INTRODUCTION

This book will discuss what would have been known in the late 19th and early 20th centuries as “positive” or “public law—today referred to as legislation, statutes, codes, administrative rules, ordinances, and the like. All of these legal forms share the characteristics of comprising a short, simple statement of a legal principle, applicable to any behavior in a geographically relevant area: for example, “Spitting on the street in Kalamazoo is a tort.” Legislation thus comes from uniformly applicable codes of law rather than rules derived from the outcome of the adjudication of litigated cases: e.g., “The case of Rex v. Queen held that a defendant’s expelling of saliva from her mouth onto the sidewalk was a tort.”

The pragmatic difference is that bodies like the U.S. Congress adopt a legal principle which word-for-word applies to conduct in question. Legislation and its progeny do not require speculating as to the legal meaning of a governmental decision on a particular set of facts. Although adjudication has the advantage of providing a specific context to interpret a rule of law, it has several disadvantages: inaccurately or vaguely stated facts, treatment of cases with similar but not necessarily identical facts, and different courts’ emphases on the same facts. Adjudication is a highly useful means of building up a consensus of legal treatment for particular forms of human behavior, but it does not provide a clear rule for deciding disputes between individual and institutional parties.

The discussion below as to trial by ordeal is only partially to provide a perhaps flippant introduction to the distinction between legislation and adjudication. These practices obviously originated in an era which lacked either an effective legislative body—not to come until
centuries after the Magna Carta in Appendix A—or a credible system of courts and other decision-makers. Its tongue in cheek overview of medieval dispute resolution is accurate to the extent of showcasing a variety of adjudicatory modes which no treat even half-way seriously. More important, it points up the basically unregulated system of choosing a procedural form of decision-making or the substantive rules applied. In all seriousness, any of the ordeals described would be a more palatable if it specified the tribunal to hear a case and the rules of law to apply to it.

Despite these considerations, even today law students spend almost all of their first year and a majority of their second and third years studying the details of case decisions and the resulting rules. New lawyers thus cut their teeth almost exclusively on the results of litigation, with little emphasis on legislation except to the extent that it may be lurking in the background of a decision—e.g., a Uniform Commercial Code provision in a Contracts course.

The most significant aspects of a case in contracts, torts, civil procedure, and other fields may involve the ultimate application of a statute of limitations. But reading and class discussion tend to focus on the nature of an alleged substantive wrong; little attention usually is paid to policy, background, or interpretation of the statute, even though it ultimately determines whether a case is timely enough to proceed in the first place.

As always is true in the law, this distinction between legislation and adjudication is largely overblown. On the one hand, courts exercise a large amount of leeway and creativity in interpreting the supposedly clear language of statutes—particularly provisions as specific as “public interest, convenience, and necessity.” On the other, different lower courts may have totally different interpretations of statutory language, inviting appellate courts to choose their
own approach—just as with conflicting lower court adjudications. The difference thus is one of degree, rather than of kind.

Despite these caveats, it may be useful to begin by contrasting at least the nominal characteristics of legislation and adjudication. “Trial by ordeal” is an extreme form of adjudication, even though no developed or emerging country has seriously considered it since the 19th Century.
CHAPTER I
HISTORICAL OVERVIEW:
DEVELOPMENT OF LAW AND REGULATION

A. MEDIEVAL FUN AND GAMES

A HISTORY OF “TRIAL BY ORDEAL” (2014)

Arallyn Primm

[M]any of the trials were easily manipulated by the administering judges (or priests) to “prove” a verdict that they thought was correct. Still, some authors * * * say that in a society that unflinchingly believes in the efficacy of these trials, the ordeals and ordealists would have resulted in the “correct” verdict more often than not. After all, if a person was guilty, but believed that the trials always showed the truth, they’d be unlikely to be willing to undergo them—the punishment for pleading guilty was almost always far more lenient than the punishment for being “shown” to be guilty under trial by ordeal.

Though the trial by ordeal was forbidden by Pope Innocent III in 1215, its prevalence in Europe continued to be wide enough that it even came over to colonial America. Other trials by ordeal were also found throughout India, Southeast Asia, and in many parts of Africa. Both the Ramayana (a Hindu epic) and the Old Testament (in the Book of Numbers) describe trials by ordeal. Even to this day, trial by ordeal is known to take place in Liberia, concerning many human rights organizations. Here's a brief rundown of 11 trials by ordeal.

Trial by Fire
The defendant on trial must pick an object out from within flames, or walk over hot coals. If they were burned in the process, they were presumed guilty. In the Hindu version of the trial by fire, a woman suspected of adultery must stand in a circle of flame, or on top of a pyre, and not be burned. This was exemplified by the trial of Sita in the Ramayana, who was said to have not had a single flower petal in her hair be wilted by the heat of the flames, for she was so pure the flames avoided her.

**Trial by Hot Iron**

A one-pound iron was heated in a fire, and pulled out during a ritual prayer. The defendant had to carry this iron the length of nine feet (as measured by the defendant’s own foot size). Their hands were then examined for burns. If the crime of the accused was particularly egregious, such as betrayal of one’s lord, or murder, the iron would be three pounds.

**Trial by Water**

The defendant was bound in the fetal position and thrown into a body of water. Contrary to popular belief, those that sank weren’t drowned but were hauled out of the water, and those that floated didn’t float because they could swim: If he or she floated, they were guilty, and if they sank, they were presumed innocent. This was the most common ordeal undergone in the New World, and was seen during the time of the Salem witch trials. A surprisingly high number of people were deemed “innocent” by this method, but it was largely the younger women and the
men who were exonerated in these trials. Their lower body fat levels probably helped them sink down in the water.

**Trial by Hot Water**

The arm was plunged elbow-deep into hot water, often to grasp a ring, stone, or holy object at the bottom of a cauldron. After several days, if no blistering or peeling was present, the defendant was presumed innocent. Since it was not always boiling water that was used, this was one of the most easily-manipulated trials for the ordealists to work over.

**Trial by Host**

Relegated to priests accused of crimes, or suspected of lying regarding someone else’s crime (perjury). The priest would go before the altar and pray aloud that God would choke him if he were not telling the truth. He would then take The Host (the holy eucharist), and if he was guilty of perjury or the crime, he would either choke or have difficulty swallowing. This had a degree of psychosomatic truth behind it, if the priest truly believed in the trial, but it was one of the easiest of the “trial by ordeal” ceremonies to overcome by the defendant.

**Trial by Ordeal Bean**

A trial of “Old Calabar” (Akwa Akpa—now part of Nigeria), involving the “E-ser-e,” or “the ordeal bean,” now known as the calabar bean (*Physostigma venenosum*). A common use was in trials where someone was accused of witchcraft. The defendant would ingest the calabar
beans. If they vomited up the beans, they were presumed innocent, and if they digested the beans they were presumed guilty. Most defendants who digested the beans were killed by their effects. The physostigmine effects of the calabar beans are similar to the effects of nerve gasses that have been used in war; they disrupt the communication between muscles and the nervous system, and the victim dies of asphyxiation when the diaphragm fails to respond.

* * *

_Trial by Diving_

This trial, found in India, Thailand, Burma, and Borneo, involved a test of breath-holding, and was most often used in disputes of contested cock-fights. Two stakes were secured beneath the water of a clear pond, and both parties involved in the dispute would dive and grasp onto a stake. Whichever claimant stayed beneath the water longest was declared to have truth on his side.

Our current court systems work best when those involved are skeptical, analytical, and not biased toward any one viewpoint, but in the days of Trial by Ordeal, the opposite would have been true—the more people involved in a case brought to “court” who were thoroughly vested in the idea that these ordeals were accurate in showing guilt and innocence, the more effective these trials were. The guilty would refuse the trials, and the innocent would undergo the trials with such confidence in their success that they would oftentimes succeed, even in a trial that hadn’t been “helped” along by the ordealists.
QUESTIONS

1. How clear is it that trial by ordeal was irrational or fraudulent? Might there have been some valid reasons for it?

2. To some extent could there have been a self-screening function? In non-scientific time, might a guilty party have feared that he or she would not be able to pass the ordeal in question and thus have refused to participate—thus creating a self-selected pool of at least some confessions? And was the prospect of picking up a hot object or sticking an arm into boiling water all that different from the state of mind created by modern police questioning techniques—for example, the currently challenged practice of lying to an accused as to the prosecutor’s evidence, such as the existence of a non-existent eyewitness? Does this suggest that only a person with an extremely high pain threshold or well-developed scamming skills would undergo an ordeal?

3. Does this suggest that ordeals yielded false positives? Would any sane person voluntarily thrust their arm into a cauldron of boiling water, or believe that they could outlast an adversary in holding their breath under water? If this were the case, should the assumptions have been reversed, and willingness to undergo an ordeal be considered a sign of anti-social behavior?

4. Medieval decision makers obviously probably never considered or simply disregarded these psychodynamic possibilities, The point of the exercise to them presumably was that it yields a quick, cheap, and intuitively accurate reading as to a party’s truthfulness and credibility. As long as no one worried too much about slaughtering the innocent and just outcomes, ordeals probably seemed like a perfectly sensible way of dispensing justice.
B. EARLY US DEVELOPMENTS

After a millennium of seat-of-the-pants jurisprudence, changes in the economic, technological, and social framework of Western society began to change all this. As discussed by Pitofsky and Bork below, considerations of both humanity and efficiency made this approach unacceptable. It simply was not good business for a manufacturer to force an effective employee to maim him or herself in a pot of boiling water or with a red-hot stone.

One approach to changing this approach was to make dispute resolution through adjudication more professional and precise. As seen in courses like Civil Procedure, this primarily took the form of creating codes of conduct and procedure, They led to regularization of case law through a variety of approaches: professional training for lawyers as well as judges (legal education); standardization of procedural rules (codes like the Federal Rules of Civil Procedure); creation of procedures to enhance fact finding (pleading and discovery); and creation of court structures to minimize and correct mistakes in dispute resolution (appellate courts).

Even the most carefully and efficiently crafted adjudicatory reforms, however, relied upon fact finding—usually based on testimony or documents—in an open courtroom. They did not include careful, detailed, or factually based considerations in a business-like setting. Although they did not pressure a litigant to make a case by potentially maiming him or herself, they did not maximize thoughtfulness in factually detailed and complicated questions.

By the time of the Civil War, the United States thus had developed an increasingly complex infrastructure, which naturally created its own variety of disputes to resolve—just as theft of a sheep or misuse of neighboring property did in medieval times. As Hurst explains, the
environment and aspirations of 19th Century America were far different from those of older European cultures. They demanded different methods of both detailed law-making and implementation. Creation of new general laws became largely the job of Congress and state legislature. Implementation of detailed new norms was largely the work of administrative agencies, as they arose somewhat later in the 20th Century.

While legislation and regulation grew into preeminent parts of U.S. legal culture, the general area of public law received remarkably little attention until the latter half of the 20th Century. Moreover, both increased legislation and creation of new administrative agencies created bitter ideological battles as well as a string of major Supreme Court litigations. Hurst points out that neither Congress nor agencies received much professional or academic attention until the last few decades, even though the forces behind their creation built steadily throughout the 19th Century.

James Willard Hurst

DEALING WITH STATUTES (1982)

1-3

Settlers from the Old World brought their old ways of life with them. The divisions of control among the family, church, neighborhood, School and law. New social configurations stimulated social inventions. The mixture of cultural ideas diluted the strength of each. At the same time the pace of the industrial revolution in this country exceeded the capacity for change of institutions -like the family - which grow by time consuming habit.

All this made people conscious of a need for legal regulation. The vastness of the United
States as well as sectional differences made federalism basic theme with Americans. The fact that men and women moved with such ease within the American class structure affected the place law took in their lives. It affected their attitude toward the lawyer. He always ranked high in our social hierarchy. As far back as 1830, the looseness of our class structure led not only lawyers but men and women in general to concern themselves with individual advancement. They enriched themselves on the new land and from the expanding markets, and were therefore content to leave public life to the lawyer. By training and means of livelihood he became one of the few who did the community's serious reading, spoke its thought, and struggled to bring together its diverse interests.

* * *

People did not regard either the state or the lawmakers with awe. To them government represented a tool to further ambition and energy. Because other institutions were weak, the law had much to offer in bounty and protection. Understanding this, we understand how it became natural for Americans to use law to win their partisan, business, or social ends.

* * *

Law school catalogs tell the story. Their evidence is a conservative measure of the extent of change; the schools blend the intellectual's curiosity about what goes on under the surface of events with the practitioner's stress on current business. Take five notebooks representing the year's work of a student at the Litchfield Law School in 1813: one notebook was filled with real property matters; one the student gave to forms of action, pleading and practice; about three
fourths of another to commercial law (especially bills and notes and insurance), about one third of another to contracts, with the remainder of the notebooks occupied by brief notes on a scattering of subjects (the headings of municipal law, master and servant, bailments, and chancery each taking less than 15 per cent of the contents of one notebook).

The Harvard Law School listed its texts for 1832-1833 as including real property, personal property, commercial and maritime law, equity, criminal law, civil law, the law of nations, and constitutional law. Its course list for 1870-1871 showed some widening of scope. The school required the study of real property, personal property, contracts, torts, criminal law and criminal procedure, civil procedure at common law, and evidence. The students might elect sales, bailments, agency, negotiable instruments, partnership, shipping, insurance, equitable jurisdiction and procedure, principal and surety, domestic relations, marriage and divorce, wills and administration, corporations, conflict of laws, constitutional law, and debtor-creditor relations, including bankruptcy. The list was a hodgepodge that had grown rather in response to the pressure of events than to an educational plan.

By 1940 the schools had widened their offerings in kind, as well as degree, but most legal education still lacked a broad plan. The schools still taught the staples: real property (but with more stress on the borrowing of the law of future interests in land for planned control of the passing of intangible wealth); contracts (but with greater bulk, and more stress on business deals); torts (with main attention now to accidental injuries from the use of machines); procedure, pleading and practice (but with stress on new remedies and efforts to simplify the field by legislation). New directions of emphasis in 1940 put the familiar titles in the shade. The
corporations course had new prominence, and the teaching of corporation finance, taxation, antitrust law, and patents further reflected the importance of the corporation and problems of the concentration of economic power. Novel marketing patterns showed their effect in courses treating constitutional protections to interstate commerce trade regulation, sales of goods, creditors' rights and seller’s security. Tensions of a tightly interlaced, mainly urban life prompted study of land use, zoning, municipal corporations, and due process of law in collision with regulatory legislation. Men in our society tended to group into more sharply defined interests; in the face of such divisions government within its limited capacity tried to bring the community together and to hold the balance of power. Law school catalogs gave indication of this pressure in the new fields of public utilities, civil liberty, labor relations, administrative law, and the new reach of constitutional law from high politics into the everyday affairs of the market.

* * *

Lawyers formed voluntary, selective bar organizations, and a handful of the bar, together with law teachers, saved standards of education and admission to the bar from collapse. At the same time administrative agencies took over new fields of legal control, and statute making showed new life, thanks to the legislative committee and the organized interest group. Such changes in agencies and procedures continued within a setting which crystallized before the critical ‘70s. Legal history speaks mainly, in this aspect, of efforts to fit old agencies to new facts, to work under the handicap of old forms, or to fight inertia and vested interest in order to effect change.
SOME PRELIMINARY THOUGHTS

1. How different was the first year law school 100 years ago as related by Hurst from that in current use today?

2. Was the curriculum oriented towards development of intellectual and professional skills or more towards hands-on and useful skills? Were the law students of that era being trained to deal with major transactions—i.e., mergers and acquisitions—or sales of real property? Has there been massive change between then and now?

3. Note that there were no clinical or similar courses. Was that the result of limited creativity or other factors, such as the nature of the practice?

4. Although not mentioned by Hurst, conspicuously absent by modern standards also were law reviews, journal, conferences and the like. What was the likely reason for that?

The emphasis on common law and limited use of legislation and regulation began to change shortly after the Civil War. Whether true or not, most contemporary observers credited the Union’s victory not on the quality of its troops, but rather on its ability to produce large amounts of war material quickly and inexpensively. After all, the Civil War introduced breech-loading rifles, machine guns, and steam-powered warships, and submarines to the lexicon of modern warfare. Although the technology of these weapons has evolved in the last 100+ years, the basic concepts developed in a relatively short period of time. And in turn this created major changes in the size, logistics, and strategies of U.S. businesses. Hurst focuses largely on changes in the technological and economic basis of American business in explaining the need for legislative and then regulatory systems.
A. THE RISE OF LEGISLATION

Statute law directly embodies governing standards and rules for major sectors of life in society—for the market economy (as in the law of corporations and fair trade practices), for non-market factors (as in care for preserving the human stock and natural resources), for a general range of social institutions, * * * Particularly in contrast stands the limited range of affairs determined by common law in the twentieth-century as compared with the prominence of common law in nineteenth-century public policy.

Yet the schools, the legal literature, and the legal profession have given remarkably little attention to the legislative process. Judge-made law is still the darling of the legal philosophers. Until recently legal historians have been content to piece together their stories almost wholly out of the action of courts.

* * *

B. THE RISE OF LEGISLATION: CIVIL WAR TO WORLD WAR II

Geography set some problems for law in this country, made some matters here of no account, affected the direction and emphasis of others. It was not often a prime mover. The decisive facts were the vast land areas and the wealth and variety of natural resources.
The physical setting worked to free us from legal traditions that might otherwise have bound us. The ocean limited the ideas freighted over from the common law and civil systems, great as was the effect of both. The country's size, rawness, and range of sectional differences in natural wealth and natural obstacles helped give our social relations a distinctive character.

* * *

The man-made physical setting - technology - was one of the great moving forces for change in American law. [T]he invention of the automatic reaper opened the way for a growth in farming that affected public-land policy and laid the basis for a tangle of speculation, credit, boom and bust, tariff and antitrust law; agriculture was thenceforth to be a major interest pressing upon the law. The rotary printing press and the telegraph made possible the modern newspaper. They facilitated vast circulation, broad markets, appeals to mass emotion and lewdness. Thus questions of trade-mark law, of libel, of free speech and press took on a new importance in our law.

The years after 1870 saw the truly massive impact of technological change. Men began to live always in the midst of machinery, the machines of factories, mines, railroads, street railways, and especially the automobile. Personal injury suits became of major importance. Who should bear the loss from personal injury was a legal issue with many facets; negligence became the greater part of the law of torts. The growth of cities was stimulated as well as limited by the improvement of transportation, building construction, and water supply. The expansion of the factory system and of commercial organization suitable to mass markets and to handling the
immense paper work of national and international commerce, insurance, and finance spelled new demands upon law. Urban habits changed the kinds and amount of crime. They aroused urgent demands for legal controls to handle the dangers that crowded living created for health, safety, and fair dealing. Class lines sharpened, as the United States switched to mass-production industry, shifted emphasis from skilled to semi- and un-skilled labor, and found profit in concentrating ownership and control. The law had to consider labor relations, and monopolies and combinations to restrain trade. Patent law began by rewarding the ingenious individual and ended with concern for the uses that big business made of patent privileges. People found that, willy-nilly, they had lost power to fend for themselves and were dependent mainly upon others for things that had to be made or done if all were to have food, shelter, clothing, and the comforts of a rising standard of living. Society was more sensitive to the threat that vital services might be stopped, or ransom demanded for them; new means of mass communication made possible a new demagogy; unplanned, undesired, too-swift change could outdate machines and processes overnight and unsettle jobs and hopes. Through all these different channels came new demands that the law be used to guard social order and to direct the pace and direction of change.

* * *

C. FACTORS IN THE RISE OF LEGISLATION

The relatively short time span back of most of our legal history shows the pace of change in the man-made setting of the law. We need only to recall the familiar story. Fulton's Clermont made its successful trip up the Hudson in 1807, and in 1831 a steamboat first traveled the upper
Missouri. Steam trains began to run from Charleston to Hamburg, South Carolina, in 1833; in 1852 the first train ran from Philadelphia to Pittsburgh; in 1869 the first transcontinental line was finished; from 1860 to 1900 railway mileage grew from 30,000 to 166,000 miles, and to 240,000 miles by 1940. The first telegraph line opened between Washington and Baltimore in 1844; the first telephone message was sent in 1876; Edison's electric power plant began operation in New York City in 1882.

* * *

Population is an index that, like the growth of communications, marks the rush of change. Wisconsin had 305,000 people in 1850; 776,000 in 1860; 1,055,000 in 1870; 1,315,000 in 1880; and grew at the rate of about 300,000 each ten years, to 3,138,000 in 1940. From 1850-1860 Minnesota went from 6,000 people to 172,000. Population shifts were as great. In 1789 only about 3 per cent of the people lived in cities, and only 5 cities had over 8,000 people; by 1890 about one third of the people lived in towns of 4,000 or more; American life began to be overshadowed by the rise of great cities.

The use of natural resources typically followed the same headlong course of development. The law has no very proud story to tell of itself, for example, in connection with the destruction of the Wisconsin forests. There was no serious attempt to control waste of this natural wealth until the great damage had been done. But, in fairness, we must read this story in light of the fact that the lumber industry rose, flourished, and fell to minor rank in Wisconsin in about thirty years, and in a raw, youthful state, whose institutions had no seasoning to help them
meet questions of the kind thrust upon them.

A second point to note is that we must use some caution in sizing up the part that particular individuals played in the growth of the law. We like to bring things down to life size by tracing what happened to the doings of specific people. * * * But neither reason nor evidence supports any idea that the individual has played any greater or lesser role in the growth of law than he has in any other aspect of social life. If individual names seem to bulk large in English legal history, this is probably an illusion fostered by the relative smallness of the stage. The American story has more breadth and sweep, if a shorter time span. In it, we see that individuals have prominence according to how far they were able to express their time or foretell the generation to come, rather than according to their ability to change the direction of social currents.

* * *

In the first three quarters of the nineteenth century the performance of Congress and the state legislatures showed relatively limited and unskillful use of their endowments. The bulk of the statute books consisted of highly particularized measures; statutes of broad policy or general reach were relatively few and reflected little bold programming or implementation. The state scene especially showed highly fragmented, ad hoc, unorganized lawmaking; for example, in Wisconsin between the first legislature of 1849 and the legislature of 1872 (following amendment of the constitution to forbid most special or local legislation), each year a pencil-thin volume of "general" laws stood dwarfed alongside a two- to four-inch-thick volume of "private and local" laws. The impression of fragmented, ad hoc, unorganized
legislative action is not mistaken. This was for the most part the character of early and mid-nineteenth-century legislative process. Sessions were short. Most legislators were inexperienced in government, and there was substantial turnover in membership. Committee systems were undeveloped and committees had no staff to contribute continuity or learned skill. There was no sustained tradition of policy leadership from the White House. State constitutions had created a weak executive, and until the end of the nineteenth century state governors set no precedents for programming legislative action.

* * *

So, also, nineteenth-century legislators made little use of their potential for setting standards or rules of behavior in the general community. At least for the years before the 1870's this outcome does not seem to have been the product of any doctrinaire philosophy of laissez faire. True, society committed to market dealings the regulation of the bulk of decisions on allocating economic assets. But through most of the century this pattern reflects more a taken for granted acceptance of the administrative utility of the market than the product of a felt need to protect the market from threat of legislative invasion; legal protection of market autonomy emerged more through common law than through legislative contests.

Despite its obvious imperfections and limitations, nineteenth century legislative process was by no means without vitality in the two other principal domains of authority. From our national beginnings statute law embodied major components of social and legal order. Recognition of this fact may be useful as a caution against underestimating twentieth-century legislative process because of the imperfections we see in it.
Chief executives eventually emerged as leading sources of initiative of will to obtain passage of bills. Under Washington, Hamilton's reports on monetary and fiscal policy set early precedents for presidential leadership, not only in mustering the will to action but also in fashioning the substance of programs. Jefferson seized the opportunity to lead Congress in implementing the purchase of Louisiana.

QUESTIONS

1. Why was legislative performance so “limited and unskillful?” Was this just the product of unfamiliarity with the logistics and procedures of drafting and adopting statutes? Would today’s 150 years of experience with the mechanics have made legislators more active and forthright?

