The Hinckley Journal of Politics is published annually by the Hinckley Institute of Politics for students, public officials, university officials, and the public. The opinions expressed herein are not necessarily those of the University of Utah, the Hinckley Institute of Politics, the Publications Council, or the editorial board. Please direct your correspondence to the Journal Editors, Hinckley Institute of Politics, 260 South Central Campus Drive, Room 253, Salt Lake City, Utah 84112, (801) 581-8501, or email: hinckley@hinckley.utah.edu.

# Hinckley Journal of Politics

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As the director of the Hinckley Institute of Politics, it is my pleasure to introduce the 2007 Hinckley Journal of Politics.

Continuing in the outstanding academic tradition of the Hinckley Journal, this year’s edition represents quality research on issues relevant to Utah, our nation, and the world. Topics range from statewide education initiatives and toxic waste management to federal healthcare mandates and feminism in the Middle East. Each article comes from bright and dedicated students seeking to both expand their own knowledge while simultaneously provide substantive research and analysis in their field.

In addition to student contributions to the Journal, we are grateful for and enlightened by articles submitted by Provo Mayor Lewis Billings, Senator Gregory Bell and Representative Carol Spackman Moss.

This fantastic compilation could not have come to fruition without the diligent work of its 2007 co-editors Cameron Diehl and W. Brett Barrus. Additionally, the tireless effort of the Managing Editor Courtney McBeth, our Faculty Advisors, Student Board Members, and Hinckley Institute staff was pivotal in making this year’s Journal possible.

Through the various opportunities offered through the Hinckley Institute of Politics, University of Utah students are able to apply the theories and concepts they learn in the classroom to real world experiences. To date, the Hinckley Institute has placed and supported over 4,000 interns in political offices throughout the State of Utah, in Washington D.C., and at a host of international locations. Interns are required to complete a research paper based on the issues pertinent to their internships and, therefore, reflect practical ideas and conclusions about some of today’s most pressing issues. The Journal represents some of the best and most compelling of these papers.

We still mourn the loss of R.J. Snow a great friend and mentor. The Journal reflects R.J.’s life-long pursuit of helping students put serious academic study to practical effect and then to memorialize those experiences through thoughtful research and writing. It is an honor to dedicate this Journal to our beloved R.J. Snow.

Sincerely,
Kirk L. Jowers
Director, Hinckley Institute of Politics
**EDITORS’ NOTES**

**HINCKLEY JOURNAL OF POLITICS’ MISSION STATEMENT**

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

**GENERAL COMMENTS**

It has been an honor to serve as editors for the 2007 edition of the *Hinckley Journal of Politics*. We thank the student authors and the public officials who have contributed to this year’s Journal for their hard work. The Journal is one of many wonderful opportunities the Hinckley Institute provides for undergraduate students. We are indeed appreciative of the generosity of the Hinckley family for their vision of the need for student involvement in practical politics and the principle of citizen involvement in government. We thank the Hinckley staff for their dedication to students. We also commend the student authors for their involvement in the political process, whether it is serving an internship, working on a campaign, or studying politics. We hope you will find the articles within the *Journal* thought-provoking and timely.

**ACKNOWLEDGEMENTS**

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

- This year’s published authors, for their hard work and excellent writings in politics.
- This year’s contributing public officials: Utah State Representative Carol Spackman Moss, Utah State Senator Gregory Bell and Provo City Mayor Lewis Billings for their continued efforts in representing the people of Utah and for their support of the Hinckley Institute of Politics.
- This year’s Editorial Board members, for reviewing and making the final selection of papers for publication, and for distributing the weight of the load required in putting together this publication.
- This year’s Faculty Advisors, Chandran Kukathas, Pei-te Lien, Susan Olson and Matt Bradley for their work in reviewing and editing the published student papers.
- Robert H. Hinckley and the Hinckley family. Because of Mr. Hinckley’s vision and the support of his family, many students at the University of Utah have been given the opportunity to gain a greater respect and love for politics and our system of government.
- All of the students who submitted papers for publication.
- The many people who have given their support to the Hinckley Institute of Politics.
- Hinckley Institute of Politics Managing Editor Courtney McBeth and Hinckley Institute Staff.
GENERAL SUBMISSION GUIDELINES
The Hinckley Journal of Politics welcomes submissions from University of Utah undergraduate students of any discipline, members of the faculty, and Utah’s public officials of any capacity. Any political science-related topic is acceptable. The scope can range from university issues to international issues. Papers must adhere to the following submission guidelines to be considered for publication.

SUBMISSION GUIDELINES FOR STUDENTS

1. SUBMISSION COPIES:
Authors must submit one hard copy of their paper. The editors kindly request that authors submit a maximum of three papers for consideration each year.

2. SUBMISSION COVER PAGE:
The first page of the paper should include the author’s name, email, telephone number, and full address; the title of the paper; and an abstract of the paper approximately 150 words in length.

3. PAPER LENGTH:
Papers should be between 10 and 35 pages in length.

4. PAPER FORMAT:
Papers should be formatted as follows:
• Double-spaced (exceptions: tables and charts).
• Number all pages in the upper right-hand corner of each page except the first page.
• Use single column format with 1” margins on the top, bottom, left, and right.
• Print on one side of the paper.
• Use 12 point Times New Roman font.
• The author’s name should appear on the cover page only and not on any subsequent pages.

5. STYLE GUIDELINES:
Papers must adhere to the Publication Manual of the American Psychological Association (APA style) for in-text citations, referencing, and submission/publication format. A style guideline is available at the Hinckley Institute of Politics or online at the Hinckley Institute of Politics website under Publications.

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

SUBMISSION GUIDELINES FOR PUBLIC OFFICIALS:
The Journal will consider for publication essays written by national, state, and local public officials. For paper guidelines, public officials may contact the Journal editors.

CORRESPONDENCE MAY BE SENT TO:
University of Utah
Hinckley Institute of Politics
260 South Central Campus Drive Room 253
Salt Lake City, UT 84112-9151
Phone: (801) 581-8501
Fax: (801) 581-6277
Email: hinckley@hinckley.utah.edu
ABOUT THE HINCKLEY INSTITUTE OF POLITICS

Robert H. Hinckley

A man of vision and foresight, a 20th century pioneer, a philanthropist, an entrepreneur, and an untiring builder of education and of the American political system—all are apt descriptions of Robert H. Hinckley, a Utah native and tireless public servant. Robert H. Hinckley began his political career as a state legislator from Sanpete County and a mayor of Mount Pleasant. Hinckley then rose to serve as the Utah director for the New Deal program under President Franklin D. Roosevelt.

Hinckley went on to serve in various capacities in Washington, D.C., from 1938 to 1946 and again in 1948. During those years he established and directed the Civilian Pilot Training Program, served as Assistant Secretary of Commerce for Air, and directed the Office of Contract Settlement after WWII. In these positions Hinckley proved himself to be, as one of his colleagues stated, “One of the real heroes of the Second World War.” Also in 1946, Hinckley and Edward Noble jointly founded the American Broadcasting Company (ABC), and over the next two decades helped to build this company into the major television network it is today.

Spurred by the adverse political climate of the ‘40s, ‘50s, and ‘60s, Hinckley recognized the need to demonstrate that politics was “honorable, decent and necessary,” and to encourage young people to get involved in the political process. After viewing programs at Harvard, Rutgers and the University of Mississippi, Hinckley believed the time was right for an institute of politics at the University of Utah. So in 1965, through a major contribution of his own and a generous bequest from the Noble Foundation, Robert H. Hinckley established the Hinckley Institute of Politics to promote respect for practical politics and to teach the principle of citizen involvement in government.

“Every student a politician” was Hinckley’s dream. The Hinckley Institute of Politics strives to fulfill that dream by sponsoring internships, scholarships, forums, mentoring and a minor in Campaign Management. Today, 42 years later, Hinckley’s dream is a reality. More than 4,000 students have participated in programs he made possible through the Hinckley Institute of Politics. Many of these students have gone on to serve as legislators, members of Congress, government staffers, local officials, and judges. All participants have, in some measure, become informed, active citizens. Reflecting on all of his accomplishments, Robert H. Hinckley said, “The Hinckley Institute is one of the most important things I will have ever done.”
HINCKLEY INSTITUTE OF POLITICS  
UNIVERSITY OF UTAH

The Hinckley Institute of Politics at the University of Utah is a bipartisan institute dedicated to engaging students in governmental, civic, and political processes; promoting a better understanding and appreciation of politics; and training ethical and visionary students for service in the American political system. Robert H. Hinckley founded the Hinckley Institute of Politics in 1965 with the vision to, “teach students respect for practical politics and the principle of citizen involvement in government.” Since its founding, the Hinckley Institute has provided a wide range of programs for students, public school teachers and the general public including: internships, courses, forums, scholarships and mentoring. The Hinckley Institute places emphasis on providing opportunities for practical experience in politics.

INTERNATIONAL PROGRAM
A nationally recognized program and the heart of the Hinckley Institute, the Hinckley international program provides internship scholarships and places over 200 students every year in political and government offices, non-profit organizations, campaigns, and think tanks. The Institute provides internship opportunities to students from all majors for academic credit in Washington, D.C., at the Utah State Legislature, in local offices and campaigns, and internationally.

CAMPAIGN MANAGEMENT MINOR
The Hinckley Institute of Politics offers an undergraduate minor in Campaign Management designed to provide undergraduate students the opportunity to learn the theory and practices that will allow them to be effective participants in election and advocacy campaigns. Students are required to complete a political internship and an interdisciplinary series of courses in areas such as campaign management; interest groups and lobbying; voting, elections and public opinion; media; and other practical politics.

PUBLIC FORUMS AND EVENTS
The Hinckley Institute hosts weekly Hinckley Forums where political speakers address public audiences in the Hinckley Caucus Room. Hinckley Forums enable students, faculty, and community members to discuss a broad range of political concepts with local, national, and international politicians, ambassadors, activists, and academics. The Institute also co-hosts national conferences on campaign finance. Past guests include Presidents Bill Clinton and Gerald Ford; Senators Orrin Hatch, John McCain, and Harry Reid; Utah Governor Michael Leavitt; and many other notable politicians and professionals. The speeches are broadcast on KUER 90.1 FM radio and KUED TV.

Scholarships and Loans
The Hinckley Institute provides substantial financial aid to students through the Robert H. Hinckley, Abrelia Clarissa Hinckley, Anne and John Hinckley, Senator Pete Suazo, and Scott M. Matheson scholarship funds. The Hinckley Institute is also the University of Utah representative for the Harry S. Truman Congressional Scholarship and the James Madison Fellowship—two of America’s most prestigious scholarships.

HUNTSMAN SEMINAR FOR TEACHERS
The Huntsman Seminar in Constitutional Government for Teachers is a week long seminar sponsored by the Huntsman Corporation. The primary focus of the seminar is to improve the quality of civic education in Utah schools by bringing Utah educators together with political experts and visiting politicians to discuss current events in Utah and American politics. The Huntsman Seminar is truly a unique opportunity for teachers to gain an in-depth understanding of local and national political issues.

The Hinckley Institute of Politics is located in 253 OSH For Further Information call (801) 581-8501

DEPARTMENT OF POLITICAL SCIENCE
The Department of Political Science values its relationship with the Hinckley Institute for the opportunities the Institute provides students to enrich their academic studies with experience in practical politics. The Institute’s programs complement the academic offerings of the Political Science Department. Courses are available in five subfields of the discipline: American Politics, International Relations, Comparative Politics, Political Theory, and Public Administration. For undergraduate students, the Department offers a major with B.A. and B.S. degrees and a teaching minor. Undergraduate certificate programs in International Relations, Public Administration, and Practical Politics are open to both majors and non-majors.

At the graduate level, the Department offers M.A. and M.S. degrees, including the Master of Public Administration, Master of Public Policy, and the Ph.D. degree. Dual degrees are available at the graduate level with Educational Administration, Law, Social Work, and Health Services Administration. The Department has several graduate scholarships, both need-based and merit-based available to entering freshmen and continuing students. The Political Science SAC (Student Advisory Committee) and Pi Sigma Alpha honorary society provide opportunities for students to get involved in departmental activities. If you have questions about the Department and its programs, contact the office at 252 Orson Spencer Hall, 581-7031.
The Hinckley Institute joins thousands of former colleagues, students and interns in mourning the loss of Dr. R.J. Snow, the second director of the Hinckley Institute of Politics, serving from 1975 to 1985. R.J. was an extraordinary scholar and administrator and a mentor, friend and example to many. While his loss is painful and we will miss him dearly, he leaves a lasting legacy of love for our country and unmatched devotion to students and higher education.

THE LEGACY OF R.J. SNOW

“The people who leave the most lasting legacies are often those who don’t worry about such things while they’re alive. Such seems to be the case with R.J. Snow, the former University of Utah and Brigham Young University vice president who died on Tuesday in an automobile accident near his home. Snow, 68, was just preparing to teach his final political science course this summer before retiring. At a time when nerves in the state and nation are strained and tensions are often pulled taut, the loss of R.J. Snow is like the loss of a great athlete during crunch time. He was taken at a crucial moment. He was at the top of his game. Still, given all that, one hopes the life he lived will now resonate even stronger; that those who are left to grapple with the problems of politics, education and society will find his memory and meaningful example — his legacy — calling forth in themselves R.J. Snow's hallmark decency and civility.”


HINCKLEY INSTITUTE DIRECTORS REMEMBER THEIR COLLEAGUE AND FRIEND

Hinckley Institute Director Kirk L. Jowers: “R.J. was a great mentor, friend, and example. The love he showed for the students and for our country has been his lasting legacy at the Hinckley Institute. I join thousands of former students and interns in mourning his passing.”

Hinckley Institute Director Ted Wilson: “He had a wonderful way about him. He would try to put salve on the wounds and balm on the situations to make the world better. He was very low key but very smart. He just really loved people.”

Hinckley Institute founding Director J.D. Williams: “I so admired him as a student, treasured him as a colleague, and stood in awe of his qualities as a husband to Marilyn and father to four magnificent children. If one wants to know why teaching has been a great career, it’s because I knew R.J. Snow.”
Warming up to Credit Freeze Laws: The Case of Utah

W. Brett Barrus

The high-profile personal information data breaches of 2005 drew considerable public attention to the growing crime of identity theft. In order to equip consumers with tools for ID theft prevention, several states enacted credit freeze laws. Originating in California in 2001, these types of laws allow consumers to have more control over who can access their credit reports by placing a “freeze” on their records.

There has been substantial debate regarding the merits of credit freezes. The credit reporting industry sees this process as unnecessary and “overkill,” touting their own fraud alerts services as sufficient to protect consumers. Consumer advocates, however, view these laws as one of the strongest protections consumers can have against abuse of their personal credit information.

This study advances understanding of credit freeze laws by exploring the main arguments for and against them and detailing the history of Utah’s unique credit freeze law. This study identifies the key factors that aided the law’s passage in 2006 despite having failed in 2005. This is accomplished through interviews of individuals directly involved with the passage of the law in 2006 and relevant literature in periodicals and government reports. The discussion of Utah’s law emphasizes the differences between it and credit freeze laws passed in other states as well as proposed national legislation. Finally, this study speculates on the future of credit freeze laws in Utah and nationally.

The passage of Utah’s law with its unique 15-minute freeze feature has created an intriguing situation for other states and the credit industry. It has in essence drawn a line in the sand — for other states, the credit bureaus, and the federal government — to cross over or retreat from in determining national policy regarding the future of credit freeze laws.

INTRODUCTION

In the 2006 Utah legislative session, lawmakers concluded a two-year struggle to determine whether a “credit freeze” would become a viable identity theft prevention option for Utah’s consumers. The goal of this legislation was to limit third-party access to a consumer’s credit information to only consumer-designated vendors. In doing so, the law would potentially prevent criminals from committing the most common type of identity theft — the opening of fraudulent credit accounts and loans. This type of legislation has become increasingly common in the wake of high-profile data breaches in such private and public organizations as ChoicePoint, the Department of Veteran’s Affairs, and DSW shoe warehouse. Utah’s law also contained a 15-minute, credit “thaw” feature that established this law as particularly unique. Making this “thaw” part of the bill was instrumental in gaining enough support to pass the legislation. Utah’s law is being heralded as a template for other states but now all state credit freeze laws are being threatened by national legislation that could preempt these state laws.

In this paper, I will explain what credit freeze laws are and the main arguments for and against them. I will then relate the history of Utah’s credit freeze law focusing on the key factors that aided its passage in 2006 despite having failed in 2005. In the course of this discussion, I will emphasize the differences between Utah’s law and credit freeze laws passed in other states and proposed national legislation. Finally, I will forecast the probable future of credit freeze laws in Utah and nationally.

The type of legislation that I will be discussing has been alternately called a credit freeze and a security freeze in the media, research and in the legislation. For consistency I will use the term “credit freeze” throughout the paper except where the term “security freeze” is used in a direct quotation.

IDENTITY THEFT & CREDIT FREEZES

The definition of what constitutes identity theft plays an
important part in how legislation is crafted to prevent and prosecute it. According to the Fair Credit Reporting Act (FCRA) of 2001, “the term ‘identity theft’ means a fraud committed using the identifying information of another person, subject to such further definition as the Commission may prescribe, by regulation”. This definition, part of the 2003 amendments to the Act, only applied to crimes after they were committed. Since this amendment to the FCRA, the definition has been further amended by the Federal Trade Commission (FTC) in Regulation 16 part 603, to include the “attempt to commit fraud.” This addition has opened the door for prosecution against those who steal personal information before they use it fraudulently. This focus on prevention has also encouraged lawmakers to adopt strong laws aimed at limiting unauthorized access to personal information.

Items of personal information that are commonly stolen include legal names, social security numbers, bank account numbers, and credit information, such as card and account numbers. Using this information, criminals are able to perpetrate several types of crimes. Typically, these are divided into crimes involving the use of existing credit cards or credit card numbers, use of existing non-credit card accounts or account numbers, and the creating of new fraudulent accounts. Credit freezes are designed to prevent this last form of identity theft by making it impossible for criminals to use a consumer’s stolen information to gain a new fraudulent account.

There is great deal of variance when it comes to quantifying the number of victims who have had their identities stolen and used to establish fake accounts. This variance is due to several challenges in collecting data. First, many victims of identity theft are not typically aware that they are victims for months, or even years. Secondly, consumers who do have their identities stolen are often victims of multiple types of fraud. Even the most conservative estimates show that identity theft is a common and costly crime. In 2004, a Bureau of Justice Statistics report claimed that 3,589,100 households reported that they discovered they were a victim of some form of identity theft in the last six months. Of these incidents, 538,700, or 15% of reporting households, involved the creation of new fraudulent accounts (Baum, 2006). An FTC survey of 4057 citizens found that 4.7% of those interviewed had been a victim of identity theft in the last 5 years in which their information was used to create a new fraudulent account. The findings of this survey also suggest that nearly 3.25 million Americans are victimized in this type of crime yearly (Synovate, 2003, p. 4). It is apparent from these statistics that a significant portion of identity theft crimes are committed by creating new accounts.

Identity theft is also a very costly crime. The most common types of fraud, opening fraudulent accounts and unauthorized use of existing accounts, directly involve the pillaging of consumers’ funds. According to the FTC’s survey:

“On average, victims of “New Accounts & Other Frauds” ID Theft indicated that the person or persons who misused the victim’s personal information had obtained money or goods and services valued at $10,200 using the victim’s information. This result suggests that the total loss to businesses, including financial institutions, from this type of ID Theft was $33 billion in the last year (Synovate, 2003, p. 5).”

Furthermore, identity theft is also very costly for consumers to correct, not only in dollars but in time. The FTC estimates that “on average, victims of the ‘New Accounts and Other Frauds’ form of ID Theft spent 60 hours resolving their problems,” suggesting that nearly 194 million hours were spent in total (Synovate, 2003, p. 6).

Credit or credit freeze laws are specifically designed to address forms of identity theft involving the creation of new accounts. The typical credit freeze law follows a simple model; Consumers place a freeze on their reports, thereby limiting access to the report by creditors. Credit bureaus are required to unfreeze the report at the request of the consumer. After providing some type of security code, the report is unfrozen or thawed for a specific period of time or for a specific creditor. The thawing and freezing typically is done at a reasonable cost to the consumer. In essence, any potential criminal armed with an individual’s information would not be able to create a fraudulent account because the reports would be frozen and the criminal would not have the access code to thaw them.

CREDIT FREEZE LEGISLATION IN RESPONSE TO NATIONAL DATA BREACHES

In the wake of the large ChoicePoint and LexisNexis data breaches of 2005, a frenzy of lawmaking within the individual U.S. states produced various credit or credit freeze laws. In fact, many bills addressing identity theft had been or were in the process of becoming laws at the time of these breaches. Identity theft laws are not entirely new. Federal laws making identity theft illegal have been in effect since the 1998 passage of the Identity Theft and Assumption Deterrence Act. But the sheer scale of the breaches caused something of a panic and the public outcry turned these incidents into catalysts for stronger and more prolific legislation. These incidents raised awareness of the issue and revealed the large hole in policy related to identity theft. Most prominently, issues concerning the notification requirements surrounding such breaches and possible future preventative measures became the focus of debate. In the years after the initial incidents, many states, including Utah, passed their own notification requirements and credit freeze laws as preventative measures.

Prior to the data breaches of 2005, only California and Texas had freeze laws in effect, though several other states had laws under consideration (see Fig 1.1). The first credit freeze law was passed in California in 2001 in combination with another law specifying the terms in which businesses were to disclose breaches and losses of personal information (U.S. PIRG). The law served as a model for laws to come and was the standard by which consumer notification of the LexisNexis and ChoicePoint breaches occurred. Within a year of these high-profile breaches, 23 states had passed laws
mandating the terms of credit freezes and 34 states had laws specifying data breach notifications (U.S. PIRG). Currently, there are 45 states with notification laws and 26 states with credit freeze laws.

The speed with which the states passed their legislation as well as the general newness of these types of laws, has led to significant differences between the various states’ laws. While the general operation of these laws is similar, there are several variable parts of each law. States have made different decisions regarding the coverage, cost, and the duration of freezes and thaws. The differences in these state laws have a large effect on the preventative ability of a particular law and subsequently, the level and sources of political support. This lawmaking resulted in 26 states which currently have credit freeze laws, some of which are substantially different from one another. This so-called ‘patchwork’ of laws has led the credit reporting agencies, who generally oppose credit freeze legislation, and some national lawmakers to push for a national law preempting the states’ laws. Later, I will discuss examples of national laws under consideration and what effect they may have on state laws.

Currently, there is considerable debate regarding the part that credit freeze laws should play in protecting consumers. The three major credit bureaus that produce the vast majority of credit reports are Experian, Equifax, and Transunion. These corporations have typically favored promoting their own identity theft prevention and account monitoring services over any sort of credit freeze legislation. Whereas credit freeze laws only dictate the actions of the three reporting bureaus which collect and maintain the information in credit reports, the notification laws passed along with many credit freeze laws are aimed at both credit bureaus and creditors who buy information from them. How both of these laws are carried out will potentially have a large effect on the security of consumers’ personal information and credit.

**The Arguments Regarding Credit Freeze Laws**

The largest point of variance among the state laws pertains to who is permitted to place a freeze on their credit information. Currently, 5 of the 26 states with credit freeze laws only allow victims of identity theft to place freezes on their accounts. Washington is the only state that allows credit freezes to consumers on the condition that they are potential victims of identity theft. They must have received notification that their personal information may have been compromised due to a data breach before they can freeze their files (see Fig 1.1).

Opponents of credit freeze cite that only individuals who have been notified that they could be at risk of identity theft need a credit freeze. J. Craig Sherman, vice President for the National Retail Federation, states:

“Our concern is that the credit freeze issue has become overkill, because most consumers are never going to be the victims of ID theft. If consumers place a credit freeze on their files, it can cause difficulties when trying to purchase homes, cars or even opening simple lines of credit at a department store (Hunt & Arnold, 2006).”

The justification for this view is that the small number of people who do become victims of identity theft (and who discover it and file a report) will be able to prevent further abuse of their information by freezing their account. Credit reporting agencies also will save time and money if they only have to deal with a minimal number of consumers requesting credit freezes.

Proponents of credit freeze laws, in particular those laws that apply to all consumers, feel that by only allowing victims to freeze their reports the purpose of the legislation is defeated. “It’s like telling someone that they can’t put a lock on their door until someone breaks in and steals their stuff,” explained Utah Deputy Attorney General Kirk Torgensen (Torgensen, 2007). Illinois initially passed a credit freeze law that only applied to victims of identity theft but in 2005 amended the law to include all consumers. Michelle Jun, a staff attorney for Consumers Union’s Financial Privacy Now campaign, spoke about the benefits of this new amendment:

“ Illinois’ security law is stronger than other existing safeguards available to consumers. Federal law allows identity theft victims to put fraud alerts on their credit files, and consumers can pay for credit monitoring services. But this won’t erase the damage that has been done by the time they discover their identity has been stolen (Sun-Times News Group, 2007).”

Credit bureaus often tout their fraud alert services as an already existing tool to combat identity theft, but some consumer advocacy groups feel that fraud alerts are not effective preventative measures. In 2003, the Fair and Accurate Credit Transactions Act (FACT Act) was passed and among its effects was the codifying of a system of alerts that consumers could place on their reports (The White House, 2003). The first was an initial report that was placed on a consumer’s file for 90 days. It requires creditors to use “reasonable procedures” to protect the consumer from identity theft (Consumers Union, 2003). There is considerable debate as to what “reasonable procedures” entail. This may vary between agencies and depends entirely on the in-house policies of the reporting agencies. There is also an extended alert that will last up to 7 years. In both cases, the procedures required to protect consumers are not detailed. Consumers inquiring about how to use fraud alerts were given the following advice by Maxine Sweet, Experian’s vice president of public education. Sweet said,

“When you are a fraud or identity theft victim, or have good reason to believe you may be, you can request an initial security alert be added to your credit history. The alert tells lenders that you are or may be a victim of identity theft and asks that they take additional precautions before granting credit in your name (Sweet, Ask Max credit advice: Difference between fraud alert, victim statement and security freeze, 2005).”

Consumers may add a phone number to this alert so that they may be contacted to approve the issuance of credit in their name. Prior to the FACT Act, credit bureaus were not required to act on these requests and are still only required to “flag” the report though the law does not require lenders to
call consumers before releasing a report (Sweet, Ask Max credit advice: Difference between fraud alert, victim statement and security freeze, 2005).

Linda Foley of the Identity Resource Center stated in 2005 that fraud alerts have been found by the Center to work only 50%-70% of the time (Foley, 2004). This may be because credit bureaus are not actually heeding the alerts. According to Equifax’s (one of the three credit bureaus) “FAQs for Consumers” website:

“When you, or someone else, attempts to open a credit account the lender should contact you by phone to verify that you want to open the new account. If you cannot be reached by phone, the credit account should not be opened. However, a creditor is not required by law to contact you if you have a fraud alert in place. Fraud alerts can legally be ignored by creditors” [emphasis added] (Equifax).

With fraud alerts as an uncertain tool, a credit freeze seems to be a more reliable and effective alternative. Freezes are also seen as a stronger tool, requiring not just notification of the opening of new accounts but preventing the opening of new accounts without a consumer’s explicit permission to do so.

Another point of difference among the state laws deals with the cost of placing freezes and initiating thaws on a consumer’s report. Utah’s law cites “reasonable fees” to be exacted when consumers are both placing the freeze and temporarily thawing it. Currently, a majority of states are limiting the imposable fees to 10 dollars per credit bureau to institute a freeze and five to 10 dollars per bureau to un-freeze a report (Fig. 1.1). Those states that only allow victims of identity theft to freeze their reports do not charge for this service, with the exception of Texas which limits the fee to a one-time eight-dollar charge that is to be honored by all three bureaus.

Addressing the issuance of fees, the Information Policy Institute explained the purpose of these fees:

“File maintenance costs are typically offset by selling credit files to those entities with an FCRA defined permissible purpose. Credit files that have been frozen cannot be sold. As such, a reasonable fee structure must take into account the scope of the costs associated with freezing a file—both for the service of the credit file freeze and for the service of account maintenance (Information Policy Institute, 2005).”

This argument assumes that frozen files would have been sold had they not been frozen. It does not take into account that the type of consumer who places a freeze on their file is not likely to seek new accounts frequently. Subsequently, their file would not have likely been sold to any potential creditors. Also, most credit freeze laws (including Utah’s) do allow entities approved by the FCRA to update, amend and add reports to frozen files for the purposes of keeping files current. Therefore, the only real cost that is associated with a credit freeze is the manpower and time required to freeze and unfreeze accounts.

Opponents of credit freeze laws have also argued that this type of law may actually mask identity theft from consumers. Experian has also asserted in their advice column that identity thieves are now using credit freezes to lock consumers out of their information. They stated, “Armed with the knowledge that the credit file is frozen, the identity thief uses the stolen identity to commit other types of fraud, effectively masking the identity theft (Sweet, Ask Max credit advice: Frozen credit file interferes with wedding plans, 2005)” This alarmist scenario is likely unwarranted. According to the Information Policy Institute, “…ID thieves are typically detected either by their victims or by the lenders monitoring account activity; the enactment of a national federal file freeze law [or state law] is not likely to directly impact either of these two detection mechanisms (Information Policy Institute, 2005).” Consumer’s will have a PIN number or password that prevents thieves from thawing their file and will still have access to all of their current credit file monitoring rights and services, including a yearly free report from each agency. Further, if consumers do loose their PIN numbers or passwords, or somehow loose access to their account, they can obtain a new one by providing identifying information, such as a driver’s license and social security card to the reporting agencies. I was unable to find any documented instances in which a thief was able to mask their crime using a frozen file. Furthermore, it is difficult to imagine a scenario, given the nature of a credit freeze law, in which this deception could occur.

The strongest argument that the credit bureaus may have against credit freeze laws involves the nature of their creation. Specifically, as it stands, states are being allowed to dictate to a large national industry how to conduct its business. These states are doing so with many differing requirements. The so-called “patchwork” of laws has led the credit reporting agencies, who generally oppose credit freeze legislation, and some national lawmakers to push for a national law preempting the states’ laws. The implications of these actions will be discussed later in this analysis.

Response to credit freeze laws has been somewhat ambivalent from industries like auto dealers, bankers, retailers, and other business that offer instant credit. These industries rely on a strong and trusting customer base and therefore have a vested interest in keeping their customers by preventing fraud. Further, they face potential losses associated with the purchase of goods on fraudulent accounts. At the same time, the instant lines of credit offered by retailers make up a significant part of their business. Frequently, these retailers offer discounts to consumers who open credit accounts at the checkout line. The auto industry also makes the claim that many of their sales rely on impulse buys, and without instant financing on site, they would lose a portion of their sales. Chris Hoofnagle, the west coast Director of the Electronic Privacy Information Center (EPIC), pointedly described the relationship between these industries and the credit bureaus. He said, “The credit bureaus are creatures that serve the creditors and don’t want any slowdown of instant credit (Hunt &
In the creation of Utah's law, the support of these industries was the deciding factor in persuading lawmakers to adopt the legislation. This support was hard won and relied on a feature of the law that was entirely new and unique to already recognized credit freeze laws.

**LEGISLATIVE HISTORY OF UTAH’S CREDIT FREEZE LAW**

The creation of Utah’s own credit freeze law seemed to happen relatively quickly, only requiring two annual sessions of the legislature. In reality, it was the culmination of several years of research, planning, and discussion. The law that was the eventual product of these events was, in comparison to the other states, revolutionary. It has now become a template for other states to follow and may prove to play a considerable role in the formation of national legislation.

The impetus for Utah’s credit freeze law came years before the high-profile security breaches of 2005. In October of 2003, the Utah Attorney General’s Office held an Identity Theft Summit. Attendees included prosecutors, police officers, bankers, merchants, and legislators. Among the proposals regarding legal action to prevent identity theft was a discussion of credit freeze laws (Consumer Affairs, 2006). Laws in other states, namely California, and those under consideration in Vermont and New Jersey were analyzed to see if they would work in Utah (Torgensen, 2007).

The Deputy Attorney General Kirk Torgensen began working with State Senator Carlene Walker to craft a bill that would protect consumers but also be favorable to business interests. Other stakeholders that worked closely with Senator Walker in promoting the bill included the AARP.

The bill, S.B. 39, produced by this working group, allowed credit freezes for all consumers (not just victims only) and asserted that “reasonable fees” be charged to freeze and unfreeze a file. It also mandated that the thaw could take no longer than 3 days. The implementation date for this legislation was July 1, 2006. Substantively, the body of the bill was similar to California’s law and to those being considered by other states at that time.

The bill was introduced to the Utah State Senate on January 17, 2005 and was presented to the Senate Business and Labor Standing Committee on January 31, 2005. At this meeting, Senator Walker explained the nature of the bill assisted by Richard Hamp of the Attorney General’s Office. Carter Livingston of AARP Utah and Francine Giani, Director of the Utah State Division of Consumer Protection, spoke in support of the bill during the meeting. Chantele Artman, representing the Consumer Data Industry Association, spoke in opposition to the bill. The bill was recommended to the floor of the Senate by a five to one vote. It is interesting to note that only one individual spoke against this legislation. In future committee meetings for S.B. 71, the bill presented in 2006, more resistance to the law was exhibited by the credit reporting agencies.

Once the bill reached the Senate floor in 2005 there was a small debate on an amendment moving up the effective date of the bill to January 1, 2006 instead of July 1. The date was changed to January and then the next day moved back to July. This last action was done at the request of Senator Walker, who after discussions with the representatives of the credit bureaus, felt that the bureaus would need the extra time to effectively make the necessary adjustments in their business. The Senate voted unanimously to pass the bill without any other changes.

The bill went on to pass favorably out of the House Business and Labor committee, though it was by a much smaller margin – seven to five. At this point, the bill went to the Rules Committee to determine when it would be considered by the House of Representatives at large. According to Senator Walker, Kirk Torgensen, and Laura Polacheck, the Speaker of the House, Greg Curtis was approached by an influential friend and auto dealer with concerns about the bill. At the request of the auto dealer, the bill stayed in the Rules Committee and was not placed on the calendar to be considered during the rest of that legislative session (Polacheck, 2007) (Torgensen, 2007).

Disappointed but not defeated, Senator Walker and members of the Attorney General’s Office consulted with the auto dealer’s association, as well as the retailers and bankers association to find a way to address the concerns of some members of the business community and still make the bill a strong protection for consumers. During the months in between sessions, these discussions led to some changes to the 2005 bill that would accommodate the concerns of business. The main change being the requirement of the 15 minute thaw.

The biggest complaint from the auto dealers and other merchants was that credit freezing would hamper their business practices. Auto dealers in particular claimed that they relied on providing instant credit to shoppers who bought new cars on “impulse.” The dealers also argued that individuals who had car accidents and needed a replacement car would be inconvenienced by having to wait 3 days to unfreeze their credit (Torgensen, 2007). In order to meet these concerns, a 15-minute credit unfreeze or thaw, was inserted as the new standard required by the bill and was eventually numbered S.B. 71. The requirement of a 15-minute thaw was envisioned to take the form of a website or toll free number that consumers could access or call and then present a PIN number or some other form of identification in order to unfreeze their account.

Senator Walker described a meeting in which she presented this change to a group of influential auto dealers. She recalled that after she had explained this new measure that well known auto dealer, Larry H. Miller, told the group that this was an important protection for their customers and the right thing to do. Senator Walker claimed that this was a turning point in gaining support for her bill (Walker, 2006). With this new unfreeze requirement, former enemies of the legislation became allies. “Bankers, realtors, car dealers, and other merchants came together to help us craft a business-
friendly plan that gets the job done,” said Senator Walker (Walker, 2006). Virtually every other aspect of the law was the same as the 2005 proposal, including the coverage for all consumers and reasonable fees for the service.

