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RATIONAL LEGISLATING

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One should not watch either sausage or legislation being made.[1]

[N]o man's life, liberty or property are safe while the Legislature is in session.[2]

Americans love their country and their Constitution, but many do not trust their government.[3]

I. INTRODUCTION

Legislatures are the bedrock of our government; yet legislators and the legislative process itself are commonly viewed with distrust, and even revulsion, by a disquietingly large number of Americans. Public cynicism has increased as legislatures have limited the application of ethics, conflict-of-interest, and financial disclosure laws to themselves. The almost daily reports of individual legislator misconduct confirm in the public mind that there is reason for concern. The result is the problem of *legislative misbehavior*, which consists of actual or perceived self-serving legislative conduct, coupled with legislative action that keeps legislative behavior invisible to public scrutiny.

We usually rely on courts to keep official conduct within acceptable bounds. The problem of legislative misbehavior, however, escapes meaningful examination under conventional standards of judicial review. Strict-scrutiny judicial review incites public outcry against activist judges; rational-basis judicial review has no teeth. Conventional judicial review of legislation has focused on having courts exercise judicial review under open-ended constitutional provisions such as Due Process or Equal Protection

1. Peter L. Strauss, *The Common Law and Statutes*, 70 U. Col. L. Rev. 225, 240 n. 38 (1999) (analogy attributed to Otto von Bismarck) (citing *Respectfully Quoted* 190 (Suzy Platt ed., 1989). For an amusing comparison of an actual sausage factory and legislatures, see Alan Rosenthal, *The Legislature as Sausage Factory*, State Legislatures Magazine, Sept. 2001, Vol. 27, Issue 8, at 12.

2. *The Final Acctg. in the Est. of A.B.*, 1 Tucker 247, 249 (N.Y. Surr. Rep. 1866) (deciding a legal malpractice action against the estate of an attorney who had advised a widow of her rights according to common law dower, rather than according to a statute giving her greater rights).

3. Panel on Civic Trust & Citizen Resp., *A Government to Trust and Respect: Rebuilding Citizen-Government Relations for the 21st Century* 1 (Natl. Acad. of Pub. Administration 1999).

clauses.[4] When legislation affects individual fundamental rights or classifies persons according to suspect traits such as race, courts have proved up to the task of overseeing legislative behavior, but the activist form of judicial review exercised in those settings has often exposed courts to the criticism that they are acting undemocratically, overstepping their proper institutional bounds.[5]

When "merely" individual economic or property concerns are affected by legislative misbehavior, conventional judicial review has proved toothless, amounting to little or no oversight at all. Courts simply conclude that it is up to the political process to fix any problems, adopting the attitude that, "if you don't like what they did, vote the rascals out of office." Such judicial self-restraint is premised on the same concern for separation of powers that is used to criticize courts when they exercise activist judicial review to protect individuals against legislation that affects fundamental rights or classifies according to suspect traits. Courts therefore exercise judicial "non-review" for fear of intruding—or of being perceived as intruding—into the legislative sphere.[6] As demonstrated by long-standing and pervasive popular disaffection with legislatures in this country, courts' refusal to exercise meaningful judicial review when individual economic or property interests are affected by legislation merely creates golden opportunities for legislative misbehavior.

A proper solution must address the problem of curbing legislative misbehavior, ensure that courts remain within their proper institutional sphere, and not hamper legislatures from carrying out their lawmaking responsibilities. This Article proposes that legislative misbehavior is best curbed through *rational legislating* requirements, whereby legislators must include in the legislative record an explicit elaboration of the path of lawmaking—from *evidence*, through *findings*, to ultimate *conclusions*—that clearly sets out the analytic connection between the problems legislators seek to address and the enactments passed to address them.[7] This

4. *See infra* pt. III (reviewing the conventional judicial review approaches including the differences and shortcomings).

5. *See infra* pt. III.B. (demonstrating the shortcomings of activist judicial review).

6. *See infra* pt. III.C. (discussing the shortcomings of deferential judicial review).

7. The concept of "rationality" incorporated in this proposal may be defined "as the possession of the information necessary to make a decision, ratiocination on that information, and the self-conscious evolution of a decision." Eugene Burdick, *Political Theory and*

Article suggests that such requirements, embodied in a statute or constitutional provision, should be promulgated either by legislatures themselves, or enacted through popular initiative. Once enacted, the statute or constitutional provision can be enforced by courts. Unlike conventional approaches to judicial review of legislation, such enforcement would not run afoul of separation-of-powers concerns because the substantive and procedural requirements would have been enacted by legislatures or by the populace, not by the courts themselves through interpretation of open-ended constitutional provisions. Moreover, rational legislating requirements would demand only that legislation include the necessary statements. They would not constitute substantive deliberation requirements.[8]

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the Voting Studies, in *American Voting Behavior* 139 (Eugene Burdick & Arthur J. Brodbeck eds., Free Press 1959) (emphasis omitted).

8. The proposal in this Article should be distinguished from a recommendation that courts should ensure that legislative action is the product of a *deliberative* process. *See e.g. Fullilove v. Klutznick*, 448 U.S. 448, 548–553 (1980) (Stevens, J., dissenting); Victor Goldfeld, Student Author, *Legislative Due Process and Simple Interest Group Politics: Ensuring Minimal Deliberation through Judicial Review of Congressional Processes*, 79 N.Y.U. L. Rev. 367 (2004); William D. Popkin, *Materials on Legislation: Political Language and the Political Process* § 6.03 (Found. Press 1993) (discussing legislative rationality according to a deliberative model); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 Stan. L. Rev. 29 (1985).

A requirement of deliberation asks whether legislators actually considered—heard, weighed, and reconciled—evidence, participated actively in arriving at findings from that evidence, and took active roles in formulating the conclusions from that process. In contrast, a requirement of legislative rationality is satisfied if the legislative record contains materials which show evidence was introduced, findings were derived from that evidence, and conclusions were reached.

The distinction may be clarified using an analogy drawn from the administrative law field. When courts exercise judicial review over administrative action that does not concern or involve a vested right, the standard of judicial review is "substantial evidence," whereby courts ask only whether there is *any* evidence *in support* of the decision reached by the administrative body. If *any* such evidence exists—even if there is substantial and even overwhelming evidence to the contrary—the courts will uphold the administrative action. In contrast, when vested rights *are* involved, courts ask whether the *weight of the evidence* preponderates in favor of the administrative decision. Courts exercise independent judgment and re-weigh the evidence. In those settings, courts will uphold the administrative action only if they conclude that the weight of the evidence preponderates in favor of the agency action. C. Dallas Sands et al., *Local Government Law* vol. 3, § 16.29.50 (Thompson West 1997 & Supp. 2003) (comparing judicial review of legislative and administrative action).

The rational legislating requirement does not go even as far as the substantial evidence standard, and certainly not as far as the independent judgment standard. Under rational legislating judicial review, courts would merely ask whether the legislature prepared the appropriate record of its action. Thus, rational legislating requirements "cannot guarantee that deliberation will occur at all, or that any deliberation will be enlightened

Part II of this Article documents the public's distrust of legislatures, and how legislative efforts to keep legislative behavior invisible to public scrutiny have given rise to the problem of legislative misbehavior. Part III describes conventional judicial review approaches to curbing legislative misbehavior and explains why they have been inadequate to the task. Part IV considers constitutional and legislative attempts to curb legislative misbehavior and discusses why these also have fallen short. Part V posits a theory of rational legislating, explains its origins in federal and state constitutional and administrative law, delineates the mechanisms for enacting rational legislating requirements, sets out examples of existing legislative practices, and demonstrates why such practices do not satisfy the requirements of the theory of rational legislating. Part VI identifies and addresses potential criticisms of the proposed rational legislating approach. Part VII sets out a proposed Model Rational Legislating Statute, including commentary on each of the provisions recommended for inclusion in the statute.

II. THE PROBLEM OF LEGISLATIVE MISBEHAVIOR

In a 1999 national survey by the Indiana University Public Opinion Laboratory, only sixteen percent of the respondents had a "great deal of confidence or trust" in their state's legislature, seventy percent had "some or a little confidence or trust," and twelve percent either had "no confidence or trust" at all, or simply "did not know."[9] Polls like these illustrate that, increasingly, Americans feel their legislatures have become captives of special interests. In 1964, a University of Michigan research institute asked Americans whether they thought their governments "were run by a few big interests looking out for themselves or [instead operated] for the benefit of all the people."[10] Less than one-third of those surveyed thought special interests were in control at that

and positive. At the most, [rational legislating requirements are] rules and structure [, which] provide an opportunity for deliberation and an environment conducive to public dialogue." William N. Eskridge, Jr. et al., *Cases and Materials on Legislation: Statutes and the Creation of Public Policy* 70 (3d ed., West 2001) (discussing the effect of proceduralism on deliberation).

9. Pub. Op. Online, *How the Public Views the State Courts 1999 Survey*, Accession No. 0396609, Question No. 006 (May 14, 1999) (available at LEXIS).

10. Arthur H. Miller, *Is Confidence Rebounding?* Pub. Opinion 16–17 (1983).

time.[11] By 1982, however, a similar survey revealed that over sixty percent of the respondents held that belief.[12]

The public concern that legislators act only to advance a few special interests could be relieved if legislators opened their personal finances to public view instead of working to avoid or conceal financial disclosures and skirt conflict-of-interest requirements. The reality, sadly, is that legislators have effectively concealed such information from public view. The extent of that concealment was documented by the Center for Public Integrity in 1999, which found after examining the ethics, conflict-of-interest, and financial disclosure laws pertaining to lawmakers in the fifty states, that

> lawmakers have written disclosure laws that are designed to keep the public and the press in the dark about their personal financial activities and interests; have drilled truck-sized loopholes into existing disclosure and conflict-of-interest rules; and have made it extraordinarily—and unnecessarily—difficult for others to obtain the reports they file. The only possible rationale for the elaborate obstacle courses that the Center uncovered is the belief of many state lawmakers that their private financial affairs are nobody's business but their own.[13]

Four years later, in 2003, the Center for Public Integrity conducted a similar study, surveying lobby disclosure laws in the fifty states and as applicable to the federal government, focusing on regulations governing lobbyist registration, spending reports, public access, and enforcement.[14] Center researchers reviewed the relevant legislation and confirmed the administrative interpretations of the statutory requirements by interviewing public offi-

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11. *Id.*

12. *See* Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 Tex. L. Rev. 873, 873 (1987) (discussing these studies).

13. Diane Renzulli, *Not-so-full Disclosure*, The Public, i (newsletter of the Ctr. for Pub. Integrity) 1 (Feb. 1999).

14. Ctr. for Pub. Integrity, *Hired Guns: Nationwide Ranking,* http://www.publicintegrity.org/hiredguns/nationwide.aspx (May 15, 2003) [hereinafter Ctr. for Pub. Integrity, *Nationwide Ranking*]. For the methodology of the study, *see* Ctr. for Pub. Integrity, *Hired Guns: Methodology*, http://www.publicintegrity.org/hiredguns/default.aspx?act=methodology (last accessed Oct. 28, 2004) [hereinafter Ctr. for Pub. Integrity, *Methodology*].

cials in charge of overseeing lobbyists.[15] Their survey used a 100-point scale, with answers promoting *openness*, *accountability*, and *public access*, receiving higher values.[16] No state received a score of "excellent."[17] Only the State of Washington received a "satisfactory" score, while forty-one states received failing or "barely passing" scores.[18] The federal government received a "failing" score of

15. *Id*.

16. Ctr. for Pub. Integrity, *Nationwide Ranking*, *supra* n. 14, at http://www.publicintegrity.org/hiredguns/nationwide.aspx; *Methodology*, *supra* n. 14, at http://www.publicintegrity.org/hiredguns/default.aspx?act=methodology.

17. Ctr. for Pub. Integrity, *Nationwide Ranking*, *supra* n. 14, at http://www.publicintegrity.org/hiredguns/nationwide.aspx.

18. Scores of 80 and higher are "satisfactory to excellent"; 70 to 79 are "relatively satisfactory"; 60 to 69 are "barely passing" and scores below 60 are "failing":

State	Score	Ranking
Washington	87	1
Kentucky	79	2
Connecticut	75	3
South Carolina	75	3
New York	74	5
Massachusetts	73	6
Wisconsin	73	6
California	71	8
Utah	70	9
Maryland	68	10
Ohio	67	11
Indiana	66	12
Texas	66	12
New Jersey	65	14
Mississippi	65	14
Alaska	64	16
Virginia	64	16
Kansas	63	18
Georgia	63	18
Minnesota	62	20
Missouri	61	21
Michigan	61	21
Nebraska	61	21
Arizona	61	21
Colorado	60	25
Maine	59	26
North Carolina	58	27
New Mexico	58	27
Rhode Island	58	27
Montana	56	30
Delaware	56	30
Arkansas	56	30
Florida	55	33
Louisiana	55	33
Oregon	55	33

thirty-six, fourth from the bottom of the scale.[19] And in a 2004 follow-up report to its 2003 study, the Center found that, while some states had worked to strengthen their lobby disclosure requirements, several actually had weakened theirs.[20] The net result was that, "[t]o the general public preoccupied with daily living, the design of the legislature appears to consist mainly of dark corners."[21]

Clearly, legislators' efforts to conceal what they do from public scrutiny is enough to cause public distrust.[22] But in addition,

Vermont	54	36
Hawaii	54	36
Idaho	53	38
Nevada	53	38
Alabama	52	40
West Virginia	52	40
Iowa	47	42
Oklahoma	47	42
North Dakota	46	44
Illinois	45	45
Tennessee	45	45
South Dakota	42	47
Federal Government	36	48
New Hampshire	36	48
Wyoming	34	50
Pennsylvania	0	51

Id. (emphasis added). Pennsylvania received a score of "0" because its basic statutory lobbying regulations were struck down by the state supreme court in 2002 as violating the court's authority to regulate the practice of law. *Gmerek v. St. Ethics Commn.*, 807 A.2d 812, 813 (Pa. 2002).

19. Ctr. for Pub. Integrity, *Hired Guns: How the Feds Stack up*, http://www.publicintegrity.org/hiredguns/report.aspx?aid=167 (May 15, 2003).

20. Ctr. for Pub. Integrity, *Under Pressure*, http://www.publicintegrity.org/hiredguns/report.aspx?aid=275 (May 19, 2004); *see also* Ctr. for Pub. Integrity, *Hidden Agendas: How State Legislators Keep Conflicts of Interest under Wraps*, http://www.public-i.org/oi/report.aspx?aid=617 (accessed Apr. 1, 2005) [hereinafter Ctr. for Pub. Integrity *Hidden Agendas*].

21. William J. Keefe & Morris S. Ogul, *The American Legislative Process: Congress and the States* 8 (9th ed., Prentice Hall 1997).

22. *Id.* at 3–18 (discussing public discontent over legislatures). Keefe and Ogul point out that "[i]nstitutional arrangements in the legislature obscure the public's view of the decision-making process and, moreover, make it difficult to fix responsibility for actions taken by government." *Id.* at 7 (emphasis omitted). And further, "In a word, why and how legislative decisions are taken are not easily discovered by outsiders." *Id.* at 8. Keefe and Ogul summarize the relevant data as follows:

> In seventeen Gallup surveys between 1973 and 1995 . . . the confidence level [in Congress] averaged only 30 percent. In 1994, it slipped to 18 percent . . . . [I]n 1995, popular confidence in the institution reached only 21 percent. [Even when President Nixon was being impeached,] only 42 percent of the public viewed Congress favorably. [In] a 1994 *Washington Post*–ABC News opinion study . . . [e]ight out of ten vot-

there are the almost daily reports of legislative impropriety that reinforce the public's belief that there is indeed good reason why legislators try to conceal their personal financial interests from public view:

> [A] Massachusetts lawmaker stalls legislation that would have tightened inspection standards for trucking companies in the state, benefiting his family's trucking business. . . . [A] New Mexico liquor retailer votes against legislation that would, in effect, kill drive-up liquor windows in the state. . . . [A]n Arkansas lawmaker agrees, in exchange for payments from dog-racing interests, to introduce profit-boosting legislation that they wanted. . . . A Connecticut lawmaker pushes for the legislature to relocate the New England Patriots to a stadium in downtown Hartford even though his law firm does work for a company involved in the deal. Retired teachers in the Missouri legislature vote retired teachers—and thus themselves—more generous pension benefits. Two state representatives in Alabama stall activity on the state's education budget until their employer, a state university, receives $5 million for higher salaries.[23]

Legislators' efforts such as these to hide their actions behind a shroud of secrecy coincide with the painfully predictable, recurring cases of individual legislative misconduct. The result is the problem of *legislative misbehavior*, which consists of actual or perceived self-serving legislative conduct, coupled with legislative action keeping legislative behavior invisible to public scrutiny. Self-serving conduct might take the direct form of using the legislator position to enrich oneself, or the indirect form of using the position to benefit one's friends, who in turn will support one's private interests and reelection. The unavoidable public impression is that legislation consists of self-interested legislative trad-

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> ers . . . contend that members "care more about keeping power than . . . about the best interests of the nation, . . . care more about special interests" than they do about the average person, and quickly "lose touch with people." Three out of four voters say that candidates for Congress "make campaign promises they have no intention of fulfilling," and less than one of three believe most members "have a high personal moral code."

Id. at 15.

23. Ctr. for Pub. Integrity, *Hidden Agendas*, *supra* n. 20, at http://www.public-i.org/oi/report.aspx?aid=617.

ers—or of legislative traders self-interestedly responsible to self-interested constituents—producing legislation that is "indecipherable to any outside observer."[24] Actual or apparent self-serving behavior, when coupled with concealment of legislative activity from scrutiny, results in a lack of public confidence in legislatures.[25] The weakening of lobby disclosure requirements and the resulting public distrust of legislatures has grown to such an extent that the National Conference of State Legislatures suggests that by 2025, Americans may do away with representative bodies altogether and enact legislation solely through on-line, initiative-specific voting.[26]

III. CONVENTIONAL JUDICIAL-REVIEW APPROACHES FOR CURBING LEGISLATIVE MISBEHAVIOR

In order to develop a theory of judicial review for curbing legislative misbehavior, it is necessary to first explore theories of judicial review generally. In order to do that, we first need to examine the concepts that judicial review entails.[27]

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24. Frank I. Michelman, *Political Markets and Community Self-determination: Competing Judicial Models of Local Government Legitimacy*, 53 Ind. L.J. 145, 175–176 (1977-1978).

