

INDIANA
INTERNATIONAL & COMPARATIVE
LAW REVIEW

VOLUME 3

1993

NUMBER 2

TABLE OF CONTENTS

ARTICLES

- The Right of Privacy and Restraints on Abortion under the "Undue Burden" Test: A Jurisprudential Comparison of *Planned Parenthood v. Casey* with European Practice and Italian Law CHARLES STANLEY ROSS 199
- Choice of Language in Bilateral Treaties: Fifty Years of Changing State Practice JOHN KING GAMBLE
CHARLOTTE KU 233
- European Constitutional Law in Action: Visiting a Public Debate at the Swiss Federal Supreme Court..... DR. MARC FORSTER 265

COMMENTS

- Towards the Establishment of Constitutionalism in Russia MICHAEL P. CHAUVIN 271
- American Labor Law on Foreign Soil: Policies and Effects in a Smaller World ANTHONY SCOTT CHINN 291
- Allocation of the Radio Spectrum: Is the Sky the Limit? SARA ANNE HOOK 319
- Environmental Implications of the North American Free Trade Agreement MICHAEL J. KELLY 361

The Right of Privacy and Restraints on Abortion under the “Undue Burden” Test: A Jurisprudential Comparison of *Planned Parenthood v. Casey* with European Practice and Italian Law

by Charles Stanley Ross*

I. INTRODUCTION

The most recent Supreme Court decision on state regulation of abortion continues a particularly American line of precedent and reasoning—welcome to some, indefensible to others—in upholding a woman’s right to choose an abortion before fetal viability. At the same time the Court recognized that a state may impose restrictions on the interruption of pregnancy, so long as these restraints do not impose an “undue burden” on the exercise of the constitutionally defended right.¹ The Court’s 5-4 decision contains a withering dissent wherein the Chief Justice and three colleagues deny the existence of a constitutional right to an abortion and argue that a state legislature has total dominion over restraints on abortion procedures. Justice Scalia’s additional dissent further goes the majority opinion by lamenting the impossibility of applying the “undue burden” test associated with the reasoning, in past decisions and this one, of Justice O’Connor.²

The language of the Court’s opinion—from the majority’s proclamation of the right to abortion as a “fundamental liberty” protected by the Constitution to the ridicule Scalia heaps on the “undue burden” test,³ as well as Justice Blackmun’s lament that he is eighty-three years old and cannot much longer hold back the forces of darkness that were one vote away from gaining their will in this decision⁴—reveals a court

* Associate Professor, Department of English, Purdue University & J.D. Candidate, 1994, Indiana University School of Law—Indianapolis.

1. *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992).

2. “Justice O’Connor’s ‘undue burden’ test.” *Id.* at 2855 (Rehnquist, C.J., dissenting).

3. “But to come across this phrase [‘Liberty finds no refuge in a jurisprudence of doubt’] in the joint opinion—which calls upon federal district judges to apply an ‘undue burden’ standard as doubtful in application as it is unprincipled in origin—is really more than one should have to bear.” *Id.* at 2876 (Scalia, J., dissenting).

4. *Id.* at 2844 (Blackmun, J., concurring in part).

polarized and even to a certain extent terrorized by what, at the time the decision came down, seemed the most divisive issue in American politics,⁵ certainly the issue that has ideologically accounted for the selection of Supreme Court justices in recent times. However, the apocalyptic terms of polarization and terror and the unwelcome specter of justices held hostage by a public clamoring for judicial support in a political war seem distant things to Americans today, only shortly after the 1992 election of the Democratic candidate for president. If this abatement arises in part from the fair certainty that the next justice will be appointed by a president driven by the ideological force of the abortion issue in an opposite direction from his predecessors, Americans can also derive a certain calm on the issue by realizing how much the *Casey* decision, despite its embattled language and logic, conforms to current developments in international law.⁶

5. "We are offended by these marchers who descend upon us, every year on the anniversary of *Roe*, to protest our saying that the Constitution requires what our society has never thought the Constitution requires." *Id.* at 2884 (Scalia, J., dissenting). See *Roe v. Wade*, 410 U.S. 113 (1973).

6. A similar thesis is offered by Mary Ann Glendon, in *ABORTION AND DIVORCE IN WESTERN LAW* (1987) [hereinafter *GLENDON*], who argues for restrictions on the "right of abortion" by finding them humanely applied in West European countries such as France and Germany. She argues for compromise in this sphere. "[T]he European countries have been able to live relatively peacefully with these laws without experiencing the violence born of complete frustration and without foreclosing re-examination and renegotiation of the issues." *Id.* at 40. She anticipates *Casey*: "It would not be necessary to overrule *Roe* in order to achieve the result of returning most regulation of abortion to the states." *Id.* at 42. She is also aware of Italy's similarity to the United States on this issue.

Here the Italian experience is instructive. In 1975 the Italian Constitutional Court was asked to rule on the constitutionality of an article of the Penal Code which made all abortions criminal except where the defense of strict necessity applied. The Court held that the Penal Code could not constitutionally place 'a total and absolute priority' on the fetus's constitutional right to life where this would deny adequate protection under the Italian Constitution.

Id. at 171 n.168 (citing "Carmosina et al., Decision of the Italian Constitutional Court of February 18, 1975," translated in MAURO CAPPELLETTI AND WILLIAM COHEN, *COMPARATIVE CONSTITUTIONAL LAW* 612-14 (1979)). "This narrow holding permitted the Italian legislature to adopt compromise legislation (similar to the French statutes discussed above), which has been well accepted in a country where abortion was an explosive political issue." *Id.* at 43.

Glendon continues her argument in her book *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991), cited in Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 *NOTRE DAME L. REV.* 403 (1992). "The judicially announced

This article will show that international practice and thinking support two key features of the *Casey* decision. These features are, first, a shift away from the language of a "right of privacy" to justify a woman's right to choose an abortion⁷ and, second, the search for a fair means to balance the woman's right against the state's interest in regulating abortion. A comparison of *Casey* with the practice in other countries defuses the conservative argument from tradition⁸ and original intent.⁹ Moreover, although Justice Scalia bemoans the "undue burden" test as unworkable because it is meaningless and at least one commentator claims the Court will be called upon to rule on every little variant the states will dream up to assert their regulatory privilege,¹⁰ this article will illustrate that the very same issue has been handled over the past fifteen years by the Constitutional Court of Italy in a series of decisions that have been overlooked by commentators in the United States because of their failure to grasp the rich texture of Italian law.¹¹

abortion right in 1973 brought to a virtual halt the process of legislative abortion reform that was already well under way to producing, in the United States as it did all over Europe, compromise statutes that gave substantial protection to women's interests without completely denying protection to developing life." *Id.* at n.474. It follows that an attack on the *Casey* view that undue burden does not infringe a fundamental right should center on analysis of European practice filtered through Glendon's book.

7. The minority opinion objects to an "all-encompassing 'right of privacy' " as a basis for abortion decisions. *Casey*, 112 S. Ct. at 2859 (Rehnquist, C.J., dissenting).

8. "[I]n defining 'liberty,' we may not disregard a specific, 'relevant tradition protecting, or denying protection to, the asserted right.'" *Id.* at 2874 (Scalia, J., dissenting) (citation omitted).

9. "At the time of the adoption of the Fourteenth Amendment, statutory prohibitions or restrictions on abortion were commonplace." *Id.* at 2859 (Rehnquist, C.J., dissenting).

10. Fed. News Service, July 3, 1992, available in LEXIS, Nexis library, FED-NEW file. "Mr. Barnes: 'What the court did by setting up this vague undue burden standard was to say you're going to have to send up every little regulation that involves abortion from now until Doomsday is going to be decided [sic].'" *Id.*

11. This article confirms Glendon's surmise that Italian law supports *Casey* and suggests *Casey* will not be dislodged. GLENDON, *supra* note 6, at 43. One suspects, in fact, that Glendon's book influenced Justice O'Connor's definition of "undue burden" in *Casey*. Such a direct influence would somewhat preempt the point of this article, were it not that Glendon, who seems comfortable with French and German law, shows no signs of reading law in Italian. Like the *Casey* plurality, Glendon clearly opposes the message of *Roe*, that "no state regulation of abortion in the interest of preserving unborn life is permissible in approximately the first six months of pregnancy." *Id.* at 45. She advocates leaving restriction decisions up to state legislatures, *id.* at 47, replacing

II. THE CULTURAL CONTEXT OF THE RIGHT TO PRIVACY AT THE TIME OF *ROE V. WADE*

Efforts at legislative reform to liberalize abortion laws in the United States were cut short in 1973 when the Supreme Court extended the notion of a "right to privacy" to create a constitutional guarantee against the power of the state to pass laws preventing the interruption of pregnancy.¹² A series of articles lauded the Court's decision while attacking its reasoning. One respected commentator, for example, wondered about the scope of the right to privacy: "Thus it seems to me entirely proper to infer a general right to privacy, so long as some care is taken in defining the sort of right the inference will support."¹³ The conservative view is that the inferred right will not support a constitutional protection of abortion such as *Roe* proposes. Archibald Cox, Alexander Bickel, John Hart Ely, Harry Wellington, Richard Epstein, and Paul Freund have all been highly critical of the logic of *Roe*.¹⁴ "A privacy-based defense of abortion seems to depend on the premise that the woman's choice affects only herself—in other words, that the fetus is not a person."¹⁵ The disquiet of the commentators suggests that the Court was guided by public policy in a way similar to its own earlier ruling that laws against contraception were unconstitutional on the right of privacy grounds.¹⁶

Today's disquiet also stems from our current chronological and emotional distance from the cultural upheaval that characterized the 1960s. This Article will briefly describe that era to make the point that the "right of privacy" may be regarded as a cultural phenomenon whose time had come.¹⁷ The most prominent cultural phenomenon of the sixties was the sexual revolution, heralded by the introduction of

a right to abortion with a legislative compromise. *Id.* at 60. Her view, then, seems to coincide with *Casey*. By contrast, *Casey* is this article's point of departure, not the *point d'arrivee*, and this article focuses ultimately on the comparative role of the Italian Constitutional Court in regulating such restrictions. Otherwise this article finds many points of similarity with Glendon's fine book.

12. Cf. GLENDON, *supra* note 6, at 34.

13. John Hart Ely, *The Wages of Crying Wolfe: A Comment on "Roe v. Wade,"* 82 YALE L. J. 920, 924 (1973).

14. GLENDON, *supra* note 6, at 43.

15. Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion,* 84 NW. U. L. REV. 480, 480 (1990).

16. See *Griswold v. Connecticut*, 381 U.S. 479 (1964).

17. Cf. GLENDON, *supra* note 6, at 11, 12 (characterizing the era as concerned for world population and traumatized by birth defects caused by thalidomide).

the birth-control pill and by changes in fashion, popular culture, and politics. These changes manifested themselves in panty-hose and mini-skirts, drugs and new forms of rock and roll, and the Vietnam War.¹⁸ Some of these changes entered American consciousness from foreign experience. In the period between 1967 and 1980, European lawmakers passed liberal abortion laws, reflecting a cultural swing as much as a sudden application of liberal principles to social life. Under these conditions the "right of privacy" became a growth stock that would after two and a half decades offer less spectacular returns.

Cultural factors help us appreciate that at the time of the *Roe* decision, the development of a constitutional "right of privacy" was widely touted (and usually praised) as an example of the judicial power to make law. At Harvard the course syllabus for Social Science 137, taught to undergraduates by Prof. Paul Freund, began with a series of cases and articles on the right to privacy.¹⁹ The A student would,

18. For example, some contend that the Vietnam War was an attempt by aging World War II veterans to restage their youthful glories. The actors on stage this time, however, had grown up on war films that had declared bombing raids a thing of the past. I may cite my own experience, that 1950s documentaries like *Navy Log* or *Victory at Sea*, designed to glorify one branch of the armed services by recycling the same clips of guns blazing and sailors trapped in smoking hatches, had the opposite effect.

19. The reading consisted of sections of *Roberson v. Rochester-Folding Box Co.*, 64 N.E. 442 (N.Y. 1902) (refusing to grant an injunction against the use of girl's picture in an advertisement); O'Brien, *The Right of Privacy*, 2 COLUM. L. REV. 437 (1902) (asserting that the development of right of privacy shows how public opinion can affect the law and evolving legal institutions); *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68 (Ga. 1905) (holding unauthorized use of photo is breach of right of privacy grounded in natural law); *Donahue v. Warner Bros., Inc.*, 194 F.2d 6 (10th Cir. 1952) (holding that since right of privacy does not have vital social implications that freedom of expression does, it does not preclude semi-fictional portrayal of a public personality); *Haelan-Laboratories, Inc. v. Topps Chewing Gum Inc.*, 202 F.2d 866 (2d Cir. 1953) (stating that ball player has right to publicity value of his portrait); BENJAMIN CARDOZO, *THE GROWTH OF THE LAW* (1924), reprinted in *SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO*, 201-204, 213-216 (1947) (asserting that judges apply not only logic, history, and tradition, but also social mores); FREDERICK WILLIAM MAITLAND, *EQUITY AND THE FORMS OF ACTION* 1-22 (1936) (describing the independence of courts and their equity function); C.K. OGDEN, *BENTHAM'S THEORY OF FICTIONS* xvii-xix, cxiii-cxviii (1932) (stating that a fiction says something exists that does not exist); JEROME FRANK, *LAW AND THE MODERN MIND* 312-321 (1930) (denouncing legal formalism, Frank equates legal fictions with logical forms); *Koussevitsky v. Allen, Towne & Heath*, 188 Misc. 479 (N.Y. Sup. Ct. 1947) (refusing to enjoin an unauthorized biography where the subject is famous); *Eick v. Park Dog Food Co.*, 106 N.E.2d 742 (1952) (holding right of privacy prevents unauthorized use of photograph); JOHN CHIPMAN GRAY, *THE NATURE AND SOURCES OF THE LAW* 30-37 (1963) (stating

on his midterm exam, show an erudite ability to temper his excitement and joy that by means of the *Griswold* decision, the Supreme Court had permitted the sale of contraceptive devices; he would also show a sceptical appreciation of the blend of logic, tradition, and stare decisis which fed the growth of the "right of privacy."²⁰ But the liberal slant was unmistakable, if not quite what Prof. Freund intended.

The existence of the right of privacy as a legal fiction, the subject of Freund's course, may be better illustrated by a quotation from Thomas Wolfe's *Bonfire of the Vanities*, where the narrator draws on cultural anthropology to theorize, humorously, about the breakdown in privacy that occurs when the popular press pillories a young millionaire bond salesman whose car has struck a black teenager:

The Bororo Indians, a primitive tribe who live along the Vermelho River in the Amazon jungles of Brazil, believe that there is no such thing as a private self. The Bororos regard the mind as an open cavity, like a cave or a tunnel or an arcade, if you will, in which the entire village dwells and the jungle grows. In 1969 José M. R. Delgado, the eminent Spanish brain physiologist, pronounced the Bororos correct. For nearly three millennia, Western philosophers had viewed the self as something unique, something encased inside each person's skull, so to speak. This inner self had to deal with and learn from the outside world, of course, and it might prove incompetent in doing so. Nevertheless, at the core of one's self there was presumed to be something irreducible and inviolate. Not so, said Delgado. "Each person is a transitory composite of materials borrowed from the environment." The important word was *transitory*, and he was not talking about years but hours. He cited experiments in which healthy college students lying on beds in well-lit but soundproofed chambers, wearing gloves to reduce the sense of touch and translucent goggles to block out specific sights, began to hallucinate *within hours*. Without the entire village, the whole jungle, occupying the cavity, they had no minds left.

He cited no investigators of the opposite case, however. He did not discuss what happens when one's self—or what

that fictions help law develop); and finally *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding that there is a constitutional right of privacy found in penumbras of Bill of Rights that protects married couple's use of contraceptive from government interference).

20. *Griswold*, 381 U.S. at 479.

one takes to be one's self—is not a mere cavity open to the outside world but has suddenly become an amusement park to which everybody, *todo el mundo, tout le monde*, comes scampering, skipping and screaming, nerves a-tingle, loins aflame, ready for anything, all you've got, laughs, tears, moans, giddy thrills, gasps, horrors, whatever, the gorier the merrier. Which is to say, he told us nothing of the mind of a person at the center of a scandal in the last quarter of the twentieth century.²¹

This wonderful passage from Wolfe's novel reminds us that the "right of privacy" that eventually supported *Roe* began in an article in which Warren and Brandeis argued against the power of the press to publish unauthorized photographs.²² Wolfe goes on to describe the postmodern nightmare that occurs as the press turns the life of the novel's protagonist, Sherman McCoy, into a public spectacle. When the "brass crucible of his mind" is invaded by brash newspaper reporters, Sherman loses "his inviolable self."²³ Brandeis's reworking of John Stuart Mill's idea of personal autonomy, the "right to be let alone,"²⁴ continues to exert its powerful magic today, whether in right to privacy arguments against strip searches in prisons or to defend Amish communities.²⁵

Set against this cultural context, the low profile the right to privacy maintains in the *Casey* Court's opinion is remarkable. The phrase does not occur at all in the plurality opinion except in the context of a

21. THOMAS WOLFE, *THE BONFIRE OF THE VANITIES* 511-512 (1988).

22. Louis D. Brandeis & Samuel D. Warren, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

23. Wolfe, *supra* note 21, at 512.

24. Cf. Ronald J. Krotoszynski, Jr., *Autonomy, Community, and Traditions of Liberty: The Contrast of British and American Privacy Law*, 1990 DUKE L. J. 1398, 1398 n.2 ("The autonomy/privacy relation is a difficult matter."); and Yao Apasum Gbotsu et. al., *Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity*, 40 UNIV. OF MIAMI L. REV. 521 (1986). "The privacy line of cases can be read to either restrict the right of privacy to familial decisions, or to expand the right to privacy to protect individual autonomy. It is not clear which interpretation the Court will ultimately embrace." *Id.* at 563. Mill's concept of autonomy "would restrict an individual's sphere of action only where other members of the society are at risk of harm." *Id.* at 565-66.

25. "The Amish and others who settled in America generally found the essential conditions to form communities and to practice the free exercise of religion. They found for the most part a right that Justice Louis Brandeis calls 'the most comprehensive of rights and the right most valued by civilized man,' a right Americans should be proud to protect—the right to be left alone." John A. Hostetler, *An Amish Beginning*, THE AMERICAN SCHOLAR 552, 562 (1992).

woman's right to overrule her husband: "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion."²⁶ Notice to husbands is the one restriction the Court strikes down, however, and the opening concessive clause ("If the right to privacy means anything") suggests that it does *not* mean anything—which is fairly accurate as far as the sheer argument of *Casey* is concerned.

Rather than arguing that a woman's right to privacy protects her decision to terminate her pregnancy as in *Roe*, the *Casey* Court draws on the language of "due process" and the liberty clause of the Fourteenth Amendment. The *Casey* Court states, "Constitutional protection of the woman's decision to terminate her pregnancy derives from the Due Process Clause of the Fourteenth Amendment. It declares that no State shall 'deprive any person of life, liberty, or property, without due process of law.'"²⁷ "The most familiar of the substantive liberties protected by the Fourteenth Amendment are those recognized by the Bill of Rights."²⁸ Other liberties are protected also, even where not mentioned in the Bill of Rights or recognized when the Fourteenth Amendment was passed. The Court opines that "[m]arriage is mentioned nowhere in the Bill of Rights and interracial marriage was illegal in most States in the 19th century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause. . . ."²⁹ The Court cites with approval the words of Justice Harlan: "This 'liberty' is not a series of isolated points . . . [but] a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgement."³⁰ The plurality opinion ultimately rests on the view that "the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law."³¹ Gone is the powerful "fiction" of the right of privacy (the point of Prof. Freund's course) and its penumbras from *Griswold*. Abortion is *sui generis*.³²

26. *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2830 (1992) (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453).

27. *Id.* at 2804.

28. *Id.*

29. *Id.* at 2805.

30. *Id.*

31. *Id.* at 2807.

32. *Cf. Casey*, 112 S. Ct. at 2810. "Finally, one could classify *Roe* as *sui generis*."

III. CURRENT ABORTION PRACTICE IN EUROPE

Every Western European country except Ireland has either a law that permits abortion or a cultural strategy that effectively allows access to abortion services. France, West Germany, Italy, Luxembourg, the Netherlands, Portugal, Spain, Switzerland, and the United Kingdom permit abortion for cause.³³ Ireland's law, deriving from a constitutional referendum in 1983, openly prohibits abortion. Yet in abortion as in trade, politics, and cultural autonomy, the practice of the Irish contradicts the public expression of sentiment.³⁴ Thousands of Irish women

By this phrase the Court means that the woman's liberty is tied into a complex of decisions that impinge on her choice as to marriage and procreation. *Id.* at 2811. The Court calls *Roe* a "rare" case, comparable in the lifetime of the judges only to *Brown v. Board of Education*, 347 U.S. 483 (1954), where the "the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution." *Casey*, 112 S. Ct. at 2815.

33. GLENDON, *supra* note 6, at 146-50.

34. The myth that the Irish abstain from contraception practices is openly belied by the contents of public sewer systems that litter the country's estuaries (used condoms carried in from England and America by Irish citizens). Ireland winks at embargoes as well as contraception. A flourishing transshipment industry repackages goods from America in order to avoid this or that trade sanction. Spray-painted slogans of "Brits out" on public walls in Ireland do not stop Irish citizens from enjoying open immigration that Great Britain has allowed Irish workers in advance of the EEC open border policy. Slogans are often at cross purposes with private attitudes. For example, it is not clear how many citizens of the Republic—outside the paid ranks of the IRA—would genuinely welcome unification with a million and a half Protestants in the North.

The Irish maintain a moral position often misunderstood by Americans, who tend to take what they hear about Irish politics at face value. The current President of Ireland, Mary Robinson, established her reputation as counsel in *Norris v. Ireland*, a right to privacy case where the European Court of Human Rights ruled against Irish homosexuality laws on the grounds that article 8 of the European Convention on Human Rights protects sexual behavior on the basis of right to privacy. 13 EUR. CT. H. R. 186 (1991). Article 8 of the European Convention on Human Rights reads, "Everyone has the right to respect for his private and family life, his home and his correspondence." Involved in the right of privacy issue, homosexuality cases may be said to be "really about" abortion. For instance, the rejection of homosexual rights base on a right to privacy in *Bowers v. Hardwick*, 478 U.S. 186 (1986), precursed *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), which criticized *Roe's* trimester framework which had been founded in *Roe* on a woman's right to privacy. Both issues potentially broaden the right of personal autonomy. BASIC DOCUMENTS ON HUMAN RIGHTS 246 (Ian Brownlie ed., 2nd ed., 1981). Unlike the United States Supreme Court, the European Court of Human Rights can review cases, but it is not an appeals court. Its "task is to ensure that the standards of the Convention and its protocols are observed by the administration of the States concerned." *Id.* at 242.

use abortion facilities in England, just as the work force passes fluidly from country to country.³⁵ The recent decision by the European Court of Human Rights defining abortion as a "service" further weakens the Irish law.³⁶ Similarly, West Germany's memories of the slaughter of the unwanted make its laws strict, as judges are hesitant to tamper with any form of human life,³⁷ but the restrictions imposed by its conservative Supreme Court are regularly evaded by women who resort to nearby countries.³⁸ Moreover, since unification Germany has had two laws, the restrictive measures of the West and the liberal law of

The European expansion of the right to privacy to include homosexual conduct may explain the reticence of the *Casey* court to talk in terms of privacy, if the United States Supreme Court regards the right to privacy as the thin end of the wedge toward expanding homosexuals' rights. *Cf. Bowers v. Hardwick*, 478 U.S. 186 (1986).

As a product of a changing culture, Ireland's President Robinson, who won a case condemning homosexuality laws on right to privacy grounds (in contrast to the *Bowers* decision) clearly favors abortion, but as president she refuses to promote her cause, even when speaking French. An interviewer from *LE MONDE* asked her if she was free to express her opinion on abortion, since everyone knew where she stood ("Donc, même si vous ne pouvez pas dire tout ce que vous pensez, sur l'avortement par exemple, les gens savent quelles sont vos convictions"). She responded, "Exactly. My past views [when she was free to speak before her election as President] are perfectly clear" ("Tout à fait. Mes déclarations passées sont parfaitement claires"). *LE MONDE*, May 26, 1992, available in LEXIS, Nexis library, Currnt file.

35. Alberto Trevissoi and Martino Cavalli, *Speciale Aborto—Un problema che divide i Dodici: la Corte di giustizia apre uno spiraglio all'armonizzazione*, *IL SOLE 24 ORE*, Oct. 14, 1991, at 29 [hereinafter *Speciale Aborto*]. "A migliaia, tuttavia, ogni anno le irlandesi vanno ad abortire nel vicino a molto più permissivo Regno Unito." *IL SOLE 24 ORE* is an Italian financial newspaper, available on Lexis, comparable to the *WALL STREET JOURNAL* or the *FINANCIAL TIMES*.

36. The right to services seems ready to join the free circulation of merchandise, people, and capital that enjoy immunity from legal interference by members of the European Community. *Speciale Aborto*, *supra* note 35: "L'aborto è un <servizio medico>. Come tale, potrebbe in futuro rientrare in una delle quattro grandi libertà di circolazione delle merci, delle persone, dei capitali e, appunto dei servizi che il Trattato Cee pone a fondamento del mercato unico europeo" (summarized in text). See *Open Door Counselling, Lt. and Dublin Wellwoman Centre Ltd. v. Ireland*, Nos. 14234/88, 14235/88. *EUR. CT. H. R.*, March 7, 1991. See also Cathleen Colvin, *Society for the Protection of Unborn Children (Ireland) Ltd. v. Grogan: Irish Abortion Law and the Free Movement of Services in the European Community*, 15 *FORDHAM INT'L L. J.* 476 (1991/92).

37. Contrast Glendon's explanation of West Germany's conservatism ("The priority given to the value of life in the West German constitutional order is, the Court explained, a reaction to the taking of innocent life in the years of the 'final solution'." *GLENDON*, *supra* note 6, at 26) with the report in a French newspaper, which calls the decision part of the most hypocritical legislation in Europe ("L'ancienne Allemagne fédérale a l'une des législations les plus hypocrites d'Europe.") *LE MONDE*, Aug. 6, 1992, available in LEXIS, Nexis library, Currnt file.

38. *Speciale Aborto*, *supra* note 35.

East Germany. Like all countries influenced by the liberal constitution of the former Soviet Union, East Germany permits abortion on demand. The problem of merging two very different philosophies of abortion is currently a key item in the country's judicial agenda.³⁹

In addition to abortions for cause, some countries allow abortion on demand (as does the United States). These are Austria, Denmark, Greece, Norway, and Sweden.⁴⁰ In others, however, even the limitation of abortion for "cause" poses little restriction when the cause includes the mental and social well-being of the woman, as in the law of the United Kingdom, in effect since 1967.⁴¹ All the countries of Europe regulate abortion by statute, unlike the United States, where the abortion right is constitutionally guaranteed. Just as the United States Supreme Court in *Casey* has taken on the task of monitoring whether state laws infringe on a woman's fundamental liberty, in most countries the courts are called on to interpret abortion statutes. This fact is only remarkable in light of the emotionally charged political nature of the abortion issue. In Italy, abortion statutes are promoted by the Constitutional Court.

Access to abortion facilities in Europe is hampered less by the legal structure than the unwillingness of doctors to perform the operation. Doctors in Portugal, Spain and Greece disfavor the procedure, making abortion difficult to obtain.⁴² In Poland, the Medical Association has declared participation in the procedure a breach of ethics. Moreover, a divided court has refused to intervene.⁴³

The Constitutional Tribunal found the case made by the Commissioner for Civil Rights Protection against the Doctors' Code of Ethics inconsistent with current law. The Tribunal found the Code not to be a legal norm, but a community one, and as such not falling under its authority. It did not pass sentence, but decided to notify the Sejm of the Code's

39. LE MONDE, Aug. 6, 1992, available in LEXIS, Nexis library, Currnt file.

40. GLENDON, *supra* note 6, at 151-53.

41. *Id.* at 12.

42. *Speciale Aborto*, *supra* note 35.

43. Polish News Bull., October 8, 1992, available in LEXIS, Nexis library, Currnt file. "Four justices issued separate statements, reiterating that they did not share the above position. Describing that the code was a set of legal and [sic] well as ethical norms, they emphasized that the Constitutional Tribunal should have examined the code guided by judicial autonomy." Poland's current abortion law was passed in 1956. *Speciale Aborto*, *supra* note 35.

inconsistency with several laws, including that on conditions of legalized abortion. The Code, in force since May, permits abortion only in cases when the pregnancy threatens the mother's life. A doctor who performs an abortion in any other case may lose his license.⁴⁴

Much closer study of the actual conditions in individual countries is needed in order to compare practice and the impact of local laws.

V. SIMILARITY OF RESTRICTIONS ON ABORTION PROCEDURES BETWEEN EUROPEAN LAW AND CASEY

The *Casey* decision represents current American policy on abortion. As we have seen, the Court affirmed the right of a woman to decide for herself whether or not to abort a fetus she is carrying as a liberty interest protected by the Constitution, avoiding the topic of the right to privacy. But the Court also gave prominence to another rule of law when in *Casey* it applied the "undue burden" test to uphold five restrictions on abortion while striking down one. The Court applied the "undue burden" test to allow a waiting period restriction of twenty-four hours; a requirement that minors inform one parent or employ a judicial bypass procedure; a provision for informed consent about the nature of abortion, fetal development, and attendant health risks; a provision that specifies that a physician shall counsel women seeking abortion; and a record-keeping requirement. Using the same "undue burden" test, the Court struck down a statutory provision requiring husband notification on the grounds that a state could not allow a husband to veto his wife's abortion decision, despite his interest in the fetus.⁴⁵

A. *The Supreme Court's "Undue Burden" Standard*

The "undue burden" test for state laws on abortion originated in Justice O'Connor's dissent in *Akron v. Akron Center for Reproductive Health*⁴⁶ and was outlined more fully in her dissent in *Thornburgh v. American College of Obstetricians and Gynecologists*.⁴⁷ "[J]udicial scrutiny of state regulation of abortion should be limited to whether the state law bears

44. The Warsaw Voice, October 18, 1992, available in LEXIS, Nexis library, Currnt file.

45. *Casey*, 112 S. Ct. at 2803, 2833.

46. 462 U.S. 416, 468 (1983).

47. 476 U.S. 747, 814 (1986).

a rational relationship to legitimate purposes . . . with heightened scrutiny reserved for instances in which the State has imposed an 'undue burden' on the abortion decision."⁴⁸ "An undue burden will generally be found 'in situations involving absolute obstacles or severe limitations on the abortion decision,' not wherever a state regulation 'may "inhibit" abortions to some degree.'"⁴⁹ Moreover, if a state law does interfere with the abortion decision to an extent that is unduly burdensome so that it becomes "necessary to apply an exacting standard of review," the possibility remains that the statute will withstand the stricter scrutiny.⁵⁰ The burden that Justice O'Connor views as "undue" is evidently serious—a seriousness perhaps best gauged operationally by examining what restrictions the test permits.

Subtle changes in the undue burden test occurred before it reappeared in *Casey's* plurality opinion, which recognizes "the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State."⁵¹ "Undue interference" would seem to be anything that prevents a woman from carrying out her decision, but the final effect is more restrained. The new "undue burden" test differs markedly from the reasoning in *Griswold*, where the Court found that a Connecticut law was overbroad. Breadth is no longer the issue: The new "undue burden" test rejects a per se rule that any regulation touching on abortion must be invalidated if it poses "an unacceptable danger of deterring the exercise of that right."⁵²

The *Casey* decision reveals the difficulty of defining and applying the undue burden standard. Justice Stevens, in a partial dissent, approves of the "undue burden" standard but finds that "[a] burden may be 'undue' either because the burden is too severe or because it lacks a legitimate rational justification."⁵³ He would find unconstitutional that section of the Pennsylvania statute that requires physicians or counsellors to provide a woman materials "clearly designed to persuade her to choose not to undergo the abortion" and that section requiring a 24-hour waiting period.⁵⁴

The "undue burden" test as spelled out in *Casey* accepts that state regulation may make a liberty "more difficult to exercise" without

48. *Id.* at 828.

49. *Id.* (citing *Akron*, 462 U.S. at 464).

50. *Id.*

51. *Casey*, 112 S. Ct. at 2804.

52. *Thornburgh*, 476 U.S. at 767-68.

53. *Casey*, 112 S. Ct. at 2843 (Stevens, J., dissenting).

54. *Id.* at 2841 (Stevens, J., dissenting).

being "an infringement of that right."⁵⁵ After comparing the abortion right to a state's right to regulate the "framework" in which voting takes place, the Court defines the limit of the right: "Only where state regulation imposes an undue burden on a woman's ability to make this decision [to procure an abortion] does the power of the State reach into the heart of the liberty protected by the Due Process Clause."⁵⁶ The "heart of liberty" is not a temporal concept; since there is no moment in time before which "the State's interest in protecting the life of the unborn"⁵⁷ cannot reach, the Court eliminates the concept of a first trimester, the period (according to *Roe*) when states could not regulate abortion. The focus on "liberty" leads the Court from the trimester framework of *Roe* to a division of the gestation period determined by fetal viability, the point at which a presumption in favor of the mother's interest in the fetus tips to favor the State's interest. Liberty involves balancing the State's interest against the individual's.

The Court thus defines "undue burden" against a context of balancing interests, i.e., personal liberty weighed against state policy. An "undue burden" is not just any interference, delay, or cost, but a "substantial obstacle" that infringes or hinders free choice:

A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus. A statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it. . . . Some guiding principles should emerge. What is at stake is the woman's right to make the ultimate decision, not a right to be insulated from all others in doing so. Regulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose.⁵⁸

The Court stresses, by reiteration, that an "undue burden" is a "substantial obstacle in the path of a woman's choice."⁵⁹

55. *Id.* at 2818.

56. *Id.* at 2819.

57. *Id.* at 2825.

58. *Id.* at 2820-21.

59. *Id.* at 2821.

The language of the Court substitutes one image for another. Cicero said that metaphor is not the language of the law,⁶⁰ and the play of images may lie behind the dissenting opinion that the "undue burden" standard is unpredictable. On the other hand, the image may represent the kind of broad language that characterizes constitutions, a statement of principle left to courts to decide. "The Abbé Sieyes, a veteran of many constitutional draftings, ventured the proposition that a constitution should be both short and obscure."⁶¹ A short text builds consensus; an obscure one "enables new meaning and content to be built into the constitution, according to changing societal conditions and demands."⁶² Criticism "always inheres when the Court draws a specific rule from what in the Constitution is but a general standard."⁶³ The "undue burden" standard turns out to be less a test than a source for what the Court calls the "principles" that "control our assessment of the Pennsylvania Statute."⁶⁴ These principles allow a provision for informed consent as long as the mechanism for ensuring informed consent does not become an "undue burden" on choice.⁶⁵

In basing its decisions on the "undue burden standard," the Court breaks the standard into two parts, first asking if the measure is reasonable to implement a State interest, and second asking if that implementation raises a substantial obstacle in the woman's path of choice. The second part is the concern of this article, for the Court literally considers the *path* to the abortion clinic, in upholding the 24-hour waiting period, by mentioning the plight of women "who must travel long distances."⁶⁶ The Court concludes that cost and delay are obstacles, but not substantial obstacles. "A particular burden is not of necessity a substantial obstacle."⁶⁷ Constitutionality depends on whether a provision places "barriers in the way of abortion on demand."⁶⁸

A "principle" as much as a test, then, the "undue burden" standard undergoes refinement every time the Court applies it. It might

60. CICERO, *TOPICA* (Loeb edition) VII, 32.

61. EDWARD McWHINNEY, *CONSTITUTION-MAKING: PRINCIPLES, PROCESS, PRACTICE* 57 (1981).

62. *Id.*

63. *Casey*, 112 S. Ct. at 2816.

64. *Id.* at 2821.

65. *Id.*

66. *Id.* at 2824.

67. *Id.* at 2825. The Court seems to leave open the possibility that it would accept statistical evidence that the waiting period actually blocks a woman's path to the abortion clinic. An undue burden would arise if it could be shown that traveling twice to a clinic negated her right to choose an abortion, perhaps by making it impossible to escape detection by her husband. *Id.*

68. *Id.*

be said to be defined operationally by a series of examples of the rule as applied.⁶⁹ Some might find that the undue burden standard has the air of judicial legislating. Yet a single principle seems to emerge. The undue burden standard prevents a state not from interfering or monitoring a woman's right to choose an abortion, but from negating that choice.

B. *European Practice*

The application of the undue burden standard in the *Casey* decision coincides fairly well with contemporary practice in Western Europe where statutes permitting abortion also set forth guidelines for the procedure. For example, the *Casey* Court upheld a statute that "requires that at least 24 hours before performing an abortion a physician inform the woman of the nature of the procedure, the health risks of the abortion and of childbirth, and the 'probable gestational age of the unborn child.'" ⁷⁰ This statute has several elements. In comparing this provision with European practice, this article will look at the time requirement and the requirement that there be informed choice based on something more than just the statistics for a safe outcome of an operation.

Statutory provisions that require information to be considered for a certain space of time are common on the Continent. For example, Pennsylvania's twenty-four hour waiting period resembles the pause for reflection required in the Netherlands, which has probably the most liberal abortion law in Europe.⁷¹ Belgium, which imposes complicated procedures, requires a waiting period of six days for a woman to confirm her intention in writing.⁷² Portugal requires that a woman register her signed consent "not less than three days prior to the procedure."⁷³ France, where the state goes much further than in Amer-

69. That is, the court defines the term by showing it in action, not by synonym or metaphor or genus and species (e.g., an undue burden is an interference we will not allow). The rule is like a Rube Goldberg machine, which may be defined not by what it does (transmit motion) but by whatever happens (lever A hits button B, triggering a little ball, etc.).

70. *Id.* at 2822.

71. *Speciale Aborto*, *supra* note 35. The law is liberal because it allows abortion to the moment of birth.

72. *Id.*

73. Law No. 6/84 of 11 May 1984, art. 141 (1), which states that "[t]he consent of the pregnant woman to the performance of an abortion shall be unequivocally

ica to ease and support childbirth, requires a waiting period of one week from the date of the woman's original request and two days from the date of counseling.⁷⁴ Italy requires a seven-day waiting period after counseling.⁷⁵ The Netherlands has a five-day waiting period.⁷⁶ West Germany imposes a three-day wait, except in emergencies (an exception common in the other countries).⁷⁷ Luxembourg requires a one-week waiting period.⁷⁸ Even with such restrictions, however, Italy recorded 170,000 abortions in 1988, while France registered 163,000 and the Netherlands 16,000.⁷⁹ Less liberal West Germany still witnessed 83,000 abortions.⁸⁰ No data are available for Belgium and Portugal, where abortions are difficult to obtain, due to policy in the former and diffident doctors in the latter.⁸¹ Spain, Denmark, the United Kingdom, Austria, Norway, and Sweden do not openly impose waiting periods in their statutes, although what happens in practice may produce substantial delay. Given the contrasting figures, it is hard to conclude that the waiting period alone either stifles choice or signals a country's intention to interfere with a woman's choice. The provision of the Pennsylvania Abortion Control Act upheld in *Casey*, that a woman be given certain information at least 24 hours before the abortion is performed, seems nothing unusual, at least on a comparative basis.

Also in line with European practice is the ruling of the Court in *Casey* upholding a provision that "a woman seeking an abortion give her informed consent prior to the abortion procedure."⁸² Such counseling is required by France,⁸³ West Germany,⁸⁴ the Netherlands,⁸⁵

recorded in a document signed by her or on her behalf, in accordance with the law, not less than three days prior to the date of the procedure." 35 INT'L DIG. OF HEALTH LEGIS. 796 (1984).

74. GLENDON, *supra* note 6, at 146.

75. Italian Law No. 194 of 22 May 1978, *cited in* 29 INT'L DIG. OF HEALTH LEGIS. 589 (1978).

76. GLENDON, *supra* note 6, at 148.

77. *Id.* at 147.

78. *Id.* at 148.

79. *Speciale Aborto*, *supra* note 35.

80. *Id.*

81. *Id.*

82. *Casey*, 112 S. Ct. at 2803.

83. A physician approached by a woman who wishes to terminate her pregnancy must "inform her of medical risks to herself and her future maternity; and of the biological seriousness of the operation requested by her" and "furnish her with an information folder" with laws and offers of assistance for mothers and the possibilities of adoption. A consultation is also required. "This consultation shall be in the form

Denmark,⁸⁶ Norway,⁸⁷ Italy,⁸⁸ Spain,⁸⁹ and Sweden.⁹⁰ There is no effective requirement for informed consent in Portugal,⁹¹ the United Kingdom,⁹² Austria,⁹³ or Greece,⁹⁴ although other factors such as scarce medical resources or unwilling physicians may affect availability.

The *Casey* Court also follows European practice in striking down husband notification. For this issue, the Court uses the language of "undue burden" but avoids talk of paths and obstacles in favor of more fundamental liberty arguments. Because statistics indicate large numbers of women are abused or fear abuse, the Pennsylvania statute "will operate as a substantial obstacle to a woman's choice to undergo an abortion. It is an undue burden, and therefore invalid."⁹⁵ More

of a private interview during which the woman shall be provided with assistance and advice appropriate to her situation, as well as the necessary means to resolve the social problems posed." Law No. 75-17 of 17 January 1975, in *GLENDON*, *supra* note 6, at 156.

84. The West German law requires a "mandatory counseling session in which the pregnant woman must be advised of services available to her, especially ones that would facilitate continuation of the pregnancy." *GLENDON*, *supra* note 6, at 147.

85. The Dutch statute requires that a pregnant woman be furnished with "information regarding ways of dealing with her distressed situation other than termination of pregnancy." *Id.* at 148. See 37 INT'L DIG. OF HEALTH LEGIS. 734 (1986).

86. The Minister of Health regulates information for the woman on the consequences of pregnancy. 37 INT'L DIG. OF HEALTH LEGIS. 793 (1986).

87. A woman's abortion must be approved by a committee; there is no clear mandate for informed consent, but the act mandates society to ensure guidance to create a "responsible attitude." *GLENDON*, *supra* note 6, at 153.

88. "In all cases, in addition to guaranteeing the necessary medical examinations, counselling centres and medicosocial agencies shall be required, especially when the request for termination of pregnancy is motivated by the impact of economic, social, or family circumstances upon the pregnant woman's health, to examine possible solutions to the problems in consultations with the woman. . . ." 29 INT'L DIG. OF HEALTH LEGIS. 590, art. 5 (1978).

89. "[H]ealth professionals are required to inform applicants for pregnancy termination of the medical, psychological, and social consequences of the continuation of pregnancy and of its termination, as well as of the existence of means for social assistance and family counselling available to applicants." 38 INT'L DIG. OF HEALTH LEGIS. 264 (1987).

90. In Sweden, a social worker must be consulted after the twelfth week. *GLENDON*, *supra* note 6, 153.

91. 35 INT'L DIG. OF HEALTH LEGIS. 768 (1984).

92. 42 INT'L DIG. OF HEALTH LEGIS. 37 (1991).

93. Abortion is a criminal offense that is exempt from punishment "when performed by a physician during the first three months of pregnancy after a medical consultation." *GLENDON*, *supra* note 6, at 151.

94. *Id.* at 152.

95. *Casey*, 112 S. Ct. at 2829.

fundamentally, husband notification implies husband consent, yet such control is "repugnant to our present understanding of marriage and of the nature of the rights secured by the Constitution."⁹⁶ Husband notification is generally not required in countries that permit abortion, not because of disturbing statistics of abuse, but because European countries tend to recognize female autonomy. Italy requires a woman to consent to consultation with her husband.⁹⁷ Other countries simply do not mention the husband.

European countries require that records of abortions be kept, often as part of the paperwork of public hospitals where the operations are authorized and performed. The Court in *Casey* similarly upholds record keeping requirements, despite protests of excessive record keeping. The Court ruled that the costs of record keeping have not been shown to be so great as to create a substantial obstacle.⁹⁸ However, the Court struck down a requirement that women state their reason for having an abortion, "the precise information we have already recognized that many women have pressing reasons not to reveal."⁹⁹

Provisions regarding minors, who must obtain some form of parental consent, are perhaps the most controversial aspect of abortion regulation both in the United States and Europe. Under the undue burden standard in *Casey*, this method of control is permissible as long as the minor has a judicial bypass procedure. European statutes have similar provisions, although they are being challenged, as in the case of Italy.

C. *Assessing the Undue Burden Standard from a European Perspective*

The undue burden standard as revealed by the *Casey* holdings on Pennsylvania's abortion control statute not only coincides with European practice, but it stands in contrast to a "strict scrutiny" standard that would judge a state provision only by whether it represented a "compelling" interest of the state. "Strict scrutiny" prevails where abortion control is regarded as a violation of a woman's right to privacy.¹⁰⁰

96. *Id.* at 2831.

97. 29 INT'L DIG. OF HEALTH LEGIS. 590 (1978).

98. *Casey*, 112 S. Ct. at 2832.

99. *Id.* at 2833.

100. *Id.* at 2845 (Blackmun, J., concurring in part). "The Court today reaffirms the long recognized rights of privacy and bodily integrity." *Id.* This does not seem an accurate account of the plurality decision. Justice Blackmun's advocacy of strict scrutiny instead of intermediate scrutiny guided by the "undue burden" test is therefore a minority opinion.

Compelling the continuance of pregnancy violates a woman's right to privacy in two ways. First, it infringes the right to bodily integrity. Second, it deprives a woman of critical life choices. Where choice of abortion is regarded as a fundamental liberty, however, as in the plurality opinion of *Casey*, the undue burden standard operates. The Court traditionally conceives of its role as one of drawing a line between individual liberties and state power.¹⁰¹ It appears that a fundamental liberty is less compelling than a right to privacy and requires less strict scrutiny.

If most other countries join the plurality in *Casey* in not resorting to right of privacy arguments in legalizing abortions, they may or may not face the problem of drawing a line between the state's interest in protecting the unborn and a woman's family choices. Decisions over the last several years show that the Italian Supreme Court has been involved in determinations similar to those in *Casey*. The Italian Court also faced the problem of delineation. The differences between Italy's civil law system and the United States common law system should not discourage finding a distinct similarity in the responses of each country's highest court to methods of controlling abortion.

V. ITALIAN LEGAL "PRINCIPLES" THAT RESTRICT LOCAL RESTRAINTS ON ABORTION

A. *Authority in Italian Civil Law and the Role of the Courts*

The new Constitution of the Italian Republic of December 22, 1947, established "a Constitutional Court with the authority to review and to declare invalid laws which conflict with the Constitution."¹⁰² Besides the Constitution, the most important sources of law are codes, which consolidate and sometimes amplify statutes.¹⁰³ Laws are interpreted by a decentralized system of courts. "The country is divided

101. Not only does the plurality opinion fail to ground "fundamental liberty" in the right to privacy, it avoids other traditional bases such as custom, reason, neutral principles, societal consensus, or natural law. Cf. J. Ely, *The Supreme Court, 1977 Term—Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 16-55 (1978). Its bases instead are workable social practice and stare decisis. The former reflects current social thinking that regards social power not as an exercise in dominion but as an interplay between dominant and suppressed groups. Cf. MICHEL DE CERTEAU, *THE PRACTICE OF EVERYDAY LIFE* (1984); Umberto Eco, *Language, Power, Force*, in UMBERTO ECO, *TRAVELS IN HYPERREALITY* 239 (1990).

102. ANGELO GRISOLI, *GUIDE TO FOREIGN LEGAL MATERIALS: ITALIAN* 15 (1965).

103. *Id.* at 17.

into twenty-three districts each of which has a court of appeals (*Corte d'appello*).''¹⁰⁴

The district of each court of appeals contains a considerable number of lower courts. The lowest rung is the *conciliatore* (or *giudice conciliatore*) of which there is one in each commune and which has only civil jurisdiction in petty affairs; the judge is not a professional judge, but is appointed from among the educated members of the community, and his office is gratuitous and honorary. The lowest professional judge is the *pretore*. He singularly determines civil and labor matters, appeals from the decisions of the *conciliatore* in criminal matters, and matters concerning persons under disability (*materia tutelare*). He also has numerous administrative functions. There are 978 first instance courts (called *pretore*) distributed among the twenty-three districts.¹⁰⁵

''The highest court in the hierarchy of the ordinary courts is the *Corte di cassazione*.''¹⁰⁶ ''If . . . it finds that there was a violation of the law, it quashes (*cassa*) the decision of the court below and remands the case. . . .''¹⁰⁷

Decentralized courts and the primacy of the civil code contribute to making the Italian system less hierarchical than that of the United States. The *pretore* is not bound by the next higher court, the Tribunal.¹⁰⁸ As a result, judicial precedents are not a source of law; rather, judges interpret and apply legal rules.¹⁰⁹ Unlike common law judges, Italian judges ''interpret'' law; they do not ''make'' it. Because there is no judge-made law, there are no binding precedents. Therefore, where there is no law on point, judges resort to ''principles prevailing in the Italian system.'' ¹¹⁰

B. *Importance of Italian "Principles" Compared to American "Fundamental Liberty"*

The general principles of law used by Italian judges to decide difficult cases reside not in natural law but in positive Italian law.

104. *Id.* at 32.

105. *Id.* at 33.

106. *Id.* at 34.

107. *Id.* at 35.

108. *Id.* at 43.

109. *Id.* at 40.

110. *Id.* at 41-42.

Fundamental rules, "such as the equality of citizens before the law,"¹¹¹ emerge from enacted statutes and decrees. These principles take the form of maxims (*regulae juris*) or proverbs (*brocardi*), and may remind us of Bacon's collected sayings in the law or the pithy sentences used by Coke to support arguments.¹¹² Italian jurisprudence, then, is essentially interpretation of the law by all conceivable means. "Through the judge's interpretation, the abstract rules of the codes are related to practical experience."¹¹³ To this end, cases are collected but are not binding.¹¹⁴ The power of the Constitutional Court depends to a great extent on its ability to persuade.

C. *Italy's 1978 Law on Abortion*

A recent article by Maria Cristina Folliero uses the Court's intervention on abortion to analyze its current power.¹¹⁵ The article indicates that the legal control of abortion in Italy depends both on the civil code and the "principles" by which that code is interpreted. "In pre-war Italy, abortion was classified among crimes against the family. . . . During the fascist regime, the emphasis was moved from the individual and the family to the 'race.' . . . These laws survived the postwar republican constitution in 1948 and remained in power until the early 1970s." In the wake of a Constitutional Court ruling in 1971 that held unconstitutional a law prohibiting the publicity of contraceptive methods, pressure to change the abortion law grew. "In the summer of 1978, and after numerous attempts and the fall of one government on the abortion issue, Parliament succeeded in passing a new law and thus avoided [a] referendum."¹¹⁶

1. *Major Provisions of the Law*

Italian abortion laws derive from Law No. 194 of 22 May 1978, "On the social protection of motherhood and the voluntary termination

111. *Id.* at 50.

112. *Id.*

113. *Id.* at 44.

114. *Id.* at 45.

115. Maria Cristina Folliero, *La Legge N. 194 del 1978 nella giurisprudenza della Corte Costituzionale: Dal monito al controllo di come il monito sia attuato*, 33 (II) GIURISPRUDENZA COSTITUZIONALE 1336 (1988) [hereinafter *Controllo*].