S.B. 71 was introduced into the Utah Senate during its 2006 general session on January 23, 2006. It was again heard in the Senate Business and Labor Committee on January 26 with a large contingent of government agencies and businesses speaking in favor of the bill. These proponents included Chris Kyler, CEO of the Utah Association of Realtors; Craig Bikmore from the Utah Auto Dealers Association; Jim Olsen, President of the Utah Retail Merchants Association; and Howard Headlee of the Utah Bankers Association. In total, there were eight individuals there to speak in favor of the bill. Outnumbered were the two lobbyists, Candace Daly and Craig Moody, representing the Consumer Data Industry Association. Not surprisingly, with the support of the business groups, the bill received a favorable recommendation by the committee by a vote of five to one and was sent to the Senate floor for further debate. It was approved by the Senate, again unanimously with an amendment requiring a redundant system that would enable the bureaus to unfreeze records within 15 minutes should their original system fail. They also eliminated routine maintenance as an excuse for not unfreezing records within 15 minutes. These amendments were approved and a substitute bill was introduced to the House.

After being approved in the Senate, the bill needed only to be approved by the House of Representatives before it became law. This bill was being carefully watched by the reporting agencies and their representative organization, the Consumer Data Industry Association. As part of their political strategy, they waited to combat the law if and when it reached the House of Representatives. According to Candace Daly, there was not a lot of access for them to the Utah Senate and they felt that they had a better chance of stopping or at least lessening the impact of the legislation on their industry in the House. In fact, while the bill was in the House, they were able to get all of the amendments to the bill that they sought (Daly, 2007). During the first committee hearing in the House, representatives from the three reporting agencies as well as a representative from the National Association of Credit Management traveled to Utah to speak against the bill in its first House Committee Hearing. Only Senator Walker was able to attend the hearing, leaving only the opponents of the law to testify. Those who spoke against the bill that day were Craig Moody and Chantele Mack; Murray Johnston, Director of State Government Affairs, Experian; Eric Rosenberg, Transunion; Julie Long, Equifax; Scott W. Lee, General Counsel, NCAM Intermountain. Without any other support Senator Walker deferred her comments to another committee meeting when the proponents of the law could speak for it.

On February 17, 2006, the House Business and Labor committee heard testimony again regarding S.B. 71 after it was replaced by the 3rd substitute bill, changing the enactment date of the law. Chris Kyler of the Utah Association of Realtors and Craig Bikmore of the Utah Auto Retailers Association spoke in favor of the bill, with Dean Wangsgarn, President of the National Association of Credit Management, and Candace Daly representing the Consumer Data Industry, speaking against it. The committee approved the bill nine to four and sent it to the floor of the House for a vote. On February 27, two days before the legislative general session adjourned, the bill passed the House unanimously and the Senate concurred unanimously with all of the amendments the next day. S.B. 71 was signed into law by the Governor John Huntsman Jr. on March 20, 2006.

One of the most debated issues during this session was the enactment date of the bill. The original version of S.B 71 had September 1, 2006 as the enactment date with September 1, 2008 as the date that violations of the law could be enforced by the Attorney General. The 2nd Substitute S.B. 71 amended those dates to make the entire bill inactive until September 2007. The 3rd substitute S.B. 71 had extended that date to September 1, 2008. These substitutions were made by Senator Walker and the attorney general’s office at the request of the credit bureaus. The credit bureaus reported that they did not have the systems currently available to meet the criteria of the law and would need at least two years to be able to accommodate consumers who wished to freeze their files and unfreeze them according to Utah’s statute.

The Senate allowed for the delay in implementation requested by the credit reporting agencies but Senator Walker now regrets that action. “I think we were snookered,” said Senator Walker (KUTV News, 2006). By requesting such a large window of time from the passage of the state law until its enactment date, Senator Walker feels that the bureaus were just trying to buy more time to push for national legislation preempting the state’s law. In response to Senator Walker’s claim, Candace Daly, one of the lobbyists for the Consumer Data Industry Association replied, “That is absolutely not true.” She went on to explain that each of the credit bureaus has its own system and cannot share information under collusion and anti-trust laws (Daly, 2007). This means that they will each separately have to develop a system to accommodate for Utah’s near instant thaw requirement which will take some time. Deputy Attorney General Kirk Torgensen feels that there may be some legitimacy to the credit bureaus’ claim. “We are dictating to them how to run their business,” said Torgensen. He acknowledges that the changes necessary to comply with Utah’s law could require a large effort. “There are systems that might necessitate development and procedural changes to accommodate the new law’s requirements and two years may actually be reasonable (Torgensen, 2007).” Regardless of their motivation for extending the implementation date, the credit reporting agencies been given time to work with the federal government on a consistent national law.
PROPOSED NATIONAL LAWS
The credit bureaus have been strong supporters of national laws that would create a lone statute and preempt state laws already passed, including Utah’s law. In fact, several of the laws proposed in the 2006 session of Congress would have eliminated credit freezes altogether. While none of these bills actually passed, they demonstrated that a national standard is likely to be established soon. A review of the proposed national laws reveals the strength of the credit bureau’s influence and paints an uncertain picture for the future of Utah’s law.

From the inception of new identity theft laws by the states beginning in 2005, there have been arguments for a national, comprehensive law addressing identity security. Norm Magnuson, Vice President of the Consumer Data Industry Association, in January of 2007 stated the following concerning credit freeze laws, “At the start, there was no question we looked at them as problematic. The only thing we’re looking for now is consistency (Gelles, 2007).” Think tanks, including the Information Policy Institute also believe that a consistent national standard is the best policy option for both consumers and the credit reporting industry (Information Policy Institute, 2005).

In 2006, Kirk Torgensen and all 50 of the state Attorney General’s offices wrote letters urging congress to not preempt their own state legislation when it comes to data security. Currently eight states are in the process of adopting the 15 minute unfreeze including California (Torgensen, 2007) (California Progress Report, 2006). Debra Bowen, the California legislator that sponsored the first credit freeze bill, commented, “now that the credit bureaus are being required to give people in other states the ability to lift a freeze in 15 minutes, it only makes sense to give California shoppers that same right (California Progress Report, 2006).” If California and other states were to adopt the same standard as Utah, a great deal more pressure would be put on the federal government to adopt this same standard as part of any federal legislation. This would achieve the consistency that the consumer data industry desires but will most likely not be embraced by the industry as a large part of their data protection policies. Further, if states do not adopt this same standard quickly, federal legislation may reflect the current standard of three days.

From the bills considered in 2006, it is difficult to determine conclusively what form federal legislation will take. There were five separate bills focused on identity theft that included sections attempting to regulate credit freezes. These were S. 1408, S. 1780, S. 3568, H.R. 4127 and H.R. 3997 (see Fig. 2 for a comparison of these bills). While none of these bills were passed they do provide an interesting look at how polarized views are on credit freezes and how they should be administered, if at all.

Legislation in the Senate including S. 3568 sponsored by Utah’s Senator Robert Bennett stalled quickly after being introduced in committee. Meanwhile, the two most prominent bills to be discussed in 2006 were developed by the House Energy and Commerce Committee. These were bills H.R. 4127 and H.R. 3997. Both of these bills are drastically different in how they approach the credit freeze issue. H.R. 3997 would have preempted existing state laws and made credit freezes available only to identity theft victims. This bill, among other statutes seen as harmful to consumers, sought to establish a national standard for credit freezes. Consumer advocacy groups were angered by its approval by the committee. “It’s shocking that at a time when data breaches are in the headlines daily and consumers are at greater risk than ever [of] identity theft, Congress would choose to vote on a bill that would strip consumers of their existing identity-theft protections,” said Susanna Montezemolo, a policy analyst with Consumers Union (Azulay, 2006). The law would also have weakened the requirements imposed on businesses to disclose security breaches. According to Ed. Mierzwinski, Director of U.S. Public Interest Group’s consumer program, “This is the worst data bill ever. It is truly a bad bill (Lazarus, 2006).” Lawmakers who voted in favor of the bill were interested in creating a national standard according to chief author, Rep. Steve LaTourette, a republican from Ohio (Lazarus, 2006). This bill enjoyed strong support from the credit reporting agencies that, according the Center for Responsive Politics, spent nearly 30 million dollars in 2005 on lobbying (Azulay, 2006).

Soon after H.R. 3997 exited committee, H.R. 4127, which was seen to be much more consumer friendly, passed the committee in a unanimous 41-0 vote (Montezemolo & Hillebrand, 2006). This bill would have allowed states to continue enforcing any currently passed state laws concerning fraud. It would also have not made any mandate on the terms of security freezes and required stricter notification requirements in case of security breaches. This bill has been renumbered as H.R. 958 in the 110th session of congress and should come up for consideration this year.

In 2006, the FTC also negotiated the largest civil suit ever – a 10 million-dollar suit against Choice Point in response to its security breach (Montezemolo & Hillebrand, 2006). This, along with the creation of the Consumer Privacy Legislative Forum by several high-tech companies, will provide further attention and pressure on lawmakers to address identity theft concerns (Stevens, 2007). With security freeze cited as a high legislative priority, despite the other priorities like the Iraq war, there is a good chance that the 110th Congress will see further legislation addressing credit freezes and it will be proposed nationally.

FUTURE OF UTAH’S LAW
The future of Utah’s law is inextricably tied to the fate of the proposed federal laws. Utah’s law will not take effect until September 2008. Until that time comes, Utah lawmakers and the Attorney General’s office will have to plan for the implementation and regulation of the new statute including how to notify consumers and encourage them to signup for the service. Other serious questions yet to be answered include how
much the freeze will cost Utahans and how to ensure compliance to the new standards by the industries. But at the present time, all eyes are really on Congress to see if all of the effort expended in 2007 will be for naught in 2008.

While the law currently states that “reasonable fees” should be applied, it is still unsure what those fees will be. This will be up to the credit bureaus to determine. One scenario would have Utahan’s paying considerable more to freeze their reports because the agencies would charge higher costs to creditors requesting consumers’ reports. These higher costs would reflect an effort by the reporting agencies to recoup the costs of implementing a 15-minute thawing system. The cost for the freezes would not necessarily be higher, but the total cost for requesting a report (which is passed on to the consumer in application fees, closing costs, financing changes, etc.) would be higher (Daly, 2007). Without other states adopting the same standard, Utah may end up footing the bill for the new system.

The Attorney General’s office will be tasked with regulating how well the credit reporting agencies are complying with the new statutes and will be responsible for bringing any legal action against the credit agencies. Under Utah law, citizens can not directly seek legal redress if they have problems with their credit reports. This prevents consumers from directly seeking damages from the industry in instances where the law was not followed. This is seen to provide some level protection to the industry and allow them to be less strict in their implementation and conduct regarding these new procedures.

One of the biggest questions yet to be answered is what will happen if the reporting agencies are not prepared to provide 15-minute thaws when the law comes into effect in 2008. There is currently some question as to whether each reporting agency has the resources to develop a system (Daly, 2007) (Walker, 2006). When asked about bringing suit against the credit bureaus, Kirk Torgensen said that his main concern would be situations in which consumers had requested freezes and then they were not applied to their reports. He was not necessarily concerned with how quickly these reports were thawed when requested.

Regardless of the application of the law, the 15-minute thaw would be enforceable by the law and could be subject to a civil suit brought by the Attorney General’s Office (Torgensen, 2007). According to Candace Daly, there is a good chance that rather than be sued for violating the law, the reporting agencies will just refuse provide any services to Utah creditors (Daly, 2007). It seems unlikely that the credit reporting bureaus would decide against investing in a freezing/thawing system and then forgo doing business with all of their clients that provide credit in Utah. This seems especially unlikely since Experian, one of the three largest bureaus, has already developed a system. Responding to the passage of the Rhode Island credit freeze bill in July of 2006, Maxine Sweet said that Experian had already “spent many millions developing the system to process these [credit freezes]” and that they could be thawed in 15 minutes (Myers, 2006). While Experian appears ready for Utah’s law to come into effect the other agencies may not be as prepared.

As discussed earlier, it is certain that eventually a federal law addressing security freezes will be passed. This may happen soon rather than later. Two scenarios exist that would result in the survival of Utah’s law. The first would be the passage of a national law like H.R. 4127 that would allow states to continue to enforce their current statutes. The second would be a national law that adopts the state’s current standards, including the 15-minute thaw. This is only a likely scenario if other states, like California, begin to adopt Utah’s same standard.

CONCLUSION

The passage of Utah’s credit freeze law demonstrates several important aspects of the legislative approach to preventing identity theft. First, it illuminates the differing interests of consumers, creditors, and the agencies that gather personal financial information. Utah’s case proved that compromise on the part of consumer advocacy groups to appease business interests does not have to weaken the protection these laws offer. By adopting the 15 minute thaw, lawmakers were able to make the law more convenient for consumers and palatable to businesses that offer credit. By bringing businesses on board to advocate for the law, Utah lawmakers were able to pass a law that had previously failed and make it more consumer friendly in the process. This consumer-business alliance had the effect, however, of alienating the consumer reporting agencies and may make the implementation of this new law very challenging.

With the passage of Utah’s stringent mandate on consumer reporting agencies, Utah has now placed a potential burden upon the entire data reporting industry. The consequences of this action are still to be seen. The law may result in higher costs for consumer credit or even the preemption of this state law by a federal statute. On the other hand, it may prove to be the first step in producing more consumer- and business-friendly freeze laws for the entire nation. State Senator Carlene Walker stated that Utah’s credit freeze law “holds water” (KUTV News, 2006). In a state that is viewed as pro-business, this strong consumer legislation has made a statement.

Secondly, the passage of credit freeze laws by many states and the subsequent conflicts with potential legislation expose the fuzzy line between the rights of states to protect their citizens and the responsibility of the federal government to regulate interstate commerce. In light of increasingly common breaches of personal information, states have acted more swiftly than the federal government in providing protective and preventative measures for their citizens. The result has been varying standards with which data reporting agencies must comply. While the agencies and some federal lawmakers have called for a single national standard, actually passing one
has been more difficult. Federal lawmakers have been reluctant to undo the work of the states. The hope of Kirk Torgenson and the other proponents of Utah’s law is that other states will begin to adopt Utah’s standard, thus building a strong case for federal law to adopt the same standard and not preempt the current state laws.

Finally, the passage of Utah’s law is only one step in what could be seen as the development of a comprehensive system for preventing identity theft. While consumers have previously borne the responsibility of protecting their information, creditors and data reporting agencies are beginning to bear more of the burden. Credit freeze laws are examples of this shift in responsibility. The arguments nationally and within the states regarding credit freeze and other privacy-protection laws clearly demonstrate that more discussion is required to find the best solution for all stakeholders, the data reporting industry included.

## Appendices

### Fig. 1 Analysis of State Laws

<table>
<thead>
<tr>
<th>State</th>
<th>Date Effective</th>
<th>Eligibility</th>
<th>Cost of Freeze</th>
<th>Cost to Temporarily Lift Freeze</th>
</tr>
</thead>
<tbody>
<tr>
<td>California</td>
<td>1/1/2003</td>
<td>Any Consumer</td>
<td>No fee for identity theft victims; $10 for others to freeze at each ($30 total)</td>
<td>$10 for a temporary date-range lift per credit reporting agency ($30 total); $12 ($36 total) to lift for one creditor per agency</td>
</tr>
<tr>
<td>Colorado</td>
<td>7/1/2006</td>
<td>Any Consumer</td>
<td>No fee for first freeze; $10 at each credit reporting agency ($30 total) to place a second freeze</td>
<td>$10 to lift temporarily or permanently per credit reporting agency ($30 total); $12 to lift for one creditor per agency ($36 total)</td>
</tr>
<tr>
<td>Connecticut</td>
<td>1/1/2006</td>
<td>Any Consumer</td>
<td>$10 to freeze at each credit reporting agency ($30 total)</td>
<td>$10 to lift temporarily or permanently per credit reporting agency ($30 total); $12 to lift for one creditor per agency ($36 total)</td>
</tr>
<tr>
<td>Delaware</td>
<td>1/1/03 subsequently amended</td>
<td>Any Consumer</td>
<td>No fee to victims of identity theft.</td>
<td></td>
</tr>
<tr>
<td>Florida</td>
<td>7/1/2006</td>
<td>Any Consumer</td>
<td>No fees for identity theft victims and individuals over the age of 65; up to $10 for others to freeze at each credit reporting agency ($30 total)</td>
<td>$10 to lift temporarily or permanently per credit reporting agency ($30 total)</td>
</tr>
<tr>
<td>Hawaii</td>
<td>1/1/2007</td>
<td>Identity Theft Victims Only</td>
<td>No fees</td>
<td>No fees</td>
</tr>
<tr>
<td>Illinois</td>
<td>1/1/2006 *Any Consumer after 1/1/2007</td>
<td>Any Consumer</td>
<td>No fees</td>
<td>No fees</td>
</tr>
<tr>
<td>Kansas</td>
<td>1/1/2007</td>
<td>Identity Theft Victims Only</td>
<td>No fees</td>
<td>No fees</td>
</tr>
<tr>
<td>Kentucky</td>
<td>3/24/2006</td>
<td>Any Consumer</td>
<td>No fees for identity theft victims; $10 for others to freeze at each credit reporting agency ($30 total)</td>
<td>$10 to lift temporarily or permanently per credit reporting agency ($30 total); $10 to have PIN reissued.</td>
</tr>
<tr>
<td>Louisiana</td>
<td>7/1/2005</td>
<td>Any Consumer</td>
<td>No fee for identity theft victims or persons age 62 or older; $10 for others to freeze credit at each credit reporting agency ($30 total)</td>
<td>$8 for a temporary lift per credit reporting agency ($24 total)</td>
</tr>
<tr>
<td>Maine</td>
<td>2/1/2006</td>
<td>Any Consumer</td>
<td>No fees for identity theft victims; up to $10 for others to freeze at each credit reporting agency ($30 total)</td>
<td>$10 to lift temporarily or permanently per bureau ($30 total); $12 to lift for one creditor per bureau ($36 total)</td>
</tr>
<tr>
<td>Minnesota</td>
<td>8/1/2006</td>
<td>Any Consumer</td>
<td>$5 at each credit reporting agency ($15 total)</td>
<td>$5 at each credit reporting agency ($15 total)</td>
</tr>
</tbody>
</table>

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**Note:** The table above provides a snapshot of state laws as of the date of the publication. State laws and fees may change over time. For the most up-to-date information, please consult the website of the respective state or the Department of Justice.
<table>
<thead>
<tr>
<th>State</th>
<th>Date</th>
<th>Consumer Type</th>
<th>Initial Freeze Fee</th>
<th>Temporary Freeze Fee per Agency</th>
<th>Additional Fees</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nevada</td>
<td>10/1/2005</td>
<td>Any Consumer</td>
<td>No fees</td>
<td>$15 for others to freeze</td>
<td>$18 to lift</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>at each credit reporting agency</td>
<td>temporarily</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>($45 total)</td>
<td>permanently</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>($60 total)</td>
</tr>
<tr>
<td>New Hampshire</td>
<td>1/1/2007</td>
<td>Any Consumer</td>
<td>No fees for identity theft victims; up to $10 for others to freeze</td>
<td>$10 to lift temporarily or permanently</td>
<td>$5 to lift for one creditor per agency ($15 total)</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>at each credit reporting agency</td>
<td>per credit reporting agency ($30 total)</td>
<td>($60 total)</td>
</tr>
<tr>
<td>New Jersey</td>
<td>1/1/2006</td>
<td>Any Consumer</td>
<td>No fee for initial freeze</td>
<td>$5 to remove, temporarily lift or have PIN reissued ($15 total)</td>
<td>($54 total)</td>
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<td></td>
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<td></td>
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<td>New York</td>
<td>11/1/2006</td>
<td>Any Consumer</td>
<td>No fees for initial freeze; further freezes $5 at each credit reporting agency ($15 total) to place a second freeze</td>
<td>$5 at each credit reporting agency</td>
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<tr>
<td>North Carolina</td>
<td>12/1/2005</td>
<td>Any Consumer</td>
<td>No fee for identity theft victims; $10 for others to freeze at each ($30 total)</td>
<td>$10 to lift temporarily or permanently</td>
<td>per credit reporting agency ($30 total)</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>($30 total)</td>
<td></td>
<td>($60 total)</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>1/1/2007</td>
<td>Any Consumer</td>
<td>No fees for identity theft victims and individuals over the age of 65; up to $10 for others to freeze at each credit reporting agency ($30 total)</td>
<td>$10 to lift temporarily or permanently</td>
<td>per credit reporting agency ($30 total)</td>
</tr>
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<td>Pennsylvania</td>
<td>1/1/2007</td>
<td>Any Consumer</td>
<td>No fees for seniors 65+ years old</td>
<td>No fees for seniors 65+ years old</td>
<td>($30 total)</td>
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<td></td>
<td></td>
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<td>Rhode Island</td>
<td>1/1/2007</td>
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<td>South Dakota</td>
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<td>Identity Theft Victims only</td>
<td>No fees.</td>
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<td>9/1/2003</td>
<td>Identity Theft Victims Only</td>
<td>$8 to freeze; placement at one credit reporting agency must be honored by all</td>
<td>No fees to remove</td>
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<td>Utah</td>
<td>9/1/2008</td>
<td>Any Consumer</td>
<td>&quot;Reasonable fees&quot;</td>
<td>&quot;Reasonable fees&quot;; Consumer can temporary lift or “thaw” freeze within 15 minutes of electronic request</td>
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<td>Any Consumer</td>
<td>No fees for identity theft victims; up to $10 for others to freeze at each credit reporting agency ($30 total)</td>
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<td>*Any Consumer after 7/1/2006</td>
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<td>HR 3997 Financial Data Protection Act</td>
<td>Yes- credit freeze, data security, notice, mitigation.</td>
<td>Yes – based on VT law, only available to identity theft victims</td>
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<td>HR 4127 Data Accountability and Trust Act (renumbered as HR 958 for 110th congress)</td>
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<td>Unclear</td>
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<td>State AG</td>
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<td>Yes – data security, investigation, notice and mitigation</td>
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<td>FTC and functional regulators</td>
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WORKS CITED


CIVIC ENGAGEMENT, SUBURBAN SPRAWL, AND MASTER-PLANNED COMMUNITIES

During the past four decades, America has experienced significant declines in the number of Americans who are civically engaged in their communities. Several political scientists, architects, and urban planners suggest that America's suburban sprawl is creating an environment that discourages civic engagement because it establishes communities that are dependent upon the automobile, build malls in lieu of town squares, and lack public facilities that encourage public participation and community involvement.

One of the responses by urban planners, architects, and developers has been to design and build master-planned communities. Even though these communities are incorporating many design techniques that originated in America's older cities where civic engagement flourished, they establish communities that are created by professionals rather than born of the cooperative workings of the citizens themselves. Additionally, many master-planned communities establish private government organizations known as Community Associations to govern the affairs of the community.

Even though elected members of these associations often serve with significant and genuine dedication, community associations can be careless in their responsibilities. Such carelessness is evident when an association fails to follow standard parliamentary procedure and provide adequate due process to the association's members. The dereliction of these basic responsibilities compromises democracy within the community association. Likewise, democracy is further compromised when community associations contract professional, real estate, community management companies that assist the association with community finances, events planning, and enforcement of the community's codes, regulations, and restrictive covenants.

There are two significant problems arriving from suburban sprawl and master-planned communities. First, suburban sprawl results in poorly defined communities that do not provide circumstances that encourage civic engagement. Second, master-planned communities stifle authentic civic engagement through the establishment of restrictive covenants, private government organizations, and contracted, professional, real estate, community management companies.

In order to invigorate civic engagement in America's communities, communities must begin to incorporate proven and effective urban design techniques that will reduce automobile dependence, decrease isolation, and provide forums of communication that foster civic engagement in both new and existing developments. Additionally, when new development occurs, municipalities should resist allowing developers to create an abstract form of community with community associations that act in concert with professional managers to create and enforce design criteria standards, among a myriad of other community regulations and restrictions, which limit the freedom of their citizens by insulating their ability to participate in local government.
Finally, states should restructure their tax laws from point-of-sale tax revenues, which drive communities to cannibalize one another in an attempt to secure retail within their jurisdiction, to a system that encourages mixed-use development and smart growth. A new tax structure will motivate communities to incorporate the policies recommended in this paper. In the end, if these policies are implemented, America's communities will be safer, more pleasant, and more enlightened with increased civic engagement.

CIVIC ENGAGEMENT
In 2002, the American Political Science Association formed a Standing Committee on Civic Education and Engagement. This forum of discussion resulted in the 2005 publication of the book Democracy at Risk, which is authored by nineteen distinguished political scientists from across the nation who set out to discuss the level of civic engagement in American democracy. In Democracy at Risk, the authors defined civic engagement to include, “any activity, individual or collective, devoted to influencing the collective life of the polity” (Macedo, 2005). They further explained that civic engagement includes voting, campaigning, rallying, marching, attending public meetings, lobbying, writing to newspapers, attending forums, military service, and volunteer service (Macedo, 2005).

As explained by Alexis de Tocqueville, such civic engagement has been routine among many American citizens, especially in the early days of American history. Tocqueville was impressed at the extent to which Americans embraced civic engagement. In his book, Democracy in America, Tocqueville stated, “...how is it that each [American] is interested in the affairs of his township, of his district, and of the state as a whole as in his own? It is that each, in his sphere, takes an active part in the government of society” (Tocqueville, 2000). More recently, alarming statistics indicate that civic engagement is dramatically declining and that many citizens are not actively participating in government (Macedo, 2005). Therefore, the question arises: is civic engagement among America’s citizens important? If the answer is yes, then a second question can be asked. Does America’s built environment influence the level at which Americans are civically engaged?

As Macedo (2005) and his colleagues indicated, there will be those who argue that it is not important for there to be a high level of civic engagement among America's citizens, and that having more people actively involved in America's democracy will make democracy more difficult (Macedo, 2005). Nevertheless, I agree when Macedo (2005) and his colleagues stated that “Ultimately...improving the quantity, quality, and equality of civic engagement will improve the quality and legitimacy of self-governance, and it should increase our collective capacity to pursue common ends and address common problems” (Macedo, 2005).

Americans should do all that is reasonable to promote and encourage civic engagement among all American citizens. Through the implementation of proven and effective urban design policy, America’s communities will once again begin to establish built environments that promote walking and talking among their citizens. Such environments foster congenial atmospheres that enable citizen interaction and communication to increase. As the community's civic dialogue broadens so will the level of its citizens’ civic engagement.

Creating an appropriate urban environment to increase civic engagement is crucial. Civic engagement is not likely to increase while walking New York City's teeming streets where Mark Twain explained that “a man walks his tedious miles through the same interminable street every day, elbowing his way through a buzzing multitude of men, yet never seeing a familiar face, and never seeing a strange one the second time” (Putnam, 2000). If states and communities will begin implementing new urban design policies and reformed tax policies, then built environments will improve and civic engagement will increase.

SUBURBAN SPRAWL
Increasingly, the American dream has included purchasing a four bedroom home with a two-car garage on a quarter-acre lot in a residential suburb that may be anywhere from fifteen to thirty miles away from a downtown location of employment. Why the suburb? Because it makes better sense to move out to the “west valley” where new homeowners are able to “drive ‘till they qualify” for a mortgage that will enable them to afford the home that they have been dreaming of than to try and locate in more expensive central communities.

What can a suburban American homeowner expect in their new neighborhood? They can expect to live on a sixty-foot wide street built with wide turns that enable speeding cars to glide by a multiplicity of identical appearing homes, whose front elevations are dominated by driveways and two-car garage doors. There will be sidewalks that wind along tree shaded deprived streets that lead to the subdivision's seven-lane wide major arterial highway that their children will need to cross on their way to school. As for after school activities, the neighborhood children will hurry home to play video games, watch television, and surf the Internet, since there are no parks with safe pedestrian access nearby. While these children are fighting enemy combatants in their latest video game, their parents will be fighting rush hour traffic, which daily doubles the travel time of what should be a maximum thirty-minute drive from downtown.

These are all components of suburban sprawl. Unfortunately, as this family copes with the many pressures of suburban life, they will likely spend more of their time stuck in traffic and less of their time walking; more of their time gaining weight and less of their time getting fit; more of their time in isolation and less of their time socializing with neighbors. These realities of suburban sprawl may ultimately affect the degree to which this family will choose to be civically engaged in their community.
In his book *Bowling Alone*, Robert Putnam (2000) has identified three distinct reasons which illustrate how suburban sprawl contributes to civic disengagement:

“First, sprawl takes time. Second, sprawl is associated with increasing social segregation, and social homogeneity appears to reduce incentives for civic involvement, as well as opportunities for social networks that cut across class and racial lines. Third, most subtly but probably most powerfully, sprawl disrupts community ‘boundedness’” (p. 214).

Putnam’s three distinct reasons establish only a few of the factors that are resulting from America’s suburban sprawl. Additionally, sprawl is contributing to increased traffic congestion, increased pollution, and an incessant appetite for land consumption, while at the same time eroding America’s sense of community and civic engagement. That is why it is critical that the American appetite to consume and sprawl be curbed. Otherwise, America’s civic engagement will continue to decline while harmful social and environmental issues increase.

**MASTER-PLANNED COMMUNITIES**

One response for controlling suburban sprawl has been to build master-planned communities. A master-planned community includes the following characteristics: development of a large tract of land (e.g. one-thousand plus acres) a preeminent theme that guides community design; multiple building contractors that provide diversity in home styles and construction; established commercial centers and shopping districts; and large open space features (e.g. golf courses, lakes, parks, recreational spaces). Master-planned communities work to establish walkable, mixed-use neighborhoods where families can live, shop, work, and play all within walking distance of their homes. Communities that incorporate such design criteria will have greater success in promoting civic engagement. This claim is supported by Putnam (2000) who states “Getting involved in community affairs is more inviting—or abstention less attractive—when the scale of every day life is smaller and more intimate.” (P. 205).

Putnam’s (2000) addressed this issue by introducing another component of civic engagement called social capital—the theory that social networks have value. He explained that “social capital refers to connections among individuals—social networks and the norms of reciprocity and trustworthiness that arise from them. In that sense, social capital is closely related to what some have called ‘civic virtue’” (P. 19).

According to Putnam, social capital was prevalent throughout the first two-thirds of the twentieth century when it reached a pinnacle in the 1960s. However, the trend did not continue and America has seen a significant decline in civic participation during the last third of the twentieth century, especially in the 1980s and 1990s.

Putnam included substantial statistical information to support his claim. One such table comprised of survey information from Roper Social and Political Trends surveys, 1973-1994, is entitled *Trends in Political and Community Participation*. On this table, Putnam shows the relative change during the twenty year period from 1973-74 to 1993-94 of community participation in several key areas that provide a reliable gage for measuring levels of civic engagement. For instance, those surveyed who said they had served as an officer of some club or organization was down 42% over this period. Likewise, the number of people claiming to have worked for a political party was down 42%. People who claimed to have served on a committee for some local organization were down 39%. Those people who had attended a
public meeting on town or school affairs were down 35%. Those who had written a congressman or senator were down 23%. And finally, those people claiming to have written a letter to the paper were down 14%. Putnam argued that “we Americans need to reconnect with one another” (Putnam, 2000).

To draw further from the points made by both Duany and Putnam, I refer to a small experiment in an urban planning class at the University of Utah that illustrates why quality public spaces are needed to improve America’s social capital and increase civic engagement. Professor Keith Bartholomew asked the students to observe how people tend to communicate with each other when passing one another face-to-face while walking on a sidewalk. Then, in contrast, Professor Bartholomew asked the class to reflect on how people tend to respond to others they pass while driving in the isolated comfort of a car. It was observed that the way in which people choose to react to each situation is markedly different. People are generally kinder and more cordial toward one another on the sidewalk where barriers that can isolate behavior are removed and their words and actions are exposed. When people are driving in the controlled environment of their own car, however, the students noted that their words and actions tend to be more cynical and critical of others (Bartholomew, 2006).

A second example that articulates the disintegration of America’s civic dialogue is occurring through the online, interactive, comment board on KSL Television’s website—Salt Lake City’s leading television station. When linking to each story at ksl.com the user has the option of posting a comment to express their point-of-view, or to just read the comments already posted by others. These relatively anonymous postings (showing aliases, or initials, or sometimes first names) reveal an alarming reality about our civic dialogue. Disappointingly, with the protection of anonymity, the majority of people that post comments on the board allow themselves to say just about anything (and they undoubtedly would say more if KSL did not censor some of their comments.) It is a rarity for someone to post a comment that adds any worthwhile substance to the conversation. Instead, the majority of postings are laced with outlandish criticisms, stinging phrases, and constant carping, not only as the comments address the story itself, but also, and possibly even more so, in the responses that participants post to one another. The cynical sentiment that prevails in the majority of these comments is overwhelming and such dialogue is not a recipe for productive social evolution.

Therefore, the following question should be asked of the dialogue that occurs on KSL’s comment board: would this same manner of exchange occur if these individuals were having this dialogue at the city library? Perhaps the answer to the question is yes; but if such is the case, then the response to that question is indeed a damning commentary on America’s civic engagement of which Tocqueville would find little to praise. America’s communities must reintroduce and increase the number of public environments that will provide for uplifting and productive interaction if healthy civic engagement is to increase.

Putnam (2000) also argued that the many negative effects of suburban sprawl as verified through statistics and research. He argued that these homogeneous, suburban communities, which require continuous use of the automobile, have separated Americans in such a way that social interaction with neighbors and participation in community events has declined. For instance, Putnam wrote that between 1969 and 1995, while the average household size was decreasing, the number of cars per household doubled from one to two. Likewise, during this same time period the average commuting distance to work increased by 26% and the average commuting distance for shopping increased 29%. Putnam (2000) wrote:

“Americans adults average seventy-two minutes every day behind the wheel, according to the Department of Transportation’s Personal Transportation Survey. This is, according to time diary studies, more than we spend cooking or eating and more than twice as much as the average parent spends with the kids” (P: 212).

Putnam continues by explaining that the car and commute hurt community life. He stated, “evidence suggests that each additional ten minutes in daily commuting time cuts involvement in community affairs by 10 percent” (Putnam, 2000). Thus, those who live in suburban communities are participating less and the social capital of their neighborhood is diminishing ultimately reducing their civic engagement (Putnam, 2000).

A second essay by Barber titled Malled, Mauled, and Overhauled: Asserting Suburban Sprawl by Transforming Suburban Malls into Usable Civic Space addresses several additional issues pertaining to suburban sprawl and master-planned communities. His essay focuses on two themes. First, the loss of our classic public spaces to redefined public spaces as developed in commercial centers and malls. Second, the attempt to create utopian societies through master-planned communities that lack genuine characteristics of community and democracy (Henaff, 2001).

Countless examples of Barber’s first point are found throughout America’s suburban communities where, since the 1960s, and until recently, developers have built hundreds of enclosed malls. Intent on maximizing tenant sales, developers have designed enclosed malls to discourage key elements of civic engagement. Barber stated:

"On entering an enclosed mall, we are asked to shed every identity other than that of the consumer. Eating is about buying fast food and moving back into the stream of shoppers; entertainment means buying Hollywood's latest and all the commodities that go with them; hanging out and people-watching are discouraged by security guards and, more important, the architecture is designed to impede sitting or standing around and keep the traffic flow moving into the shops" (Henaff, 2001).
Despite developers’ efforts to make malls as profitable as possible, Barber indicated that their initial success is beginning to fail as consumers are becoming less attracted to the mall environment which is resulting in a downward shift of mall sales (Henaff, 2001). This has left the majority of mall developers in an uncomfortable, and more importantly, unprofitable situation leading several mall developers to begin researching ways to redevelop mall sites into profitable centers.

In expounding his second point, Barber examined the master-planned community of Celebration, Florida, which was built in 1996 by the Disney Corporation. He criticized the Disney Corporation for the way in which they manipulate everyday life in Celebration. Barber stated: “The downside is not in what Disney does (which it often does very well), but in the totalizing nature of its ambitions” (Henaff, 2001).