25. And it does not help that legislators conduct the people's business by primarily consulting each other rather than their constituents. *See e.g.* Malcolm E. Jewell & Samuel C. Patterson, *The Legislative Process in the United States* 88 (Random House 4th ed. 1986) (noting that "[a] study of selected votes in the U.S. House of Representatives during the 91st Congress (1969) showed that members mentioned taking their voting cues from other members more than from any other actor (interest groups, constituents, party leaders, staff, and the executive")). A similar study of state legislators' voting in 1974 also found that friends in the legislature exercised the highest influence on voting by their colleagues. While approximately 40% of the responding legislators named friends in the legislature as those whom they consulted in making decisions, only about 4% said they consulted constituents. *Id.* at 88, 89 fig. 4.2.

26. *See* Rich Jones & Max Arinder, *Building a Legislative Legacy for the Future*, http://www.ncsl.org/programs/pubs/201legis.htm (accessed Apr. 1, 2005); Rebecca Walsh, *Many Bills at Capitol Drafted in Secret*, Salt Lake Trib. B1 (Jan. 2, 2004) (stating that "[s]ome of the most controversial laws of the 2003 legislative session were drafted in secret"); *see generally* John Martinez & Michael Libonati, *State and Local Government Law, A Transactional Approach* ch. III.A. (Anderson Publg. 2000).

27. There is a surprising dearth of scholarship on standards of judicial review as concepts in their own right. *See generally* Jeffrey P. Bauman, *Standards of Review and Scopes of Review in Pennsylvania—Primer and Proposal*, 39 Duq. L. Rev. 513 (2000–2001); Erwin Chemerinsky, *Foreword: The Vanishing Constitution,* 103 Harv. L. Rev. 43 (1989–1990); Steven Alan Childress, *A Standards of Review Primer: Federal Civil Appeals*, 125 F.R.D. 319 (1989); Philip Hamburger, *Law and Judicial Duty*, 72 Geo. Wash. L. Rev. 1 (2003); Ronald R. Hofer, *Standards of Review—Looking Beyond the Labels*, 74 Marq. L. Rev. 231

A. Standards of Judicial Review Generally

Judicial review of governmental conduct may be defined as a court's appraisal of whether a governmental entity or officer has acted properly. The tests used by courts to evaluate such conduct are embodied in *standards* of judicial review. To understand how standards of judicial review determine the effectiveness of court oversight of legislative misbehavior, we must consider (1) the characteristics that differentiate standards of judicial review from each other, (2) the factors that trigger one standard of judicial review as opposed to another, and (3) the differences in the operation between "deferential," as opposed to "activist," standards of judicial review. Each of these dimensions will be considered in turn.

1. The Characteristics That Differentiate Standards of Judicial Review

Standards of judicial review can be differentiated in terms of (1) the allocation of the burden of proof, (2) the level of importance of the required governmental objective, and (3) the required relation between the means used and the governmental objective sought to be achieved.[28] Thus, (1) a court may presume the governmental action is proper, thereby placing the burden of proof on the challenger to prove otherwise, *or* it may instead place the burden on the government to demonstrate the propriety of its conduct; (2) the governmental objective involved may be required to be merely "legitimate" to sustain the governmental action *or* the objective may have to be more "important" *or* "compelling" in order to sustain the action; and (3) the means used may be required to be merely a reasonable or "rational" way to achieve the objective sought *or* the means used may instead be required to be "necessary" to the achievement of the objective.

(1990–1991); Richard H. W. Maloy, *"Standards of Review"—Just a Tip of the Icicle*, 77 U. Det. Mercy L. Rev. 603 (1999–2000) (focusing on appellate standards of judicial review); Evan Tsen Lee, *Principled Decision Making and the Proper Role of Federal Appellate Courts: The Mixed Questions Conflict*, 64 S. Cal. L. Rev. 235 (1991).

28. Some scholarship on standards of judicial review suffers from failing to identify exactly what it is that is being reviewed. *See e.g.* Robert J. Hopperton, *Standards of Judicial Review in Supreme Court Land Use Opinions: A Taxonomy, an Analytical Framework, and a Synthesis*, 51 Wash. U. J. Urb. & Contemp. L. 1 (1997) (discussing the combination of judicial review and state and local land use laws).

Note that the last factor is a *relational* one—it is imprecise to say, for example, that a means used is a "rational" one or that an end is "rational." The pertinent question is whether the means and ends are rationally related *to each other*.

2. The Factors That Trigger One Standard of Judicial Review as Opposed To Another

In Footnote 4 of its decision in *United States v. Carolene Products Company*,[29] in which the United States Supreme Court upheld the Filled Milk Act prohibiting interstate shipment of certain kinds of adulterated milk,[30] the Court announced that henceforth judicial review of legislation would primarily follow a bifurcated path.[31] When merely economic interests are affected by governmental action, deferential judicial review will be applied; when suspect traits such as race or fundamental rights such as free

29. 304 U.S. 144, 152 n. 4 (1938). Footnote 4 stated,

> There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth.
>
> It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. [These include] restrictions upon the right to vote[,] . . . on restraints upon the dissemination of information, on interferences with political organizations, [and] prohibition of peaceable assembly.
>
> Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, . . . or national, . . . or racial minorities . . . . [W]hether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

Id. (citations omitted); *see generally* Peter Linzer, *The* Carolene Products *Footnote and the Preferred Position of Individual Rights: Louis Lusky and John Hart Ely vs. Harlan Fiske Stone*, 12 Const. Commentary 277 (1995) (discussing the effect of Footnote 4 on judicial review); Elizabeth J. Wallmeyer, *Filled Milk, Footnote Four & the First Amendment: An Analysis of the Preferred Position of Speech after the* Carolene Products *Decision*, 13 Fordham Intell. Prop. Media & Ent. L.J. 1019 (2003) (analyzing Footnote 4 and its effect on "individual liberties, civil rights, and general questions concerning judicial activism and standards of review").

30. 21 U.S.C. §§ 61–63 (2000).

31. *Caroline Products*, 304 U.S. at 152–154.

speech, are affected by governmental action, activist judicial review will be used.[32]

3. The Differences between "Deferential" and "Activist" Standards of Judicial Review

Deferential standards of judicial review are characterized by a judicial tendency toward accepting the determination of the governmental entity whose conduct is being examined. Governmental conduct will be upheld if it is in pursuit of "legitimate" governmental objectives and the government has used means to achieve the objectives that are "rational," in that they are reasonably likely to achieve the ends. For example, consider a state statute setting the speed limit at forty miles per hour on major streets. Because only the property right to use one's automobile is involved, deferential judicial review will be triggered. A court will presume the government conduct is proper, placing the burden on the challenger to demonstrate there is no legitimate governmental objective sought, or that the speed limitation is not reasonably likely to achieve such an objective. Clearly, there is a legitimate governmental objective in restricting traffic to speeds slow enough to protect the public's health and welfare. And a speed of forty miles per hour is reasonably likely to achieve that objective on major thoroughfares. Accordingly, the speed limit would be upheld.[33]

Activist standards of judicial review, in contrast, are characterized by a judicial tendency to second-guess the governmental entity involved, and to uphold the government action only if the

32. An intermediate level of judicial review subsequently has developed for review of gender-based classifications. *Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1981). Some courts and scholars have argued that a sliding scale should replace the three-level structure. *See Montgomery v. Carr*, 101 F.3d 1117, 1122 (6th Cir. 1996) (arguing that the Supreme Court does not have the "authority to delineate these different tiers of judicial review"). For the purposes of this Article, however, the general distinction between activist judicial review on one hand, and deferential judicial review on the other, will suffice.

33. *See e.g. People v. Austin*, 443 N.E.2d 1107, 1108 (Ill. App. 2d Dist. 1982) (rejecting the argument that the federal government's imposition of conditions on state receipt of federal highway funds was bribery); *Village of So. Charleston v. Phillips*, 1994 WL 12416 at *1 (Ohio App. 2d Dist. 1994) (stating that "the posted speed limit enjoys a presumption of regularity that must be overcome by [a defendant]"); *Commonwealth v. Kondor*, 651 A.2d 1135, 1136 (Pa. Super. 1994), (admiring the "principled tenacity" of self-proclaimed expert driver's challenge to speed limit, but upholds speed limit anyway).

government is able to demonstrate it is advancing what are termed "important" or "compelling" governmental objectives. In addition, in the area of fundamental rights such as infringement upon free speech or the free exercise of religion, identification of the means that are *least restrictive* of individual rights, yet still achieve the legislative objectives sought, also will be considered.[34]

For example, suppose an ordinance prohibits all residential signs except those falling within ten exemptions. Under activist judicial review, the burden of proof is on the government to demonstrate a compelling state interest and that the means used are necessary to achieve that interest. Moreover, the government also must demonstrate that there are no other alternative means that are less restrictive of the right to free speech and that there are alternative channels of communication for the speech affected. The United States Supreme Court invalidated such an ordinance in *City of Ladue v. Gilleo*,[35] holding that, although the problem of visual clutter was a sufficiently important governmental objective, the ordinance almost completely foreclosed residential signs "to political, religious or personal messages."[36] The Court emphasized that residential signs are a "venerable means of communication that is both unique and important."[37] The Court rejected the city's contention that "hand-held signs, 'letters, handbills, flyers, telephone calls, newspaper advertisements, bumper stickers, speeches, and neighborhood or community meetings'" and banners were reasonable alternative channels of communication.[38]

B. Shortcomings of Activist Judicial Review of Legislation

There are two reasons why activist judicial review is an inadequate tool for curbing legislative misbehavior: (1) there is no fundamental right or suspect trait sufficient to trigger such review, and (2) even if such review were triggered, courts would suf-

34. *U.S. v. Am. Lib. Assn., Inc.*, 539 U.S. 194 (2003).

35. 512 U.S. 43, 55 (1994).

36. *Id.*

37. *Id.* at 54

38. *Id.* at 56 (citation omitted). In contrast, in *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 817 (1984), the Court upheld a Los Angeles ordinance prohibiting the posting of signs on *public* property, because citizen's interests in controlling public property do not rise to the same level as the interest with respect to controlling one's private property.

fer from insurmountable problems of institutional legitimacy if they exercised such review to curb legislative misbehavior.

First, legislative misbehavior does not affect a fundamental right or classify according to a suspect trait, so activist judicial review is not triggered. No person has a right to be free of legislative behavior that is self-serving or that seeks to hide legislative action from public scrutiny. The only possible source for a fundamental right that might arguably be affected by legislative misbehavior is the Guaranty Clause of the federal Constitution, which provides that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government."[39] Federal courts, however, have no power to enforce the clause, since the United States Supreme Court has held that the issue is a nonjusticiable political question.[40] State courts, in contrast, *can* enforce the clause.[41] However, state courts have been unable to determine the substantive content of the Clause's open-ended terms, and as a result have been reluctant enforcers.[42]

Second, even if activist judicial review of legislative misbehavior could be triggered, such review of legislative action invites public criticism of courts on the ground that the review is undemocratic. Alexander Bickel coined the phrase to describe that

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39. U.S. Const. art. IV, § 4.

40. *Minor v. Happersett*, 88 U.S. 162 (1874) (holding that women may be denied the right to vote, and subsequently reversed by U.S. Const. amend. XIX); *Luther v. Borden*, 48 U.S. 1 (1849).

41. *Kadderly v. City of Portland*, 74 P. 710, 719, 720 (Or. 1903) (holding that lawmaking by voters through initiative is compatible with the Guaranty Clause requirement of Republican form of government because initiated laws "may be amended or repealed by the Legislature at will" and "are subject to the same constitutional limitations as other statutes"); s*ee also In re Pfahler*, 88 P. 270, 273 (Cal. 1906) (determining that initiative power in city charter for strictly local affairs is consistent with Guaranty Clause); *Ex parte Wagner*, 95 P. 435 (Okla. 1908).

42. For discussions of the problem of infusing substantive content into the Guaranty Clause by state courts, see Hans A. Linde, *Practicing Theory: The Forgotten Law of Initiative Lawmaking*, 45 U.C.L.A. L. Rev. 1735 (1998); Hans A. Linde, *When Initiative Lawmaking Is Not "Republican Government": The Campaign against Homosexuality*, 72 Or. L. Rev. 19 (1993) [hereinafter Linde, *Initiative Lawmaking*]; *see also* Julian N. Eule, *Judicial Review of Direct Democracy*, 99 Yale L.J. 1503, 1513 (1990) ("rethinking the countermajoritarian difficulty" entailed in judicial review of popular legislation); David Schuman, *The Origin of State Constitutional Direct Democracy: William Simon U'Ren and "The Oregon System"*, 67 Temple L. Rev. 947 (1994). For an argument in favor of reviving the Guaranty Clause as a basis for effective judicial review, see Janice C. Griffith, *Judicial Funding and Taxation Mandates: Will* Missouri v. Jenkins *Survive under the New Federalism Restraints?* 61 Ohio St. L.J. 483 (2000).

argument as the "counter-majoritarian difficulty."[43] The premise of the counter-majoritarian argument is that legislatures are popularly elected and reflect majority will.[44] Judicial control of legislative misbehavior using activist judicial review—which by definition entails close examination of legislative objectives and the means legislatively selected to achieve those objectives—thus is said to intrude improperly into the democratic process. That criticism is particularly potent when courts use open-ended constitutional provisions such as the Due Process, Equal Protection, or Guaranty clauses to exercise such review.[45] The texts of these clauses provide courts with little guidance about whether a particular instance of legislative misbehavior "crosses the line."

Judicial control of legislative misbehavior using activist judicial review under open-ended constitutional provisions, therefore, is not a viable option.

C. Shortcomings of Deferential Judicial Review of Legislation

Deferential judicial review, like activist review, provides very little protection against governmental action. The Third Circuit's discussion of such review in *Hancock Industries v. Schaeffer*,[46] is illustrative.[47] With respect to *identification of the ends* sought to be achieved by the governmental action,

> The court accepts at face value contemporaneous declarations of the legislative purposes, or, in the absence thereof, rationales constructed after the fact, unless "an examination of the circumstances forces [the court] to conclude that 'they could not have been a goal of the legislation.'" Thus, where there are "plausible reasons for [the governmental] action,

43. Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 16–23 (2d ed., Vail-Ballou 1986) (coining the phrase "counter-majoritarian difficulty").

44. For criticisms of this underlying assumption of the counter-majoritarian difficulty argument, see Chemerinsky, *supra* n. 27, at 75 (arguing that majoritarianism is not necessarily the paramount value in American constitutional law); *see also* Michael J. Perry, *Morality, Politics and Law: A Bicentennial Essay* 149 (Oxford U. Press 1988).

45. For classic explorations of the counter-majoritarian difficulty in judicial review, see Jesse H. Choper, *Judicial Review and the National Political Process* (U. of Chi. Press 1980); John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harv. College 1980).

46. 811 F.2d 225 (3d Cir. 1987).

47. *Id.*

> [the court's] inquiry is at an end. It is, of course, 'constitutionally irrelevant whether this reasoning in fact underlay the legislative decision.'"[48]

Similarly, with regard to the *relation* between the objective and the means, the court continued

> [W]hen a court inquires whether the legislative action is rationally related to achievement of the statutory purposes, it need not decide whether the facts available to the legislature are more likely than not true. . . . If the legislative determination that its action will tend to serve a legitimate public purpose "is at least debatable," the challenge to that action must fail as a matter of law.[49]

As the United States Supreme Court has explained,

> [i]n ordinary civil litigation, the question frequently is which party has shown that a disputed historical fact is more likely than not to be true. In an equal protection case . . . , however, those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.[50]

Under deferential judicial review, it is not enough for the challenger to introduce evidence tending to support a conclusion contrary to that reached by the legislature. If the legislative determination that its action will tend to serve a legitimate public purpose "is at least debatable," the challenge must fail as matter of law.[51]

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48. *Id.* at 237–238 (citations omitted) (quoting *Minn. v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463 n. 7 (1981) (quoting *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 n. 16 (1975)); and quoting *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980) (quoting *Fleming v. Nester*, 363 U.S. 605, 612 (1960)).

49. *Id.* at 238 (quoting *Caroline Products*, 304 U.S. at 154).

50. *Vance v. Bradley*, 440 U.S. 93, 110–111 (1979).

51. *Carolene Products*, 304 U.S. at 154. One must search long and hard to find an instance when deferential review resulted in invalidation. *See e.g. Miller v. Boone County Hosp.*, 394 N.W. 2d 776, 780 (Iowa 1986) (holding that provision of six-month statute of limitations on tort claims against the government, while statute of limitations for tort claims against private parties is two years, lacked rational relation to legitimate governmental objective). More representative of the usual result is *Pausley v. Chaloner*, 388 N.Y.S.2d 35 (N.Y. App. Div. 3d Dept. 1976) (upholding against a rational basis challenge

Courts' fundamental justification for the ostensible "non-review" of legislative action under deferential standards of judicial review is the concept of "separation of powers," whereby courts are constrained in order to allow legislatures ample freedom to craft legislation addressing social ills.[52] Courts that try to do more—whether by questioning the legitimacy of objectives or by questioning the likelihood that the legislative means used are reasonably likely to achieve those objectives—almost inevitably subject themselves to the charge of "Lochnerism"—that they are intruding into the legislative sphere.[53] As a result, courts remain far back from this "*Lochner* line."

For practical purposes, therefore, deferential review amounts to non-review, and for this reason, is not a useful tool for judicial control of legislative misbehavior.