116. IRENE FIGÀ-TALAMANCA, INT'L HANDBOOK ON ABORTION 279-81 (Paul Sachdev ed., 1988).

of pregnancy."¹¹⁷ American law and practice, as Glendon complains, tend to separate abortion from the social issue of motherhood and care for women.¹¹⁸ A good instance of American blindness to the larger social context in which abortion might be set occurs in the mistranslation of the title of the Italian law circulated by a standard reference book. It renders as "Rules regarding *the social prevention of maternity* and the voluntary interruption of pregnancy" what, when correctly translated, reads "Guidelines for *the social protection of motherhood* and provisions for the voluntary cessation of pregnancy."¹¹⁹

In addition to not isolating abortion from the larger matrix of family practice and contraception, Italian law recognizes the right of individual choice and the State's interest by providing public assistance to obtain an abortion. Article one of the abortion statute, which idealizes motherhood, serves as a prelude to article two, which provides for counselling and also abortion assistance.¹²⁰ Providing the means for

117. There is no official version of the Italian law other than that published in *GAZZETTA UFFICIALE*, Part 1, 22 May 1978, No. 140, 3642-46. In this article the Italian text will be cited from the version in *CODICE DONNA: NORME INTERNE E ATTI INTERNAZIONALI* 945 (2nd ed., n.d.) [hereinafter Law No. 194]. The standard translation is printed in 29 *INT'L DIG. OF HEALTH LEGIS.* 589 (1978). It is reprinted here with additions and corrections based on a fresh comparison with the Italian text.

118. GLENDON, *supra* note 6, at 20.

119. My emphasis. The offending work is *HANDBOOK*, *supra* note 116, at 281. The second quotation is my translation of "Norme per la tutela della maternità e sull'interruzione volontaria della gravidanza."

120. Article two reads:

1. The State guarantees the right to responsible and planned parenthood, recognizes the social value of motherhood, and shall protect human life from its inception.

The voluntary termination of pregnancy as covered by this Law shall not be a means of birth control.

The State, the regions, and local authorities, acting within their respective powers and areas of competence, shall promote and develop medico-social services and shall take other measures necessary to prevent abortion from being used for purposes of birth control.

2. The family counselling centres [consultori familiari] established by Law No. 405 of 29 July 1975 shall assist any pregnant woman, subject to the provisions of that Law:

- (a) by informing her of her rights under State and regional legislation and of the social, health, and welfare services actually available from agencies in her areas;

- (b) by informing her of appropriate ways to take advantage of the provisions of labour legislation designed to protect the pregnant woman;

- (c) by taking special actions, or suggesting such actions to the competent

contraception was by itself a breakthrough in the 1970s, but in addition article 3 indicates Italy's willingness to spend public money in assisting women in their abortion choice.¹²¹

local authority or social welfare agencies in the area; wherever pregnancy or motherhood create problems which cannot be satisfactorily dealt with by normal actions under item (a);

(d) by helping to overcome the factors which might lead the woman to have her pregnancy terminated.

For the purposes of this Law, the counselling centres may make use of voluntary assistance, on the basis of pertinent regulations or agreements, from appropriate basic social welfare organizations and voluntary associations, which may also assist mothers in difficulties after the child is born.

The necessary and medically prescriptible [that is, medically legal] means for achieving freely chosen objectives with regard to responsible parenthood may also be supplied to minors by health agencies and counselling centers.

29 INT'L DIG. OF HEALTH LEGIS. 589 (1978).

The original text of the last paragraph reads, "La somministrazione su prescrizione medica, nelle strutture sanitarie e nei consultori, dei mezzi necessari per conseguire le finalità liberamente scelte in ordine alla procreazione responsabile è consentita anche ai minori." Law No. 194, *supra* note 15. The previously published version reads, "The necessary means for achieving freely chosen objectives with regard to responsible parenthood may also be supplied to minors by health agencies and counselling centres, against a medical prescription." 29 INT'L DIG. OF HEALTH LEGIS. 589 (1978). Since the phrase "against a medical prescription" makes little sense, it has been changed.

The end of section 1, above, raises an issue that deserves comment. The statutes seek to prevent abortion from being used as a method of birth control. "In fact in Italy abortion continues to be considered a contraceptive practice. According to the minister of Health, 70% of abortions are prompted by the incorrect use of contraceptive devices or practices" ("Di fatto in Italia l'aborto continua a essere considerato una pratica contraccettiva. Secondo il ministero della Sanità, il 70% degli aborti è provocato dall'uso non corretto di metodi anticoncezionali"). Bruno Bramati, Piergiorgio Crognani, and Carlo La Vecchia, *Contracezione: Metodi, Efficacia, Diffusione*, IL SOLE 24 ORE, Nov. 17, 1991, at 188 [hereinafter Bramati].

121. Article three reads:

3. In order for the family counselling centers to fulfill the tasks assigned by the present law, their financial support, which rests on art. 5 of law 405 of July 29, 1975, is hereby increased by an annual disbursement of fifty billion lira, to be divided among the base districts following the criteria established by the aforementioned article.

To cover the loss of 50 billion lira relative to the 1978 budget a corresponding reduction is authorized in the disbursement provided in chapter 9001 in the Minister of the Treasury's budget. The Minister of the Treasury is authorized to carry out, through appropriate decrees, the necessary variations to achieve balance.

(My translation). For the text in Italian, see 29 INT'L DIG. OF HEALTH LEGIS. 589, 589 (1978).

Despite its concern for family life, reflected in language that shows concern to discourage (but not disallow) abortion, the Italian abortion statute does not require husband notification. Its language includes references to the woman's and the man's "dignity and freedom," a concept that seems poles apart from the language of "undue burden" and substantial obstacles employed by the *Casey* Court. Italian law also provides for a seven-day waiting period and mandatory counseling and information sessions, designed to be nonthreatening. The tone remains considerate, not admonitory.¹²²

122. Article five reads:

5. In all cases, in addition to guaranteeing the necessary medical examinations, counselling centres and medicosocial agencies shall be motivated by the impact of economic, social, or family circumstances upon the pregnant woman's health, to examine possible solutions to the problems in consultation with the woman and, where the woman consents, with the father of the conceptus, with due respect for the dignity and personal feelings of the woman and the person named as the father of the conceptus, to help her to overcome the factors which would lead her to have her pregnancy terminated, to enable her to take advantage of her rights as a working woman and a mother, and to encourage any suitable measures designed to support the woman, by providing her with all necessary assistance both during her pregnancy and after the delivery.

Where the woman applies to a physician of her choice, he shall: carry out the necessary medical examinations, with due respect for the woman's dignity and freedom; assess, in consultation with the woman and, where the woman consents, with the father of the conceptus, with due respect for the dignity and personal feelings of the woman and of the person named as the father of the conceptus, if so desired taking account of the result of the examinations referred to above, the circumstances leading her to request that the pregnancy be terminated; and inform her of her rights and of the social welfare facilities available to her, as well as regarding the counselling centres and the medicosocial agencies.

Where the physician at the counselling centre or the mediosocial agency, or the physician of the woman's choice, finds that in view of the circumstances termination is urgently required, he shall immediately issue the woman a certificate attesting to the urgency of the case. Once she has been issued this certificate, the woman may report to one of the establishments authorized to perform pregnancy terminations.

If termination is not found to be urgently required, the physician at the counselling centre or the medicosocial agency, or the physician of the woman's choice, shall at the end of the consultation, if the woman requests that her pregnancy be terminated on account of circumstances referred to in Section 4, issue her a copy of a document signed by himself and the woman attesting that the woman is pregnant and that the request has been made, and shall request her to reflect for seven days. After seven days

A unique feature of Italian law allows doctors to register as conscientious objectors, freeing them from participating in state-sponsored abortions.¹²³ Commentators have complained that this feature makes

have elapsed, the woman may take the document issued to her under the terms of this paragraph and report to one of the authorized establishments in order for her pregnancy to be terminated.

29 INT'L DIG. OF HEALTH LEGIS. 589, 590 (1978). The more holistic Italian law contrasts with American statutes, such as that passed in Akron, Ohio. See *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983). Cf. GLENDON, *supra* note 6, at 19.

The translation of article 5, above, refers to the "father of the conceptus," 29 INT'L DIG. OF HEALTH LEGIS. 589 (1978), meaning the father of the fetus ("padre del concepito"). "Conceptus" is a neo-Latin neologism, not in my dictionary, that reminds me of the diminutive "homunculus" in the eighteenth-century novel *Tristram Shandy* by Laurence Sterne, where the narrator (rather unnervingly, considering the subject of this article), begins telling his story before he is born. In the Italian statute, the word "concepto" refers to a stage before the "feto," which precedes the "nascituro" (the stage at which abnormalities can be detected) and the "viable fetus." One wonders if *Casey's* rejection of the trimester approach will collapse the fine discriminations of the Italian language (as the influence of American law is, in general, very powerful on foreign countries).

123. Article 9 reads:

9. Health personnel and allied health personnel shall not be required to assist in the procedures referred to in Sections 5 and 7 or in pregnancy terminations if they have a conscientious objection, declared in advance. Such declaration must be forwarded to the provincial medical officer and, in the case of personnel on the staff of the hospital or the nursing home, to the medical director, not later than one month following the entry into force of this Law, or the date of qualification, or the date of commencement of employment at an establishment required to provide services for the termination of pregnancy, or the date of the drawing up of a convention with insurance agencies entailing the provision of such services.

The objection may be withdrawn at any time, or may be submitted after the periods prescribed in the preceding paragraph, in which case the declaration shall take effect one month after it has been submitted to the provincial medical officer.

Conscientious objection shall exempt health personnel and allied health personnel from carrying out procedures and activities specifically and necessarily designed to bring about the termination of pregnancy, and shall not exempt them from providing care prior to and following the termination.

In all cases, hospital establishments and authorized nursing homes shall be required to ensure that the procedures referred to in Section 7 are carried out and pregnancy terminations requested in accordance with the procedures referred to in Sections 5, 7, and 8 are performed. The regions shall supervise and ensure implementation of this requirement, if necessary by the move-

an abortion difficult to produce and creates a black-market for the service.¹²⁴ A similar boycott by doctors in Indiana is said by many to make it impossible to obtain a legal abortion from a local practitioner south of Indianapolis.

Another controversial feature of the law requires minors to notify a parent, unless a judge (the *giudice tutelare*) "finds serious grounds rendering [such notification] impossible or inadvisable."¹²⁵ The issue

ment [mobilità] of personnel.

Conscientious objection may not be invoked by health personnel or allied health personnel if, under the particular circumstances, their personal intervention is essential in order to save the life of a woman in imminent danger. Conscientious objection shall be deemed to have been withdrawn with immediate effect if the objector assists in procedures or pregnancy terminations provided for under this Law, in cases other than those referred to in the preceding paragraph.

29 INT'L DIG. OF HEALTH LEGIS. 589, 592-93 (1978).

124. Irene Figà-Talamanca states that "[b]y removing the abortion practice entirely (often a lucrative one) from the private to the public sector, the new law eliminated the physicians' financial incentives. Previously, a number of physicians working in public services (hospitals, clinics, etc.) privately performed clandestine abortions for a fee. As long as the 'conscience' clause gives them a way out at no loss, they have no reason to offer the services free of charge in the public sector." Figà-Talamanca, *supra* note 116, at 287. An Italian newspaper article summarizes the state of affairs: "There is a kind of emigration from the cities due to an abundance of doctors who are conscientious objectors to abortion and to disorganization in the application of law 194, which regulates abortion. . . . Where this migration does not occur, women are turning to private clinics." ("C'è ormai una sorta di migrazione dalle città dove per un eccesso di medici obiettori e per disorganizzazione l'applicazione della legge 194 che regolamenta l'aborto non è possibile verso altre città dove invece è attuate nei tempi previsti. E, quando questa migrazione non avviene, si va in una clinica privata.") Bramati, *supra* note 120.

125. Article twelve reads:

12. Requests for pregnancy termination under the procedures prescribed by this Law shall be made in person by the woman.

Where the woman is under 18 years of age, the consent of the person exercising parental authority over the woman or her guardian shall be required for the termination of pregnancy. However, during the first 90 days, if there are serious grounds rendering it impossible or inadvisable to consult the persons exercising parental authority or the guardian, or if those persons are consulted but refuse their consent or express conflicting opinions, the counselling centre or medicosocial agency, or the physician of the woman's choice, shall carry out the duties and procedures set out in Section 5 and submit to the magistrate responsible for matters of guardianship [*giudice tutelare*] in the locality in which it (he) operates, not later than seven days following the request, a report giving its (his) views on

was brought to a referendum.¹²⁶ The Italian public, like the Court in *Casey*, upheld parental notification "provided that there is an adequate judicial bypass procedure."¹²⁷

2. *The Role of the Constitutional Court in Promoting Italy's Abortion Statute*

Just as in the United States, Italy's abortion laws are constantly under attack by groups that want deeper restrictions and the Constitutional Court of Italy plays an increasing role in refining abortion statutes. The United States, following *Casey*, views abortion as a *sui generis* fundamental liberty. The presumptive norm against which U.S. abortion law has been played is a debate over the scope of a right to privacy. In Italy the Constitutional Court derives the right to abortion from a complex interplay of positive law, including legal principles of its own creation.

The presumptive norm in Italy, according to an important article by Maria Cristina Folliero, has been the Constitutional Court's ruling of 1975, which prompted the legislature's 1978 law on abortion.¹²⁸ First the Court in 1975 affirmed the "diritti inviolabile" (fundamental right) of a person as superior to that of the "conceptus." There followed the notion that there is no equivalence between the life and health of one who is already a person—the mother—and the well-being of the embryo that will become a person.¹²⁹ According to Folliero, this principle guided the Italian Constitutional Court in later years. The third ruling stated that "it is obligatory that a legislator take the necessary precautions to prevent that abortions be procured without a profound recognition of the reality and gravity of damage or danger that can ensue to a mother who pursues her pregnancy: the freedom of abortion must be

the matter. Within five days, after interviewing the woman and taking account of her wishes, the grounds which she puts forward, and the report submitted to him, the magistrate may issue a decision, which shall not be subject to appeal, authorizing the woman to have her pregnancy terminated.

29 INT'L DIG. OF HEALTH LEGIS. 589, 593-94 (1978).

126. Two proposals have failed to pass in general elections. "One [referendum] aimed at making the law more liberal (extending abortion unconditionally to minors and abrogating the conscience clause), and the other aimed at restricting it (permitting abortion only under certain life-threatening conditions)." Irene Figà-Talamanca, *supra* note 116, at 282.

127. 29 INT'L DIG. OF HEALTH LEGIS. 589, 593 (1978). Cf. *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2832 (1992).

128. *Controllo*, *supra* note 115.

129. *Id.* at 1338.

anchored in an alert evaluation of the conditions that justify it."¹³⁰

Guided by this sentence, the Court in the years after the passage of the 1978 abortion law has controlled the otherwise independent judicial interpretation of the statute and local legislation concerning it. The actual issues before the Court concern two portions of the abortion law, parental notification by minors and the conscientious objector provision for doctors. Despite different points of departure, the courts in Italy and the United States charged with ultimate interpretation of the constitution are called on to make unusually close judgments of provisions that threaten to impinge a woman's choice of abortion.

One of the issues Folliero examines in deriving these principles arose from a failed referendum attempt in 1981 to extend abortion unconditionally to minors.¹³¹ Article 12 of Law 194 governs abortion by minors.¹³² A local attack on the constitutionality of this provision raised the issue in a way not dissimilar to what happens in the United States when a state seeks to interfere with a woman's right to an abortion. The Italian statute allows public doctors who register as conscientious objectors to opt out of giving abortions, but medical assistants must attend before and after an abortion despite their feelings. How do these rules affect a judge facing a minor who refuses to inform a parent? What happens, for example, when the *guidice tutelare* is also an objector?¹³³ Is article 12 unconstitutional because it does not make clear whether the judge is comparable to the doctor or the assistant?

The Constitutional Court found no valid comparison and, therefore, no violation of equal protection that would invalidate the statute.¹³⁴ In reaching its decision, the Court distinguished *external* from *internal* actors in the abortion decision process. For an external actor, such as a judge, the option of conscientious objector does not arise, because one cannot create a homology with the functions and roles of other

130. "L'esistenza nella sent. n. 27 del 1975, della formula tassativa "sia obbligo del legislatore di predisporre le cautele necessarie per impedire che l'aborto procurato senza seri accertamenti, sulla realtà e gravità del danno o pericolo, che potrebbe derivare alla madre dal proseguimento della gestazione: la liceità dell' aborto deve essere ancorato ad una previa valutazione delle condizioni atte a giustificarlo." *Id.* at 1379-80.

131. *Id.* at 1355. *Cf.* Figà-Talamanca, *supra* note 115, at 282. "[T]he difficult and unusual procedure required to bring an issue to a popular vote (referendum) . . . involves collecting, within the span of three months, half a million notary-public-authenticated signatures of citizens requesting modification of a law." *Id.* at 281.

132. *See supra* note 125.

133. *Controllo, supra* note 115, at 1356.

134. *Id.* at 1358.

participants.¹³⁵ Folliero laments that article 12 fails to give minors protection equal to what older women enjoy. But she takes consolation in the decision making process, which solidifies the Constitutional Court's active involvement in controlling and protecting abortion laws. The Court's decision isolates the point at which the minor herself makes a decision to resort to the protection of the *giudice tutelare*. This decision opens the way for a future realization of the minor's autonomy. The next step, perhaps imminent in Italy, is to show convincingly that the autonomy of minors is a principle in Italian laws.

Adherence to these principles has allowed the Court to maintain Italy's abortion laws against suits that claim the law conflicts with elements of the Constitution. For example, "the ordinance of the *Pretore* of S. Donà di Piave raised the issue of constitutional legitimacy in the name of a reputed contradiction between articles 29 and 30 of the Constitution (on the protection of the family, the moral and legal equality of spouses, and the rights and duties of spouses to maintain, instruct and raise their children) and article 5 of law 194 (with regard to the provision that does not recognize the relevance of the desire of the father of the conceived, even of the husband)."¹³⁶ Article 29 of the Constitutions reads:

"The State recognizes the family as a natural association founded in marriage.

Marriage is based on the moral and legal equality of husband and wife within the limits laid down by the laws for ensuring family unity."¹³⁷

Article 30 of the Constitution reads:

"It is the duty and right of parents to support, instruct and educate their children, even those born out of wedlock.

135. "Per questo soggetto definito *esterno*, l'opzione in termini di obiezione di coscienza non può porsi così come non può porsi il profilo dell'omologazione a funzioni e ruoli ad altri assegnati." *Id.* at 1360.

136. "L'ordinanza del Pretore di S. Donà di Piava sollevava incidente di legittimità costituzionale, in nome di un ritenuto contrasto tra gli artt. 29 e 30 Cost. (tutela della famiglia e dell'eguaglianza morale e giuridica dei coniugi; diritto-dovere dei coniugi di mantenere, istruire ed educare i figli) e l'art. 5 l. n. 194 (per la parte in cui non riconosce rilevanza alla volontà del padre del concepito, nella specie visto nella veste istituzionale di marito)." *Id.* at 1372.

137. Translated in 8 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 53 (Gisbert H. Flanz et al. eds. & trans., 1987).

"Should the parents prove incapable, the law states the way in which these duties shall be fulfilled."¹³⁸

These Constitutional provisions, the Court ruled, do not nullify the woman's right not to inform her husband of her abortion decision as guaranteed by article 5 of Law No. 194 (a physician shall consult "with the woman and, where the woman consents, with the father of the conceptus").¹³⁹

The principles that brace this decision also guided the Court's ruling when an ordinance of the *Pretore* of Urbino raised the common problem of the relationship between the extent of the power of the *giudice tutelare* (as in article 12) and the principle of autodetermination of the woman (when a minor). Folliero derides the basis of this case as "not-too solid grounds on the level of a system of formal-hermeneutic appeals."¹⁴⁰ Article 24 of the Constitution guarantees the right to a defense as an "inviolable right," which it was argued should apply to the unborn.¹⁴¹ Article 24 reads,

"All are entitled to institute legal proceedings for the protection of their own rights and legitimate interests. Defence is an inalienable right at every stage of legal proceedings.

"The indigent are entitled, through special provisions, to proper means for action or defence at all levels of jurisdiction.

"The law lays down the conditions and methods for obtaining reparation for judicial errors."¹⁴²

Folliero argues that the Court ruled correctly in determining that the right of the unborn did not enter into a proceeding of voluntary jurisdiction.¹⁴³ She finds an important position developing in the opinion. In her analysis, the Court affirmed the judge's power to respect or deny the will of the minor to the extent that the young woman can adequately appreciate the seriousness and importance of the action she prepares to take.

These brief illustrations show that the Italian constitutional system is itself in flux. On the abortion issue, the Court is still working out

138. *Id.*

139. *See supra* note 122.

140. "[U]n terreno non più solido sul piano dell'impianto ermeneutico-formale del ricorso." *Controllo, supra* note 115, at 1373.

141. *Id.*

142. *See supra* note 137.

143. *Controllo, supra* note 115, at 1374.

the main threads in a dense weave of principles, constitutional decisions, and positive law. The Constitutional Court is also proposing itself as a source of law.¹⁴⁴ At this stage in history, the Court seems both to affirm autodetermination and to deny it. Folliero concludes that this duplication of interpretive position may be less disconcerting than it appears insofar as the Court always respects its initial principles set out in 1975. If she correctly believes that these principles guide the Italian Supreme Court, then they are Italy's equivalent of the "undue burden" standard in *Casey*. The first principle is the state's interest in the health of a woman, broadly understood, with respect to the right to life of the conceived. The second is the principle that a woman can choose for herself. The third is the positive valuation of the procedures and conditions that the legislature believes justify abortion.¹⁴⁵ These principles state what the United States Supreme Court has achieved by a different historical route involving the recognition of a right to privacy in *Roe*, followed by an unwillingness to refer to that legal fiction when affirming the woman's fundamental liberty in *Casey*.

VI. CONCLUSION

The constitutional problem, in both Italy and the United States, is of a court that appears to be micromanaging statutes, or legislating to the legislatures. "The suggestions, the directions, and the warnings contained in the Court's decisions, which influence future legislation, amount to a growing insertion of the Court into the legislative picture."¹⁴⁶ The comparison of the two countries' abortion laws suggests that it is a situation that is here to stay. The thrust of Folliero's argument is that the rights of underage women will be more fully recognized in the future, and the same may be true in the United States. This exception proves the general rule, that the "undue burden" standard is less important as an accurate instrument for judicial determination than a recognition of current practices and debates in America and elsewhere.

European law in general and Italian law in particular offers a platform from which to set in perspective the historically-determined logic by which the American Supreme Court has negotiated its way through the political battles of the abortion issue. Folliero's summary

144. The Court seeks "di potersi comunque autoproporre come fonte nel sistema delle fonti." *Id.* at 1376.

145. *Id.*

146. "[I] suggerimenti, gli indirizzi, i moniti contenuti nelle sentenze della Corte, da cui discende l'attività legislative 'di seguito', si risolvono in intromissioni sempre più penetranti della Corte nel quadro legislativo." *Id.* at 1379.

of the Italian Constitutional Court's principles illustrates another way of understanding the logic that lies behind the "undue burden" standard. The first principle, drawn from the total matrix of Italian law, is the right of women to self-determination. The second is respect for procedures and conditions that the legislature says qualify one for abortion.¹⁴⁷ This summary suggests that the "undue burden" standard, although it will be refined by the Supreme Court, is made of sterner stuff than the dissenting opinions in *Casey* indicate.

147. *Id.* at 1375-76.

Choice of Language in Bilateral Treaties: Fifty Years of Changing State Practice¹

*John King Gamble**
*Charlotte Ku***

I. INTRODUCTION

Treaties and treaty-making deservedly occupy a central place in the international legal scholarly literature. As the major source of international obligation, examining the form and content of treaties can provide tangible and quantifiable information about the behavior of states and the international environment in which they operate. On a more immediate level, treaties serve as a means for interstate communication. The language in which treaties are written affects how widely and deeply treaty obligations are understood and, hence, followed.

Dozens of books and articles have concerned the genre of treaties² and literally hundreds of pieces have focused on specific treaty-related

1. A discussion in 1982 with Professor Peter H. Rohn, Director of the University of Washington's Treaty Research Center, planted the seeds for this work. Professor Rohn also commented on portions of an earlier draft of this paper and has discussed these issues with us. We wish to acknowledge the research assistance of Kyle L. Hannon, Angela Carone, Lisa Howells, Vicky Kohlmeier, Sheryl Sivavec, Terri Thomas-Mack, and Andy Watson.

* Professor of Political Science, The Behrend College, The Pennsylvania State University.

** Deputy Executive Director, American Society of International Law.

2. See ARNOLD McNAIR, *THE LAW OF TREATIES* (1961) for the most comprehensive coverage on the genre of treaties in the English language. See also SUZANNE BASTID, *LES TRAITÉS DANS LA VIE INTERNATIONALE* (1985); FRANCESCO CAPOTORTI, *CONVENZIONE DI VIENNA SUL DIRITTO DEI TRATTATI* (1969); INGRID DETTER, *ESSAYS ON THE LAW OF TREATIES* (1976); TASLIM O. ELIAS, *THE MODERN LAW OF TREATIES* (1974); A. FRANGULIS, *THÉORIE ET PRATIQUE DES TRAITÉS INTERNATIONAUX* (1934); GYORGY HARASZTI, *SOME FUNDAMENTAL PROBLEMS OF THE LAW OF TREATIES* (1973); MYRES MCDUGAL *et al.*, *The Interpretation of Agreements and World Public Order* (1967); PAUL REUTER, *INTRODUCTION AU DROIT DES TRAITÉS* (1972); SHABTAI ROSENNE, *DEVELOPMENTS IN THE LAW OF TREATIES, 1945-1986* (1989); and SHABTAI ROSENNE, *THE LAW OF TREATIES: A GUIDE TO THE LEGISLATIVE HISTORY OF THE VIENNA CONVENTION* (1973).

issues³ or categories of treaties.⁴ Considerable scholarly attention has been paid to the legal and logistical problems attendant with using more than one language as official text of a treaty:

If the two can, without violence to the language, be made to agree, that construction which establishes this conformity is to prevail. In case they cannot be made to harmonize, other rules of construction must be resorted to for the purpose of determining, if possible, the common intention of the parties.⁵

3. See, e.g., , EFFECTIVE NEGOTIATION: CASE STUDIES IN CONFERENCE DIPLOMACY (Johan Kaufman ed. 1989); OSCAR SCHACHTER, TOWARDS WIDER ACCEPTANCE OF UN TREATIES (1971); ROBERT B. STEWART, TREATY RELATIONS OF THE BRITISH COMMONWEALTH (1939); M.T.Z. TYAU, THE LEGAL OBLIGATIONS ARISING OUT OF TREATY RELATIONS BETWEEN CHINA AND OTHER STATES (1917); MARK E. VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES (1985); Hans Blix, *The Requirement of Ratification*, 30 BRIT. Y.B. INT'L L. 356 (1953); Maarten Bos, *Theory and Practice of Treaty Interpretation*, 27 NETH. Y.B. INT'L L. 3 (1980); Michael Brandon, *The Validity of Unregistered Treaties*, 29 BRIT. Y.B. INT'L L. 186 (1952); J.E.S. Fawcett, *Treaty Relations of British Overseas Territories*, 26 BRIT. Y.B. INT'L L. 86 (1949); John King Gamble, *Reservations to Multilateral Treaties: A Macroscopic View of State Practice*, 74 AM. J. OF INT'L L. 372 (1980); Michael J. Glennon, *The Senate Role in Treaty Ratification*, 77 AM. J. INT'L L. 257 (1983); Manley O. Hudson, *Reservations to Multipartite Instruments*, 32 AM. J. INT'L L. 330 (1938); Donald M. McRae, *The Legal Effect of Interpretive Declarations*, 49 BRIT. Y.B. INT'L L. 155 (1978); Martin A. Rogoff, *The International Legal Obligations of Signatories to an Unratified Treaty*, 32 ME. L. REV. 269 (1980); Shabtai Rosenne, *The Depository of International Treaties*, 61 AM. J. INT'L L. 923 (1967).

4. See, e.g., HUNGDAH CHIU & DOUGLAS M. JOHNSTON, THE PEOPLE'S REPUBLIC OF CHINA AND THE LAW OF TREATIES (1972); THE HAGUE CONVENTIONS AND DECLARATIONS OF 1899 AND 1907 (James Brown Scott ed. 1915); ROBERT HUDEC, DEVELOPING COUNTRIES IN THE GATT LEGAL SYSTEM (1987); NATALIE H. KAUFMAN, HUMAN RIGHTS TREATIES AND THE SENATE (1990); JOHN V.A. MACMURRAY, TREATIES AND AGREEMENTS WITH AND CONCERNING CHINA, 1894-1919 (1921); ANTOINE PILLET, LES CONVENTIONS DE LA HAYE (1918); ROBERT M. SLUSSER & JAN F. TRISKA, THE THEORY, LAW AND POLICY OF SOVIET TREATIES (1962); KENNETH VANDELDELDE, UNITED STATES INVESTMENT TREATIES (1992); ROBERT WILSON, U.S. COMMERCIAL TREATIES AND INTERNATIONAL LAW (1960); Philip Alston, *U.S. Ratification of the Covenant of Economic, Social and Cultural Rights*, 84 AM. J. INT'L L. 365 (1990); R.R. Baxter, *The Geneva Conventions before the U.S. Senate*, 49 AM. J. INT'L L. 550 (1955); John King Gamble, *Post World War II Treaty-Making: The Task of the Third UN Law of the Sea Conference in Perspective*, 17 SAN DIEGO L. REV. 527 (1980); Pierre-Henri Imbert, *La France et les traités relatifs au droit de l'homme*, 26 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 31(1980); Arnold McNair, *The Functions and Differing Legal Character of Treaties*, 11 BRIT. Y.B. INT'L L. 100 (1930); Bernard H. Oxman, *The Third U.N. Conference on the Law of the Sea: The Tenth Session (1981)*, 76 AM. J. INT'L L. 1 (1982) .

5. SAMUEL B. CRANDALL, TREATIES: THEIR MAKING AND ENFORCEMENT 389 (2d ed. 1916).

Inconsistency between languages creates many problems. The solution suggested by the Vienna Convention on the Law of Treaties, however, is not altogether satisfactory:

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail. . . . 3. The terms of the treaty are presumed to have the same meaning in each authentic text. 4. . . . when a comparison of the authentic texts discloses a difference of meaning . . . the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.⁶

Of course, many problems arise when the treaty does not have the same meaning in different languages. Samuel B. Crandall provides a fascinating discussion of numerous cases where a seemingly minor difference in wording between languages created serious problems once the treaties were implemented.⁷ David P. O'Connell describes a solution suggested in 1924 by the World Court: "[w]hen a treaty is in two languages, and there is a discrepancy between them, each party is only bound by the meaning of the text in its own language." Both solutions do little to resolve conflicts.⁸

The focus of this article is a different aspect of language in treaties — the choice of language or languages as official text or texts of bilateral treaties. Some research has addressed the broader issue of multiple use of languages in international organizations and multilateral treaties,⁹ but bilateral treaties have received scant attention. This inattention likely stems from the difficulty of examining the treaty practice of more than 150 states in tens of thousands of treaties, a difficulty now largely overcome by modern database management techniques. This article examines a lengthy period of state practice, the half century between 1920 and 1970, in order to describe and understand language choices. At first blush, this may seem like much ado about nothing. Of course, it is the content, not the choice of official text, that matters most.

6. Vienna Convention on the Law of Treaties, May 23, 1969, art. 33, 63 AM. J. INT'L L. 875, 886 (1969) [hereinafter Vienna Convention].

7. CRANDALL, *supra* note 5, at 389-93.

8. DAVID P. O'CONNELL, INTERNATIONAL LAW 258 (2d ed., vol. 1, 1970). See Mavrommatis Concessions, 1924 P.C.I.J. (Ser. A) No. 2, at 19.

9. MALA TABORY, MULTILINGUALISM IN INTERNATIONAL LAW AND INSTITUTIONS (1980).

However, the approach taken here, based as it is on an enormous amount of state practice, can elucidate a number of important issues:

- To what degree has English taken over the *lingua franca*¹⁰ role previously played by Latin and French?
- Is there any political dimension to language choice?
- Has the rise of the United States and the Soviet Union as superpowers after World War II been accompanied by an increased use of English and Russian as official texts?
- Is the emergence of the Third World as a major force in the international system reflected in languages used in treaties?

II. THE "CONVENTIONAL" WISDOM ABOUT OFFICIAL TEXT

No doubt the treaty power claimed by all states includes the right to use their languages as official texts of the treaties to which they are party. Although the Vienna Convention does not deal explicitly with the issue, it is inconceivable that any state lacks the power to have its national language(s) used as an official text of a bilateral treaty. Lord Arnold McNair stated simply that "parties are free to choose the language or languages in which a treaty is expressed."¹¹

Aside from the assertion that states may use whatever official texts they wish in their treaties, the most frequent focus of work on language choice concerns the use of *lingua franca*:

Until the eighteenth century the common language, or *lingua franca*, of diplomacy was Latin. Not only did diplomats write to each other in Latin but they even conversed in that medium. Such treaties as those of Westphalia (1648), the Anglo-Danish Treaty of 1670, and the Anglo-Dutch Treaty of 1674 were all drafted and signed in Latin and that was in fact the general practice.¹²

Latin was the language of most treaties "[u]ntil about the beginning of the eighteenth century,"¹³ although Mala Tabory found an exception in that "towards the end of the fifteenth century, Castilian Spanish

10. The term, *lingua franca*, will be used here because it is so widely understood. Some prefer "third language," but that is easily confused with those treaties that have three different languages as official texts.

11. ARNOLD MCNAIR, *THE LAW OF TREATIES* 30 (1961).

12. HAROLD G. NICOLSON, *DIPLOMACY* 231 (1939).

13. CHARLES C. HYDE, *INTERNATIONAL LAW: CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES* 1422 (1945).

was the diplomatic idiom in many courts."¹⁴ Eventually, Latin was replaced by French due to "the political ascendancy of France under Louis XIV."¹⁵ However, others were quick to assert that the position enjoyed by the French language was at most indirectly related to the military, diplomatic, and political successes of France. More than half a century ago, James Brown Scott noted that linkages between national, economic, and political power and language are at most indirect:

Le grec est devenu la langue du commerce intellectuel quand la Grèce est descendue à l'état d'une province romaine. Il est devenu même la langue d'une civilisation mondiale sous l'empire d'Auguste et pendant les premiers siècles de notre ère, pendant lesquels ses successeurs ont dominé le monde, brisant toute opposition matérielle, imposant et leur volonté et leurs lois. Ni la puissance militaire, ni le prestige immense de l'Empire ne réussirent à remplacer le grec de l'Orient par le latin.¹⁶

Even less tenable are the numerous assertions on the intrinsic superiority of the French language. Harold G. Nicolson stated that French "possesses qualities which enable it to claim precedence over others for all purposes of diplomatic intercourse."¹⁷ Scott, a francophone of René Lévesque (Quebec separatist leader) proportions, believed that the use of French could overcome the foreign mind-set and avoid misunderstandings and ambiguity.¹⁸ Manley O. Hudson took Scott to task, albeit politely, pointing out that in the immediate post-World War I period, English was used increasingly.¹⁹ Perhaps the most ambitious claim made on behalf of the French language was:

It is impossible to use French correctly without being obliged to place one's ideas in the proper order, to develop them in a logical sequence, and to use words of almost geometrical accuracy. If precision is one of the major virtues of diplomacy, it may be regretted that we are discarding as our medium of

14. TABORY, *supra* note 9, at 4.

15. LASSA FRANCES L. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* 771 (H. Lauterpacht ed., 8th ed. 1955).

16. JAMES BROWN SCOTT, *LE FRANÇAIS, LANGUE DIPLOMATIQUE MODERNE* 129 (1924).

17. NICOLSON, *supra* note 12, at 234.

18. SCOTT, *supra* note 16, at 1.

19. Manley O. Hudson, *Languages Used in Treaties*, 26 AM. J. INT'L L 368 (1932).

negotiation one of the most precise languages ever invented by the mind of man.²⁰

Writing almost fifty years later, Leslie Green reached entirely the opposite conclusion: "There is, of course, nothing linguistically special about either the French or English languages which warrants special treatment. Indeed, there are no scientific grounds for thinking that any human language is better, either in general or for some special purposes, than any other."²¹

Regardless of the dominant role played by French, states insisted that the use of French was a matter of convenience, not a legal requirement.²² This sentiment was expressed even at the time of the Congress of Vienna when French was pre-eminent:

Article 120 of the General Treaty of the Vienna Congress of 1815 expressly observes that the fact of the French language having been exclusively employed in all copies of that treaty is not to be construed into a precedent for the future, and that every Power reserves the right to adopt, in future negotiations, and conventions, the language which it had previously employed in diplomatic relations.²³

Commentators generally agree about when French was overtaken by English as the model diplomatic language. "French has lost its dominant position as *the* diplomatic language and, since 1919, English has become at least as important."²⁴ The Paris Peace Conference in 1919 appears to have been the first time that English and French were on an equal footing.²⁵ In the period since World War II, two dominant trends have emerged in language choice. First is the increased use of English where a *lingua franca* is employed. Second (generally regarded as the prevailing practice) is the practice of preparing "versions of the treaty in both languages. . . ."²⁶ United States practice early abandoned French in favor of making English one of the official texts:

20. NICOLSON, *supra* note 12, at 234.

21. Leslie Green, *Are Language Rights Fundamental?*, 25 OSGOODE HALL L. J. 639, at 662 (1987).

22. JOHN BASSETT MOORE, *A DIGEST OF INTERNATIONAL LAW* 181-82 (vol. 5, 1906).

23. OPPENHEIM, *supra* note 15, at 771-72.

24. EDWARD D. BROWN & GEORG SCHWARZENBERGER, *A MANUAL OF INTERNATIONAL LAW* 129 (6th ed. 1976).

25. OPPENHEIM, *supra* note 15, at 772.

26. BROWN & SCHWARZENBERGER, *supra* note 24, at 129.

Bilateral agreements concluded by the United States with other countries are usually drawn up in the English language and in the language of the foreign country, or in some other foreign language selected by it. The French language has frequently been the language selected. In a number of such agreements the English language has been the only language of the originals, while in some of the earlier agreements the English language was not used, but French, Spanish, Arabic, Turkish, or Portuguese, as the case might be, alone was used.²⁷

John Bassett Moore cited a transmittal letter accompanying the 1785 consular treaty with France written by John Jay recommending that "in the future, every treaty or convention which Congress might think proper to engage in should be formally executed in two languages."²⁸ In fact, the United States and the United Kingdom were among the first and most insistent upon using their national language in all their treaties.²⁹

The position of the Soviet Union on language choice showed a certain ambiguity. On the one hand, Soviet advocacy of the Russian language because of its "inherent richness and beauty"³⁰ is reminiscent of pleas on behalf of French early in this century. In a different vein, Academician Korovin declared that "Soviet treaty practice strictly adheres to the principle of complete equality of languages of the contracting parties."³¹

There are broader implications to these issues. Although linkages between national, economic, and political power and language are difficult to prove, the possibility of such linkages should not be overlooked. Why was Latin chosen as the language of diplomacy? It was the language of the university, the *literati* and of the Roman Catholic Church, whose support for any treaty could make violation costly. A more cynical explanation would hold that Latin was used to placate the church in a minor, *pro forma* way to divert attention from the content of treaties.

In the modern era, especially in democratic states, public opinion has become important in the negotiation and implementation of fair

27. GREEN H. HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 37 (vol. 5, 1943).

28. MOORE, *supra* note 22, at 180.

29. BISWANATH SEN, *A DIPLOMAT'S HANDBOOK OF INTERNATIONAL LAW AND PRACTICE* 458-59 (1979).

30. ROBERT M. SLUSSER & JAN F. TRISKA, *THE THEORY, LAW, AND POLICY OF SOVIET TREATIES* 61 (1962).

31. *Id.* at 60.

and equitable treaties, "open covenants openly arrived at."³² The need to make treaties accessible to the public-at-large has clear implications for language choice. Nationalist aspirations, be they in 1648, 1914, or 1993, probably are the most potent political forces operating during this millennium. Language is a factor in virtually all of these nationalist movements. The choice of language in treaties can be a manifestation of important domestic political forces. Furthermore, language choice can be influenced by external factors such as hegemonic third parties and the need for a guarantor power.

III. CATEGORIZING STATE PRACTICE

The recent trend in bilateral treaties has been to make the language(s) of both party-states official languages of the treaty.³³ For example, if the United States and Mexico conclude a bilateral agreement on border problems, both English and Spanish will be official texts. However, the most interesting cases arise when states opt for language choices different from this now-dominant pattern. This choice may take several forms,³⁴ the most common of which are:

- (i). the parties may opt for a convenient neutral language or *lingua franca*, e.g., Bulgaria and Greece employ French;³⁵
- (ii). the parties may decide to use the language of one of the parties as the only official language, e.g., U.S. and Sweden use English;³⁶
- (iii). other — there are examples that fit into neither (i) or (ii) but that combine them, e.g., Indonesia and Japan using Japanese, Indonesian, and English.³⁷

Later this article shall deal with the more complicated situation arising when a language, e.g., English, both plays a *lingua franca* role and is the official language of one of the parties.

32. KENNETH N. WALTZ, *MAN, THE STATE, AND WAR* 95-103 (1959).

33. There are more complicated situations where a state may have more than one official language, e.g., Belgium, Canada, Finland, India, and Switzerland.

34. Blix and Emerson adopted a scheme for classifying language choice that consisted of a single authentic text, one of several authentic texts, several authentic texts, all texts equally authentic and all texts equally authentic (by implication). *THE TREATY MAKER'S HANDBOOK* 254-57 (Hans Blix and Jirina H. Emerson eds., 1973).

35. *See, e.g.*, Payments Agreement, Dec. 5, 1953, Bulg.-Greece, 225 U.N.T.S. 145.

36. *See, e.g.*, Exchange of Notes Between the Governments of the United States of America and Sweden, concerning the denunciation of provisions No. 11 and 12 of the Consular Convention of June 1, 1910, June 18 and 29, 1920, Swed.-U.S., 2 L.N.T.S. 157.

37. *See, e.g.*, Treaty of Peace, Jan. 20, 1958, Japan-Indon., 324 U.N.T.S. 227.

It is a daunting task to examine a sizable number of treaties to determine what practice has actually been followed. Ironically, the research for this article could have been carried out more easily a decade ago.³⁸ For purposes of this article, all bilateral treaties contained in the League of Nations Treaty Series (L.N.T.S.) and in the United Nations Treaties Series (U.N.T.S.) (those registered between 1945 and 1970) have been examined. This sample does not include all of the bilateral treaties signed during the period between 1920 and 1970,³⁹ but it does represent such a large number — and not a patently atypical sample — that we assume that it is representative of all treaties concluded during this fifty-year period. Before examining these treaties, it is important to get some grasp of the magnitudes involved:

Table 1

TREATIES INCLUDED IN THE STUDY

SERIES	YEARS COVERED	TOTAL NUMBER	NO. / %		
			BILATERALS BET. STATES	"RULES"	EXCEPTIONS
League	1920-42	4,900	4,410 / 90	2,427 / 55	1,983 / 45
UN	1945-69	10,035	8,128 / 81	7,069 / 87	1,059 / 13

Although Table 1 is fairly straightforward, some elaboration may prove helpful. This study includes nearly 15,000 treaties, the vast majority of which were signed between 1920 and 1970. Most of these treaties were bilaterals between states, however, some were multilateral treaties and bilaterals between a state and an international organization. The latter two categories have been excluded to avoid extraneous, complicating factors. In the case of the L.N.T.S., there are 4,410 bilateral treaties between states (90% x the 4,900 total) of which 45% (or 1,983) fall into the category of principal interest here: those that have official texts that are not simply the official language(s) of the parties. In the case of the U.N.T.S., only 13% of the bilaterals fall into this category. Broadly speaking, about 15,000 treaties were ex-

38. The Treaty Research Center, established by Professor Peter H. Rohn at the University of Washington, collected information about most of the world's treaties and made it possible to answer questions such as those surrounding choice of official text. Regrettably, the Treaty Research Center is no longer in operation.

39. For example, there is the problem of the "gap"-treaties that were never registered with the League of Nations or with the United Nations.

amined and approximately 20% (3,000) of them fell into this "exception" group of treaties using a language other than the official language(s) of the parties.

IV. BROAD PATTERNS OF BEHAVIOR

One of the most conspicuous findings, evident from Table 1, is the marked increase in the proportion of standard fare cases, i.e., those using the official language(s) of both parties, from the League of Nations to the United Nations. For the L.N.T.S., 45% of bilateral treaties between states did something other than choose the languages of both parties—what we defined as "exception" nearly was the "rule." In the case of the U.N.T.S., the figure dropped to 13%. This represents a marked change in behavior in a relatively short period of time. The reasons for this change will be examined principally by analyzing the 45% of the L.N.T.S. and the 13% of the U.N.T.S. that constitute exceptions as defined here.⁴⁰

The first question one must ask about these treaties regards the number of official texts chosen. As Table 2 shows, almost all of these treaties (95%) use only one language as official text.⁴¹ The others, the 5% using two official texts, are interesting, but represent such a small group that they can be dealt with separately almost on an individual basis.

Table 2
NUMBER OF OFFICIAL TEXTS ACCORDING
TO SIGNATURE DECADE

		NUMBER OF OFFICIAL TEXTS			
		ONE	TWO	> 2	TOTALS
DECADE	1920s	1024	63	0	1087
TREATY	1930s	841	48	0	889
WAS	1940s	112	3	0	115

40. A more satisfactory approach would have been to examine all bilateral treaties and to compare the "exceptions" to the "rules." This was feasible only for three "case studies," Canada, China, and Japan, discussed *infra* at Part V.

41. It must be remembered that this group of treaties contains only the "exceptions," those that do not have both countries' languages as official texts. If all bilaterals were included, most would have two official texts.

SIGNED	1950s	284	13	0	297
	1960s	612	32	1	645
	TOTALS	2873	159	1	3033

The next question to be addressed is which languages have been used in these 3,033 treaties. This information is contained in Table 3.

Table 3
FREQUENCIES OF LANGUAGES AS OFFICIAL TEXTS
(TOTAL = 3,194)

ARABIC	1	GERMAN	119
AFRIKAANS	1	ITALIAN	13
CHINESE	1	JAPANESE	4
CZECH.	1	NORWEG.	3
DANISH	4	PORTUG.	26
DUTCH	3	RUSSIAN	6
ENGLISH	903	SPANISH	63
FRENCH	2009	SWEDISH	6

Sixteen different languages were used at least once, but English, French, and German account for 97% of the cases. Figure 1 shows the relative proportion of English, French, and German⁴² over the fifty year period. In the earliest decades, German occupied a small, but significant, position. After World War II, German almost disappeared as a language in bilateral treaty-making except, of course, in the usual two language cases and between German-speaking countries.

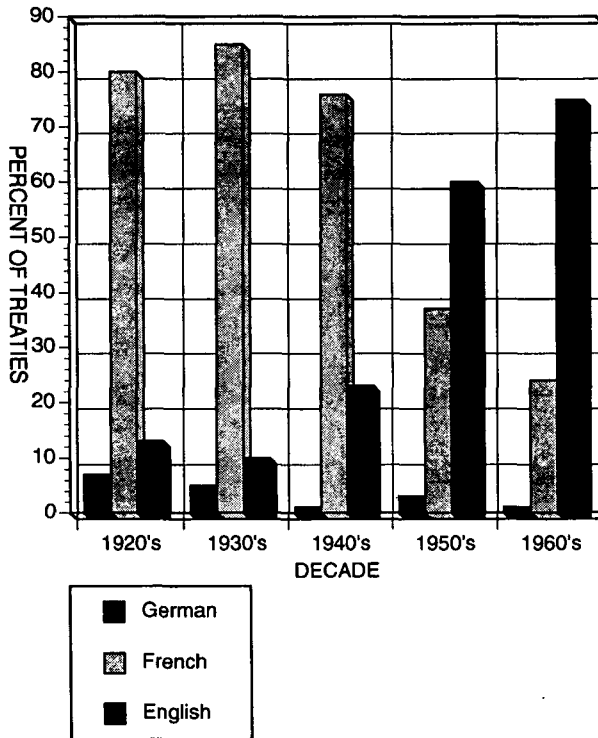
The relative importance of English and French could hardly be more striking. Before World War II, French accounted for approximately 80% of the treaties. The most recent data available (the 1960s) show that the frequencies of English and French have reversed with English now accounting for almost 80% of treaties.

No satisfactory way exists to account in the data for an official text acting both as *lingua franca* and as the national language of one of the parties. This problem is most acute for the United States and English. The United States is clearly the most prolific treaty maker in the world⁴³ and also insists on the use of English in virtually all of its

42. The incidence of other languages is too small to be represented on the graph.

43. PETER H. ROHN, *TREATY PROFILES* 244-45 (1976).

Figure 1
 PERCENTAGE OF TREATIES BY LANGUAGE BY DECADE
 (TOTAL = 2,943)



treaties. How can one determine the extent to which the dominance of English since World War II is due to the power and influence of the United States, to the ascendancy of the English language or whether the two factors are inseparable? It would be fascinating to try to resolve this matter by carefully controlling for each factor, perhaps even quantifying differences between languages. For example, consider the cases of Romania and the Netherlands. Since Dutch and Romanian are used by relatively few people, there is virtually no chance that either will be used as a *lingua franca*. One might assume that Romania would prefer to use French as a *lingua franca* while the Netherlands would opt for English because of relative linguistic proximities, Romanian to French and Dutch to English.

Figure 2
 PERCENTAGE OF TREATIES BY LANGUAGE BY DECADE
 (EXCLUDES TREATIES WITH OFFICIAL TEXT SAME AS NATIONAL LANGUAGE
 OF EITHER PARTY)
 (TOTAL = 1601)

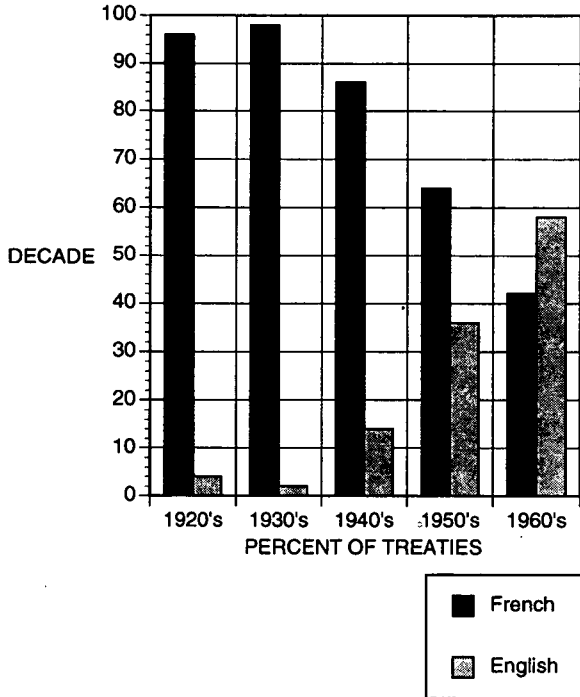


Figure 2 provides one way of addressing the problem of the inseparability of the *lingua franca* and dominant party roles played by languages. The figure includes those treaties that use only one language as official text and for which that language is the national language of neither party. Thus, any possible direct effects the United States would have on the greater use of English, France on the greater use of French, etc., have been removed. The dominance of English over French is not as marked as in Figure 1, but the fifty-year shift is strong and clear. During the 1920s, French accounted for 95% of these treaties and English only 4%. By the 1960s, English stood at 56% while French had dropped to 41%.