Celebration is not a community that has grown out of the cooperative associations of average people; rather, it is a development by a large corporation that influences everything from community design, to economy, schools, and government. Barber further argued that Celebration is an extension of the mall atmosphere wherein Disney has created a controlled environment with a captive audience to whom they may constantly market Disney products (Henaff, 2001). This is not an ideal model for future developers to follow. Nevertheless, there are several similarities between Disney’s Celebration, Florida and Kennecott Land’s Daybreak development in South Jordan, Utah.

While Daybreak lacks what Barber identified as Disney’s “let’s-theme-park-the-world” attitude, Kennecott Land is implementing many of the characteristics that are found in the design of Celebration, Florida. It is now common for developers, like Disney and Kennecott Land, to contract architects and urban planning consultants who promote new urbanism ideals as reflected in the master-planned community. Unfortunately, however, these developers and designers can succumb to the desire to enshrine their master-planned community, for the foreseeable future, through establishment of codes, regulations, and restrictive covenants that run with the land making it extremely difficult, if not impossible, for any future property owners to make adjustments to the designer’s initial plan.

Daybreak is the first of approximately ten proposed master-planned communities that are being developed by Kennecott Land along the West Bench of the Salt Lake Valley at the base of the Oquirrh Mountain Range. Kennecott Land, formed in 2001, is a land development subsidiary of the Rio Tinto Group, an international mining conglomerate that owns Kennecott Utah Copper and the Bingham Canyon Copper Mine. Decades ago, Kennecott Utah Copper purchased the tract of land now being developed for potential mining that never materialized (History, Kennecott Land). Rather than continue to preserve this undeveloped tract of land, Kennecott Land was formed as a way to introduce new revenue for the company through land development, and to provide available land to help accommodate Utah’s unprecedented population growth (expected to double from 2.2 million to 5 million by the year 2050).

The Daybreak community is being developed within the jurisdiction of South Jordan, Utah, while the remaining communities will be developed in what is presently unincorporated Salt Lake County. Kennecott Land’s completed development will cover an expanse of approximately ninety-three thousand acres, or one hundred forty-five square miles, which represents fifty-three percent of the developable land in the Salt Lake Valley. It is the largest metropolitan land-owning by anyone in the United States. Kennecott Land estimates that the West Bench development, to be completed by 2050, will consist of one hundred sixty-eight thousand residences that will house approximately four hundred fifty thousand people (Varella, 2005). If those projections are met, then Kennecott Land’s West Bench development will dwarf Disney’s twenty-thousand resident Celebration, Florida. Because Kennecott Land’s West Bench development could affect nearly a half-million people it is imperative that master-planning be done in such a way that it promotes civic engagement.

While Kennecott Land’s communities may be beautiful and functional, they appear to stifle civic engagement through the establishment of (1) community associations, or private governments; (2) restrictive covenants; and (3) the contracting of a professional, real estate, and management company, Capital Consultants Management Corporation of Dallas, Texas, who manages Daybreak and Celebration, Florida. Evidence of Kennecott Land’s desire to assume control of the entire development of the Daybreak community is documented in a portfolio feature of Kennecott Land’s Daybreak development that was published in Land Development by the National Association of Home Builders. It states,

“Daybreak’s rapid success is attributable to Kennecott Land’s holistic approach to development of significantly large areas of property. What’s more, the company’s business model includes acting as a “master developer” of these large areas—that is, they design, plan, entitle, develop infrastructure, finance, and prepare design guidelines for their communities. They select and manage builders who share a commitment to excellence and Kennecott’s design standards” (National Association of Home Builders, 2005).

There are many people that prefer the privatization of government responsibilities and would welcome developers like Kennecott Land, who are willing to take on the entire development process, and relieve city planners of the need to address all of these details. Likewise, design firms will prefer developers like Kennecott Land because they will establish the restrictive covenants that will maintain their design for years. While there is merit to both of those arguments, I suggest that municipalities should not allow developers to establish restrictive covenants that dictate every detail of the com-
munity from the type of fences that people may have to the colors allowed on their houses. Such restrictive covenants may preserve the planners design, but are not healthy for civic engagement because they introduce elements of control that begin to lead down a slippery slope of limiting basic freedoms and liberties.

An individual’s community is a place that they can influence and shape. If restrictions are necessary, then let them be presented before the public for approval. Public involvement through democracy is what gives genuine feeling and character to a community. It is what makes a community born of the people that live in it. This occurs because each participant assumes a stake in the community’s development. If the community succeeds or fails it will be a direct reflection of the people who live there. Establishing this type of policy makes it incumbent upon municipalities to educate their citizens about the need to incorporate new urbanism design. I am not referring to design details that dictate items like house color. Instead, I’m referring to new urbanism design principles that establish mixed-use development, safer streets, mass transit, and other similar and important design attributes. When properly informed, Americans make good decisions. They should be trusted by developers and planners to make such decisions in the development of their communities.

**PROPOSED SOLUTIONS**

**TAX POLICY**

Many municipalities face significant difficulties when they try to implement policies that will improve their built environment without raising taxes. The pressure to provide all of the services and infrastructure that is necessary and demanded by a community’s residents has driven municipalities to reevaluate their revenue sources.

Municipalities derive revenue from three main categories: property taxes, fees, and local sales taxes (Wassmer, 2002). In many regions, municipalities are already collecting property taxes at the maximum allowed rate. This is especially true in California where the 1978 passage of Proposition 13 capped property taxes at one-percent for all property owners (Lewis, 2001). Raising property taxes is extremely unpopular and can lead to political suicide for any politician who recommends doing so. This creates a significant challenge for municipalities who are experiencing revenue shortfalls, especially since it is estimated that the property taxes collected on five residences are only sufficient to cover the costs associated with three (Bell, 2006). Likewise, municipalities are limited in the number of fees that they can levy. This leaves the sales tax as the last real possibility for municipalities that need to increase their revenue.

Utah State Senator Gregory Bell explained that as municipalities continue to evaluate how they can increase their revenue, they “like all other entities, will follow the course of least resistance” (Bell, 2006). In determining what that course will be, municipalities compare and contrast their revenue sources with their expenditures to find the revenue that will provide the greatest fiscal outcome. This process is best described by the term fiscalization of land use, which is a term that was pioneered by D.J. Misczynski and refers to “local efforts to employ land-use regulation so as to increase local revenue streams” (Lewis, 2001, P. 24). It is reasonable, therefore, to understand why municipalities choose to court retail, since it can increase their local sales tax revenue. Robert W. Wassmer of California State University, Sacramento, explains in a recent journal article that municipalities generally prefer an increase in retail activity because “in most instances [it] requires a relatively small amount of local government services and generates relatively little environmental damage” (Wassmer, 2002).

In Utah, the current sales tax system collects between 5.75% and 8% on every retail dollar spent. Four point seventy five percent of the tax returns to the state. One percent is reserved as the local option portion. The remaining 0% to 2.25% varies between municipalities where sales taxes have been increased to provide revenue for various county and town interests that relate to parks, highways, mass transit, hospitals, resorts, etc (Utah State Tax Commission, 2007). The 1% local option portion is evenly split with one half returning to the point-of-purchase and the other half being distributed pro-rata, statewide, based on population (Utah Code Section 59-12-204, 59-12-205). For example, if during the course of a year, Nordstrom, in Salt Lake City, sells $100 million worth of merchandise, then the state will collect $4.75 million, Salt Lake City will collect $500,000, and the remaining $500,000 will be dispensed equally to all municipalities, statewide, based on population. Utah is ahead of the curve to modify sales tax distribution by having already split the local option sales tax in this manner. Many states still return the full 1% local option sales tax to the point-of-purchase.

Unfortunately, there is a limited amount of retail that can be supported by any one region or community. This leads municipalities to compete with one another to locate, within their jurisdiction, all of the possible retail that the region can support so that they may receive the half-percent local option sales tax revenue. Wassmer (2002) explained that “the greater the reliance on a municipal revenue source that generates a local fiscal surplus from local retail activity, the more likely it will be that local officials zone for retail land uses and utilize local incentives to encourage it” (Wassmer, 2002). The competition between municipalities to lure the limited retail from one municipality to the next has been referred to, by Senator Bell, as a cannibalization of cities that is harming the built environment, contributing to sprawl, and decreasing social capital. Senator Bell explained the consequences of this phenomenon, which are often referred to as zoning for dollars:

“The financial incentive to create sprawl-type, auto-orient-ed, retail, facilities is very high. This often comes at the cost of losing established Main Street businesses and creating town gateways connecting the main part of town with free-
In order to return balance to community planning in municipalities, Senator Bell argued that the point-of-purchase benefit derived from the local option sales tax must be removed and redistributed based on some other criteria (Bell, 2006).

A second reason why municipalities resist further modifications to the sales tax structure is best explained by Paul G. Lewis (2001) of the Public Policy Institute of California in San Francisco. He stated “taking away local control over the sales tax in California, however, would place cities in the position of dependent claimants, fighting for yet another state-controlled revenue source – much the same position they are in now with respect to the property tax” (P. 1324).

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Although private management companies, which are contracted to assist community associations, guarantee aesthetically pleasing and functional communities through the continued enforcement of the designer's plan and restrictive covenants, the management companies and the community designers are taking away the deliberative citizen processes that shape communities. Such management companies are suitable for small developments but should not be allowed to manage the affairs of larger master-planned communities.

REDEVELOPMENT

Douglas Rae, a political scientist and member of the Yale faculty since 1967, left his chairmanship of Yale University's political science department in 1990 to serve for eighteen months as Chief Administrative Officer of New Haven, Connecticut. Rea recounted his experiences and observations while serving in New Haven's city government in his recent book City. The following quotation from Rae's book provides an excellent vision for future development of America's communities and built environment. Rae (2003) said,

"The old urbanism—the city of steam and manure—cannot be recaptured, and it would not suit our needs if it could be. But certain critical details of that older urbanism—the magic of small commitments to place, the value of strangers in ordinary life, the humanity of well-ordered sidewalks—must be among the principal guideposts to a new era of urbanism in the twenty-first century" (P. 31).

Rae's vision for future development should be considered not only when establishing new development, but also in the redevelopment of America's decaying and sprawling neighborhoods. One such location is Valley Fair Mall in West Valley City, Utah. The mall is situated on a sixty-acre site that is located on Constitution Boulevard between 3500 and
3800 South streets. The mall’s construction was completed in 1970 during the era when many indoor suburban malls were built. Valley Fair Mall consists of forty-four acres of paved parking and six hundred thousand square feet, or fourteen acres, of retail space. Like most suburban malls, Valley Fair Mall is arguably West Valley City’s most valuable land bank.

At the time of its construction, Valley Fair Mall was located in the Granger neighborhood of Salt Lake County. In 1980, after two public votes, the residents of the Granger, Hunter, and Redwood neighborhoods successfully voted to incorporate the region into what is present day West Valley City (2007). West Valley City, as is the case with most suburban communities, does not have an urban center or recognized downtown. Therefore, I propose that West Valley City reverse the suburban trend and implement the policies that I am advocating by redeveloping Valley Fair Mall, and surrounding sites, into a new, central, eighty-acre downtown for West Valley City.

The sites that I recommend for redevelopment include: Valley Fair Mall, Granger Elementary School, Granger Christian Church, Firestone Tires, Big O Tires, Jubilee Foods, Party City, and a small apartment complex. A possible name for the new development could be “Valleymall Promenade: A Downtown for West Valley City.” Unlike master-planned communities, multiple developers, under direction of the city, should be part of this venture, which, comprising eighty-acres is the equivalent of eight Salt Lake City blocks, or seventy-two Portland, Oregon blocks. If Utah’s population projections remain accurate, then the state will need to redevelop locations like Valley Fair Mall in order to accommodate all of the anticipated growth.

Hypothetically, this redevelopment could ultimately look like the following: it would have a downtown consisting of seventeen blocks that average three-hundred fifty feet in length. Such a configuration would be walkable while formatting well with the existing street pattern. One of the center blocks could be reserved for a park which would serve as a public gathering place and is an essential element for a successful downtown. On another central block, perhaps across from the park, could be a location for a new West Valley City Municipal Government Center. Another block adjacent to the park could be a site for a new Granger Christian Church. Granite School District could build a new Granger Elementary School on the same location as the existing school. West Valley City could invite KTVX channel 4 to locate in this new urban center where they would become more competitive with KUTV channel 2, which recently relocated to new Main Street in Salt Lake City. A small convention center could be built along with a new hotel. A new cinema, theater, office towers, condominiums, and mixed-use buildings would be encouraged. Light-rail service would also be brought to the location connecting West Valley City’s urban center with other urban centers in the Salt Lake Valley. Certainly, the economy will determine whether a development of this magnitude could be supported, but the concept should at least be considered.

An urban center redevelopment of this nature would have a positive influence in redefining West Valley City and the heart of Salt Lake Valley. At the same time, this new development would be a conglomerate of civic opportunity. What had once been a sixteen-acre mall with a forty-four acre parking lot would now be a thriving center of urban activity. West Valley City would become an attractive and desirable urban center. West Valley City would be recognized as a community built by people through multiple developers and a place where civic engagement flourishes. West Valley City would become another enduring installation of the American experience.

**CONCLUSION**

Thus far, America’s experiment in democracy has proven to be an effective form of government which has given her citizens a voice in government while protecting their individual freedom. To ensure that America’s experiment in democracy continues to flourish at the local level, government leaders and policy makers must curb the effects of suburban sprawl by implementing proven and effective urban design techniques that will establish public facilities that incite public participation and community involvement. Likewise, municipalities must discourage allowing developers to create an abstract form of community by establishing community associations that act in concert with professional master-planned community managers to create and enforce design criteria standards that limit the freedom of their citizens by insulating their ability to participate in local government.

If the following three policy recommendations are implemented, civic engagement in America’s communities will increase. First, states must revise their sales tax laws from a policy of point-of-sale revenue distribution to a policy that distributes local option sales tax revenues based on population. Second, municipalities need to establish community councils in lieu of master-planned community associations. And third, municipalities must change their focus from zoning for dollars to planning with vision. If each American will do their part to implement these policy proposals, our communities will be safer, more pleasant, and more enlightened with increased civic engagement.

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Rhetoric: How Politicians Manipulate Language and the Media to Shape Public Thought

Elspeth Gustavson

This essay analyzes how politicians use the art of political rhetoric and framing to alter public opinion and the media's receptiveness to the rhetoric. By analyzing the way politicians have used the terms “global climate change,” “tax relief,” “the war on terror,” “theory,” “torture vs. abuse,” and the language framing abortion and controversial George W. Bush administration policies, the essay shows how politicians can use the power of words to gain political support from the public. The analysis then turns to the media's failure to act as a middle ground for the public. The essay examines how the media, due to the influence of money, does not offer an unbiased opinion. Finally, the essay explores the media's failure to act as an extra-constitutional “check and balance” to government's power.

INTRODUCTION

Language plays a pivotal role in everyday life, and political life is no different. Rhetoric is simply the effective or specialized use of language. Political rhetoric is one of the numerous ways language is crafted to serve its creators. This essay analyzes the specific ways that the manipulation of language shapes public perception of specific policies and initiatives. The analysis then proceeds to consider the media's power to dispense this rhetoric and ultimately its failure to inform citizens in unbiased ways that challenge political authority.

POLITICAL RHETORIC IN UNITED STATES

The first lesson any communicator must learn is that people are not blank slates. In 1999, Anthropologist Axel Auburn and linguist Joe Grady's showed in their research study that the average American's “thinking is shaped by emotionally loaded models of interpersonal relations” (Aubrun and Grady, 1999). The Rockefeller Brothers Fund's interpretation of the study was that “Research on human cognition...shoes that deeply held views of the world and assumptions about how the world works guide people's thinking and reasoning in largely unconscious and automatic ways” (U.S. in the World, 2004). In other words, when communicating, people will use personal experiences and biases to conceptualize the communicator's rhetoric. This feature of human cognition makes it very difficult for an individual to clearly communicate an idea to another because they both have different backgrounds and thus assign different connotations. A connotation is “the associated or secondary meaning of a word or expression; implication” (Random House Dictionary, 1980, p. 285). Different people will understand different words or expressions according to the way their personal experiences construct connotations.

As an elected representative, politicians must master the skill of communication in order to express to their constituents what they believe and to account for their actions. Most politicians therefore understand the consequences of human cognitive thinking and the formulation of connotations. However, instead of attempting to use language that overcomes these human cognitive biases, politicians use language meant to key into these biases and create specific cognitive reactions. Politicians “spin” language to persuade the public to think in a specific way rather than to impartially provide information. For example, Karen Callaghan and Frauke Schnell found that “laboratory subjects will support a policy proposal when it is said to produce 90 percent employment but oppose the same proposal when it results in 10 percent unemployment” (Callaghan and Schnell, 2005). This is the art of political rhetoric: the ability to manipulate the connotations of language without changing its denotation, and thus persuade the public to a specific set of ideas in a political environment.

Shakespeare said, “What's in a name? That which we call a rose By any other name would smell as sweet” (Shakespeare, 1992). However, there is a lot more to a name than Shakespeare suggests. Consider the difference between the names jungle and rainforest. Both of these names describe the tropical areas of dense vegetation and animal life. However,
jungle conjures images of a chaotic labyrinth where wild animals are bound to attack at any moment. In contrast, rainforest suggests a sublime rain saturated forest with thriving wildlife and beautiful rays of sunshine beaming through the canopy. Or consider the name estate tax versus death tax. Both terms name the tax placed on assets left to heirs in wills, but death tax frames the tax policy in a negative way. Contrary to Shakespeare's writing, there is a good deal in a name because the name itself evokes an emotional response that shapes the way one thinks about the object.

Another more prevalent name for this political rhetoric is “framing.” Framing is how politicians use linguistic cues to define the political boundaries within which a policy will be considered. Rochefort and Cobb argued that “if policy making is a struggle over alternative realities, then language is the medium that reflects, advances, and interprets these alternatives” (Rochefort and Cobb, 1995). Though historically the study of frames is a newer social science, the framing technique has existed in the United States longer than democracy. For example, the Founding Fathers long debated which frame of representation should be used in the constitution. The “federalist” representative frame that argued for strong centralized government competed with the “anti-federalist” frame that focused on the danger of centralized power (Callaghan and Schnell, 2005). Framing, or political rhetoric, has been used for centuries to structure the way the public thinks about policy and to capture the attention of the citizenry.

The idea that politicians sit around and deliberate over the precise language to use to convince a nation that their way is the right way sounds at least conspiratorial if not absurd. However, through polls, focus groups, “meta-analysis”, media content analysis, and message testing, politicians and consultants do scientifically gauge public reaction to different language (US in the World, 2004). For example pollsters like Frank Luntz conduct many research studies to determine the precise language that would create the wanted public interpretation. According to Steven Poole, Luntz then advised the Republican Party in a 2003 memo that,

“It's time for us to start talking about 'climate change' instead of global warming...‘Climate change’ is less frightening than 'global warming.' As one focus-group participant noted, climate change 'sounds like you’re going from Pittsburgh to Fort Lauderdale.' While global warming has catastrophic connotation attached to it, climate change suggests a more controllable and less emotional challenge” (Poole, 2006).

By changing the language of the discussion for environmental policy, politicians also alter the way Americans think about specific environmental policy. Such political rhetoric is not necessarily a political conspiracy, but a common language practice used everyday by common people.

In the wake of the al-Qaeda terrorist attacks on the World Trade Center on September 11th 2001, a new political rhetorical era of "terrorism" emerged. In President George W. Bush's first State of the Union Address following the terrorist attack on the United States, the President used the term "terror" thirty-six times (terror 14 times, terrorist 19 times, bioterrorism twice, and terrorism once) (Bush, 2002). Almost one percent of all the words in the address had the root "terror." With the increased level of fear and anxiety about terrorism in the nation, politicians utilized “terror” as the new catchphrase for political persuasion. In fact, the phrase the "war on terror," as opposed to the "war on terrorism" has an interesting rhetorical function. Before 9/11, “terror” itself was understood as a particular form of violence that a state practiced on its own citizens. However, “terrorism” was defined as a non-state group's violent acts against a state. According to these definitions, “terrorism,” is the proper definition of the catastrophe of 9/11. Writer Steven Poole said,

"Once you start using “terror” to describe all such actions, it becomes much easier to construct a symbolic link between suicide bombers and countries...US government officials regularly called Saddam Hussein’s Iraq a “terror state”; and al-Qaeda’s weapon was “terror” as well as “terrorism”...and so going into Iraq was a relevant part of the “war on terror” (Poole, 2006, p.35).

Poole suggested then that the blending of the terms “terror” and “terrorism” rhetorically guided public thought to clearly link the war on Afghan “terrorism” to the war against Saddam Hussein’s “terror state.”

To consider a different example, the words “tax” and “cut” connote negative experiences for most Americans. “Tax” reminds most citizens of the big check they have to write every April 15th, and “cut” evokes painful memories of a stinging paper cut, or other physical pain. Therefore, calling a policy proposal a “tax cut” does not create a positive image for the American public. Republicans found an ingenious rhetorical strategy to frame their proposed tax cuts in a way that would evoke positive and supportive attitudes from the public. They removed the word “cut” and replaced it with the comforting word “relief.” Not only does this language change remove the anxiety associated with the phrase “tax cuts,” but once “relief” is added to tax, linguist George Lakoff pointed out, tax becomes an affliction. Lakoff said, “the person who takes it away is a hero, and anyone who tries to stop him is a bad guy” (2004). Therefore, by changing the language of tax cut policy to “tax relief,” Republicans not only provide a frame that the public is more likely to support, but they also produce a frame that makes them the heroes.

The rhetorical presentation of policies that are controversial and emotionally sensitive should be handled delicately. The issue of abortion is a case in point. Cleverly, people who support legalized abortion rhetorically softened their position by adopting the name “pro-choice.” However, the opposition was quick to respond by changing their slogan from "the right to life" to “pro-life.” The first rhetorical function of this slogan change is to place anti-abortion supporters in direct opposition to legalized abortion supports. In addition, the change to “pro-life” successfully put abortion in the frame of “life” and not “choice” because life holds a higher...
morality priority than choice. In other words, if anti-abortionists are "pro-life," than pro-choice advocates must be "anti-life." If the public understands legal abortion policy to be "anti-life," they are much less likely to support such a policy (Poole, 2006). Another rhetorical achievement of the "pro-life" movement was enacting policy banning "partial-birth abortion." As linguist George Lakoff explained, though "partial-birth abortion" is a rare and horrific procedure that only occurs in one percent of all abortions "it is the first step to ending all abortion. It puts out there a frame of abortion as a horrendous procedure, when most operations ending pregnancy are nothing like this" (2004). By rhetorically defining abortion policies as "anti-life" and framing all abortion as a horrendous procedure, "pro-life" activists guide public perception of abortion.

Another emotionally charged debate that supporters and opponents carefully frame is evolution vs. intelligent design. The primary issue in the debate over creationism theory is what children should be taught in public schools. Considering the constitutional separation of church and state in the U.S., supporters of "intelligent design," are careful to rhetorically frame their "theory" in nonreligious terms. Proponents of intelligent design pretend "ignorance as to the identity of the actual designer, because if it were admitted that they thought it was God, it would be thrown out under the establishment clause of the US constitution" (Poole, 2006). Another interesting rhetorical exercise in the creationism debate is the use of the term "theory." By placing the creationism debate in the frame of "theory," the public is led to view the debate as one over divergent scientific explanations of creation. Calling intelligent design a "theory" legitimates the concept and makes it sound fit for a science class. However, it is not clear that intelligent design offers any scientific description of how the universe was actually designed and its status as a scientific theory is debatable. In this frame, naming evolution a "theory" seems fitting because evolution is an entirely scientific explanation of creation. However, by framing evolution as "just a theory," proponents of intelligent design attempt to strip evolution of its scientific legitimacy touting that it's findings have the status of law (Poole, 2006).

Under criticism from the public over some of its actions, the George W. Bush administration has very carefully framed its reaction statements in order to make controversial policies and practices seem justified, or at least not as controversial. One of these controversial practices is the "torture" of detainees at various detention centers. Secretary of State Condoleezza Rice insisted that they were not "torturing" anyone, and instead changed the language to "abuse." Even though the United Nations Convention Against Torture defined such treatment as torture, the administration rhetorically softened public opinion by substituting the word "abuse" (Poole, 2006).

The administration also rhetorically justified the controversial decision to wage a war in Iraq without support from the United Nations (UN) by saying Bush did not need a "permission slip" to defend America. As writer Richard Reeves (2005) pointed out, this rhetoric "frames the issue of multinational talks in such a way as to suggest that anyone taking the UN seriously is clearly a schoolchild asking for teacher's say-so." Finally, the public questioning of the Bush administration's use of illegal wiretapping brought about another interesting language adjustment. Instead of calling his program "wiretapping," Bush renamed his policy the "terrorist surveillance program" (Poole, 2006). Since American citizens do not consider themselves "terrorists," this name "terrorist surveillance program" removes the feared eyes of the government from the public "us" to the terrorist "them."

The Influence of the Media

Everyday citizens of America have contact with the media in some way. From traffic reports on the radio, to billboards, to the internet and television, the media is a constant unavoidable influence on American thought. The media has historically been the supplier of information the public needs to form political opinions and make political decisions. In the words of American humorist Will Rogers, "All I know is just what I read in the papers" (Rogers, 2007). In numerous, well-publicized studies social scientists examined public policy preferences via opinion polls in light of media coverage of specific policies. These numerous studies showed "that issues featured in the media become correspondingly important to the public. By contrast, issues receiving little media coverage are unlikely to arouse public concern or to engender political action" (Graber, 1990, p.71). Together these studies demonstrate that the media has the power to set political agenda by setting public preference for policy. This means that, in addition to the public need for an unbiased media to serve as a check on political power, an unbiased media is also needed to produce unbiased information about political issues for public consumption. Basically if politicians controlled the media, they would have greater control over what the public wants from their politicians and when.

Unfortunately, this political control of media is partially a reality; the unbiased media is a myth. Christopher Dickey concluded in a web essays that the media "long ago concluded having access to power is more important than speaking truth to it" (Dickey, 2005). To a certain extent, close proximity to political power makes sound business sense to the media. If a reporter is in the good graces of powerful politicians, she/he is more likely to have access to interviews with that politician, and interviews sell. Also, there are numerous cases where news reporters became so close to the political power, they were paid to act as a mouthpiece for the politicians' rhetoric. Politicians have the power to sway public opinion with rhetoric, and the media has the power to set the agenda. When the media source neglects its democratic responsibility to challenge power, the news becomes nothing but a loudspeaker for political rhetoric.

One example of the media simply disseminating politician's rhetoric is the case of Armstrong Williams, a conserva-
tive commentator, talk-show host and newspaper columnist for the Washington Times, the Detroit Free Press and other publications. After Williams’ extensive positive reporting on the benefits of the Bush administration’s education policy No Child Left Behind (NCLB), he was,

“unmasked as the front man for a scheme in which $240,000 of taxpayers’ money was quietly siphoned to him through the Department of Education and a private PR firm so that he would ‘regularly comment’ upon the Bush Administration’s No Child Left Behind policy in various media venues during an election year” (Rich, 2005, P. 5).

Williams was literally being paid by policy makers of NCLB to publicly spread the good news about NCLB. Williams told reporters from the Los Angeles Times and The Nation that “he had ‘no doubt’ that there are ‘others’ like him being paid for purveying administration propaganda and that ‘this happens all the time’” (Rich, 2005, P. 20).

Sadly, Armstrong Williams was right. Reporter Douglas Bandow resigned from Copley News Service in December of 2005 “after he admitted writing as many as two dozen op-eds for which he was paid $1,000 to $2,000 each by embattled Washington lobbyist Jack Abramoff” (Javers, 2006, P. 35). William Greider of The Nation magazine observed, “Information is shaped (and tainted) by the proximity of leading news-gatherers to the royal court and by their great distance from people and ordinary experience. People do find ways to inform themselves, as best they can when the regular ‘news’ is not reliable” (Greider, 2005).

There are at least three additional known cases where federal agencies televised “fake news reports” during the Bush administration. As reported by The New York Times,

“The Department of Health and Human Services, the Census Bureau and the Office of National Drug Control Policy have all sent out news ‘reports’ in which, to take one example, fake newsmen purport to be ‘reporting’ why the administration’s Medicare prescription-drug policy is the best thing to come our way since the Salk vaccine” (Rich, 2005).

All of these incidents were found to be violations of federal law that “prohibits ‘covert propaganda’ purchased with taxpayers’ money” (Rich, 2005). The question the American public needs to be asking is “How can our media provide us unbiased information when politicians are paying them with taxpayers’ money” (Javers, 2006). The ‘free press’ is important in ensuring that politician’s rhetoric is challenged. True free investigative journalism was meant to keep politicians in line by keeping a public eye on their actions and decisions. The unbiased media needs to be the objective opinion the public relies on to engender an informed democracy.

**CONCLUSION**

It is too common in our day to merely dismiss what politicians actually say as...’spin,’ to assume that it is meaningless waffle, and to close our ears. On the contrary, if [political rhetoric] is interrogated rather than accepted uncritically and spread by compliant media, it cannot help but betray what its users really mean. (Poole, 2006, p.36)

Politicians are great communicators; they have mastered the art of rhetoric, framing, and therefore the manipulation of public opinion. The Nation reported, “Democracy…begins not at election time but in human conversation” (Greider, 2005). The media may often act as a loudspeaker for the rhetoric of politicians, deafening the American public to the discourse of policymaking. The government still has a very intimate impact on the citizen’s everyday life and cannot be ignored. A citizen’s responsibility to the democratic process does not begin or end at the polls. The public must compel the media to question the rhetoric politicians tout, and seek the meaning behind the words.

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Quantifying the Impact of Partisan Gerrymandering: Uncompetitive, Unresponsive, and Unaccountable American Democracy

Bryson B. Morgan

In pursuit of electoral advantage, legislators create custom-designed congressional and legislative districts. Gerrymandering turns democracy on its head by permitting legislators to hand-pick their constituents - threatening the democratic ideals of electoral choice and officeholder accountability. The result is declining electoral competition and increasing partisanship in Congress as elections are frequently decided in party primaries and officeholders represent increasingly partisan districts. The 2006 elections brought dramatic change, yet 87% of congressional elections were won by more than 10%. Some argue that gerrymanders in red states balance gerrymanders in blue states, but injustice equally spread is equally unjust and the resulting rise in partisanship in Congress is eroding deliberation and compromise. Despite ruling in 1986 that partisan gerrymandering was justiciable, the U.S. Supreme Court has upheld even the most partisan plans. The recent failure of the Court to invalidate the Texas redistricting plan demonstrates the urgent need to prevent this partisan abuse from occurring multiple times each decade.

The 2001-2002 round of congressional and state legislative redistricting strained the fabric of American democracy in unprecedented ways. In the name of gaining marginal electoral advantages, legislators and their allied partisan officers systematically fragmented, packed, cracked, stacked, dislocated, overpopulated, and underpopulated congressional and state legislative districts. Where partisan advantage is not feasible, legislators reach across the aisle in order to create “safe” districts that protect the interests and incumbents of both parties. The result is often bizarre shaped districts with finger-like extensions, tentacles, and spindly legs.

Few states have escaped the recent rounds of redistricting without suffering through partisan gerrymanders. Utah is one such state where citizens have been shuffled to and fro in the name of partisan gain. Most recently in Utah, the 2001 redistricting intended to severely limit Representative Jim Matheson’s chance of re-election was called a “scam” by the Wall Street Journal and even Senator Robert Bennett (R-UT) remarked that it was “the worst case of political gerrymandering” that he had seen (Burton, 2002). With the lingering prospect that Utah will gain a fourth congressional seat prior to the 2010 round of congressional reapportionment, and the rapidly-approaching 2011 redistricting cycle commencing in only four years, the time is ripe for a thorough analysis of the effects of legislative-controlled redistricting.

This paper offers a brief glimpse into the contemporary research that has sought to quantify the effects of partisan gerrymandering on American democracy and demonstrates how the current legal framework for addressing partisan gerrymandering not only fails to curb the most partisan redistricting plans, but in many cases allows partisan intent to shield plans from successful legal challenge. The paper accomplishes this by showing how gerrymandering distorts a fair representation model characterized by fairness, responsiveness, and accountability. Once the impact of gerrymandering is explained, the paper argues that it is both urgent and necessary for states to reform their redistricting practices.

Fair Representation Model

To understand the effects of gerrymandering, one must start with a conception of a fair or ideal representation model. Brookings Institution scholar Tom Mann wrote that, “The legitimacy of the American electoral system depends on sustaining reasonable levels of fairness, accountability, and responsiveness” (Mann & Cain, 2005, italics added). Defining these traits further is vital to understanding the parameters within which our electoral system is intended to operate. It is impor-
tant to note that some limitations on electoral fairness in America are due purely to the structure of the American electoral system, i.e., single-member, simple plurality districts. The purpose of this section is to articulate and define electoral fairness within the restraints of the American electoral system rather than argue for broad electoral principles that would warrant the adoption of a new system, such as proportional representation, in the United States.

**FAIRNESS**

The beauty and value of democracy is that it simultaneously empowers the individual and equalizes everyone (Harris, 2006). Thus, electoral fairness means that once an individual has satisfied the legal requirements established in their respective states regarding voter eligibility and registration, he or she has the right to cast a ballot that will be counted correctly, weighed equally, and not be subject to vote dilution. Equally weighed votes are present when electoral districts are equally populated. Vote dilution takes the form of packing (incorporating all or most of a certain group into one district) and cracking (splitting a group into multiple districts where their votes will not control the outcome of an election), and can be targeted against any group within society united by a common characteristic such as race, religion, income level, or political party affiliation. As Douglas Rae noted in *The Political Consequences of Electoral Laws*, an undiluted vote will result in a proportionate share of seats for a party as the total votes the party or group received. For example, if Republicans receive 60% of the vote they should receive roughly 60% of the seats (Rae, 1971). While the courts have gone to great lengths to protect minority groups from vote dilution, states remain free to dilute the votes of other groups.

**RESPONSIVENESS**

Responsiveness is the quality of an elected body that leads it to accurately reflect popular will. As originally designed, the United States Constitution provides for the direct expression of the public will in only one half of one of the three branches of government, the House of Representatives. It is only in this body that the public finds the constitutional right of direct election. While the President was insulated from the public by the Electoral College and the Senate elected by a vote of the various state legislatures, the House was designed not only to embody the public’s “free and fair contest of ideas” (Mann, 2005a), but mirror the ever-changing nature of those views by being subject to election every second year. As James Madison, the Father of the Constitution wrote in *Federalist Paper No. 52*, the House of Representatives was intended to have “an immediate dependence on, and an intimate sympathy with, the people.” As Sam Hirsch noted:

> “The Framers had a vision for the United States House of Representatives. It was to stand apart from the Senate, the Presidency, and the Supreme Court as our one truly majoritarian national institution, as the body most responsive to popular sentiment, with no intermediary between it and the people. It is not a mistake that Representatives were given two-year terms while other federal officials were given four years or six or life tenure. The Framers named it the House of Representatives for good reason” (Hirsch, 2003, p. 215).

**ACCOUNTABILITY**

Accountability is the result of responsiveness at the individual officeholder level. Just like responsiveness, accountability largely boils down to electoral competition, and how “accountable” a particular representative is can be predicted to a large degree by how likely she is to be ousted from office in an approaching election. As mentioned above, the House of Representatives derives its power directly from the people. Thus, Members of the House should act as delegates in representing the views of their constituents. Furthermore, the electorate, upon finding they are being inadequately or undesirably represented, retains the right to replace the officeholder. The benefits of electoral accountability are many, ranging from the lowest level of accountability in the form of prompt responses to constituent correspondence to the highest level in the form of constituent-desired policy outcomes. Elected officials who represent closely contested districts behave differently than their colleagues from districts insulated from competition.

