Today*, WASH. POST, May 6, 1999, at A21.

179. See Peter Kellner, *Why We May Live to Regret This Rash New Terror Law*, EVENING STANDARD (London), Sept. 3, 1998, at 4.

180. See Hansard Debates, *supra* note 152, at col. 930. The Republic of Ireland is ironically moving towards its own legislation that somewhat mirrors the EPA and TCA. See Una Bradley, *Crackdown on Terror throughout Island*, BELFAST TELEGRAPH, Aug. 20, 1999.

181. See Martin, *supra* note 3, at 201-02.

182. *Remarks on signing the Antiterrorism and Effective Death Penalty Act of 1996*, 32 WEEKLY COMP. PRES. DOC. 717 (Apr. 29, 1996).

183. See discussion *infra* Part II.B.2.

184. Some of these tools, beyond the scope of this discussion, include the use of taggants in plastic explosives, greater cooperation between the CIA and FBI and increased funding for law enforcement. Taking the foreign jurisdictional extensions of the Omnibus Diplomatic Security and Anti-Terrorism Act of 1986 even further, the AEDPA grants civil standing to the aggrieved families of terrorist victims to sue terrorist-sponsoring states. AEDPA, Pub. L. No. 104-132, § 221, 110 Stat. 1214, 1241. The AEDPA also includes a section devoted to habeas corpus reform. See *id.* tit. I.

185. See 8 U.S.C. 1181 (1994), amended by Pub. L. No. 302, § 219(a)(1). See generally U.S. Dep't of State: *Daily Press Briefing*, M2 PRESSWIRE, Oct. 9, 1997 (statement

Albright designated thirty groups as foreign terrorist organizations.¹⁸⁶ Surprisingly absent from the list was the IRA, and the many other groups involved in the conflict in Northern Ireland.¹⁸⁷ These designations expire, unless renewed, after two years.¹⁸⁸ Although the courts may review and overturn designations,¹⁸⁹ some fear that this review power is illusory, and ultimately the political tide will determine which groups end up on the administration's hit list.¹⁹⁰

Extending the principle of guilt by association that was abandoned with the Immigration and Nationality Act of 1990,¹⁹¹ as well as raising First Amendment questions of free speech and freedom of association,¹⁹² the AEDPA criminalizes the giving of support to

of Press Secretary Jamie Rubin) (“[A] terrorist organization targets innocent civilians to make their political point.”).

186. See *Terrorist Organizations*, POST-STANDARD (Syracuse), Nov. 26, 1997, at B6; *USIA: Designation of Foreign Terrorist Organizations*, M2 PRESSWIRE, Oct. 9, 1997 (listing the designated organizations: Abu Nidal Organization, Abu Sayyaf Group, Armed Islamic Group, Aum Shinrikyo, Euzkadi Ta Askatasuna, Democratic Front for the Liberation of Palestine — Hawatmeh Faction, HAMAS, Harakat ul-Ansar, Hizballah, Gama'a al-Islamiyya, Japanese Red Army, al-Jihad, Kach, Kahane Chai, Khmer Rouge, Kurdistan Workers' Party, Liberation Tigers of Tamil Eelam, Manuel Rodriguez Patriotic Front Dissidents, Mujahedin-e Khalq Organization, National Liberation Army, Palestine Islamic Jihad - Shaqaqi Faction, Palestine Liberation Front - Abu Abbas Faction, Popular Front for the Liberation of Palestine, Popular Front for the Liberation of Palestine - General Command, Revolutionary Armed Forces of Colombia, Revolutionary Organization 17 November, Revolutionary People's Liberation Party/Front, Revolutionary People's Struggle, Shining Path and Tupac Amaru Revolutionary Movement).

187. See Brian Rohan, *IRA Omitted from Clinton's Terror List: Move Criticized by Unionists*, Sen. Diane Feinstein, IRISH VOICE, Oct. 21, 1997, at 7 (“The IRA is one of the oldest, most violent and indiscriminate of terrorist organizations in modern history Their omission may well be misread as an invitation to their membership to conduct fundraising and other activities in the [United States]”) (quoting Sen. Diane Feinstein)).