The large quantity of treaties included in this study limited the amount of information collected about each treaty except, of course, for the most basic attributes: signature date, force date, parties, languages, and a general categorization of the subject matter (i.e., political, diplomatic, economic, cultural, military, and humanitarian). One could

disagree about where a particular treaty should fall, but the categories were applied uniformly.

Table 4 must be interpreted with great care due to the small numbers, especially in the case of German and the co-existence of two different factors, topic category and time. Since French dominated the pre-World War II years, it is difficult to determine if the subject matter of those treaties is due more to the era or to a tendency for the French language to be used more when certain subjects are negotiated. Overall, the clearest finding is a negative one. There is not much difference among French, English, and German for the major topic categories.

Table 4
FREQUENCIES OF LANGUAGES BY TOPIC
(TOTAL = 2,908)

	English	French	German
DIP.	294 34%	988 51%	60 54%
CUL.	26 3%	25 1%	1 1%
ECON.	395 46%	844 44%	39 35%
HUM.	8 1%	3 <1%	0 0%
MIL.	29 4%	35 2%	11 10%
POL.	114 13%	36 2%	0 0%
TOTALS:	866 100%	1931 100%	111 100%

While Table 2 shows the infrequency of treaties with more than one official text, Table 5 illustrates changes over time. Except for the atypical decade of the 1940s, there is remarkable consistency.

Table 5
PERCENTAGE OF TREATIES WITH MORE THAN
ONE OFFICIAL TEXT

DECADE:	1920s	1930s	1940s	1950s	1960s
% WITH MORE THAN ONE TEXT	5.8%	5.4%	2.6%	4.4%	5.0%

Another way to approach the treaties with two official texts is to examine language dyads, i.e., pairs of languages. With sixteen different languages represented, a total of 120 possible dyads exists. Most of the dyads were never used. This is hardly surprising—one would not expect to find Chinese and Irish as official texts in an agreement other than one between China and the Republic of Ireland. It might be interesting to look at very small dyads, for example, Chinese/English,⁴⁴ Italian/Russian,⁴⁵ and English/Irish,⁴⁶ each of which occurs only once.⁴⁷ However, if any generalizations are to be made, the focus should be on those dyads that occur fairly often. There are three of these that account for 70% of the treaties in this multi-text category:

English/French:	43 occurrences
French/Portuguese:	18 occurrences
French/Spanish:	39 occurrences

Looking first at the English/French dyad, more than half of these treaties have the United States or the United Kingdom as one party. Evidently, English was used to accommodate them along with French in its role as *lingua franca*. Typical examples here are the 1923 Agreement between the United States and the Netherlands,⁴⁸ the 1930 Agreement between the United States and Greece,⁴⁹ and the 1967 Agreement between the U.K. and Yugoslavia.⁵⁰ Although the overall incidence of multi-texted treaties is quite constant over the fifty-year period, the treaties involving the United States and the United Kingdom occurred mostly before World War II, indicative probably of a wider *lingua franca* role for English after World War II. The French/Portuguese dyad consists of treaties between Portugal or Brazil and European countries.

44. Customs Treaty, Nov. 12, 1928, China-Nor., 87 L.N.T.S. 381.

45. Agreement on Economic and Technical Cooperation, June 2, 1961, U.S.S.R.-Italy, 457 U.N.T.S. 263.

46. Exchange of Notes Constituting a Trade Agreement, Dec. 26, 1951, Ir.-Switz., 558 U.N.T.S. 306.

47. This discussion considers only "exceptions," e.g., a treaty between China and the United Kingdom with English and Chinese both as official texts would not be counted.

48. Exchange of Notes Regarding Copyright on Musical Works, Oct. 2, 1922 Apr. 3, 1923, U.S.-Neth., 21 L.N.T.S. 175.

49. Treaty of Conciliation, June 19, 1930, U.S.-Greece, 136 L.N.T.S. 399.

50. Agreement Between the Postal Administration of the UK and the Administration of Posts, Telegraphs, Telephones of the Socialist Federal Republic of Yugoslavia for the Exchange of Money Orders, June, 30, 1967, U.K.-Yugo. 642 U.N.T.S. 325.

Typical examples, all of which are found in the L.N.T.S., are the 1921 Exchange of Notes between Portugal and Sweden⁵¹ and the 1932 Exchange between Brazil and Sweden.⁵² The French/Spanish dyad is similar to the French/Portuguese, except that it spans the entire fifty-year period. Examples are the 1922 Exchange between Spain and Sweden⁵³ and the 1961 Exchange between Chile and the Netherlands.⁵⁴

V. THREE CASE STUDIES: CANADA, CHINA AND JAPAN

If a comprehensive system were available to examine treaties, it would be possible to answer virtually any question about them including uses of official text. For example, it is possible to construct a model of language choice and test hypotheses about languages. Since no system now exists, one has to be satisfied with carefully drawn subsets of treaties, such as the group of 3,000 "exceptions" already discussed. Another way of defining subsets is to examine the treaty behavior of individual countries. In some instances, this examination has already been done, most notably with the United States and Germany. It is clear that the United States insists on English in virtually all of its treaties—there was no appreciable change in this posture during the fifty-year period covered in this study. The case of the German language is interesting in that one can see German playing a fairly substantial role through the 1930s, followed by its virtual disappearance thereafter, as the single language of bilateral treaties, save for those instruments between two German-speaking countries.

The three countries selected for "case studies" provide very different contexts for viewing the interplay between language choice and broader sociopolitical forces. In each case, we have examined all bilateral treaties during at least the fifty-year period,⁵⁵ not just the "exceptional"

51. Exchange of Notes Constituting an Agreement Concerning the Exchange of Notification with Regard to Person of Unsound Mind, Sept. 20, 1921, Port.-Swed., 7 L.N.T.S. 143.

52. Exchange of Notes Constituting an Agreement Regarding Reciprocal Assistance to Brazilian & Swedish Nationals Suffering from Mental Disease, Jan. 27, 1932, Braz.-Swed., 178 L.N.T.S. 119.

53. Exchange of Notes Concerning the Application of the New Spanish Customs Tariff to Merchandise Ordered in & Coming from Sweden, Dec. 29, 1921, Spain-Swed., 9 L.N.T.S. 57.

54. Exchange of Notes Constituting an Agreement Concerning the Abolition of the Travel Visa Requirement, Apr. 7, 1961, Chile-Neth., 453 U.N.T.S. 239.

55. Depending upon the country examined, it was necessary to extend the fifty-year timespan to accommodate more recent political events.

cases that have been the focus so far. This increases the information base and provides a different view on the results.

A. *Canada*

Canada represents an interesting case study because of a marked change in official policy, i.e., from the mid-1960s onward, bilingualism was taken seriously as official policy by the Canadian federal government. Thus, a change might be expected in official text languages to occur sometime in the 1960s. A Royal Commission report published in 1967 went so far as to tabulate numbers of bilateral treaties between 1928 and 1965. The Commission found that the English language dominated Canadian treaty-making.⁵⁶ However, the report distinguished between agreements and exchanges of notes in a somewhat confusing way.⁵⁷ In addition, some attention has been given to the matter of language of official text in the scholarly literature. Allan Gotlieb's study, which understates the dominance of English in earlier Canadian treaties, commented:

So far as Canadian practice is concerned, there is a tendency, in contemporary usage, to pay very strict attention to Canada's bilingual character, perhaps resulting in more stringent practices than are generally found internationally. At one time, the Canadian practice appears to have been to conclude bilateral agreements which were authentic in one of the two official languages, and in particular, English with English-speaking countries, and French with French-speaking countries. Exchanges of notes followed in general the usual international practice of being in only one language, English with English-speaking countries and French with French-speaking countries.⁵⁸

Professor Anne Marie Jacomy-Millette dealt somewhat more with political forces at work in determining official texts. She wrote that, earlier in Canadian history, English was the language of most Canadian bilateral treaties.⁵⁹ The policy has changed in more recent years:

However, there has recently been a new tendency in this respect, in line with the bilingual policy introduced at the

56. REPORT OF THE ROYAL COMMISSION ON BILINGUALISM AND BICULTURALISM, BOOK I, THE OFFICIAL LANGUAGES 64-65 (1967).

57. *Id.*

58. ALLEN GOTLIEB, CANADIAN TREATY-MAKING 70-71 (1968).

59. ANNE MARIE JACOMY-MILLETTE, TREATY LAW IN CANADA 60 (1975).

federal level, first by the government of Mr. Pearson, and since June 1968, that of Mr. Trudeau. Generally the official text of bilateral treaties involving Canada is now in two versions, French and English, equal in authenticity, even where the agreement was concluded with English-speaking countries such as the United States. Use of both official languages for the text of agreements is also the rule with the majority of exchanges of notes or letters.⁶⁰

According to Jacomy-Millette, before the 1960s, it was not uncommon to find English used in exchanges of notes even with French-speaking countries.⁶¹

In order to be certain of finding treaty-based evidence of official bilingualism, the article extends coverage through the mid-1970s. Since Canada is an active treaty maker, there is a sizable number of treaties from which to draw conclusions: 453 with signature dates ranging from 1907 through 1977.⁶² First the overall picture and then a few interesting examples will be discussed. The most telling finding is that 95.6% (433) of these treaties have English as an official text, whereas only 32.7% (148) have French. Figure 3 shows the proportion of treaties falling into each language category: English-Other; English-French; English only; and French only—as well as the absolute numbers of treaties in each language category (the small numbers atop the bars).

For Canada, the most telling question is the degree of change in use of official texts over time. French has not quite achieved parity with English in terms of frequency of use, but, as Figure 3 shows, the change in the more recent time period is pronounced. Changes might be particularly apparent in examining Canadian treaties with France and the United States where, one would surmise, pressure would be substantial to defer to the language of the other party. The number of Canada/France bilaterals is too small to permit generalization. However, in the case of the United States, there is such a volume of treaty activity⁶³ that trends, if there are any, should be discernible.

60. *Id.*

61. *Id.* at 48.

62. Signature date is the most accurate measure of policy of language since it is unaffected by delays in registering the treaty for publication in the L.N.T.S. or the U.N.T.S. Many of these delays are inexplicable.

63. PETER H. ROHN, *TREATY PROFILES* 80-81, 244-45 (1976). There were 113 bilaterals for the period between 1946 and 1965, the largest dyad for both countries.

Figure 3
LANGUAGE COMBINATIONS IN CANADIAN
BILATERAL TREATIES

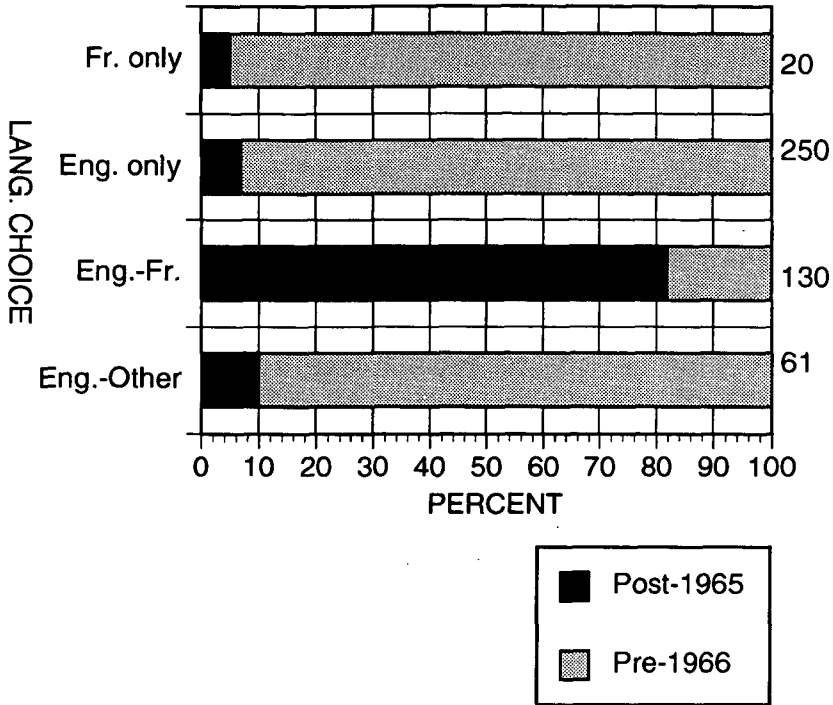


Table 6⁶⁴

USE OF ENGLISH AND FRENCH
CANADA/U.S.A. BILATERALS

	<u>English</u>	<u>French</u>
signed before 1966	128	2
signed after 1965	48	36

The contrast shown by Table 6 could hardly be greater. Before 1966, a bilateral treaty between Canada and the United States had less than a 2% chance of having French as one of the official texts. After 1965, and the introduction of clear new policies on bilingualism, three quarters of the treaties used both English and French. These findings

64. Use of percentages in tables like this one would be confusing because of double counting, i.e., a treaty using both English and French would count in both the French and English columns.

are clear evidence of political forces affecting behavior manifested in international law.

Now that bilateral treaties as a whole have been described, this article will discuss some of the individual treaties. Before 1950, most Canadian treaties used only English as official text, unusual and notable because, at this time, French dominated as a treaty language. French, however, was used in a few instances. For example, treaties with French speaking countries occasionally included both French and English as official texts, e.g., the 1922 Convention between Canada and France,⁶⁵ the 1937 Agreement between Canada and Haiti,⁶⁶ and the 1946 Exchange of Notes between Belgium and Canada.⁶⁷ There are, literally, only several examples where French is the sole official text. These seem to be of two varieties, i.e., treaties with France such as the 1947 Exchange on War Damage Compensation,⁶⁸ and a few cases where Canada conformed to normal practice at the time, e.g., the 1926 Agreement with Norway.⁶⁹ This limited use of French should be seen in the context of dozens of bilaterals with the United States, almost none of which used French. In fact, it is not until 1962 that the first bilateral between Canada and the United States with both English and French as official texts was signed.⁷⁰

The post-1965 situation finds both English and French used in most treaties. The exceptions are a dozen or so bilateral treaties with the United States where only English is used. This period saw a significant increase in treaties with three official texts. If one party insists on more than one official text, that seems to open the door to official texts for all languages of both parties. For example, the 1966 Convention for the Avoidance of Double Taxation⁷¹ between Canada and Norway has English, French, and Norwegian as official texts. In

65. Commercial Convention, Dec. 15, 1922, Can.-Fr., 21 L.N.T.S. 38.

66. Agreement, Apr. 23, 1937, Can.-Haiti, 224 L.N.T.S. 59.

67. Exchange of Notes Constituting an Agreement Concerning Settlement of War Claims, July 13, 1946, Belg.-Can., 230 U.N.T.S. 159.

68. Exchange of Notes Constituting an Agreement on War Damage Compensation, May 5, 1947, Can.-Fr., 231 U.N.T.S. 81.

69. Agreement Concerning Exchange of Postal Parcels, Apr. 30, 1926, Can.-Nor., 51 L.N.T.S. 203.

70. Interim Agreement Relating to General Agreement on Tariffs & Trade, Mar. 7, 1962, Can.-U.S., 436 U.N.T.S. 3.

71. Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, Nov. 23, 1966, Can.-Nor., 604 U.N.T.S. 295.

the 1967 Cultural Agreement,⁷² Canada and Belgium use Dutch, English, and French. This practice is different from that of the 1920's, when they likely would have used French only, an official language in both countries. Later, the article discusses the implications of this "inflation" in the number of languages.

B. *China*

China presents a vastly different situation from that encountered with Canada. One of the earliest Chinese treaties, the 1689 Treaty between China and Russia, was written in Latin, the norm for that time, and was negotiated through intermediaries (Catholic priests).⁷³ Any discussion of Chinese treaty-making must consider the nature of Chinese treaty relations as they developed in the 19th century. These relations were characterized by Western powers and Japan using treaties with China to maintain diplomatic, commercial, and political privilege. These foreign powers assumed responsibility for implementing treaties within China.⁷⁴ Given this context, language choice surely was influenced. However, interpreting the use of official texts in 19th century treaties presents certain difficulties. Treaty series often did not specify official texts. Further, a widespread practice of 20th century treaties—including an explicit textual statement about authentic texts—was not used in 19th century Chinese treaties.

Even given the above limitations, a reasonable estimate can be made that the Chinese language was used in about one third of 19th century Chinese treaties. For example, the 1842 Treaty between China and Great Britain⁷⁵ and the 1844 Peace Treaty⁷⁶ between China and the United States used Chinese and English. Many other treaties used only English, e.g., the 1872 Treaty between China and Japan⁷⁷ and the 1894 Convention with the United States.⁷⁸ A few treaties followed the mode of the times, using French as *lingua franca*, e.g., the 1844 Treaty of Friendship, Com-

72. Cultural Agreement, May 8, 1967, Can-Bel., 637 U.N.T.S. 217.

73. Treaty, Oct. 1689, China-Russia, 18 C.T.S. 503.

74. See TREATIES AND AGREEMENTS WITH AND CONCERNING CHINA, 1894-1919 (John V.A. MacMurray ed. 1921); M.T.Z. TYAU, THE LEGAL OBLIGATIONS ARISING OF TREATY RELATIONS BETWEEN CHINA AND OTHER STATES (1917).

75. Treaty, Aug. 29, 1842, China-U.K., 93 C.T.S. 465.

76. Treaty of Peace, Amity & Commerce, July 3, 1844, China-U.S., 97 C.T.S. 105.

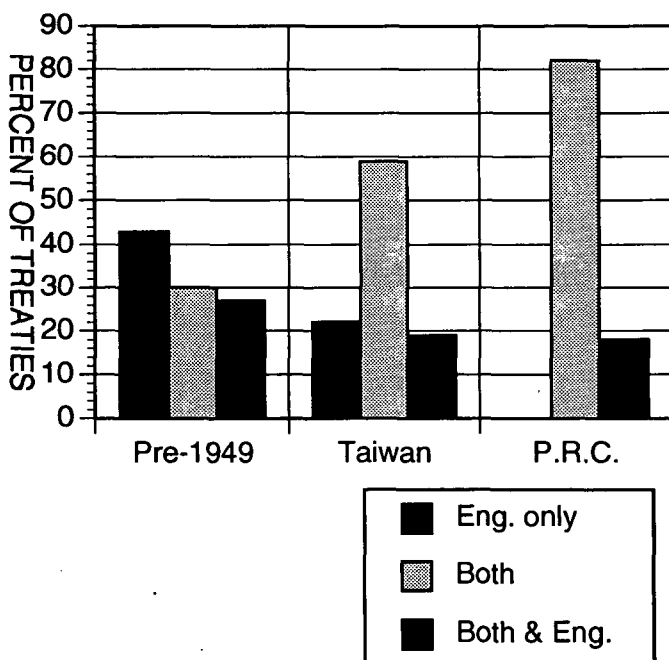
77. Treaty of Commerce & Navigation, 1868, China-Japan, 144 C.T.S. 139.

78. Convention Regulating Immigration, Mar 17, 1894, China-U.S., 180 C.T.S.

merce and Navigation with France.⁷⁹ One of the very few explicit textual references to languages and language issues was contained in the 1899 Agreement between China and Germany, a treaty that appears to have been written in German: "Article IV. All correspondence between the Customs Office at Tsiutan and the German authorities and German merchants shall be conducted in the German language. . . . Correspondence in Chinese shall be likewise permitted."⁸⁰

The period between 1920 and 1980 saw the end of an era of Western influence in China followed by a civil war and, ultimately, the bifurcation of Chinese treaty-making. Thus, it is important to compare pre-1949 treaty behavior with that of Beijing and Taipei after 1949. Figure 4 provides a broad view of language use in Chinese treaties.

Figure 4
USE OF LANGUAGE IN THE TREATIES OF
PRE-1949 CHINA, TAIWAN, and P.R.C.



79. Treaty of Friendship, Commerce & Navigation, Oct. 24, 1844, China-Fr., 97 C.T.S. 375.

80. Agreement Respecting the Establishment of a Maritime Custom Office at Tsintaw, Apr. 17, 1899, China-Germany, 187 C.T.S. 383.

Figure 4 uses three main language categories — English only; Chinese and the language of the other party; and Chinese, the language of the other party, and English. Several points stand out about the period before 1949 (summarized in the leftmost portion of Figure 4). First, there is not a single treaty with Chinese as the only official text. Although the same may be true for Hungarian, Finnish, Urdu, and Irish, Chinese was used by more people than any other language in the world. Thirty-two from a total of 75 treaties have only one official text and more than 90% of the official texts are English. English was used as the only official text with many different parties including Japan,⁸¹ the Soviet Union,⁸² the United Kingdom,⁸³ and Italy.⁸⁴ The other unilingual treaties used French and commonly were with Switzerland.⁸⁵

Somewhat more than half (43) of these 75 treaties have two or more official languages. The pattern is very clear in showing that virtually all of this subset uses English as one of the official texts. If the treaty is between China and an English-speaking country,⁸⁶ the official texts are Chinese and English. If the party is not an English-speaking country, English is still used, making a total of three official texts. This pattern holds across the entire range of languages including treaties with Japan,⁸⁷ Austria,⁸⁸ Portugal,⁸⁹

81. Treaty for the Settlement of Outstanding Questions Relative to Shantung, Feb. 2, 1922, China-Japan, 10 L.N.T.S. 309.

82. Agreement for the Provisional Management of the "Chinese Eastern Railway," with Declaration for the Regulation of the Situation Created for the Russian Citizen in Pursuance of the Principle of Equal Representation of Citizenship of the Two Countries on the Staff of the "Chinese Eastern Railway," May 31, 1924, China-U.S.S.R., 37 L.N.T.S. 193.

83. Agreement Between the Post Office of North Borneo and the Post Office of China for the Transaction of Money Order Business, July 17, 1936, China-U.K., 173 L.N.T.S. 343.

84. Exchange of Notes of the Settlement of the Claims for Damages Arising out of the War, July 30, 1947, China-Italy, 12 U.N.T.S. 377.

85. *See, e.g.*, Agreement with Regard to the Traffic in Narcotic Drugs Between the two Countries, Apr. 12, 1927, China-Switz., 66 L.N.T.S. 427.

86. *See, e.g.*, Parcel Postal Agreement Between China & Ceylon, Dec. 8, 1922, China-U.K.-Ir., 137 L.N.T.S. 319.

87. Agreement Concerning the Exchange of Inserts, Letters & Boxes Between the Two Countries, Dec. 8, 1922, China-Japan, 20 L.N.T.S. 233.

88. Treaty, Oct. 19, 1925, China-Aus., 55 L.N.T.S. 9.

89. Preliminary Treaty of Amity & Commerce, Dec. 1928, China-Port., 107 L.N.T.S. 93.

Sweden,⁹⁰ Thailand,⁹¹ Ecuador,⁹² and the Netherlands.⁹³

Another view of Chinese treaty-making in this earlier period comes from inquiring into what portion of Chinese treaties, signed between 1920 and 1948, had Chinese as an official text. The answer is 56%, compared to 84% for English as an official text. Notwithstanding arguments in favor of English as an international language, one can imagine how this dominance of English over Chinese could create feelings of neocolonialism and linguistic hegemony.

The post-1949 period provides the opportunity to compare the behavior of two Chinese states, each with many treaty commitments. The practice followed by the People's Republic of China (hereinafter China or PRC) showed a marked change. All 41 treaties of the PRC used Chinese as one official language. The norm was Chinese and the language of the other party. There are a few tri-lingual treaties. A 1951 Agreement between China and Poland used Chinese, Polish, and Russian.⁹⁴ Perhaps reflecting the deterioration in Sino-Soviet relations, a 1960 Treaty between Czechoslovakia and PRC used only Chinese and Czech.⁹⁵ In a very few cases, English was used, but only along with Chinese and the language of the other party, e.g., a 1974 Agreement on Maritime Transport with Denmark with Chinese, Danish, and English as official texts.⁹⁶ Possibly, the use of English in this treaty resulted from a combination of a relatively sympathetic Western party and little knowledge of Danish in the Chinese foreign ministry.

The use of official languages by the Republic of China (hereinafter Taiwan) also shows a dramatic change from the pre-revolution period. Taiwan, like the PRC has adopted Chinese as an official text. Some exceptions exist, such as French being the sole official text⁹⁷ and 17 treaties, mostly with the United States, in which only English is used. Unlike the PRC treaties, however, Taiwan often used English as a third language along with the national languages of both parties, e.g.,

90. Treaty Regulating Tariff Relations Between the Two Countries, Dec. 20, 1928, China-Swed., 107 L.N.T.S. 81.

91. Treaty of Amity, Jan. 23, 1946, China-Thail., 161 U.N.T.S. 127.

92. Treaty of Amity, Jan. 6, 1946, China-Ecuador, 7 U.N.T.S. 233.

93. Air Transport Agreement, Dec. 6, 1947, China-Neth., 43 U.N.T.S. 185.

94. Agreement Concerning Cultural Co-operation, Apr. 3, 1951, P.R.C.-Pol., 304 U.N.T.S. 187.

95. Consular Treaty, May 7, 1960, P.R.C.-Czech., 402 U.N.T.S. 209.

96. Agreement on Maritime Transport, Oct. 21, 1974, Den.-P.R.C., 991 U.N.T.S. 15.

97. Exchange of Notes Constituting a Provisional Agreement Concerning Civil Air Transport, July 19, 1963, P.R.C.-Belg., 564 U.N.T.S. 23.

treaties with Spain,⁹⁸ Turkey,⁹⁹ and the Republic of Korea.¹⁰⁰ Taiwanese treaty activity diminishes substantially after the mid-1970s. However, there is some indication of a shift back towards the use of English as the only language, likely a result of feelings of isolation resulting from the widespread recognition of the PRC as the official representative of China.

Overall, the use of official texts in Chinese treaties seems to reflect nationalism, but differently than might be imagined. Similarly, the forces of nationalism are manifest in the treaties of the PRC and of Taiwan. This is evidence of the dominance and durability of nationalism over more transient political ideologies.

C. *Japan*

The international legal scholarly literature, at least that available to us in North America, mentions little about Japanese policy or behavior in choice of official text languages in bilateral treaties. Adams provided a general description of the behavioral side of choosing official text:

English is the most frequently used language as an official language occurs, first, where it is the only language stated as being official and, second, in instances where three languages are designated and English is designated to prevail in the event of a dispute. These latter agreements usually are written in Japanese, the language of the co-signatory and English. In some instances, English and Japanese are recognized as being equally authentic, most notably in treaties with the United States, the United Kingdom and Canada. Finally, in instances where English is not used as the official language, French is the most prevalent language used.¹⁰¹

The practice of Japan in treaty languages should be especially interesting for two reasons. First, it can be a test of whether the changes in the use of English and French hold up in a non-Western context. It is entirely possible that the dominance of French as *lingua franca* in diplomacy and treaty-making is a remnant from the age of Euro-centric

98. Treaty of Amity, Feb. 19, 1953, P.R.C.-Spain, 181 U.N.T.S. 81.

99. Cultural Convention, Feb. 12, 1957, P.R.C.-Turk., 282 U.N.T.S. 125.

100. Treaty of Amity, Nov. 27, 1964, P.R.C.-Korea, 555 U.N.T.S. 3.

101. L. JEROLD ADAMS, *THE THEORY, LAW AND POLICY OF CONTEMPORARY JAPANESE TREATIES* 41 (1974).

international law. Perhaps these behaviors did not extend beyond Europe and its colonial umbrella. Second, it would be interesting to examine whether Japan's subjugation following World War II is reflected in treaty behavior. One might hypothesize that the Japanese language, as a symbol of militarism, would have been used less, especially immediately after 1945.

Table 8

NUMBER OF OFFICIAL TEXTS BY TIME PERIOD

	<u>ONE</u>	<u>TWO</u>	<u>≥2</u>
UNTIL 1945	56 (79%)	10 (14%)	5 (7%)
1946-1959	66 (47%)	65 (48%)	8 (5%)
1960-1974	69 (43%)	79 (49%)	13 (8%)

Clearly, there has been a substantial change in Japanese practice. In the pre-war period, about four-fifths of Japanese treaties had only one official text. Since World War II, almost half have had two official texts. The use of English and French in those treaties with only one official text has changed significantly over the three time periods considered.

Table 9

USE OF ENGLISH AND FRENCH IN UNILINGUAL TREATIES

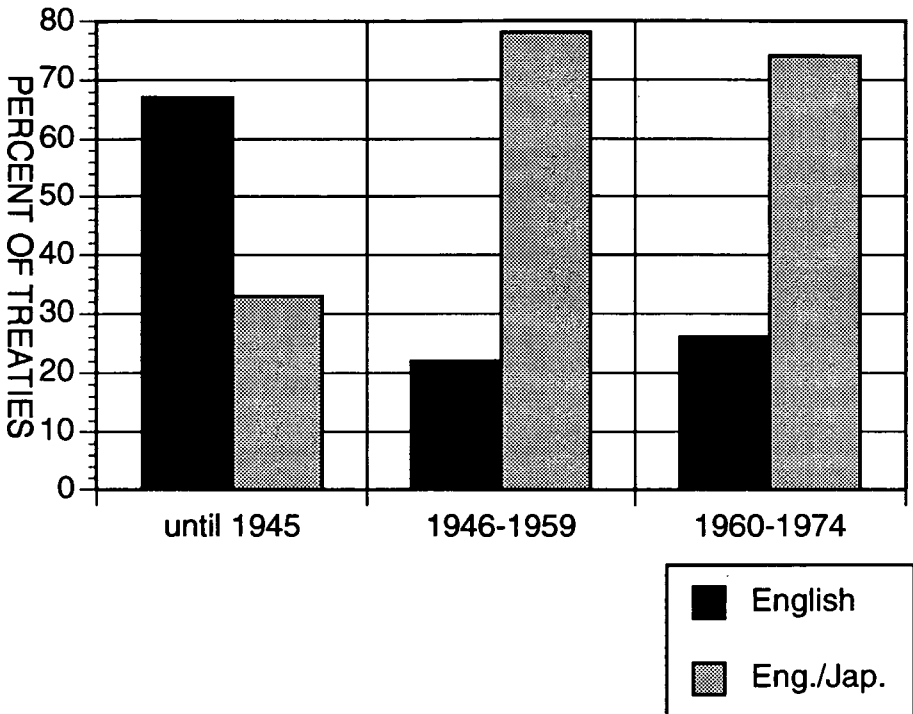
	<u>English</u>	<u>French</u>
until 1945	34 (61%)	22 (39%)
1946-1959	53 (80%)	10 (15%)
1960-1974	67 (97%)	2 (3%)

The diminution in the use of French is comparable in degree to that observed for the entire world. The difference stems from the fact that French never achieved the widespread use in Japanese treaties it enjoyed in most of the world.

The anticipated change in language behavior after World War II is not seen in these data, at least not in an unequivocal way. The Japanese language was used in a much higher percentage of these treaties in the immediate post-war period than in the period between 1920 and 1945. One way to focus on any changes that may have occurred is to examine United States-Japanese bilateral treaties. In all except the first time period, there were large numbers of these treaties

from which to draw conclusions. Not surprisingly, all of these treaties are of one of two language types, English only or English and Japanese.

Figure 5
USE OF ENGLISH AND ENGLISH/JAPANESE IN
BILATERAL TREATIES BETWEEN JAPAN AND
THE UNITED STATES



Conclusions based on this information must be tentative. Few treaties existed in the pre-war period. But this began to change in the wake of World War II with Japanese being used as one official text in most treaties. The most recent time interval shows some shift back towards English — the amount of that shift is small (4%) and would be unremarkable were it not for half of the most recent treaties, i.e., 6/13, signed from 1971-1974, using English exclusively. One possible explanation is that the wider use of the Japanese language was a point of honor immediately after the war that eventually gave way to expediency, as Japan participated more actively in a global economy dominated by the English language.

Some examples of specific Japanese treaties that fall into these categories follow. During the first time period, 1919-1945, most Japanese treaties had only one official text, usually English. Not surpris-

ingly, English was used in treaties with the United States¹⁰² and the United Kingdom.¹⁰³ English was the only official text in treaties with Poland,¹⁰⁴ the Soviet Union,¹⁰⁵ Cuba,¹⁰⁶ and Thailand.¹⁰⁷ French was used mostly in treaties with European countries, including the Netherlands,¹⁰⁸ Norway,¹⁰⁹ and Finland.¹¹⁰ During this period, virtually all Japanese treaties with China had three official texts, invariably using English as a third language.¹¹¹

The post-war treaties show less variety with only one dominant mode, i.e., Japanese and the language of the other party. There are a few cases where French remains the sole language, e.g., the 1953 Note with France¹¹² and a 1956 Exchange of Notes with Italy.¹¹³ There are many examples of English as the only official text. Most of these are with the United States, but English also was used exclusively in

102. *See, e.g.*, Treaty Concerning the Yap Island and the Other Islands Under Mandate Situated in the Pacific North of the Equator and Exchange of Notes Relating Thereto, Feb. 11, 1922, U.S.-Japan, 12 L.N.T.S. 201; Exchange of Notes Constituting an Agreement Regarding the Development of Certain Portions of the Great Lakes-St. Lawrence Basin Project, Oct. 14, 31 & Nov. 17, 1940, U.S.-Japan, 101 L.N.T.S. 63.

103. *See, e.g.*, Exchange of Notes Respecting the Obligation of Article 8 of the Treaty of Commerce & Navigation, June 14, 1924, Japan-U.K., 28 L.N.T.S. 538; Convention for the Prevention of Smuggling of Intoxicating Liquors, Nov. 7, 1940, Japan-U.K., 203 L.N.T.S. 267.

104. Treaty of Commerce & Navigation, Dec. 7, 1922, Japan-Pol., 32 L.N.T.S. 61.

105. Convention Embodying Basic Rules of the Relations Between Japan and the Union of Soviet Socialists Republic, Together with Protocols A and B, Declaration, Exchange of Notes, Annexed Note and Protocol of Signature, Jan. 20, 1925, Japan-U.S.S.R., 34 L.N.T.S. 31.

106. Exchange of Notes Constituting a Provisional Commercial Agreement, Dec. 21, 1929, Japan-Cuba, 111 L.N.T.S. 13.

107. Treaty Concerning the Continuance of Friendly Relations Between the Two Countries and the Mutual Respect of Each Other's Territorial Integrity, June 12, 1940, Japan-Thail., 204 L.N.T.S. 131.

108. Treaty, Oct. 12, 1921, Japan-Neth., 12 L.N.T.S. 239.

109. Exchange of Notes Constituting an Arrangement Concerning the Exchange of Notifications with Regard to Persons of Unsound Mind, Oct. 23, Nov. 6, 1923, Japan-Nor., 33 L.N.T.S. 265.

110. Exchange of Notes Regarding the Abolition of Passport Visas Between the Two Countries, Feb. 25, 1928, Fin.-Japan, 71 L.N.T.S. 467.

111. *See, e.g.* Agreement Concerning the Exchange of Correspondance Between the Two Countries, Dec. 8, 1922, P.R.C.-Japan, 20 L.N.T.S. 205.

112. Peace Treaty, Apr. 25, 1953, Japan-Fr., 187 U.N.T.S. 41.

113. Exchange of Notes Constituting an Arrangement Concerning the Abolition of Visas on Passports, Jan. 11, 1956, Japan-Italy, 267 U.N.T.S. 175.

treaties with Sweden,¹¹⁴ Turkey,¹¹⁵ Czechoslovakia,¹¹⁶ and Argentina.¹¹⁷

VI. CONCLUSIONS

This survey of language choice in bilateral treaties has produced results that should be of interest along several dimensions. It provides a precise description of broadly based state practice in the bilateral aspect of treaty-making. Three prevalent generalizations about treaty making are confirmed:

- 1) there is no international law standard about use of official texts;
- 2) English now dominates treaty-making as French once did; and
- 3) modern practice tends to use the language of both parties as official texts.

Although all three are true, they are too broad to describe, much less to explain, state behavior. The absence of an international law standard hardly obviates the need to understand practice. Neither of the other two assertions is an ironclad rule—it is important to know the degree to which English now dominates and what portion of recent treaties use the languages of both parties. English is now the diplomatic language, although French has been more resilient than many would have believed. The issue of the utility of French language ability resurfaced during the informal negotiations that, ultimately, led to the selection of Boutros Boutros-Ghali as UN Secretary-General.¹¹⁸

In many instances, choice of language reflects political forces, most notably, nationalism or international status in this aspect of treaty behavior. German has all but disappeared as a *lingua franca*. The Soviet Union and the Russian language are the exception—there was virtually no tendency for the rise of the U.S.S.R. as a superpower to be

114. Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, Dec. 12, 1956, Japan-Swed., 318 U.N.T.S. 309.

115. Exchange of Letters Constituting an Arrangement Concerning the Mutual Abolition of Passport Visas, Nov. 5, 1957, Japan-Turk., 318 U.N.T.S. 411.

116. Treaty on Commerce, Dec. 15, 1959, Japan-Czech., 383 U.N.T.S. 277.

117. Exchange of Notes Constituting an Agreement Concerning Reciprocal Waiving of Passport Visas, Dec. 26, 1961, Japan-Arg., 451 U.N.T.S. 71.

118. See Paul Lewis, *Africans Pressing Bid for U.N. Post Say Next Chief Must Be From Their Continent and Warn of Clash at Assembly*, N.Y. TIMES, Oct. 22, 1991, at A11; Judith Miller, *A Born Secretary General*, N.Y. TIMES, Nov. 22, 1991, at A12.

accompanied by increased use of the Russian language. In the case of Canada, domestic policy changes in the form of official bilingualism explain the behavior. The treaty practices of China and Japan indicate that both national pride and convenience are factors in language choice.

It is hoped that this research will stimulate further efforts to show how information basic to international law—treaty attributes in this case—can be a meaningful indicator of state behavior. A disappointing development in academic international law circles over the last quarter century is the abandonment of international law by mainstream political science.¹¹⁹ One of the main reasons offered for this change is international law's inability to use the quantitative techniques widely applied in political science since the 1960s. These treaties provide one concrete example of how phenomena of interest to international lawyers can be meaningful indices of national behavior of the sort in which political scientists should be very interested.¹²⁰ In fact, the care with which international law experts are taught to approach their work increases the likelihood that the data collected will be meaningful, sensitive indicators of behavior.

The patterns in language choice uncovered by this research can be viewed in a broader context. There is an interesting and rapidly expanding trend of literature in political science and psychology dealing with language problems, especially within multilingual societies. A major problem is balancing the competing values of simplicity and efficiency against the often emotional feelings individuals and whole groups have for national languages. The logical solution is an easy-to-learn artificial language. The advantages of an artificial language are significant:

1. learnable (because of grammatical and lexical regularity);
2. powerful (having true-to-nature terminologies, logical structures, and freedom from idiomatic restrictions); and,
3. fair (having no native speakers).¹²¹

The most successful of these, Esperanto, never achieved any level of proficiency by more than one person in a thousand,¹²² and has never

119. For a wide ranging discussion, see Charlotte Ku (chair), *Bridging the Gap Between Political Scientists and Lawyers*, 81 *ASIL Proceedings* 1987 381, 381-394 (1990).

120. Twenty years ago, Harold Lasswell made these same points, but almost no one listened. See Michael Barkun & Wesley B. Gould, *INTERNATIONAL LAW AND THE SOCIAL SCIENCES* (XV-XX by Harold D. Lasswell 1970).

121. Jonathan Pool, *The World Language Problem*, 1 Univ. of Wash.: Language and Soc'y Papers # LD2 (1990), reprinted in *RATIONALITY AND SOCIETY* 1991.

122. PETER G. FORSTER, *THE ESPERANTO MOVEMENT* 1-3 (1982).

been used in either the L.N.T.S. or the U.N.T.S. It appears that the international community will have to endure continued use of more official texts—on the part of states. One of our most striking findings is the huge increase in average number of texts used from the League of Nations to the United Nations. The statistics may be sterile, but they paint a clear picture. L.N.T.S. treaties averaged about 1.6 official texts, while U.N.T.S. treaties average about 2.0 texts per bilateral treaty. Faced with the combination of perceptions of linguistic imperialism¹²³ and feelings that every national language has “a basic right to its possession and, if necessary, its defence,”¹²⁴ there probably will be further increases in the number of languages used. It is possible to develop theoretical solutions to try to curb the cumbersome use of several official texts. One commentator suggests a tax or subsidy according to ease or difficulty in operating with languages.¹²⁵ Although an interesting idea, it is fraught with political and operational problems.

Professor Manley O. Hudson, in a seminar he conducted at Harvard Law School in 1932, asked each class member to examine official texts used in the treaties of her/his country for the period January 1, 1921 - December 31, 1930.¹²⁶ Although the class analyzed the treaties of only twelve countries,¹²⁷ their findings are consistent with those discussed here. Hudson realized the shortcomings of his study noting that “the limited number of treaties considered does not permit a final and general conclusion to be drawn.”¹²⁸ Sixty years later, the research for this article has met Professor Hudson’s objection.

Many possibilities exist to broaden the applicability and increase the elegance and parsimony of this research. There are prospects for using the broad contours developed here to examine more concrete matters:

- How has the World Court dealt with issues of language and official text;
- Do third languages used in treaties relate to substantive treaty provision, e.g., the guarantor role of third parties;

123. TABORY, *supra* note 9, at 5.

124. PETER L. BERGER, *FACING UP TO MODERNITY* 161(1979).

125. Jonathan Pool, *The Official Language Problem*, 85 *AMER. POL. SCI. REV.* 495, 498-502 (1991).

126. Hudson, *supra* note 19, at 370.

127. *Id.* at 370-72 — China, Colombia, France, Germany, Hungary, Italy, Japan, Peru, Poland, Switzerland, the United Kingdom, and the United States.

128. *Id.* at 372.

•Does language choice affect the probability of treaty compliance?

Language choices in certain multilateral treaties might be examined. One could learn little from general multilateral treaties, since almost all of them now employ all six languages of the United Nations as official texts; but plurilateral treaties are more interesting. For example, the five Scandinavian countries often negotiate pentalingual treaties.¹²⁹ Putting aside intraregional politics, it would be much simpler if English were used exclusively, especially since all five use English often in their other treaty relations. This exclusive use of English would seem all the more rational since, if one exceeds three languages, complexities and problems seem to escalate.¹³⁰ Maybe it is time to consider radical solutions like a linguistic difficulty supplement or tax.

There can be no doubt that huge amounts of resources are used for everything from foreign office personnel to library budgets because of growing sensitivity about the use of national languages. Maybe this is another area where some curbs on nationalistic forces might be considered. An alternative view holds that the widespread use of bilingual and trilingual treaties might be a small price to pay if it were to improve, even marginally, the likelihood of agreement on substantive treaty provisions. Given the large number of possible languages which could be used in treaties, coupled with the increasing number of technical subjects covered by treaties, language choice remains an important consideration as the world strives for greater equality and order through increased clarity and compliance in treaty relations.

129. See, e.g., Convention Respecting the Application of the Accident Insurance Laws of the Various States to Cases where an Employer in Lieu of the Contracting States Carries on a Business or Employs Workers in Another of the Said States, March 3, 1937, 182 L.N.T.S. 127.

130. Heinz Kloss, *Types of Multilingual Communities*, in *EXPLORATIONS IN SOCIO-LINGUISTICS* 7 (Stanley Lieberson ed. 1966).

European Constitutional Law in Action: Visiting a Public Debate at the Swiss Federal Supreme Court

by *Dr. Marc Forster**

I. THE FUNCTIONS OF THE SWISS FEDERAL SUPREME COURT WITHIN THE SWISS FEDERALIST LEGAL SYSTEM

The Swiss Federal Court is at the same time the highest court of appeal on issues of federal law and the constitutional supreme court of Switzerland.

Somewhat similar to the U.S. system, the Swiss political system is based on a division of powers and competence between the Federation (the Swiss central administration) and the twenty-six Swiss cantons, which are principally sovereign. This division of powers, established by the Federal Constitution of 1848, is called the "Swiss federalist system." The distribution of competence between the cantons and the federal central administration is relatively simple: federal powers must be expressly granted by the Constitution.¹ Examples of federal legislation are the military, the nuclear industry, construction of national highways, the federal railways, and social security matters. The basic civil and criminal statutes are principally federal laws. However, the cantons hold the jurisdiction of lower instance and follow their own procedure. As a result, there are twenty-six different statutes of civil and criminal procedure in Switzerland—making the lives of practicing lawyers difficult. The cantonal law courts do apply the same substantive federal civil and criminal law.

Federal law is legislated by the Federal Parliament (Federal Assembly) and executed by the Federal Government (Federal Council). Also there are several kinds of direct democracy in Switzerland. For example, a petition signed by 50,000 citizens (called a referendum) automatically entitles the petitioners to have a federal statute brought to a vote by all Swiss citizens. In such case, the federal statute is adopted if a simple majority of the citizens vote for it. Any amendment

* Attorney-at-Law, Secretary of the Court, Swiss Federal Supreme Court, Lausanne, Switzerland.

1. BUNDESVERFASSUNG [Constitution] [BV] art. 3 (Switz.).

of the Federal Constitution requires a majority of the voting citizenry and a majority of the cantons.

What is the function of the Swiss Federal Court within this political and legal system?²

In civil and criminal law, the Swiss Federal Court mainly assumes the function of the highest court of appeal. This means the Court reviews how the cantonal law courts apply the substantive federal civil and criminal law. Administrative law matters are more complicated because the power of the cantons is broader. Most of the public services are left to cantonal legislation and organization. Public services include education, social welfare, the police, and private and public construction.

There is a division of legislative and administrative powers between the federal central state and the cantons. The Constitution declares and establishes issues of federal concern, and leaves the rest to the cantons. This dichotomy creates a vast field of possible litigation matters. The first problem may be, What was meant to be a cantonal issue and what a federal issue? Does the Constitution declare the subject federal or not? Also, the application of federal law can be contested, as cantons are often legally obligated to execute the federal law. For example, if the Federation decides to build a national highway, the cantons must keep and control that highway. When litigants disagree on the proper execution of federal law the Federal Court must decide whether federal law was correctly applied.³

Finally, and most importantly, the Swiss Federal Court supervises the strict observation of the human rights and individual liberties guaranteed by the Constitution,⁴ e.g., article 4 of the Swiss Constitution (equal liberty of all people). It does so even in completely cantonal affairs. Where cantonal law is applicable, however, the so-called judicial "cognition" of the Swiss Federal Court is restricted. In other words,

2. There are only a few academic articles existing in English on the functions of the Swiss Federal Supreme Court. See Christoph Leuenberger, *The Swiss Federal Court* (with a special reference to its library), 5 INT'L J. L. LIBR. 339 (1977); Fred L. Morrison, *The Swiss Federal Court: Judicial Decision Making and Recruitment*, in FRONTIERS OF JUDICIAL RESEARCH 133 (Joel B. Grossman & Joseph Tanenhaus eds., 1969).

3. The Swiss Federal Court reviews the application of the federal law by the cantonal and some federal authorities. The federal laws — based on direct democracy — are binding on the Court. The democratic elements in the Swiss political system leave less important significance to the "rule of law concept" established in the United States in decisions like *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). Leuenberger, *supra* note 2, at 342.

4. Switzerland adopted the European Convention on Human Rights in 1974 in its constitutional law after the convention's ratification.

the cantons are free in their own affairs, but they must respect elementary constitutional rights. Basically, any person who feels individually wronged by an act of the authorities can appeal to the Swiss Federal Supreme Court and invoke its jurisdiction to protect individual constitutional rights and liberties.

II. THE ORGANIZATION AND APPOINTMENT OF THE SWISS FEDERAL COURT

The thirty federal judges making up the Court are elected for a period of six years by the Federal Assembly. The selection of the federal judges is a product of the typical Swiss pattern of democracy by accordance. This means that the major political parties determine the composition of the Federal Court about the same way as they allot the seats in the Federal Government. In the Swiss Federal government, accordance means that all major political parties are represented at the same time; the same applies to linguistic and cultural regions. In addition, the Federal Constitution stipulates that the Parliament has to consider judges who will represent all three official languages: German, French, and Italian. At present, the Federal Court is made up of nineteen German, nine French and two Italian-speaking judges.

The idea of accordance also explains why the linguistic minorities are over-represented and why an effort is made to select judges from an evenly distributed number of regions. Overrepresentation of minorities means that the French speaking population, for example, is represented by two out of seven members of the Federal government. That number is more than the percentage of the French-speaking Swiss population. The parliamentary control is ensured by the obligation of the Court to report annually to the Federal Assembly and by the requirement of reelection by the Parliament after a period of six years. However, it is extremely rare for a federal judge not to be reelected. Beyond this formal supervision, the Parliament exercises no control over the Court's judgments.

The thirty judges never all join to sit on the same case. Instead, the Court is divided into six permanent chambers or divisions, each of which has jurisdiction over cases pertaining to a specific subject matter. There are two public law divisions: one for constitutional law and one for administrative law, composed of seven and six judges, respectively. There are two civil (private) law divisions of six judges each, which function mainly as courts of appeal in civil matters. There is a debt execution and bankruptcy law chamber of three judges and, finally, a criminal law division, which is composed of five judges and which mainly hears appeals in criminal law matters.

III. ORAL ARGUMENT AND THE DECISION MAKING PROCESS

The procedure in the Court is almost exclusively based on written statements. Once the parties have filed their statements, the presiding judge appoints a judge-reporter for the case. The presiding judge or a judicial clerk under the judge's supervision prepares a report containing the essentials (facts, jurisdiction, etc.) of the case and an outline of the reporter's opinion. This report is submitted to the other judges who are assigned to hear the case. About two weeks later, the case comes up for oral argument, usually in a public session. Unlike in most of the rest of the world, the discussions and deliberations among the judges are held in public. This is unique to the Swiss Federal Supreme Court, which might provide interesting insights to foreign constitutional lawyers. In most other European supreme courts, only the hearings of the parties are public and the judges withdraw for private deliberation.

The Swiss Federal Court's session is opened by the presentation of the judge-reporter's view, followed by a general discussion. After each judge has given a final statement, a vote is taken by show of hands. In non-controversial cases, however, a summary procedure is carried out without any debate.

During the sessions, the judges and clerks wear dark suits, not the robes traditionally worn by judges in many other countries. This custom is a reflection of Switzerland's democratic tradition: the federal judge is expected not to differ from ordinary people.

The Federal Court usually proclaims its decision in the language of the lower court from which the appeal came. In debates and written statements, each member of the Court uses his native language, and judges and clerks are expected to read and understand all three of Switzerland's official languages. There are no facilities for translation.

A session of the first public law division on constitutional law shall now be described. The disputed matter is a conflict of competence between a Swiss municipality and the Swiss Canton of Grisons.

IV. MUNICIPALITY OF VELLA V. CANTON OF GRISONS⁵

Vella is a small village situated in the Swiss mountains in the Canton of Grisons. E.G. owns an apartment house in Vella, which has six rental units. When he built this house in 1989, he had to apply for a building permit with the local authorities of Vella. He was issued

5. See 1P.160/1991 (Jan. 15, 1992) (conflict of competence in building law).

a permit, but it was restricted by specific conditions. The main condition was that the apartment on the ground floor had to be rented to persons living in the community of Vella. The authorities of Vella wanted to avoid the village being sold out to foreigners. Many Swiss holiday villages in the Alps are facing the problem of their houses and apartments being sold as vacation homes to non-resident city dwellers and foreigners. This results in the native inhabitants of these villages being unable to find apartments, and the villages being deserted when holiday season is over. The local authorities are attempting to remedy the situation by imposing building restrictions which require that a certain percentage of housing space be reserved for those who live and work in the community.