IV. CONSTITUTIONAL AND LEGISLATIVE ATTEMPTS TO CURB LEGISLATIVE MISBEHAVIOR

The United States Constitution does impose requirements governing the procedures for enacting legislation, but none that amount to rational legislating requirements.[54] In contrast, state constitutions contain numerous restrictions on the manner in

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the requirement that plaintiffs seeking tort recovery against the government must file a notice of claim within ninety days after the claim arises, whereas plaintiffs seeking tort recovery against private defendants have three years to file a complaint). *See generally* Sands et al., *supra* n. 8, at vol. 4, § 27.27 (noting that time limits on notice of claim requirements in the government tort liability setting are usually upheld under deferential judicial review).

52. *See e.g. U.S. v. Lopez*, 514 U.S. 549, 557, 568 (1995) (stating that, when reviewing acts of Congress passed pursuant to the Commerce Clause, courts defer to Congress because "the Commerce Clause grants Congress extensive power and ample discretion to determine its appropriate exercise") (Kennedy & O'Connor, J.J., concurring); *Corn v. N.M. Educators F. Credit Union*, 889 P.2d 234, 239 (N.M. App. 1995) (deferring to state legislature's judgment in making classifications and devising procedures with respect to workers' compensation benefits), *overruled in part on other grounds, Trujillo v. City of Albuquerque*, 965 P.2d 305 (N.M. 1998); *Vincent v. Voight*, 614 N.W.2d 388, 411 (Wis. 2000) (providing deference to the state legislature regarding fiscal-educational decisions).

53. *Lochner v. N.Y.*, 198 U.S. 45, 45–46 (1905) (invalidating restriction on bakers' working hours). The *Lochner* approach was firmly rejected in *Ferguson v. Skrupa*, 372 U.S. 726, 730–731 (1963) (upholding state statute forbidding any person from engaging in debt adjusting unless as an incident to lawful legal practice).

54. *See e.g.* U.S. Const. art. I, § 5, cl. 2 (stating that "[e]ach House may determine the Rules of its Proceedings"); *id.* at art. I, § 5, cl. 3 (requiring each House to keep a journal recording votes); *id.* at art. I, § 7, cl. 2 (providing that votes overriding presidential veto shall be recorded in the journal of each House).

which legislatures conduct their business.[55] Such requirements, however, have proved ineffective in curtailing legislative misbehavior.[56] At least one state, New Jersey, has enacted a statute providing for a statutory action to curb legislative misbehavior, but that too has not proved up to the task.[57] State constitutional provisions and the New Jersey statute are considered next.

A. State Constitutional Requirements on Procedure for Enacting Legislation

State constitutions were amended throughout the nineteenth century to include procedural limitations on state legislatures.[58] Typical requirements include the following:

> that a bill contain a title disclosing its subject[;]. . . that a bill contain only matters on a "single subject"; that all bills be referred to committee; that the vote on a bill be reflected in the legislature's journal; that no bill be altered during its passage through either House so as to change its original purpose; and that appropriations bills contain provisions on no other subject.[59]

For two fundamental reasons, however, these state constitutional requirements have proved ineffectual in curtailing legislative misbehavior: (1) under the "plenary power principle," state legislatures are presumed to have inherent, plenary authority to enact legislation, and (2) limitations on that authority are strictly construed.

1. The "Plenary Power Principle"

The analytical structure for considering whether actions of local, state, or federal governments are lawful generally proceeds as follows: (1) Did the actor have the *power* to act? (2) If so, is

55. *See infra* pt. IV.A. (describing the procedural limitations on state legislatures).

56. *See infra* pt. IV.A. (describing the ineffectiveness of procedural limitations).

57. *See infra* pt. IV.B. (describing New Jersey's "popular action" statute).

58. For a careful review of these requirements, see Robert F. Williams, *State Constitutional Limits on Legislative Procedure: Legislative Compliance and Judicial Enforcement*, 48 U. Pitt. L. Rev. 797, 797–800 (1987).

59. *Id.* at 798–799; *see also* Otto J. Hetzel et al., *Legislative Law and Process, Cases and Materials* § 440–441, 292–457 (3d ed., Lexis Publg. 2001) (providing a comprehensive discussion of state constitutional procedural requirements).

there a *limitation* that curtails that power, whether the limitation is imposed (a) by the terms under which such power was granted, (b) by restrictions imposed on the power by the authority given to other governmental entities, or (c) by restrictions imposed on the power by the countervailing rights of individuals?[60]

Questions about whether the actor had the power to act, however, are subject to one clearly established and unique exception. Under the "plenary power principle," state governments have inherent sovereign power to act; they need not look to positive sources, such as state or federal statutes or constitutions.[61] Therefore, under the plenary power principle, state constitutions serve as *limitations* on state governments, in contrast to the federal constitution, which is a *grant* of power to the federal government.

The rationale for the plenary power principle was described by the United States Supreme Court in *Lane County v. Oregon*,[62] in which the Court upheld an Oregon statute requiring state taxes to be paid in gold and silver coin, as follows:

> The people of the United States constitute one nation, under one government, and this government, within the scope of the powers with which it is invested, is supreme. On the other hand, the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence. The States disunited might continue to exist. Without the States in union there could be no such political body as the United States.[63]

The "equal footing" doctrine, whereby states must be admitted into the Union on an equal basis, assures that each state has no more or less plenary power than other states in the Union, and also assures that Congress cannot alter that equality through

60. *See e.g. Hospitality Assn. of S.C., Inc. v. County of Charleston*, 464 S.E.2d 113, 116–117 (S.C. 1995) (describing two-step process of judicial review of local government conduct); *see also* Martinez & Libonati, *supra* n. 26, at 6–9 (discussing "power question first" approach).

61. *See Alden v. Me.*, 527 U.S. 706 (1999) (recognizing that states have inherent sovereignty).

62. 74 U.S. 71 (1868).

63. *Id.* at 76; *see also Leitch v. Dept. of Revenue*, 1982 WL 2142 at *1 (1982) (noting that the Oregon statute in *Lane County* has since been repealed).

conditions imposed on admission to the Union.[64] For example, in *Coyle v. Smith*,[65] the Court upheld an Oklahoma statute enacted in 1910 providing for the relocation of the state capital from Guthrie to Oklahoma City, even though Oklahoma had been admitted into the Union on the express condition that the state capital would not be moved before 1913.[66]

The plenary power principle provides a granite-like foundation for legislative power to enact legislation. It therefore is not surprising that state courts have found it an immovable object.

2. Limitations on State Legislative Authority Are Strictly Construed

The kinds of enactments covered by the plenary power principle, and the deferential character of judicial review for plenary power purposes, were discussed by the California Supreme Court in *In re Bonds of Madera Irrigation District*,[67] a case involving a petition brought by the board of directors of a statutorily created irrigation district for the confirmation of their organization and for judicial approval of the proceedings for the issuance and sale of certain bonds to finance the district.[68] The petition was opposed by persons owning land within the district.[69] The action had all the earmarks of a "friendly" lawsuit, in which an action was brought to obtain judicial approval in order to assure bond buyers that bonds would be enforceable against the issuing district.[70] The Court held as follows:

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64. Article IV, § 3 of the United States Constitution provides,

> [n]ew States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

65. 221 U.S. 559 (1911).

66. *Id.* at 574–575; *see also* Ann Althouse, *How to Build a Separate Sphere: Federal Courts and State Power*, 100 Harv. L. Rev. 1485 (May 1987); Frank P. Grad, *The States' Capacity to Respond to Urban Problems: The State Constitution*, in *The States and the Urban Crisis* 29 (Alan Campbell ed., Prentice-Hall 1970); Michael E. Libonati, *The Law of Intergovernmental Relations: IVHS Opportunities and Constraints*, 22 Transp. L.J. 225, 228–229 (1994).

67. 28 P. 272 (Cal. 1891).

68. *Id.* at 272.

69. *Id.*

70. *Id.*

> That the legislature is vested with the . . . authority to deal with any subject within the scope of civil government, except in so far as it is restrained by the provisions of the constitution, and that it is the sole tribunal to determine as well the expediency as the details of all legislation within its power, are principles so familiar as hardly to need mention. . . . [This] comprehends the exercise of all the sovereign authority of the state in matters which are properly the subject of legislation; and it is incumbent upon anyone who will challenge an act of the legislature as being invalid to show either that such act is without the province of legislation, or that the particular subject-matter of that act has been by the constitution, either by express provision or by necessary implication, withdrawn by the people from the consideration of the legislature. The presumption which attends every act of the legislature is that it is within its power, and he who would except it from the power must point out the particular provision of the constitution by which the exception is made, or demonstrate that it is palpably excluded from any consideration whatever by that body.
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> . . .
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> In providing for the public welfare, or in enacting laws which in the judgment of the legislature may be expedient or necessary, that body must determine whether or not the measure proposed is for some public purpose. We do not mean by this that the declaration of the legislature that an act proposed by it will be for the public good will of necessity preclude an investigation therein, or that such declaration will be conclusive when the act itself is palpably otherwise. . . . Acts may be passed by that body which will, by their very terms, or the nature of their provisions, show that their purpose is private, rather than public. . . . But if the subject-matter of the legislation be of such a nature that there is any doubt of its character, or if by any possibility the legislation may be for the welfare of the public, the will of the legislature must prevail over the doubts of the court.[71]

The California Supreme Court's strict-interpretation approach to state legislative power restrictions finds expression in

71. *Id.* at 273–274.

various forms in other states.[72] Many state courts simply take the position that issues regarding the procedure whereby bills have been enacted are nonjusticiable.[73] Other state courts adopt some variant of the "enrolled bill" rule, which provides that any asserted violation of the procedural requirements for enacting legislation can only be determined from the final legislative enactment, or enrolled bill, on its face.[74]

The plenary power principle, coupled with judicial hesitancy to question whether state legislatures have adhered to state constitutional requirements regarding the procedure for enacting legislation, has rendered such requirements ineffectual for curbing legislative misbehavior.

B. New Jersey's "Popular Action" Statute

New Jersey is the only state in the Union with a statute for curbing legislative action through judicial review of legislative procedure. This "popular action" statute, enacted in 1873, allows either the governor, or two or more citizens of the state, to bring an action contending that a law or joint resolution of the state's legislature was not duly passed by both houses of the legislature, was not approved by the governor, or was not otherwise enacted in the manner required by the state constitution.[75]

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72. Williams, *supra* n. 58, at 816.

73. *See* Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 Harv. L. Rev. 1833, 1842–1844 (2001) (discussing justiciability approaches in state courts generally and advocating the position that state courts should treat a wider range of questions as justiciable than do federal courts); Williams, *supra* n. 58, at 816–818 (describing state courts, such as those in Pennsylvania and Texas, that do not look beyond the face of a bill).

74. Williams, *supra* n. 58, at 816–818 (tracing the approach as originating with *Field v. Clark*, 143 U.S. 649, 669–680 (1892)).

75. N.J.S.A. §§ 1:7-1–1:7-7; *see generally* J. A. C. Grant, *New Jersey*'s *"Popular Action" in Rem to Control Legislative Procedure*, 4 Rutgers L. Rev. 391, 397 n. 28 (1949) (noting the statute has been in place since 1873, enacted as Act of March 3, 1873, Pamph. L. 1873, c. 116). In the first seventy-seven years the statute was in effect (from 1873 until 1950), only nine petitions were brought, and only four statutes were held unconstitutional. These included a 1912 statute regarding removal of railroad crossings for failure to follow procedures for passing a statute over the governor's veto, *In re Pub. Util. Bd.*, 84 A. 706 (N.J. 1912), and a 1911 statute enabling municipal ownership of public utilities for failure to include certain amendments in the enrolled bill, *In re Jaegle*, 85 A.214 (N.J. 1912); and two similar cases, a 1938 special act repealing the charter of a private detective association, *In re Miller*, 4 A.2d 522 (N.J. 1939), and a 1946 statute limiting liquor licenses, both held unconstitutional for failure to provide proper notice to the private parties affected

Actions under the statute may not contest the substantive validity of legislation;[76] only the "machinery of enactment" may be challenged.[77] In addition, however, complaints about legislation must be premised on violations of procedures for enactment of legislation that are already contained in New Jersey's constitution; courts may not impose additional or different procedural requirements.[78] For example, in *In re Application of Reilly*,[79] the New Jersey Legislature passed a bill that was conditionally vetoed by Governor Whitman.[80] Instead of trying to override the governor's veto or to meet her objections, the Legislature passed a second, essentially indistinguishable bill, which was then signed by Donald DeFrancesco, who had become governor after Governor Whitman resigned to accept a federal appointment.[81] The statute was challenged on the ground that, under these circumstances, the state constitution allowed the legislature only to either override the governor's veto or to amend the bill to meet the objections in the governor's conditional veto.[82] The court concluded that the

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before the bills were introduced, *In re Ch. 147 of the Laws of 1946*, 49 A.2d 255 (N.J. 1946); *see* Grant, *supra* n. 75, at 409–411 (describing these cases).

Since 1950, in seven reported decisions involving petitions brought under the New Jersey popular action statute, none of the petitions have succeeded: *Application of McCabe*, 409 A.2d 1158 (N.J. 1980); *Ackerman Dairy Inc. v. Kandle*, 253 A.2d 466 (N.J. 1969); *Application of Freygang*, 136 A.2d 625 (N.J. 1957); *In re Gilmore*, 774 A.2d 576 (N.J. Super. App. Div. 2001); *Application of Forsythe*, 450 A.2d 594 (N.J. Super. App. Div. 1982); *Application of Fisher*, 194 A.2d 353 (N.J. Super. App. Div. 1963); *Application of McGlynn*, 155 A.2d 289 (N.J. Super. App. Div. 1959).

76. *In re Application of Reilly*, 837 A.2d 412, 413, 417 (N.J. Super. App. Div. 2003).

77. *McGlynn*, 155 A.2d at 295.

78. *E.g. McCabe*, 409 A.2d at 1160–1162; *Meadowlands Regl. Redevelopment Agency v. State*, 304 A.2d 545, 547–548 n. 1 (N.J. 1973).

79. 837 A.2d 412.

80. *Id.* at 413.

81. *Id.*

82. The relevant portions of the New Jersey Constitution provided as follows:

(e) Upon receiving from the Governor a bill returned by him with his objections, the house in which it originated shall . . . proceed to reconsider it. If, upon reconsideration, . . . two-thirds of all the members of the house of origin agree to pass the bill, it shall be sent, together with the objections of the Governor, to the other house; and if, upon reconsideration, it is approved by two-thirds of all the members of the house, it shall become a law. . . .

(f) The Governor, in returning with his objections a bill for reconsideration at any . . . session of the Legislature, may recommend that an amendment or amendments specified by him be made in the bill, and in such case the Legislature may amend and reenact the bill. If a bill be so amended and reenacted, it shall be presented again to the Governor, but shall become a law only if he shall sign it within 10 days after presentation. . . .

constitutional procedure was not exclusive and did not prevent the legislature and the succeeding governor from enacting legislation in the alternate manner, despite the fact that this method was not envisioned in the constitutional description of the applicable procedures.[83] The court thereby narrowly construed the constitutional requirements on the procedures for enacting legislation.

The limitations on judicial review under New Jersey's popular action statute render it an inadequate tool for curbing legislative misbehavior. No rational legislating requirements are included in the New Jersey Constitution that might be enforced through the statute, and New Jersey courts decline to add to the constitutional requirements already in place.

V. THEORY OF RATIONAL LEGISLATING

Because control of legislative misbehavior under existing doctrine has proved inadequate, a new theory for curbing such misbehavior is essential. Early attempts to formulate such a theory focused on *judicial* review, usually under some form of constitutional review using open-ended constitutional provisions such as the Due Process or Equal Protection clauses. After critically examining these early efforts, we will consider a more robust theory.

A. Early Attempts to Formulate a Theory of Judicial Review of Legislation

Julius Cohen, writing in 1950, was the first to critically consider extending the Realist critique to legislative conduct.[84] The Realist critique of formalism in legal analysis revealed that "the meaning of legal concepts is found in the consequences that they produce," rather than in "arid conceptualism."[85] Realists like Cohen allowed us to acknowledge frankly that judges do not just find the law; they make it. The great advance of Realism in legal analysis was in bringing the conduct of courts to the "level of con-

Id. at 413–414 (quoting N.J. Const. art. V, § I, subparas. 14(e), (f)).

83. *Id.* at 417.

84. Julius Cohen, *Towards Realism in Legisprudence*, 59 Yale L.J. 886 (1950).

85. *Id.* at 886.

sciousness."[86] Under the glare of Realism, judicial conduct was subjected to examination under the microscope of rationality, the ideal of the scientific method.

Cohen pointed out that, if courts indeed "made" law, and if *judicial* conduct was properly examined for rationality, then since legislatures are the paradigm "law makers," *legislative* conduct should be examined for rationality as well.[87] However, Cohen did not solve the manner in which such "legisprudence" should proceed.[88] And although numerous textbooks have been written discussing various aspects of the legislative process, no one else has discussed the manner in which legisprudence should proceed either.[89]

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86. *Id.* at 887.

87. Cohen argues that the same fact-finding safeguards that apply to judges should apply to legislatures:

> For the realist, then, policy-making is the common denominator of both the judicial and legislative processes. But the similarity does not stop here. If arid conceptualism is descriptive of policy-making on the judicial level, the conceptualism is no less arid on the legislative; and if there is a crying need for "realism" in the one area, there is more than sufficient evidence of such need in the other.

Id. at 888.

88. *Id.* at 897 (coining the term "legisprudence").