Before demonstrating how gerrymandering distorts the fair representation model, we must first define gerrymandering and briefly discuss its history.

**DEFINITION AND EVOLUTION OF GERRYMANDERING**

Political scientists Dudley and Gitelson defined gerrymandering as “the intentional manipulation of electoral districts for political purpose” (Dudley and Gitelson, 2002). More specifically, and for the purposes of this paper, I have chosen to use a more narrow and detailed view of gerrymandering and defined it as the calculated arranging of electoral districts in a way that favors one political party's interests, incumbents or challengers, or insulates a particular officeholder from immediate and/or future electoral competition.

Gerrymandering is not a new phenomenon in American politics. Its use dates back to the founding of the United States and its name dates back to about two decades of the signing of the Constitution. The very term gerrymandering reminds us of the practice’s deeply embedded roots in American democracy. It was on February 11, 1812, that Massachusetts Governor Elbridge Gerry approved a redistricting plan that would help his party retain control of the state legislature (Dudley and Gitelson, 2002). The resulting shape of one of the districts looked like a salamander to some, leading Gilbert Stuart to label it and other similarly-shaped districts as “gerrymanders” (Shultz, 2006).

Contrary to many reports, even mid-decade redistricting – the redrawing of districts multiple times in a single decade – is not a recent phenomenon. As Carson, Engstrom, and Roberts (2006) pointed out, “while the case of Texas may strike the modern observer as a sign that partisanship in the
contemporary era has reached a fever pitch level, this type of off-cycle redistricting actually has analogs in an earlier historical era” (p. 283). Most notably, they pointed to the frequent re-redistricting of congressional districts that took place in the final three decades of the nineteenth century such as Ohio redrawing its boundaries before each congressional election for twelve years (Carson et al., 2006).

Prior to the technological revolution of the 1980s and 90s, legislators redrew lines using large maps and calculators. The advent of personal computers with expanded capabilities has made it possible for legislators to not only make instantaneous redistricting calculations, but to consider several demographic factors including voting information consecutively with population counts. With the advent the Census Bureau’s TIGER (Topologically Integrated Geographic Encoding and Referencing) database in the 1990s, color-coded maps showing levels of concentration for any data item can be easily generated (Brace, 2004). In the last twenty years, redistricting an entire state has evolved from being an intricate manual process lasting weeks to a highly-sophisticated process that, even in the early 90s, could be completed in less than an hour.

As the hardware capabilities of PCs have increased, the number of criteria that state legislatures use in redistricting has greatly increased - from 12 available criteria in 1990 to 256 in 2000 (Brace, 2004). Even in such states as Utah, where official state-owned computers used in redistricting do not factor in political data such as past voting behavior, the state parties, using programs such as Autobound™ and Maptitude™, incorporate such data and transfer completed maps to the state legislative staff. Where in the past legislators were using a hammer to conduct redistricting, they are now using scalpels.

**HOW GERRYMANDERING PERVERTS THE FAIR REPRESENTATION MODEL**

After the 2001 Utah redistricting cycle, Senator Robert Bennett (R-UT) called political gerrymandering the “greatest threat to democracy in the United States; greater than soft money in political campaigns” (Burton, 2002, p. B2). Senator Bennett is not the only person to voice concern. In reflection over his years presiding over the greatest era of expansion of civil liberties, Chief Justice Earl Warren offered his opinion that redistricting, and more specifically, *Baker v. Carr* (1962) was “the most important case of his tenure on the Court” (Warren, 1977, p. 306). While the intricacies of redistricting are complex and difficult to understand, the impact of gerrymandering of American politics is familiar to the novice observer. In fact, many consider redistricting to place considerable limits on the ability of the United States to be considered a truly democratic nation. This claim has been echoed by organizations such as *Freedom House* who, in its 2005 annual report, expressed concern over “the widespread use of sophisticated forms of gerrymandering” (*Freedom House*, 2005).

**FAIRNESS**

Redistricting directly infringes on electoral fairness in two ways: the unequal weighing of votes and the spreading and packing of populations in order to dilute the voting power of certain targeted groups within society. While significant progress has been made in the area of population equality and racial vote dilution, ample room for partisan tinkering still remains in the arena of partisan vote dilution.

**THE “ONE PERSON, ONE VOTE,” OR POPULATION EQUALITY STANDARD**

Article I, Section 2 of the United States Constitution stipulates that “The House of Representatives shall be composed of members chosen every second year by the people of the several states” and that “Representatives and direct taxes shall be apportioned among the several states which may be included within this union, according to their respective numbers” (U.S. Constitution Art I § 2). Prior to the 1960s it was common for states to draw districts with unequally populated districts, and in some cases, states went for more than 50 years without changing district boundaries. With the United States Supreme Court’s decision in *Baker v. Carr* (1962), which ruled that redistricting and reapportionment were subject to challenges under Article I, section 2, and the Equal Protection Clause of the U.S. Constitution, and the subsequent rulings in *Wesberry v. Sanders* (1964), *Reynolds v. Sims* (1964), and *Avery v. Midland County* (1968), the Supreme Court applied the one-person, one-vote standard to congressional, state legislative, and local government elections, respectively. As political scientist Bruce Cain noted, these cases have made population equality the highest redistricting priority for all states (Mann & Cain, 2005).

The “one-person, one-vote” standard was further defined in *Karcher v. Daggett* (1983), which required states to make a “good-faith effort” to ensure that populations be distributed evenly throughout all districts of a redistricting plan. In determining that populations are distributed equally, two standards are applied: a strict standard for congressional plans and a more lenient standard for state legislative and other plans. According to the stricter standard for congressional districts, total population deviations are most likely to be upheld if well under one percent, though this is not guaranteed. However, a state may employ larger total population deviations in order to achieve a compelling state interest such as district compactness, respect for county, municipal, and precinct boundaries, preserving the cores of prior districts, and avoiding contests between incumbents (Abrams v. Johnson, 1997). As was the case in Karcher, even total deviations of less than one percent, that are not adequately defended, will be found unconstitutional. For example, “a federal district court in Kansas in 1992 rejected a plan whose 0.94% total deviation was justified only by the goal of retaining the integrity of county lines” (Hebert, Verrilli, Smith, & Hirsch, 2000).
State legislative plans are also required by the Equal Protection Clause of the Fourteenth Amendment to have equally populated districts. However, despite similar language from the court, state redistricting plans are not required to be as equally-populated as congressional plans. In *White v. Regester* (1973), the Supreme Court stated that “we cannot glean an equal protection violation from the single fact that two legislative districts in Texas differ from one another by as much as 9.9%” (*White v. Regester*, 1973). Thus, state district plans with population deviations of less than 10% require no special justification. This does not mean, however, that states are given free reign to vary populations within the 10% range. As Hebert, Verilli, Smith, and Hirsch (2000) explained, a deviation of less than 10% “might be challenged if it was a product of some unconstitutional, irrational, or arbitrary state policy.”

Nor does the 10% standard mean that total population deviations above 10% will always be rejected. In these cases, states must show a legitimate, longstanding, and consistently applied state policy in order to justify such deviations. In one such instance in 1983, the Court upheld a Wyoming state legislative plan with a total population deviation of 89% - the largest district having a population of 9,453, and the smallest, Niobarra County, having a population of 2,924. The population deviation was tolerated because the Court found that “Wyoming's constitutional policy - followed since statehood - of using counties as representative districts and ensuring that each county has one representative is supported by substantial and legitimate state concerns” (*Brown v. Thompson*, 1983).

**Racial Vote Dilution: The Voting Rights Act at Work**

Since the early 1980s, challenges to redistricting plans have increasingly focused on racial vote dilution. Section 5 of the Voting Rights Act of 1965, which applies to Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia, as well as sections of California, Florida Michigan, New Hampshire, New York, North Carolina, and South Dakota, requires that states receive preclearance from the Attorney General of the United States or the United States District Court for the District of Columbia for “any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting” (Voting Rights Act of 1965). As applied to redistricting, this means that proposed plans must satisfy two “prongs” – that the plan will not have the effect of worsening the voting power of minority voters, known as “retrogression,” and that the plan does not have the purpose of “denying or abridging the right to vote” (Hebert et al., 2000).

While Section 5 of the Voting Rights Act of 1965 only applies to certain areas, Section 2 of the Voting Rights Act precludes all states and jurisdictions from diluting the voting power of minorities. In determining if minority vote dilution has occurred, Section 2 stipulates the following:

“As applied to redistricting, Section 2 has been interpreted to require the creation of “majority-minority districts” (yet to be fully defined by the Court) when certain criteria, set forth in *Thornburg v. Gingles* (1986), are met. The “Gingles test” requires 1) that the minority group is “sufficiently large and geographically compact to constitute a majority” in a single-member district (*Grove v. Emison*, 1993), 2) that the minority group be “politically cohesive,” and 3) that the white majority votes “sufficiently as a bloc to enable it…usually to defeat the minority’s preferred candidate” (*Thornburg v. Gingles*, 1986).

Beginning in 1993, the U.S. Supreme Court has retreated from its strong support of minority-majority districts. In *Shaw v. Reno* (1993) the Court ruled that the “excessive and unjustified use of race in redistricting is prohibited by the Equal Protection Clause of the Fourteenth Amendment” (Hebert et al., 2000, p. 50). The Shaw doctrine has had a profound effect as “courts have invoked Shaw to strike down districts in Alabama, Florida, Georgia, Louisiana, New York, North Carolina, South Carolina, Texas, and Virginia” (Hebert et al., 2000, p. 50). In defining when the use of race in redistricting plans exceeds allowable limits, the Court stepped back from the potentially broad reading in Shaw by finding in *Miller v. Johnson* (1995) that race must be found to be the “predominant factor” in determining district lines, and redistricters must have “subordinated traditional race-neutral districting principles…to racial considerations” (Miller v. Johnson, 1995). Despite this weakening trend, the legal protections against minority vote dilution are strong.

**Partisan Vote Dilution**

The limits on partisan gerrymandering are few and seldom enforced. Political or partisan motivations in drawing lines are acceptable, and there is no requirement that lines be drawn neutrally. In fact, the Supreme Court, in *Gaffney v. Cummings* (1973), condoned both partisan and incumbency-protection gerrymanders, as it asserted that “politics and political considerations are inseparable from districting and apportionment,” and warned against “politically mindless approaches to redistricting – arguing that they “may produce, whether intended or not, the most grossly gerrymandered results.” Furthermore, under the “Shaw doctrine” mentioned previously, proving that a partisan gerrymander was adopted in order to protect an incumbent or to further a party’s partisan interests shields it from challenges that race was used as the “predominant” factor in drawing district lines. Such was the case in *Hunt v. Cromartie*, (1999) where an expert witness convincingly testified that political party affiliation was the predominate motivation for districting rather than race.
In the landmark case *Davis v. Bandemer* (1986), the U.S. Supreme Court ruled for the first time that partisan gerrymandering was justiciable, basing its ruling in the Equal Protection Clause of the Fourteenth Amendment. However, the plurality opinion, which established the criteria for identifying a partisan gerrymander, wrote that in order for a district plan to be “sufficiently adverse” to warrant invalidation, challengers were required to prove both discriminatory intent and effect. The Court wrote, “unconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter’s or a group of voters’ influence on the political process as a whole” (*Davis v. Bandemer*, 1986, italics added). As Hebert, Verilli, Smith, and Hirsch (2000) noted, “the doctrine has had little real bite.” The way in which the Bandemer standard has been interpreted by the U.S. Supreme Court and lower courts constitutes a very narrow judicial approach. In one such case, California Republicans were ruled not to have been the victim of an unconstitutional gerrymander because there were “no allegations that California Republicans have been ‘shut out’ of the political process,” and the Court wrote further that “Republicans remain free to speak out on issues of public concern” (*Badham v. EU*, 1988). More recently, challenges to plans based on partisan vote dilution have met similar fates.

Several cases challenging the constitutionality of partisan gerrymanders emerged following the 2001 round of redistricting. In *Veith v. Jubelirer* (2004), the Court upheld a Republican redistricting plan that “ignored all traditional redistricting criteria, including preservation of local government boundaries, solely for the sake of partisan advantage,” and created “meandering” and “irregular” districts designed to maximize partisan electoral outcomes. While all nine justices agreed that excessive partisanship in redistricting is unconstitutional, Justice Antonin Scalia, writing for a four-member plurality asserted that all political gerrymandering claims should be declared nonjusticiable because no court had been able to find a fitting remedy in the 17 years since Bandemer. According to Scalia, it was time to recognize that the solution to political gerrymandering simply did not exist. Justice Kennedy, however, wrote in his concurring opinion that while no judicially manageable standards had been found, the Court should not give up on eventually finding such standards (*Veith v. Jubelirer*, 2004).

Most recently, in *LULAC et. al v. Perry* (2006), Texas Democrats and minority organizations challenged the mid-decade redistricting plan masterminded by Rep. Tom Delay (R-TX) that solidified Republican control of the Texas Legislature and added to the party’s domination of Congress by yielding a net gain of six Republican seats. Plaintiffs argued that the plan was unconstitutional because it discriminated on the basis of race, was a blatant partisan gerrymander, violated the Voting Rights Act of 1965 by diluting the voting strength of minorities, and was adopted via an unconstitutional mid-decade redistricting process. On June 28, 2006, the Supreme Court issued its six-part, 132 page opinion largely upholding the mid-decade redistricting plan. The Court rejected the claim that the plan constituted an unconstitutional political gerrymander, restating its opinion that no judicially manageable standards for dealing with partisan gerrymandering had been found.

The U.S. Supreme Court in both Veith and LULAC has hinted that such a standard may be found within the First Amendment’s guarantee of free speech, and legal scholars are in hot pursuit of a workable standard that the Court will accept. However, such a standard is not likely to emerge given the current composition of the Supreme Court. As Jeffrey Rosen (2006) of George Washington Law School has indicated, “political gerrymandering, at least for the foreseeable future, may be a problem without an obvious judicial or political solution” (p. 1). This warning has also been reiterated by other scholars such as Bruce Cain (2006) of Berkeley, who wrote that while “partisan gerrymandering is theoretically justiciable, there is nothing much for line-drawers to worry about” (p. 1).

As shown in the figures below, the impact of partisan gerrymandering is readily recognized as an influencing factor in electoral outcomes. Figures one and two are the result of a survey of several hundred “potential political candidates” conducted by political scientists L. Sandy Maisel, Cherie Maestas, and Walter Stone. The survey strongly indicates that in both Republican and Democratic controlled states, potential candidates see the redistricting process as having a negative impact on the minority party. In Republican controlled states, more than 60% of potential candidates indicated that redistricting helps Republican incumbents and nearly 57% indicated that redistricting hurts Democratic incumbents by favoring Republican challengers. The survey indicated similar, though not as dramatic, results in Democratic controlled states, where 48% of potential candidates indicated that redistricting favors Democratic incumbents and 36% say that redistricting hurts Republican challengers to those incumbents (Maisel, Maestas, and Stone, 2004).

![Figure 1: Perceived Incumbent Advantage Due to Redistricting](source: Maisel, Maestas, and Stone, 2004.)

RESPONSIVENESS
As noted earlier, responsiveness is the ability of an electoral system to accurately reflect public opinion and mirror both the short-term and long-term changes in public sentiment. Gerrymandering limits the responsiveness of the American electoral system in three ways: 1) by moving the main arena of the candidate selection process from the general elections to the party primaries, 2) by limiting the electoral influence of the “moderate middle,” then increasing the partisan polarization in Congress, and 3) by severely reducing the ability of the electorate to change the partisan composition of elected bodies.

DISTORTING THE CANDIDATE SELECTION PROCESS
In February of 2006, the Associated Press published a guide for prospective Pennsylvania legislative candidates. The advice it offered underscores the impact that gerrymandering has had on the candidate-selection process. It read, “House districts contain about 60,000 people each, but a primary can be won with just a few thousand votes if the turnout is low. Because of gerrymandering, the primary is often the only real contest” (Associated Press, 2006). With the general election threat largely removed, candidates have compelling incentives to focus the majority of their time, energy, and funds on appeasing party loyalists in primary elections. As Thomas Mann and Norman Ornstein (2006) write in their recent book The Broken Branch, “new and returning members are naturally most reflective of and responsive to their primary constituencies, the only realistic locus of potential opposition, which usually are dominated by those at the ideological extreme. This phenomenon has tended to move Democrats in the House left and Republicans right” (Mann and Ornstein, 2006, p. 12). Where in a competitive election primary voters are more likely to favor moderate candidates with widespread appeal, uncompetitive elections produce elected officials that appease the most partisan factions of their political party. Hence the “moderate middle” is quickly becoming the “vanishing middle.”

Gerrymandering has also been shown to have a significant impact on the candidate entry process. Potential candidates are well aware of the effect that gerrymandering has on their prospects of electoral success. Research also suggests that qualified candidates are less likely to run in districts that have been adversely gerrymandered and more likely to run in districts that have been favorably gerrymandered (Krasno and Green, 1988). As will be explained later in this paper, redistricting decreases the competitiveness of congressional and state legislative elections. This lack of competition dramatically affects the willingness of qualified candidates to run for elected office. Specifically, large margins of victory for incumbents in previous elections deter qualified challengers (Hetherington, Larson, and Globetti, 2003). This trend has been documented not only in contemporary American politics (Hetherington, Larson, and Globetti, 2003) but also in the intensely polarized and gerrymandered era at the end of the nineteenth century (Carson, Engstrom, and Roberts, 2006).

THE RISE OF PARTisan POLARIZATION
Of increasing concern to many reformers is the rise in partisan polarization in Congress and many state legislatures since the 1980s (Mann and Cain, 2005). As Tom Mann recently noted, “a healthy degree of party unity among Democrats and Republicans has deteriorated into bitter partisan warfare” (Mann, 2005). The partisan warfare is the result of a decline of ideologically moderate members and an increase in the number of fiercely partisan elected officials who are less willing to compromise and less likely to engage in deliberative legislative processes. As Norm Ornstein noted, the rise in polarization in Congress has been accompanied by a sharp decline in the number of committee meetings and days spent in deliberative session (Mann and Ornstein, 2006). The rise in polarization leads to policy outcomes that fail to represent public opinion, or as one political scientist has noted, the current climate leaves a large portion of the electorate with moderate policy preferences stuck with choices that are simultaneously too liberal and too conservative (Masket et al., 2006).

There is no question that partisanship has substantially increased over the past thirty years. However, there is a great deal of debate as to what has caused this polarization. Political scientists point to several factors including the movement of Southern conservative Democrats to the Republican Party and the decline in electoral competition due to “increasing geographical segregation of voters and successive waves of incumbent-friendly redistricting” (Mann, 2006). While the impact of gerrymandering on polarization is generally accepted, the extent of that impact is hotly debated. Political scientists such as Abramowitz, Alexander, and Gunning (2006) have argued that redistricting has a minimal impact political partisanship – pointing out that most of the increases in partisanship have occurred between redistricting cycles, not immediately following redistricting. On the other side, political scientists such as McDonald (1999) and Carson, Crespin, Finocchiaro, and Rohde (2004) have shown that roll-call voting of Members from newly-redrawn congressional districts is more polarized than roll-call voting of Members from unaltered districts. Most recently, political sci-
entists Masket, Winburn, and Wright (2006) found that “districting will almost invariably involve packing like-minded voters together. The result is districts that are more homogeneously liberal and conservative than the districts from which they were created.” This view has been echoed by Bruce Cain (2006) of Berkeley who pointed out that “as districts get more safe, the need to attract independent and centrist cross-over votes lessens. This allows a shift to the extremes of the ideological continuum. As more members represent the extremes, Congressional politics becomes more polarized and uncivil.” (Cain, 2006)

**DISTRIBUTIONAL BIAS**

The third way in which gerrymandering perverts the responsiveness of the American electoral system is by embedding an advantage, often referred to as a distributional bias, into the district maps, making it difficult for a party that receives a majority of votes to receive a majority of seats. The distributional bias of the current 2001 redistricting map is well documented. Samuel Issacharoff (2004) of New York University has shown that this bias occurs in both Democratic and Republican controlled states. By comparing the percentage of the vote that states gave to George W. Bush and Al Gore in the 2000 election to the percentage of congressional seats that each party received in the 2002 congressional elections, he found that “in those states where Democrats controlled the last redistricting process, Al Gore won 51.5% of the vote, while Democrats won 57.1% of the Congressional seats… in states where Republicans controlled redistricting, George Bush won 53.1% of the vote, while Republicans won congressional elections in 66.7% of districts” (Issacharoff, 2004). Issacharoff’s results are significant, showing that both parties have crafted favorable plans - giving a 5.5% advantage to Democrats in blue states and a 13.6% advantage to Republicans in red states. These findings dispel the notion that the distributional bias of the current electoral map is due to natural “social sorting” – a common argument of many redistricting reform opponents.

While distributional bias is present, it has been common for left-leaning reformers to exaggerate the severity of the distributional bias. One such reformer, Sam Hirsch (2003), has claimed that a Democratic takeover of Congress is impossible “unless the Democrats receive close to 60% of the national congressional votes” (Hirsch, 2003). The 2006 midterm elections silenced such claims. What remains, however, is the reality that some of the distributional bias favoring the Republicans in Republican-controlled states and Democrats in Democrat-controlled states is due to redistricting. Thus, redistricting acts like an intricate system of levees designed to save the political party in power from short-term, and to a lesser extent long-term, changes in public opinion. While a gerrymandered map may not impede an outraged public from expressing their electoral desires, it effectively turns the roar of an angry electorate into a mere whisper.

**OFFICEHOLDER ACCOUNTABILITY**

To this point it has been shown that gerrymandering limits the fairness and responsiveness of the American electoral system. The third and final quality of a fair representation model, accountability, is also strongly impacted by redistricting. Gerrymandering reduces officeholder accountability by limiting the ability of constituents to elect their candidates of choice. This is done by implementing what are known as “incumbency protection” gerrymanders – redrawing an incumbent’s district to shield the officeholder from electoral competition or remove potential challengers from the district boundaries. With the ability to draw district lines at will, incumbents no longer fear electoral defeat and are faced with few incentives to act as a delegate in the representation of their constituents. As many have stated, politicians are choosing their voters when voters should be electing their representatives.

**THE DECLINE OF ELECTORAL COMPETITION**

Over the last quarter century the number of competitive House seats has been on average 58, or 13% percent of all seats. However, this number plummeted after the 2001 redistricting cycle, when in 2002 less than 10% of congressional elections were competitive, and in 2004 when only 27 seats, or 6% were decided within a 10 percent margin- an all-time low in American history (Mann, 2006a). The 2006 elections brought dramatic change, yet 87% of congressional elections were won by more than 10%. While many attribute the decline in competition to campaign finance laws, which are thought to favor incumbents, Professor Michael MacDonald estimates that even if there were no incumbents running, the number of races in the 48-52% range would be about 81 (Cain, 2006). This trend is likely to continue. When asked what his impressions of the 2002 and 2004 elections in which 98% of incumbents were re-elected were, conservative commentator George Will remarked that “incumbents are working to eliminate that awful 2 percent” (Will, 2006). Michael McDonald posed a sobering question; “How can the country regarded as leader of the free world host legislative elections whose competitiveness is nearly on par with one-political party dictatorships such as Cuba, old Iraq, Libya, and the old Soviet Union?” (McDonald, 2006b).

Redistricting is closely tied to this decline in competition. Masket, Winburn, and Wright’s (2006) studies showed that there is a strong correlation to partisan-controlled redistricting and a decline in competition in state legislative races. There is also considerable evidence that the 2001 round of redistricting has been the worst on record. In the past, the election cycles immediately following a redistricting cycle – typically those election in the years ending in “2” – were characterized by increased electoral competition and increased quality of electoral challengers (Hetherington et al., 2003). However, the 2002 congressional elections were notably uncompetitive. As Tom Mann wrote, “less than 50 of the 435
seats were seriously contested in 2002, many fewer than the number of targets in 1972, 1982, and 1992, the first elections after the previous rounds of redistricting" (Mann, 2005a, P. 4).

In a study of the impact of the 2001 round of redistricting on competition, Sam Hirsch (2003) reveals that of the 108 Members of Congress considered to be “at-risk” in the 2002 election (Republicans representing districts in which Al Gore won the 2000 Presidential election, Democrats representing districts in which Bush won the 2000 election, and incumbents who won with less than a 10% margin in the 2000 election), “20 at-risk Democrats and 25 at-risk Republicans” were the beneficiaries of significant boundary shifts “that made their districts more secure — and not surprisingly, none of them was defeated in November 2002” (p. 188). These findings have been echoed by Michael McDonald, who has calculated that “incumbency protection maps were adopted in twenty states, which affected 231 districts, due to bipartisan plans adopted in larger states such as California and Texas” (McDonald, 2006a). The graph below, taken from Hirsch’s analysis, compares the 2001 redistricting cycle to those of past years. Note that the 2002 congressional elections were less competitive than “normal” elections between 1974 and 2000, but uncharacteristically uncompetitive when compared to previous post-redistricting elections.

![Figure 3: The 2002 Congressional Elections Compared to Past Elections](image)

Source: Hirsch, 2003

What has evolved in the United States is very much a system of one-party domination in individual districts. As Steven Hill (2006), an advocate of election reform, stated in a speech in the summer of 2006, the United States does not have a two-party system, but rather that the United States is an aggregation of several one party districts. One-party dominance of politics in a district is comparable to corporate monopolies. As Rep. Rahm Emanuel (D-IL) wrote:

“Monopolies are as harmful in politics as they are in business. Competition keeps everyone honest, while the concentration of power and barriers to entry lead to inefficiencies and corruption. One of the common threads running through the scandals involving Members of Congress from both parties — such as former Reps. Duke Cunningham (R-OH) and Tom DeLay (R-TX) and current Reps. Bob Ney (R-OH) and William Jefferson (D-LA.) — is that they each came from gerrymandered districts where they never have faced an opponent who can effectively challenge their actions” (Emanuel, 2006).

**Conclusion: An Urgent Need for Reform**

We have shown that redistricting perverts the fair representation model by diluting votes, distorting the candidate selection process resulting in more partisan politicians, embedding a distribitional bias within the electoral map that prevents elected bodies from reflecting public opinion, and insulating officials from competition. There are three main reasons why it is urgent and necessary to reform our nation’s redistricting practices. The impact of gerrymandering on our electoral system is better understood now more than ever before. Gerrymandering has been strongly tied to the decline in congressional election competition, changes in candidate emergence, and the increased polarization of Congress. Secondly, new technology allows legislators to express their partisan gerrymandering desires in unprecedented ways. As Justice Breyer stated, “the availability of enhanced computer technology allows the parties to redraw boundaries in ways that target individual neighborhoods and homes, carving out safe but slim victory margins in the maximum number of districts, with little risk of cutting their margins too thin” (Vieith v. Jubelirer, 2004).

Lastly, in the deeply and almost evenly divided American political climate, redistricting is emerging as the electoral tactic of choice for political parties seeking to either maintain or retake control of the House of Representatives. The 2003 mid-decade redistricting plan engineered by Tom Delay and other national Republican leaders such as Karl Rove illustrates the growing importance of redistricting in modern party warfare. The Texas plan gave six seats to the GOP, more than double the gains the party made in the 2004 election (Mann, 2005a). As some have noted, the future is likely to be a “redistricting arms race.” According to Tom Mann, “changing conditions have elevated redistricting as a weapon of choice for party leaders and incumbents to advance their political interests” (Mann, 2005b). An astute national party committee that faces the option of either pouring millions of hard-earned funds into a single congressional election with the hopes of gaining one seat, or spending a fraction of the cost to draw a favorable district plan in a large state such as Florida, California, New York, or Texas that will result in winning multiple seats can be expected to employ gerrymandering as a major campaign tool.

Furthermore, the Supreme Court’s ruling in LULAC which has given the green light to parties to redistrict as often as they like “could open the floodgates for partisan redistricting” (Vicini, 2006). As Mary Wilson, President of the League of Women Voters, warned, “we now can expect an even more vicious battle between the political parties as they redraw district lines every two years for partisan gain” (Vicini, 2006). If the Court refused to invalidate the Texas mid-decade redistricting plan that was admittedly drawn for partisan purposes, then when would they? As one editorial in the Washington Post noted, “from this cacophony of shifting majorities, confluences and disents, one thing emerges clearly: The
Supreme Court will do nothing to rein in even the worst excesses of partisan gerrymandering” (Washington Post, 2006, p. A12).

There are a few states that are more likely than others to see partisan mid-decade redistricting plans emerge before the end of the decade. The most likely states are those in which one party controls both chambers and the governor’s office. According to the National Conference of State Legislatures, there are 12 states – Alaska, Florida, Georgia, Idaho, Indiana, Missouri, North Dakota, Ohio, South Carolina, South Dakota, Texas, and Utah where both chambers of the state legislature and the governor’s office are under control by Republicans, and eight states – Illinois, Louisiana, Maine, New Jersey, New Mexico, North Carolina, Washington, and West Virginia in which the Democrats control both chambers and the governor’s office (NCSL, 2006). This means that the Republicans are in direct control of 124 seats and the Democrats are in control of 71 seats, for a total of 195 seats that are vulnerable to partisan gerrymandering. With as tightly divided as Congress currently is and appears likely to remain in the foreseeable future, either party could potentially gain control of Congress by simply adjusting congressional maps. If Democrats are able to take control of the governorships in large states such as California and New York, they will have significantly more area to work with in redrawing lines to net a gain in Congress.

In challenging the 2000 redistricting cycle, more than 175 lawsuits were filed, including nineteen cases in Texas and Maryland, twelve in Colorado, ten in New York and Illinois, nine in Georgia, and eight in North Carolina and Minnesota (NCSL, 2006). On average, more than three lawsuits were filed in each state. In order to restore public faith in our electoral system, reinstate partisan fairness, and reduce the amount of wasteful redistricting litigation, it is both urgent and necessary that comprehensive redistricting reform is passed on a state-by-state basis. Many states have already removed the redistricting process out of legislators’ hands and into the control of independent bipartisan redistricting commissions guided by clearly defined redistricting standards and designed to minimize partisan abuses. Such reform is desperately needed in Utah before the rapidly-approaching 2011 redistricting cycle arrives. Without such reform, the Utah legislative districts will continue to be severely biased against Democrats – bias that currently results in Democrats controlling only 28 out of 104 legislative seats.

Due to the reluctance of Congress to address gerrymandering, achieving reform will require the passage of state constitutional amendments. Independent redistricting commissions have been successfully implemented by Utah’s neighbors to the north and south. However, significant obstacles stand in the way of achieving such reform in Utah. In particular, the state constitutional amendment process requires that amendments be referred to the ballot by a two-thirds vote of each house of the state legislature. Reformers will need to persuade legislators to forfeit their control over the redistricting process, which will require intense pressure from the public and media. Once referred to the ballot, persuading the public to pass redistricting reform will also be a difficult task. Past reform efforts in 2005 in California and Ohio demonstrated that raising awareness about redistricting is an extremely difficult task and opponents will portray the reform as a minority party power grab.

To be successful, reformers will need the support of a broad coalition of organizations including minority community organizations, good-government advocacy groups and the business community. Reformers will also need to raise significant sums of money in order to conduct extensive public-opinion research and execute a thorough voter-education campaign. While reforming redistricting is only one of many reforms needed to address the systemic problems of the American electoral system, it is the one that is most urgent. As Tom Mann has said, “redistricting reform is no panacea, but it’s a start” (Mann and Cain, 2005).

**References**


The Ephemeral Immigration Reform and Control Act of 1986: Its Formation, Failure and Future Implications

Matt Homer

The Immigration Reform and Control Act of 1986 (IRCA) was an attempt to create a comprehensive solution to illegal immigration. However, since that time, illegal immigration has risen considerably. What are the reasons for this failure? And what does this suggest for future immigration policy? This paper analyzes IRCA’s formation, key features, reasons for failure and possible recommendations for the future.

Immigrants have been both a source of American success and scapegoats for American failures. They have been treated simultaneously with appreciation and scorn. Consequently, a dual and contradictory attitude toward immigrants has been present throughout American history – but is particularly evident today. Reflecting this ambivalence, American policies have also been contradictory. They promote free-trade and greater global integration – processes which naturally lead to increased migration – but at the same time try to limit immigration through an old fashioned quota system. The simultaneous use of open and closed policies has created confusing results, one of which is the rise of illegal immigration. As the amount of legal immigration channels have decreased, the amount of individuals trying to enter the United States has increased. As a result many have simply switched to entering illegally.

The Immigration Reform and Control Act of 1986 (IRCA) was an attempt to create a comprehensive solution to this perceived problem. At the time, illegal immigration was viewed as a significant concern and policy makers believed it could be stemmed through sanctioning employers who hired illegals. Although the purpose of IRCA was to end illegal immigration, we have seen that it has risen considerably since that time. What are the reasons for this failure? And what does this suggest for future policy options?

This paper will discuss IRCA’s impact and effectiveness in relation to legal and illegal immigration. In order to provide context I will first provide a brief history of immigration to the United States until the early 1980s. I will then look at the formation of IRCA, including the role of key political players and the compromises they bartered. Following this, the IRCA will be summarized and its most important provisions highlighted. We will then look at specific reasons for IRCA’s failure and consider possible recommendations for future immigration policy.

HISTORY OF IMMIGRATION IN THE UNITED STATES

American attitudes and policies toward immigration have always been characterized by conflicting desires. Americans enjoy the benefits of immigration especially in the form of low-priced goods, labor and services but are also afraid that immigrants will have negative consequences upon the nation’s economy, security and cultural identity. Compounding these conflicting attitudes is the fact that virtually all Americans are a product of immigration. It is also important to recognize that many immigrants and their children are future voters—an understanding of which politicians are well aware. Thus, an ambivalent attitude toward immigrants, a nostalgic view of our own immigrant past and a sense of pragmatism about the future has led to a history of conflicting immigration policies.

Even before the United States declared independence from Britain, anti-immigrant attitudes had sprung up in the American colonies. Settlers worried that newcomers would be a burdensome group that required basic training in survival techniques. Others feared new entrants would be an added source of crime (Vedder, Gallaway & Moore, 2000). It is also likely some worried their jobs would be taken or their cities would become overcrowded.

Once the United States became a nation, the first bill relating to immigration was passed in 1790. This act made citizenship available only to free white persons who had lived in the United States for at least two years. Eight years later, in 1798, the Alien and Sedition Act gave the President power to expel any immigrant he considered a national threat.

Until 1830 most immigrants came from northern European nations, establishing a homogenous American identity. The composition of immigrant flows changed significantly between 1830 and 1850 when the Irish took over as the largest group of newcomers. They dwelled in cities and were regarded as Catholics who threatened to weaken
America’s Protestant legacy. Eventually, Chinese immigrants replaced the Irish as the principal target of scorn, but by 1882 public opinion was so overwhelmingly anti-Chinese that Congress passed the Chinese Exclusion Act, which prohibited all immigration from China.

In the nineteenth century, politicians often made immigration an important element of their party platforms. Sometimes they opposed it and other times they voiced support, depending upon which course of action brought the most political supporters. In 1856 both parties ran on anti-immigrant platforms supporting strict immigration quotas. However, politicians soon switched their positions after it became apparent that immigrants were an important group of future constituents.

The late 1800s and early 1900s witnessed the rise of the “Teutonic” theory, which argued that non Anglo-Saxon immigrants were not suited to American institutions. A contradictory “melting-pot” theory was also formulated highlighting America’s success as a cosmopolitan society with unlimited ability to assimilate new immigrants (Vedder et al., 2000, p. 350).

The insecurities of World War I tipped the scales of public opinion against newly arrived immigrants. During this time period, a head tax and literacy test became mandatory for all potential immigrants. This, however, was not the most restrictive legislation of the time period. A national quota was also enacted which aimed to preserve America’s Anglo-Saxon identity by reducing the flow of immigrants from undesirable places (such as Italy). Quotas were assigned independently for each nationality and were heavily weighed in favor of northern Europeans.