When E.G. constructed the house, he violated the conditions of the building permit. Instead of reserving the whole apartment on the ground floor for a local renter, he divided the apartment into two flats and leased one of them to a foreigner. The local authorities of Vella ordered E.G. to immediately restore the apartment to its former state and to comply with the provisions of the building permit. E.G. appealed the Community of Vella's order to the Cantonal Administrative Court. The Cantonal Court vacated the order of the municipality. The cantonal judges stated that the order to restore the apartment building to its former status and to reserve the entire ground floor apartment for a native citizen was not adequate and too restrictive. They also stated that there was no legal basis for such restrictions.

The Municipality of Vella appealed the decision of the cantonal court to the Swiss Federal Court. The community argued that the cantonal judges had interfered in a sphere of local concern and that the cantonal court was wrong in stating that the order to restore was not proportional. In other words, the Community of Vella objected to a violation of its freedom to regulate as a legal entity, i.e., its communal autonomy.

According to Swiss constitutional law, a Swiss municipality can appeal to the Federal Supreme Court when the canton violates its legal autonomy. A Swiss local community has the right to regulate if there is no substantive cantonal law to the contrary. If the cantonal legislature leaves a legal issue to the municipalities, the municipalities have the authority to decide the issue. As a result, the Federal Court in this case only had to decide whether the disputed matter was left to the municipality and, if so, whether the order of the Community of Vella was in accordance with constitutional law.

The reporting judge, Mr. Justice Spühler, was of the opinion that the local communities in the Canton of Grisons are free to apply the

communal building law as long as cantonal and federal building laws are respected. The cantonal court therefore violated the Constitution because the order to respect the building restrictions was in accordance with the cantonal and federal law. The reporting judge found that the order was in accordance with the constitutional principle of proportionality. The federal judges of the First Public Law Division⁶ discussed this aspect in public. The judges considered the fact that the landlord did not act in good faith when he disregarded the restrictions in the building permit. In the judge-reporter's opinion, E.G.'s argument that the restrictions in the permit had no legal basis was invalid. E.G. appealed the order to restore the apartment, not the restrictions in the building permit. He had the option to take legal action against these restrictions, but failed to do so. The judges also took into consideration that the objective of reserving apartments for the housing of native citizens responds to a legitimate interest of the mountain villages. Based on this reasoning, the Federal Supreme Court admitted the petition and found for the Community of Vella.⁷ E.G. was ordered to restore his apartments to their former state.

This example demonstrates that the Swiss federalist system leads to a very broad competence and autonomy of cantonal, regional and local authorities. Some constitutional lawyers consider this to be a democratic quality which other European nationalist and centralist systems are still lacking, and an example for others to aspire to.

6. Justices Egli (President of the Chamber), Kuttler, Schmidt, Spühler (Reporting Judge) and Aemisegger.

7. In its decision of January 15 1992 (1P.160/1991) the Swiss Federal Court cancelled the sentence of the Cantonal Administrative Court.

Towards the Establishment of Constitutionalism in Russia

I. INTRODUCTION

The liberal and democratic trends that began circulating during the Enlightenment as a result of such thinkers as John Locke, Jean-Jacques Rousseau, and Montesquieu¹ have become widely accepted as the dominant constitutional paradigm. Not only has democracy established itself firmly on an institutional basis, but democracy has also become a benchmark by which to measure a nation's commitment to the rights and freedoms of its citizens. In the wake of the Cold War, and following the breakup of the Soviet Union, emerging countries, and developed countries as well, are faced with the challenge of demonstrating to their people and to the international community that individual rights and freedoms will be guaranteed through political stability.

The most effective method of embodying such a guarantee is by the promulgation of an enforceable constitution which delineates the general and specific rights and duties of that country's citizens. During the era of the American Revolution, a constitution was defined as establishing

the Basis and ground work of Legislation, and ascertain[ing] the Rights Franchises, Immunities and Liberties of the people, How and how often officers Civil and military shall be elected by the people, and circumscribing and defining the powers of the Rulers, and so affording a sacred Barrier against Tyranny and Despotism.²

This note will be divided into three sections. The first part introduces general principles of constitutionalism. The second part analyzes the development of constitutional rights in Russia and in the United States. The third part compares the concepts underlying the United States Constitution with constitutional changes that are currently taking place in Russia.

1. Charles Louis de Secondat, Baron de La Brède et de Montesquieu.

2. Tom N. McInnis, *Natural Law in the American Revolutionary Struggle*, 26 *LEGAL STUDIES FORUM* 41, 49 [hereinafter McInnis]. See also *BLACK'S LAW DICTIONARY* 163 (5th ed. 1983) (A constitution is "[t]he organic and fundamental law of a nation or state . . . laying the basic principles to which its internal life is to be conformed . . .").

II. OVERVIEW OF CONSTITUTIONALISM

"In the last two centuries constitutionalism has become established in a position of co-legitimacy with democracy."³ Because "the evolution of political institutions closely followed the evolution of the doctrine of constitutionalism,"⁴ it is necessary to present a general outline of the development of constitutionalism.

While constitutions have been used for centuries to order the "enactment and implementation of public policies, . . . the line of authority between rulers and ruled" only began to become clear during the Roman era.⁵

Modern constitutionalism developed during the monarchical period, when rulers held power as a result of so-called God-given, or natural and inherent, rights. John Locke's conception of a social contract which was binding on the ruler and ruled alike became the generally accepted view.⁶ The belief that all humans were subject to the same laws facilitated the rise in importance of legislatures to express, in Rousseau's words, the general will.⁷ From this eighteenth-century idea of natural and inalienable rights, which would today be called human rights, flows the view that government is an institution created by the people to secure those rights.⁸

Political cohesion was achieved in the monarchical system through the common framework of a belief in God and in an other-worldly accountability for wrong-doing. Both the Church and the nobility held considerable power over the people in the monarchical system.⁹ However, as notions of rights began to spread, and legislatures began to exercise the powers they held as the voice of the people, confusion arose over the jurisdiction and responsibilities of each of the two or more bodies exercising authority. It was, therefore, in each group's best interest to establish regular procedures for the exercise of power, and in this way constitutions came to play an integral role in government.

3. WILLIAM G. ANDREWS, *CONSTITUTIONS AND CONSTITUTIONALISM* 22 (3d ed. 1968) [hereinafter ANDREWS].

4. *Id.* at 19.

5. *Id.*

6. EDWARD MCWHINNEY, *CONSTITUTION-MAKING: PRINCIPLES, PROCESS, PRACTICE* 68 (1981) [hereinafter MCWHINNEY].

7. JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* 76 (Maurice Cranston trans., Penguin Classics 1968) (1762).

8. MCWHINNEY, *supra* note 6, at 68.

9. ANDREWS, *supra* note 3, at 19-20. "According to medieval scholastics, the Church and the secular authorities had co-ordinate powers." *Id.*

With the rise of absolute monarchs, emerging nation-states had all power lodged in one central authority. Both the Church and the nobility saw their influence wane. Among the first monarchs to succeed in uniting both temporal and spiritual power were King Henry VIII, who ruled England in the sixteenth century, and Louis XIV, King of France in the late seventeenth and early eighteenth centuries.¹⁰ Revolutions were necessary to abrogate the effects of such despotic regimes and to instill sovereignty in the people of these countries. Constitutions have become prominent following the demise of absolute monarchs or governments.

Attempts by a despotic leader to transcend the traditional framework of the monarchical system and to impose a complete displacement of citizens' rights have been repeated in the United States and in Russia prior to the development of stable constitutional systems in those countries. The monarchical expropriation of the American colonists' natural rights and liberties was made by King George III. The United States Declaration of Independence charges that "[t]he history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute tyranny over these states."¹¹

In the Soviet Union, the head of the Communist party wielded power comparable to that of a monarch or czar.¹² The Soviet system embodied what has come to be known as totalitarianism, a system more repressive than dictatorial absolute monarchies. "Unlike a dictatorship, where the ruling elite guilty of the regime's crimes is tiny, a totalitarian regime creates a whole class of rulers [guilty of crimes against the regime]."¹³ The Communist party professed to transcend spiritual boundaries by proclaiming that there was nothing beyond the state. "Soviet law is precisely the expression of what is expedient for the construction of socialism and the fight for socialism."¹⁴

For a constitution to be of value in protecting a society against tyrannical excesses, the rule of law must have a strong foundation, because a constitution means nothing if the law is not supreme. "Laws

10. *Id.* at 20.

11. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

12. Some, in fact, question whether or not the 1917 "Revolution" was really a revolution at all. See Abbott Gleason, *Russia: The Meaning of 1917*, ATLANTIC MONTHLY, Nov. 1992, at 30.

13. Vladimir Bukovsky, *Totalitarianism in Crisis: Is There a Smooth Transition to Democracy?*, in TOTALITARIANISM AT THE CROSSROADS 15 (Ellen Frankel Paul ed., 1990) [hereinafter Bukovsky].

14. David Forte, *Western Law and Communist Dictatorship*, 32 EMORY L.J. 135, 181 (1983).

change, but the Law must remain, and with it the fundamental values; a law which contravenes that Higher Law is not a law at all."¹⁵ Moreover, the fundamental values embodied in a constitution must be contemporary, not based on archaic principles.¹⁶ When the Soviet Union developed its first constitution, it did not attempt to incorporate the Enlightenment ideas of rights because such a notion was considered by Marxist-Leninists to be based on the exploitation of the working class by the capitalist class, an archaic condition which communism professed to destroy.

According to communist dogma, capitalism was merely an evolutionary step on the human ladder that would ascend to communism. The notion of a rule of law was antithetical to communism's main tenet: as the workers, or proletariat, developed consciousness of their exploitation by the capitalist class, bourgeois laws would disappear, resulting in 'homo Sovieticus.' 'Homo Sovieticus' was to be the end product of human development, a being so perfect that laws would not be tolerated.¹⁷ One element of Soviet legal ideology was the rejection of the notion that man by his very nature is endowed with certain inalienable rights.

Following the destruction of communism in the Union of Soviet Socialist Republics, Russians are faced with the task of formulating a constitution which will direct their government and society. A constitutional commission under the direction of Oleg Rumantsyev produced a draft constitution in 1992 which has drawn heated discussion from all quarters of Russian life.¹⁸ Just as the fundamental values asserted in the Declaration of Independence sought to guarantee American citizens the right to "life, liberty and the pursuit of happiness,"¹⁹ and the United States Constitution "secures the blessings of liberty to ourselves and our posterity,"²⁰ the draft Constitution of the Russian Federation guarantees "the rights and liberties of man and citizen according to . . . the generally accepted principles and rules of international law."²¹

15. MAURO CAPPELLETTI, *JUDICIAL REVIEW IN THE CONTEMPORARY WORLD* vii (1971).

16. McWHINNEY, *supra* note 6, at 69.

17. Christopher Osakwe, *The Four Images of Soviet Law: A Philosophical Analysis of the Soviet Legal System*, 21 *TEX. INT'L L.J.* 1, 4 (1985).

18. Andrei Chernov, *Russia Without Despotism and Despots*, *Moskovskiy Novosti*, Apr. 5, 1992, at 6, available in LEXIS, Nexis Library, Intl File.

19. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

20. U.S. Const. pmbl.

21. Kontstitutsiia RF § 1, art. 2, para. 2 (1992) (Russia) (draft) [hereinafter Draft], available in LEXIS, Nexis Library, Intl File. See *infra* notes 86-89 and accompanying text.

Because a constitutional government is a limited government,²² consensus on the forms of state institutions and procedures is especially important. "If general agreement on the desirability of the survival of the state breaks down, civil war or revolution may result."²³ Procedural prescriptions, which establish the foundation of the political society, have been successfully incorporated into western notions of government constitutional power as early 400 B.C. in the Greek city-states.

In addition to procedural limitations, however, a constitution must also provide for the proscription of power. Principles once considered inviolable that were disregarded by such legislative tyranny as in the Nazi-Fascist era are now being put in written form to provide legal barriers against their violation. "Constitutional restraints on state authority are essential in socialist countries if they are to fulfill aspirations to be less oppressive than capitalist ones."²⁴

When implementing a constitution, the proscription of power takes two forms: the separation of powers into different branches, and the separation of functions.²⁵ A separation of functions takes place in "fully-evolved parliamentary regimes."²⁶ In either case, the arbiter is a broad, popular electorate.²⁷

Modern constitutionalism incorporates ideas of popular sovereignty, consent of the governed, accountability of officials to the people, the rule of law, the constitution as the supreme law, and government limited by separation or diffusion of powers and by checks and balances.²⁸ "Most importantly, constitutionalism implies respect for individual rights and contemplates some means of assuring that respect"²⁹ Whatever its contents, a constitution will not be able to provide for every possible

22. ANDREWS, *supra* note 3, at 13. The purpose of a prescriptive constitution is to establish limits on governmental action. A descriptive constitution, on the other hand, serves merely to guide the policy-making branch or branches of the government. *Id.*

23. *Id.* at 9.

24. PAUL Q. HIRST, *LAW, SOCIALISM AND DEMOCRACY* 85 (1986).

25. ANDREWS, *supra* note 3, at 21.

26. *Id.*

27. *Id.*

28. Louis Henkin, *Revolutions and Constitutions*, 49 *LA. L. REV.* 1023, 1035 (1989) [hereinafter Henkin]. The notion of a separation of powers is embodied in the United States Constitution and was first developed by Montesquieu. According to Montesquieu, "[s]o that one cannot abuse power, power must check power by the arrangement of things." MONTESQUIEU, *THE SPIRIT OF THE LAWS* 155 (Anne M. Cohler et al. eds., 1990) (1748).

29. Henkin, *supra* note 28, at 1035.

right or freedom. Many things must be settled by practice because "over-anticipation is a fault of pedantry and of distrust."³⁰

III. HISTORICAL DEVELOPMENT OF CONSTITUTIONALISM

A. *American Constitutional Development*

The thirteen newly independent American states greatly feared relinquishing any power to a central government that might usurp power to the extent that England had. The states therefore agreed to form a loose confederation under the Articles of Confederation, which allowed them to have broad powers over the national congress.

Each state agreed to relinquish certain powers to the central government. In return, each state retained authority over virtually everything that occurred within its borders. The structure of the central government consisted of a unicameral congress which was responsible for executive, legislative, and judicial functions.³¹ According to Thomas Jefferson, the areas in which the national government had competence to act were international relations and defense.³² One of the major shortcomings of the Articles was the inability of the central government to collect taxes from the states for operation of the national government.³³

The Articles of Confederation failed to address major problems of unity and administration among the states. Nevertheless, "[t]he *federal* idea . . . finds its historical origins in the Articles of Confederation"³⁴ Consequently, the Constitutional Convention, which convened in Philadelphia in 1787, became a debate to enact an effective government.³⁵ While the delegates to the Constitutional Convention represented ideologically diverse viewpoints and interests, the goal of the Convention was to protect liberty by reducing the chance that a tyrannical faction would be able to wrest power from the legitimate government.³⁶

30. Ruth Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 *YALE L.J.* 229, 258 (1990).

31. J.W. PELTASON, CORWIN AND PELTASON'S UNDERSTANDING THE CONSTITUTION 9 (9th ed. 1982). The national government was run, in Congress' absence, by an administration consisting of one person from each state. *Id.*

32. Akhil Reed Amar, *Approaching Democracy: A New Legal Order for Eastern Europe*, 58 *U. CHI. L. REV.* 483, 489 (1991).

33. PELTASON, *supra* note 31, at 9.

34. McWHINNEY, *supra* note 6, at 75 (emphasis in original).

35. PELTASON, *supra* note 31, at 11.

36. *Id.* at 11-12.

The delegates distrusted any government dominated by a single faction, whether composed of one person, as in a monarchy; a small group of people, such as in an oligarchy; or even a larger group, called "a tyranny of the majority."³⁷ A balance between factions results in what is termed a mixed regime. Cicero and Montesquieu both conceived of a mixed regime as including monarchy, oligarchy, and democracy.³⁸ Aristotle, on the other hand, viewed a mixed regime in terms of democracy and oligarchy.³⁹

Many delegates to the Constitutional Convention feared that democracy would facilitate tyranny.⁴⁰ In order to avoid a tyranny of the majority, a check was placed upon the democratic tendencies of government. The United States Constitution accomplishes this by countering the democratic House of Representatives with the competing faction of aristocracy embodied in the Senate.⁴¹

In the United States Constitution, a mixed regime was created by diffusing power at the national level into three independent branches: the executive, the legislative, and the judicial. Each branch has areas of specific jurisdiction, and each acts to ensure that no branch oversteps its mandate. Furthermore, power is shared between the national government and smaller units. These smaller units, composed of states, local governments, and individuals, retain power in certain instances while sharing power jointly with other state, local or individual units, or with the national government in some instances, or while relinquishing power to the national government in other cases.

These ideas of federalism, and the separation of powers, along with the closely related notion of governmental checks and balances, have become well known for the governmental stability they have established under the Constitution of the United States of America.

B. *Russian Constitutional Development*

The development of a meaningful constitution in Russia has taken somewhat longer than in the United States. As was the case in a number

37. ALEXANDR SOLZHENITSYN, *REBUILDING RUSSIA: REFLECTIONS AND TENTATIVE PROPOSALS* 63 (1991) [hereinafter Solzhenitsyn] ("For John Stuart Mill, unlimited democracy held the danger of the tyranny of the majority . . .").

38. PAUL EIDELBERG, *THE PHILOSOPHY OF THE AMERICAN CONSTITUTION: A REINTERPRETATION OF THE INTENTIONS OF THE FOUNDING FATHERS* 112 (1986) [hereinafter EIDELBERG].

39. *Id.*

40. *Id.* at 260.

41. *Id.*

of Western countries, the ideology of constitutionalism has been developing in Russia since the eighteenth century. In France, the Declaration of the Rights of Man and of the Citizen, promulgated in 1789, marked the beginning of the French constitutional era. Likewise in Russia, Catherine the Great sought to ascertain the "natural laws on which the legislation of her empire should repose."⁴²

The Decembrists' Revolt, which was put down in 1825, sought to introduce a constitutional framework to the Russian czarist system. The Decembrists are credited with being Russia's first revolutionary movement.⁴³ Although they knew that their own deaths would be the probable result of their actions, they nevertheless sought to create a constitutional monarchy with an elected legislature. "The blood of the . . . Decembrists whetted the appetite of [the Russian-Soviet] state."⁴⁴

Under Bolshevik control of Russia following the October Revolution of 1917, Lenin sought to ensure the success of a worldwide proletarian revolution. The initial Soviet Constitution was primarily a reflection of the "revolutionary Marxist stage of Soviet reality" of the early Bolshevik government.⁴⁵ The first Soviet constitution was used to supplement the socialist conscience of the revolutionary judges until communism could become strong enough to perfect human development.⁴⁶ This Constitution, ratified in 1918, did not order legal relationships, it "merely provided the ideological signal of what those relationships should be and what those purposes were."⁴⁷ The Soviet Constitutions, therefore, did not so much proscribe power as describe the goals of the Soviet government.

When Josef Stalin took control of the USSR, the Communist Party of the Soviet Union (CPSU) largely abandoned the illusion that the workers of the world would unite. Instead, Stalin concentrated on building "socialism in one country" by fortifying and strengthening communism in the countries comprising the Soviet Union until the Communist system could become strong enough to overpower capitalism.⁴⁸ This entrenchment was marked by the passage of a new constitution in 1936.

42. GEOFFREY BRUUN, *THE ENLIGHTENED DESPOTS* 76 (1967).

43. CHRISTOPHER ANDREW AND OLEG GORDIEVSKY, *KGB: THE INSIDE STORY* 18 (1990).

44. ALEKSANDR I. SOLZHENITSYN, *THE GULAG ARCHIPELAGO* 433 (Thomas P. Whitney trans., Harper & Row 1974).

45. Forte, *supra* note 15, at 165.

46. *Id.*

47. *Id.* at 166.

48. Adam Ulan, *Perestroika and Ideology*, in *TOTALITARIANISM AT THE CROSSROADS*, *supra* note 13, at 37 [hereinafter Ulan].

The 1936 constitution granted broad individual rights. However, these rights, as was the case with the first Soviet Constitution as well, were not enforceable for two reasons. First, while broad rights were granted, other constitutional provisions made antisocial behavior illegal. Yet, antisocial behavior was broadly defined. Under Lenin's Criminal Code of 1922, crime was defined as "every socially dangerous action or inaction that threatens the foundations of the Soviet system."⁴⁹ Second, no court had jurisdiction over constitutional questions.⁵⁰ All government power was unified. The judiciary was subordinated to oversight by the political branches of government. "[T]he CPSU, acting like a Hobbesian sovereign, [oversaw] all organs of the government."⁵¹

Nikita Khrushchev's major legacy was in helping Soviet society recognize governmental reorganization in the post-Stalin era. "Khrushchev sought to cleanse, rather than to reform, the Soviet system."⁵² In the process, a greater degree of openness was permitted. Leonid Brezhnev succeeded Khrushchev and tried to establish a firm hold on the party and society, but he did not have enough of a "cult-of-personality" to rule as authoritatively as Stalin had.⁵³ Consequently, dissatisfaction was voiced in an effort to take advantage of the textual constitutional rights. The optimistic period of the Khrushchev generation set the Russian people up for the "crushing disillusionment of the long, painful decline under Brezhnev."⁵⁴ The 1977 constitution, which was ratified under Brezhnev, made cosmetic reforms but did not change the ruling institutions. This enabled the CPSU to maintain a constitutional stranglehold on the rights of the Russian people.

Following Mikhail Gorbachev's ascent to power, the Communist party began to acknowledge that it did not play the primary role in Soviet society. This realization, along with "growing declines in industrial and agricultural output, soaring inflation and budget deficits, and the run-down of foreign trade and the exchange reserves,"⁵⁵ caused

49. Roger Scruton, *Totalitarianism and the Rule of Law*, in *TOTALITARIANISM AT THE CROSSROADS*, *supra* note 13, at 198-99.

50. ANDREWS, *supra* note 3, at 154.

51. Osakwe, *supra* note 17, at 16.

52. Ulan, *supra* note 48, at 33.

53. "The Brezhnev era probably came closest to what might be described as a period of stability in Soviet history." This is because the Soviet Union managed to maintain a semblance of status quo while the United States was dealing with such crises as the Watergate scandal and Vietnam, and the West was facing the Mid-East oil embargo. Furthermore, following Mao's death in 1976, China seemed ready to plunge into instability. *Id.* at 34.

54. HEDRICK SMITH, *THE NEW RUSSIANS* 21 (1990).

55. Memorandum from Adolphe J. Warner, Chairman, *Global Asset Management*

Russians and non-Russians alike to question the legitimacy of the Soviet government.

The Baltic states, claiming that only Soviet hegemony had kept them in the Soviet Union, solidified their freedom as independent states in the early 1990's. While some republics of the former Soviet Union followed the example of the Baltics, other republics sought only to assert more governmental autonomy, and still maintain advantageous alliances with the former central government and with other republics.

In response to a mounting economic crisis and secessionist drive by republics, the Politburo attempted to reestablish CPSU dominance of the regular legislative process. The failed conservative coup of August 1991 demonstrated that there could be no retreat without a bloody struggle from a state in which legitimacy is derived from the people, not from a political party or faction. President Boris Yeltsin, when faced with a situation that paralleled the 1917 revolution, chose to support a peaceful transition to a free society instead of winning approval with bullets.⁵⁶

IV. CONTEMPORARY COMPARISON OF CONSTITUTIONAL RIGHTS

A. *Weaknesses of the Post-Coup Government*

In an historical context, the people of Russia in the late twentieth century face problems similar to those that confronted the thirteen American colonies more than two hundred years earlier. After the colonies had broken with England, they attempted to collaborate under the Articles of Confederation. The Articles, however, proved incapable of maintaining unity and stability between the semi-autonomous states.

Many colonists feared a return to some form of dictatorial regime because of the weak and disjointed central government. Prior to the ratification of the Constitution, the United States was not a unified country. "Religious differences were significant and potentially dangerous. . . . Regional differences were sharply marked."⁵⁷ Although the one thing agreed upon was the need to protect liberty, there nevertheless

Associates, The Old Ruble Must Go Now: Why Currency Reform Can't Wait (Sept. 13, 1991), available in WESTLAW, PRNEWS Database).

56. Gavril Popov, *Popov on '91 Coup*, Current Digest of the Soviet Press, Sept. 23, 1992, at 1, available in LEXIS, Nexis Library, Intl File.

57. President Jimmy Carter, *Keynote Address: The United States and the Advancement of Human Rights Around the World*, 40 EMORY L.J. 723, 724. For a contemporary treatment of the regional divisiveness of slavery, see Douglas L. Wilson, *Thomas Jefferson and the Character Issue*, ATLANTIC MONTHLY, Nov. 1992, at 57.

“were differences over what form governments should take.”⁵⁸

In the aftermath of the failed 1991 coup, the Russian government and its ruling institutions have been weak and ineffective. The republics that once comprised the Soviet Union have been free to follow their own course. In addition, many of the ethnically diverse regions within the territory of Russia and the other former Soviet republics are threatening separation by violent means.

The legislature, which is the main institution of procedural democracy, is blocking reforms.⁵⁹ President Yeltsin took sole responsibility for the reforms by denying the legislature the right to form a cabinet. As a result, the legislature no longer had a role in guiding the reforms and instead began to criticize Yeltsin's moves at every opportunity.⁶⁰ Currently, the legislature is not only hindering the exercise of executive power, but has also encroached on the functions of the executive as well. Ruslan Khasbulatov, Chairman of the Supreme Soviet, is “for all practical purposes the second head of the executive branch.”⁶¹ Furthermore, Chairman Khasbulatov has declared that the budget power is the primary state power⁶², which suggests that a loose alliance of semi-sovereign states resembling the United States under the Articles of Confederation is likely to encounter serious problems.

A number of additional considerations may make the situation in Russia more difficult to resolve than the problems that faced the framers of the United States Constitution. First, because English tyranny over the American colonies was imposed from outside, the vestiges of English rule were more easily swept aside, so the new system more readily flourished. The American break with England might today be called a “war of ‘people’s liberation,’ a war for self-determination against external and distant forces.”⁶³

In Russia, on the other hand, the tendrils of CPSU power have penetrated every square inch of Russian life, requiring the establishment of a totally new system of government. “If a revolution destroys a systematic government, but the systematic patterns of thought that

58. McInnis, *supra* note 2, at 52.

59. *Press Conference by Boris Yeltsin* (pt. 1) (Russian Television, June 9, 1991), available in LEXIS, Nexis Library, Currnt File.

60. Lyudmila Telen, *Power vs. Power*, Moscow News, April 15, 1992, available in LEXIS, Nexis Library, Intl File.

61. August Mishin, *Hopes for a Constitution Die Hard*, Moscow News, Sept. 9, 1992, available in LEXIS, Nexis Library, Intl File.

62. *Speech by Ruslan Khasbulatov Urging Deputies to Adopt the Draft Constitution* (Russia's Radio, Apr. 17, 1992), available in LEXIS, Nexis Library, Currnt File.

63. Louis Henkin, *supra* note 28, at 1034.

produced that government are left intact, then those patterns will repeat themselves in the succeeding government.”⁶⁴ Montesquieu’s words can easily be applied to the succession of authoritarian rulers throughout the history of Russia and the Soviet Union; “all the blows were struck against tyrants, none against tyranny.”⁶⁵

A number of authors have noted that authoritarian strains run deep in Russia.⁶⁶ Events at the top cause repercussions throughout the country.⁶⁷ Indeed, the systematic patterns of thought that underlie Communist and Czarist Russian authoritarianism are still present, despite efforts by President Boris Yeltsin and other Russian democrats and reformists to ground government legitimacy firmly on the rule of law.

The CPSU was banned in Russia in November 1991. Criminal charges have been brought against the party for its role in, and execution of, the August 1991 attempted coup designed to oust the legally elected government.⁶⁸ Because the CPSU made state property determinations and state budget appropriations without any accountability to the people, and because the KGB was officially employed as an “armed detachment of the party which [acted] under control of the CPSU leadership,” the property of the CPSU has been nationalized.⁶⁹

Moreover, a great number of Russian citizens participated in the tyranny, either in an official capacity, such as in the army or KGB, or in a more discreet manner, as in the large number of informers who implicated neighbors or others in crimes against the state. Many people have questioned Yeltsin’s motives in banning the CPSU and the far-right party National Salvation Front.⁷⁰ In light of these steps, one might

64. ROBERT M. PIRSIG, *ZEN AND THE ART OF MOTORCYCLE MAINTENANCE* 88 (Bantam New Age ed., 1981).

65. MONTESQUIEU, *supra* note 28, at 22.

66. According to Leonid Abalkin, a Russian historian, one reason that the Communist government was able to gain power was because the “authorities had always been prone to tyranny” Lyudmila Alexandrova, *Scholars Discuss Russian Revolution Heritage*, TASS, Nov. 6, 1992, available in LEXIS, Nexis Library, Currnt File. See also *infra* note 82.

67. Telen, *supra* note 60. See also Popov, *supra* note 56.

68. *The CPSU Was Banned, Not the Communists; Nobody is Persecuting Them* (Official Kremlin Int’l News Broadcast, May 26, 1992), available in LEXIS, Nexis Library, Currnt File.

69. *Id.*

70. The Russian Federation Constitutional Court ruled that President Yeltsin’s decree “banning the creation and activity of the National Salvation Front and its structures, does not correspond with the Russian Federation Constitution” The Court pointed out that the term “extremist elements” was overly broad and the

begin to see new meaning in the words of the former Communist premier, Anatoly Lukyanov, who said from his jail cell that from a legal and political point of view, actions by the democratic government of Russia to ban and discredit the CPSU and other extremist parties must be looked at as an attempt to "get rid of a strong political opposition."⁷¹

In addition to the intransigence caused by an entrenched resistance to Enlightenment ideals, a second problem developing in Russia is the potentially devastating economic conditions facing the country. A primary obstacle to economic reform is the development of a currency that is convertible on the world market. Bound up with the fate of the Russian ruble is the axiom that "economic policies follow political trends in the short run, while the reverse holds true in the longer run."⁷² The failure of the Soviet Union is not so surprising then, considering the drastic economic conditions that prevailed preceding the 1991 coup attempt.⁷³

The problem is complicated by the experience of other former Communist countries which have attempted a currency exchange and have found individual larceny to be pervasive and hard to avoid.⁷⁴ Russian law enforcement officials have already encountered individual larceny as the society transforms from a planned economy to a free-market economy, because more favorable conditions are created for criminals to evade the authorities.⁷⁵ "The old command economy has broken down, but no market system exists to succeed it."⁷⁶ While the

application of this decree could lead to violations of citizen's constitutional rights. Russian Federation Constitutional Court, Decree 3-P, February 12, 1993, *available in* LEXIS, Nexis Library, Intl File.

71. *Interview from Behind the Bars* (Official Kremlin Int'l News Broadcast, Sept. 18, 1992) *available in* LEXIS, Nexis Library, Currnt File [hereinafter Lukyanov] (Lukyanov had been arrested for taking part in the coup but has since been released).

72. Adolphe J. Warner, *supra* note 55.

73. One illustration of the failure of the Soviet economy is the extent to which natural resources have been degraded under Soviet control. Total environmental damage caused by air and water pollution was estimated at twenty billion rubles at the end of the 1970's, with projections at the end of the 1990's as high as 120 billion rubles. Revolutionary Communist philosophy rejected the idea that nature should be given protection from the enterprises of the state. Communists "cannot wait for favors from nature. Our task is to take them from her." Bukovsky, *supra* note 14 at 27.

74. Adolphe J. Warner, *supra* note 55.

75. *Crime in Russia*, UPI, Sept. 16, 1992, *available in* LEXIS, Nexis Library, UPI-Daily File.

76. Robert B. Zoellick, Relations of the United States with the Soviet Union and the Republics, Statement Before the Subcommittee on Europe and the Middle

rise in crime spreading across the former Soviet Union is encouraged by the absence of stability in the ruling institutions, such behavior cannot be blamed solely on the attempted establishment of democracy. "No constitutions, laws, or elections will, by themselves, assure equilibrium in a society, because it is human to persist in the pursuit of one's interests."⁷⁷ Only to the extent that market relations become normalized will a rule of law stabilize.⁷⁸

A third problem confronting the Russian Federation is the effect which the former Communist regime continues to have on Russian society. Although the Soviet Union has been dissolved and the CPSU outlawed, the current government must function under a modified version of the 1977 Soviet Constitution, which was ratified under Leonid Brezhnev. While key provisions have been deleted to allow for a multi-party system and for limited ownership of private property, the modified Brezhnev Constitution nevertheless continues to make the state's interests supreme over the individual, to give priority to state property over private property, and to punish violations of public order more severely than violations of individual rights.⁷⁹

The Soviet legacy goes far beyond the doctored Brezhnev Constitution. The attitude of many Russians can be summed up in the words of Anatoly Lukyanov, who asserted that "[b]y allowing all kinds of political adventurists to step on the memory of the millions of Communists who gave their lives for the cause of the working class, for socialism and for the defeat of fascism, then we betray ourselves, our ancestors and our history."⁸⁰ Indeed, that a government has succeeded in maintaining complete control over millions of people by repressive measures in the name of the liberation of the proletariat is not a sufficient explanation for the seventy-five year hegemony of the Soviet one-party system. Because "government could not be unjust without hands to exercise its injustices,"⁸¹ one "cannot fully explain the rejection of greater pluralism by the leadership . . . without taking into account the weakness

East of the House Foreign Affairs Committee (October 2, 1991), in DEP'T ST. DISP., October 7, 1991.

77. SOLZHENITSYN, *supra* note 37, at 54. In fact, crime, and other behavior labelled as anti-social, had been on the rise under the Soviet system for some time. In 1983 there were 40 million "medically certified alcoholics," a number that was projected to double by the year 2000. Bukovsky, *supra* note 13, at 27.

78. Steven Erlanger, *Discovering Justice: Russia and the Law*, The New York Times, May 11, 1992, at Section A, Page 1, Column 1.

79. *Id.*

80. Lukyanov, *supra* note 71.

81. MONTESQUIEU, *supra* note 28, at 65.

of democratic ideas, beliefs, and traditions in Russia throughout its history.’⁸²

Finally, the development of a multiparty democratic regime has been hindered by the governmental structure of the former Soviet Union. Because of the condemnation and repression of pluralism by the CPSU, a weak differentiation between individual and social groups has developed, along with insufficient awareness of those groups on a political level.⁸³ Furthermore, the vertical power structure of the Soviet government, in which orders from party leaders filtered down through the chain of command, has resulted in the lack of a well-established legislative base on which to develop a consistent state policy towards political parties.⁸⁴ The very discrediting of the CPSU has hindered the development of pluralism by giving political parties in general a bad name.

B. *Post-Soviet Constitutional Development*

While the problems facing Russia are very serious, they are not insurmountable. A necessary first step, however, is to establish the foundation on which the Russian government will proceed. During the American Revolution,

[d]isagreements over how to best construct a government which exemplified the principles of natural law . . . led to a period of experimentation in the creation of state constitutions. . . . It was the unhappiness with the results of these experiments and their seeming inability to inspire public virtue and Republican consciousness on the part of their citizens which brought forth calls for a stronger national government.⁸⁵

The Constitutional Commission charged with developing a constitution produced a lengthy document in 1992 which granted very broad individual and social rights. Among the rights granted in the fifty page charter⁸⁶ were the right of recreation⁸⁷, the right to a ‘favourable environment’⁸⁸ and provisions guaranteeing a social state.⁸⁹ However,

82. ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* 262 (1989).

83. Vyacheslav Nikonov, *Ideas and People: On the Near Approaches to Power - Thoughts on Russian 'Party Building'*, *Nezavisimaya Gazeta*, Aug. 7, 1992, at 5, available in LEXIS, Nexis Library, Intl File.

84. *Id.*

85. McInnis, *supra* note 2, at 58.

86. The draft constitution contained six titles, twenty-five chapters, and 136 sections. Draft, *supra* note 21.

87. Draft, *supra* note 21, article 36.

88. *Id.* art. 38.

89. *Id.* art. 39.

consensus was never reached on the draft constitution as a result of disagreement over the structure and the power-sharing arrangement of the proposed federal government.

A number of attempts have been made to find a solution to the question of how power is to be divided between the three branches of government. The disagreement over the shape and structure of the Russian Federation government has developed into a battle for supremacy between the executive branch, represented by President Boris Yeltsin and supporters of the reforms, and the legislative branch, represented by Supreme Soviet Chairman Ruslan Khasbulatov and conservative members of the former Communist regime.

President Yeltsin attempted to ameliorate the power struggle by asking for the opinion of the citizens of Russia in a national referendum. The Congress of People's Deputies formulated the four questions to be put to the eligible voters, which were approved by the Constitutional Court. (1) Do you trust Russian Federation President Boris Yeltsin? (2) Do you approve of the Socio-Economic policy implemented by the Russian Federation president and government since 1992? (3) Do you think it necessary to hold early elections of the Russian Federation President? (4) Do you think it necessary to hold early elections of the Russian Federation People's Deputies?⁹⁰

The referendum was held on Sunday, April 25, 1993. Early returns were very favorable to President Yeltsin, however, no substantive gains appear possible. According to a Constitutional Court ruling, the first two questions, relating to confidence in the president and his policies, required only a majority of those voting, while for early elections to be mandated, the required vote was at least a majority of the eligible 105 million voters. Without such early elections, Russia seems certain to face continued struggle between the two dominant branches of government. This means that those who claim to rule Russia will continue to be distracted from the two most pressing requirements for continued stability of Russian society: the development of a federal constitution that will guarantee basic rights to every citizen, and reform of the economy that will allow Russian society to prosper and develop on the world market.

In a federal government, a constitution divides governmental power between a central and subdivisional governments, giving to each sub-

90. Russian Congress of People's Deputies, Resolution 4684-1, *On the All-Russian Referendum on 25th April, 1993*, (March 29, 1993), available in LEXIS, Nexis Library, Intl File.

stantial functions.⁹¹ A federal constitution must make the national government supreme, with the constitution assuming the role of supreme law of the land.⁹² According to the preamble of the 1992 draft Constitution, "We, the multinational people of the Russian Federation . . . adopt the constitution of the Russian Federation and proclaim it THE BASIC LAW OF OUR SOCIETY AND STATE."⁹³ In a federal government, the constitution grants legislative, executive, and judicial powers to the national government.⁹⁴

The Constitutional Commission's Draft Constitution incorporated sections detailing the functions of the executive, the legislative, and the judicial functions envisioned by the Commission. In the draft, the legislative jurisdiction included all policy areas, consisting of domestic, foreign, and defense policy⁹⁵, determining and enforcing jurisdictional questions through enactment of federal laws⁹⁶, and nominating judges of kray and oblast courts (which are analogous to United States state and municipal courts) subject to presidential approval.⁹⁷ The strength of this parliamentary body was added to considerably by giving to the legislature supervisory powers over the activities of the executive branch⁹⁸, power to pose and decide "the question of the resignation of the members of the government of the Russian Federation"⁹⁹, and the power to dismiss the president,¹⁰⁰ negotiate treaties,¹⁰¹ declare, extend or cancel states of emergency, and decide war and peace.¹⁰²

Under the plan outlined by the Constitutional Commission, the president was to be the highest official of the Russian Federation and the head of the executive branch.¹⁰³ The president was to be elected directly by the people and could serve a maximum of two five-year terms.¹⁰⁴ This provision demonstrates Russia's commitment to legiti-

91. PELTASON, *supra* note 31, at 16.

92. *Id.*

93. Draft, *supra* note 21, Preamble (emphasis in original). While the draft has been rejected, the importance being given to a Constitution as the fundamental law of Russia shows that the Russian people demand accountability from their government.

94. PELTASON, *supra* note 31, at 16.

95. Draft, *supra* note 21, art. 88(b).

96. *Id.* art. 88(a).

97. *Id.* art. 88(j).

98. *Id.* art. 88(l).

99. *Id.*

100. *Id.* art. 88(m).

101. *Id.* art. 88(n).

102. *Id.* art. 88(q).

103. *Id.* art. 95(1).

104. *Id.* art. 95(4).

mizing the government through the approval of the people by avoiding the type of compromise the United States employs in the electoral college.

The judicial functions of the draft Russian Federation Constitution embodied supreme judicial power in a Constitutional Court, which was to be composed of fifteen members¹⁰⁵ appointed by the president of the Federation subject to the approval of the Supreme Soviet.¹⁰⁶ The Constitutional Court was to preside over the Supreme Court¹⁰⁷ and the Supreme Economic Court¹⁰⁸, which would govern matters relating to civil, criminal, and administrative cases, and economic questions, respectively.

C. *Problems Facing Constitutionalism*

If the executive power does not have the right to check the enterprises of the legislative body, the latter will be despotic, for it will wipe out all the other powers, since it will be able to give itself all the power it can imagine. But the legislative branch cannot be able to check the executive—the legislative body should not have the power to judge the person, and consequently the conduct, of the one who executes.¹⁰⁹

The constitution must create a balance in governmental powers so that the executive does not destroy the legislative right to adopt laws, and so that the legislature cannot overstep its mandate. If the legislature is able to impose extensive checks on the executive branch, then the legislature, in effect, subsumes the powers of the executive.

The draft constitution would have given an extremely broad range of power to the Supreme Soviet. These powers would have allowed the legislature to control certain aspects of the executive branch. Such a scheme did not “rule out a return to a totalitarian state but, on the contrary, objectively facilitate[d] this.”¹¹⁰ Furthermore, despite the fact that the powers generally within the purview of the legislature are the discussion and adoption of laws, the Supreme Soviet and its Chairman, Ruslan Khasbulatov, are purposefully “acquiring more and more power,”

105. *Id.* art. 106.

106. *Id.* art. 96(e).

107. *Id.* art. 107.

108. *Id.* art. 108.

109. MONTESQUIEU, *supra* note 28, at 162.

110. Andrei Chernov, *Russia Without Despotism and Despots*, *Moskovkiye Novosti*, Apr. 5, 1992, at 6, available in LEXIS, Nexis Library, Currnt File.

by creating executive structures under the Supreme Soviet.¹¹¹

Second, the national/state structure duplicates the apportionment of powers that existed under the Soviet government. An alternative draft constitution presented by Anatoly Sobchak "seeks to replace these divisions with new administrative areas—on the basis that the old are hopelessly enmired in the structures of the old regime and cannot be 'democratised' simply by being shifted under the aegis of a presidential, or for that matter a parliamentary, republic."¹¹²

Third, the stability engendered by the United States Constitutional system of staggered elections has not been incorporated into the draft Russian Federation Constitution. The problems that developed following the 1991 coup are due in part to the fact that deputies to the congress were elected en masse three years before the coup, and therefore did not reflect the prevailing situation of a society undergoing change. Finally, the jurisdiction of the Supreme Soviet, would have, in effect, been determined and enforced by the Supreme Soviet itself.¹¹³

The future of the Russian Federation is unclear. With no constitution addressed to the specific concerns of post-Soviet society, the stability of the Russian government is questionable. The powers held by the three different branches are ambiguous and conflicting. In the face of hyperinflation and massive unemployment, President Yeltsin and democratic reforms continue to have the approval of the Russian people, while the Congress of People's Deputies are increasingly being seen as intransigent and regressive. Composed mainly of hard-line conservatives elected prior to the 1991 coup, and due to serve until their terms end in 1995, the Congress of People's Deputies holds the reins of promoting a new constitution. However, given the composition of the Congress, the Communist constitution may have as much influence on the future of the Russian Federation as ideas embodied in the United States or other modern Constitutions.

V. CONCLUSION

Constitutionalism is a guiding force in the evolution of modern nation-states. Constitutionalism developed within the framework of the monarchical system as rights which had previously been held only by the ruler became fundamental rights of the people as well. As legislatures became the voice of the people, constitutions were promulgated to solidify

111. *Id.*

112. John Lloyd, *Survey of the Reforming Russia*, Financial Times, May 13, 1992.

113. Draft, *supra* note 21, art. 88(a).

the relationships between the ruling institutions and the people.

The United States Constitution established a system based on individual rights and the limitations on state power. While Russia has encountered constitutional ideas over the years, constitutionalism has never been fully assimilated. Following the demise of the Soviet Union, Russia is at a major turning point. Either a new constitution will establish a system that is supreme over every individual, or constitutionalism will continue to occupy a strictly educational and descriptive role, embodying lofty principles that are not readily attainable.

The Enlightenment ideals that served as the backdrop to the Philadelphia Convention in 1787 should be reappraised in light of the needs of Russia today. Given the tendency of strong leaders to win the political support of Russians, a system needs to be encouraged that will focus more on the process than on the participants. Each governmental branch must have enough authority to accomplish its objectives, but must not be able to overtake the functions of other branches to the point that any one faction gains ascendancy of the government as a whole, as the Communist party did following the October Revolution of 1917.

Finally, any constitution must be flexible enough to cope with significant changes in society. The ethnic divisions and economic troubles facing Russia require imaginative solutions, solutions which can be developed without destroying the rights and freedoms of the citizens of Russia.

*Michael P. Chauvin**

* J.D. Candidate, 1994, Indiana University School of Law—Indianapolis.

American Labor Law on Foreign Soil: Policies and Effects in a Smaller World

“[A statute] must be read in the light of the mischief to be corrected and the end to be attained.”¹

I. INTRODUCTION

Labor law is remedial and largely the product of reaction.² American courts have been hesitant to apply labor and employment laws such as the Labor Management Relations Act (LMRA)³ to factual situations which arise in foreign countries even when American workers are affected. So it should come as no surprise that in the recent case of *Labor Union of Pico Korea v. Pico Products*,⁴ the United States Court of Appeals for the Second Circuit denied a foreign labor union the right to sue a foreign subsidiary of an American company in a federal court under the LMRA. On the surface, giving a foreign litigant standing to sue under the LMRA would be like forbidding drivers to travel at 65 miles per hour while encouraging them to drive at 75.

However, at a time when the proliferation of catch-phrases like “global economy” and “new world order” is rampant, perhaps the reasoning and impact of such a decision should be given more than summary review. If labor law were to take a progressive turn in light of the changing world, the policy-based underpinning of the Second Circuit’s decision would no longer be applicable; further, if contemporary notice is not taken of the policies contrary to the court’s decision, an aggrieved future party may be forced to look to the empty chair of lost rationale when attempting to articulate such unfamiliar policies

1. *NLRB v. Hearst Publications*, 322 U.S. 111, 124 (1944). For a discussion of the statement in the context of the theme of this comment, see David P. Currie, *Flags of Convenience, American Labor, and the Conflict of Laws*, 1963 SUP. CT. REV. 34, 45.

2. See generally 51 C.J.S. Labor Relations §§ 20-25 (1967).

3. 29 U.S.C. §§ 141-44, 151-67, 171-87 (1988 & Supp. 1990 & 1991). The Labor Management Relations Act was passed in 1947 as an amendment to the National Labor Relations Act of 1935. The LMRA is also known as the Taft-Hartley Act and is found with the NLRA and other labor statutes in Title 29. Section 301 of the Act authorizes employers and labor organizations to litigate contract disputes in federal courts.

4. 968 F.2d 191 (2d Cir. 1992), *cert. denied*, 113 S.Ct 493 (1992).

in his changed world. It is with that future party's plight in mind that this note is written.

There are three substantive topic issues addressed in this note. First, the Second Circuit's recent decision will be analyzed to ascertain whether or not it is consistent with the policies which have underlain labor law. This analysis necessarily involves a review of decisions of the United States Supreme Court which have spoken on the issue of extraterritorial application of American law. There will be particular emphasis on the application of labor statutes so as to provide a basis for analysis of the Second Circuit's rationale in *Pico*. Second, policies which run counter to those relied upon by the court will be discussed. Included are 1) a discussion of the Supreme Court's decision in *EEOC v. Arabian American Oil*,⁵ which is illustrative of the current debate over the method of determining extraterritorial application of American employment law, and 2) statements of the general policies which throw the traditional approach in question. Third, the impact of continued adherence to the established labor policies will be addressed. Specifically, the possible economic effects on the United States resulting from divergence in policy and the current economic reality will be analyzed.

II. THE PICO DECISION

On June 24, 1992, the United States Court of Appeals for the Second Circuit decided a novel question. Namely, does the Labor Management Relations Act contemplate a suit by a foreign labor union against a wholly owned American subsidiary operating in a foreign country.⁶ Basing its decision on statutory interpretation,⁷ a well-established

5. 111 S.Ct. 1227 (1991).

6. *Pico*, 968 F.2d at 194. The union was organized under the laws of South Korea and had entered a collective bargaining agreement with Pico Korea, a South Korean company which was a subsidiary of Pico Macom, a Delaware corporation. In turn, Pico Macom was a subsidiary of the defendant, Pico Products, which was a New York corporation. The union brought an action in the United States District Court for the Northern District of New York basing its cause of action for breach of that agreement on numerous theories. Prior to a bench trial, the district court dismissed the union's suit under the LMRA, but left two of its state law claims intact and the action proceeded as a diversity suit. At trial, the union tried to pierce the corporate veil under New York law in order to reach Pico Products in its remaining claims against Pico Korea. See *Labor Union of Pico Korea v. Pico Products*, 90-CV-774, 1991 WL 299121 at 4-5 (N.D.N.Y. 1991). The court found that evidence of Pico Products' control over Pico Korea was insufficient to pierce the corporate veil and entered judgment for the defendant. *Id.* at 13. On appeal, the Second Circuit affirmed

lished presumption against extraterritorial application of American labor law,⁸ and Congressional intent,⁹ the court answered that question emphatically in the negative.¹⁰

A. *The Statute*

The Labor Management Relations Act¹¹ states that suits under the Act may brought in federal courts "without regard to the citizenship of the parties."¹² The plaintiff-labor union in *Pico* asserted that such language clearly allowed it to bring suit in a federal court even though its members were citizens of South Korea.¹³ The court stated that such an argument was "misplaced because the issue is not plaintiffs' citizenship, but rather whether the labor agreement at issue is of the type Congress planned on having [the LMRA] control."¹⁴ The court stated further that such language merely establishes federal question jurisdiction.¹⁵ The union argued that the only limitation on the LMRA's applicability is that the industry covered by the collective bargaining agreement must be one which "affect[s] commerce."¹⁶ Once again the court refused to adopt the union's broad interpretation and commenced to discuss whether the nature of the Act itself, and not just its jurisdiction-granting language, authorized the union's suit.¹⁷

To support its finding that the statutory language of the LMRA is not in itself dispositive authority for extraterritorial application, the

the district court's findings with regard to the state law claims and in its opinion addressed only the denial of the application of the LMRA to the union's claim for breach of the collective bargaining agreement. The Second Circuit stated that the LMRA did not contemplate a suit by a foreign labor union, thus affirming the lower court's ruling in all respects. 968 F.2d at 196. The union filed a petition for certiorari in United States Supreme Court on September 22, 1992, which petition was denied on November 16, 1992. *Labor Union of Pico Korea v. Pico Products*, 113 S.Ct. 493 (1992).

7. *Pico*, 968 F.2d at 194.

8. *Id.*

9. *Id.*

10. *Id.* at 195.

11. 29 U.S.C. §§ 141-44, 151-67, 171-87.