89. Although the legislative process is a principal concern in textbooks about legislation, most make no mention of rational legislating concepts, and those that do fail to elaborate on the concept or its implementation. *See* Eskridge et al., *supra* n. 8, at 71–72 (mentioning the prospect that "proceduralism"—the notion that we should impose procedural requirements on legislatures—may address the public's low esteem of legislatures, and actually refer to rational legislating ideas, but do not elaborate on how to implement them); Otto J. Hetzel, *Legislative Law and Process* 563–604 (2d ed., Matthew Bender & Co. 1993) (reviewing challenges to state legislation for failure to follow procedural requirements contained in state constitutions, but not mentioning rational legislating requirements); Hetzel et al., *supra* n. 59, at 440–441 (setting out New Jersey's popular action statute, but not providing a discussion of rational legislating); Hans A. Linde et al., *Legislative and Administrative Processes* 121–122 (2d ed., Found. Press 1981) (referring to New Jersey's popular action statute, N.J. Stats. Tit. 1, ch. 7, for judicial review of legislation for compliance with state constitution-mandated procedures, but not elaborating on rational legislating requirements); Abner J. Mikva & Eric Lane, *Legislative Process* 177–205 (2d ed., Aspen L. & Bus. 2002) (discussing procedural requirements and their enforcement, but failing to mention rational legislating concepts); Charles B. Nutting & Reed Dickerson, *Legislation, Cases and Materials* 200–350 (5th ed., West 1978) (discussing state constitutional procedural requirements on legislation, including New Jersey's popular action statutes, but not mentioning rational legislating requirements); Popkin, *supra* n. 8 (concerning primarily statutory interpretation); Horace E. Read et al., *Materials on Legislation* (4th ed., Found. Press 1982); Barbara Sinclair, *Unorthodox Lawmaking: New Legislative Processes in the U.S. Congress* (2d ed., Cong. Q. Books 2000).

In 1975, Laurence Tribe rediscovered the problem of overseeing legislative conduct.[90] Tribe focused on judicial review as the mechanism, and Due Process clauses as the textual reference for the authority of courts to oversee legislative behavior.[91] He suggested that the substantive requirement should be that legislative conduct is "constitutionally required to take a certain form, to follow a process with certain features, or to display a particular sort of structure."[92] Tribe's analysis foundered, however, on questions about the parameters of that substantive standard, leaving us with no response to the question he posed: "How can [courts] accurately discern systemic unresponsiveness?"[93]

One year later, in 1976, Hans Linde examined the problem of oversight of legislative conduct more closely.[94] Like Cohen, Linde also considered the problem as one of determining "rationality" in the legislative process.[95] Like Tribe, Linde also viewed the problem as one of judicial review of legislative action under Due Process clauses.[96] Linde recognized, however, that despite the manner in which the standard of review was formulated, and regardless of the purported source of constitutional authority, the fundamental difficulty was that it was *judicial* review that was involved; "Again, it is judicial review and invalidation that is problematic, not the standard of legitimacy."[97]

Linde adeptly identified the weak point of existing theory: the fact that it was *judicially* formulated and *judicially* administered review of legislative conduct.[98] The weakness of such an approach is that it leaves the courts vulnerable to a charge of institutional

90. Laurence H. Tribe, *Structural Due Process*, 10 Harv. Civ. Rights-Civ. Libs. L. Rev. 269 (1975) [hereinafter Tribe, *Structural Due Process*]. Tribe also uses the concept of "structural due process" to formulate a model of structural justice. Laurence H. Tribe, *American Constitutional Law* § 17-3, 1682–1687 (2d ed., Found. Press 1988) [hereinafter Tribe, *American Constitutional Law*] (defining the "Two Levels at Which Structural Analysis Plays a Role: Due Process of Lawmaking and Due Process of Law-applying").

91. Tribe, *Structural Due Process*, *supra* n. 90, at 291.

92. *Id.* (emphasis in original removed).

93. *Id.* at 319.

94. Hans A. Linde, *Due Process of Lawmaking*, 55 Neb. L. Rev. 197 (1976).

95. *Id.* at 222.

96. *Id.* at 199 (asking, "[W]hat is due process of law in legislation, or, more briefly, what is due process of lawmaking?").

97. *Id.* at 248.

98. *Id.*

illegitimacy, particularly when their oversight of legislative action is premised on open-ended constitutional provisions.[99]

B. The Rational Legislating Theory of Judicial Review of Legislation

The rational legislating theory is set out below, and then its federal and administrative law antecedents are explored. The mechanisms whereby the rational legislating theory may be enacted are then described.

1. The Rational Legislating Theory

Legislative misbehavior is best curbed through *rational legislating*, whereby legislators are required to explicitly lay out in the legislative record the path they have followed in enacting legislation. Such a record would eliminate the public distrust of legislatures, minimize enactment of baseless legislation, and allow courts to exercise meaningful judicial review without overstepping—or being perceived to overstep—the proper judicial role in our democratic society.

The mechanism is straightforward. Suppose a legislature was interested in enacting legislation to authorize the carrying of concealed weapons.[100] In order to prepare the necessary record, the legislature would first have to compile the necessary *evidence*.

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99. In the analogous setting of judicial invalidation of legislation under open-ended constitutional provisions, Laurence Tribe has suggested that the net effect is a "remand to the legislature." Tribe, *American Constitutional Law*, *supra* n. 90, at § 17–2, 1680 n. 16. (citations omitted). Such "remands" are narrowly targeted at particular deficiencies in legislation as measured by open-ended constitutional provisions. By comparison, the theory advanced in this article addresses the type of showing that legislatures must make in order to comply with rational legislating procedural requirements. The distinction turns on the source and nature of the requirement involved. For example, legislation examined for compliance under the Equal Protection Clause may be found deficient because it improperly discriminates on the basis of race. The legislature could not simply re-enact the same statute. In contrast, a statute enacted in violation of rational legislating requirements might be re-enacted, provided that the legislative record, the second time around, included the rational legislating provisions.

100. For example, the Utah Concealed Weapons Act authorizes the issuance of a concealed weapons permit to any person twenty-one years of age or older who, among other elements, (1) "has not been convicted of a felony" or other specifically-named offenses, (2) "has not been adjudicated . . . as mentally incompetent," (3) proves that he or she is "of good character," and (4) proves that he or she has "general familiarity with the types of firearms to be concealed." Utah Code Ann. § 53-5-704 (2004).

Such evidence could take the form of written or oral testimony, documents, or exhibits. Expert and lay witnesses could present live testimony in legislative hearings. Alternatively, such witnesses could submit their views in writing for the record. For example, because the notion of issuing permits for the carrying of concealed weapons is not a universally lauded goal, one could expect that evidence on the issue would reflect the disparate views, with strong support in evidence for each position. With regard to this issue in Utah, specifically, there was a dramatic split of opinion on whether—and if so, under what circumstances—the state should issue permits for concealed weapons.[101] Despite a vast array of opinion both in support of and against the issuance of concealed weapons permits in Utah, there is no indication that any evidence either way was considered when the Utah Concealed Weapons Act was initially enacted.

Because evidence on any seriously contested public issue is bound to be contradictory, ideally the legislature would be inclined to weigh the evidence and consider whether the quantum or persuasiveness of that evidence established a preponderance one way or another. A weighing such as this might also encourage or force lawmakers to entertain alternate formulations of the proposed legislation that they had not envisioned before the evidence-gathering process was initiated. In weighing the evidence, therefore, the legislature would have to make *findings* establishing the factual foundation upon which the legislature sought to proceed. For example, if the Utah Legislature had accumulated evidence before enacting the Utah Concealed Weapons Act,[102] its research might have revealed information about the increased incidences of crime by people carrying guns, concealed or otherwise, on university campuses.[103] It might also have received con-

101. *See U. Utah v. Shurtleff*, 252 F. Supp. 2d 1264, 1266–1267 (D. Utah 2003) (reviewing the University of Utah's contention that the Utah Concealed Weapons Act does not override the University's policy against the carrying of concealed weapons on campus).

102. Utah Code Ann. § 53–5–704.

103. The University introduced such evidence in its challenge to the state's concealed weapons laws. *Shurtleff*, 252 F. Supp. 2d at 1273. The State did not dispute the University's evidence

> that the research of medical and social science experts in the United States [showed]: (1) that there is a strong correlation between the increased availability of firearms and rates of homicide, suicide, and unintentional firearm death; (2) that, among college students nationwide, there exists a strong correlation between gun

trary testimony, showing that people who obtain permits for weapons are less likely to commit crimes with such weapons. Instead, the Utah Legislature simply relied on anecdotal statements from sponsors of the legislation that the issuance of permits for the carrying of concealed weapons indeed would make society *safer*, either because criminals would be deterred from committing crimes because they would never know whether a person with a concealed weapons permit was present, or because such criminals would be confronted by a person with a concealed weapon who would, in turn, stop the crime from occurring.[104]

> ownership and substance abuse; (3) that an overwhelming majority of citizens in the United States believe that citizens should not be allowed to carry firearms on college campuses, in hospitals, or in sports stadiums; and (4) that women, minorities, and persons who are not owners of guns are more likely to feel less safe, as other members of their communities obtain firearms.

Id. (citation omitted).

104. Utah Senate Majority Leader Michael G. Waddoups sponsored the legislation in 1995 and has been the principal spokesperson for the legislation ever since. Dan Harrie, *Scrap Permits, Keep Guns, Activists Urge*, Salt Lake Trib. C1 (May 20, 2004). *The Salt Lake Tribune* reported that "Senate Majority Leader Mike Waddoups, R-Taylorsville, is the mastermind of most of Utah's gun legislation in the past eight years, including the 1995 legislation that liberalized the concealed-carry permit standards." *Id.*

When the University of Utah insisted on enforcing its own rule against carrying of concealed weapons on campus, Senator Waddoups responded with a bill to "clarify the intent of the Legislature, that citizens with a concealed weapons permit are permitted to carry a firearm anywhere they'd like in the state." Andrew Kirk, *Waddoups' SB Voted out of Committee*, Daily Utah Chron. A1 (Feb. 9, 2004). The intent of the bill, he explained, was "to allow guns on state university and college campuses. . . . Why shouldn't [University students and employees] be able to protect themselves? It doesn't make sense to me. There are people who say they feel threatened and want to carry a weapon to protect themselves." *Id.*

The fact that Senator Waddoups' views could benefit from rational legislating requirements has become apparent from his own statements. He insists that giving wide freedom to concealed weapons permit holders to carry their weapons will not abridge private property rights, "[b]ut when it was pointed out the bill would allow guns in the dorms of [Brigham Young University] as well as in vehicles on campus, Waddoups was unable to come up with a response." His further explanation was that there might "be a 'stickler' with that issue." *Id.*

Senator Waddoups also noted, "My intention is that this bill makes it very clear that the University of Utah is part of the state of Utah and that they are going to have to adhere to the state law regarding concealed weapons on their campus." Jennifer Dobner & Angie Welling, *Lawmaker Wants U. Gun Ban Shot down*, Deseret Morn. News B1 (Jan. 30, 2004). The Senator went on to explain his philosophy about allowing permit holders to carry concealed weapons on the University of Utah campus:

> "Now we have the University of Utah restricting law-abiding citizens and doing nothing to protect them from criminals," he said. "You have to allow people to protect themselves on your campus, unless you have a way to protect them."

. . .

As the last element of its thorough investigation, the legislature again, ideally, would set out its *conclusions*, in the form of the legal rules comprising the statutes it enacts. Thus, for example, if the Utah Legislature had found from the evidence before it that insufficiently trained concealed weapons holders would create more danger than they might help in reducing crime in the state, the legislature could have concluded that the state should issue concealed weapons permits only to applicants who had demonstrated completion of rigorous training requirements. Instead, the legislature merely required applicants to have a "general familiarity with the types of firearms to be concealed."[105] The implementation of such requirement meant that,

> [i]n practice, applicants may obtain a concealed weapons permit with virtually no familiarity or skill relating to the use of firearms. Applicants need not pass any test and need not otherwise demonstrate proficiency in the use of weapons or their knowledge of the safe use of weapons. Applicants need not prove that they can shoot with any degree of accuracy. Applicants need not prove that they know how to load or clean a weapon, or store a weapon safely. Although applicants for concealed weapons permits must disclose whether they have been adjudicated as mentally incompetent, the application process does not require any further disclosure or investigation of the applicant's psychological or emotional condition, psychological history, or history of hospitalization. Neither the statute nor the application process requires further disclosure concerning the applicant's psychological fitness to carry a concealed weapon.[106]

2. Rational Legislating's Federal Constitutional Law Antecedents

The concept of requiring rational procedures for legislative action already exists in federal constitutional law. In recent years,

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"If you can't protect yourself, you have to rely on the person that's taking away your right to personal protection," said Waddoups. "The only way that I know of and the Legislature has found so far is to make those areas secure [by placing magnetometers at the entrances to buildings or by encircling the campus with a fence]. The University of Utah is not taking that on."

Id.

105. Utah Code Ann. § 53-5-704.

106. Rul. on S.J. at 6, *Shurtleff*, 252 F. Supp. 2d 1264.

the Court has imposed similar requirements on Congress when considering legislation that intrudes on state sovereignty.

In *Board of Trustees of University of Alabama v. Garrett*,[107] the United States Supreme Court held that Congress exceeded its authority when it authorized state employees to sue states in federal court for damages under Title I of the Americans with Disabilities Act of 1990 (ADA).[108] Two plaintiffs were involved—Patricia Garrett, a registered nurse who was forced to give up her position as Director of Nursing for the University of Alabama in Birmingham Hospital because she had to take substantial leave from work to undergo breast cancer radiation treatment and therapy, and Milton Ash, a security officer for the Alabama Department of Youth Services, who was denied a reassignment to daytime shifts in order to accommodate his diagnosed sleep apnea.[109] In a five-to-four decision authored by Chief Justice William Rehnquist,[110] the Court held that the Eleventh Amendment prohibits nonconsenting states from being sued by private individuals in federal court and that Congress may abrogate such immunity.[111] However, a valid abrogation requires that Congress unequivocally intend to do so (which the Court held it did in Title I of the ADA), and that Congress act within its constitutional authority.[112]

The Court held the Fourteenth Amendment merely requires minimum rational basis review when states discriminate on the basis of disability, the burden is on the challenger to demonstrate that there is no rational basis between the use of the classification and the achievement of some legitimate governmental objec-

107. 531 U.S. 356 (2001).

108. 42 U.S.C. §§ 12111–12117 (2000); *Bd. of Trustees of U. Ala.*, 531 U.S. at 360, 374.

109. *Id.* at 362.

110. Chief Justice Rehnquist was joined by Justices Sandra Day O'Connor, Anthony Kennedy, Antonin Scalia and Clarence Thomas. *Id.* at 359.

111. *Id.* at 363 (citing *Kimel v. Fla. Bd. Regents*, 528 U.S. 62, 73 (2000)).

112. The Court pointed out that Congress's constitutional authority to do so is not aided by the Commerce Power under Article I, *Id.* at 360, 363 (citing *Kimel* 528 U.S. at 78–79), so the only source of authority for the ADA was as "appropriate legislation" under § 5 of the Fourteenth Amendment, implementing § 1 of the Fourteenth Amendment, which prohibits, inter alia, the denial of Equal Protection. Although the Court acknowledged that Congress may prohibit a "somewhat broader swath of conduct" than is prohibited by the Constitution itself, it is up to the "Court, not Congress, to define the substance of constitutional guarantees." *Id.* at 365 (quoting *City of Boerne v. Flores*, 521 U.S. 507, 519–524 (1997)).

tive.[113] Congressional legislation, therefore, may not impose requirements on the states *significantly greater* than those imposed by minimum rationality review.[114] The test for determining this, in turn, is whether congressional legislation exhibits "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[115]

The first requirement of the "*Garrett* test" is that Congress must demonstrate a legislative record that shows a pattern of irrational state discrimination in employment against the disabled.[116] Congress had considered anecdotal evidence, but conducted no rigorous studies, and although there was evidence of *local* governmental discrimination against the disabled, it showed no *state-level* governmental discrimination against the disabled.[117] Moreover, although there was evidence of discrimination in the provision of *services*, no evidence of such discrimination in *employment* was revealed.[118]

The Court therefore held that the congressional record fell "far short of even suggesting the pattern of unconstitutional discrimination" prohibited by the Fourteenth Amendment.[119] Ex arguendo, the Court also indicated that, even if the requisite threshold showing had been made, there was no "congruence and proportionality" between such assumed State conduct and the provisions of the ADA because (1) the ADA imposed an "undue burden" standard, whereas the Fourteenth Amendment requires only reasonableness; (2) the ADA shifted the burden of proof onto the states, whereas the Fourteenth Amendment imposed the burden on the challengers; and (3) the ADA prohibited action that had a discriminatory impact on the disabled, whereas the Fourteenth Amendment prohibits intentional state misconduct.[120] Besides, the Court pointed out, the disabled still had other avenues for relief: (a) enforcement of the ADA by the United States against states for damages; (b) enforcement "by private individ-

113. *Id*. at 366–367.
114. *Id.*
115. *Id.* at 365 (quoting *City of Boerne*, 521 U.S. at 520).
116. *Id.* at 368.
117. *Id.* at 368–372.
118. *Id*. at 371 n. 7.
119. *Id.* at 370.
120. *Id.* at 367, 372–374.

uals . . . for injunctive relieve under *Ex Parte Young*";[121] and (c) actions by the disabled against states under state laws.[122]

In contrast to *Garrett*, the Court held in *Nevada Department of Human Resources v. Hibbs*,[123] that Congress had properly abrogated state sovereign immunity.[124] The Court, again in a five-to-four decision,[125] held that the Family and Medical Leave Act of 1993 ("FMLA")[126] provision for damages claims against states for violation of that act may be enforced in federal court.[127] Mr. Hibbs, a state social worker, requested twelve weeks' unpaid leave under the FMLA to care for his wife, who had suffered severe neck injuries in a car accident and required almost constant care.[128] The State granted Mr. Hibbs's FMLA request.[129] However, after he had used three weeks of unpaid FMLA leave, Hibbs realized he would need more time to care for his wife, so he requested and was granted paid leave under Nevada's Catastrophic Leave program.[130] The State, however, counted *both* his unpaid leave *and* his paid leave for purposes of the twelve-week FMLA period and fired him when he did not return to work.[131] Claiming the State had to allow him the full twelve-week FMLA leave in addition to the other paid leave, he sued the State under the FMLA in federal court, and the State contended that the FMLA provision for such an action violated the Eleventh Amendment.[132]

In *Hibbs*, the Court reiterated that Congress may abrogate a state's Eleventh Amendment immunity if Congress "makes its intention to abrogate unmistakably clear . . . and acts pursuant to a valid exercise of its power under [Section] 5 of the Fourteenth

121. 209 U.S. 123, 155–157 (1908) (holding that a private individual may bring suit against an officer employed by the state).