Despite anti-immigrant sentiment, border security between the United States and Mexico was non-existent in the nineteenth and early twentieth centuries. Accordingly, individuals were free to move back and forth between countries. The border patrol was created in 1924, the same year that Mexican migration to the United States peaked. Many Mexicans had been engaged in a circular flow of seasonal labor that took them back and forth across the border. When the great depression hit, however, a devastated America deported over 400,000 Mexicans and immigration evaporated in response to a weak American economy. The United States then transitioned into a protectionist stance and immigrants took a portion of the blame for its poor economic performance.

The next change in US immigration policy occurred during World War II. American women were engaged in wartime production and many men served in the armed forces. This left a considerable amount of agricultural jobs unfilled. As a result, the US initiated the Bracero program, which provided a legal route for Mexicans to work in the United States. Illegal immigration decreased dramatically in response to this program because most Mexicans were able to immigrate legally. From this it can be seen that immigration behaves somewhat like a seesaw. When legal routes increase, illegal entry declines and vice versa.

Following World War II, the Civil Rights Movement created further changes in immigration policy. In 1964 the Bracero program was discontinued amid claims of unfair working conditions. One year later Congress eliminated the system of national quotas and created a new quota system that was not based upon nationality. It also established a new, sponsor based, family oriented path for legal immigration that was not subject to numerical limit.

Looking at Figure 1 shows the high share of immigrants present in the United States from the mid 1840s until the 1910s. At one point, immigrants made up 12 percent of the total US population. Then, after an all-time low in the 1930s the share of immigrants has been steadily increasing. Today, they make up nearly 6 percent of the population. By the early 1980s, millions of immigrants, mostly Hispanic, were living in the United States illegally and America’s immigration laws were again considered antiquated and dysfunctional. In response, Congress began anew to reform immigration policy. After several years of debate, they eventually passed the 1986 Immigration Control and Reform Act.

**Formation of the 1986 Immigration Reform**

The early 1980s was a period of rising tensions in the arena of immigration reform. Over several years, the US House of Representatives and Senate had both passed numerous immigration bills, but were unable to reach any compromise over how to deal with illegal immigration. The House supported greater border enforcement, opposed amnesty and refused to consider a guest worker program. The Senate, more pragmatic in its approach, favored internal policing through employer sanctions, legalization for illegal immigrants and a guest worker program. Added to this impasse were signs of ambivalence from the White House, where President Reagan declined to take an active role in the process.

The deadlock began to loosen in the early part of 1985 when Senator Simpson (R-WY) introduced Senate Bill 1200 (S. 1200): the Immigration Reform and Control Act (IRCA).
This legislation promised to stem the flow of illegal immigration with increased employer sanctions. It also proposed legalizing undocumented immigrants already in the country.

In an attempt to compromise with the House, Senator Simpson included a “trigger” provision that set a timeline for legalization (“New Immigration bill introduced in Senate,” 1985). This would have prevented legalization from occurring until employer sanctions had eliminated the flow of illegal immigrants. Although intended as a compromise piece, this provision soon drew criticism from Democrats and the Hispanic Caucus over fears that legalization would never occur if employer sanctions proved unsuccessful. Agricultural businesses also voiced their opinion and called for a “seasonal worker program” that would permit foreign laborers to work temporarily in the United States (“Action Starting on immigration legislation,” 1985).

In August 1985, S. 1200 left the committee process with several important provisions attached. Criminal penalties and hefty fines were proposed for employers caught illegally hiring undocumented workers and funding for employer law enforcement was increased (“Senate Judiciary approves immigration,” 1985). The focus in the Senate soon shifted to the “seasonal worker” provision, which was heavily supported by western growers. Democrats, labor unions and the Hispanic Caucus all voiced their disapproval of a temporary worker program because they believed workers could be exploited. Although unions voiced their concern over this matter they were also concerned that guest workers would threaten union power. Despite this, the bill eventually passed the Senate on September 21, 1985—guest worker program included—with a significant majority (69-30). The passed bill included criminal penalties, fines and jail time for employers; additional funding for enforcement; legal status for most illegal immigrants; and a temporary worker program (“Farm worker program may be problem,” 1985).

In July 1985 the House of Representatives introduced its own version of the Senate’s bill, H.R. 3080, without the controversial “trigger” proposal or a temporary worker program. Then, after the Senate bill was passed, the reform process stood still for nearly a year as H.R. 3080 entered the committee process and House leaders refused to move the bill forward without the President’s participation. After a year of waiting, President Reagan voiced his support for the effort in March 1986 and House members subsequently began moving the process along. The House then became divided over the prospect of a guest worker program and in September the bill died (“Republicans defeat rule,” 1986). Yet no sooner had it died, than reports began circulating about its impending resurrection. A short time later, in what CQ Weekly described as a “stunning reversal,” the bill was revived and passed on the same day, 9 October, with a clear majority.

In order to reconcile differences in the separate Senate and House bills, a conference was formed to negotiate a compromise. In this process friction emerged over six issues: employer sanctions, the legalization of Salvadorans and Nicaraguans, possible discrimination, the timeline for legalization, reimbursement for state expenses and legal services for H-2 visa workers (“Refusal to give up brings dead bill back to life,” 1986). By the middle of October 1986, nearly two years after the legislation was first introduced, both chambers of Congress agreed to a “grand compromise,” and on November 6, 1986 President Reagan signed the bill into law.

**Provisions of 1986 Law**

In what was truly a compromise, many key provisions were erased. The Senate gave up their “triggered” timeline to legalization as well as a guest worker program. In return, the House accepted several provisions they initially opposed, including indefinite employer sanctions and a modified H-2 visa program for agricultural workers. Additionally, the House also gave up its request that Salvadorans and Nicaraguans be excluded from legalization.

The reform package promised to stem the flow of illegal immigration through tightened employer sanctions and recognized the existing reality of illegal immigrants already present by granting them legal status. IRCA contained three major elements to be considered in-depth.

**Employer Sanctions and Enforcement**

IRCA created civil and criminal punishments for companies (with four or more individuals) who employ unauthorized workers. First, it made it unlawful for employers to knowingly hire unauthorized workers or to continue employing previously hired workers who are known to be illegal. Second, it required employers to verify a workers status using a passport, birth certificate, Social Security card, alien document or “other proof.” Potential workers were also required to attest, in writing and under threat of perjury, that they were authorized to work in the United States.

Employers found violating this law would be subject to fine and imprisonment. For the first offense, employers could be fined from $250 to $2,000 per undocumented worker. The second offense raised the fine amount per individual to $2,000 to $5,000. On a third offense employers would have to pay between $3,000 and $10,000 per undocumented worker and face the possibility of six months’ jail time.

IRCA stipulated that employer sanctions should be phased in over time. The first six months following enactment was an educational period in which employers were not penalized. After this initial period, employers were issued warning citations, but not fined for the following year. After a year-and-a-half of education and warnings, the sanctions and penalties were to be rigorously enforced.

Some lawmakers feared that tightened sanctions would promote discrimination against all Hispanics (regardless of legal status). As a result, IRCA required employer sanctions to expire after three years if evidence of systematic discrimination was discovered.
In response to weak identification verification systems, Congress requested further research concerning a possible telephone verification system and ways to reduce the use of counterfeit and fraudulent documents. Congress also directed the Attorney General to establish a complaint mechanism for individuals to report suspected instances of illegal immigration. In addition, IRCA called for the establishment of investigation procedures and judicial review in cases of dispute.

To finance these measures Congress increased funding for the Immigration and Naturalization Service (INS) and the Border Patrol. They were given $868 million over a two year time period in order to increase enforcement, improve services and engage in community outreach. Congress also created a $35 million Immigration Emergency Trust Fund to reimburse state and local agencies that incurred costs as a result of the Act.

LEGALIZATION
The second part of IRCA recognized the millions of undocumented immigrants already living in the United States by granting many of them legal status and putting them on a track for citizenship. Temporary resident status was given to undocumented aliens who arrived in the US before January 1, 1982 and applied within the first 18 months of the law's enactment. Individuals convicted of a felony or three misdemeanors did not qualify.

After nineteen months of temporary status these individuals were then able to apply for permanent legal status. In addition to the aforementioned requirements they were also obliged to prove at least a minimal understanding of the English language and American history and government. If unable to meet these requirements they were still allowed legal status if they could show active pursuit of those goals. During the first five years of their legal status, immigrants were prohibited from obtaining federal financial assistance, such as Medicaid or food stamps. Unlike earlier immigration laws, this mass legalization was without numerical limit.

AGRICULTURAL EXCEPTIONS
As part of the compromise, IRCA expanded the H-2 visa program instead of creating a separate guest worker program. This allowed for a constant agricultural workforce of up to 350,000 foreign individuals. Many existing agricultural workers were granted legal status, and new workers were allowed to apply for the visa as long as the cap of 350,000 workers was not exceeded.

Once workers had obtained the H-2 visa they could eventually leave agriculture to work in other sectors. In this way, it was expected these individuals would make room for new immigrants wanting to work in agriculture. An H-2 visa required employers to look first for American workers and also to ensure that hiring a foreigner would not negatively affect the wage level of American workers. After this, employers were required to submit a request for workers to the labor secretary.

WHY IRCA FAILED
Today, an estimated 12 million undocumented immigrants currently live in the United States and hundreds of thousands enter annually. Thus, it can be said that IRCA has failed in its primary objective to stem the flow of illegal immigration. As Figure 2 shows, the amount of immigrants entering annually has increased dramatically since the 1980s. Mirroring this trend has been an increase in the share of immigrants who are illegal.

Since 1986, funding for employer and border enforcement has increased more than tenfold. Yet, border crossings and immigration have also increased. Prior to 1986, the cost of each border apprehension was approximately $100, but in 2002 the cost had increased to $1,700 (Massey, 2005). While the government may be paying more for each additional apprehension, the odds of being apprehended have decreased substantially. In the 1970s and 1980s the probability of apprehension at the border was near 30 percent, but in 2002 that probability had decreased to just 5 percent (Massey, 2005). There are a variety of reasons for these failures.

UNFORTUNATE MYTHS
Beneath the debate surrounding legal and illegal immigration are a number of myths. Some believe that immigrants increase unemployment, lower American wages, increase crime and bankrupt the nation’s social programs. A group of 500 economists wrote an open letter to Congress and the President in the summer of 2006 dispelling many of these common myths. The signatories come from varied backgrounds, diverse countries and opposing political parties. In the letter they emphasize that “immigrants do not take American jobs” and “the American economy can create as many jobs as there are workers willing to work” (Independent Institute, 2006). They also pointed out that immigrants, over time, always add more to America than they initially “took.”

Immigration is an indicator of a powerful American economy – not a sign of weakness. Unfortunately, few realize this significant truth in a debate that has been dominated by emotion, protectionist attitudes and xenophobic fear. Illegal immigration may be a problem, but not because immigrants are adversely affecting our country. Having an underground, illegal subclass is certainly problematic, not only for
American citizens, but also for illegals themselves. Unfair working conditions, intimidation and discrimination are commonplace at illegal worksites. Yet, the solution to such a problem is not to restrict immigration. If anything, this course of action pushes immigrants toward clandestine entry and unfair working conditions. Thus, IRCA attacked the wrong problem by assuming that immigration is harmful. The marketplace, not politicians, is the best regulator of immigration.

**Uncontrollability of Immigration**

Another false assumption is the belief that illegal immigration can actually be controlled. In 2006, Jagdish Bhagwati, a prominent economist from Columbia University, argued that illegal immigration will always exist, regardless of lawmaker actions (Bhagwati, 2006). The uncontrollability of immigration can be seen in Figure 3, which shows when current illegal immigrants entered the country. After IRCA’s passage in 1986, illegal immigration has continued to increase. As long as the American economy is relatively strong, the impetus for immigrants to work in the US will be greater than our resolve or ability to hinder them. It is highly unlikely any wall, at any height or depth, can ever eliminate the flow of illegal immigration. A weak economy is the only sure way to end illegal entry.

**Failure to Address the Determinants of Immigration**

Understanding the causes of immigration is essential to any effective policy reform. Carlos Gutierrez, Secretary of the US Commerce Department, has argued one reason for IRCA’s demise was its failure to address the “push” and “pull” factors that actually determine the phenomenon (Gutierrez, 2006). Immigration is a function of many elements – relative US wage levels, labor market flexibility, probability and cost of crossing the border, ability to find work, demographic changes, political turmoil, demand for labor in growing sectors, existing immigrant networks and family relationships – to name just a few (Council of Economic Advisors, 2005 & 2006; Wasem, 2006). IRCA failed because it naively believed that brute force was a more powerful deterrent than all these factors combined. It also failed because it didn’t really consider these factors in the first place.

**Temporary Guest Worker Program**

IRCA was also unsuccessful because it failed to satisfy the marketplace. Instead of creating a temporary guest worker program, as the Senate initially proposed, lawmakers settled for an expanded H-2 visa program which grossly underestimated labor market needs. The program only allowed for a fixed quota of 350,000 H-2 visa-holders in the country at any given time.

As a result, labor shortages occurred in some sectors. In fact, in the summer of 2006 it was reported that nearly six million boxes of Floridian oranges would go un-harvested as the result of labor shortages (“Labor shortage shorts orange harvest,” 2006). In response to high labor demand, hundreds of thousands of immigrants continue to be drawn to the United States each year. Many come illegally because the government has limited their ability to enter legally. This situation has created a gap between what is legally allowed and what is economically required. Making it tougher to enter the country legally has spurred illegal immigration.

**No Enforcement**

Tightened employer sanctions have been little enforced since IRCA’s early years (Wasem, 2006). It seems the executive branch has been reluctant to enforce laws that harm American businesses – who are generally major contributors to political campaigns. Another problem was that IRCA requires employers to “validate” their workers legal status by inspecting their identification documents and ascertaining their authenticity. This is extremely problematic because most employers are not trained as anti-fraud agents. Business owners are not policemen or investigators and requiring them to examine documents for fraud or forgery is a setup for failure. Commerce Secretary Gutierrez argued that employers should not be placed in this weak position in the first place. Instead, they should be free to hire anyone at will, without having to act as policemen. They should never, in his view, have to choose between staying profitable or breaking the law.

IRCA misunderstood human nature because it assumed that employer sanctions would discourage employers from hiring illegals. Instead, businesses have merely added possible sanctions as a cost of doing business (Griswold, 2002). In some instances employers even pass the cost of fines and sanctions onto the immigrants themselves, depressing their wages even lower. The IRCA did not adequately enforce employer sanctions and consequently sent mixed signals to American businesses. Enforcing IRCA proved politically unfeasible and economically unwise.

**Immigration vs. Economic Integration**

As the United States pursues a course of economic integration with Latin America, the IRCA sends unclear messages to its southern neighbors and stands in opposition to various free-trade agreements. Curbing immigration is antithetical to economic integration (Griswold, 2002; Massey, 2005).
Globalization and economic integration have changed the United States’ relationship with neighboring countries. Improved transportation networks have facilitated increased trade and shortened the time it takes to travel. Improved capital access, primarily through NAFTA, has fostered foreign direct investment and an integrated regional economy. Culturally, diaspora communities exist as semi-integrated islands within the United States because of improved communication and trade; these communities are able to maintain linkages between their new homes and national origins. These conditions not only promote economic integration, they also promote immigration.

IRCA weakens other American policies because it seeks to reconcile two antithetical goals. The friction between anti-integration policies, such as IRCA, and pro-integration policies, such as NAFTA, has rendered both less effective.

**SHIFTING THE CROSSINGS**

Rather than stemming the flow of immigration, increased border enforcement has shifted the flow to new areas along the border. For example, after increasing border security at the traditional crossing spots at El Paso, Texas and San Diego, California, immigrants just shifted their point-of-entry to rural locations (Massey, 2005).

When the majority of immigrants were entering the border at well-known crossing points it was easy to monitor the size and flow of immigrants, even though only 30% were apprehended. Now, with many immigrants using the full 2,000 mile border, apprehension efforts have been rendered significantly less effective. There have also been adverse effects for the immigrants themselves. Crossing in rural, desert areas has decreased the chance of survival and increased the cost of attempting to enter.

Rather than stemming the flow of immigration, IRCA has decreased the probability an illegal immigrant will be caught, shifted immigration to areas that are more difficult to enforce and bolstered a burgeoning black market of human smugglers.

**VARIETY OF ENTRY METHODS**

While attempting to limit illegal crossings at the border, IRCA did not consider other forms of entry. Nearly half of all undocumented immigrants currently in the United States initially entered legally (Pew Hispanic Center, 2006). Thus, in addition to shifting border crossings to new areas, it is also probable IRCA increased the number of immigrants overstaying their legal visas. These individuals enter the country legally – through border checkpoints, airports, or seaports – and remain in the United States after their visas have expired. IRCA did not address the issue of visa-overstayers, except through employer sanctions.

**CIRCULAR NO MORE**

Before IRCA a circular pattern of migration existed between the US and Latin America. Previous to IRCA, between 40-50% of immigrants came to the US for short periods of time in order to work and then return home. In response to IRCA and tightened border security, fewer immigrants are now choosing to return to their homes because they are afraid they will be unable to re-enter the United States (Massey, 2005). By decreasing the rate of emigration, IRCA has increased the amount of illegal immigrants choosing to stay within the United States.

Experts have placed the historical rate of annual emigration at 25% the rate of immigration. This means the amount of individuals leaving the country annually is 25% of the amount entering (Board of Trustees, 2006). Tighter border security increases net in-migration because it discourages individuals from leaving, but does little to prevent anyone from coming.

**ENFORCING THE UNENFORCEABLE**

Studies have shown that IRCA has had no discernable success in accomplishing its goal (Orrenius & Zavadny, 2003; Massey & Phillips, 1999). At the border, immigrants continue to enter the country in large numbers and within the interior of the United States enforcement agencies have been unwilling to penalize employers. Overall, IRCA has produced numerous unintended consequences, but has done nothing to achieve its aims.

The Immigration Reform and Control Act was an attempt to control the uncontrollable. Its aims denied the basic realities that determine immigration and were based more upon myth than fact. In addition, IRCA’s ambitions were antithetical to our nation’s free-market policies. In most instances IRCA backfired, placing employers in an untenable position, shifting entry points for illegal immigration, placing undocumented workers in difficult conditions and reducing the rate of emigration. It has also increased the cost of enforcing border controls and amplified the risks associated with crossing – raising the stakes on all sides. But the main way in which IRCA has failed is that illegal immigrants continue to enter the country at progressively higher rates.

**POLICY IMPLICATIONS FOR FUTURE IMMIGRATION LAW**

There is no panacea for the current immigration dilemma, but there are many lessons to be learned from IRCA’s failure.

First, immigration is not a problem, but having undocumented workers may be. An underground economy is problematic because it subjects workers to unfair conditions and reduces their bargaining power. It is also challenging for employers who must face the difficult trade-off between hiring an illegal and hiring no one. Yet, the solution to the problem of illegality is not restriction. As IRCA has shown, attempting to restrict this phenomenon has the tendency of accentuating it. Instead, creating more legal paths to immigrate legally would decrease illegal immigration and ensure that employers and employees are competing on a level playing field.

Second, immigration may be managed, but it cannot be
controlled. Once policy makers face this reality an effective reform policy will be easier to find. Managing immigration would mean eliminating quotas and allowing the market a larger role in determining the flow of immigration. This would decrease illegal entry because enough legal options would be available to satisfy demand. There should also be guidelines to ensure that immigrants enter in an orderly manner, are properly registered, receive identification and continue working.

Third, increased border security will not decrease illegal immigration. The title of a recent article in the International Herald Tribune illustrates this point well: “The Higher the Wall, The Less It Works (Massey, 2006).” Tightened border security has done little to reduce illegal immigration, but has instead unleashed a storm of unintended consequences. Future reform should recognize that more walls and more patrol agents will not work.

Fourth, employers are not enforcement officers. Current regulations requiring employers to verify the authenticity of their workers is a setup for failure. Instead, employers should be relatively free to hire without having to worry about issues of legality. Another lesson to be learned is that politicians lack the long-term stomach to conduct a campaign against American businesses.

Fifth, the market must be satisfied. This must be the most central part of any would-be reform policy. Previous experiences with IRCA have shown that attempts to regulate the labor market through restrictive immigration quotas are futile. Very few discernable benefits derive from such a course of action and numerous problems inevitably arise. Any effective reform must allow the market to determine the flow and composition of immigrants. The government’s role should be to facilitate immigration and not to restrict it.

Sixth, the reality of an increasingly global market place must be accepted. Not only do Americans compete with themselves for jobs, they also compete with individuals around the world. This is not something to be feared.

Seventh, all immigrants should be given a path to citizenship. Although a temporary worker plan may be beneficial for the market, it must also provide immigrants access to the American dream.

CONCLUSION

Immigrants have a long and varied history in the American experience – as evidenced by conflicting attitudes and policies – and forming a sustainable and comprehensive immigration policy is not an easy task. However, doing so is absolutely essential for immigrants themselves and for the collective future of the United States as a nation.

Unfortunately, immigration reform has taken a turn in the wrong direction by focusing upon restrictive measures. The Immigration Reform and Control Act of 1986 backfired and resulted in unintended consequences. Today, American lawmakers stand at a crossroads similar to their predecessors in 1985. The solutions proposed today are nearly identical to those before. Congress and the President should recognize that discretion has proven unsuccessful in the past and are not likely to work in the future. Instead, they should work through markets rather than against them.

In order to proceed they must first break through the web of myths that surround immigration, understand the factors that influence migration and accept the fact that immigration is a permanent occurrence in the global marketplace for labor. A policy may then be crafted which satisfies the market’s demand for labor, places the government into a facilitative role and affords each immigrant a path to citizenship. The issue of illegality is certainly an important consideration, but this can only be solved when enough legal channels are available to meet demand. Instead of restricting immigration, the United States should open more paths for immigrants to enter legally.

REFERENCES


Women in Kuwait: The Struggle for Political Equality

KaLyn Davis

After the Gulf War in the 1990s, Kuwait became one of the most advanced democracies in the Middle East. Despite its progressive attitude, women were, until May 2005, unable to vote. Relative equality in other areas of society, such as education and employment, made women highly aware of the disadvantages they faced in not voting. Using the knowledge and resources available to them, they began a grassroots suffrage movement that engaged in tactics such as strikes and demonstrations to gain the vote for women. Before these tactics could be effective however, women had to convince both the government and society that by voting they would not be abandoning their Islamic beliefs. Before gaining the right to vote, women faced the challenge of proving that Islam itself did not discourage women from voting.

INTRODUCTION

Since the end of the Gulf War in the early 1990s, the state of Kuwait has been acknowledged as one of the most advanced democracies in a region where democracy has long been absent. Unlike its neighbors in the Gulf region, Kuwait’s constitution provides for a fully elected parliament, with substantial lawmaking powers (McElhinny, 2005). Despite Kuwait’s progressive system of government, however, a large and important part of its population has been deprived of the right to participate. Women in Kuwait, until May 2005 when they were officially enfranchised had been excluded from voting and from running for office (Online NewsHour, 2006). This exclusion brings into question the extent to which Kuwait could truly be called a democracy.

Before the success of the women’s suffrage movement and the enfranchisement of women, only about 10% of Kuwait’s population was allowed to participate (Human Rights Watch, 1999).

Furthermore, recent statistics illustrate that Kuwait, a state often viewed by its neighbors as an example on which to base their own democratic institutions, actually lagged behind other Gulf states in allowing women to participate. In 2004, Kuwait was the only democratic Gulf state that did not allow women to vote or run for office. The only other Gulf states without suffrage for women were Saudi Arabia and the U.A.E., neither of which allowed for any sort of elections. Yet, even in Saudi Arabia, where neither men nor women could vote, there were women present on the appointed council known as the Shura (Choucair, 2004). These statistics lead to the question: why did women in Kuwait have to fight so hard for the right to vote in a country that was the most progressive democracy in its region?

It took many years of patience before Kuwait’s women’s suffrage movement succeeded in getting the vote for women. During that time, women’s rights activists engaged in tactics similar to those used in Western countries in their fight for greater political rights. In their struggle, they faced many obstacles, perhaps the biggest of which was the region’s traditional exclusion of women from participating in politics. This exclusion, though often attributed to the region’s predominant religion, Islam, may have more to do with the traditions of the people who came to practice the religion. As this paper will suggest, there is evidence that suggests that Islam itself is highly tolerant of women in politics. Because of this, women in Kuwait had to wait for a change in the views of society about women’s role in politics. When this change came, the grassroots tactics of the suffrage movement allowed women to slowly build support for their cause and, eventually, gain the right to vote.

THE WOMEN’S SUFFRAGE MOVEMENT IN KUWAIT: BACKGROUND & CHARACTERISTICS

When Kuwait gained its independence from Britain, a constitution was established that would give equality to all Kuwaiti citizens. It even goes so far as to stipulate gender equality in a nation that is overwhelmingly Islamic (News: Arab World, 2005). Despite the equality explicitly granted to them in the constitution, Kuwaiti women have been excluded from politics for more than forty years. That period of time would turn into forty years of fighting for those rights to which Kuwaiti women felt they were entitled. The suffrage movement in Kuwait began in the 1960s, not long after the constitution went into effect (Gorvett, 2005).

When Kuwait gained its independence and established itself as a democracy, politics became, essentially, the only
public sphere in which women were not equal to men. Universal education and healthcare, along with equality in employment, have allowed Kuwaiti women to become both highly successful and highly visible in society (Tétreault, 2004). In Kuwait, 70% of college students are women (Power, n.d.). Because women in Kuwait are well educated and are entitled to the same employment as men, many women hold very prominent positions in business and in society. These advantages place women on equal footing with men in most respects. Political participation is the most obvious exception to this equality.

Mary Ann Tétreault contends that it was, in large part, the freedoms of women in other parts of society that motivated them to push for greater rights in the political realm. This argument is highly plausible for two reasons. First, equality in most public spheres would increase the awareness of Kuwaiti women of their exclusion from politics. If women were allowed to have the same education as men, hold the same jobs as men, and earn the same income as men, why should they not be allowed to have the same say in government as men? Second, the high levels of education among women and their prominent, high paying positions in the work force would provide women’s rights activists with both the knowledge and the resources necessary to organize a movement to gain more extensive political rights (Tétreault, 2004).

The organizations established by suffragists proved to be highly important in the struggle to attain the vote for women, largely because the suffrage movement required grassroots tactics to accomplish its goals. In this way, Kuwait differs greatly from its neighbors in the Persian Gulf. In the vast majority of Gulf states which allowed women to vote in elections, the reform came from the top down (McElhinny, 2005). In these countries, the government granted women the right to vote, giving the public little or no say in the decision. In Kuwait, however, attempts by the Emir to grant women broader political rights were not successful. On several occasions, Kuwait’s parliament overruled decrees sent out by the Emir that would have allowed women to vote (Gorvett, 2005). Though the highest levels of government supported change and the granting of political rights to women, the attitudes among the elected parliament did not. In most cases, opposition to women’s rights was strongest among members of parliament who were Islamists or tribal leaders (Gorvett, 2005). McElhinny (2005) points out, however, that supporters of women’s rights also generally opposed the decisions from the Emir. Though allowing top-down reform would have been a faster way to achieve suffrage for women, this reform would ultimately be more legitimate if society itself, and parliament along with it, came to accept the change. As a result, the women’s suffrage movement in Kuwait came to resemble similar movements in the West, with grassroots tactics such as protests and strikes becoming the tools used to achieve the ultimate goal.

Women’s organizations in Kuwait became very important throughout the suffrage movement as they helped to organize the activities of the suffragists. The Women’s Cultural and Social Society (WCSS), one of Kuwait’s earliest organizations for women, began organizing protests, marches, and forums on women’s rights from the beginnings of the suffrage movement in the early 1960s (Tétreault, 2004). This organization, along with others such as the Graduates Society, were the channels through which women were allowed to express their views and voice their desire for greater political rights. One al Jazeera news article illustrated clearly the atmosphere surrounding the women’s suffrage movement. The article described a group of close to 500 Kuwaiti women holding a demonstration outside of parliament. Loud chants and signs, some written in Arabic, others in English, made the wishes of the crowd known (News: Arab World, 2005) The tactics described in this article such as strikes, marches, protests and pickets are similar to tactics used by Western movements and particularly mirrored the women’s suffrage movement in the United States.

As time went on and the women’s suffrage movement began to grow stronger, leaders of women’s organizations felt that a higher level of organization was necessary to keep the movement consistent and unified. As a result, the Women’s Issues Committee (WIC) was established in 1995. The main purpose of this new committee was to coordinate the actions of the different women’s suffrage organizations. Typical grassroots tactics remained in effect under the WIC’s guidance, but tactics such as lobbying parliament for bills granting women the vote increased. Additionally, the WIC helped women to bring court cases against those who would not allow women to register to vote, claiming that such discrimination was unconstitutional (Tétreault, 2004). Though such tactics were present throughout the movement, the greater organization and influence of the WIC allowed them to become more effective and influential.

The grassroots tactics, as well as the lobbying campaigns and court cases, would eventually alter the views of society in such a way that opposition to suffrage for women would fade, and a new and legitimate law would emerge that would allow women to both vote and run for office. Before this could happen, however, suffragists had to overcome several obstacles that had for years stood in the way of greater political rights for women.

The Greatest Challenge: Islam vs. Democracy & The Rights of Women

Any discussion of political rights in a predominantly Islamic country must take into consideration the relationship between Islam itself and democracy. In this case, it is also important to look at the views of Islam toward the rights of women.

A major issue in global politics at this time, especially in light of the current Iraq war, is the debate over the compatibility of Islam and democratic systems of government. Some scholars argue that democracy could never thrive in a place in which the dominant religion is Islam. Islam, it is thought,
lacks many of the principles necessary for a democracy to survive. The most important of these principles is the separation of church and state. In Islam, there is no concept of a division between the secular and the religious (Rizzo, 2005). Muslims are expected to follow the laws of Islam before any other law. Because of this, the laws of Islam and the laws of society are often one and the same. This leads to another tension between Islam and democracy. Because Islam is the highest law, the individual rights and liberties that have come to define democracy are often not recognized in Islamic countries (Rizzo, 2005). Without these rights and liberties, any claim to true democracy is lost. It is for these reasons that many doubt that democracy can ever truly succeed in an Islamic country.

Though it is often argued that democracy and Islam are incompatible, several case studies have proven that democracy can be functional and legitimate in an Islamic society. One of the biggest examples of this is Kuwait itself, where an elected parliament establishes law and citizens enjoy substantial liberties and freedoms. Though Kuwait's democracy is not perfect, and only recently allowed women to begin voting, it stands as an example of how democracy can thrive in an Islamic country. Muslims living under democratic circumstances generally take full advantages of their rights and liberties, as well as their civic responsibilities. In Kuwait, for example, citizens who hold very orthodox Muslim beliefs tend to have extremely high levels of political participation (Rizzo, 2005). Scholars who say that Islam and democracy are compatible, point to aspects of Islam which suggest that democratic practices are actually encouraged in Islam. One of these aspects, mentioned by Rizzo (2005), is the fact that Islamic doctrine emphasizes, “consultation and consensus in political leadership” (P.2). This suggests that Islamic leaders are encouraged to consult with each other and with those under their care in order to be truly effective leaders. These ideas of “consultation and consensus” are arguably two of the major criteria of democracy.

While some argue that Islam and democracy can never coexist, examples such as Kuwait suggest that democracy can, in reality, thrive in an Islamic country. What, however, does this mean for women? In order for a government such as Kuwait's to be considered a democracy, women must enjoy the same rights as men, both socially and politically. This is problematic, as many view the exclusion of women from politics as a characteristic of Islam. This was the major obstacle faced by Kuwaiti women in their struggle to gain the right to vote. As a result, the suffrage movement in Kuwait faced something of a paradox. Women had to attempt to separate the issue of women's rights from religion completely, while at the same time showing that they still adhered to the traditional values and teachings of Islam. It was, in fact, common for women to push for their rights while being very careful to show society that they were not so radical as to have abandoned their Islamic values. An article in *al-Jazeera* pointed out that many of the women engaged in a protest were wearing traditional Islamic clothing (*News: Arab World*, 2005). Women in Kuwait were extremely careful to preserve their image as faithful Muslims in order to make society more at ease with their desire for greater rights. In proving that they could participate in politics and at the same time retain their religious beliefs, women in Kuwait would both make the public more amenable to reform and create more legitimacy for that reform.

In their fight for the right to vote, women in Kuwait joined with an expanding global movement to redefine the role of women in Islam, using Islamic doctrine itself as justification. As Rizzo (2005) pointed out, the lack of rights for women in Islam stems not from Islamic doctrine, but from the melding together of Islam and traditional tribal beliefs and customs. The issue, Rizzo argued, is the difference between what she refers to as “traditional Islam” and “Pristine Islam” (P.29). Traditional Islam, the actual way in which the religion is practiced, excludes women mainly because of tribal customs and the interpretation of its leaders (Coleman, 2006). This suggests that Islam's exclusion of women has more to do with custom than with actual doctrine. This can be argued because many Muslim countries throughout the world have granted women the right to participate in politics. Turkey, which has universal suffrage (CIA Factbook, 2007, *Turkey*), is a good example. In light of this, Muslims who support greater rights for women are turning both to the Koran and to Islam's early history to find evidence that their religion does, in reality, justify political rights for women.

Reinterpretations of the Koran have played a very large role in the women's rights movement in the Middle East (Coleman, 2006). Women's rights activists point to passages in Islam's holy book which suggest that women would, if true Islam was being practiced, have equal rights to men. Rizzo (2005) pointed out one such passage that states that both sexes are equal under the eyes of God. Other arguments that use Islam as a justification for women's rights point to the status of women in the early days of Islam. In the days when Islam was a new religion, women held equal status with men in most respects, including their right to have a say in decision making. Women in early Islam were even known to ride to battle alongside their male counterparts. Perhaps the biggest justification for women's rights, however, comes from the views of the prophet Muhammad himself. Women's rights activists point out that Muhammad held women in very high regard, and often consulted them on important matters. This was particularly true of his daughter, who had considerable influence (Rizzo, 2005).

These arguments, using Islam as a means of justifying broader political rights for women, often came into play in Kuwait during the women's suffrage movement. As was pointed out earlier, most of the opposition to women's rights came from Islamists and tribal leaders, who had to be convinced that granting women certain political rights would not con-
tried to discredit their Islamic beliefs. Though the fight would be long and difficult, the suffrage movement would eventually succeed in overcoming Islamist opposition. In truth, the time women were actually granted the right to vote ran for office, the majority of Kuwaiti citizens who held strict orthodox beliefs had actually come to support the granting of rights to women (Rizzo, 2005). In addition, large numbers of Islamist women who had earlier opposed the expansion of rights gradually joined the movement, indicating a shift in the attitudes of Islamists towards women’s suffrage (Tétreault, 2004). In addition to this shift, the Islamic Constitutional Movement, Kuwait’s largest Sunni Islamist group, abandoned its original stance on women’s rights in 2004. After opposing the expansion of political rights to women for so many years, the Islamic Constitutional Movement suddenly threw its support behind the suffrage movement (Al Mughni, 2004). This was also indicative of the success of the women’s movement in convincing Islamists that political rights for women did not interfere with Islam. It was largely this change in the Islamic camp that eliminated a large part of the opposition faced by the suffrage movement and made granting voting rights to women possible.

Because the major argument against expanding political rights for women stemmed from the belief that such rights were against Islam, Kuwaiti women had to work hard to assure society that they could, in fact, hold Islamic values and still participate in politics. By showing that Islam itself does not necessarily discourage women from participating, women’s rights activists in Kuwait were eventually able to wear down the Islamist opposition and gain their right to vote. The importance of this issue is illustrated by a clause in the law that granted women their political rights in order to be allowed to vote (McElhinny, 2005).