2. But why did inexperience result in lack of skill? To be sure, before the Civil War most politicians and businesspeople were not familiar with the operation, economics, and long-term social effects of technology such as reapers and telegraphy—the first making production more efficient, the second allowing faster price dissemination and trading. But to a large extent the operational and hence legal issues tended to define themselves. The new technology created a ménage a trois—and accompanying tensions—among farmers, railroads, and commodities traders. By the 1870’s the farmers formed themselves into Grangers, trade associations concerned with what they viewed as underpayment for their produce by telegraph-based traders
and excessive transportation charges by railroads. Telegraph carriers fought that they viewed as excessive government regulation. And railroads feared what attempts at increased regulation by state and local regulatory agencies. As the first large-scale economic administrative agency, with jurisdiction somewhat ironically over both telegraphy and railroads, the Interstate Commerce Commission in 1887 became the bogeyman of most sectors of the economy.

3. Regardless of the inside baseball aspects all these relationships, why would the relative newness of extensive legislative involvement necessarily be either “limited” or “unskilful?” Although Congress and the state legislatures obviously were learning new skills with the legislative process, was this much different from the technical and financial skills which went with the development of a newly mechanized economy? The long-term development of telegraphy, mail, and long-distance trade, as discussed below, were icons of the simultaneous movement of law making from adjudication to legislation.

4. Or were the 19th Century legislators deficient in their skills? Today virtually all federal and local representatives have university and often graduate education—with a perhaps disproportionate emphasis on law then as now. In the 19th Century, few legislators had any higher education at all, let alone any form of bachelors or higher degree. (For a lively description of the intellectual prowess of most members of Congress, have a look at Gore Vidal’s somewhat fact-based novel, *Burr.*

5. Or were there structural flaws in the developing legislatures, simply because of the ventures’ newness? By the end of the 20th Century, Congress and most state bodies had a pretty good idea of how to process newly submitted bills into potential statutes. In a prior world which
had relied—albeit decreasingly--on scalding or burning people as a form of decision making, however, the idea of a committee system, debate in two separate legislative houses, negotiations in a conference committee and the like would have seemed senseless and a waste of time. Although the current system still accommodates some influence-peddling, political manipulation, and outright bribery, there is a uniform, written, and generally accepted approach to doing legislative business. There is a short and amusing account of cultural differences between medieval and relatively modern attitudes towards government procedures in one of Mark Twain’s often overlooked novels, *A Connecticut Yankee in King Arthur’s Court*. 
C. THE RISE OF ADMINISTRATIVE AGENCIES

Largely in parallel step with the increased use of legislation in the 19th Century was the growing reliance of regulatory agencies in the 20th. The phenomenon was hardly surprising, since even a Congress of 535 members could not effectively supervise more than 500 federal agencies. Moreover, as discussed before, legislation often was much more detailed than traditional common law holdings, requiring still more time and attention. And as outlined later, during the New Deal agencies became a political tool under President Franklin D. Roosevelt. For example, in creating the then new National Labor Relations Board, it was easy for the Administration to insure that its internal procedures and decision making staff leaned in the President’s direction. This naturally was less than popular with opposing interests in the business and related communities, and naturally led to political and legal warfare in Congress and the courts, as indicated *infra*.

Nelson discusses the 19th Century lead-up to all this. As is evident, he picks up on some of the same theme as in Hurst’s discussion about the development of legislation. Once again, the sheer physical nature of the still new United States played a large role in shaping the structure, role, and powers of these then strange new entities.

**William Nelson**

*The Roots of American Bureaucracy (1982)*

[Remember that Hurst placed considerable significance upon the particular economic and logistical characteristics of law and business in the post-Civil War United States. The literal topography of America created business issues not present in Western Europe—perhaps justifying his heavy emphasis upon the early development of what then was viewed as “new
technology”—particularly steamboats, railroads, and telegraphy. And the sheer size of the new country created problems which had not been encountered in Europe. He thus emphasized the geographical need to develop solutions to new problems.]

* * *

2. THE PHYSICAL SETTING OF THE LAW IN THE UNITED STATES

Geography set some problems for law in this country, made some matters here of no account, affected the direction and emphasis of others. It was not often a prime mover. The decisive facts were the vast land areas and the wealth and variety of natural resources.

For over one hundred years the land itself was a prize that stirred men to scheme and fight in making and manipulating laws and legal procedures; party ambition, economic interest, and hope of social advance all bore hard upon the law here. Men speculated or invested in land and used it as both a source and object of credit. * * *

* * *.

Communications were basic to national growth in a country of vast distances. Promoters early brought pressure on government to help transportation; later on, users of transportation pressed for its regulation of the strongest political forces, some of the most warping influences, mixed with these issues. No one thing was more important in the rise of the administrative process, and nothing brought more discredit to the legislative branch, than the influence of "the railroad." Measured by the few people who were on hand to claim and use Them, we had a wealth of natural resources.
In these raw-material states, business, politics, and thinking swirled about the issues of the debtor-creditor relationship. Both in fact and in the eyes of their people, states like Wisconsin, Michigan, Oklahoma, or Montana stood, or still stand, in a colonial relation to the Eastern states. The Easterners had the capital, the manufacturers, and the markets on which the younger states depended. Out of this background men made strong movements in the law. They wanted the state to dictate the law to railroads and other public utilities; they wanted the government to manage money and credit, to make them "easier"; they wanted government to take steps to save natural wealth and to plan the use of land for the greater benefit of average people; they wanted to tax wealth that was flowing out of their home states; they wanted the federal government to spend money where it would help to even out the level of national well-being.

The man-made physical setting - technology - was one of the great moving forces for change in American law. This was so before the Civil War. [Afterwards] the invention of the automatic reaper opened the way for a growth in farming that affected public-land policy and laid the basis for a tangle of speculation, credit, boom and bust, tariff and antitrust law; agriculture was thenceforth to be a major interest pressing upon the law. The rotary printing press and the telegraph made possible the modern newspaper. They facilitated vast circulation, broad markets, appeals to mass emotion and lewdness. Thus questions of trade-mark law, of libel, of free speech and press took on a new importance in our law.

* * *

Thus the law cast the protection given to "property" about interests of more intangible
kind, as businessmen found value in those intangibles. The growth of mass production industry, national markets, and nation-wide advertising moved the law to recognize broader rights in trade-marks and trade names, to which trade or customer acceptance had attached commercially valuable secondary meanings; and finally, the law began to give wider protection to the general reputation represented by an established mark or name. Industrial combination, and later financial manipulation of big industry and commerce, offered new prizes in profit, power, and social status. * * *

[The Post Office] had special importance in two ways. First, it did not ship mail by itself; instead mail was shipped by private contractors. Those contractors made a good deal of money; for example, the contract for the thirty-one-mile route between Hagerstown, Maryland and McConnellstown, Pennsylvania was worth $1,400 per year, and the combined contracts from Baltimore to Washington and Baltimore to Wheeling, Virginia, were worth $57,000. Moreover, the number of contracts was large: by 1835, the number of contractors and their immediate dependents was over twenty thousand and they received almost $2 million from the post office. Before the appointment of Amos Kendall as postmaster general in 1835, the department had let most contracts to its "old and faithful contractors" who had delivered the mail for long periods, through changes of administration, without regard to their politics. Kendall ceased favoring contractors who had carried the mail in the past and instead favored those whose politics were more acceptable to the administration. Together with post office employees, these contractors and their employees constituted a sizable army whose economic interests ensured their loyalty to federal law and administration policy.

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Although control of the post office would by no means guarantee total control of the dissemination of news and political opinion, the post office could surely help to manipulate political opinion and maintain social order, as it did when it refused to deliver abolitionist tracts in the South. The franking privilege that local postmasters possessed until it was taken from them by statute in 1845 also aided in manipulating news and opinion.

* * *

The customs office similarly relied on economic incentives as a means of exercising political control. Again, the potential for power in the service rested in part on the number of available places: by the 1850s the service in New York alone employed close to one thousand. Those thousand, however, were only the tip of the iceberg. The real power of the collector and his staff was their control of the speed with which imported goods cleared the port and the appraisal and classification of goods and hence the tax imposed on them.

* * *

The land office was as politically significant in the newly emerging states of the West as the customs service was in the port cities of the East. In 1833 there were fifty-three land districts throughout the West; in 1837, there were sixty-two. Each district had its own staff, and in addition there was a staff of 8 surveyors general and 126 deputy surveyors. By 1840 the cost of this administrative machinery was nearly $350,000 per year. Money paid out in salaries, however, accounted for only a small part of the land office's significance. * * * The land operations of the federal government gained added importance because they gave rise to disputes requiring administrative and sometimes congressional adjudication. Congress alone struggled during the century with between 30,000 and 35,000 claims covering some 45 million acres.
The objective, however, often was not clearly seen as separate from the objective of ending special privileges of aristocrats, and in fact the two were related. First, they were related in the rather obvious way that office could not be given to faithful political partisans until it had been taken away from its traditional aristocratic holders. Second, the idea of rotation - "a leading principle in the republican creed" that sought to ensure access to office on the basis of equality rather than of privilege - increased the strength a party brought to office by increasing the number of those who could hope someday to hold it. The point is that men who expected to gain office within months or even a few years, whether by rotation of their own party members or by an electoral victory of the opposition party, would join with current officeholders to support and even increase official power.

* * *

Essentially, the reformers were seeking to transform the process of governmental decisionmaking from one in which those in power simply allocated the spoils of office among the party faithful into one that compelled administrators to act in accordance with autonomous, abstract standards. This concern with compelling officeholders to act objectively necessarily led not only to reform in the means of obtaining office but also to reform of abuses, as legislation relating to the postal service, the customs administration, and the land office demonstrates.

* * *

In the last third of the century, Congress enacted a complex series of reforms in the awarding of postal contracts. Congress outlawed these and some similar practices by a major piece of reform legislation in 1872, which required the post office to comply with detailed requirements for advertising before receiving bids for contracts, prohibited the award of
additional compensation except in narrowly specified circumstances, compelled bidders to give security for the performance of their contracts before their bids would be opened, and even made failure to perform a bid accepted by the government a misdemeanor. The new requirements explicitly excluded contracts made with railroads, which by the 1870s had become the principal carriers of domestic mail; although the legislation set the rates of compensation for railroads, it gave the postmaster general discretion to make contracts with whichever roads he chose.

* * *

The administration of customs was also depolicized [sic]. The political power of the customs service had rested largely on the ability of agents to practice favoritism in classifying and appraising the goods of friendly merchants. Those efforts culminated in the Customs Administration Act of 1890, which established a Board of General Appraisers, consisting of nine men who were appointed by the president with Senate confirmation for unspecified terms but could be removed from office only for cause. This board, one of the earliest of the federal administrative agencies, rapidly built up expertise and precedent that gave agents standards to follow in individual cases; although the new standards did not eliminate all possibilities of favoritism, they did provide a gauge by which specific decisions could be measured if favoritism was suspected.

Reforms were also instituted in the General Land Office during the decades following the Civil War. An important element of the land office's business, it will be recalled, was the adjudication of competing land claims. During the 1860s and 1870s three volumes of adjudications were published privately, and in 1881 the government began publishing a regular series of reports. 25 Cases in the first volume of the government series illustrate how apolitical
and similar to the increasingly formalistic judicial process the adjudicatory process of the land office had become. With the introduction of standards into the land office, one of its high officials observed that the "business transacted here is really a profession in itself." Such an office needed to be staffed not by political partisans but by "able men of legal education and mature judgment." Professional lawyers were in fact brought into the land office with the creation in 1881 of the Board of Law Review, consisting of the commissioner of the land office and two law assistants, to adjudicate land cases; a third law clerk was appointed in 1882.

Meanwhile, standards were gradually being introduced elsewhere in the federal administrative system. As in the land office, the introduction of standards was often marked by the publication of agency decisions. * * * Throughout the federal government many jobs were also beginning to require special abilities, skills, and expertise. In the Department of Agriculture, for example, some newly developing jobs required scientific expertise, and others, statistical skills that could only be measured objectively. Throughout the bureaucracy, the introduction of office machinery such as typewriters and telephones created job opportunities for people with the technical skills needed to operate and repair them.

Thus, by the end of the nineteenth century the administrative process was coming to be understood, in accordance with the scientific ideal of reformers, as one that required trained experts who made decisions and otherwise performed their tasks in accordance with autonomous, abstract standards. This transformation was not complete by the end of the century, especially at the state and local level; but the direction of change had become clear despite the failure of some reform efforts.
The reformers met with a mixture of failure and success in their efforts to deal with perhaps the most difficult and important problem confronting late nineteenth-century government - the problem of railroad rate regulation. Numerous ills stemmed from railroad ratesetting practices in the late nineteenth century. In the words of the Senate committee that framed the Interstate Commerce Act of 1887, "no general question of governmental policy occupie[d] ... so prominent a place in the thoughts of the people....."
NOTES AND COMMENTS

1. Note that none of these three agencies was regulatory in nature, like many modern entities—e.g., with the Securities & Exchange Commission policing the stock exchanges, the Federal Communications Commission broadcasters and telephony, etc. They were more in the nature of government corporations, with missions of implementing legislative policy. To this extent, they largely followed practices in Western Europe—for example the postal telephone and telegraph providers, which now have largely morphed into private sector companies or a mixture—such as the UK mixture of the governmental British Broadcasting Corporation and the private Independent Broadcasting Company.

2. Agencies always bring with them a certain amount of political motivation, as was true of the Post Office, Customs, and the Land Office. What interests was each agency trying to please, and how? Businesses by providing easy approval of their practices? Workers or small businesses (known as “small dealers and worthy men”)? Ideological causes, such as land reform and wider distribution? Although it may seem bizarre by modern standards, the Post Office was perhaps the most powerful mass medium in the country, since it distributed content as well as third parties’ mail.

3. And what were the goals? Campaign contributions, although nothing on the order of billion-dollar budgets for television broadcast campaigns? Pleasing potential voters with jobs, land, and business opportunities? Remember that the number of qualified voters in the United States before the Civil War was in the thousands, not millions. When Tammany Hall came to power in New York City in the beginning of the century, there were only a few thousand voters in the entire City. Although winning votes still is important for any political organization today,
it does not allow a relatively small number of politicians and their supporters to control a city, state, or nation.

4. The first round of many reform efforts in US history before the Civil War obviously was less than successful. Offhand, it is less than clear why the establishment of professional staffs at the Land Office or Customs would have been effective, as opposed to being simply end-run—as may actually have been the case then and certainly was the result until the development of a well-articulated civil service after World War I. Did they in fact have much effect? Did the railroads manage to continue getting sweetheart deals from the Post Office? Was Customs biased to major merchants, despite the existence of a supposedly non-partisan board of overseers?

5. The importance of controlling government agencies thus was probably more important in the 19th Century than today. What does that suggest about who really controlled the increasingly important Congress—and through it, federal administrative agencies?
Competing Legislative and Regulatory Policies

The increase in Congressional legislation and the creation of new federal administrative agencies during the 19th centuries was driven largely by political considerations. By the Civil War, U.S. politics had developed into two large parties, both descended from British ideology.

Unfortunately for today’s readers, their labels have little relation to the two dominant parties of the last 50 years. Democrats drew their constituency from workers and small businesspeople—the “small dealers and worthy men” of the early antitrust laws. Indeed, it was no accident this party (the Democrats) was seen as representing rights of states and particularly rural areas, while the other one—the Federalists—advocated the development of big businesses in general and manufacturing in particular. It favored central financial control by the national government, particularly through a central Bank of the United States (of which there were several iterations). As Nelson points out, this dichotomy also had geographical boundaries, with differences between the Western (“raw-material”) and Eastern (manufacturing) states.

Paralleling this geographical and economic dichotomy was a difference in approaches, which was controlling during the growth of legislation and regulation during the New Deal and which still has a major influence on the shaping of public law. In simple terms, the last 50 years has seen continuing tension between legal developments based on encouraging an efficient marketplace as opposed to enhancing individual rights.

This ongoing friction is discussed below largely in terms of antitrust policy, since it tends to be most visible there. Although competition policy is only one of many legislative and regulatory concerns, it highlights the differences between the ideological approaches to “law and economics” issues. Almost all antitrust issues—which often arise within agencies’ jurisdiction—
involve a choice between efficient markets and humanistic values. They tend to invoke both ideological approaches, and thus are instructive in the wide range of governmental policies which are at issue in statutory policy and administrative regulation.

Robert Pitofsky  
THE POLITICAL CONTENT OF ANTITRUST  
127 U. Pa. L. Rev. 1051 (1979)

There probably has never been a period comparable to the last decade, however, when antitrust economists and lawyers have had such success in persuading the courts to adopt an exclusively economic approach to antitrust questions. In this paper, I will urge a different view. It is bad history, bad policy, and bad law to exclude certain political values in interpreting the antitrust laws. By “political values,” I mean, first, a fear that excessive concentration of economic power will breed antidemocratic political pressures, and second, a desire to enhance individual and business freedom by reducing the range within which private discretion by a few in the economic sphere controls the welfare of all. A third and overriding political concern is that if the free-market sector of the economy is allowed to develop under antitrust rules that are blind to all but economic concerns, the likely result will be an economy so dominated by a few corporate giants that it will be impossible for the state not to play a more intrusive role in economic affairs.

This view is not at odds with the central beliefs of both the “Chicago” and “Harvard” schools that the major goals of antitrust relate to economic efficiency—to avoid the allocative
inefficiencies of monopoly power, encourage efficiency and progressiveness in the use of resources, and perhaps, on fairness grounds, to maintain price close to cost in order to minimize unnecessary and undesirable accumulations of private wealth. Because interpretations that exclude all but economic concerns have lately become so influential, however, it is important to explain why economic concerns, although properly of paramount importance, should not control exclusively.

It can be argued that the political considerations discussed here are ill-defined and incapable of exact or even meaningful definition. Also, it will be difficult to balance vague concepts such as a fear of economic conditions conducive to totalitarianism against the efficiency loss of an industry structure that is disassembled or a series of business transactions that are disallowed. Finally, it may be that when such vague and controversial factors are introduced into antitrust considerations, some enforcement officials and judges will lose sight of the secondary role of these political factors and will distort and misinterpret antitrust policy. There is merit to each of these concerns. But despite the inconvenience, lack of predictability, and general mess introduced into the economists' allegedly cohesive and tidy world of exclusively micro-economic analysis, an antitrust policy that failed to take political concerns into account would be unresponsive to the will of Congress and out of touch with the rough political consensus that has supported antitrust enforcement for almost a century.

I. Political Values
Those advocating a non-economic dimension to antitrust should be as specific as possible about those concerns that they would include in an enforcement equation. The considerations I believe must be taken into account are described below; with respect to each, examples will indicate those enforcement areas or cases in which such considerations appear to have played a role. Also mentioned briefly are some non-economic considerations that do not have a proper role in antitrust enforcement, although they undoubtedly have influenced and will continue to influence many courts.

A. Fear of Concentrated Economic Power

If the choice were posed solely between monopoly power achieved individually, solely as a result of efficiencies, and government intervention to prevent concentration, the legislative history of the Sherman Act and the overwhelming weight of subsequent judicial interpretation would opt for monopoly power. The issue is rarely posed that way, however. Instead, there is characteristically a legal challenge to business behavior that produced or maintained monopoly power, or to mergers or cartel arrangements that tend to concentrate or coordinate market power, and a defense that the behavior or arrangements are efficient and therefore tend to contribute to consumer welfare.

* * *

Perhaps a few examples will help make the point more concrete. If General Motors were to announce a merger with IBM or United States Steel with Xerox, and if those mergers were part of a growing merger trend among the top Fortune 200, it seems unlikely that the legality of
those transactions would be fully explored from an antitrust point of view solely by an investigation of the extent to which one company bought products from the other or was a potential entrant into the other's product line. Alternatively, suppose that a single wealthy family were to acquire the leading newspaper in each of the twenty largest cities in the United States. One possible response would be enactment of special legislation to head off that development. If a bill were to become bottled up in committee, however, the Sherman Act should be sufficiently flexible to take into account that threat to political values. Finally, the bedrock antitrust rule that efficient, profit-maximizing conduct that would be legal if engaged in by a small company becomes illegal if part of an unreasonably exclusionary program to maintain monopoly power—for example, acquisition and aggressive enforcement of patents or a sales policy that encourages leasing over purchases—can only be understood in light of an antagonism to monopoly power because of political concerns and “in spite of possible costs.”

[Democracies] are systems of rules for constraining rather than mobilizing authority. They grow out of a struggle to control authority rather than to create it or make it more effective. They are therefore political systems that are, again, like markets. They practice decentralization, diffusion of influence and power, and mutual adjustments so that individuals in small groups rather than national collectivities can strive for whatever they wish.

It is sometimes argued that it is pointless to deconcentrate industries or to prevent increases in firm size in the name of protecting the political process because associations of small firms with a common interest are as effective (perhaps more effective because of the appearance of numbers) as larger business units pressing for particular political goals. A striking
initial point about this argument is that there are little or no relevant data one way or another on the question. However, the contention that groups of firms are the equivalent of a single firm in organizing to achieve political goals does fly in the face of what we know about firm behavior in the analogous area of cartel organization. We know that, given a large number of participants, different levels of efficiency and capacity, and different outlooks about the rewards of vigorous competition or cautious cooperation, cartels are notoriously difficult to organize and maintain. In the absence of contrary evidence, one might reasonably expect that the kind of uniform commitment to a single set of political goals that might constitute some threat to political stability should be much easier to organize, coordinate, and maintain when relatively few different political and economic interests need to be consulted.

* * *

Professors Blake and Jones have written:

Another political objective of antitrust is the enlargement of individual liberty. Not only are we interested in material well-being and distrustful of political power, but we also have a strong libertarian streak. In the absence of strong countervailing considerations, we favor freedom of action and the wide range of choice that freedom implies .... [T]he individual who wants to be an entrepreneur rather than an employee ought not to have his opportunities restricted by unnecessary barriers to entry, or by trade practices designed specifically to eliminate him from the field.

* * *
C. Avoidance of Political Interference

A level of industrial concentration that would raise a serious threat of provoking state nationalization probably is not present in the economy today. It is debatable whether there has been any significant recent increase in concentration among the top 200 American corporations; even if there were some increase in concentration, foreign competition and the improved ability of firms to market their products at greater distances from their home plants probably means that most markets are at least as deconcentrated today as they were twenty or thirty years ago. As a result, there are relatively few situations today in which a political dimension must be incorporated to explain a result. That need not always be the case, however. Technological developments or changes in world trade patterns may generate fierce pressures toward concentration. * * *

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Robert Bork

The Antitrust Paradox: A Policy at War With Itself (1978)

2-6

“The antitrust movement” as professor Richard Hofstadter remarks, “is one of the faded passions of American reform.”1 But Hofstadter goes on, and probably is not a paradox—“the antitrust enterprise has more significance in contemporary society than it had in the days of T.R. or Wilson, or even in the heyday of Thurman Arnold.” The very nearly simultaneous ‘collapse of
antitrust feeling both in the public at large and among liberal individuals” and our arrival at a state of affairs in which “the managers of the large corporations do their business with one eye constantly cast on the shoulders at the Antitrust Division” are probably explained, though Hofstadter does not quite make the causality explicit, by the fact that “antitrust as a legal-administrative enterprise has been solidly institutionalized in the past quarter-century.” The warning of fervor with the growth of organization, bureaucracy, and effective power is a familiar occurrence in both secular and religious movements.

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In all kinds of political weather the machinery of antitrust enforcement grinds steadily on, mindlessly reproducing both the policy triumphs and disasters of the past. Even when public and political enthusiasm for the harassment of business is at an ebb, the enforcement bureaucracy and the residual potency of the antitrust symbol remain strong enough to prevent the law’s mistakes from being retracted.

The full range of modern rules that significantly impair both competition and the ability of the economy to produce goods and services efficiently* * * ignore the obvious fact that more efficient methods of doing business are as valuable to the public as they are to the businessmen. In modern times the Supreme Court, without compulsion by statute, and certainly without adequate explanation, has inhibited or destroyed a broad spectrum of useful business structures and practices. Internal growth to large market size has been made dangerous. Growth by merger with rivals is practically impossible, as is growth by acquisition of customers or suppliers. Even
acquisitions for the purpose of moving into new markets have been struck down, as the law evolves a mythology about the dangers of conglomerate mergers. Cooperative ventures between independent businesses are outlawed through a misapplication of the sound policy against price fixing and market division. The Court has destroyed the most useful forms of manufacturer control over the distribution of products, requiring higher cost modes of reaching the public. it has needlessly proliferated rules about pricing behavior that have the effect of making prices higher and markets less effective allocators of society’s resources. The Court has done these things, moreover, on demonstrably erroneous notions of the economics that guide the law.