188. See *Designation of Foreign Terrorist Organizations*, *supra* note 186.

189. See *People's Mojahedin Org. v. United States*, No. 97-1648, 1999 WL 420471, at *5-6 (D.C. Cir. June 25, 1999) (holding that a court may review the Secretary of State's determinations that an organization is foreign and engages in terrorist activity, but not her determination that the organization's activities threaten national security).

190. See *Counterterrorism Legislation Hearing Before the Subcomm. on Terrorism, Tech., and Gov't Info. . . . on S. 390 and S. 735*, 104th Cong. (1995) [hereinafter *Cole Testimony*] (“[T]he statutory definition of ‘terrorist organization’ is so open-ended — encompassing literally tens of thousands of potential organizations, and hundreds of thousands of affiliated organizations and persons — that it effectively gives the President carte blanche to blacklist groups and attach criminal consequences to the designation.” (testimony of David Cole, Professor, Georgetown University Law Center)).

191. 8 U.S.C. § 212(a)(3)(iii) (1994).

192. See discussion *infra* Part II.B.2.

designated terrorist organizations.¹⁹³ Congressional leaders hoped to weaken the strength of terrorist organizations by cutting off access to support systems, for "terrorism is not a self-sustaining enterprise. It needs money and supplies to succeed."¹⁹⁴ As current legislation already prohibits fundraising and contributions to a group's terrorist actions,¹⁹⁵ this ban extends to the humanitarian activities of organizations deemed terrorist.¹⁹⁶ Congress decided to enact this extension of criminal liability in support of the peaceful and legal branches of designated groups because "foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct."¹⁹⁷

Immigrants' status in the United States became more tenuous with the passing of the AEDPA. The Act provides for the exclusion of foreigners and deportation of resident aliens who violate certain criteria.¹⁹⁸ Foreigners affiliated with a designated terrorist group will have a hard time gaining any kind of visa or entry into the United States.¹⁹⁹ In addition to the penal sanctions risked by ordinary citizens associated with terrorist groups, legal resident aliens easily could face deportation, as can those immigrants who have engaged in certain criminal activity.²⁰⁰ The AEDPA has broadened the latter category of deportable aliens by removing some exceptions previously available to those who had committed particular crimes,²⁰¹ and who had lived legally in the United States for at least seven years.²⁰² The logic behind this latest form of American exclusion is that "immigrants allowed to live in the

193. See Antiterrorism and Effective Death Penalty Act of 1996 Pub. L. No. 104-132, §§ 303, 321-330, 110 Stat. 1214, 1250-58.

194. Albright, *supra* note 7.

195. See Cole Testimony, *supra* note 190 (citing 18 U.S.C. § 2339A).

196. See Beall, *supra* note 109, at 699; Humanitarian Law Project v. Reno, 9 F. Supp. 2d 1176, 1204-5 (C.D. Cal. 1998) (granting preliminary injunction of plaintiffs who wish to provide humanitarian support to the Tamil Tigers and the Kurdistan Workers' Party).

197. § 301(a)(7), 110 Stat. at 1247; see also *U.S. Dep't of State: Daily Press Briefing*, *supra* note 185 ("[W]hen it comes to taking down the infrastructure, our rule of reason is [that] that infrastructure provides assistance to the military wing . . ." (statement of Press Secretary Jamie Rubin)).

198. See tit. IV, 110 Stat. 1258-81.

199. See Smith, *supra* note 120, at 269.

200. See *id.*

201. See *id.* at 271 (listing examples of deportable offenses including: "aggravated felony, controlled substance violation, firearm offenses, and two or more crimes involving moral turpitude").

202. See *id.*

United States should not be committing crimes,"²⁰³ and criminal aliens should not even get past the border.