**Other Obstacles:**
Though the status of women in Islam was perhaps the biggest difficulty for the women’s movement in Kuwait, there were many other obstacles which had to be overcome before Kuwaiti women could receive the vote. First, the ideas of Kuwaiti women on political participation were not always consistent. Often the opposition was able to discredit the efforts of the women’s suffrage movement by showing that not all women supported the expansion of political rights. Highly conservative women who believed that Islam afforded women all of the rights they needed were used to persuade society and parliament that women did not, in fact, want the vote and should not be granted suffrage (Tétreault, 2004). These women often joined Islamists in arguing that Islam forbade women from participating in politics. It was not until the shift in the views of Islamists, discussed above, that these arguments began to become ineffective in keeping women from gaining their political rights.

Second, one of the most common traits of politics in general kept women in Kuwait from gaining their right to vote. In Kuwait, where women had never been allowed to vote or run for office, the power had always been held by men. Adding a new bloc of voters would be a risk to those in office. The idea that the men in power were simply afraid to lose that power is especially plausible in Kuwait, where such a small percentage of the population held the vote. Now that women in Kuwait have been granted the vote as well, the number of registered voters who are women outnumber men by about a third (Brown, 2006). This disparity in numbers could be explained by the exclusion of all males serving in the military from voting. In addition, Kuwait has an estimated population of 2,418,393 and approximately half of this population consists of non-nationals, many of whom do not meet the voting criteria (CIA Factbook, 2006, Kuwait). When such a small number of people are allowed to vote, the exclusion of males serving in the military increases the chances that women voters will outnumber men. This factor suggests that the prospect of allowing women to vote did cause the men in power to fear a loss of that power. With the majority of voters being women, it is highly likely that at least some of the power in parliament will shift to women, or to those who represent women’s views. This possibility, along with differing views among women themselves, helped to delay the granting of political rights to women and prolong the suffrage movement. Only time and the gradual change of the views of society, assisted by the grassroots tactics of the women’s movement, allowed these obstacles to be overcome.

**International Pressure as a Force for Change:**
It has already been suggested that grassroots tactics, lobbying, court cases, and arguments using Islam to justify women’s rights were used to overcome obstacles, alter public opinion, and persuade parliament to finally grant Kuwaiti women the vote. There was, however, one other major impact on Kuwait’s decision to allow women to vote. This was outside pressure from foreign countries and international organizations.

Ever since Kuwait was freed from an Iraqi invasion in the early 1990s, the small state has been largely dependent on foreign support, especially from the U.S., for its security (Brown, 2006). The U.S. has had a long-standing policy of promoting democracy in the Middle East and has taken a strong interest in Kuwait’s democracy. It was, in large part, pressure from the United States that persuaded the Emir to support the extension of political rights to women and led him to attempt to bestow such rights upon them (McElhinny, 2005).

Pressure on Kuwait to amend its electoral laws and give women the vote came not only from the U.S., but from other international organizations. Human Rights Watch, an organization associated with the United Nations, criticized Kuwait on several occasions for failing to extend political rights to women. As justification for this, the organization pointed to the many human rights treaties to which Kuwait is signatory (Human Rights Watch, 1999). In not allowing women to vote, Kuwait opens itself to accusations of hypocrisy from the
international community. As dependant as Kuwait is on international support, this would be seen as an embarrassment by Kuwait's leaders, and would make them more amenable to supporting women's rights.

Kuwait's peers, its neighbors in the Persian Gulf, have also been a source of pressure on Kuwait's democracy, prompting political reform. Because Kuwait, with its fully elected parliament, is considered the most progressive democracy in the Middle East, its neighbors look to the tiny country as an example. Other gulf states watch Kuwait closely, observing its practices and government. This has led to an expansion of political rights across the gulf region, an increase in the number of countries with written constitutions, and more elections in which citizens choose their representatives in their respective assemblies (Brown, 2006). Kuwait's influence has been illustrated by talk in Saudi Arabia of allowing women to vote in municipal elections that, until recently, did not even exist. This idea of granting Saudi women the right to vote came about shortly after Kuwaiti women were enfranchised (McElhinny, 2005). It seems reasonable to suggest that, being the leading democracy in the Middle East, Kuwait would begin to feel a certain amount of embarrassment at being, as was mentioned earlier, the only state in the Gulf that did not allow women to participate in its democratic systems.

External pressure from the U.S., international organizations, and neighboring gulf states, pushed Kuwait to rethink its policies on the political rights of women. Wishing to avoid international embarrassment and accusation of hypocrisy, Kuwait's government began to support women's rights themselves. This international pressure combined with the tactics discussed earlier to help women in Kuwait overcome the opposition they faced in their struggle to gain the right to vote.

**CONCLUSION**

Despite the relative progressiveness of Kuwait's system of government, the absence of the right of women to vote kept Kuwait from being able to claim status as a true democracy. International pressure on Kuwait pushed the government to support the extension of political rights to women. Support from the Emir, however, did not translate into support from Kuwait's parliament, which blocked several attempts to grant voting rights to Kuwaiti women. As a result, international pressure alone could not attain political rights for women. Instead, Kuwaiti women had to organize to fight for those rights. Long years of engaging in grassroots tactics such as strikes, marches, and protests became characteristics of a suffrage movement that was more similar to Western movements than it was to the top-down reform processes within the Gulf region. In addition, Kuwaiti women lobbied hard to push legislation through parliament that would grant them the right to vote.

Before their tactics could succeed, however, Kuwaiti women had to alter the views of society and parliament on the issue of women's rights. Using the Koran and Islamic history as justification, women's rights activists were finally able to overcome the largest obstacle they faced in their struggle for rights. This obstacle was the idea that Islam promoted the exclusion of women from politics. Women were able to overcome that obstacle by proving that political participation would in no way interfere with their desire or ability to follow Islamic laws and principles. Other obstacles, such as the unwillingness of men to risk the power they had held for so long, or divisions among women about their place in politics, were eventually overcome as the suffrage movement gradually convinced society that reform was both acceptable and desirable.

In the end, it was the mixture of international pressure, religious justification, and grassroots tactics that persuaded much of the opposition to abandon its former views on the issue and throw its support to the suffrage movement. This shift allowed Kuwaiti women, in May of 2005, to finally achieve the goal they had sought for more than 40 years: the right to participate in Kuwait's democratic processes by voting and running for office.

**REFERENCES:**


Stamping Out Icons: A Legal Analysis on How to Legislate Against Virtual Child Pornography Without Trampling Over the First Amendment

Paul T. Baker

Both the United States Supreme Court and the United States Congress have struggled on how to eliminate child pornography within the American legal framework. This paper will analyze the legal controversy and examine both judicial precedent and federal legislation that have attempted to address the issue of exploitation of children in pornography.

INTRODUCTION

The Supreme Court has acknowledged that “child pornography is a social concern that has evaded repeated attempts to stamp it out” (Free Speech Coalition v. Reno, 1999). In 1977, Congress found that “child pornography and prostitution were highly organized, highly profitable, and exploited countless numbers of real children in its production” (Free Speech Coalition v. Reno, 1999, pp. 1087-1091). Since then Congress has struggled to eliminate the child pornography market in the United States.

In a 9-0 decision in New York v. Ferber, the Supreme Court ruled that producing child pornography causes irreversible harm to children and, hence, cannot be protected by the First Amendment. New technology complicated the issue by introducing virtual child pornography that appeared to depict actual children. Congress passed legislation that barred virtual child pornography, but in Ashcroft v. Free Speech Coalition the Supreme Court struck that ban down because children were not harmed in its production.

In a concurring opinion, Justice Thomas argued that if technology sufficiently confuses actual and virtual child pornography enough to hinder the government’s ability to prosecute child pornographers, then the government will have a compelling state interest to ban both forms of child pornography. This paper recounts the history and offers a legal analysis of Ashcroft v. Free Speech Coalition and the cases before it. It concludes that in light of recent cases, technology has fused virtual and actual child pornography to the point where prosecuting child pornographers has become sufficiently difficult to justify a ban on virtual child pornography. If technology has in fact blurred the court’s ability to distinguish between actual and virtual child pornography, then a compelling state interest exists that would warrant a ban on virtual child pornography. Such a ban would protect the right to free speech safeguarded by the First Amendment, while simultaneously stamping out the child pornography market in America.

Part I of this article briefly reviews the history of obscenity law including a study on the Supreme Court’s strict ruling on child pornography in New York v. Ferber. Part II examines the details surrounding the decision in Ashcroft v. Free Speech Coalition including a detailed analysis of the Child Pornography Protection Act (CPPA) and Free Speech Coalition v. Reno. Part III considers the multiple concurring and dissenting opinions from Ashcroft v. Free Speech Coalition, including an analysis of Justice Thomas’s solution to the virtual child pornography dilemma. It also briefly considers Congress’s reaction to the majority opinion. Part IV discusses the post-Ashcroft v. Free Speech Coalition reaction by the court system. It examines the controversial verdict in United States v. Hilton, which is a key decision in determining that technology has fused traditional and virtual child pornography. It establishes that U.S. v. Hilton shows that technology has advanced to a point where child pornographers can escape prosecution through a “computer-generated images defense.” Finally, this section concludes that U.S. v. Hilton, if accepted around the Nation, would justify banning a narrowly tailored category of virtual child pornography.

1The First Amendment grants Freedom of Speech.
2Virtual Child Pornography: Fictitious, computer-generated images of children engaged in sexual conduct which images are created using digital technology.
PART I: OBSCENITY AND CHILD PORNOGRAPHY

HISTORY OF OBSCENITY LAW

In general, the First Amendment restricts the Government from barring what the citizenry may see, read, say, or hear. Justice Kennedy said, “The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought” (Ashcroft v. Free Speech Coalition, 2002). Freedom of speech, however, is not absolute. It has limitations. One classic example is Chief Justice Oliver Wendell Holmes’s declaration that the First Amendment would not protect a person who yells “fire” in a crowded theatre (Epstein and Walker, 2004). Although several categories of limited speech exist, this discussion focuses on obscenity. The court has always struggled to define what is obscene. Justice Potter Stewart summed up the difficulty of defining obscenity when he said, “I shall not today attempt further to define the kinds of material, but I know it when I see it” (Jacobellis v. Ohio, 1964). Prior to the 1950s, American Courts adopted the British definition of obscenity found in the 1868 case of Regina v. Hicklin. The British labeled material obscene if:

“The tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort might fall” (Epstein and Walker, 2004, p 360).

By and large, the Hicklin test ruled that any material that is unacceptable for a child should be considered obscene. In other words, the Hicklin test established the authority to limit speech to a substantial degree.

In Roth v. United States (1957) Justice William Brennan Jr. said, “obscenity is not within the area of constitutionally protected speech or press” (Epstein and Walker, 2004). He opted to replace the Hicklin test with a new one which stated that material was obscene if:

“To the average person, applying contemporary community standards, the dominant theme of the material taken as a whole, appeals to prurient interest” (Epstein and Walker, 2004).

Roth v. United States altered the Hicklin test to declare speech as obscene if the “average adult” would find the material at question to be obscene. This standard also required that the material be viewed as a whole as opposed to being considered obscene due to individual parts. Finally, the new test granted states, and not the federal government, authority to use their individual definitions of obscenity in regulating speech. Roth v. United States went a long way towards protecting speech previously defined as obscene under the Hicklin test. However, the Supreme Court soon adapted this standard in an effort to protect the First Amendment. It is important to note that throughout this century the Court has been careful not to allow states too much liberty in prohibiting speech.

Justice Burger further developed this new definition of obscenity in Miller v. California (1973) by stating that material was obscene and therefore void of Constitutional protection only if:

“the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and whether the work, taken as a whole lacks serious literary, artistic, political, or scientific value” (Epstein and Walker, 2004).

In Miller v. California we find the basic framework for the modern judicial definition of obscenity used today. All speech that falls under this basic definition of obscenity is not protected by the First Amendment and States therefore have authority to prohibit it.

CHILD PORNOGRAPHY: A NEW CATEGORY OF UNPROTECTED SPEECH

In 1982, the Supreme Court ruled that a new category of speech cannot be protected by the First Amendment even if it is not obscene: child pornography. The decision came in New York v. Ferber. Twenty states passed laws prohibiting material that portrayed children engaged in sexual conduct. These laws prohibited such images regardless of whether they were considered legally obscene. They claimed that since the production of child pornography is interconnected to child abuse, the State was entitled to greater leeway in regulating the market. The defense contended that this type of legislation violated the First Amendment by limiting freedom of speech. The issue struck a nerve with the court. All nine justices unanimously agreed that protecting the physical and psychological well being of children was a compelling reason to designate child pornography as prohibited speech. Specifically, they said that States were "entitled to greater leeway in the regulation of pornographic depictions of children" (Epstein and Walker, 2004). The Supreme Court still upholds New York v. Ferber today.

In a concurring opinion, Justice Brennan added an exception to the new category. He said that prohibiting any material with depictions of children that had serious literary, artistic, scientific, or medical value would violate the First Amendment. Likewise, he noted that “in the absence of exposure, or particular harm, to juveniles or unconsenting adults, the State lacks power to suppress sexually oriented materials” (Epstein and Walker, 2004). Here, Justice Brennan hinted that the First Amendment would have protected this category of speech from regulation by government were it not for the direct harm children suffer in the production of child pornography. This logic would prove to be critical to future rulings.

Other categories of unprotected speech include libel, slander, and defamation.
PART II: FIRST AMENDMENT PROTECTION FOR VIRTUAL CHILD PORNOGRAPHY

PIXELS, DIGITIZATION, AND VIRTUAL PORNOGRAPHY

The Internet and technology have redefined our perception of obscenity and, in particular, child pornography. In 1996, Congress attempted to curtail virtual child pornography: a new brand of child pornography that could be created by means other than using real children (these included actual images contorted by computers and fictional images fabricated through digital technology). In 1996, the United States Senate held hearings on how to reform obscenity laws in light of the internet and new digital technology (Senate Comm. on the Judic., 1996). In these hearings, the Senate established that new technology allowed the creation of two types of virtual child pornography. The first of the two types of virtual child pornography is digital child pornography. This type of virtual image presents sexual activity by children created using only fictitious computer images. The movie Final Fantasy demonstrates the quality of digital technology that is available today that can be used to create digital child pornography (Internet Movie Database, Inc., 1990). The second type of virtual child pornography Congress found is called morphed pornography. Morphed pornography (otherwise known as computer-altered photography) digitally alters a picture of a child to make it appear as if the child were engaging in sexual acts. The latter requires an original photo of a child that can be transformed or modified. Congress hoped to ban both of these groups of virtual child pornography through new legislation.

In 1996, Utah’s Senator Orrin Hatch sponsored the passage of the Child Pornography Prevention Act (CPPA) in response to the two new types of virtual child pornography (CPPA, 1996). The hearings on the CPPA highlighted 13 reasons why virtual child pornography was worthy of regulation. Congress claimed that virtual child pornography “whets the appetite” of child molesters and that they could use the same digital images to seduce children into sexual activity. Another finding alleged that technology would advance to the point that actual and virtual child pornography would become almost indistinguishable, making it difficult for the government to prosecute actual child pornographers. It is important to recognize that under the logic of these findings, the damage inflicted on children emanates from the content of the images and not from the means of their production (FCC v. Pacifica Foundation, 1978).

In general, the CPPA extended the ban on child pornography to include any sexually explicit depiction that “is or appears to be” of a minor (Section 2256(8) (B)). It also gave Congress authority to prohibit and prosecute the producer of any image “advertised, promoted, presented, described, or distributed in such a manner that conveys the impression” of a “minor engaging in sexually explicit conduct” (Section 2256 (8)(D)). The statute defines “sexually explicit conduct” as “actual or simulated... sexual intercourse... bestiality... mas-turbation... sadistic or masochistic abuse... or lascivious exhibition of the genitals or pubic area of any person” (18 U.S.C. Section 2256 (2)).

A CHALLENGE TO THE CPPA

The CPPA did not pass Constitutional muster because the Supreme Court, preceded by the Ninth Circuit Court, struck it down for vagueness and over-breath. Soon after Congress passed the CPPA, plaintiffs contended in the First and Eleventh Circuit Courts that the Act was overbroad in that it prohibited lawful speech without offering a compelling State interest (U.S. v. Acheson, 1999) (U.S. v. Hilton, 1999). Those courts ultimately found the claims to be unsubstantiated in light of the Supreme Court’s decision in New York v. Ferber. The judges in the First and Eleventh Circuit Courts decided that the government successfully proved a direct link existed between child abuse and virtual child pornography.

In 2000, the Ninth Circuit Court agreed to hear Free Speech Coalition v. Reno: a challenge to the CPPA on appeal from the US District Court for the Northern District of California. In this case the Free Speech Coalition sought “declaratory and injunctive relief by a pre-enforcement” challenge to the CPPA (Free Speech Coalition v. Reno, 1999). The Plaintiffs admitted that some of the material they sold on the market would be considered virtual child pornography under the definitions of the CPPA.

The government based its defense on the congressional findings of the CPPA. First, they said that pedophiles use traditional and virtual child pornography to seduce children by persuading them that sexual activities are normal. Second, Congress declared that both real and virtual child pornography “whets the appetite” of child molesters, inciting child abuse. Next, Congress stated that new advances in technology allowed the creation of visual depictions that “appear to be children” engaged in sexual activity but are “virtually indistinguishable to the unsuspecting viewer” from actual child pornography. They predicted that in the near future further advances in digital technology would make it increasingly difficult to distinguish actual and virtual child pornography. This, they calculated, would make prosecutions in actual child pornography cases progressively more complex (CPPA, 1996).

This is important because in FCC v. Pacifica Foundation the Supreme Court ruled that “The fact that society may find speech offensive is not a sufficient reason for suppressing it.” (FCC v. Pacifica Foundation, 1978)

The CPPA included an affirmative defence which allowed defendants the chance to prove their innocence by showing that the material at question was produced using adult actors instead of children. Section 2256A(c)

The Free Speech Coalition: A California trade association of business involved in the production and distribution of materials marketable to the adult-entertainment industry.

The findings of the CPPA state 13 reasons virtual child pornography should be banned. We will not discuss all of them in this article.
In a 2-1 ruling, Judge Donald W. Molloy delivered the court’s opinion that “the First Amendment prohibits Congress from enacting a statute that makes criminal the generation of images of fictitious children engaged in imaginary but explicit sexual conduct” because “the phrases ‘appears to be’ and ‘conveys the impression’...are vague and overbroad” (Free Speech Coalition v. Reno, 1999). The majority felt that the defendants failed to show a legitimate compelling interest strong enough to expand a curb on speech to include virtual child pornography. Judge Molloy quoted U.S. v. Hilton when he said; “Blanket suppression of an entire type of speech is by its very nature a content-discriminating act” (Free Speech Coalition v. Reno, 1999). He likewise said that the government’s argument was flawed because Congress’ motivation to ban virtual child pornography was based on the secondary, indirect effects attributed to the content of the images (as opposed to the direct harm caused to children in the production of real child pornography). In a dissenting opinion, Judge Ferguson maintained that the defendants “provided compelling evidence that virtual child pornography causes real harm to real children” (Free Speech Coalition v. Reno, 1999).

Stepping back to analyze the cases up to this point, one can see that the constitutionality of the CPPA hinged on whether the judges felt virtual child pornography caused direct harm to children. Judges Molloy and Thomas reasoned that no harm to real children stemmed from the content of virtual child pornography, whereas Judge Ferguson and the District Court felt the opposite. This would prove to be a pivotal assumption of the case. Ultimately, the Supreme Court would agree with the District court.

**ASHCROFT v. FREE SPEECH COALITION**

In 2001, the Supreme Court agreed to hear Ashcroft v. Free Speech Coalition to settle the dispute between the Ninth Circuit and the First and Eleventh Circuits. Since both the plaintiff and defendant’s arguments remained the same, this paper will not revisit those details of the case here. Instead, this article will analyze the majority opinion.

Justice Kennedy held that the evidence supporting harm to real children was secondary, indirect, and unsatisfactory. He said that,

“Virtual child pornography is not ‘intrinsically related’ to the sexual abuse of children, as were the materials in Ferber. While the Government asserts that the images can lead to actual instances of child abuse, the causal link is contingent and indirect... The harm does not necessarily follow from the speech, but depends upon some unquantified potential for subsequent criminal acts” (Ashcroft v. Free Speech Coalition, 2001).

In other words, Justice Kennedy echoed the opinion of Judge Molloy by repeating that child pornography can only be denied if real harm exists in the production, as opposed to the content of the disputed material. The majority used this logic to refute the government’s claim that virtual child pornography can be used to seduce children. They alleged that cartoons, video games, and candy could be used for similar purposes, but it would be irrational to prohibit these items.

The majority opinion rejected the government’s basic premise in supporting the CPPA. All of the government’s arguments were based on the assumption that virtual images of child pornography are indistinguishable from real child pornography. However, Justice Kennedy refused to accept this logic, alleging that “if virtual images were identical to illegal child pornography, the illegal images would be driven from the market by the indistinguishable substitutes.” He argued that, “few pornographers would risk prosecution by abusing real children if fictional, computerized images would suffice” (Ashcroft v. Free Speech Coalition, 2001). Those who have studied the psyche of child pornographers find this logic to be flawed. They argue that most users derive satisfaction from witnessing the abuse of a child (Lanning, 2001) (Klain, Davies, & Hicks, 2001). If Justice Kennedy’s assumption that child pornographers would rarely risk prosecution by viewing actual child pornography is accurate, then a practical solution to virtual child pornography would be to embrace it (Rogers, 2005). However, if child pornographers derive sexual gratification from the recording of child abuse, then accepting virtual child pornography would only complicate prosecution of actual child pornography. If so, the government would have a stronger case in support of a ban on virtual child pornography.

Later, the majority declared section 2256(8)(B) (the “appears to be” clause) to be unconstitutional. Justice Kennedy based his opinion on a broad interpretation of the language in the CPPA, disregarding the intent of the statute to limit “sexually explicit” images. Specifically, he stated that the CPPA proscribes speech “despite its serious literary, artistic, political, or scientific value.” He alleged that works such as “Romeo and Juliet,” and movies such as “Traffic” or “American Beauty” would be illegal under the perimeters of the CPPA (Ashcroft v. Free Speech Coalition, 2001). Justice Kennedy’s opinion repeatedly mentions the need to protect the visual depiction of teenagers engaged in sexual activity because it is,
and always has been, a valuable theme in expression of the arts. While this speech is undoubtedly worth protecting, it should not be held to be indistinguishable from lewd depictions of children engaged in sexual activity geared to appeal to the prurient interest. Congress’ stated intent was to extend child pornography laws to virtual child depictions of the prurient interest and not to ban virtual productions of Romeo and Juliet.

Finally, the Supreme Court rejected the government’s claim that the ability to produce computer-generated images would make prosecuting real child pornographers difficult, if not impossible. The government suggested that fusing virtual and actual child pornography into the same category of unprotected speech would make prosecutions plausible. The majority pronounced that “the government may not suppress lawful speech as the means to suppress unlawful speech” and that doing so “turns the First Amendment upside down” (Ashcroft v. Free Speech Coalition, 2001). The CPPA included an affirmative defense that would allow the accused to prove that images were produced using adult actors, and therefore establish their innocence. Although Justice Kennedy accepted that a properly tailored “affirmative defense can save a statute from a First Amendment challenge,” he refused the CPPA’s affirmative defense as incomplete and insufficient (Ashcroft v. Free Speech Coalition, 2001). This is one of the reasons that four Justices signed concurring or dissenting opinions. It is to this collection of varied opinion that we now turn.

PART III: THE REACTION TO Ashcroft v. Free Speech Coalition

A DIVIDED DISSENT

Justices Rehnquist and Scalia interpreted the text of the CPPA narrowly. They opined that Congress intended to reach “computer generated images that are virtually indistinguishable from real children engaged in sexually explicit conduct” and that the statute should not “be read to do any more than precisely this” (Ashcroft v. Free Speech Coalition, 2001). Justices Rehnquist and Scalia fully agreed with Congress’s motives regardless of the vague nature of the Act. Although, in their judgment, the CPPA seemed plain, the phrase “appears to be” was truly open to a wide range of interpretation. This is clear because seven of their peers agreed on this point.

Justice O’Connor (joined in part by Justice Scalia) concurred in part and dissented in part. She agreed with the Court that Section 2256(8)(C) (which extends the ban to depictions that “convey the impression” of child pornography) prohibited speech that she interpreted to be protected by the First Amendment. She maintained that this particular idiom would proscribe depictions of adult actors posing as children. Doing so, she felt, exceeded Congress’ intent to protect children from the child pornography market (Ashcroft v. Free Speech Coalition, 2001).

Justice O’Connor also disagreed with the Court in part. She felt that the CPPA’s prohibition was effectively tailored to curtail hard-core virtual child pornography. In addition, she professed that “any speech that has serious literary, artistic, political, or scientific value” that is “unintentionally (ensnared)” by the CPPA would be protected by the affirmative defense clause (Ashcroft v. Free Speech Coalition, 2001). She indicated that defendants in such a hypothetical would be able to challenge prosecutors by showing that the material challenged by the CPPA contains “a substantial amount of valuable or harmless speech” (Ashcroft v. Free Speech Coalition, 2001). The defendants never presented any “examples of films or other materials that are wholly computer-generated and that contain images that” fall under the definitions of virtual child pornography under the CPPA (Ashcroft v. Free Speech Coalition, 2001). Justice O’Connor hinted that virtual child pornography (defined narrowly by the CPPA) with serious value might not exist at all. If true, this analysis would throw a wrench in the majority’s opinion that the prohibition on virtual child pornography is overbroad because it limits valuable speech. Works of art such as Romeo and Juliet would retain a solid defense on the basis of their serious political, artistic, literary, or scientific value.

Finally, O’Connor recommended that substituting “appears to be” with the phrase “virtually indistinguishable from” would help clarify the language of the CPPA, thereby making it constitutionally viable. She acknowledged Congress’s extensive effort to purge the nation of child abuse. Plaintiffs successfully convinced O’Connor that a compelling state interest existed in curbing virtual child pornography (contrary to the majority of her peers). She noted that evidence presented by the National Law Center for Children and Families (NLCCF) convinced her to agree with the government.10 With the evidence that the NLCCF presented, she expressed concern that technology would soon advance to a point that prosecutors would be unable to distinguish between the two categories of child pornography and that defendants would escape punishment.

Justice Thomas delivered the final concurring opinion of Ashcroft v. Free Speech Coalition. Here, as we will soon see, he sponsored a rationale that could potentially reverse the majority opinion.11 Justice Thomas’ greatest concern echoed Justice O’Connor’s and the government’s concern. He said “that persons who possess and disseminate pornographic images of real children may escape conviction by claiming

10As Amice Curiae to the Court, the National Law Center for Children and Families entered virtual child pornography evidence (in the form of images) into the brief. The images were difficult enough to distinguish from real images of child pornography that they aided in convincing Justice O’Connor that Congress had a righteous intent in passing the CPPA.

11This is the same solution that could potentially rescind the ruling in Ashcroft v. Free Speech Coalition.
that the images are computer-generated, thereby raising a reasonable doubt as to their guilt.” (Ashcroft v. Free Speech Coalition, 2001). He appropriately asserted that if “technology evolves(s) to the point where it becomes impossible to enforce actual child pornography laws because the Government cannot prove that certain pornographic images are of real children” then “the Government should not be foreclosed from enacting a regulation of virtual child pornography” (Ashcroft v. Free Speech Coalition, 2001).

This logic is the antithesis of the majority’s statement that “the Government may not suppress unlawful speech as the means to suppress unlawful speech.” Justice Thomas responded that prosecuting actual child pornography satisfies a compelling Government interest and justifies suppressing a narrowly defined category of protected speech. In other words, if technology reaches a point where actual and virtual child pornography are almost impossible to distinguish (rendering the government unable to take legal action against violators of the former) then both brands of child pornography could be fused into one category and defined as unprotected speech. This, Justice Thomas warned, would require a narrowly tailored definition of virtual child pornography. This cautionary note suggests that at some future date the language of the CPPA would be too vague to pass constitutional muster.11

Justice Thomas left open a line of reasoning that could potentially reverse Ashcroft v. Free Speech Coalition. Congress should take strict heed of the counsel Justice Thomas provides here. It is apparent that Congress paid close attention to the multiple concurring and dissenting opinions offered by Justices Rehnquist, Scalia, O’Connor, and Thomas. This paper will now review Congress’ reaction to Ashcroft v. Free Speech Coalition and will touch on the broad opinions for and against the PROTECT Act does not fall within the scope of this paper.

**The PROTECT Act: Congress’ Reaction to Ashcroft v. Free Speech Coalition**


Congress reformed several key aspects of the CPPA in an attempt to tailor the PROTECT Act in such a way that it would pass constitutional muster in light of Ashcroft v. Free Speech Coalition. The first reform to the CPPA came as a result of the congressional findings. The new findings stated three distinctly new conclusions. First, Congress stated that “there is no substantial evidence that any of the child pornography images being trafficked today were made other than by the abuse of real children” (PROTECT Act, 2003). This means that most child pornography is either actual child pornography or morphed child pornography.12 Next, Congress declared that technology exists “to disguise depictions of real children to make them unidentifiable and to make depictions of real children appear computer-generated.” This technology would bolster a “computer-generated images” defense. Finally, the findings asserted that “technology will soon exist, if it does not already, to computer generate realistic images of children.” The findings in the CPPA claimed that direct harm to children increased as a result of virtual child pornography. The new findings concluded that the existence of virtual child pornography is not as problematic as the prosecutorial obstacles that arise when defendants manipulate images to appear to be virtual depictions (PROTECT Act, 2003).

Next, Congress reformed the definition of virtual child pornography. In the CPPA, Congress defined virtual child pornography to be any visual depiction that “is or appears to be, of a minor engaging in sexually explicit conduct.” Accepting Justice O’Connor’s recommendation, Congress modified the definition to images that are “virtually indistinguishable from a minor engaging in sexually explicit conduct,” excluding “drawings, cartoons, sculptures, or paintings depicting minors or adults.” Congress later defined “indistinguishable” to mean that “an ordinary person viewing the depiction would conclude that the depiction is of an actual minor engaged in sexually explicit conduct.” There is no doubt that Congress heavily relied on Justice O’Connor’s concurring-dissenting opinion in Ashcroft v. Free Speech Coalition to reform the CPPA.

The final difference between the CPPA and the PROTECT Act is the expansion of the affirmative defense. In the CPPA, the affirmative defense allowed producers of virtual child pornography to prove their innocence by showing that adult actors were used in the place of minors. The PROTECT Act expanded the affirmative defense to apply to distributors and viewers (as well as producers).

Clearly, some day the PROTECT Act will be challenged in the Courts. It is unclear, however, whether the PROTECT Act with its new revisions will pass constitutional muster. Even though the new language undoubtedly focuses the definition of virtual child pornography, the Act still has its fair share of critics. Some argue that the “virtually indistinguishable” is just as vague as the “appears to be” language of the CPPA (Bernstein, 2005; Rogers, 2005; Watanabe, 2005).

Expanding the definition to include works with serious value is a step in the right direction; however, the PROTECT Act still falls to link virtual child pornography to the obscenity standard established in Miller v. California. Even though Congress expanded the affirmative defense to distributors and consumers of virtual child pornography, others critique the

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11For the purposes of this paper, we will refer to this reasoning as either “the prosecution rational” or the “computer-generated images defense.”

12Justice Thomas felt that the language of the CPPA would have to be reformed in order for a future Act to pass constitutional muster. He agreed with the majority that the CPPA was too vague.

13The image’s architect must use an actual picture of a child in the production of an image for it to be considered morphed pornography.
new affirmative defense clauses as being inadequate. Regardless of whether or not the PROTECT Act will survive a challenge in the court system, it is important to see how Congress has responded to Ashcroft v. Free Speech Coalition. It is also important to recognize that Congress used Justice O'Connor’s opinion as a framework for new legislation against virtual child pornography.

**PART IV: THE REACTION IN THE COURTS, U.S. V. HILTON, AND THE END OF ASHCROFT**

**POST-ASHCROFT v. FREE SPEECH COALITION**

Since the ruling in Ashcroft v. Free Speech Coalition the Government’s fears of difficult child pornography prosecutions have materialized. Defendants have appealed to courts for retrial in direct response to Ashcroft v. Free Speech Coalition. The courts have established that "the government must prove that an image depicts actual children to sustain a conviction" of child pornography (United States v. Hilton, 2004). In other words, the government must establish that the images presented in each case were actual depictions of children. If any aspect of the depiction includes an actual child, then the picture is illegal under the PROTECT Act. The government customarily used the Tanner Scale to determine whether or not a depiction involved actual minors. The Tanner Scale (U.S. v. Hilton, 2004) is a scale used for measuring stages of physical development in children, adolescents, and adults based on external developments. Almost every court has accepted this scale to gauge whether images were made using actual children.

In the wake of Ashcroft v. Free Speech Coalition, most courts required the government to prove that an actual child was used in the creation of images considered in cases. In 1994 the Supreme Court ruled in U.S. v. X-citement Video that in child pornography cases the government had the burden of proving that a defendant “knowingly” possessed depictions of actual child pornography in order to find the defendant guilty (U.S. v. X-citement Video, 1994). In U.S. v. Reilly, the defendant had previously pleaded guilty to having “knowingly received... several images of child pornography” (2002). After the Supreme Court overturned the CPPA in Ashcroft v. Free Speech Coalition, the U.S. District Court for the Southern District of New York reversed the defendant’s guilty plea. Judge Patterson ruled that “the allocation of Reilly was insufficient in that he did not acknowledge that he knew that the images he received were of actual children” (U.S. v. Reilly, 2002).

This ruling merged the “knowingly” standard of U.S. v. X-citement Video with Ashcroft v. Free Speech Coalition. The two decisions need to be bonded together to protect defendants such as Reilly. However, this bond means that not only must the government prove that an image is of an actual child, it must prove that the defendant knew it was not of a virtual child. This places a heavy burden on the government that will severely cripple its ability to prosecute.

Courts have further developed the details of procedure in child pornography cases. Ashcroft v. Free Speech Coalition demands an answer to a critical question in trial procedure: Does the verdict “require either direct evidence of the identity of the children in the proscribed images or expert testimony that the images depicted are those of real children rather than computer-generated ‘virtual’ children.” (U.S. v. Hilton, 2004) A number of Circuit Courts have offered an answer to this question. Almost all of these have agreed that “pornographic images themselves should suffice to prove the use of actual children in production” and that “a jury can (still) distinguish a depiction of an actual child from a depiction of a virtual child even where the images themselves were the only evidence” presented (U.S. v. Hilton, 2004). Most judges agree that,

“After Free Speech Coalition, defendants will certainly argue that the government has failed to prove beyond a reasonable doubt that the pictures are of real children. And, in light of evolving technology, triers of fact may be more inclined to accept such arguments if the government relies on only the pictures as evidence” (U.S. v. Hilton, 2004, p. 68).

The introduction of images to juries has proven to be a deciding factor in the judgment of actual and virtual child pornography cases. Since Ashcroft v. Free Speech Coalition “no jury has acquitted a defendant on the basis that he was ignorant that the pornographic images were of real children” (Rogers, 2005). This is probably a result of the effects that the evidence has on the jury, regardless of whether the images are actual or virtual child pornography. Even though juries have ruled in favor of the government in every case thus far, we have seen that the government’s fears of the difficulties in prosecuting actual child pornographers have become reality. This burden will probably become even more difficult with time. We will now consider U.S. v. Hilton; the outcome of which may lead to more stringent guidelines for prosecutors of child pornography cases.