* * *

But there is more to fear than that, for the courts are of course not the sole generators of antitrust policy. A new era of antitrust expansion seems likely to begin in Congress, which is influenced by popular moods. There has always existed in this country a populist hostility to big business, a hostility that is currently reinforced by the suspicion that major corporations are somehow to blame for hardships that have their origin elsewhere, in the politics of OPEC, in federal regulation of natural gas prices—or in bad weather, for that matter.

The direction of new legislation is determined by the prevailing tone of public discourse. That discourse has in recent years been almost uniformly in favor of fresh antitrust assaults on business. Ralph Nader, though rather more voluble than most, expresses not untypical attitudes. “Antitrust,” Mr. Nader informed us a few years back, “is going to erupt into a major political issue because it is not just an esoteric issue for lawyers.” Rather it is “going modern and will
shed more and more of its complexities.” He was a true prophet: shortly thereafter, a Nader Study Group filed a report on something called “The Closed Enterprise System” which shed the complexities of antitrust so completely that the reader is given no hint of their existence. Indeed, both the tone and the message of the report are best paraphrased by Professor Richard Posner as suggesting “that if we would only stop thinking so much about the problem and throw the book at the bastards our monopoly problem would be solved.”

* * *

Such attitudes have, of course, found reflection in Congress. * * * We are urged, then by persons in and out of Congress, to throw the antitrust book at business in order to improve the quality of American life. One could wish that those who want to throw the book had taken the time to understand it. * * *Because antitrust’s basic premises are mutually incompatible, and because some of them are incorrect, the law has been producing increasingly bizarre results. Certain of its doctrines preserve competition, while others suppress it, resulting in a policy at war with itself. * * *Given the pace and direction of its development, the overriding need of antitrust today is a general theory of its possibilities and limitations as a tool of rational social policy.

* * *

A consumer-oriented law must employ basic economic theory to judge which market structures and practices are harmful and which beneficial. Modern antitrust has performed this task very poorly its version of economics is a mélange of valid insights and obviously incorrect – sometimes fantastic—assumptions about the motivations and effects of business behavior. There
are many problems here, but perhaps the core of the difficulty is that the courts, and particularly the Supreme Court, have failed to understand and give proper weight to the crucial concept of business efficiency. Since productive efficiency is one of the two opposing forces that determine the degree of consumer well-being (the other being resource misallocation due to monopoly power), this failure has skewed legal doctrine disastrously. Business efficiency necessarily benefits consumers by lowering the costs of goods and services or by increasing the value of the product or service offered; this is true
NOTES AND COMMENTS

1. What substantive evils is Pitofsky concerned about? What would be his agenda for the Federal Trade Commission—not an idle question, given the fact that he served as Chairperson of that agency?

2. Is the problem economic—i.e., large corporations taking advantage of “small dealers and worthy men.” Is it political, on the theory that big companies will be able to direct the nature of ideology and debate? In fact, is it an economic issue, a speech issue, or a bit of both?

3. If the problem is that efficient corporations tend to be big and thus have substantial economic power to abuse, does one set of values outweigh the other? Are individual rights clearly more important than efficiency—which in turn results in lower prices and higher quality for all?
CHAPTER II
LEGISLATION: PLAYERS AND PROCESS

A. THE FEDERAL LEGISLATIVE PROCESS: AN OVERVIEW

Every person is subject to multiple laws, at the federal, state, and local, levels. Most people are familiar with the concept of “Dual Sovereignty,” in which Federalism is rooted – whereby each citizen is subject to the laws of the United States as well as of each state where they reside, work, or travel to – the legislative process by which these laws are enacted is a broader concept. Moreover, the term legislation, used broadly, can refer to the process by which nearly every level of government – from the national down to the state and municipal – creates the legal framework within which society operates. Indeed any type of rulemaking not subject to the Administrative Procedure Act, is fundamentally similar to how an agency creates rules and regulations.

As discussed elsewhere,¹ the major analytically significant distinguishing factor between legislation and regulation is who is adopts them (which affects the process of adoption to a certain extent). In a nutshell, if a law is promulgated by elected federal and state governmental officials it is “legislation.” If, on the other hand, it is promulgated by appointees (through an authorizing statute) it is a “rule.” This chapter looks at the former, using the Federal legislative process as a guide quite a lot. The Library of Congress reports that during the 109th Congress (2005-2006) 10,558 bills and 143 joint resolutions were introduced, with the majority originating

¹ See Chapter [●] at pp. [●]
in the House of Representatives. For that reason, this section will examine a bill as introduced in the House, and which then makes its way to the Senate, noting differences in practices when the bill is originally introduced in the Senate.

I. Source of Authority

The United States Government’s authority to enact laws is derived, like all federal power, from the Constitution. Specifically, Article I of the Constitution provides that:

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.\(^3\)

* * * * *

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States: If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it.

If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law.\(^4\)

* * * * *

If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.\(^5\)

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3 U.S. Const. art I, § 1
4 U.S. Const. art I, § 7, cl. 2
5 U.S. Const. art I, § 7, cl. 2

52
This construct – passage by both houses, signature or veto by the president, and a congressional override by a two-thirds vote – is deceptively simple, and many terms that have become part of our everyday lexicon (like “filibuster” and “cloture”) are nowhere to be found.

As Chief Justice Marshall wrote in *McCulloch v. Maryland*, “we must never forget that it is a constitution we are expounding.” 17 U.S. (4 Wheaton) 316, 407. Thus, while the Constitution tells us “what” power Congress and the President have, it tells us very little about “how” that power is exercised. By way of illustration, compare Figure 1, a graphic representation of the process outlined in Article I, and Figure 2, an outline of the steps which a typical bill would be expected to go through:
Figure 2

Figure 2.6

6 Source, Lexis Nexis available at:
http://www.lexisnexis.com/help/cu/the_legislative_process/how_a_bill_becomes_law.htm

54
The procedure which will be examined below – of introduction, referral to committee and committee proceedings (if any), reporting, the various procedures for floor debates and votes, and finally passage and presentment – is thus not a creature of the Constitution or some other legislation. Rather it is the result of the rules and practices of the House of Representatives and the Senate.⁷ For instance, Senate procedure is governed “not only by the Senate’s standing rules and precedents, but by various customary practice” which generally “expedites business, but require unanimous consent.”⁸ A wealth of information on these rules and procedures is on the respective chambers’ websites.⁹ Chief among them, and excerpted below, is “How Our Laws Are Made” (26th Ed.), John V. Sullivan (former Parliamentarian, U.S. House of Representatives).¹⁰ Many of these procedures of the House of Representatives can be traced the “Manual of Parliamentary Practice for the Use of the Senate of the United States,” written by Thomas Jefferson during his tenure as vice president from 1797 to 1801.

II. Drafting and Introduction of the Bill

Generally speaking, the work of Congress can be divided into two categories, legislation (in the form of bills or resolutions), which requires the approval of the president, and pronouncements (in the form of concurrent or simple resolutions) which are not “presented” to

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the president for signature and just express the opinions of Congress. As noted above, legislation is most commonly achieved through the introduction a bill or joint resolution, with the majority originating in the House of Representatives.

Ideas for bills can come from many places, including through citizens transmitting their ideas to their Congress member, or a Congress member’s own initiative (such as promises made during the election campaign). Once a lawmaker is stirred into action, the first step is drafting the bill. The process can involve Senators, Representatives, agencies, state legislatures, scholars, private organizations or individuals or, in many cases, some or all of the above. This process is discussed at greater length at Chapter 3(B) infra. Congress members can propose both public and private bills. The more widely known “public” bill affects general policy and the public at large (for example a bill targeting emissions standards in vehicles or general immigration policy). “Private” bills, which apply to a particular individual or group of individuals, are less common. These bills are generally designed to exclude the targeted individual or group of individuals from a law of general application, and most commonly come up in the immigration context.11

Once drafted, a bill is introduced by a Senator or a Representative in their respective chamber. The rules differ somewhat on procedure. For instance, in the House of Representatives a bill can be introduced by any member when the House is in session by simply placing it in the “Hopper” (see Figure 3).

11 For instance, in 2012, S. 285, sponsored by Senator Carl Levin and subsequently signed by President Obama, allowed a Nigerian immigrant with an expired visa to become a lawful permanent resident of the United States so that he could attend medical school. The bill is reprinted as Appendix [●]. [http://www.gpo.gov/fdsys/pkg/CREC-2012-07-25/pdf/CREC-2012-07-25-pt1-PgS5412-2.pdf#page=1]
Figure 3. Source: How Our Laws Are Made (26th Ed.), Section V; Parliamentary Boot Camp, House Floor Basics: People & Process. No permission is required. The only requirement is that the member introducing it, known as the primary sponsor, sign it. There is no limit to the number of co-sponsors. In contrast, in the Senate, a senator introduces a bill by presenting it to one of the clerks at the Presiding Officer’s desk, without commenting on it from the floor of the Senate. However, a Senator may use a more formal procedure for introducing the bill from the floor (usually accompanied by a statement about the measure). Frequently, Senators obtain consent to have the bill or resolution printed in the Congressional Record following their formal statement.

A bill that is introduced in either chamber receives a designation – “H.R.” for bills originating in the House of Representatives, and “S.” for bills originating in the Senate – that will follow it throughout the process. Even if the same, or substantially similar, bill is introduced in both chambers, only one bill can make it through the process (approval by both chambers) and to
the President for signature. Once a number is assigned, the bill is referred to an appropriate committee (and then sub-committee) for consideration.

III. Consideration By Committee and Reporting

Once introduced in either chamber, legislation is referred to one or more committees, and then subcommittees, according to its subject matter. Many committees adopt rules requiring referral to subcommittee unless the full committee votes to retain the measure. Each committee’s jurisdiction is defined by certain subject matter under the rules of each House and all measures are referred accordingly. Committee membership enables members to develop specialized knowledge of the matters under their jurisdiction. Membership is divided between Democrats and Republicans, with the proportion of membership determined by the majority party in most instances. In many ways committees function like administrative agencies, as will be seen.

A. The Committees

As "little legislatures," committees monitor on-going governmental operations, identify issues suitable for legislative review, gather and evaluate information; and recommend courses of action to their parent body. In his 1885 doctoral thesis at Johns Hopkins University, entitled “Congressional Government,” future President Woodrow Wilson wrote that:

it is not far from the truth to say that Congress in session is Congress on public exhibition, whilst Congress in its committee-rooms is Congress at work.\footnote{12 [Cite] [available at http://www.gutenberg.org/files/35861/35861-h/35861-h.htm]}

Therefore, this is where the most thorough consideration of a proposed bill occurs. The subcommittee may request reports from government agencies or departments, hold hearings, mark up and revise the bill, and report the legislation to the full committee. The full committee
may take similar action, and report the legislation to its full chamber. There are, at the time of writing, 20 standing committees in the House and 16 in the Senate. These committees are permanent (or semi-permanent) and continue from session to session. They include the following:

<table>
<thead>
<tr>
<th>HOUSE COMMITTEES</th>
<th>SENATE COMMITTEES</th>
</tr>
</thead>
<tbody>
<tr>
<td>Agriculture</td>
<td>Agriculture, Nutrition, and Forestry</td>
</tr>
<tr>
<td>Appropriations</td>
<td>Appropriations</td>
</tr>
<tr>
<td>Armed Services</td>
<td>Armed Services</td>
</tr>
<tr>
<td>Banking and Financial Service</td>
<td>Banking, Housing, and Urban Affairs</td>
</tr>
<tr>
<td>Budget</td>
<td>Budget</td>
</tr>
<tr>
<td>Commerce</td>
<td>Commerce, Science, and Transportation</td>
</tr>
<tr>
<td>Education and the Workforce</td>
<td>Energy and Natural Resources</td>
</tr>
<tr>
<td>Government Reform</td>
<td>Environment and Public Works</td>
</tr>
<tr>
<td>House Administration</td>
<td>Finance</td>
</tr>
<tr>
<td>International Relations</td>
<td>Foreign Relations</td>
</tr>
<tr>
<td>Judiciary</td>
<td>Governmental Affairs</td>
</tr>
<tr>
<td>Resources</td>
<td>Health, Education, Labor, and Pensions</td>
</tr>
<tr>
<td>Rules</td>
<td>Indian Affairs</td>
</tr>
</tbody>
</table>

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At any time each chamber also has several “select committees,” convened for a special purpose. Some are clearly temporary, such as the committees formed to investigate the assassinations of John F. Kennedy and Martin Luther King Jr. Some committees, such as the Senate’s select Committee on Indian Affairs appear to straddle that divide (the committee has existed in its current form since 1977, by legislation became permanent in 1984, and now has jurisdiction over all “legislation proposed by Members of the Senate that specifically pertains to American Indians, Native Hawaiians, or Alaska Natives”).

Finally, each chamber has a number of subcommittees that assist the committees in their work. The House currently has [ ] subcommittees, with the Senate having 68. In addition, there are four standing joint committees of the two Houses – the Joint Committees on Printing, Taxation, the Library, and Aging – with oversight responsibilities but no legislative jurisdiction. The House may also create select committees or task forces to study specific issues.

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13 See http://www.indian.senate.gov/history

14 See http://www.senate.gov/pagelayout/committees/d_three_sections_with_teasers/committees_home.htm; see also Congressional Directory, 112th Congress, Committee Assignments available at www.gpo.gov
and report on them to the House, either formally through resolution, or informally through organization of interested members.

B. Consideration by Committee

In considering a proposed bill, a committee will usually start by seeking input from the relevant agency or department about a bill, with input often sought from the Government Accountability Office. This is the investigative arm of Congress charged with examining matters relating to the receipt and payment of public funds, which will provide a report on the necessity or desirability of enacting the bill into law. Although influential, these reports are not binding on a committee. A committee may hold public hearings on the proposed legislation (during which testimony is recorded) if the bill is deemed to be sufficiently important, which will often be followed by an open session discussion popularly known as a “markup” session.15

Once deliberation, or “markup,” is complete, a vote is taken to determine whether to report the bill favorably to the full committee or, alternatively, to “table” (e.g. postpone indefinitely) the discussion. Any bill that is not passed at the end of the Congressional Session must be reintroduced at the next session to be considered. Therefore, if a bill is “tabled” (and unless it is rescued from that fate through the discharge parliamentary procedure described below) it is considered “dead.” A report is made by the subcommittee to the full committee at its meeting, at which point the full committee can vote to report the bill favorably, adversely, or without recommendation. The latter two reports are unusual, because the committee can alternatively “table” a bill, or take no action at all, which prevents further progress.

15 See, generally, How Our Law Are Made (26th Ed.) Section VI.
In the House of Representatives, one of the only options available to override this de-facto veto is to bring a motion to discharge, which requires the signatures of 218 Representatives (over half of the 435 voting Representatives). Such a course of action is unlikely on a controversial bill, since a majority party would be in control of the committee, and a minority party would be unlikely to muster the necessary votes to override the “tabling” without some defections.

If, on the other hand, the committee votes to report the bill to the House, its staff would write a detailed report, describing the purpose and scope of the bill, and the reason it recommends approval. These reports,\(^{16}\) which are considered part of the bill’s “legislative history”, must include:

1. the committee’s oversight findings and recommendations;
2. a statement required by the Congressional Budget Act of 1974, if the measure is a bill or joint resolution providing new budget authority (other than continuing appropriations) or an increase or decrease in revenues or tax expenditures;
3. a cost estimate and comparison prepared by the Director of the Congressional Budget Office; and
4. a statement of general performance goals and objectives, including outcome-related goals and objectives, for which the measure authorizes funding.

Each report accompanying a bill or joint resolution relating to employment or access to public services or accommodations must describe the manner in which the provisions apply to the legislative branch. Each of these items is set out separately and clearly identified in the report to prevent Congress from enhancing its own interests. The report additionally will include

\(^{16}\) See Section VIII of How Our Laws Are Made (26\(^{th}\) Ed.) (Reported Bills, Contents of Report).
the voting history, identify the specific powers granted to Congress in the Constitution to enact the law, and include an estimate of the cost of carrying out the bill for a set number of years.

C. The Congressional Caucuses

Another set of important (albeit less formal) organizations are the Congressional caucuses. Caucuses are informal congressional groups and organizations of congress members with shared interests in specific issues or philosophies but have no official governmental status. They therefore work together to advance specific legislation that aligns with those philosophies. Typically, these groups organize without official recognition by the chamber and are not funded through the appropriation process. They often play a crucial role once a bill comes up for a vote. Private groups thus heavily influence all legislation.

At the highest level sit the Party Conferences, which are caucuses comprised of members of one house from one party (four total). These caucuses meet regularly in closed session to set legislative agendas and to select committee members, chairs, and floor leaders. At the next level are the ideological conferences inside each party, which cross chambers (and sometimes work with the other party on “bipartisan” issues). These range the spectrum from liberal to conservative in each party:

<table>
<thead>
<tr>
<th>Democratic Party</th>
<th>Republican Party</th>
</tr>
</thead>
<tbody>
<tr>
<td>Blue Dog Coalition (Conservative)</td>
<td>Republican Study Committee (Conservative)</td>
</tr>
<tr>
<td>New Democrat Coalition (Moderate)</td>
<td>Republican Main Street Partnership (Moderate)</td>
</tr>
<tr>
<td>Congressional Progressive Caucus (Liberal/Progressive)</td>
<td>Liberty Caucus (Libertarian)</td>
</tr>
</tbody>
</table>

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Finally, there are the commonly “bi-partisan” affinity caucuses. These can be racial, ethnic, religious, or interest group, oriented caucuses that advance the interests around which they are organized. For example, the Congressional Black Caucus has included members from all four chambers. Again, this is similar to private players in the regulatory realm, as will be seen in Chapter 3(B), infra.

IV. Calendaring, Full Floor Debate, and Engrossment and Message to Senate

A. Calendaring The Bill

Once a public bill is favorably reported by the committees to which it was referred it is assigned a number. In the House of Representatives this means placement on either the “Union Calendar” or the “House Calendar,” which are printed in a publication each day. The Union Calendar concerns all public bills that:

(1) raise revenue;
(2) involve taxes;
(3) directly or indirectly make appropriations of money or property;
(4) authorize payment of appropriations;
(5) release any liability of the United State; or
(6) refer a claim to the Court of Claims.

By contrast, the House Calendar contains only bills that involve no cost to the government. Such bills are few in comparison to their counterparts on the Union Calendar.

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17 Private bills are referred to a separate Private Calendar maintained by the house.
In the Senate there is no distinction between bills based on whether they are appropriating money, and all legislation is placed on the Calendar of Business (while nominations are placed on the Executive Calendar). In addition, if House bills are rescued from “tabling” by discharge, they are placed on the Calendar of Motion to Discharge Committees. Although bills are usually heard in the order they are calendared, especially important bills may “jump” the line through several procedures available to the House. They include the following:

First, the House may, by “unanimous consent” and in the discretion of the Chair (usually when the Chair is assured by both the majority and minority leadership that there are no objections), may allow a reported or unreported measure (e.g. a measure that did not pass through committee) to be heard. Such a dispensation would be a non-starter for any remotely controversial bill.

Second, permission can be sought from the Committee on Rules for a “Special Resolution” or “Rule” (a bit like an equitable order, not to be confused with a general rule) to allow consideration of the bill out of sequence. Because a majority of the Committee on Rules is comprised of more members of the majority party, it allows bills that are favorably viewed by a chairman of the committee that has favorably reported the bill to fast track it for a vote by seeking such dispensation. Such an authorization can also proactively waive any procedural challenges (or “points of order”), such as an allegation that it contains a federal unfunded mandate or has not been reported from a committee properly.

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18 See, generally, How Our Law Are Made (26th Ed.) Section VIII. (Other procedures, such as a Motion to Suspend Rules, Calendar Wednesday, and District of Columbia Business, Questions of Privilege and Privileged Matters are available as well).
Third, if a bill is pulled from its untimely demise in committee by a “Motion to Discharge Committee” (upon proper notice, and following a certain time period), the House may move to consideration immediately. If the House decides not to vote on it immediately, it will queued in the appropriate calendar as if it was reported by the standing committee on the date it was discharged by motion (meaning that other bills would still be in front of it).

B. The Floor Debate and Legislative Maneuvering

There is a marked distinction between how the House and Senate operate once it is time to vote on a bill, including how long debate can go on, how many objections may be interposed, and whether the process can be short circuited by less than a majority of the body. For this reason, they are discussed separately.

1. The House of Representatives: Majority Rules

Although the mechanics of House debate are discussed below, it should be noted that unlike the Senate (where a minority party holds more sway due to the Senate’s cloture and filibuster rules, as discussed and defined below) the House operates, to a large extent, at the will of the faction that holds a simple majority of the 435 voting members.

As to mechanics, once the turn of a bill comes to the floor – whether calendared in its sequence or by special dispensation – it will be debated and voted on by the House. The first requirement for debate is a proper quorum, which can either be 218 members when the full House debates the bill,\textsuperscript{19} or a special quorum of 100 members if the “Committee of the Whole House on

\textsuperscript{19} U.S. Const. art I, § 5.
the State of the Union” will consider the bill instead. Once quorum is met, debate, governed by Rules of the House as adopted at the opening of each Congress, ensues.

As noted above, several options exist, some more appropriate than others based on the nature of the bill. The major difference between these approaches is (1) the amount of time allowed for debate, and (2) the amount of votes needed to pass the bill. For instance, a bill (usually a minor or uncontroversial one) called up by “unanimous consent” receives no debate, is voted on immediately, and (as the name implies) requires unanimous consent. Unanimous consent may be used for procedural votes (like a motion to refer a bill to conference). Alternatively, a bill called up by a Motion to Suspend the Rules, receives forty minutes of debate, no amendments are allowed, and two thirds majority is required. Both of these devices may be used for a minor or uncontroversial bill as to which there is no, or minimal, opposition. On the other hand, a contentious piece of legislation advanced by a majority party may be called up by Special Resolution, a flexible device allowing, for instance, only an hour of debate and consideration of pre-approved amendments. A myriad of these “Special Rules” exist.

Once the time allowed under the rule chosen to govern debate has been consumed, debate is terminated and a second, section-by-section, reading is conducted during which amendments may be offered to a section when it is read. The time allowed for debate of amendments may be limited if the House adopts rules limiting such debate on certain bills. If no such special rule is

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20 This “Committee of the Whole,” as it is commonly known, is comprised of the entire House of Representatives, and only 25 representatives are required to force a recorded (rather than a voice) vote. Special rules govern debate which, importantly, limit amendment debates significantly. This device is used to give initial consideration to important bills.

adopted (known as an “open” amendment process) a member is permitted five minutes to explain the proposed amendment, with five minutes allowed for opposition. Although designed to prevent a “filibuster” by limiting the time to 10 minutes per amendment, “amendments to amendments” and “pro forma amendments” can drag out the debate unless certain rules are adopted at the outset. The House Rules provide from some standard safeguards, such as requiring that any proposed amendment be relevant to the text under consideration (known as the “Germaneness Rule”). Generally, debate in the House is cut off by moving and ordering “the previous question”. If it is carried by a majority of the members voting, with a quorum being present, the Speaker then puts the question:

‘‘Shall the bill be engrossed and read a third time?’”21

If this question is decided in the affirmative, the bill is read a third time by title only and passage voted on. After passage or rejection of the bill by the House, a motion to reconsider it is automatically laid on the table by unanimous consent. This procedural mechanism is employed to prohibit this motion from being made at a later date, because the vote of the House on a proposition is not “final and conclusive” until there has been an opportunity to reconsider it.

2. The Senate: The Filibuster, Cloture and the Nuclear Option

As noted above, the Senate and House differ on procedure greatly when it comes to debate. Unlike in the House, a bill is traditionally brought to the floor by a “simple” motion by the majority leader to bring the question to the floor, the two other options being a “simple unanimous consent request” and “complex unanimous request agreement.” As the names imply,

21 If a bill has been amended in committee or on the floor in the first house, it is ordered engrossed. Engrossing a bill means incorporating the amendments into the body of the bill so that the second house gets one document.
neither unanimous consent approach is appropriate for a controversial bill where a negotiated solution is impossible (for instance if a single member objects). But bringing the motion in such cases is far from “simple."