12. Labor Management Relations (Taft-Hartley) Act, § 301(a), 29 U.S.C. § 185(a).

13. *Pico*, 968 F.2d at 194.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Pico*, 968 F.2d at 194.

court cited *Foley Bros., Inc. v. Filardo*.¹⁸ In *Foley Bros.*, the Supreme Court was concerned with the application of the Federal Eight Hour Law¹⁹ to an American employee of a U.S. government contractor working in Iran and Iraq.²⁰ The words at issue in *Foley Bros.* stated that the law applied to “[e]very contract made to which the United States, . . . is a party.”²¹ Despite the very broad language of the statute, the Court refused to apply the law extraterritorially, stating that there was no language in the statute “that gives any indication of congressional purpose to extend its coverage beyond places over which the United States has sovereignty or has some measure of legislative control.”²²

The Second Circuit noted further that like the Federal Eight Hour Law, the LMRA did not distinguish between aliens and citizens in its coverage, and that the Supreme Court in *Foley Bros.* thought such an omission important.²³ Thus when read literally, the Eight Hour Law supports suits from alien workers.²⁴ Apparently finding such an interpretation unpalatable, the Court essentially stated *ipso facto* that the statute must not have been meant to apply to any workers outside the territorial possessions of the United States.²⁵

B. *The Presumption*

The Supreme Court in *Foley Bros.*, the Second Circuit in *Pico*, and indeed most American courts which pass on questions of jurisdiction involving labor and employment laws, do not hesitate to invoke a strong presumption against applying those laws in foreign countries.²⁶ A root

18. 336 U.S. 281 (1949).

19. 40 U.S.C. §§ 321-26 (repealed 1962). The Federal Eight Hour Law was enacted in 1892 and was designed to provide employees of U.S. government contractors with compensation of one and one-half times their basic rate of pay for all work done in excess of eight hours in a work day.

20. *Foley Bros.*, 336 U.S. at 283.

21. *Id.* at 282.

22. *Id.* at 285.

23. *Pico*, 968 F.2d at 194.

24. *Foley Bros.*, 336 U.S. at 286.

25. *Foley Bros.*, 336 U.S. at 286. The Court stated that unless it read the statute as having no extraterritorial effect at all, it would be forced to conclude that Congress' intent was to regulate the conduct of foreign citizens and that kind of intent “should not be attributed to Congress in the absence of a clearly expressed purpose.” *Id.*

26. Compare *Foley Bros.*, 336 U.S. at 285 (stating that “unless a contrary intent appears, [legislation] is meant to apply only within the territorial jurisdiction of the United States”) with *Pico*, 968 F.2d at 194 (stating that “laws generally apply only in those geographical areas or territories subject to the legislative control of the United States, absent Congress' clearly expressed affirmative aim to the contrary”) (emphasis added).

of authority for this presumption derives from Justice Holmes' opinion in *American Banana Co. v. United Fruit Co.*,²⁷ where he stated that "[w]ords having universal scope . . . will be taken as a matter of course to mean only every one subject to such legislation, not all that the legislator subsequently may be able to catch."²⁸ For various policy reasons, the courts have taken Holmes' words to heart;²⁹ however, the presumptions created as a result of adherence to these policies are not always uniform.

The fact that the courts have articulated a presumption against extraterritorial application of certain laws necessarily implies that the courts believe that Congress, at least in certain circumstances, has the power to give its legislation extraterritorial effect. For if this were not true, courts would merely state that for one reason or another, Congress was barred from giving such effect to its laws. Indeed, it is almost uniformly stated in the introductory paragraphs of court opinions which address this question, that Congress has the power to regulate outside the territorial boundaries of the United States.³⁰

The *Pico* court recognized that Congress could, under the Commerce Clause,³¹ regulate the contract dispute there at issue.³² The question with regard to the LMRA, as articulated by the *Pico* court, was whether Congress had authorized extraterritorial jurisdiction in a case initiated by a foreign labor union.³³ To the Second Circuit, the

27. 213 U.S. 347 (1909).

28. *Id.* at 357.

29. *Cf. Benz v. Compañía Naviera Hidalgo, S.A.*, 353 U.S. 138, 142 (1957) (The Court seemed to suggest that reciprocity of restraint in assertion of jurisdiction is significant, as it pointed out that the local sovereign's jurisdiction is discretionary not mandatory).

30. *See, e.g., Pico*, 968 F.2d at 194; *Foley Bros.*, 336 U.S. at 284; *Benz*, 353 U.S. at 142-43; and *Blackmer v. United States*, 284 U.S. 421, 437 (1932).

31. U. S. CONST. art. I, § 8, cl. 3 states that Congress has the power "[t]o regulate Commerce with foreign Nations."

32. *Pico*, 968 F.2d 194. As it stated this in one simple sentence, the court seemed to assume that it would have jurisdiction apart from the fact that the contract affected commerce within the meaning of the Act. However, the question could become in this kind of case, were there sufficient contacts under *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) and its progeny to give the court jurisdiction over litigants who were arguably both Korean citizens. The importance of this question would become more acute if it were the wholly owned American subsidiary, *Pico Korea*, attempting to enforce a contract with the Korean labor union. Certainly the contract would affect commerce, but would the labor union have sufficient contacts with the United States to allow a federal court to entertain the action?

33. *See id.* at 194. It is unclear from the wording of the court's statement of the issue, i.e., "was § 301 triggered in this case," *id.*, whether this is implicitly

barrier for a federal court to hear such a case was "the broad presumption against extraterritorial application of federal law."³⁴ The court did not expand upon this language, apparently leaving interpretation of its meaning to be gleaned from a recitation of precedent.³⁵ There are two key inquiries vis-à-vis the "broad presumption" advanced in *Pico*. First, in light of precedent, what is the current content of the presumption? Second, does the presumption vary over different kinds of cases, and if so, why? To answer both of these questions, it is necessary to review the cases which have established the presumption against extraterritoriality.

1. *The Early Cases*

As mentioned previously, Justice Holmes' opinion in *American Banana* is given great weight with regard to the policy of the presumption, so it should come as no surprise that it is one of the most often quoted cases in this area.³⁶ *American Banana* involved the application of the Sherman Anti-trust Act³⁷ to a case arising primarily from acts done in Panama and Costa Rica.³⁸ Although application of the Act was denied in the case, Justice Holmes did not articulate a definite presumption against such application. However, he did note that "[a]ll legislation is prima facie territorial."³⁹ Holmes considered the assertion that Congressional legislation would extend to acts done in foreign countries a "startling [proposition],"⁴⁰ and based his doubt on "the general and almost universal rule . . . that the character of an act as lawful or unlawful must be determined wholly by the law of the country where

suggesting that there may be fact situations arising principally in foreign countries which could fall within the LMRA, or whether such statement was merely rhetorical. Keeping in mind that *Pico* was a novel question, it certainly seems from the Second Circuit's opinion that it considers the extraterritorial application of the LMRA to foreign litigants foreclosed. *See id.*

34. *Id.*

35. *See id.* at 194-195. (The court reviewed *Foley Bros. v. Filardo*, 336 U.S. 281 (1949); *Benz v. Compañía Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963); *International Longshoreman's Ass'n Local 1416 v. Ariadne Shipping Co.*, 397 U.S. 195 (1970); and *EEOC v. Arabian American Oil Co.*, 111 S.Ct. 1227 (1991)).

36. *See American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909).

37. 15 U.S.C. §§ 1-7 (1890) (as amended by 104 Stat. 2880 (1990)).

38. *American Banana*, 213 U.S. at 355.

39. *Id.* at 357 (quoting *Ex parte Blain*, L.R. 12 Ch. Div. 522, 528; *State v. Carter*, 27 N.J.L. 499; other citations omitted).

40. *American Banana*, 213 U.S. at 355.

the act is done."⁴¹ Holmes also opined that not only would it be unjust to apply the Sherman Act in the case, but it would interfere with the authority of other sovereign nations.⁴² It is clear then that to the extent that Holmes' opinion in *American Banana* helped to establish a general presumption against extraterritoriality, such presumption was based, at least in part, on notions of sovereignty and of fear of interference therewith.

A much stronger statement of the presumption came nine years after *American Banana* in *Sandberg v. McDonald*.⁴³ In denying application of the Seaman's Act⁴⁴ to facts arising from acts done in England, the majority stated that "[l]egislation is presumptively territorial and confined to limits over which the law-making power has jurisdiction."⁴⁵ To determine whether the presumption was overcome, the Court looked for the purpose of the statute by analyzing its language and also tried to find the intent of Congress with regard to the facts of the case.⁴⁶ The majority deferred to the presumption, finding no language which specifically authorized application, and no intent to do so *from the language of the statute*.⁴⁷ Even the dissenters who favored application, found that it was the *language* which was broad enough to allow it.⁴⁸ Therefore, since none of the Justices were willing to look beyond the four corners of the Act (although the dissenters accused the majority of doing so implicitly),⁴⁹ rebutting the presumption in *Sandberg* required, *de facto*, clearly expressed legislative intent on the face of the statute.⁵⁰

41. *Id.* at 356.

42. *Id.*

43. 248 U.S. 185 (1918).

44. 38 Stat. 1165 (1915) (regulating, *inter alia*, payment to seamen and rights of arrest for desertion) (later codified at 46 U.S.C. §§ 597, 656, 660-1. Repealed by Pub. L. 98-89 § 4(b) (1983)).

45. *Sandberg*, 248 U.S. at 195 (citing *American Banana*, 213 U.S. at 357).

46. *Id.* at 195-96.

47. *Sandberg*, 248 U.S. at 195.

48. *Id.* at 197, 202 (McKenna, J., dissenting). Interestingly, Justice Holmes was one of the four dissenters who favored extraterritorial application of the Act.

49. *Id.* at 203-04 (dissenting opinion). The dissent said of the majority's construction of the statute that "[t]o qualify these provisions or not to take them for what they say, would, in our opinion, ascribe to the act an unusual improvidence of expression." *Id.* at 200. The dissent stated further that the Court's function in this regard was "the simple service of interpretation, and there is no reason to hesitate in its exercise because of supposed consequences." *Id.* at 202.

50. "Had Congress intended to make void such contracts and payments a few words would have stated that intention, not leaving such an important regulation to be gathered from implication." *Id.* at 195.

Just four years after *Sandberg*, the Court seemed to modify the presumption. In *United States v. Bowman*,⁵¹ the Court held that the requisite intent of Congress could be inferred without a clear expression on the face of the statute.⁵² The Court stated that when the locus covered by the statute was "not specifically defined, [it] depends upon the purpose of Congress as evinced by the description and nature of the crime and upon the territorial limitations upon the power of jurisdiction of a government to punish crime under the law of nations."⁵³ Concerning interpretation, the Court specifically distinguished the law there involved, a criminal statute, from civil statutes.⁵⁴ Therefore, it could be argued that *Bowman* stands for the proposition that where the character of the conduct sought to be regulated is such that it necessarily contemplates foreign facts, all other things constant, the presumption against extraterritoriality will not serve as a bar to application of the statute.⁵⁵

The Court sustained the above proposition in *New York Central R.R. Co. v. Chisholm*.⁵⁶ The statute at issue in *Chisholm* was the Federal Employers' Liability Act.⁵⁷ Although the language of the Act provided that "every common carrier by railroad while engaging in interstate or foreign commerce shall be liable to any of its employees,"⁵⁸ the Court denied application of the Act where a railroad employee had been killed while working in Canada.⁵⁹ Acknowledging that Congress could impose liability upon U.S. citizens for torts committed outside the United States, the Court nonetheless stated that the statute "contains no words which definitely disclose an intention to give it extraterritorial effect, nor do the circumstances require an inference of such purpose."⁶⁰ With *Chisholm* then, it becomes apparent that the Court no longer required an affirmatively expressed Congressional intent on the face of the statute to apply laws extraterritorially.

51. 260 U.S. 94 (1922).

52. *Id.* at 97.

53. *Id.*

54. *Id.* at 98.

55. See *Bowman*, 260 U.S. at 98. "It would be going too far to say that because Congress does not fix any locus it intended to exclude the high seas in respect of this crime. The natural inference from the character of the offense is that the sea would be a probable place for its commission." *Id.*

56. 268 U.S. 29 (1925).

57. 35 Stat. 65 (1908) (*as amended by* 36 Stat. 291 (1910). Current version at 45 U.S.C. § 51 (1988)).

58. *Chisholm*, 268 U.S. at 30.

59. *Id.* at 32.

60. *Id.* at 31 (emphasis added).

2. *Liberalization of the Rule*

Much like a great fish story in which some new twist is added at each telling, so were new and interesting features added to the presumption against extraterritoriality in subsequent opinions, perhaps to allow flexibility in varying fact situations. The case of *Skiriotes v. Florida*⁶¹ is a logical extension of the earlier cases which had defined the presumption. The Court tied together its previous holdings,⁶² and stated that where a criminal statute is at issue, it "is to be construed as applicable to citizens of the United States upon the high seas or in a foreign country, though there be no express declaration to that effect."⁶³ In setting out the rationale for allowing extraterritorial application of the statute, the Court stated that "the United States is not debarred by any rule of international law from governing the conduct of its own citizens upon the high seas or even in foreign countries when the rights of other nations or their nationals are not infringed."⁶⁴ Although the Court cited *American Banana* for this proposition,⁶⁵ it is a much broader statement than Holmes had made. Holmes had stated in an almost reluctant tone that there were situations when the "old notion of personal sovereignty [was kept] alive";⁶⁶ but that is quite different from the statement in *Skiriotes*, which places only interference with foreign sovereignty and rights as a barrier to American governance of its citizens abroad.

Lest there be any doubt about the breadth of the statement in *Skiriotes*, the Court gave an example of it in *Steele v. Bulova Watch Co.*⁶⁷ The question in *Steele* was whether the language of the Lanham Trademark Act⁶⁸ authorized jurisdiction over a case in which an American citizen was alleged to have infringed upon a trademark owned by Bulova Watch Company, through acts done almost exclusively in Mexico.⁶⁹ Seizing upon the dicta of *Skiriotes* and its predecessors, which stated that Congress could choose to regulate such a fact situation as

61. 313 U.S. 69 (1941).

62. See *id.* at 74 (where the Court, *inter alia*, relied on *United States v. Bowman*, 260 U.S. 94 (1922) and *Blackmer v. United States*, 284 U.S. 421 (1932)).

63. *Id.* at 73-74.

64. *Id.* at 73.

65. *Id.*

66. *American Banana*, 213 U.S. at 356.

67. 344 U.S. 280 (1952).

68. 15 U.S.C. § 1051-1128 (1946) (*as amended by* 102 Stat. 3935 (1988)).

69. *Steele*, 344 U.S. at 281.

was therein involved,⁷⁰ the Court held that Congress must have intended the Act to apply to this case "in light of [its] broad jurisdictional grant."⁷¹ Incredibly, the language to which the Court was referring stated that the Act applied to "[a]ny person who shall, in commerce, infringe a registered trademark,"⁷² commerce being defined as "all commerce which may be lawfully regulated by Congress."⁷³ And as if saying it made it so, the Court stated that *American Banana* "compels nothing to the contrary."⁷⁴ With *Steele* then, it appeared that the presumption could be overcome by the Court's conception of the *purpose* of the statute outside the language contained therein.⁷⁵

Just a year later in *Lauritzen v. Larsen*,⁷⁶ the Court recognized that more and more it was being asked to determine whether acts of Congress were to be applied extraterritorially.⁷⁷ Although the Court opined that precedent required a narrow construction of such legislation,⁷⁸ it nonetheless impliedly assumed that when Congress had left open the question, extraterritorial "application [was] to be judicially determined from context and circumstance."⁷⁹

3. *The Labor Cases*

It should now be evident that through the *Lauritzen* decision, the Court had begun to shed the oppressive skin of fear associated with

70. See *Steele*, 344 U.S. at 282 (where the Court also noted *Foley Bros. v. Filardo*, 336 U.S. 281 (1949) and *Blackmer v. United States*, 248 U.S. 421 (1932) on this point).

71. *Id.* at 286.

72. *Id.* at 284 (quoting 15 U.S.C. § 1127).

73. *Id.* Compare this with the statements in *Foley Bros.*, *supra* notes 21-22 and 26, and in *American Banana*, *supra* notes 28 and 39, which declare that broad jurisdictional grants are to be narrowly construed.

74. *Id.* at 288.

75. See generally *Steele*, 344 U.S. at 289-92 (Reed, J., dissenting and stating that while there are some cases where a specific contrary intent to the presumption will not be necessary, this was not one of them).

76. 345 U.S. 571 (1953). *Lauritzen* concerned the application of the Jones Act, 46 U.S.C. § 688 (1920), in a case where a Danish seaman boarded a Danish vessel while in New York City and was subsequently injured while in Havana harbor. *Id.* at 573.

77. *Id.* at 577.

78. The Court quoted two statements by Chief Justice Marshall, one of which held that broad language ought to be limited in application by the intent of the legislature and the other of which stated that "an Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Id.* at 577-78.

79. *Id.* at 577.

extraterritorial application of American laws as expressed in *American Banana*, and had begun to announce presumptions with different strengths which correlated to various fact situations.⁸⁰ If *Pico* is to be understood as rightly or wrongly decided, the nature of the presumption articulated by the Court with regard to labor and employment laws must be determined.

One of the early cases to speak on the issue of extraterritorial application of labor laws was *Vermilya-Brown Co. v. Connell*.⁸¹ *Vermilya-Brown* dealt with a claim for overtime pay under the Fair Labor Standards Act (FLSA)⁸² by American citizens working on a U.S. military base leased from Great Britain and located in Bermuda.⁸³ The specific issue was whether in providing coverage of the Act over the "United States or the District of Columbia or any Territory or possession of the United States,"⁸⁴ Congress intended the Act to cover the leased military base.⁸⁵ After undertaking to determine the legislative history of the FLSA and finding nothing as an aid in construction,⁸⁶ the Court stated that "[u]nder such circumstances, our duty as a Court is to construe the word 'possession' as our judgment instructs us the lawmakers, within constitutional limits, would have done had they acted at the time of the legislation with the present situation in mind."⁸⁷ While the statement of the majority may not be repugnant to the

80. See Conley J. Schulte, Casenote, *Americans Employed Abroad By United States Firms Are Denied Protection Under Title VII: EEOC v. Arabian American Oil Co.*, 25 CREIGHTON L. REV. 351, 357 (1991) (stating that the Court has used a weak presumption when the law sought to be applied extraterritorially will affect only U.S. citizens, and a strong presumption against such application when foreign laws will be infringed upon).

81. 335 U.S. 377 (1948).

82. 29 U.S.C. § 201 (1938) (as amended by 103 Stat. 938 (1989)). For a discussion of the extraterritorial application of the Fair Labor Standards Act and an analysis of the choice of law and the statutory interpretation methods involved therein, see Mary Beth Plummer, Comment, *Choice of Law or Statutory Interpretation?: The Fair Labor Standards Act Applied Overseas*, 3 IND. INT'L & COMP. L. REV. 177 (1992).

83. *Vermilya-Brown*, 335 U.S. at 378-79.

84. *Vermilya-Brown*, 335 U.S. at 379 (quoting 29 U.S.C. § 203(b) and (c)).

85. *Vermilya-Brown*, 335 U.S. at 380.

86. It is important to note that in the previously discussed cases, the judicial norm with regard to determination of legislative intent consisted merely of a review of the statute itself, and arguably an assessment of the purpose of the law in light of the end to be achieved. Thus, *Vermilya-Brown* represents somewhat of a departure in the method of ascertaining Congressional intent, namely by specific reference to legislative history, assuming of course, that the opinions in the previous cases genuinely reflect the actual methods used.

87. *Vermilya-Brown*, 335 U.S. at 388.

disciplines of statutory construction and interpretation, the effect of the Court's self-appointed discretion had a significant impact on the status of the presumption against extraterritoriality. That is, because "[t]he reach of the act is not sustained or opposed by the fact that it is sought to bring new situations under its terms,"⁸⁸ the Court could essentially construe the extraterritorial application of the Act *ad hoc*, recognizing only such limits as it decided to impose on itself.⁸⁹

If the inquiry into the content of the presumption against extraterritoriality had ended with *Vermilya-Brown*, the labor union in *Pico* might have had a better environment of precedent in which to argue, in light of the progressive nature of the analysis of Congressional intent. However, *Vermilya-Brown* was a 5-4 decision and the following cases were distinguished in such a way as to preclude its future meaningful use.

Foley Bros. v. Filardo has been discussed previously as a case which stands for the proposition that in the absence of an express congressional intention to the contrary, a statute will only be taken to apply within the territorial jurisdiction of the United States.⁹⁰ The question to be answered here is whether the Court relied on any specific fact or quantum of facts which are unique to labor statutes.⁹¹ In its analysis, the Court looked at 1) the language of the Act, 2) the legislative history, and 3) administrative interpretations of applicability.⁹² Finding no specific language which would support extraterritorial application, the Court implicitly followed the doctrinal analysis of *Vermilya-Brown* while

88. *Id.* at 385.

89. *Cf.* EEOC v. Arabian American Oil, 111 S. Ct. 1227 (1991). In a dissenting opinion in *Arabian American*, Justice Marshall noted that the majority had selectively chosen bits of precedent language in order to, in effect, create a clear-statement rule, when giving effect to the entirety to the precedent wording would have compelled a different result. *Id.* at 1237. This is an example of the Court's proclivity to articulate ad hoc standards when confronted with the lack of a clear statement of jurisdictional application on the face of the statute, even when the legislative history or circumstances surrounding enactment of the statute would not stand in the way of a rule of application contra to the Court's decision.

90. *See* *Foley Bros. v. Filardo*, 336 U.S. 281 (1949). Remember that *Foley Bros.* was concerned with the application of the Federal Eight Hour Law to an American working in Iran and Iraq. *See supra* notes 19-25 and accompanying text.

91. It might be useful to think about the various factors which seem to influence the Court with regard to application or non-application of the labor and employment laws in these cases using a paradigmatic method. For example: foreign workers + no clear statement + no legislative intent = no application, but American workers + no clear statement + positive legislative intent = application, etc.

92. *See* *Foley Bros. v. Filardo*, 336 U.S. 281 (1949).

distinguishing its *Foley Bros.* holding therefrom.⁹³ This is significant because by looking to facts extrinsic to the statutory language, the Court proved willing to follow its contemporary philosophy of not requiring affirmative Congressional intent expressed on the face of the statute.⁹⁴ The Court found that the Federal Eight Hour Law was enacted by Congress with a concern for "domestic labor conditions"⁹⁵ and that nothing in the legislative history suggested an intent to make the statute applicable to a contract outside the United States.⁹⁶ Further, the Court stated that the administrative interpretations of the Act "afford no touchstone by which its geographic scope can be determined."⁹⁷

If *Foley Bros.* is the grandfather of the presumption in labor cases, then *Benz v. Compañía Naviera Hidalgo, S.A.*⁹⁸ is the current head of the family. *Benz* was one of the principal cases relied upon by the Second Circuit in *Pico*⁹⁹ and is the pinnacle case denying extraterritorial application of the LMRA. The dispute in *Benz* arose when American union members picketed a foreign ship with a foreign crew while the ship was docked in Oregon.¹⁰⁰ The Court recognized that "the problem presented [was] not a new one," and in that vein it devoted only a modicum of space to articulating the presumption and analyzing the language of the statute.¹⁰¹ The Court seemed to assume that amorphous jurisdictional language did not end the query, but rather began it.¹⁰² The sole question was "one of intent of Congress as to the coverage of the Act."¹⁰³ The Court found that "Congress did not fashion [the Act] to resolve labor disputes between nationals of other countries operating under foreign laws"¹⁰⁴ and that "[t]he whole background of the Act is concerned with industrial strife between American employers and employees."¹⁰⁵

The *Pico* court similarly relied on *McCulloch v. Sociedad Nacional de Marineros de Honduras*¹⁰⁶ as an extension of the *Benz* analysis.¹⁰⁷ The facts

93. *Id.* at 285.

94. *Id.*

95. *Id.* at 286.

96. *Id.* at 287.

97. *Id.* at 288.

98. 353 U.S. 138 (1957).

99. *See Pico*, 968 F.2d at 194.

100. *Benz*, 353 U.S. at 139.

101. *Id.* at 145.

102. *Cf. supra* notes 78-79 and accompanying text.

103. *Benz*, 353 U.S. at 142.

104. *Id.* at 143.

105. *Id.* at 143-44.

106. 372 U.S. 10 (1963).

107. *Pico*, 968 F.2d at 194-95.

of *McCulloch* are more analogous to the facts of *Pico* than were those of *Benz*. In *McCulloch*, an American union petitioned under § 9(c) of the National Labor Relations Act (NLRA)¹⁰⁸ for representative elections for a crew of alien seaman working on a Honduran vessel. This vessel was owned by a Honduran corporation which was in turn owned by an American corporation.¹⁰⁹ Seizing upon the rationale of its holding in *Benz*, the Court merely restated in *McCulloch* that the legislative history of the NLRA “inescapably describes the boundaries of the Act as including only the workingmen of our own country and its possessions.”¹¹⁰ In addition, the Court rejected a theory based on “balancing of contacts” on which the National Labor Relations Board (NLRB) had predicated its jurisdiction in its pre-litigation management of the case.¹¹¹ Therefore, because the Court had *defined* both the NLRA and LMRA as not contemplating disputes involving foreign workers, a flexible presumption was no longer needed in cases arising under those Acts. By rejecting the balancing of contacts theory advanced by the NLRB, the Court in *McCulloch* seems to have foreclosed actions involving foreign workers regardless of the degree to which American corporations are involved.¹¹²

The current state of the question of extraterritorial jurisdiction in labor cases, looked at as a subset of all cases involving the proposed extraterritorial application of a statute, is seen by the Court as being guided primarily by the intent of Congress. This intent is evidenced not only in the language of the statute, but also in the legislative history and circumstances surrounding enactment. Because Congress has generally chosen jurisdictional language which is not explicit with regard to extraterritorial application, the Court’s articulation of the presumption has relied less on statutory construction. Essentially, it seems that in the labor cases, the Court assumes that by using amorphous language, Congress expresses only a desire to leave the question open to the Court’s interpretation.

107. *Pico*, 968 F.2d at 194-95.

108. 29 U.S.C. § 151 (1935) (*as amended by* 61 Stat. 136 (1947)).

109. *McCulloch*, 372 U.S. at 13.

110. *Id.* at 18 (quoting *Benz*, 353 U.S. at 144).

111. *Id.* at 19. Again the Court was concerned over the possible interference with sovereignty—this time in the form of the “internal discipline” of the vessel—which inquiring in to such contacts would presumably create. *Id.*

112. *See id.* The Court feared that inquiry in the quantity and nature of contacts would force the NLRB to disturb the field of maritime law and international relations. *See also supra* note 33.

C. *The Intent*

As can be seen from the preceding discussion, the phrase "legislative intent" has changed in meaning over the course of decisions involving extraterritorial application of American law. In the beginning, there was strictness of interpretation. Recall that in *Sandberg*, the Court purported to determine legislative intent from the statutory language itself.¹¹³ Thirty years later in *Vermilya-Brown*, the Court stated that it had searched the legislative history of the FLSA to determine Congressional intent, and has consistently used that method to date.¹¹⁴

As asserted above, the Court has relied almost exclusively on Congressional intent in determining the question of extraterritorial application of the NLRA and its LMRA amendment. In *Benz* and *McCulloch*, the Court presented the legislative history regarding this question in a seemingly straight-forward manner. The Second Circuit in *Pico* cited *Benz* for the proposition that Congress did not intend the LMRA to reach beyond disputes involving American employers and employees.¹¹⁵ If that is the controlling thought in the Act, certainly application is precluded under the facts of *Pico*, but what about American employees working for American employers abroad? Does the legislative history of the LMRA as perceived by the Court, amount to a preclusion based on *geography* as the Court's holdings would seem to suggest, or is it based on citizenship? In *Benz*, the Court pulled two quotations from the legislative history of the LMRA made by Chairman Hartley himself¹¹⁶, both conspicuously containing the word "American" which the Court saw fit to then italicize.¹¹⁷ As if using a well-formulated search on a computerized legal database, the *Benz* Court came up with statements about Americans in the context of citizenship. But it is also true that the legislative history of the LMRA shows that Congress was concerned with American *interests*.¹¹⁸ American interests are not confined

113. See *supra* note 47 and accompanying text.

114. See *supra* note 87 and accompanying text.

115. *Pico*, 968 F.2d at 195.

116. Representative Hartley was the co-sponsor of the Taft-Hartley Act.

117. See *Benz*, 353 U.S. at 144.

118. See H.R. REP. NO. 245 on H.R. 3020, 80th Cong., 1st Sess. 294 (1947) (stating under the caption "Necessity for Legislation" that "[t]he committee believes that the enactment of the bill will have the effect of bringing widespread industrial strife to an end, and that employers and employees will once again go forward together as a team united to achieve for their mutual benefit and for the welfare of the Nation the highest standard of living yet known in the history of the world."). If the goal to be achieved was a higher standard of living, is the intent of Congress to limit the

necessarily to territorial possessions of the United States, nor are Americans the only group which affects commerce. Because the Court's interpretation did not encompass those facts, perhaps it can be said then that the Court reads legislative history strictly.

However, a so-called strict reading of legislative history could be seen to be in conflict with the Court's opinion in *Vermilya-Brown*. If "[t]he reach of the Act is not sustained or opposed by the fact that it sought to bring new situations under its terms,"¹¹⁹ then why cannot changed world conditions like those which affected the decision in *Vermilya-Brown*, also play a part in the Court's analysis of the legislative intent of Congress with regard to the LMRA? Arguably, there is another inquiry to be made in light of the Court's statements in *Vermilya-Brown*, namely how does Congress intend its intent to be understood?

D. Summary

In light of the Supreme Court's opinions in *Foley Bros.*, *Benz*, and *McCulloch*, the Second Circuit's decision in *Pico* seems rightly decided in that the labor union's assertion of jurisdiction under the language of the LMRA must fail. "Boilerplate language"¹²⁰ such as "affecting commerce," "every contract," and "without regard to the citizenship of the parties" has not persuaded the courts that Congress intended to apply the statute extraterritorially.¹²¹ Thus, the *Pico* court properly articulated the issue in the case as whether or not Congress intended that the LMRA cover the labor contract in question.¹²² The court relied upon the presumption against extraterritoriality and suggested that more than was factually present in the case would be needed to overcome it.¹²³ However, the *Pico* court misleads a casual reader slightly in that under the Supreme Court's holdings in *Benz* and *McCulloch*, it is clear that with regard to the NLRA and its LMRA amendments, the presumption can never be overcome when the cause arises from foreign facts.¹²⁴

Act to territorial application if extraterritorial application would better serve that goal? This is not to presuppose that extraterritorial application would in fact serve that goal. However, the Court has declined to even consider such a possibility.

119. See *supra* notes 88-89 and accompanying text.

120. *Pico*, 968 F.2d at 195 (citing *EEOC v. Arabian American Oil*, 111 S.Ct. 1227, 1231-32 (1991)).

121. See *id.* See also *supra* note 21-22 and accompanying text.

122. *Id.* at 193.

123. *Id.* at 194.

124. If the Court will not undertake to evaluate contacts, how could it weigh

Although the Court has not articulated the strongest presumption possible, it has taken a strict view of extraterritorial application of the labor laws in question, because of its perception of the intent of Congress based on legislative history. But in determining the Court's true method of analysis, the question obtains, does it fail to establish a stronger presumption, one requiring a clear manifestation of intent on the face of the statute, merely because it peeks ahead to the *outcome* of allowing itself to consider legislative intent? What would happen in an employment case, for example, if in the absence of clear statutory language, the legislative history and circumstances of enactment seemed to suggest that Congress favored application of the law to Americans outside the territorial domain of the United States, in which case the principles of *American Banana*¹²⁵ and *Chisholm*¹²⁶ might be infringed upon? The Court answered that question in *EEOC v. Arabian American Oil Co.*¹²⁷

III. CONTRARY CONCERNS

The policy which seems to have influenced the Court the most in developing its strict presumption against extraterritoriality is the fear of interference in foreign affairs;¹²⁸ indeed the Second Circuit echoed this fear in *Pico*.¹²⁹ But in most judicial undertakings there are competing policies which require a balancing in order to determine a course of action. When world conditions and political philosophies change, but statutory language does not reflect the magnitude of that change, the Court is left either to extrapolate new holdings based on this perceived change in conditions and philosophy, or to merely adhere to the canons of the past. In adhering to the traditional rationale, the Court delegates the duty of revision to the legislature which is perhaps better suited to

any differences across fact situations? If the definition of the kind of contract disputes justiciable under the statutes has been held not to include those where the litigants are foreign entities, what facts could those litigants point to in order to get their feet in the door of a federal court? See *supra* note 112 and accompanying text.

125. See *supra* notes 39-42 and accompanying text, and *infra* notes 128-29 and accompanying text (discussing the idea of infringement on sovereignty).

126. See *supra* note 41 (discussing Holmes' opinion in *American Banana* stating that the character of action is governed by law of situs) and *Chisholm*, 268 U.S. at 32 (citing *American Banana* for that proposition).

127. For a discussion of the case and criticisms of the Court's decision, see *infra* notes 130-43 and accompanying text.

128. Compare *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909) with *Benz v. Compañía Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957) and *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 19 (1963).

129. See *Pico*, 968 F.2d at 195.

meaningfully articulate such change. But in the absence of a revised legislative expression of direction, the Court left to its own devices may promulgate rules which will seem arbitrary to some, no matter which course it chooses to follow.

This section of the note will address both the resultant arbitrariness and possible modes of correction. First, an arguably arbitrary result will be shown via a brief discussion of the Court's recent holding in *EEOC v. Arabian American Oil*. Second, the various policies which could serve as rationale for a change in the presumption against extraterritoriality will be analyzed.

A. *An Arbitrary Course*

In *EEOC v. Arabian American Oil*, the Supreme Court held that Title VII of the Civil Rights Act of 1964¹³⁰ did not apply extraterritorially, so that American employers abroad who employ American workers are not subject to the Act.¹³¹ The case arose from facts involving a naturalized American citizen born in Lebanon, who was discharged while working for an American company in Saudi Arabia.¹³² The employee, Bourselan, filed a complaint with the EEOC charging that he was discharged on the basis of his race, religion and national origin.¹³³ In deciding the question of extraterritorial application of the Act, the majority labeled the jurisdictional language of the statute "boilerplate"¹³⁴ and stated that in such cases, the requirement of a "clear statement" was in effect.¹³⁵

The majority holding does not seem at variance with precedent until it is realized that Congress may have actually provided circumstantially through the statutory language itself that the Act apply extraterritorially. Specifically, Congress stated that the Act would "not apply to an employer with respect to the employment of aliens outside any State."¹³⁶ The argument by negative implication is, that since Congress sought to specifically exempt alien workers from coverage, it

130. 42 U.S.C. § 2000e et seq. (1964).

131. See *Arabian American*, 111 S.Ct. at 1236.

132. *Id.* at 1229-30.

133. *Id.* Bourselan, whose state law claims had been dismissed by the district court, also petitioned for certiorari individually in his claim against the company. The Court granted his petition and disposed of the two cases together. *Id.* at 1230.

134. *Id.* at 1231

135. *Id.* at 1235.

136. 42 U.S.C. § 2000e-1 (1988).

must have meant to include American workers.¹³⁷ In language that seems to give a restrictive presumption new vitality, the majority stated that “[i]f we were to permit possible, or even plausible interpretations of language such as that involved here to override the presumption against extraterritorial application, there would be little left of the presumption.”¹³⁸ However, as Justice Marshall pointed out in dissent, the duty of the Court is not merely to look at whether the statutory language specifically supports such application or whether it is too amorphous to be so read;¹³⁹ the Court’s mandate is to ascertain Congressional intent by “exhausting all the traditional tools.”¹⁴⁰ Marshall said further that the Court had not applied a “clear statement rule” since *Foley Bros.*, because such a rule is not designed to ascertain legislative intent, but rather to “shield important values from an *insufficiently strong* legislative intent to displace them.”¹⁴¹

Exactly why the majority read Title VII the way it did in *Arabian American* is debatable, but the decision itself has been the subject of intense scrutiny.¹⁴² What the Court’s decision offers is evidence of perhaps another shift in the Court’s perception of its role in determining extraterritorial application of labor and employment laws—that is, a shift to the restrictive.¹⁴³ In the final analysis, what motivated the Court

137. See *Arabian American*, 111 S.Ct. at 1237 (Marshall, J., dissenting).

138. 111 S.Ct. at 1233.

139. See 111 S.Ct. at 1237 (Marshall, J., dissenting).

140. 111 S.Ct. at 1237 (dissenting opinion). Justice Marshall described these “traditional tools” as “including legislative history, statutory structure, and administrative interpretations.” *Id.* at 1238. Compare Marshall’s list of tools with those in *Foley Bros.* See *supra* note 92 and accompanying text.

141. 111 S.Ct. at 1238.

142. See, e.g., Sean M. Bunting, Note, *The Extraterritorial Force of Title VII: Regulating the Conduct of American Employers Overseas*, 9 HOFSTRA LAB. L.J. 257. See also Schulte, *supra* note 72, at 376 and Adam M. Mycyk, Comment, *United States Fair Employment Law in the Transnational Employment Arena: The Case for Extraterritorial Application of Title VII of the Civil Rights Act of 1964*, 39 CATH. U.L. REV. 1109, 1156 (challenging validity of decision); see also Robert E. Riggs & Guy L. Black, *Supreme Court Voting Behavior: 1990 Term*, 6 B.Y.U. J. PUB. L. 1 (asserting ideological motive for decision); and see Kenneth Kirschner, *The Extraterritorial Application of the Civil Rights Act*, 34 LAB. L.J. 394, 407 (proposing non-application of Title VII prior to the *Arabian American* case).

143. Note the Court’s specific holding in *Arabian American* is not more restrictive than *McCulloch* or *Benz*, since, as has been shown, the Court rarely applies labor and employment law extraterritorially. However, the impact of the Court’s seeming disregard of the scheme of the Act and the conditions for which it was designed to remedy is significant if Congress does not change its current method of drafting statutes.

to so hold may not be as important as the divergence such a holding creates in light of changing economic conditions.

B. *Time For a Change?*

Although the content and strength of the presumption against extraterritoriality has varied over the years, one thing has remained the same. The constant has been the Court's lamentations about having to articulate a presumption in the first place. In many of the cases discussed previously, the Court has challenged Congress to be more explicit in drafting and by doing so has provided an extra justification for its holdings.¹⁴⁴ Although one can certainly understand the plight of the Court, a distinction should be noted between two types of statutes. There are those which do not give a clear indication of jurisdictional intent on the face of the statute, and those which are devoid of ascertainable intent from the entirety of the history and circumstances. Should the Court not take a stand when the facts of a case merely present a new situation, one not contemplated at the time of enactment of the statute, but one which arguably would have been included in the legislation had Congress been aware of the situation?¹⁴⁵ If the answer is yes, then a more flexible method of extraterritorial application—one which is more likely to afford justice to the litigants—could be utilized. This is not to say that the principle fears which have been the traditional

Stranger still is the way in which the majority distinguished *Steele* by stating that it was the jurisdictional language in *Steele* which evidenced the Congressional intent to apply the Lanham Act extraterritorially. See *Arabian American*, 111 S.Ct. at 1232. Recall that the conclusive fact in *Steele*, at least according to the *Steele* Court, was the nature of the law to be applied in light of the "broad jurisdictional grant." See *Steele*, 344 U.S. at 286.

144. See, e.g., *Lauritzen*, 345 U.S. at 593 (stating that the assertion of what is in the best interest of the United States "would be within the proprieties if addressed to Congress."); *McCulloch*, 372 U.S. at 22 (stating "just as we directed the parties in *Benz* to the Congress, which 'alone has the facilities necessary to make fairly such an important policy decision' . . . we conclude here that the arguments should be directed to the Congress rather than to us.") (citation omitted); and *Arabian American*, 111 S.Ct. at 1236 (stating that "Congress, should it wish to do so, may similarly amend Title VII and in doing so will be able to calibrate its provisions in a way that we cannot."). Congress took the Court's challenge and amended Title VII to cover American citizens abroad. See Civil Rights Act of 1964 as amended by Civil Rights Act of 1991, § 701(f). Congress did provide an exception where complying with the Act would cause the employer to violate foreign law. § 702(b) Cf. Michael A. Warner, Jr., Comment, *Strangers in a Strange Land: Foreign Compulsion and the Extraterritorial Application of United States Employment Law*, 11 NW. J. INT'L L. & BUS. 371.

145. See *supra* notes 87-89 and accompanying text.

underpinning of the presumption against extraterritoriality would be ignored, just that they would be balanced against other concerns.

In these cases, the Court has announced a fear of interference with the laws of other nations.¹⁴⁶ But it should first be noted that there is no general prohibition against the exercise of extraterritorial jurisdiction found in international law.¹⁴⁷ Additionally, the Court itself has recognized that the United States may regulate the conduct of its citizens abroad.¹⁴⁸ Of course, it complicates the matter if the facts which give rise to the dispute occurred in a foreign nation, but not fatally so if the law of the situs does not cover the situation or does not conflict with American law.¹⁴⁹ This notion in itself is not repugnant to the holding already announced by the Court in *Steele v. Bulova*.¹⁵⁰

In this alternative framework, the next line of analysis would be to ascertain the intent of Congress to have the statute apply extraterritorially. However, if it had already been established that neither international law, nor the law of the foreign situs of the action precluded the entry of American law, why articulate a restrictive presumption?¹⁵¹ The Court could in that event balance the interest of the rights sought to be vindicated through litigation with the possible effects on foreign sovereignty and foreign relations. The more qualitative contacts the litigants have vis-à-vis the American law, the more weight that should be given to application of the statute.¹⁵² Conversely, the more likely that the litigation would *actually* interfere with foreign interests (not just violation of foreign law, but also infringement upon custom and industry standards, for example), the more weight the Court should give to non-application.¹⁵³

The Second Circuit in *Pico* recognized that “[i]n the present ‘global economy’ ever-expanding trade makes it increasingly possible that foreign industry might affect commerce ‘between a foreign country and

146. See *supra* notes 39-42 and accompanying text. See also *supra* notes 128-29 and accompanying text.

147. See Gary Z. Nothstein & Jeffrey P. Ayres, *The Multinational Corporation and the Extraterritorial Application of the Labor Management Relations Act*, 10 CORNELL INT'L L.J. 1, 13 (1976). See also *supra*, note 64 and accompanying text.

148. See *supra* notes 61-66 and accompanying text.

149. See Nothstein & Ayres, *supra* note 147, at 21-25.

150. See *supra* notes 67-75 and accompanying text.

151. Cf. Nothstein & Ayres, *supra* note 147, at 30.

152. *Id.* at 30-31.

153. Compare to the “governmental interest technique” as articulated in Nothstein & Ayres, *supra* note 147, at 32-34.

any State.”¹⁵⁴ Precisely because this is the current reality, the fact situations presented to the courts have outpaced the development of the presumption against extraterritoriality. Writing just after the Court had decided *McCulloch*, Professor David Currie articulated the Court’s failure in this regard when he stated that:

Mr. Justice Clark correctly acknowledged in *McCulloch*, as the Court has often recognized, that in international conflict of laws as well as elsewhere a statute means what the legislature intended it to mean. But the attempt to carry out the will of Congress should not be abandoned simply because legislative history reveals no evidence of attention to the specific problem at hand. Every law, as Mr. Justice Holmes taught, is an expression of social policy; the job of statutory construction is to ascertain and effectuate the purpose for which the statute was enacted. A statute, the Court has written, ‘must be read in the light of the mischief to be corrected and the end to be attained.’¹⁵⁵

IV. THE EFFECTS

As illustrated by the Supreme Court’s decision in *Arabian American* and the Second Circuit’s decision in *Pico*, the judicial route of choice in the changed world so far is one of adherence to the canons of the past. The Court can hardly be blamed for not rushing to undertake a task which is not only unfamiliar to its daily exercise, but also contrary to its mandate; drafting statutes is for the legislative branch. Putting aside the issue of the application of labor and employment laws to American citizens abroad, do the Court, the Congress, or the People of this nation want a South Korean labor union to have “justice” in an American court against an American company? Under the traditional American approach to dealing with foreign interests, perhaps few would take up the union’s cause. However, after watching American corporations migrate in vast numbers to places such as South Korea, in search of more favorable labor costs and perhaps more favorable *labor laws*, the People might want to re-evaluate that question.

It is not the intent of this section to quantitatively measure the impact of the presumption against extraterritoriality on corporate migration. There are no doubt countless factors which combine to spur

154. *Pico*, 968 F.2d at 195 (quoting the jurisdictional language of the LMRA).

155. *See Currie, supra* note 1, at 45.

corporations to locate or relocate their operations in foreign countries. This section merely attempts to briefly show what economists have written about American labor policies and their impact on the nation's economy and on the labor movement. The eye here is to be placed on divergence in American law and international business reality.

A. *Economics in a Changed World*

Changed world conditions have impacted the effectiveness of American labor policy. Because of the increase in capital mobility, Direct Foreign Investment (DFI) has increased where factor costs are lower.¹⁵⁶ As a result, "[b]y moving or threatening to move, corporations are in perfect position to force one group of workers to compete directly with another."¹⁵⁷ Therefore, the power of unions to bargain and strike is diminished because management can "simply walk off with the machinery."¹⁵⁸ One of the effects of the decline in union power has been a decline in wage increases. In the United States during the period from 1982 to 1988, pay for non-union workers rose significantly more than for union workers.¹⁵⁹ In the past, union workers had fared better than their non-union counterparts.¹⁶⁰ Some economists feel that the effectiveness of traditional policies of advancing union worker's interests is declining as the transnational economic climate develops.¹⁶¹ At issue in restructuring governmental policies designed to meet the world economic changes are macro-economic aspects such as freedom of move-

156. See JAGDISH BHAGWATI, *POLITICAL ECONOMY AND INTERNATIONAL ECONOMICS* 310 (Douglas A. Irwin ed., 1991). Factor costs comprise the various inputs involved in the production process, including direct and indirect labor costs.

157. Barry Bluestone, *Deindustrialization and Unemployment in America*, in *DEINDUSTRIALIZATION AND PLANT CLOSURE* 12 (Paul D. Staudohar and Holly E. Brown, eds., 1987).

158. June Nash, *The Impact of Worldwide Industrial Restructuring on a New England Community*, in *LABOR IN THE CAPITALIST WORLD-ECONOMY* 264 (Charles Bergquist ed., 1984).

159. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, *BULLETIN 2319, EMPLOYMENT COST INDEXES AND LEVELS, 1975-88* at 2 (1988). Union workers wages rose 18.1% while non-union workers wages rose 26.1%. *Id.*

160. *Id.*

161. See RICHARD EDWARDS AND PAOLO GARONNA: *THE FORGOTTEN LINK: LABOR'S STAKE IN INTERNATIONAL ECONOMIC COOPERATION* 115-17 (1991). The authors suggest that traditionally, the two methods by which labor has sought to advance its interests are through national labor unions and social democratic state politics. They view these methods as becoming less effective in carrying out the goals of labor as the international economic structure becomes more regionalized by investment zone and not contained by geographical sovereignty. *Id.*

ment and management of mass migration, and micro-economic aspects such as occupational health and safety and child care.¹⁶² Although some of the issues are not new, economists from different theoretical camps argue that a change in policy is required to cope with change in the international economy.

Some argue that failed economic policy and misprioritization stand in the way of economic evolution. For example non-wage labor costs, such as benefits, pensions and job security devices—things sought to be enforced through collective bargaining agreements—are increasingly important items for companies to control, and could be easily targeted by governmental policy for change.¹⁶³ However, the political ramifications of mandating short-term cuts in such costs to promote long-term competitiveness are seen as undesirable. Furthermore, the significance of maintaining an affirmative policy rather than a policy of inaction is not seen as persuasive.¹⁶⁴ But the failure to strive for a change in policy leaves in place antiquated federal labor laws which “continue to distort the playing field in U.S. labor relations.”¹⁶⁵ American corporations are no longer bothering to play within the rules of American labor laws, they merely subvert them by going abroad, defeating the purpose of such laws.¹⁶⁶

The purpose of the LMRA was to provide balance in the relationship between employer and employee.¹⁶⁷ Multinational corporations (MNC's) are now able to easily transfer “economic activities to places where unions are weak and labor costs and standards are low.”¹⁶⁸ By being willing to move their operations to developing nations, American firms have taken advantage of the fact that unions have traditionally found it difficult to effectively expand their organizations internationally.¹⁶⁹ Even where American companies can make a reasonable profit

162. *See id.* at 117-21.

163. *See generally* ROBERT A. HART, *THE ECONOMICS OF NON-WAGE LABOUR COSTS* 7-33 (1984) (defining non-wage labor costs) and *see id.* at 162 (stating that there are strong arguments for government policies designed to reduce such costs).

164. *See id.* at 162-63.

165. MORGAN O. REYNOLDS, *MAKING AMERICA POORER: THE COST OF LABOR LAW* 187 (Cato Institute 1987).

166. *See* Nash, *supra* note 158, at 264.

167. *See supra* notes 2-3 and accompanying text. *See also* note 118 and accompanying text. *Cf. supra* note 115 and accompanying text.

168. RAY MARSHALL, VERNON M. BRIGGS, JR., AND ALLAN G. KING, *LABOR ECONOMICS: WAGES, EMPLOYMENT, TRADE UNIONISM, AND PUBLIC POLICY* 641 (5th ed. 1984).

169. *Id.* *See also*, Nash, *supra* note 158, at 264.

in the United States, they are willing to move to foreign countries to realize minimal profit increases when the climate for economic expansion is better abroad.¹⁷⁰ Thus the balance, once guaranteed by federal labor law, has shifted unfavorably for unions.¹⁷¹

B. *Solutions*

There is a division among economists as to what theory, protectionism or free marketeering, will best serve American workers. Some economists see protectionist measures as an important way to re-energize the labor movement, as at least a beginning to a solidifying of the American industrial base.¹⁷² Specifically, one theory of coping with corporate flight and deindustrialization is to have stricter plant-closing laws and to statutorily strengthen union's bargaining position or weaken that of corporations.¹⁷³ Other economists take the free market approach and suggest that in addition to promulgation of laws which open transnational trade, laws governing, among other things labor, taxation, and insurance should be harmonized therewith.¹⁷⁴ The free marketeers see the very nature of unions in the current economic climate as repressive and would seek to do away with much labor legislation.¹⁷⁵

A perhaps less extreme view is that the policymakers in the United States must see things the way they are now, not the way they would

170. See Bluestone, *supra* note 157, at 12.

171. The advantages which various countries have for American firms may not necessarily correspond to the level of development. For example, although the American influence on the development on South Korea, the center of the dispute in *Pico*, has found the country with somewhat advanced labor legislation, a diminished enforcement capability inherent in the South Korean system undermines effectiveness of the laws. See INTERNATIONAL LABOR PROFILES 174 (Grand River Books 1982) (a compilation of a series of pamphlets published by the BUREAU OF INTERNATIONAL LABOR AFFAIRS, U.S. DEP'T OF LABOR). In some developing countries, however, human rights violations and illegal contracts are the result of the lower social costs of production. See WALTER R. MEAD, THE LOW-WAGE CHALLENGE TO GLOBAL GROWTH: THE LABOR COST-PRODUCTIVITY IMBALANCE IN NEWLY INDUSTRIALIZED COUNTRIES 24 (Economic Policy Institute 1990).

172. See generally BARRY BLUESTONE ET AL., CORPORATE FLIGHT: THE CAUSES AND CONSEQUENCES OF ECONOMIC DISLOCATION (The Progressive Alliance 1981).