**U.S. v. HILTON**

In 2004, the First Circuit granted post-conviction relief to defendant David Hilton on appeal in light of the Supreme Court’s decision in Ashcroft v. Free Speech Coalition (U.S. v. Hilton, 2004). The defendant contended that “the government may not criminalize possession of non-obscene, sexually explicit images that appear to, but do not in fact, depict actual children” (U.S. v. Hilton, 2004, p. 59). Plaintiffs contested that the images were of actual child pornography based on testimony by an expert witness, Dr. Lawrence Ricci. Dr. Ricci used the Tanner Scale to prove that images at question depicted real minors. Prior to the hearing, the district court

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1U.S. v. Hilton is the one exception. That’s the one major reason why it is such a controversial decision.

had concluded that Dr. Ricci's evidence was insufficient, granting Mr. Hilton post-conviction relief.

In U.S. v. Hilton, the court rejected the claims that “pornographic images themselves...suffice to prove the use of actual children in production.” In doing so they also found that juries can no longer “distinguish a depiction of an actual child from a depiction of a virtual child even where the images themselves were the only evidence” (U.S. v. Hilton, 2004). Instead, in the majority opinion, Judge Torruella of the First Circuit declared that “while the images form essential evidence without which a conviction could not be sustained, we hold that the government must introduce relevant evidence in addition to the images to prove the children are real.” The majority alleged that pornographers successfully manipulate images of real children to be amenable to expert analysis under the Tanner Scale. They said that the “parameters of body proportion and growth” will be mimicked by virtual pornographers and that “a finding of guilt beyond a reasonable doubt demands...relevant evidence in addition to the images themselves” (U.S. v. Hilton, 2004).

This decision is in direct contrast to every other child pornography case to date. The central question of U.S. v. Hilton reverses the central question discussed in Ashcroft v. Free Speech Coalition. There, the justices needed to determine if virtual child pornography resembled actual child pornography enough that it damaged society. In U.S. v. Hilton, the court asks if actual pornography can be manipulated to resemble virtual child pornography enough that the two categories of speech are almost impossible to distinguish. U.S. v. Hilton accepts that technology has advanced to a level that justifies a new perspective on child pornography cases.

If one accepts the premise that technology has advanced to a point where juries cannot distinguish between the two categories of speech, then it would be necessary for the government to provide extra evidence, apart from the images themselves, to prove guilt. Extra evidence could include testimony by experts on computer graphics with respect to how the images were created. Another option could include finding the identity of the real children used in pictures that have been morphed to be child pornography. Providing this additional evidence will be expensive and time consuming for the government. As technology continues to advance, expert witnesses will find it progressively more complex to prove beyond a reasonable doubt that defendants were cognizant of the fact that the images they were looking at were in their possession and that they were aware that the images were of actual and not virtual child pornography. This places a heavy burden on the government.

U.S. v. Hilton ended in a more divisively different result than any other trial considering virtual child pornography since Ashcroft v. Free Speech Coalition. Respondents attacked the verdict and there was no shortage of criticism (Wisconsin v. Holze, 2004). For the purposes of this article we will set aside the widespread disapproval of the verdict and analyze the potential consequences of the judgment.

U.S. v. Hilton: The Beginning of the End for Ashcroft?
The verdict in U.S. v. Hilton could hold serious consequences for the outcome of virtual child pornography law in America. Justice Thomas feared the time would come when “persons who possess and disseminate pornographic images of real children may escape conviction by claiming that the images are computer-generated, thereby raising a reasonable doubt as to their guilt.” Thomas said that during Ashcroft v. Free Speech Coalition the government failed to provide a case where “a defendant has been acquitted based on a ‘computer-generated images’ defense.” U.S. v. Hilton is the first case where an individual who possessed actual child pornography has escaped conviction. Justice Thomas added,

“in the event this occurs, the Government should not be foreclosed from enacting a regulation of virtual child pornography that contains an appropriate affirmative defense or some other narrowly drawn restriction” that “(bars) or otherwise (regulates) some narrow category of ‘lawful speech in order to enforce effectively laws against pornography made through the abuse of real children’ (Ashcroft v. Free Speech Coalition, 2001).

If Hilton were to become the norm, then the government would have too much of a burden placed upon it to prove child pornographers are guilty beyond a reasonable doubt. An increased financial burden would slow down child pornography cases. The courts would be forced to spend time, energy, and money to prove how individual pictures were produced. Pornographers would regularly escape prosecution.

Justice Thomas’s concurring opinion would justify an Act, be it the PROTECT Act or an amended version of it, which would ban a narrowly tailored category of virtual child pornography. If Hilton were to become the norm, then courts would in effect agree that technology has advanced to a level that compelling state interest exists for the sake of banning a well defined category of virtual child pornography. Doing so would be an effective way to protect the First Amendment and enable the government to effectively curb child pornography: a social concern that creates a market of organized crime that exploits countless numbers of children (Free Speech Coalition v. Reno, 1999).

1Reader, be reminded that “the government must prove that an image depicts actual children to sustain a conviction” and that the Tanner Scale has been sufficient to prove so in almost every court since Ashcroft v. Free Speech Coalition. (U.S. v. Hilton, 2004. p.63)
2Remember that many of these depictions are morphed pornographic images that combine an actual picture and fictional body parts.
3This claim is based on Dr. Ricci’s testimony using the Tanner Scale.
CONCLUSION

Child pornography has been found to be a social concern that should be strictly regulated. We must be careful to understand the history of child pornography in order to curb its harmful effects on society while simultaneously protecting our First Amendment rights. Today, virtual child pornography is a category of speech that is protected by the First Amendment and that cannot be banned without a compelling state interest. However, U.S. v. Hilton demonstrates that modern technology has fused actual and virtual child pornography together to the point that prosecuting actual child pornographers has become unfeasible. Justice Thomas’s concurring opinion in Ashcroft v. Free Speech Coalition provides a legal justification to ban a narrowly tailored category of virtual child pornography in order to enable the government to prosecute actual child pornographers. Applying this logic would assist Congress in curbing an industry that abuses countless children.

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Sales Tax and Land Use:  
Are Cities Being “Driven to the Mall”?

Senator Greg Bell

RESEARCH ASSISTANCE FROM BARTLY MATHEWS

In 1999, citizens in part of unincorporated Salt Lake County, Utah were forming the city of Holladay. As they were deciding the boundaries for the new city, they considered the tax revenues that various properties would bring to their city. They could include the Cottonwood Mall, a traditional anchored shopping mall, and/or Cottonwood Corporate Center, a large state-of-the-art, mid-rise office complex, which is a hotbed of high-tech companies located near upscale residential areas where executives for such companies might tend to live. Holladay chose the mall over the office park because of the tremendous sales tax revenue the city would reap from it (Linton, 2004). Holladay would have gained little on a net basis from including the office park in its municipal boundaries because the city does not participate in the significant personal and corporate income taxes generated there.

The Holladay experience vividly demonstrates some of the powerful financial incentives and disincentives at work for Utah municipalities. Like all persons and entities, municipalities react in a rational manner to economic stimuli. This article explores whether municipalities and their citizens are well served by the current municipal fiscal structure imposed by the state of Utah, especially the point-of-sale portion of local option sales tax. It also discusses whether the state of Utah’s goals for economic development are helped or hindered by the current fiscal structure under which municipalities operate.

Municipal Share of Sales Tax

Under Utah’s current system, the local option sales tax is 1% (or 1 cent per dollar) of the roughly 6.5% sales and use tax, which varies from county to county depending on transit, transportation, ZAP, RAP, and other “boutique” taxes. (In the 2006 and 2007 General Sessions, the Utah Legislature reduced the state portion of sales tax on unprepared food as well as the “boutique” taxes from RAP, ZAP, etc.; but the municipal local option portion on food is unaffected.) All municipalities have adopted the local option sales tax. Of this 1%, one-half is distributed to all local governments proportionately based on population. The other half percent is distributed to the municipality at the point of sale. Thus, if Smallville generates $1,000,000 of non-food sales, the tax will be approximately $65,000; $55,000 will go to the State and other entities, and $10,000, the local option portion, will be split: one-half ($5,000) will be paid to Smallville and the remaining one-half ($5,000) will be divided among all Utah municipalities based on population.

Sales Tax as a Driver of Land Use Decisions

Farmington City, Utah provides an interesting picture of how many formerly rural and bedroom suburban cities have moved along the arc of sales tax reliance, with the accompanying increasing intensity of land uses. In the mid 1980’s, Farmington City, a charming town of about 5,000 inhabitants, conducted an extensive values study, exploring what its citizens valued in their city and how they wanted Farmington to develop (Forbush, 2007). The almost unanimous response was that Farmingtonians enjoyed the quasi-rural flavor of their community and wanted to preserve that environment and did not want typical suburban retail-type development in Farmington. Tellingly, the citizens indicated they would prefer to travel to other cities for the retail and other services they needed.

However, the city’s population steadily increased (tripling by 2007 to 15,000) and brought with it escalating demands for both the quantity and quality of city services. Newer citizens were not satisfied with the minimal police and fire protection. The city established a full-time police department, built a new public safety building, hired a full-time fire chief, and manned their fire station during all but the late hours of the night. The city built a swimming pool, then expanded it, built several parks and enhanced others, and expanded its recreation programs. The City built a cultural center for the performing arts and other events.

In considering these expanded services and facilities, Farmington City leaders had realized that the city’s traditional revenue sources were inadequate to fund these expanded services and amenities. (The capital costs of these facilities were paid for mostly by general obligation bonds authorized by public election.) The city already assessed the maximum of franchise taxes. Raising property taxes was problematic for the reasons discussed below. Nor would all the new residen-
tial building help its revenue stream. New residences not only bring new citizens who place additional burdens on city services, but generate little in property tax revenue for the City. Since being amended by public vote in the 1980s, the Utah Constitution has required that residential property, unlike commercial, industrial and other types of real property, be taxed at only 55% of its value (agricultural ground receives different but favorable treatment for taxation purposes). Thus, if a vacant parcel of land were being considered for either office development or residential development, assuming the market value of these developments were the same, the city would receive 45% less in property taxes for the residential development.

**Real Property Tax Limitations**

In 1978 California voters passed Proposition 13, which capped the amount of property taxes which can be assessed against real property. Subsequently, many Western states followed suit. In the mid-1980s, Utah instituted “Truth in Taxation” by statute, the purpose of which was to keep cities, counties, school districts and other governmental entities from passively increasing their property tax revenues. Because county assessors periodically re-appraise the value of real property, which has historically resulted in ever growing valuation, if a city maintains the same property tax rate, the city will receive more dollars in property taxes each year. If a city budget anticipates that the city will receive more property tax revenue in the next year than in the current year (other than for new growth), Truth in Taxation kicks in. Truth in Taxation requires a municipality 1) to give public notice via a large ad in the newspaper that it is “raising” property taxes, and 2) to hold a Truth in Taxation public hearing.

To avoid the stigma of advertising to its citizens that it is increasing property taxes, the city must therefore annually reduce its property tax rate. There is no inflationary factor built into this formula. If a city wishes to maintain the inflation-adjusted equivalent of the exact same dollar value of its property tax receipts, the city has to go through the Truth in Taxation process every year. For example, assume that Smallville’s property tax receipts in 2007 were $100 with a tax levy of .0020 and inflation was 2%. Smallville may avoid Truth in Taxation advertising and a public hearing only by reducing its property tax levy so that its property tax revenues in 2008 will be $100 or less. If Smallville wishes to collect $102 in 2008 so that its property tax revenue simply keeps pace with inflation, Smallville must go through the Truth in Taxation process, even though its property tax rate may not increase and may even decrease. [Note: The foregoing example assumes there is no increased valuation for new buildings or other new property. Increased revenue from growth is not subject to Truth in Taxation.]

When raising property taxes is on the agenda, the city council room tends to fill up with senior citizens protesting that they live on fixed incomes and cannot afford a property tax increase. Businesses protest that rates are lower in other towns and that they will move their business locations. Citizens turn out to decry government waste and inefficiency. Many city officials who have undergone a Truth in Taxation hearing vow never to go through it again; the political and personal pain for these officials can be intense.

Another practical barrier to increasing property taxes is that the pay-off is typically somewhat small for most cities. Farmington had a relatively high property tax levy of .002149 in 2006 and total assessed valuation of about $610,000,000, which will result in total property tax revenue of about $1,300,000. To raise $500,000 more a year, Farmington would have to increase property taxes by 38%. This would increase City property taxes on a $300,000 home from $355 to $490, an increase of $135. Most citizens would see that as a very significant tax increase. As will be seen below, this amount can be fairly easily raised from one big box store.

A city’s typical share of property taxes on residences rarely defrays the cost of services for those residences. In the last two decades, most Utah cities have not been able to fund from traditional tax sources the services and programs citizens have come to expect from modern city government. Adding new residences only aggravates the problem. The city can resort to impact fees and utility franchise taxes, but most suburban cities already assess some or all of these. Therefore, all that remains for a city to raise significant new revenue in a politically acceptable way is to create or expand the city’s retail base to provide more point-of-sale sales tax revenue.

**The Appeal of Sales Tax for Cities**

Sales tax is one of the most appealing taxes for a city. In making purchases, consumers generally know what the cost of the sales tax will be. Because many purchases are elective, payment of sales tax can also be considered elective to some degree and thus avoids many of the negative elements associated with governmental imposition and extraction of less palatable taxes. With the exception of necessities, one can somewhat moderate one’s purchases to lessen the amount of total sales tax one pays in total. Moreover, sales tax is often paid in trifling amounts; the pain is spread over many, many purchases.

As between a city and its residents, the sales tax is indirect, and the responsibility for it is diffused because sales taxes are collected by the retailer and remitted to the state, which then distributes the revenue to the entities entitled to it. Having the retailers collect the tax distances a city considerably from any pain and resentment which might be felt by the taxpayer. The political responsibility for sales tax is made even more diffuse by the fact that a major portion of sales taxes collected in regional facilities such as shopping malls and car dealerships comes from the residents of a wider region rather than citizens of the host city. Because all Utah municipalities levy the same sales tax rate, no municipality stands out as having a higher tax rate than any other.
polities, the sales tax collection process is about as painless as collecting taxes can be.

By contrast, property tax levies vary widely from city to city, and citizens are often keenly aware of these differences. Sales taxes are spread across millions of transactions. With sales tax, there is no ominous check to write on April 15 (state and federal income taxes) or November 30 (property taxes), which focuses the taxpayer's attention on the existence of the tax and size of the levy. Surely if one were able to quantify a city official's misery-per-tax-dollar-raised index, property tax increases would rate very high and sales tax would rate very low. Indeed, the only political heat a city official will likely get from pursuing augmented sales tax revenue will be in the context of land use decisions.

In comparison to the political and economic hurdles of raising property taxes, gaining only one mega-retailer can make a huge difference to a city's bottom line. Landing a Costco store can add $500K or more to the city's revenue ($100,000,000 annual sales times ?% = $500,000). The Centerville City Budget for 2007-2008 conservatively estimates that a new Wal-Mart store will bring $350,000 in point-of-sales revenue to the City (Lutz, 2007). Big box retail and new used car lots are very popular with cities because of the huge amount of sales taxes they generate. For most cities, no other tax, fee or municipal imposition provides cities with the ability and the flexibility to raise revenues on the scale that point-of-sale sales tax does.

CITIES HAVE STRONG ECONOMIC INCENTIVES TO ALLOW RETAIL DEVELOPMENTS

Again the Farmington City experience is instructive. As mentioned, the city leaders felt the need to seriously augment the city revenues to pay for the costs of increased demands of public safety, recreational, open space and cultural amenities. The city could have scaled back its budget, but the city's leaders determined their electorate wanted those services and amenities if they could be funded from sales taxes rather than through more direct levies on Farmington citizens. In about 2003-04 they projected both the anticipated revenues of the city and the anticipated costs for increased services and amenities. Their projections showed a significant shortfall in revenues of about $1,000,000 per year. The city would have had to increase property taxes by three and one-half times (350%) to garner that much money. The city never considered such a tax increase, but the following illustrates the impact such an increase would have: the city portion of the annual property tax bill on a $300,000 residence would have skyrocketed from $355 to $1,240, and on a $1,000,000 commercial property would have jumped from $2,150 to $7,525.

There was no alternative but to promote significant retail development to secure increased sales tax receipts for the city (Forbush, 2007). Accordingly, Farmington worked with a developer and other landowners to re-zone property for a huge retail complex to be known generally as Farmington Station. Farmington Station is on the west side of I-15 at the junction of Clark Lane and Park Lane. Initially, this lifestyle center development was anticipated to have about 800,000 square feet of mostly retail space, and at build-out with neighboring properties developed, will have up to 1.5 million square feet of retail/commercial space. By way of comparison, Layton Hills Mall (a traditional, enclosed mall in Layton, Utah with three department store anchors) has 660,000 square feet in the mall proper. Significant office and multi-family residential developments are also slated to be developed nearby or as part of Farmington Station.

Farmington's commitment to a regional shopping facility was not necessarily tantamount to selling its birthright. Lying at the junction of I-15, US 89, and Legacy Highway, Farmington Station is a good site for retail uses. Moreover, the shopping facilities will be integrated with the Frontrunner commuter rail station being built there. The Farmington Station property is bounded on the east and north by the Union Pacific and commuter rail tracks, as well as I-15. It fronts the Davis County Justice complex, the Davis County Fairgrounds, and the large Davis County Jail complex. The property is served by the Park Lane interchange and located at the junction of the freeway and major highways mentioned above.

The scale, the intensity and the traffic of Farmington Station and its ancillary properties when developed will drastically alter the lifestyle of area residents. A decade ago, west Farmington residents enjoyed a semi-rural environment, with many horse properties, small farms and large vacant parcels of land. However, many suburban-style subdivisions have been developed in the last few years hastening west Farmington's suburbanization. The Farmington Station development will complete this transformation.

In only two decades Farmington City has changed from being a quasi-rural “Mayberry” with its citizens content to live with few shopping and other commercial amenities in their own city to a city driven to bring in a large-scale, regional retail/commercial development. Ironically, the residents of Farmington City are not perceived to have demanded the commercial development per se. The City's primary motivation in facilitating the development of Farmington Station is not to satisfy the shopping needs of its own citizens. This huge development is mainly being built to appeal to an entire regional shopping market primarily for the fiscal benefit of the citizens of Farmington.

And so it goes. Smaller cities which have had limited or only local commercial facilities have either aggressively developed or merely allowed extensive commercial/retail development on a regional scale. The following cities are more or less typical of this phenomenon: North Logan, West Bountiful, Centerville, Springville, South Jordan, West Jordan, Taylorsville, Riverton, West Valley City, Spanish Fork, Washington, Draper, Murray, Pleasant Grove, Lehi, and American Fork. On a contrary note, residents of Centerville, Sandy, the east Millcreek area of Salt Lake County and other areas have strongly fought to prevent the location of Wal-
Mart, Home Depot or other big box stores into their communities.

**THE RETAIL CHASE**

An obvious downside to ever more retail development is that cities “cannibalize” limited retail spendable dollars. New stores do not bring more retail expenditures into the shopping region as a whole. While Smallville may generate additional sales tax revenues from their own new retail facilities, those revenues will come at the expense of other cities in the region (except for growth in spendable income). Thus, there are ever new winners and losers in this endless chase after retail growth. Many shopping centers along the Wasatch Front stand vacant, victims certainly to economic and demographic forces, but in some cases victims also to the zoning actions of the city next door, which developed more attractive and larger shopping centers. There are over 20 vacant big box stores in the Salt Lake Valley. A small shopping center contains about 10 acres. As the smaller shop tenants most often leave a shopping center when the anchor goes dark, the entire shopping center usually becomes vacant. Thus, 20 vacant big boxes will likely result in at least 200-300 acres in vacant shopping centers, a huge amount of unproductive and blighted real estate. (Salt Lake Tribune, 2003, p. A1)

In recent years, the Utah Legislature has deprived cities of most of their ability to induce retailers and developers to their towns with financial incentives, including redevelopment agency powers such as sharing or giving to the developer or retailer property tax and sales tax rebates. Still, receptive city leaders can facilitate significant movement of large retail facilities through favorable zoning. Until fairly recently, municipal boundaries generally developed out of historic and geographic conditions, without regard to point-of-sale sales tax considerations. Moreover, not all cities are favorably located in a large shopping region, or have a freeway off-ramp or convenient highway access and exposure. The host city’s boundaries have almost nothing to do with the area from which a retail/commercial facility will draw customers. For example, the Southtowne Mall is just across the freeway from the eastern boundary of South Jordan. The mall no doubt enjoys many purchases by South Jordan residents. Yet Sandy City receives the entire point-of-sale portion of the local option sales tax. Sandy City has some costs associated with hosting the mall, such as fire and police protection above what would be necessary without the mall. But it is axiomatic that Sandy City derives a net fiscal benefit from hosting the mall, the Auto Mall, and other large retail/commercial facilities. Sandy City’s “per capita gross taxable sales” (PCGTS) of nearly $22,000 are markedly higher compared to neighboring suburbs like South Jordan ($7,100) and Riverton ($4,800). Understandably, South Jordan and Riverton are both currently aggressively pursuing retail development within their boundaries so they can benefit from point-of-sale sales tax revenues.

It seems unfair for the point-of-sale city to enjoy the exclusive benefit of the sales tax on sales made for the most part to residents of the larger region. Riverdale City lies at the intersection of I-84, I-15, and Riverdale Road in Weber County. Riverdale has one-tenth the population of Ogden, the largest city in Weber County, but has over five times the PCGTS, which are $83,000 for Riverdale and $16,000 for Ogden (Utah State Tax Commission Annual Report, 2006 fiscal year, annual sales figures, p. 29, divided by 2005 Census population figures). Neighboring Washington Terrace doesn’t have the freeway exposure and heavy highway traffic Riverdale has, but with a populace the same size as Riverdale’s, Washington Terrace gets a puny $1,964 of PCGTS. Riverdale’s annual taxable sales of $653,000,000 are more than 40 times Washington Terrace’s of $16,500,000, with virtually the same population. Washington Terrace residents probably spend nearly as much in Riverdale stores and restaurants as Riverdale’s residents, yet Riverdale keeps all of that point-of-sale revenue. Including the revenue from the sales tax distributed on the basis of population, the bottom line for FY 2005 was that Riverdale received $4,600,000 in total sales tax revenue while Washington Terrace received only $656,000.

Leaders of cities like Riverdale which host regional retail facilities argue that the system is not inequitable with arguments like these: 1. There are many costs associated with hosting regional retail facilities such as additional public safety personnel and equipment and the need to maintain city roads burdened with heavy shopping traffic. 2. Host cities have often had to bear significant infrastructure capital and O&M costs associated with such commercial facilities. 3. The host city probably planned for commercial development and their citizens have dealt with the intensity of the land uses, including traffic, overburdened freeway off- and on-ramps, and other inconveniences. 4. Retail host cities had to pay the political price of zoning for large commercial uses. While it may now seem self-evident that the sites of large shopping facilities should have been located where they now are, it probably was not always so apparent. Residents likely raised stiff opposition to some of these facilities. 5. The extra municipal costs offset the benefits of such commercial developments.

Mayor Jerry Washburn of Orem has opined that cities like his who have regional-scale commercial development may currently be at fiscal equilibrium and questions if anyone knows where the equilibrium point is. Moreover, he believes that changing the system to distribute more of local option sales tax on the basis of population would penalize cities who have developed a lot of retail and who have “played by the rules”. He pointed out that under the existing system, Orem City would have an additional $2 million in sales tax revenue each year but for the population component. (Washburn, 2003)

Still, the incredibly wide variation of sales tax receipts among cities inarguably demonstrates the strong economic
incentive for cities to pursue point-of-sale sales tax revenues. These disparities are easily seen in sales tax per capita data for 2005. Ogden's and Logan's PCGST (per capita gross sales taxes) were about $16,000. Salt Lake City's and St. George's were far greater at $30,000 and $28,000, respectively. Sandy City, a regional shopping area, had PCGST of almost $22,000. The foregoing five large cities are regional economic and shopping centers. However, Riverdale and North Logan are small cities which have a large retail presence and disproportionately high retail sales because of their favorable location in their respective regions, especially Riverdale with an astounding $83,000 PCGST. Farmington had an anemic PCGST of just over $6,000 (Howe, 2006).

NON-ECONOMIC COSTS OF THE FISCALIZATION OF LAND USE

Many people refer to cities' pursuing or permitting retail establishments to improve their bottom line as "Zoning for Dollars". Scholars call it the "Fiscalization of Land Use" (Wassmer, 2002). Some Utah cities make land use decisions in favor of retail/commercial development based on their bottom line. We know this to be true because they say they do so. However, if Farmington and other communities had ways to finance their growth other than by facilitating regional retail growth within their boundaries, they would likely pursue such alternatives as a complement to and maybe even instead of expanding retail facilities in their communities. One wonders whether the citizens of the cities who have developed commercial/retail facilities for sales tax revenue are pleased with the result. Do they view retail and commercial development as necessary to finance a modern city? Do they enjoy large retail developments as providing desirable services and amenities? Do they object to their city's change from a bucolic and identifiable town to a sprawling suburb with fast-food franchises and discount super-stores as its gateway? Has there been a consequent loss of Main Street businesses such as the hardware store, the local grocery, the diner, the deli and the barber shop, and have the residents noted and regretted this loss? Do they care that they now can't tell when they're leaving their town and entering the neighboring one? Do residents care that when most Wasatch Front cities are viewed at their freeway entrances, they are becoming indistinguishable from each other and from the suburban areas of Phoenix, Las Vegas and Southern California? Do they care that we are close to having the same McCity at every freeway off-ramp? Do they regret that suburban commercial development is almost exclusively auto-dependent, sprawl-type development? Do they care that the gateways to their cities and towns are no longer a tapestry of fields and pastures and unique older homes, but a predictable pattern of four-lane roads lined with big box retail, car lots and malls? Will they miss the ambience and connectedness of the traditional town with its smaller scales and the unique flavor deriving from hometown shops and stores and old buildings? Will there be any place to walk to anymore? Is it still possible for a ten-year old living in suburban Utah to ride his bike to his baseball practice or to get an ice cream cone?

MUNICIPAL MIS-ALIGNMENT WITH STATE ECONOMIC DEVELOPMENT POLICIES

As can be seen in the example about Holladay at the beginning of this article, Utah's municipal finance policy runs counter to Utah State's economic development policy. The state aggressively seeks to create and maintain high-paying jobs, to foster the creation of desirable businesses, to fortify the health of and expand existing companies, and to attract businesses from elsewhere. Non-retail business tends to create wealth, while retail business consumes it and adds little to the economy. Retail growth naturally follows population growth without incentives or external assistance. Notably, Utah has an acute need for graduate engineers (software, electrical, mechanical, and civil). These jobs pay from $50,000 to $150,000. (Sutherland, 2007) Their employers typically provide health insurance and other employee benefits, and such employees become net payers to the state rather than consumers of state services.

By contrast, retail enterprises typically pay minimum wage or slightly better, offer few meaningful career opportunities, and rarely provide health insurance and other benefits. Adults working in retail make far less than those working in high-tech companies, in real estate, banking, finance, and other market sectors. Such adults often need state and federal resources to supplement their wages and to compensate for the health and other benefits they lack. A self-sustaining wage for a family of four in the Salt Lake-Ogden SMSA is $44,700 per (Pearce, 2001). Even two parents working full time at $10/hr. will fall short of making $40,000 per annum, and one working parent will make half that. Utah's median wage is about 80% of the national average. This results in high taxes relative to income and in resource-constrained government programs relative to other states. Combine this with Utah's higher number of children per household and its disproportionately young population, and the result is that our public education and other public programs suffer from serious under-funding compared to other states. Because cities are economically rewarded by pursuing retail development, they may give industrial and office development short shrift. Moreover, the strong suburban bias against multi-family rental units sharply restricts the availability of low-cost rental housing, where most people start their adult lives and in which most of the workforce must live until they can afford a home of their own. Many of the conflicts between proposed rental housing and existing suburban single-family residents could be avoided if more sites were made available for such rental units, sites which are currently deployed, zoned or planned for retail uses. Certainly, retail competes for sites with industrial, office, and multi-family rental projects. Given the strong systemic economic bias towards retail in Utah's municipal fiscal structure, it can hard-
ly be doubted that more industrial, office and rental projects would be developed absent such bias.

Utah’s urban freeways and highways are clogged with commuters traveling from suburban cities to work. If suburban cities had significant economic incentives to create jobsites and attract capital investment in businesses, it could materially reduce commuting, with its public costs in money, pollution, and wasted resources and its private costs in money, time, and lost family and social interaction. If a change in land use policy at the city level could be effected which created more job sites in the suburbs, it would pay huge dividends. Reducing VMT’s (vehicle miles traveled) by only 3% would result in a reduction in congestion of 10%. (Wasatch Choices 2040, 2007) and the consequent savings in time and money would be significant. Commendably and against the grain of local incentives, West Point, Syracuse and Clearfield are considering entering into an interlocal agreement to cooperate in the development and zoning and sharing of revenue in the Davis Economic Development Cooperative. “An overriding idea is to create lots of jobs over time, so that residents of the area won’t have to commute long distances to work — employment, entertainment and shopping will be closer to home.” (Ogden Standard Examiner, 2007)

IS THERE A BETTER WAY?
The best sales tax distribution system would 1) align municipal incentives with State economic development goals of creating jobs and facilitating desirable business growth, 2) let retail develop naturally as it will, 3) fairly offset municipal costs of hosting regional retail developments, and 4) allocate to cities a significant portion of local option sales taxes on a population basis in recognition that sales taxes are paid by the populace.

In 2005, I introduced a SB 169 in the Utah Legislature. Although the language of the bill was never finalized, my announced and widely-discussed intent was to change the local option distribution formula to 25% for the point-of-sale city and 75% for all cities based on population. I had worked with a respected economist to try to estimate the “hosting costs” associated with regional retail development. However, the many different kinds of retail (whether “new” or “old”, neighborhood or regional, etc.) and the many varying conditions cities deal with in hosting retail proved to be too complicated to reduce to a statutory formula. The 25/75% split attempted to strike a rough balance between compensating the host city for its costs while removing the incentive to create retail facilities. The proposal would also have had a hold harmless formula “freezing”, i.e. grandfathering cities’ existing point-of-sale revenue, so that the change in distribution would be prospective only. Nonetheless, the Utah League of Cities and Towns vociferously opposed this bill, although several cities expressed support for a change along these lines. I didn’t push the bill, hoping that in time we could develop a more appealing proposal.

Ogden Mayor Matt Godfrey and his staff suggested one interesting idea for a new distribution formula, which would reflect multiple factors such as total payroll of businesses in a city or other job-related figures in an effort to balance the cities’ costs and benefits of hosting retail as well as giving due credit to cities who hosted job sites. Salt Lake City Mayor Rocky Anderson and his staff have also been very interested in changing the system as their city’s expenses in hosting a huge day-time workforce are very high and are not fully recouped, in their view, through only point-of-sale sales taxes.

CONCLUSION

Like all rational creatures, city leaders respond to financial incentives. Utah’s municipal fiscal structure provides a strong bias in favor of cities facilitating regional retail development. Most of this development has been sprawl-type auto-oriented retail and commercial facilities. Such development often comes at the cost of losing traditional Main Street-type businesses and the scale and flavor of the historic places from which these suburbs have grown. The economic development incentives applicable to cities are misaligned with the State’s goals of non-retail job creation and business growth. Cities’ fiscal bias towards retail development has worked against siting more industrial and office facilities in suburban locations, which has seriously increased commuting and its attendant public and private costs such as congestion, pollution, and highway capital and maintenance costs.

The current municipal point-of-sale sales distribution formula is neither fair nor good policy. A new formula could protect cities that have invested in retail facilities, yet could begin to wean municipalities from over-reliance on sales tax dollars and even give them incentives to align themselves with State economic development goals by providing for more office, industrial and non-retail commercial development in their communities.

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Voices from the Classroom
The Effect of Class Size on Teaching and Learning

Representative Carol Spackman Moss

Teachers are expected to reach unattainable goals with inadequate tools. The miracle is that at times they accomplish this impossible task.

Dr. Haim Ginott – teacher and child psychologist

Strolling into third period French class, 42 high school students, shoulders bent from carrying backpacks bulging with books, notebooks, lunches, CDs, iPods, cell phones, and writing utensils, move cautiously down narrow aisles to their seats. Their classroom, originally designed to accommodate 30 desks, now has 42 desks, wall-to-wall, each one filled nearly every period. Once everyone is seated, the aisles are no longer navigable. For the teacher, Mme. D., walking to a student’s desk is like negotiating a minefield. After the bell rings, she starts directing questions in French to various students.

As most people know, to successfully learn a foreign language, a person needs to practice conversing in that language. In a class this size, for the teacher to question each student for even two minutes would take 84 minutes of a 90-minute period. Then add time for grammar instruction, history, culture, or geography. If you include time for students to ask questions, check on missing assignments, pass back tests or hand in assignments, one can see that this highly qualified, well-organized, enthusiastic teacher may not be able to meet the goals she has for her students: to speak, write, and read French.

In Mme. D.’s French class and in countless classrooms throughout Utah, individualized instruction, the opportunity for a teacher even to make eye contact with each student, has become nearly impossible. Sadly, her class is not the exception; rather, it is the rule. Mme. D. has 38-42 students in each of her six classes. Additionally, because of the demand for foreign language classes, she gives up her consultation period each day to teach two additional sections. Her total enrollment: over 300 students.

In most of Utah’s high schools and junior highs, the average class size increase in the past six years has been 7 to 10 students per class. This includes required subjects like English, history, math, and science, as well as elective courses like foreign language, art, and music. Currently, it is not uncommon for English and history teachers to have total enrollments of more than 200. Furthermore, for many science teachers, it is nearly impossible to conduct labs because the rooms were designed with 25-30 lab stations; too few to accommodate the 38 plus students enrolled in most science classes.

Down the hall from the French class are two math classes—calculus and basic math. The calculus class has 46 students, basic math has 42. The two math teachers, like the French teacher, have outstanding reputations for successfully working with students of wide ranging abilities. While the calculus class has highly motivated, competitive students, basic math has students who struggle to learn computational skills or to balance a checkbook. Many simply hope to pass the class, or at the very least, pass the math portion of the Utah Basic Skills Competency Test (UBSCT) in order to receive a “basic high school diploma.” Still, in both courses a number of students require individual help, want answers to questions, and time to work problems under the teacher’s supervision. With more than 40 students, even in a 90-minute period, the time is insufficient to engage in the detailed, one-on-one instruction necessary for students to master even simple math concepts, much less complex ones in calculus or trigonometry.

Because of the crowded conditions, the calculus teacher told me, “I am certain if the state fire marshal were to do an inspection he would shut down my classroom or demand removal of at least ten students since the lack of space between rows would prevent a safe, orderly evacuation in an emergency.” In fact, one junior high in Granite District has, for safety purposes, banned backpacks from classrooms altogether.

Sadly, the scenarios I have described exist in schools throughout the state. In my own teaching career, in conversations with countless teachers and students, and in visits to many schools, I have found that overcrowded classrooms are the norm. While the most crowded classrooms can be found
in suburban schools along the Wasatch Front, I have also heard reports of similarly large classes in some small rural schools.

The most serious consequence of large class sizes is that they determine the teaching methods teachers use and dictate the way students learn, often with negative consequences. For example, large classes inevitably lead to more direct instruction, i.e. lecture, and note-taking. While lecturing is often appropriate or necessary, when it becomes the only teaching method, students with different learning styles suffer. Teachers use the lecture method more often with large classes because of the difficulty of directing a discussion with 40 students. In large classes fewer students ask questions and those who do are typically the more aggressive ones who often dominate the discussion. Additionally, teachers with large class loads will, out of necessity, assign fewer essays or research papers, give more multiple-choice tests, avoid group work, and assign fewer student presentations. Most difficult of all, though, is the overriding issue of discipline and behavior management in a large classroom of students.