To facilitate the deportation process, the AEDPA established special removal courts.²⁰⁴ In a similar vein as the Diplock courts,²⁰⁵ the removal courts' procedures eliminate due process protections, effectively streamlining the deportation action.²⁰⁶ The AEDPA discards the Federal Rules of Evidence in deportation hearings,²⁰⁷ allowing the use of unlawfully obtained evidence by the government.²⁰⁸ Invoking the questionable doctrine of national security, Congress also allows the government to use secret evidence against individuals in removal hearings.²⁰⁹

While *United States v. Reynolds*²¹⁰ permits the protection of secret information, "[i]t is . . . the firmly held main rule that a court may not dispose of the merits of a case on the basis of *ex parte, in camera* submissions."²¹¹ *Reynolds*, however, only prevented the discovery of secret government documents in the context of civil claims.²¹² The *Reynolds* Court explained that such privilege has no place in a criminal context because, "the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense."²¹³ Although a deportation hearing is not a criminal prosecution, they bear a closer resemblance than a deportation hearing and a civil trial.²¹⁴ The

203. *Id.*

204. *See id.* at 268-69.

205. *See* discussion *supra* Part I.A.2.

206. *See infra* notes 210-16 and accompanying text.

207. Pub. L. No. 104-132, § 401, 110 Stat. 1214, 1260 (amending the Immigration and Nationality Act, 8 U.S.C. § 1534(h) (1999)).

208. *See* 8 U.S.C. § 1534(e)(1)(B). ("[A]n alien subject to removal under this subchapter shall not be entitled to suppress evidence that the alien alleges was unlawfully obtained . . .").

209. *See id.* § 1534(e)(1)(A).

210. 345 U.S. 1 (1952) (holding that the head of a governmental department, in this case the Secretary of the Air Force, may assert privilege protecting military secrets to prevent discovery of an airplane crash report by plaintiff widows of deceased servicemen).

211. *Abourezk v. Reagan*, 785 F.2d 1043, 1061 (D.C. Cir. 1986), *aff'd*, 484 U.S. 1 (1987).

212. *Reynolds*, 345 U.S. at 12.

213. *Id.*

214. *Compare* *Reno v. American-Arab Anti-Discrimination Comm.*, 119 S. Ct. 936, 947 (1999) ("While the consequences of deportation may assuredly be grave, they are not imposed as a punishment."), *with id.* at 950 (Ginsburg, J., concurring) ("As this court has long recognized '[t]hat deportation is a penalty — at times a most serious

permissible use of secret evidence creates an environment for dangerous and unjust decisions, such as the situation that befell Ellen Knauff in 1950 when the Immigration and Naturalization Service (“INS”) denied her entry into the country based upon frivolous secret evidence provided by a jilted former lover of her husband.²¹⁵ While Congress “may prescribe conditions for [a lawful resident alien’s] expulsion and deportation, not even Congress may expel him without allowing him a fair opportunity to be heard.”²¹⁶ The removal provisions of the AEDPA tread precariously near this line.

2. Response to and Ramifications of the AEDPA

Aside from the increased police powers,²¹⁷ the AEDPA raises a number of controversial issues. Challenges to the AEDPA’s fundraising ban on First Amendment free speech and association²¹⁸ grounds are currently pending.²¹⁹ The AEDPA gave the President the power to condemn individuals for their affinity to the political ideals of designated terrorist groups.²²⁰ The AEDPA goes even

one — cannot be doubted.” (alteration in original) (quoting *Bridges v. Wixon*, 326 U.S. 137, 154 (1945)), and *id.* at 956 (Souter, J., dissenting). In his dissent, Justice Souter voiced the concern that

The interest in avoiding selective enforcement of the criminal law . . . is that prosecutorial discretion not be exercised to violate constitutionally prescribed guaranties of equality or liberty. This interest applies to the like degree in immigration litigation, and is not attenuated because the deportation is not a penalty for a criminal act

Id. at 956 (citations omitted).

215. See *Counterterrorism Legislation Hearing Before the Subcomm. on Terrorism, Tech., and Gov’t Info. . . . on S. 390 and S. 735*, 104th Cong. (1995) (testimony of Gregory T. Nojeim, Legislative Counsel, American Civil Liberties Union) (citing ELLEN KNAUFF, *THE ELLEN KNAUFF STORY* xv-xvi (1952)).

216. *Kwong Hai Chew v. Colding*, 344 U.S. 590, 597-98 (1953); see also *Rafeedie v. INS*, 880 F.2d 506 (D.C. Cir. 1989) (affirming preliminary injunction against an INS attempt to use secret information to exclude permanent resident alien); *Rafeedie v. INS*, 795 F. Supp. 13 (D.D.C. 1992) (holding government’s attempt to use secret evidence to exclude alien unconstitutional).