173. See *id.* at 79-94 and Bluestone, *supra* note 157, at 14.

174. See EDWARDS AND GARONNA, *supra* note 161, at 35.

175. See REYNOLDS, *supra* note 165, at 148 (stating that "[e]xpressed in blunt terms, U.S.-style unions are government-supported worker cartels that interfere with the price mechanism and therefore impede the advance of prosperity. A prime objection to unions is that they reduce the level of real wages, despite all the ostentatious struggle to raise the prices of union labor.").

like them to be as an extension of the time when the United States ruled the world economy.¹⁷⁶ Many theorists agree that the regional nature of the developing centers of production will break down the traditional notion of nationalism with regard to labor.¹⁷⁷ As a result, unions may have to abandon historically adversarial positions vis-à-vis management¹⁷⁸ as the standard of living of union members will be lowered one way or the other.¹⁷⁹

V. CONCLUSION

Congress has left the jurisdiction-granting provisions of some of the more important labor and employment laws open for interpretation by the Supreme Court. The Court's task in evaluating nebulous statutory wording for the sometimes "mythical" intent of Congress is not enviable. However, the Court's analysis appears unfulfilling from the perspective of those seeking to enforce such laws extraterritorially and those who favor a basis of interpretation which coincides with the current world economic conditions. Congress has not articulated a new philosophy of the fundamental rights of employees and employers which will guide the United States into the next century, and the Court has not felt itself at liberty to impose any view other than that which flows through judicial restraint.

In the context of today's complex and internationally integrated economy, the labor laws which have been the subject of the debate over extraterritorial application seem much older than their years. It would be difficult for any jurist to find a meaningful way to correlate a statute which was written in part to remedy the perceived problem of communist infiltration into labor unions,¹⁸⁰ to a fact situation involving multiple countries, multiple layers of corporate entities and a multitude of ramifications for choosing one road or the other. The answer does not necessarily lie in holding American-owned foreign subsidiaries amenable to suit from their foreign employees in American courts. But to have the Court attempt to extrapolate what the intent of Congress in 1935 or 1947 would be today is folly. The current

176. See HAZEL J. JOHNSON, *DISPELLING THE MYTH OF GLOBALIZATION: THE CASE FOR REGIONALIZATION* 150 (1991).

177. See, e.g., *id.* at 1-16. See also EDWARDS AND GARONNA, *supra* note 161 at 116 (stating that "the economic world in which workers must seek to advance and defend their interests can no longer be appropriately conceived of in national units.").

178. See JOHNSON, *supra* note 176, at 131.

179. *Id.* at 140.

180. See H.R. REP. NO. 245 on H.R. 3020, 80th Cong., 1st Sess. 295 (1947).

Congress should take heed of the Court's challenges and make its meaning clear with regard to extraterritorial application of labor and employment laws; but Congress should first determine what it intends to mean by taking notice of the expanding economy of this shrinking world.

*Anthony Scott Chinn**

* J.D. Candidate, 1994, Indiana University School of Law—Indianapolis.

Allocation of the Radio Spectrum: Is the Sky the Limit?

I. INTRODUCTION

The radio spectrum, also called the electromagnetic spectrum, is a critical and scarce natural resource.¹ It has been compared to a river,² real estate,³ and farmland.⁴ Radio spectrum is instantly renewable at no cost; when a portion of the segment is unoccupied, it is freely available to other users.⁵ Like other natural resources, it can be polluted,⁶ it can be wasted via inefficient practices,⁷ and it can be rendered almost useless by overcrowding and interference.⁸ Given current technology, radio spectrum can also be defined as a limited natural resource,⁹ since only a finite portion of the atmosphere above the Earth is amenable to present communications technology.

Because radio spectrum cannot be seen, heard, smelled, or touched, it has been taken for granted by the public at large in much the same

1. Christian A. Herter, *The Electromagnetic Spectrum: A Critical Natural Resource*, 25 NAT. RESOURCES J. 651 (1985).

2. *Id.* at 653.

3. Milton Mueller, *Technical Standards: The Market and Radio Frequency Allocation*, TELECOMM. POLICY, March 1988, at 42, 44. The author suggests that since the way to deal with scarcity in real estate is to build skyscrapers, a solution to the spectrum problem can be found by increasing technology so as to manipulate higher frequencies; to increase the ceiling on the maximum usable frequency. There are many ideas for changing technology to either move higher on the spectrum or increase existing spectrum efficiency. A compilation of these is provided in Electronics Division of the Institution of Electrical Engineers, *Second International Conference on Radio Spectrum Conservation Techniques, 6-8 September, 1983*, UNIVERSITY OF BIRMINGHAM, U.K., 1-159 (1983).

4. Jack Taylor, *Technology vs. Allocation: Dividing Up the Radio Spectrum*, TELEPHONY, Oct. 8, 1990, at 24.

5. Herter, *supra* note 1, at 653.

6. *Id.*

7. Taylor, *supra* note 4, at 24. The author compares what has happened to the radio spectrum with the settlement of the American West. When poor farming practices exhausted the soil, people merely moved farther toward California. Eventually, the open frontier ran out, which forced farmers to use more efficient methods of farming to conserve soil. According to Taylor, the same thing has occurred with spectrum. Overcrowding and interference from inefficient use of spectrum has led to the manipulation of spectrum at higher and higher frequencies, until the ceiling of maximum usable frequency (MUF) was reached, resulting in the need to reconsider spectrum allocation practices.

8. Herter, *supra* note 1, at 655.

9. *Id.*

way as clean air and fresh water have been in the past. If radio spectrum is to continue to support such traditional technologies as radio and television broadcasting, air traffic control, and police and emergency communications, as well as accommodate newer communications like cellular telephones and satellite systems, it must be allocated equitably and efficiently, in a manner that takes advantage of the transmission characteristics of available frequencies.

Concern with the scarcity of radio spectrum is not new. In 1950, Harry Truman remarked:

The most pressing communications problem at this particular time, however, is the scarcity of radio frequencies in relation to the steadily growing demand. Increasing difficulty is being experienced in meeting the demand for frequencies domestically and even greater difficulty is encountered internationally in attempting to agree upon the allocation of available frequencies among the nations of the world.¹⁰

Truman realized 40 years ago that the scarcity of the radio spectrum had international as well as domestic implications for the growth of communications technology.

The problem of radio spectrum allocation has emerged again as an issue of international importance for several reasons. First, a variety of new communications products are being developed. The companies representing technologies such as high definition television (HDTV),¹¹ personal communications services (PCS),¹² and digital audio broadcasting¹³ do not want to expend resources on product development without some guarantee that they will be allocated the spectrum they need to support these new products. Providers of these technologies also assert that spectrum allocation methods in the United States are too slow, leaving them at a competitive disadvantage to Japan and Western Europe.¹⁴ Second, the Federal Communications Commission

10. Harry S. Truman, quoted in OFFICE OF TECHNOLOGY ASSESSMENT, CONGRESS OF THE UNITED STATES, *THE 1992 WORLD ADMINISTRATIVE RADIO CONFERENCE: ISSUES FOR U.S. INTERNATIONAL SPECTRUM POLICY 1* (1991) [hereinafter WARC-92].

11. Janine S. Natter, *Scarcity of the Airwaves: Allocating and Assigning the Spectrum for High Definition Television (HDTV)*, 13 HASTINGS COMM./ENT. L. J. 199, 201 (1991).

12. Carson E. Agnew, *Efficient Spectrum Allocation for Personal Communications Services*, IEEE COMMUN. MAG., Feb. 1991, at 52, 54.

13. Ernest A. Hakanen, *Digital Audio Broadcasting: Promises and Policy Issues in the USA*, 15 TELECOMM. POLICY 491-96 (1991).

14. Mike Mills, *Tight Squeeze on Spectrum Tunes Out Competition*, 48 CONG. Q. WEEKLY REP. 2823, 2824 (1990).

(FCC), the government agency responsible for spectrum allocation within the United States, has already notified one user group, electric utilities, that they will have to move off a segment of spectrum to make room for personal communications services (PCS) and personal communications networks (PCNs).¹⁵ Third, another group of spectrum users, amateur radio operators, has had legislation introduced in both the House and Senate that would protect amateur radio allocations. S. 1372¹⁶ and H.R. 73¹⁷ would mandate the FCC to provide equivalent spectrum for amateur radio operators should any of their existing spectrum be reallocated for other purposes. Both bills reveal that amateur radio has already lost over 100 MHz of spectrum through reallocation by the FCC.¹⁸ Such so-called first generation services may be faced with relinquishing portions of their spectrum in order to make room for new technologies.¹⁹ In addition, those that are non-mobile in nature may be forced to switch from wireless to wireline technology,²⁰ which may involve expensive and extensive retrofitting for users of these services. Fourth, the World Administrative Radio Conference, the international body responsible for allocating radio spectrum for the entire world, met in Torremolinos, Spain, for a month, beginning February 3, 1992.²¹ The ability of WARC-92 to provide a viable forum

15. Steven R. Rivkin, *FCC to Electrics: Move, Use, or Lose!* PUB. UTIL. FORT., May 1, 1992, at 13.

16. S. 1372, 102nd Cong., 1st Sess., 137 CONG. REC. S8617 (1991). Text reads: "(2) The Federal Communications Commission shall not diminish existing allocations of spectrum to the Amateur Radio Service after January 1, 1991. The Federal Communications Commission shall provide equivalent replacement spectrum to the Amateur Radio Service for any frequency reallocation after January 1, 1991."

17. H.R. 73, 102nd Cong., 1st Sess., 137 CONG. REC. H56 (1991). As of this writing, neither bill has been passed and the FCC has rejected H.R. 73. See *FCC Rejects Amateur Spectrum Protection*, CQ, Dec. 1992, at 143 and *Congress Adjourns With No Action on Amateur Radio Bills*, QST, Dec. 1992, at 89.

18. *Id.* Text reads: "(5) the Federal Communications Commission has taken actions which resulted in the loss of over 100 MHz of spectrum to amateurs."

19. Ray Kowalski, *Currents*, CQ, Nov. 1992, at 11, 12. CQ is not an abbreviation, but is the name of an amateur radio journal. When amateur radio operators want to contact each other, they call CQ, then their call signs, on the air.

20. *Id.* at 14. The transition between wireless and wireline transmission technology has been called the Negroponte Switch. *Id.* However, the switch is limited by whether the communications needed are mobile or non-mobile, since it is not practicable to use wireline technology for mobile applications.

21. David Sumner, *It Seems to Us . . . WARC-92*, QST, Feb. 1992, at 9. QST is not an abbreviation, but is the name of an amateur radio journal. Its name comes from the Q signals, a shortened way to communicate, and is a general call to all amateur radio operators.

for radio spectrum allocation is crucial in determining the role of WARC's in allocating spectrum in the future.

In addition to economic factors, geopolitical changes make a discussion of spectrum particularly appropriate. The last major World Administrative Radio Conference was held in 1979 (WARC-79). However,

[t]he world today is a far different place from 1979. Western Europe is more unified, eastern Europe less so. Some countries, especially along the Pacific rim, have made startling economic progress while other economies have faltered and some have even collapsed. Former enemies have become allies; former outcasts have been welcomed back to the world community.²²

Thus, there are international political shifts that will cause the United States to seek new alliances to achieve the spectrum allocation goals it desires. At the same time, developing countries or countries whose economies have been unprecedented growth may have greater demands for spectrum than they have had in the past. On the other hand, developing countries whose economies cannot yet support substantial communications technologies still want to preserve their allocation of radio spectrum for future communications needs.

Few outside the communications industry realize the magnitude of the problem of scarce spectrum and how it will impact the development and viability of communications technology in the future. New users and service providers are faced with nearly zero-sum growth because most of the technologically viable spectrum has already been allocated.

[T]he commercial telecommunications world is engaged in a titanic struggle. At stake is telecommunications supremacy, or maybe even survival. Telecommunications users and service providers are battling telecommunications innovators who see their chance to gain a share of the multi-billion-dollar industry. Given the absence of vacant spectrum to support new technologies, the spectrum innovators can only prevail at the expense of the spectrum incumbents.²³

In addition, a report by the Office of Technology Assessment to help United States delegates prepare for WARC-92 listed six major trends

22. *Id.*

23. Kowalski, *supra* note 19, at 14.

that would shape communications policy at WARC-92 and in the future: the pace of technological change;²⁴ globalization;²⁵ the rising importance of regionalism;²⁶ liberalization and privatization;²⁷ telecommunications and economics;²⁸ and new players and alliances.²⁹

This note will look at the allocation of spectrum from a historical perspective to see whether current mechanisms are appropriate for the future, given intense competition for spectrum and a changing geopolitical and economic landscape that will further increase the demand for spectrum. Auctions, user fees, and flexible use will then be examined to see whether they might apportion spectrum more fairly and efficiently than current allocation mechanisms.

II. WHAT IS SPECTRUM: A TECHNICAL OVERVIEW

The birth of modern radio communication, and hence the discovery of radio spectrum, is usually credited to Guglielmo Marconi.³⁰ On December 12, 1901, Marconi was able to transmit the letter "S" in Morse code from St. John's, Newfoundland, to Cornwall, England, with a kite sent 400 feet in the air, a transmission of over 2,000 miles.³¹ Not only did this newly discovered ability to communicate over long distances excite the public, but it also fanned the flames of entrepreneurship in communications technology.³² A combination of this entrepreneurship and the powerful communications possibilities of the radio spectrum has provided modern society with television, shortwave and amateur radio, microwave ovens, air traffic control, infant monitors,

24. WARC-92, *supra* note 10, at 63.

25. *Id.*

26. *Id.* at 64.

27. *Id.* at 69.

28. *Id.* at 70.

29. *Id.* at 71.

30. CLINTON B. DESOTO, 200 METERS AND DOWN 10-15 (1936). However, other inventors also played a role in the discovery of the radio spectrum. Michael Faraday found a relationship between electromagnetism and light. James Clerk Maxwell theorized that electric phenomena could be reduced to motion in the form of waves, which traveled through a mysterious substance he called "aether." *Id.* at 10.

31. *Id.* at 15. Marconi's first wireless message was transmitted a total of two miles in 1896. On June 2, 1896, he applied for a patent from the British Patent Office. He used an oscillator as a transmitter, with a coherer as a receiver. He added a Loomis aerial to radiate the electromagnetic oscillations that made sound possible. *Id.* at 13.

32. *Id.* Some scientists considered Marconi a charlatan. He had not invented anything new, but had used familiar devices developed by others. *Id.* at 13.

and a host of other products and services which provide information, safety, entertainment, and communication. The entrepreneurial spirit is still evident today, with the introduction of such new products as cellular telephone and satellite communications, which depend on manipulation of the radio spectrum.

A basic understanding of how radio spectrum works is essential to seeing why it is both a crucial and a scarce natural resource. Radio waves are the foundation of wireless communications.³³ A radio wave can transmit information either as audio, video, or data signals by varying such characteristics as phase, amplitude, or frequency.³⁴ Radio waves are distinguished either by their frequency or by their wavelength.³⁵ Frequency is defined as the number of cycles a radio wave can complete in one second and is measured by an international unit of frequency known as a hertz (Hz).³⁶ Radio waves can also be designated by length of their wave, with the longer wavelengths having the lowest frequencies.³⁷ For example, the wavelengths for commercial AM radio broadcasting are very long, while those for microwaves are very short.³⁸

The radio spectrum is further classified into "bands" that group a series of radio frequencies together.³⁹ Bands are then described either by their wavelength or by name.⁴⁰ Hence, a band may be designated as high frequency (HF) or very high frequency (VHF), or it could be called the L-band, the S-band, or the K-band, a naming convention that was developed in World War II to keep actual frequencies secret.⁴¹ The International Telecommunication Union (ITU) uses band numbers, for example, Band 1 or Band 2, to classify frequencies,⁴² while bands

33. WARC-92, *supra* note 10, at 27.

34. *Id.* 1 hertz is equal to one cycle per second. Amplitude and frequency are used in the familiar designations of AM and FM for radio stations. These refer to frequency modulation or amplitude modulation.

35. *Id.* at 28.

36. *Id.* The name of the international unit for frequency measurement was in honor of Heinrich Hertz, who discovered that a spark could be induced to jump across an air gap between two wires, when a another spark was created in a circuit using a spark gap and an induction coil. DeSoro, *supra* note 30, at 10.

37. *Id.*

38. *Id.*

39. *Id.* at 29.

40. *Id.*

41. *Id.* See Figure 1 for a graph of frequency band designations and their corresponding wavelengths. *Id.* at 31. The designations of VHF and UHF can be found on many television control panels.

42. *Id.* at 29.

may also be designated to reflect the communications service which uses it, such as the AM or FM radio bands.⁴³

The ability of radio waves to transmit signals can be influenced by several factors.⁴⁴ The weakening of a signal as it travels through the atmosphere is called attenuation.⁴⁵ Attenuation happens when radio signals pass through rain, clouds, snow, or sleet, with radio signals at high frequencies being more affected by atmospheric conditions than those at lower frequencies.⁴⁶ This susceptibility to attenuation is one reason why communication over long distances is difficult at higher frequencies, especially those above 10 GHz.⁴⁷ Thus, the range of spectrum that can be economically manipulated by communications technology is currently limited by height restrictions.

Radio waves are both bent and reflected as they pass through the atmosphere.⁴⁸ Radio signals bend as they travel from one atmospheric layer to another, depending on the density of the atmosphere.⁴⁹ In addition, radio waves can also be reflected by the ionosphere, which is the top layer of the Earth's atmosphere.⁵⁰ The ionosphere is divided into D, E, F1, and F2, layers, with the D and E layers disappearing at night and the F layers combining into one,⁵¹ leading to changes in the reflective properties that influence long-distance communication possibilities.⁵² Reflection by the ionosphere makes it possible for radio signals to travel thousands of miles, enabling long-distance communications, particularly on the high frequencies (HF) between 3 and 30 MHz.⁵³ These same HF waves can catch shorter waves and channel them back to Earth using orbiting satellites.⁵⁴

43. *Id.* at 30.

44. *Id.* at 30-32.

45. *Id.* at 30.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 31.

50. *Id.*

51. LARRY D. WOLFGANG, THE AARL 1989-1992 TECHNICIAN CLASS LICENSE MANUAL FOR THE RADIO AMATEUR, 3-3 (1989).

52. *Id.* See Figure 2, which illustrates how the D, E, F1, and F2 bands encircle the earth, as well as their distance from the surface of the Earth, measured in miles. *Id.* at 3-3.

53. WARC-92, *supra* note 10, at 31.

54. Frederick O. Maia, *WARC-92 Could Impact Amateur Spectrum: 150 Nations to Meet February 3rd in Spain*, CQ, July 1991, at 82.

The amount of bending of a radio signal is related to its frequency, with less bending at higher frequencies.⁵⁵ At a certain frequency, atmospheric conditions prevent sufficient bending so that the radio signal cannot be reflected back to Earth.⁵⁶ This point on the radio spectrum is known as the maximum usable frequency (MUF),⁵⁷ a point which can be as high as 30 to 40 MHz or as low as 6 MHz. MUF may also be influenced by the time of day, the season, and atmospheric conditions.⁵⁸ MUF can also be affected by the sunspot cycle,⁵⁹ although no one is certain why this is so.

The behavior of frequencies above MUF indicates why these frequencies are not as good for long distance communications as those from 3 to 30 MHz. Above MUF, especially for frequencies above 1 GHz, radio signals travel in nearly straight lines from a transmitter to a receiver.⁶⁰ The distance of line-of-sight communications is generally limited to the horizon, but since the Earth is curved, this distance can also be affected by antenna height.⁶¹ Using line-of-sight communications requires that no obstacles be between the transmitter and the receiver, such as tall buildings or hills.⁶² However, some lower obstacles do not pose a problem if antennas are placed on top of towers or mountains.⁶³ Line-of-sight radio signals are also substantially affected by atmospheric conditions, such as temperature and the amount of water vapor in the air,⁶⁴ making it possible for radio signals to travel farther than normal.⁶⁵

The unpredictability of the distance abilities of higher frequencies, especially those above 1 GHz, makes them difficult to rely on for

55. WARC-92, *supra* note 10, at 31.

56. *Id.*

57. *Id.* See Figure 3 for a demonstration of how radio signals travel. Note that some bounce off the ionosphere at angles which make long distance communications possible. Others, particularly the signal on the left side of the diagram, head off into space, making them useless for communication. WOLFGANG, *supra* note 51, at 3-8.

58. *Id.*

59. JAMES P. DUX AND MORTON KEYSER, TALK TO THE WORLD: GETTING STARTED IN AMATEUR RADIO, 23 (1989). Some people theorize that the sunspots enrich the atmosphere with unusually high levels of ultraviolet radiation. This super-charged atmosphere is then more responsive to radio signals. *Id.*

60. WARC-92, *supra* note 10, at 31.

61. *Id.* "Line-of-sight propagation is accomplished by means of the space wave, a combination of a direct ray and one or more reflected rays." WOLFGANG, *supra* note 51, at 3-9.

62. *Id.*

63. *Id.* See Figure 4 for an illustration of the path of a groundwave from antenna to antenna. *Id.* at 32.

64. *Id.* at 31-32.

65. *Id.* at 32.

communications.⁶⁶ This lack of predictability means that international radio spectrum allocation is particularly challenging at these frequencies, since one of the basic functions of international spectrum management is to prevent or reduce interference.⁶⁷ Interference prevents the same frequency from being used again for many miles beyond the horizon because of the possibility that atmospheric conditions may carry a line-of-sight signal beyond its normal transmission limits, adversely affecting another country's communications.⁶⁸

Many users of the radio spectrum can operate in the same geographical region at the same time as long as they are on different frequencies; however, only one user can operate without interference on any one frequency in a given area.⁶⁹ These constraints mean that governments or other organizations need to allocate spectrum among a variety of user groups within a country or geographic region. Since radio spectrum cannot be confused within national boundaries and cannot be measured to a point past a country's borders, like the 12-mile limit of the territorial sea,⁷⁰ allocation of the radio spectrum must be determined at an international level before it can be further divided within a particular nation. Because the transmissions of one nation can interfere with or even jam transmissions of another, it became apparent several decades ago that international control of the radio spectrum was essential.⁷¹ Hence, a global organization was developed to set standards for international radio operation,⁷² particularly in the area of spectrum allocation. This organization is the International Telecommunication Union (ITU).

III. ORGANIZATIONS RESPONSIBLE FOR ALLOCATING SPECTRUM

There are international and domestic organizations and government agencies that allocate radio spectrum. Those most important for worldwide allocation are the International Telecommunication Union (ITU) and World Administrative Radio Conference (WARCs). Within the United States, spectrum is allocated by the Federal Communications Commission (FCC) and the National Telecommunications and Information Administration (NTIA).

66. *Id.*

67. *Id.*

68. *Id.*

69. Maia, *supra* note 54, at 82.

70. Herter, *supra* note 1, at 655.

71. Maia, *supra* note 54, at 82.

72. *Id.*

A. *The International Telecommunication Union (ITU)*

The International Telecommunication Union was established in 1865 by 20 European nations.⁷³ Originally called the International Telegraph Union, its responsibility was to facilitate the delivery of telegrams between member nations.⁷⁴ The system in place at the time was simple; messages were handed to other telegraph operators at the member nations' borders.⁷⁵ In 1885, telephone regulation was made part of the mission of ITU, with radio communication added in 1906.⁷⁶ That same year, the first of several telecommunications treaties was promulgated.^{77,78,79} In spite of these treaties, ITU continued to be the

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. Telecommunication (Wireless Telegraph), November 3, 1906, 37 Stat. 1565, Treaty Series 568, p. 556. Countries participating included Germany, the United States, Argentina, Austria, Hungary, Brazil, Bulgaria, Chile, Denmark, Spain, France, Great Britain, Greece, Italy, Japan, Mexico, Monaco, Norway, the Netherlands, Persia, Portugal, Roumania, Russia, Sweden, Turkey, and Uruguay.

78. Telecommunication (Radiotelegraph), July 5, 1912, 38 Stat. 1672, Treaty Series 581, p. 883, 1 L.T.S. 135. Countries participating included Germany and the German Protectorates, the United States and its possessions, the Argentine Republic, Austria, Hungary, Bosnia-Herzegovina, Belgium, the Belgian Congo, Brazil, Bulgaria, Chile, Denmark, Egypt, Spain and the Spanish Colonies, France and Algeria, French West Africa, French Equatorial Africa, Indo-China, Madagascar, Tunis, Great Britain and the British Colonies and Protectorates, the Union of South Africa, the Australian Federation, Canada, British India, New Zealand, Greece, Italy and the Italian Colonies, Japan and Chosen, Formosa, Japanese Sakhalin and the leased territory of Kwantung, Morocco, Monaco, Norway, the Netherlands, the Dutch Indies and the Colony of Curaçao, Persia, Portugal and the Portuguese Colonies, Roumania, Russia and the Russian Possessions and Protectorates, the Republic of San Marino, Siam, Sweden, Turkey, and Uruguay.

79. Telecommunications: Radiotelegraph, November 25, 1927, 45 Stat. 2760, Treaty Series 767, p. 683, 84 L.T.S. 97. Countries included the Union of South Africa, French Equatorial Africa and other colonies, French West Africa, Portuguese West Africa and the Portuguese Asiatic possessions, Germany, Argentine Republic, Commonwealth of Australia, Austria, Belgium, Bolivia, Brazil, Bulgaria, Canada, Chile, China, Republic of Colombia, Spanish Colony of the Gulf of Guinea, Belgian Congo, Costa Rica, Cuba, Curaçao, Cyrenaica, Denmark, Dominican Republic, Egypt, Republic of El Salvador, Eritrea, Spain, Estonia, the United States, Finland, France, Great Britain, Greece, Guatemala, Republic of Haiti, Republic of Honduras, Hungary, British India, Dutch East Indies, French Indo-China, Irish Free State, Italy, Japan, Chosen, Taiwan, Japanese Sakhalin, the Leased Territory of Kwantung and the South Sea Islands under Japanese Mandate, Republic of Liberia, Madagascar, Morocco (with the exception of the Spanish Zone), Mexico, Monaco, Nicaragua, Norway, New

international body responsible for radio regulation. ITU made its first radio frequency allocation in 1927.⁸⁰

In 1932, ITU adopted its current name, the International Telecommunication Union, to reflect its responsibility for total oversight of communications on a global basis.⁸¹ ITU became a specialized agency of the United Nations (U.N.) in 1947,⁸² even though it is older than the U.N.,⁸³ pre-dating it by 80 years.⁸⁴ Its headquarters are in Geneva, Switzerland,⁸⁵ and 162 nations are currently members.⁸⁶ Almost every country in the world is a member of ITU, even though some are not members of the U.N.⁸⁷ These statistics suggest that most countries throughout the world recognize how vital radio spectrum is to efficient communication systems.

The most far-reaching responsibility of ITU is the allocation of radio frequencies to prevent interference between its member nations.⁸⁸ Member nations must then conform their own radio regulations to the international framework of radio agreements developed under the auspices of the ITU.⁸⁹ It is important to realize that the ITU has no power to prevent unauthorized use of a particular frequency.⁹⁰ However, the ITU can deny legal protection under the Radio Regulations to any user who engages in prohibited "harmful interference" to another radio service.⁹¹ Each member nation of ITU typically has its own organizations

Zealand, Republic of Panama, Paraguay, the Netherlands, Peru, Poland, Portugal, Rumania, Kingdom of the Serbs, Croats, and Slovenes, Siam, Italian Somaliland, Sweden, Switzerland, Surinam, Syro-Lebanese Territories, Republic of San Marino, Czechoslovakia, Tripolitania, Tunis, Turkey, Uruguay, and Venezuela.

80. Maia, *supra* note 54, at 82.

81. *Id.*

82. *Id.*

83. David Sumner, *WARC-92 Finds Room for New Radio Services*, QST, May 1992, at 25.

84. THE WORLD ALMANAC AND BOOK OF FACTS, 828 (1992). The charter for the United Nations became effective on October 24, 1945, upon ratification by the permanent members of the Security Council, along with a majority of other signatories.

85. Maia, *supra* note 54, at 82.

86. Kirk Kleinschmidt and Paul Rinaldo, *WARC-92: What it Means to You*, QST, June 1991, at 16.

87. Sumner, *supra* note 83, at 25. According to the World Almanac, the U.N. has 150 member countries. WORLD ALMANAC AND BOOK OF FACTS, *supra* note 84, at 828.

88. Maia, *supra* note 54, at 82.

89. Kleinschmidt and Rinaldo, *supra* note 86, at 16.

90. Herter, *supra* note 1, at 658.

91. *Id.*

and government agencies that are responsible for domestic radio regulation.

B. *United States Spectrum Agencies*

Two agencies are responsible for allocating radio spectrum within the United States per regulations provided by ITU. These two agencies are the Federal Communications Commission (FCC) and the National Telecommunications and Information Administration (NTIA). The NTIA represents government and military radio users, while the FCC is responsible for other radio users, such as commercial, amateur, and local government.⁹² The FCC is the most important organization for spectrum allocation in the United States in that it has control over the bulk of current and potential radio spectrum users, including those in the communications industry whose new products will be vying for spectrum space in which to operate.

Allocation of radio spectrum in the United States began with the enactment of the Radio Act of 1912.⁹³ This legislation was in response to technical interference problems from government, commercial, and amateur spectrum users.⁹⁴ However, as commercial radio broadcasting expanded, the demand for radio frequencies soon exceeded the supply, and current legislation did not give the Secretary of Commerce the power to deny an application to use a particular frequency.⁹⁵

The Radio Act of 1927 was an attempt by Congress to cope with widespread interferences caused by an increasing number of radio broadcasters.⁹⁶ This Act created a Federal Radio Commission (FRC) that was given responsibilities for assigning frequencies and reducing interference.⁹⁷ To expand this type of regulation to all forms of communication, Congress enacted the Communications Act of 1934.⁹⁸ This Act incorporated the regulatory scheme adopted in the Radio Act of 1927⁹⁹ and is still used today to control telecommunications in the

92. Kleinschmidt and Rinaldo, *supra* note 86, at 16.

93. Michael C. Rau, *Allocating the Spectrum by Market Forces: The FCC Ultra Vires?* 37 CATH. U. L. REV. 149, 153 (1987).

94. *Id.*

95. *Id.* at 154.

96. *Id.* For a comprehensive discussion of early radio broadcasting, see TOM LEWIS, *EMPIRE OF THE AIR: THE MEN WHO MADE RADIO*, 1-142 (1991).

97. *Id.* The FRC was to exercise these powers according to the "public convenience, interest, or necessity." *Id.*

98. *Id.*

99. *Id.* at 155.

U.S.¹⁰⁰ The Act also resulted in the establishment of the Federal Communications Commission (FCC) as an independent government agency that would oversee and regulate wire and radio communication.¹⁰¹

The FCC must exercise its authority within the scope and spirit of international telecommunications agreements, including the ITU.¹⁰² Its primary functions are to allocate radio frequencies, determine which frequencies will be used by individual stations, and provide licensing to individual stations.¹⁰³ Operation of the FCC is conducted according to the Communications Act of 1934, the Administrative Procedures Act, and other laws of Congress. It is managed by five Commissioners who are appointed by the President, but who also must be approved by the Senate.¹⁰⁴ Commissioners serve for a term of five years, and no more than three can be from the same political party.¹⁰⁵ The President designates one of the Commissioners as FCC Chairman.¹⁰⁶ The FCC staff is further organized into different administrative bureaus.¹⁰⁷ In addition to their domestic responsibilities, both the FCC and the NTIA have a role to play in representing the United States in international radio spectrum allocation. This role becomes particularly important for World Administrative Radio Conferences (WARCs).

C. *World Administrative Radio Conferences (WARCs)*

World Administrative Radio Conferences (WARCs) are responsible for making changes to international radio regulations.¹⁰⁸ Deriving their authority from the ITU, they are international meetings of government and private industry representatives.¹⁰⁹ Radio regulations that are promulgated by a WARC are equivalent to treaties among ITU member nations, and must be adhered to when these nations formulate their own domestic communications regulations and policies.¹¹⁰ In the United States, the Senate must ratify the Final Acts of a WARC before they are binding on this country.¹¹¹

100. Maia, *supra* note 54, at 82.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* See also WARC-92, *supra* note 10, at 76-80.

108. Kleinschmidt and Rinaldo, *supra* note 86, at 16.

109. *Id.*

110. *Id.*

111. *Id.*

There have been many WARC's throughout the 20th century. Most of these WARC's were specialized, covering a single spectrum user group, a particular geographic area, or a limited portion of the spectrum.¹¹² Examples of specialized WARC's were ORB-85¹¹³ and ORB-88,¹¹⁴ which dealt primarily with regulation of the geostationary orbit. However, several WARC's in the past century have been considered "general." The first general WARC was held in 1903, with several significant WARC's held since then.¹¹⁵ Of these, perhaps the WARC of 1927, held in Washington, D.C., has been the most important.¹¹⁶ At this conference, the radio spectrum was first divided into segments, resulting in a Table of Frequency Allocations that countries later agreed to as a guide for domestic spectrum assignments at the 1932 WARC in Madrid.¹¹⁷ The last large WARC was held in 1979.¹¹⁸ WARC-92 is not a "general" WARC, but has been called to handle specific questions and issues identified at WARC-79 and subsequent specialized radio conferences.¹¹⁹

A WARC only has authority over specific issues that are on its agenda, which may be formulated as early as two years before the conference.¹²⁰ Each member nation of ITU is responsible for selecting its own delegates to a WARC.¹²¹ The United States team may contain dozens of delegates, representing the Department of State, which has overall responsibility for United States participation in WARC's, the NTIA, the FCC, and selected spokespersons from the communications

112. *Id.*

113. Milton L. Smith, *Space WARC 1985: The Quest for Equitable Access*, 3 BOSTON UNIV. INTL. L. J. 229-55 (1985); Barbara L. Waite and Ford Rowan, *International Communications Law, part II: Satellite Regulation and the Space WARC*, 20 INT. LAWYER 341-365 (1986); Gregory C. Staple, *The New World Satellite Order: A Report from Geneva*, 80 AM. J. INT. L. 699-720 (1986).

114. Stephen E. Doyle, *Space Law and the Geostationary Orbit: The ITU's WARC-ORB 85-88 Concluded*, 17 J. SPACE L. 13-21 (1989); Stephen E. Doyle, *Regulating the Geostationary Orbit: ITU's WARC-ORB '85-'88*, 15 J. SPACE L. 1-23 (1987).

115. Kleinschmidt and Rinaldo, *supra* note 86, at 18. The following were major WARC's that have been held in the last century: Berlin, 1903; Berlin, 1906; London, 1912; Washington, 1927; Madrid, 1932; Cairo, 1938; Atlantic City, 1947; Geneva, 1959; Geneva, 1971; and Geneva, 1979.

116. *Id.*

117. *Id.*

118. *Id.* at 16.

119. *Id.*

120. Sumner, *supra* note 83, at 25.

121. Kleinschmidt and Rinaldo, *supra* note 86, at 16.

industry.¹²² However, the representation of smaller countries may be handled entirely by officials from particular government agency, such as the Ministry of Post, Telephone and Telegraph, in lieu of broad-based representation from a wide variety of groups that is typical of larger countries.¹²³ In addition, a number of recognized international organizations, such as the International Amateur Radio Union (IARU), may be permitted to attend a WARC on behalf of its members.¹²⁴ Extensive preparation goes into a WARC, which is evident from documentation produced before and after WARC-92.^{125,126}

IV. WARC-92 AND SPECTRUM ALLOCATION

Since WARC-92 happened so recently, very little substantive information has been published to date. The most comprehensive sources are two articles that appeared in *QST*, the official journal of the American Radio Relay League,¹²⁷ and the United States Delegation Report,¹²⁸ submitted to the Secretary of State by Ambassador Jan Witold Baran, Chairman of the United States Delegation. These sources provide details on the purpose of WARC-92, preparations by the United

122. *Id.*

123. *Id.* at 17.

124. *Id.* at 16. The IARU is one of many organizations that has participated successfully in WARGs, protecting the spectrum interests of its members. Sumner, *supra* note 83, at 27.

125. WARC-92, *supra* note 10, 1-131. This is the most complete source the author has found on what spectrum is, the technological, economic, and geopolitical problems associated with it, an overview of international and national bodies dealing with spectrum, and future projections on spectrum allocation.

126. Jan Witold Baran, World Administrative Radio Conference for Dealing with Frequency Allocations in Certain Parts of the Spectrum (WARC-92) 1-79 (July 10, 1992), a substantive, but as yet unpublished, report on the purpose, preparations, and outcomes of WARC-92.

127. Sumner, *supra* note 83, 25-28; Paul L. Rinaldo, *WARC-92: Inside the United States Delegation*, *QST*, May 1992, at 28-30, 52. David Sumner is the Executive Vice President of the American Radio Relay League (ARRL), the U.S. organization for amateur radio operators. Paul L. Rinaldo is the Editor of *QST*, the official journal of the ARRL.

128. Baran, *supra* note 126, 1-79. Baran's report also features tables showing present and future spectrum allocations as a result of WARC-92, as well as detailed information on each of the committees, the attendees of WARC-92, and the number of representatives sent by ITU member nations. This report was obtained from the headquarters of the American Radio Relay League. It is not clear whether it will be published in an official form.

States delegation, and the important outcomes that were achieved on an international, as well as a national, level.

A. *Purpose of WARC-92*

The official title for WARC-92 was the World Administrative Radio Conference for the Allocation of Frequencies in Certain Parts of the Spectrum.¹²⁹ Its primary purposes were to revise radio frequency allocations for new and existing services and to specify conditions governing the use of these frequencies.¹³⁰ Although not a "general" WARC per se, WARC-92 was important because it had the broadest responsibilities for allocating radio spectrum since WARC-79. According to Ambassador Baran, "WARC-92 will play an important role in determining the economic competitiveness of the U.S. in international communications technologies and the ability of the U.S. to achieve its own domestic telecommunications goals."¹³¹ WARC-92 was also held to deal with issues that had been raised at specialized conferences on mobile communications, space, and broadcasting.¹³² The need for the conference became evident with new advances in communications technology making increasing demands on spectrum that had already been allocated to other uses.¹³³

Fifty-three delegates from the United States attended WARC-92, joining a total of 1400 delegates representing 127 ITU member nations and observers from 32 international and regional organizations.¹³⁴ WARC-92 was preceded by 18 months of preparation on behalf of the United States delegation, setting United States requirements for spectrum, submitting positions to be used in negotiation with other ITU member nations, participation in bilateral and multilateral negotiation sessions, and coordinating spectrum requests between established United States government and industry groups.¹³⁵

B. *Preparations for WARC-92*

Extensive preparations were made before WARC-92, from the distribution of a technical report that was agreed to in advance of the

129. *Id.* at 1.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* at 2.

conference to the setting of an agenda at an international level.¹³⁶ Member nations of ITU then prepared proposals that were due in Geneva eight months before WARC-92 was actually held.¹³⁷ These proposals were prepared in English, Spanish, and French.¹³⁸ Representatives of member nations then carefully read all proposals to identify positions that they could support or areas of potential compromise.¹³⁹

United States preparations for WARC-92 were initially handled by the NTIA and the FCC.¹⁴⁰ NTIA was responsible for developing government proposals, which it did in conjunction with the Interdepartmental Radio Advisory Committee (IRAC), which is chaired by the NTIA.¹⁴¹ This led to the formation of an ad hoc committee from IRAC, Ad Hoc 206, in August 1989, which then broke into four subcommittees: allocations to the high frequency broadcasting (HFBC) services; allocations to the bands 1-3 GHz; allocations at frequencies greater than 10 GHz; and regulatory matters.¹⁴² By April 1991, Ad Hoc 206 sent its positions on WARC-92 to the United States Department of State.¹⁴³

On the non-government side, the FCC formed an Industry Advisory Committee (IAC) to help collect information and develop proposals for WARC-92.¹⁴⁴ While IAC also divided into four subcommittees, it included public input through two Notices of Inquiry and one Supplemental Notice of Inquiry (NOI).¹⁴⁵ The FCC adopted its proposals on June 13, 1991.¹⁴⁶

The proposals from both the NTIA and the FCC were nearly identical, so only minimal coordination was needed.¹⁴⁷ The Department of State then forwarded these proposals to the ITU in July 1991.¹⁴⁸

136. Sumner, *supra* note 83, at 26.

137. *Id.*

138. *Id.*

139. *Id.*

140. Baran, *supra* note 126, at 7.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* Principle objectives of the United States at WARC-92 were:

- a) to obtain spectrum allocations needed to support a host of new mobile-satellite applications including those provided by low Earth orbiting satellites;
- b) to obtain frequency allocations to provide for new and improved terrestrial

Since these proposals lacked positions on satellite sound broadcasting and terrestrial digital audio broadcasting, an additional proposal was sent to the ITU in November 1991.¹⁴⁹

After United States proposals were sent, delegates from the United States conducted intensive preconference bilateral and multilateral consultations with individual countries, groups of countries, and international organizations.¹⁵⁰ These meetings included representatives from the Conference of European Posts and Telecommunications (CEPT), the Region 2 countries of the Inter-American Telecommunications Conference (CITEL), the frequency management arm of the North Atlantic Treaty Organization (NATO), and the Satellite Organizations and Notifying Administrations (SONA), which includes the International Telecommunications Satellite Organization (Intelsat), the International Maritime Satellite Organization (Inmarsat), and the European Telecommunications Satellite Organization (Eutelsat).¹⁵¹ In addition, joint industry-government trips were taken to Senegal, Côte d'Ivoire, Nigeria, Cameroon, Benin, Japan, Australia, and India.¹⁵² Other bilateral meetings included representatives from Hungary, Korea, Tanzania, Nicaragua, New Zealand, and Switzerland.¹⁵³ Such comprehensive diplomacy may become increasingly necessary if the United States is to achieve its spectrum allocation goals, particularly as new alliances are formed and the economies of both developed and developing countries improve or decline.

In addition to United States preparatory efforts, planning for WARC-92 continued on several fronts. Organizations included in this planning were ITU's International Radio Consultative Committee

-
- and satellite-based broadcasting services;
 - c) to obtain frequency allocations needed to support the National space program;
 - d) to protect vital U.S. national security interests;
 - e) to gain acceptance of new and revised radio service definitions into the Radio Regulations; and
 - f) to ensure adoption of new procedures to coordinate the operation of non-geostationary satellite networks with other services operating in the same bands.

Id. at 6.

149. *Id.* at 7.

150. *Id.* at 10.

151. *Id.* at 10-11.

152. *Id.* at 11.

153. *Id.*

(CCIR),¹⁵⁴ the International Frequency Registration Board (IFRB),¹⁵⁵ the Plenipotentiary Conference,¹⁵⁶ and the Administrative Council.¹⁵⁷

Authority over a WARC rests with a body called the Plenary, which then establishes committees to work in certain areas.¹⁵⁸ Once WARC-92 was convened, delegates were divided into six committees.¹⁵⁹ Committee 4 (Frequency Allocation), Committee 5 (Regulatory), and the Working Group to the Plenary (a Technical Committee) had the most significant input into the substantive matters of WARC-92.¹⁶⁰ Committee 4 divided itself into three groups, dealing with frequencies below 137 MHz, frequencies between 137 MHz and 3 GHz, and frequencies above 3 GHz.¹⁶¹

C. *Results of WARC-92*

WARC-92 proved to be a workable venue for allocating spectrum on a worldwide basis, with the United States able to achieve its goals for communications development without these goals being at the expense of other WARC participants and, according to Ambassador Baran,

[t]he United States delegation's broad objectives were to improve the efficiency of spectrum use and increase the availability of modern telecommunication services at competitive prices. Worldwide interest in liberalizing telecommunications regulations, coupled with the sweeping geopolitical changes in the years immediately preceding the WARC, created a climate favorable to reducing technical and operational barriers in international regulations.¹⁶²

The positive outcomes of WARC, especially the reallocation of spectrum for new technologies, show that it continues to be a significant mechanism in the international allocation of spectrum. However, as the speed of technological development increases, it may be that WARCs, or at least specialized WARCs dealing with a specific communications

154. *Id.* at 8.

155. *Id.*

156. *Id.* at 9.

157. *Id.*

158. Sumner, *supra* note 83, at 26.

159. Baran, *supra* note 126, at i-ii, Table of Contents.

160. Sumner, *supra* note 83, at 26.

161. *Id.*

162. Baran, *supra* note 126, at 2.

technology, will need to be held more often. This idea has been proposed,¹⁶³ as have changes in the structure of ITU and its related organizations,¹⁶⁴ so that they can more quickly respond to ongoing spectrum allocation demands and communications regulation in general.

Committee 4, the frequency allocation committee for WARC-92, considered 22 different requests for spectrum.¹⁶⁵ However, the most important of these frequency requests concerned shortwave radio,¹⁶⁶ satellite sound broadcasting,¹⁶⁷ mobile satellite services,¹⁶⁸ high definition television,¹⁶⁹ and space services.¹⁷⁰ Increased allocation for shortwave radio was considered essential, since such broadcasting is a vital part of promoting United States foreign policy goals.¹⁷¹ Shortwave radio saw a surge in popularity during the Gulf War of 1991. An additional 790 kHz was allocated for shortwave radio during WARC-92, including 200 kHz on the most optimal segment of the shortwave spectrum.¹⁷² Satellite sound broadcasting, which would provide digital audio broad-

163. Kleinschmidt and Rinaldo, *supra* note 86, at 17.

164. WARC-92, *supra* note 10, at 49-62. Some of the proposed changes have already been made to the structure of ITU.

The "new" ITU is organized into three sectors: Development, standardization and radiocommunication. Of the most interest to us is the Radiocommunication Sector, which includes the activities (other than standards-setting) of the CCIR. The work of the sector will be conducted through World and Regional Radiocommunication Conferences and Radiocommunications Assemblies, held every two years. Thus, "World Administrative Radio Conference" and "WARC" disappear from our lexicon.

Michael Owen and David Sumner, *The ITU Restructures*, QST, March 1993, at 103.

165. Baran, *supra* note 126, i-ii, Table of Contents. The Committee's 22 requests for spectrum allocation were: high frequency broadcasting; low earth orbit mobile-satellite service below 1 GHz; manned space communications near 400 MHz; aeronautical public correspondence; terrestrial mobile service; existing mobile-satellite service allocations; radio astronomy services; low earth orbit mobile-satellite services above 1 GHz; radiodetermination-satellite service; future public land mobile telecommunication systems; space services near 2 GHz; new mobile-satellite service allocations; broadcasting-satellite service (sound); wide RF-band high definition television; fixed-satellite service at 14.5 - 14.8 GHz; general-satellite service; inter-satellite service for LEOs; radiolocation-satellite service; inter-satellite service for data relay satellites; uplink power control beacons; deep space research; and new space research service allocations near 37/40 GHz.

166. *Id.* at 2.

167. *Id.*

168. *Id.* at 3.

169. *Id.* at 4.

170. *Id.*

171. *Id.* at 2. *See also Id.* at 17-19.

172. *Id.*

casting from satellites directly to individual receivers, was agreed on as a vital need by all ITU delegations.¹⁷³ Most ITU member nations chose 1452-1492 MHz as their frequencies.¹⁷⁴ However, the United States, China, India, Japan, and Russia decided upon the S-band for satellite sound broadcasting.¹⁷⁵ The use of satellite sound may have an additional benefit; it may reduce interference on the shortwave bands, because it will provide another method of offering audio communication outside of already overcrowded HF spectrum.¹⁷⁶ Similar allocations were made for terrestrial-based digital audio broadcasting.¹⁷⁷

One of the most significant allocation agreements was for mobile satellite services, including low earth orbit satellite systems, referred to as LEOS.¹⁷⁸ "Little" LEOS would provide data services at frequencies below 1 GHz,¹⁷⁹ and "Big" LEOS would support a wide range of communications services, including both data and voice.¹⁸⁰ Additional allocations were made for mobile satellite services (MSS) and geostationary orbit (GEO) satellite systems, so that spectrum will be available for these technologies in the future, since it is estimated that there will be tremendous demand for a wide variety of services that can be provided via mobile satellite systems.¹⁸¹ This technology could potentially

173. *Id. See also Id.* at 28-29.

174. *Id.* at 3.

175. *Id.* Source uses Russia. *See also* Rinaldo, *supra* note 127, at 52. Author uses Russian Federation.

176. *Id.*

177. *Id.*

178. *Id. See also Id.* at 19-21 and 24-25.

179. *Id.* These data-only systems require very little spectrum and can be operated with inexpensive mobile equipment. They are especially practical where population density is too low to consider investing in a communications infrastructure built on wire or optical fiber cabling. Developing countries are especially intrigued by this technology as a way to economically reach unserved segments of their populations without extensive investment in infrastructure. It is estimated that there may be a \$1-2 billion dollar market potential of LEOS, half from domestic sales and the other half being sold internationally. *Id.*

180. *Id.* "Big" LEOS will provide real time communications directly between two points any place in the world. They will also be able to interface with wireline systems or provide a direct connection between mobile terminals and satellites. Several U.S. companies are interested in these systems and counted on WARC-92 to ensure them the spectrum they will need before they are willing to make further investments in developing "big" LEOS. Estimates have suggested that by 21st century, there may be as many as 2 million subscribers to "big" LEOS. *Id. See also* Bruce S. Hale, *Big LEOS*, QST, April 1993, at 40-41.

181. *Id. See also Id.* at 23-24 and 27-28.

involve complex arrangements with terrestrial mobile systems and cellular and public correspondence networks.¹⁸²

The public at large might be most intrigued by the WARC-92 allocations for high definition television (HDTV) and space services. Committee 4 was able to allocate spectrum for wide-band HDTV, which will become available in 2007.¹⁸³ Frequencies were also allocated for several of NASA's projects, such as communications to support a space station, a moon colony, and a manned mission to Mars.¹⁸⁴ There was also an allocation for extra vehicular activity (EVA), which is needed when astronauts work outside of their space vehicles.¹⁸⁵ An additional allocation in support of the United States space program was the proposed data relay satellite system.¹⁸⁶ This will be instrumental in the multinational mission to planet Earth, a project which will provide extensive information for researchers in climatology and meteorology.¹⁸⁷

The United States was not the only ITU member nation to achieve its spectrum goals. Other countries were equally successful, with allocations made for Future Public Land Mobile Telecommunications Systems (FPLMTS),¹⁸⁸ aeronautical public correspondence,¹⁸⁹ general satellite services,¹⁹⁰ and very-long-baseline radiointerferometry (VLBI).¹⁹¹ In addition, the Working Group of the Plenary discussed wind profiler radars and decided to commission a study on this technology, as well as to slate a future conference to determine its spectrum requirements.¹⁹²

The question of political alliances was expected to be most evident in the deliberations of Committee 4. The traditional split between developed and developing countries was present, as delegates attempted to provide room on the spectrum for new technologies being contemplated by the developed countries without disenfranchising the more modest communication goals of developing countries.

It became evident that there were two camps; one advocating allocation for new technologies; the other willing to

182. *Id.*

183. *Id.* at 4. *See also Id.* at 29-30.

184. *Id.* *See also Id.* at 21, 27, and 33-34.

185. *Id.*

186. *Id.* *See also Id.* at 32-33.

187. *Id.*

188. Rinaldo, *supra* note 127, at 52. *See also* Baran, *supra* note 126, at 26.

189. *Id.* *See also* Baran, *supra* note 126, at 21-22.

190. *Id.* *See also* Baran, *supra* note 126, at 31.

191. *Id.* *See also* Baran, *supra* note 126, at 34.

192. *Id.* *See also* Baran, *supra* note 126, at 39.

benefit from new technologies so long as there was no change. Allocations for new technologies would have to come mostly from the fixed service. In the developed world, while there are fixed service operations at UHF, many of these operations have been or could be moved to frequencies above 3 GHz. Optical fiber is also increasing in use, which can free up some radio frequencies. In the developing world, the picture is entirely different. Frequencies all the way from HF through VHF and UHF are extensively used for fixed service operations, in many cases simply to provide basic telephone service to rural areas. Developing countries would like to take advantage of new technologies, which may involve satellites, but want to retain their terrestrial fixed services to provide basic domestic communications services.¹⁹³

More unusual was a rift between the United States and European countries, which had traditionally allied themselves to achieve common spectrum allocation purposes.