The word simple is in quotations because this involves the Senate procedure most people have heard of, the “filibuster.” Filibuster, an adaptation of the French form (filbustier) of the Dutch word (vrijbuiters) for a “free booter” or “pirate,” refers to a legislative group (now exclusively in the U.S. Senate) which obstructs the passage of a bill by making long speeches during debate in an attempt to delay the vote. In short, the filibuster allows a senator to block the majority leader’s motion to consider the bill by speaking about the legislation.²² A senator embarking on a filibuster is allowed to speak until he “yields” the floor and no other senator seeks recognition. Although a Senator is not generally allowed to speak on the same subject more than twice, that does not mean that the speech must relevant or “germane” to the specific bill.

By way of example, the longest filibuster was undertaken by the U.S. Senator Strom Thurmond of South Carolina who spoke, from 8:54 p.m. on August 28 to 9:12 p.m. on August 29, 1957, against the Civil Rights Act of 1957. The 24 hour and 18 minute speech recited, among other things, the Declaration of Independence and the Bill of Rights, George Washington’s farewell address, and [other examples], among others.²³ Nor are senators required to create delay without help. Senator Thurmond’s speech was but one of many that consumed 57

²² See, generally, United States Senate, Art and History, “Filibuster and Cloture” available at http://www.senate.gov/artandhistory/history/common/briefing/Filibuster_Cloture.htm

²³ This speech is reported in Volume 103, Part 12, of the Proceedings and Debates of the 85th Congress, First Session. Available at http://www.senate.gov/artandhistory/history/resources/pdf/Thurmond_filibuster_1957.pdf
days, between March 26 and June 19, 1957. That particular filibuster was broken by then Senate Majority Leader, and future president, Lyndon B. Johnson, who refused to refer any further business to the Senate. In the end, the objectors ran out of Senators seeking recognition, and the matter was forced to a vote.

Delay can be beneficial to a minority party if it believes that either the composition of the Congress (in either chamber), or the occupant of Presidency, will be change before the next Congress. In those instances, delaying the vote will have the effect of killing the bill. Indeed, with any contentious piece of legislation there are many variables, and “deals,” made in the passage of the initial bill that may be hard to duplicate (either from the pressure borne on the legislators by constituents or special interest groups, or from the fact that the quid pro quo that enabled passage in the first place is no longer feasible).

It should be clear that the Senate would be unwilling to stop action on all legislation for nearly two months unless the legislation is of paramount significance. However, because the country was so divided at the time, Johnson lacked the votes to employ the only practical weapon available to break a filibuster, “cloture.” Cloture is short hand for Senate Rule XXII, which allows the Senate to bring the filibuster to a close by a three-fifths majority (or 60 Senators) on a motion signed by 16 Senators. “Post cloture” debate is now limited to thirty hours (which can be increased by supermajority). After the time expires, the Senate may only consider amendments actually pending before voting on the bill. Thus, when under the current rule the majority party lacks 60 votes, the mere threat of filibuster is enough to defeat a bill and actual filibusters have become rare. Once the bill and its amendments are considered, a simple majority vote is taken.
Another, rarely used procedure, is available if cloture is not feasible. Although referred to as the “nuclear” or “constitutional” option, it is not, in fact, a single procedure, but rather several alternatives if the “supermajority” requirement of cloture is unworkable. In 2005 – the year then Senate Majority Leader Bill Frist, (R) Tenn. threatened to use the procedure to break the Democratic-led filibuster of judicial nominees submitted by President George W. Bush.24 Broadly, these options fall into (1) a majority rule change or cloture at the session’s beginning, or (2) a constitutional cloture.

The genesis of the first “nuclear option” lies with the same 85th Congress that considered the Civil Rights Act in 1957. On the opening day of a Congressional session (e.g. the beginning of the Congress), the Senate may adopt rules that will govern debate. On the opening day of the 85th Congress the then Vice President, and thus Senate presiding officer Richard Nixon expressed his “personal” opinion that the Senate could adopt new rules “under whatever procedure the majority of the Senate approves” and that he did not believe that the Senate was bound by any previous rule “which denies the members of the Senate the power to exercise its constitutional right to make its own rules.” Several abortive attempts were made to use the opening day rule change and cloture procedures in the 1960’s and 1970’s. On November 21, 2013, the 113th Congress employed the “nuclear option” to change the rules governing cloture for most judicial and executive nominees.25


As explained by the CRS, the constitutional option is yet untested.\textsuperscript{26} The procedure would require a “live” controversy (such as a nomination proceeding), and two alternatives are envisioned:

At this point, the scenario could play out in at least two different ways. It has been suggested that the presiding officer, probably the Vice President or the President pro tempore, could declare Rule XXII [the provision for cloture] unconstitutional, set the supermajority threshold aside, and rule that cloture could be invoked by a simple majority. This ruling itself would constitute a break with Senate precedents, which, as discussed above, rely on the Senate as a whole to decide constitutional issues. If the chair issued such a ruling, opponents would likely appeal, and the appeal would ordinarily be debatable. Another Senator, however, could move to table the appeal, which would be a non-debatable motion. If the Senate voted to table the appeal of the ruling, a question which would be decided by a simple majority, the appeal would fail and the new precedent would appear to be confirmed, permitting cloture to be invoked by simple majority, if the majority could get to that vote.

Under a second scenario, following a vote in which the Senate failed to invoke cloture on a pending measure or matter, a Senator would, from the chamber floor, make a constitutional point of order that the supermajority requirement for cloture is unconstitutional. The presiding officer might then, in keeping with precedent, submit the constitutional question to the Senate for its decision. Because a procedural question submitted to the Senate traditionally is debatable, and the point of the exercise according to its supporters is to find a way to limit debate, however, the presiding officer could break with precedent by ruling that the motion would not be debatable. It is likely that a Senator would appeal the decision of the chair that the question would not be debatable, and this appeal probably would be met with a counter motion to table the appeal. If the tabling motion were successful, the appeal would fail, with the effect of sustaining the ruling of the chair. Pursuant to the ruling that the submitted point of order was not debatable, the Senate would then proceed to vote, without debate, on the constitutional question, which would be decided by a simple majority vote.

\textit{Id.} at CRS-7. Employment of either of these versions of the “constitutional option” would require the chair to overturn previous precedent, either by ruling on a question that by precedent

\textsuperscript{26}\textit{See} “Changing Senate Rules: The ‘Constitutional’ or ‘Nuclear’ Option,” at CRS 6-7.
has been submitted to the Senate, or by ruling non-debatable a question that by precedent has been treated as debatable.

V. **House-Senate Conference**

Assuming that one way or another a House and Senate bill comes out of all these machinations, both branches must produce a uniform product for conveying to the President. Unless there is total agreement among the Senate and House, this requires a joint conference committee to reach a completely identical law – usually through negotiations. Once the Senate vote is taken, the original engrossed House bill and the engrossed Senate amendments, are sent back to the House. *See* Conferences and Committees *infra*, [*]. Because the same bill must be approved by both chambers, any “amendments” by the Senate require an inter-chamber back and forth to resolve the differences. One option is for the House to accept the Senate version as proposed. Failing that, amendments (with the attendant debate) can be sent back and forth. When a controversial bill is involved, however, the only real option is an inter-chamber “conference,” with members appointed by the leaders of the respective houses. Such committees vary in size, but are on average contain about two dozen Congressmen. The agreement reached is known as the Conference Report, which must be approved by both chambers.
VI. Signature or Veto by the President

Once the same bill has been passed by both houses it is sent to the President for signature. On this procedure the Constitution is clear:

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States: If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it.

If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law.

U.S. Const. art I, §7. The President bound to sign the legislation as passed (or let ten days pass without taking action) or reject it; at which that point Congress could either muster the votes to overcome the veto, or start over and attempt to pass a bill the President would sign. The U.S. Supreme Court made clear, in *Clinton v. City of New York*, 524 U.S. 417 (1998), that any attempt to depart from this procedure by giving the president the power of a “line item veto” of budget bills is unconstitutional, as it would give the president a unilateral legislative-style amendment power.

At the time of signing the President may (and often does) include a pronouncement, known as a “signing statement,” which is usually printed along with the bill in the US Code Congressional and Administrative News. It ranges from the merely rhetorical (e.g. this is a “good law”) to the substantive (such as the president’s belief as to the constitutionality of the law). The presidential signing statement has been around for hundreds of years (including signing statements by Presidents James Monroe and Andrew Jackson), but it gained prominence during the presidency of George W. Bush, who repeatedly asserted in signing statements that he
would not act contrary to the constitutional provisions that direct the president to “supervise the unitary executive branch.” This practice, which has been criticized by the American Bar Association as undermining the constitutional separation of powers, has continued under President Obama.27

B. **THE PLAYERS IN LEGISLATIVE AND REGULATORY ACTION**

I. **Introduction of the Part(ies).**

In a traditional common law litigation, each side has fairly self-evident relevant goals. A plaintiff generally attempts to extract money damages, injunctive relief, or some other form of benefit from a defendant. And conversely, a defendant tries to avoid giving up any of these to a plaintiff. As should be evident by this point in law school, neither side ever is likely to be 100% successful—thus leading to the common use of settlements or consent decrees.\(^{28}\)

This is not to suggest that the more modern emphasis on economics and technology in legislation and regulation are or ever have been irrelevant to the courts. As far back as the beginning of the 17\(^{th}\) Century, Lord Coke almost singlehandedly began to develop a form of legal economics for dealing with antitrust and corporate cases. While the form and development of the discipline naturally have become considerably more sophisticated in the ensuing four centuries, the basic approach did not wait upon the development of universal high-speed computers.

By comparison, legislative or regulatory disputes may have a dozen or more parties on different sides, each with a radically different legal mission and distinct legal goals. An overly simplistic division would include at least the following types of players:

<table>
<thead>
<tr>
<th>Governmental</th>
<th>Economic</th>
<th>Private</th>
</tr>
</thead>
</table>

\(^{28}\) Consent decrees effectively are a form of injunctive settlement, most commonly used in disputes between a government and private party, as discussed in the Subsection (4cb) below.
<table>
<thead>
<tr>
<th>Elected official</th>
<th>Industries</th>
<th>Grassroots</th>
</tr>
</thead>
<tbody>
<tr>
<td>e.g., Senators, Representatives, Governors, Mayors</td>
<td>e.g., Builders, Lawyers, Manufacturers</td>
<td>e.g., Religion, Race, Low-Income</td>
</tr>
</tbody>
</table>

Any of all of these groups may have an assortment of missions, such as the following:

- Legislative and/or regulatory agendas to modify the financial and/or behavioral modification of other groups (akin to older types of equitable relief);
- Rules for licensing, certificating, or other governmental approval, from liquor licenses to drivers licenses;
- Employment rules, such as minimum wages or health care requirements; and
- General ideological approaches to the role of government, such as the Tea Party or the American Civil Liberties Union.

Groups may seek different types of goals from a legislature, an administrative agency, and a common law court. With the Congress or any similar body, a group usually pursues a statutory right to a particular legal right or other benefit. Sometimes, of course, the right at issue may by necessity include the creation of an administrative issue to ensure that laws are followed—such as health care, veterans, welfare, and other agencies. A group’s mission thus may require not only passage of a statute, but also the creation of an agency to implement it. (As will be seen at the end of this section of the book, securing a sound guarantee may involve imposing obligations on different branches of government—thus raising questions as to “signing statements” with legislative interpretations, combination of different branches’ personnel, and the like. These all raise issues as to separation of powers, as will be discussed.)
One basic lesson thus is that a particular governmental figure or private party may become involved with issues for reasons that have little or no relation to its stated purpose. Senators and representatives often stake out significant positions on issues not related directly to their constituents. For example, a representative in a state legislation may develop a concern with intellectual property law, virtually all of which is governed by federal law. An elected official may not have a single automotive manufacturing plant in his or her jurisdiction, but may be concerned about related work done by local workers. In turn, this naturally creates a real interest for a politician – and his or her career success, for a particular issue. And purely grassroots organizations often become heavily involved in the fates of elected officials or of private companies with no immediate connection to their areas of interest.

It thus may be useful briefly to map out the relationships between the players discussed above and their chosen issues. Although simple in concept, there is a complex relationship among government, industry, and grassroots organizations, as indicated below. Perhaps most important, this is a series of multipart connections. As indicated, each of the links controls and is controlled by each of the others.

**Table II**

<table>
<thead>
<tr>
<th>Government</th>
<th>Industry</th>
<th>Grassroots</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pressure</td>
<td></td>
<td></td>
</tr>
<tr>
<td>President</td>
<td>←→</td>
<td></td>
</tr>
<tr>
<td>Courts</td>
<td>←→</td>
<td></td>
</tr>
</tbody>
</table>

78
In simple terms, all of these powers must interact in order to accomplish anything. Congress needs agencies to implement its wishes; agencies need Congress’ help to support and pay for their activities. Industries need grassroots organizations to endorse Congressional and administrative agency agreement.

This mutual interdependency has led over the years to the creation of private organizations to help coordinate the necessary cooperation. In some cases, individual companies attempt to influence a legislature or an administrative agency. In other situations, they organize to create an entity to represent firms’ common concerns. As discussed above, these interests include a range from taxation to labor, voting rights, intellectual property, health care and the like.

The most basic—and most blatant—form of collective industry action has two main strategic advantages. First, it allows the individual companies to work out a common position and legislative/regulatory policy—and hence avoid counter-productive positions. Second, it encourages firms to pool their finances, political resources, and staff. If done efficiently, it can increase an industry’s deployment of more resources in the political and economic process of lobbying.

Some observers view this scenario as overblown, reasoning that many Fortune 100 companies have more than enough political and financial assets to achieve common goals. After all, they argue, how many mega corporations are necessary to influence the Congress or the
Department of Transportation to allow auto manufacturers not to include emergency cellular radios in every new automobile? This type of lobbying assignment may be fairly difficult, if many individual citizens—e.g., a few million parents of teenagers—and interested organizations—such as hospitals, doctors, and health care providers—feel strongly about an issue. To quote the organizing genius of the first German nation, Kanzler Wilhelm von Fischer, “Macht macht Recht.”

1. Types of Lobbying

   a. Rationale and Structure

Organizations formed to influence legislatures or agencies generally are known as lobbyists or trade associations. The former name derives from a quaint old 17th Century British custom of a lobbyist (sometimes with a few well-muscled friends) meeting a legislator on his (in a mono-gender profession) at the doorway to a legislative meeting hall, in order to influence him. By the time of the US Civil War, this term had evolved into a fairly formal trade association, with the growth of increasingly organized and economically well-endowed lobbying groups. Americans commonly today call this lobbying, with the growth of powerful private groups during the last century. As will be seen in the discussion of regulation, sometimes the borderline between government agencies and private trade associations becomes unclear; officials often take an industry point of view. For example, which of the following entities is clearly governmental as opposed to private? Please try this to distinguish the following entities as

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29 Note shortly his cautionary tale about the legislative, warning people with a taste for sausage not to watch its manufacture.

30 This generally is interpreted as “power makes right”—or alternatively “power makes law,” depending upon one’s view of 19th Century German.
governmental or private, without the benefit of any on-line research method: Better Business Bureau; Consumers Union; Red Cross; Public Citizen; Law Enforcement Assistance Administration; Federal Trade Commission.

Another means of developing an understanding of the types and purposes of lobbying or trade association organizations is to analyze those which currently play some type of role in the US governmental system. The two following charts may be helpful exercises. The first is a relatively short and simple list of private trade associations. In looking through it, please ask yourself some basic questions as to each organization’s purpose, intended effect on legislation or regulation, and amount of potential impact—again, without the aid of any on-line research.

**Table III**

List of Trade Associations

PlanningShop

www.planningshop.com/tradeassociations.asp

**Organizations**

American Boarding Kennels Association
American Dog Trainers Network
American Miniature Llama Association
American Pet Association
American Veterinary Society of Animal Behavior
Association of Pet Dog Trainers
International Association of Pet Cemeteries
International Professional Groomers
International Society of Canine Cosmetologist
Missouri Pet Breeders Association
National Animal Control Association
National Association of Professional Petsitters
National Dog Groomers Association of America
Pet Behaviorist
Petsitters International
Professional Dog Walkers Association
Professional Mobile Groomers International
Seminole Dog Fanciers Association
The Cat Fanciers’ Association

This list at least shows the diversity and size of trade associations. Obviously enough, none of these entities are major industrial or ideological entities. Although it hardly is worth our time to give background on each one, you may assume that all of them are groups of small businesses or non-profit organizations. They thus have little or nothing in common with groups such as the American Manufacturers Association, the National Association of Broadcast, the American Railroad Association, or the American Medical Association. Nevertheless, even trainers of pet dogs or Seminole dog fanciers presumably have common concerns which bring them together to form a trade association type of group.
Lest you chortle too quickly, these interests may be significant to pet dog trainers and Seminole dog fanciers. Assuming that they do not rise—or fall—to the level of making dogs as profitable as automobiles, they are important to a large number of small individuals and companies. What would their concerns include? Limits on government health requirements for pets? Minimum wages for pet sitters? Licensing of pet therapists? Humane treatment of pets?

To what extent are these financial or ideological interests; does it make any difference? How could you tell the difference? Are cosmetologists concerned with the same potential governmental regulation of business activities as General Motors or American Airlines? Are the Humane Society and the llama breeders involved with maximizing the numbers of consumers served—and charged? Although these questions are somewhat easier to answer with advent of web sites, are the answers always clear, particularly when there are mixed motives? For example, do Formula 1 race car owners focus on ticket sales to their events or improving the quality of the breed? Is there an overlap perhaps between financial gain and quality of a product or industry?

In many cases is governmental response to private concerns equally important, whether the activity is or is not for profit? Does it help to recall the late Dr. Martin Luther King's observations that "A riot is the language of the unheard?"

Though these questions are useful in ascertaining the importance of entities from big business to small animals, it also is important to put at least some type of financial value on large corporations and their goals. One clear measurement is simply the amount which their trade associations are willing to give to particular candidates. Table II gives a limited amount of data
about contributions to major Congressional candidates. As will be discussed, however, remember that this covers only a small number of individuals, and is based upon a very limited amount of data. Nevertheless, it gives a rough idea as to the differences among trade associations.