217. See James Ledbetter, *Press Clips: Hello Ollie!*, VILLAGE VOICE, June 4, 1996, at 22. A passage in the legislative findings of the AEDPA says, “the President should use all necessary means, including covert action and military force, to disrupt, dismantle, and destroy international infrastructure used by international terrorists, including overseas terrorist training facilities and safe havens.” *Id.* (quoting AEDPA § 324(4)). “What Reagan and Oliver North did illegally, any President now has the legal authority to do.” *Id.* (quoting former Gov. Jerry Brown).

218. See Beall, *supra* note 109, at 700; Cole Testimony, *supra* note 190.

219. See *ADL Brief Urges Court to Uphold Anti-Terrorism Act*, U.S. NEWSWIRE, Sept. 15, 1998 (indicating that *Humanitarian Law Project v. Reno* awaits decision on constitutionality of fundraising ban in appeal to the Ninth Circuit Court of Appeals).

220. See discussion *supra* Part II.B.1.

further to forbid individuals from providing humanitarian aid to such groups, many of whom provide food, shelter and education to an otherwise oppressed people.²²¹ Although the United States Supreme Court has yet to directly rule on the constitutionality of the AEDPA's fundraising provisions, the Ninth Circuit Court of Appeals held in *American-Arab Anti-Discrimination Committee v. Reno*²²² that "targeting individuals because of activities such as fundraising is impermissible unless the government can show that group members had the specific intent to pursue illegal group goals."²²³

The deportation components of the AEDPA may remove unwanted aliens from American shores, but overzealous enforcement²²⁴ has had unanticipated results. Many legal alien residents have been deported for reasons unrelated to terrorism, raising questions regarding the validity of the AEDPA. Hundreds of long-term residents have gone abroad on vacation to be met by arresting officers upon their return.²²⁵ Lorraine Paris provides one such example: INS officials detained Ms. Paris upon her return to New York from her honeymoon because of a late 1970's marijuana conviction.²²⁶ Additionally, once the government ejects these "crimi-

221. *Compare Plaintiffs Seek Right to Aid Groups on U.S. Terror List*, WASH. POST, Mar. 20, 1998, at A22 (referring to lawsuit arguing that plaintiffs should be able to donate food, clothing and other items to orphanages and refugee centers run by the Tamil Tigers), and Ben Barber, *Controversy Dogs People's Mojahedin: State Lists Hill's Heroes as Terrorists*, WASH. TIMES, Apr. 22, 1998, at A15 (indicating that "224 members of Congress had signed a statement urging the United States to support the [People's Mojahedin]. . . . 'One man's terrorist is another man's freedom fighter'" (quoting Rep. Gary L. Ackerman)), with ADL Brief Urges Court to Uphold Anti-Terrorism Act, *supra* note 219 ("[G]roups like Hamas use the schools, mosques and clubs they fund 'to recruit individuals to serve as suicide bombers,' and then provide support for their families 'once the attack has been carried out.'" (quoting ADL brief)).

222. 119 F.3d 1367 (1997), *vacated*, 119 S. Ct. 936 (1999) (refusing to resolve First Amendment issue as the Illegal Immigration Reform and Immigrant Responsibility Act deprives the court jurisdiction over claim). *But see* 119 S. Ct. at 948 (Ginsburg, J., concurring) ("[I]nterlocutory intervention in Immigration and Naturalization Service (INS) proceedings would be in order, notwithstanding a statutory bar, if the INS acts in bad faith, lawlessly, or in patent violation of constitutional rights.").

223. *American-Arab Anti-Discrimination Comm.*, 119 F.3d at 1376.

224. *See* James Ridgeway & Jean Jean-Pierre, *Crime Story: The U.S. Exports Its Bad Boys Back to Haiti*, VILLAGE VOICE, Oct. 22, 1996, at 31 ("According to the Immigration and Naturalization Service 33,159 aliens have been deported so far this fiscal year, up from 32,347 a year ago. 'I am very confident that we will meet and exceed our goal of 62,000 total removals (final deportations) for this year.'" (quoting David Martin, general counsel, INS)).