[A] split in the industrialized world was also evident. The United States came to WARC with numerous allocation proposals for mobile satellites, mainly targeted toward serving parts of the US and other countries with low population densities. Europe, on the other hand, was pushing terrestrial mobile service allocations, particularly the much heralded Future Public Land Mobile Telecommunications Systems (FPLMTS). These two giants were on a collision course.¹⁹⁴

These changes in alliances, particularly the new regionalism, had been predicted in WARC-92 preparation documents.¹⁹⁵

Based on the frequency allocations made, WARC-92 provided a basis for emerging technologies that could become essential parts of communication systems in the 21st century.¹⁹⁶ WARC-92 was also significant in that it showed that a public/private partnership and extensive diplomacy between both developed and developing ITU member nations can have a positive and lasting impact on spectrum allocation in the future.¹⁹⁷

193. *Id.* at 29.

194. *Id.*

195. WARC-92, *supra* note 10, at 64-69 and 71-73.

196. Rinaldo, *supra* note 127, at 52.

197. Letter from Jan Witold Baran, Ambassador and Chairman, United States Delegation, to James E. Baker, Secretary of State, 2 (July 10, 1992).

V. OTHER ALLOCATION PROPOSALS

A variety of authors have proposed alternative ways to allocate the radio spectrum. These proposals focus more on allocations at the national level. A discussion of each reveals strengths and weaknesses that may help determine whether they could successfully be implemented either domestically or internationally. It is first useful to review how spectrum is currently allocated, then to look at three of the most commonly proposed alternatives: auctions, user fees, and flexible use. Finally, the legal and economic implications of these three alternatives must be considered from both a national and an international view.

A. *Current Allocation Mechanisms*

Radio spectrum is currently allocated first at the international level. WARC-92 is a good illustration of how ITU member nations come to a WARC with extensive preparation and negotiation already completed. Within a WARC, delegates from member nations reach agreement on how the spectrum will be allocated on a worldwide basis. Typically, agreements can be reached that are satisfactory to the majority of member nations. Member nations that are unhappy with allocation decisions can request secondary allocations,¹⁹⁸ ask for footnotes to protect their desired frequencies,¹⁹⁹ or split the service into different frequencies among ITU regions.²⁰⁰

WARC-92 was successful in that it made great strides in finding spectrum for new technologies without hampering existing spectrum users. The strength of a WARC-type system of spectrum allocation is evident in that international cooperation is fostered, which hopefully will result in compliance with allocation decisions. On the other hand, when WARCs are held sporadically, new technologies needing spectrum may have to wait several years before a commitment is made to allocate spectrum to them. With rapid developments in communications technology, pressure will build for spectrum allocation long before a WARC can be prepared and held. In addition, many of the WARC-92 decisions will not be implemented for 10-15 years.²⁰¹ While it is only fair to give

198. Rinaldo, *supra* note 127, at 52. Secondary allocations were made for very-long-baseline radiointerferometry (VLBI).

199. *Id.* at 30. Footnotes were requested by the U.S. for "Little" LEOS to protect existing services.

200. *Id.* at 52. This was used to satisfy spectrum needs for HDTV among a number of ITU member nations who wanted to use different segments of the spectrum.

201. Baran, *supra* note 126, at 1.

existing spectrum users sufficient time to move onto alternate spectrum, waiting periods of a decade or more slow down the product development process in a global economy where companies must innovate to remain competitive.

At the domestic level, the FCC is primarily responsible for spectrum once allocations have been made at a WARC. The FCC traditionally has followed a licensing scheme where companies and individuals make direct application.²⁰² Often cumbersome and time-consuming, “[t]he process by which the Federal Communications Commission allocates the nongovernment portion of the spectrum is in essence a complex series of coordinating activities. It includes negotiations with numerous other parties, both public and private.”²⁰³ Over time, the FCC has adopted several principles to help it decide whether to grant a license,²⁰⁴ which have been published in some form since 1935.²⁰⁵ Looking at past decisions, the FCC seems to give the most weight to safety of life and property, the number of people served, and the amount of capital investment involved.²⁰⁶

Currently, the FCC relies on a “block allocation” system, where the FCC estimates what a communications service will need and then

202. For example, once an amateur radio operator has passed the necessary examinations and Morse code requirements, a short application is filled out by a Volunteer Examination Coordinator (VEC). This application is forwarded directly to the FCC. Within 4-8 weeks, a license with callsign is sent directly to the applicant. The only charge is a \$4.95 fee for Technician and higher license classes, which subsidizes the administration of the examination process.

203. John O. Robinson, *Spectrum Allocation and Economic Factors in FCC Spectrum Management*, 19 IEEE TRANS. ELECTROMAGNETIC COMPAT. 182, 183 (1977).

204. *Id.* at 185. These principles are:

- a) whether the service in question really requires the use of radio or whether wireline is a practical substitute;
- b) radio services which are necessary for safety of life and property deserve more consideration than those which are more in the nature of conveniences or luxuries;
- c) where other factors are equal, the Commission attempts to meet the request of those services which will render benefits to the largest segment of the population;
- d) whether the service meets a substantial public need and has a reasonable probability of being established on a viable basis;
- e) consideration of the most suitable place in the spectrum to satisfy the requirements of each particular service;
- f) consideration of industry and public investment already committed to a particular frequency band.

205. *Id.* at 184.

206. *Id.* at 185.

allocates a range of spectrum.²⁰⁷ Criticisms of the block allocation method are that the public interest standard is too subjective, the quantity of spectrum made available by the FCC has a direct correlation with the profitability of a particular communications service, and traditional spectrum users such as radio and television broadcasters view allocation as potentially harmful either in terms of interference or economic competition.²⁰⁸ Other problems with the block allocation system are that it is not an efficient method of allocating spectrum, it is not flexible enough to adapt to changing technology, it is detrimental to research and development of products that would conserve spectrum, and that the inadequate resources of the FCC limit the quality of decisions that are made on complex spectrum issues.²⁰⁹ In addition, the public interest standard is considered too vague to be so heavily weighed in spectrum decision-making and the block allocation system limits opportunities to do long-range planning on spectrum issues.²¹⁰

Should the FCC decide not to grant a license, or when more than one entity is vying for the same portion of spectrum, a hearing must be conducted.²¹¹ These hearings can be long, costly to applicants, the government, and the public, and are also subjective, since they rely primarily on information supplied by license applicants.²¹² Given problems with the allocation procedures used by the FCC, along with difficulties and delays associated with WARC decisions at the international level, it seems prudent to consider proposals for other methods of spectrum allocation.

B. Auctions

New Zealand and the United Kingdom have already instituted auctions for spectrum allocation.^{213,214} In the United States, the Pres-

207. Rau, *supra* note 93, at 158. See also Roy Kowalski, *Currents: A Look at Communications: Where We've Been, Where We Are, and Where We're Likely to Go*, CQ, Jan. 1993, at 26-28.

208. *Id.* at 159.

209. *Id.* at 159-60.

210. *Id.*

211. Robinson, *supra* note 203, at 189.

212. *Id.*

213. CONGRESSIONAL BUDGET OFFICE, AUCTIONING RADIO SPECTRUM LICENSES, 12-3 (1992) [hereinafter CBO]. The New Zealand plan included holding auctions to distribute rights for the "A" block American Mobile Phone Standard (AMPS) and both the "A" and "B" blocks for the Total Access Communications Standard (TACS). The bidding process provided \$20 million in NZ dollars, equivalent at the time to

ident's budget request includes a proposal that would require the FCC to use auctioning or competitive bidding for assigning licenses to private users of the radio spectrum, as part of the Emerging Telecommunications Technology Act of 1992.²¹⁵ This Act transfers 200 MHz currently assigned to government use to the private sector, a segment that falls under 6 GHz, that would be made available over a 15-year period.²¹⁶ The proposal requires a first-stage application and a second-stage screening, but does not specify what the spectrum can be used for or how charges will be assessed.²¹⁷

There are a variety of arguments for and against the use of auctions for allocating spectrum. Auctions could be especially helpful in the assignment of frequencies within spectrum already allocated for a particular purpose.²¹⁸ A primary advantage of an auction would be that it could replace the time-consuming hearing process that is now held when more than one entity applies for the same segment of spectrum.²¹⁹ Since the amount of the bid would approximate the value of that segment of the spectrum, this bid could also be used as a shadow price for other parts of the spectrum which are not currently assigned a cost.²²⁰ In addition, an auction could help determine the applicant who

\$11.9 million in U.S. dollars. The funds generated by the auction went to the New Zealand Government. Terrence J. Schroepfer, *Allocating Spectrum Through the Use of Auctions*, 14 HASTINGS COMM./ENT. L. J. 35, 38-39 (1991).

214. *Id.* at 13-15. The U.K. auctioned the rights to offer programming on Independent Television Channel 3 in February 1991. The auction, which involved 40 production companies vying for 16 franchises, participated in a sealed bidding process, with the rights to the franchises awarded to the highest bidders. The entire bidding process took only six months, with an opportunity for public comment in the interim. The bidders were also evaluated on their capacity to fulfill the public interest standards that are the law in the U.K. as well as in the U.S. Countries such as Canada, Australia, and Italy, along with the countries of the European Community as a whole, are considering auctions as a way to grant spectrum licenses. *Id.* at 12.

215. *Id.* at 16.

216. *Id.* See also David Sumner, *It Seems to Us . . . Spectrum for the 21st Century*, QST, Jan. 1993, at 9.

217. *Id.*

218. Robinson, *supra* note 203, at 189.

219. *Id.*

220. *Id.*

Shadow prices would exhibit their greatest effect in the spectrum management function of allocation. Since they would provide a measure of spectrum value, shadow prices would also be extremely useful in establishing user charges. However, their primary importance lies in that [sic] fact that the knowledge of spectrum value provided by these shadow prices would enable the Commission to examine the economic cost of allocation decisions,

would most likely use the spectrum to its optimum efficiency, comparing applicants by their willingness to commit financial resources.²²¹ It is also probable that an auction, as a single event with an established format, would be less expensive and less time-consuming than the open-ended hearing, which can last for many months.²²²

Although there may be economic efficiency if an auction is properly designed and administered,²²³ the disadvantages of this mechanism are the need for regulation of the public trust,²²⁴ the danger that the ability of auctions to raise funds for the government will lead to sacrificing other objectives of spectrum management,²²⁵ and the potential for market failure within the communications industry.²²⁶ The so-called "deep pockets" argument has also been made, with the premise that a comparative hearing offsets the advantages the large firms with vast financial resources have over smaller firms that would be out-bid in an auction format.²²⁷ In addition, there is a concern that the public interest standard that underlies assigning radio spectrum will be lost if a monetary measurement of spectrum value is adopted.²²⁸

Other factors against the use of auctions for allocating spectrum are the administrative burdens,²²⁹ the fact that an auction might not bring in the level of funding anticipated,²³⁰ and that applying economic concepts to spectrum allocation would be a radical departure from the

including the cost of holding spectrum in reserve for anticipated radio service development and growth.

Id.

221. *Id.*

222. *Id.*

223. CBO, *supra* note 213, at 18-20.

224. *Id.* at 20.

225. *Id.* at 21-22.

226. *Id.* at 22.

227. Schroeffer, *supra* note 213, at 45-46. *See also* CBO, *supra* note 213, at 22.

228. CBO, *supra* note 213, at 21.

229. *Id.* at 19. However, the CBO report did state that "[a]uctions may be superior to either comparative hearings or lotteries in the areas of administrative ease, transaction costs, and timeliness." *Id.* The same study also notes that "[c]omparative hearings are time-consuming and costly. Lotteries are fast, but take longer than auctions and increase the cost to society of spectrum management because they encourage speculative entries." *Id.*

230. *Id.* at 23-38. Estimates the amount of revenue that could be generated from auctioning land-mobile communications licenses, looking at such factors as costs, revenues, and profits, consolidation in the industry, market projections, private investors, acquisition values, stock values, Office of Management and Budget forecasts, and foreign experiences.

tradition of viewing spectrum as a free, public good.²³¹ On the other hand, an auction is said to cost only fifteen percent of either a lottery or a hearing,²³² with the processing time for an auction being three months, as opposed to twelve for a lottery and eighteen for a comparative hearing.²³³ What is particularly troublesome about an auction is that it could become purely a revenue-raising scheme for the government.²³⁴

A specific auction format has been proposed which would purportedly reduce the disadvantages of this method of spectrum allocation.²³⁵ An auction is needed that would require a minimum amount of bidder preparation, would prevent collusion between bidders, and would have an outcome that would maximize the efficiency of spectrum use.²³⁶ The type of auction proposed is a Vickrey auction, also known as second-sealed bid.²³⁷ In a Vickrey auction, the bidder submits one bid, without knowing the content of other bids.²³⁸ When the bids are opened, the winner pays the amount of the second highest bid.²³⁹ This type of auction allows a bidder to value the item on his own, rather than trying to strategize according to what other bidders might offer.²⁴⁰ The Vickrey auction is thought to be a way to protect consumers, minimize price inflation, and ensure that prices will match the value of the item being auctioned.²⁴¹

C. *User Fees*

Charging for spectrum use is not a new concept. In 1969, the TAS method of selling spectrum to potential users was proposed.²⁴² Under this proposal, spectrum would be sold according to measures of time, area, and spectrum, hence the designation of TAS, and would permit TAS spectrum owners to negotiate for alterations in the specifications of their allocations.²⁴³ It was theorized that such a system

231. Robinson, *supra* note 203, at 190.

232. Evan Kwerel and Alex D. Felker, *Using Auctions to Select FCC Licenses*, OPP WORKING PAPER NO. 16, 1985, at 20.

233. *Id.* at 17.

234. Schroepfer, *supra* note 213, at 44.

235. *Id.* at 45.

236. *Id.*

237. *Id.* at 41-42.

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.* at 46.

242. *Id.* at 38.

243. *Id.*

would result in efficient use of the spectrum, as users traded with each other to maximize their spectrum needs.²⁴⁴ Under TAS, once spectrum had been initially allocated, the FCC would have a very limited role, with market forces rather than formalized applications and hearings determining how spectrum would be used.²⁴⁵

There are arguments for and against the implementation of user fees in apportioning radio spectrum.²⁴⁶ If spectrum users were charged a fee related to measures of bandwidth, area of operations, or type of technology, there would then be financial incentives to use more efficient technology or reduce operating power in order to lower costs.²⁴⁷ In addition, charging spectrum users seems to be a fairer system than letting the general population subsidize spectrum use via taxes and government-supported agencies.²⁴⁸ Such a fee would not only prevent excess demand, but could also generate resources that might help pay for spectrum maintenance and regulation.²⁴⁹ In addition, it may be that imposing user charges would have the immediate result of re-educating the public, as well as spectrum users, that there is a cost for using this resource.²⁵⁰ It could also encourage the use of non-spectrum based communications, particularly when wireline, cable, or other alternatives might be available.²⁵¹

There may be difficulties associated with implementing user fees for the allocation of radio spectrum. First, courts have often concluded that a user fee charged for a particular government service cannot exceed the benefits received from the use of that service.²⁵² In *National Cable Television Assn., Inc. v. United States*²⁵³ and *Federal Power Commission*

244. *Id.*

245. *Id.*

246. Terrance J. Schroepfer, *Fee-Based Incentives and the Efficient Use of Spectrum*, 44 *FED. COMM. L. J.* 411-33 (1992).

247. *Id.* at 411.

248. *Id.* at 413. He compares spectrum with a public park, to show how the imposition of a user fee can prevent non-users from subsidizing users and that fees generated can go towards maintenance of the park. In addition, charging a fee may reduce excess demand on park resources.

249. *Id.*

250. Robinson, *supra* note 203, at 189.

251. *Id.*

252. Schroepfer, *supra* note 246, at 419-28.

253. *National Cable Television Assn., Inc. v. United States*, 415 U.S. 336 (1974). Ruling on the interpretation of the Independent Offices Appropriation Act of 1952, the court held:

While those who operate CATV's may receive special benefits, we cannot

v. New England Power Co.,²⁵⁴ administrative agencies were limited by the Supreme Court in the amount they could charge for their services. These cases would be relevant for radio spectrum, since it is the FCC, a government agency, with the responsibility for regulating it. In addition, *Federal Power Commission* also held that user fees could only be charged to entities that actually use the service.²⁵⁵ This would imply that spectrum users had "purchased" the spectrum, causing potential difficulty with the reading of the Communications Act of 1934.²⁵⁶ However, cases such as *Skinner, Secretary of Transportation v. Mid-America Pipeline Co.*²⁵⁷ and *Florida Power & Light Company v. United States*²⁵⁸ seem

be sure that the Commission used the correct standard in setting the fee. It is not enough to figure the total cost (direct and indirect) to the Commission for operating a CATV unit of supervision and then to contrive a formula that reimburses the Commission for that amount. Certainly some of the costs inured to the benefit of the public, unless the entire regulatory scheme is a failure, which we refuse to assume.

Id. at 343. See also Schroeffer, *supra* note 246, at 420-23.

254. *Federal Power Commission v. New England Power Co.*, 415 U.S. 345 (1974). Again applying the Independent Offices Appropriation Act of 1952, the court ruled on whether the Federal Power Commission could impose an assessment on electric utilities and natural gas companies in proportion to sales and deliveries. "The Court of Appeals held that whole industries are not in the category of those who may be assessed, the thrust of the Act reaching only specific charges for specific services to specific individuals or companies. We agree with the Court of Appeals." *Id.* at 349.

255. *Id.* at 351. "But each member of the industry which is required to adopt the new accounting system is an 'identifiable recipient' of the service and could be charged a fee, if the new system was indeed beneficial to the members of the industry. . . . But what was done here is not within the scope of the Act."

256. See *infra*, this Note, Section E: Legal and Economic Implications.

257. *Skinner, Secretary of Transportation v. Mid-America Pipeline Co.*, 490 U.S. 212 (1989). The Secretary of Transportation was directed to develop a schedule of pipeline safety user fees under Section 7005 of the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) and to collect these fees from facilities covered by the Hazardous Liquid Pipeline Safety Act of 1979 (HLPESA) and the Natural Gas Pipeline Safety Act of 1968 (NGPSA). "As we have indicated, § 7005 explicitly reflects Congress' intention that the total costs of administering the HLPESA and the NGPSA by recovered through the assessment of charges on those regulated by the Acts and provides intelligible guidelines for these assessments." *Id.* at 224.

258. *Florida Power & Light Company v. United States*, 846 F.2d 765 (D.C. Cir. 1988), *cert. denied*, 490 U.S. 1045 (1989). This case was also decided under COBRA, wherein licensees of nuclear power reactors sought to avoid uniform annual fees imposed by the Nuclear Regulatory Commission.

Without defining the limits of the COBRA delegation to the NRC, we conclude that the NRC has exercised its authority within congressional guidelines that provide sufficient standards. The NRC has reasonably lim-

to allow the collection of fees regardless of the benefit obtained by the user. This is fortunate for those who would charge user fees for spectrum, since it would be hard to place a value on the benefit gained by access to the radio spectrum. Indeed, given the wide variety of concerns which use spectrum, from individual amateur radio operators to vast broadcasting conglomerates, different values would probably be needed.

Another difficulty that would arise with the introduction of user fees for spectrum allocation would be the additional administrative burdens imposed on the FCC.²⁵⁹ While a flat fee may be appropriate for some activities, it would not be such a simple arrangement when applied to spectrum allocation.²⁶⁰ First, the characteristics of spectrum vary greatly depending on power, bandwidth, time of day, and frequency level.²⁶¹ In addition, the value of a segment of spectrum may depend on the particular user group involved and the services to be offered.²⁶²

A variety of pricing mechanisms have been proposed, based on gross revenues, cost recovery, and opportunity costs.²⁶³ However, the difficulty of some of these pricing mechanisms is that many services provided by spectrum are not sold, but are available to society as a public good.²⁶⁴ In addition, many entities use spectrum for only part of their services, leading to the difficult task of determining what percentage of a company's profits were dependent on spectrum.²⁶⁵ Equally complex would be the FCC constructing a fee structure which provides an incentive to move to alternative or more efficient technology, as well as the need for the FCC to speculate as to which technologies would be most suitable for given segments of the spectrum, a particularly

ited regulatory services to programs which it concluded, with sufficient explanation, were clearly applicable to all operating licensees. Further, it reasonably limited the charges to those licensees only. We are unpersuaded of error or impermissible arbitrariness in the NRC's implementation of the statutory directive.

Id. at 776.

259. Schroeffer, *supra* note 246, at 423-28.

260. *Id.* at 424.

261. *Id.*

262. *Id.*

263. *Id.* at 426-28.

264. *Id.* at 428. The value of spectrum can now only be estimated from other sources. If some portion is allocated via market mechanisms, it may provide shadow pricing that can be used to value segments of the spectrum that will not be sold.

265. *Id.*

subjective task when considering future communications services.²⁶⁶

Instead of user fees, granting property rights over a segment of radio spectrum is advocated as being easier to administer and more likely to result in the conservation of spectrum.²⁶⁷ Spectrum saved via more efficient technology could then be offered to other users.²⁶⁸ Such a plan has been proposed in Australia.²⁶⁹ Under this scheme, spectrum access rights (SARs) could be sold, with the owner of a SAR being granted certain rights over a frequency allocation, the time it could be used, the geographic region that could be covered, and the maximum power level that would be allowed.²⁷⁰ This is the most radical of the proposals for spectrum allocation and may not currently be permitted under the statutory language of the Communications Act of 1934.²⁷¹

D. *Flexible Use*

A third method suggested for allocation of the radio spectrum is flexible use, also called flexible radio allocation. The idea for this method was proposed through the FCC's Office of Plans and Policy (OPP) in October 1983.²⁷² The study advanced defining segments of radio spectrum without specifying a particular technology that would be used.²⁷³ In response to this, the FCC set aside 2 MHz, a very small segment of spectrum, to be reserved for General Purpose Radio Service.²⁷⁴ Advantages of flexible use were identified as allowing more diversified ownership of the spectrum, providing greater ease of market entry, and permitting small scale innovation,²⁷⁵ since companies wanting to introduce a new communications service could piggyback onto spectrum already held by a compatible technology without having to go through the lengthy process of license application and hearing. In addition, product innovation could go forward on a limited scale at first, with the opportunity for additional spectrum in the future.

On the other hand, there are some dangers associated with flexible use of the spectrum. The first of these is that the flexible use licensee

266. *Id.* at 429.

267. *Id.* at 429-30.

268. *Id.*

269. *Id.* at 431.

270. *Id.*

271. *See infra*, this Note, Section E: Legal and Economic Implications.

272. Mueller, *supra* note 3, at 45.

273. *Id.*

274. *Id.* at 48. *See also Senate Bill Includes Protection for Amateur Radio Operators*, QST, April 1993, at 78-79.

275. *Id.* at 56.

would in a sense "own" his portion of the spectrum,²⁷⁶ which seems contrary to the Communications Act of 1934. The freedom for a spectrum user to determine what services would be offered through his spectrum is thought to usurp the statutory role of the FCC in overseeing spectrum for the public interest.²⁷⁷ Even more unusual would be the ability to allow the granting of sublicenses outside of the primary purpose for which spectrum was allocated in the first place.²⁷⁸ In addition, a spectrum "owner" would be allowed to stop a current service in favor of a new one without permission from the FCC.²⁷⁹

There are several obstacles that would have to be overcome before flexible use could be implemented: the current mandate by the Communications Act of 1934 for periodic license renewal,²⁸⁰ the requirement that a hearing be held,²⁸¹ the protection of the public interest standard,²⁸² and administrative problems associated with trying to maintain control over licensees when the FCC would no longer be involved in determining the type of spectrum services to be provided.²⁸³ Instead, the FCC's responsibility would merely be to issue "flexible" licenses, rather than those that specifically indicate what the spectrum can be used for.²⁸⁴ Additional problems concern the extent to which flexible use would still preserve the status quo of current spectrum users²⁸⁵ and the difficulty of recombining small segments of spectrum that have been licensed away in the past to form a large enough block to divide between flexible spectrum users.²⁸⁶

E. *Legal and Economic Implications*

There could be difficulties at both the international and national level in implementing any of these allocation methods. The Commu-

276. Rau, *supra* note 93, at 178. Section 301 provides that the purpose of the Act is "to provide for the use of such channels [of radio transmission] but not the ownership thereof, by persons for limited periods of time, . . . and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license." 47 U.S.C. § 301 (1988).

277. *Id.*

278. *Id.* at 179.

279. *Id.*

280. *Id.* at 180-82.

281. *Id.* at 182-84.

282. *Id.* at 184-85.

283. *Id.* at 186-87.

284. *Id.* at 186.

285. *Id.*

286. *Id.* at 187.

nications Act of 1934, through which the FCC derives its authority to allocate the non-government portion of the spectrum, is not clear on whether market-based allocation methods can be used.²⁸⁷ There is a general belief that legislation would have to be adopted to permit either auctions or user charges for several reasons.²⁸⁸ First, the Communications Act of 1934 prohibits private ownership of the radio spectrum,²⁸⁹ primarily out of concern that spectrum would be monopolized as it was back in the early days of spectrum-based communications.²⁹⁰ However, granting spectrum via an auction or by the payment of user fees implies that it is “owned,” even if only temporarily.²⁹¹ Instead, the Act contemplates a “trusteeship” model, where licensees serve the public interest in exchange for permission to use the radio spectrum.²⁹² The spectrum is considered to be publicly owned²⁹³ and spectrum users

287. Robinson, *supra* note 203, at 190.

The FCC spectrum management goals have not been explicitly defined in any one document. However, a review of FCC Reports, Orders, and Notices of Inquiry makes clear that its management goals are to satisfy the objectives contained in the Communications Act, within the authority bestowed by Congress. The overall guiding principle is stated at the outset of Section 303, wherein Congress charged the Commission with management of the spectrum “as public convenience, interest, or necessity requires.” In addition, the FCC has paid special attention to:

1) the congressional objective stated in Section 1 of the Act: “to make available, so far as possible, to all people of the United States a rapid, efficient, nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges.”

2) the Congressional mandate to

- a) Section 303(c), Assign bands of frequencies to the various classes of stations;
- b) Section 303(f), Make regulations not inconsistent with law as it may deem necessary to prevent interference between stations;
- c) Section 303(g), Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest.

Id. at 184.

288. *Id.*

289. *Id.*

290. Herter, *supra* note 1, at 657. The earliest efforts towards international cooperation in spectrum allocation stemmed from the need to provide safety at sea. At that time, Marconi had a monopoly on the equipment and personnel that were used by the fleets of Canada and Great Britain. The only way to communicate with them or to stations on shore was through his equipment.

291. Robinson, *supra* note 203, at 190.

292. Rau, *supra* note 93, at 149-50.

293. *Id.*

cannot alter their communications services without approval from the FCC.²⁹⁴ Second, the Act requires the FCC to license spectrum for a limited period of time.²⁹⁵ Without a modification in legislation, this could mean routinely holding auctions for segments of spectrum, perhaps as often as every ten years. Companies responsible for developing new communications technologies would need to consider carefully before committing resources to a new product when the necessary spectrum could be lost to a higher bidder within the next decade.

A modification in legislation would also be needed to replace the hearing process required under Section 309(e) of the Communications Act.²⁹⁶ Interpreting current statutory language suggests that there is currently no authority for the FCC to substitute an auction for the hearing process.²⁹⁷

The Communications Act of 1934 may or may not allow flexible use as a method of allocating spectrum.²⁹⁸ Section 303(b) of the Act mandates that the FCC must "[p]rescribe the nature of the service to be rendered by each class of licensed stations and each station within any class."²⁹⁹ If this section of the statute is construed broadly, it may permit spectrum to be classified for flexible use.³⁰⁰ On the other hand, if the statute is read more narrowly, it would forbid the flexible use as an allocation mechanism.³⁰¹ The Act seems to charge the FCC with determining how a segment of the spectrum will be used by a particular communications service.³⁰² However, the premise of flexible use is that once a communications provider is granted a portion of the spectrum, the provider would determine how the spectrum would be used and would have the ability to "sell" or "rent" that spectrum to other users.³⁰³ The narrow view of 303(b) suggests that it is the FCC which must determine the nature of the service that can be offered in a segment of spectrum.³⁰⁴ To find otherwise implies that the FCC can

294. *Id.* at 150.

295. *Id.* at 155. Citing to 97 U.S.C. § 307(c) of the Communications Act of 1934.

296. Robinson, *supra* note 203, at 190.

297. *Id.*

298. Rau, *supra* note 93, at 177.

299. Special Provisions Relating to Radio; Powers and Duties of the Commission, 47 U.S.C. § 303(b) (1988).

300. Rau, *supra* note 93, at 177.

301. *Id.*

302. *Id.*

303. *Id.* at 178.

304. *Id.* at 177.

delegate its responsibility for spectrum determination to a private party.³⁰⁵

Flexible uses seems to fly in the face of the trusteeship model of spectrum allocation envisioned by the Communications Act of 1934. In order to allow the implementation of flexible use, the Act would have to remove such requirements as periodic renewal, promote minimal FCC supervision, ensure that the holding of a flexible license does not constitute "ownership," and recognize that local markets may influence what types of spectrum-based communications services will be offered.³⁰⁶

Experiments are underway in the United States, as well as in other countries, to see whether auctions, user fees, or flexible use can be implemented as alternatives to existing spectrum allocation mechanisms. While there may need to be changes in the Communications Act of 1934, as well as a realignment of the view of spectrum as a public good in the United States in order to allow devices such as auctions and user fees to be implemented in the United States, the introduction of these methods on an international scale seems more problematic. It is one thing for the FCC to collect monies from auctions or user fees. It is quite another for collection to be done among the nations of the world. Supposedly, the responsibility for this would fall to the ITU, an organization which has not traditionally had a monetary purpose behind its formation. It is also not clear where the proceeds from auctions or user fees would go once they were paid to the ITU. Instituting these methods could result in adversarial relationships, with the larger, richer countries possibly being able to "buy" spectrum from poorer countries willing to subordinate their future communications goals for funds needed currently for other social problems.

Of the three proposed allocations methods, flexible use seems most compelling for experimentation on an international level. ITU member nations already accept primary and secondary use arrangements, the footnoting of spectrum plans to reserve spectrum, and a deviation from spectrum allocations within regions where no harmful interference will occur. Allowing spectrum to be defined for multiple uses could be tried on an international level without destroying the relationships between ITU member nations which were manifested at WARC-92. Flexible use could be blended into the allocation proposals submitted at several specialized radio conferences coming up in the future.

VI. CONCLUSIONS

Characteristics of the radio spectrum and the economic constraints of current technology mean that, at least for now, the sky *is* the limit

305. *Id.*

306. *Id.* at 188.

in terms of the radio spectrum that can be allocated for current and new communications technologies. Given these limitations, it is important that the available spectrum be apportioned not only among a variety of commercial and public concerns, but also between countries, whether they are ready to exploit it at present or not. The ITU has a rich history of being able to fairly allocate spectrum and the nations of the world have been willing to participate in this organization. The success of WARC-92 in allocating the spectrum to both the new technologies that wanted it and the ITU member nations that requested it proves that WARCs, or their successors, can continue to be the primary method of allocating spectrum at an international level. Some experimentation should be done with flexible use at the international level. This can be done with minimal disruption to existing allocation relationships.

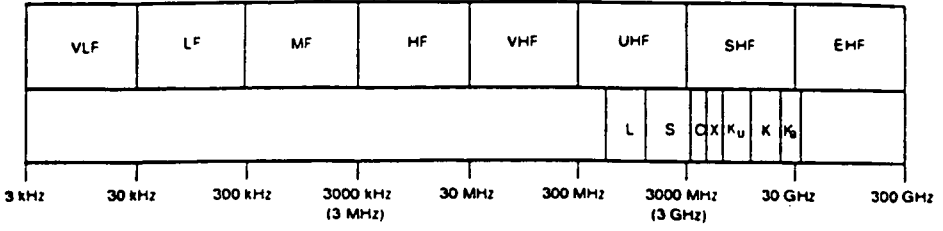
At the national level, the FCC should continue to explore auctions, user fees, and flexible use for limited allocations of spectrum. Of these three mechanisms, flexible use seems to be the most workable, because it provides greater efficiency of spectrum without the administrative and spectrum-valuing complications of auctions and user fees. The proposed auctioning of a segment of previously government-owned spectrum is an appropriate way to test the effects of market mechanisms on a traditionally free public good. However, any type of market-based allocation method must consider the public, non-profit users of spectrum, who would potentially be deprived of spectrum if fees were charged for it. Society benefits from such free services that rely on spectrum as public broadcasting, amateur radio, and emergency communications systems. These services must be protected in the event that market-based approach is taken to allocating spectrum in the future.

*Sara Anne Hook**

* J.D. Candidate, 1994, Indiana University School of Law—Indianapolis.

The author thanks Mrs. Janet Duncan, Indiana University School of Dentistry Library, and Mr. Steve Mansfield, American Radio Relay League (ARRL), for their assistance in obtaining documents for this Note.

This Note has been submitted to the 5th Annual Stephen G. Thompson Memorial Writing Competition, sponsored by the Catholic University of America Institute for Communications Law Studies.



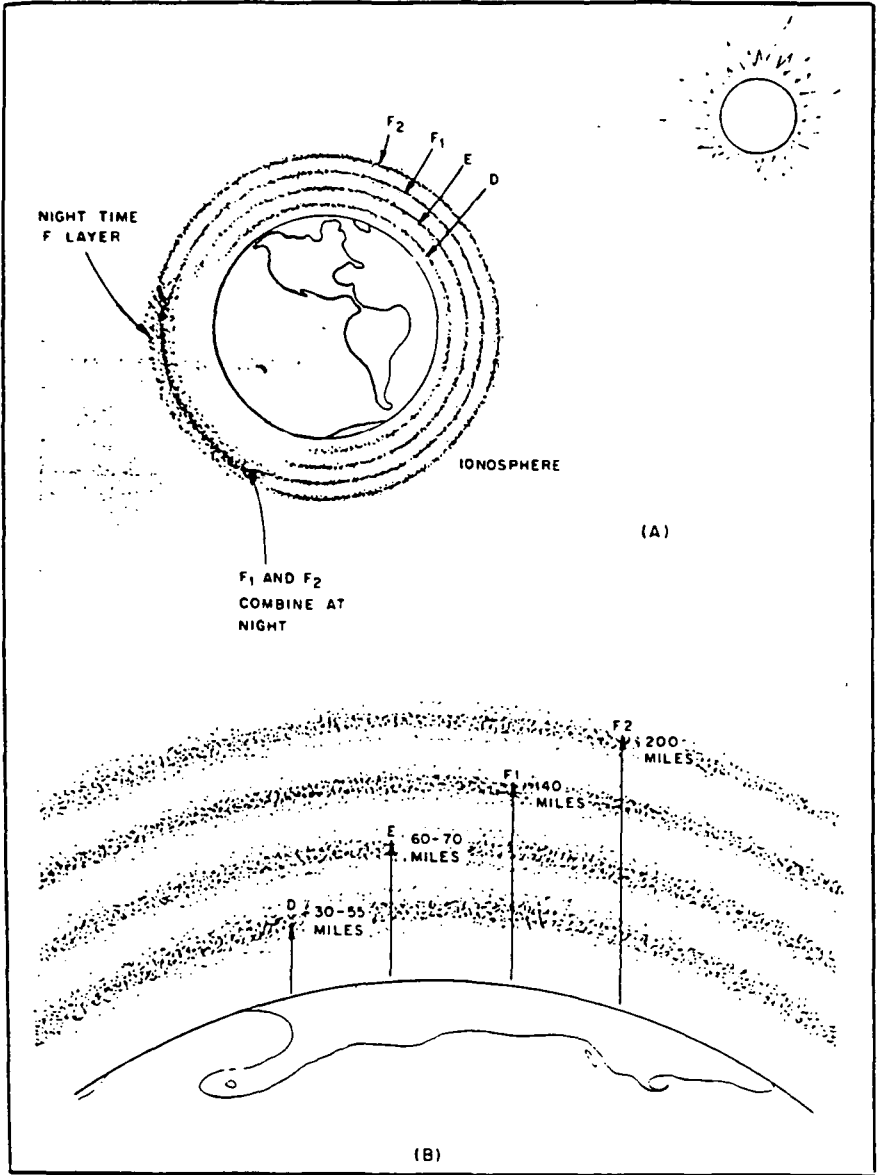


Figure 2

Reprinted with permission from the ARRL Technician Class License Manual; Copyright ARRL

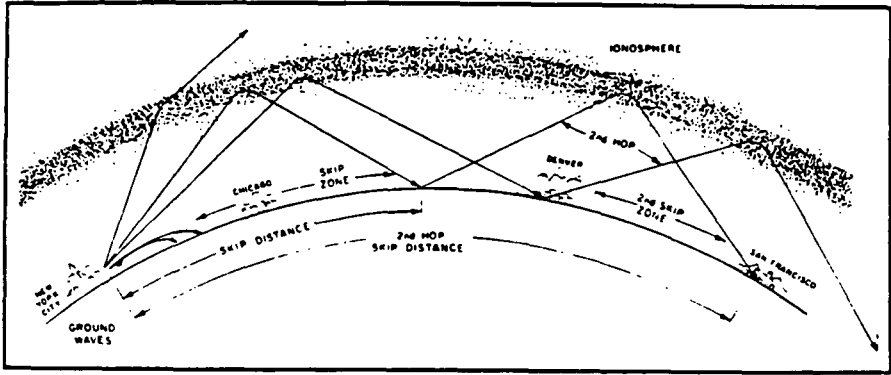


Figure 3

Reprinted with permission from the ARRL Technician Class License Manual; copyright ARRL

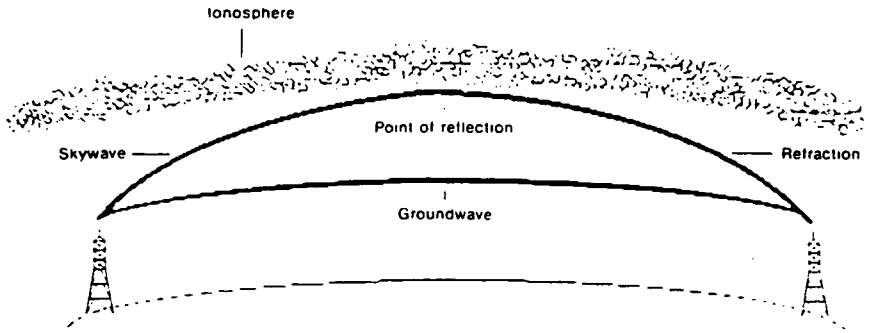


Figure 4

Environmental Implications of the North American Free Trade Agreement

Sustainable development is ' . . . a strategy for improving the quality of life while preserving the environmental potential for the future, of living off interest rather than consuming natural capital . . . The key element of sustainable development is the recognition that economic and environmental goals are inextricably linked.'¹

I. INTRODUCTION

By its very nature, environmental policy collides head-on with international trade goals. Environmental regulations seek to conserve the earth's resources while international trade goals seek to exploit them.² This inherent conflict has come to the surface during recent trade negotiations on the North American Free Trade Agreement (NAFTA) among Canada, Mexico, and the United States, and the Uruguay Round of GATT talks.

NAFTA would create a six trillion dollar free trade zone, stretching from the Arctic Circle to below the Tropic of Cancer, with a combined marketplace of over 360 million consumers.³ Creation of such a trading bloc is consistent with recent trends in international trading regionalism, such as the formation of the EC and current moves toward alignment by Pacific rim nations.⁴

The idea of "free trade" presumes a trade environment free from regulation, where market forces are the controlling factors. Environmental policy presumes a high degree of regulation from broad schemes to specific details. Synthesis of these two concepts comes only after meticulous negotiation and compromise.

1. "National Commission on the Environment Recommends Major Policy Changes" 15 *Focus 1* [World Wildlife Fund, Inc.] Jan./Feb. 1993 (quoting "Choosing a Sustainable Future" National Commission on the Environment).

2. Robert Houseman & Durwood Zaelke, *Trade, Environment, and Sustainable Development: A Primer*, 15 *HASTINGS INT'L & COMP. L. REV.* 535, 602 (Summer 1992).

3. THE WHITE HOUSE, OFFICE OF THE PRESS SECRETARY, THE NORTH AMERICAN FREE TRADE AGREEMENT (News Release) 1 Fact Sheet (August 12, 1992) [on file at office of IND. INT'L & COMP. L. REV., IU School of Law at Indianapolis].

4. Terry Wu & Neil Longley, A. *U.S.-Mexico Free Trade Agreement: U.S. Perspectives*, 25 *J. OF WORLD TRADE* 5 (June 1991).

Many environmental questions arise in the context of a free trade area, such as which health standards will apply under health and safety import/export laws, whether environmental laws of one nation may be construed as trade barriers against another, and whether lax enforcement of environmental regulations in one country will attract relocation of businesses from another country.

Likewise, many international trade questions arise in the context of heavy environmental regulation, such as how free trade can be achieved with layers of environmental regulation, whether it is possible to harmonize environmental laws between nations as trade laws are harmonized, and whether new wealth from free trade must be used to bring lower environmental standards of one nation up to the higher standards of a chief trading partner over time.

This note focuses on the potential conflict and possible resolution of environmental policies with international trade goals under the North American Free Trade Agreement. Although this article discusses the international free trade agreement among the U.S., Canada, and Mexico, it will concentrate primarily upon the bilateral industrial and environmental relationship between the U.S. and Mexico. The environmental and trade issues center around this bilateral relationship, and Canada's physical distance from these problems precludes its inclusion in the core analysis of this article.

II. POLLUTION PAST & PRESENT

The history of the current free trade area between Mexico and the United States has been one of intense environmental degradation and abuse. This free trade area exists along the U.S.-Mexican border⁵, where duty-free assembly plants operate. The border region has been correctly described by the American Medical Association as a "virtual cesspool,"⁶ where 206 million liters of raw sewage pour each day into the Tijuana, New, and Rio Grande rivers.⁷ This environmental mess was not present a quarter of a century ago.⁸ It came with the advent

5. The border region, as recognized in the 1983 U.S.-Mexico Border Environmental Agreement (the La Paz Agreement), is "an area 100 kilometers on each side of the [U.S.-Mexican] international boundary." U.S. ENVIRONMENTAL PROTECTION AGENCY ET AL., PUB. NO. 8764-C1, INTEGRATED ENVIRONMENTAL PLAN FOR THE MEXICAN-U.S. BORDER AREA (First Stage 1992-1994) I-1 (April 1992) [hereinafter IEP].

6. Jan Gilbreath Rich, *Bordering on Trouble*, THE ENVIRONMENTAL FORUM, May/June 1991, at 26, 27.

7. *Id.*

8. *Id.* at 26.

of the "maquiladora" industry,⁹ inspired by regulation-free international trade goals.

A. *The Maquiladora Problem*

The Maquiladora program was established under Mexican presidential decree in 1965.¹⁰ The focus was on border development, and the goal was an increase in trade and foreign investment by allowing foreign companies to own Mexican assembly plants, known as "maquiladoras."¹¹ The maquiladora industry has been the chief economic and trade link between Mexico and the United States.¹²

Most maquiladora assembly plants are wholly-owned subsidiaries of U.S. companies.¹³ The U.S. parent corporation ships components and machinery temporarily to the maquiladora, duty-free, on contract.¹⁴ The maquiladora then assembles the components and returns the finished product to the American company.¹⁵ This process of component assembly is very attractive to American parent corporations for several reasons: low minimum wages for Mexican workers, easy access to Mexico, low transportation costs compared to overseas assembly, and the duty-free entry of equipment and components.¹⁶

The maquiladora relationship is profitable to both Mexican and American economies. Nearly 200 maquiladora plants¹⁷ employ over 482,000 Mexican workers.¹⁸ In 1990, maquiladora exports made up

9. *Id.*

10. Cheryl Schechter & David Brill, Jr., *Maquiladoras: Will the Program Continue?*, 23 ST. MARY'S L.J. 697, 701 (1992).

11. *Id.* at 702.

12. William R. Leighton & T. Richard Sealy III, *Federal Income Tax Issues in the Organization, Financing, and Operation of Maquiladoras*, 23 ST. MARY'S L.J. 721, 722 (1992).

13. Daniel I. Basurto Gonzalez & Elaine Flud Rodrigues, *Environmental Aspects of Maquiladora Operations: A Note of Caution for U.S. Parent Corporations*, 22 ST. MARY'S L.J. 659, 661 (1991).

14. *Id.*

15. *Id.*

16. *Id.* It is suggested that recent increases in minimum wages of Far Eastern countries may also contribute to the increased interest of U.S. companies in using maquiladora plants.

17. Schechter, *supra* note 10, at 699 (citing figures taken from the January-May 1991 report of the Secretary of Commerce and Industrial Development, *Direccion General de la Industria Mediana y Pequena y de Desarrollo Regional*).

18. Gonzalez, *supra* note 13, at 661 (citing Monthly Score Board, 5 Twin Plant News, May 1990, at 72).

about one-quarter of Mexico's total exports.¹⁹ That same year, U.S.-Mexican bilateral trade rose to \$59 billion, which made Mexico the United States' third largest trading partner.²⁰ The U.S. currently supplies 70% of Mexico's imports.²¹ The maquiladora industry is an embodiment of international free trade goals and ideals.²²

However, this economic success did not come without a heavy burden on the surrounding environment. The environmental devastation wrought by the largely unregulated expansion of the maquiladora program is an outgrowth of the population explosion in the area beyond the capacity of the sanitary infrastructures to cope.²³

For example, the population of Tijuana was less than 200,000 in 1960, compared to over 1 million today.²⁴ Sanitation services have not kept up with the huge population growth of Mexicans attracted to jobs that maquiladoras provide²⁵ (the average maquiladora worker is paid about \$10 per day).²⁶ Many of these new border residents live in "colonias" - slums without drinking water, electricity, or sewage.²⁷ In fact, one journalist who visited the area reported: "Barrels that once carried toxic materials and still bear the warning labels are commonly sighted in slums, where they are used for drinking water."²⁸

B. *Transboundary Pollution*

Unfortunately, the pollution generated by the maquiladora plants and surrounding colonias does not respect international borders. Pollution problems have had a significant impact on American cities north of the border. Air and water serve both as the receptacles and the carriers of pollutants from Mexico into the United States.

1. *Air Pollution*

The EPA has cited no less than nine cities on the American side of the border that currently exceed United States National Ambient

19. Schechter, *supra* note 10, at 699.

20. Leighton, *supra* note 12, at 722 (citing U.S. DEP'T OF COMMERCE, NORTH AMERICAN FREE TRADE AGREEMENT: GENERATING JOBS FOR AMERICANS 50 (May 1991)).

21. *Id.* at 722-23.

22. *Id.*

23. Rich, *supra* note 6, at 27.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* at 28.

28. *Id.* at 27.

Air Quality Standards.²⁹ The primary source of air pollution in U.S. cities along the border seems to be Mexico.³⁰ One of the major concerns in the region is the emission of volatile organic compounds by maquiladora plants in Mexico.³¹

Very old automobiles, discarded by Americans, with emission control devices stripped off by the Mexicans that drive them, are another significant source of air pollution drifting north into the United States.³² Additional sources of air pollution floating over the border come from Mexican city dumps, which regularly catch fire, sending plumes of black smoke into the air, and the bonfires of the Mexican homeless, who burn anything to generate heat during the winter.³³

Geography can also play a role, such as in El Paso and Juarez, where the Franklin and Juarez mountains prevent the smothering air pollution from dispersing.³⁴ Other contributors include long lines of trucks idling their engines for hours while waiting at border crossings,³⁵ and U.S. factories moving to the Mexican Border region to avoid strict pollution-control laws.³⁶ In fact, the General Accounting Office issued an April 1990 report finding that "78% of the furniture manufacturers relocating from Los Angeles to Mexico did so because of California's stringent pollution-control laws."³⁷

The EPA has compared what polluting emissions over the next ten years would be with NAFTA and without NAFTA. Their findings are that with NAFTA in place, together with a controlled Mexican

29. Michael Scott Feely & Elizabeth Knier, *Environmental Considerations of the Emerging United States-Mexico Free Trade Agreement*, 2 DUKE J. COMP. & INT'L L. 259, 274 (Spring 1992) (citing the August 1991 draft version of the INTEGRATED ENVIRONMENTAL PLAN FOR THE U.S.-MEXICO BORDER AREA III-30, National Ambient Air Quality Standards [NAAQS] are set by the EPA Administrator for the allowable levels of pollutants in the air. 42 U.S.C.A. §§ 7409-7410 (West Supp. 1991). The U.S. border communities exceeding the NAAQS are: San Diego and Imperial Co.'s, CA; El Paso Co., TX; Yuma, Puma, Santa Cruz, and Cochise Co.'s, AZ; and Dona Anci Co., NM. *Id.*

30. J. Michael Kennedy, *On Texas Border, Outlook for Air Quality Is Murky*, L.A. TIMES, November 20, 1991, at A1.

31. Feely, *supra* note 29, at 274-75.

32. Kennedy, *supra* note 30, at A1.

33. *Id.*

34. *Id.*

35. *Id.* Indications are that a North American Free Trade Agreement would significantly increase the transborder trucking, and thus the transborder air pollution as well.

36. *Id.*

37. *Id.*

regulatory environment, emissions would increase 0% to +165%.³⁸ With no NAFTA, but with a controlled Mexican regulatory environment, emissions would increase -10% to +125%.³⁹ Thus, it appears that NAFTA would affect the air quality of the border region negatively, even with a controlled Mexican regulatory environment.

2. *Water Pollution*

Rapid population growth in the region has also outpaced the ability of existing wastewater treatment sites to service the communities.⁴⁰ Consequently, the water quality of the border region has degenerated significantly. For example, the New River, originating south of Mexicali, carries raw and partially treated sewage, and industrial and agricultural waste north into California, where agricultural runoff enters the river, causing further contamination.⁴¹ The root of the problem is the insufficiency of Mexicali's wastewater treatment system to deal with all of the wastewater generated.⁴²

In Ciudad Juarez, a ditch has been dug which feeds millions of gallons of raw domestic and industrial sewage per day into the Rio Grande.⁴³ The Rio Grande picks up more sewage as it flows on until, when it reaches Nuevo Laredo, the fecal contamination level of the river is 1,000 times greater than the Texas limit.⁴⁴ An Austin journalist discovered that, as a result, "90% of adults thirty-five years or older in the shanty towns near San Elizario, Mexico, contract hepatitis sometime during their lifetime."⁴⁵

The EPA found that less than 1% of the Texas colonias have any wastewater collection and treatment systems.⁴⁶ In fact, U.S. Border Patrol agents wear rubber gloves to guard against infection as they frisk Mexican detainees still wet from illegal border crossings.⁴⁷ Sanitary

38. U.S. TRADE REPRESENTATIVE ET AL., REVIEW OF U.S.-MEXICO ENVIRONMENTAL ISSUES [hereinafter REVIEW] 88 (table 4) (February 1992).

39. *Id.*

40. *Id.* at 107. It is reported that the population increase has put pressure not only on wastewater treatment facilities, but also on water sources as well.

41. *Id.* at 109.

42. *Id.*

43. Feeley, *supra* note 29, at 273.

44. *Id.*

45. *Id.* (citing James Garcia, *Border River Laden with Wastes*, AUSTIN AMERICAN-STATESMAN, Sept. 29, 1991, at A1, A17).