122. *Bd. of Trustees of U. Ala.*, 531 U.S. at 374 n. 9.

123. 538 U.S. 721 (2003).

124. *Id.* at 737, 740.

125. The majority consisted of Chief Justice Rehnquist and Justices O'Connor, Souter, Ginsburg and Breyer. *Id.* at 723.

126. 29 U.S.C. §§ 2601–2654.

127. *Nev. Dept. of Human Resources*, 538 U.S. at 724–725.

128. *Id.* at 725.

129. *Id.*

130. *Hibbs v. Dept. of Human Resources*, 273 F.3d 844, 848–849 (9th Cir. 2001), *aff'd*, 538 U.S. 721.

131. *Id.* at 849.

132. *Id.*

Amendment."[133] Because the FMLA clearly imposed liability on states, the case turned "on whether Congress [had] acted within its constitutional authority."[134] Section 5, the Court held, authorizes Congress both to remedy *and* to deter violation of § 1 rights—"among them equal protection of the laws—by enacting . . . '*prophylactic legislation*' that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct."[135] Congress exceeds such authority, however, if it enacts legislation purporting to effect a "substantive redefinition" of Fourteenth Amendment rights.[136] Valid legislation, the Court emphasized, must exhibit "congruence and proportionality" between the injury to be prevented or remedied and the means adopted to that end.[137]

As in *Garrett*, the *Hibbs* Court examined the relationship between the objectives Congress sought to achieve, the means sought to achieve them, and the connection between the two.[138] The objective in this case was held to be Congress's attempt to prohibit gender-based discrimination in the workplace.[139] Since the means used was to apply this prohibition to states, the congressional record had to demonstrate the necessary connection between that "means" and the discrimination-prohibition "end."[140] The Court inquired whether the congressional legislative record contained evidence of a pattern of gender-based constitutional violations by states and found such evidence in the record, showing that states persisted in providing leave to women, but not to men, in similar circumstances.[141] Accordingly, the Court found the necessary connection between means and ends: the FMLA was held "congruent and proportional" to the targeted evil.[142]

The *Garrett* and *Hibbs* decisions demonstrate that, in order to properly implement § 5 of the Fourteenth Amendment, Congress must have a proper objective, and the statutory means used must

133. *Nev. Dept. of Human Resources*, 538 U.S. at 726.
134. *Id.*
135. *Id.* at 727–728 (emphasis in original).
136. *Id.* at 728 (quoting *Kimel*, 528 U.S. at 88).
137. *Id*. (quoting *City of Boerne*, 521 U.S. at 520).
138. *Id.*
139. *Id.*
140. *Id.* at 728–729.
141. *Id.* at 729–732, 735.
142. *Id.* at 740.

bear the requisite "congruence and proportionality" to achieving that objective.[143] In order to uphold congressional action, the Court requires Congress to produce the requisite evidence in the record, findings establishing congressional consideration and resolution of evidence conflicts, and a statute that embodies conclusions thereby properly supported by the evidence and findings.[144]

The Court has developed a similar requirement in Just Compensation Clause jurisprudence.[145] In *Dolan v. City of Tigard*,[146] the Court held that land-development permits that require the landowner to dedicate a portion of land as a condition on issuance of the permit must be supported by a record showing that the government has marshaled evidence and set out findings showing there is a "rough proportionality" between an easement condition on a development permit and "nature and extent [of] impact of . . . proposed development."[147]

Judicial inquiry into whether evidence exists in the legislative record for legislative findings leading to enactment of legislation is thus the hallmark of the Court's evolving jurisprudence in these areas.[148] Significantly, however, the Court in these fields has exercised judicial review that second-guesses the legislative determination of whether the evidence indeed supports the findings, and whether the findings, in turn, lead to the legal rules enacted.[149] In contrast, rational legislating requirements would en-

143. *Id.* at 728 (quoting *City of Boerne*, 521 U.S. at 520); *Bd. of Trustees of U. Ala.*, 531 U.S. at 365 (quoting *City of Boerne*, 521 U.S. at 520).

144. *Nev. Dept. of Human Resources*, 538 U.S. at 728–729; *Bd. of Trustees of U. Ala.*, 531 U.S. at 368, 374.

145. The federal Just Compensation Clause provides as follows: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V. The Clause applies to state and local governments through the Due Process Clause of the Fourteenth Amendment. U.S. Const. amend. XIV, § 1 (stating "[N]or shall any State deprive any person of . . . property, without due process of law"); *Chi., B. & Q.R. Co. v. City of Chi.*, 166 U.S. 226, 241 (1897).

146. 512 U.S. 374 (1994).

147. *Id.* at 391; John Martinez & Karen L. Martinez, *A Prudential Theory for Providing a Federal Forum for Federal Takings Claims*, 36 Real Prop., Prob. & Trust J. 445, 447 (Fall 2001).

148. For an analysis of the United States Supreme Court's examination of the legislative record in this field, see Timothy Zick, *Marbury Ascendant: The Rehnquist Court and the Power to "Say What the Law Is"*, 59 Wash. & Lee L. Rev. 839 (2002).

149. *See e.g. Dolan*, 512 U.S. at 393–397 (holding that the city's evidence did not support findings that the easement condition was related to the impact of the permit).

tail judicial review that asks only whether the *statements* of the evidence, findings, and legal conclusions are in the legislative record. Thus, rational legislating requirements would not trigger the level of judicial scrutiny that the Court has exercised in these areas.

3. Rational Legislating's State Constitutional Law Antecedents

The requirement of rational procedures for legislative action already exists in state constitutional law as well. Whereas in the *Garrett* and *Hibbs* decisions, the United States Supreme Court imposed a rational legislating requirement in order to protect state sovereignty, the Utah Supreme Court, for example, has imposed a rational legislating requirement to protect the individual right to access courts. In *Laney v. Fairview City*,[150] city-owned high-voltage power lines electrocuted and killed John Laney while he was carrying irrigation pipe which came into contact with the power lines.[151] Laney's wife and children sued the City for wrongful death, but the trial court dismissed their suit on the grounds that a state statute held the City immune under Utah Code § 63-30-2(4)(a), which had been recently enacted.[152] On appeal, the Utah Supreme Court questioned whether the statute violated the state constitution's "open courts" clause.[153]

150. 57 P.3d 1007 (Utah 2002).

151. *Id.* at 1010.

152. *Id.* at 1010–1011 (citing Utah Code Ann. §§ 63-30-2(4)(a), 63-30-3(1) (enacted in 1987 and repealed in 2004)).

153. *Id.* at 1016. The Utah Open Courts Clause provides as follows:

> All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

Utah Const. art. I, § 11. Most states have similar provisions. *See e.g. Tex. Assn. of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 448 (Tex. 1993) (reiterating that Texas Constitution's Open Courts provision, article I, § 13, guarantees (1) "courts must actually be open and operating," (2) "citizens must have access to those courts unimpeded by unreasonable financial barriers," and (3) "meaningful legal remedies must be afforded"); *see generally* David Schuman*, The Right to a Remedy*, 65 Temp. L. Rev. 1197, 1201–1202 (1992) (reporting that thirty-nine states have such clauses in their constitutions). For a discussion of the origins of state open courts provisions, see Jonathan M. Hoffman, *By the Course of the Law: The Origins of the Open Courts Clause of State Constitutions*, 74 Or. L. Rev. 1279 (1994).

The Utah Supreme Court determined that the City would have been subject to suit according to the state's law of sovereign immunity prior to the enactment of the state statute involved.[154] The Court confirmed that Utah Code § 63-30-2(4)(a) indeed provided the city with immunity from suit under the circumstances.[155] Turning to the constitutional issue, the Court asked (1) whether the statute indeed abrogated a pre-existing cause of action, and if so, (2) whether the legislature had provided a reasonable alternative remedy, and if not, (3) whether the legislature properly justified its action on the ground that it sought to eliminate "a clear social or economic evil . . . and [that] the elimination of [the] existing [cause of action] was not an arbitrary or unreasonable means for achieving [that] objective."[156]

The Court concluded that the legislature indeed had eliminated a previously existing cause of action and that no reasonable alternative remedy had been provided.[157] Of critical significance for our purposes, however, is the manner in which the Court determined whether the legislature was justified in its action. The Court carefully reviewed the legislative record and found that the statute in question had been proposed by a governmental task force that had specifically found as follows:

> In the past several years, lawsuits naming governmental entities as defendants have increased dramatically. The large damage awards against governmental entities that plaintiffs have obtained in these lawsuits [have] made it increasingly difficult for government entities to obtain or afford liability insurance. . . . If a government entity does not have liability insurance, and a court orders the entity to pay damages, the entity would need to pay the award by taking money from its general fund.[158]

The task force had recommended the statute, the Court found, in the "hope that passage of these bills will make it easier

154. *Laney*, 57 P.3d at 1022.

155. *Id.* at 1015.

156. *Id.* at 1022–1023. The Court had developed the test in *Berry v. Beech Aircraft Corp.*, 717 P.2d 670, 680 (Utah 1985).

157. *Laney*, 57 P.3d at 1023 (quoting *Berry*, 717 P.2d at 680).

158. *Id.* at 1025–1026 (quoting John L. Fellows, *Memorandum to Members of the State and Local Affairs Interim Committee* 1 (Sept. 4, 1986) (on file with the State of Utah Office of Legislative Research and General Counsel)).

or cheaper for a government entity to obtain liability insurance."[159] Thus, the Court concluded, the legislative objective had been "to make liability insurance more affordable for government entities by reducing liability risks."[160]

Although the Court thereby found a perfectly legitimate government objective, it nonetheless held that there was no rational relationship between that "end" and the statutory "means" used to achieve it. The Court concluded as follows:

> While that objective is worthy, the legislature swept too broadly when it severely curtailed negligence actions against municipalities operating power systems. The amendment partially abrogated the remedy of persons injured by a breach of the high duty of care imposed on such operators. The legislative concern about increased damage awards against governmental entities is stated in very general terms; no specifics are given. We do not know whether any municipality in this state operating an electrical system has sustained a large damage award. We do know that only a small fraction operate municipal power systems. The general nature of the legislative findings do not show that large damage awards have been made against municipalities in connection with their operation of an electrical power system, or that such operation has been affected in any way by potential liability.[161]

Looking closely at the facts involved, the Court pointed out that, by operating its electrical system, the City actually generated an annual profit and tax dollars did not subsidize the system.[162] Therefore, any liability insurance that would have to be obtained could be recouped, if necessary, through rate increases.[163] The legislature's critical error, the Court held, had been to sweep all activities of municipalities under the immunity umbrella, without consideration of circumstances such as were involved in the case.[164]

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159. *Id.* at 1026.
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.* The Court even suggested the legislature should have considered "less restrictive alternatives," in the form of "caps" on the amount of damages. *Id.*

Resonating clearly with rational legislating theory, the Court concluded, "The immunization of all municipal activities was not justified by any legislative investigation, findings, or relevant history."[165] Again, however, as with United States Supreme Court jurisprudence, the searching level of judicial review exercised by the Utah Supreme Court is far greater than would be authorized by rational legislating requirements.

4. Rational Legislating's Administrative Law Antecedents

Courts and legislatures have long imposed a requirement of rational legislating in the field of judicial review of certain types of administrative agency action.[166] Administrative agency action may be broadly categorized as either "legislative," consisting of the formulation of rules of general applicability, or "administrative," consisting of the application of legislative rules to particular circumstances.[167] For example, the rezoning of an agricultural area of a town for commercial use would be a legislative action. In contrast, the approval of a permit for the construction of a specific gas station in the commercial zone would be an administrative action.

The threshold question, therefore, involves characterizing a governmental action as either legislative or administrative. In *Topanga Association v. County of Los Angeles*,[168] the California Supreme Court characterized a local zoning board's decision whether to issue a variance for land development as an administrative determination.[169] Moreover, the Court held both as a mat-

165. *Id.* In a subsequent decision, the Utah Supreme Court used a similar approach in reviewing legislation which increased the requirements for submitting an initiative petition to Utah voters. *Gallivan v. Walker*, 54 P.3d 1069 (Utah 2002).

166. Linde observed that "we do, in fact, have one lawmaking process that is held, by and large, to the requisites of rational policy-making. . . . It is the administrative process." Linde, *supra* n. 94, at 225. *See generally* Sands et al., *supra* n. 8, at vol. 3, § 16.29.50, 90–97 (providing "[a] suggested analytical approach to standards of judicial review").

167. For illustrations of the distinction, see *Jackson Ct. Condos., Inc. v. City of New Orleans*, 874 F.2d 1070, 1075 (5th Cir. 1989) (citing *County Line Jt. Venture v. Grand Prairie, Tex.*, 839 F.2d 1142, 1144 (5th Cir. 1988)) (distinguishing "legislative" from "adjudicative" action by municipal body); *Strumsky v. San Diego County Employees Assn.*, 520 P.2d 29, 33 n. 2 (Cal. 1974) (citing *Wulzen Bd. of Supervisors of City and County of S.F.*, 35 P. 353, 356 (Cal. 1894)); *Smith v Strother*, 8 P. 852, 853–854 (Cal. 1885)) (stating that "legislative action is the formulation of a rule to be applied to all future cases").

168. 522 P.2d 12 (Cal. 1974).

169. *Id.* at 13–14.

ter of common law and as a matter of interpretation of California Code of Civil Procedure § 1094.5 governing judicial review of administrative action, that local government decisions on variance applications were required to include a record showing the evidence considered, factual findings from the evidence, and legal conclusions supported by such findings.[170]

The *Topanga* Court emphasized that this record of findings would "bridge the analytic gap between the raw evidence" considered and the ultimate legal conclusions drawn from such evidence.[171] The Rhode Island Supreme Court in *Irish Partnership v. Rommel*[172] further explained the purposes served by evidence-findings-conclusions requirements, pointing out that they

> [1] facilitat[e] judicial review, [2] avoid[ ] judicial usurpation of administrative functions, [3] assur[e] more careful administrative consideration, [4] help[ ] parties plan their cases for rehearings and judicial review, and [5] keep[ ] agencies within their jurisdiction.[173]

Many other states have followed the same approach with respect to judicial review of agency decisions held to be administrative in character.[174]

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170. *Id.* at 14–18 (construing Cal. Code Civ. Proc. § 1094.5).

171. *Id.* at 17.

172. 518 A.2d 356 (R.I. 1986).

173. *Id.* at 358 (quoting *Hooper v. Goldstein*, 241 A.2d 809 (1968) (quoting Kenneth Culp Davis, *Administrative Law Treatise* vol. 2, § 16.05, 444 (West 1958))).

174. *See e.g. Daro Realty, Inc. v. D.C. Zoning Commn.*, 581 A.2d 295, 302–303 (D.C. 1990) (illustrating approach); *Town of Beverly Shores v. Bagnall*, 570 N.E.2d 1363, 1369 (Ind. App. 1991), *rev'd in part on other grounds*, 390 N.E. 2d 1059 (Ind. 1992) (requiring findings when zoning board decides variance); *Whitesell v. Kosciusko County Bd. of Zoning Appeals*, 558 N.E.2d 889, 890 (Ind. App. 1990) (applying findings requirement only to decisions that are "final and appealable"); *Porter County Bd. of Zoning Appeals v. Bolde*, 530 N.E.2d 1212, 1215 (Ind. App. 1988) (holding that the board made ultimate findings required by zoning ordinance, but failed to make specific findings necessary to support its conclusions); *Glasser v. Town of Norport*, 589 A.2d 1280, 1282 (Me. 1991) (holding that the statutory findings requirement may be satisfied from record as a whole); *Bucktail, LLC v. County Council of Talbot County*, 723 A.2d 440, 451–453 (Md. 1999) (holding findings inadequate because they simply repeated "statutory criteria" and consisted of "broad conclusory statements" and "boilerplate resolutions"); *Hartford County v. Earl E. Preston, Jr., Inc.*, 588 A.2d 772, 778 (Md. 1991) (determining that findings requirement is a "fundamental right of a party to . . . proceeding[s]"); *People's Counsel for Balt. County v. Mockard*, 533 A.2d 1344, 1348–1349 (Md. 1987) (interpreting statutory provision that administrative agency set out "consideration of factors" interpreted to require findings); *Hurrle v. County of Sherburne ex rel. Bd. of Commrs.*, 594 N.W.2d 246, 249–250 (Minn. App. 1999) (holding

Because of the traditional deference given by courts to legislative governmental action, courts generally have been unwilling to cross the line from imposing the evidence-findings-conclusions requirements in the *administrative* decision setting to the *legislative* decision setting. However, the Oregon Supreme Court in *Fasano v. Board of County Commissioners of Washington County*,[175] extended the requirements to small-scale rezonings, which ordinarily would be characterized as legislative action.[176] The Court reasoned that when governmental decisions affect a small number of people or only a limited area of land, they are indistinguishable from quintessential administrative decisions applying general rules to specific cases.[177]

The purposes served by evidence–findings–conclusions requirements in the administrative setting also would be served in rational legislating review of legislative action: (1) judicial review of legislation would be facilitated, (2) judicial usurpation of legislative functions would be avoided, (3) more careful legislative conduct would be encouraged, (4) the legislature, as well as parties challenging the procedures and substance of legislation, could adequately plan their cases for legislative reconsideration and for judicial review, and (5) the legislature would be kept within its proper authority, both with respect to procedural and substantive legislative requirements.

The next question to be addressed is how rational legislating might be practically implemented.

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that findings requirement demands contemporaneous reasons, not subsequently formulated explanations); *Fasano v. Bd. of County Commrs. of Wash. County*, 507 P.2d 23, 26 (Or. 1973) (applying findings requirement to small-scale rezonings); *Coretsky v. Bd. of Commrs. of Butler Township*, 555 A.2d 72, 74 (Pa. 1989) (determining that statutory requirement that decision expressly "cite . . . provisions of the statute or ordinance relied upon" is mandatory; failure to do so triggers "deemed . . . approval" of subdivision application); *Bellevue Shopping Ctr. Assocs. v. Chase*, 556 A.2d 45, 46 (R.I. 1989) (requiring "findings of fact *and* conclusions of law").