**Table V**

Top Interest Groups Giving to Members of Congress, 2014 Cycle

The Center for Responsive Politics


<table>
<thead>
<tr>
<th>Rank</th>
<th>Interest Group</th>
<th>Total</th>
<th>Dem Pct.</th>
<th>GOP Pct.</th>
<th>Top Recipient</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Lawyers/Law Firms</td>
<td>$34,995,848</td>
<td>70%</td>
<td>30%</td>
<td>Cory Booker (D-NJ)</td>
</tr>
<tr>
<td>2</td>
<td>Retired</td>
<td>$26,254,384</td>
<td>46%</td>
<td>54%</td>
<td>John Boehner (R-Ohio)</td>
</tr>
<tr>
<td>3</td>
<td>Securities/Invest</td>
<td>$25,387,159</td>
<td>46%</td>
<td>54%</td>
<td>Cory Booker (D-NJ)</td>
</tr>
<tr>
<td>4</td>
<td>Health Professionals</td>
<td>$21,412,296</td>
<td>39%</td>
<td>61%</td>
<td>John Cornyn (R-Texas)</td>
</tr>
<tr>
<td>5</td>
<td>Real Estate</td>
<td>$20,228,591</td>
<td>48%</td>
<td>52%</td>
<td>Cory Booker (D-NJ)</td>
</tr>
<tr>
<td>6</td>
<td>Leadership PACs</td>
<td>$18,000,408</td>
<td>43%</td>
<td>57%</td>
<td>Mark Pryor (D-Ark)</td>
</tr>
<tr>
<td>7</td>
<td>Insurance</td>
<td>$17,812,128</td>
<td>37%</td>
<td>63%</td>
<td>Mitch McConnell (R-Ky)</td>
</tr>
<tr>
<td>8</td>
<td>Oil &amp; Gas</td>
<td>$13,115,482</td>
<td>17%</td>
<td>83%</td>
<td>John Cornyn (R-Texas)</td>
</tr>
<tr>
<td>Rank</td>
<td>Industry</td>
<td>Spending</td>
<td>% for Industry</td>
<td>% for Industry</td>
<td>Representative</td>
</tr>
<tr>
<td>------</td>
<td>---------------------------</td>
<td>-----------</td>
<td>----------------</td>
<td>----------------</td>
<td>--------------------</td>
</tr>
<tr>
<td>9</td>
<td>Lobbyists</td>
<td>$11,885,624</td>
<td>49%</td>
<td>51%</td>
<td>Ed Markey (D-Mass)</td>
</tr>
<tr>
<td>10</td>
<td>Pharm/Health Prod</td>
<td>$10,708,161</td>
<td>44%</td>
<td>56%</td>
<td>Mitch McConnell (R-Ky)</td>
</tr>
<tr>
<td>11</td>
<td>Commercial Banks</td>
<td>$9,555,676</td>
<td>33%</td>
<td>67%</td>
<td>John Cornyn (R-Texas)</td>
</tr>
<tr>
<td>12</td>
<td>TV/Movies/Music</td>
<td>$9,529,622</td>
<td>60%</td>
<td>40%</td>
<td>Cory Booker (D-NJ)</td>
</tr>
<tr>
<td>13</td>
<td>Electric Utilities</td>
<td>$9,350,307</td>
<td>38%</td>
<td>62%</td>
<td>John Boehner (R-Ohio)</td>
</tr>
<tr>
<td>14</td>
<td>Misc Mfg/Distrib</td>
<td>$8,378,384</td>
<td>32%</td>
<td>68%</td>
<td>John Boehner (R-Ohio)</td>
</tr>
<tr>
<td>15</td>
<td>Misc Finance</td>
<td>$8,081,635</td>
<td>43%</td>
<td>57%</td>
<td>Cory Booker (D-NJ)</td>
</tr>
<tr>
<td>16</td>
<td>Crop Production</td>
<td>$7,845,724</td>
<td>35%</td>
<td>65%</td>
<td>Thad Cochran (R-Miss)</td>
</tr>
<tr>
<td>17</td>
<td>Business Services</td>
<td>$7,606,589</td>
<td>58%</td>
<td>42%</td>
<td>Cory Booker (D-NJ)</td>
</tr>
<tr>
<td>18</td>
<td>Hospitals/Nurs Homes</td>
<td>$6,842,124</td>
<td>48%</td>
<td>52%</td>
<td>Harry Reid (D-Nev)</td>
</tr>
<tr>
<td>19</td>
<td>Computers/Internet</td>
<td>$6,744,599</td>
<td>55%</td>
<td>45%</td>
<td>Cory Booker (D-NJ)</td>
</tr>
<tr>
<td>20</td>
<td>Bldg Trade Unions</td>
<td>$6,493,068</td>
<td>85%</td>
<td>15%</td>
<td>Pete Visclosky (D-Ind)</td>
</tr>
<tr>
<td>21</td>
<td>Public Sector Unions</td>
<td>$6,443,930</td>
<td>94%</td>
<td>6%</td>
<td>Ed Markey (D-Mass)</td>
</tr>
<tr>
<td>22</td>
<td>Defense Aerospace</td>
<td>$5,857,357</td>
<td>40%</td>
<td>60%</td>
<td>John Cornyn (R-Texas)</td>
</tr>
<tr>
<td>23</td>
<td>Air Transport</td>
<td>$5,855,664</td>
<td>35%</td>
<td>65%</td>
<td>Bill Shuster (R-Pa)</td>
</tr>
<tr>
<td>24</td>
<td>Retail Sales</td>
<td>$5,827,189</td>
<td>37%</td>
<td>63%</td>
<td>Cory Booker (D-NJ)</td>
</tr>
<tr>
<td>25</td>
<td>General Contractors</td>
<td>$5,816,228</td>
<td>27%</td>
<td>73%</td>
<td>John Boehner (R-Ohio)</td>
</tr>
<tr>
<td>26</td>
<td>Health Services</td>
<td>$5,612,345</td>
<td>42%</td>
<td>58%</td>
<td>Mitch McConnell (R-Ky)</td>
</tr>
<tr>
<td>27</td>
<td>Accountants</td>
<td>$5,606,789</td>
<td>41%</td>
<td>59%</td>
<td>Cory Booker (D-NJ)</td>
</tr>
<tr>
<td></td>
<td>Category</td>
<td>Amount</td>
<td>Percent for</td>
<td>Percent against</td>
<td></td>
</tr>
<tr>
<td>---</td>
<td>---------------------------</td>
<td>------------</td>
<td>-------------</td>
<td>-----------------</td>
<td></td>
</tr>
<tr>
<td>28</td>
<td>Transport Unions</td>
<td>$5,486,125</td>
<td>74%</td>
<td>26%</td>
<td>Nick Rahall (D-WVa)</td>
</tr>
<tr>
<td>29</td>
<td>Automotive</td>
<td>$5,410,542</td>
<td>25%</td>
<td>75%</td>
<td>Mitch McConnell (R-Ky)</td>
</tr>
<tr>
<td>30</td>
<td>Education</td>
<td>$5,405,648</td>
<td>67%</td>
<td>33%</td>
<td>Cory Booker (D-NJ)</td>
</tr>
<tr>
<td>31</td>
<td>Pro-Israel</td>
<td>$5,233,906</td>
<td>61%</td>
<td>39%</td>
<td>Cory Booker (D-NJ)</td>
</tr>
<tr>
<td>32</td>
<td>Food &amp; Beverage</td>
<td>$4,911,486</td>
<td>33%</td>
<td>67%</td>
<td>John Boehner (R-Ohio)</td>
</tr>
<tr>
<td>33</td>
<td>Beer, Wine &amp; Liquor</td>
<td>$4,741,759</td>
<td>42%</td>
<td>58%</td>
<td>John Boehner (R-Ohio)</td>
</tr>
<tr>
<td>34</td>
<td>Telephone Utilities</td>
<td>$4,084,772</td>
<td>45%</td>
<td>55%</td>
<td>Ed Markey (D-Mass)</td>
</tr>
<tr>
<td>35</td>
<td>Railroads</td>
<td>$3,908,183</td>
<td>34%</td>
<td>66%</td>
<td>Bill Shuster (R-Pa)</td>
</tr>
<tr>
<td>36</td>
<td>Construction Svcs</td>
<td>$3,886,719</td>
<td>47%</td>
<td>53%</td>
<td>Bill Shuster (R-Pa)</td>
</tr>
<tr>
<td>37</td>
<td>Industrial Unions</td>
<td>$3,641,174</td>
<td>96%</td>
<td>4%</td>
<td>Ed Markey (D-Mass)</td>
</tr>
<tr>
<td>38</td>
<td>Misc Defense</td>
<td>$3,639,369</td>
<td>41%</td>
<td>59%</td>
<td>Dick Durbin (D-Ill)</td>
</tr>
<tr>
<td>39</td>
<td>Agricultural Svcs</td>
<td>$3,579,529</td>
<td>27%</td>
<td>73%</td>
<td>Mitch McConnell (R-Ky)</td>
</tr>
<tr>
<td>40</td>
<td>Defense Electronics</td>
<td>$3,451,693</td>
<td>42%</td>
<td>58%</td>
<td>Jack Reed (D-RI)</td>
</tr>
<tr>
<td>41</td>
<td>Chemicals</td>
<td>$3,408,343</td>
<td>28%</td>
<td>72%</td>
<td>John Boehner (R-Ohio)</td>
</tr>
<tr>
<td>42</td>
<td>Food Process/Sales</td>
<td>$3,377,571</td>
<td>33%</td>
<td>67%</td>
<td>John Boehner (R-Ohio)</td>
</tr>
<tr>
<td>43</td>
<td>Mining</td>
<td>$3,308,168</td>
<td>9%</td>
<td>91%</td>
<td>John Boehner (R-Ohio)</td>
</tr>
<tr>
<td>44</td>
<td>Finance/Credit</td>
<td>$3,186,585</td>
<td>32%</td>
<td>68%</td>
<td>Jeb Hensarling (R-Texas)</td>
</tr>
<tr>
<td>45</td>
<td>Casinos/Gambling</td>
<td>$3,151,666</td>
<td>55%</td>
<td>45%</td>
<td>Harry Reid (D-Nev)</td>
</tr>
<tr>
<td>46</td>
<td>Repub/Conservative</td>
<td>$2,993,114</td>
<td>1%</td>
<td>99%</td>
<td>Tom Cotton (R-Ark)</td>
</tr>
<tr>
<td></td>
<td>Category</td>
<td>Amount</td>
<td>Grassroots %</td>
<td>PAC %</td>
<td>Congressmate</td>
</tr>
<tr>
<td>---</td>
<td>------------------</td>
<td>-----------</td>
<td>--------------</td>
<td>-------</td>
<td>--------------------</td>
</tr>
<tr>
<td>47</td>
<td>Building Materials</td>
<td>$2,895,286</td>
<td>20%</td>
<td>80%</td>
<td>Bill Shuster (R-Pa)</td>
</tr>
<tr>
<td>48</td>
<td>Misc Business</td>
<td>$2,849,254</td>
<td>42%</td>
<td>58%</td>
<td>Cory Booker (D-NJ)</td>
</tr>
<tr>
<td>49</td>
<td>Misc Energy</td>
<td>$2,755,490</td>
<td>37%</td>
<td>63%</td>
<td>John Boehner (R-Ohio)</td>
</tr>
<tr>
<td>50</td>
<td>Candidate Cmtes</td>
<td>$2,343,930</td>
<td>59%</td>
<td>41%</td>
<td>Raul Ruiz (D-Calif)</td>
</tr>
</tbody>
</table>
b. Abuse of Lobbying: The Abramoff Story

Most professional lobbyists prefer the title of “lawyer-lobbyist,” perhaps because it sounds more respectable than a phrase like “influence-peddler.” In fairness, lobbyists—“lawyer” or otherwise—spend most of their time on traditional legal pursuits, such as writing white papers for their clients’ positions, drafting the proposed bills and related legislative documents discussed before in Subsection A. They naturally use traditional newspapers, magazine, radio, television, and on-line social media to sing the praises of their client and to explain its preferences for legislative and regulation action.

Until the current millennium, an integral part of any lobbying effort was the “three Bs”—bribes, broads, and booze (not necessarily in that order). Since the middle of the 19th Century, however, lawyer-lobbyists have concentrated less on outright favors and more on cultivating clients willing to pay large bills for services in dealing with legislative and administrative bodies. Sometimes this leads to outright abuse, if a lobbyist parlays his or her political connections into manipulating clients into paying outrageous sums for government preferences. In current history, by far the most egregious example of this the lawyer-lobbyist Jack Abramoff’s extraction of huge fees from American Indian tribes for a variety of federal legislative and regulatory favors. As discussed below, Abramoff’s behavior was by no means typical of most lawyer-lobbyists. He overreached enormously in both charging clients and interacting with government officials. It is a good morality tale, however, for any new lawyer contemplating a career which involves lobbying as shown by the brief summary below.
The Jack Abramoff Report:
Committee on Governmental Reform, US House of Representatives
One Hundred Ninth Congress, September 29, 2006

* * * * *

I. Background

On January 3, 2006, lobbyist Jack Abramoff pleaded guilty in federal district court in the District of Columbia to four counts of conspiracy, one count of mail fraud, and one count of tax evasion. Under the conspiracy provisions of the plea agreement, he admitted to conspiracy to commit (1) mail fraud, (2) mail and wire fraud, (3) bribery and honest services fraud of a public official, and (4) violations of post-employment restrictions for former Congressional staff members. Honest services fraud basically is a government official's use of his or her position to extract favorable treatment from a citizen—for example, expediting a processing of papers in return for preferred seating at a free public concert. It obviously is just a wink and a nod away from bribery, and many observers believe there is no substantive difference.

In an attachment to the plea agreement, he admitted that he had defrauded clients by concealing from them that payments to other organizations whose services he had recommended were shared with him, that he had defrauded his own law firm by accepting payments for services directly from clients, that payments to organizations controlled by him were diverted to his personal use, and that he conspired to offer and “provided things of value to public officials in exchange for a series of official acts and influence and agreements to provide official action

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31 Archive.waxman.house.gov/Abramoff/docs/Abramoff.pdf
and influence.”2 The disclosure in the plea agreement that these crimes had been committed as far back as 1993.

A. Jack Abramoff’s Lobbying Practice

Jack Abramoff maintained a federal and state governmental lobbying practice since at least 1994, and from January 2001 through March of 2004, Jack Abramoff presided over a substantial lobbying practice from his position as a partner at Greenberg Traurig L.L.P. (Greenberg). [one of the largest corporate firms in the US]. Largely representing Indian tribes and insular territories, Abramoff’s practice grew rapidly in the late 1990s following successful engagements with clients such as the Mississippi Band of Choctaw Indians (Choctaw) and the territory of the Commonwealth of Northern Mariana Islands (CNMI).

Abramoff’s Choctaw and CNMI representations built a foundation for a significant lobbying practice. During the mid to late 1990s, Abramoff was responsible for a number of successful initiatives for the Choctaw. The tribe, which operates a large hotel and casino in Mississippi, found itself as the third-largest employer in Mississippi.5 Given the sophisticated nature of the Choctaw’s interest, it sought Abramoff’s services as their federal lobbyist. One of Abramoff’s early successes in representing the Choctaw was to arrange for support in the Congress to exempt the tribe from federal taxation on gambling revenues. With respect to the proposed taxes, Abramoff reportedly told then-Majority Whip Tom DeLay, “[r]egardless of what you feel about gaming, what you are creating here is a tax on these people, and conservatives should never be in favor of new taxes.”6
Similarly, Abramoff achieved some early successes for the CNMI. In 1995, Abramoff achieved a major victory for the territory by working to retain the territory’s exemption from U.S. minimum wage and immigration laws. Avoiding the U.S. labor laws allows the territory to retain its competitive position in the low-cost textile industry.

On the heels of these successes, Abramoff became the steward of a fast growing lobbying practice. But Abramoff began defrauding these clients as early as 1999 using conduit service providers, excessively making up fees for grassroots-related services, and receiving fees from those providers that were not disclosed to his clients.

A principal technique for Abramoff in winning and retaining clients was to convince clients that his contacts with relevant government policy-makers were so strong they would be foolish not to retain his firm. In the world of lobbying, perceived influence often carries just as much weight as actual influence.

B. Senate Report

The U.S. Senate Committee on Indian Affairs reports (Senate Report) in substantial detail the schemes employed by Abramoff and his business partner, “grassroots” political consultant Michael Scanlon, and some of their colleagues to defraud clients out of enormous amounts, nearing $70 million.

The Senate Report describes the Abramoff-Scanlon scheme as follows:
As a general proposition, the scheme involved the following: getting each of the Tribes to hire Scanlon as their grassroots specialist; dramatically overcharging them for grassroots and related activities; setting aside for themselves an unconscionable percentage of what the Tribes paid at a grossly inflated rate -- a rate wholly unrelated to the actual cost of services provided; and using the remaining fraction to reimburse scores of vendors that could help them maintain vis-a-vis the Tribes a continuing appearance of competence. One example of this fee-splitting arrangement arises from a payment of $1,900,000 from the Saginaw Chippewa Tribe of Michigan. On or about July 9, 2002, Scanlon assured Abramoff, “800 for you[,] 800 for me[,] 250 for the effort the other 50 went to the plane and misc expenses. We both have an additional 500 coming when they pay the next phase [sic].”

Indeed, on July 12, 2002, after that payment arrived, Scanlon made three payments to Abramoff, including a payment of $800,000.

1. The Sales Pitch

Over a three-year period from 2001 through 2003, Abramoff and Scanlon collected $66 million from six tribal clients, the Mississippi Band of Choctaw Indians (Choctaw), the Coushatta Tribe of Louisiana (Coushatta), the Saginaw Chippewa Tribe of Michigan (Saginaw Chippewa), the Agua Caliente Band of Cahuilla Indians (Agua Caliente), the Ysleta del Sur Pueblo of Texas (Tigua), and the Pueblo of Sandia of New Mexico (Sandia Pueblo).12
In pitching his services to the Coushatta tribe, Abramoff traded on his ties to Rep. Delay. In meeting with Coushatta officials, Abramoff described his background, political connections, and capabilities. In particular, he mentioned that he knew “how to get things passed through the legislature” and could get “line items” for the Tribe.

Working to sign the Agua Caliente tribe, one tribal official reported to the Senate Committee staff that “Abramoff boasted that he was part of the lobbying team that had secured self-regulation of Class III gaming under the Indian Gaming Regulatory Act” for the Choctaw. That tribal official stated that Abramoff’s comments were the reason why she was interested in hiring him. As the possibility of retaining Abramoff became more of a reality, Abramoff frequently exchanged correspondence with tribal officials promising political power for the tribe. He wrote, “I think what we have in mind is helping the tribe set up the kind of political strength we have done for others, but doing it very carefully so that you are the ultimate controller of the political power.”

When Abramoff first met with the Sandia Pueblo tribe in New Mexico, he “stressed his Republican connections, going back to his days working on grassroots activities for President Reagan.” One tribal representative recalled in an interview with Senate Committee staff that Abramoff “impressed the tribal leaders with his aggressive approach, specifically recalling Abramoff ‘talk[ing] about breaking bones and busting kneecaps.’”

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In situations where Abramoff was not able to commence a lobbying engagement with a prospective tribal client, he, with the assistance of Scanlon, would agree to provide campaign-related services to prospective candidates in tribal elections. The purpose of the free campaign assistance was to install a favorable slate of tribal leaders. With friends in high places within the tribe, the hope was for the tribe to commence a lucrative lobbying and grassroots political consulting engagement. Sometimes Abramoff also obtained tribal lobbying clients by working both sides of an issue. In early 2002, for example, working through intermediaries, Abramoff urged the State of Texas to close Tigua casinos, while simultaneously appealing to the Tigua tribe that their only hope for survival is to hire him as their lobbyist.

2. **Kickbacks Paid to Abramoff**

Any examination of Abramoff’s billing records must be informed by the findings of the Senate Committee. Integral to the Abramoff fraud were the kickbacks he received after persuading his clients to hire Scanlon for his grassroots political services. According to the Senate Committee’s findings, Scanlon’s operation allowed Abramoff to wrongfully obtain tens of millions of dollars. The most expensive element of Scanlon’s services related to what the Committee described as a “purportedly elaborate political database.” Scanlon’s mark-up, according to the Committee was “unconscionable”:

For example, while Scanlon told the Coushatta Tribe of Louisiana that their “political” database would cost $1,345,000, he ended up paying the vendor that actually developed, operated and maintained that database about $104,560. The dramatic mark-ups were intended to accommodate Scanlon’s secret 50/50 split with Abramoff.
After its two year investigation, the Senate Committee concluded Scanlon’s services were “pathetic” and “incompetent.” The Senate Committee stated that, with respect to the Sandia Pueblo, their “experience with Scanlon gave them new meaning to the phrase ‘take the money and run.’” The Agua Caliente tribe did not believe that Scanlon actually performed any of the work they paid him.

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QUESTIONS AND COMMENTS

1. One less than obvious aspect of Abramoff's practice was a partner in one of the largest law firms in the United States. Do we normally expect high-ranking members of major institutions to commit sleazy form of fraud on the level of street fraud? Why would Abramoff have done so, given the danger to and ultimate destruction of his reputation and a lucrative practice?

2. What exactly did Abramoff do wrong? Did he steal from either his tribal clients or the United States? Did he misrepresent facts issues to either one? Did he commit any kind of fraud?

3. To be sure, he overbilled his clients for his and his consultants' services. But does this seem like a major criminal or ethical violation? Do you think it uncommon among high-powered practicing lawyers?

4. Did Abramoff have an argument that the respectable bar was serving him up as a sacrificial lamb to enhance its own credibility? Do over-the-top corporate lawyers have an interest in showing the public that only a few "bad apples" create problems in the profession? We are not told how much Abramoff charged on an hourly basis for his services, but "white-shoe" practitioners today receive anywhere between $800 and $1,200 per hour for their services. Would it be interesting to know what Abramoff's going rate was? For example, what did he charge for handling the sale of one $1000-annual revenue corporation to another?

5. In terms of comparing attorney fees, is it of interest that the average national annual income of private practitioners is about $80,000? Where does Abramoff fit in on this spectrum?
What about big-firm corporate lawyers? Where do these points fit on the moral compass? Is it different from the legal compass? How?

And note the lack of any mention of a wide variety of "perks." A Gulfstream 5 jet (purchase price: $ 30 million plus) obviously would skew a lawyer's overall compensation package.
3. **Role of the President or Executive**

   **a. administrative agencies**

   Since the discussion so far has focused primarily upon passage of legislation, it naturally has focused primarily on participation of the US president and other chief governmental executives. The president is the most visible figure, since he or she has a national and sometimes global presence. Governors, mayors, and other state-local officials often impact on a wide variety of citizens and institutions—for example, the creation of state insurance "exchanges" under the federal Affordable Care Act. (And in a few cases they even go on to become presidents.)

   Until the advent of President Franklin D. Roosevelt and the dramatic growth of administrative agencies in the 1930's, there was little emphasis on the role of federal, state, and local administrative agencies. Since then, all three levels of government have grown, and often work together. For example, the New York State banking authorities coordinate with several federal agencies, as well as the State Attorney General, in enforcing investment standards and bank stability. State environmental agencies, local code authorities, and the Environmental Protection Agency cooperate in adopting rules and bringing litigation. The Federal Communications Commission works with the New York State Public Service Commission as well as the New York City Department of Information Telecommunications and Information.

   Most visibly, the US president has direct jurisdiction over federal—and perhaps state-local—agencies. The president's authority is clear in a few cases: executive agencies which
report directly to the Administration. This covers administrative day-to-day operation of the agencies as well as enforcement of statutory and regulatory policies,

Two broad generalizations are fairly clear, as discussed at length in Part II. The president has direct plenary power over federal *executive vs independent* agencies, the former of which report directly to him under their enabling statutes—for example, the Department of Justice, the armed forces, and the Department of Transportation. These departments usually are administered by one person, who is appointed by the president, and who reports directly to him or her. (There are hundreds of other, smaller, but similar agencies.) In effect the president is the equivalent of a COE in a private company in terms of dealing with executive agencies.

By contrast, independent agencies are subject to 3-5 commissioners, board members, or the like—who are nominated by the president but must be approved by the Senate, and no one party can have more than a bare majority of agency appointees—hence splits like 2-1, 3-5, 5-7 etc. For example, members of the Securities & Exchange Commission, Federal Trade Commission, and National Labor Relations Board generally reflect the thinking of the dominant, legacy party, but cannot adopt rules along partisan lines. How this tradition applies to the growth of new, minority parties has not been addressed. Regardless of formal party affiliations, members of independent agencies naturally have political backgrounds, as shown by their ability to get their positions in the first place. They thus are sensitive to the groups which supported them. But they do not have the same type of direct reporting to the president-CEO as officials in executive agencies. Part II of the book will revisit this relationship in more detail.
b. **Presidential control over statutory language: signing statements**

Some observers believe that a president should have a power less than a veto, but more than just disapproval. During the last decade, this has coalesced primarily around the notion of a "signing statement"—a document by which a president would express his or her views on a statute without taking any formal legal action. Former President George W. Bush was a strong supporter of signing statements, and issued many. But this was not totally new, since the custom dates back to President Jefferson, and never seems to have created much upset.

On an analytical level, critics on both sides cannot agree as to what a signing would have. Possibilities include:

Expressing agreement or disagreement?

If a president disagrees, would this in any way lay the groundwork for a veto? On what grounds, since the Constitution has separate grounds for vetoes and statements?

Whether favorable or unfavorable, would a statement have any effect on a court considering the validity of a statute, since the issues are quite different?

In future cases, would the statement have any value whatsoever as a precedent? If so, how much?

As to all these issues, would there be a separation of powers problem, by creating a disagreement between the executive and legislative branches of government?

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The Harvard Law Review article essay below recaps the recent history, and also sets out some of the jurisprudential problems with this new and relatively untested procedure.

The President’s Role In The Legislative Process

125 Harv. L. Rev. 2068

Harvard Law Review

June, 2012

Developments in the Law -- Presidential Authority

THE PRESIDENT'S ROLE IN THE LEGISLATIVE PROCESS

In the U.S. constitutional system, the coordinate branches of government are charged with maintaining institutional equilibrium, each checking the others to prevent undue concentration of power. One way in which the President helps to maintain that interbranch balance is through his affirmative role in the legislative process. While the constitutional text presupposes an active role for the President in originating and shaping legislation, developments in the realities of the legislative process over time have precipitated changes in the ways the President can influence that process.

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Signing statements raise constitutional objections, and state a president's intentions regarding enforcement is a manifestation of this phenomenon. Although signing statements

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originated in the Monroe Administration, presidents rarely used them as a policy tool before the mid-twentieth century. Later, in the 1980s, signing statements became a staple of executive branch practice in the Reagan Administration and, since then, “have increasingly been utilized by Presidents to raise constitutional or interpretive objections to congressional enactments.”

This phenomenon went largely unnoticed until the George W. Bush administration. President Bush, while not deviating dramatically from his immediate predecessors in terms of the number of signing statements issued, challenged far more provisions of law with these statements, especially on constitutional grounds. By some accounts, “the Bush Administration . . . used signing statements to claim the authority or state the intention to disregard or decline to enforce all or part of a law [the President] signed more than all of his predecessors combined.”

While President Bush's signing statements drew considerable popular criticism, there is a general consensus among scholars and former Justice Department officials that the practice of using signing statements--both to assert that some aspect of a law is unconstitutional and to state in advance the President's intent to disregard the invalid provision or provisions--is not itself constitutionally problematic. To the extent critics found cause for concern in the signing statements, it was in the statements' content, most notably the scope of executive authority they asserted, not in their existence per se.

Nonetheless, the public outcry against President Bush's perceived abuse of signing statements caused a change in the White House's public stance toward signing statements, leading the Obama Administration to adopt voluntary restraints on this previously important tool.
of executive power. Although he reserved the right to issue signing statements when necessary to protect executive branch prerogatives against legislative encroachment, President Obama voluntarily disclaimed the use of signing statements for other purposes--namely, disregarding or undermining congressional enactments because of policy disagreements or dubious constitutional objections.

Since the 1980s, signing statements have been an integral means for the President to exert executive branch prerogatives in the legislative process. Beginning with the Reagan Administration, Presidents have increasingly employed signing statements to serve various strategic executive branch goals: (1) clarifying legislative meaning and guiding statutory interpretation, (2) providing interpretive guidance for administrative officials, (3) resisting legislative encroachment on executive branch prerogatives, and (4) communicating (and at times expanding) presidential non-enforcement authority. This upward trend in the use of signing statements continued unabated for more than twenty-five years, peaking in the George W. Bush Administration and then declining precipitously under President Obama.

4. **Hybrid Procedures: Bankruptcy and Consent Decrees**

   **a. Bankruptcy**

   In depth Overview of Bankruptcy Court, Law.com

**Adversary Proceedings**

When differences between debtors and creditors cannot be resolved by the normal proceedings of bankruptcy court, or one party does not act fairly according to State and Federal
statutes on bankruptcy, adversary proceedings are a natural result. Solicited by one proverbial side of the equation through the means of a formal complaint, an adversary proceeding is similar to most civil court operations, with a plaintiff, defendant, judge, and, on request, a trial by jury.

Oftentimes, these proceedings will manifest as a result of the appearance of fraud or abuse. Either the accused will have obscured the true nature of their assets (i.e. what they are, who owns them) or will have falsified court documentation to deliberately deceive creditors and bankruptcy court officials.

Through adversary proceedings, almost all stages of the bankruptcy relief process may be contested. For one, the debt repayment plan, the big symbol of one's attempt to get out of debt, is subject to review upon allegations of fraudulent activity. So too can discharge of debts be objected to for similar reasons, or simply with the idea that the debtor may wish to have some debts discharged that are legally incapable of inclusion in this category.

Debtors and creditors may even seek judgments to see where they stand on the issue beforehand and after. In short, there are a lot of potential uses for adversary proceedings for debtors and creditors alike.