46. REVIEW, *supra* note 38, at 110.

47. Juanita Darling, Larry B. Stammer, & Judy Pasternak, *Can Mexico Clean Up Its Act?*, L.A. TIMES, November 17, 1991, at A1.

development is the only answer to these problems, and the cash to accomplish this has not been forthcoming from the corporations which own the border region subsidiaries. This in turn has degraded the surrounding environment both directly through emissions and discharges, and indirectly through population attraction.

The potential effect of NAFTA is inescapable. Industrial and population growth will continue to rise dramatically under the proposed NAFTA.⁴⁸ The EPA has concluded that "[t]he current conditions concerning the effects on public health from poor water quality would be exacerbated by an increased rate of growth along the U.S.-Mexican border."⁴⁹

C. *Hazardous Waste Dumping*

The hazardous waste⁵⁰ dumping problem is twofold. First, the U.S., as the largest generator of hazardous waste in the world,⁵¹ ships most of its waste to Mexico,⁵² whence it never returns to the U.S.⁵³ Second, maquiladoras along the Mexican border have been identified by both governments as major sources of hazardous waste pollution.⁵⁴

NAFTA is designed to increase the industrial base of North America.⁵⁵ This, in turn, will bring an increase in hazardous waste generation.⁵⁶ One of the major problems with hazardous waste disposal is transportation to approved dump sites. NAFTA will bring increased trade traffic onto an already overburdened transportation system.⁵⁷ What

48. REVIEW, *supra* note 38, at 113.

49. *Id.* at 112.

50. Typical industrial hazardous wastes may include acids, bases, liquids containing heavy metals, metal-plating wastes, organic solvents, and cyanide wastes. REVIEW, *supra* note 38, at 123. [for purposes of this article, the term hazardous waste also includes toxic waste, such as chemicals and pesticides].

51. Barbara Scramstad, *Transboundary Movement of Hazardous Waste from the United States to Mexico*, 4 TRANSNAT'L LAW. 253 (Spring 1991). Estimates of U.S. generation of hazardous waste range from 60 to 247 million tons per year. (citing FRONTLINE: *Global Dumping Ground* (PBS television broadcast, October 1990)) *Id.* at 255.

52. *Id.* at 256. U.S. companies find it cheaper to pay the import duties and ship their hazardous waste to Mexico than to comply with many of the stringent U.S. federal hazardous waste disposal regulations. *Id.*

53. *Id.*

54. *Id.* at 258.

55. U.S. TRADE REPRESENTATIVE, HIGHLIGHTS OF THE NORTH AMERICAN FREE TRADE AGREEMENT, Market Access: Goods, 1-2 (On file at IND. INT'L & COMP. L. REV. office).

56. Feeley, *supra* note 29, at 276.

57. *Id.*

will this mean for the increased hazardous waste transportation?

Without proper transportation infrastructure development, an increased number of trucks carrying hazardous waste on more congested roads means that there is a higher risk of catastrophe. The current emergency response systems in place are not equipped to handle even the present level of traffic.⁵⁸ More hazardous waste trucking, in more traffic, on the same inadequate roads, is a disaster waiting to happen.

III. COMPARATIVE REGULATORY STRUCTURES

Against the preceding background of unregulated industrial development and environmental degradation, it is useful to compare and contrast the environmental regulatory structures and enforcement mechanisms of the U.S. and Mexico.

A *U.S. Environmental Regulations*

1. *Environmental Statutes*

The environmental statutes of the United States have been recognized as some of the most rigorous in the world.⁵⁹ Most of our environmental protection statutes were promulgated in the late 1960's and 1970's.⁶⁰ The basic structure of these statutes remain essentially unchanged today.⁶¹

U.S. environmental laws tend to be area specific rather than multi-area "umbrella" statutes, such as are common in Mexico.⁶² A brief overview of U.S. environmental law reveals the range and variety of subjects statutorily covered:

The Clean Air Act (CAA)⁶³ provides uniform federal standards for specific pollutants and controls emissions from motor vehicles as well as new sources of pollution. The 1990 amendments also regulate substances which deplete the ozone and those which contribute to acid rain.⁶⁴

58. *Id.*

59. Beth Burrows & Andrea Dubrin, *Fast Track: Trading Away Food Safety and Environmental Rules*, SEATTLE TIMES, April 24, 1991, A7 (quoting U.S. Representative James Scheuer, D-N.Y.).

60. REVIEW, *supra* note 38, at 17.

61. *Id.*

62. Gonzalez, *supra* note 13, at 667.

63. 15 U.S.C.A. § 12 et seq. (1992).

64. REVIEW, *supra* note 38, at 17.

Section 815 of these amendments specifically recognized the need for air quality monitoring and remediation in the border region.⁶⁵ Under this section, the EPA Administrator is authorized to negotiate with representatives of Mexico to develop and implement an air quality monitoring program.⁶⁶

While § 815 does not provide a specific enforcement mechanism, other provisions of the CAA allow citizens to bring a civil action against any other person or entity in violation of the CAA or against the EPA Administrator himself if he has not proceeded with program implementation in a timely fashion.⁶⁷

The Clean Water Act (CWA)⁶⁸ regulates discharge into surface water, establishes minimum water quality standards developed by the states, and restricts discharge of dredged or fill material into U.S. waters and wetlands.⁶⁹ A related law is the Safe Drinking Water Act⁷⁰ which establishes national standards for the purity of drinking water which are applicable to any public water system serving more than 25 people.⁷¹

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),⁷² also known as Superfund, authorizes hazardous waste clean-up, imposes liability on hazardous waste generators and polluters for clean-up costs and natural resource damage, and taxes petroleum and chemical products to finance hazardous waste clean-up projects.⁷³

Recent case law interpreting CERCLA has found that a parent corporation may be responsible for the acts of its subsidiary.⁷⁴ Extrapolated extraterritorially, then, U.S. companies which typically own

65. Malissa Hathaway McKeith, *The Environment and Free Trade: Meeting Halfway at the Mexican Border*, 10 PAC. BASIC L.J. 183, 198 (1991).

66. *Id.* "Congress has provided, subject to appropriations, a statutory framework for funding personnel and equipment for purposes of monitoring and remediation projects in Mexico." *Id.* (citing Pub. L. No. 101-549, § 815(b)(2), 104 Stat. 2694 (1990)).

67. *Id.* at 198-199.

68. 33 U.S.C.A. § 1251 et seq. (1992).

69. REVIEW, *supra* note 38, at 18.

70. 42 U.S.C.A. § 201 et seq. (1992).

71. REVIEW, *supra* note 38, at 18.

72. 42 U.S.C.A. § 9601 et seq. (1992).

73. REVIEW, *supra* note 38, at 18. The Emergency Planning and Community-Right-To-Know Act, which is a related statute, makes the magnitude of toxic emissions public. *Id.*

74. McKeith, *supra* note 65, at 196.

100% of their maquiladora subsidiaries may be held liable for acts in violation of CERCLA by those subsidiaries. CERCLA defines itself as operating within the jurisdiction of the United States, including that jurisdiction granted through an "international agreement to which the United States is a party."⁷⁵ Thus, although it has not been pursued, extraterritorial application of CERCLA is not entirely out of the question.

The Resource Conservation and Recovery Act (RCRA)⁷⁶ establishes a "cradle-to-grave" paper trail to ensure proper generation, management, and disposal of hazardous waste.⁷⁷ Under this scheme, the EPA knows who the generators, transporters, and disposers of hazardous waste are, thus enabling the EPA to track any lost or illegally dumped waste back to the last person who had it.

RCRA also requires hazardous waste exporters to notify the EPA of intent to export sixty days prior to export. The EPA then notifies the State Department of the intended export. In turn, the State Department directs the U.S. Embassy in the country of intended import, Mexico for example, to notify the foreign government of the intended import.⁷⁸

The Mexican embassy then communicates Mexico's acceptance or refusal of the import to the State Department. This translates into an approval or rejection by the EPA of the exporter's intended export. If approved, the export is accompanied by another paper trail of manifests for each shipment at each step of the export/import process.⁷⁹

The National Environmental Policy Act (NEPA)⁸⁰ requires an environmental impact analysis, in the form of an "environmental impact statement" (EIS), of major federal agency actions before they are undertaken.⁸¹ After review of the draft EIS by the public and other agencies, corrections in the federal action may be made.⁸² Publication of EIS's assures the public that federal agencies have considered environmental concerns in their decisionmaking process.⁸³

75. *Id.* at 196 (quoting CERCLA, 42 U.S.C. §§ 9601-9675 at 9601(19) (1988)).

76. 42 U.S.C.A. § 6901 et seq. (1992).

77. REVIEW, *supra* note 38, at 18. RCRA also establishes a demonstration program which tracks medical waste from generation to ultimate disposal. *Id.* at 19.

78. Scramstad, *supra* note 51, at 265-6.

79. *Id.*

80. 42 U.S.C. § 4321 et seq. (1988).

81. REVIEW, *supra* note 38, at 19. "Draft EIS's are circulated for interagency and public review and comment." *Id.* at 20.

82. M. Diane Barber, Comment, *Bridging the Environmental Gap: The Application of NEPA to the Mexico-United States Bilateral Trade Agreement*, 5 TUL. ENVTL. L.J. 429, 435-6 (1992).

83. *Id.*

Although President Carter attempted to extend the applicability of NEPA by executive order to govern federal actions taken abroad,⁸⁴ the courts have not been willing to interpret it that way. Thus, it remains questionable whether NEPA has any significant extraterritorial application.⁸⁵

The Endangered Species Act (ESA)⁸⁶ compiles a scientific listing of species of flora and fauna which are considered in danger of extinction. Actions by federal agencies must not jeopardize listed species. Taking of listed species for any purpose by both private and public entities is prohibited. Portions of this statute also implement the Convention on International Trade in Endangered Species (CITES).⁸⁷

Species listed as endangered include both domestic and foreign species.⁸⁸ A species may still be protected under ESA, even if it is not protected in its habitat country.⁸⁹ The import/export bans on endangered species may indeed conflict with free trade obligations of member nations to the General Agreement on Tariffs and Trade (GATT).⁹⁰

The Marine Mammal Protection Act (MMPA)⁹¹ imposes a moratorium, with certain exceptions, on the domestic taking of marine mammals and the importation of marine mammals or parts or products thereof. This act is designed to reduce the mortality of marine mammals, resulting from domestic and foreign commercial fishing.⁹² MMPA protects marine mammals extraterritorially and extrajurisdictionally via import/export bans which have recently been challenged by GATT member nations.⁹³

2. EPA Enforcement

There are a variety of ways in which the EPA may enforce U.S. environmental laws. Most of the preceding statutes empower the EPA

84. Exec. Order No. 12, 114 3 C.F.R. 356 (1979), 42 U.S.C. § 4321 (1982).

85. Barber, *supra* note 82, at 461-62.

86. 16 U.S.C. § 1531 et seq. (1988).

87. REVIEW, *supra* note 38, at 20.

88. Houseman, *supra* note 2, at 595.

89. *Id.*

90. *Id.* For the ESA to comply with GATT, it must fall within article XX, which is an exception for some endangered species. However, article XX has not been held to apply extraterritorially; so the ESA provisions protecting species not found within the United States would seem to violate GATT. *Id.* at 595-596.

91. 16 U.S.C. § 1361 et seq. (1988).

92. REVIEW, *supra* note 38, at 21. This act also regulates Outer Continental Shelf development; and, in 1988, MMPA was amended "to require observer coverage on domestic fishing vessels in fisheries where a high level of interaction between fishing operations and marine mammals is expected." *Id.*

93. Houseman, *supra* note 2, at 596.

to issue compliance orders. They also allow for civil and criminal actions to be brought, for which fines or imprisonment may result.⁹⁴ The EPA has not refrained from referring cases to the Department of Justice for prosecution. Since 1988, EPA has referred 1,111 cases stemming from violation of U.S. environmental laws to the Department of Justice.⁹⁵

One highly publicized action by the EPA recently occurred along the U.S.-Mexico border. In May 1992, "Sbicca of California Inc., and three of its employees, . . . [were indicted by a grand jury] . . . for attempting to illegally export hazardous waste to Mexico."⁹⁶ Sbicca is a U.S. company which manufactures polyurethane shoe soles. Solvents used to clean the shoe mold produce toxic waste.⁹⁷

The defendants, Sbicca's vice-president, its general manager, and its Tijuana maquiladora plant manager, "were charged with one count of conspiracy to transport hazardous waste without a manifest," one count of illegal transportation of hazardous waste, and one count of illegal export of hazardous waste.⁹⁸ "Each count carries a maximum penalty of two years [imprisonment] or a fine of \$50,000 per day of violation."⁹⁹

The indictment alleges that company officials sought a site in Mexico to dispose of the solvents. Sbicca's general manager allegedly gave the maquiladora plant manager \$900 to accomplish this. The plant manager then allegedly drove a truck carrying the hazardous waste to the border crossing and offered a bribe to a Mexican Customs official to allow him through without a manifest describing the type and quantity of waste.¹⁰⁰

According to Assistant U.S. Attorney, Melanie Pierson, "This is the first time an employee of a U.S. Company has been prosecuted

94. REVIEW, *supra* note 38, at 35-6. Each environmental statute provides for a different variety of enforcement mechanisms, and each separately empowers the EPA, or other federal agency to enforce the law; however, most of the provisions are similar in substance.

95. *Id.* at 37.

96. United States v. Sbicca of California, Inc., No. 92-610R (S.D. Cal. May 14, 1992), cited in *Barrage of Actions Filed by EPA, Mexico Focusing on Law Violations in Border Area*, [Current Report] Int'l Envtl. Rep. (BNA) 399, 400 (June 17, 1992).

97. The spent solvents are composed of 1,1,1-trichloroethane, which is considered toxic waste. *Id.*

98. *Id.* Dominic Sbicca is the company's vice-president, Eduardo Reyna is the company's general manager, and Juvenal Cabrera Cruz is the manager of Sbicca's Tijuana maquiladora plant.

99. *Id.*

100. *Id.* The paper trail of manifests and approvals mandated by RCRA was not followed by Sbicca.

for allegedly offering a bribe to a Mexican Customs official in order to transport toxic wastes."¹⁰¹ This case demonstrates the variety of actions that can be brought by the EPA to enforce U.S. environmental law domestically, yet still have an impact extraterritorially.

3. *Regulations Threatened by International Free Trade*

Many stringent U.S. environmental regulations which have import/export restrictions written into them are open to challenge as barriers to free trade. Those who wish to challenge these laws generally do so through the General Agreement on Tariffs and Trade (GATT), which largely governs international free trade.¹⁰² Although the U.S. Senate has never ratified GATT, nor has the Supreme Court recognized it, the Executive Branch conducts trade policy under GATT rules and several state courts have upheld GATT as a legitimate international agreement which preempts inconsistent state law.¹⁰³

As the environmental action group Greenpeace put it, "Under [GATT] . . . , U.S. efforts to label tuna as dolphin-safe, Denmark's ban on the use of polyvinylchloride food containers, British rules on labeling irradiated food, and West German law requiring beverage containers to be recyclable, could all be attacked as nontariff trade barriers" ¹⁰⁴ This view was reiterated by the Center for Policy Alternatives, which analyzed the effects that the draft Uruguay Round of GATT would have on state legislation.¹⁰⁵ The report concluded that state environmental laws challenged as trade barriers could be easily preempted, and that the disputes would be settled through confidential dispute settlement procedures in which the federal government would represent the states.¹⁰⁶ The tuna/dolphin dispute, adjudicated by GATT, between the U.S. and Mexico, serves as an example of how an en-

101. *Id.*

102. John P. Manard, Jr., *GATT and the Environment: The Friction Between International Trade and the World's Environment—The Dolphin and Tuna Dispute*, 5 TUL. ENVTL. L.J. 373, 376-78 (May 1992).

103. Jeffrey Jay Clark, *The United States Proposal for a General Agreement on Trade in Services and its Preemption of Inconsistent State Law*, 25 B.C. INT'L & COMP. L. REV. 75, 75 n.2, 96-7 (Winter 1992).

104. Burrows, *supra* note 59.

105. Katherine Tammaro, *Why The States Should Worry About Gatt*, 9 STATE REPORT ON THE ENVIRONMENT, (Center for Policy Alternatives), August 1992, at 7.

106. *Id.* at 13.

vironmental protection law may successfully be construed as a nontariff trade barrier.¹⁰⁷

In August, 1990, the U.S. government was compelled by court order, under the Marine Mammal Protection Act (MMPA), to impose an embargo on all yellowfin tuna and tuna products from Mexico and other nations whose tuna harvesting methods kill excessive numbers of dolphin.¹⁰⁸ Mexican, Venezuelan, and other tuna fleets use purse sein nets to catch yellowfin tuna; however, the dolphin which swim above the tuna are commonly caught and drowned as well.¹⁰⁹ MMPA was passed in 1972 to protect against the needless killing of marine mammals, especially dolphins.¹¹⁰ The District Court's decision was upheld in February, 1991, by the Ninth Circuit on appeal.¹¹¹

Subsequently, Mexico filed a challenge to the U.S. embargo with GATT.¹¹² GATT then convened a dispute resolution panel¹¹³ which found in favor of Mexico.¹¹⁴ The panel declared the U.S. embargo to be a trade barrier in opposition to U.S. GATT obligations regarding free trade.¹¹⁵ The panel reasoned that the U.S. law could not be applied extraterritorially and remain consistent with GATT.¹¹⁶ It should be noted that there is no interface between international conventions on environmental protection and the GATT.¹¹⁷

107. John H. Jackson, *Dolphins and Hormones: GATT and the Legal Environment for International Trade After the Uruguay Round*, 14 U. ARK. LITTLE ROCK L.J. 429, 434-35 (Spring 1992).

108. *Earth Island Institute v. Mosbacher*, 746 F. Supp. 964, 975-76 (N.D. Cal. 1990).

109. *Id.* at 966-67. The area where most of the damage to dolphin herds has occurred is the Eastern Tropical Pacific. *Id.*

110. *Id.* at 967. Judge Thelton E. Anderson eloquently summarized the intent of Congress: "The statute (MMPA) was intended to use access to the United States market as an incentive for foreign nations to reduce marine mammal deaths. . . . Simply put, the continued slaughter and destruction of these innocent victims of the economics of fishing constitutes an irreparable injury to us all, and certainly to the mammals whom Congress intended to protect. Indeed, for those species now threatened with extinction, the harm may be irreparable in the most extreme sense of that overused term." *Id.* at 975.

111. *Earth Island Institute v. Mosbacher*, 929 F.2d 1449, 1450 (9th Cir. 1991).

112. Manard, *supra* note 102, at 391.

113. The panel was composed of three individuals from Hungary, Switzerland, and Uruguay. *Id.*

114. Joel P. Trachtman, Note, *GATT Dispute Settlement Panel*, 86 AM. J. INT'L LAW 142, 143 (1992).

115. *U.S. Embargo on Mexican Tuna Violates GATT Rules, Panel Finds*, 8 Int'l Trade Rep. (BNA) 1288 (August 28, 1991).

116. Manard, *supra* note 102, at 415.

117. *GATT Official Assesses Tuna Decision's Impact on Link Between Environment, Trade*, 8 Int'l Trade Rep. 1505 (October 16, 1991).

Congress has since passed a bill allowing the importation of tuna from Mexico and Venezuela, provided that they make efforts to reduce their dolphin kill rates.¹¹⁸ As Bush Administration EPA Administrator, William K. Reilly, put it, "This (ruling) has sent a shudder of fear through American conservationists."¹¹⁹

This precedent is dangerous for several reasons. NAFTA constitutes a free trade area formed under GATT and its member nations, Mexico, the U.S., and Canada, must all abide by GATT rules and obligations.¹²⁰ GATT's demonstrated willingness to use these rules and obligations to strike down domestic environmental laws as trade barriers, coupled with its lack of interface with international environmental agreements, sets the stage for a wholesale slaughter of environmental regulations which may in some aspect interfere with free trade.

B. *Mexican Environmental Regulations*

1. *Environmental Statutes*

Mexico's environmental statutes are comparable to those of the United States;¹²¹ however, enforcement of these statutes is the main problem.¹²² Mexico is a civil law jurisdiction, as opposed to the common law systems of both the U.S. and Canada.¹²³ Therefore, the bulk of environmental law in Mexico can be handled administratively, rather than legislatively or judicially.¹²⁴ Unlike the environmental law of the U.S., which is reflected in several subject specific statutes, the environmental law of Mexico is laid down in one far-reaching environmental statute.¹²⁵

This statute, known as The General Law of Ecological Equilibrium and Environmental Protection (General Law),¹²⁶ superseded several

118. *House Approves Bill That Would End Tuna Embargoes Against Mexico, Venezuela*, Int'l Env. Daily (BNA) 5 (Sept. 28, 1992).

119. Darling, *supra* note 47, at A1.

120. North American Free Trade Agreement [hereinafter NAFTA], preliminary text September 6, 1992, U.S.-Mexico-Canada, part 1 art. 103, 1-2 (WESTLAW, NAFTA database).

121. William K. Reilly, *Free Trade and the Environment: Tools for Progress*, Address before the U.S. Chamber of Commerce, Washington, D.C. (March 23, 1992) reprinted in EPA Fact Sheet, EPA 175-F-92-001, September 1992.

122. *Id.*

123. Gonzalez, *supra* note 13, at 662-63.

124. *Id.* at 667.

125. Adam L. Moskowitz, comment, *Criminal Environmental Law: Stopping the Flow of Hazardous Waste to Mexico*, 22 CAL. W. INT'L L.J. 177-78 (1991).

126. *Ley General del Equilibrio Ecologico y Proteccion del Ambiente*, 1 Gaceta Ecologica 2-60 (June 1989). McKeith, *supra* note 65, at 189, n.27.

attempts by various Mexican governments to successfully construct a comprehensive national environmental law.¹²⁷ The General Law regulates air pollution, water pollution, soil erosion, natural resources, and hazardous waste and materials.¹²⁸ The environmental enforcement agency of Mexico, equivalent to the U.S. EPA, is the Secretaria de Desarrollo Urbano y Ecologia (SEDUE),¹²⁹ which was formed in 1982.¹³⁰

Under the General Law, each industrial production facility must comply with the following requirements:

- (1) Obtain an Environmental Operating license from SEDUE;
- (2) File an Environmental Impact Statement (EIS), completed by a SEDUE registered environmental consultant;
- (3) Obtain from SEDUE a Residual Water Discharge Registration;
- (4) Obtain a Hazardous Waste Generator Registration from SEDUE;
- (5) Acquire and issue Ecological Manifests for every shipment of hazardous waste or raw materials;
- (6) Gain approval of hazardous waste storage facilities; and,
- (7) Report and keep records of any changes in the information provided to SEDUE in the applications for any of the above licenses or registrations.¹³¹

While the General Law is comprehensive in scope and sets relatively high ecological standards, compliance is minimal because enforcement is lacking. "SEDUE estimates that 52% of the nation's 1,963 maquiladoras have generated hazardous waste, only 307 generators have obtained basic operating licenses and only 19% reportedly are returning waste to the country of origin."¹³² The compliance rate is dismal at

127. Feeley, *supra* note 29, at 280-81. The General Law was passed in 1988. This comprehensive act superseded several attempts at a national environmental statute. In 1971, the Federal Law to Prevent and Control Environment Pollution was promulgated. In 1982, the Portillo administration passed the Federal Law on Environmental Protection. And, in 1983, President Miguel de la Madrid adopted the National Development Plan. *Id.*

128. McKeith, *supra* note 65, at 189, n.28.

129. REVIEW, *supra* note 38, at Executive Summary-2.

130. *Id.* at 28. SEDUE is subdivided into three sub-secretariats: Urban Development, Environment, and Housing. The Environment sub-secretariat is organized into four management units focusing on: (1) technical standards, guidelines and procedures, and environmental impact of new sources; (2) conservation; (3) regulations and enforcement; and (4) environmental education. *Id.*

131. McKeith, *supra* note 65, at 190-91.

132. *Id.* Much like RCRA, Mexico's hazardous waste laws are based on the "cradle-to-grave" tracking concept; however, consistent enforcement of manifests has yet to occur. *Id.*

best. With NAFTA encouraging the multiplication of even more industrial production facilities, this problem will become even more unmanageable.

2. *SEDUE Enforcement*

Currently, Mexico simply has neither the manpower, training, nor financial resources to adequately enforce its comprehensive General Law.¹³³ Indeed, this very situation was the basis for the Bush administration's argument that only through increased revenue generated by NAFTA would Mexico be able to afford to clean up its environment and begin enforcing its General Law.¹³⁴ This argument has been the cornerstone of the U.S. government's view toward the environmental impact of NAFTA.

However, the Bush administration's argument did not reflect the lack of political will on the part of the Mexican government to command SEDUE enforcement. Aggressive enforcement by SEDUE is not encouraged because doing so would hinder industrial expansion in Mexico.¹³⁵ As a third world country, Mexico's desire for increased economic growth has overshadowed enforcement of environmental standards against industrial polluters.

Beyond the foregoing reasons for the lack of environmental law enforcement by SEDUE, there is little economic gain to be had by prosecuting maquiladora polluters. Since all equipment, machinery, components, and raw materials which the maquiladoras use are typically owned by their U.S. parent corporations, the maquiladoras themselves have few, if any, tangible assets with which to satisfy a judgment against them.¹³⁶ Only liability of the parent corporation would yield any economic justification for litigation, and again, this would impede investment.

The numbers reflecting this lack of environmental law enforcement are appalling. For example, eight out of ten assembly plants in Mexico

133. Moskowitz, *supra* note 125, at 179.

134. Karen Tumulty, *Free Trade Talks Raise Questions That Alarm Environmentalists*, L.A. TIMES, November 17, 1991, at A19.

135. Moskowitz, *supra* note 125, at 179. While the Mexican government seems to recognize the danger of environmental damage, the impetus remains on economic growth first. For example, in an effort to boost their industrial sector, Mexico invited U.S. asbestos companies to relocate to Mexico from the U.S. *Id.* at n.171 (citing Rose, *Transboundary Harm: Hazardous Waste Management Problems and Mexico's Maquiladoras*, 23 INT'L LAW 223 (1989)).

136. Gonzalez, *supra* note 13, at 682-83.

are out of compliance with environmental laws¹³⁷ and, less than one-third of the dangerous liquid waste produced by Mexico City factories is disposed of properly. The remaining two-thirds are unaccounted for and probably dropped into the city's sewer system.¹³⁸

SEDUE's budget in 1990 was only \$3.1 million compared to the \$50 million that Texas alone spends per year to protect the air and water.¹³⁹ In fact, SEDUE's per capita budget is 48 cents compared to EPA's \$24.40.¹⁴⁰ Mexico hired an additional 100 compliance inspectors in 1991, largely to put the best face on Mexican environmental enforcement during NAFTA negotiations, which brought the total number of inspectors available to monitor the entire country's factories up to 255.¹⁴¹ This is about the same number of inspectors fielded to regulate just air quality in four countries of the Los Angeles area.¹⁴²

NAFTA will provide even more companies for SEDUE to regulate and, thus, will increase the stress on an already overworked compliance staff. Even though Mexico's General Law is laudable in its goals and provisions, without adequate enforcement, it lies as impotent on the books as a paper tiger.

3. *The Money Problem - No Pesos for Protection*

Mexico's cash-strapped budget clearly cannot cope with the expenses of environmental enforcement, even if the political will to enforce environmental laws were to exist. The Mexican government is paying \$100 million of the \$78 billion national budget for public relations to promote NAFTA.¹⁴³ Mexico is the developing world's second largest debtor nation, and as such, it is under pressure to drastically reduce government spending as well.¹⁴⁴

While the idea that NAFTA will generate greater financial resources for Mexico to clean up its environment and enforce its General Law

137. Larry Williams, *Fears of a Trade 'Cesspool'*, CHI. TRIB., January 13, 1992, at C15.

138. Juanita Darling, *Report Sees U.S. Trade Pact as Mexico Pollution Threat*, L.A. TIMES, July 17, 1991, at A1.

139. Bruce Stokes, *Greens Talk Trade*, 23 NAT'L J. 862, 865 (April 13, 1991).

140. Darling, *supra* note 47, at A1.

141. *Id.* SEDUE had a staff of seven people to assess the environmental impact of roughly 700 to 900 construction projects in 1992. *Id.*

142. *Id.*

143. *Id.*

144. "Over the last decade, the federal budget deficit has been slashed from 16% of the economy to less than 1%, with cuts in social services, as well as the sale of government-owned industries to the private sector." *Id.*

is appealing, the reality is that environmental protection will have intense competition with other national priorities for those financial resources. NAFTA does not force Mexico to use any new wealth generated from NAFTA for environmental protection. Indeed, with a staggering national debt over its head, Mexico may well decide to begin paying off some of its debt burden.

Alternatively, new money could be used for health care, social services, infrastructure and transportation development, agricultural technology, reinvestment in industrial technology, and many other areas which demand just as much attention from the Mexican government as does environmental protection, and which undoubtedly have greater and more influential constituencies.

Thus, the conundrum is that even though Mexico does not currently have the financial resources now to deal with the environmental problems they face, there is no guarantee, nor even any solid commitment, that Mexico would use new wealth from NAFTA to address its environmental problems in the face of other competing national priorities.

IV. THE NORTH AMERICAN FREE TRADE AGREEMENT

On August 12, 1992, the White House announced the completion of negotiations on NAFTA.¹⁴⁵ Under NAFTA, all trade barriers and tariffs would be eliminated, with barriers to trade on \$250 million of U.S. exports lifted immediately and tariffs on an additional \$700 million in textile and apparel exports eliminated in six years.¹⁴⁶

NAFTA, along with the Uruguay Round of GATT, was negotiated under 'Fast Track' authority granted to the President by Congress. Congress' grant of power to the President is necessary because it is Congress' constitutional responsibility to regulate foreign commerce.¹⁴⁷ With fast track power, the President can negotiate agreements in confidentiality and then submit them to Congress for an up or down vote without the possibility of amendment.¹⁴⁸

Under fast track procedures, the President may sign the agreement 90 days after he officially notifies Congress of his intent to enter into

145. WHITE HOUSE, *supra* note 3, at 1.

146. *Id.* at 2.

147. *Fast Track Authority and North American Free Trade Agreement: Hearings Before the Subcomm. on Economic Development of the House Comm. on Public Works and Transportation, 102nd Cong., 1st Sess. VI (1991) (Memo to the Members of the Subcommittee on Economic Development from the Committee Staff).*

148. *Id.* at VI-VII.

the agreement. In this case, President Bush notified Congress of his intent to enter NAFTA on September 18, and he signed NAFTA on December 17.¹⁴⁹ Congress must now vote either for or against the agreement within 90 days of the President's signing and introducing implementing legislation,¹⁵⁰ unless an extension of fast track negotiating authority is granted to President Clinton.

A. *International Environmental Treaties Recognized*

NAFTA specifically recognizes three international environmental agreements, but with the condition that if any of the participating countries has an alternate, yet equally effective, means of complying with any of those environmental agreements which is more compatible with the principles of free trade, that country must choose the means most compatible with free trade.¹⁵¹

Article 104 of NAFTA provides in relevant part:

1. In the event of any inconsistency between this Agreement and the specific trade obligations set out in:

(a) *Convention on the International Trade in Endangered Species of Wild Fauna and Flora*, done at Washington, March 3, 1973;

(b) the *Montreal Protocol on Substances that Deplete the Ozone Layer*, done at Montreal, September 16, 1987, as amended June 29, 1990;

(c) *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*, done at Basel, March 22, 1989, upon its entry into force for Canada, Mexico, and the United States; or

(d) the agreements set out in Annex 104.1,

such obligations shall prevail to the extent of the inconsistency, provided that where a Party has a choice among equally effective and reasonably available means of complying with such obligations, the Party chooses the alternative that is the least inconsistent with the other provisions of this Agreement.¹⁵²

149. *President Bush Signs NAFTA at Ceremony*, 9 Int'l Trade Rep. (BNA) 2162 (December 23, 1992).

150. *NAFTA: Bush Notifies Congress of Intent to Sign NAFTA*, 9 Int'l Trade Rep. (BNA) 1632 (September 23, 1992).

151. NAFTA, *supra* note 120, at 1-2.

152. *Id.* Annex 104 contains a 1986 bilateral hazardous waste movement agreement between the U.S. and Canada as well as the 1982 La Paz agreement on environmental protection between the U.S. and Mexico. *Id.* at 1-4.

1. *Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)*¹⁵³

CITES guards against threats to the earth's biodiversity through controls or moratoriums on trade in animal and plant species which are threatened with extinction.¹⁵⁴ The level of trade restriction that CITES places on any given species is proportional to the degree of threat to that species.¹⁵⁵ CITES operates on a system of appendices, each of which contain a listing of species assigned a certain degree of endangeredness, which mandate varying levels of trade restrictions.¹⁵⁶

Appendix I prohibits all commercial trade in listed species which are currently threatened with extinction. Non-commercial trade is allowed only upon a showing that moving the species is not detrimental to their survival.¹⁵⁷ Appendix II includes species which may easily become threatened without strict trade regulation. Again, commercial trade is only allowed upon a showing that moving the species is not detrimental to their survival.¹⁵⁸ Appendix III allows any party to protect a species that has been locally classified as threatened through the establishment of quota systems for trade regulation.¹⁵⁹

As to the effects of NAFTA on endangered species in the border region, a U.S. government study has cautioned that growth along the border could affect roughly fifty endangered species and over 100 "candidate" endangered species. Increased use of water for industry, residences, and agriculture would alter rivers, wetlands, and remove brush habitat. The report also noted that the increases in commerce that NAFTA would bring could disguise an increase in illegal trade of endangered wildlife.¹⁶⁰

2. *The Montreal Protocol on Substances That Deplete the Ozone Layer (Protocol)*¹⁶¹

The Protocol provides for the elimination of substances harmful to the ozone layer, such as chlorofluorocarbons (CFC's), by the year

153. *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, March 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243 [hereinafter CITES].

154. *REVIEW*, *supra* note 38, at 30.

155. Houseman, *supra* note 2, at 581.

156. *Id.*

157. *Id.* Commercial trade in species under CITES includes trade in species-derived products.

158. *Id.*

159. *Id.* at 581-82.

160. *NAFTA Negotiators Should Facilitate Trade in Clean Fuels*, *Environment Review Says*, 8 Int'l Trade Rep. (BNA) 1527, 1528 (Oct. 23, 1991).

161. *The Montreal Protocol on Substances that Deplete the Ozone Layer*, Sept. 16, 1987, *entered into force* Jan. 1, 1989, 26 I.L.M. 1541 (1987) [hereinafter Protocol].

2000.¹⁶² It is believed that significant ozone depletion will result in increased incidents of cataracts and skin cancer, as well as a reduction in food crop yields.¹⁶³ The Protocol restricts trade in CFC's among Protocol parties and non-parties, and between Protocol parties.¹⁶⁴

The Protocol also provides for assistance to developing member nations in meeting their Protocol objectives by lengthening their CFC and CFC product phase-out timetables, offering financial assistance, and providing technology transfer incentives.¹⁶⁵

3. *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal* (Basel)¹⁶⁶

On August 11, 1992, the U.S. Senate ratified The Basel Convention (Basel), which went into effect on May 5 after Australia became the twentieth signatory.¹⁶⁷ Basel is "designed to prohibit the shipment of hazardous waste to countries lacking appropriate facilities for such material."¹⁶⁸

Basel was drafted by the United Nations Environment Programme (UNEP), and provides an international forum for Lesser Developed Countries (LDC's) to collaborate with industrialized nations in controlling the transportation of hazardous waste.¹⁶⁹ The ultimate goal of Basel is to actually make transboundary shipment of hazardous waste so inconvenient and expensive that industry will be forced to reduce and recycle its waste domestically.¹⁷⁰

162. Houseman, *supra* note 2, at 578.

163. *Id.* (citing WORLD RESOURCES INSTITUTE, WORLD RESOURCES 1990-1991, at 62-63 (1990)).

164. *Id.*

165. *Id.*

166. Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, *opened for signature* March 22, 1989, 28 I.L.M. 649 (1989) [hereinafter Basel].

167. *Hazardous Waste: Senate Ratifies Basel Convention on Transboundary Shipments of Waste*, 23 Env. Rep. (BNA) 1255 (August 21, 1992).

168. *Id.* Richard Fortuna, of the Hazardous Waste Council, noted the importance of completing the implementing legislation since NAFTA negotiations had already been completed, "NAFTA could remove trade barriers that keep hazardous waste operations inside the United States, where environmental standards are high NAFTA may cause Mexico or Canada to increase their import of hazardous wastes from the United States, which would mean a loss of both jobs in the hazardous waste industry and the incentive to prevent pollution." *Id.*

169. Scramstad, *supra* note 51, at 281.

170. *Id.* at 282-3.

B. *Integrated Environmental Plan for the U.S.-Mexico Border*

While environmental responsibility and the concept of sustainable development¹⁷¹ are encouraged throughout the NAFTA document, nowhere is there an environmental enforcement mechanism or provision. Instead of pressing for inclusion of environmental enforcement provisions in NAFTA, the U.S. opted for a parallel agreement with Mexico addressing solely the environmental issues of the border region. This bilateral focus ultimately produced the Integrated Environmental Plan for the U.S.-Mexico Border Area (IEP).¹⁷² The IEP is not tied to NAFTA, it is considered by both governments a separate agreement wholly outside NAFTA provisions.

The IEP grew out of an interagency Review of U.S.-Mexico Environmental Issues, coordinated by the U.S. Trade Representative, which "while conceding that increased trade and development [under NAFTA] could worsen existing pollution problems along the 1,550-mile border, presented a predominantly optimistic view, claiming that economic growth could help raise the funds needed to solve those problems."¹⁷³ The Review basically catalogues the environmental problems that exist in the U.S.-Mexico border area.

The IEP attempts to deal with the problems identified in the Review through joint EPA/SEDUE consultations and information/technology exchange, but, like NAFTA, contains no environmental enforcement provisions.¹⁷⁴ Environmentalists cite few concrete suggestions for environmental improvement and no funding requirements as crippling weaknesses of the document.¹⁷⁵ Diane Takvorian of the San Diego-based Environmental Health Coalition characterized it as "[a]n insult from conception to delivery," and Naachiely Lopez Hurtado of the

171. Sustainable development contemplates the use of natural resources to meet the needs of the current generation, without jeopardizing the resource base for future generations. Alex Hitle & Scott Nilson, eds., *RESPONSE OF ENVIRONMENTAL AND CONSUMER ORGANIZATIONS TO THE SEPTEMBER 6, 1992 TEXT OF THE NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA)*, 1 (Oct. 6, 1992) [on file at the IND. INT'L & COMP. LAW REV. office, hereinafter *RESPONSE*]. As a sub-part of sustainable development, 'sustainable trade' is trade and trade policies which meet the needs of the current generations without jeopardizing the resource base for future generations. Houseman, *supra* note 1, at 611, n.373.

172. IEP, *supra* note 5.

173. Amy Wallace, *U.S.-Mexico Trade Pact Foes Assail Environmental Study*, L.A. TIMES, October 19, 1991, at A23.

174. IEP, *supra* note 5.

175. Patrick McDonnell, *Doubts Voiced About U.S.-Mexico Plan*, L.A. TIMES, September 24, 1991, at A3.

Tijuana-based Mexican Ecologist Party commented, "We don't think this is a real plan."¹⁷⁶

Although there are no funding requirements in IEP, both the Mexican and American governments gained much publicity with their announcements in February 1992 that the U.S. will spend \$379 million over the next two years on border clean-up while Mexico plans to spend \$466 million.¹⁷⁷ Beyond these initial monetary promises, there is nothing in the IEP to guarantee future funding. It is unclear what effect the Clinton administration will give this financial commitment, considering the cost-cutting approach that the new administration is taking toward government funding. Vice President Gore will provide the environmental conscience of this administration, and much depends upon his advice to President Clinton on this matter.

There is clear reason, however, to believe that Mexico's commitments on the environment may be dubious.¹⁷⁸ President Carlos Salinas does not want environmental issues to scuttle NAFTA and, along with it, Mexico's access to the U.S. market.¹⁷⁹ To that end, Salinas ordered plant closings, over 200 along the U.S.-Mexico border, when it became clear that the environmental enforcement capabilities of Mexico were going to be an issue with the American public.¹⁸⁰

A case in point involves the great fanfare that was generated by Salinas' decision to shut down a large government-owned oil refinery in the middle of Mexico City.¹⁸¹ The closure cost some \$500 million, small change compared to what NAFTA would bring to the Mexican economy.¹⁸² However, evidence of Mexico's duplicity on environmental issues lies in the fact that the plant was later quietly reassembled in Salamanca with absolutely no new pollution controls.¹⁸³

In the absence of environmental enforcement provisions in NAFTA and IEP, Mexico may continue to play such shell games with the U.S. to gain the necessary public approval for passage of NAFTA. Indeed, under the current version of NAFTA, Mexico may continue to challenge

176. *Id.*

177. *President Announces Three-Year Program to Clean Up, Prevent Pollution at Mexican Border*, 22 *Env. Rep. (BNA)* 2427 (Feb. 28, 1992).

178. Darling, *supra* note 47.

179. *Id.*

180. REPORT OF THE ADMINISTRATION ON THE NORTH AMERICAN FREE TRADE AGREEMENT AND ACTIONS TAKEN IN FULFILLMENT OF THE MAY 1, 1991 COMMITMENTS, Tab 7, 19-20 (Sept. 18, 1992) [hereinafter REPORT].

181. Darling, *supra* note 47.

182. *Id.*

183. *Id.*

our domestic environmental laws as nontariff trade barriers. The Mexican government has demonstrated its willingness to engage in both of these games.

C. *Opposition to NAFTA*

Intense opposition to NAFTA has come from many quarters such as from labor, agriculture, consumer, human rights, religious, and environmental groups.¹⁸⁴ This section will concentrate on opposition to NAFTA based upon environmental principles.

1. *Non-Governmental Organizations*

Opposition to NAFTA by environmental non-governmental organizations (NGO's) was very intense during the White House campaign to gain fast track negotiating authority from Congress. Thus, to split the NGO coalition working against them in their lobbying effort, President Bush initiated the interagency Review of Environmental Issues, pledged to include environmental NGO's in the advisory process, and agreed to produce a parallel environmental agreement, the IEP.¹⁸⁵

These commitments effectively divided the NGO coalition into one group lead by the National Wildlife Federation, which endorsed the White House compromises, and another group led by the Sierra Club, which demanded inclusion of environmental provisions in NAFTA itself.¹⁸⁶ The end results were that the White House got its fast track authority, and the environmental lobby was fractured.

Since NAFTA's completion, the NGO's remaining in opposition to NAFTA base their main argument on NAFTA's lack of "mechanisms to guarantee that an appropriate share of the wealth it [NAFTA] may generate will go towards environmental and infrastructural improvement"¹⁸⁷ Another point of contention is that, with regard to the international environmental agreements that NAFTA recognizes in Article 104, NAFTA itself becomes the sole arbiter of what is, and what is not, allowed under the treaty.¹⁸⁸

Also, environmental NGO's are unconvinced that NAFTA will not lead to lower environmental standards. Justin Ward, of the Natural

184. Edmund W. Sim, *Derailing the Fast-Track for International Trade Agreements*, 5 FLA. INT'L L.J. 471, 482 (1990).

185. REPORT, *supra* note 180, at Tab 7, 1-2.

186. Tumulty, *supra* note 134.

187. RESPONSE, *supra* note 171, at 2.

188. *Id.* at 8. As noted earlier, NAFTA recognizes CITES, the Montreal Protocol, and the Basel Convention.

Resources Defense Council, commented " 'We do not have the same level of confidence as the administration' that NAFTA will not lead to lower environmental standards in the United States."¹⁸⁹ The EPA did admit, at a briefing on August 15, 1992, that NAFTA provisions do not allow any action to be taken against a member nation that attracts investment or relocation via reduction of environmental or health standards.¹⁹⁰

NGO's have even resorted to litigation in order to intervene. Public Citizen filed suit in January 1992 in the U.S. District Court for the District of Columbia to force the Office of the U.S. Trade Representative (USTR) to conduct an Environmental Impact Statement (EIS), as required under the National Environmental Protection Act (NEPA).¹⁹¹ The District Court found that Public Citizen did not have standing to sue, and dismissed the case. The Circuit Court also dismissed the case on appeal, holding that the federal agency action complained of was not a final action, and therefore the agency was not required by NEPA to issue an EIS.¹⁹² Public Citizen refiled its action to bring USTR into compliance with NEPA on September 15, 1992.¹⁹³

2. Congressional Concerns

Many of these criticisms and concerns have found their way to Capitol Hill. House Majority Leader Richard Gephardt recently stated, "My review of the [NAFTA] accord indicates that under this agreement, substandard environmental conditions that exist on both sides of the U.S.-Mexican border will remain static or grow worse. A properly negotiated NAFTA would make them better."¹⁹⁴ Representative Gephardt's view reflects the opinion of many members of Congress who are in favor of the a free trade agreement in principle, but not necessarily NAFTA, due in large part to its labor and environmental deficiencies.

189. *North American Free Trade Agreement Greeted with Suspicion by Environmental Groups*, (Special Report), Int'l Env. Daily (BNA) 17 (Sept. 10, 1992).

190. *Id.* at 19.

191. *Public Citizen v. Office of the United States Trade Representatives*, 782 F. Supp. 139, 144 (D.D.C. 1992).

192. *Public Citizen v. Office of the United States Trade Representatives*, No. 92-5010, 1992 U.S. App. LEXIS 17947, at *22-23 (D.C. Cir. 1992).

193. *Suit on EIS Preparation for NAFTA Refiled by Public Citizen*, 16 Chem. Reg. Rep. (BNA) 1133 (September 18, 1992).

194. *Gephardt Says Bush Should Give Up on Congressional Approval for NAFTA*, 16 Chem. Reg. Rep. (BNA) 1060 (Sept. 11, 1992). Rep. Gephardt went on to observe that, "A properly negotiated NAFTA would halt the use of environmental gamesmanship as a factor for companies deciding where to locate their plants." *Id.*

Representative Ron Wyden, chairman of the House Subcommittee on Regulation, Business Opportunities, and Energy, noted the lack of a link between the IEP and NAFTA,¹⁹⁵ and called the administration's argument for revenue generation followed by environmental protection "trickle-down environmentalism."¹⁹⁶ In a letter to then-U.S. Trade Representative Carla Hills, Representative Wyden wrote, "You describe this proposed agreement as 'the greenest in history,' but the fact is that much of it is more brown than green."¹⁹⁷

The lack of an environmental enforcement mechanism in NAFTA itself has drawn considerable criticism from Congress. In response to the admission of Bush's EPA Administrator, William Reilly, that NAFTA would not allow the U.S. to impose trade sanctions on Mexico to enforce its environmental laws, Representative Robert Matsui, of the House Ways and Means Committee, argued that NAFTA needs an "environmental hammer clause" which should include provision for the U.S. to use tariffs as an enforcement mechanism.¹⁹⁸ Part of the concern in this area is centered around the fear that U.S. companies complying with stricter environmental standards would be at a competitive disadvantage with Mexican companies or U.S. companies operating in Mexico.¹⁹⁹

D. *Possible Solutions to the NAFTA Problem*

Short of adopting an "environmental hammer clause," there are several solutions which have been proposed from various sectors to address the environmental deficiencies of NAFTA. The National Wildlife Federation has proposed a 1% "Green Tax" on investment in Mexico to be earmarked for ecological budgets.²⁰⁰ This would ensure that some of the new revenue generated by NAFTA would go directly toward environmental protection and clean-up.

195. *Protecting the Environment in North American Free Trade Agreement Negotiations: Hearings Before the Subcomm. on Regulation, Business Opportunities, and Energy of the House Comm. on Small Business*, 102nd Cong., 1st Sess. 69 (1991) (Statement of Hon. Ron Wyden, Chairman, Subcomm. on Regulation, Business Opportunities, and Energy).

196. *Id.* at 60 (Statement of Hon. Ron Wyden, Chairman, Subcomm. on Regulation, Business Opportunities, and Energy).

197. *Congress Examines NAFTA Provisions to Ensure Enforcement of Environmental Laws*, 23 *Env. Rep. (BNA)* 9999 (Sept. 25, 1992).

198. *Id.*

199. *Id.*

200. Darling, *supra* note 47.

The Economic Strategy Institute (ESI) has proposed the creation of a "Trinational Superfund" to help clean up hazardous waste.²⁰¹ This proposal would be funded initially by the U.S. and Canada, by assessments on polluters, and by Mexican purchases of outstanding Mexican debt, which would be treated as face-value contributions to the superfund.²⁰² ESI's superfund proposal would empower the fund with inspection authority as well as the power to impose fines for past pollution.²⁰³

Legal experts of the International Bar Association have discussed creation of separate environmental courts both at the national and international levels.²⁰⁴ Lord Chief Justice Harry Woolf, of the Court of Appeal in London, cited the example of the New South Wales Land and Environmental Court in Australia as a model of how an environmental court could work: "This specialized court, which has been in existence for 10 years, has been able to hear cases 'within a time scale of three months' and provides expert assessments through the technical expertise of its judges."²⁰⁵

Applied to NAFTA, a separate environmental court could be empaneled with environmental experts from the U.S., Canada, and Mexico who are familiar with the laws of each nation as well as with the provisions of NAFTA and the international agreements which it embodies.

VI. CONCLUSION

The myriad environmental problems surrounding NAFTA call into question the wisdom of allowing such a far reaching trade agreement to be entered into without ensuring that all of these environmental issues will be addressed. While it is a step forward that an international trade agreement actually recognizes environmental issues within its text, NAFTA does not go far enough to impact these problems in a positive way.

President Clinton has decided not reopen NAFTA negotiations to discuss inclusion of environmental and labor provisions due to the

201. *ESI Proposes that NAFTA Include Trinational Superfund for Environment*, 8 Int'l Trade Rep. (BNA) 1619.

202. *Id.*

203. *Id.*

204. *Governments Seen Making Greater Use of Criminal Law in Environmental Cases*, Int'l Env. Daily (BNA) 5 (Sept. 29, 1992).

205. *Id.* at 7.

adamant opposition to renegotiation by both Mexico and Canada.²⁰⁶ The President has instead offered to negotiate ancillary agreements to NAFTA in these areas.²⁰⁷ Since passage of these agreements would not be a prerequisite to NAFTA implementation, it is doubtful that ancillary agreements strict enough to be effective would be passed by all three legislatures. The U.S. is the largest market in the world; and if Mexico and Canada want free access to it, they could be made to reopen NAFTA negotiations for inclusion of these vital provisions.

In a speech on "American Taxation" in 1774, Edmund Burke said, "It is the nature of all greatness not to be exact, and great trade will always be attended with considerable abuses."²⁰⁸ Clearly, it is time for environmental abuses in the name of free trade to end. Economics and environmental protection can be successfully synthesized into a regime of sustainable development, but only through intense negotiation and considerable compromise on both sides.

In this spirit, I urge the Clinton administration to reopen the NAFTA negotiations and press for inclusion of environmental safeguards in the agreement itself. Only through NAFTA will the marriage between economics and environmental protection be consummated. Only through international free trade that is sensitive to environmental considerations will sustainable development flourish. And, only through sustainable development will the environment for future generations be preserved.

*Michael J. Kelly**

206. *President Bush Signs NAFTA at Ceremony, supra* at 149.

207. *Id.*

208. Edmund Burke, *Speech on American Taxation (1774)*, reprinted in *THE OXFORD DICTIONARY OF QUOTATIONS*, 3rd ed., Oxford University Press, New York, 1980.

* J.D. Candidate, 1994, Indiana University School of Law—Indianapolis.