175. 507 P.2d 23 (Or. 1973).

176. *Id.* at 26.

177. *Id.*; *see also Estate of Gold v. City of Portland*, 740 P.2d 812, 814 (Or. App. 1987) (considering a balance of three factors to determine whether action is administrative: (i) whether "process is bound to result in a decision," (ii) whether "preexisting criteria" must be applied to concrete facts, and (iii) whether action would affect "relatively small number of persons").

The Fasano approach is definitely a minority perspective. Only Florida seems to have adopted a similar approach. *See Lee County v. Sunbelt Eqs., II, L.P.*, 619 So. 2d 996, 1000–1001 (Fla. 2d Dist. App. 1993).

5. Mechanisms for Enacting a Rational Legislating Requirement

Because state legislatures have plenary power, they could readily adopt a rational legislating requirement by resolution or statute.[178] Similarly, there seems to be no question that Congress as well can enact a rational legislating requirement by resolution or statute.[179]

Given that a rational legislating requirement would hold state legislators and members of Congress to a higher standard than occurs under current practices, it seems unlikely that either would adopt a rational legislating requirement on its own impetus. Accordingly, the power of the populace to impose the requirement should be considered.

As there exists no national "power of initiative,"[180] the only way for the general public to impose a rational legislating requirement on Congress would be through the cumbersome constitutional amendment process. However, about half the states do have the initiative mechanism in place, whereby citizens may en-

178. *See supra* pt. IV.A.1.; *cf. Dyer v. Blair*, 390 F. Supp. 1291, 1308 (N.D. Ill. 1975) (determining that state legislature has inherent authority to determine the manner in which it will ratify proposed federal equal rights amendment).

179. *See* U.S. Const. art. I, § 5, cl. 2 (stating that "[e]ach House may determine the Rules of its Proceedings"); *Yellin v. U.S.*, 374 U.S. 109, 143 (1963) (ruling that, in fact, "the manner in which a house or committee of Congress chooses to run its business ordinarily raises no justiciable controversy" (citations omitted)).

By comparison, the third clause of Article I, § 5 of the United States Constitution requires each house of Congress to keep a journal of its proceedings, but there is no provision imposing rational legislating requirements:

> Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgement require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

U.S. Const. art. I, § 5, cl. 3; *see Field v. Clark*, 143 U.S. 649, 680 (1892) (preventing "journals of either house, . . . reports of committees or . . . other documents printed by authority of Congress" to be used to show the enrolled bill omitted section that in fact was passed by Congress); *see also I.N.S. v. Chadha*, 462 U.S. 919, 951 (1983) (reiterating that the Constitution delegated powers to each branch of the federal government to allow each branch to carry out its functions within its assigned sphere of responsibility).

180. David B. Magleby, *Let the Voters Decide: An Assessment of the Initiative and Referendum Process*, 66 U. Colo. L. Rev. 13, 42 (1995) (citing David B. Magleby, *Direct Legislation in the American States*, in *Referendums around the World* 218, 218 (David Bultler & Austin Ranney eds., Am. Enter. Inst. 1994) (stating that "[t]he United States is one of only five democracies which has never held a national referendum")).

act statutory or constitutional amendments through popular vote.[181]

But the state initiative mechanism is not without its flaws. Adoption of laws through the mechanism of popular democracy has generated both procedural and substantive concerns of its own. Hans Linde concluded that, "if a state permits lawmaking by statewide initiatives, their legitimate use must exclude measures for motives that the designers of republican government most feared."[182] He identified five recognizable types of measures this principle would invalidate:

> 1. Initiatives that refer to any group of individuals in pejorative or stigmatizing terms or, conversely, in terms that exalt one group over other members of the community. . . .
>
> 2. Initiatives that avoid emotional, ideological, or sectarian labels but are by their terms directed against identifiable racial, ethnic, linguistic, religious, or other social groups. . . .
>
> 3. Initiatives that do not name any targeted group, but that are proposed in a historical and political context in which the responsible state officials and judges have no doubt that the initiative asks voters to choose sides for and against such an identifiable group and that it is so understood by the public. . . . Ordinarily the context for mobilizing an initiative drive will not be obscure to anyone, but if the responsible officials or judges are unsure, procedures to make the determination exist or can be designed.
>
> 4. Initiatives which appeal to majority emotions to impose values that offend the conscience of other groups in the community without being directed against those groups. . . .

181. *See e.g.* Cal. Const. art. IV, § 1 (stating that "the legislative power of this State is vested in the California Legislature which consists of the Senate and Assembly, but the people reserve to themselves the powers of initiative and referendum"); Or. Const. art. IV, § 1 (stating that "the legislative power of the state, except for the initiative and referendum powers reserved to the people, is vested in a Legislative Assembly, consisting of a Senate and a House of Representatives"); Magleby, *supra* n. 180, at 15 (stating that "[o]nly six states west of the Mississippi River do not have some form of initiative . . . while only eight states east of the Mississippi have the process in some form"); *see generally* K.K. DuVivier, *By Going Wrong All Things Come Right: Using Alternate Initiatives to Improve Citizen Lawmaking*, 63 U. Cin. L. Rev. 1185, 1186–1189 (1995) (discussing the history of initiatives).

182. Linde, *Initiative Lawmaking*, *supra* n. 42, at 21.

> Of course proponents may pretend utilitarian goals for any measure, but initiatives of this type will rarely obscure their noninstrumentalist, emotional wellsprings. This is precisely why they, too, need to pass through the safeguards of republican lawmaking.
>
> 5. Initiatives to place affirmative legislation into the constitution itself, where the measure neither can be amended by the legislature nor tested by judges to stay within limits imposed by the state's constitution. . . . "[183]

A popular initiative that serves to enact rational legislating requirements would be consistent with Linde's criteria and would not run afoul of the evils he identified. Far from preventing the proper functioning of legislatures, such requirements would enhance them by forcing legislators to focus attention on the evidentiary bases for their actions, to resolve evidentiary conflicts, and to consider findings that bear a rational connection to legislation ultimately enacted. Popular initiatives are thus a perfectly useful mechanism for enacting legislative rationality requirements applicable to state legislatures.[184]

6. Current Practices among the States

Current practices among state legislatures would not satisfy rational legislating requirements. This is not surprising, since no state *requires* that state legislatures abide by rational legislating requirements in enacting legislation.[185]

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183. *Id.* at 41–43; *see generally* Eule, *supra* n. 42, at 1531–1539 ("rethinking the counter-majoritarian difficulty" entailed in judicial review of popular legislation); Linde, *Practicing Theory*, *supra* n. 42, at 1758–1760 (reiterating concerns); Schuman, *supra* n. 42 (discussing the origin of voter initiatives and referenda).

184. The initiative mechanism is a popular alternative mechanism for adoption of novel or controversial laws. *See e.g.* René Galindo & Jami Vigil, *Language Restrictionism Revisited: The Case against Colorado*'s *2000 Anti-Bilingual Education Initiative*, 7 Harv. Latino L. Rev. 27 (2004) (discussing a proposed initiative to prevent anti-bilingualism laws); Joseph Lubinski, Student Author, *The Cow Says Moo, the Duck Says Quack, and the Dog Says Vote! The Use of the Initiative to Promote Animal Protection*, 74 U. Colo. L. Rev. 1109 (2003) (providing examples of initiative successes and suggesting its use in animal-rights issues); Eileen Pruett & Cynthia Savage, *Statewide Initiatives to Encourage Alternative Dispute Resolution and Enhance Collaborative Approaches to Resolving Family Issues*, 42 Fam. Ct. Rev. 232 (2004) (reviewing the use of initiatives to improve alternative dispute resolutions in family law).

185. *See generally infra* pt. IV.B.6.a.–c. (discussing legislation that does not abide by

The current practices among the states with respect to rational legislating requirements fall roughly into four categories. Almost all legislation among the states is in the first category, consisting of legislation that is enacted without findings, or with findings unsupported by reference to evidence.[186] The second category consists of the comparatively rare instances in which findings are supported by evidence provided by a specialized board or commission.[187] In the third category are the also relatively rare cases in which legislation addresses very specific social problems, and therefore legislatures tend to include both findings and the supporting evidence in the legislation.[188] The fourth category consists of much of the legislation enacted by the Florida legislature, which appears to have a practice—albeit not mandated by law—of including both findings and supporting evidence in the legislative record.[189] Each of these categories is discussed in turn below.

a. Findings Unsupported by Evidence

The overwhelming majority of legislation enacted by states contains no findings at all, or findings without reference to supporting evidence. For example, Montana enacted legislation combining the state alfalfa seed industry committee with the state alfalfa leaf-cutting bee committee, merely upon a finding that the two were "closely related."[190] In another Montana example, the legislature gave small liquor distillers better tax treatment than large liquor distillers solely on a finding that "small . . . companies . . . are particularly vulnerable to variables in the marketplace."[191] In another illustrative example of the common

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rational legislation principles).

186. *Infra* pt. IV.B.6.a. (discussing findings unsupported by evidence).

187. *Infra* pt. IV.B.6.b. (discussing findings supported by evidence provided by a commission or board).

188. *Infra* pt. IV.B.6.c. (discussing findings supported by evidence in narrowly focused settings).

189. *Infra* pt. IVB.6.d. (discussing findings supported by evidence).

190. Mont. Code Ann. § 2-15-3004 (2004) (folding the state alfalfa leaf-cutting bee committee into the state alfalfa seed industry committee, stating that "the Legislature finds that the alfalfa seed industry and the alfalfa leaf-cutting bee industry are closely related").

191. *Id.* at § 16-1-401 (giving small liquor manufacturers more favorable tax treatment than large liquor manufacturers); 1985 Mont. Laws 1544 (declaring in the preamble that "the Montana Legislature finds that small, emerging companies engaged in the business of

practice among the states, the Nevada Legislature enacted alternatives to incarceration for alcohol abusers solely upon the finding that "the handling of alcohol abusers within the criminal justice system is ineffective, whereas treating alcohol abuse as a health problem allows its prevention and treatment and relieves law enforcement agencies of a large and inappropriate burden."[192]

In each of these enactments, findings may have been supported by evidence, but we have no way of knowing what sources were consulted from the legislation itself. Thus, there is no way for the public or courts, for that matter, to determine whether the legislatures were legislating "rationally."

b. Findings Supported by Evidence Provided by Commission or Board

The rare instances when legislation includes findings supported by reference to evidence usually involve legislation enacted after study by a commission or board. For example, when the New York State Legislature approved an interstate compact with Delaware, New Jersey, and Pennsylvania for the creation of the Delaware River Basin Water Commission, the legislature provided as follows:

> Whereas, the peoples of the States of Delaware, New Jersey, and New York and the Commonwealth of Pennsylvania have a common interest in the waters of the Delaware River Basin; and
>
> Whereas, it is desirable that the water and water resources of the Delaware River and its tributaries be developed, utilized, controlled, and conserved for the benefit of all the people; and
>
> Whereas, the United States Supreme Court, in its decision in the Delaware River Case (283 U.S. 336), established the principle of equitable apportionment of the waters of the upper Delaware River Basin; and

manufacturing, distilling, rectifying, bottling, and processing liquor are particularly vulnerable to variables in the marketplace in comparison to larger well-established companies").

192. Nev. Rev. Stat. § 458.250 (2000).

Whereas, political subdivisions and metropolitan areas in the States of New Jersey and New York and the Commonwealth of Pennsylvania have been confronted constantly with the problem of meeting existing and prospective requirements of the people within their respective areas for obtaining and maintaining an adequate and satisfactory supply of water, both for domestic and industrial purposes; and

Whereas, it is essential that there be maintained an adequate minimum flow in the Delaware River for the protection of public health, for the benefit of industry and of fisheries, such as oysters, clams and other shellfish, for animal and aquatic life, for recreation, for general sanitary conditions, for the dilution and abatement of pollution, and for the prevention of undue salinity; and

Whereas, for the purpose of promoting interstate cooperation in various fields of governmental operations, including the utilization, control and conservation of water resources of interstate river systems, the States of Delaware, New Jersey, and New York and the Commonwealth of Pennsylvania each has created and now maintains a Commission (or Committee) on Interstate Cooperation, which Commissions have jointly organized and established and are now maintaining, in cooperation with each of the others, a joint advisory board known as "The Interstate Commission on the Delaware River Basin" for the purpose, among other activities, of formulating and recommending integrated programs for the development, utilization, control and conservation of the water resources of the Delaware River Basin; and

Whereas, upon the recommendation of the said Interstate Commission on the Delaware River Basin, submitted through the Commission on Interstate Cooperation of each of the States concerned, the legislatures of the States of New Jersey and New York and the Commonwealth of Pennsylvania, by reciprocal legislation, enacted laws at their 1949 Sessions (New Jersey Laws of 1949, Chap. 105; New York Laws of 1949, Chap. 610; Pennsylvania Laws of 1949, Act 475), authorizing and directing the said Interstate Commission on the Delaware River Basin to make surveys and investigations to determine and report on the feasibility and advisability of the future construction of an integrated water project designed, among other purposes, to meet the com-

> bined prospective water supply requirements of political subdivisions and metropolitan areas in the said States, both within and outside the said Basin, empowering such Commission to enter upon lands, structures, and waters for the purposes of such surveys and investigations, making an appropriation to such Commission, and requiring a full report of its proceedings, findings, conclusions, recommendations, and such draft or drafts of legislation as it may deem necessary or proper for enactment by such States; and
>
> Whereas, based upon a full report submitted by the Interstate Commission on the Delaware River Basin setting forth the findings, conclusions, and recommendations resulting from its surveys and investigations, it is the opinion of that Commission, concurred in by each of the aforesaid Commissions on Interstate Cooperation, that the future construction of integrated water projects in the Delaware River Basin is feasible, advisable, and urgently needed, and can best be accomplished by and through a joint administrative agency created by an agreement or compact between the States of Delaware, New Jersey, and New York and the Commonwealth of Pennsylvania; and
>
> Whereas, the Congress of the United States, by its joint Resolution of March 1, 1911 (36 Stat. 961), relating to the conservation of forests and water supply and protection of forests from fire, gave general consent to encourage the making of agreements or compacts between States for the purpose of conserving the forests and the water supply;
>
> Now, Therefore, the Commonwealth of Pennsylvania and the States of New Jersey and New York (and the State of Delaware if and when Delaware becomes a signatory State) do hereby solemnly covenant and agree each with the other as follows.[193]

When a commission or board studies a problem, legislatures have a ready-made foundation of evidence, findings and recommended legislation upon which to act. However, not all legislation

193. N.Y. Envtl. Conservation Law § 21-1701 (McKinney 2003); *see also* 36 Pa. Consol. Stat. Ann. § 3510.1 (2003) (authorizing the Delaware River Port Authority, an entity created through an interstate compact between the states of Pennsylvania and New Jersey, to expand its operations).

has such a background, and there is no existing requirement that legislation enacted after commission or board study must include rational legislating elements.

c. Findings Supported by Evidence in Narrowly Focused Settings

Sometimes legislation is so narrowly focused that findings are supported by evidence set out in the statute itself. Alabama, Maine, and New Jersey provide examples. The Alabama statute providing for the formation of a public corporation to complete the building of an agricultural coliseum provides as follows:

> The Legislature has ascertained and found and hereby declares that agriculture, dairying and the raising of livestock constitute the principal sources of income of the inhabitants of the state, and it is in the public interest for the state to use every reasonable means to further the development of those pursuits. At the time of adoption of this article, the state had begun the construction of the coliseum as a building designed primarily for use in the education of the inhabitants of the state in the said pursuits and the holding in the coliseum of livestock shows, agricultural and industrial displays, markets for livestock and agricultural products and other exhibits and related events. The coliseum had not been then completed because of lack of funds available for that purpose, and in its incomplete condition it was not capable of rendering the service to the inhabitants of the state for which it was intended. It was the intent of the Legislature, by the passage of this article, to authorize the incorporation of a public corporation as an agency of the state for the purpose of acquiring the coliseum and of completing the construction and equipment thereof, at a cost not exceeding $1,250,000.00, to provide for the lease of the coliseum and to vest said corporation with all powers, rights, privileges and titles that may be necessary to accomplish such purpose. This article shall be liberally construed in conformity with the said intent.[194]

Similarly, the Maine statute providing for equalization of prices received by milk producers in the state provides as follows:

194. Ala. Code § 2-6-21 (2003).

> The Legislature finds that among Maine's dairy farmers, prices received for milk differ substantially, and that these differences arise in part from a dual marketing system whereby approximately [half] the milk produced in Maine is marketed in Maine subject to the price control authority of the Maine Milk Commission, Maine market, while the other [half] is marketed to handlers selling in southern New England, commonly known as the Boston market, subject to the price regulations of the northeast marketing area milk marketing order.
>
> The Legislature finds that under this dual system, producers selling on the Maine market receive a significantly higher price for their milk than do their Boston market counterparts; that, in terms of net income after operating costs, producers on the Maine market receive, on the average, 50% more than their Boston market counterparts of equal size; that the lower net returns received by producers selling on the Boston market seriously limits their ability to withstand cost fluctuations caused by unpredictable increases in costs of fuel, credit, feed and other input costs or price fluctuations resulting from changing milk price support policies, all of which are largely controlled by national and international policies and other events beyond their control; that this relative vulnerability engenders an instability in the present marketing system resulting in a destructive competition for higher priced markets; that this instability has recently been aggravated by the introduction of store-brand milk in Maine markets; that the result is a serious threat not only to the viability of these Boston market farms but also to the Maine dairy industry as a whole; and that the loss of these dairy farms would seriously erode Maine's agricultural base.
>
> The Legislature finds that the higher prices paid to Maine milk producers selling on the Maine market result from the state and federal regulatory framework of the milk industry, as well as from actual cost differences which would exist independent of any regulatory framework. Specifically, higher prices on the Maine market are found to derive from cost savings realized by the Maine market producers in transporting milk to local markets, and from a comparatively higher fluid milk, Class I, utilization rate. Whereas, this favorable utilization rate is made possible by the presence of [two] independently regulated markets which allow the sale of excess Maine production on the Boston market, with the

result that such excess is excluded from the calculation of utilization rates on the Maine market, the Legislature finds that the resulting price difference is in the nature of an economic benefit which has arbitrarily accrued to Maine market producers over Boston market producers.