225. *See* Antonio C. Campo, *New Anti-Terrorism Law Harsh to Immigrants*, FILIPINO REP., Aug. 8, 1996, at 20.

226. *See id.*

nal" aliens from the United States, they return to their native countries, bringing their problems with them. Newly deported Haitian-born criminals have increased the size of existing zenglendo gangs and now risk overrunning the already unstable nation.²²⁷ While it may not be a major concern of the United States if Haiti becomes a criminal playland, American foreign policy officials would not like to see the military intervention that returned Jean-Bertrand Aristide's administration to power go to waste.²²⁸ The broad powers and discretion granted by the AEDPA invite inconsistent, unexpected and sometimes catastrophic effects.

III. NEW DAY RISING?

Governments have historically implemented a number of failed antiterrorist policies.²²⁹ In order to properly form legislation to prevent terrorism, however, one must first understand the roots and goals of terrorist action. "[T]errorist violence is aimed specifically at influencing not so much government decision makers or leaders of governments, but civilian populations: to have a psychological effect on that audience in the hopes that they will pressure government into either submitting or overreacting."²³⁰ The United States, paralleled by Great Britain, has consistently refused to buckle to terrorist action, instead leaning towards the latter extreme of over-legislating. It is such overreaction that undermines the foundation of civilized society and yields the very results sought by terrorists.²³¹

One unfortunately typical response to terrorism focuses on eliminating the threat by relocating or isolating it.²³² Exclusion orders in Britain and deportation in America both attempt to remove dangerous factors from society. This strategy can never succeed

227. Compare Ridgeway, *supra* note 224, at 31, with Walker, *supra* note 60, at 17 ("After all, removal to Northern Ireland, the heartland of paramilitary activity against the British state, seems to increase rather than decrease the opportunity for military engagement.").

228. See Ridgeway, *supra* note 224, at 31 ("The gangs, swollen by recent U.S. deportees, are pushing the country further and further back into just the sort of chaos the U.S. Army rescued it from . . .").

229. See Martha Crenshaw, *Unintended Consequences: How Democracies Respond to Terrorism*, FLETCHER F. WORLD AFF., Fall 1997, at 153, 156.

230. *Id.* at 154.

231. See Tam Dalyell, *Obituary: Roger Slott*, INDEP. (London), Aug. 10, 1999, at 6 (stating that long-time Labour MP Roger Slott believed that "the powers in the Emergency Provisions Act weakened the core principles on which a civilised society is based. That in itself was of assistance to terrorists in their evil campaign [of] violence").

232. See Crenshaw, *supra* note 229, at 157.

because moving a volatile element does not defuse its destructive power, but merely transplants it.²³³ Exclusion of a suspect between states, or from a country entirely, arbitrarily deprives liberty, free travel, access to family and nothing else.²³⁴ Further, partial action towards individuals loosely associated with terrorist groups often tends to tighten their binds to the organization, forcing people underground and "increas[ing] recruitment into the deeply clandestine armed groups, which exacerbate[s] terrorism."²³⁵ By excluding or deporting a suspected terrorist, a nation often pushes an individual out of its bed and into the arms of her devoted terrorist brethren. The United States would be better advised to zealously prosecute the people with clear and unequivocal ties to the violent activities of a terrorist enclave.

Improving security measures in hopes of preventing terrorist strikes produces some reasonable results in the short term.²³⁶ The fatal flaw with this approach remains that terrorists have increasing access to newer and more powerful technologies to evade such security procedures. Terrorists rarely identify with individual sponsor-states, now instead favoring mobile, transnational structures.²³⁷ No matter what precautions a country takes, "[t]errorists have an inherent advantage They can attack anywhere, any time. And you cannot protect everything, everywhere, all the time."²³⁸ Nations can proportionally increase their fortifications in response to each new technological breakthrough, but at what point does this Pyrrhic war resolve anything? Right now in America, "[t]he technology exists for imposing an Orwellian state with unprecedented degrees of control."²³⁹ While temporarily complicating attacks and providing some peace of mind, improving security measures ultimately will not end terrorism, it is merely a delaying tactic.