**Role of Bankruptcy Judges**

Working hand in hand with a representative of the U.S. Trustee [an administrative official appointed under the US Trustee Program], a bankruptcy court judge will also be involved significantly with discussion and confirmation of a plan. At the very least, a reorganization or liquidation plan must serve the initial stated purpose of the debtor in applying for bankruptcy and
must be fair to all creditors and interested parties and clear their objections, or else risk dismissal by the judge.

Then again, a bankruptcy judge does not work only to serve the creditor and restrict the debtor. As much as the veracity of a voluntary petition must be proved, bankruptcy judges must also respond to the viability of lenders' claims and any motions filed by attorneys during proceedings.

b. Consent Decrees

Consent decrees are a procedure to implement negotiated resolutions of disputes. An example of the Consent Decree from *Anderson v. Madison County*, is at Appendix B.
C. JUDICIAL REVIEW OF LEGISLATION

There is one more important group – besides Congress, the President, Agencies, and the myriad of interest groups – that affects the shape of our laws: the Judiciary. The Judiciary serves two roles with regard to legislation. First, it is frequently called upon to interpret the law, and its application. Second, once legislation matures into law, and normal political challenges (short of repeal, which would fail as it would require passage both houses and approval by the same President who signed the challenged law in the first place) are generally no longer available to opponents of the bill, the judiciary may be called to decide on the law’s validity. These avenues are generally available only to those directly affected by the law, who may challenge the law in court.  

At base, the argument with regard to the validity of the statute come in two varieties. First, a plaintiff may argue that the legislature did not have the power to adopt the law to begin with, and that there is no set of circumstances under which the law would be valid. This is known as a “Facial Challenge.” As discussed below, such a challenge may be brought as the bill becomes a law. Second, a plaintiff may argue that he is injured by the application of the law in a certain way (this is known as an “As-Applied Challenge”). While easily stated as a general rule, in practice the distinction between the two types of challenges is far from clear-cut. See, generally, Citizens United v. Federal Election Commission, 558 U.S. 310, 331 (2010) (“the distinction between facial and as-applied challenges is not so well defined that it has some

32 These are the concept of “standing” and justicability. As noted below, certain exceptions, such as challenges under the First Amendment, exist.
automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge”).

I. The Power To Seek Judicial Review in Federal Court

The power to bring such challenges in Federal courts lies in Article III, Section 2, of the Constitution, which empowers Federal Courts to hear “all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority[.]” More specifically, it is Article III as interpreted by the Supreme Court’s landmark decision in *Marbury v. Madison*, 5 U.S. 137 (1803), which empowers the Federal judiciary to act as a final, non-political, check on legislation. This third pillar of the “checks and balances” form of our government is, in large part, the doing of Chief Justice Marshall, a staunch federalist. Indeed, Alexander Hamilton, argued in Federalist Papers for a strong and independent Judiciary, that would work as a check on the power of the legislature. To wit, her argued that:

If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the Constitution. It is not otherwise to be supposed, that the Constitution could intend to enable the representatives of the people to substitute their WILL to that of their constituents. It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to
be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

Federalist No. 78, The Judiciary Department.

The facts of the Marbury decision, which concerned the appointment of William Marbury as the Marshall for the District of Columbia, will no doubt be studied at length in several Constitutional Law classes. For our purposes it is sufficient to note that the case is famous not for its facts, but for the enshrinement of the concept of Judicial Review – in other words the power of the Federal Courts to rule that Congress and the President exceeded their authority in passing a certain law because it conflicts with the Constitution. In the Marbury case the law ruled unconstitutional was the Judiciary Act of 1789, which purported to allow William Marbury to bring his claim directly in the Supreme Court (referred to as “Original Jurisdiction”), rather than in the District Court (in which case it would only make it to the Supreme Court pursuant to the power of appellate review). The Judiciary Act provided, in relevant part, that:

The Supreme Court shall also have appellate jurisdiction from the circuit courts and courts of the several states, in the cases herein after provided for; and shall have power to issue writs of prohibition to the district courts [...] and writs of mandamus [...] to any courts appointed, or persons holding office, under the authority of the United States.

Judiciary Act of 1789, § 13 (emphasis added). In his case William Marbury sought a “writ of mandamus,” defined by Black’s Law Dictionary as a “writ issued by a court to compel
performance of a particular act by a lower court or a governmental officer or body, [usually] to correct a prior action or failure to act.” MANDAMUS, Black's Law Dictionary (9th ed. 2009).

In Marbury’s case, it was the failure to deliver the commission, which was granted to him by the outgoing Secretary of State (by way of coincidence, some would say, the very same Chief Judge who rendered the decision in his case). Justice Marshall, who delivered the opinion of the Court, ruled as follows:

The question, whether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it. That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis, on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority, from which they proceed, is supreme, and can seldom act, they are designed to be permanent.

This original and supreme will organizes the government, and assigns, to different departments, their respective powers. It may either stop here; or establish certain limits not to be transcended by those departments. The government of the United States is of the latter description. The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?

The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed,
and if acts prohibited and acts allowed, are of equal obligation. It is a proposition
too plain to be contested, that the constitution controls any legislative act
repugnant to it; or, that the legislature may alter the constitution by an ordinary
act.

Between these alternatives there is no middle ground. The constitution is either a
superior, paramount law, unchangeable by ordinary means, or it is on a level with
ordinary legislative acts, and like other acts, is alterable when the legislature shall
please to alter it. If the former part of the alternative be true, then a legislative act
contrary to the constitution is not law: if the latter part be true, then written
constitutions are absurd attempts, on the part of the people, to limit a power, in its
own nature illimitable.

Certainly all those who have framed written constitutions contemplate them as
forming the fundamental and paramount law of the nation, and consequently the
theory of every such government must be, that an act of the legislature, repugnant
to the constitution, is void. This theory is essentially attached to a written
constitution, and is consequently to be considered, by this court, as one of the
fundamental principles of our society. It is not therefore to be lost sight of in the
further consideration of this subject.

If an act of the legislature, repugnant to the constitution, is void, does it,
notwithstanding its invalidity, bind the courts, and oblige them to give it effect?
Or, in other words, though it be not law, does it constitute a rule as operative as if
it was a law? This would be to overthrow in fact what was established in theory;
and would seem, at first view, an absurdity too gross to be insisted on. It shall,
however, receive a more attentive consideration.

It is emphatically the province and duty of the judicial department to say what the
law is. Those who apply the rule to particular cases, must of necessity expound
and interpret that rule. If two laws conflict with each other, the courts must decide
on the operation of each. So if a law be in opposition to the constitution; if both
the law and the constitution apply to a particular case, so that the court must either
decide that case conformably to the law, disregarding the constitution; or
conformably to the constitution, disregarding the law; the court must determine
which of these conflicting rules governs the case.

This is of the very essence of judicial duty. If then the courts are to regard the
constitution; and the constitution is superior to any ordinary act of the legislature;
the constitution, and not such ordinary act, must govern the case to which they
both apply. Those then who controvert the principle that the constitution is to be
considered, in court, as a paramount law, are reduced to the necessity of
maintaining that courts must close their eyes on the constitution, and see only the
law.

This doctrine would subvert the very foundation of all written constitutions. It
would declare that an act, which, according to the principles and theory of our
government, is entirely void; is yet, in practice, completely obligatory. It would
declare, that if the legislature shall do what is expressly forbidden, such act,
notwithstanding the express prohibition, is in reality effectual. It would be giving
to the legislature a practical and real omnipotence, with the same breath which
professes to restrict their powers within narrow limits. It is prescribing limits, and
declaring that those limits may be passed at pleasure.

That it thus reduces to nothing what we have deemed the greatest improvement on
political institutions – a written constitution -- would of itself be sufficient, in
America, where written constitutions have been viewed with so much reverence,
for rejecting the construction. But the peculiar expressions of the constitution of
the United States furnish additional arguments in favor of its rejection.

The judicial power of the United States is extended to all cases arising under the
constitution. Could it be the intention of those who gave this power, to say that, in
using it, the constitution should not be looked into? That a case arising under the
constitution should be decided without examining the instrument under which it
arises? This is too extravagant to be maintained.

Marbury v. Madison, 5 U.S. 137, 176-179 (1803). Thus, the Supreme Court, in 1803, establish itself as a constitutional “check” on all legislation passed by Congress. After the Civil War – which, among other things, pitted proponents of state sovereignty against proponents of a strong federal government – Congress passed the Fourteenth Amendment, which guarantees that basic rights afforded by the US Constitution are available to citizens of all states. Specifically, Section 1 establishes that “[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.” With this baseline established, Section 1 goes on to say that “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” Thus, the Supreme Court was given the ability to act as a check on laws passed by state legislatures to the extent those laws conflict with the U.S. Constitution.

Although the analysis of Federal and state legislation varies to a degree – recall that the Federal government is one of enumerated powers, and therefore a law may be challenged merely as exceeding those powers; whereas state laws must be found to violate some affirmative rights established by the US Constitution (such as the First, Second, or Fourteenth Amendments) – at base the power of the Court is the same: the Court is deciding whether the legislature had the
power to pass the law in the first place, since a law which conflicts with the United States Constitution is invalid.

As discussed below, this analysis falls into two categories: the Facial Challenge, which asserts that the law, as a whole, is invalid. A famous, successful, Facial Challenge is the Supreme Court’s decision in *Brown v. Board of Education*, 347 US 483 (1954), which held that state laws establishing segregated public schools were facially invalid because they violated the equal protection clause of the Fourteenth Amendment. The As-Applied challenge asserts that it is not the entire law, but rather a particular application of the law, which renders it law unconstitutional. We will consider the contours of the As-Applied challenge through the Supreme Court’s decision in *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998), which concerned the way in which the National Endowment for the Arts (an independent Federal agency) distributed funds to artists. An amendment to the enabling statute’s language required the agency to consider the work’s “decency and respect for the diverse beliefs and values of the American public” in awarding grants, which brought it into conflict with the First Amendment. As discussed below, the divided Supreme Court considered both the facially validity, and application, of the statute.

**II. FACIAL CHALLENGE**

A Facial Challenge to a law seeks to invalidate some part, or all, of the law as inherently unconstitutional. The proponent of the challenge argues that the legislature overreached in some way, either stepping beyond the bounds of its enumerated powers (in the case of the Federal

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government), or infringing on some rights guaranteed by the US Constitution (this kind of challenge can be brought against laws adopted by both state and Federal legislatures). Such challenges are often (but not always) brought as soon as the bill becomes a law, as will be seen in the Affordable Care Act case study below often in an attempt to kill the law in its infancy, before certain provisions (which may spawn entire bureaucracies) become operational and reversal becomes more politically fraught.

This may appear to conflict with the concept of ripeness and justicability at first blush, and indeed the Supreme Court *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442 (2008), cautioned that Facial Challenges, which require a showing that a law is unconstitutional in all of its applications, are disfavored because: (1) they often rest on speculation; (2) they run contrary to the fundamental principle of judicial restraint that courts should neither “anticipate a question of constitutional law in advance of the necessity of deciding it” nor “formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied,”; and (3) they threaten to shortcircuit the democratic process by preventing laws embodying the will of the people from being implemented consistent with the Constitution.


In 2004, voters in the State of Washington passed an initiative changing the State’s primary election system. The People’s Choice Initiative of 2004, or Initiative 872 (I–872), provides that candidates for office shall be identified on the ballot by their self-designated “party preference”; that voters may vote for any candidate; and that the top two votegetters for each office, regardless of party
preference, advance to the general election. The Court of Appeals for the Ninth Circuit held I–872 facially invalid as imposing an unconstitutional burden on state political parties’ First Amendment rights. Because I–872 does not on its face impose a severe burden on political parties’ associational rights, and because respondents’ arguments to the contrary rest on factual assumptions about voter confusion that can be evaluated only in the context of an as-applied challenge, we reverse.

I

For most of the past century, Washington voters selected nominees for state and local offices using a blanket primary. From 1935 until 2003, the State used a blanket primary that placed candidates from all parties on one ballot and allowed voters to select a candidate from any party. See 1935 Wash. Laws, §§ 1–5, pp. 60–64. Under this system, the candidate who won a plurality of votes within each major party became that party’s nominee in the general election. See 2003 Wash. Laws § 919, p. 775.

1 The term “blanket primary” refers to a system in which “any person, regardless of party affiliation, may vote for a party’s nominee.” California Democratic Party v. Jones, 530 U.S. 567, 576, n. 6, 120 S.Ct. 2402, 147 L.Ed.2d 502 (2000). A blanket primary is distinct from an “open primary,” in which a person may vote for any party’s nominees, but must choose among that party’s nominees for all offices, ibid., and the more traditional “closed primary,” in which “only persons who are members of the political party ... can vote on its nominee,” id., at 570, 120 S.Ct. 2402.

California used a nearly identical primary in its own elections until our decision in California Democratic Party v. Jones, 530 U.S. 567, 120 S.Ct. 2402, 147 L.Ed.2d 502 (2000). In Jones, four political parties challenged California’s blanket primary, arguing that it unconstitutionally burdened their associational rights by
forcing them to associate with voters who did not share their beliefs. We agreed and struck down the blanket primary as inconsistent with the First Amendment.

* * * * *

Because California’s blanket primary severely burdened the parties’ associational rights, we subjected it to strict scrutiny, carefully examining each of the state interests offered by California in support of its primary system.

* * * * *

After our decision in Jones, the Court of Appeals for the Ninth Circuit struck down 1189 Washington’s primary as “materially indistinguishable from the California scheme.” Democratic Party of Washington State v. Reed, 343 F.3d 1198, 1203 (2003). The Washington State Grange [a fraternal organization] promptly proposed I–872 as a replacement. It passed with nearly 60% of the vote and became effective in December 2004.

Under I–872, all elections for “partisan offices” are conducted in two stages: a primary and a general election. To participate in the primary, a candidate must file a “declaration of candidacy” form, on which he declares his “major or minor party preference, or independent status.” Wash. Rev.Code § 29A.24.030 (Supp.2005). Each candidate and his party preference (or independent status) is in turn designated on the primary election ballot. A political party cannot prevent a candidate who is unaffiliated with, or even repugnant to, the party from designating it as his party of preference … In the primary election, voters may select “any candidate listed on the ballot, regardless of the party preference of the candidates or the voter.”
The candidates with the highest and second-highest vote totals advance to the general election, regardless of their *448 party preferences. Ibid. Thus, the general election may pit two candidates with the same party preference against one another. Each candidate’s party preference is listed on the general election ballot, and may not be changed between the primary and general elections.

Immediately after the State enacted regulations to implement I–872, the Washington State Republican Party filed suit against a number of county auditors challenging the law on its face. The party contended that the new system violates its associational rights by usurping its right to nominate its own candidates and by forcing it to associate with candidates it does not endorse.

* * * * *

The Court of Appeals affirmed. 460 F.3d 1108, 1125 (C.A.9 2006). It held that the I–872 primary severely burdens the political parties’ associational rights because the party-preference designation on the ballot creates a risk that primary winners will be perceived as the parties’ nominees and produces an “impression of associatio[n]” between a candidate and his party of preference even when the party does not associate, or wish to be associated, with the candidate. Id., at 1119. The Court of Appeals noted a “constitutionally *449 significant distinction between ballots and other vehicles for political expression,” reasoning that the risk of perceived association is particularly acute when ballots include party labels because such labels are typically used to designate candidates’ views on issues of public concern. Id., at 1121. And it determined that the State’s interests underlying I–872 were not sufficiently compelling to justify the severe burden on the parties’ association. Concluding that the provisions of I–872 providing for the party-preference designation on the ballot were not severable, the court struck down I–872 in its entirety.

We granted certiorari, 549 U.S. 1251, 127 S.Ct. 1373, 167 L.Ed.2d 158 (2007), to determine whether I–872, on its face, violates the political parties’ associational
II

Respondents object to I–872 not in the context of an actual election, but in a facial challenge. Under United States v. Salerno, 481 U.S. 739, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987), a plaintiff can only succeed in a facial challenge by “establish[ing] that no set of circumstances exists under which the Act would be valid,” i.e., that the law is unconstitutional in all of its applications. Id., at 745, 107 S.Ct. 2095. While some Members of the Court have criticized the Salerno formulation, all agree that a facial challenge must fail where the statute has a “’plainly legitimate sweep.’” Washington v. Glucksberg, 521 U.S. 702, 739–740, and n. 7, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997) (STEVENS, J., concurring in judgments). Washington’s primary system survives under either standard, as we explain below… In determining whether a law is facially invalid, we must be careful not to go beyond the statute’s facial requirements and speculate about “hypothetical” or “imaginary” cases. See United States v. Raines, 362 U.S. 17, 22, 80 S.Ct. 519, 4 L.Ed.2d 524 (1960) (“The delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases thus imagined”). The State has had no opportunity to implement I–872, and its courts have had no occasion to construe the law in the context of actual disputes arising from the electoral context, or to accord the law a limiting construction to avoid constitutional questions. Cf. Yazoo & Mississippi Valley R. Co. v. Jackson Vinegar Co., 226 U.S. 217, 220, 33 S.Ct. 40, 57 L.Ed. 193 (1912) (“How the state court may apply [a statute] to other cases, whether its general words may be treated as more or less restrained, and how far parts of it may be sustained if others fail are matters upon which we need not speculate now”). Exercising judicial restraint in a facial challenge “frees the Court not only from unnecessary pronouncement on constitutional issues, but also from premature interpretations of statutes in areas where their constitutional application might be cloudy.” Raines, supra, at 22, 80 S.Ct. 519.

Facial challenges are disfavored for several reasons. Claims of facial invalidity often rest on speculation. As a consequence, they raise the risk of “premature interpretation of statutes on the basis of factually barebones records.” Sabri v.
United States, 541 U.S. 600, 609, 124 S.Ct. 1941, 158 L.Ed.2d 891 (2004) (internal quotation marks and brackets omitted). Facial challenges also run contrary to the fundamental principle of judicial restraint that courts should neither “‘anticipate a question of constitutional law in advance of the necessity of deciding it’” nor “‘formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.’” Ashwander v. TVA, 297 U.S. 288, 346–347, 56 S.Ct. 466, 80 L.Ed. 688 (1936) (Brandeis, J., concurring) (quoting Liverpool, New York & Philadelphia S.S. Co. v. Commissioners of Emigration, 113 U.S. 33, 39, 5 S.Ct. 352, 28 L.Ed. 899 (1885)). Finally, facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution. We must keep in mind that “‘a ruling of unconstitutionality frustrates the intent of the elected representatives of the people.’” Ayotte v. Planned Parenthood of Northern New Eng., 546 U.S. 320, 329, 126 S.Ct. 961, 163 L.Ed.2d 812 (2006) (quoting Regan v. Time, Inc., 468 U.S. 641, 652, 104 S.Ct. 3262, 82 L.Ed.2d 487 (1984) (plurality opinion)). It is with these principles in view that we turn to the merits of respondents’ facial challenge to I–872.

A

[The Supreme Court summarized the competing Constitutional principles applicable to the dispute. States possess a broad power to prescribe the time place and manner of holding elections, but may not exercise that power in a way that violations specific provisions of the Constitution. In particular, the State must “observe the limits established by the First Amendment rights of the State’s citizens” including the “freedom of political association.”]

Election regulations that impose a severe burden on associational rights are subject to strict scrutiny, and we uphold them only if they are “narrowly tailored to serve a compelling state interest.” … If a statute imposes only modest burdens, however, then “the State’s important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions” on election procedures. …“Accordingly, we have repeatedly upheld reasonable, politically neutral
regulations that have the effect of channeling expressive activity at the polls.”
[citations omitted]

The parties do not dispute these general principles; rather, they disagree about whether I–872 severely burdens respondents’ associational rights. That disagreement begins with Jones. Petitioners argue that the I–872 primary is indistinguishable from the alternative Jones suggested would be constitutional.

* * * *

Unlike the California primary, the I–872 primary does not, by its terms, choose parties’ nominees. The essence of nomination—the choice of a party representative—does not occur under I–872. The law never refers to the candidates as nominees of any party, nor does it treat them as such.

* * * *

Respondents counter that, even if the I–872 primary does not actually choose parties’ nominees, it nevertheless burdens their associational rights because voters will assume that candidates on the general election ballot are the nominees of their preferred parties. This brings us to the heart of respondents’ case—and to the fatal flaw in their argument. At bottom, respondents’ objection to I–872 is that voters will be confused by candidates’ party-preference designations. Respondents’ arguments are largely variations on this theme.

* * * *

We reject each of these contentions for the same reason: They all depend, not on
any facial requirement of I–872, but on the possibility that voters will be confused as to the meaning of the party-preference designation. But respondents’ assertion that voters will misinterpret the party-preference designation is sheer speculation. It “depends upon the belief that voters can be ‘misled’ by party labels. But ‘[o]ur cases reflect a greater faith in the ability of individual voters to inform themselves about campaign issues.’ ” Tashjian, 479 U.S., at 220, 107 S.Ct. 544 (quoting Anderson, supra, at 797, 103 S.Ct. 1564). There is simply no basis to presume that a well-informed electorate will interpret a candidate’s party-preference designation to mean that the candidate is the party’s chosen nominee or representative or that the party associates with or approves of the candidate. See New York State Club Assn., Inc. v. City of New York, 487 U.S. 1, 13–14, 108 S.Ct. 2225, 101 L.Ed.2d 1 (1988) *455 rejecting a facial challenge to a law regulating club membership and noting that “[w]e could hardly hold otherwise on the record before us, which contains no specific evidence on the characteristics of any club covered by the [law]”). This strikes us as especially true here, given that it was the voters of Washington themselves, rather than their elected representatives, who enacted I–872.

Of course, it is possible that voters will misinterpret the candidates’ party-preference designations as reflecting endorsement by the parties. But these cases involve a facial challenge, and we cannot strike down I–872 on its face based on the mere possibility of voter confusion. See Yazoo, 226 U.S., at 219, 33 S.Ct. 40 (“[T]his court must deal with the case in hand and not with imaginary ones”); Pullman Co. v. Knott, 235 U.S. 23, 26, 35 S.Ct. 2, 59 L.Ed. 105 (1914) (A statute “is not to be upset upon hypothetical and unreal possibilities, if it would be good upon the facts as they are”). Because respondents brought their **1194 suit as a facial challenge, we have no evidentiary record against which to assess their assertions that voters will be confused. See Timmons, 520 U.S., at 375–376, 117 S.Ct. 1364 (STEVENS, J., dissenting) (rejecting judgments based on “imaginative theoretical sources of voter confusion” and “entirely hypothetical” outcomes). Indeed, because I–872 has never been implemented, we do not even have ballots indicating how party preference will be displayed. It stands to reason that whether voters will be confused by the party-preference designations will depend in significant part on the form of the ballot. The Court of Appeals assumed that the ballot would not place abbreviations like “‘D’” and “‘R,’” or “‘Dem.’” and “‘Rep.’” after the names of candidates, but would instead “clearly state that a
particular candidate ‘prefers’ a particular party.” 460 F.3d, at 1121, n. 20. It thought that even such a clear statement did too little to eliminate the risk of voter confusion.

But we see no reason to stop there. As long as we are speculating about the form of the ballot—and we can do no *456 more than speculate in this facial challenge—we must, in fairness to the voters of the State of Washington who enacted I–872 and in deference to the executive and judicial officials who are charged with implementing it, ask whether the ballot could conceivably be printed in such a way as to eliminate the possibility of widespread voter confusion and with it the perceived threat to the First Amendment. See Ayotte, 546 U.S., at 329, 126 S.Ct. 961 (noting that courts should not nullify more of a state law than necessary so as to avoid frustrating the intent of the people and their duly elected representatives); Ward v. Rock Against Racism, 491 U.S. 781, 795–796, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989) (“‘[I]n evaluating a facial challenge to a state law, a federal court must ... consider any limiting construction that a state court or enforcement agency has proffered’” (quoting Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494, n. 5, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982))).

* * * * *

We are satisfied that there are a variety of ways in which the State could implement I–872 that would eliminate any real threat of voter confusion. And without the specter *457 of widespread voter confusion, respondents’ arguments about forced association and compelled speechfall flat.