The Legislature finds that it is in the best interest of the Maine dairy industry and the well-being of the State as a whole to adjust prices paid to Maine milk producers to redistribute this benefit among Maine milk producers in both markets. In so doing, it is the intention of the Legislature to eliminate those differences attributable to the higher utilization rates which are a product of the [two] regulated markets.

The Legislature finds that dairy farms in Aroostook, Washington and northern Penobscot Counties presently operate at significantly higher costs because of their remoteness from markets and supplies; that they face greater risks because they operate on a closer margin; that their markets are less secure; and that negative changes in the overall economy have a magnified effect in the northern Maine region.

It is the intent of the Legislature that the reblending of Class I premiums under the Maine Milk Pool created by this chapter be deemed to be the reapportionment of an economic benefit created by regulation in order to smooth out differences in milk prices between different markets and not as a tax on the income of Maine market producers. It is also the interest of the Legislature that deductions from the Maine Milk Pool for promotion be deemed to be deductions from the amounts otherwise payable from the pool to Maine and Boston market producers.

In addition to the above findings and as a result of the possible implementation of an over-order premium to be paid to milk producers, the Legislature finds that legislation is necessary to ensure that such a premium is distributed in a manner which is most advantageous and most equitable for all Maine milk producers and intends to achieve that result by enacting the provisions of this chapter relating to over-order pricing. The Legislature also finds that while the pooling and redistribution of such a premium as provided in this chapter is in the best interest of all Maine milk produc-

> ers, it intends that redistribution to be a separate and distinct purpose and function of the Maine Milk Pool not essential to the purpose and function of the pool as originally enacted.[195]

And New Jersey workers' compensation legislation made specific provision for jockeys as follows:

> The Legislature finds and declares that, whereas current law already requires virtually all employers to provide for the payment of workers' compensation benefits to injured employees, because of the unique nature of the horse racing industry, difficulties have arisen in ensuring that coverage is provided to employees. For example, out-of-State horse owners are sometimes unaware of their obligation to provide such coverage, or because a jockey may ride the horses of more than one owner, there may be confusion as to who the responsible employer is. As a result, serious injuries have been sustained for which there is no coverage.
>
> It is, therefore, in the public interest to ensure that workers' compensation coverage is available to persons employed in the thoroughbred and standardbred horse racing industries in New Jersey by collectively securing workers' compensation insurance coverage for such persons, the costs of which shall be funded by the horse racing industry, and the assessments for funding that coverage shall be calculated separately for the thoroughbred and standardbred industries, based on their respective experience.[196]

In each of these narrowly focused settings, legislatures have the luxury of a narrowly defined problem to address, so the resulting legislative record is comparatively easy to produce. However, legislatures do not always encounter such narrowly-defined problems to address, and there is no existing provision that mandates inclusion of rational legislating provisions in the final legislative product.

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195. 7 Me. Rev. Stat. Ann. § 3151 (2003).

196. N.J. Stat. Ann. § 34:15-130 (1999); *see also* 3 V.I. Code Ann. § 631 (2002) (establishing group health and life insurance programs for employees of the Government of the Virgin Islands, in accordance with the practice of most governmental bodies in the United States).

d. Findings Supported by Evidence: The Florida Practice

The Florida Legislature, unique among the states, includes findings in much of its legislation, and in many instances, the findings are supported by reference to evidence. The following four examples are illustrative. In the first example, the Florida Legislature enacted a statute directing some of the state's lottery revenue to education[197] and explained its action as follows:

> WHEREAS, in 1998 the voters approved an amendment to Section 1, Article IX of the State Constitution that required the Legislature to establish by law a uniform, efficient, safe, secure, and high-quality system of free public schools that allows students to obtain a high-quality education, and
>
> WHEREAS, in 2002 the voters of Florida approved a further amendment to Section 1, Article IX of the State Constitution to assure that students obtain a high-quality education, and
>
> WHEREAS, the voters defined a high-quality education as, by 2010 a prekindergarten through grade 3 core-curricula class size of no more than 18 students assigned to a teacher, a grade 4 through grade 8 core-curricula class size of no more than 22 students assigned to a teacher, and a grade 9 through grade 12 core-curricula class size of no more than 25 students assigned to a teacher, and
>
> WHEREAS, the Legislature finds that a high-quality education cannot be achieved solely by small class sizes but also requires well-educated, well-trained, well-compensated, and effective classroom teachers and school administrators who maintain orderly, disciplined classrooms conducive to student learning, and
>
> WHEREAS, Section 1, Article IX of the State Constitution requires that such reduced class sizes be accomplished through a system that is both efficient and uniform, and
>
> WHEREAS, the constitutional principle of efficiency includes the school districts' use of their facilities, teachers, and other resources in the most efficient manner, and

197. Fla. Stat. § 24.121 (2003).

> WHEREAS, the Florida Supreme Court in considering the provisions of Amendment 9 to Section 1, Article IX of the State Constitution, found that "rather than restricting the Legislature, the proposed amendment gives the Legislature latitude in designing ways to reach the class size goal articulated in the ballot initiative, and places the obligation to ensure compliance on the Legislature," and
>
> WHEREAS, the Legislature has chosen to focus on student achievement, provide clarity of goals, safeguard the efficient use of public funds, allow flexibility to reach those goals, recognize issues relating to efficiency and equity of implementation, and require accountability to meet the standards set forth in the State Constitution, NOW, THEREFORE.[198]

In a second example, a Florida statute encouraged local governments to use their redevelopment agency powers to deal with community demands caused by military base closures,[199] and was justified as follows:

> WHEREAS, the Legislature finds that the procedure for disposition of property owned by a community redevelopment agency is cumbersome, and could be streamlined to assist in the task of redevelopment, and
>
> WHEREAS, the Legislature also finds that the Federal Government is in the midst of a major post-Cold War reduction in the nation's defense industry, with communities within this state facing the consequences of base closures and realignments, and
>
> WHEREAS, the success the state and local communities will have in responding to these dramatic changes will depend on the ability of this state to act in a coordinated, well-planned, and prompt manner in response to defense downsizing impacts and issues, and
>
> WHEREAS, local communities may desire to designate the areas of closed military bases as community redevelopment areas pursuant to part III of chapter 163, Florida Statutes, the Community Redevelopment Act of 1969, in order to ad-

198. 2003 Fla. Laws ch. 2003-391.
199. Fla. Stat. § 163.380.

> minister, direct, and control the property of such bases which are subsequently deeded to the local community by the Federal Government in order to effectively redevelop those properties into income-producing and thriving areas within the communities, and
>
> WHEREAS, the use of the Community Redevelopment Act of 1969 is an appropriate procedure to assist with the planning and reuse of property contained on former military bases; however, given the size and scope of the bases, as well as the large impact the closure of such former bases has on the local community, certain modifications to the existing property disposition procedures for community redevelopment agency property are required, and
>
> WHEREAS, given the large impact of the closure of military bases on the local community, as well as the extensive procedures required of local communities by the Federal Government prior to transfer of such property, the Legislature finds it appropriate to modify the property disposition procedures set forth in the Community Redevelopment Act of 1969 so that, for properties in community redevelopment areas which are established for closed military bases only, no set disposition procedures will be required, and the local community will be allowed to establish appropriate procedures for the disposal of real property, NOW, THEREFORE.[200]

In a third Florida example, a statute addressed the problem of protecting manatees from boats by empowering local governments to regulate vessels on lakes and rivers in their jurisdictions,[201] justified as follows:

> WHEREAS, the Legislature finds that manatees are dying at record rates and our traditional efforts to protect them are not enough, and
>
> WHEREAS, the Legislature intends by passage of this act to ensure that the Department of Natural Resources has the appropriate authority and resources to implement the Florida Manatee Recovery Plan, prepared by the Florida Mana-

200. 1996 Fla. Laws ch. 96-254.
201. Fla. Stat. § 327.22.

> tee Recovery Team for the Southeast Region of the United States Fish and Wildlife Service, NOW, THEREFORE.[202]

A fourth Florida example is a statute reformulating Florida's workers' compensation laws to encourage the creation of a self-executing system which would reduce expenses for employers.[203] The Legislature based its action on the following:

> WHEREAS, the Legislature finds that there is a financial crisis in the workers' compensation insurance industry, causing severe economic problems for Florida's business community and adversely impacting Florida's ability to attract new business development to the state, and
>
> WHEREAS, over the past several years, businesses have experienced dramatic increases in the cost of workers' compensation insurance coverage despite recent legislative reforms, and
>
> WHEREAS, it is the sense of the Legislature that if the present crisis is not abated, many businesses will cease operating which, in the current recessionary climate, could cripple the employment market in the state, and
>
> WHEREAS, workers' compensation health care costs are escalating at a far greater rate than the present rate of inflation, and
>
> WHEREAS, Florida employers are currently paying the second highest overall rates for workers' compensation coverage in the country, and
>
> WHEREAS, despite initial system cost reductions occurring as a result of 1990 reforms to the compensation system, current system costs exceed cost levels prior to the 1990 legislation and workers' compensation insurance premium rates are 6 percent above the prereform level of 1990, and
>
> WHEREAS, the Legislature finds that the current wage loss formula for permanent partial disability benefits causes a

202. 1990 Fla. Laws ch. 90-219.
203. Fla. Stat. § 440.015.

disincentive to return to work for those employees able to return to the same or similar employment, and

WHEREAS, the Legislature finds that the wage loss formula is partly to blame for an increase in eligibility for permanent partial disability benefits and for an increase in total payments for permanent partial disabilities, and

WHEREAS, permanent total disability benefits are awarded in Florida at levels more than five times the national average, and

WHEREAS, high costs for workers' compensation coverage inhibit economic growth and restrict funds available to provide employment and raise workers' wages, and

WHEREAS, an overriding public purpose is the necessity to lower compensation rates while retaining the ability of employers to purchase compensation coverage, and

WHEREAS, the Legislature finds that additional changes to the compensation system are necessary to lower rates while discouraging fraud and promoting workplace safety that will promote economic growth and stability for employers and employees, and

WHEREAS, the Legislature finds that there is an overpowering public necessity for reform of the current workers' compensation system in order to reduce the cost of workers' compensation insurance while protecting the rights of employees to benefits for on-the-job injuries, and

WHEREAS, the Legislature finds that the reforms contained in this act are the only alternative available that will meet the public necessity of maintaining a workers' compensation system that provides adequate coverage to injured employees at a cost that is affordable to employers, and

WHEREAS, the magnitude of these compelling economic problems demands immediate, dramatic, and comprehensive legislative action, NOW, THEREFORE.[204]

204. 1993 Fla. Laws ch. 93-415.

The Florida Legislature's practice of including reference to evidence, findings, and conclusions in much of its legislation is unique among the states and most closely matches what rational legislating would require. The practice is followed whenever legislative sponsors anticipate that legislation might be subject to litigation.[205] The inclusion of evidence, findings, and conclusions is intended to explain the Legislature's action and thus to be more likely to lead to judicial approval.[206]

The Florida Legislature's practice, however, is not mandated by law.[207] It therefore need not be followed with respect to all Florida legislation, and indeed could be discontinued altogether.

VI. POTENTIAL CRITICISMS OF RATIONAL LEGISLATING APPROACH

A. "Bad Apples"

It may be argued that legislative misbehavior is a function of a few individual "bad apple" legislators, not an institutional malady. That argument, however, misses the point. The legislative misbehavior problem stems from the failure of legislatures *as institutions* to set out the manner in which legislation comes to be—and in concealing their conduct altogether from public scrutiny. Thus, there will always be "bad apple" legislators, but rational legislating will provide a cure individually and institutionally by making each level accountable.

B. Not the Right Tool

Also of concern is that the requirement of rational legislating will not alleviate the public's lack of confidence in legislatures. Rational legislating, however, is not addressed to public perception directly but is at the heart of what may cause public dissatisfaction—how legislatures reveal—or, more accurately, how they conceal—the manner in which legislation is enacted. Certainly no procedural or substantive requirement can fully guarantee or re-

205. Telephone Interview with David Savelle, Fla. H. Bill Drafting Off. (June 15, 2004).
206. *Id*.
207. *Id*.

establish public confidence; we can only try to eliminate the possible causes of that distrust.

C. The Good Old Times

Another concern directed against rational legislating is that legislatures will be prevented from being legislatures, which have no other way to operate than the old-fashioned, smoke-filled backroom, good-old-boy-network way. The argument might be premised on the notion that as Americans, we carry an image in our minds of competent lawmakers being allowed to go about their business without the introduction of what some might consider "bureaucratic requirements," which would further impede and tangle the legislative process. A source of authority for that argument might even be found in the constitutional guarantee of a "republican form of government."[208]

The criticism, however, presupposes that the conventional way of doing things was the "good old times." As the review of the consequences of "business as usual" under existing legislative procedures reveals, however, public cynicism and discontent is the end result.[209]

D. Too Expensive

Another critique might focus on the possible costs in time, energy, and resources consumed by rational legislating requirements. Compliance with rational legislating requirements, however, will amount to no more than careful drafting of provisions reflecting the background of enacted legislation. The total cost may amount to no more than slight administrative and research costs.

Moreover, even if compliance with rational legislating requirements entails significant additional costs, these may just be included as part of the costs of living in a democratic society. The appropriate costs of government are the costs of *good* government. If additional requirements can lead to more sound legislating and

208. U.S. Const. art. IV, § 4 (securing a "republican form of government"); *see supra* pt. I.B. (discussing the Guaranty Clause).

209. *See supra* pt. I.

greater public confidence, then one can hardly argue that the price is too high.

E. Good Laws Invalidated

Some might counter that legislation that is perfectly sound as a matter of substance might be invalidated because of a failure of procedure. Moreover, the concern is that, even if the proper procedure was used, if it was not properly documented, then legislation which is sound both as a matter of substance *and* as a matter of procedure might be invalidated.

The answer to this worry may be found in analogous state[210] and federal[211] environmental laws that require the preparation of environmental documentation before governmental decisions are made that may have negative environmental consequences.[212] Under such laws, for example, a governmental agency charged with issuing a land-development permit would be required to include in the record of the application proceedings an environmental-impact report documenting the possible consequences of granting or denying the permit. If the requisite environmental-impact report is not included in the record, the agency's decision to grant the permit would be subject to subsequent judicial invalidation, regardless of whether the governmental action was otherwise substantively and procedurally unassailable.

Invalidation in those circumstances is justified, however, because the required environmental documentation serves two separate functions: first, it ensures that the agency will have all available information concerning the potential environmental impacts of its decision to issue or deny the permit. Paradoxically, this function is fulfilled regardless of whether the governmental agency decisionmakers *actually* considered the information. The requirements "merely prohibit[] uninformed—rather than un-

210. *See e.g. California Environmental Quality Act*, Cal. Pub. Resources Code Ann. § 21000 et seq. (West 2003); *Louisiana Environmental Quality Act*, La. Stat. Ann. §§ 30-2001–2391 (2003); *State Environmental Quality Review Act*, N.Y. Envtl. Conservation Law §§ 8-0101–8-0117; *Oklahoma Environmental Quality Act*, Okla. Stat. tit. 27A, §§ 1-1-201–1-4-107 (1996); *Wyoming Environmental Quality Act*, Wyo. Stat. Ann. §§ 35-11-101–35-11-1507 (2003).

211. *National Environmental Policy Act*, 42 U.S.C. §§ 4321–4347 (2000).

212. *See generally* Joel A. Mintz, *State & Local Government Environmental Liability* (2003); Dan Selmi & Kenneth Manaster, *State Environmental Law* (2003).

wise—agency action."[213] Second, environmental documentation "guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision."[214]

Rational legislating requirements serve the same two functions as environmental documentation: first, they assure that, regardless of whether legislators *actually* considered the evidence, weighed the evidence to arrive at findings of fact, and from those findings derived legal conclusions ultimately embodied in legislation, the existence of a paper trail serves to document the formal foundation upon which legislation was premised. As with environmental documentation requirements, the existence of such documentation provides an opportunity for legislators to consider the evidence, resolve conflicts in such evidence, and formulate findings that bear a rational connection to the legislation ultimately enacted—whether they take advantage of the opportunity to do so or not. Second, and perhaps of greater importance, rational legislating requirements expose the process of legislation to public scrutiny, providing the public with a chance to see how sausages indeed are made. And that is an opportunity that has not been available before.

F. Use of Procedural Remedy Strategically to Accomplish Other Objectives

It could be argued that the rational legislating remedy, although addressed only to procedural concerns, might be used to accomplish substantive results, and not necessarily positive ones. For example, a claimant might challenge the validity of a statute because he or she actually and honestly disagreed with the statute as a matter of policy. More insidiously, the validity of a statute might be challenged solely to achieve delay in its implementation.

The response to such criticism is that any requirement, procedural or otherwise, can be used strategically to accomplish unrelated objectives.[215] And this is not necessarily a bad thing. For

213. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989).

214. *Id*. at 349.

215. Michael Herz, *Parallel Universes: NEPA Lessons for the New Property*, 93 Colum. L. Rev. 1668, 1720 (1993) (stating that the National Environmental Policy Act "creates

example, if I disliked my neighbor, I could sue her for maintaining a nuisance by keeping a wild dog in her back yard, even though I might in fact be a wild dog lover. Here, consider that my suit was in actuality motivated by the fact that I disliked my neighbor for her political views about foreign policy. The fact that I have other reasons for disliking the neighbor does not affect the fact that I still have a good reason for a nuisance suit. Similarly, if rational legislating requirements have been violated, it makes no difference that the challenger may have another agenda.