233. Cf. Walker, *supra* note 60, at 17 ("[C]riminal charges are preferable if sufficient evidence is available to sustain them, for imprisonment is a more effective method of prevention.").

234. See Aolain, *supra* note 43, at 1384.

235. Crenshaw, *supra* note 229, at 157.

236. See *id.* at 158.

237. See Carla Anne Robbins & John J. Fialka, *A Step Behind: Despite Tough Words, Antiterrorism Effort in U.S. Is Still Flawed*, WALL ST. J., July 22, 1996, at A1 ("It's impossible to know where to send a Tomahawk missile to punish these guys" (quoting a senior State Department official)).

238. *Id.* (quoting Brian Jenkins, deputy chairman, Kroll Associates).

239. *Id.* (quoting Brian Jenkins, deputy chairman, Kroll Associates); see also William Greider, *The Cyberscare of '99*, ROLLING STONE, Aug. 19, 1999, at 51 (exploring the Clinton administration's fear of terrorist strikes at American utilities and economic centers over the internet and government plans for cyber-countermeasures).

The most extreme, and obvious, response to terrorism lies with military force. However, this approach often causes more harm as increased terrorist casualties augment the terrorist motive for revenge, feeding the perception that their terrorist campaign is really a "holy war" against unjust oppression.²⁴⁰ "The IRA admits it cannot overthrow British rule through military might; its goal is to simply outlast the British."²⁴¹ England has made much more progress towards lasting peace by sitting down at a table with republican leaders than America has by refusing to negotiate with terrorists. Military intervention generally results in greater bloodshed on both sides of the gun, as evidenced by the bombing of Pan Am flight 103 in retaliation to America's raid on Libya.²⁴²

While some believe that terrorists cannot be understood nor reasoned with,²⁴³ the situation in Northern Ireland illuminates the assistance a working knowledge of a movement's past can impart. In analyzing British history and legislation, the "failure of policy and implementation led the authors of one comprehensive study to conclude that '[t]he [United Kingdom] is not 'above' the [Northern Irish] problem, it is an integral part of that problem.'"²⁴⁴ The restrictive policies implemented by the British have reinforced the historical feelings of oppression at the core of Northern Ireland's "Troubles" and, in so doing, magnified them. American politicians must learn from their British counterparts. Neither reviving the exclusionary principles of the McCarran-Walter Act, embracing the McCarthy-ist paranoia of foreign foes, nor following the English restrictions on due process, will end the long struggle against terrorism. This rash of antiterrorist law charting the "politics of the last atrocity" does not attack the root of terrorism. Political reality must not define constitutional reality. The American colonists threw off the yoke of British rule for a reason: they did not like Britain's laws and policies.

The primary distinction between the terrorist threats to Britain and those to America lies in the fact that Britain's problems primarily come from within, while America's are primarily external.

240. See Crenshaw, *supra* note 229, at 159.

241. Myers, *supra* note 18, at 32.

242. See Crenshaw, *supra* note 229, at 159.

243. See Steven Emerson, *Stop Aid and Comfort for Agents of Terror*, WALL ST. J., Aug. 5, 1996, at A18 ("An effective counterterrorism policy must begin with the understanding that terrorism is the product of an extremist ideological culture, and it can only be fought using a complete moral, political and military arsenal.").

244. Myers, *supra* note 18, at 61 (quoting LIAM O'DOWD ET AL., NORTHERN IRELAND: BETWEEN CIVIL RIGHTS AND CIVIL WAR 208 (1980)).

The same discord lies within both countries' "enemies," however. Opposed to the old days of isolationism,²⁴⁵ the United States now plays a hyperactive role in world affairs, yet seems reluctant to truly immerse itself in the global environment. The recent negotiations with Republican paramilitaries and Middle-Eastern fundamentalists have brought all concerned parties closer to resolution than the EPA, TCA and AEDPA. True bilateral discourse engenders equality and understanding, two of the United States' founding virtues. The designation provisions of the AEDPA²⁴⁶ only distance the United States further from the rest of the world and should therefore be repealed. Police agencies pursue groups that actively embrace violence, and there is no need then to further blacklist any other organizations that appear threatening. The same principles that gave birth to America must inform its approach towards legislation, encouraging a complete shedding of traditional egoism and the genesis of an interactive, organic worldview.