**1195 Our conclusion that these implementations of I–872 would be consistent with the First Amendment is fatal to respondents’ facial challenge. See Schall v. Martin, 467 U.S. 253, 264, 104 S.Ct. 2403, 81 L.Ed.2d 207 (1984) (a facial challenge fails where “at least some” constitutional applications exist). Each of their arguments rests on factual assumptions about voter confusion, and each fails
for the same reason: In the absence of evidence, we cannot assume that Washington’s voters will be misled. See Jones, 530 U.S., at 600, 120 S.Ct. 2402 (STEVENS, J., dissenting) (“[A]n empirically debatable assumption ... is too thin a reed to support a credible First Amendment distinction” between permissible and impermissible burdens on association). That factual determination must await an as-applied challenge. On its face, I–872 does not impose any severe burden on respondents’ associational rights.

(Emphasis Added).

One can see the majority’s hostility to the Facial Challenge, based on the considerations outlined above. The Court begins its analysis by announcing the “No Set of Circumstances”, that “a plaintiff can only succeed in a facial challenge by ‘establish[ing] that no set of circumstances exists under which the Act would be valid,’ i.e., that the law is unconstitutional in all of its applications.” [PIN CITE]. It concludes its analysis by stating that many of the factual arguments presented by the proponents of the challenge “must await an as-applied challenge.” [PIN CITE]. Although high, this burden is not insurmountable, as demonstrated by the Supreme Court’s reasoning in Brown v. Bd. Of Ed.


These cases come to us from the States of Kansas, South Carolina, Virginia, and Delaware. They are premised on different facts and different local conditions, but a common legal question justifies their consideration together in this consolidated opinion.
In each of the cases, minors of the Negro race, through their legal representatives, seek the aid of the courts in obtaining admission to the public schools of their community on a nonsegregated basis. In each instance, they have been denied admission to schools attended by white children under laws requiring or permitting segregation according to race. This segregation was alleged to deprive the plaintiffs of the equal protection of the laws under the Fourteenth Amendment. In each of the cases other than the Delaware case, a three-judge federal district court denied relief to the plaintiffs on the so-called ‘separate but equal’ doctrine announced by this Court in *Plessy v. Ferguson*, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256. Under that doctrine, equality of treatment is accorded when the races are provided substantially equal facilities, even though these facilities be separate. In the Delaware case, the Supreme Court of Delaware adhered to that doctrine, but ordered that the plaintiffs be admitted to the white schools because of their superiority to the Negro schools.

The plaintiffs contend that segregated public schools are not ‘equal’ and cannot be made ‘equal,’ and that hence they are deprived of the equal protection of the laws. Because of the obvious importance of the question presented, the Court took jurisdiction.

In the first cases in this Court construing the Fourteenth Amendment, decided shortly after its adoption, the Court interpreted it as proscribing all state-imposed discriminations against the Negro race. The doctrine of *separate but equal* did not make its appearance in this court until 1896 in the case of *Plessy v. Ferguson*, *supra*, involving not education but transportation. American courts have since labored with the doctrine for over half a century.
In none of these cases was it necessary to re-examine the doctrine to grant relief to the Negro plaintiff. And in *Sweatt v. Painter*, supra, the Court expressly reserved decision on the question whether *Plessy v. Ferguson* should be held inapplicable to public education.

In the instant cases, that question is directly presented. Here, unlike *Sweatt v. Painter*, there are findings below that the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other 'tangible' factors. Our decision, therefore, cannot turn on merely a comparison of these tangible factors in the Negro and white schools involved in each of the cases. We must look instead to the effect of segregation itself on public education.

In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.
We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other ‘tangible’ factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.

In *Sweatt v. Painter*, *supra* (339 U.S. 629, 70 S.Ct. 850), in finding that a segregated law school for Negroes could not provide them equal educational opportunities, this Court relied in large part on ‘those qualities which are incapable of objective measurement but which make for greatness in a law school.’ In *McLaurin v. Oklahoma State Regents*, *supra* (339 U.S. 637, 70 S.Ct. 853), the Court, in requiring that a Negro admitted to a white graduate school be treated like all other students, again resorted to intangible considerations: ‘* * * his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession.’ *494* Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. The effect of this separation on their educational opportunities was well stated by a finding in the Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs:

‘Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to (retard) the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial(ly) integrated school system.’

**692** Whatever may have been the extent of psychological knowledge at the
time of *Plessy v. Ferguson*, this finding is amply supported by modern authority. Any language *495 in *Plessy v. Ferguson* contrary to this finding is rejected.

We conclude that in the field of public education the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. This disposition makes unnecessary any discussion whether such segregation also violates the Due Process Clause of the Fourteenth Amendment.

(Emphasis Added). In reading the above excerpts, one will note that the Court relies on several empirical studies (and previous decisions) regarding the effects of segregation on educational outcomes. Indeed, by 1954, the discrimination that the Court sought to end was ongoing for many, many, years. This brings into focus the recent observation made by the Supreme Court in *Citizens United v. Federal Election Commission*, 558 U.S. 310, 331 (2010), that "the distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge". And indeed, based on the information available to it, the Supreme Court may have been justified in striking down these laws As-Applied (forcing the states to make the schools truly “equal”). Yet the Supreme Court decided to scuttle the entire “separate but equal” scheme in higher education as unconstitutional because it viewed the very system *itself* as unconstitutional. With that in mind, we move on to the As-Applied challenge.

**III. AS APPLIED CHALLENGE**
As the name suggests, the As-Applied challenge focuses on whether a particular application of the statute would render it unconstitutional. Indeed, to bring an As-Applied Challenge, the plaintiff must usually allege that it was actually injured by that particular application of the statute. With that in mind, we review both the majority, and dissenting, opinions in *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998).

By way of background, *Finley* concerned the constitutionality of the 1990 Williams/Coleman Amendment (§954(d)(1)) to the National Foundation on the Arts and Humanities Act (20 U.S. Co § 954). The amendment was brought about, in part, by two controversial works that were funded by the National Endowment for the Arts (the “NEA”) in 1989 (an exhibit title "The Perfect Moment," featuring the work of Robert Mapplethorpe, and the “Piss Christ” photograph by Andres Serrano). The amended statute provided that:

No payment shall be made under this section except upon application therefor which is submitted to the National Endowment for the Arts in accordance with regulations issued and procedures established by the Chairperson. In establishing such regulations and procedures, the Chairperson shall ensure that … artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public;
20 U.S. Co § 954(d)(1) (emphasis added). Both the District Court, and the Ninth Circuit Court of Appeals, found the amendment to be facially unconstitutional. Justice O’Connor, who delivered the opinion of the Supreme Court, reversed.\textsuperscript{33}

\textbf{National Endowment for the Arts v. Finley, 524 U.S. 569 (1998), Justice O’Connor:}

The National Foundation on the Arts and the Humanities Act of 1965, as amended in 1990, 104 Stat. 1963, requires the Chairperson of the National Endowment for the Arts (NEA) to ensure that “artistic excellence and artistic merit are the criteria by which [grant] applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public.” 20 U.S.C. § 954(d)(1). In this case, we review the Court of Appeals’ determination that § 954(d)(1), on its face, impermissibly discriminates on the basis of viewpoint and is void for vagueness under the First and Fifth Amendments. We conclude that § 954(d)(1) is facially valid, as it neither inherently interferes with First Amendment rights nor violates constitutional vagueness principles.

I

A

With the establishment of the NEA in 1965, Congress embarked on a “broadly conceived national policy of support for the ... arts in the United States,” see § 953(b), pledging federal funds to “help create and sustain not only a climate encouraging freedom of thought, imagination, and inquiry but also the material conditions facilitating the release of ... creative talent.” § 951(7). The enabling statute vests the NEA with substantial discretion to award grants; it identifies only the broadest funding priorities, including “artistic and cultural significance, giving emphasis to American creativity and cultural diversity,” “professional

\textsuperscript{33} Justices Scalia at Thomas filed a concurring opinion that agreed with the result, but disagreed with the reasoning. In a lengthy dissenting opinion Justice Souter strongly disagreed with the plurality’s decision regarding the facial validity of the statute.
excellence,” and the encouragement of “public knowledge, education, understanding, and appreciation of the arts.” See §§ 954(c)(1)–(10).

Applications for NEA funding are initially reviewed by advisory panels composed of experts in the relevant field of the arts. Under the 1990 amendments to the enabling statute, those panels must reflect “diverse artistic and cultural points of view” and include “wide geographic, ethnic, and minority representation,” as well as “lay individuals who are knowledgeable about the arts.” §§ 959(c)(1)–(2). The panels report to the 26–member National Council on the Arts (Council), which, in turn, advises the NEA Chairperson. The Chairperson has the ultimate authority to award grants but may not approve an application as to which the Council has made a negative recommendation. § 955(f).

*574 Since 1965, the NEA has distributed over $3 billion in grants to individuals and organizations, funding that has served as a catalyst for increased state, corporate, and foundation support for the arts.

* * * * *

Throughout the NEA’s history, only a handful of the agency’s roughly 100,000 awards have generated formal complaints about misapplied funds or abuse of the public’s trust. Two provocative works, however, prompted public controversy in 1989 and led to congressional revaluation of the NEA’s funding priorities and efforts to increase oversight of its grant-making procedures. The Institute of Contemporary Art at the University of Pennsylvania had used $30,000 of a visual arts grant it received from the NEA to fund a 1989 retrospective of photographer Robert Mapplethorpe’s work. The exhibit, entitled The Perfect Moment, included homoerotic photographs that several Members of Congress condemned as pornographic. See, e.g., 135 Cong. Rec. 22372 (1989). Members also denounced artist Andres Serrano’s work Piss Christ, a photograph of a crucifix immersed in urine. See, e.g., id., at 9789. Serrano had been awarded a $15,000 grant from the Southeast Center for Contemporary Art, an organization that received NEA
support.

When considering the NEA’s appropriations for fiscal year 1990, Congress reacted to the controversy surrounding the *575 Mapplethorpe and Serrano photographs by eliminating $45,000 from the agency’s budget, the precise amount contributed to the two exhibits by NEA grant recipients.

* * * * *

In the 1990 appropriations bill, Congress also agreed to create an Independent Commission of constitutional law scholars to review the NEA’s grant-making procedures and assess the possibility of more focused standards for public arts funding. The Commission’s report, issued in September 1990, concluded that there is no constitutional obligation to provide arts funding, but also recommended that the NEA rescind the certification requirement and cautioned against legislation setting forth any content restrictions. Instead, the Commission suggested procedural changes to enhance the role of advisory panels and a statutory reaffirmation of “the high place the nation accords to the fostering of mutual respect for the disparate beliefs and values among us.” See Independent Commission, Report to Congress on the National *576 Endowment for the Arts 83–91 (Sept.1990), 3 Record, Doc. No. 51, Exh. K (hereinafter Report to Congress).

Informed by the Commission’s recommendations, and cognizant of pending judicial challenges to the funding limitations in the 1990 appropriations bill, Congress debated several proposals to reform the NEA’s grant-making process when it considered the agency’s reauthorization in the fall of 1990.

* * * * *
Ultimately, Congress adopted the Williams/Coleman Amendment, a bipartisan compromise between Members opposing any funding restrictions and those favoring some guidance to the agency. In relevant part, the Amendment became § 954(d)(1), which directs the Chairperson, in establishing procedures to judge the artistic merit of grant applications, to “take[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public.”

*577 The NEA has not promulgated any official interpretation of the provision, but in December 1990, the Council unanimously adopted a resolution to implement § 954(d)(1) merely by ensuring that the members of the advisory panels that conduct the initial review of grant applications represent geographic, ethnic, and esthetic diversity. See Minutes of the Dec. 1990 Retreat of the National Council on the Arts, reprinted in App. 12–13; Transcript of the Dec. 1990 Retreat of the National Council on the Arts, reprinted in id., at 32–33. John Frohnmayer, then Chairperson of the NEA, also declared that he would “count on [the] procedures” ensuring diverse membership on the peer review panels to fulfill Congress’ mandate. See id., at 40.

**B**

The four individual respondents in this case, Karen Finley, John Fleck, Holly Hughes, and Tim Miller, are performance artists who applied for NEA grants before § 954(d)(1) was enacted. An advisory panel recommended approval of respondents’ projects, both initially and after receiving Frohnmayer’s request to reconsider three of the applications. A majority of the Council subsequently recommended disapproval, and in June 1990, the NEA informed respondents that they had been denied funding. Respondents filed suit, alleging that the NEA had violated their First Amendment rights by rejecting the applications on political grounds, had failed to follow statutory procedures by basing the denial on criteria other than those set forth in the NEA’s enabling statute […] Respondents sought restoration of the recommended grants or reconsideration of their applications […] When Congress enacted § 954(d)(1), respondents, now joined by the National Association of Artists’ Organizations (NAAO), amended *578 their complaint to challenge the provision as void for vagueness and impermissibly viewpoint based. First Amended Complaint, ¶ 1.
The District Court denied the NEA’s motion for judgment on the pleadings, 795 F.Supp. 1457, 1463–1468 (C.D.Cal.1992), and, after discovery, the NEA agreed to settle the individual respondents’ statutory and as-applied constitutional claims by paying the artists the amount of the vetoed grants, damages, and attorney’s fees. See Stipulation and Settlement Agreement, 6 Record, Doc. No. 128, pp. 3–5.

The District Court then granted summary judgment in favor of respondents on their facial constitutional challenge to § 954(d)(1) and enjoined enforcement of the provision.

* * * * *

A divided panel of the Court of Appeals affirmed the District Court’s ruling. 100 F.3d 671 (C.A.9 1996). The majority agreed with the District Court that the NEA was compelled by the adoption of § 954(d)(1) to alter its grant-making procedures to ensure that applications are judged according to the “decency and respect” criteria. The Chairperson, the court reasoned, “has no discretion to ignore this obligation, enforce only part of it, or give it a cramped construction.” Id., at 680. Concluding that the “decency and respect” criteria are not “susceptible to objective definition,” the court held that § 954(d)(1) “gives rise to the danger of arbitrary and discriminatory application” and is void for vagueness under the First and Fifth Amendments. Id., at 680–681. In the alternative, the court ruled that § 954(d)(1) violates the First Amendment’s prohibition on viewpoint-based restrictions on protected speech. Government funding of the arts, the court explained, is both a “traditional sphere of free expression,” Rust v. Sullivan, 500 U.S. 173, 200, 111 S.Ct. 1759, 1776, 114 L.Ed.2d 233 (1991), and an area in which the Government has stated its intention to “encourage a diversity of views from private speakers,” Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 834, 115 S.Ct. 2510, 2519, 132 L.Ed.2d 700 (1995). 100 F.3d, at 681–682. Accordingly, finding that § 954(d)(1) “has a speech-based restriction as its sole rationale and operative principle,” Rosenberger, supra, at 834, 115 S.Ct., at 2519, and noting the NEA’s failure to articulate a compelling interest for
the provision, the court declared it facially invalid. 100 F.3d, at 683.

* * * * *

We granted certiorari, 522 U.S. 991, 118 S.Ct. 554, 139 L.Ed.2d 396 (1997), and now reverse the judgment of the Court of Appeals.

II

A

[The majority recited the standards applicable to a Facial Challenge, and rejected the lower Courts’ reasoning, deciding that “§ 954(d)(1) admonishes the NEA merely to take ‘decency and respect’ into consideration” and that the legislation was aimed at reforming procedures rather than precluding speech, which undercut respondents’ argument that the provision inevitably will be utilized as a tool for invidious viewpoint discrimination. The majority determined that the facial challenge was an argument that the § 954(d)(1) criteria were “sufficiently subjective that the agency could utilize them to engage in viewpoint discrimination” but found that argument unpersuasive because the entire “artistic excellence” scheme was subjective and that the arguments were too hypothetical to withstand a facial challenge test].

Respondents do not allege discrimination in any particular funding decision. (In fact, after filing suit to challenge § 954(d)(1), two of the individual respondents received NEA grants. See 4 Record, Doc. No. 57, Exh. 35 (Sept. 30, 1991, letters from the NEA informing respondents Hughes and Miller that they had been awarded Solo Performance Theater *587 Artist Fellowships).) Thus, we have no occasion here to address an as-applied challenge in a situation where the denial of a grant may be shown to be the product of invidious viewpoint discrimination. If the NEA were to leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints, then we would confront a
different case. We have stated that, even in the provision of subsidies, the Government may not “ai[m] at the suppression of dangerous ideas,” Regan v. Taxation With Representation of Wash., 461 U.S. 540, 550, 103 S.Ct. 1997, 2003, 76 L.Ed.2d 129 (1983) (internal quotation marks omitted), and if a subsidy were “manipulated” to have a “coercive effect,” then relief could be appropriate. See Arkansas Writers’ Project, Inc. v. Ragland, 481 U.S. 221, 237, 107 S.Ct. 1722, 1731–1732, 95 L.Ed.2d 209 (1987) (SCALIA, J., dissenting); see also Leathers v. Medlock, 499 U.S. 439, 447, 111 S.Ct. 1438, 1443, 113 L.Ed.2d 494 (1991) (“[D]ifferential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints”). **2179 In addition, as the NEA itself concedes, a more pressing constitutional question would arise if Government funding resulted in the imposition of a disproportionate burden calculated to drive “certain ideas or viewpoints from the marketplace.” Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 116, 112 S.Ct. 501, 508, 116 L.Ed.2d 476 (1991); see Brief for Petitioners 38, n. 12. Unless § 954(d)(1) is applied in a manner that raises concern about the suppression of disfavored viewpoints, however, we uphold the constitutionality of the provision. Cf. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 396, 89 S.Ct. 1794, 1809, 23 L.Ed.2d 371 (1969) (“[W]e will not now pass upon the constitutionality of these regulations by envisioning the most extreme applications conceivable, but will deal with those problems if and when they arise” (internal citation omitted)).

(Emphasis Added). Thus, although the Court was unable to rule on whether the NEA Scheme could be defeated under an “As-Applied” challenge (because the NEA settled the claim and funded the projects), the Supreme Court outlined the contours of the challenge. A statute that considers viewpoints in distributing government funds would be found unconstitutional if it penalized disfavored viewpoints. Thus, the Court said that although the statute was facially valid, and these particular plaintiffs had no standing to bring such a claim, a future claim could arise if a different plaintiff could prove that the NEA “applied [the statute] in a manner that raises concern about the suppression of disfavored viewpoints.” [Pin Cite].

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IV. STANDING, RIPENESS AND JUSTICEABILITY – AN OVERVIEW

V. THE AFFORDABLE CARE ACT: A CASE STUDY

[FOCUS ON VARIOUS CHALLENGES BROUGHT TO THE ACA. PICK BEST FEW CIRCUIT DECISIONS TO FOCUS ON. FOCUS ON THE SUPREME COURT’S DECISION HOLDING THAT CONGRESS HAD THE POWER UNDER TAXATION TO ENACT INDIVIDUAL MANDATE. STATE OF LAW / ONGOING CHALLENGES.]
JOHN, by the grace of God King of England, Lord of Ireland, Duke of Normandy and Aquitaine, and Count of Anjou, to his archbishops, bishops, abbots, earls, barons, justices, foresters, sheriffs, stewards, servants, and to all his officials and loyal subjects, Greeting.

KNOW THAT BEFORE GOD, for the health of our soul and those of our ancestors and heirs, to the honour of God, the exaltation of the holy Church, and the better ordering of our kingdom, at the advice of our reverend fathers Stephen, archbishop of Canterbury, primate of all England, and cardinal of the holy Roman Church, Henry archbishop of Dublin, William bishop of London, Peter bishop of Winchester, Jocelin bishop of Bath and Glastonbury, Hugh bishop of Lincoln, Walter Bishop of Worcester, William bishop of Coventry, Benedict bishop of Rochester, Master Pandulf subdeacon and member of the papal household, Brother Aymeric master of the knighthood of the Temple in England, William Marshal earl of Pembroke, William earl of Salisbury, William earl of Warren, William earl of Arundel, Alan de Galloway constable of Scotland, Warin Fitz Gerald, Peter Fitz Herbert, Hubert de Burgh seneschal of Poitou, Hugh de Neville, Matthew Fitz Herbert, Thomas Basset, Alan Basset, Philip Daubeney, Robert de Roppeley, John Marshal, John Fitz Hugh, and other loyal subjects:
+ (1) FIRST, THAT WE HAVE GRANTED TO GOD, and by this present charter have confirmed for us and our heirs in perpetuity, that the English Church shall be free, and shall have its rights undiminished, and its liberties unimpaired. That we wish this so to be observed, appears from the fact that of our own free will, before the outbreak of the present dispute between us and our barons, we granted and confirmed by charter the freedom of the Church's elections - a right reckoned to be of the greatest necessity and importance to it - and caused this to be confirmed by Pope Innocent III. This freedom we shall observe ourselves, and desire to be observed in good faith by our heirs in perpetuity.

TO ALL FREE MEN OF OUR KINGDOM we have also granted, for us and our heirs for ever, all the liberties written out below, to have and to keep for them and their heirs, of us and our heirs:

(2) If any earl, baron, or other person that holds lands directly of the Crown, for military service, shall die, and at his death his heir shall be of full age and owe a `relief', the heir shall have his inheritance on payment of the ancient scale of `relief'. That is to say, the heir or heirs of an earl shall pay £100 for the entire earl's barony, the heir or heirs of a knight 100s. at most for the entire knight's `fee', and any man that owes less shall pay less, in accordance with the ancient usage of `fees'

(3) But if the heir of such a person is under age and a ward, when he comes of age he shall have his inheritance without `relief' or fine.

(4) The guardian of the land of an heir who is under age shall take from it only reasonable revenues, customary dues, and feudal services. He shall do this without destruction or damage to
men or property. If we have given the guardianship of the land to a sheriff, or to any person answerable to us for the revenues, and he commits destruction or damage, we will exact compensation from him, and the land shall be entrusted to two worthy and prudent men of the same "fee", who shall be answerable to us for the revenues, or to the person to whom we have assigned them. If we have given or sold to anyone the guardianship of such land, and he causes destruction or damage, he shall lose the guardianship of it, and it shall be handed over to two worthy and prudent men of the same "fee", who shall be similarly answerable to us.

(5) For so long as a guardian has guardianship of such land, he shall maintain the houses, parks, fish preserves, ponds, mills, and everything else pertaining to it, from the revenues of the land itself. When the heir comes of age, he shall restore the whole land to him, stocked with plough teams and such implements of husbandry as the season demands and the revenues from the land can reasonably bear.

(6) Heirs may be given in marriage, but not to someone of lower social standing. Before a marriage takes place, it shall be made known to the heir's next-of-kin.

(7) At her husband's death, a widow may have her marriage portion and inheritance at once and without trouble. She shall pay nothing for her dower, marriage portion, or any inheritance that she and her husband held jointly on the day of his death. She may remain in her husband's house for forty days after his death, and within this period her dower shall be assigned to her.

(8) No widow shall be compelled to marry, so long as she wishes to remain without a husband. But she must give security that she will not marry without royal consent, if she holds her lands of the Crown, or without the consent of whatever other lord she may hold them of.
(9) Neither we nor our officials will seize any land or rent in payment of a debt, so long as the debtor has movable goods sufficient to discharge the debt. A debtor's sureties shall not be distrained upon so long as the debtor himself can discharge his debt. If, for lack of means, the debtor is unable to discharge his debt, his sureties shall be answerable for it. If they so desire, they may have the debtor's lands and rents until they have received satisfaction for the debt that they paid for him, unless the debtor can show that he has settled his obligations to them.

* (10) If anyone who has borrowed a sum of money from Jews dies before the debt has been repaid, his heir shall pay no interest on the debt for so long as he remains under age, irrespective of whom he holds his lands. If such a debt falls into the hands of the Crown, it will take nothing except the principal sum specified in the bond.

* (11) If a man dies owing money to Jews, his wife may have her dower and pay nothing towards the debt from it. If he leaves children that are under age, their needs may also be provided for on a scale appropriate to the size of his holding of lands. The debt is to be paid out of the residue, reserving the service due to his feudal lords. Debts owed to persons other than Jews are to be dealt with similarly.