G. Legislative Research Offices Solve the Problem

Legislators have access to legislative research offices that arguably might ensure that rational legislation is produced.[216] However, such offices merely assist in the gathering of information for legislators, drafting proposed legislation at the request of legislators, and commenting on bills submitted by legislators for review.[217] Thus, they occupy merely passive, reactive roles.

Moreover, legislative research offices have no responsibility for assuring that the legislative end-product will include a record demonstrating legislative compliance with rational legislating requirements. Thus, no legislative research office has been established for, or has as part of its duties, the preparation of a record for legislation that includes reference to evidence considered, a

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opportunities for strategic behavior"); *see also* George Cameron Coggins & Jane Elizabeth Van Dyke, *NEPA and Private Rights in Public Mineral Resources: The Fee Complex Relative?* 20 Envtl. L. 649, 650 (1990) (stating that "[p]rocedure is not that easily severed from substance, and even strictly procedural requirements inevitably have substantive consequences").

216. The offices of legislative research are known by various names. *See e.g.* Alaska Stat. § 24.60.990(9) (2002) (Legislative Research Agency); Ark. Code Ann. § 10-3-303 (2002) (Bureau of Legislative Research); Conn. Gen. Stat. § 2-71c (2003) (Legislative Office of Legislative Research); 17 Guam Code Ann. § 20104 (2003) (Legislative Research Bureau); 25 Ill. Comp. Stat. § 130/10-1 (2003) (Legislative Research Unit); Kan. Stat. Ann. § 38-2105 (2000) (Legislative Research Department); Ky. Rev. Stat. Ann. § 6.145 (West 2003) (Legislative Research Commission); Mass. Gen. Laws. Ann. ch. 3, § 58 (2003) (Legislative Research Bureau); Mo. Rev. Stat. § 23.070 (2003) (Committee on Legislative Research); Utah Code Ann. § 36-12-12 (2003) (Office of Legislative Research and General Counsel).

217. *See* Ark. Code Ann. § 10–3–303(c)(1) (stating that the Bureau of Legislative Research will "[m]ake studies and investigations, upon direction of the Legislative Council, and secure factual information, prepare reports, and draft legislation as may be required by the Legislative Council or any of its subcommittees").

statement of findings from that evidence, and a statement of conclusions from those findings.

H. Anecdotes as Evidence

Part of the problem of legislative misbehavior is the use of anecdotes as the sole foundation for legislation. One can argue that rational legislation requirements will not solve that problem, because anecdotes could be included as "evidence" in the required record. At present, however, there is no requirement that *any* evidence must be included in the legislative record at all. Therefore, the inclusion of anecdotal evidence will provide at least the intended foundation for legislation, rather than leaving it to court conjecture.

More important, the requirement that the legislative record must refer to anecdotal evidence, if that is the only foundation for the legislature's action, will expose the legislative process to scrutiny and reveal the weak foundation. If there are links between such "evidence," findings, and conclusions, then judicial review will conclude that the requirements of rational legislating have been fulfilled and the legislation will be upheld. However, the mere fact that the legislative path from anecdote to legislation has been exposed will allow the democratic process to function as intended: voters will be able to see how well—or irrationally—legislators are behaving, and vote accordingly at the next election.

I. Courts Intruding into the Legislative Sphere

In reviewing legislation for compliance with rational legislating requirements, it could be argued that courts would unjustifiably intrude into the legislative sphere. Courts presently use this justification for exercising what amounts to judicial non-review of legislative action that merely affects economic interests. This purported "intrusion" is also the criticism leveled at courts when they exercise more searching forms of judicial review, such as activist, intermediate, or sliding scale forms of review, applied when legislative action classifies according to a suspect or immutable trait, or affects a fundamental right.

Unlike more searching forms of judicial review, however, courts inquiring about whether legislation includes the required elements of rational legislating would not be using open-ended

constitutional provisions to justify their action. Instead, the impetus—and justification—for such review would come either from legislatures themselves in the form of a rational legislating statute, or through popular initiative enacting such a statute. Therefore, the source of authority for judicial review would be extrinsic to the courts, unlike existing forms of searching judicial review.

VII. MODEL RATIONAL LEGISLATING STATUTE, WITH COMMENTARY

Section 1: Title.

> Model Rational Legislating Statute.
>
> *Commentary: The title of the statute could vary from state to state. Additional formal requirements might apply, such as a long title and an enacting clause.*[218]

Section 2: Purpose.

> The purpose of this statute is to require that all legislation include a legislative record setting out a summary of the evidence considered, the findings of fact derived from such evidence, and the conclusions from such findings.
>
> *Commentary: This concisely sets out the objective of the statute.*

Section 3: Rational Legislating Record.

> *Commentary: The rational legislating statute itself, if passed by the legislature, should conform with rational legislating requirements. In contrast, since the problem of legislative misbehavior does not apply to popular voting through initiatives,*[219] *a rational legislating statute enacted through popular initiative need not include this section.*

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218. *See generally* Eskridge et al., *supra* n. 8, at 409–415 (describing the long title as a general description of the statute and the enacting clause as the formal beginning).

219. Some scholars have called for closer judicial scrutiny of initiatives, but that question is beyond the scope of this Article. *See e.g.* Glen Staszewski, *Rejecting the Myth of Popular Sovereignty and Applying an Agency Model to Direct Democracy*, 56 Vand. L. Rev. 395, 399 (2003) (urging judicial recognition that initiatives involve lawmaking by initiative proponents); *see generally* Linde, *Initiative Lawmaking*, *supra* n. 42, at 19 (criticizing

Section 3.1: Evidence.

> The state legislature has considered the following evidence:
>
> [The legislature should include studies or reports indicating the need for rational legislating requirements in the particular state.]
>
> *Commentary: There may be studies or instances of legislative misbehavior peculiar to a particular state that might be included in this section.*

Section 3.2: Findings.

> From such evidence, the state legislature makes the following findings:
>
> [The legislature should set out a discussion of the evidence it found persuasive as well as that found to be unconvincing. It should also set out the relative weights attached to items of evidence. When conflicting evidence is considered, the legislature should enumerate those items of evidence it found to prevail over other items. Finally, the legislature should set out its ultimate findings of fact, representing the results of the legislature's consideration of the evidence.]
>
> *Commentary: Findings should "bridge the analytic gap" between the evidence considered and the conclusions reached.*[220]

Section 3.3: Conclusions.

> From such findings, the state legislature concludes as follows:
>
> [The legislature should set out the legal rules that the findings of fact support.]

popular voting).

220. *Topanga*, 522 P.2d at 18.

Commentary: The conclusions should only be generally set out, since legislation as enacted will embody those legal rules.

Section 4: Rational Legislating Requirements.

Section 4.1: General.

All enacted legislation shall include a record of compliance with rational legislating requirements as set forth in the following sections.

Commentary: This section establishes the mandatory character of the rational legislating requirements.

Section 4.2: Evidence Summary Requirement.

All legislation shall include a summary of the evidence considered by the legislature in the course of its enactment. The summary shall identify the evidence found persuasive as well as that found to be unconvincing. The summary shall set out what relative weight was given to some evidence, as opposed to other evidence. When conflicting evidence is considered, the legislature shall set out which items of evidence it found to prevail over other items.

Commentary: The summary should identify all evidence considered, evidence rejected, the relative weight accorded to evidence considered, and the resolution of conflicts in the evidence considered.

Section 4.3: Findings Requirement.

The legislature shall set out its ultimate findings of fact, representing the results of the legislature's consideration of the evidence.

Commentary: The findings of fact establish the factual foundation upon which the legislature took action to enact the legislation involved.

Section 4.4: Conclusions Requirement.

The legislature shall set out a summary of the legal rules that the findings of fact support.

Commentary: The conclusions should be set out generally, since the remainder of the legislation will embody those legal rules.

Section 5: Standing to File Petition.

The attorney general or any resident of this state may institute a proceeding under this statute.

Commentary: The attorney general, acting on behalf of that office, or on behalf of any state officer or department represented by the attorney general, may challenge legislation under the statute. In addition, any resident of the state may do so.

Section 6: Statute of Limitations.

A petition under this statute must be filed no later than ninety days after the effective date of the legislation challenged as being in violation of the provisions of this statute.

Commentary: Ninety days is the typical period of time during which a notice of claim must be filed against a governmental entity in a tort liability action.[221] *This seems a reasonable statute of limitations for actions challenging legislative compliance with rational legislating requirements as well.*

Section 7: Procedure.

Commentary: There is no common-law parallel to proceedings under the statute.[222]

Section 7.1: Subject Matter Jurisdiction over Actions under this Statute.

A proceeding under this statute shall be commenced by the filing of a petition in a state court of general subject matter jurisdiction.

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221. *See generally* Sands et al., *supra* n. 8, at § 27.27 (discussing "notice of claim" requirements in government tort litigation).

222. *See* Grant, *supra* n. 75, at 399 (suggesting that the closest parallel is the *accion popular* in some Latin American countries).

Commentary: The statute could instead provide that subject matter jurisdiction over such actions will be limited to intermediate appellate courts or the state's *highest court.*

Section 7.2: Stay of Legislation.

The filing of a petition under this statute shall stay the effect of legislation under review, unless the court on good cause shown determines that such a stay would be contrary to the public interest.

Commentary: This section represents a compromise among competing concerns. First, new legislation by definition will affect changes in the law, so no one could rely on the legislation until it is enacted. However, a ninety-day statute of limitations is provided, during which people might have relied on the legislation being challenged. The compromise in this section is to provide that the filing of a petition automatically stays the effect of the challenged legislation, but allows the court to refuse such stay in the public interest.

Section 7.2: Thirty-day Deadline for Determinations.

A petition filed pursuant to this statute shall be placed on the expedited calendar. Final judgments in such cases shall be entered no later than thirty days after the filing of such petitions. If no final judgment has been entered as of such deadline, legislation challenged shall be deemed invalid and unenforceable as of the expiration of such time period, subject to further appellate review.

Commentary: Since judicial review is limited to compliance with formal requirements comprising the rational legislating requirements, judicial determinations should be relatively straightforward: either the legislative record contained the requisite evidence, findings, and conclusions or it did not. Accordingly, this section assures that courts will speedily resolve such petitions.

Their failure to do so will result in invalidation of legislation through the "deemed invalid" provision.[223]

Section 7.4: Limitation of Proceedings to Documentary Evidence.

All matters to be entered in the record of the proceedings in such cases shall be in the form of documents. No testimony of witnesses shall be allowed except through affidavits.

Commentary: Since the issue is the relatively straightforward one of whether the legislative record includes the evidence-findings-conclusions demanded by the rational legislating requirements, there is no reason why live testimony should be admitted. Resolving such cases "on the papers alone" should suffice.

Section 7.5: Stay of Unrelated Claims.

A petition under this section ordinarily shall be in the form of an independent action. If a lawsuit involving other claims raises the issue of whether legislation complies with this statute, adjudication of such other claims shall be stayed pending determination of the issue of compliance with this statute.

Commentary: It is relatively likely that a statute may be challenged under this statute in the context of litigation involving other issues, such as challenges to the legislation on other grounds, or involving other unrelated claims.[224] *Therefore, this section provides that the issue of compliance with legislative rationality shall take precedence over resolution of all other issues, which will be stayed pending resolution of that question.*

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223. An analogous mechanism has evolved in the public-land-development-regulation area. Thus, statutes have been enacted providing that if land-development permits have not been approved or denied within a certain time frame, the applications are deemed approved. *See* Sands et al., *supra* n. 8, at § 16.54 nn. 37, 38 (2003) (discussing various state provisions).

224. *See* Grant, *supra* n. 75, at 416 (mentioning this as a possible problem, but failing to address it).

Section 8: Nature of Proceeding as In Rem; Defense of Legislation.

Section 8.1: Nature of Proceedings as In Rem.

> A proceeding under this statute shall be an in rem proceeding to adjudicate whether the legislation challenged includes compliance with rational legislating requirements mandated by this statute. Such proceeding will not be an adversarial proceeding against the legislature or individual legislators, but the legislature, its committees, or members may participate through legislative counsel in such proceedings.
>
> *Commentary: Styling the proceedings as in rem, with respect to legislation, rather than adversarial against the legislature or against legislators, should accomplish at least two objectives: first, as a political matter, legislators are more likely to support the statute*'s *enactment if they do not view themselves as potential targets. Second, the nature of the proceedings as in rem reinforces the idea that it is a special proceeding focused narrowly on one aspect of legislation challenged: compliance with formal rational legislating requirements.*[225]

Section 8.2: Defense of Legislation.

> The State Attorney General shall defend legislation challenged under this statute. If the Attorney General is the challenger in such action, the legislative counsel, or counsel appointed by the legislature for that purpose, shall defend such legislation.
>
> *Commentary: In most instances, the state attorney general will defend legislation challenged under this statute. However, when the attorney general is the challenger, the state legislature may provide for other counsel to defend the legislation in question.*

225. *Id.* at 399 (discussing the history of the New Jersey statute as evidencing concern that it authorizes an action in rem, questioning the procedural pedigree of legislation, instead of an action directly against the legislature, or regarding the substantive validity of legislation).

Section 9: Standard of Judicial Review.

> A court reviewing legislation pursuant to this statute shall be limited to determining whether the record included with the enactment of the legislation includes compliance with rational legislating requirements mandated by this statute.
>
> This statute does not authorize a court to determine whether the evidence summarized supports the findings set out, or whether such findings in turn support the legal conclusions set out.
>
> The substantive validity of legislation shall not be reviewed in proceedings under this statute.
>
> *Commentary: These provisions make clear that the scope of review under the statute is extremely narrow.*

Section 10: Invalid Legislation—Effective Date; Remedies

Section 10.1: Effective Date of Invalidity.

> Legislation determined to violate the provisions of this statute shall be invalid and void as of the date of its enactment, from and after the date of the entry of final judgment in such proceedings, or as of the expiration of the thirty-day period set forth in § 7 herein, whichever first occurs.
>
> *Commentary: Invalid legislation is void* ab initio. *The determination that legislation is void shall occur at either of two points: (1) upon entry of final judgment of invalidity or (2) upon expiration of the thirty-day period during which a court with whom the petition is filed can act. If no appeal is filed, such judgment or "deemed" judgment will become final upon the expiration of the time for filing of a notice of appeal; if an appeal is filed, such judgment or "deemed" judgment will become final upon final action by the trial court on remand after such appeal.*

Section 10.2: Remedies upon Determination of Invalidity.

> The prevailing parties in an action in which legislation is held or deemed invalid under this statute shall re-

cover their costs and attorney fees. With respect to any single item of legislation, however, such recovery shall be limited to the lesser of actual costs and attorney fees or the sum of $10,000.

Commentary: Costs and attorney fees are provided in order to encourage private parties to challenge legislation under the statute. In order to deter multiple challenges to the same legislation, thus potentially resulting in multiple awards of costs and attorney fees, the statute limits such recovery to a set dollar amount. Thus, parties wishing to challenge legislation under this statute would be forced to streamline the litigation and hold expenses down to under $10,000.

Section 11: Remedies—Valid Legislation.

Legislation determined to be in compliance with the provisions of this statute shall be declared valid and enforceable. The prevailing parties in such action shall recover their costs and attorney fees. Such recovery, however, shall be limited to the lesser of actual costs and attorney fees or the sum of $10,000.

Commentary: It should be neither too difficult or costly, nor too easy and costless, to challenge legislation under this statute. This section effects a compromise by requiring the losing challenger to pay up to $10,000 in costs and attorney fees for bringing an unsuccessful challenge.[226]

Section 12: Prospective Effect.

This statute shall be prospective only, applicable only to legislation enacted after the effective date of this statute.

Commentary: This is necessary to assure that legislation enacted prior to the effective date of the rational legislating requirements is not affected.[227]

226. Under the New Jersey popular action statute, unsuccessful plaintiffs must pay the costs and necessary expenses of the Attorney General in defending the action, including a fee to the Attorney General not to exceed $500 in any one case. N.J. Stat. Ann. § 1:7–7.

227. *See* Grant, *supra* n. 75, at 416 (referring to the need to make such statutes prospective only in order to avoid causing a "virtual jurisprudential shipwreck" of invalidation

VIII. CONCLUSION

The American system of federal and state governments consists of representative democracies whose legislatures are supposed to guard against "rashness, precipitancy, and misguided zeal . . . and to protect the minority against the injustice of the majority."[228] Left to their own devices, however, legislatures tend toward institutional arrogance, concealing their conduct from public and judicial view, thereby generating cynicism and distrust on the part of the governed.

Roscoe Pound once proposed that a "Ministry of Justice" should be established to provide sufficient research and recommendations to allow legislators to become responsible policy makers.[229] But the problem is not that legislators are ignorant about how to legislate properly. The problem is that there is no one who can see what they are doing. The requirement of rational legislating would make the process of legislation more transparent, and thereby make progress toward assuring that legislatures carry out their responsibilities in a rational manner.

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of laws passed before the requirement became effective).

228. *Rice v. Foster*, 4 Del. 479, 487 (1847).

229. Roscoe Pound, *A Ministry of Justice as a Means of Making Progress in Medicine Available to Courts and Legislatures*, 10 U. Chi. L. Rev. 323 (1942). Pound suggested that such a ministry would be responsible for

> advising the legislature of needed laws to meet gaps in the law or defects in the administration of justice and to meet difficulties developed in the course of the work of the courts; for study of how laws and legal precepts and doctrines function and the effects in action of particular legal precepts and doctrines; for making available promptly, and in such wise that it may utilized intelligently, the best and most authentic of what is continually being added to the stock of human knowledge by the progress of the sciences; for investigation of what hinders better performance of the tasks of the courts and how to make that performance more effective for its purpose. . . .

Id. at 333. Pound's suggestion would have moved from the passive and reactive posture, characteristic of contemporary legislative research offices, to an active posture. Such a ministry, however, would not solve the problem of legislative misbehavior. First, the ministry would be at the beginning of the legislation pipeline, not at the end of it, so legislators still would be free to engage in the same practices of legislative misbehavior; they just would have more information to disregard. Second, such a "Ministry of Justice" would not help with public scrutiny of the legislative end product. No additional requirements would be imposed to make the process of legislation transparent.