Terrorism must be recognized for what it is: just another form of organized crime.²⁴⁷ Future legislation should de-emphasize individual military action and instead reorient the American criminal justice system towards an international scale. The State Department must establish closer ties and stronger lines of communication with foreign states. Cooperation and coordination with foreign law enforcement agencies can efficiently and effectively achieve both national and international security goals.

Punishment of terrorists and individuals who support terrorist violence is laudable, but revisiting well-documented historical calamities is hardly a wise decision. Disciplining the exercise of the Constitutional rights of free speech and association and exiling individuals who hold unpopular views cannot be justified by the vain hope that such precautions will dissuade extremist paramilitaries from attacking the next Alfred P. Murrah building. The provisions of the AEDPA prohibiting charitable contributions to "designated" organizations²⁴⁸ serve only to further alienate American

245. See *supra* notes 88-101 and accompanying text.

246. Pub. L. No. 104-132, § 302, 110 Stat. 1214, 1248 (1996).

247. See Albright, *supra* note 4, at 33 ("Terrorism is not a legitimate form of political expression or a manifestation of religious faith. It is murder."); cf. Marilyn Manson, *Columbine: Whose Fault Is It?*, ROLLING STONE, June 24, 1999, at 23, 77 ("Isn't killing just killing, regardless if it's in Vietnam or Jonesboro, Arkansas? Why do we justify one, just because it seems to be for the right reasons? Should there ever be a right reason?").

248. See § 303, 110 Stat. at 1250.

and foreign citizens, many of whom only wish to help in what they perceive as an honorable cause. The State Department should never tolerate aid given to groups that wage campaigns of violence, but lines of allegiance among charitable organizations are sometimes admittedly difficult to discern. The uncertainty involved in such designations and the real chance of hasty or misguided certification serve as further reasons to stop forcing government officials from forging black and white out of a myriad shades of gray.²⁴⁹ The similar mutation of due process in deportation hearings fosters further paranoia and injustice. For fear of arbitrary persecution, law enforcement should only pursue an alleged terrorist group and its members/benefactors after gathering evidence sufficient for substantive action, and a “conviction” should only be supported by evidence that would stand up in court.

The AEDPA will not aid American efforts to combat international terrorism, and should be repealed. A comprehensive realignment of United States foreign policy towards international cooperation, grass-roots reform, meaningful dialogue and effective criminal legislation can break the cycle of fury.

CONCLUSION

America likes to think of itself as a nation founded upon principles of liberty and equality. Lest our policymakers forget, the founding fathers disavowed British imperialism through the Declaration of Independence, rejecting oppression and government intrusion into the lives of everyday citizens. Despite the United States' close ties with Great Britain, there is no reason to follow in the mistaken footsteps of British antiterrorist legislation that tramples the civil rights held so dear by those who claim America as their home, and by those who hope to partake of the rights some politicians seem either to take for granted or to ignore. Immigrants of all races and creeds founded America, and the exclusion and removal elements of the AEDPA deny the diversity and liberty that built the United States. British laws dealing with Northern Ireland fail exactly because they do overlook this vital and basic need of all peoples to be free from persecution and secure in their individual sovereignty. Legislation plays an important role in America's anti-terrorism scheme, but “[u]nless it is carefully crafted — with an abundance of checks and balances against the

249. Some could view the economic support of certain mainstream politicians as a threat to national security.

possibility of overzealous enforcement — we may one day look back and wonder whether the terrorists actually achieved their goal of undermining American society.”²⁵⁰ The Anti-Terrorism and Effective Death Penalty Act of 1996 is not a salvation from terrorism but a step into the past.

250. *The Second Wakeup Call: Coping with Terrorism in the Nineties: Hearings on S. 390 and S. 735 Before the Subcomm. on Terrorism, Tech. and Gov't Info.*, 104th Cong. (1995) (testimony of Robert Kupperman, Senior Advisor, Center for Strategic and International Studies).