* (12) No 'scutage' or 'aid' may be levied in our kingdom without its general consent, unless it is for the ransom of our person, to make our eldest son a knight, and (once) to marry our eldest daughter. For these purposes only a reasonable 'aid' may be levied. 'Aids' from the city of London are to be treated similarly.
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+ (13) The city of London shall enjoy all its ancient liberties and free customs, both by land and by water. We also will and grant that all other cities, boroughs, towns, and ports shall enjoy all their liberties and free customs.

* (14) To obtain the general consent of the realm for the assessment of an `aid' - except in the three cases specified above - or a `scutage', we will cause the archbishops, bishops, abbots, earls, and greater barons to be summoned individually by letter. To those who hold lands directly of us we will cause a general summons to be issued, through the sheriffs and other officials, to come together on a fixed day (of which at least forty days notice shall be given) and at a fixed place. In all letters of summons, the cause of the summons will be stated. When a summons has been issued, the business appointed for the day shall go forward in accordance with the resolution of those present, even if not all those who were summoned have appeared.

* (15) In future we will allow no one to levy an `aid' from his free men, except to ransom his person, to make his eldest son a knight, and (once) to marry his eldest daughter. For these purposes only a reasonable `aid' may be levied.

(16) No man shall be forced to perform more service for a knight's `fee', or other free holding of land, than is due from it.

(17) Ordinary lawsuits shall not follow the royal court around, but shall be held in a fixed place.

(18) Inquests of novel disseisin, mort d'ancestor, and darrein presentment shall be taken only in their proper county court. We ourselves, or in our absence abroad our chief justice, will send two justices to each county four times a year, and these justices, with four knights of the county
elected by the county itself, shall hold the assizes in the county court, on the day and in the place where the court meets.

(19) If any assizes cannot be taken on the day of the county court, as many knights and freeholders shall afterwards remain behind, of those who have attended the court, as will suffice for the administration of justice, having regard to the volume of business to be done.

(20) For a trivial offence, a free man shall be fined only in proportion to the degree of his offence, and for a serious offence correspondingly, but not so heavily as to deprive him of his livelihood. In the same way, a merchant shall be spared his merchandise, and a husbandman the implements of his husbandry, if they fall upon the mercy of a royal court. None of these fines shall be imposed except by the assessment on oath of reputable men of the neighbourhood.

(21) Earls and barons shall be fined only by their equals, and in proportion to the gravity of their offence.

(22) A fine imposed upon the lay property of a clerk in holy orders shall be assessed upon the same principles, without reference to the value of his ecclesiastical benefice.

(23) No town or person shall be forced to build bridges over rivers except those with an ancient obligation to do so.

(24) No sheriff, constable, coroners, or other royal officials are to hold lawsuits that should be held by the royal justices.

* (25) Every county, hundred, wapentake, and tithing shall remain at its ancient rent, without increase, except the royal demesne manors.

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(26) If at the death of a man who holds a lay 'fee' of the Crown, a sheriff or royal official produces royal letters patent of summons for a debt due to the Crown, it shall be lawful for them to seize and list movable goods found in the lay 'fee' of the dead man to the value of the debt, as assessed by worthy men. Nothing shall be removed until the whole debt is paid, when the residue shall be given over to the executors to carry out the dead man's will. If no debt is due to the Crown, all the movable goods shall be regarded as the property of the dead man, except the reasonable shares of his wife and children.

* (27) If a free man dies intestate, his movable goods are to be distributed by his next-of-kin and friends, under the supervision of the Church. The rights of his debtors are to be preserved.

(28) No constable or other royal official shall take corn or other movable goods from any man without immediate payment, unless the seller voluntarily offers postponement of this.

(29) No constable may compel a knight to pay money for castle-guard if the knight is willing to undertake the guard in person, or with reasonable excuse to supply some other fit man to do it. A knight taken or sent on military service shall be excused from castle-guard for the period of this service.

(30) No sheriff, royal official, or other person shall take horses or carts for transport from any free man, without his consent.

(31) Neither we nor any royal official will take wood for our castle, or for any other purpose, without the consent of the owner.
(32) We will not keep the lands of people convicted of felony in our hand for longer than a year and a day, after which they shall be returned to the lords of the 'fees' concerned.

(33) All fish-weirs shall be removed from the Thames, the Medway, and throughout the whole of England, except on the sea coast.

(34) The writ called *precipe* shall not in future be issued to anyone in respect of any holding of land, if a free man could thereby be deprived of the right of trial in his own lord's court.

(35) There shall be standard measures of wine, ale, and corn (the London quarter), throughout the kingdom. There shall also be a standard width of dyed cloth, russett, and haberject, namely two ells within the selvedges. Weights are to be standardised similarly.

(36) In future nothing shall be paid or accepted for the issue of a writ of inquisition of life or limbs. It shall be given gratis, and not refused.

(37) If a man holds land of the Crown by 'fee-farm', 'socage', or 'burgage', and also holds land of someone else for knight's service, we will not have guardianship of his heir, nor of the land that belongs to the other person's 'fee', by virtue of the 'fee-farm', 'socage', or 'burgage', unless the 'fee-farm' owes knight's service. We will not have the guardianship of a man's heir, or of land that he holds of someone else, by reason of any small property that he may hold of the Crown for a service of knives, arrows, or the like.

(38) In future no official shall place a man on trial upon his own unsupported statement, without producing credible witnesses to the truth of it.
+ (39) No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgement of his equals or by the law of the land.

+ (40) To no one will we sell, to no one deny or delay right or justice.

(41) All merchants may enter or leave England unharmed and without fear, and may stay or travel within it, by land or water, for purposes of trade, free from all illegal exactions, in accordance with ancient and lawful customs. This, however, does not apply in time of war to merchants from a country that is at war with us. Any such merchants found in our country at the outbreak of war shall be detained without injury to their persons or property, until we or our chief justice have discovered how our own merchants are being treated in the country at war with us. If our own merchants are safe they shall be safe too.

* (42) In future it shall be lawful for any man to leave and return to our kingdom unharmed and without fear, by land or water, preserving his allegiance to us, except in time of war, for some short period, for the common benefit of the realm. People that have been imprisoned or outlawed in accordance with the law of the land, people from a country that is at war with us, and merchants - who shall be dealt with as stated above - are excepted from this provision.

(43) If a man holds lands of any 'escheat' such as the 'honour' of Wallingford, Nottingham, Boulogne, Lancaster, or of other 'escheats' in our hand that are baronies, at his death his heir shall give us only the 'relief' and service that he would have made to the baron, had the barony been in the baron's hand. We will hold the 'escheat' in the same manner as the baron held it.
(44) People who live outside the forest need not in future appear before the royal justices of the forest in answer to general summonses, unless they are actually involved in proceedings or are sureties for someone who has been seized for a forest offence.

* (45) We will appoint as justices, constables, sheriffs, or other officials, only men that know the law of the realm and are minded to keep it well.

(46) All barons who have founded abbeys, and have charters of English kings or ancient tenure as evidence of this, may have guardianship of them when there is no abbot, as is their due.

(47) All forests that have been created in our reign shall at once be disafforested. River-banks that have been enclosed in our reign shall be treated similarly.

* (48) All evil customs relating to forests and warrens, foresters, warreners, sheriffs and their servants, or river-banks and their wardens, are at once to be investigated in every county by twelve sworn knights of the county, and within forty days of their enquiry the evil customs are to be abolished completely and irrevocably. But we, or our chief justice if we are not in England, are first to be informed.

* (49) We will at once return all hostages and charters delivered up to us by Englishmen as security for peace or for loyal service.

* (50) We will remove completely from their offices the kinsmen of Gerard de Athée, and in future they shall hold no offices in England. The people in question are Engelard de Cigogné', Peter, Guy, and Andrew de Chanceaux, Guy de Cigogné, Geoffrey de Martigny and his brothers, Philip Marc and his brothers, with Geoffrey his nephew, and all their followers.
* (51) As soon as peace is restored, we will remove from the kingdom all the foreign knights, bowmen, their attendants, and the mercenaries that have come to it, to its harm, with horses and arms.

* (52) To any man whom we have deprived or dispossessed of lands, castles, liberties, or rights, without the lawful judgement of his equals, we will at once restore these. In cases of dispute the matter shall be resolved by the judgement of the twenty-five barons referred to below in the clause for securing the peace (§ 61). In cases, however, where a man was deprived or dispossessed of something without the lawful judgement of his equals by our father King Henry or our brother King Richard, and it remains in our hands or is held by others under our warranty, we shall have respite for the period commonly allowed to Crusaders, unless a lawsuit had been begun, or an enquiry had been made at our order, before we took the Cross as a Crusader. On our return from the Crusade, or if we abandon it, we will at once render justice in full.

* (53) We shall have similar respite in rendering justice in connexion with forests that are to be disafforested, or to remain forests, when these were first a-orested by our father Henry or our brother Richard; with the guardianship of lands in another person's `fee', when we have hitherto had this by virtue of a `fee' held of us for knight's service by a third party; and with abbeys founded in another person's `fee', in which the lord of the `fee' claims to own a right. On our return from the Crusade, or if we abandon it, we will at once do full justice to complaints about these matters.

(54) No one shall be arrested or imprisoned on the appeal of a woman for the death of any person except her husband.
* (55) All fines that have been given to us unjustly and against the law of the land, and all fines that we have exacted unjustly, shall be entirely remitted or the matter decided by a majority judgement of the twenty-five barons referred to below in the clause for securing the peace (§ 61) together with Stephen, archbishop of Canterbury, if he can be present, and such others as he wishes to bring with him. If the archbishop cannot be present, proceedings shall continue without him, provided that if any of the twenty-five barons has been involved in a similar suit himself, his judgement shall be set aside, and someone else chosen and sworn in his place, as a substitute for the single occasion, by the rest of the twenty-five.

(56) If we have deprived or dispossessed any Welshmen of lands, liberties, or anything else in England or in Wales, without the lawful judgement of their equals, these are at once to be returned to them. A dispute on this point shall be determined in the Marches by the judgement of equals. English law shall apply to holdings of land in England, Welsh law to those in Wales, and the law of the Marches to those in the Marches. The Welsh shall treat us and ours in the same way.

* (57) In cases where a Welshman was deprived or dispossessed of anything, without the lawful judgement of his equals, by our father King Henry or our brother King Richard, and it remains in our hands or is held by others under our warranty, we shall have respite for the period commonly allowed to Crusaders, unless a lawsuit had been begun, or an enquiry had been made at our order, before we took the Cross as a Crusader. But on our return from the Crusade, or if we abandon it, we will at once do full justice according to the laws of Wales and the said regions.
* (58) We will at once return the son of Llywelyn, all Welsh hostages, and the charters delivered to us as security for the peace.

* (59) With regard to the return of the sisters and hostages of Alexander, king of Scotland, his liberties and his rights, we will treat him in the same way as our other barons of England, unless it appears from the charters that we hold from his father William, formerly king of Scotland, that he should be treated otherwise. This matter shall be resolved by the judgement of his equals in our court.

(60) All these customs and liberties that we have granted shall be observed in our kingdom in so far as concerns our own relations with our subjects. Let all men of our kingdom, whether clergy or laymen, observe them similarly in their relations with their own men.

* (61) SINCE WE HAVE GRANTED ALL THESE THINGS for God, for the better ordering of our kingdom, and to allay the discord that has arisen between us and our barons, and since we desire that they shall be enjoyed in their entirety, with lasting strength, for ever, we give and grant to the barons the following security:

The barons shall elect twenty-five of their number to keep, and cause to be observed with all their might, the peace and liberties granted and confirmed to them by this charter.

If we, our chief justice, our officials, or any of our servants offend in any respect against any man, or transgress any of the articles of the peace or of this security, and the offence is made known to four of the said twenty-five barons, they shall come to us - or in our absence from the kingdom to the chief justice - to declare it and claim immediate redress. If we, or in our absence abroad the chief justice, make no redress within forty days, reckoning from the day on which the
offence was declared to us or to him, the four barons shall refer the matter to the rest of the twenty-five barons, who may distraint upon and assail us in every way possible, with the support of the whole community of the land, by seizing our castles, lands, possessions, or anything else saving only our own person and those of the queen and our children, until they have secured such redress as they have determined upon. Having secured the redress, they may then resume their normal obedience to us.

Any man who so desires may take an oath to obey the commands of the twenty-five barons for the achievement of these ends, and to join with them in assailing us to the utmost of his power. We give public and free permission to take this oath to any man who so desires, and at no time will we prohibit any man from taking it. Indeed, we will compel any of our subjects who are unwilling to take it to swear it at our command.

If one of the twenty-five barons dies or leaves the country, or is prevented in any other way from discharging his duties, the rest of them shall choose another baron in his place, at their discretion, who shall be duly sworn in as they were.

In the event of disagreement among the twenty-five barons on any matter referred to them for decision, the verdict of the majority present shall have the same validity as a unanimous verdict of the whole twenty-five, whether these were all present or some of those summoned were unwilling or unable to appear.

The twenty-five barons shall swear to obey all the above articles faithfully, and shall cause them to be obeyed by others to the best of their power.
We will not seek to procure from anyone, either by our own efforts or those of a third party, anything by which any part of these concessions or liberties might be revoked or diminished. Should such a thing be procured, it shall be null and void and we will at no time make use of it, either ourselves or through a third party.

* (62) We have remitted and pardoned fully to all men any ill-will, hurt, or grudges that have arisen between us and our subjects, whether clergy or laymen, since the beginning of the dispute. We have in addition remitted fully, and for our own part have also pardoned, to all clergy and laymen any offences committed as a result of the said dispute between Easter in the sixteenth year of our reign (i.e. 1215) and the restoration of peace.

In addition we have caused letters patent to be made for the barons, bearing witness to this security and to the concessions set out above, over the seals of Stephen archbishop of Canterbury, Henry archbishop of Dublin, the other bishops named above, and Master Pandulf.

* (63) IT IS ACCORDINGLY OUR WISH AND COMMAND that the English Church shall be free, and that men in our kingdom shall have and keep all these liberties, rights, and concessions, well and peaceably in their fulness and entirety for them and their heirs, of us and our heirs, in all things and all places for ever.

Both we and the barons have sworn that all this shall be observed in good faith and without deceit. Witness the abovementioned people and many others.
Given by our hand in the meadow that is called Runnymede, between Windsor and Staines, on the fifteenth day of June in the seventeenth year of our reign (i.e. 1215: the new regnal year began on 28 May).
APPENDIX B

vs.

Anderson v. Madison County 232 F.3d 450 (5th Cir. 2000)

CONSENT ORDER

Plaintiffs Anderson, et al. and Plaintiff-Intervenor United States (collectively, the "parties-plaintiff") and Defendant Madison County School District ("MCSD" or the "District"), having engaged in good-faith negotiations, do voluntarily agree to the entry of this Consent Order, subject to the Court's approval. This Consent Order is intended to resolve specific issues being pursued by the parties-plaintiff on appeal of the Court's September 21, 1999 Memorandum Opinion and Order (the "September 1999 Order"), approving the District's Motion to Modify Desegregation Plan, and to clarify actions the District will take to implement this Court's September 1999 Order.

After reviewing the terms of this Consent Order, the Court concludes that the entry of this Consent Order comports with the objectives of the Fourteenth Amendment to the Constitution of the United States of America and applicable federal law, and, if properly implemented, will further the orderly desegregation of the Madison County School District. It is, THEREFORE, ORDERED, ADJUDGED AND DECREED as follows:

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I. BACKGROUND

This action was brought in 1969, alleging unlawful operation of a racially dual system of public education in violation of the Fourteenth Amendment to the Constitution and Title IV of the Civil Rights Act of 1964, 42 U.S.C. 2000c-6, et seq. The Court entered Consent Orders in 1988, 1989, and 1990.

On October 7, 1998, the MCSD filed a Motion to Modify Desegregation Plan, seeking approval to construct five (5) new schools (one high school, two middle schools and two elementary schools), to make additions and renovations to existing school facilities, and make related student reassignments. On November 2, 1998, the United States filed its Response in Opposition to the MCSD's Motion for Modification of its Desegregation Plan. After extensive discovery, trial was held in this case from May 17 to May 25, 1999. On September 21, 1999, this Court entered its Memorandum Opinion and Order. On November 19, 1999, the parties-plaintiff filed notices of appeal and motions for stay of portions of the September 1999 Order.

On December 17, 1999, this Court granted the motions of the parties-plaintiff for a stay of the construction portion of its September 1999 Order, pending resolution thereof by the Fifth Circuit Court of Appeals. Subsequently, the parties engaged in diligent and good faith efforts to reach agreement on outstanding issues, as reflected in this Consent Order. With the exception of the location of the new high school and its attendance zone, the parties agree that this dispute shall be resolved without further delay to avoid more costly and protracted litigation.

II. SCHOOL CONSTRUCTION
The District has agreed to the following modifications of its construction proposal approved by the Court in its September 1999 Order, as set forth below. (1)

**A. Expert Review of Plans** At least fifteen (15) business days prior to the anticipated date for completion of the schematics for each new facility identified herein, the District shall so notify the parties-plaintiff by telephone and in writing (by facsimile). Prior to finalizing its construction plans, or entering into any binding commitments to commence construction of any of the new facilities identified herein, the District shall permit an expert designated by the United States, in consultation with the Superintendent and/or other designated representative of the District, twenty-one (21) days within which to review and comment on the plans at the schematic stage. This 21-day period shall commence on the date on which the expert receives the schematics. The District shall provide all documents reasonably necessary to permit the expert to make this evaluation, including such materials as the expert may reasonably request, and shall make a good-faith effort to address any suggestions and concerns that the expert may provide. In the event such designated expert fails to review and comment in writing upon the plans within twenty-one (21) days of their submission, the District shall be relieved of any further obligation under this paragraph.

**B. New High School**

1. The location of the new high school shall continue to be a disputed issue on appeal to the Fifth Circuit Court of Appeals.

2. The District shall insure that travel times to and from this new high school, particularly to and from the Flora attendance area, are consistent with Section III, below.
C. New Middle Schools

1. Subject to recognized principles of site-based management concerning curricula, grants, gifts and the provisions of Section VII, below, the District shall ensure that programming and facilities at each of its middle schools are educationally comparable.

2. *East Flora Middle School* The District shall renovate and make additions to East Flora School to include a middle school for grades 6-8 that is educationally separate from the elementary school on the same site. Enhancements and improvements will include a science lab facility, facilities to accommodate art and music, middle school-specific classrooms, a computer lab with internet access, a media center appropriate for middle school students in grades 6-8, and appropriate space for a parents' center. In addition, the District will renovate the existing gymnasium for use by the middle school.

The District shall make this project a priority of the initial phase of its construction and renovation program, with the goal of starting construction and renovation by the beginning of the 2001-2002 school year. The new Flora Middle School shall have the same attendance zone as that for students in grades 6 through 8 in the current Flora attendance zone.

3. *New Rosa Scott Middle School* The District shall use its best efforts to purchase a site (and resolve any land usage issues regarding that site) in the Madison area on Bozeman Road adjacent to the corporate limits of the City of Madison and the Reserve subdivision for the purpose of building new Rosa Scott Middle School. In the event the District is unable to acquire this site for the purpose of building a new school, the middle school shall be built at a site of the District's choosing west of I-55, if acquisition of such site is feasible; or if not feasible, the
school will be built on a tract of land currently owned by the District on Madison Avenue adjacent to Liberty Park. This school shall have the same attendance zone as the current Rosa Scott Middle School. The Court finds and the parties agree that all sites described are within the Madison area.

4. **New Velma Jackson Middle School.** The new middle school for students in grades 6 through 8 in the Velma Jackson attendance area shall be built at a site selected by the District, between the existing Velma Jackson School and Luther Branson Elementary School. The District shall make this project a priority of the initial phase of construction and renovation.

**D. Velma Jackson School**

1. The District shall ensure that the facilities for elementary students in grades Pre-K-5 and for high school students in grades 9-12 at the Velma Jackson School are separated to the extent practicable. The District shall make the renovations at the Velma Jackson Campus a priority of the initial phase of renovations.

2. The District shall complete the necessary renovation, remodeling, and addition(s) to insure that the "Eco-Journeys" high school magnet program at Velma Jackson High School is appropriately equipped so as to be fully implemented by the 2000-2001 school year.

**E. Future Construction/Attendance Zone Modifications**

Should the District determine to construct, consolidate or close school(s), or to reconfigure grades or attendance zones, at least sixty (60) days prior to expending any funds, or entering into any binding commitments, or finalizing a school bond resolution, the District shall provide
written notice and sufficient information to counsel for the parties-plaintiff to evaluate the District's proposed action(s). The parties commit to work together, informally and in good faith, to attempt to resolve any identified concerns. If the parties-plaintiff fail to object to the District's proposed action(s) within the prescribed sixty (60) day period, then the parties-plaintiff shall be deemed to have waived any objections to such proposed action(s).

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V. STAFF RECRUITMENT, HIRING, ASSIGNMENT AND COMPENSATION

A. Prior to the beginning of the 2000-2001 school year, the District shall adopt, and therefore adhere to, written policies governing recruitment, hiring, compensation, assignment and transfer of school-based and District-level administrators, and of teachers, teacher-aides, and other staff who work directly with children at a school.

B. Administrators. Prior to the beginning of the 2000-2001 school year, the District will determine its administrative organization structure and provide job descriptions for each Central Office administrator and building principal position. The District shall advertise within the District all openings. If no District candidate is deemed by the Superintendent to be satisfactory for a position, the District will then advertise positions outside the District. All applicants at either stage will be interviewed by a bi-racial panel (2) selected by the District. The Superintendent shall retain the authority to make all final employment recommendations to the School Board regarding administrators.
C. Consistent with Singleton, (3) the District shall, not later than June 30, 2003, assign teachers so that the ratio of black to white teachers at each school in the District is within +/- 15% of the District-wide ratio of black teachers to white teachers.

VI. BI-RACIAL ADVISORY COMMITTEE

The Court shall establish an independent bi-racial advisory committee to advise the Superintendent and Board of Education of the District on matters dealing with implementation of and proposed modifications to the desegregation orders of this Court. The advisory committee shall consist of eight (8) members and shall be formed beginning with the school year 2000-01. The parties-plaintiff shall appoint four (4) members, two (2) whites and two (2) blacks, to the committee. The District shall appoint four (4) members, two (2) whites and two (2) blacks, to the committee. Members shall serve staggered four year terms. The initial committee shall have two members to serve a one year term, two to serve a two year term, two to serve a three year term, and two to serve a four year term. Terms shall begin on August 1 of each year. No person shall be eligible to serve on this committee who is or has been a litigant against the District, is not a resident of the District, employee of the District, or is a member of the Board of Education of the District. All of the members of the committee shall, at the time their terms commence, be either parents or legal guardians of children enrolled in the MCSD public schools or residents of the Madison County School District. The committee shall select a chairperson to serve a term of one year. Thereafter, the Chair shall rotate annually between a black and a white member. The committee shall meet on a regular basis, but no less than five (5) times during school year 2000-
01, and at least three (3) times each school year thereafter, pursuant to appropriate notice at a reasonable time and place to be determined by the committee. The committee shall maintain appropriate records and minutes of its meetings. The committee shall issue an annual written report to the District and the Court not later than June 15th of each year. Prior to its submission, the report shall be approved by a majority of the committee and signed by each of its members. The District shall supply the committee with reasonable staff support and assistance and information as the committee may reasonably request, including clerical assistance in the preparation of the committee's annual reports. At least annually, the Board of Education shall hold a public meeting with the committee.

VII. TITLE I SCHOOLS INITIATIVE

The District has agreed to enter into a detailed school/college partnership with Tougaloo College concerning programming, curricula and performance at the District's Title I schools. The District will finalize such an arrangement with Tougaloo College for implementation beginning with the 2000-2001 school year, and will provide all parties with a copy of the final agreement. The parties recognize that the District and Tougaloo College shall retain reasonable flexibility to modify and implement this partnership as specific educational needs at each Title I school are identified and as those needs evolve over time.

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IX. JURISDICTION
The Court shall retain jurisdiction over this case, and all prior orders not inconsistent with, or otherwise modified by, this Consent Order remain in full force and effect.

SO ORDERED this the _____ day of ____________ , 2000.

__________________________________________ United States District Judge

The signatures of counsel for each of the parties below and on the following page signify the parties' consent to this agreement [SIGNATURE BLOCKS OMITTED].