One 7th grade teacher told me how class size limits her teaching style: “First, I don’t have enough space in the room for students to work in groups of three, plus the noise level is too high with that many talking at once. Second, because we have to spend so much time preparing for all the state and federally mandated tests, I have precious little time to have students do creative, team-oriented assignments like class presentations.”

Another teacher with 31 students in her 6th grade class said, “Every teacher, every parent, and every principal can tell you that kids can’t learn in classrooms that are bursting at the seams from overcrowding. When will our legislature address this serious problem?”

If classes were smaller, how might instructional strategies change and how would students benefit? First, teachers would assign more projects requiring creative thinking and production of a product. Given the freedom to do creative work, many students display remarkable talent, especially in their use of technology. For example, many teenagers have the capability to produce power point presentations and make videos, complete with music and sophisticated editing. Also, portfolios of student work which include a variety of assignments over time, give better assessments of student progress than standardized tests. Yet, since portfolios take much longer to grade than objective tests, teachers are more inclined to choose the tests for evaluating student progress.

A 2006 TIME cover story cautioned that our American schools have not kept pace with the skills students will need in the global economy which demands not only competence in traditional academic disciplines, but also what might be called 21st century skills. Some of these skills include:

- Knowing more about the world, being conversant in other languages, knowing geography and global trade issues.
- Cultivating creative and innovative skills, seeing patterns or trends, thinking across disciplines.
- Understanding new sources of media and more importantly, learning to interpret, evaluate, manage, and act on them.
- Developing good people skills. Emotional intelligence or EQ has been cited as being as important as IQ. “Most innovations today involve large teams of people,” says former Lockheed Martin CEO Norman Augustine. “We have to emphasize communication skills, the ability to work in teams and with people from different cultures.” (Wallis & Steptoe, 2006).

For students to acquire 21st century skills, they need to learn in a variety of ways, not simply through note-taking and memorization of facts. While the federal No Child Left Behind Act (NCLB) has put renewed emphasis on reading and math, the required assessments determine little more than basic literacy skills, not higher-level thinking skills. But these higher-level skills do not come naturally; they are learned. Critical thinking skills are taught through rigorous assignments, lively class discussions, and most importantly, through written responses, essays and research papers which require a student to organize ideas, focus on a thesis, and defend it with multiple means of support. Writing, combined with close reading, is among the most valuable aspects of schooling. (Schmoker, 2006). As the National Commission on Writing tells us, writing “requires students to stretch their minds, sharpen their analytical capabilities, and make valuable and accurate distinctions” (2003).

Even though most teachers have the desire and ability to teach creatively and make challenging assignments, many have gone into a pure “survival mode” given the difficulties of managing huge numbers of students and grading an overwhelming number of tests and written assignments. For instance, if an English teacher with 200 students assigned one essay per week, and spent only 5 minutes grading each paper, it would take over 16 hours to complete one set of papers. That’s two hours every day of the week, in addition to the time spent teaching, preparing lessons, and fulfilling a required extra-curricular assignment. A popular high school English teacher and cancer survivor who is retiring this year told me, “I had planned to teach a few more years to make it to 30 years, but it has simply gotten too hard with the huge class loads we carry.”

Another warning of today’s educational shortcomings came from Bill Gates in February of 2005 when he delivered the keynote address to the nation’s governors at the National Education Summit on High Schools. His thesis: America’s high schools are obsolete. “They were designed,” Gates said, “to meet the needs of another age” (Gates, 2005). He went on to say that only one-third of our students graduate from high school ready for college, work, and citizenship. Here in Utah we should be proud that the dismal figures Gates speaks of are not yet the norm for our high school graduates. Yet
more and more of our low-income, minority kids are not getting the education that will prepare them for even a living-wage job. Central to the redesign Gates proposed were three principles that should be applied in every school—the new three R’s:

- The first R is Rigor - making sure all students are given a challenging curriculum that prepares them for college or work;
- The second R is Relevance - making sure kids have courses and projects that clearly relate to their lives and their goals;
- The third R is Relationships – making sure kids have a number of adults who know them, look out for them, and push them to achieve. (Gates, 2005)

The three R’s Gates speaks of are unquestionably easier to accomplish in smaller classes and in smaller schools. I believe the optimum size for a high school is 1300-1500 students with class sizes of 25-30. Such moderate-sized schools can offer a rich and varied curriculum, including a number of Advanced Placement courses, an International Baccalaureate Program, Concurrent Enrollment Courses, and vocational and technical courses as well.

The third R, forming relationships, can only occur in smaller classes which allow teachers to create an environment of trust and encouragement. Small classes can prevent students from “falling through the cracks” because a teacher is able to address their individual needs and handle problems before they escalate. Student motivation and satisfaction increases in smaller classes. A student recently told me the best thing about her small creative writing class, compared to her other classes of more than 40 is “The teacher knows me.” Not surprisingly, parents who send their children to charter schools or private schools tell me they do so for three reasons: (1) smaller classes, (2) more individualized instruction, and (3) more attention on core classes like English, math, science, and history. Should not public schools be able to provide the same advantages to the 96% of our students who attend public schools?

Can our public schools, originally designed years ago to educate workers for fat less technical jobs, make the necessary shifts and prepare students for a technologically-based, global world? Only if we make a strong commitment to creating smaller learning environments which will allow teachers to foster the kind of collaborative learning that prepares students with 21st century skills. Public education in Utah will not, however, be able to meet these challenges if policymakers do not respond to the significant concerns of parents and teachers to unreasonably large class sizes. Since the late 1990s the combined effect of increased student enrollment, the impact of budget cuts, or budgets lacking enough funds to accommodate growth, and resigning or retiring teachers, have dramatically increased class sizes, which have now reached intolerable levels.

One reason for the inaction on the part of policymakers is that local districts report Utah’s class size average as 28 in high school and junior high and 22 in elementary. These averages, with some exceptions, are NOT what teachers and students experience every day. Why is there such a disconnect between reporting and reality? Because most school districts compute average class size on a formula that includes special education classes which are typically small, ESL classes, also usually small, and library and office aides which may number two or three. Some districts also include teacher’s consultation periods in the count when, in fact, they have no students at all. By averaging these small classes, along with the classes of 40 or more, the numbers look much smaller than they actually are.

These unrealistically low numbers, when reported in news stories and in legislative committee meetings, have resulted in some lawmakers drawing conclusions that class size complaints lack merit. My response to legislators is simple: visit classrooms, and visit many of them. Spend an entire day with a teacher or teachers and see for yourself. Legislators might then learn that the teacher shortage results from a combination of dismally low salaries, the increased burden on teachers’ time, and decreased satisfaction in the classroom, causing teachers to be overwhelmed with classroom management issues, in particular, discipline and the basic necessity of keeping large numbers of students “on task.”

Because teachers have a responsibility, as well as a desire for the success of all children, they need the best possible learning environment to accomplish their objectives. Smaller classes make a significant improvement in this environment. (Alberta Teachers’ Association, 1998.) Unfortunately, in Utah the push for funding class size reduction has collided with the view of many lawmakers that they can address only one education problem at a time. For example, in the 2007 Legislative Session, the primary funding focus for public education was teacher salaries. Some legislators asked teachers and education representatives if they wanted higher salaries or lower class sizes. What an impossible choice! The two issues are inseparable. A 7th grade Utah History and English teacher recently said to me, “Give me the salary I am getting now and reduce each of my classes by five to ten students and I could address the needs of all my students. Plus, it would reduce the time I spend grading papers, enhance the type of assignments I give, and reduce classroom management issues.

Teachers of smaller classes, some who have fled Utah to teach in other states, or to teach in private schools, speak confidently about their teaching, their pupils’ progress and their ability to reach those with special needs, ranging from those with disabilities to the highly gifted.

Parents also see the benefits of smaller classes and are very eager to have their children in smaller classes, believing that disruptions will be minimized and individual attention maximized. Recently, a parent told me his son was in a first-grade class of 31 children, and the first-year teacher, according to the father, “has her hands full and seems overwhelmed at times.” Though parent volunteers provide some assistance,
the ultimate responsibility for the students’ achievement, particularly in reading, lies with the teachers and their ability to teach every child in that class.

When many states have class size standards for kindergarten through 3rd grade of 20 or below, it is unrealistic to expect Utah teachers, with much higher numbers, to accomplish the objectives set by state and national standards, particularly if they also have large numbers of non-English speaking students. For the past two years the Utah Legislature has failed to fund a class size reduction bill for $30 million which would have reduced classes in K-3 to 20 students per class. Even though funding is available in these times of record tax surpluses, it has gone for other priorities, the biggest one being transportation.

The recent passage of a voucher program to subsidize private school tuition, if enacted, threatens to further divert money away from public schools, pushing class sizes even higher. For example, if 25 students were to leave a public elementary school for a private school, the public school, according to current staffing ratios, will lose one teacher, causing an increase, not a decrease in class sizes as the voucher proponents claim.

These are critical times for public education in Utah with a burgeoning young population to educate and a looming teacher shortage. Yet the future of a successful community and state rests on the quality of education provided for its children. School district officials and state legislators must listen to the “voices from the classroom” and work together for a long-range funding plan to correct the serious problems of overcrowded classes. From many studies we know that teaching itself trumps all other factors affecting school and student performance, and if the shortcomings of most instruction are correctable, then bold steps must be taken to correct the damaging trend of “stacking them deep, and teaching them cheap.” Further studies are not needed to understand that to make unprecedented improvements will require that we make unprecedented changes in priorities and allocation of resources. The stakes are too high for us to fail. The financial journalist and founder of Forbes Magazine, B.C. Forbes aptly expressed how important the stakes are when he said, “Upon our children—how they are taught—rests the fate—or fortune—of tomorrow’s world.”

REFERENCES

iProvo: A Telecommunications Success Story

By Lewis K. Billings, Mayor of Provo

Throughout history, new technology has been at first criticized and outcast. In 1977, Ken Olsen, President and Founder of Digital Equipment Corp., said to his employees, “There is no reason anyone would want a computer in their home” (Many, 2005). Many Provo City employees can tell you the story of how a previous Mayor lambasted fax machines and said they would never be of any use. The area of telecommunications is always a prime target for this disparaging. It seems people often do not understand the communications needs of the future. Whether this criticism comes from fear of competition or just not understanding the technology, innovators still often find themselves having to rigorously defend their work. In Provo City with the creation of iProvo, I have found myself in this position.

iProvo is the largest municipally-owned Fiber-to-the-Subscriber™ (FTTS) network in the United States. The fiber optics infrastructure passes by each home and business in Provo. Bandwidth on this ultra-high capacity network is leased to private companies who provide retail telecommunications services, such as telephone, internet, and television. In addition, it allows many services not possible with other current technology, such as fully interactive distance learning, full-motion videoconferencing, uploading and downloading of immense graphics files, video gaming, telemedicine applications, business-to-business connections, telecommuting and numerous school, local community and neighborhood applications. iProvo is designed to be part of a public/private partnership where the essential infrastructure is owned by the public, but the services are provided by private sector companies.

From the standpoint of bandwidth alone, nothing can compare to fiber. In fact, the only thing limiting fiber’s capacity is scientists’ ability to break the spectrum of light into finer detail. In addition, fiber will not become obsolete. The glass fibers that carry pulses of light have virtually infinite capacity; a single strand of fiber transmitting multiple frequencies of light could conceivably carry all the phone traffic for the entire planet. With new technologies being developed, the capacity is almost unimaginable.

I strongly believe fiber-to-the-home and office is the only technology that will meet future needs. This network as deployed today operates at gigabits per second. It truly allows the network to become the computer, making access to internet applications as fast as to one’s own computer hard drive. This network will enable products that we have yet to conceive of, but that are certain to become necessities for living well and working well in the decades ahead.

An example of this is telemedicine. During the testing of the iProvo system we had a doctor who was able to transfer full body scans very quickly via the fiber-to-the-hospital facilities from a satellite office. This is just one example of the many opportunities that exist in the medical field for iProvo to support. The need to quickly transfer complex files to medical personnel and hospitals throughout the country could translate, literally, into saving lives. iProvo connectivity opens the possibility for our residents to have access to any doctor or medical specialist in the world in a timely and meaningful way.

One of the daily newspapers in Utah editorialized against iProvo, saying high tech projects like iProvo should be left “to the dreamers” (Deseret Morning News, 2003, P. 12). I admit it. I am a big dreamer. But I believe that big dreamers built this country. Big dreamers built our communities. Big dreamers sent men to the moon. With iProvo, we are dreamers, but we are also doers – very practical doers. My goal is to position Provo for the future. We have three choices. We can follow and die; stay even and survive; or we can lead and prosper. I want Provo to prosper, and iProvo is how to do that. We are building the infrastructure of the future, and in the process we are facilitating commerce and enabling whole new ways of living and doing business.

Local governments have always been facilitators and partners with private businesses and free enterprise and have the role of providing infrastructure that is too difficult or too expensive for a private firm to provide alone. Municipalities enable robust competition in the private sector by providing basic services like police and fire protection, and by installing and maintaining essential infrastructure like roads, bridges, and water systems. Today, basic telecommunications infrastructure is crucial to a community’s success.

Former FCC Chairman Michael Copps said, “... broadband networks are indeed the roads, the canals, the railroads and the interstate highways of the Information Age. All of these were built with the public and private sectors working together to provide Americans with the infrastructure we needed in order to prosper” (Copps, 2003).

An example of how this public-private partnership should work is an airport. Would it make economic sense for each airline to own its own airport? Obviously not. Airlines cannot justify building their own airports, and cities do not try
to operate airlines. Cities provide the infrastructure of the airport itself, and each airline pays its share through operating fees. Airlines share costly public infrastructure, offering services over it and competing on price, customer service, destination availability, etc. This is exactly how iProvo works. We developed the infrastructure, making fiber connections available to every home and business. But private contractors provide the services to the consumer and compete for each customer's business.

Many telecommunications experts believe this model is the best way to provide advanced telecommunications services to homes and businesses:

“There is a wide class of municipalities for which a municipal broadband network is not only viable but is essential if the deployment of broadband is ever to be achieved. By developing an open-access broadband infrastructure, the Town can unbundle the network and provide wholesale network access . . . This assures a level playing field and creates a competitive environment which in turn will likely manifest itself in low prices, high quality of service, and a diversity of broadband products and services to customers. The service providers need scale and efficiency in local distribution and they cannot each deploy such distribution. A municipal network is . . . the very most efficient and economically viable alternative to get service providers to homes and local businesses” (McGarry, 2002).

Without local ownership and control these rich telecommunication services would not have been made available to all residents and businesses in Provo. It is local government’s core mission to build infrastructure for everyone and for the long term. Building a high speed communications infrastructure is a logical next step for community growth and quality of life.

**Why iProvo is Needed**

When I first ran for Mayor, one of my platform planks was that I would seek to use technology to benefit our residents and businesses. After the election I set out to do this. Working with City employees, it became clear that the City needed a fiber optic network to control traffic lights and traffic cameras, to connect City facilities, to enhance public safety capabilities, to accomplish electrical distribution system SCADA (Supervisory Control and Data Acquisition) monitoring and control, and to provide other municipal services.

At the time, five private sector companies had franchise agreements to provide fiber connectivity in Provo, but none could or would provide what the City needed. Telecom companies have said it is too expensive to run fiber to every home and business. Their return on investment would not be quick enough. Because the private sector was not going to provide what the City needed, we began to work to meet our own needs. As we built a backbone and began to develop and deploy internal applications, businesses and residents began to express similar needs for connectivity.

Let me assure you that I am a champion of the private sector. I am from the private sector. My background is business. I feel strongly that government should not do what the private sector can and will do. But no single telecommunications company could justify such an investment. Cities, however, are suited to install this infrastructure because their capacity is so great it can be shared among many competing firms and the investment repaid over a longer repayment period than a private company could justify.

There is an old saying that we always overestimate the impact of technology in the short run but underestimate it in the long run. The spectacular implosion of the dot-com balloon a few years ago did nothing to invalidate the underlying technologies that have continued to develop unabated. Today, many internet businesses are making profits and doing extremely well, and any business or government entity without a robust internet strategy is in serious trouble. Ultra-broadband capabilities in every home and business accelerate the transformation of whole industries. Every web site becomes a potential full-motion video broadcast channel, and every computer becomes a potential receiver of millions of these broadcast web sites.

A 2006 U.S. Department of Commerce study concluded that economic growth and jobs are going disproportionately to communities with strong communications access deployment (US Department of Commerce, 2006). The communities that can offer dependable, reasonably-priced, high-speed connections are preferred, other things being equal, over communities that cannot.

Commissioner Copps agrees. “In the 21st century, having access to advanced communications and information will be every bit as important as access to basic telephone services was in the 20th century. I believe that providing meaningful access to advanced telecommunications for all our citizens may well spell the difference between continued stagnation and economic revitalization” (Copps, 2001).

Consider an example I will refer to as a “Tale of Two Cities.” Cedar Falls and Waterloo are adjacent cities in Iowa, literally across the street from each other. They have similar tax structures, educational levels and economic bases. Yet, in the last decade, Cedar Falls has seen great growth in business relocations, construction and tax base, while Waterloo’s economic growth has been stagnant. What made the difference?

Most observers attribute it to a giant step Cedar Falls took in 1996 when it made fiber-optic connections available to every home and business in the city. Following that, annual new construction in Cedar Falls tripled from $32 million in 1996 to $101 million in 2002. Waterloo remained flat, hitting an 8-year low in 2002 at $53 million. In documenting this, Doris J. Kelly concluded,

“There may be no single thing more important in a community’s efforts to achieve economic well-being than to grasp the role that telecommunications plays in creating meaningful jobs, enhanced education and world-class healthcare. Now, more than ever, the direct link is evident between advanced communications and productivity and economic development” (Black & Veatch, 2004).
The advanced technology companies clustered in the Provo/Orem area are second to none. Many up-and-coming high-tech companies are quickly carving a niche for themselves here. The 40-mile strip between Salt Lake City and Provo was described in The Economist as “the world’s second-biggest swath of software and computer-engineering firms after California’s Silicon Valley” (1994). iProvo supports and attracts these companies. This year, Provo was ranked number two in best places for business and careers by Forbes Magazine, the highest ranking Provo has ever received in the numerous times it has been ranked (Badenhausen, 2007). Provo is seeking a diversified economic base, and iProvo is an attractive draw for all types and sizes of industry and business. Additionally, Inc. magazine ranked Provo number seven in the hottest midsize cities for entrepreneurship for 2007, up from number nine in 2006 (Shires, 2007). iProvo fiber services make it possible for a start-up company to have the same telecommunications resources as a large established company. One of the truly exciting things about iProvo’s ultra-speed technology is that it spawns entrepreneurial activity, resulting in even more services and applications.

Fiber-optic access provides a higher quality of life to residents also. Reasonably-priced access to a high-capacity network provides residents new potentially life-changing possibilities. Advanced services and visual communications that were unreliable or of poor quality when operated on a traditional network are suddenly not only possible but also practical on a high-capacity active fiber network. Provo citizens and businesses want to compete in the global marketplace. We want to attract businesses and residents who are on the leading edge of advanced technology. We do not want to become second-class citizens of the on-line world, languishing at the bottom of the digital divide.

U.S. NEED FOR BROADBAND
The United States has traditionally led the world in technology and innovation. Through most of the 1990’s, the U.S. led the world in high-speed connectivity (Kushnick, 2006). Yet the United States has dropped to 15th place in broadband deployment (Organization for Economic Co-operation and Development, 2007). With 58.1 million broadband subscribers compared to 116.5 million U.S. households, only one-half of the U.S. population is using broadband. And only .3 percent of those subscribers are to fiber. This is only roughly 174,000 subscribers to fiber-to-the-premise networks, compared to 7.9 million in Japan. Though the large rural areas in the United States can make fiber deployment difficult, when compared to the metropolitan-like area of Japan, it does not explain why large metropolitan areas in the United States do not have fiber-to-the-premise access.

Access to broadband and better broadband like fiber is increasingly important. A 2004 study concluded that average households will need 57-72 Mbps of bandwidth by 2009 - much more than can be offered by basic broadband of DSL and cable (Baller & Lide, 2006). And businesses will need much more than that. Only fiber-to-the-premise has the ability to offer that bandwidth to all consumers on a network.

The Brookings Institution estimates America’s broadband decline could lead to a loss of $1 trillion in economic productivity over the next decade, as well as more than 1.2 million jobs that could be created by better broadband (Reinan, 2006).

CURRENT TYPES OF TELECOMMUNICATIONS SERVICE
The term broadband is so widely used that it can only be understood in context of the speed, data transfer capacity, and security the technology offers to the user. These attributes are also the parameters that define the user applications the broadband service can support. Older broadband technology, especially those using the existing copper wires in some form, are often hampered by the ability to send information from the user’s computer to the Internet. In addition, environmental impacts can harm or damage the transmission of many of these older technologies. Fiber-to-the-premise broadband offers a broadband solution that overcomes the shortfalls of DSL, cable modem, wireless, satellite, and broadband over power line systems. These slower broadband systems can be good interim solutions given the limitations of the speed and data transfer capacity that each can offer to a user, but they are not at all sufficient in the long term view of what is happening with technology and data.

When referring to internet connectivity, the Federal Communications Commission (FCC) many years ago defined an access speed in excess of 250 Kbps as broadband. However, this traditional FCC-defined broadband speed is very slow by today’s standards, especially considering current applications like online gaming, file sharing, streaming video or voice over Internet protocol phones (especially for upload speeds). Upload speeds for most of today’s broadband users are as critical as download speeds. The FCC-defined broadband speeds are hardly adequate to transfer typical video content, such as pictures and movies, or even large files, such as programs and slide shows, especially when looking at the projected future needs of users. Following is a more in-depth description and comparison of the types of broadband.

DIGITAL SUBSCRIBER LOOP
DSL describes the most common method for sending data over a phone line in residential applications, although it can be used for businesses. While it technically would qualify as broadband by the FCC definition above, it is the slowest broadband technology commonly used for internet access. Although claims of speeds as high as 8 Mbps are sometimes made, typical connections operate at 1-2 Mbps downloading and 250 Kbps uploading. Even these speeds are not guaranteed. This technology uses the traditional copper wires and is limited by the capacity of this old technology. Copper wires use electrical signals which are prone to interference by other devices.
COAX / COAXIAL
Coax or Coaxial is used to describe the type of wire used by most of today’s cable systems to reach the home or business. It is metallic, usually copper, with a center conductor and an outside wire mesh or metal foil shield.

FIBER OPTIC CABLE
This cable is made of a very thin strand of glass with a protective cover. It can carry light signals generated by a laser for several miles.

HYBRID FIBER COAX SYSTEM
This type of system, commonly called HFC, is used by many cable companies today. It includes fiber-optic cable from the office of the cable company to the neighborhood of the subscribers and coaxial cable from that point to the home or business. Several hundred subscribers typically share a single fiber with the optical signals converted, split, and amplified once they reach the coax. This type of system can operate at a few Mbps for downloading and a few hundred Kbps for uploading. However, this capacity is shared by all the subscribers sharing the fiber from the hub to the head end facility. The more users on the system, the slower the speeds that each subscriber experiences since there is a shared use of a single fiber access point. The use of amplifiers is another point of weakness in the system delivery and a cause for outages.

CABLE MODEM
Cable modem is a type of modem that provides access to a data signal sent over the cable television infrastructure. Bandwidth of cable modem service typically ranges from 3 Mbps to 6 Mbps for downloading. The uploading bandwidth on residential cable modem service is most often 384 Kbps. However, many cable internet providers are reluctant to offer cable modem access without tying it to a cable television subscription, adding to the cost for the consumer.

WIRELESS
This type of system uses radio waves to communicate between users. These systems are well suited for mobile or portable applications and operate up to tens of Mbps. The drawback to these types of systems is finding radio frequencies that are available for use. The most common form of wireless system for data today is specified as 802.11 and commonly called Wi-Fi. Certain frequencies have been dedicated for Wi-Fi use, and these frequencies are shared by all Wi-Fi enabled devices today. These frequencies are often crowded, and when they are, the capacity is shared by all users. Wi-Fi capabilities are typically from 5 to 50 Mbps, shared by all users. If the frequencies get too crowded, the devices can cause interference with each other, and then no data can be transferred. Wireless data connections are actually quite tenuous. Climatic conditions such as rain, snow, and wind can cause connection problems. Line of sight between antennas is required for good wireless connections but not always possible. Since these devices are not regulated, this can sometimes be a problem. Security of a wireless network is considered to be inadequate by most network managers. While this may improve with enhanced encryption schemes, wireless connections will never match the security that is possible with a fiber connection.

SATELLITE
This means of data communication is reasonably good for downloading data. Unfortunately, uploading data can be quite difficult. Early systems uploaded data using a dial-up telephone line. The best application for satellite seems to be satellite television broadcasting. Weather and interference to the satellite inhibits transmission of these systems.

BROADBAND OVER POWER LINES (BPL)
The electric power lines can be used to transmit data along with the electric power. However, because the electric distribution system was not designed to carry high speed data, BPL suffers from some serious problems. When used to carry high frequency data, it radiates electromagnetic signals that interfere with radio signals used by aircraft and amateur radio operators. These signals are blocked by transformers, so special adaptations must be made to route the signals around transformers. Similar to wireless technology, it also has inherent security issues.

FIBER-TO-THE-PREMISE
This type of broadband system (iProvo is an example) uses fiber transmission from the network operations center all the way to the individual home or business. These systems operate at typical transmission speeds of 100 Mbps to 1 Gbps for each subscriber whether downloading or uploading data. A properly designed network allows many subscribers to share backbone fiber without slowing down the experience. Fiber-optics has many advantages over the traditional copper wire technology that has been used over the past hundred years as it can carry light signals generated by a laser for several miles. Fiber-optics are thin pieces of glass that are made of extremely pure optical glass that is thinner, less expensive and can co-exist with electrical wires without any interference. Fiber-optics provide less signal degradation than copper wires because of the use of light to transfer data and are ideally suited for digital signals which are important for computer networks. While the electronic equipment on each end of the fiber would need to be upgraded at regular intervals, fiber technology can be used far into the future due to its ability to continue to expand capacity by dividing the light by color. The virtually unlimited capacity that fiber optics offer to current and future applications ensures that a community needs only one fiber system built to meet its broadband service needs. Ownership of rights-of-way and access to the use of electrical conduits can also greatly reduce the costs of construction of a fiber system.
OSI MODEL (OPEN SYSTEMS INTERCONNECTION BASIC REFERENCE MODEL)

OSI Model describes how information is exchanged between different information systems over networks. It consists of seven layers, each with its own rules and procedures.

INTERNET PROTOCOL (IP)

IP is a network protocol at layer 3 of the OSI model. IP is the protocol used to determine the path and logical addressing of devices and can pass information between networks. The IP protocol by itself does not guarantee that the data will arrive at the receiving end without errors. A higher level protocol is required for that, such as TCP, Transmission Control Protocol, at layer 4. Together, the TCP/IP protocols are used to make sure data is transmitted error-free over the Internet.

IP VIDEO

IP Video describes the process of sending video content over a packet-switched network using the Internet Protocol. This differs from analog video which is used for broadcasting video over the air or over older cable systems, and from digital video, which is used by cable and satellite systems and which requires a receiver, usually called a set-top box or cable box. These boxes convert the digital video back into a signal that a TV can use. IP Video also requires a receiving set-top box.

BIT

A bit is the smallest unit of information that digital computers use. It can have only two values, 0 or 1. Inside computers, these two values are often represented as a switch that is either on or off.

BYTE

A byte is 8 bits. It can represent 256 different combinations of 8 bits set to 0 or 1. It can therefore represent 256 different values.

Mega, Giga

Mega and giga are prefixes and stand for million and billion respectively. A megabit is a million bits, and a gigabyte is a billion bytes.

FEDERAL LEGISLATION ON BROADBAND

The Telecommunications Act of 1996 was the first major reform of United States telecommunications law in 62 years. It significantly amended the 1934 Communications Act and, on a more limited basis, the 1984 Cable Act. The Act contains seven titles that cover issues from regulation of telecommunications carriers to indecent programming on cable television.

One of the major thrusts of the Act was to advance competition in all areas of communications services. The Act abolished rules that previously prevented telephone companies from entering the cable television arena and cable companies from offering telephone service. The Act also relaxed or removed barriers to consolidation, merger and acquisition, and integration of services. Section 706 of the Act charges the FCC with “encouraging the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans” by “regulatory forbearance, measures that promote competition . . . or other regulating methods that remove barriers to infrastructure investment” (Telecommunications Act of 1996).

In 2002, the FCC ruled cable modem service as an “information service” keeping it free from the regulations traditionally imposed on incumbent telecommunications providers, including the requirement that their networks be available to other providers. The ruling was upheld by the Supreme Court in National Cable & Telecommunications Association v. Brand X Internet Services. Subsequent to the Supreme Court’s decision, the FCC ruled in August of 2005 that DSL would also receive regulatory treatment as an “information service” in an effort to “place all broadband internet access providers on a level playing field” (Martin, 2005).

In 2004, against the backdrop of state legislatures erecting barriers to municipal entry into telecommunications, the Supreme Court issued an opinion in the case of Nixon v. Missouri Municipal League. The issue before the Court was whether the language in Section 253 of the Act pre-empting state or local legislation that prohibits the ability of “any entity” from providing telecommunications services included municipal entities. The Court ruled Congress did not intend “any entity” to include municipalities. The effect of this opinion is that states are allowed to limit—or flat out prohibit—municipalities from providing telecommunications services (Nixon v. Missouri, 2005).

HISTORY OF IPROVO AND STATE LEGISLATIVE ISSUES

The population of Provo is approximately 115,000. It is located high in the Rocky Mountains, bordered by Utah Lake on one side and mountains rising as high as 14,000 feet on the other. Robert Redford’s Sundance Ski resort is located in Provo Canyon 20 minutes away. Provo is the county seat and home of Brigham Young University, one of the largest private universities in the country with some 30,000 students. Provo is the birthplace and/or home of many important businesses such as WordPerfect, Novell, Nu Skin, Morinda, and Steven R. Covey.

Provo is the largest public power city in the state. Provo City Power has existed since 1940. Its beginning was very controversial, just like our broadband project is today, but it has been very popular with our citizens for over 65 years. Provo City Power has been steady and responsive, providing reliable customer service and stable rates.

When current companies were unable to provide the services Provo needed, the city issued an RFP for an opinion on the viability of a municipal telecommunications system in Provo. Uptown Services was hired to provide this report. The
Uptown Services report indicated that the city could be successful if it built and operated its own telecommunications network. The report was reviewed by Peregrine Communications, who agreed with the conclusions.

On June 5, 2000, I appointed a Telecommunications Ad Hoc Committee, made up of elected officials, business representatives, representatives from the University, and residents to review the report and make recommendations on iProvo developing its own telecommunications infrastructure. After reviewing the opportunities and risks involved in the construction and operation of a telecommunications network, the committee, by unanimous vote, recommended that the city proceed based upon the guiding principles as outlined in the report. By ordinance, we then created a Telecommunications Utility as a subsidiary of the Energy Department.

The Telecommunications Utility designed and constructed a fiber-optic backbone connecting the electrical substations. The location of these substations, spread as they were throughout Provo, placed fiber-optic lines in close proximity to many additional desired connection sites. Knowing the possibility existed that the city might desire to use the fiber for future uses, additional fibers were added to the design. The construction labor cost of hanging a 12 count fiber is no different than the cost of hanging a 288 count fiber. Provo now had a fiber rich backbone covering much of the city.

This fiber was used to connect city buildings for data and telephone communications. Connections were made between City Hall and the Energy Department, Engineering, etc. In addition, a number of remote fire stations were placed on the city network for the first time as the fiber backbone was in all parts of the city.

At that point we began to seriously investigate and explore the feasibility of a fiber-to-the-premises community broadband network. We went through a long and deliberative process, including thorough study by a special task force of community leaders, numerous public hearings, city council debate and scrutiny, and a great deal of staff work.

When it became apparent that we, as a city, were getting serious about building this network, the two largest incumbent telecommunications providers began a campaign against iProvo. One company hired a public relations firm and a telemarketing company to make calls to citizens. They took out full page advertisements in local newspapers and ultimately hired people to picket City Hall.

It was a bruising fight, but the efforts of the large incumbent companies actually backfired. One meeting at City Hall was filled with people who were concerned because of the calls they had received from the telemarketers. But as these residents listened to what iProvo actually was, they became angry at the telemarketers and incumbent company because our proposal had been so grossly misrepresented. I heard many times how the proposed iProvo was completely different from what they had been told through phone calls and advertisements.

From there, it moved to a state legislative fight. The incumbent companies had made many contributions to state legislative races over the years, and it greatly helped their cause. At first, we were shut out of closed meetings in which proposed legislation affecting us was discussed.

Eventually, the sponsor of the legislation was convinced to meet with us, and numerous significant compromises were made in his legislation. The legislation, as initially proposed, would have prevented us from proceeding with our project. The legislation that was passed allowed us to proceed under a wholesale, open network model, rather than actually offering retail services, which is actually a model I am very happy with.

iProvo was challenged at the Utah State Legislature again the following year, but again we were able to prevail. The opposition was working with a philosophy of “If you can’t convince, then simply confuse.” I was told DSL was expanding in Provo, and I should just be patient. Or that there was plenty of fiber in Provo already, so we did not need more. We were put in the position of constantly explaining the facts about fiber, which were being greatly misconstrued by the opposition.

In 2002, we designed, constructed and operated a fiber-to-the-home neighborhood demonstration project to test and prove the technology. A 300-home trial was built in primarily single-family homes in the Grandview neighborhood with a small number of multi-dwelling units in student housing areas added. While we had some problems with our telephone switch provider, the technology worked, and the services offered were very popular. With a successful test completed, Provo City bonded for the full network build-out.

**Current Status of iProvo**

iProvo has been fully funded and built out to every home and business in Provo, and services are currently offered by two providers. iProvo is also currently looking to add service providers to give even more options to our residents. It is the only network in Provo providing broadband access to every home and business in Provo, including those of the two largest incumbent competitors. Public ownership has been the only way to ensure universal access to broadband in Provo. The capital outlay of the network was $40 million, including the fiber build-out and the network equipment. The project was financed by a sales tax revenue bond. A municipally-owned fiber-to-the-premises project is a relatively new concept, and a telecommunications revenue bond would have been cost prohibitive. The sales tax revenue bond allowed us to receive a very favorable bond rating and interest rate. The iProvo network currently has nearly 10,000 subscribers and projects 40-60 new subscribers each week over the next year.
CONCLUSION

Government exists to provide those services necessary for basic security, economic success, and quality of life that the private sector either cannot or will not provide. Thus, an obvious role of government is to provide vital infrastructure and public safety services. We come together as a society to jointly accomplish these purposes. Providing these services under the direction of duly elected leaders is what city government is all about.

I firmly believe ultra-broadband telecommunications infrastructure is as critical to the economic vitality and quality of life of Provo residents and businesses as other forms of basic infrastructure. None of us will be successful in the future without access to the electronic highway with enough capacity for the amazing and life-altering applications that are here today and the many others rapidly being developed. This infrastructure is vastly more important than some other common and widely accepted municipal services, such as golf courses and recreation centers.

iProvo provides a basic fiber-optic public telecommunications network on which private firms can vigorously compete and offer advanced phone services, high-definition television, ultra-broadband Internet access, telemedicine, video conferencing, telecommuting, and so forth. The system allows for school channels, neighborhood channels, and new applications we cannot even fathom today. Rather than unfairly competing with the private sector, this arrangement actually ensures and encourages competition and attracts more private firms to offer services to city residents and businesses. The incumbent telecommunications firms have also been invited to use the network.

In weighing the proper role of government, I firmly believe that providing this basic public infrastructure is just what government ought to be doing.

REFERENCES


We either advance or we decline. Power comes from looking forward with faith and courage - of expecting and demanding better things.”

—ROBERT H. HINCKLEY